

*A Balanced Federalism:  
An Examination of Public Lands Policy  
in the United States with Australia Analogies*



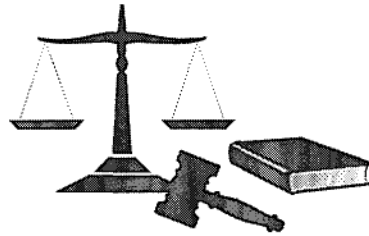
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Alexander Hamilton  
*The Federalist Papers: No. 31*  
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*Everything beyond [a republic's constitutional powers]  
must be left to the prudence and firmness of the people;  
who, as they will hold the scales in their own hands,  
it is to be hoped will always take care to preserve  
the constitutional equilibrium  
between the general and the State governments.*

## *Declaration and Authority of Access*

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Brian L. Haugstad

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# Abstract

## Thesis Summary:

Public land management in the United States is primarily a function of the United States Federal Government, with roughly ninety-five percent of America's public lands owned by the American people and intensely managed by America's federal government. Within Australia this trend is reversed, with Australia's states administering the vast majority of Australia's non-alienated common lands under noticeably less public, government and judicial scrutiny than occurs in the United States. *The focus of this thesis is to explain why the United States developed primarily a national approach to public land management, while Australia's government lands are mainly managed at the state level and to illustrate the aftermath of these differences.*

## Methods:

This thesis will concentrate upon critical historical events, including similarities and differences in colonial and post-American Revolution land policies, constitutional provision, modern case law, and notable judicial decisions. Australia's state land policies will be revealed for strictly comparative purposes to demonstrate the importance of America's national land policies to public land conservation. Written and/or phone inquiries were conducted with each of Australia's state/territorial land administrative agencies and the *Australian National Parks and Wildlife Service*. Similar inquiries were conducted with public land administration agencies within the United States, including the *National Parks Service*, *National Forest Service*, *Bureau of Land Management*, and the *Arkansas Department of Parks*. Historical references were obtained from the Tasmania University Library; Tasmania State Library; Saint Paul [Minnesota], Milwaukee [Wisconsin] and Boston [Massachusetts] public libraries; as well as the university libraries of Minnesota, Wisconsin, Sydney, and Melbourne. Having traveled extensively throughout Australia as an environmental studies and aboriginal anthropology student at Sydney University in 1985, an extended dedication has been included to demonstrate that Native American and Native Australian civilizations declined because of land policies that encouraged genocide and displaced native people from their ancestral lands.

## Conclusions:

The United States developed a national approach to public land management because of unanimous, early agreement among America's states; early governing land laws that solidified the constitutional, national land powers of the United States Congress; pro-development and later pro-conservation land philosophies; and important presidential initiatives in conservation. The aftermath of a national approach resulted in the United States Government securing 'true' national lands, while nationalism and romanticism succeeded in greatly furthering legalized land conservation. These factors may be illustrated by comparing America's national land policies to Australia's largely state administered land policies through differences in public land tenure, historic land policy, land law development, and executive and congressional initiative.



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# Burial of The Minnisink

By Henry Wadsworth Longfellow

*On sunny slope and beechen swell, The shadowed light of evening fell;  
And, where the maple's leaf was brown, With soft and silent lapse came down,  
The glory, that the wood receives, At sunset, in its golden leaves.*

*Far upward in the mellow light Rose the blue hills. One cloud of white,  
Around a far uplifted cone, In the warm blush of evening shone;  
An image of the silver lakes, By which the Indian's soul awakes.*

*But soon a funeral hymn was heard  
Where the soft breath of evening stirred  
The tall, gray forest; and a band  
Of stern in heart, and strong in hand,  
Came winding down beside the wave,  
To lay the red chief in his grave.*



*They sang, that by his native bowers  
He stood, in the moon of the flowers,  
And thirty snows had not yet shed  
Their glory on the warrior's head;  
But, as the summer fruit decays,  
So died he in those naked days.*

*A dark cloak of the roebuck's skin Covered the warrior, and within  
Its heavy folds the weapons, made For the hard toils of war, were laid;  
The cuirass, woven of plaited reeds, And the broad belt of shells and beads.*

*Before, a dark-haired virgin train Chanted the death dirge of the slain;  
Behind, the long procession came Of hoary men and chiefs of fame,  
With heavy hearts, and eyes of grief, Leading the warhorse of their chief.*

*Stripped of his proud and martial dress, Uncurbed, unreined, and riderless,  
With darting eye, and nostril spread, And heavy and impatient tread,  
He came; and oft that eye so proud Asked for his rider in the crowd.*

*They buried the dark chief; they freed Beside the grave his battle steed;  
And swift an arrow cleared its way To his stern heart! One piercing neigh  
Arose, and, on the dead man's plain, The rider grasps his steed again.*

*Northwest Ordinance, Article 3*

*July 13, 1787*

The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, for preserving peace and friendship with them...

*President Andrew Jackson First Address to Congress*

*December 8, 1829*

It has long been the policy of [the United States] Government to introduce among [Indians] the arts of civilization, in the hope of gradually reclaiming them from a wandering life.... Professing a desire to civilize and settle them, we have at the same time lost no opportunity to purchase their lands and thrust them farther into the wilderness. By this means they have not only been kept in a wandering state, but been led to look upon us as unjust and indifferent to their fate.

*General Allotment Act (Dawes Act), Section 6*

*February 8, 1887*

Every Indian born within the territorial limits of the United States to whom allotments shall have been made under the provisions of this act, or under any law or treaty, and every Indian born within the territorial limits of the United States who has voluntarily taken up, within said limits, his residence separate and apart from any tribe of Indians therein, and has adopted the habits of civilized life, is hereby declared to be a citizen of the United States...

*Indian Citizen Act (June 2, 1924)*

Be it enacted..., That all non-citizen Indians born within the territorial limits of the United States be, and they are hereby, declared to be citizens of the United States...

Francis Paul Prucha, ed., *Documents of the United States Indian Policy*, 2nd ed. (Lincoln, NE: University of Nebraska, 1991), pp. 9, 47, 171 and 218.

*Columnist D. Macallister  
Melbourne Review (1878)*

Total extinction, however, of [indigenous Australians], which seems and is so certain, is not without an important significance to those who are conversant with the theory of 'Evolution', or who have kept abreast of 'The Drift of Modern Thought', for being admittedly on the lowest link of the long chain embraced by mankind, we cannot fail to recognize in their extinction a decided widening of the chasm by which mankind is now cut off from its animal progenitors.

"The Australian Aborigines", *Melbourne Review*, III, 1878, pp. 137-139.

*Australian Constitution, Section 127  
9 July, 1900 (Repealed August 10, 1967)*

In reckoning the numbers of the people of the [Australian] Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.

*Aboriginal Land Rights (1966-1967)*

In 1966, no Aborigines in Australia owned land by virtue of being Aborigines. There were no land rights. It was not until 1967 that Australian Koori received their national citizenship as "Australians," and not until 1974 that 200,000 square miles was first provided the Koori through a long-fought Lands Rights campaign.

Nicolas Peterson, ed., *Aboriginal Land Rights, A Handbook* (Canberra: Australian Institute of Aboriginal Studies, 1981), p. 1; and Dean Jaensch and Max Teichman, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne, VIC: MacMillan, 1988), pp. 1 and 117.

*Aboriginal Land Rights Commission (1974)*

The claim by Aboriginal people to ownership of their traditional lands has been a continuing part of Australian history. It was not recognized by white law until 1974, when the Aboriginal Land Rights Commission recommended land rights for Aborigines in the Northern Territory. Since then, federal governments have transferred many traditional lands to Aborigines, following inquiries by the Aboriginal Lands Rights Commission to verify ownership claims. South Australia has also granted land rights to the Pitjantjatjara people. The issue is still not resolved in other states, and remains a major matter of contention in Queensland.

Dean Jaensch and Max Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne: MacMillan, 1988), p. 117.

## Dedication

"ONE OF THE GREATEST IRONIES and tragedies of American history has been that progress and the expansion of republican government has often been tied to the destruction of native peoples."<sup>1</sup> Native Americans did not share in the prosperity and abundance which characterized America's manifest destiny, and rapid, energetic movement to tame, settle, and civilize its western frontier. Instead, Native Americans endured a fate familiar to indigenous cultures from throughout the world, a fate that emerged and was forwarded by immigrant scorn, selfishness and greed.

As characterized by Henry Wadsworth Longfellow's *Burial of the Minnisink* and by early government and public sentiment, Native American and Native Australian societies were often ignorantly misunderstood, intentionally misrepresented or vehemently hated by the European invaders that would ultimately displace them. It is therefore important, that as we continue to discover our own public land history, that we bear in mind that our history and the histories of other countries developed at the expense of much earlier and often intrinsically more complex native histories. To deny or ignore native populations a rightful place in the history of our public lands is to deny ourselves of their importance and of the benefit of thousands of years of knowledge.

Even today, it is often difficult for people to understand how truly fundamental the environment was, and still often remains, in the everyday lives of Native Americans and

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## ★ Dedication ★

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of Australian Koori.<sup>a</sup> Since the arrival of colonialism, these early indigenous land values have increasingly been viewed by non-natives as forever transfigured or permanently obliterated, and therefore no longer meaningful. Consequently, these values have become, without regret, often forgotten by these same people.

It remains seldom acknowledged, for instance, that the environment was immeasurably integral to both civilizations. Both Native Americans and Native Australians developed a symbiotic relationship between their communities and their physical surroundings. Beyond providing for their physical needs, for many within these early societies, land provided the source of their intangible beliefs and spiritual souls.

Native Americans regarded land not only as community property, but as elementary wealth held by community tenure. Land was so critical to life that no single generation could be trusted with ownership. Not only American Indians, but people throughout the world who had a direct tie to the earth and its resources, considered hunting grounds, grazing regions and upland watersheds to be held by the community as a trust. The European concept of land as property was totally alien to the Indians. When the Native Americans lost their tribal common lands, they suffered a cultural earthquake that shattered their world.<sup>2</sup>

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<sup>a</sup> The term *Koori* is gaining acceptance among native communities in Australia in replacing the historically derogatory and racial expression, *Aboriginal*. Latin-derived, *Aborigine* denotes *any native people of the world*, much the same that the term *Indian* is commonly and incorrectly used in North and South America in designating various native groups of the Americas. *Koori* is an ancient term, used by indigenous groups formerly of the central coast region of New South Wales, which translated means *my people*. With an estimated 600 dialects and languages spoken in Australia prior to European discovery, a single term, *Koori*, is slowly being accepted among Native Australians to commonly identify all native kin-groups of Australia.

James Miller, *Koori: A Will to Win, The Heroic Resistance, Survival and Triumph of Black Australia* (London: Angus and Robertson, 1985), p. vii; and dialogue from Dr. Gaynor MacDonald, Lecturer of Aboriginal Studies, University of Sydney (July 30 & August 14, 1985).



Similarly, Native Australians held a spiritual closeness to the land.

The land held the key to life's secrets. People were given the knowledge to read the land, and for every rock, tree and creek they found an explanation for existence. They did not own the land, the land owned them. To know the land was to know life, for what better way of knowing life than to know the stage on which it was enacted.<sup>3</sup>

As a consequence of ignorance and hatred by foreign colonists, Native Americans and Native Australians confronted similar violent intolerance, the theft of their ancestral lands, and harrowing military and biological aggression that arguably assassinated their cultures.<sup>b</sup> For example, seemingly whenever immigrants to the United States insatiably demanded additional territories for settlement, legally-binding treaties between the

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<sup>b</sup> Native Americans and Native Australians suffered from the ravages of European diseases, warfare, enslavement, and cultural persecution. It has been estimated that, whereas Native American tribal populations dwindled by 10 percent as a result of warfare between Whites and Natives, the introduced diseases of smallpox, diphtheria, cholera, typhus, typhoid, influenza, tuberculosis, scarlet fever, chicken pox, measles and venereal disease collectively resulted in average tribal losses of between 25-50 percent of their population. In addition, attempts were made to starve natives into submission (or death), by intentionally eradicating an estimated 75 million American bison-- a mainstay food source of many natives of the western plains. Deprived of food and weakened by disease, native resistance was lessened through coercive attempts to exterminate, segregate or assimilate natives. Similarly, although seldom acknowledged by Australian historians, as many as 90 percent of Native Australians may have perished due to conventional and biological warfare, with the greatest number of deaths occurring during major smallpox outbreaks known to have existed in 1789 and 1829-31.

Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985), p. 166; Dialogue from Dr. Gaynor MacDonald, Lecturer of Aboriginal Studies, University of Sydney (July 31, 1985); and Brian L. Haugstad, Australian Anthropology term paper, "A Review of Noel Butlin's *Our Original Aggression-Aboriginal Populations of Southeast Australia*," (Sydney Institute of Education, October 15, 1985).

United States Government and Native American nations were systematically broken.<sup>c</sup> Likewise, lands legally ceded to Native Americans for their protection were routinely altered and seldom enforced by Congress.<sup>d</sup> As demand for public lands continued, Native Americans were pushed further westward, until eventually they were sequestered upon ever smaller Indian reserves or reservations, often on lands that settlers found of little immediate value and that were frequently far removed from their

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<sup>c</sup> According to Bernard Shanks, "repeatedly, American Indian tribes lost their land to the wave of frontier settlement. Dozens of treaties were solemnly signed between various tribes and the United States. The United States broke virtually every treaty, and additional Indian lands were seized, stolen, and transferred from tribal ownership. Land and its resources were the heart of Indian culture; loss of the community land shattered the Indian's world. The foundation of their lives, history, and hopes was swept aside. Entire cultures, rich and unique, died as a result of manifest destiny. Those scattered tribal members who witnessed the demise of their heritage were caustic about the treaties. An old Sioux summarized the government's record in 1891: 'They made us many promises, more than I can remember, but they never kept but one; they promised to take our land and they took it.'"

Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco, Sierra Club, 1984), p. 28.

<sup>d</sup> America's early *Indian laws*, unlike Australia, allowed for the legal sovereignty of Indian tribes. Eventually nearly 200 treaties were established by the United States Federal Government between 1783 and 1888. The treaty-making process however, provided few benefits for Native Americans, rather according to Carl Waldman, treaties were "conveniently applied by Europeans to establish the credibility of the negotiated rights to previously held tribal tracts of land." Inevitably, legally binding treaties between the United States Government and the Native Americans nations were made worthless by being modified as demand for lands warranted. With little legal enforcement, nor protection from trespass, the majority of early Indian reserves were dismantled through illegal theft or sale. Most notable of these broken Congressional treaties include the *General Allotment Act (Dawes Act) of 1887* and the *Curtis Act of 1898*, which reduced Indian lands from 150 million acres to 60 million acres, and which further dismantled Indian reservations earlier assigned to them.

Francis Paul Prucha, ed., *Documents of United States Indian Policy*, 2nd ed. (Lincoln, NE: University of Nebraska, 1990); and Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985), pp. 165-178.

original tribal lands.<sup>e</sup>

While Native Americans were provided limited political and territorial sovereignty during America's early history, Native Australians were arguably provided fewer societal rights and privileges, and ultimately had few, if any, political or land cession rights prior to 1967.<sup>f</sup>

Displaced from their ancestral lands, diminished in population, and with few political

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<sup>e</sup> Native Americans received land grants since the nation's founding in 1775, however these reserve land were often later indiscriminately taken from them. According to Angie Debo, "it can be shown statistically that [American] Indian holdings declined from 138,000,000 acres in 1887 to 47,000,000 in 1934." According to Bernard Shanks and recent figures, "today some 53 million acres of remaining Indian lands are not regarded as public lands, as they previously were. They are rightfully and legally viewed as tribal lands, with their management and settlement solely a tribal matter."

Angie Debo, *A History of the Indians of the United States*, 7th ed. (Norman, OK: University of Oklahoma, 1983), p. 331; Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco, Sierra Club, 1984), pp. 28-29.

<sup>f</sup> Native Australians were provided little political recognition by the Australian Government prior to the 1960's. Following the tide of the American Civil Rights movement and international pressure, Native Australians first became legal citizens of Australia in 1967, 80 years following the United States first granting citizenship to Native Americans (*General Allotment Act of 1887*, amended by the *Burke Act of 1906*, and made all inclusive with the *Indian Citizen Act of 1924*). Not until 1974 and as a consequence of being granted Australian citizenship in 1967, did Native Australians first receive land grants from Australia's state or federal governments. According to Jaensch and Teichmann, "the claim by Aboriginal people to ownership of their traditional lands... was not recognized by white law until 1974, when the Aboriginal Land Rights Commission under Mr. Justice Woodward recommended land rights for Aborigines in the Northern Territory." Similarly, according to Peterson, "in 1966 no Aborigines in Australia owned land by virtue of being Aborigines-- there were not land rights." Following these events, Peterson continues, "today, fifteen years later (1981) Aborigines hold title to over 469,995 square kilometers [116.1 million acres]."

Dean Jaensch and M. Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne, VIC: MacMillan, 1988), p. 117; Nicolas Peterson, ed., *Aboriginal Land Rights: A Handbook* (Canberra: Australian Institute of Aboriginal Studies, 1981), p. 1.

powers or employment prospects<sup>g</sup>, many Native Americans and Native Australians have relocated to inner cities, notably Oklahoma City, Sydney, Los Angeles, Alice Springs and Minneapolis, and face a multitude of social, economic and health-related problems derived from discrimination and despair.<sup>h</sup>

Bygone characters of America and Australia's indigenous past are today often visualized as little more than visionary and romanticized caricatures of vanished cultures and folklore. Inaccurate accounts of American antiquity, such as select writings of Henry Wadsworth Longfellow and James Fenimore Cooper's fictional depiction of the "noble savage" (Native Americans)<sup>i</sup>, although questionably strengthening the frontier legacy of the United States, may have, nonetheless, also greatly distorted the merciless

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<sup>g</sup> According to the 1980 United States census; 1,418,195 or just over one-half of one percent of America's population are Native American, while in November 1980 the Australia Department of Aboriginal Affairs estimated that 175,400 or roughly one percent of Australia's population identify themselves as Native Australian. In such small numbers, Native Americans and Native Australians have limited political powers.

Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985), p. 201; and Nicolas Peterson, ed., *Aboriginal Land Rights, A Handbook* (Canberra: Australian Institute of Aboriginal Studies, 1981), p. 2.

<sup>h</sup> Native Americans and Native Australians currently endure the shortest life span, highest infant mortality rate, highest unemployment, least formal education, highest government welfare dependency, lowest per capita income, poorest housing, most inadequate health care, and highest incidence of alcoholism of any ethnic group in their respective countries.

Carl Waldman, *Atlas of the North American Indian* (New York: Facts on File Publications, 1985), p. 201; and Dialogue from Paul Coe, Australia representative to the United Nations Indigenous Groups Commission, (November 11, 1985).

<sup>i</sup> French political philosopher, Jean Jacques Rousseau (1712-1778) introduced the term *noble savage* in describing Native Americans. Although Rousseau had never seen a Native American, he held a strong cultural bias, and described Native Americans as a "sort of simple, irrational creature, romping through nature."

John C. Shea, *American Government: The Great Game of Politics* (New York: St. Martin's, 1984), p. 67.

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★ *Dedication* ★

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fate of the Native American--often the slaughter of their people. Chief Joseph of the Nez Percés tribe, in surrendering his people to United States forces in 1877, sorrowfully voiced his heartfelt anguish for his people and the pain felt by many displaced Native Americans when he lamented:

I am tired of fighting. Our chiefs are dead. The old men are all dead. It is cold and we have no blankets. The children are freezing to death. My people, some of them, have run away to the hills, and have no blankets, no food; no one knows where they are--perhaps freezing to death. I want to have time to look for my children and see how many I can find. Maybe I shall find them among the dead. Hear me, my chiefs, I am tired; my heart is sick and sad. From where the sun now stands, I will fight no more forever.<sup>4</sup>

For us, the benefactors of indisputable injustice, it is right that we understand the spiritual and physical loss of life, that native civilizations encountered in being displaced from their ancestral lands in favor of our own societies and enlightenment. Private and public lands have become, in many ways, a presumed measure of our societies' values and affluence. Unfortunately, little is mentioned of the costs of human lives that accompanied expropriating America and Australia's vast public and private domain. Understanding public and private land policy as more than simply an outgrowth of intergovernmental negotiations, but, more importantly, as a fundamental human experience, allows us to reflect rightfully upon our public land histories as among our greatest civil freedoms. This thesis is, therefore, fittingly dedicated in honor and acknowledgment of the native peoples of North America and Australia, who, in search of a better life, lived and perished in the defense and pursuit of their lifestyles and many valued freedoms.

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★ *Dedication* ★

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*Excerpts from Chief Seattle of the Duwamish, Infamous 1854  
Speech of Submission at the City which now Bears his Name,  
alone the Forested Shores of the American Pacific Northwest.*



There was a time when our people covered the whole land, as the waves of a wind-ruffled sea covers its shell-paved floor. But that time has long passed away with the greatness of tribes now almost forgotten. No, we [native and non-native people] are distinct races and must ever remain so. There is little in common between us. And when the last red man shall have perished from the earth and his memory among white men shall have become a myth, these shores shall swarm with the invisible dead of my tribe, and when your children's children shall think themselves alone in the field, the store, the shop, upon the highway or in the silence of the woods, they will not be alone. In all the earth there is no place dedicated to solitude. At night, when the streets of your cities and villages shall be silent, and you think them deserted, they will throng with the returning hosts that once filled and still love this beautiful land. The white man will never be alone. Let him be just and deal kindly with my people, for the dead are not altogether powerless. Dead-- I say? There is no death. Only a change of worlds.

*From the Eulogy for Chief Seattle Given by his Son,  
James Seattle (June 1866).*

The White Men will not  
forget him, for here is  
his picture, made by the  
light of the heavens.

The older it grows, the  
more it will be prized.



When the Seattles are  
no more, their Chief  
will be remembered  
and revered by the  
generations to come.<sup>5</sup>

## Endnotes to Pages i To xi

<sup>1</sup>Paul Finkelman, *Pathways to the Old Northwest, An Observance of the Bicentennial of the Northwest Ordinance* (Indianapolis, IN: Indiana Historical Society, 1988), p. 12.

<sup>2</sup>Bernard Shanks, *This Land Is Your Land: The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), p. 4.

<sup>3</sup>James Miller, *Koori: A Will to Win, The Heroic Resistance, Survival and Triumph of Black Australia* (Sydney: Angus and Robertson, 1985), p. 1.

<sup>4</sup>Ralph K. Andrist, *The Long Death, The Last Days of the Plains Indians* (New York: MacMillan, 1964), p. 315.

<sup>5</sup>T. C. McLuhan, *Touch the Earth, A Self-Portrait of Indian Existence* (New York: Promontory, 1993) p. 30; and David Buerge, ed., *Chief Seattle* (Seattle, WA: Sasquatch, 1992), n.p.

# Ernest Hemingway

*You have to Live Life, Before You can Write it.*



## Robert Frost

### *"The Road Not Taken"*

*Two roads diverged in the yellow wood, And sorry I could not travel both  
And be one traveler, long I stood And looked down one as far as I could  
To where it bent in the undergrowth;*

*Then took the other, as just as fair, And having perhaps the better claim,  
Because it was grassy and wanted wear; Though as for that, the passing there  
Had worn them really about the same,*

*And both that morning equally lay In leaved no step had trodden black.  
Oh, I kept the first for another day! Yet knowing how way leads on to way,  
I doubted if I should ever come back.*

*I shall be telling this with a sigh Somewhere ages and ages hence: Two roads  
diverged in a wood, and I-- I took the one less traveled by, And that  
made all the difference.*



## Editorial Preface

DEPARTING TULLARMARINE International Airport near Melbourne Australia and having never traveled to Tasmania, I had a limited understanding of the island and of its inhabitants. While crossing over Bass Strait, 300 kilometers of watery expanse that links the tiny, most southern Australian State of Tasmania to its figurative mother mainland Australia, I wondered what lay before me and what exact fascination had drawn me to the *land down under, the land down under*.

My interest in Tasmania began while having earlier attended Sydney University. At that time, Australian mainland friends and academics alike had described life upon this little-known island as *slow-paced, a little backward, and as a restful holiday destination*. I was told that few mainland Australians or foreign tourists visit the island, and that like Queensland, Tasmania was unique, misunderstood and often unappreciated. Commonly referred as the *Apple Isle* or the *Holiday Isle*, I was lead to imagine that Tasmania was a quiet place, complete with an abundance of apple trees. As we neared Tasmania, my illusive destination became evermore a curiosity. Reaching sight of Tasmania and traveling over the heart-shaped isle, which native Tasmanians affectionately call *Tassie*, I was convinced that seclusion had preserved this mysterious land-- "a living reminder of the ancient super continent Gondwanaland."<sup>1</sup>

Roughly the size of Ireland or the U.S. state of West Virginia, Tasmania is as unique as

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the one thousand year old varieties of King Billy pine *Athrotaxis selaginoides* and pencil pine *A. cupressoides* that inhabit the state. From living relics of ancient forests, such as the 3,000 year old huon pine *Lagarostrobus franklinii*, to the autumnal colors of the deciduous beech *Nothofagus gunni*, to 90 meter tall mountain ash *Eucalypus regnans* (allegedly the world's tallest hardwood), Tasmania exhibits a superlative and biased contrast to the general aridness of mainland Australia.

I soon discovered that this clandestine land of pristine, cool-temperate rain forests, alpine meadows, coastal reefs and underwater marine forests was also home to a multiplicity of fauna. Over thousands of years, Tasmania ultimately provided marsupials such as the Tasmanian tiger *Thylacinus cynocephalus*, and the Tasmanian devil *Sacrophilus harrisii*, along with other singular creatures, with their final southward retreat from extinction. Nearing Tasmania, I felt privileged to be visiting this most isolated of lands, which so richly deserves preservation.

Shortly after arriving in Tasmania, I discovered that beneath Tasmania's seemingly untroubled and earthy grandeur rested distant and upcoming environmental controversies. These controversies began with the precipitous Lake Pedder debate (1967-1973), when the State of Tasmania elected and successfully constructed the Strath-Gordon hydro-electric dam within its western wilderness. In 1980, Tasmania again proposed building a hydro-electric dam, however this time the site was the

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Franklin River, and the end result was unmistakably different.

The Federal Commonwealth of Australia, having received the support of the National Labor Party and many mainland activists, prohibited construction of the dam, claiming that this action violated existing Commonwealth legislation, the Australian Constitution's external affairs power, and the National Government's *World Heritage Treaty* obligations. Confronted by this impasse, Tasmania filed legal suit, claiming that the Australian Federal Government violated the National Constitution by defying Tasmania's State Reserved Powers. In a 1983 landmark ruling (Franklin Dam or Tasmanian Dam case), Australia's High Court upheld the Federal Government's decision to protect areas of western Tasmania.<sup>a</sup> These actions set legal precedence and insured the Australian Commonwealth a greater role along side the states in future decisions affecting Australia's government lands.

Times have changed for Tasmania, as have its days of isolation. As a result of the *Franklin Dam Case*, Tasmania became among Australia's first states to have its traditional public land powers significantly eroded in favor of an increasing federal or national role. As Geoff Mosley maintains, "Lake Pedder's demise was the anvil on which a future national approach to [Australia's government land] conservation was forged."<sup>2</sup> Similarly, the Tasmanian controversy appears to have strengthened

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<sup>a</sup> The Commonwealth v. Tasmania (1983) 158 CLR 1.

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Australia's land preservation movement, by "usher[ing] in a new phase of community concern for the long-term future of the natural environment."<sup>3</sup>

From an Australian state's viewpoint, the High Court's ruling clearly illustrates an attempt by Australia's Federal Government, and perhaps the courts themselves, to override states' powers. From an American standpoint, this case is interesting because, antithetically, America's western states have long attempted to reverse and override the enumerated *federal constitutional powers* of the United States Congress in administering America's federal lands. Federal supremacy and jurisdiction over United States federal public lands has likewise been upheld by the courts in the United States, as they were in Tasmania. However as will be subsequently explained, American precedence was founded upon quite different arguments.

Embracing the varied principles of history, philosophy, geography, politics, economics, literature, and constitutional and statutory law, relationships emerge between government, society, and the land which binds the two. Understanding these connecting links and the role that government assumes in public land policy remains among the most engaging challenges that any environmentalist may want to undertake.

*Brian L. Haugstad*  
*December 1995*

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This thesis was written primarily in the United States. Therefore, U.S. spelling, grammar and punctuation practices have been consistently used throughout this dissertation. Arial and *Shelby Delante BT* fonts have also been applied. Footnotes, endnotes and bibliography used in this work follow that of *The MLA Style Sheet, Second Edition*.

## *Endnotes to Pages xiv To xviii*

<sup>1</sup>Geoff Law, "Tasmania's Green Heritage, A Guide to Gondwanaland," *BBC Wildlife*, June 1986, p. 275.

<sup>2</sup>Geoff Mosley, "The Australian Conservation Movement," *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 182.

<sup>3</sup>Bruce MacDonald, *Report on the Review of the Australian National Parks and Wildlife Service* (Canberra: Australian Government Publishing Service, March 1989), p. 94.

## Introduction

*The question of the relationship of the States to the Federal Government is the cardinal question of our constitutional system. At every turn of our national development we have been brought face to face with it, and no definitions either of statesman or of judges has ever quieted or decided it. It cannot, indeed, be settled by the opinion of any one generation, because it is a question of growth, and every successive stage of our political and economic developments gives it a new aspect, makes it a new question.*

President Woodrow Wilson (1908)<sup>1</sup>

WITHIN THE CONTEMPORARY WORLD, environmental study has become an education of global and cultural perspectives. In the distant past, destruction of the environment was limited to isolated areas of the world, with merely regional environmental impacts. Present environmental destruction by humans, however, increasingly affects all life within the earth's biosphere. Therefore, it is meaningful to understand not only how different societies approach and attempt to resolve environmental challenges, but also to understand and compare among nations the working relationship between state and national governments in the development and administration of public land policy. As President Wilson revealed, relationships between states and national governments are continually being altered in response to societal change. It is this dynamic aspect of federalism that makes its study so interesting. The intent of this paper will be to compare the public land experiences of the United States to those of Australia and to attempt to understand how the public land policies of each nation have been transformed as a result of federalism.

## *American and Australian Similarities*

Arriving in Tasmania from the United States, I was affably astonished to learn that Australia and the United States, two countries with profound constitutional, societal, and geographic similarities, should have evolved public land administration and conservation efforts so seemingly different. First, Australia has adopted American federalism or "modern federalism," as an integral part of its constitutional system. In fact, much of the *Australian Constitution*, as originally drafted, was based upon the written and judicial interpretation of the *United States Constitution*.<sup>a</sup> Both constitutions have a similar distribution of national and regional powers, including explicit national

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<sup>a</sup> The *Australian Constitution* was in part patterned upon the *United States Constitution*. According to Hunt, "American phrasing and judicial decisions did directly influence Australian drafting and provisions. When words in the American Constitution exactly fitted the needs of Australian draftsmen, and had been demonstrated to be effective, they were adopted... The framework into which [Australia] fitted a pattern that was new in many details, and more intricate than anything that had preceded it, was that of the American Constitution." Similarly, Lumb states, "The formal allocation of [Australian] powers was embodied in the Constitution along the lines of the United States Constitution."

Erling M. Hunt, *American Precedents in Australian Federation* (New York: Columbia University, 1930), pp. 255-256; and R. D. Lumb, *Australian Constitutionalism* (Sydney: Butterworths, 1983), p. 48. See also: P. H. Lane, *The Australian Federal System with United States Analogues* (Sydney: The Law Book Company, c. 1970).



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powers and state reserved powers<sup>b</sup>, and relative to public lands, both constitutions have comparable federal land powers<sup>c</sup>.

Second, both nations share cultural, economic, and historical similarities. Australia and the United States share a common language, social and political attitudes, lifestyles and many common values. Economically, both nations live under a system of private enterprise and share a similar standard of living.

Like brothers growing up in different parts of the world... [the United States and Australia] were founded by those rejected by Europe or who had rejected Europe. Prisoners, the persecuted, and the disinherited often lead the way. The crowded poverty of the masses and the social and economic gridlock of class distinctions in Europe made both wilderness colonies seem utopian--there idealists could experiment with radical concepts of egalitarian, democratic government, and hard work and intelligence were rewarded.

*National Geographic* (1988)<sup>2</sup>

Third and most importantly, both the United States and Australia are geographically large, with unique and similar land management challenges not commonly found in smaller nations.<sup>d</sup> The large territorial size of Australia and the United States is an important similarity, since most of the world's largest countries maintain federal

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<sup>b</sup> Both constitutions have provided nearly identical *reserved powers* to their states through the United States' tenth amendment and Australia's s. 107. According to Sir Samuel Griffith, "Sec. 107 reproduced, item by item, in absolutely equivalent phraseology, the tenth amendment of the *United States Constitution*."

W. A. Holman, ed., *The Australian Constitution: Its Interpretation and Amendment* (n.p.: Law Book Company of Australasia, 1928), p. 44.

<sup>c</sup> The United States federal *properties clause* (Art. IV, §3, cl. 2) is comparable to Australia's *Government of Territories clause* (s. 122). See Chapter Two; *Property Rights and Land Law*.

<sup>d</sup> Unlike the comparatively ordered and closer government confines within Europe; America and Australia were challenged by expansive territories, early absence of territorial law, unexplored wilderness and within the United States, tremendous international immigration diversity.

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governments. Before the recent breakup of the Soviet Union in 1990, federal governments comprised an estimated nearly 52% of the world's total land area and nearly 40% of the world's total population.<sup>e</sup> The importance of understanding federalism and the federal distribution of public land powers, therefore, provides not only a means of understanding American and Australian public land policy, but clearly, understanding federalism is a global concern.

### *Defining Federalism*

During recent years there has been a resurgence of interest in federalism in both the United States and Australia. According to Dave Frohnmayer in the United States, "presidents, supreme court justices, and state governors now are talking more about federalism than they have at an time in the past half century."<sup>8</sup> Similarly, Brian Galligan contends that, in Australia, "interest in federalism by political scientists has waxed and

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<sup>e</sup> In 1986, 51.8% of the world's land area or 70,391,921 square kilometers and 40.0% of the world's total human population (approximately 2 billion people) lived among federated governments. These figures include the Soviet Union federation, which is currently undergoing a significant remodeling within its former federal union.

Max Frenkel, *Federal Theory* (Canberra: Australian National University, 1986), p. 102.

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waned over the decades, but at present there seems to be a resurgence of interest,"<sup>f</sup> despite as Galligan continues, "intergovernmental relations are probably the most significant but least studied area of contemporary Australian politics."<sup>4</sup>

*Federalism*, like the word 'democracy' are terms that are frequently misinterpreted. Perhaps this is because modern views of federalism differ widely from earlier forms of

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<sup>f</sup> Whereas Australian political writers appear indifferent to and dissatisfied with Australian federalism, American sentiment appears generally much more favorable. Australian writers often discuss the inherent flaws of duplicating government functions under federalism, while American political scientists are generally more satisfied with America's version of federalism and commonly discuss which level of government (state, local or national) should be responsible for specific government functions. Much of Australia's lukewarm satisfaction with its federal system is likely a partial product of Australia's historical closeness to Britain's Westminster unitary system and perhaps unrealistic attempts to blend British parliamentary government with the United States' federal and constitutional democracy. Such sentiment is reflected by Australian Governor-General Sir Ninian Stephen, when he expressed the following.

[Federalism] still operates relatively well. If we were to test present day Australian federalism by public reaction to it, or rather, by the lack of any reaction to it, perhaps we should conclude that it is generally regarded as an acceptable enough structure of government. Australian federalism is not really seen as existing as any distinct topic capable of being grappled with by the citizen. Instead, if it is mentioned at all, it is usually only as the arena within which one's particular hobby horses may appropriately be exercised. Those hobby horses range from Canberra's remote and over-mighty bureaucracy, through our unnecessary second tier of parish pump state governments or, per contra, the threatened misuse of treaties to subvert the true sovereignty of those same, but now admirable, state governments, all the way to the now familiar picture of our creaking horse and buggy Constitution, their only proper destinations the knacker's yard and the scrap-heap respectively.

Stephen in Brian Galligan, ed., *Australian Federalism* (Melbourne: Longman Cheshire, 1989), p. xii.

According to Lyons, "[in the United States] not long ago some were predicting that the states would go..., these voices are increasingly in the minority. The economic, cultural, geographic, and political diversities that provided the original stimulus for a federated system of distinct state and national governments are as important today as they ever were."

William W. Lyons, "Federalism and Resource Development: A New Role for States?," *Environmental Law*, 12 (1982), 933.

For other examples see: Gordon Maddox, *Australian Democracy, In Theory and Practice* (Melbourne: Longman Cheshire, 1988), pp. 94-98; and John C. Shea, *American Government, The Great Game of Politics* (New York: St. Martin's, 1984), pp. 91-94 and pp. 114-118.

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federalism.<sup>9</sup> In simple terms, federalism in modern times refers to any government that purposefully distributes political powers between a sovereign central government and sovereign individual state or regional governments.

Among the features which earned American federalism, and its complementary separation of powers<sup>h</sup>, its distinctive and widespread public appeal in the United States and later worldwide, was that for the first time in history, a nation's sovereignty was

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<sup>9</sup> The word "federalism" originated from the Latin term *foedus*, meaning union, compact or treaty, and may have first appeared as defensive alliances, and later religious and political federations. In 545 B.C., the Ionian Cities of Greece formed perhaps the earliest of defensive federations, to defend themselves from Persian invasion. Later, Greek civilization established through the Aegean League, a government which divided civil responsibility between a central government (to contemplate war) and the city-states to manage other early functions within society. Common during early Greek civilization were the classic and amphictyonic city-states or city leagues. These early political federations were united by communities promoting a common worship of their Gods. Amphictyonic unions later spread throughout the ancient world and became increasing common in not only Greece, but also in Italy (the Latin league) and in Israel. The rise and continuation of the Roman Empire also owed much to its many alliances and federations. Inevitably, the term "fédération" was introduced in France and consequently Europe in the 14th century. Later during the Middle Ages, state alliances were established in the German Empire, the Swiss Confederation, and between Poland and Lithuania. In 1661, Ludolph Hugo, an early German political theorist, introduced a "state made up of states," to describe his native German homeland. The English term, "federalism" did not emerge until the English Civil War in 1645. England's early sense of federalism however, does not correspond with what we currently identify as federalism. It was not until the end of the English Revolution and during the era of the "social contract" that the theoretical foundations of American federalism, also known as modern federalism, began to emerge. Modern federalism was formally devised in 1777, during the midst of the American Revolutionary War.

W. K. C. Guthrie, *A History of Greek Philosophy* (Cambridge: Cambridge University, 1978), I, 51 and S.R. Davis, *The Federal Principle: A Journey Through Time in Quest of Meaning* (Berkeley: University of California, 1978), pp. 178-182 in Graham Maddox, *Australian Democracy, In Theory and Practice* (Melbourne: Longman Cheshire, 1985) p. 104; Max Frenzel, *Federalist Theory*, (Canberra, Australian National University, 1986), p. 97; Bernard Voyenne, *Histoire de l'idée Fédéraliste*, (Paris: n.p., 1976) p. 63, Ernest Deuerlein, *Föderalismus* (München, n.p., 1972) and Daniel J. Elazar, *The Politics of American Federalism*, (Lexington, KY: n.p., 1969), p. xiiis in Max Frenzel, *Federal Theory*, (Canberra: Australian National University, 1986) p. 55 and 99.

<sup>h</sup> To further prevent the illegal usurpation of political powers, in addition to federally distributing powers between states and the national government, political powers were also distributed between the executive, legislative and judicial branches of government. Through these means, tyranny earlier associated with unitary, monarchical and imperial governments was averted within the newly independent American nation.

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directly and solely derived from the people<sup>i</sup>, while federalism and the separation of powers provided an added 'double security' for an union of states.<sup>j</sup> No longer were civil liberties a descended right provided to the people from either the monarchy or by a non-elected legislative body, as was conducted in Britain during the American Revolution, and is still, arguably in place in the British Commonwealth of Australia. As will be revealed, differences between the United States' federal presidential system and Australia's federal parliamentary system and constitutional monarchy were significant in influencing their nations' government land practices.

Today, many individuals commonly associate federalism and the separation of powers

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<sup>i</sup> According to James Madison, the American republic is defined as "a government which derives all its powers directly or indirectly from the great body of the people, and is administered by people holding offices during pleasure for a limited period, or during good behavior. It is *essential* to such a government that it be derived from the great body of the society, not from an inconsiderable proportion or a favored class of it..."

Alexander Hamilton, J. Madison and J. Jay, *The Federalist Papers* (1787-1788; rpt. New York: New American Library, 1961), p. 241.

<sup>j</sup> James Madison, noted father of the *United States Constitution*, stressed the necessity of the separation of powers in what he referred as a compound republic maintained through a double security.

"In a single republic, all the power surrendered by the people is submitted to the administration of a single government; and the usurpations are guarded against by a division of the government into distinct and separate departments. In the compound republic of America, the power surrendered by the people is first divided between two distinct governments, and then the portion allotted to each is subdivided among distinct and separate departments. Hence a double security arises to the rights of the people. The different governments will control each other, at the same time that each will be controlled by itself."

Alexander Hamilton, J. Madison and J. Jay, *The Federalist Papers*, No. 51 (1787-1788; rpt. New York: New American Library, 1961), p. 323.

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as either a source of individual liberties and freedoms,<sup>k</sup> while others, particularly advocates of unitary governments, see federalism as a negative source of administrative and political duplication and retrenchment.<sup>l</sup>

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<sup>k</sup> Improved government stability, improved government representation and protection of minority rights are among the leading reasons why federalism was quickly championed in the United States and Australia. In both nations, personal freedom and self-determination were highly valued. The advantages of the federal system include the following.

- (1) Improved opportunity for citizens to participate and to be represented in political life.
- (2) Improved protection of minority views.
- (3) Reduced size, resentment, and coercion of defeated minorities.
- (4) State and local governments are said to be closer to concerns of citizens.
- (5) Greater division of government and improved citizen representation intensifies rule of law.
- (6) With a greater number of regional governments, there is improved likelihood of experimental creativity and innovation, competition among states, and perhaps improved cooperation among governments.
- (7) Improved opportunity for state and local governments to share political experiences and financial resources.

According to Frohnmayer, "the consuming objective of the federal political theory was to fragment power. Tyranny, according to this theory, always accompanies centralization of governmental power."

Dave Frohnmayer, "A New Look at Federalism: The Theory and Implication of 'Dual Sovereignty,'" *Environmental Law* 12 (1982), 911.

<sup>l</sup> According to Greenwood, "conditions have changed, and in changing have borne out the contention that federalism is a weak form of government. The states in nearly all federal countries are no longer adequate either as economic or administrative units, while attempts to obtain united action through co-operation between state and central authorities are bound to be clumsy and slow moving. Without the establishment of unitary control there can be little hope of successfully planning on a national scale..."

Gordon Greenwood, *The Future of Australian Federalism: A Commentary on the Working of the Constitution* (Melbourne: Melbourne University, 1946), p. 10.

*Table 1:*

Approximate Location of Six Governments on a confederacy/Federalism/Unitary Continuum and Possible Direction of Change					
<i>Confederacy</i>	<i>Federalism</i>			<i>Unitary System</i>	
American Confederation of States (1860-61)	Canada	United States	Australia	United Kingdom	France
<b>Not Applicable</b>	←	↔	⇒	←	⇒

**Source:** Adapted from John C. Shea, *American Government, The Great Game of Politics* (New York: St. Martin's Press, 1984), p. 92.

As Table 1 illustrates, governments may be characterized along a continuum between an ideal confederation, where a group of states or nations unite for a common purpose, and an ideal unitary system, where all sovereignty resides in a central or national government. In between, federalism is often identified.

In actuality, modern federalism is less a lateral mid-point between confederate and unitary governments, but instead is in itself, an original system of government that is able to often successfully implement advantages of both national and regional governments by transferring 'best suited' responsibilities to either the national or state governments. For example, national defense has traditionally been determined to be a best suited function of the federal government, while public education and public law

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enforcement have been often determined as best suited to the administration and closer representation of state governments.

However, public land management is not easily defined as either a state or a national administrative function. For example, in Australia, government land administration and management remain primarily a function of Australia's states, while the vast majority of America's public lands have been owned and administered by the United States Federal Government since soon after the United States proclaimed its independence from Britain in 1775.

### *America's National Land Bias*

These circumstances did not occur as a matter of chance. Rather, the dominant role of American Federal Government in managing United States' public lands was deliberate and although not commonly known, was unanimously agreed upon by the American States. As will be disclosed, this *early consensus* between the states and the federal government is a central reason why public lands have historically been looked upon favorably by the American public and why public land conservation efforts have been widely successful throughout United States' history. This federal consensus was also critical in establishing *legal precedence* and *judiciary support* for the long-term management and preservation of the nation's most scenic and endangered lands.



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America's early land laws, notably the Northwest Land Ordinances, likewise profoundly strengthened the role of the national government and indirectly provided America's Federal Government with the political force necessary to effect sweeping reforms in public land conservation. For example, through the Federal Properties clause (article 4, section 3, clause 2) of the United States Constitution, the United States Federal Government became nationally and constitutionally entrusted with the national jurisdiction and management of all federal territory in the United States. Moreover, since America's Federal Government secured these constitutional powers early in the nation's history, legal precedence further strengthened the already dominant position of the federal government in the management and conservation of the nation's public lands, through the 'eyes of the courts.'

While the Australian Constitution has similar national lands provisions to the United States Constitution, notably Australia's *Government of Territories clause* (Section 122), which likewise provides Australia's Federal Government with near unlimited control over federally administered lands; in effect this constitutional role has never been fully realized because the vast majority of government lands in Australia remain under the jurisdiction of Australia's states. Consequently, Australian States have often individually struggled to provide effective public land conservation, while the Australian Federal Government has been largely unable to establish comprehensive national land directives, because of its constitutional limitations.

## *Australia's State Land Bias*

Since its British colonial era, Australia's largely independent states have been provided principal jurisdiction over its nation's public lands. According to Allen, "the public domain of Australia was at first in the hands of the [British] imperial authorities, but even so there was no real uniformity of policy between colonies until the very eve of the granting of self-government [in 1901], after which the individual states effectually controlled their own lands and adopted different land policies."<sup>5</sup> These practices likewise continued following Australia's national territorial independence in 1901, since according to J. M. Powell, the *Australian Constitution* "left the states with many of their traditional powers, including controls over land and associated mineral and water resources and the regulation of transport, urban development, recreation, agriculture, mining, energy, and the *environment*." [Italics added.]<sup>6</sup>

Another distinguishing difference between American and Australian federalism and indirectly a distinction between their nations' public land policies is the contrasting difference between the United States and Australia's taxation policies.

*Table 2:*

Percentage of Total Taxation and Expenditure For Own Purposes by Level of Government				
Percentage of Total Taxation (Percentage of Outlays)				
	<i>Federal</i>	<i>State</i>	<i>Local</i>	<i>Total</i>
<b>Australia</b>	81.3 (50.9)	14.9 (43.4)	3.8 (5.7)	100 (100)
<b>United States</b>	67.3 (59.5)	20.1 <sup>2</sup> (17.2)	12.7 <sup>2</sup> (23.3)	100 (100)
<b>Canada</b>	56.4 (40.6)	34.4 (38.8)	9.2 (20.6)	100 (100)
<b>Germany<sup>1</sup></b>	68.3 (57.1)	23.1 (23.1)	8.6 (19.8)	100 (100)
<b>Switzerland</b>	59.5 (47.2)	23.0 (29.7)	17.4 (23.1)	100 (100)

**Notes:** <sup>1</sup> Federal sector includes duties and share of VAT given to the European Community.

<sup>2</sup> Includes 3 and 19 percent, for state and local government respectively, being the estimated contribution of social security levies.

**Source:** OECD Revenue Statistics 1965-1982; and IMF, Government Finance Statistics Yearbook, vol. vi, 1982 in Brian Galligan, ed., *Australian Federalism* (Melbourne: Longman Cheshire, 1989), p. 122.

As Table 2 illustrates, interestingly Australia's taxation methods strongly favor the centralization of federal powers as compared to other federal governments found elsewhere in the world. This is reflected in both the percentage of taxation and tax outlays that the Australian Federal government regulates. From this observation, one may conclude that Australian States are fiscally more dependent upon their national government than among regional governments elsewhere, including the United States.

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This observation is significant because this factor may explain why Australian States are increasingly dependent upon economic development seized through the utilization of state lands and resources. Consequently, it is not surprising that Australia's states would ardently defend their traditional rights to these lands. Furthermore, it would not be surprising if Australian States would forego land conservation in an effort to obtain their lost tax revenues.

This hypothesis is not necessarily correct, however, it does signal a possible explanation for a statement earlier made by former Australian Prime Minister John Gorton, "in [establishing Australia's] nature conservation for example... no [state] public authority takes responsibility for any coordinated policy."<sup>7</sup> Similar sentiment was expressed by Russell Mathews when he stated, "genuine policy co-ordination [among Australia's Federal and State governments] is virtually non-existent in such areas as economic development, transport, energy, urban affairs, community development, Aboriginal affairs, *environmental control*." [Italics added.]<sup>8</sup>

As will be clarified throughout this thesis, there is little doubt that the United States has been more successful at providing national land policies and at legally preserving and managing its public lands than have similar Australian efforts. It remains to be determined, however, what exact historical, political, cultural or economic mechanisms

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were most responsible. Beyond more visible economic signs, are a multitude of more likely explanations.

### *Thesis Summary*

Comparing the public land conservation efforts of the United States and Australia, one may reach the following conclusions.

- 1) Public land conservation in the United States during the past one hundred years has received much greater popular support from its citizens than has similarly occurred in Australia. As a result, historically, land conservation has become a national priority among the American public and the United States Federal Government, and to an increasing degree among American States. Culturally, national land conservation has become an integral part of America's tradition, culture and identity, which is not generally and historically true in Australia.
- 2) As a result, the United States has historically been able to provide its public lands with greater legal protection, financial funding, and professional management than Australia has provided its government lands.
- 3) Antithetically, frustration with federalism in Australia and specifically many obstacles today associated with Australia's state administered government land policies may be attributed to complications associated with Australia's integration of American federal constitutionalism with British parliamentary law. The continued acceptance of out-dated British land sovereignty over non-alienated Australian lands and the continuation of common law founded upon British legal precedence has in major part limited the Australian Constitution from fully exercising its national Government of Territories clause (s. 122) and nationalizing government land policies in Australia.

Obtaining 'true' national lands and 'true' national support for public lands is best achieved through the leadership of the national government and through the combined

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efforts of federal and state governments. Consequently, it may be historically and politically demonstrated that United States national land policies have resulted in a greater commitment to public land conservation than have the mostly individual state efforts in Australia. Furthermore, many of the ongoing problems that Australia faces in providing consistent and effective management of its government lands may be explained by its absence of unified, national land policies. This distinction is best exemplified through differences in public land tenure, land policy, land law development, and executive and congressional initiative.

For the purposes of this thesis, United States land policies will be emphasized throughout this thesis, while Australia's state dominated government land policies will be used strictly for comparative purposes, to demonstrate that strong national goals and directives are necessary to effectively support long-term public land preservation efforts.

It is often debated, whether or not public lands should be the responsibility of the states or the federal government, and how effective are each in administering public lands? Resolving these highly subjective and politically motivated questions will not be the intent of this thesis. After all, one division of government is not inherently more capable than another in administering public lands.

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However, if we examine the many accomplishments of the United States' nationally administered public land policies as compared to Australia's largely independent state administered government land policies, one may conclude that cooperation between the states and the federal government and a public land policy led by the federal or national government may provide greater consistency of policies, improved popular support and participation, increased government financial support and provide improved nationwide and worldwide legal enforcement necessary to conserve our remaining public lands and natural resources.

Furthermore, it is not the intention of this thesis to belittle the contributions that American and Australian States have made, especially in promoting public land conservation through public recreation. It is simply the intent of the author to demonstrate that national land administration and management encourages greater public commitment and government involvement in public land conservation than similar, individual state efforts.

Apart from this premise, this thesis will attempt to answer the following questions.

*"With the many similarities between the United States and Australia, why did these nations develop public land management strategies so different from one another?"*

*Moreover, why has the United States acquired primarily a national approach to public land management, while Australia acquired a states' approach?"*

## *Summary Argument*

To resolve these questions, one must examine features of American and Australian history which most contributed to, in America's case, the nationalization of public land policies, and in Australia's case, the regionalizing of its government land policies.

The features most contributing to a nationalization of United States land policy include the following:

- (1) United States national public land policy originated from an unanimous state consensus.
- (2) Early in American history nearly all public lands were transferred from and by the states to the jurisdiction and ownership of the National Government.
- (3) The majority of the nation's public lands are today regionally located within the remote, and the less populated Western United States.
- (4) National public land conservation was made legitimate through enumerative constitutional powers and from congressionally approved presidential powers.
- (5) Jeffersonian property rights were widely implemented in the United States, including massive land transfers to the public. Extensive ownership of lands have resulted in a desire to intensely manage both private and public properties, and to insure its availability for future generations.
- (6) Significant historic events, including the *American Revolutionary War*, the *American Civil War*, the *Great Depression* of the 1930's, and the *American Civil Rights Movement*, and extensive federal environmental legislation of the 1970's have led to a new aggressive, and primarily federal, statutory environmental law focus. States have followed, by often designing and enacting complementary and expanded federal



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requirements.

- (7) The United States Supreme Court has consistently supported Congress' constitutional power to enact laws regarding federal properties. Meanwhile, the court has broadly ruled that following Congressional acquiescence, the President and executive federal land agencies are entitled to broad authority to legally set aside federal lands.
- (8) The American public has historically maintained a strong nationalistic and romantic desire to cultivate an uniquely American cultural ethic, which showcased and preserved America's singular and spectacular landscapes.

These eight principal factors enabled the United States to establish a legacy of legally protected and professionally managed public lands.

- (1) Since the United States Federal Government administers the majority of the nation's public lands, the United States has been able to establish a *true national public domain*, composed of nationally and internationally significant parks, wildernesses and reserves.
- (2) Constitutional provision and sustained judicial review removed doubt that the National Government, and specifically Congress, had full and plenary powers to preserve and manage all federal lands.
- (3) Constitutional federal land powers enabled Congress greater ease in legislatively preserving, as well as distributing to the states, private citizens and other business interests, large tracts of public lands.

Australia acquired a state managed public land policy because of the following reasons.

- (1) Unlike the United States, following their territorial independence and federation, Australian States maintained many of their traditional colonial legislature powers, including virtual sovereign control over their respective, government-owned territories.
- (2) Australian States legally retain jurisdiction over nearly all government lands in Australia.

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- (3) Unlike the United States, since the Australian Federal Government retains little direct jurisdictional control over Australia's government lands, the Australian Constitution's *Government Territories Power* has a limited role.
- (4) The Federal Government has relied upon largely unrelated national powers to attempt to preserve nationally and internationally significant public lands, including Australia's *External Affairs power*, the *Trade and Commerce power* and the *World Heritage Convention Treaty*. The use of these national powers has often been controversial, and as the *Tasmanian Dams Case* illustrates, federal legality and national jurisdiction has been challenged in court by the states.
- (5) Dominated by Wakefield and British colonial land policies and by government land ownership by the Crown, property rights within Australia continue to exist largely as rights of *leasehold* as compared to American property rights which are primarily characterized as rights of *permanent freehold*.
- (6) The Australian landscape is very unique, however it is also extensively dry, flat, and homogenous, compared to other deemed significant or threatened land sanctuaries of the world. In addition, compared to more densely populated countries such as the United States, Australia's public lands may not be perceived as immediately threatened nor requiring preservation. For these reasons, historically it may have been difficult for the public to realize, and for the states to justify, the preservation of public lands as regionally or nationally significant. Similarly, with less public land jurisdiction than the states, until recently, Australia's Federal Government has faced equal difficulties rationalizing the preservation of public lands based upon national or international significance.

Given these six arguments, Australia developed a public land heritage built upon the following federal approaches.

- (1) Australia is unique in the world, in not having a true "national park system". Instead, a "pseudo" national park system exists, which more

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resembles America's state park system.

- (2) The Federal Government's administrative role in public land management is limited. For example, the *Australian National Parks and Wildlife Service* is restricted to managing ten wildlife parks and reserves, advising government on international agreements, and as a research and think tank agency for such matters as national wildlife policy.<sup>9</sup>
- (3) Lack of consensus among Australia's states in matters such as land classification and nomenclature has frustrated and prevented the states and the Federal Government from maintaining a cooperative and mutually beneficial relationship.

## Endnotes to Pages 1 To 21

<sup>1</sup>Woodrow Wilson, *Constitutional Government in the United States*, p. 173 in James Huffman, "Governing America's Resources in the 1980's," *Environmental Law Journal* (Summer 1982), pp. 881-882.

<sup>2</sup>Wilbur E. Garrett, "Portraits of the Land, Australia," *National Geographic*, Feb. 1988, p. 157.

<sup>3</sup>Dave Frohnmayer, "A New Look at Federalism: The Theory and Implications of 'Dual Sovereignty,'" *Environmental Law*, 12 (1982), 905.

<sup>4</sup>Brian Galligan, ed., *Australian Federalism* (Melbourne: Longman Cheshire, 1989), pp. 11 and 64.

<sup>5</sup>H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), pp. 48-49.

<sup>6</sup>J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Sydney: Longman Cheshire, 1988), p. 15.

<sup>7</sup>John Gorton, "Australian Federalism: A View from Canberra," in Graham Maddox, *Australian Democracy: In Theory and Practice* (Melbourne: Longman Cheshire, 1988), p. 97.

<sup>8</sup>Russell Mathews, *The Commonwealth-State Financial Contract* in Graham Maddox, *Australian Democracy: In Theory and Practice* (Melbourne: Longman Cheshire, 1988), p. 94.

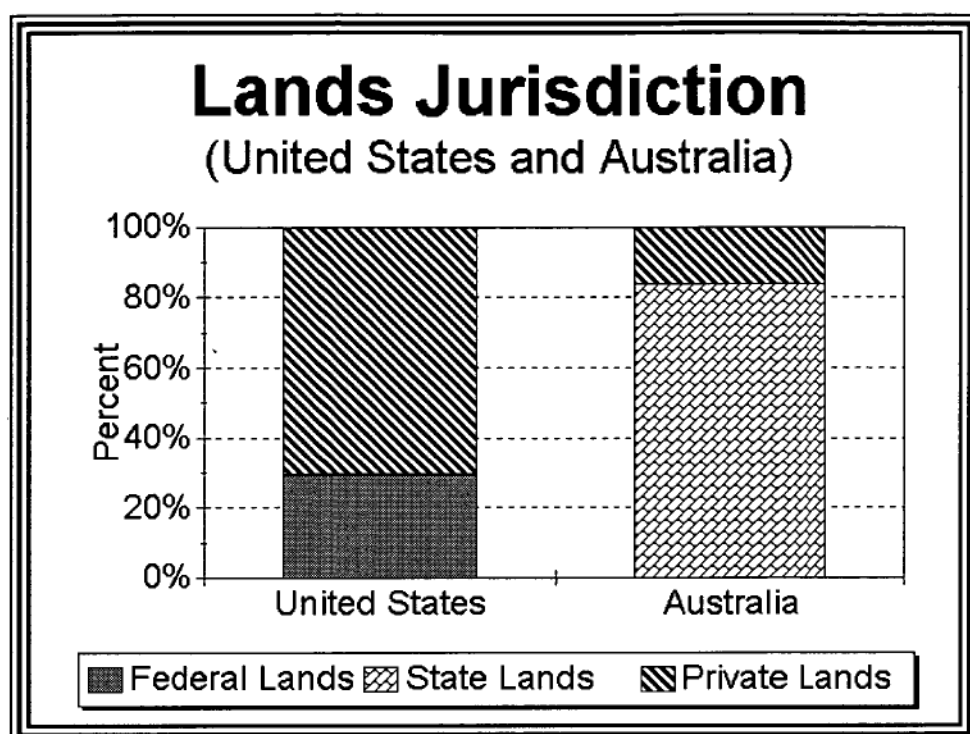
<sup>9</sup>Bruce MacDonald, *Report on the Review of the Australian National Parks and Wildlife Service* (Canberra: Australian Government Publishing Services, March 1989), p. 20.

★ Chapter One: ★  
Public Land Tenure:  
Jurisdiction, Distribution & Conservation

UNITED STATES AND AUSTRALIAN public land policies evolved from largely separate legal, cultural and ideological beginnings. This chapter will begin by explaining the visible outcomes of America's national land policies and Australia's state land policies, including differences between the United States and Australia in public and private lands jurisdiction, public and private land tenure, and regional distribution of public lands. The second half of chapter one will compare public land conservation efforts in both nations, to illustrate how government land distribution and conservation practices are historically and geographically related.

*Public Land Jurisdiction*

The first and perhaps the most obvious distinction between American and Australian government land policies, relates to the quantity of federal, state and private lands within each nation, and to the government bodies responsible for public lands. Within the United States, the Federal Government controls a far larger proportion of government administered lands than do American States. Conversely in Australia, states regulate a far larger percentage of Australia's government controlled territories than does the Australian Federal Government.



**Figure 1: Lands Jurisdiction  
(United States and Australia)**

**U.S. FEDERAL SOURCE:** *Public Land Statistics* (1990), Bureau of Land Management Publication (Washington D.C.: 1990).

**U.S. STATE SOURCE:** *Annual Information Exchange*, April 1990, National Association of State Park Directors, (Austin, TX: Texas Parks Department, 1989).

**AUSTRALIAN SOURCE:** C. J. Mobbs, ed., *Occasional Paper No. 19, Nature Conservation Reserves in Australia* (1988) (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 3-5.

As Figure 1 illustrates, in the United States, the majority of public lands are maintained under the jurisdiction of Congress and the ownership of the American people. Presently, thirty percent of the United States' total land area is publicly owned (70 percent private), while 84 percent of Australia's lands remains government controlled (16 percent private or alienated).<sup>1</sup> Moreover, roughly 98.4 percent of American public lands are administered by the United States Federal Government, whereas 1.6 percent

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## ★ Chapter One: Public Land Tenure ★

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of the nation's public lands are owned and administered by individual U.S. state governments. Within Australia, the reverse is practiced, with more than 99 percent of public lands administered by Australia's state governments,<sup>a</sup> and less than one percent by Australia's federal government.<sup>b</sup>

Consequently, Australia has a far larger proportion of its land area as government property than does the United States. However, unlike in the United States, Australia's non-alienated or non-privatized lands are not formally the legal public property of Australian citizens as is true in the United States respectively. Rather, all non-alienated lands in Australia continue to be, formally, the constitutional property of Australia's Crown sovereign--the Crown monarch of Britain. Consequently, Australia's government lands or loosely speaking, public lands, are commonly referred as *Crown lands*. As will become increasingly clear in chapter two, the issue of Crown land sovereignty has had a lasting impact upon why Australia continues to maintain largely state government land policies, while the United States quite differently maintains a national land policy.

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<sup>a</sup> Roughly 95 percent of Australia's public lands are directly administered by Australian States. The remaining four percent constitute primarily the Northern Territory's *Kakadu National Park and Uluru (Ayers Rock-Olga Mountains) National Park* and although technically retained by the Northern Territory, are managed by the Australian National Parks and Wildlife Service.

C. J. Mobbs, ed., *Nature Reserves in Australia* (1988), *Occasional Paper No. 19* (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 20-21 and 29-30.

<sup>b</sup> The *National Parks and Wildlife Conservation Act of 1975* provides for the establishment of parks and reserves over land or sea where constitutionally there is basis for Australian Commonwealth interest. These areas of direct federal jurisdiction and management include reserves within the Australian National Territory (ACT), Norfolk Island, Christmas Island and some ocean reefs.

Mobbs, pp. 6-7.

## ★ Chapter One: Public Land Tenure ★

### *Public and Private Land Tenure*

Second, private land tenure also varies significantly between Australia and the United States. Within the United States, citizens maintain direct ownership to a far larger portion of the nation's land area than similarly occurs in Australia.

*Table 3:*  
*Public & Private Land Tenure in Australia*

	Public Lands (%)			Private Lands (%)			Density
Australian State	Leased/ Licensed	Other <sup>1</sup>	Total (%) Public Lands	Alienated	Under Alienation	Total (%) Private Lands	People /km <sup>2</sup>
Australian National Territory	27.2	72.4	99.6	.04	--	.04	91.67
New South Wales	54.4	9.0	63.4	34.4	1.8	36.2	6.40
Northern Territory	57.3	28.0	85.3	14.6	N.A.	14.6	.09
Queensland	73.8	6.9	80.7	7.6	11.8	19.4	1.33
South Australia	55.9	36.7	92.6	7.3	0.1	7.4	1.31
Tasmania	-62.3-		62.3	36.4	1.3	37.7	6.19
Victoria	10.2	28.2	38.4	61.1	0.5	61.6	16.83
Western Australia	38.9	53.6	92.5	6.7	0.9	7.6	.50
AUSTRALIA	-83.7-			13.1	3.1	16.2	1.90

<sup>1</sup> NOTE: 'Other' includes 'occupied' by the Crown, 'reserved', 'unoccupied' and 'unreserved.'

**AUSTRALIA LAND DATA SOURCE:** *Year Book Australia* (1982), p. 66 in J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 23.

**AUSTRALIA POPULATION DENSITY SOURCE (1981 CENSUS):** Colin Sale and G. Wilson, *Australia: Our Changing Land* (Melbourne: Longman Cheshire, 1984), p. 83.



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## ★ *Chapter One: Public Land Tenure* ★

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Table 3 illustrates the ratio of public to private lands within each of Australia's states and principal territories. 83.7 percent of Australia is governmentally held, while 16.2 percent is privately owned. With the exception of the State of Victoria, all of Australia's states maintain a sizable majority of their lands as government property. Furthermore, roughly one-half of Australia's total land area is leased or licensed to private interests by Australia's state governments.

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*Table 4:*  
*United States Public Land Tenure From 1960 to 1988*

U.S. STATE + / - "Note:" Below	PERCENT NATIONAL LAND 1989 (1960)	PERCENT STATE LAND 1987-88 (1975)	STATE'S TOTAL PUBLIC LANDS
Alabama - / +	1.683% (3.3%)	0.149% (0.13%)	1.832%
Alaska (P.L.S.) - / +	67.802% (99.7%)	0.886% (0.38%)	68.687%
Arizona (P.L.S.) - / +	43.324% (44.7%)	0.050% (0.03%)	43.374%
Arkansas + / +	10.182% (9.0%)	0.141% (0.08%)	10.323%
California (P.L.S.) + / +	60.917% (44.9%)	1.275% (0.84%)	62.191%
Colorado (P.L.S.) - / +	34.064% (36.0%)	0.432% (0.24%)	34.496%
Connecticut (N.E.) + / -	0.444% (0.2%)	5.780% (6.10%)	6.224%
Delaware (N.E.) - / +	2.398% (2.5%)	0.936% (0.57%)	3.335%
Dist. Columbia (N.E.) / -	27.849% (28.8%)	0% (0%)	27.849%
Florida + / +	9.664% (9.4%)	0.981% (0.82%)	10.645%
Georgia + / +	6.147% (5.4%)	0.165% (0.13%)	6.312%
Hawaii + / +	16.485% (5.7%)	0.606% (0.44%)	17.091%
Idaho (P.L.S.) - / +	62.573% (64.8%)	0.088% (0.05%)	62.662%
Illinois + / +	1.380% (1.2%)	1.040% (0.80%)	2.420%
Indiana + / -	2.029% (1.5%)	0.244% (0.28%)	2.273%
Iowa + / +	0.444% (.3%)	0.145% (0.13%)	0.589%
Kansas + / +	1.314% (0.7%)	0.067% (0.05%)	1.380%
Kentucky + / +	5.453% (3.9%)	0.163% (0.16%)	5.616%
Louisiana + / +	22.647% (3.7%)	0.132% (0.08%)	22.778%
Maine (N.E.) + / +	0.769% (0.6%)	0.357% (0%)	1.127%
Maryland (N.E.) + / +	3.116% (2.9%)	4.486% (0.99%)	7.602%
Massachusetts (NE) + / +	1.640% (1.1%)	5.299% (4.67%)	6.939%
Michigan + / +	9.769% (8.9%)	0.705% (0.61%)	10.474%
Minnesota - / +	4.661% (6.6%)	0.391% (0.34%)	5.052%
Mississippi + / +	5.527% (5.0%)	0.074% (0.05%)	5.602%
Missouri + / +	4.589% (3.8%)	0.246% (0.18%)	4.835%

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*Table 4 Continued:*

U.S. STATES +/- "Note:" Below	PERCENT NATIONAL LAND 1989 (1975)	PERCENT STATE LAND 1987-88 (1975)	STATE'S TOTAL PUBLIC LANDS
Montana (P.L.S.) - / +	27.728% (29.7%)	0.056% (0.04%)	27.784%
Nebraska + / +	1.466% (1.4%)	0.305% (0.23%)	1.770%
Nevada (P.L.S.) - / +	82.265% (86.9%)	0.205% (0.20%)	82.471%
New Hampshire (NE) +/-	13.250% (12.1%)	0.530% (1.82%)	13.781%
New Jersey (N.E.) + / +	2.814% (2.1%)	6.195% (5.25%)	9.009%
New Mexico (P.L.S.) - / -	33.109% (34.9%)	0.153% (0.21%)	33.261%
New York (N.E.) - / -	0.728% (0.9%)	0.842% (9.71%)	1.570%
North Carolina - / +	3.633% (6.0%)	0.404% (0.22%)	4.037%
North Dakota + / +	4.420% (4.4%)	0.039% (0.03%)	4.459%
Ohio + / +	1.227% (0.8%)	0.792% (0.78%)	2.019%
Oklahoma - / +	1.982% (2.6%)	0.217% (0.20%)	2.199%
Oregon (P.L.S.) - / +	48.165% (51.1%)	0.145% (0.14%)	48.310%
Pennsylvania (N.E.) +/-	2.225% (1.9%)	0.959% (1.03%)	3.184%
Rhode Island (N.E.) - / -	0.692% (1.1%)	1.362% (1.82%)	2.054%
South Carolina - / +	2.239% (5.8%)	0.405% (0.33%)	2.644%
South Dakota - / +	5.613% (6.8%)	0.189% (0.18%)	5.802%
Tennessee - / +	4.947% (5.8%)	0.462% (0.43%)	5.409%
Texas + / +	1.691% (1.6%)	0.134% (0.06%)	1.825%
Utah (P.L.S.) - / +	63.782% (69.1%)	0.220% (0.11%)	64.003%
Vermont (N.E.) + / +	5.978% (4.3%)	2.876% (0.59%)	8.854%
Virginia - / +	7.524% (8.4%)	0.211% (0.19%)	7.735%
Washington (P.L.S.) - / +	28.981% (29.5%)	0.548% (0.19%)	29.529%
West Virginia + / +	13.621% (6.1%)	1.338% (0.43%)	14.959%
Wisconsin + / +	5.443% (5.1%)	0.343% (0.31%)	5.786%
Wyoming (P.L.S.) + / -	48.774% (48.4%)	0.192% (0.25%)	48.966%
<b>U.S.A.</b> - / +	<b>29.153% (33.9%)</b>	<b>0.476% (0.433%)</b>	<b>29.630%</b>

Note: +/- signifies an increase or decrease in federal or state public lands during the specified period.

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**First +** = federal lands. **Second +** = state lands.  
+ = increase in public land area. - = decrease in public land area.  
(P.L.S.) = Public Lands States. (N.E.) = Northeastern States.

Sources from previous cited: **Table 3: Public Land Tenure in the United States.**

**National Data Source** 1989 STATISTICS: *Public Land Statistics 1990* (Washington D.C.: Bureau of Land Management, 1990). 1960 STATISTICS: *Statistical Appendix to the Annual Report of the Director, Bureau of Land Management to the Secretary of the Interior For the Fiscal Year Ended June 30, 1961* (Washington D.C.: Bureau of Land Management, U.S. Department of the Interior, 1961), p. 11.

**States Data Source** 1987-88 STATISTICS: calculated from *Annual Information Exchange April 1989*, National Association of State Park Directors (Austin, TX: Texas Parks and Wildlife Department, 1989), pp. 1-6. 1975 STATISTICS: calculated from *State Parks Statistics 1975*, (Arlington, VA: National Society of Park Resources, 1977). [A publication of the National Association of State Park Directors, and compiled by the Missouri Division of Parks and Recreation, Jefferson City, MO.]

**States' Area Data Source:** 1986 State and Metropolitan Area Data Book (Washington D.C.: U.S. Bureau of the Census, 1986).

According to *Public Land Statistics*, "the [United States] Federal Government has at various times in U.S. history held title to about 80 percent of the [nation's] total area."<sup>2</sup> Today, however, as illustrated by Table 4, America's federal and state governments collectively retain roughly 30 percent of the United States' land area, while among individual states, public land tenure has changed little during recent decades. As later revealed in chapter three, public land transfers to the American public was a common occurrence until this practice was essentially ended by the *Taylor Grazing Act of 1934*.<sup>c</sup>

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<sup>c</sup> The Taylor Grazing Act of 1934 allowed the United States Secretary of the Interior to classify and limit entry upon all public lands, which effectively ended the era of public land distribution in favor of public land retention.

Act of June 18, 1934, ch. 865, § 7, 48 Stat. 1269, amended, Act of 26, 1936, ch. 842, title I, § 2, 49 Stat. 1976 (codified at 43 U.S.C. § 315f).

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Table 4 also illustrates that, unlike Australia, government ownership and jurisdiction of public lands in the United States varies greatly depending upon geographic region and upon individual states. The states of Nevada and Iowa for instance have the largest and smallest percentages of public lands of all American States, at 82.5 percent and 0.59 percent respectively. With the exception of *Alaska*,<sup>d</sup> and to a lesser degree *California*, *Hawaii*, *Louisiana*, and *West Virginia*, who experienced modest *increases* in federal lands during this same period, there has been little variation in land tenure in the United States during the past thirty years.<sup>e</sup>

Among American State-owned property, land tenure has likewise changed little during recent years. As Table 4 also illustrates, forty-two states increased their state-owned public acreage between 1975 and 1987-88, with *Maryland*, *Vermont*, *Washington*, and *West Virginia* experiencing the largest relative gains, while eight states had relatively

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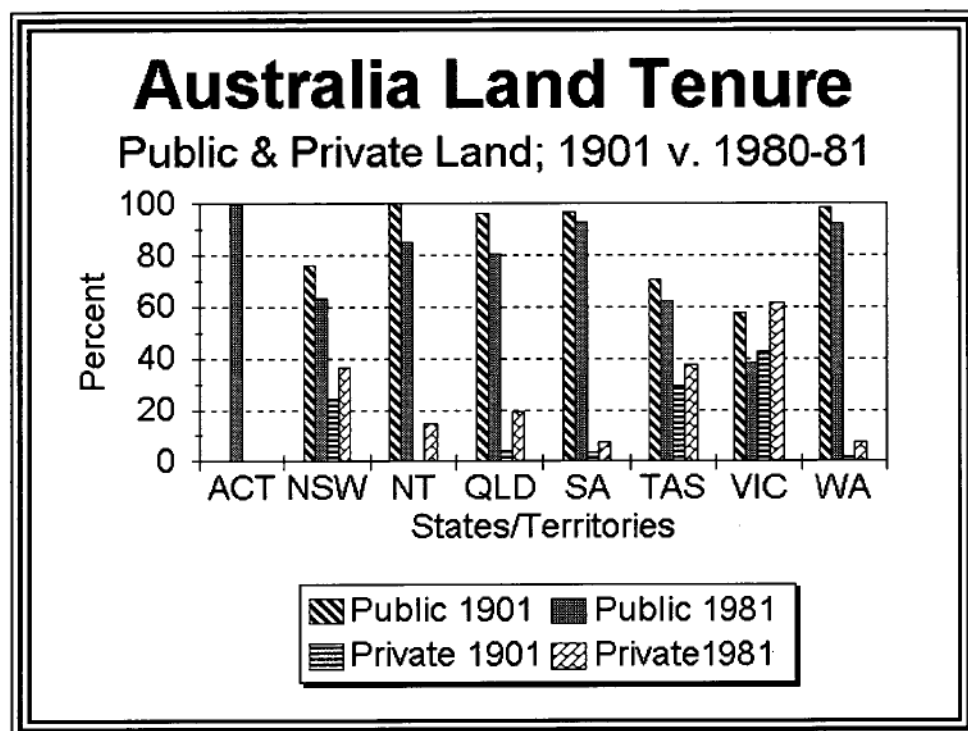
<sup>d</sup> A reduction of federal lands in Alaska with land transfers to the State of Alaska and to indigenous groups most contributed to the overall reduction of federal lands in the United States from 33.9 percent in 1960 to 29.15 percent in 1989. Among America's states, Alaska experienced the largest change in land tenure during recent decades. In 1960, 99.7 percent of Alaska's land area was federally owned. As a result of the *Alaska Statehood Act of 1958* (Pub. L. No. 85-508, 72 Stat. 339, 1958) whereby the federal government agreed to transfer 103.5 million acres or 28% of Alaska's land area to the State of Alaska, and to native Alaskans who claimed 80% of Alaskan lands. The Federal Government agreed to transfer at least 13 million acres a year to the State following state litigation against the Federal Government in *Alaska v. Reagan* (No. A 78-291 CIV D. Alas. Stipulation of Settlement, Aug. 15, 1981). By 1990, with millions of acres transferred to State of Alaska, federal ownership of Alaska decreased to 67.8 percent.

*Public Land Statistics*, 1960 and 1990 eds. (Washington, D.C.: Bureau of Land Management, 1960 and 1990) and David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (1982), 323.

<sup>e</sup> Among America's fifty states, twenty-one experienced minor reductions in federal properties from 1960 to 1989, while twenty-nine experienced small increases during the same period.

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small losses in acreage.<sup>f</sup> Nationally, however, from 1975 to 1988, average state-owned acreage increased slightly from a scant 0.433 percent to 0.476 percent of United States' total land area.



**Figure 2: Australia Land Tenure  
Public & Private Land; 1901 v. 1980-81**

**KEY:** ACT= Australian Capital Territory, NSW= New South Wales, NT= Northern Territory, QLD= Queensland, SA= South Australia, TAS= Tasmania, VIC= Victoria, WA= Western Australia.

**SOURCE:** J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement" in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), pp. 19-23.

<sup>f</sup> Connecticut, Indiana, New Hampshire, New Mexico, New York, Pennsylvania, Rhode Island, and Wyoming all experienced modest decreases in their respective state-owned properties.

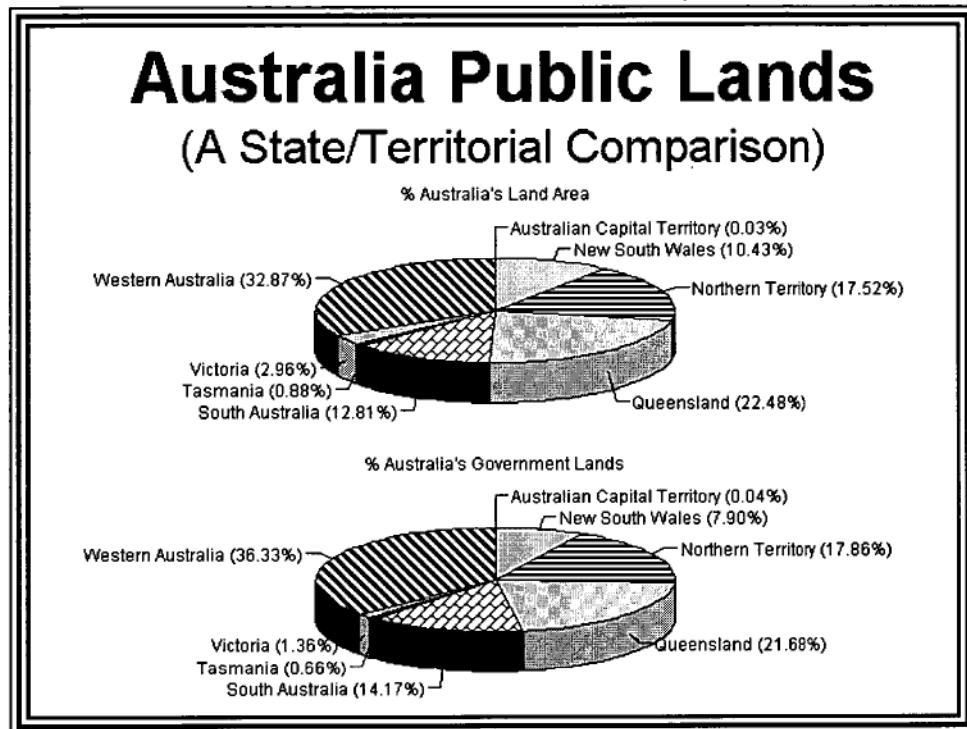
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Like the United States, Australia's land tenure has not changed drastically during recent decades. In fact, as displayed by Figure 2, during the first eighty years following national federation in 1901, Australian land tenure has changed only slightly. By 1901, 94.2 percent of Australia's land area was government held.<sup>3</sup> Eighty years later, 83.7 percent of Australia has been retained by largely Australia's state governments. Whereas early United States land policy profoundly encouraged the sale or free distribution of lands to the states, settlers, and other business interests, Australia has continued a lengthy tradition begun during its colonial history of State government ownership and retention of its government or *crown lands*.

## Regional Public Land Distribution



**Figure 3: Australia Public Lands  
(A State/Territorial Comparison)**

**AUSTRALIA LAND AREA SOURCE:** C. J. Mobbs, ed., *Occasional Paper No. 19, Nature Conservation Reserves in Australia (1988)* (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 3-5.

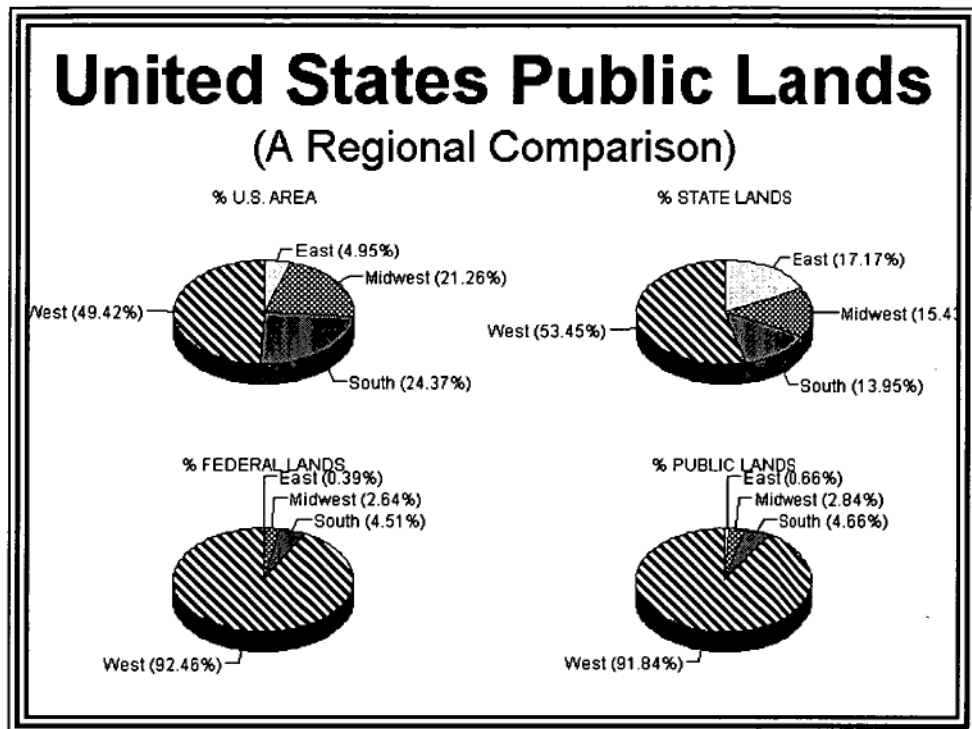
**PUBLIC LAND AREA SOURCE:** *Year Book Australia (1982)*, p. 66 in J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 23.

Regional distribution of public lands in the United States and Australia is also characteristically distinct. Figure 3 illustrates that the distribution of Australia's government lands are nearly evenly distributed, proportional to State/Australia total land area. Western Australia, South Australia, and the Northern Territory have only a slightly



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higher ratio of public lands when compared to the more populated states of New South Wales, Victoria, and Queensland.<sup>4</sup>



**Figure 4: United States' Public Lands  
(A Regional Comparison)**

**FEDERAL SOURCE:** *Public Land Statistics (1990)* (Washington D.C.: Bureau of Land Management, 1990).

**STATE SOURCE:** *Annual Information Exchange, April 1990*, National Association of State Park Directors, (Austin, TX: Texas Parks and Wildlife Department, 1989).

Within the United States, public lands are regionally clustered primarily within the mostly unpopulated and often mountainous, arid, or forested western one-third of the continental United States and the State of Alaska. Figure 4 illustrates that the vast majority of America's public lands (91.8%) are found within this region. With

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approximately one-half of the land area of the United States, these twelve states, commonly referred to as *public land states* (designated *P.L.S.* in Table 4),<sup>9</sup> contain an unproportionate 92.5 percent of the nation's federal lands, and 53.5 percent of state-owned lands.

Figure 4 also illustrates that eleven Northeastern States (designated *N.E.* in Table 4) and the District of Columbia<sup>h</sup> could correspondingly be referred as the *state land region*. The Northeast, comprising the approximate area of the original thirteen colonies prior to U.S. federation, contains 4.9 percent of U.S. land area, 0.7 percent of America's public lands, 0.4 percent of the nation's federal public lands, but an unproportionate 17.2 percent of the nation's state-owned and administered public lands.<sup>i</sup>

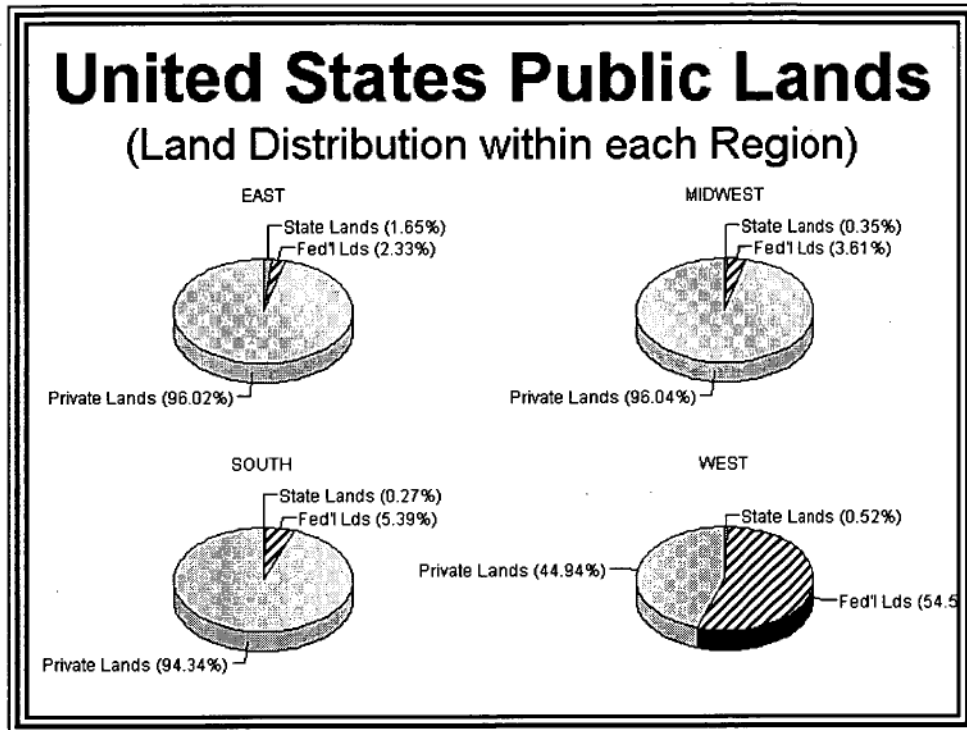
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<sup>9</sup> The public land states include Alaska, Arizona, California, Colorado, Idaho, Montana, Nevada, New Mexico, Oregon, Utah, Washington and Wyoming.

<sup>h</sup> These states include Connecticut, Delaware, the District of Columbia, Maine, Maryland, Massachusetts, New Hampshire, New Jersey, New York, Pennsylvania, Rhode Island and Vermont.

<sup>i</sup> The Southern and Midwestern States are intermediate between the Eastern and Western States, with a near equal distribution of public lands. The South with 24.4 percent of United States' land area contains 4.7 percent of United States public lands, 4.5 percent of federal lands and 14.0 percent of state public lands. The Midwest with 21.3 percent of America's land area, includes 2.9 percent of the nation's public lands, 2.6 percent of federal lands, and 15.4 percent of state lands.

*Public Land Statistics*, 1990 ed. (Washington D.C.: Bureau of Land Management, 1990) p. 1; and *Annual [State Lands] Information Exchange, April 1989* (Austin, TX: Texas Parks and Wildlife Department, 1989).



**Figure 5: United States Public Lands  
(Land Distribution within each Region)**

**FEDERAL SOURCE:** *Public Land Statistics (1990)*, (Washington, D.C.: Bureau of Land Management, 1990).

**STATE SOURCE:** *Annual Information Exchange*, April 1990, National Association of State Park Directors, (Austin, TX: Texas Parks Department, 1989).

Within all geographic regions of the United States, America's Federal Government administers a far larger proportion of public lands than do the American States. Figure

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5 reveals that only within the *public land states*, or the western one-third of the United States and Alaska<sup>j</sup>, do public lands exceed non-government owned lands in total area.

### *Public Land Conservation*

Though Australia has more public lands under government jurisdiction than does the United States, the United States has historically been able to legally preserve through conservation and professional management far larger areas of its public domain for a much longer period than has been similarly set aside in Australia. It may appear that Australia, with its impressive quantity of government properties and relatively small yet highly urban population, would have few difficulties in legally preserving its vast government lands. Historically, however, Australia has struggled to provide widespread legal protection and professional management of these lands. In terms of public lands receiving *legislative or legal protection* for instance, Australia lags significantly behind the United States.

*Legislatively protected areas* may be defined as government lands which have received Congressional/Parliamentarian or State statutory protection. These lands are designated according to their intended use, are provided conservation or long-term

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<sup>j</sup> Independently, the State of Alaska with 16 percent of United States' area, contains over one-third of the nation's public lands, 37.4 percent of the nation's federal lands and approximately 30 percent of the United States' state-owned lands.

*Public Land Statistics*, 1990 ed. (Washington D.C.: Bureau of Land Management, 1990) pp. 1-10; and *Annual [State Lands] Information Exchange, April 1989*, National Association of State Park Directors (Austin, TX: Texas Parks and Wildlife Department, 1989), pp. 1-8.

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preservation status, and are safeguarded from irreversible damage through government law enforcement. Such public lands may be designated through multi-use purposes such as recreation and wildlife refuge; however the focal reason for conserving these public areas would remain the protection and management of unique and threatened ecosystems from private incursion. Recent figures suggest that there are more legislatively protected and professionally managed public lands in Alaska than in all of Australia.<sup>k</sup>

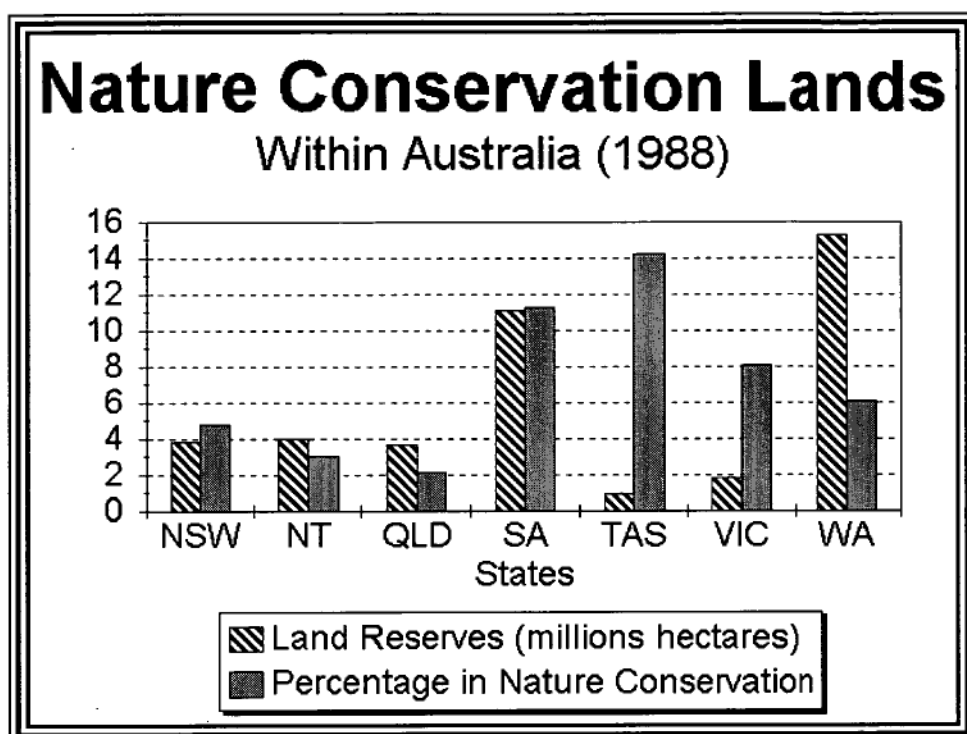
### *Australian Land Conservation Efforts*

According to the Australian National Parks and Wildlife Service, "as of 31 December 1988, 5.3 percent of [Australia's] land area was [legally] reserved for nature conservation or 40.78 million hectares (100.77 million acres)."<sup>5</sup>

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<sup>k</sup> The Australian National Parks and Wildlife Service estimates that 40,780,930 hectares (100.8 million acres) or "about 5.3 percent of the total land surface [of Australia], had been reserved under different categories" in 1988. The Sierra Club estimates that within the State of Alaska during the period November 1988 to January 1991, the U.S. National Fish and Wildlife Service, U.S. National Forest Service and the U.S. National Park Service administered and managed 155,904,413 acres (63.1 million hectares). The U.S.F.W.S. administered 77,058,617 acres (31.2 million hectares), the N.P.S. 54,612,615 acres (22.1 million hectares), and the N.F.S. 24,233,181 acres (9.8 million hectares).

C. J. Mobbs, ed., *Nature Conservation Reserves in Australia (1988)* (Canberra: Australian National Parks and Wildlife Service, 1989), p. iii; and "U.S. Public Lands Booklets" containing statistics for the U.S. Fish and Wildlife Service and U.S. National Park Service (San Francisco: Sierra Club, Nov. 1988), pp. 1-16.



**Figure 6: Nature Conservation Lands  
Within Australia (1988)**

**SOURCE:** C. J. Mobbs, ed., *Nature Conservation Reserves in Australia (1988)*, Occasional Paper No. 19 (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 3-5.

As Figure 6 illustrates, like the United States, the *legal reservation or conservation* of public lands in Australia is disproportionately distributed and is not directly proportional to State population. Tasmania and South Australia have the largest legal set-asides of land, at 14.2 percent and 11.3 percent of their total state land area respectively, while the Northern Territory and Queensland have the smallest reserves at 2.99 percent and 2.12 percent respectively. With the exception of Australia's three most populous states, the majority of these land reserves are located either near the ocean coasts, or near

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state capitals and other major metropolitan areas.<sup>1</sup> Within the most densely populated states of Victoria, New South Wales, and Tasmania, reserved government lands are more evenly distributed throughout these states than among other Australian States. Unlike United States' public land reserves which historically were established in remote wilderness areas, the interior or *outback* regions of Australia have relatively few designated national parks or nature reserves.<sup>6</sup>

The majority of Australia's legislative public land reserves are today broadly classified as either *National Parks* or variously defined *Nature Reserves*. In all, Australia's states have 34 categories of government land reserves, with a total of 3,225 land reserves (1988).<sup>7</sup> Among these designated areas, *National Parks* are the only land designation common among all Australian States, making up more than 45 percent of Australia's total reserved lands, followed by *Nature Reserves* in New South Wales, Tasmania and Western Australia (27.3%); and *Regional Reserves* (10.7%) and *Conservation Parks* (10%) in South Australia.<sup>8</sup>

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<sup>1</sup> Many of Australia's early parks were relatively small compared to America's early national parks. For instance, Australia's first designated national park was New South Wales's 18,000 acres (7,285 hectare) *Royal National Park* in 1879, followed by other national parks including South Australia's first, 796 hectare (1,967 acre) *The National Park* (now Belair Recreation Park) near Adelaide in 1891. Early national parks in the United States were generally significantly larger, such as America's first, 2,219,790 acre (890,000 hectares) *Yellowstone National Park* in 1872; and 761,170 acre (308,041 hectare) *Yosemite National Park* in 1890.

*Australia's 100 Years of National Parks* (Sydney: New South Wales National Parks and Wildlife Service, 1979), pp. 17 and 125.

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Michael and Irene Morcombe summarize the many difficulties associated with Australian States independently managing Australian land conservation when they conclude.

Australia's conservation lands bear many titles. In some states, those places which have recreational, scenic or other attractions for the general public are termed national parks. The confusion of names is heightened by the diversity of control. Some states have all or most conservation areas vested in a single department or authority, while others have a multitude of administrators. And so we have around Australia a multiplicity of governing bodies—some sixteen authorities, services and councils, one national, many Statewide, and others controlling very restricted areas or purposes of reserves. Government policies change, flora and fauna reserves become national parks, boundaries expand and contract. These changes may sometimes reflect conservation victories, or political capitulation to the demands of mining, timber, agricultural or other interests. Roads, visitor centres, tourist accommodation and other facilities are built, altered, occasionally excluded or abandoned.<sup>9</sup>

Australia's conservation efforts are compounded by the reality that, prior to the 1960's, Australia's national parks and land reserves received little or no professional management nor legal protection. For example, in New South Wales, before the [N.S.W.] *National Parks and Wildlife Service* was established in 1967, the management of national parks and historic sites was overseen by individual Trust organizations. According to Wendy Goldstein and the New South Wales National Parks and Wildlife Service, "except for a few major parks established by Acts of parliament, e.g., Kosciusko State Park Act, 1944, any of these parks lands could be revoked without great difficulty. In fact, there were generally no legal differences between national parks, campgrounds, and recreation reserves."<sup>10</sup> In addition to the Trust organizations in New South Wales, which commonly oversaw its State's parks and reserves, other



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Australian States had similar modest government land management. Similarly, initial parks and reserves within Western Australia were managed by a *State Gardens Board*, while within the states of Victoria and South Australia, *Committees of Management and honourary bailiffs*, as well as a locally appointed *Board of Commissioners* administered reserved lands within these states respectively.<sup>11</sup>

While it is true that during Australia's colonial period the British government established in Australia several national parks,<sup>m</sup> these parks were generally small, were situated near settlements for human health and recreation purposes and were provided minimal legal protection. Prior to the 1960's, Australian parks and reserves were plagued by inadequate and non-binding legislation, lack of funding and public support, and insufficient professional management staff, including park rangers. Without widespread support and funding, Australia's states were often compelled to sell domestic grazing and timber rights on reserved lands to finance park management, development and park reconstruction, which grazing and timber removal ironically contributed.<sup>n</sup>

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<sup>m</sup> Among Australia's earliest government land reserves include: (Royal) National Park (1879) and Ku Ring Gai Chase (1894) in New South Wales, Belair (1891) in South Australia, Wilson's Promontory (1898) and Mount Buffalo (1898) in Victoria, and John Forrest (1900) in Western Australia.

<sup>n</sup> According to Ovington, during much of the late nineteenth century and much of this century, "park management meant providing picnic areas and entertainment, usually the funding of these was by the sale of the park resources-- timber, grazing and timber rights."

J. D. Ovington, "A National Perspective," in *The Value of National Parks to the Community: Values and Ways of Improving the Contribution of Australian National Parks to the Community*, eds. John Messer and Geoff Mosley (Hawthorn, VIC: Australian Conservation Foundation, 1980), pp. 46-47.

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During the first one-half of the twentieth century, there was no general public appreciation of the national park concept in Australia. National parks were seen as playgrounds which sometimes also protected special scenery and wildlife. An overriding theme that afflicted Australia's early public land history can be summarized as a *general indifference* toward the environment and wildlife. According to the New South Wales National Parks and Wildlife Service, "until 1945 practically all of the national parks and equivalent reserves were initiated by far-sighted individuals to protect areas of wilderness, scenery and sometimes the habitat of plants and animals. General public attitude was neutral because there was always an unspoiled patch of bush nearby."<sup>12</sup>

As in during the early years of the national park movement in the United States, individual effort among small active groups and individuals were also vital in establishing land reserves in Australia. Among the most influential of these groups were New South Wales' *Sir John Robertson* and the *New South Wales Zoological Society*, c.1878; Western Australia's *B. H. Woodward* and the *Western Australian Natural History Society*, c.1903; Queensland's *Robert Collins*, c.1878; and Tasmania's *William Crooke* and the *Tasmanian Field Naturalists Club*, c.1904.<sup>13</sup>

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Lack of nationwide consistency and inadequate management together contributed to other difficulties managing Australia's so-called *reserved lands*. The *Australian Academy of Sciences* fittingly came to the same conclusion in 1968.

Australia has a long history in national parks. As a result there are many areas which have been called 'national parks' or 'fauna reserves'. Unfortunately, the definition of 'national park' has varied from time to time and from State to State. It is therefore not as easy as it may seem to provide details of every area, especially as the definitions are still being changed.<sup>14</sup>

*Australian Academy of Science (1968)*

As a consequence of these inconsistencies, and the resulting lack of consensus among the states, Australia has, until recent decades, provided little or no legal protection and professional management to these 'designated' lands. It was not until the 1960's and the 1970's, when domestic and foreign appeals for change became more vocal, that Australia's states and the Federal Commonwealth began changing its practices by implementing legislative action.

In 1974, the *Report of the Committee of Inquiry into the [Australian] National Estate* responded by releasing the following statement.

Uniformity of nomenclature: A survey of legislation, policies and practices shows a confusing variety among the States and Territories in the types of parks that can be established, their nomenclature, and in what is or may be done within them. While we do not urge uniformity simply for its own sake, we think that the Australian public and visitors from abroad, or even park staff traveling or working in different States, would be greatly assisted if a uniform system of classification and nomenclature were adopted at least for the larger and more important reserves. Everyone would then know, from the name of a park, what kind of areas they were visiting and what they might not do there. It would be entirely

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proper for the Australian Government to take a lead in moves to achieve this result and to apply the agreed classification within its own Territories.<sup>15</sup>

### *Report of the Committee of Inquiry into the National Estate (1974)*

Comprehensive government land management policies were not meaningfully introduced among Australia's states and the Australian Commonwealth until the early 1970's.<sup>o</sup> During the late 1960's and early 1970's, each of Australia's states, and indeed the federal government, approved similar *national parks and wildlife bills*<sup>p</sup>, which from that time forward, became an infrastructure for Australia's national parks and wildlife services within each state and at the federal level. The creation of these services helped create a legal, administrative, and management framework which had

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<sup>o</sup> See *Australian Land Conservation* section.

<sup>p</sup> New South Wales' initial *National Parks and Wildlife Bill* of October 1, 1967, was later expanded to become the *National Parks and Wildlife Act of 1974*. Victoria established its *National Parks Act of 1975*, having earlier approved a *National Parks Act of 1956*. South Australia approved its *National Parks and Wildlife Act of 1972* from an earlier *National Park Act of 1891* which established "The National Park" at Belair (South Australia's first National Park), and which today is referred as Belair Recreation Park. Queensland established its *National Parks and Wildlife Act of 1975*, having earlier set precedence with its *State Forests and National Parks Act of 1907*, which allowed for lands to be set aside for their future scenic and recreational potential. Tasmania established its *National Parks and Wildlife Act of 1970* following earlier attempts of conservation which included the *Waste Lands Act of 1863*, the *Crown Lands Act of 1899*, and the *Preservation Act of 1915*. Western Australia established the *Conservation and Land Management Act of 1984* from earlier conservation attempts which included the *Game Act of 1892*, the *Parks and Reserves Act of 1895*, the *Native Fauna Conservation Act of 1950*, the *Permanent Reserves Act of 1899*, the *Land Act of 1933*, and the *National Parks Authority Act of 1976*. The Northern Territory established the *Conservation Commission Act of 1980*. The Federal Commonwealth established the *Australian National Parks and Wildlife Service* through the enactment of the *National Parks and Wildlife Conservation Act of 1975*, which was later expanded through the *Whale Protection Act of 1980*, and the *Wildlife Protection (Regulations of Exports and Imports) Act of 1982*.

*Australia's 100 Years of National Parks* (Sydney: New South Wales National Parks and Wildlife Service, 1979), pp. 93-148; Bruce MacDonald, *Report on the Review of the Australian National Parks and Wildlife Service* (Canberra: Australian Government Publishing Service, March 1989), p. 17; and C. J. Mobbs, ed., *Occasional Paper No. 19, Nature Conservation Reserves in Australia (1988)* (Canberra: Australian National Parks and Wildlife, 1989), pp. 6-19.

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historically been absent in Australia, and which had long plagued Australian land conservation efforts. In addition to establishing the nation's first principal structure for public land management, Australia, during recent decades, has continued 'designating' large areas of public lands, with presumably an intent to eventually professionally manage these public areas.

The remoteness of many of these legally designated areas is both an asset and a liability in ultimately preserving Australia's reserved lands. While it is true that many areas of Australia (for example the Kimberly region of the far North) remain largely isolated and removed from the disturbances of tourism and from other so-called developments, it is equally true that without legal designation and preservation these remote areas will increasingly be susceptible to damaging disturbance in the near future. As Morcombe states, "eventually most of these potential [land reserve] areas will become national parks or sanctuaries, with rangers and visitor facilities."<sup>16</sup> If this is indeed true, a great opportunity currently exists, as largely existed in the United States during the late nineteenth century, to study and place legal safeguards upon these areas well before future disturbances occur. A problem with this scenario is that without changes to the *Australian Constitution* relative to public lands, these ventures will continue to rely largely upon the political will of Australia's individual states.

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This view is reflected by the Australian Federal Government's current relatively minor role in safeguarding Australian public lands. The *Australian National Parks and Wildlife Service (A.N.P.W.S.)*, established in 1975 under the provisions of the *National Parks and Wildlife Conservation Act of 1975* and the *Amendment Act of 1978*, was the nation's first federal agency of its kind, and remains the primary federal conservation agency in Australia. Since Australia's government land reserves are primarily administered by the states, the role of the A.N.P.W.S. is limited in providing assistance to the states *as needed or requested*, in generally a supporting role,<sup>9</sup> while the federal agency appears limited by meager Federal Parliament appropriations and by insufficient land management staffing.<sup>†</sup>

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<sup>9</sup> Among the functions of the *Australian National Parks and Wildlife Service* include: 1) working with state and territorial organizations to provide national statistics relating to nature conservation in Australia; 2) participating in development of co-ordinate nature conservation activities as needed; 3) framing national principles for Commonwealth Government endorsement regarding wildlife and nature conservation protection; 4) providing advice to the Commonwealth Government regarding international agreements relative to national parks and wildlife agreements; 5) providing specialized assistance upon request to relevant state and territorial authorities; 6) developing and sponsoring cost-sharing arrangements with states/territories for national training and education related to nature conservation.

*Australia's 100 Years of National Parks* (Sydney: New South Wales National Parks and Wildlife Service, 1979), pp. 154-160.

<sup>†</sup> For the year ending 30 June 1989, Parliamentary Appropriations for the *Australian National Parks and Wildlife Service* totaled \$A14,174,000, with a net yearly revenue for 1988-89 of \$A15,795,193. Nearly one-half of that fiscal year's expenditures (\$A6,945,163) were spent upon *salaries, allowances, and administrative expenses* for 161 approved staff.

*Australian National Parks and Wildlife Service, Annual Report 1988-89* (Canberra: Australian Government Publishing Service, 1989), pp. 1 and 124.

*Table 5:  
Growth of National Parks and Reserves  
in Australia from 1968 to 1988*

State or Territory	Number National Parks	Area Hectares (Acres) in Millions	Number Nature Reserves	Area Hectares (Acres) in Millions	Nat'l Pks and Reserves % of State	Date
Australian National Territory	0 0 1	0 0 0.094 (0.232)	1 3 # 5	0.0048 (.012) 0.0098 (.024) #0.0182 (.045)	2.0 % 4.0 % # 46.76 %	6-68 6-78 12-88
New South Wales	19 46 68	0.803 (1.98) 1.734 (4.29) 3.104 (7.669)	55 126 # 370	0.059 (146.9) 0.339 (0.837) #0.708 (1.75)	1.0 % 2.6 % # 4.76 %	6-68 6-78 12-88
Northern Territory	4 12 4	0.195 (0.482) 0.252 (0.621) 0.141 (0.348)	5 6 # 86	4,647(11.48) 4,971(12.28) # 3.88(9.593)	3.6 % 3.9 % # 2.99 %	12-68 6-78 12-88
Queensland	254 323 317	0.941 (2.32) 2.182 (5.39) 3.522 (8.70)	0 3 # 257	0 0.032 (0.080) # 0.142 (.35)	0.5 % 1.3 % # 2.12%	6-68 6-78 12-88
South Australia	6 8 12	0.208 (0.515) 0.233 (0.576) 2.648 (6.543)	98 162 # 267	0.961 (2.375) 3.687 (9.112) #8.47 (20.93)	1.2 % 4.0 % # 11.30 %	6-68 6-78 12-88
Tasmania	NA 12 13	0.288 (0.712) 0.653 (1.614) 0.851 (2.103)	0 24 # 214	0 0.028 (0.069) #0.116 (.286)	4.2 % 10.0 % # 14.24 %	6-68 6-78 12-88
Victoria	20 26 33	0.150 (0.371) 0.260 (0.643) 1.202 (2.970)	28 22 # 329	0.051 (0.127) 0.035 (0.086) #0.628 (1.55)	0.9 % 1.3 % # 8.04 %	6-68 6-78 12-88
Western Australia	35 42 60	0.332 (0.822) 4.563 (11.28) 4.757 (11.75)	127 412 #1,187	0.818 (2.022) 8.086 (19.98) #10.49 (25.9)	0.5 % 5.0 % # 6.04 %	12-68 6-78 12-88
AUSTRALIA	338 469 508	2.917 (7.208) 9.877 (24.41) 16.319 (40.3)	314 758 # 2,715	6.541 (16.16) 17.188 (42.5) #24.45 (60.4)	1.23 % 3.52 % # 5.3 %	6/12-68 6-78 12-88

#: All 1988 public land reserves not specifically identified as either National Parks or Nature Reserves have been classified as Nature Reserves.

#### STATISTICAL SOURCES:

Adapted from statistics obtained through J. D. Ovington, "A National Perspective" in *The Value of National Parks to the Community: Values and Ways of Improving the Contribution of Australian National Parks to the Community*, eds. John Messer and Geoff Mosley (Hawthorn, VIC: Australian Conservation Foundation, 1980), p. 51; and C. J. Mobbs ed., *Nature Conservation Reserves in Australia* (1988), *Occasional Paper No. 19* (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 3-5.

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Table 5 illustrates that between the years 1968 and 1988, Australia experienced a dramatic increase in its *designation* of State administered *National Parks* and *Nature Reserves*. In 1968 merely 1.23 percent of the Australia's land area was reserved through legislation for all types of *nature conservation*. By 1978 this figure increased to 3.52 percent, and by 1988 conservation efforts again increased, to 5.3 percent.

During this time, all states experienced notable increases in *legislative* land conservation, with Victoria and South Australia showing the greatest increases. For example, in Tasmania, of all public lands having received legal conservation status (*State Reserves, Game Reserves and Conservation Areas*) as of 30 June 1989, 57.4% of Tasmania's *National Parks* in total area were established since 1950, while overall, 59.9% of Tasmania's legally designated government reserves have been established since 1960.<sup>s</sup>

As Table 5 illustrates, during the twenty year period between 1968 to 1988, Australia experienced more than a 400 percent increase in its *legal or legislative designation* of its government lands. In particular, South Australia and Victoria nearly tripled their legal land reserves during the ten year period from 1978 to 1988. With the rapid designation

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<sup>s</sup> These figures include all terrestrial reserves in Tasmania, consisting of *National Parks, State Reserves, Nature Reserves, Historic Sites, Aboriginal Sites, Game Reserves, Wildlife Sanctuaries, Muttonbird Reserves, Conservation Areas, Protected Archaeological Sites, Protected Areas, State Recreation Areas, Coastal Reserves, Lakeside Reserves, River Reserves*, and other reserves.

Tony Peddar, Secretary; *State Reserves, Game Reserves, Conservation Areas, and Lands Recreation Areas* (Hobart, TAS: Tasmania Department of Parks, Wildlife and Heritage, 30 June, 1989).



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and legal preservation of government lands within Australia since 1968, it is perhaps understandable that, through the largely independent attempts of Australian States, together with increasing but relatively small contributions from the Federal Government's *Australian National Parks and Wildlife Service*, Australia continues to struggle in providing management and protection to these newly designated government reserves.

In spite of these encouraging efforts to legally designate government lands for conservation, Australia's management of these lands is far from complete. According to the *Australian Conservation Foundation*, Australia has "a long way to go in rounding out the system so as to make it more fully representative of our major ecosystems, and of course, we have scarcely begun managing the areas which have already been set aside."<sup>17</sup> This view has also frequently been expressed by member conservation organizations of the United Nations,<sup>1</sup> including the *International Union for the Conservation of Nature and Natural Resources (I.U.C.N.)*, and the *International Commission of National Parks (I.C.N.P.)*. For example, the I.C.N.P. has eliminated several Australian national parks from its lists "because they are in areas of such

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<sup>1</sup> The *International Union for the Conservation of Nature and Natural Resources (I.U.C.N.)* was founded in 1949 as a result of United Nations and UNESCO initiatives to establish worldwide goals concerning nature conservation and to create a world conservation strategy. In 1958 the *International Commission of National Parks (I.C.N.P.)* was created by the I.U.C.N. to create an assistance program for creating National Parks throughout the world. In 1969 the general assembly of the I.U.C.N. met in New Delhi and adopted a world definition of a *National Park*. The *United Nations Educational, Scientific, and Cultural Organization (UNESCO)* adopted the *International Convention for the Protection of the World Cultural and Natural Heritage (The World Heritage Convention)* in 1972.

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tremendous potential that higher maintenance of standards is required."<sup>18</sup> The I.U.C.N. has also been reluctant to recognize some Australian national parks according to I.U.C.N. guidelines set in 1963."

Nonetheless, Australia should be commended for courageously designating large areas of its public domain within the past twenty-five years. These endeavors have prompted establishment of a *professional* approach to land conservation and management, in amalgamating park functions, in enlarging legal protection of public lands, and in improving overall accountability.

Unfortunately, as stated by the *Australian Conservation Foundation*, "the rapid increase in areas controlled by [state] national parks services has caused a great lag in preparation of management plans, [and the] rapid growth in numbers of parks has not generally been paralleled by equivalent increases in [park service] staff."<sup>19</sup>

Professor Bruce Davis accurately concludes a likely reason for Australia's historic land management challenges when he remarked, "Australia is unique amongst nations in *not possessing a truly national parks system*." (Italics added.)<sup>20</sup> Instead, the Australian Federal Commonwealth currently relies on several seemingly unrelated constitutional

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<sup>18</sup> Only five of Western Australia's 45 National Parks in 1963 meet I.U.C.N. required management conditions for I.U.C.N. designation.

C. F. H. Jenkins, *The National Parks of Western Australia* (Crawley, WA: National Parks Authority of Western Australia, 1980), p. 1.

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powers to implement environmental initiatives of national and international importance.

Among these powers include the following.

- (1) *Trade and Commerce Power* (Section 51(I)).<sup>v</sup>
- (2) *External Affairs Power* (Section 51(xxix)).<sup>w</sup>
- (3) *Corporations Power* (Section 51(xx)).<sup>x</sup>
- (4) *Race Power* (Section 51(xxvi)).<sup>y</sup>
- (5) *Grants Power* (Section 96).<sup>z</sup>
- (6) *Territories Power* (Section 122).<sup>aa</sup>
- (7) *Defense Power* (Section 51(iv)).<sup>bb</sup>
- (8) *Fisheries power* (Section 51(x)).<sup>cc</sup>

Australia's federal government has attempted to compensate for its lack of common law jurisdiction in matters concerning the environment by often relying upon these unrelated powers to indirectly enact national and international land directives. These attempts have often been challenged by the states as an infringement of traditional states'

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<sup>v</sup> The Trade and Commerce Power was used to ban the export of minerals from Fraser Island off the coast of Queensland in 1976. See: *Murphyores v. The Commonwealth* (1976) 136 CLR 1.

<sup>w</sup> The External Affairs Power was used as a primary legal defense in the Tasmanian Dam case to halt construction of a hydro-electric scheme upon Tasmania's Gordon River in 1983. See: *Commonwealth v. Tasmania* (1983) 46 A.L.R. 625.

<sup>x</sup> The Corporations Power was used as a secondary legal defense by the Federal Government in the 1983 Tasmanian Dam case. See: D. E. Fisher, *National Resources Law in Australia* (Sefton, N.S.W.: The Law Book Company, 1987), p. 230.

<sup>y</sup> The Race Power was used as a tertiary legal defense by the Federal Government in the 1983 Tasmanian Dam case. See: Fisher, p. 230.

<sup>z</sup> The Grants Power has been used to encourage states to adopt environmental practices consistent with Commonwealth goals, such as soil conservation. See: David Solomon, "The Environment and...The Powers Game," *The Weekend Australian*, 20-21 May, 1989, p. 25.

<sup>aa</sup> The Territories Power has been used to encourage the Australian Capital Territory and the Northern Territory to follow environmental practices consistent with Commonwealth goals. See: Solomon, p. 25.

<sup>bb</sup> The Defense Power has been used in support of federal initiatives supporting uranium production. See: Solomon, p. 25.

<sup>cc</sup> The Fisheries power has been used in support of national conservation efforts to preserve coastal marine environments, including the Great Barrier Reef. See: Solomon, p. 25.

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powers, and increasingly rely upon the courts to rule upon what traditionally should be a legislative function.

As a consequence, many of Australia's most successful attempts to preserve its government lands have become a product of international agreements and court rulings. Among these legal conventions include the often overlapping international designations as either *World Heritage Areas*, *International Biosphere Reserves* or as *International Wetlands*.<sup>dd</sup> As the 1983 Tasmanian Dam case court ruling illustrates (refer to Editorial Preface), international agreements between Australia's state and federal governments and the international community has become a seemingly necessary means to enact a pseudo-national lands protection agenda within Australia.

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<sup>dd</sup> The World Heritage Convention was adopted by the General Assembly of the United Nations Educational, Scientific and Cultural Organization (U.N.E.S.C.O.) in 1972 and was in force by 1975. Australia became a signatory of the World Heritage Convention in 1974 and as of 1988 had seven properties in Australia included in the convention totaling 2,894,551 hectares (7.15 million acres) terrestrial, and 34,500,000 hectares (85.25 million) marine reserve. Included in this amount is 251,578 hectares (621,649 acres) in New South Wales; 1,887,738 hectares (4.66 million acres) in the Northern Territory; 755,235 hectares (1.86 million acres) in Tasmania and 34,500,000 hectares included within Queensland's Great Barrier Reef marine reserve.

Biosphere reserves are likewise reserved through international treaty of the U.N.E.S.C.O., Man and the Biosphere Program (M.A.B.). As of 31 December 1988, there were twelve Australian areas nominated as biosphere reserves, in all totaling 4,536,571 hectares (11.21 million acres). Included in this amount is 754,152 hectares (1.86 million acres) in New South Wales; 132,538 hectares (327,501 acres) in the Northern Territory; 2,132,600 hectares (5.27 million acres) in South Australia; 455,025 hectares (1.12 million acres) in Tasmania; 184,500 hectares (455,900 acres) in Victoria; and 877,756 hectares (2.17 million acres) in Western Australia.

The Convention on Wetlands of International Importance was established in 1971 to encourage international cooperation for the conservation of wetland habitat. As of 31 December 1988, there were twenty-nine Australian wetlands included on this list, totaling 1,904,455 hectares (4.6 million acres).

C.J. Mobbs, ed., *Nature Conservation Reserves in Australia (1988)*; *Occasional Paper No. 19* (Canberra: Australian National Parks and Wildlife Service, 1989), pp. 3-68.

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Similar questions have been raised concerning whether Australia's Federal Government has the constitutional authority to influence only the most popular and politically controversial environmental reform measures.<sup>ee</sup> These views have been similarly expressed by the *Australian Department of Arts, Sport, the Environment, Tourism and the Territories*.

The creation of Australian National Park Service was in fact to establish a body which could promote a "national" system of national parks, but the experience in the Australian federal system since then had revealed the difficulties in establishing such an arrangement, however desirable it may be. With the establishment of World Heritage areas and parks in the Territories a "pseudo" national system could be said to exist. However, it was also argued that the World Heritage Listing process has created, in effect, a national park system without any but the most ad hoc conservation and management provisions.<sup>21</sup>

Although Australia has attempted, in part, to nationalize its government land policies by creating the *Australian National Parks and Wildlife Service*, and through greater use of federal international treaties (ie. World Heritage Treaty), lack of a specific federal constitutional power providing the Federal Government with jurisdiction over government lands has legally hampered Australia's Federal Government from enacting broad and consistent land conservation legislation throughout Australia.

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<sup>ee</sup> According to Brugger and Jaensch, "the fact that the [Australian] Commonwealth Government has had to use the 'external affairs' power to stop the Tasmanian dams and the 'trade and commerce power' to stop sand mining on Fraser Island is ludicrous. In this day and age, when the world environment is so dangerously threatened, it is archaic for a modern state not to have an 'environmental and conservation power' built into its constitution. The issue here is not merely national heritage but world heritage. It probably is the case that the Dams decision implies that serious cases of the environment damage might be countered by Commonwealth action, but it is unlikely that the 'external affairs' power could be used for less serious cases of environmental damage.

Bill Brugger and D. Jaensch, *Australian Politics, Theory and Practice* (Sydney: George Allen and Unwin, 1985), p. 188.

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These difficulties remain disappointing and frustrating to many within Australia, including as expressed by legal affairs columnist David Solomon of *The Weekend Australian* (see footnote below).<sup>ff</sup>

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<sup>ff</sup> "The only question is whether the Federal Government is serious enough about conservation and the environment to suggest that it should be given adequate constitutional powers to make laws for the protection of the environment. Its present powers are a mish-mash and provide nowhere near the constitutional backing needed for implementing the world's most comprehensive statement on the environment..."

Expediency has been the hallmark of national environment policy and legislation. To date it has survived constitutional challenge, though in the epochal Tasmanian Dams case it was by the barest possible margin. But a rational, national, environment policy relying on a grab-bag of a dozen or so unrelated (and seemingly irrelevant) constitutional powers would inevitably fail in some respects.

Legislation over the past 15 years has, however, been spasmodic and directed towards specific targets. The absence of a general environmental power has inhibited the development of any national planning for the protection of the environment. Conflict between the Commonwealth and the States has prevented any co-operative planning. If plans... envisage concerted Commonwealth action, it would be better if that action were authorized under a specific head of constitutional power. It is messy to have to resort to constitutional subterfuges. It always leaves the final decision on the validity of Commonwealth action *in the hands of the courts*, [italics added] rather than the electorate.

But there are also many environmental issues that have national effects or implications, and where Commonwealth actions may be needed in the face of State or local inactivity or inability. The Constitutional Commission was not terribly impressed by the need for a change to the Constitution to give the Commonwealth concurrent power with the States over environmental matters. It, and two of its advisory committees, thought on balance that an additional power was not warranted. It recited all of the powers that did exist and was doubtful about the way in which a general power might be confined to Commonwealth actions to truly national issues.

If the Commonwealth is serious about its intentions in the area of conservation, it must confront the problem that its constitutional powers are not fully adequate. If it does not act to have those powers increased, it will have to rely on muddling through. If it is true that 87 per cent of people [in Australia] (90 per cent of women) think the threat to the environment must be treated seriously, it seems difficult to see why a government that wants the electorate to think it treats the environment seriously should hesitate to ask for the powers that most other world governments already have."

David Solomon, "The Environment and... The Powers Game," *The Weekend Australian*, 20-21 May, 1989, p. 25.

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### *United States Land Conservation Efforts*

According to David Getches, "modern [American] policy, expressed in a host of federal laws, favors protection and preservation of publicly owned natural resources," and that "policies promoting transfers of public lands are subordinated to overriding policies of conservation and intensive management."<sup>22</sup>

For example during recent decades, Congress has provided federal land management agencies with legal directives in requiring that these agencies solicit state and public participation in recommending how federal lands should be managed in the United States. Among the most notable of these Congressional attempts include the *Federal Land Protection Management Act* of 1976 (F.L.P.M.A.) and the *National Forest Management Act* (N.F.M.A.) of 1976.<sup>99</sup> With these congressional enactments, according to William Lyons, "the tide of federal domination [had] ebbed and the states have a new opportunity to increase their control over resource and policy development provided they can meet the challenge."<sup>23</sup> These laws are monumental because they

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<sup>99</sup> The *Federal Land Policy and Management Act* of 1976 (43 U.S.C. 1701), also known as the *Organic Act of the Bureau of Land Management*, provided fundamental authority for the management of public lands by the Secretary of the Interior, prescribing detailed management direction in such areas as land use planning, land acquisition and disposal withdraws, range management, and right-of-ways. The *National Forest Management Act* of 1976 (16 U.S.C. 472, 476, 500, 513-521, 528, 576, 594, 1600-1614) amended the *Forest and Rangeland Renewable Resources Planning Act* of 1974 to provide for new timber management authorities and a coordinated land management planning process that requires full public participation in the development and revision of land management plans for the National Forest System.

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allow America's states a legitimate opportunity to participate with Congress and federal land agencies in *recommending* changes consistent with state interests.

Likewise, since the vast majority of public lands in the United States are the constitutional responsibility of the United States Congress and the Federal Government, and as United States' courts have consistently sustained the right of the federal government to wholly and solely manage federal properties under the provisions of the Constitution's *Federal Properties Clause* (art. 4, sect. 3, cl. 2), American States have increasing opportunities to enter into the dialogue in managing federal lands. As Lyons states, "the states... now have what may be a once-in-a-lifetime opportunity. Industry and states should work together and work hard to press this opportunity for all it is worth."<sup>24</sup>

These significant cooperative efforts have been obtained only following a long history of federal cooperation among the Federal Government and the states, and following a long history of land conservation efforts that began early in the United States' history and which were greatly promoted and advanced through America's extensive history of land distribution, destruction and ultimately conservation.



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### *A History of Land Distribution and Conservation*

During the first one hundred years of American history (1776-1876), the United States Congress spent more of its time and efforts dealing with public lands than any other single issue. It debated and passed dozens, then hundreds, and eventually thousands of public land laws with more complex details than any other policy issue. Most of these early land laws dealt with how to best *dispose* of western lands through sale or grants and promote economic development and trade, while strengthening the national economy. The most significant and well-known of these many public land laws include

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the *Land Ordinance of 1785*<sup>hh</sup>, the *Preemption Laws* and the *Distribution Act of 1841*<sup>ii</sup>, the *Homestead Act of 1862*<sup>jj</sup>, and the *Morrill Act of 1862*<sup>kk</sup>.

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<sup>hh</sup> The *Land Ordinance of 1785* laid the foundation for the management and distribution of public lands in the United States, as well as established democratic policies for the newly established Northwest Territories. The ordinance authorized the sale of public lands at a minimum price of one dollar per acre to pay off the national debt, initiated the surveying of public lands, authorized the reservation of lands for public schools, initiated a reservation system for American Indians, and compensated selected Revolutionary War veterans with free lands.

"Ordinance of 1784, 1785, and 1787," *The Encyclopedia Americana, International ed.*, 1986, Grolier.

<sup>ii</sup> The Pre-emption land laws were a series of laws began in 1830 and continuing until 1841, when these laws were slightly modified by the enactment of the *Distribution Act of 1841*. The pre-emption laws attempted to make the sale of lands widely available at low cost to settlers moving West, while pardoning squatters for illegal settlement. These laws also attempted to provide settlers with the right of settling upon and *improving* lands for a time, before buying it, while limiting the quantity of lands individuals might purchase. With the "pre-emption clause" added to the *Distribution Act* (Act of Sept. 4, 1841), settlers could now move to and purchase 160 acres at a minimum price of \$1.25 per acre, without competition from competitive auctions and powerful land speculators. The act also provided Western States (who had not already received federal land grants) with 500,000 acres. Finally all states would receive 10 percent of the net proceeds from sales within its borders, together with 5 percent already allocated for internal improvements. The remaining 85 percent of the proceeds would be distributed to all the states, based upon their State's representation in Congress.

Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), pp. 15-18.

<sup>jj</sup> The *Homestead Act of 1862* (Act of May 20, 1862) provided any citizen older than 21 with 160 acres (65 hectares) of free land beginning January 1, 1863, provided they reside on the land for five years. The act also enabled settlers to purchase unlimited lands at \$1.25 per acre, and obtain a mortgageable title after six months residence, provided their mortgaged lands were already purchased.

*The Statutes at Large, Treaties and Proclamations of the U.S.A. from Dec. 5, 1859 to March 3, 1863* (Boston: Little, Brown & Company, 1965), pp. 392-394.

<sup>kk</sup> The *Morrill Act of 1862* provided land grants to states, to establish agricultural and mechanic arts (A&M) colleges and universities. Under the act, 30,000 acres was provided to each of the public land states for each Senator and Representative they had in Congress, while giving *scrip* instead of land to the older states on the same formula. The proceeds to these land sales (federally allocated 7,830,000 acres) would be used to finance eventually hundreds of *land grant universities*. The act was later expanded with the *Morrill Act of 1890*.

John R. Fernstrom, "Evolution of Federal Policies for U.S. Sparelands, and Problems of Program Implementation," in *Settlement Systems in Sparely Populated Regions, The United States and Australia*, eds. R. E. Lonsdale and J. H. Holmes (Pergamon, 1981), pp. 350-351.

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*Table 6:*

<i>Disposition of United States Public Lands, 1781 to 1990</i>	
<i>Type of Disposition</i>	<i>Acres/Hectares</i>
Disposition by methods not elsewhere classified <sup>a</sup>	303,500,000/122.8 M
Granted or sold to homesteaders <sup>b</sup>	287,500,000/116.4 M
<i>Total Unclassified and Homestead Dispositions</i>	591,000,000/239.2 M
Granted to States for:	
Support of common schools	77,630,000/31.4 M
Reclamation of Swampland	64,920,000/26.3 M
Construction of Railroads	37,130,000/15.0 M
Support of miscellaneous institutions <sup>c</sup>	21,700,000/8.8 M
Purposes not elsewhere classified <sup>d</sup>	117,600,000/47.6 M
Canals and rivers	6,100,000/2.7 M
Construction of wagon roads	3,400,000/1.4 M
<i>Total Granted to States</i>	328,480,000/132.9 M
Granted to railroad corporations	94,400,000/38.2 M
Granted to veterans as military bounties	61,000,000/24.7 M
Confirmed as private land claims <sup>e</sup>	34,000,000/13.8 M
Sold under timber and stone law <sup>f</sup>	13,900,000/5.6 M
Granted or sold under timber culture law <sup>g</sup>	10,900,000/4.3 M
Sold under desert land law <sup>h</sup>	10,700,000/4.3 M
<i>Total Miscellaneous Dispositions</i>	224,900,000/91.0 M
<i>Grant Total</i>	1,144,380,000/463 M

<sup>a</sup> Chiefly public, private, and preemption sales, but includes mineral, scrip locations, and sales of townsites and townlots.

<sup>b</sup> The homestead laws generally provide for the granting of lands to homesteaders who settle upon and improve vacant agricultural public lands. Payment for the land is sometimes permitted, or required,

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under certain conditions.

<sup>c</sup> Universities, hospitals, asylums, etc.

<sup>d</sup> For construction of various public improvements (individual items not specified in the granting acts), reclamation of desert lands, construction of water reservoirs, etc.

<sup>e</sup> The Government has confirmed title to lands claimed under valid grants made by foreign governments prior to the acquisition of the public domain by the United States.

<sup>f</sup> The timber and stone laws provided for the sale of lands valuable for timber or stone and unfit for cultivation.

<sup>g</sup> The timber culture laws provided for the granting of public lands to settlers on condition that they plant and cultivate trees on the lands granted. Payment for the lands were permitted under certain conditions.

<sup>h</sup> The desert land laws provide for sale of arid agricultural public lands to settlers who irrigate them and bring them under cultivation.

**\*\*Note--** Data are estimates from available records.

**Source:** Table obtained from *Public Lands Statistics (1990)* (Washington D.C.: Bureau of Land Management, 1990), p. 4.

As Table 6 illustrates, and as notably different from Australia, approximately 1.15 billion acres (465 million hectares) or one-half of the United States' nearly 2.3 billion acres (931 million hectares) have been transferred to individual citizens, states, businesses, and non-governmental organizations through *federal land laws* during the past two hundred years. Most of these land transfers were intended to directly benefit the public, by supporting public works programs, economic development, and education in the form of *agricultural and mechanical (A&M)* schools and universities throughout the nation. Free enterprise and rugged individualism typified this period of manifest destiny, and any government interference was seen as an infringement upon Americans' right to freely exploit any natural wonders that otherwise could be acquired and utilized.

### *The American Conservation Movement*

To combat the effects of land degradation caused by these early, massive government land transfers, *conservation* developed as public policy, to reform and temper the

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widespread distribution and destruction of America's public lands. Specifically, reforms occurred in response to the malicious destruction of America's forest lands, soils and wildlife. Vast areas of Eastern and Midwestern hardwood forests had been devastated, while an estimated seventy-five million American bison were recklessly slaughtered and neared extinction. Also during this period of rapid distribution of public lands came numerous, and equally unenviable attempts to defraud and manipulate the intent of Congress in distributing and administering the nation's public domain."

Unlike within Australia, where land conservation is primarily a recent event, public land conservation in the United States developed as a major social reform during the latter nineteenth century, spurred by the wanton abuses of America's early land settlement laws, by unscrupulous acts of land traders; railroad, mineral, and timber companies; ranchers; and by dishonest settlers.

Considering that the United States Government's early objections were to distribute public lands often as quickly as possible, it is somewhat surprising that the American

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" Numerous cases of fraud include scandalous and often illegal transfers of public lands to private corporations. Railroad companies received 94.4 million acres (larger than the State of Montana) to construct railroads; millions of acres were given to unscrupulous land traders and unregulated homesteaders; and millions of acres of land was publicly subsidized and given to the *Bureau of Reclamation* for the construction of hundreds of dams for use in irrigation and power generation, which benefitted few, but wealthy corporate farmers and monopolistic energy corporations. Other examples include overgrazing of domestic cattle, unsustainable timber harvesting of the national forests, and fraudulent mineral exploration, characterized by the Teapot Dome oil scandal in Wyoming of 1920.

*Public Land Statistics*, 1990 ed. (Washington, D.C.: Bureau of Land Management, 1990), p. 4; and Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 12-13, and 73-87.

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public and government through extraordinary to miraculous legislative means began preserving millions of acres of public lands often well before these areas were noticeably disturbed. Ultimately it appears that America's conservation of lands were founded upon inherent values of nationalism, transcendental romanticism of the environment, and to prevent destruction of specific natural land formations (ie. volcanic springs in Yellowstone National Park), or threatened flora and fauna (ie. giant Sequoia trees in Sequoia National Park and American bison in Yellowstone National Park).

A ground-swell of nationalism demanded a change in government policy from America's early land laws, which had encouraged the nation's phenomenal land rush. The exact catalyst which triggered this change in societal priorities is difficult to determine, however Everhart is likely correct when he argues that "a handful of idealists" made up of early conservationists and media publicists, redirected the public and the government in conserving many of the nation's remaining natural wonders.<sup>mm</sup>

Popularized by the writings of early explorers to Wyoming's Yellowstone Valley, including Ferdinand Hayden, General Washburn, Nathaniel Langford, David Folsom,

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<sup>mm</sup> According to Everhart, "the whole idea of setting aside Yellowstone as the world's first national park seems today almost to smack of the miraculous. It was primarily the work of a handful of idealists--members of the several Yellowstone explorations who believed the scenic wonders should be shared by all and a few men of vision in Congress, including the senator who predicted that if government were not forthcoming some worthy member of the land-grabbing fraternity would 'plant himself right across the only path that leads to these wonders, and charge every man that passes along between the gorges of these mountains a fee of a dollar or five dollars.' These men were supported and given public attention by crusading publishers and conservationists. The pattern has really not changed much since 1872."

William C. Everhart, *The National Park Service* (New York: Praeger, 1972), pp. 8-9.

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and Truman Everts; the impassioned speeches to Congress by Gustavus Doane and John Muir; the artistry of Thomas Moran; and the photography of William Jackson; 2.2 million acre (890,000 hectare) Yellowstone National Park received Congressional approval as the nation's first national park following minimal debate.<sup>25</sup> On March 1, 1872, President Ulysses S. Grant signed and approved the *Yellowstone National Park* bill, which would preserve for perpetuity, Yellowstone National Park "as a public park or pleasuring ground for the benefit and enjoyment of the people."<sup>25</sup> According to William Everhart, "the act not only barred forever for commercial use the riches of timber, grass, water power, and minerals, it also established for the first time the policy of national ownership of superlative resources for the common good."<sup>26</sup> Clearly, as repeated by Freeman Tilden, "it is not likely that [neither the early promoters of Yellowstone, nor Congress] had in mind a 'recreational park'."<sup>27</sup>

Through this act of Congress, American transcendentalism, with its reverence and intuitiveness toward nature and its convictions expressed through the writings of Ralph Waldo Emerson, David Henry Thoreau, William Cullant Bryant, James Kirk Paulding and Washington Irving, became an increasingly intrinsic part of America's burgeoning cultural ethic and desire to showcase its unique and spectacular natural heritage.

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<sup>25</sup> Yellowstone Park although often celebrated as the world's first national park, could likewise be referred to as the world's first *nation's park*. Following the legislative designation of Yellowstone National Park, other national parks were subsequently set-aside as national domain, owned by the American people and preserved for perpetuity.

William C. Everhart, *The National Park Service* (New York: Praeger, 1972), p. 8.

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Conservation of lands and natural resources in the United States, in fact however, originated much earlier than the creation of Yellowstone National Park in 1872. One of the nation's first land conservation attempts occurred in 1799, when Congress, following the *Revolutionary War*, authorized a sparse \$200,000 to purchase timber reserves from private lands, to guarantee the unique types of wood necessary in building naval vessels.<sup>28</sup> Through this endeavor Congress recognized a still widely acknowledged association between the *conservation of natural resources and the national security of the United States*. Other notable Congressional conservation efforts that soon followed included the preservation of *Arkansas Hot Springs Reservation* in 1832<sup>oo</sup> and California's *Yosemite Reserve* in 1864.<sup>pp</sup>

The United States can trace its government and organizational management of public

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<sup>oo</sup> *Arkansas Hot Springs* is the oldest land reservation set-aside by act of Congress for the perpetual use and enjoyment of the people, and with freedom from exploitation. As such, the reserve may be considered *the United States' first national park*. The reserve through the years has been expanded to more than 5,800 acres; and on March 4, 1921, was formally designated a national park by Congress.

Freeman Tilden, *The National Parks*, 4th ed. (New York: Alfred A. Knopf, 1978), pp. 122-124.

<sup>pp</sup> Yosemite Reserve may also be noted as arguably the nation's first *national park*. During the midst of the American Civil War in 1864, through joint agreement between the State of California and the United States Government, Congress set aside Yosemite with the understanding that California would defend the interests of the reserve and that the reserve would be maintained as a park "for public use, resort, and recreation, and shall be held inalienable for all times." According to Tilden, prior to the designation of Yosemite "the concept of setting aside such places of natural beauty and geological significance had never before been carried out in any young country in recorded history. It was the Magna Charta of national cultural behavior. The few instances of zealous preservation in ancient times had only a religious background." On October 1, 1890, Yosemite was designated by Congress as a national park and was thereafter administered by the Federal Government.

Freeman Tilden, *The National Parks*, 4th ed. (New York: Alfred A. Knopf, 1978), p. 99; Jean-Paul Harroy et al., *The World of Nature, National Parks of the World* (London: Orbis, n.d.), p. 6; and *U.S., Statutes at Large*, 15, p. 325 in Roderick Nash, *Wilderness and the American Mind*, 3rd ed. (New Haven, CT: Yale University, 1982), p. 106.



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land resources to the *Cadastral Survey* in 1785<sup>99</sup>, and to the founding of the *General Land Office* (G.L.O.) in 1812<sup>100</sup>. Throughout the middle nineteenth century, the Federal Government encouraged numerous professional approaches in managing national public lands.<sup>101</sup> In 1891, Congress adopted the *General Revision Act* (also known as the *Creative Act of March 3*)<sup>102</sup>, which revised many of the earlier *public lands laws* under the

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<sup>99</sup> The *Cadastral Survey of 1785* was among the nation's first attempt to physically survey the nation's public lands, in order that the value, size, and ownership of land could be determined as a basis for collecting property taxes.

<sup>100</sup> The General Land Office was founded in 1812 and operated under the Department of Treasury. The G.L.O.'s principal functions during those days was not management of lands, but rather the *disposal* and *sale* of lands. The G.L.O. attempted to "dispose of as much land as possible, as fast as possible." In 1934, Congress approved the Taylor Grazing Act. Under this act, the federal 'Grazing Service' established a leasing system for more than 150 million acres (60.7 million hectares) of public lands, in an attempt to prevent overgrazing and damage to land caused by domestic livestock. The Taylor Grazing Act *officially closed* public lands throughout the country from further distribution to private interests. In 1946, President Harry Truman merged the General Land Office with the equally antiquated federal *Grazing Service*, and created the new *Bureau of Land Management* under the Department of the Interior.

David C. Williams, *Integrating Environmental Assessment into Resource Management Planning: The Bureau of Land Management* (Washington, D.C.: Bureau of Land Management, June 1989), p. 3. (Presented at the International Association of Impact Assessment (I.A.I.A.) at the Griffith University, School of Australian Environmental Studies, Brisbane, Queensland, July 5-9, 1988); and Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), p. 81.

<sup>101</sup> According to Richard Manning, "out of Washington and its centralizing set of mind, as much as out of the West and the Western temper, came institutions that have shaped the West and to a lesser degree the whole country: Geological Survey, National Park Service, Forest Service, Coast and Geodetic Survey, Weather Bureau, Bureau of Standards, Bureau of Mines, Reclamation Service, many of them proliferating out of the mitotic cell of the Smithsonian [Institution]. Geology was a states' rights matter, topography and mapping were divisions to occupy the peacetime Army, time and weather were for the Navy to play with, and too much of the private science was the occupation of amateurs... Postwar Washington permitted and encouraged the development of professionals and put them into charge of operations of incalculable potential. Less than twenty years after the [American Civil] war, Washington was one of the great scientific centers of the world. It was so for a multitude of causes, but partly [as Manning concludes] because America had the virgin West for science to open, and Washington forged the keys to open it with."

Richard Manning, *Grassland: The History, Biology, Politics, and Promise of the American Prairie* (New York, Penguin, 1995), p. 104-105.

<sup>102</sup> Ch. 561, 26 Stat. 1095 (1891). Repealed by provisions of the *Federal Land Policy and Management Act* of 1976.

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General Land Office. Perhaps most significant, however, was that the act established a professional approach in forest management, while section 24 of the act authorized the President to establish forest reserves and range lands in the public domain through presidential proclamation.

Consequently, America's forests were among the first land resource to meaningfully benefit from legislative conservation of public lands in the United States. Beginning in 1891 and during less than three years of President Benjamin Harrison's administration (1891-1893), Harrison legally reserved *through conservation* more than 13 million acres (5.26 million hectares) of forests as *forest reserves*. The following President, Grover Cleveland, reserved an additional 21 million acres (8.5 million hectares) of forest land.<sup>29</sup> The *Yellowstone Timberland Reserve* in Wyoming (now the Shoshone and Teton National Forests) was the first forest reserve, followed shortly thereafter by *Pike Reserve* in Colorado, and the *San Bernardino* and *Sierra Forest Reserves* in California.<sup>uu</sup>

President Theodore Roosevelt however, was undoubtedly the most influential and foresighted of America's Presidents, strongly favoring and promoting conservation of lands. During the last six years of Roosevelt's two administrations (1904-1909),

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<sup>uu</sup> President Benjamin Harrison preserved 1.24 million acre (502,000 hectare) *Yellowstone Timberland Reserve* on March 30, 1891, to become the first *forest reserve* in the United States authorized by Congress.

Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, CA: Doubleday, 1962), p. 48.

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Roosevelt created more than 132 million acres (53.4 million hectares) of forest reserves through Presidential proclamation, as well as creating numerous additions to the National Park and National Monument systems provided through the *Lacey Act of 1906*.<sup>vv</sup>

On June 4, 1897, Congress formally enacted the *Forest Service Organic Administration Act*<sup>www</sup>, establishing the *National Forest Service*<sup>xx</sup>, under the auspices of the Department of the Interior. The Forest Service today continues to function in protecting and

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<sup>vv</sup> Roosevelt's contributions to the American conservation movement were colossal and nationally inspiring. According to Frome, Roosevelt and his bureau chiefs "charted a new government course in dealing with public domain. Besides laying the basis for protecting one-tenth of the land area of the land area [of the United States] as National Forests, he was responsible for creating five new National Parks, four great game refuges, fifty-one bird refuges, and of preserving the nearly extinct [American] buffalo. They brought forward the National Monuments Act [Lacey Act of 1906], which provided setting aside other than National Parks, and the Inland Waterways Commission, to save the waterways and their power for public use. [Furthermore], Roosevelt established a conservation conference of governors to awaken the states, a National Conservation Commission and a North American Conservation Conference."

Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, NY: Doubleday, 1962), p. 44.

<sup>www</sup> 30 Stat. 34 of June 4, 1891 (codified as amended at 16 U.S.C. §§ 473-81 (1976)).

<sup>xx</sup> The Forest Service administers 191 million acres (77.3 million hectares) of public lands, including National Forests (186.3 million acres) and National Grasslands (3.8 million acres) under the United States Department of Agriculture. The N.F.S. also cooperates with federal and state officials in the enforcement of game laws on the National Forests and in the development and maintenance of wildlife resources; cooperates with the state and private owners in the application of sound forest management practices; in protection of forest lands against fire, insects, diseases; and in the distribution of tree planting stock. Furthermore, the N.F.S. conducts forest research and wildlife management. Of the 191 million acres which the Forest manages, 86.5 million acres (35 million hectares) are classified commercial forests. Forty-one percent of the nation's standing softwood timber and 20 percent of the nation's harvested saw timber originate from national forests (1986). 161.9 million tree seedlings were produced in N.F.S. nurseries in 1985. The N.F.S. in 1986 had a staff of 29,211 permanent employees, and in fiscal year 1985 raised more than 1.13 billion dollars in timber and mineral sales, of which 235.6 million dollars were returned to states.

*What the Forest Service Does* brochure (Washington D.C.: United States Department of Agriculture, Forest Service, Oct. 1986), pp. 2, 10 and 34; and *National Wildlife Federation, Conservation Directory 1992* (Washington D.C.: National Wildlife Federation, 1992), p. 11.

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managing these lands as *forest reserves*. In 1905, Congress, through the *Transfer Act of 1905*<sup>y</sup>, transferred the management of the nation's forests from the Department of the Interior to the Department of Agriculture. Later in 1946, the General Land Office was replaced by the *Bureau of Land Management (B.L.M.)*, and was thereafter directed by the Department of the Interior.<sup>zz</sup>

In 1906, Congress enacted the *Antiquities Act*, also known as the *Lacey Act*. This act authorized the president, according to "his discretion, to declare by public proclamation historic landmarks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned or controlled by the Government of the United States to be *national monuments* [*italics added*]."<sup>aaa</sup>

Soon after, Congress moved one step further from the legal *conservation* to the legal and permanent *preservation* of America's most spectacular public lands. Through the *National Park Service Organic Act* of 1916, Congress created the *National Park Service*. The service was established to "promote and regulate the use of the...

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<sup>y</sup> Act of February 1, 1905 (16 U.S.C. 472, 524, 554).

<sup>zz</sup> The Bureau of Land Management administers 272 million acres (110.1 million hectares) of public lands, located primarily in the western public land states, and include approximately 48 percent of all federally owned lands. These lands and resources are managed under multiple-use principles, including outdoor recreation, fish and wildlife production, livestock grazing, timber, industrial development, watershed protection, and onshore mineral production.

*Public Land Statistics*, 1990 ed. (Washington D.C.: Bureau of Land Management, 1990), p. 1; and *National Wildlife Federation, Conservation Directory 1992* (Washington D.C.: National Wildlife Federation, 1992), p. 27.

<sup>aaa</sup> June 8, 1906, ch. 3060, § 2, 34 Stat. 225.

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national parks...[whose]purpose is to conserve the scenery and the natural and historic objects and the wildlife therein and to provide for the enjoyment of the same in such a manner and by such means as will leave them unimpaired for the enjoyment of future generations."<sup>bbb</sup> All lands within the National Park System, with the exception of *National Reserves*<sup>ccc</sup>, prohibit harvesting of timber, hunting of wild animals, mining of minerals, and grazing of domestic animals. Furthermore, there are no *shows* or *amusements* allowed on national park service lands, with the intent to make profits.<sup>ddd</sup> America's earliest federal parks and reserves were usually chosen by the United States Congress for their lands' unique *national character*, as well as for unique and threatened ecosystems, and geological, historical, and scenic features.

Effective July 1, 1974, Congress established the *United States Fish and Wildlife Service*, under the direction of the Department of the Interior to function in conserving the nation's migratory birds, endangered species, certain mammals, and sport fishes.

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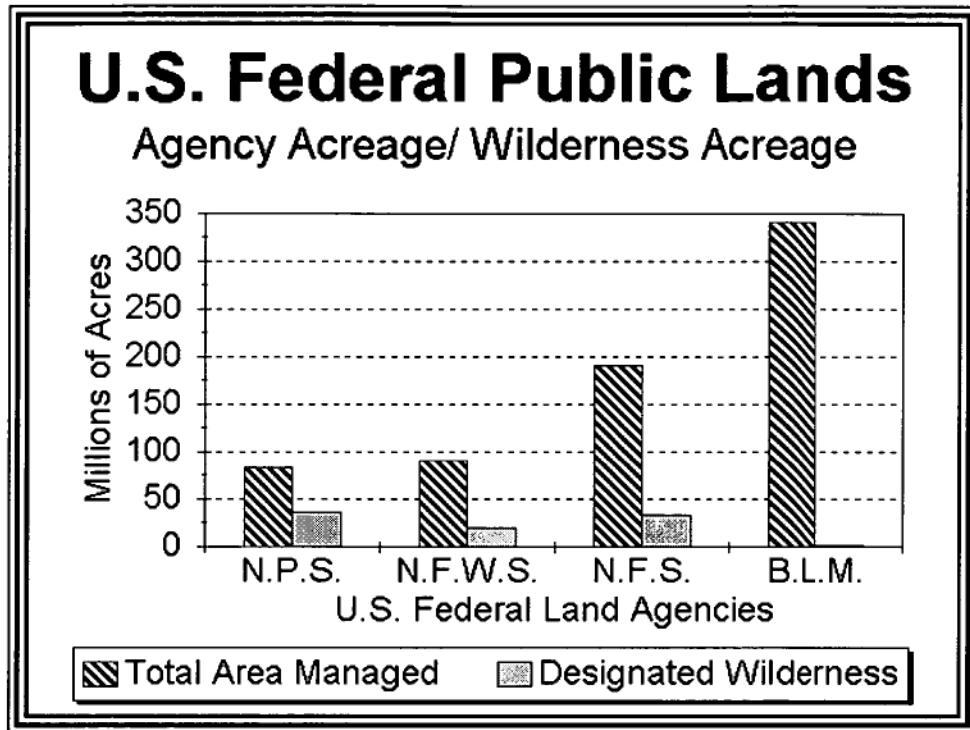
<sup>bbb</sup> *National Park Service Organic Act of 1916* (16 U.S.C. 1).

<sup>ccc</sup> *National Preserves* are established to protect certain resources, although hunting, fishing and the extraction of minerals or fuels may be permitted under strict permit.

*The National Park Service* booklet (San Francisco: Sierra Club, Nov. 1988), p. 1.

<sup>ddd</sup> National Parks are funded and financially operate through appropriations from Congress. Cash receipts from visitors to the parks are returned to the Department of the Treasury, in order that America's National Parks do not become a profit seeking business.

Freeman Tilden, *The National Parks*, 4th ed. (New York: Alfred A. Knopf, 1978), p. 18.



**Figure 7: U.S. Federal Public Lands  
Agency Acreage/Wilderness Acreage**

**KEY:** N.P.S.= U.S. National Park Service.  
 N.F.W.S.= U.S. National Fish and Wildlife Service.  
 N.F.S.= U.S. National Forest Service.  
 B.L.M.= U.S. Bureau of Land Management.  
 One Acre= 2.471 Hectares.

**SOURCE:** Sierra Club Public Land Booklets, (San Francisco, CA: Sierra Club Press, 1990).

As Figure 7 illustrates, public land conservation and federal management in the United States is today extensive. At an expense of billions of dollars annually, the professional

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management of tens of thousands,<sup>eee</sup> and thousands more of public volunteers, safeguarding America's public lands have become a time-honored part of America's cultural tradition. Today the majority of federal lands (approximately 96% of federal lands) are managed under the executive branch of the Federal Government, by either the U.S. Department of the Interior's *Bureau of Land Management*, *National Park Service* and *United States National Fish and Wildlife Service*, or by the U.S. Department of Agriculture's *National Forest Service*.<sup>fff</sup> The remaining roughly four percent of federal lands are administered by primarily either the U.S. Department of Defense or the U.S. Department of Energy. The Department of the Interior also oversees trust responsibilities of the United States Government to Native Americans through the Bureau of Indian Affairs.<sup>ggg</sup>

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<sup>eee</sup> In 1986, the National Forest Service had 29,211 permanent full-time employees, while in 1991 the National Park Service had an estimated 12,000 full-time employees. Staffing figures from the Bureau of Land Management and the U.S. Fish and Wildlife Service were not readily available.

What the Forest Service Does (Washington D.C.: United States Department of Agriculture, Oct. 1986), p. 2; and Paul C. Pritchard, "The National Park Service 75th Anniversary," *National Geographic*, Aug. 1991, p. 36.

<sup>fff</sup> The federal land agencies include the *Bureau of Land Management*, who administers 272 million acres (110.1 million hectares or 41.1% of the nation's federal lands); the *National Forest Service*, who administers 191 million acres (77.3 million hectares or 28.8% of the nation's lands); the *National Fish and Wildlife Service*, who administers 91.1 million acres (36.9 million hectares or 13.8% of the nation's lands); and the *National Park Service*, who administers 82.5 million acres (33.4 million hectares or 12.5% of the nation's public lands).

*Public Land Statistics*, 1990 ed. (Washington D.C.: U.S. Bureau of Land Management, 1990), pp. 1-8.

<sup>ggg</sup> The Bureau of Indian Affairs is charged with carrying out the portion of the trust responsibilities of the United States to Native American tribes. This trust includes the protection and enhancement of Native American lands and the conservation and development of natural resources, including forestry, fish and wildlife, outdoor recreation, water, range, and mineral resources. Created by the War Department in 1824, the Bureau of Indian Affairs was transferred to the Department of the Interior in 1949.

*Conservation Directory 1992* (Washington D.C.: National Wildlife Federation, 1992), p. 27.

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The *National Park Service*, responsible for the nation's nationally and internationally significant preserves,<sup>hhh</sup> manages National Parks, National Monuments and a host of other nationally significant sites<sup>iii</sup> under the nation's most rigorous preservation guidelines, while the three largest federal land managing bureaus, the *Bureau of Land Management*, the *National Forest Service*, and the *National Fish and Wildlife Service* administer federal lands under multiple-use conservation methods, and resource based criteria.

As Figure 7 further reveals, public lands within these federal land agencies have also been provided added legal protection through being designated *National Wilderness*. Through the *Wilderness Act of 1964*, designated areas receive additional protection from off-road vehicle use and from permanent developments such as roads, buildings and dams.<sup>30</sup> As of June 1990; 90.5 million acres (36.6 million hectares) had received additional protection as national wilderness in accordance with the *Wilderness Act* and

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<sup>hhh</sup> The National Park Service under the U.S. Department of the Interior administers 82.45 million acres (33.37 million hectares) of lands of national and international significance. The N.P.S. also furnishes interpretive and landmark programs for the nation's federal natural and historic sites, as well as coordinates the Wild and Scenic Rivers System and National Trail System. The N.P.S. is well-funded and well-staffed with more than 17,000 full and part-time employees, more than 45,000 annual volunteers, and in 1989 had an annual budget of approximately one billion dollars.

*The National Park Service* brochure (San Francisco: Sierra Club, Nov. 1988), pp. 1-3; *The National Park Service in Brief 1989* (Washington D.C.: National Park Service, 1989), p. 2; and *National Wildlife Federation, Conservation Directory 1992* (Washington D.C.: National Wildlife Federation, 1992), p. 29.

<sup>iii</sup> In addition to National Parks, the National Park Service also administers National Monuments, National Preserves, National Seashores, National Lakeshores, National Riverways, Wild and Scenic Riverways, National Historic Sites, National Military Parks, National Battlefield Parks, National Battlefield Sites, National Battlefields, National Historical Parks, National Memorials, National Recreational Areas and National Parkways.



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the National Wilderness Preservation System.<sup>iii</sup>

### *National Reserves versus State Reserves*

According to Freeman Tilden, one of America's leading park historians, there is a clear difference between the meaning of America's so-called *national parks* and *state parks*.

[Tilden writes] it is true that, just as the [America's] national parks are for the whole people of the nation, the state parks are for the people of the state, the county parks primarily for those of the county, and so on, down through the units of the government. [State parks, for instance,] may be areas of beauty and significance, though not in the highest degree, which also offer opportunities for physical recreation to the inhabitants of nearby centers of population.<sup>31</sup>

This view is repeated and further clarified by Harold Caparn when he states, "state parks should not necessarily be confined to the rare and most beautiful scenery. They might with great advantage also preserve examples of the average or characteristic scenery of each state."<sup>32</sup>

Freeman Tilden accurately sets apart America's national parks from state parks when he states in a later text.

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<sup>iii</sup> Wilderness preservation designation provides extra protection for federal lands administered by the U.S. Forest Service, the National Park Service, the Fish and Wildlife Service, and the Bureau of Land Management. According to this act, "a wilderness [is] an area where the earth and its community of life are untrammelled by man, where man himself is a visitor who does not remain." Within wilderness areas, logging, off-road vehicle use, and such permanent developments such as roads, buildings, and dams are prohibited. Each wilderness includes all the land and water within congressionally established boundaries, which may include state-owned, local government-owned, and privately owned holdings.

*National Wilderness Preservation System* (San Francisco: Sierra Club, June 1990), pp. 2 and 4.

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National parks are not merely places of physical recreation... and not merely places of spectacular scenic features and curiosities. They are national domain. Yellowstone and Yosemite belong as much to the citizens of Maine as to those of Wyoming and California; Isle Royale to the New Mexican as much as the people of Michigan. The national parks are really national museums.<sup>33</sup>

National parks, national monuments and other land reserves administered by the U.S. National Park Service are designated as *nationally significant*. These lands may be nationally significant for scenic, geologic, historic, cultural and/or to protect endangered animal or plant life. Congress votes a *national parks* into being, while Presidents establish *national monuments* through either presidential proclamation or executive order.

Similarly, a state legislature may decide that one of its scenic, historic, or scientific places must be preserved because it is an outstanding expression of the natural or human aspect of its particular heritage. While state reserves are often of lesser nationally significant and grandiose than are national lands administered by the National Park Service, there are notable exceptions, for example, New York's Niagara Falls, Adirondack, Catskill and Palisades State Land Reserves. Most state reserves, however, are of lesser calibre than are national reserves in part because America's

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state park movement had its organizational beginning in 1921<sup>kkk</sup>, and consequently, many of the state were transferred into state ownership as a result of private lands being donated or purchased by the states. Since 1921, enthusiasm for state reserves and for their primary recreational purposes has been vastly expanded.<sup>lll</sup>

### *Conservation During Crisis*

Perhaps the greatest indicator of the overall strength of the conservation movement in the United States, however, is its ability to withstand challenges during periods of national crisis. The United States has a surprising record in this regard.

As earlier cited, Yosemite Reserve was approved as the nation's first national reserve during the midst of the *American Civil War* in 1864. Equally surprising, during the

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<sup>kkk</sup> In January 1921, Iowa Governor W. L. Harding invited more than 200 conservationists, national park service representatives and media personalities to Des Moines, for the first ever state land conservation conference. In that year, only fifteen states had state-owned and administered reserves, and combined, these reserves totaled fewer than one hundred. Twenty-nine states did not have a single state land reserve. New York and Connecticut were the only states with more than seven reserves, while California had only one state-owned reserve.

Freeman Tilden, *The State Parks: Their Meaning in American Life* (New York, Alfred A. Knopf, 1962), p. 5.

<sup>lll</sup> As of April 1989, it has been calculated that the fifty United States administer 4,573 reserves totaling 10,820,183 acres with Alaska, California, Illinois and Florida have the largest number of state reserved acres. Total operating budget for state reserves in all states totaled \$US902.8 million with California, New York, Kentucky and Pennsylvania having the largest budgets. Annual visitors attendance totaled more than 710 million with California, Ohio, Washington State and New York leading.

*Annual Information Exchange April 1989*, a publication of the National Association of State Park Directors (Austin, TX: Texas Parks and Wildlife Department, 1989), pp. 1-34.

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1930's and the era of the Great Depression, Presidents Hoover and Roosevelt creatively used the popularity of America's national and state parks, monuments, and recreational lands as a means of rallying the nation and reducing national unemployment which plagued the nation at that time. Through the creation of the *Civilian Conservation Corps* (C.C.C.),<sup>mmm</sup> the *Public Works Administration* (P.W.A.),<sup>nnn</sup> the *Works Progress Administration* (W.P.A.),<sup>ooo</sup> and the *Civil Works Administration* (C.W.A.),<sup>ppp</sup> and cooperating closely with state authorities, the federal government employed millions of laborers in a wide variety of park-related development projects within national, state, county and municipal parks.

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<sup>mmm</sup> The *Civilian Conservation Corps* (C.C.C.) received top national priority during Roosevelt's presidential administration and was one of the public works programs to most benefit the development and expansion of state and federal lands in the United States. Like the other public works programs, the 'Corps' made use of the expertise of the National Park Service and the manpower which the federal government provided. 28 percent of C.C.C. work was completed on National Park service areas, while 72 percent was on other park and recreation areas. Typical C.C.C. work included building camp and picnic ground shelters, bridges, camp tables, park roads, water reservoirs, and fire towers.

Harlan D. Unrau and G. Frank Williss, *Administrative History: Expansion of the National Park Service in the 1930's* (Washington: National Park Service, Sept. 1983), pp. 76-93.

<sup>nnn</sup> The *Public Works Administration* (P.W.A.) was involved in "needed road and trail construction and the various types of other physical improvements which are required in the administration, protection, and maintenance of the national parks and national monuments."

Unrau and Williss, pp. 96-99.

<sup>ooo</sup> The *Works Progress Administration* (W.P.A.) projects were completed in three federal, twenty-two state, three county, and thirteen municipal park areas. Completed work included work the Jefferson National Expansion Memorial National Historic Site, beach erosion control, and the development of federal and non-federal recreational park projects.

Unrau and Williss, pp. 99-101.

<sup>ppp</sup> The *Civil Works Administration* (C.W.A.) was involved in making architectural drawings of some 860 historic buildings for the Historic American Buildings Survey, reforestation, landscaping parks, archeological studies, preparing museum displays, and building swimming pools.

Unrau and Williss, pp. 94-96.

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The impact upon the nation's parklands was staggering. During the 1930's, the National Park Service estimates that park development was forwarded "fifteen to twenty years ahead of schedule had regular manpower and appropriations been relied upon."<sup>34</sup> Moreover, within a one year period between 1933 and 1934, roughly 500,000 acres was added to the nation's *state park systems*, while the *Civilian Conservation Corps* alone worked at 655 parks nationwide and completed an estimated 580,000 man-years of work.<sup>999</sup> The effect of Roosevelt's public works programs were also influential in greatly furthering legislative conservation at the state level and upon state-owned lands. According to Richard Cowart, "the states' managerial expertise was a result of federal programs that mandated or encouraged active state participation."<sup>35</sup>

Likewise, during both world wars, national parks survived great scrutiny to their survival. According to William Everhart, during World War I, "heavy pressure [was placed] on the [National] Park Service, and newspapers regretfully decided that, while 'wild posies' were beautiful, they were not as vital as mutton. Eventually some grazing was permitted in several of the parks, but the short duration of U.S. participation in the war

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<sup>999</sup> "The [Civilian Conservation Corps] accomplished useful work in the parks because each unit in the park system had prepared a master plan for developmental and protective work that generally kept six years ahead of date in order to provide a full program of long-term development in the event that [federal] appropriations were enlarged in any year. In addition, the C.C.C. made recommendations on all projects in state parks and cooperated with state authorities in supervising, assisting, and advising in the conduct of work on such projects."

Unrau and Williss, pp. 76-93.

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prevented serious damage."<sup>rrr</sup>

During World War II, the resolve of the National Park Service and the American people to protect national parks was also evident, whereby as Tilden states, America's national parks "came through practically intact in their basic integrity, however much they may have deteriorated for lack of money and manpower, is really a heartening testimony that their meaning is understood and cherished."<sup>sss</sup> A further comment of the value placed upon America's public lands as opposed to Australia, may be observed by comparing

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<sup>rrr</sup> Between 1886 and 1918, the United States Cavalry under the Department of War was empowered to enforce restrictions preventing hunting, timber cutting and grazing of domestic animals upon national park lands. The Secretary of the Interior had requested this help, since park appropriations were minimal during early years (Yosemite National Park received its first federal appropriations in 1898). The army however often was often as sympathetic to hunters and ranchers as to the Department of the Interior. With the end of World War I, the cavalry troops were finally withdrawn from National Park lands, while in 1919 the Army Corps of Engineers were also removed from park functions and with increasing appropriations the Department of the Interior resumed full control of park management and enforcement.

William C. Evert, *The National Park Service* (New York: Praeger, 1972), pp. 11, and 22-23.

<sup>sss</sup> During World War II, it was decided that the use of national park service lands during war times would be determined with, "each case... considered on its [own] merits." However according to Tilden, "throughout such dangerous periods the Park Service was sustained and fortified by public sentiment, expressed partly through the many conservation societies that are alert to the needs of the national parks and to the potential dangers. But behind those organizations perhaps there was further force. Today there is a more general understanding of the meaning of parks by the whole people."

Freeman Tilden, *The National Parks* (New York: Alfred A. Knopf, 1978), pp. 26-27.

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legislative appropriations for the management and maintenance of public lands.<sup>ttt</sup>

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<sup>ttt</sup> In terms of public and government priority, public land appropriations and staffing, and public participation, the United States far exceeds Australia its efforts to conserve its public lands. The greatest disparities, however, exist at the federal level. While billions of dollars are spent by the U.S. Federal Government in the professional management, staffing, and maintenance of United States' federal lands, for the year ending 30 June 1989, Parliamentary appropriations for the *Australian National Parks and Wildlife Service* totaled merely \$A14,174,000, with a net yearly revenue for 1988-89 of \$A15,795,193; and approved staffing of only 161 persons. American and Australian States have more equitable expenditures and staffing in managing state owned and administered lands. For example, comparing the coastal states of Queensland and California, we find that Queensland legally administers 3,663,769 hectares (1.48 million acres) for conservation purposes; has government land expenditures of \$A55,682,000 (\$A5.9 million federal appropriations); and staffs 682. California administers 3,156,137 hectares (1.28 million acres); has an operating budget for California state lands of \$US139,460,000 (\$US1.25 million federal appropriations); and staffs 3,307. The sum *State Park Operating Budget* of all fifty United States for the fiscal year 1988-1989 totaled \$US900,517,221 or .29 percent of the total operating budget (\$US310.6 billion) for all American States. Figures for Australia's total state operating budgets and land conservation appropriations could not be obtained in their entirety.

*Australian National Parks and Wildlife Service, Annual Report 1988-89* (Canberra: Australian Government Publishing Service, 1989), pp. 1 and 124; *Annual Report 1988-89* (Pallarenda, Qld: Department of Environment and Conservation Queensland, 1989) pp. 3-4, 18-22; and *Annual Information Exchange April 1989* (Austin, TX: Texas Parks and Wildlife Department, 1989), p. 22.

## Endnotes to Pages 23 To 81

<sup>1</sup>*Public Land Statistics*, 1990 ed. (Washington, D.C.: United States Bureau of Land Management, 1990), p. 1; and *Year Book Australia* 1982, p. 66 in J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 23.

<sup>2</sup>*Public Land Statistics*, 1990 ed. (Washington, D.C.: United States Bureau of Land Management, 1990), p.1.

<sup>3</sup>J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement" in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 19.

<sup>4</sup>*Year Book Australia* 1982, p. 66.

<sup>5</sup>C. J. Mobbs, ed., *Nature Conservation Reserves in Australia* (1988), *Occasional Paper No. 19* (Canberra: Australian National Parks and Wildlife Service, 1989), p. 3.

<sup>6</sup>Mobbs, pp. 22-69.

<sup>7</sup>Mobbs, pp. 1-69.

<sup>8</sup>Mobbs, pp. 1-2.

<sup>9</sup>Michael Morcombe and I. Morcombe, *Discover Australia's National Parks* (Sydney: Runaway, 1988), p. 8.

<sup>10</sup>Wendy Goldstein, ed., *Australia's 100 Years of National Parks* (Sydney: New South Wales National Parks and Wildlife Service, 1979), p. 95.

<sup>11</sup>Goldstein, pp. 95, 109, 120 and 125.

<sup>12</sup>Goldstein, p. 10.

<sup>13</sup>Goldstein, pp. 93-160.

<sup>14</sup>Bruce MacDonald, *Report on the Review of the Australian National Parks and Wildlife Service* (Canberra: Australian Government Publishing Service, 1989), p. 9.

<sup>15</sup>MacDonald, p. 9.

<sup>16</sup>Morcombe and Morcombe, p. 9.



<sup>17</sup>D. F. McMichael, "An International Perspective" in *The Value of National Parks to the Community: Values and Ways of Improving the Contributions of Australian National Parks to the Community*, eds. John Messer and Geoff Mosley (Hawthorn, VIC: Australian Conservation Foundation, 1980), p. 42.

<sup>18</sup>Jean-Paul Harroy and others, *The World of Nature, National Parks of the World* (London: Orbis, n.d.), p. 63.

<sup>19</sup>J. D. Ovington, "A National Perspective" in *The Value of National Parks to the Community, Values and Ways of Improving the Contribution of Australian National Parks to the Community*, ed. John Messer and Geoff Mosley (Hawthorn, VIC: Australian Conservation Foundation, 1980), p. 54.

<sup>20</sup>MacDonald, p. 13.

<sup>21</sup>MacDonald, p. 13.

<sup>22</sup>David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 289-290.

<sup>23</sup>William W. Lyons, "Federalism and Resource Development: A New Role for States?," *Environmental Law*, 12 (1982), 931.

<sup>24</sup>Lyons, p. 944.

<sup>25</sup>Freeman Tilden, *The National Parks* (New York: Alfred A. Knopf, 1978), p. 20.

<sup>26</sup>William C. Everhart, *The National Park Service* (New York: Praeger, 1972), p. 8.

<sup>27</sup>Freeman Tilden, p. 20.

<sup>28</sup>Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), p. 37.

<sup>29</sup>Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, CA: Doubleday, 1962), pp. 48 and 51.

<sup>30</sup>*National Wilderness Preservation System* brochure (San Francisco: Sierra Club, June 1990), p. 1.

<sup>31</sup>Freeman Tilden, *The State Parks: Their Meaning in American Life* (New York: Alfred A. Knopf, 1962), pp. 26-27.

<sup>32</sup>Tilden, *The State Parks: Their Meaning in American Life*, p. 26.

<sup>33</sup>Tilden, *The National Parks*, pp. 19-22.

<sup>34</sup>Harlan D. Unrau and G. F. Williss, *Administrative History: Expansion of the National Park Service in the 1930's* (Washington: National Park Service, Sept. 1983), p. 75.

<sup>35</sup>Richard H. Cowart and S. K. Fairfax, "Public Lands Federalism: Judicial Theory and Administrative Reality," *Ecology Law Quarterly* 15 (1988), 409.

★ Chapter Two: ★  
Public Land Policy:  
History, Law, Environment & Philosophy

"*H*ISTORIANS SAY the history of the United States is basically the history of the settling of its land."<sup>1</sup> Perhaps it is equally accurate when Clayton argues, "much of [America's] history parallels the history of *public lands*."<sup>2</sup> It has been similarly written of Australian history, "unless we understand what the problems of Australian land settlement were, and what attempts were made to cope with them, we can not get to the core of Australian history."<sup>3</sup>

This chapter will focus on American and Australian public land policies. Specifically, historic differences in land philosophies, property rights issues, the environment and land settlement strategies will be discussed. It will be demonstrated that these contrasting issues resulted in America's national land policies, while contrarily establishing Australia's unique, state land policies.

### *Historic and Geographic Adaption*

Undoubtedly, American and Australian societies were exposed to different historic events and geographic circumstances that singularly influenced their nations' public

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land histories. These societal adaptations may be observed through conceptual differences in philosophical attitudes towards lands, or through more readily identifiable differences, such as several already alluded differences in public land law, land tenure, acquisition, distribution, settlement and conservation. These early and uniquely American and Australian land practices are responsible for many of our current federal and state administrative land policies. Although the exact origins of these policies remain difficult to define even among experienced constitutional lawyers and historians, nonetheless the most significant and primary differences are distinguishable.

### *Property Rights and Land Law*

The cornerstone of *public and private land policy* in the United States and Australia rests strongly upon the issues of *property rights*. In the United States, historically, land has been the principal basis of wealth and has been widely distributed by its federal and state governments to the public. Consequently, land has been manifestly central to American civil rights and to American jurisprudence.<sup>a</sup> As will be demonstrated, America's liberal property rights philosophies, as adopted, were a departure from the earlier feudal property rights and socioeconomic class structures that were common

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<sup>a</sup> According to Richard Manning, "politics [in the United States] is power, and agrarianism is an attempt to invoke the power of the land, translate it as property, and so divide and confer that power equally among the many yeomen."

Richard Manning, *Grassland: The History, Biology, Politics, and Promise of the American Prairie* (New York: Penguin, 1995), p. 94

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throughout much of Europe, including England at the time of the American Revolution, and later, arguably, in colonial Australia.

Land law during America's colonial history has been described by Paul Gates as a "product of English royal institutions, common and statutory law, and the practices and the customs, as well as laws, of France, Spain, the Netherlands, and Sweden."<sup>4</sup> In direct protest to what was often viewed by American colonists as excessive and suppressive monarchial imperialism among these forenamed governments, all of whom had imperial colonies in what is today the continental United States, early American policy makers radically revised their earlier colonial land policies by acknowledging and adopting a combination of European and American 'social contract' and 'rationalist' philosophies. Often considered radical in Europe, America was founded upon a mixture of European ideals including those of Locke, Montesquieu, and Rousseau, and the 'home-grown' ideals of Jefferson, Madison, Hamilton and Paine.

John Locke's theories of property rights and land distribution were especially significant in the United States, and are reflected in the fact that throughout America's early history, government lands were routinely and rampantly distributed to homesteading settlers and to business interests. During and following this widespread public lands distribution, Locke's property philosophies were likewise applied through the conservation of the nation's remaining most scenic and endangered public lands. Quite

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differently, according to Richard Lumb, in England and Australia, Locke's influences were regarded as largely philosophical.<sup>5</sup>

Ultimately, the American colonies declared their *territorial and civil independence* from England in 1775, in defiance of considered unlawful imperial controls over *territorial and civil rights*, taxation, trade restrictions, Native American relations, and from Britain's seemingly severe punitive enforcement measures. As a result, the United States broke from conventional European wisdom, and through its inspired Founding Fathers, drafted and implemented the world's first constitution written *by the people and for the people*, to incorporate various elements of natural rights, of which property rights were fundamental. With the successful conclusion of the American War of Independence, land sovereignty was shifted from the Crown monarch of Britain to the American people. Private lands became the sole property of individuals, while public lands became the collective property of the citizens of the American nation and of American States.

As will be further revealed in chapter 3 and chapter 4, liberal individual property rights and a centralized federation resulted in the nationalization of public land policies in the United States. Antithetically, the continuation of British custom and law in Australia resulted in regional, non-alienated property rights in Australia, under very different circumstances.

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### *American Property Rights*

American property rights born of the philosophies of John Locke not only contributed to the *American Revolution*, but these policies are today firmly attached to the *United States Constitution* and to the historical events which resulted in the Constitution's adoption in the fall of 1787. As a result, the United States Constitution provides safeguards for both *private* and *public property rights*.

In protection against theft of private property, which at the time of the writing of the Constitution meant principally *private land*, the fifth amendment to the *United States Constitution* provides that "*no person...shall be deprived of life, liberty, and property, without due process of law; nor shall private property be taken for public use, without just compensation.*"

Similarly, the Constitution ensures that through legislative and judicial interpretation, the federal government is provided the right and power to protect the *public land interests* of its citizens through the *Enclave Clause*,<sup>b</sup> and through the *Federal Properties clause*.

*"the Congress shall have power to dispose of and make all needful rules and*

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<sup>b</sup> Congress may, through the *Enclave Clause* (Art. I, sec. 8, cl. 17), receive state lands, however, only with state consent and following the states explicitly ceding jurisdiction to the federal government. According to the Constitution, Congress may "exercise Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of Government of the United States, and to exercise like authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, Dock-Yards, and other meaningful Buildings."

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*regulations respecting the territory or other property belonging to the United States; and nothing in this Constitution shall be so construed as to prejudice any claims of the United States, or of any particular State."*

Federal Properties Clause (U.S. Constitution; Art. 4, Sect. 3, Cl. 2)

The Australian Constitution does not provide for the explicit protection of private and public property as is provided in the American Bill of Rights.<sup>c</sup> Adhering to American designs of modern federalism, however, Australia's federal and state governments have adopted a formal separation of powers with separate spheres of dual sovereignty, including explicit federal constitutional powers and reserved state parliamentary powers comparable to those of the United States.

Like the *United States Constitution*, the *Australian Constitution* provides the Federal Parliament with exclusive powers over federally-owned land. The *Government of Territories Clause*, similar to the United States *Federal Properties Clause* reads,

"the Parliament may make laws for the government of any territory surrendered by any State to and accepted by the Commonwealth, or of any territory placed by the Queen under the authority of and accepted by the Commonwealth, or otherwise acquired by the Commonwealth, and may allow the representation of such territory in either House of Parliament to the extent and on the terms which it thinks fit."

Likewise state governments within both nations share surprisingly similar *federal reserved powers*. For example, American States receive their legal authority through the Constitution's *tenth amendment* or *reserved powers* amendment, which reads,

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<sup>c</sup> The *American Bill of Rights* exist as the first ten amendments to the Constitution of the United States.



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*"the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."*

Similarly, Australian States are provided comparable reserved or implicit powers through the Australian Constitution's *Saving of Powers Clause*, which reads,

*"every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the States, as the case may be."*

With seemingly similar abilities to enact comparable public land laws and policies, why then did the United States and Australia, with similar constitutions and specifically similar federal property clauses, develop widely different public land management policies and administrative strategies? An explanation for these differences may be found through examining ideological differences resulting from notable contrasts in their nations' civil liberties, frontier environments, accepted philosophies, land settlement policies, and statutory and common laws.

### *British Common Law and Australian Lands*

One of the leading reasons why Australia and the United States developed different administrative government land strategies is because of fundamental differences in their legal systems relative to common law. As earlier revealed, when the United States formed an independent nation, the sovereignty of the British monarch over United

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States territories was abolished, and in effect transferred collectively to the citizens of the United States. As Jerome Muys states, today "the citizens of the United States, through their federal government, collectively own approximately one-third of the land area of the 50 states."<sup>6</sup>

Noticeably different, following Australia's independence from Britain in 1901, Australia continues to exercise many aspects of British common law, including Crown sovereignty over Australia's non-alienated lands and, by inference, Crown sovereign control over many aspects of private land ownership, including by implication, all natural resources associated with non-alienated lands and most natural resources associated with private lands.

As a consequence, government lands in Australia are commonly referred to as 'crown lands.' According to D. E. Fisher, "title to all unalienated land [in Australia] remains in the Crown [monarch of Britain]."<sup>7</sup> This is a fundamental difference between the United States and Australia, because as Fisher continues, "this has afforded to the Crown an enormous influence over the national resources and environment."<sup>8</sup>

Following British settlement of Australia in 1788, title and sovereignty of all lands in Australia was conferred upon the Crown. As a result, the Crown could grant title and privatize lands under whatever conditions the Crown decided. These powers remained

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unchecked until 1855 when the colonial legislature of New South Wales received legislative powers from the Crown, which effectively limited the Crown from disposing of Crown lands. According to the *Commonwealth (New South Wales Constitution) Act* of 1855, the "entire management and control of the waste lands belonging to the Crown" in New South Wales were thereafter vested in New South Wales's colonial legislature.<sup>d</sup>

Following the adoption of the *Commonwealth of Australia Constitution Act* in 1901, the Federal Constitution provided the states with many of their traditional colonial powers including, according to J. M. Powell, "controls over land and associated mineral and water resources, and the regulation of... the environment."<sup>9</sup> In the following year, the *New South Wales Constitution* (1902) authorized New South Wales to legislatively regulate the "sale, letting, disposal and occupation" of Crown lands.<sup>e</sup> From that point forward, according to Fisher, "the power to control the use and development of Crown lands [was] no longer derive[d] from the rights of sovereignty and property inhering in the Crown by virtue of the common law: it was now statutory in origin."<sup>10</sup>

Through what may be observed from an American standpoint as a confusing use of British common law and Australian statutory law, each of Australia's states through a

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<sup>d</sup> *Commonwealth Act 1855* (U.K.), s. 2.

<sup>e</sup> *Constitution Act 1902* (N.S.W.), s. 8.

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series of *Lands Acts*<sup>f</sup>, provided their own states with powers to reserve lands for public purposes. Through these *acts*, Australia's state governments are able to legislate through statute, how Crown lands may be alienated, developed and managed, to the extent that "once the legislature has intervened, the common law is superseded to the extent of the application of the statute,"<sup>11</sup> even though, "there is in effect no public or jurisdictional involvement at this stage."<sup>12</sup>

This entangled legal arrangement is further complicated by the fact that, according to Fisher, "there is... no uniformity of approach among the several jurisdictions in Australia. In some instances the Crown may be able to identify two different sources of ownership. One may be statutory, the other may depend upon the common law. This may not affect ownership as such; it may however affect the way in which rights of ownership may be exercised."<sup>13</sup> Despite these facts, in *Davies v. Littlejohn* (1923), the Australian High Court ruled that "the Crown has no power to dispose [of New South Wales'] land except in strict accordance therein [with the New South Wales *Crown Lands Consolidation Act* of 1913]."<sup>9</sup>

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<sup>f</sup> *Crown Lands Consolidation Act* 1913 (N.S.W.), s. 24(1); *Land Act* 1962 (QLD), s. 334(1); *Crown Lands Act* 1929 (S.A.), s. 5(d) and (f); *Crown Lands Act* 1976 (TAS), s. 8; *Crown Lands (Reserves) Act* 1978 (VIC), s. 4(1); *Lands Act* 1933 (W.A.), s.29.

D. E. Fisher, *National Resources Law in Australia* (Sefton, N.S.W.: The Law Book Company, 1987), p. 157.

<sup>9</sup> *Davies v. Littlejohn* (1923) 34 C.L.R. 174 at 183 in D. E. Fisher, *National Resources Law in Australia* (Sefton, N.S.W.: The Law Book Company, 1987), p. 63.

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Once the administrative decision has been made to either use crown lands for public or private uses, the administration of the public or private regime of management is very much an executive or state ministerial function.<sup>14</sup> Furthermore, characteristic of Australian land law, the *original designation* of lands is consequential in how common law and legislative law will be enacted for either public or non-public purposes. As a result, early designation or classification of lands under *responsible government* largely influences how both common laws and statutory laws will be enacted in later managing these lands. Conversely, in the absence of any plan of management, public lands are guided only by the public purpose for which the land was originally dedicated or reserved.<sup>15</sup>

In practical terms, each of Australia's states' powers to legislate uses for these lands are in part determined by the precise land classification and terminology of the early state lands acts and by any legislative amendments to these land acts. For example, the states of Queensland, Western Australia, and Tasmania, whose land acts historically have contained fewer public land classifications, in effect have greater latitude in determining what is a public interest, than for instance either Victoria or South Australia, whose lands acts contain more precise classification and terminology.<sup>h</sup>

From the point of view of land conservation, fewer state defined classifications providing

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<sup>h</sup> *Crown Lands Act* 1929 (S.A.), ss. 23-29 and *Lands Act* 1958 (VIC), ss. 43-46 and 89-91.

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for either land preservation or set asides, has meant that state land ministers in Tasmania and Queensland for instance, have greater autonomy in designating and selecting lands for land development purposes than among other states.<sup>i</sup> Furthermore, by attaching common law conditions in constituting what are allowable uses for lands, the Crown is able to retain control over the use of lands, even though according to Fisher, "the Crown has no power to dispose of the land except in strict accordance therewith."<sup>16</sup>

As this mixture of British common law and Australian statutory law demonstrates, regulation of lands, and specifically lands for public purposes such as nature reserves, can be vastly complicated, is often defined differently among the states and has resulted in perpetuating regional land policies in Australia. Furthermore, regional land policies have been bolstered by common law precedence that prevents Australia's Federal Government from obtaining jurisdiction over non-alienated government lands, while consequently preventing the Federal Government from exercising its *Government of Territories* clause. Since the issuance of the *Statute of Westminster* of Britain in

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<sup>i</sup> According to Fisher, "the legislation [and lack of formal land classifications] in Tasmania gives the Minister, as Commissioner for Crown lands, a power to refuse an application for reasons so broad as to be practically unlimited." Also, consistent with all states, "the degree of discretion involved in the creation of private tenures is related to the precise terminology of the legislation."

*Crown Lands Act 1935 (TAS)*, s. 14(1)(c) in D. E. Fisher, *National Resources Law in Australia* (Sefton, N.S.W.: The Law Book Company, 1987), p. 158.

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1931<sup>j</sup> and continuing until present with Prime Minister Keating's administration, Australia's relationship as a member nation of the British Commonwealth of Nations has become increasingly loose and politically unpopular. Despite governmental overtures by Australia to remove the last vestiges of British sovereignty over Australian territories, and specifically over government land policies, Australia continues to allow itself to be swayed by centuries old British common law, ceremony and former colonial land policies.

### *A Difference in Environment*

Beyond issues of law, perhaps an equally important reason why the United States established a national lands policy while Australia maintains its regional lands policy is

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<sup>j</sup> The *Statute of Westminster* of 1931 legitimated through British statute, the newly redefined position of Britain's *Dominion nations* including Australia, as earlier defined by the 1926 Imperial Conference. In 1947, the British Dominion was officially replaced with the *British Commonwealth of Nations*. According to the Statute of Westminster, British dominion nations were elevated to "autonomous communities within the British Empire, equal in status, in no way subordinate one to another in any aspect of their domestic and foreign affairs, though united by a Common allegiance to the Crown and freely associated as members of the British Commonwealth of Nations." Even today, the British Commonwealth of Nations is similarly defined as "an association of states, dependencies, and territories formerly ruled by Britain that recognize the reigning British sovereign as titular head."

Dean Jaensch and M. Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne, VIC: MacMillan, 1988), pp. 34-35 and W. A. Krebs, ed., *The Collins Australian Pocket Dictionary* Sydney: William Collins Sons, 1988), p. 177.

<sup>k</sup> According to the *New York Times*, "Prime Minister Paul Keating of Australia has led the campaign to remove the last vestiges of British colonialism there and oust Queen Elizabeth as Australia's head of state."

Associated Press, *New York Times* in "French arms tests may hasten an end to Pacific colonialism," *Minneapolis Star Tribune*, 10 September 1995, p. 16A, col. 1.

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a result of each nation's unique physical environment. Differences in early frontier conditions resulted in distinctly different early settlement strategies. As upcoming sections will further demonstrate, the distinct frontier environments of the United States and Australia resulted in philosophical attitudes favoring either America's national land policies, or alternatively, Australia's regional land policies.

### *The Struggles and Rewards of Nature*

British historian H. C. Allen accurately concludes, "Americans' struggle with nature was, for the most part, far more rewarding than that of the Australians", while dismissing the notion that America's abundant natural resources and favorable climate singularly influenced land settlement and policy. Instead Allen remarks, "the American frontier was not a soulless phenomenon impelled by the vast forces of history: it was peopled and kept moving by men and women of flesh and blood and good sense and manifold skills and superabundant energy", from what he resolves is "the genius of [the American] people."<sup>17</sup>

This adulation is accurate, in that inexpensive or free lands and liberal land distribution policies provided by the American Government allowed immigrants from throughout the world, *regardless of nationality or social class*, through hard work *and an abundance of fertile lands*, to determine their own fate and prosperity.



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Between 1862 and roughly 1934 (when the *Taylor Grazing Act* officially closed remaining public lands from homestead entry),<sup>18</sup> nearly 300 million acres within the United States were transferred from the national domain, by the Federal Government, and privatized through the *Homestead Act*, while concurrently an additional roughly 300 million acres were acquired by settlers through various *pre-emption* public land transfers. Furthermore, between 1781 and 1990, America's states were provided nearly 330 million acres of the national domain by the Federal Government, much of which was subsequently granted or sold to homesteading settlers.<sup>19</sup>

During Australia's British colonial era (pre-1901), attempts to privatize its public lands were far less successful than American efforts. Restrictive British land purchasing policies, and a general unwillingness by Australian squatters to purchase and permanently settle lands because of relative high prices and/or lease requirements strongly contributed to this trend. However the principal limiting factor which appears to have hampered settlement beyond Australia's cumbersome statutory and British common law land distribution policies appears to be a result of Australia's arid environment, in much the same way that America's mountainous West and the desert Southwest were not settled to the extent of more temperate territories. Australia's mostly arid environment favored government land retention and regional government policies, while America's frontier favored national land policies.

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A British royal commission study of New South Wales in 1883 concluded that between the years 1861 and 1883, while in fact 29 million acres had been purchased and privatized, less than 500,000 acres had become viable farms. Only within South Australia were farms common.<sup>1</sup> Comparatively, by 1880, the United States had 150 million acres of active farmlands, while Australia had an estimated six million acres.<sup>20</sup> The reason for this deep disparity appears to be a product of Australia's generally harsh environment and unpredictable climate, as much as direct land policy issues.

Apart from America's abundant natural resources, renowned American historian Frederick Jackson Turner postulated in his well-acknowledged *The Frontier in American History*, that the American frontier was itself a source of *nationalization* within the United States. According to Turner, "in the crucible of the [American] frontier, immigrants were Americanized, liberated and fused into a mixed race, English in neither nationality nor characteristics."<sup>21</sup> Turner asserted that the American frontier was a consolidating influence in American history and the dominant influence upon American life, whereby "so long as free land exists, the opportunity for a competency exists... [that] economic

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<sup>1</sup> Between 1850 and 1884, South Australia saw that largest increase in productive farming, from an estimated 65,000 acres in 1850 to 2.76 million acres in 1884.

Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), p. 57.

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power [would] secure political power."<sup>m</sup> Turner further understood that with free land came the potential for both good and bad, when he wrote, "but the democracy born of free land, strong in selfishness and individualism, intolerant of administrative experience and education, and pressing individual liberty beyond its proper bounds, has its dangers as well as its benefits."<sup>22</sup>

...to the frontier, [Turner wrote] the American intellect owes its striking characteristics. That coarseness and strength combined with acuteness and inquisitiveness; that masterful grasp of material things, lacking in the artistic but powerful to effect great ends; that restless, nervous energy; that *dominant individualism* [italics added], working for good and for evil, and withal that buoyancy and exuberance which comes with freedom-- these are the traits called out elsewhere because of the existence of [America's unique] frontier.<sup>23</sup>

Whereas Australia's mostly arid environment undoubtedly greatly precluded early settlement of much of Australia's frontier, American settlers found greater opportunity in the form of easier to acquire and commonly more fertile lands, closer settlement, and better access to domestic and foreign trade markets through an extensive network of roads, railroads and waterways. As a result, the nature of the American frontier itself facilitated the nationalization of government policies by providing opportunity for easier travel, communication, government representation and mutually beneficial economic trade between regions of the United States. As Australian Professor Portus stated in 1942, "frontier posts [in the United States] became schools of local self-government...

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<sup>m</sup> This similar sentiment was repeated when Henry Nash Smith characterized the yeomen settlement of the American frontier as the "master symbol" of the nation.

Richard Manning, *Grassland: The History, Biology, Politics, and Promise of the American Prairie* (New York: Penguin, 1995), p. 94.

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we have never had a frontier like that in Australia."<sup>24</sup>

Physical frontier conditions and resulting differences in public land policies produced diverse results. Land tenure in the United States historically may be characterized as 'freehold,' whereas Australia lands were held often as 'leasehold.' As Alexander and Goodrich state, "whereas the small man's frontier stimulated American 'individualism', Australia owes much to the [regional] collectivism to the fact that its frontier was hospitable to the large man instead."<sup>25</sup>

Both nations' unique environments favored and sustained different settlement strategies. In the United States, the environment sustained large numbers of small pioneer *farmers*, whereas the more arid Australian *outback*, instead sustained Australia's large pioneer *pastoralists*. Ultimately, the fate and success of Australian and American land settlement law and policy was a partial product of each countries' unique environment and climate, and to the ability of the environment to sustain settlement.

In consummation, this view is reflected within the prose of a character of famed Australian poet Henry Lawson, whose character experienced first-hand the trials of both the American and Australian frontiers.

The worse and hardest years of my life were spent in Australia... I worked harder and got less in my own country in five years than I ever did in any other in fifteen...when I was starved out of my own dear native land-- and that country is the United States of America. What's Australia? A big, thirsty wilderness, with

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one or two cities for the convenience of foreign speculators... America's bad enough, but it was never so small as that...<sup>26</sup>

British historians Geoffrey Barraclough and Norman Stone similarly conclude that "the unique experience of [America's] built in empire made it especially difficult for Americans to understand the conditions of other less fortunate people, and for others to understand America as well."<sup>27</sup>

### *A Difference in Philosophy*

The widespread distribution, privatization and important economic value associated with America's generally fertile privately-owned lands are reasons enough for American people to demand a host of constitutional and statutory safeguards protecting private lands from illegal seizure. However, why did the United States make such a pivotal attempt to legally preserve its public lands and natural heritage? In answering this question, it becomes clear that whereas British *common law* has been identified as a primary source of Australia's regional and state land policies, America's early *conservation movement* appears to have further strengthened the nationalization of public land policies in the United States.

Land conservation as a major social reform began in the United States as more than simply as a reaction to prevent land destruction caused as a result of federal and state government distribution of public lands. Rather, America's conservation movement

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appears to have occurred as an outcome of an ideological and national reawakening.

During the latter nineteenth century, land conservation in the United States was seen as a means of providing the nation with something "uniquely American," and which could be easily distinguishable from other nations. Whereas Europe had a culture based upon centuries old refinements in literature and the fine arts, the *American wilderness* was seen as having no counterpart in Europe. Instead of something to be feared and destroyed, during the latter nineteenth century, the "wildness" of the United States was recognized as a cultural and moral resource and asset, and as a resource of national pride and self-esteem.

Prominent American writers such as Washington Irving, Ralph Waldo Emerson, Henry David Thoreau, Walt Whitman, William Cullen Bryant, James Fenimore Cooper, Henry Wadsworth Longfellow and James Kirke Paulding individually contributed in vesting America with a history founded upon reverence for America's unique and spectacular environment. Nationalism and patriotism, supported by the long-held Lockean theories of rationalism, surged through the nation, with the writings of Bryant's classic romanticism and Thoreau's American transcendentalism providing the moral and spiritual imperative for nature conservation. As Roderick Nash states, "romantics invested [American wilderness] with value, while nationalists proclaimed its uniqueness."<sup>28</sup>

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Subsequently, scientific confirmation during the later half of the nineteenth century likewise lead to a call for action in the form of conservation and preservation. George Perkins Marsh, a scientist and scholar, reinforced this movement in 1864 by releasing a text "Man and Nature, Physical Geography as Modified by Human Action." In this report, Marsh compared America's early destruction of its environment to the historical account of countries in Europe and the Middle East, who had once become great nations, but due to neglect, and destruction of their forests and soils, these countries turned to ruin. Marsh introduced the concept that the *condition of the land is reflected in the strength of the nation*, which was later echoed by America's foremost and most influential land conservationist, President Theodore Roosevelt when he stated that "*the United States was only as strong as its resources.*"<sup>29</sup> These stern warnings were repeated by Franklin Hough's 1877, Congressionally mandated *Report Upon Forestry*, and by John Wesley Powell's 1878 *Report on the Lands of the Arid Region of the United States*.<sup>n</sup>

Spurred by the sciences of academics such as George Perkins Marsh and John Wesley Powell, the writing of wilderness poets such as Ralph Waldo Emerson and Henry David

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<sup>n</sup> Franklin Hough's report recommended changes to improve management of the nation's forests. In his summary, Hough presented a "blueprint" to Congress, which recommended that *scientific management* of the nation's forest lands should be established, similar to that of Germany. In Powell's report, he recommended limited agriculture within the arid West and an overhaul of many public land laws which governed the use of resources in the Western United States. Ironically however, Powell's recommendations eventually lead to Congress' creation of the *Bureau of Water Reclamation*, which created irrigation and power dams throughout much of the West.

Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 57-59.

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Thoreau, the visual artistry of John James Audubon,<sup>o</sup> and the outspoken words of influential orators such as President Theodore Roosevelt, the nation began identifying its American character with the conservation of American wilderness.

Suddenly, conservation of the nation's resources began to be identified with *nationalism*, patriotism and spiritual transcendentalism. The greatness and uniqueness of the American wilderness was seen as unlike anything in Europe. The outdoors increasingly became a quintessential part of the newly emerging American culture. It was believed that nowhere else in the world could such natural wonders exist, nor be preserved--certainly not in Europe. To continue to destroy the environment without regard was seen as tantamount to destroying one's own home and nation. Soon millions of acres, often hundreds of miles from major cities, and often site unseen by legislators, were preserved by Congress as representing the achievement, uniqueness and potential of America's emerging nation.

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<sup>o</sup> Between 1820 and 1840, John James Audubon painted the majority of his more than 200 portraits of birds from throughout North America. Through these efforts, Audubon became a leading figure in American wildlife and habitat conservation.

According to Roger Tory Peterson, "John James Audubon [1785-1851] was 'the right place at the right time.' Audubon's real contribution was not the conservation ethic, but awareness. That in itself is enough; awareness inevitably leads to concern. In an era when there were no game laws, no national parks or refuges, when there was no environmental ethic, when vulnerable nature gave way to human pressures and often sheer stupidity, he was a witness who sounded the alarm. He sparked a latent nationwide interest in the natural world, especially in birds... Beginning with Audubon, wildlife artists have perhaps contributed as much to conservation and the conservation movement as the literary nature writers such as Thoreau, Burroughs, Muir, Aldo Leopold and Rachel Carson."

Roger Tory Peterson, ed., *The Audubon Society Baby Elephant Folio* (Norwalk, CT: Easton, 1981), p. 1.



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### *Contrasting Land Settlement Strategies*

As a result of notably different legal and physical frontier beginnings, the United States and Australia developed widely contrasting land settlement strategies which ultimately contributed to their respective national and regional land policies. Beyond legal and frontier conditions however, differences in settlement ideologies also emerged, resulting in different land policies.

Whereas American land policy has changed drastically since its colonial period, Australia has continued a course reminiscent of European and English colonial land doctrine. Following the *American Revolutionary War*, instead of adopting England's early colonial land precepts proposed by E. G. Wakefield and championed by English Colonial Secretary and later British Prime Minister Earl (Charles) Grey, which recommended *restricting* public land settlement beyond colonial boundaries and establishing an English cast system in both colonial Australia and as earlier alluded to in colonial America, the United States established an uniquely American alternative--namely the widespread public distribution, and later conservation, of public lands included within United States' *national domain*.

Instrumental in advocating solutions for America's early land development strategies and early societal dilemmas, were the strongly held beliefs of two American Statesmen,

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Thomas Jefferson and Alexander Hamilton, who were influenced by the natural rights of property and the 'social contract' philosophies of John Locke and Jean Jacques Rousseau.<sup>P</sup>

The issue of property rights (initially private property but later expressed as public property), was of critical importance in establishing America's republican government. According to Lockean theory, and as first incorporated by the framers of the *United States Constitution*, rights of property owners were the "bulwark of freedom against arbitrary government."<sup>60</sup> America's Founding Fathers, like Locke, believed that natural law and the rights of property existed before the creation of political authority, and that it was the responsibility of government to protect property rights. To ensure that these

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<sup>P</sup> Locke's *Two Treatises on Government* (1690) and Rousseau's *The Social Contract and Discourses* (1762) were widely read by America's Founding Fathers, pertaining to their theories of natural rights and rights of property. Rousseau believed private property was the first institution of humankind, and that "the first man who, after enclosing a piece of ground, bethought himself to say 'This is mine' and found people simple enough to believe him, was the real founder of society." Unlike Rousseau however, Locke believed that people were inherently capable of directing their future, depending upon the choices one followed. Locke stressed the theory of the 'social contract', under which in entering a civil society, it may be necessary to relinquish certain rights to secure and enforce more basic rights. The right of property was a cornerstone to Locke's theory on natural rights and was expressed by Locke as rights of "life, liberty and estate." These views were so quintessential to American society, that these terms were included into the *U.S. Declaration of Independence*, and in the fifth amendment of the *U.S. Constitution*. The *U.S. Declaration of Independence* as originally drafted demanded unalienable rights of "life, liberty, and property", but shortly before its adoption was replaced by "life, liberty and the pursuit of happiness." *We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are life, liberty and the pursuit of Happiness.* These provisions are absent from the *Australian Constitution*.

Jean Jacques Rousseau, *Discours sur l'origine de l'inégalité des hommes* ["Discourses on the origins and the foundations of inequality among men"] (Paris: 1754), in Rousseau, *The Social Contract and Discourses* (1762), in John C. Shea, *American Politics: The Great Game of Politics* (New York: St. Martin's, 1984), p. 67-70; Edward Dumbauld, *The Constitution of the United States* (Norman, OK: University of Oklahoma, 1964), pp. 13-14; and R. D. Lumb, *Australian Constitutionalism* (Sydney: Butterworths, 1983), p. 14.

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rights were fulfilled, the fifth amendment or the *Takings Clause* was adopted in 1791 as part of the *American Bill of Rights*.

Throughout American history, case law and rulings by the United States Supreme Court have indicated major support for the fifth amendment and for the value of property rights to American society. Since the United States Supreme Court ruling in *Van Horne's Lessee v. Dorrance* (1795), federal courts have restricted the federal government from taking private property through *eminent domain*,<sup>9</sup> generally except when just compensation was determined by the judiciary.<sup>7</sup> During recent decades however, and specifically by the early 1990's, the Supreme Court has indicated a slow return to *laissez-faire constitutionalism*<sup>8</sup>.

Beginning notably with *Berman v. Parker* (1954), the Supreme Court ruled that eminent domain according to the 'public use' or *Takings Clause* of the fifth amendment should be deferred from the judiciary to become a legislative function.<sup>31</sup> In fact, not until *Nollan*

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<sup>9</sup> *Eminent domain* may be defined as the right of government to appropriate private property for public use, usually with compensation to the owner.

<sup>7</sup> *Van Horne's Lessee v. Dorrance* (1795) in Richard E. Ellis, "Paterson, William," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University, 1992) pp. 625, 685.

<sup>8</sup> "Laissez-faire constitutionalism" refers to an ideological attitude that the Supreme Court maintained between the Civil War and the Great Depression of the 1930's. According to Wiecek, this ideology "reflected classical liberal economics, with its commitment to market control of the economy, a preference for entrepreneurial liberty, and a concomitant hostility to governmental regulation traditional American values including individualism, access to opportunity and hostility to restraints on competition."

William F. Wiecek, "Laissez-faire Constitutionalism," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University, 1992) p. 492.

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v. *California Coastal Commission* (1987) has the Supreme Court struck down a legislative land use decision in the United States since the 1920's.<sup>32</sup>

### *Jefferson and Hamilton Land Doctrine*

Following the *American Revolutionary War*, the founding fathers of the United States were vitally concerned in safeguarding the economic interests of its citizens. The security of private property and of contractual agreements to sustain private property were believed to be critical in developing investment capital and in establishing a strong national economy. At the same time, according to Ely, "although some state constitutions contained provisions to protect property rights, in the years immediately following the Revolution many became convinced that state governments could not be trusted to respect property ownership."<sup>63</sup> To prevent the threat of state interference and the illegal seizure of property, a government had to be devised which would protect rights of property, while maximizing the inherent economic rights of Americans, to capitalize upon the material wealth of their property and nation.

American statesmen, Thomas Jefferson (1743-1826) and Alexander Hamilton (1755-1804) are often credited as providing the essential land settlement philosophies which eventually would guide the economic development of America's *national domain* following the *Revolutionary War*. The now classic philosophical debate between

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Jefferson and Hamilton proposed two differing views concerning how to best *develop* the nation's economic potential, while still retaining the perceived natural right of all Americans to acquire and maintain private property without government interference. At odds in this nationwide debate, was how to best make use of the nation's seemingly unlimited lands and natural resources.

Both Jefferson and Hamilton saw their methods as a means of strengthening the economic and political powers of the states and the nation. Jefferson, the nation's preeminent agrarian theorist, believed that the economic strength of the nation rested in the vitality and productivity of America's farms, and in wealth distribution among common citizens. According to Jefferson's plan, America was destined to become a prosperous and happy yeoman nation of farmers,<sup>†</sup> where inexpensive or free lands and primary industry would quickly transform the fertile soils of the nation into one of the great trading markets of the world. According to Richard Manning, "Jefferson's democratic equation was wholly dependent on the ownership of land. Not too much land, which would make for squires and tyrants. Not too little, which made for peasants and paupers."<sup>34</sup>

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<sup>†</sup> According to Richard Manning, the American yeoman as envisioned by Jefferson meant "a particular type of farmer, the yeoman, who holds a small amount of land, sufficient for the care of his own family, but who neither works for wages nor hires others is a necessary precondition of democracy."

Richard Manning, *Grassland: The History, Biology, Politics, and Promise of the American Prairie* (New York: Penguin, 1995), p. 94.

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Sentiment for Jefferson's plan was great throughout the nation, as its was widely believed as David Howell remarked in 1784, that the "cultivators of the soil" were the true "guardians" of republicanism.<sup>35</sup> Similarly, American soldier and poet Humphreys wrote:

Agriculture! by whose parent aid,  
The deep foundations of our states are laid.<sup>36</sup>

Alexander Hamilton however, believed that a nation of farmers would not adequately fuel America's economic potential. Instead, Hamilton suggested public lands were a great financial resource and should be sold to provide vital revenue to the nation, and in foregoing the huge war debt incurred as a result of the American Revolution. Hamilton also proposed a more rapid and direct development of the nation's commerce, fueled by America's abundant public land resources, corporate investment, and an increased centralization of labor in America's cities.

In practice there were not great differences between Jefferson and Hamilton's plans, in that both men's strategies intended to encourage and facilitate western settlement of public lands, by enabling settlers to acquire public lands at reasonable cost, and by easing government land restrictions, which had earlier been imposed upon both the

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United States and Australia by the British during their respective colonial histories.<sup>u</sup> Hamilton, perhaps less charitable than Jefferson, in 1790 proposed selling maximum lots of 100 acres within the national domain for a modest 30 cents per acre.<sup>37</sup> Generally, proponents of Hamilton recommended somewhat higher land prices within larger saleable lots, while proponents of Jefferson encouraged smaller saleable lots at somewhat lower prices. The ultimate question and challenge for the nation, as proposed by Baltimore's *Maryland Gazette* in 1787, was how to best devise a plan which would provide settlers with adequate incentive and benefit from "the exertions of ingenuity and labour", while providing adequate rewards to "improve the bounties of a benign Providence."<sup>38</sup>

Following the American Revolution, America's northeast (the population center of the nation) generally favored an expansion of Hamilton's plan, with even higher land prices and larger saleable lots. Among the concerns of northeastern residents were that development of the West would result in a mass exodus of emigrants from their states

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<sup>u</sup> A striking similarity between the United States and Australia, was their opposition to British land restrictions during each nation's colonial history. Among the best known of these British land restrictions was the 'Proclamation Line' of 1763 in the United States and the 'nineteen colonies' land settlement restrictions in New South Wales in 1829. Both restrictions were largely disregarded in both countries. Among the American colonies, the Royal declaration of the 'Proclamation Line', limiting settlement west beyond the Allegheny Mountains, became an underlying cause of the *American War of Independence*. In Australia, Colonial Governors Bligh and Macquarie attempts to limit settlement within the established 'nineteen colonies' of New South Wales, were rejected by frontier *squatters*, who defiantly, often continued to graze their sheep whenever and wherever they pleased.

Fred Alexander, *Moving Frontiers, An American Theme and its Application to Australian History* (Melbourne: Melbourne University, 1947), p. 27; and J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote, 1988), pp. 15-16.

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to the Western frontier, and that the East would be strapped with unfair burdens of both paying the *Revolutionary War* debt and financially supporting western development. Consequently, the Northeast requested that land prices be sufficiently high to discourage northeastern residents from leaving the East.

The emerging western territories and states, along with southern states typically embraced Jefferson's more populous objectives. Westward immigrants desired free or inexpensive lands, within small workable land parcels which immigrants could afford to purchase. According to Paul Gates, "the West wanted... to have the [western public] lands ceded to the states, which presumably would administer them in a way more satisfactory to local interests."<sup>39</sup> As revealed in Chapter 3, this view became a reality with the Great States Land Cession of 1780, while calls for greater local involvement still permeate among, specifically, residents of the western public land states to this day.

The anti-federal South and southern plantations likewise indicatively approved of Jefferson's agrarian ideals. Like the larger Australian land owners of the nineteenth century who feared shortages of convict labor, southern land owners in the United States also feared the loss of their slave and indentured work force. Moreover, the South feared increased federal powers and any handouts that might lead to state dependency. Defiantly, the South long advocated a loose confederation of states, as



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opposed to a strong centralized federation of states. The South's concerns appeared well-founded, which only the *American Civil War* was able to resolve, in defense of an increasingly *strong national government* and of a centralized federation.

As United States public land policies evolved, America's early land settlement saw an explosive implementation of both Jefferson and Hamilton doctrine. Jeffersonian tenets resulted in the Federal Government transferring and distributing large tracts of the public domain to the states, to homesteading citizens, and for educational instruction and institutions, in an attempt to distribute wealth, increase the number and productivity of small family farms, improve social conditions, and ultimately strengthen the national economy.

As Richard Manning explains,

[under Jefferson's plan, federal land surveyors] took the navigators' lines of latitude and longitude and subdivided them in squares down to the township level, a square area of six by six miles. The thirty-six square miles were divided into sections of land of 640 acres each. These were quartered to 160 acres, called a quarter section, then requartered to 40-acre plots. These measures became the basis for parceling lands under the various homesteading and land entry laws. From the first, it was believed that 160 acres was exactly the amount of land a yeoman needed, and the later land entry laws of the 1860's all clung to this notion. The survey drew the lines, and yeoman were to be dropped between the lines like numbers on a spreadsheet.<sup>40</sup>

Through these early national cadastral surveys and Thomas Jefferson drafting the Land Ordinance of 1785 and as fully implemented through the Northwest Ordinance of 1787

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(see Chapter 3), Jefferson's vision of the Federal Government sectioning national lands to small farming families was realized. Through notably the Preemption Laws and the *Distribution Act of 1841*, as well as the *Homestead Act of 1862*, these early designs for parceling lands became the accepted and highly successful method of distributing public lands throughout the nation. Later, public land laws were modified to allow and encourage yeoman settlement of the drier western United States through the *Timber Culture Act of 1873*, the *Desert Land Act of 1877* and the *Timber and Stone Act of 1878*.<sup>ν</sup>

Hamilton's concepts were also realized with the *sale of public lands for government revenue*, and the transfer of extensive lands and resources to *commercial interests*, including railroad, mineral, and timber corporations, as well as land speculators and land companies. Jefferson ideology did gradually emerge however, as the dominate land policy during America's early history, for as Allen concludes, "Jeffersonian principals triumphed between the years 1785 and 1862" (and ultimately beyond), as

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<sup>ν</sup> For example the *Desert Land Act (1877)*, as championed by early federal land surveyor John Wesley Powell, permitted ranchers and farmers to claim irregular land tracts adjacent to streams and watercourses in the arid West. Generally the land distribution acts intended for drier western lands permitted settlers and often corporate interests to acquire public lands often well in excess of 160 acres at little or no cost, and often permitted them to extract vast deposits of natural resources. For example according to Bernard Shanks, beginning in 1872 "lands that looked promising for mining were to be claimed free from public lands. If mining was shown to be feasible, then the land could be purchased for \$2.50 per acre. The *1872 Mining Act* ended nearly 300 years of charging royalties [to the Government] for minerals on the American continent, a policy that had required miners to give the public a share of the income from nature's mineral gift. The strange law remains in effect today."

Bernard Shanks, *This Land is Your Land: The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), p. 42-43.

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Congress throughout the nineteenth century established increasingly *more democratic laws*, by *lessening purchase restrictions*, *reducing required size of saleable lots*, while also *reducing the price per acre* for all lands purchased or acquired from the nation's national domain.<sup>w</sup>

With an abundance of labor and natural resources, a land boom resulted throughout much of the United States during the latter eighteenth century and the nineteenth century. Quickly, millions of acres were transformed from fertile prairies and woodlands into numerous small farms and frontier towns, with still larger centers for trade and commerce. Unfortunately however, these actions often had disastrous consequences for the nation's environment.

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<sup>w</sup> The *Land Ordinance of 1785* established required the purchase of one *section* (one square mile or 640 acres), at a required price of one dollar per acre. The *Act of 1796* temporarily increased the price to two dollars per acre (although with one year credit for a dollar of it), also at 640 acre lots. In 1800, the Republicans enacted a national law which maintained the two dollar per acre price, but lessened the required lot size to 320 acres, with only \$160 down payment. In 1804 the minimum lot was decreased again to 160 lot sizes and the price per acre was decreased to \$1.64 per acre. The *Act of 1820* abolished credit payment, but lowered the price to \$1.25 per acre, at minimum lot size of 80 acres. In 1832, the credit system was restored. The *Preemption Land Acts* culminating in the *Act of 1841* enabled any adult American male to stake claim to any 160 acre lot, by virtue of genuine residence for a price of \$1.25 per acre. This law was critical because it 1) placed all pioneers on an equal footing with each other as well as earlier land speculators, 2) virtually ended the idea that revenue was the paramount object of land sales. Public lands became virtually free through the *Homestead Act of 1862*. Through this act of Congress, a maximum of 160 surveyed acres could be acquired, for only \$10, which was charged to cover administrative fees. Full legal title was acquired after five years residence. Alternatively, title could be purchased following six months residence, for \$1.25 per acre. American land settlement laws can therefore be seen from 1800 forward as a liberal and democratic trend in American land legislation.

H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), pp. 51-53.

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### *Wakefield Land Doctrine*

In Australia, the principles proposed by Jefferson and Hamilton, although well known to British officials early in Australia's colonial history, and widely known throughout Australia following Australia's gold rush in 1851<sup>\*</sup>, were dismissed as W. C. Wentworth described as "Yankee notions" of democracy.<sup>41</sup> Instead, Australian public land policy developed from a system commonly known as the *Wakefield scheme*.

The origins of the Wakefield philosophies are founded upon the utilitarian beliefs of English philosopher Jeremy Bentham (1748-1832), while the exact originators of the Wakefield's land doctrine remain disputed.<sup>†</sup> While serving a three year prison term for child abduction at Newgate gaol in England, Britain's Edward Gibbons Wakefield completed his first of several writings on colonization policies entitled, *A Letter from*

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<sup>\*</sup> According to Allen, "following the granting of [Australia's] self-government in the mid-nineteenth century, the American example was widely known in Australia, partly owing to the great influx of population in the gold rush, some of whom knew the United States. By 1851 in America, the per-emption system had operated fully for a decade and the Homestead agitation was well under way, so that there can be little doubt that the Australian clamor for closer settlement which burst forth at that time owed much to the American experience."

H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), p. 48.

<sup>†</sup> Due to the intentional vagueness and lack of instructions of Wakefield's writing, several administrative contributors are thought to have contributed to the spread and application of 'Wakefieldism' during the nineteenth century through much of the British Imperial Empire. Among the cited contributors include physiocrat Mirabeau Pére, W. C. Wentworth, Robert Gourlay, and Colonial Secretary Earl Grey.

Bill Brugger and Dean Jaensch, *Australian Politics, Theory and Practice* (Sydney: George Allen & Unwin, 1985), pp. 5-6.

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Sydney, *The Principal Town of Australasia*.<sup>2</sup> (See Appendix D: Letter from Sydney) In this writing, Wakefield made colonial reform his principal preoccupation, and attempted to analyze the economic, social, and political conditions of New South Wales, and to make suggestions for improvement of Australia's colonial land policies and colonial government administration.

Also, since the majority of settlers arriving to Australia from England during this time were convicts, Wakefield's experiences while a British prisoner undoubtedly provided Wakefield with greater foresight and understanding of convict habits and beliefs. Although having never traveled to Australia during his lifetime, Wakefield instead based his theories upon the available literature involving Australia which he had read during and following his imprisonment.<sup>42</sup> During the 1830's, a group of "colonial reformers" was founded which proposed Wakefield's theories to the British House of Commons. The *Edinburgh Review*, the *Westminster Review* and the *London Times* newspapers bitterly opposed Wakefield's proposals, but, as a result of Britain's high unemployment and Australia's scarcity of labor during the 1830's and the 1840's, Wakefield's theories were implemented in not only Australia, but also throughout much of the British

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<sup>2</sup> Because of the stigma of his imprisonment, *A Letter from Sydney* was released and published under the name of Robert Yonger. Among Wakefield's other writings include *Swing Unmasked* (1831), *Facts Relating to the Punishment of Death in the Metropolis* (1831), *The Hangman and the Judge* (1833), *England and America* (1833), *Popular Politics* (1837), Editor to Adam Smith's *The Wealth of Nations* (1835-39), *A View of Sir Charles Metcalfe's Government of Canada* (1844), and *A View of the Art of Colonization* (1849).

R.C. Mills, ed., *A Letter From Sydney, The Principal Town of Australasia: & Other Writings on Colonization* by Edward Gibbons Wakefield (London: J. M. Dutton & Co., 1929), p. xiii.

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Commonwealth.<sup>43</sup>

According to the Wakefield scheme, an English cast system of 'little Englands in Australia', would be established, whereby "the argument envisioned linking the Home and Colonial partners economically, socially and politically, by encouraging the specialized development of primary production in Australia based on the 'transplantation' of whole sectors of British society. Land, or at any rate the price of land, was the key. It was not to be given away; on the contrary, comparatively high prices were required, though they might be 'regulated' in tune with demand and supply in the immigration market."<sup>44</sup> Ultimately, Wakefield intended that the "proceeds from these sales of lands [could be spent] in paying for the passage of selected young married couples... which would go far in curing social evils [which convict trade had allegedly produced]" (see Appendix D, Article 3).<sup>45</sup>

Wakefield believed that *land, labor and capital* could be systematically balanced, and that in the absence of any one of these, colonial paralysis would result. According to Wakefield, and unlike nineteenth century American land policy, land grants were considered counter-productive for both laborer and capitalists because free land grants would inevitably lead to undue land dispersion, while, similarly, Wakefield did not favor the auctioning of lands because this practice would result in "further restriction or extraction of money from the settler."<sup>46</sup> Consequently, land was to be disposed of

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through sale.

Wakefield, although desiring a fixed price for purchased or leased lands, intentionally never proposed a specific price,<sup>aa</sup> other than to infer that the price should be a "sufficient price" or "medium price."<sup>47</sup> Through these means, Allen concludes, a ready supply of labor could be provided, while preventing laborers "from too quickly acquiring land by the savings of [their] high wages, and too readily gratifying the desire, inherent in all men, of independence."<sup>48</sup> Rather, Wakefield intended to allow individual colonial administrators, considering the "facts before his face", to "raise the price [of land within their individual colonies] by degrees with a cautious but resolute hand."<sup>bb</sup>

Bill Brugger and Dean Jaensch proposed a similar outline of Wakefield's proposals.

Centralized control over the Australian colonies should be replaced by centralized regulation of the price of land. Land should be priced sufficiently high to allow for a pool of landless labor to work it, but not so high as to choke off upward social mobility. Secondly, all or part of the proceeds of land sales were to be used to finance *immigration* [to Australia from Britain]. The aim was to recreate part of the English class system in Australia (the transportation of the 'fully grown tree' and not 'the planting of saplings'). Together with this went a scheme for self-government. This was said to be a return to the economical form of administration which applied to some of the original American colonies before the eighteenth century imposition of central control.<sup>49</sup>

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<sup>aa</sup> See Appendix D, Article 1 of *Letter from Sydney, The Principal Town of Australasia*.

<sup>bb</sup> Wakefield wrote, "How is the proper price to be ascertained? I frankly confess that I do not know how. I believe that it could be determined only by experience."

Wakefield, *Letter to Sydney*, p. 171 in Stephan H. Roberts, *History of Australian Land Settlement (1788-1920)* (Melbourne: MacMillan and Co., 1924), p. 83.

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The Wakefield system was intended to work *automatically* through a balance of land sales, labor, and emigration. According to Stephan Roberts, "if there were more sales, more labor would be needed, and there would be a revenue to bring in this labor. On the other hand, if land sales were reduced, not so much fresh labor would be needed, but since emigration was dependent on the land-fund, none would come. A harmony or balance was always secured by this self-adjusting theory."<sup>50</sup>

In practice however, the Wakefield policies were neither balanced nor effective in distributing lands to Australian settlers. The Wakefield policy of all white immigration began in 1831 at the same time free land grants were abolished in the Australian colonies, and officially continued until the last quarter of the nineteenth century<sup>cc</sup>, although related all white immigration policies still guide Australian politics.<sup>dd</sup> Unlike American land policy, and specifically different from American policy following the

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<sup>cc</sup> As convict transport from Britain to Australia was phased out during the 1850's through the 1870's, so too were the grandiose plans for a British class system. The class system could not be established without a ready supply of labor to work the lands. In its place, developed a native *Australian populism* based upon the *pioneer pastoralist and collectivism*, which reflected the age and Australia's distinctive environment.

J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 16.

<sup>dd</sup> According to Dean Jaensch and Max Teichmann, "the tight controls and the commitment to 'White Australia' did not begin to ease until the late 1950's, and then only after intense international and internal pressure... In 1965 the [Australian Labor] party removed any reference to White Australia from its platform." Not until the Whitlam government (1972-1975) however, did the Australian Labor Party (A.L.P.) officially abolish the 'White Australia' from its platform. Australia's Liberal Party, as of 1988, continues to openly discriminate against non-whites.

Dean Jaensch and Max Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne: MacMillan, 1988), p. 215.



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1840's, "the [Wakefield] policy was one dictated from the center of political power for economic reasons and not one formulated in accordance with the wishes of the men actually on the frontier."<sup>51</sup>

Not fully understanding the conditions of Australia's frontier is a principal reason why, by nearly all accounts, Wakefield's system failed within Australia. A leading obstacle which faced Australia's settlement policies and which was overlooked by colonial reformers was that Australia's generally arid environment was not suitable to either utilitarianism nor large settlement. Brugger and Jaensch characterize this point when they state that British utilitarian followers within Australia "were united in their commitment to colonial self-government, but this would only result in the greatest good for the greatest number by more rather than less [imperial] control over the relationship between labor and land."<sup>52</sup>

Wakefield's desired self-regulating equilibrium between labor, land sales and emigration also did not occur because Wakefield's intentionally vague theories lacked specific settlement guidelines and allowed too much discretion to either chance and to the colonial land administrators. For example, a *sufficient price* for land was often interpreted by administrators and antagonists as a *high price*. Likewise, unlike immigration to the United States at that time, all white immigration to Australia from Britain was slow, resulting in a scarcity of labor, while Australia's generally harsh

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environment provided little hope of purchasing lands and maintaining a livelihood from working Australia's often inhospitable and unpredictable lands.

Periodically, Australia's largely independent colonies experimented by allowing land administrators to provide incentives for settlement such as the issuing of limited land grants to settlers. However, even this proved ineffective, since rather than encouraging migration to Australia, limited land grants had a counterproductive effect of enabling badly needed laborers from leaving their then indentured responsibilities and settling upon lands of their own. This phenomenon, together with limited powers of government enforcement, undoubtedly contributed to a further scattering of labor, and to the arrival of Australia's notorious *squatters era* which formally existed between 1820 and 1860.

Ultimately however, the illegal squatting of land resulted in *regional land policies* in Australia. Neither *restriction* nor *liberalization* of Australian land policy appears to have altered the fact that Australia's inhospitable, arid environment favored neither large numbers of government land sales nor vital immigration proposed by Wakefield and desired by colonial administrators.

This view is reflected by R. C. Mills when he argues.

Economically the [New South Wales] colony suffered from scarcity of labor due to the fact that no one would willingly work for hire as an agricultural laborer while he could so easily obtain a free grant of land. Nor could the temptation of free land be withstood by the emigrant whose passage had been paid on condition of

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his accepting employment.<sup>53</sup>

Conditions within New South Wales during these times are generally indicative of Australia's broader colonial land policies during the nineteenth century, as Australia's public or *crown lands* became increasingly difficult to acquire.<sup>54</sup> As a result, few lands in Australia were sold and transferred to private ownership. Of lands which were purchased, many were later abandoned to be absorbed either by large pastoralists or pastoral companies, or reverted back to the Australian Government.

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<sup>54</sup> Prior to the 1820's, English settlement in Australia was largely restricted to areas near the coasts surrounding Sydney. In 1829, a 'nineteen counties' proclamation was given, which forbid settlement beyond these prescribed borders. The proclamation had little effect and actually encouraged illegal an *unauthorized* settlement of lands or *squatting* beyond these boundaries, a practice which would commonly continue for the next forty years and beyond. The Wakefield proposition was introduced in Australia in 1831 following labor shortages, illegal land squatting, and lack of funding for immigration. In 1831, Imperial agents responded by abolishing all free land grants, and by increasing the purchase price of public lands to five shillings per acre. Selling land during this period proved difficult, so Imperial authorities in 1838 increased public land prices to twelve shillings per acre. In 1833, 1834 and again in 1836, the British experimented by abolishing sale by auction, and by again raising land prices to a fixed price of twenty shillings per acre. In 1842, the *Australian Lands Act* raised the price of lands to twenty shilling per acre throughout all Australian colonies. Through the *Land Purchase Regulations Act* of 1844 and late the *Imperial Waste Lands Occupation Act* of 1846, pre-emption leases were established, which provided the holder with between a one and fourteen year lease. In 1861, with the *Crown Lands Acts*, one could obtain freehold title to between 40 to 320 acres at one pound per acre, with a ten pounds down payment.

H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), pp. 55-58; and J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), pp. 14-24.

Robert Clancy, "Public Land in the U.S.A.," *Good Government*, Feb. 1988, pp. 3-7.

## Endnotes to Pages 85 To 125

3. <sup>1</sup>Robert Clancy, "Public Land of the U.S.A.," *Good Government*, 874 (Feb. 1988),
- <sup>2</sup>Richard D. Clayton, "The Sagebrush Rebellion: Who Should Control the Public Lands?," *Utah Law Review*, 21 (1980), 505.
- <sup>3</sup>J. M. Powell, "Patrimony of the People: The Role of Government in Land Settlement," in *The Australian Experience, Essays in Australian Land Settlement and Resource Management*, ed. R. L. Heathcote (Melbourne: Longman Cheshire, 1988), p. 14.
- <sup>4</sup>Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, Nov. 1968), p. 33.
- <sup>5</sup>R. D. Lumb, *Australian Constitutionalism* (Sydney: Butterworths, 1983), p. 15.
- <sup>6</sup>Jerome C. Muys, "The Federal Lands," in *Federal Environmental Law*, eds. Erica L. Dolgin and T. G. P. Guilbert (Saint Paul, MN: West, 1974), p. 493.
- <sup>7</sup>D. E. Fisher, *National Resources Law in Australia* (Sefton, N.S.W.: The Law Book Company, 1987), p. 62.
- <sup>8</sup>Fisher, p. 62.
- <sup>9</sup>Powell, p. 14.
- <sup>10</sup>Fisher, p. 140.
- <sup>11</sup>Fisher, p. 63.
- <sup>12</sup>Fisher, p. 157.
- <sup>13</sup>Fisher, p. 69.
- <sup>14</sup>Fisher, p. 157.
- <sup>15</sup>Fisher, p. 158.
- <sup>16</sup>Fisher, p. 63.
- <sup>17</sup>H. C. Allen, *Bush and Backwoods, A Comparison of Frontier in Australia and the United States* (East Lansing, MI: Michigan State University), pp. 12-13.

<sup>18</sup>E. Dick, *The Lure of the Land* (1970), p. 347 in Richard D. Clayton, "The Sagebrush Rebellion: Who Should Control the Public Lands?," *Utah Law Review*, 21 (1980), 508.

<sup>19</sup>*Public Lands Statistics* (1990) (Washington D.C.: Bureau of Land Management, 1990), p. 4.

<sup>20</sup>Allen, p. 61.

<sup>21</sup>F. L. Paxson, "A Generation of the Frontier Hypothesis," *Pacific Historical Review*, 2 (1933), 46 in Fred Alexander, *Moving Frontiers, An American Theme and Its Application to Australian History* (Melbourne: Melbourne University, 1947), p. 7.

<sup>22</sup>Frederick Jackson Turner, *The Frontier in American History*, (1893; rpt. New York: Holt, 1920), p. 32.

<sup>23</sup>Turner, p. 37.

<sup>24</sup>G. V. Portus, *The Australian Quarterly*, 14 (June, 1942), 30-41 in H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), p. 36.

<sup>25</sup>C. Goodrich, "The Australian and American Labour Movements", *The Economic Record* (Melbourne, 1928), p. 191 in Fred Alexander, *Moving Frontiers, An American Theme and Its Application to Australian History* (Melbourne: Melbourne University, 1947), p. 36.

<sup>26</sup>Henry Lawson, *Prose Works*, Vol. 1 (Sydney, 1937), pp. 33-34 in H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), pp. 11-12.

<sup>27</sup>Geoffrey Barraclough and Norman Stone, eds., "The Making of the United States: Westward Expansion 1783 to 1890," *The Times Atlas of World History*, 3rd ed. (London: HarperCollins, 1991), p. 221.

<sup>28</sup>Roderick Nash, *Wilderness and the American Mind*, 3rd ed. (New Haven, CT: Yale University, 1982), p. 74.

<sup>29</sup>Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 5 and 57.

<sup>30</sup>James W. Ely, Jr., "Property Rights" in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University, 1992), p. 683.

<sup>31</sup>Ely, p. 691.

<sup>32</sup>Eric T. Freyfogle, "Nollan v. California Coastal Commission," in *The Oxford Companion to the Supreme Court of the United States*, ed. Kermit L. Hall (New York: Oxford University, 1992), pp. 595 and 691.

<sup>33</sup>Ely, p. 683.

<sup>34</sup>Richard Manning, *Grassland: The History, Biology, Politics, and Promise of the American Prairie* (New York: Penguin, 1995), p. 96.

<sup>35</sup>David Howell to Jonathon Arnold, Feb. 21, 1784, in William R. Staples, *Rhode Island in the Continental Congress*, ed. Reuben Aldridge Guild (Providence, 1870), 479.

<sup>36</sup>Humphreys, "Poem on the Happiness of America," 249, 251 in Peter S. Onuf, *Statehood and Union, A History of the Northwest Ordinance* (Bloomington, IN: Indiana University, 1987), p. 10.

<sup>37</sup>Roy M. Robbins, *Our Landed Heritage; The Public Domain 1776-1936* (Princeton, 1942) in H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), p. 49.

<sup>38</sup>*Maryland Gazette* (Baltimore), April 17, 1787 in Peter S. Onuf, *Statehood and Union, A History of the Northwest Ordinance* (Bloomington, IN: Indiana University, 1987), p. 9.

<sup>39</sup>Gates, p. 12.

<sup>40</sup>Manning, p. 96.

<sup>41</sup>Gordon Greenwood, ed., *Australia: A Social and Political History* (Sydney, 1955), p.104 in H. C. Allen, *Bush and Backwoods, A Comparison of the Frontier in Australia and the United States* (East Lansing, MI: Michigan State University, 1959), p. 57.

<sup>42</sup>Edward Gibbons Wakefield, *A Letter from Sydney, The Principal Town of Australasia*, ed. R. C. Mills (London: J. M. Dent and Sons, 1929), pp. viii-ix.

<sup>43</sup>Stephan H. Roberts, *History of Australian Land Settlement (1788-1920)* (Melbourne: MacMillan, 1924), pp. 78 and 93.

<sup>44</sup>Powell, p. 16.

<sup>45</sup>Wakefield, pp. vii-xiii.

<sup>46</sup>Roberts, p. 79.

<sup>47</sup>Roberts, pp. 80-81, and 88-89.

<sup>48</sup>Allen, p. 55.

<sup>49</sup>Bill Brugger and Dean Jaensch, *Australian Politics: Theory and Practice* (North Sydney, N.S.W.: George Allen & Unwin Australia, 1985), p. 6.

<sup>50</sup>Roberts, p. 80.

<sup>51</sup>Allen, p. 55.

<sup>52</sup>Graham Maddox, *Australian Politics: Theory and Practice* (North Sydney, N.S.W.: George Allen & Unwin Australia, 1985), p. 5.

<sup>53</sup>Wakefield, pp. vii-xiii.

☆ Chapter Three: ☆

U.S. Federal Land Law Development:  
America's National Domain &  
The Great Lands Enactments

AMERICA'S NATIONAL LAND POLICIES were first set into motion as a result of the *American Revolution*, the *States' Land Cession agreements*, and the nation's first federal land laws, commonly known as the *Northwest Land Ordinances*. As will be made evident throughout this chapter, all three events greatly strengthened the role of the United States Federal Government by simplifying the founding of America's National Domain (national public lands), accelerating the distribution of public lands to settlers and by providing the necessary constitutional and political powers necessary for Congress and the President to later legally preserve millions of acres of America's public lands.<sup>a</sup>

As a consequence of these legislative acts by America's second *Continental Congress*<sup>b</sup>,

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<sup>a</sup> The hope, optimism, economic prosperity, and national pride created by the democratic distribution of public lands in the United States helped to inspire and ingrain the American public with an intelligible national land ethic. During the latter half of the nineteenth century, *public land conservation* began replacing *public land distribution* as among America's most notable social reforms. Increasingly, legal preservation of *American wilderness* presented itself as a distinguishing feature of America's social development, cultural sophistication, and economic growth and potential.

<sup>b</sup> During the Revolutionary War era and prior to the establishment of the United States Congress and the adoption of the United States Constitution in 1789, two American legislative assemblies, each referred as the Continental Congress, governed the United States. The first convened in 1774 to voice grievances against Great Britain. The second, convening in 1775, established the Continental Army and served both as the legislative and as the executive arm of the government until the Constitution took effect in 1789.



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the ownership and administration of the majority of America's public lands were transferred from the states, to become a clearly defined role of the United States Federal Government. Equally important however, these acts laid the early foundation for what would become the United States Constitution. This chapter will provide limited comparisons between the United States and Australia, since these foresaid events in United States' history have no counterpart in Australian history.

### *Chapter Summary*

The *Great States Lands Cession* emerged as an united and unanimous agreement of all the American States during the *American Revolutionary War*, to transfer virtually all public lands within the nation, earlier claimed by the American colonies by virtue of their original and often antiquated British Colonial Land Charters, to the United States Federal Government. With this enactment and the adjunct enactment of the *Articles of Confederation* (America's first constitutional document), the Federal Government acquired full and sole authority as the administrator of nearly all public properties within America's mostly unsettled western frontier. In addition, compromise and agreement among the states reached during and following the lands cession debates served at least temporarily until the *American Civil War* (1861-1865), to strengthen the union of states during its formative years, and to strengthen the newly developing powers of the United States Federal Government. In particular, since the jurisdictional ownership of

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lands and natural resources remain an immense source of economic and political power,<sup>c</sup> the transfer of all western land claims to the Federal Government was monumental in the growth of national powers in the United States. This view is reflected by the land cession agreements which established the *national domain*, and which following their adoption, transformed America's Federal Government from a weak and nearly non-existent influence in American politics, to a legislative body able to unify the American States against the British during the Revolutionary War, and afterwards propel an international migration of settlers to the United States on a scale never before experienced in world history. The States Land Cession agreement was also significant because this accord represents cooperation and sacrifice among American States. Furthermore, the agreement *prompted the need* to quickly enact important national legislation to settle these ceded western lands, subsequently known as the *Northwest Territories*.

Beginning in 1784, the Continental Congress approved a progression of three laws that would commonly become known as Northwest Land Ordinances. These territorial laws included the *Government or Territorial Ordinance of 1784*, the *Land Ordinance of 1785*,

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<sup>c</sup> According to figures obtained by the *U.S. Geological Survey* and others (August 1979), federal lands contain a large proportion of the United States' known mineral and energy reserves. Of the roughly 30 percent of the United States which is publicly owned by the federal government, it is estimated that these lands contain 84.9 % of the nation's oil deposits, 72% of shale oil, 37.4% of natural gas, 45% of timber, 50% of geothermal, 3.7% of coal, and 37.4% of the America's uranium ore.

<sup>/</sup> U.S. Geological Survey, Department of the Interior, National Forest Service, Department of Energy, University of Texas in Richard D. Clayton, "The Sagebrush Rebellion: Who Should Control Public Lands?," *Utah Law Review*, 21 (1980), 505-533.

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and the *Northwest Ordinance of 1787*. The Northwest Ordinances were more analogous to a *regional constitution*, than simple legal ordinances, as their names may imply. Together, these laws specified how the newly acquired *Northwest Territories* and future public lands added to the national domain would become settled and would eventually become 'states' within the union, on an *equal footing* with already established states.

Different from earlier British colonial and American territorial laws which were often complex and difficult to interpret, forever changing, and which were often a source of conflict between the American colonies and England, and indeed between the American colonies themselves, the Northwest Ordinances were generally popular among settlers and as a result, were much more successfully implemented than were earlier colonial land laws. The reasons for this are quite simple. The Northwest Ordinances emphasized economic development of the West, facilitated the early sale of public lands to settler immigrants, provided various levels of territorial and Congressional representation to people living in the Northwest Territories, and established local government able to address western grievances. The Northwest Ordinances were also relatively easy to understand and were detailed, as compared to the intentionally vague Wakefield land settlement policies attempted in Australia (see *Northwest Ordinances, Appendices A, B and C*).

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Likewise, the goals of the Northwest Ordinances were also clear.

- 1) Provide military security to the region from foreign invasion.
- 2) Facilitate the sale and distribution of land, and in the course lessen the Revolutionary War debt.
- 3) Encourage families to move to and settle the West.
- 4) Inspire and improve national and international commerce and trade.
- 5) Promote and secure additional states in joining the American union of states.
- 6) Strengthen the role of the Federal Government within the Western territories.

Finally, the Northwest Ordinances were effective because as Michael Kraus states, "the ordinances were a striking departure from earlier imperial structures. Whereas expanding countries adding new regions ordinarily kept them in an inferior position, the United States arranged to have the new states enter the Union as equal partners with the old."<sup>1</sup>

### *Revolution: Origin of American National Policy*

The American States Land Cession and the Northwest Land Ordinances occurred in response to the American Revolutionary War with Great Britain. Restrictive British land policies preventing westward settlement of the American frontier were among the leading grievances which lead the American colonists to desire their independence, and eventually resulted in war between the American colonies and the British Government.

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Disputes between the colonies and Britain often centered upon colonial land policy, and specifically upon the often out-dated provisions of Britain's American colonial land charters.

### *Headrights, and American Colonial Land Policy*

Prior to the Revolutionary War, the American colonies vied with each other in attracting settlers to their colonies and to their claimed western frontier lands. Fifteen years prior to the American Revolutionary War (1760-1775), immigration to the United States continued to be high, with an estimated 250,000 new arrivals.<sup>2</sup> Through their British land charters, the American colonies, much like the later British colonies in Australia, were provided leeway in establishing their colonies' own unique administrative land policies, as long as these policies conformed to their colonies' particular land charters and to general British directives.

To entice settlers to colonize their lands, individual colonies attempted to lure settlers, by offering them incentives, including "headright" land grants, which provided land title at little or no cost to settlers as encouragement to occupy and cultivate lands. The headright system was a method to instill an English class system in America, not unlike

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the Wakefield scheme latter attempted in Australia.<sup>d</sup>

Like the Virginia colony, New York historically attracted settlers by granting large land areas through 'headright' land grants, however New York was more selective than Virginia, bestowing these lands to strictly "favorites of the State."<sup>e</sup> In contrast to both New York and Virginia; Pennsylvania and Maryland during their colonial histories, readily allowed for the sale of property. Pennsylvania provided full land title at comparably high cost (after 1713, commonly 10 pounds per 100 acres). Maryland was more flexible than Pennsylvania, and allowed limited headright land grants through modest initial purchase and periodic quitrent payments. Through this means, Maryland

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<sup>d</sup> The "headright system" was initiated by the Virginia Colony in the early 1600's and attempted to attract "men of capital" to their colony. In subsequent years, the Virginia system of largely unrestricted free land grants was commonly accepted by the Mid-Atlantic and Southern States. Based upon the number of indentured servants commissioned by generally large land owners, large estates could be established at little personal expense other than small annual quitrents. Prior to 1618, the Virginia headright system offered 100 acres for each person settling in Virginia for three years. After 1618, the system was changed to 50 acres for each person transported and for each free immigrant and member of his family. Abuses to the system lead to the formation of large estates of many thousands of acres. In 1705 headright grants were reformed, limiting patents to 4,000 acres and requiring wealthy landowners to prove within three years that the lands were being improved, or face losing these lands to the crown. The *Act of 1705* however circumvented the process by allowing land owners the right of purchasing lands at 5 shillings for 50 acres. Consequently, large land holdings continued to be common throughout many of the early American Colonies. Headright land grants were abolished following the American Revolution and were replaced by direct government land sale or later grants, which allowed settlers irrespective of social or ethnic class, to acquire lands from either the federal or state governments or through purchase from land speculators.

Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, 1968), pp. 35-39.

<sup>e</sup> Through the New York land system, high level extortion within the British Government allowed a fortunate few to amass properties in excess of one million acres. Among New York families receiving vast land holding included: Philipsburgh manor of 156,000 acres; Livingston manor of 160,000 acres; Highland patent of 205,000 acres; Kayeraderosseras patent of 400,000 acres; Evans patent of 512,000 acres and the Hardenburgh patent of 1,000,000 acres.

Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, 1968), p. 42.

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did not grant land title, however title purchases could be acquired through more moderate payments of 40 shillings per 100 acres, and with a recurrent annual quitrent of 4 shillings per 100 acres.<sup>f</sup> Headright grants within the colonies almost exclusively favored the wealthy and those of high social status, and like the Wakefield scheme within Australia, indentured servants and laborers seldom profited, as they were seldom granted lands, because they were rarely freed of their employers' obligations.<sup>3</sup>

The New England States of Massachusetts, Connecticut and Rhode Island also provided land grants. The New England "township grants" were usually granted to large organized groups, in the hope that these land grants would create productive Christian communities. To assist in this desired effect, each township was often provided with reserved lots for ministers, churches and schools.<sup>4</sup>

The colonies were highly competitive, as it was widely believed during this pre-malthusian time, that the more land and population their colonies could control, the more economically prosperous their colonies would become. As will be demonstrated, this is a major reason why the colonies, at the time of the states land cession, reluctantly relinquished their territorial claims to America's Federal Government.

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<sup>f</sup> Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, 1968), p. 41.

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### *The British Land Charters*

The 'First Charter of Virginia' of 1606 was among the first British land charters granting right of lands to the American colonies. Subsequent to the Virginia colony, additional land charters soon followed including land grant charters to the largely independent colonies of New England (1620), Massachusetts Bay (1629), New Hampshire (1629), Maryland (1632), Maine (1639), Rhode Island (1663), Carolina (1663), New Jersey (1664), Pennsylvania (1681), Georgia (1732) and New York (1764).

Virginia's most identifiable land charter, *The Second Charter of Virginia (1609)*, provided to

"...give, grant and confirm...all those Lands, Countries, and Territories, situate, lying, and being in that Part of America, called Virginia, from the Point of Land, called Cape or Point Comfort, all along the sea coast to the Northward, two hundred miles, and from the said point of Cape Comfort, all along the Sea Coast to the Southward, two hundred Miles, and all that Space and Circuit of Land, lying from the Sea Coast of the Precinct aforesaid, up to the Land throughout from Sea to Sea, West and Northwest..."<sup>5</sup>

Other colonial land charters were equally and graphically obscure. For example, the land charters for Massachusetts, Connecticut, New York, North and South Carolina, Georgia, New England, and New Jersey each provided colonial boundaries extending east to west across the North American continent, along parallels of latitude, "from sea to sea", or "from the Atlantick and Western Sea and the Ocean of the Easte Parte."<sup>6</sup>



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Due to the vagueness of geographic knowledge at that time, many of these colonial charters were unclear, which led to confusion, and to border disputes throughout much of America's colonial history,<sup>9</sup> to the extent that civil warfare threatened the colonies. Most notable of these conflicts included the border disputes between Virginia and Maryland which resulted in the drafting of the *Mason-Dixon line*,<sup>h</sup> and the dispute between New York and New Hampshire which resulted in the drawing of the *Preemption Line* through western New York and eventually led to the creation of the State of Vermont.<sup>i</sup>

### *The Proclamation Lines of 1763 and 1768*

In 1763 with the signing of the *Treaty of Paris*, the French surrender in the *Seven Years War* (1756-1763) in Europe, and the French military retreat in the *French and Indian War* (1754-1760) in North America, Britain brought to conclusion its many years of

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<sup>9</sup> Among the best known of these border disputes include feuds between: 1) Maryland from Pennsylvania, 2) Maryland from Virginia, 3) Massachusetts from New Hampshire and New York, 4) New Hampshire from New York, 5) New York from Connecticut, 6) Connecticut from Pennsylvania.

Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, Nov. 1968), p. 49.

<sup>h</sup> The *Mason-Dixon line* was established between Maryland and Virginia during the years 1763-67, and provided for the rightful navigation of the Potomac River. The line was also used to establish state boundaries between Maryland and Pennsylvania, and during the *American Civil War* divided the free states of the North from the slave states of the South.

William Morris, ed., *The American Heritage Dictionary of the English Language* (Boston: Houghton Mifflin, 1981), p. 803.

<sup>i</sup> Following a land dispute between New York and New Hampshire, New York was, by Royal decree, awarded the lands jointly claimed west of New Hampshire. New Hampshire never accepted the agreement and, following United States independence, an agreement between these states was finally reached, when in 1791, the new State of Vermont occupied the disputed area.

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warfare with France. Following the submission of French forces, territorial possessions within what is today the United States changed drastically. With the Treaty of Paris, all lands east of the Mississippi River became the undisputed property of Britain.<sup>7</sup> Through this agreement, France relinquished all claims within North America, with minimal exceptions.<sup>j</sup> Spain's presence in North America likewise deteriorated due to Britain's military victories. For Spain's relative minor role in allying itself with France in the *French and Indian War*, Britain coerced Spain into relinquishing portions of Spanish territory east of the Mississippi River (the Florida Territory), in exchange for the vastly larger Louisiana Territory, west of the Mississippi River.<sup>k</sup>

During this same year (1763), Britain began imposing territorial restrictions upon the American colonies. Initially, by relinquishing claim of the Louisiana Territory west of the Mississippi River to Spain, Britain disavowed its ownership of these lands, and

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<sup>j</sup> Following the *Treaty of Paris*, France maintained the territories of French Guadeloupe in South America, and the island territories of St. Pierre, Miquelon, Guiana, Martinique, St. Lucia. Other territories maintained include two small fishing islands in the Gulf of St. Lawrence.

Craig Brown, ed., *The Illustrated History of Canada* (Toronto: Lester, 1991), p. 194; and Oliver Perry Chitwood, *A History of Colonial America* (New York: Harper and Brothers, 1931), p. 404.

<sup>k</sup> Spain was compelled to hand over its Florida Territory to Britain, in exchange for Spain acquiring Cuba. Through this rather complex change of events, Spain was compensated for its loss of Florida when Britain ceded the former French Louisiana Territory to Spain. Through this act, Spain acquired the vast western basin of the Mississippi River or approximately 828,000 square miles. In 1802, following the defeat of the Spanish to France, Napoleon pressured Spain to return the Louisiana Territory to France, as a result of the *Treaty of San Ildefonso (1800)*. President Thomas Jefferson purchased the territory from France in 1803, for 23 million dollars.

Chitwood, p.404 and Bernard Shanks, *This Land is Your Land: The Struggle to Save America's Public Lands* (San Francisco: Sierra Club Books, 1984), p. 23; and David Saville Muzzey, *An American History* (Boston: Ginn and Co., 1925), pp. 175-176.

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consequently annulled large portions of its colonial land grants formerly destined and legally promised to the American colonists through the *sea to sea* land charters.<sup>8</sup> This action seriously breached both American Colonial and British Law, and caused great confusion and alarm among the American colonists, and among the many colonists who had already moved into the western territories as supposedly permitted by their colonial charters.

Simultaneously, the British were alarmed by the independent-minded colonists, who had already moved westward, and had, reportedly, repeated injustices against the Native Americans in the form of "unscrupulous traders and speculators, who had cheated [the Indians] of their furs and robbed them of their lands."<sup>9</sup>

In 1763 King George III of Britain enacted the *Proclamation Line*, in a radical attempt to change the management of lands and Indian affairs. Through royal decree, settlement west of the crest of the Allegheny and Appalachian Mountains was prohibited, with this area thereafter becoming an Indian reservation. Also, according to this proclamation, only British imperial agents could approve the sale of Indian lands, and those settlements already made within the reservation area were ordered to be abandoned.

Other historians have developed other explanations as to why the proclamation line was

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adopted. Hockett maintains that the imaginary proclamation line was intended to safeguard Britain's fur trade with the Indians,<sup>1</sup> while Muzzey maintains that the act intended, "to curtail the power of the [American] colonies, discredit their old sea-to-sea [land] charters, and confine them to the narrow region along the Atlantic coast, where they could be within easier reach of the British authority."<sup>10</sup> It appears that all three explanations are likely in part accurate.

Pioneers already settled within this western region chafed at the notion of the proclamation line and with little British enforcement, the proclamation was largely disregarded by the American colonists. In 1768, in a vain attempt to maintain British order, the proclamation line was further expanded westward to accommodate additional colonial expansion.<sup>11</sup> This attempt met similar American indifference.

Eventually the heavy costs of administering trade with the Indians resulted, in 1768, with the British abandoning their Indian trade restrictions and returning this role to the American colonies. Britain however counselled the colonies to enact more rigid controls. When firmer controls were not ratified by the American colonies, relations

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<sup>1</sup> In creating the proclamation line, the British had favorable and controlling intentions in mind. In addition to restricting the America's westward colonial expansion, the British hoped to "to protect the fur trade from the injury which would sustain from the inrush of settlers," and "to assure the natives, *Native Americans* (italics added), that their would be protected and encroachments prevented until, by negotiations from time to time with the proper officers, they might agree to relinquish portions of their territory."

H. Hockett, *Political and Social History of the United States*, p. 114 in Oliver Perry Chitwood, *A History of Colonial America*, (New York: Harper and Brothers, 1931), pp. 605-606.

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between Britain and the Americans quickly deteriorated.

### *The Quebec Act of 1774*

In 1774 the British enacted further restrictions upon the colonies with the *Quebec Act of 1774*. Relations soon went from bad to worse. Through the Quebec Act, Britain attempted to transfer ownership and control of lands within the area west of the American colonies and east of the Mississippi River, to the newly established Quebec Province in Canada. This action deprived the American colonists of nearly all of their remaining sea-to-sea British land grants and would have deprived the colonists of an estimated 177 million acres east of the Mississippi River<sup>m</sup>, as well as all lands west of the Mississippi River. In addition, the Quebec Colony consequently became the sole administrator of trade relations with Native Americans within this region. This edict brought forward one of the most divisionist and serious grievances held against the British by the American colonists.

The Quebec Act likewise attempted to curb settlement west of the Allegheny Mountains and east of the Mississippi River, an area already widely settled by American colonists.

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<sup>m</sup> Gates has determined that Massachusetts, Connecticut, New York, and Virginia would have lost an estimated 176,725,760 acres, if the Quebec Act would have been fully enacted.

Thomas Donaldson, *The Public Domain* (Washington, 1884), p. 87; and *Public Land Statistics* (Washington: Bureau of Land Management, 1965), p. 4 in Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger Publishing, Nov. 1968), p. 49.

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Through this British declaration, Quebec was expanded southward to include all territory between the Mississippi and Ohio rivers, subsequently referred to as the *Northwest Territory*. Through this decree, American colonial governors were prohibited from issuing land grants, the headright land grant system was revoked, land surveys began being required, and all future land sales were ordered to be placed upon public auction at a minimum price of six pence per acre.<sup>12</sup> French civil law was also instituted in the expanded Quebec, which resulted in the preferential treatment of Catholics and the abolishment of trials by jury.<sup>13</sup> The land commonly referred to as the Northwest Territory, the region south of the Great Lakes and between the Mississippi and Ohio rivers, and which had allegedly been granted to the American colonies through their colonial charters for the purposes of expansion, was, through the Quebec Act of 1774, abruptly taken from the colonists.

So intrinsic was the individual right of property to the American colonists, that collectively American and British differences pertaining to territorial and civil rights, taxation and trade restrictions, Indian relations, and the seemingly severe punitive enforcement of the new controls, collectively lead to the formal declaration by the American colonists of the "Declaration of Rights and Grievances" in 1774. This manifesto proclaimed that the American rights "to life, liberty, and property were secured by the principles of the British Constitution, the unchanging laws of nature, and their colonial charters."<sup>14</sup>

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American colonial statesman, Thomas Jefferson repeated these views in his *Summary View of the Rights of British America of 1774*.

From the nature and purpose of civil institutions, all the lands within the limits which any particular society has circumscribed around itself, are assumed by that society, and subject to their allotment only. This may be done by themselves assembled collectively, or by their legislature to whom they may have delegated sovereign authority and, if they are allotted in neither of these ways, each individual of the society may appropriate to himself such lands as he finds vacant, and occupancy will give him title.<sup>15</sup>

Ensuing disputes over property rights in large measure lead to the drafting of the *United States Declaration of Independence* and to the onset of the *American War of Independence*. According to this declaration, as authored by Thomas Jefferson,

[The King of England] has endeavored to prevent the population of these states; for that purpose, obstructing the laws for naturalization of foreigners, refusing to pass others to encourage their migration hither, and raising the conditions of new appropriations of lands.

*United States Declaration of Independence (cl. 9)*

### *The Great States Land Cession*

During the *American Revolutionary War (1775-1783)*, continued disputes concerning the territorial rights to western lands not only prevented the newly established American union of states from militarily uniting and defeating the British, but these disputes also threatened civil war among the states. By this time, an estimated 415 million acres (168 million hectares) west of the colonies had become either individually or jointly claimed by various states.<sup>16</sup> Maintaining order while resolving these near crisis

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conditions depended upon quick, decisive and lucrative management of America's public lands. The Continental Congress established shortly after the start of the war was without a unifying written constitution and consequently was largely powerless, while the union of states was weak and tenuous without a strong central government providing necessary leadership.

Numerous other problems faced the nation during the midst of the revolutionary war. The states were near complete economic bankruptcy as a result of the war, and the national government had little authority or influence in collecting necessary taxes. Without standing credit from overseas markets, international trade had nearly ceased. Domestically, trade barriers between the states made the transportation of goods difficult, while state border disputes became increasingly common. The nation had become largely a confederacy of states on the verge of collapse. An unprecedented plan was urgently needed to unite the states, strengthen the national government, propose a plan to successfully settle the western territories, and militarily secure the western territories from foreign invasion.

### *The Maryland and Virginia Dispute*

A proposition to form a federation of American States was established shortly following the start of the Revolutionary War in 1775. A written convention was submitted, but due



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to continuing internal disagreements over how Western lands should be distributed among the states, America's first constitution, the *Articles of Confederation*, was unable to receive the required unanimous state ratification. As early as 1776, Maryland urged other states to agree to cede all western land claims to the United States Federal Government. Maryland argued that the "backlands" should be maintained as a "common property", since the territory would be "wrested from the common enemy by the blood and the treasure of the thirteen states" and therefore "should be considered a common property."<sup>17</sup>

New Jersey supported Maryland's claims, insisting that Virginia, Massachusetts and Connecticut had forfeited the Northwest Territories to the United States Federal Government. This view claimed that through acts of the British Proclamation of 1763 and the Quebec Act of 1774, the early British land charters had been made null and void. Similarly, the New Jersey Legislature maintained that, "it was the confident expectation of this state that the benefits derived from a successful contest, were to be general and proportionate, and that the property of the common enemy, falling in consequence of a prosperous issue of the war, would belong to the United States, and be appropriated for their use."<sup>18</sup> Besides, New Jersey asserted, America's victory over the British in the Illinois Territory (1778-1779), secured the Northwest Territory for the United States.

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Virginia, however, claimed that since Patrick Henry, Governor of Virginia, had commissioned the Illinois attack on the British with largely Virginian forces, that the capture of the Northwest and of British Governor of the Northwest Territories, Hamilton, secured Virginia and other states, and not the national government, as the rightful recipient of the Northwest Territories.<sup>19</sup>

The jurisdictional debate surrounding the undeclared public lands of the Northwest Territory, which at the time was neither national nor state property, as well as forming a union of states from a fragile and loose confederation during the Revolutionary War, appears to have been interdependent upon one another. The survival of the colonies depended upon rapidly nationalizing the nation's military forces, as well as nationalizing the nation's public land policy. Ironically, federation among the American States could not take place until the issues of public property were resolved, while the British could not be defeated without the unified effort of America's combined colonial armies.

Unable to form a mutual consensus and seemingly powerless to resolve either controversy, the thirteen states began to divide themselves into two political factions, known commonly as the *landed states* and the *land-less states*. The landed states included Connecticut, Georgia, New York, North Carolina, Massachusetts, South Carolina and Virginia. These states believed that individually they had legitimate and often legal claim to the areas west of their state borders, by virtue of their antiquated

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colonial charters. New York was unique among the landed states, in that New York lacked a formal sea-to sea land charter, but instead based its claims to western lands upon its *special political relationship* with the Six Nations of the native Iroquois confederacy.<sup>19</sup>

The landless states of Delaware, Maryland, New Jersey, Pennsylvania and Rhode Island, whom either did not share a common border with the public land territories, or whom, believing that their early colonial charters specifically restricted or at least limited their territorial expansion, opposed the landed states in their plans to divide the public lands among the states. The land-less states further claimed that since the defeat of Britain would be acquired through the joint action of all the states, that it was proper that the western territories should be likewise jointly held. Furthermore, the land-less states contended that the colonial charters were unreasonable and unjust, and that should the landed states be given the western territory, that the landed states would consequently be able to raise revenues and pay their share of the *Revolutionary War* debt by simply selling western properties on public auction. Conversely, the land-less states would be forced to raise taxes to pay their debts.<sup>20</sup>

In the end, the American States were in the midst of a standoff. New York, Virginia,

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<sup>19</sup> By virtue of the Iroquois' claims of domination and supremacy over many of the Native American tribes within much of the Northwest Territory, New York likewise heralded its claims for western lands.

Frederick D. Williams, ed., *The Northwest Ordinance, Essays On Its Formation, Provisions, and Legacy* (East Lansing, MI: Michigan State University, 1989), p. 9.

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and the other 'landed states' were successful in omitting from the draft *Articles of Confederation*, all clauses which would have directed the settlement of the Western territory. Maryland countered by refusing to ratify the *Articles of Confederation*.

### *Resolutions of Congress on Territories*

As the United States faced a near certain defeat by the British if they were not able to militarily unite in opposition, the Continental Congress attempted to resolve the territorial disputes, and in turn, move forward in ratifying the *Articles of Confederation*. On September 6, 1780, Congress attempted to soften the issue by pressing for "a liberal surrender" of the western territories to the United States, while "urgently request[ing]", that the Legislature of Maryland ratify the *Articles of Confederation*.<sup>21</sup>

One month later, on October 10, 1780, Congress issued a declaration entitled, "Resolutions of Congress on Territories." In this statement, Congress established and indicated the general policies it would follow in administering any lands ceded by the states to the Federal Government.

Resolved that the unappropriated lands that may be ceded or relinquished to the united states pursuant to the recommendation of Congress of the 6 day of September last shall be disposed of for the common benefit of the united states and be settled and formed into distinct republican states which shall have the same rights of sovereignty freedom and independence as the other states.<sup>22</sup>

The resolution also established the approximate size of future states added to the union

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as "not less than one hundred nor more than one hundred and fifty miles square or as near thereto as circumstances will admit." Furthermore, "necessary and reasonable [war costs] expenses" were to be "reimbursed" by the United States Government. Lastly, the proposed pact provided that "said lands shall be granted and settled at such times and under such regulations as shall hereafter be agreed on by the united states in Congress assembled or any nine or more of [the thirteen states]."<sup>23</sup>

### *The Maryland Resolution*

As the national economy and the war effort continued to worsen without the aid of a central and united government, in 1780 an assembly of states was called to discuss the cession of western territory to the national government. Virginia emerged the lone dissenter at the assembly, continuing to strongly plea in favor of the landed states; but eventually agreed in principle to accept a resolution to cede all state territorial claims to the national government. In the following year (1781) and in response to the public lands agreement, Maryland finally yielded in ratifying the *Articles of Confederation*, thus forming the first congressionally approved national government in the United States. Two years later, in 1783, Congress received Virginia's formal land cession, bringing to a close the legal validation of both the states' public land cession to the United States Federal Government, and the formal ratification of the *Articles of Confederation*. Various states continued to maintain informal control over the ceded lands, however by

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1802, Georgia had become the last state to cede the remainder of its territorial lands to the United States Federal Government.<sup>24</sup>

The States' Land Cession was a confusing myriad of proposals and counter proposals among the states and the federal government. Each of the states had their own reasons for either retaining or ceding lands to the union government. Even years after the Land Cessions were formally ratified, individual states attempted to pressure the yet largely powerless federal government to modify the earlier cession agreements and grant the states additional concessions. For example, several states requested conditions be added to their land cessions. Most of the challenges were requests for additional land grants to the states; challenges which would characterize national/state land relations for the next two hundred years. Shortly after the land cession, the Federal Government had relatively few powers, and therefore the Federal Government showed flexibility through granting a number of these requests, while rejecting many more.

For instance, Virginia asked for and was granted 150,000 acres (60,700 hectares) of land between the Little Miami and the Scioto Rivers in the Ohio Valley to be given to

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George Rogers Clark and to his promised soldiers of the Revolution.<sup>°</sup> Virginia later similarly received 4,204,000 acres (1.7 million hectares) within the Northwest Territories from the Federal Government as an additional bounty to be given to its other *Revolutionary War* veterans.<sup>25</sup> Still later, Virginia requested that Congress invalidate earlier land purchases by the *Indiana, Vandalia, Illinois and Wabash* land companies, taken from the Native Americans within the Ohio country, because of the dubious means by which these lands were acquired from native Indians and from the British. This motion was rejected by Congress, but as Congress did not substantiate these purchases, these land titles lapsed and all became void.<sup>26</sup>

Land speculators were more successful in North Carolina. Following North Carolina's land cessions to the union, the North Carolina Legislature approved and allowed *favoured* land speculators to purchase lands within the federal territory of Tennessee. North Carolina also allegedly concocted illegal state legislation, including granting federal lands within Tennessee to North Carolina's war veterans, while taxing non-residents of North Carolina with higher taxes than its own state residents. This practice continued until 1796, when Tennessee formally entered the union as a state, and ended these practices.<sup>27</sup>

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<sup>°</sup> George Rogers Clark and his command of 175 (mostly Virginian) soldiers, with the aid of French settlers within the area, in 1778-79 ousted the British from the Illinois territory. For their part in securing this portion of the Northwest Territory, Virginia wished to reward them with property.

Oliver Chitwood, *A History of Colonial America* (New York: Harper and Brothers, 1931), p. 671.

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Connecticut also ceded its western territories, but not before retaining control to 3,800,000 acres (1.5 million hectares), which became the "Connecticut Western Reserve and the Firelands."<sup>28</sup> Similarly, Massachusetts succeeded in maintaining millions of acres in its province of Maine, and received ownership to more than six million acres west of the New York/Massachusetts *preemption line*.<sup>29</sup>

By delaying their land cessions with the United States until 1802, Georgia consequently benefitted most from the cession agreements, collecting both monetary and territorial rewards. Georgia was the only state to receive cash reimbursement from the Federal Government for relinquishing its land claims. Not only did Georgia receive \$1,250,000 "for the expenses incurred by the said state", but Georgia was also allowed to keep more than 24 million acres (9.7 million hectares) of their former claims.<sup>30</sup>

The two principle outcomes of the public lands cessions accord was that 1) western lands became the common property of all American people, and 2) the ceded territories would eventually enter the American union of states on an *equal standing* with the original states.<sup>31</sup> Equally important however, the resolution as approved significantly strengthened the national government and provided Congress with an *assumption of authority*, since as Gates states, the cessions resolution was "adopted before the United States had any public lands and before the Articles of Confederation were ratified and in force."<sup>32</sup>



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Following the formal ratification of both the *Lands Cession of 1780* and the *Articles of Confederation* in 1781, the United States Congress was in a position to draft legislation which could be used in guiding westward settlement and in bringing new states into the Union. These highly celebrated pieces of legislation collectively became known as the *Northwest Land Ordinances*.

### *The Land Ordinances of the Northwest Territories*

American national land policy had its origin in three Congressional land ordinances between 1784 and 1787. These government ordinances were significant in the nationalization of American public land policy, because for the first time, the United States Federal Government enacted land laws which devised regional government for the West, while inventing explicit and comprehensive, democratic methods of distributing public lands of the *national domain* to the American people.

Following the Revolution, *lands, taxes and Indians*, were among the major problems facing the nation.<sup>33</sup> Finding solutions to these problems was volatile, and threatened to plunge the yet largely powerless nation into a potentially disastrous civil war, or reemerge the United States into war with Britain. Congress needed to act quickly and decisively to organize a government within the West, while devising an equitable means to distribute western lands to the multitudes heading west. Unable to raise sufficient

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taxes from the states following the war, Congress saw the sale of national lands as a means to liquefy its war debts, while providing *industrious* citizens with the means to strengthen the nation's shattered economy.

However settlers would not wait for the Federal Government to enact necessary laws. By 1784, pioneers were already well familiar with the fertile richness of the Ohio Valley and of Kentucky. According to Peter Onuf, "the 'amazing' growth of the Kentucky District, just across the [Ohio] river from the national lands, made westward emigration seem a powerful natural force, a veritable human 'torrent'."<sup>34</sup>

As immigration to the United States continued, and as the demand for land would presumably increase land value, direct sale of lands to settlers became an ever favorable means of Congress to limit illegal land squatting, establish greater legitimacy to land claims, and most importantly, to provide the vital revenue to reduce the national debt.

President George Washington in 1784 repeated these pragmatic views when he stated, in the "spirit of emigration.. [if] you can not stop the road... it is yet in your power to mark the way; a little while and you will not be able to do either."<sup>35</sup> During the same year (1784) and with similar tolerance, Thomas Jefferson suggested that private land ownership would secure the national domain, when he stated, "these very same people

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[squatters] will be glad to pay the price which Congress will ask to secure themselves in their titles to these lands."<sup>36</sup>

However a haunting task still faced Congress. How could Congress entice settlers to purchase lands, when many settlers had already quite happily, illegally settled (squatted) upon the national lands? Correspondingly, how could Congress enact legislation and control of its frontier lands, without inflaming western settlers into revolt without strict government regulation? In the balance rested as Bernard Shanks states, *the threat of frontier rebellion*.<sup>37</sup>

Fears concerning western expansion and settlement were well-founded. The consequences of these decisions would ultimately determine whether planned expansion would result in economic growth and national security, or alternatively toward a collision course with revolution and national disintegration. If the settlement of the West was not carefully *guided*, and newly created Western States encouraged to join the union, the West could forever be lost, by either forming an independent union of states or by allying themselves with an European power. However, if mindfully managed, expansion of the West could propel the United States to become, as French economist Turgot wrote, "the hope of the world", and unlike "an image of our Europe, a mass of divided powers contending for territory and commerce."<sup>38</sup>

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### *Western Expansion Proposed*

Solving the administration of the western territories would not be easy. Against conventional European wisdom,<sup>P</sup> American theorists proposed to expand the nation to the West, financed by the sale of federal lands, and without the trade barriers of European-like national borders. However, the expansion into western lands was highly controversial. On one side, there were individuals such as George Washington and James Monroe, who believed that maintaining a large eastern population was critical in maintaining the union from a potentially dangerous West. According to Washington, Western settlers could "become a distinct people from us," while "instead of adding strength to the union", they could become "a formidable and dangerous neighbour."<sup>39</sup> Monroe had similar apprehensions when he wrote that western expansion would "make it the interest of the [western] people to separate" from the union. Instead Monroe suggested that the nation should "throw the weight of population eastward and keep it there to appreciate the vacant lands of New York and Massachusetts."<sup>40</sup>

Thomas Jefferson and a growing number of citizens, however, saw the proposed isolationists policies of Washington and Monroe not to be an alternative. John Gardner

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<sup>P</sup> Frenchman, Baron de Montesquieu's held the "civil liberty could exist only within a small territory", and that a republic's authority diminished as it expanded.

Peter S. Onuf, *Statehood and Union, A History of the Northwest Ordinance* (Bloomington, IN: Indiana University, 1987), pp. 2 and 19.

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reiterated Jefferson, when during an independence day speech to a gathered crowd in Boston, he said.

If we make the right use of our natural advantages we soon must be a truly great and happy nation. When we consider the vastness of our country, the variety of her soil and climate, the immense extent of her sea-coast, and the inland navigation by the lakes and rivers, we find a *world within ourselves*, sufficient to produce whatever can contribute to the necessities and even the superfluities of life.<sup>41</sup>

Eventually, Jefferson's view prevailed, believing that an increase in frontier population would eventually translate into increased power and national prosperity, even if this required welcoming immigrants from other nations.<sup>42</sup> Inevitably, President Washington and others agreed that an exodus of eastern settlers westward and a depopulation of the East could be overcome by an equally large influx of settlers emigrating from other nations to the United States.<sup>43</sup> Thomas Jefferson and James Madison were less concerned of the possible threats from western expansion, than either Washington or Monroe, and believed that the potential regional conflicts between the established East and the developing West were an exaggeration. Jefferson stated, "our citizens can never be induced... to go there and cut the throats of our brothers and our sons."<sup>44</sup> Similarly Madison remarked, that multiplying "ties of friendship, of marriage and consanguinity" would pacify any Western threat.<sup>45</sup> Irregardless, Jefferson concluded, as did Washington, that if westerners "declare themselves a separate people, we are incapable of a single effort to retain them."<sup>46</sup>

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With the decision made to expand the nation westward through the sale of lands, it was now necessary to determine a means to affect this policy. Sentiment during this time, even among Congress, underscored that western settlers had to be carefully selected, *not based upon nationality nor social status* as was commonly practiced in England and subsequently Australia, but upon settlers *industrious and tireless nature*. Conservative republicans such as the satirical writer "Lycurgus" and the *Connecticut Magazine*, opposed Jefferson and other liberal republicans who at the time would dominate Congress. According to Lycurgus, "universal liberty" was akin to "universal poverty," whereby the great fertility of western soils would produce idleness from prosperity, whereby settlers would "sit each under his own tree... cultivating peace with the beast and the savages."<sup>47</sup> Idleness according to Lycurgus would result in the wickedness of prosperity.

It is evident that the inland parts and western frontiers of the country are by far the most healthful and fertile portion of our dominions, and therefore, if we hold them in possession, they certainly ought never to be settled. Poverty-- hard labour-- and shortness of life are essential to the preservation of our liberties.<sup>48</sup>

*Lycurgus (1786)*

Ultimately, however, Jefferson's reformatory views prevailed, resulting in a liberalization of western and national land policy and legislation favoring populous objectives.

### *The Government Ordinance of 1784*

Between 1783 and 1784, the Continental Congress debated the fate of western

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settlement, with the intent of devising a government unique to the concerns of the West. Unable to form a consensus among Congress, on March 1, 1784, Congress placed Virginia delegate Thomas Jefferson to chair a *lands committee* of primarily Virginia Congressional delegates to resolve the issues of western lands.<sup>49</sup> On April 23, 1784, just weeks after Congress received the final conditions attached to Virginia's state land cessions, Jefferson released his committee's conclusions to Congress through a *government ordinance*, which subsequently was adopted by Congress that same day. One week later, on April 30th, a companion resolution was released by the Jefferson committee in the form of a *land ordinance*. Although not immediately adopted by Congress, this second resolution did ultimately become the basis for the later approved *Land Ordinance of 1785*.<sup>50</sup>

The land settlement strategies of Thomas Jefferson became the guiding force of America's early public land laws, which eventually resulted in the drafting and the implementation of the *Northwest Land Ordinance of 1787*, and in an established framework for government within the Northwest Territories and ultimately for the majority of all future states joining the union. The *Government Ordinance of 1784*, as drafted principally by Jefferson and co-authored by Congressman Hugh Williamson of North Carolina<sup>51</sup>, proposed the following principal recommendations (see *Appendix A: Government Ordinance of 1784*).

- 1) Lands "shall be purchased of the Indian inhabitants, and offered for sale by Congress" and "divided into distinct states."

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- 2) "When any such state shall have acquired twenty thousand free inhabitants, on giving due proof thereof to Congress," the temporary government may call "a Convention of representatives to establish a permanent constitution and government for themselves."
- 3) All "free males of full age within the limits of their state to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original states... and to erect,... counties townships, or other divisions, for the election of members for their legislature."
- 4) "Whenever any of the said states shall have of free inhabitants, as many as shall then be in any one of the least numerous of the thirteen original states, such state shall be admitted by its delegates into the Congress of the United States, on an *equal footing* with the said original states."
- 5) The newly admitted states shall be bound to the following conditions:
  - A. "That they shall be forever remain a part of this confederacy of the United States of America."
  - B. "That they shall be subject to the articles of confederation in all those cases in which the original states shall be so subject, and to all the acts and ordinances of the United States..."
  - C. *"That they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary for securing the title in such soil to the bona fide purchasers."*
  - D. "That they shall be subject to pay a part of the federal debts contracted, or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states."
  - E. *"That no tax shall be imposed on lands the property of the United States."*
  - F. "That their respective governments shall be republican."
  - G. *"That the lands of non resident proprietors shall in no case be taxed higher than those residents within any new states,*



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*before the admission thereof to a vote by its delegates in Congress.*<sup>52</sup>

The 1784 ordinance was simplistic in structure and attempted to establish a rudimentary government within the Northwest Territory. According to Paul Gates, Thomas Jefferson based his ordinance upon his earlier experiences while in the Virginia legislature and upon a bill which Jefferson had introduced in Virginia in 1778.<sup>9</sup> The 1784 ordinance provided few practical or specific legal guidelines to aid western settlement, but was significant in establishing the inception of *local government* in the West. According to Onuf, Jefferson may not have "intended the 1784 ordinance to be of practical use in organizing existing settlement."<sup>53</sup> Similarly, Salmon P. Chase observed that the Government ordinance "was too imperfect for practical purposes."<sup>54</sup>

According to Jefferson's 1784 plan, the Northwest Territory would be divided into fourteen states (later amended by Congress to ten states), along predetermined

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<sup>9</sup> According to Gates, "in the earlier measure [Jefferson's 1778 Virginia land bill] was designed to encourage migration of foreigners, 'promote population,' increase the revenue of Virginia, and create a fund for the discharge of the state's debts, he had provided for the continuation of headrights to immigrants and had favored grants of 75 acres to each native-born Virginian on his marriage. Beyond that, he favored sale. Headrights and small free grants would assure widespread ownership of lands, which he regarded as the basis of democracy. There is close similarity between the two drafts of 1778 and 1784, except that headrights free grants were not included in the latter."

Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), p. 62.

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boundaries and with state names also recommended by Jefferson.<sup>55</sup> Within each newly created state, lands would be divided into counties and townships, whereby local governmental bodies would be provided to the predominantly rural, western populations.<sup>55</sup> Counties were established as administrative subdivisions of states, while townships became the administrative subdivisions to the counties. Fond of the decimal system, Jefferson envisioned lands to be surveyed upon a rectangular grid, comprising 10 mile by 10 mile squares, using the geographical mile of 6,086 feet. Consequently, each 10 mile square would contain 100 sections or lots, with each lot containing 850 acres (344 hectares).

Jefferson's plan of 1784 was similar to Virginia's early and rather multifarious land settlement system in that settlers first selected a parcel of land, purchased land warrants with loan office certificates and presented these land warrants to the district land surveyor. The land would thereafter be surveyed and certified by the district surveyor. The surveyor's official survey certificate and the land warrant would then be presented to the territorial register, who would then present the settler with a land patent, thus completing the land transfer.<sup>56</sup>

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<sup>55</sup> Thomas Jefferson was a productive writer. During this session of Congress alone, Jefferson wrote some thirty-one papers on various subjects. In these writings, Jefferson suggested names for future states added to the Northwest Territories. Among these included *Sylvania*, *Michigania*, *Assenisipia*, *Metropotania*, *Illinoia*, *Saratoga*, *Polypotamia*, *Pelisipia*, and *Washington*.

James A. Huston, *The Northwest Ordinance of 1787* (Lynchburg, VA: H.E. Howard, 1987), pp. 13-16.

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Following the act's monumental beginnings and the formal creation by the federal government of local and state governments within the West, the Government Ordinance ultimately received little support and was never fully enacted for two major reasons. First, soon after the ordinance became law on April 23, 1784, Jefferson relinquished his position as chairman of the Congressional lands committee and ultimately accepted the United States Ambassadorship to France. With Jefferson's departure to Paris and without his support in Congress, the Government Ordinance, although approved by Congress, received little support and was never fully enacted.<sup>57</sup> Second, although the Government Ordinance authorized the sale of public lands, it did not identify a price for the land, nor did it restrict the size of land purchases.<sup>58</sup> These omissions were later modified and introduced in the revised Northwest Land Ordinance of 1787.

It appears that Jefferson did not wish to provide specific land settlement provisions, but rather wanted that the 1784 ordinance to provide a means by which new states could join the union. One year later, the 1784 ordinance was enlarged to include these missing provisions, with the adoption by Congress of the 1785 Land Ordinance. Perhaps, the greatest significance of the 1784 Ordinance, however, was that ultimately it became the cornerstone of the much improved Northwest Land Ordinance of 1787.

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### *The Land Ordinance of 1785*

The Land Ordinance of 1785 has its origins in Jefferson's congressional land committee recommendations presented to Congress on April 30, 1784. Whereas the 1784 *Government Ordinance* provided the early conditions of how new states would be added to the union, the *Land Ordinance* of 1785 specified how national lands would be surveyed, distributed, and sold to settlers of the Northwest Territory. Collectively, these Congressional ordinances were intended to be complementary.<sup>59</sup>

Following Jefferson's departure to Paris as French Ambassador to the United States in 1785, the *lands committee*, comprised of Rufus King, William Samuel Johnson, Pierce Long, David Howell and eight others, continued to labor in devising a land ordinance.<sup>60</sup> By 1785 the financial state of the United States had continued to deteriorate. The states had failed to honor their fiscal commitments to the Federal Government, interest on government securities was mounting, foreign obligations were not being met, while international credit was quickly deteriorating.<sup>61</sup> Congress, needing to act quickly and decisively, turned to the sale and distribution of its public lands to raise national revenue, rather than levying taxes against its states. The problem which faced Congress was to determine a method of land distribution which would disperse lands quickly, without assuming great administrative and survey costs, while providing fairness and good feelings among settlers.

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Three land distribution methods had already been widely attempted in the United States prior to this time. The *Virginia system* allowed settlers to claim their lands, and then *afterwards* have their lands surveyed. The disadvantage of the Virginia system was that the process was often slow, with settlers frequently contending with each other for overlapping claims, which in turn resulted in the filing of caveats with the courts, and extensive litigation.

Within the *South* with its limited population, most productive lands were owned by large plantation owners and labored by slaves. Beyond plantations, vacant lands were common and generally unregulated, allowing unclaimed lands to be readily and indiscriminately settled by small farmers or by squatters. There were few state restrictions on claiming lands in the South, and organized surveying of lands was not common and consequently, was often bitterly resisted as an infringement upon the southern lifestyle.

Within *New England*, the most populated area of the country, lands had long been distributed through a highly ordered system known as *township grants*. Within this region, extended family groups with common religious and/or social beliefs were unified in forming communities. Lands were commonly granted or sold to groups of settlers, with reserved lots for churches, ministers and schools. Also, selected lands were carefully surveyed *prior* to settlement, and property ownership was explicitly verified.<sup>62</sup>

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Eventually many elements of the New England system were proposed for adoption in the Land Ordinance of 1785 because it was concluded, as William Grayson stated, "land [in New England was] more equitably divided than in any other part of the Continent," and that other systems had the potential to "destroy all the inducements to emigration which are derived from friendships, religion and relative connections."<sup>63</sup> The principle government considerations for following much of the New England system was that under this scheme, revenue could be more readily raised by offering larger saleable lots (townships), larger lot sizes would reduce government survey costs, collection of sales revenue would be simplified, while litigation and government court expense would be reduced with fewer land transactions.

Another major benefit which the New England method provided and which was well-favored at the time, was that land settlement by townships would encourage industrious and hardworking groups to colonize the western lands. For ultimately, the goal of America's earliest land laws following the Revolution, was to distribute and sell lands as quickly as possible, to strictly tireless and enterprising persons who were willing to pay for their lands, in order that the national and territorial governments could be financed and strengthened. Adversely, squatters were seen as a threat to national security, by contributing to the national burden, rather than diminishing it. According to Peter Onuf, "the squatters' chief sin was their inability-- or unwillingness-- to pay for their lands."<sup>64</sup> Likewise, land speculators were seen as a menace of society. It was

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feared that "[land] speculators showed the dangers of rampant, unrestrained privatism—the impulse to pursue private interest at public expense, the very antithesis of the new American idea of liberty as a higher synthesis of private and public realms."<sup>65</sup> The New England land settlement strategy instead, it was thought, would promote communities which were ambitious, resourceful, and which exemplified high civil and religious principals.

The Land Ordinance as finally adopted embodied features mostly agreeable to all regions of the nation, however many of the most significant features remained consistent with New England's land settlement scheme. Among the 1785 Land Ordinance's New England provisions included the following (*see Appendix B: Land Ordinance of 1785*).

- 1) *Townships* became the unit measurement of western lands. Each township would contain 36 one mile *sections or lots* (six miles by six miles), with each one square mile lot comprising 460 acres (146 hectares).<sup>8</sup>
- 2) Section 16 of each township became reserved for education, "for the maintenance of public schools within the said township."
- 3) Land survey was required before settlement.

Beyond these provisions, the Land Ordinance compromised with other regions of the nation, by enacting the following notable provisions.

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<sup>8</sup> The principal meridian became the point where the Ohio River crossed west into Pennsylvania. Originally from this point, a north-south and an east-west line was established. Seven rows or ranges were surveyed south and west of the central meridian, thus establishing 49 original western townships.

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- 1) Public auction was allowed on all alternate townships, and would be sold lot by lot. Other townships would be purchased intact by group acquisition.
- 2) A minimum, one dollar per acre was established.

The 1785 ordinance intended to reduce jurisdictional confusion and provide the same measure of security for purchasers of federal lands as already existed with purchases of state properties, while protecting legitimate purchasers from unscrupulous land speculators and squatters, and from the threat of Indian uprisings. Among the most significant provisions to insure these outcomes, the ordinance provided prior survey before disposal, surveyed and numbered townships, public auction of lands, and the grant of one thirty-sixth of the land for schools.

Perhaps the government's greatest attempt to oversee land sales involved the use of public land auctions. With the 1785 land ordinance, all lands had to be first placed upon public auction. If lands were not sold, lands thereafter could be acquired for one dollar per acre, when purchasing a full section (640 acres) of lands.<sup>t</sup> Public auctions were attempted as a means to deter large land speculators from dominating the purchasing and sale of lands, and to allow private individuals the ability to purchase

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<sup>t</sup> Until 1830, public lands could be purchased prior to public auction. By 1830 limited preemption land laws had taken effect, permitting some people to retain their lands, provided they had made *improvements* to their lands. By 1841 with the widespread passage of the preemption land laws throughout the West, retention of lands through preemption was common.

Henry Steele Commager, *Documents of American History* (New York: 1944), pp. 123-124 and 128-132 in Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), p. 65.



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lands at generally lower prices from the government. The 1785 Ordinance provided that all lands had to be offered at public auction at a minimum price of one dollar per acre. This would exclude squatters, and would establish financial risk for small and large land speculators, whom the government feared potentially would displace the government as a principal benefactor of the land sales. The sale of national lands was, after all, intended to be a means by which the nation could use its wealth of lands to strengthen the United States Federal Government, while financing the infrastructure and government structure for the newly admitted states.<sup>66</sup>

As a compromise among the states, alternate townships (36,000 acres) were auctioned and sold intact, while the other townships could be purchased by lots or in one square mile sections (640 acres). Notice of auctions had to be provided, "not less than two nor more than six months, by causing advertisements to be posted up at the court houses, or other noted places in every county, and to be inserted in one newspaper, published in the states of their residence respectively..."<sup>67</sup> The original plan called for public land auctions to be held in each of the original thirteen states and that each of the states would conduct their own auctions, however, on April 21, 1787, before any lands were offered by auction, Congress redirected all auctions to be held in New York, then the National Capital.<sup>68</sup>

By centralizing auctions within New York, it was believed that the government would

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protect the interests of legitimate land purchasing settlers. Land speculators had long enjoyed a benefit of *greater access of knowledge* of the fertility and value of lands, by conducting their own independent surveys. Since land qualities differed from region to region, and since small land owners from the East often purchased western lands sight unseen, centralized auctions was one means which the federal government could, in part, limit prior inspection of public lands by land speculators. It was hoped that centralized auctions would minimize the impact of land speculation, by depriving land speculators of land information, and by placing settlers upon a more equitable footing with large land interests.

Ironically between 1785 and 1787, there was little demand for national lands for several reasons. The price of lands prevented many settlers from purchasing the required minimum purchase of 640 acres for 640 dollars.<sup>69</sup> Meanwhile, settlers were reluctant to purchase lands sight unseen. As a result, demand for land was depressed. With an over abundance of lands, competitive auctions likewise had a limited effect in creating a competitive land market. Without a competitive market, land speculators were able to purchase productive lands at a minimum price of one dollar per acre. However, during the early years following the American Revolution, land speculators, although they attempted to secure lands, were unable to capitalize on their speculative purchases, because Indian titles had not been secured, while "rising market values for the nation's securities gradually diminished the advantage in using them to meet

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payments on land."<sup>u</sup>

Reducing the price per acre was not, however, the principal deterrent preventing the government from selling national lands. The uncertainty of the frontier likewise greatly deterred settlers from moving west. Before settlers would feel secure and venture into the *wilderness*, often staking their life's savings, the government would have to *stabilize* the lands within the Ohio Valley and beyond. The stabilization of the West often meant that the federal government had to obtain the property rights of western lands from Native Americans through either legitimate or illegal purchase, or when all failed, by forcibly removing or eliminating the natives tribes from all saleable federal lands.

The government survey of lands also encouraged settlers to purchase lands. This would be accomplished by providing settlers with as much knowledge of lands as possible, so that settlers would feel secure that their purchased lands would sustain their families, without the threat of retaliatory Indians uprooted and displaced from their ancestral lands. As these so-called *obstacles* were eliminated, subsequent demand for lands would be self-perpetuating, and demand would encourage further demand.

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<sup>u</sup> The Yazoo, Phelps and Gorham, Holland, Connecticut, Ohio, and Scioto land companies all attempted to securing lands within the present State of Ohio during this time. With the depreciated value of the continental dollar, one dollar was equivalent to 8 cents. Nonetheless attempts by land companies to purchase more than twenty million acres resulted in only John Cleves Symmes and a group of New Jersey investors in obtaining patent to 311,682 acres. All other purchase agreements with the federal government failed, due to lack of demand for property.

Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), pp. 70-72.

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Demand for lands was also offset by even more liberal states' land settlement laws, which either preempted lands or offered lands to settlers for a few cents per acre. For instance in 1776, the Virginia Legislature enacted a law which preempted all settlers to 400 acres west of the Appalachian Mountains. Similarly, Pennsylvania and Massachusetts preempted lands to squatters<sup>70</sup>, while North Carolina preempted up to 640 acres per settler, with the explanation, "all and every right of occupancy and preemption, and every other right reserved by act or acts to persons settled on, and occupying lands within the limits of the lands hereby intended to be ceded... shall continue to be in full force, in the same manner as if the [states' land] cession had not been made..."<sup>71</sup>

Consequently, the Federal Government had to contend with both an uneasy mixture of illegal squatters, land speculators, competition from inexpensive state-owned properties, and from unlawful distribution of federal lands from renegade states such as North Carolina. For a limited time between 1783 and 1785, the United States Federal Government unsuccessfully attempted to forcibly remove squatters and

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unlawful claimants from federal lands.<sup>y</sup> Clearly the land ordinances were unsatisfactory and required necessary revision.

The 1785 Land Ordinance was notable however, since the ordinance established the rectangular, township grid survey system which still is commonly used throughout much of the United States.<sup>w</sup> Furthermore, the 1785 Ordinance was monumental in providing for public education throughout the United States, with the reservation of section 16 for the maintenance of public schools.<sup>x</sup>

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<sup>y</sup> On September 22, 1783, before the states' land cession had been fully approved, Congress formally forbid settlement north and west of the Ohio River. With little response by the settlers, Congress ordered Colonel Harmar to remove the settlers by force. This was unsuccessful so therefore latter that same year, Congress sent a larger military force to remove the settlers. Although the army was successful in "driving off the settlers, rooting up their potatoes and other crops, destroying their fences, and forcing them to flee across the [Ohio] river to Kentucky and Virginia," the squatters soon after returned. The Land Ordinance of 1785 and the later Northwest Ordinance of 1787 did not directly address the issue of land squatters. It was not until the preemption laws were fully enacted in 1841 that squatters rights in the United States were fully approved by Congress.

John Bach McMaster, *History of the People of the United States* (8 vols., New York, 1883-1913), III, 107 in Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), p. 67.

<sup>w</sup> This tradition continues today with most Northeastern and Midwestern States in the United States continuing to maintain townships and counties, while counties continue to exist in a majority of other states. Within the original New England States, towns continue to replace counties as the predominate state subdivision.

William Morris, ed., *The American Heritage Dictionary of the English Language*, (Boston: Houghton Mifflin, 1981), p. 1359; and John J. Harrigan, *Politics and Policy in the States and Communities*, 2nd ed. (Boston: Little, Brown and Company, 1984), pp. 157-158.

<sup>x</sup> Between 1781 and 1988, nearly 78 million acres of federal land holdings had been transferred to individual states for the purpose of supporting "common schools." Indeed, the 77,630,000 acres of public land transferred from the national government to individual state governments for the purposes of schools (excluding lands transferred for universities), represents approximately 24% of national land properties transferred directly to state governments from the Federal Government between the years 1781 and 1988.

*Public Land Statistics*, 1988 ed., (Washington, D.C.: Bureau of Land Management, 1988).

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*The Northwest Land Ordinance of 1787*

"I doubt whether any single law of any lawmaker ancient or modern has produced effects of more distinct and lasting character than the Ordinance of 1787."<sup>72</sup>

Daniel Webster (1827)

Second only to the *United States Constitution*, the Northwest Ordinance is perhaps the most significant and influential document in United States' history. The Northwest Ordinance was much more than either a *government ordinance* or a *land ordinance*, characteristic of the earlier federal ordinances of 1784 and 1785, from which it originated. Perhaps what most distinguishes the Northwest Ordinance from earlier ordinances is that it was more complete, less controversial, yet highly original, and perhaps, most importantly, was more widely accepted and championed among both the original states, and among the settlers and immigrants in search of western lands.

The final drafting of the Northwest Ordinance was largely the work of Nathan Dane of Massachusetts.<sup>73</sup> The *Northwest Ordinance* differed from the *Government Ordinance of 1784* in that the latter specified few requirements or stipulations for self-government

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of the western territories<sup>y</sup>, while also only crudely defining territorial boundaries.<sup>z</sup> The 1787 ordinance, however, precisely indicated the number of states which would be established within the Northwest Territories, while designating fixed new state boundaries along clear and natural boundaries, such as rivers and lakes according to known geography.<sup>aa</sup>

The Northwest Ordinance also different from the 1784 plan, recognized that law and order would need to be established to entice settlers and immigrants to settle the West. To obtain this desired result, the Northwest Ordinance provided a slower progression to eventual statehood, through three stages of government. Under the 1784 Government Ordinance, when a territorial district acquired "twenty thousand free inhabitants, on giving due proof thereof to Congress",<sup>74</sup> statehood would be granted. Under the revised Northwest Ordinance the conditions necessary for reaching

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<sup>y</sup> "That when any such State shall have acquired twenty thousand free inhabitants, on giving due proof thereof to Congress, they shall receive from them authority with appointments of time and place, to call a convention of representatives to establish a permanent constitution and government for themselves."

*Government Ordinance of 1784*, para. 3.

<sup>z</sup> "...shall be divided into distinct states... by parallels of latitude, so that each State shall comprehend from north to south two degrees of latitude, beginning to count from the completion of forty-five degrees north of the equator; and by meridians of longitude, one of which shall pass through the lowest point of the rapids of the Ohio [River]."

*Government Ordinance of 1784*, para. 1.

<sup>aa</sup> "There shall be formed in the said territory, not less than three nor more than five States... the Western State in the said territory, shall be bounded by the Mississippi, the Ohio and Wabash rivers; a direct line drawn from the Wabash and post Vincents due North to the territorial line between the United States and Canada, and by the said territorial line to the lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the Wabash from post Vincents to the Ohio; by the Ohio, by direct line due North from the mouth of the great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line."

*Northwest Ordinance (1787)*, Article 5.

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statehood were replaced through three precise stages of government. Furthermore, fundamental to the success of the Northwest Ordinance was that, like the 1784 ordinance, the 1787 ordinance declared that all new states admitted to the union would "share in the federal Councils on an *equal footing* with the original States..."<sup>75</sup> Before territorial districts could become a state, and its settlers enjoy the same privileges as the other states, including equal representation in Congress, the Northwest Ordinance required a *temporary government* be established following the successful conclusion of three stages of government.

### *Three Stage Government for the Northwest:*

Stage one occurred prior to the population of free male inhabitants of full age within the territory reaching five thousand people. During this initial phase the following government administration would be introduced (see *Appendix C: Northwest Ordinance of 1787*).

- 1) A governor, secretary, and three judges will be independently appointed by Congress. The governor would serve a term of three years, while the secretary a term of four years unless either was revoked by Congress.
- 2) The governor and the judges or a majority of them may adopt such laws of the original states criminal and civil consistent with their needs and must report these laws to Congress from time to time.
- 3) The governor may appoint and commission all officers for a militia under the rank of general, and may appoint all magistrates and other civil officers which is required for maintaining peace.



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- 4) Following the governor appointing magistrates and civil officers, these officials of the townships and counties may establish a general assembly, thereafter the powers and duties of the general assembly may be regulated and defined by the said assembly.
- 5) The governor shall establish the district into counties and townships, after Indian land titles have been extinguished.
- 6) The secretary shall transmit authentic copies of all acts to the secretary of Congress.

When full age male population reaches five thousand, a stage two government is instituted under the following administrative provisions.

- 1) Free male inhabitants of full age may elect representatives from their counties or townships to represent them in the general assembly. For every five hundred free male inhabitants there shall be one representative added to the general assembly. When the number of district representatives reaches twenty-five, the number and proportion of the representatives shall be regulated by the general assembly, also known as the *legislature*.
- 2) Representatives of the legislature must be aged twenty-one years or older, be a citizen of one of the states for three years and a resident of the district, or he must have lived in the district for three years. Furthermore, he must own at least two hundred acres of land.
- 3) Electors of representatives had to own fifty acres and land in the district, be a citizen of one of the states, and reside in the district. Alternatively, if the elector was a non-citizen, he had to own fifty acres of land and reside in the district for two years.
- 4) Elected representatives would serve two year terms, and in the event of death, the governor would request the county or township elect a replacement representative for the remainder of the term.
- 5) The general assembly or legislature shall consist of a governor, legislative council, and a house of representatives.
- 6) The elected representatives will nominate ten men having at least five hundred acres, and present this list to Congress. Congress will then elect

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five of the nominated to serve five year terms as members of the territorial council. Congress will replace seat vacancies due to death, by electing one of two men nominated by the house of representatives.

- 7) The governor, legislative council, and house of representatives, shall have authority to make laws in all cases for the good government of the district.
- 8) The governor is reserved with veto power, and the power to convene, prorogue and dissolve the general assembly.

Stage three begins when the population of the territory reaches sixty thousand free inhabitants. Under this stage, the following directives are placed.

- 1) "Whenever any of the said States shall have sixty thousand free inhabitants therein, such State shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original States, in all respects whatever."
- 2) These States shall then "be at liberty to form a permanent constitution and State government, provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in the Articles [of Confederation]..."<sup>76</sup>

The Northwest Ordinance should be remembered for more than providing for the transition of states equal to the existing states (N.W.O; Art. 5) and for providing for representative government to western territories prior to statehood. Rather, the Northwest ordinance established many of the provisions which we may take for granted and which were incorporated into the United States Constitution. Among these now constitutional provisions included the following Northwest Ordinance provisions (see *Appendix C: Northwest Ordinance of 1787*).

- 1) Guarantees of separation of church and state, and freedom of religion (N.W.O.; Art. 1).

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- 2) Rights of habeas corpus, jury trial, right to bail, due process of law, appropriate representation in legislatures, no cruel and unusual punishment and guarantees preventing seizure of property (N.W.O.; Art. 2).
- 3) Prohibition of slavery (N.W.O.; Art. 6).
- 4) Encouragement of education.

Relative to United States public lands policies, the *Government Ordinance of 1787*, the *Land Ordinance of 1785* and the *Northwest Ordinance of 1787* should be most remembered for their crucial nationalizing impact upon the United States' national land policies. Without the enactment of these congressional acts, the United States would have likely never fully developed its strong national land policies, an effective constitutional *Federal Properties clause*, and would have had great difficulty federally preserving the nation's public lands and acquiring America's rare national land ethic.

## Endnotes to Pages 130 To 181

<sup>1</sup>Michael Kraus, "Ordinances of 1784, 1785, and 1787," *Encyclopedia Americana International*, 1986, Grolier.

<sup>2</sup>Jack N. Rakove, "Ambiguous Achievement: The Northwest Ordinance," in *The Northwest Ordinance: Essays on Its Formulation, Provisions, and Legacy*, ed. Frederick D. Williams (East Lansing, MI: Michigan State University, 1989), pp. 4-5.

<sup>3</sup>Paul W. Gates, *History of Public Land Law Development* (Washington D.C.: Zenger, Nov. 1968), p. 36.

<sup>4</sup>Gates, pp. 43-46.

<sup>5</sup>*Charters and Constitutions of the United States*, p. 1,897 in "1609, The Second Charter of Virginia," *American History Leaflets, Colonial and Constitutional*, No. 16- July, 1894 (n.p.: A. Lovell, 1894), pp. 5-6.

<sup>6</sup>"Documents Illustrating the Territorial Development of the United States, 1584-1774," *American History Leaflets, Colonial and Constitutional*, No. 16- July, 1894 (n.p.: A. Lovell, 1894), pp. 1-27. Also see: Henry Steele Commager, *Documents of American History* (New York: n.p., 1944), p. 11 and 17.

<sup>7</sup>Norman Stone, ed., *The Times, Atlas of World History*, "Colonial America, 1535-1783," (London: HarperCollins, 1989), p. 164.

<sup>8</sup>Gates, p. 49.

<sup>9</sup>*New York Colonial Documents*, vii, pp. 953-978 in Oliver Perry Chitwood, *A History of Colonial America* (New York: Harper and Brothers, 1931), p. 605.

<sup>10</sup>David Saville Muzzey, *An American History* (Boston: Ginn, 1925), p. 123.

<sup>11</sup>Stone, p. 164.

<sup>12</sup>Gates, pp. 1-2.

<sup>13</sup>Oliver Perry Chitwood, *A History of Colonial America* (New York: Harper and Brothers, 1931), p. 643.

<sup>14</sup>Chitwood, p. 646.

<sup>15</sup>Julian P. Boyd, et al., *The Papers of Thomas Jefferson*, Vol. 1 (Princeton, 1950), 133 in Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), p. 3.

<sup>16</sup>Donaldson, *The Public Domain*, pp. 11 ff.; *Public Land Statistics*, 1964, p. 4; Treat, *National Land System*, p. 395, in Paul W. Gates, *History of Public Land Law Development* (Washington: Zenger, 1968), p. 57.

<sup>17</sup>Worthington C. Ford, et al. (ed.), *Journals of the Continental Congress* (34 vols., Washington, 1904-1937), V, 505n; XIV, 619-22 in Paul W. Gates, *History of Public Land Law Development* (Washington, D.C.: Zenger, Nov. 1968), p. 50.

<sup>18</sup>Ford, *Journals*, June 25, 1778, XI, 648-651.

<sup>19</sup>Chitwood, p. 671.

<sup>20</sup>Rakove, p. 9.

<sup>21</sup>Ford, *Journals*, June 25, 1778, XVII, 806-807 in Gates, p. 51.

<sup>22</sup>*American History Leaflets, Colonial and Constitutional No. 32-- April, 1901, Documents Relating to Territorial Administration* (n.p.: Lovell, 1901), pp. 6-7.

<sup>23</sup>*American History Leaflets*, pp. 6-7.

<sup>24</sup>Muzzey, pp. 136-137.

<sup>25</sup>Gates, p. 55.

<sup>26</sup>Gates, p. 52.

<sup>27</sup>Gates, pp. 53-54.

<sup>28</sup>Gates, p. 52.

<sup>29</sup>Gates, pp. 55-56.

<sup>30</sup>Gates, pp. 55-56.

<sup>31</sup>Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), p. 22.

<sup>32</sup>Gates, p. 51.

<sup>33</sup>Shanks, p. 34.,

<sup>34</sup>"Extract of a letter from a gentleman in the western country," *Maryland Journal* (Baltimore), April 4, 1786 in Peter S. Onuf, *Statehood and Union, A History of the Northwest Ordinance* (Indianapolis, IN: Indiana University, 1987), p. 25.

<sup>35</sup>Washington to Richard Henry Lee, Dec. 14, 1784, in John C. Fitzpatrick, ed., *The Writings of George Washington*, 39 vols. (Washington, 1931-44), 28:12 in Peter S. Onuf, *Statehood and Union, A History of the Northwest Ordinance* (Bloomington, IN:

Indiana University, 1987), p. 25.

<sup>36</sup>Thomas Jefferson's comment [May 4, 1784] on G. K. van Hogendorp, "On Western Territory," in Julian P. Boyd et al., eds., *The Papers of Thomas Jefferson*, 22 vols. to date (Princeton:, 1950-), 7:22 in Peter Onuf, p. 29.

<sup>37</sup>Shanks, p. 39.

<sup>38</sup>Letter from M. Turgot to Dr. Price, March 22, 1778, appendix to Richard Price, *Observations on the Importance of the American Revolution*, 2d ed. (London, 1785) in Peter Onuf, p. 4.

<sup>39</sup>Washington to Henry Knox, Dec. 5, 1784, in John C. Fitzpatrick, ed., *The Writings of George Washington*, 39 vols. (Washington, 1931-44), 28:4.

<sup>40</sup>Monroe to Patrick Henry, Aug. 12, 1786, in William Wirt Henry, *Patrick Henry: Life, Correspondence, and Speeches*, 3 vols. (New York, 1891), 2:297; Monroe to Madison, Aug. 14, 1786, in Rutland et al., eds., *Madison Papers*, 9:104-105.

<sup>41</sup>Gardner, *An Oration, Delivered July 4, 1785* (Boston, 1785) in Peter Onuf, pp. 13-14.

<sup>42</sup>"A Citizen of Pennsylvania" [Benjamin Rush], "Account of the Progress of the Population, Agriculture Manners, and Government in Pennsylvania," *Columbian Magazine*, 1 (Nov. 1786) in Peter Onuf, pp. 17-18.

<sup>43</sup>"Washington to Knox," (Dec. 5, 1784), and "Washington to Lee," (Aug. 22, 1785) in John C. Fitzpatrick, ed., *The Writings of George Washington*, 39 vols. (Washington, 1931-1944), 28:4, 231 in Peter Onuf, p. 37.

<sup>44</sup>Alexandria, Nov. 15, 1784, *Virginia Journal*, Nov. 25, 1784 in Peter Onuf, p. 7.

<sup>45</sup>Madison to Marquis de Lafayette, March 20, 1785, in Robert Rutland et al., eds., *The Papers of James Madison*, 15 vols. to date (Chicago and Charlottesville, 1962-), 8:251.

<sup>46</sup>Jefferson to Madison, Jan. 30, 1787, in Boyd et al., *Jefferson Papers*, 11:93.

<sup>47</sup>"Lycurgus," no. 10, *New Haven Gazette and Connecticut Magazine*, April 20, 1786 in Peter Onuf, p. 27.

<sup>48</sup>*New Haven Gazette and Connecticut Magazine*, no. 2, February 23, 1786 in Peter Onuf, p. 27.

<sup>49</sup>Michael Kraus, "Ordinances of 1784, 1785, and 1787," *Encyclopedia Americana International*, 1986, Grolier.

<sup>50</sup>Onuf, p. 25.

<sup>51</sup>Onuf, p. 25.

<sup>52</sup>"Annapolis May 6," *Virginia Gazette (1784)* in Robert M. Taylor, Jr. ed., "The Ordinance of 1784, By the United States in Congress assembled, April 23, 1784," *The Northwest Ordinance, 1787: A Bicentennial Handbook* (Indianapolis, IN: Indiana Historical Society, 1987), pp. 105-107.

<sup>53</sup>Peter S. Onuf, *Origins of the Federal Republic: Jurisdictional Controversies in the United States, 1775-1787* (Philadelphia: University of Pennsylvania Press, 1983), p. 166 in Paul Finkelman, "The Northwest Ordinance: A Constitution for an Empire of Liberty," *Pathways to the Old Northwest: An Observance of the Bicentennial of the Northwest Ordinance* (Indianapolis, IN: Indiana Historical Society, 1988), p. 2.

<sup>54</sup>Salmon P. Chase, *The Statutes of Ohio and the Northwest Territory, ... Illustrated by a Preliminary Sketch of the History of Ohio*, 3 vols. (Cincinnati: Corey and Fairbank, 1833) in Paul Finkelman, p. 2.

<sup>55</sup>Robert M. Taylor, Jr., ed., *The Northwest Ordinance 1787: A Bicentennial Handbook*, (Indianapolis, IN: Indiana Historical Society, 1987), p. 45.

<sup>56</sup>Gates, p. 61.

<sup>57</sup>Shanks, p. 34; and Gates, p. 61.

<sup>58</sup>Adrienne Koch, *Jefferson and Madison, The Great Collaboration* (New York, 1950) pp. 6 ff. in Gates, p. 63.

<sup>59</sup>Onuf, p. 53.

<sup>60</sup>James A. Huston, *The Northwest Ordinance of 1787* (Lynchburg, VA: H. E. Howard, 1987), p. 16.

<sup>61</sup>Gates, p. 63.

<sup>62</sup>Gates, pp. 63-64.

<sup>63</sup>Edmund C. Burnett ed., *Letters of Members of the Continental Congress* (8 vols., Washington, 1921-36) VIII, 95-97, 107 in Gates, p. 64.

<sup>64</sup>Onuf, p. 31.

<sup>65</sup>Onuf, p. 32.

<sup>66</sup>Shanks, p. 35.

<sup>67</sup>Onuf, p. 24.

<sup>68</sup>Payson J. Treat, *The National Land System* (New York, 1910), p. 44 in Gates, p. 69.

<sup>69</sup>Shanks, p. 34.

<sup>70</sup>Henry Tatter, "The Preferential Treatment of the Actual Settler in the Primary Disposition of the Vacant Lands of the United States" (Ph.D. dissertation, Northwestern University, 1932), pp. 66 ff. in Gates, p. 66.

<sup>71</sup>Thomas Donaldson, *The Public Domain* (Washington, 1884), p. 77.

<sup>72</sup>Muzzey, pp. 140-141.

<sup>73</sup>Huston, p. 19.

<sup>74</sup>*Government Ordinance of 1784*, Para. 3. (See: Appendix A).

<sup>75</sup>*Northwest Ordinance of 1787*, Para. 12. (See: Appendix C).

<sup>76</sup>*Northwest Ordinance of 1787*, Article 5. (See: Appendix C).



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### Executive Initiative & Legislative Acquiescence:

#### The American Presidential Powers

THE OFFICE OF THE PRESIDENCY and the executive branch have dramatically influenced the nationalization of land policies in the United States by withdrawing and legally preserving extensive areas of America's public domain. In fact, contrary to common public perception, historically, most federal lands that have been legislatively set aside for conservation in the United States were withdrawn by the president, and not by Congress.<sup>1</sup> In Australia, however, the executive branch of Australia's Federal Government has had a limited role in withdrawing government lands from unauthorized or private use, and as a result, far fewer lands have been legislatively set aside in Australia than in the United States.

### *Chapter Summary*

The focus of this chapter will be to reveal why and under what conditions the President of the United States and the executive branch acquired these powers, and to explain how executive initiative and congressional acquiescence have resulted in the President greatly furthering America's national land policies. As subsequently demonstrated, these unique powers of America's presidential system have often historically allowed the executive branch to relatively easily and if necessary to relatively quickly, preserve

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extensive regions of America's public domain, irrespective of Congressional politics and legislative deadlock.

Through the use of *Presidential proclamations*, *Executive orders*, and expressly granted or implied congressional legislative powers granted either to the President directly or, alternatively, to primarily the Secretary for the Department of the Interior, the executive branch has withdrawn hundreds of millions of acres of public lands either temporarily or often permanently when it is determined by the executive that federal lands are either physically threatened or when national security interests are endangered by unwise land use.

Many of these presidential land withdrawals were initially exercised to prevent the senseless sale or lease of lands that were of national importance to the United States, but were likewise saleable or leasable through America's numerous public land laws of the late eighteenth, nineteenth and early twentieth centuries. Today, with the federal land distribution laws all but eliminated through the Taylor Grazing Act of 1934,<sup>a</sup> the Presidential land withdrawal powers have increasingly become an integral tool in

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<sup>a</sup> With the adoption of the Taylor Grazing Act of 1934, the Secretary of the Interior was able to classify and limit entry upon all remaining public lands. According to David Getches, "virtually all of the present public land-- about one-third the land area of the United States-- has been withdrawn from some uses. As such there is no more 'pure' public domain, open to unrestricted private appropriation under the panoply of public land laws, yet most public land remains open to the public for more limited purposes, subject to authorization by the executive."

David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 285-286.

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federal land planning and management.

Under Australia's federal parliamentary system, neither the Australian Prime Minister nor the Governor-General have either the constitutional powers nor the explicit or implied legislative powers that have historically been provided to United States presidents. This fact explains why Australia's executive government has played a latent role in actively forwarding either national or state land policies in Australia. Consequently, without strong leadership which presidential powers provide, a quiescent continuation of regional government land policies continues in Australia.

This chapter will therefore concentrate upon the unique role of the American President in advancing national public land policies, while indicating the often limited and complex role of Australia's Prime Minister, Governor-General and national Parliament in sustaining Australia's traditionally, regional government land policies.

### *Early Constitutional Beginnings*

America's founding fathers, in devising the United States Constitution, planned for the president to be a powerful force in American Government. By fragmenting power between the executive, legislative and judicial branches of government, a *presidential system* was devised that provided unique powers to the president, equally influential

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as compared to Congress, yet noticeably different from Australia and Britain's *parliamentary system*, which vests ultimate authority in the legislative body--the parliament.<sup>b</sup>

In contrast to Australia's parliamentary government, the American presidential system consolidated the functions of the head-of-state with the head-of-government. A strong American executive, empowered to promote not only domestic policy but also foreign policy, was seen as necessary and vital to the security of the United States. In defining the constitutional role of the president to the American people, Alexander Hamilton writes in the *The Federalist Papers*:

Energy in the executive is a leading character in the definition of good government. It is essential... to the steady administration of the laws; to the protection of property against those irregular and high-handed combinations which sometimes interrupt the ordinary course of justice; to the security of liberty against the enterprises and assaults of ambition, of faction, and of anarchy.

A feeble executive implies a feeble execution of the government. A feeble executive is but another phrase for a bad execution; and a government ill executed, whatever it may be in theory, must be, in practice, a bad government.

The ingredients which constitute energy in the executive are *unity, duration, an adequate provision for its support, and competent powers* [italics added].<sup>2</sup>

With the ratification of the United States Constitution, the president was provided with

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<sup>b</sup> A major difference between Australia's parliamentary system and the United States' presidential system is that Australia's Cabinet positions are formed from majority members of the national parliament, and collectively the Australian Cabinet decides which policies to present to the combined legislature. Cabinet positions within the United States' presidential system are appointed by the president from members not in Congress and act as advisors to the president. As chief legislator, the president alone may recommend legislation to Congress.

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important powers to strengthen the president's role in government. Among the most notable of these powers is the president's constitutional power to veto congressional legislation,<sup>c</sup> along with the presidential right to withhold information and the power of executive privilege.<sup>d</sup> Perhaps equally important to these powers and privileges include the president's power of appointment, including the power to nominate and fill judicial vacancies and the power to appointment executive cabinet members.

Executive appointments are especially important in managing public lands and in directing United States' national land policies. Following a successful election, the president is entitled to appoint new federal bureau chiefs including the Secretary to the Department of the Interior and the Secretary to the Department of Agriculture, along with an estimated two to three thousand positions within the upper-most policy making posts of the federal government.<sup>e</sup> Through the appointment of individuals with similar views to that of the president, the executive is able to influence national policies at a level far beyond any other elected or appointed politician in the United States.

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<sup>c</sup> The *presidential veto* power means that the president can reject from becoming law any legislation passed by Congress. Vetoed legislation may be reintroduced in Congress, and by receiving two-thirds majority in both houses, the bill will override the veto to become law. U. S. Constitution; Article 1, section 7, clause 2.

<sup>d</sup> *Executive privilege* is the right of the president to retain the confidentiality of communications on policy matters between the president and the president's principal advisors, especially as regards requests for information from the Congress and the courts.

<sup>e</sup> Following a presidential election, Congress issues a publication commonly referred as the *Plum Book*. According to Shea, "each president seeks to get appointees who will be sympathetic to his policies."

John C. Shea, *American Government: The Great Game of Politics* (New York: St. Martin's, 1984), p. 288.

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Beyond these powers, according to John Shea, "the president is the chief legislator, and most of the important legislation the Congress considers originates in the executive branch of the government."<sup>3</sup> Not only does the president control the introduction of important domestic legislation, but the president also is the prime originator of foreign affairs policies through the president's power as commander-in-chief of the armed forces,<sup>f</sup> and through the president's power to make international treaties.<sup>9</sup> During much of this century, the president has furthered their national and international policy making authority by capitalizing upon mass communication, including radio, INTERNET and television appearances, often at the expense of Congressional powers.

### *Australia's Executive Government*

With Australia's national independence in 1901, Australian States endeavored to form a Federal Commonwealth under the Crown monarch of Britain by drafting a written constitution outlining their British laws and traditions, while utilizing American federal

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<sup>f</sup> The President shall be Commander and Chief of the Army and Navy of the United States, and of the Militia of the Several States, when called into the actual service of the United States..."

*United States Constitution*; Article 2, Section 2, Clause 1.

<sup>9</sup> "He [the President] shall have Power, by and with the Advice and Consent of the Senate, to make treaties, provided two thirds of the Senators present concur; and he shall appoint Ambassadors, and other public Ministers and Consuls, Judges of the supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law; but the Congress may by Law vest the Appointment of inferior Officers, as they think proper, in the President alone in the Courts of Law, or in the Heads of Departments."

*United States Constitution*; Article 2, Section 2, Clause 2.

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provisions that would best ensure the continued regional sovereignty of their states. One of several outcomes of this decision was to greatly limit the role of Australia's executive branch, by choosing a parliamentary Prime Minister and Governor General as opposed to a more politically influential presidential executive.

According to the Australian Constitution, "the executive power of the Commonwealth is vested in the Queen [of England] and is exercisable by the Governor-General as the Queen's representative..."<sup>4</sup> The Australian Governor-General and Prime Minister, by design, has only a fraction of the powers of the American president.<sup>h</sup> The majority of political power rest with the national parliament, according to the Westminster system of responsible government.<sup>i</sup> The curious relationship between the Governor-General, the Prime Minister and national Parliament and Australia's tendency to support regional government land policies exists as a result of Australia's paradoxical government, which attempts to *consolidate powers* through the Westminster system of responsible government and ultimate authority in parliament, while simultaneously *distributing powers* by enacting provisions of America's democratic government by distributing powers between bicameral legislatures (Senate and House of Representatives), and

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<sup>h</sup> Among the principal functions of Australia's Prime Minister, according to Jaensch and Teichmann, is "in theory [the Prime Minister] is the leader of the Executive Council and the chief advisor to the Governor General."

Dean Jaensch and M. Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne, MacMillan, 1988), p. 164.

<sup>i</sup> Responsible government, as adopted by Australia, insists that the ruling party must maintain majority support in Parliament through votes of confidence. As such, the Cabinet, Executive and Legislature of the majority ruling party, as a whole, are directly answerable to the public through elections.

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federally distributing powers between national and state governments. This attempt to blend parliamentary efficiency and sovereignty with antithetic constitutional attempts to federally distribute powers and prevent unitary despotism appear contradictory to each other and has resulted in limiting the powers of the executive branch to enact badly needed national land policies and in continually reinforcing common law precedence and Australia's regional land policies.<sup>j</sup>

It has been claimed by Brugger, Jaensch and others for instance, that Britain's responsible government and America's federal government are incompatible with each other.<sup>k</sup> Graham Maddox for instance states that, "it is arguable that, rather than benefiting from a rich dual legacy [of the British and American systems], the Australian system has inherited the worst of both worlds."<sup>5</sup> Relative to the ability of Australia's Federal Government to introduce nationwide environmental land policies, Maddox's statement appears accurate.

For example, the roles of Australia's Governor General and Prime Minister are limited

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<sup>j</sup> According to Galligan, an "institutional mismatch" exists at the "heart of the Australian Constitution. The purpose of responsible government is to unify and consolidate political power, whereas that of federalism is to fragment and restrict its exercise. Responsible government has basically the positive view of the democratic majority will; federalism a negative view.

Brian Galligan, ed., *Australian Federalism* (Melbourne: Longman Cheshire, 1989), p. 58.

<sup>k</sup> See: Bill Brugger and D. Jaensch, *Australian Politics: Theory and Practice* (North Sydney, N.S.W.: George Allen and Unwin, 1985), pp. 104-111; Gordon Greenwood, *The Future of Federalism* (St. Lucia, QLD: University of Queensland, 1976), p. 43; and Michael Coper, *Encounters with the Australian Constitution* (North Ryde, N.S.W.: CCH Australia Limited, 1987).



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compared to the American President. The Governor-General of Australia, for instance, functions largely as a figurehead as head-of-state with immense formal powers to prorogue and dissolve parliament, but virtually no direct legislative role,<sup>1</sup> other than to direct the Federal Executive Council and to provide legal basis to decisions of the Parliament Cabinet. Meanwhile, the Australian Prime Minister, while not so much as mentioned by the Australian Constitution,<sup>6</sup> functions as the leader of the Executive Council and as chief advisor to the Governor General.<sup>m</sup>

This ponderous political position of the Governor-General to dissolve Parliament and consequently remove the Prime Minister, is in itself, a deciding factor why Australia continues to maintain many status quo policies, including continued Crown sovereignty over Australian territories and continued regional land policies. In fact, it may be argued that any attempt by the Australian Federal Parliament to reverse this trend could theoretically be met with a British veto in the form of once again dissolving Australia's Parliament, as Governor-General Sir John Kerr dissolved the Gough Whitlam majority

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<sup>1</sup> The Governor General of Australia has a role somewhat more akin to that of the United States President as commander-in-chief of Australia's defense forces, although as the Queen's representative in Australia, the Governor General has parliamentary veto powers far beyond those of the United States President. In keeping with British common law precedence, the Australian Constitution provides the Governor General with limited direct legislative powers, however the Constitution provides the Governor General with immense formal political powers to change government policy. Most influential of these powers is s. 5 of the Australian Constitution which states, "the Governor-General may appoint such times for holding the sessions of the Parliament as he thinks fit, and may also from time to time, by Proclamation or otherwise, prorogue the Parliament, and may in like manner dissolve the House of Representatives."

<sup>m</sup> The role of the Prime Minister in Australian politics is more comparable to the U.S. Speaker of the House or the Senate majority leader in that both are elected by the party which won the majority of seats within their respective legislative bodies, and all three positions are party leaders with direct legislative roles.

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government in unrelated circumstances in 1975.

Whereas a weak executive has fortified the position of the states in managing the vast majority of government lands in Australia, alternatively in the United States, Congressional acquiescence of powers to the executive have often resulted in the United States President becoming the nation's leading conservationist and most influential public land advocate.

### *Conservation & the Presidential Land Reform*

With the adoption of the United States Constitution in 1787, the Constitution's Federal Properties clause provided Congress with clear powers to designate and set aside public land reserves for the nation.<sup>n</sup> America's executive branch, however, received comparable powers much later, as a result of the American conservation movement of the latter nineteenth century and only following a wide delegation of administrative powers from Congress to the president and the executive branch to prevent the unwarranted loss of natural resources and lands, and to establish organized management of the nation's remaining public lands.

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<sup>n</sup> Private and state government attempts to challenge the clearly defined Federal Properties Clause has been repeatedly and consistently refuted by the United States Supreme Court, through acclaimed cases such as *Utah Power and Light Co. v. United States* and *Kleppe v. New Mexico*.

*Utah Power and Light Co. v. United States*; 243 U.S. 389 (1917); *Kleppe v. New Mexico*; 426 U.S. 529 (1976).

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### *Congressional Acquiescence to Presidential Reform*

In 1871, the worst forest fire in United States' history killed more than 1,500 people and burned more than 1.3 million acres of public and private lands near the town of Peshtigo, north of Green Bay, Wisconsin.<sup>7</sup> As a result of this event and the continuing and unregulated destruction of the nation's forest lands, two years later the *American Academy of Sciences* recommended to Congress that "cultivation of timber and preservation of forests" was necessary and further recommended "proper legislation for securing these objects."<sup>8</sup> By 1875, the *American Forestry Association* was founded, and became the first and most influential private conservation organization to seek the protection of America's forest lands.

Similar forest conservation attempts occurred simultaneously at the government level. Reformers such as Carl Schurz, Secretary to the Interior Department under President Rutherford Hayes,<sup>9</sup> convinced Congress in 1876 to authorize the Department of Agriculture to appoint a special agent to inventory the use and depletion of the nation's forests, and to devise a plan to preserve through sustainable methods, America's still

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<sup>9</sup> Interior Secretary Carl Schurz pleaded to Congress that "the waste and destruction of the redwood and the big trees of California... [was] wanton, barbarous, disgraceful vandalism; a spendthrift people recklessly wasting its heritage; a Government careless of its future."

Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, NY: Doubleday, 1962), p. 47.

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vast yet threatened forest lands.<sup>p</sup>

Dr. Franklin B. Hough was eventually appointed by Secretary of Agriculture Watts, under the administration of President Ulysses S. Grant, to complete this enormous task; and in 1877, Hough released his conclusions through his one volume *Report on Forestry*.<sup>9</sup> Within this text, Hough pointed out that trespassers were stealing entire forests and that a management blueprint similar to European models was necessary for managing America's forests.<sup>9</sup> Hough followed-up this comprehensive report with a basic forestry textbook titled *The Elements of Forestry* (1882), which greatly encouraged the increasingly popular profession of forestry.

With the advice of the American Association for the Advancement of Sciences (founded 1848) and the American Forestry Association, the role of government in managing

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<sup>p</sup> German native and trained in German forestry methods, Franklin Hough was appointed the Congressional task of determining the nation's "annual amount of consumption, importation and exportation of timber and other forest products; the probable supply for future wants; the means best adapted to the preservation and renewal of forests; the influence of forests on climate; and the measures that have been successfully applied in foreign countries or that may be deemed applicable to this country for the preservation and restoration or planting of forests."

Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, NY: Doubleday and Company, 1962), p. 47.

<sup>9</sup> According to Hough, "the produce of these lands is of universal use, and forms the staple of commerce of no inconsiderable portion of the nation. The difference between the government price [for timber] and the actual price thereof is large, yet Congress provides that these lands shall be disposed of under the pre-emption law at \$1.25 per acre..." Hough concluded that "a national calamity is being rapidly and surely brought upon the country by the useless destruction of forests."

Bernard Shanks, *This Land is Your Land: The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 43-44.

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America's public lands began to change, whereby *science, education and government* were all seen as necessary for the protection of forests and of public lands. Forest conservation and management was rapidly becoming the first predominant benefactor from this change in national policy. Professional forestry techniques began to be taught during the 1880's at leading American universities, including Cornell and Yale Universities and at the Biltmore estate.<sup>10</sup>

While forestry and forest conservation were rapidly being accepted by science and academia, the same was not true with regard to the national government, and specifically Congress, who was reluctant to change national policies that still favored laws that encouraged the widespread distribution of public lands for settlement. Between 1876 and 1891, more than 200 forestry bills were presented to a conservation-skeptic Congress--all of which failed.<sup>r</sup>

In 1891, skepticism began to change when *the General Revision Act*, also known as the *Forest Reserve Act*<sup>s</sup>, was finally approved by Congress and became law. This act amended many earlier land laws and, perhaps by congressional mistake or oversight,

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<sup>r</sup> The first forestry bill presented to Congress occurred in 1876 for "for the preservation of the forests of the national domain adjacent to the sources of navigable rivers and other streams of the United States." The bill failed.

Bernard Shanks, *This Land is Your Land* (San Francisco: Sierra Club Books, 1984), pp. 60-61.

<sup>s</sup> The *General Revision Act*, also known as the *Forest Reserve Act of 1891*, authorized the president to set apart and reserve in any state or territory the public land forests "wholly or in part covered with timber or undergrowth, whether of commercial value or not." Ch. 561, 26 Stat. 1095 (1891).

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section 24 of the act provided the president with statutory executive authority for the first time to preserve public lands as forest lands, through either presidential proclamation or executive order.

### *Presidential Executive Orders and Proclamations*

Presidential proclamations and Executive orders have been widely used by every American President for various purposes. As defined by the House Committee on Government Operations (1957), "executive orders and proclamations are directives or actions by the President. When they are founded on the authority of the President derived from the Constitution or statute, they may have the force and effect of law."<sup>11</sup>

There are no practical differences between executive orders and proclamations and in fact both have been used in founding public land reserves, however, there are negligible differences. According to Elizabeth Ashmore, "generally, *proclamations* concern matters of widespread interest which directly affect private individuals, whereas *executive orders* relate to the conduct of the Federal Government and affect individuals indirectly."<sup>12</sup>

Among the earliest uses of presidential proclamations and executive orders occurred in establishing Native American land reservations and military reserves, and in

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removing illegal settlements from public lands.<sup>†</sup> By the early 1890's, presidential orders and proclamations were increasingly exercised as an important means of federal land use planning and management.

### *Congressional Delegation and Acquiescence*

The General Revision Act of 1891 became the early catalyst that provided statutory authority for presidents to preserve national lands through either presidential proclamation or executive order, while unbeknown to Congress, judicial precedence was likewise being established. During the subsequent four presidential administrations of Harrison, Cleveland, McKinley and Theodore Roosevelt, spanning 1891 to 1909, more than 194 million acres of national forest land alone, an area the combined size of California and Montana, was established through presidential proclamation,<sup>u</sup> before

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<sup>†</sup> The earliest proclamation appearing within the *Congressional Statutes at Large* was dated January 24, 1791, and was issued and signed by President George Washington. Presidents James Monroe and Andrew Jackson issued illegal settlement upon public lands proclamations in 1815 and 1830-31 respectively.

Anne R. Ashmore, *Presidential Proclamations Concerning Public Lands: January 24, 1791 to March 19, 1936* (Washington D.C.: United States Library of Congress, 1981), pp. 1, 15 and 87.

<sup>u</sup> President Harrison proclaimed the first forest reserve when Yellowstone Forest Reservation (next to Yellowstone National Park) was established on March 30, 1891. In all, Harrison set aside 13 million acres, followed by President Cleveland with 21 million acres, President McKinley roughly 13 million acres and President Theodore Roosevelt with 148 million acres as forest reserves. During an eighteen year period between 1891 and 1909, essentially all of America's present forest reserves, today totaling more than 191 million acres, were established by presidential proclamation.

Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, NY: Doubleday, 1962), p. 48; and Bernard Shanks, *This Land is Your Land: The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 61-62.

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Congress partially revoked and prohibited President Theodore Roosevelt and future presidents from setting aside additional forest lands in six western states.<sup>†</sup>

Congress again expanded the president's powers to withdraw national lands by delegating powers to the president through the *Antiquities Act of 1906*. This act authorized the president to withdraw small areas of national public lands which were of historic or scientific value to be proclaimed as *national monuments*.<sup>‡</sup> The measure was initially intended to be used in securing the "smallest area[s] compatible with the proper care and management of the objects to be protected".<sup>§</sup> Instead, the Antiquities Act,

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<sup>†</sup> Ch. 2907, 34 Stat. 1271 (1907). The act to prohibit additional forest withdrawals was approved by Congress in 1907, but was not signed by Roosevelt until 1909 and not before he had set aside 32 additional forest reserves during that, his last year in office.

David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *National Resources Journal*, 22 (April 1982), 286.

<sup>‡</sup> The *Antiquities Act*, also known as the *Lacey Act* or formally known as "An Act for the Preservation of American Antiquities" was approved June 8, 1906 (34 Stat. 225). Section 2 of the act reads, "that the President of the United States is hereby authorized, in his discretion, to declare by public proclamation historic land marks, historic and prehistoric structures, and other objects of historic or scientific interest that are situated upon the lands owned and controlled by the Government of the United States to be national monuments, and may reserve as a part thereof parcels of land, the limits of which in all cases shall be confined to the smallest area compatible with the proper care and management of the objects to be protected: *Provided*, That when such objects are situated upon a tract covered by a bona fide unperfected claim or held in private ownership, the tract, or so much thereof as may be necessary for the proper care and management of the object, may be relinquished to the Government, and the Secretary of the Interior is hereby authorized to accept the relinquishment of such tracts in behalf of the Government of the United States."

<sup>§</sup> According to the original sponsor of the bill, Congressman Lacey from Iowa, the act intended to protect Indian ruins in the Mesa Verde and Bandolier regions of Colorado and New Mexico, "by merely mak[ing] small reservations where the objects are of sufficient interest to preserve them...it is meant to cover the cave dwellers and the cliff dwellers."

*The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearing before the Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources, United States Senate, Publication No. 96-69* (Washington, D.C.: U.S. Government Printing Office, 1980), p. 13.



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also known as the Lacey Act, enabled presidents the legal justification to permanently set aside millions of acres of endangered lands, often irregardless of territorial size.

With the adoption of the National Parks Service in 1916, national monuments are today managed largely the same as national parks and are both managed by the National Park Service. The principal difference between the two is that Congress may establish national parks, while national monuments are set side by presidential proclamation or executive order.<sup>y</sup> Theodore Roosevelt preserved the nation's first national monument, Devil's Tower National Monument, on September 24, 1906.<sup>z</sup> Recent figures indicate that as of November 1988, there are today 78 national monuments, of which, at least 24 were added during Theodore Roosevelt's second administration (1906-1909).<sup>aa</sup>

The president and the executive branch received a third major Congressional

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<sup>y</sup> There are exceptions to this custom. Grand Canyon in Arizona was originally set aside as a national monument by Theodore Roosevelt in 1909 when Congress failed to act fast enough it providing the area protected designation. Years later, the canyon was expanded by Congress and renamed to become Grand Canyon National Park.

<sup>z</sup> 34 Stat. 3236 (1906).

<sup>aa</sup> According Sierra Club sources as of November 1988, 78 National Monuments totaling 4,717,373 acres existed as compared to a total of 48 National Parks totaling 47,946,299 acres.

*The National Park System*, Public Affairs Booklets (San Francisco: Sierra Club, Nov. 1988), p. 2.

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delegation of powers through the *General Withdrawal Act of 1910*.<sup>bb</sup> This act, also known as the *Pickett Act*, was initially enacted by Congress following an enquiry by President William Taft for Congress to clarify the president's powers to withdraw oil and gas lands and other public lands from the public domain.<sup>cc</sup> The Pickett Act stated that "the President may, at any time in his discretion, temporarily withdraw from settlement, location, sale, or entry any of the public lands... and reserve the same for... public purposes..."<sup>13</sup>

In 1915, the Pickett Act was challenged in court when oil interests filed suit against the federal government claiming that the president did not have authority to withdraw public lands that were otherwise available for mineral exploration. Congress remained largely silent in this instance, preferring that the Supreme Court determine the statutory

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<sup>bb</sup> The *General Withdrawal Act*, also known as the *Pickett Act*, was approved March 10, 1910. The act provided that, "Be it enacted... it shall be lawful for the Secretary of the Interior, upon application by the proper officer of any State or Territory to which said section applies, to withdraw temporarily from settlement or entry areas embracing lands for which the State or Territory proposes to make application under said section, pending the investigation and survey to the filing of the maps and plats and application for segregation by the State or Territory: *Provided*, That if the State or Territory shall not present its application for segregation and maps and plats within one year after such temporary withdrawal the lands so withdrawn shall be restored to entry as though such withdrawal had not been made."

*The Antiquities Act and Federal Land Policy and Management Act Amendments of 1979: Hearing before the Subcommittee on Parks, Recreation, and Renewable Resources of the Committee on Energy and Natural Resources, United States Senate, Publication No. 96-69 (Washington, D.C.: U.S. Government Printing Office, 1980), p. 20.*

<sup>cc</sup> In 1909, President Taft withdrew 3,621,062 acres of public lands rich in oil and gas in order to prevent the rapid private depletion of these nationally vitally resources.

David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 290.

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outcome of this case. In *United States v. Midwest Oil* (1915)<sup>dd</sup>, the Supreme Court ruled that Congress evidently had recognized Congress' long history of acquiescent delegation of powers to the president. The Supreme Court found that President Taft's land withdrawals of 1909 were legal because of Congress' "long continued practice" of delegating implied Congressional powers to the president.<sup>ee</sup> The court continued by noting that "scores and hundreds" of other Presidential executive orders had been earlier used in designating and enlarging numerous Indian reservations, military reservation and oil reserves and yet were not based upon any statutory authority.<sup>ff</sup>

The long-term impact of the Pickett Act and the Midwest Oil ruling was that according to David Getches, the "Pickett Act imposed no limitations on executive authority in spite of its narrowing language."<sup>gg</sup> As a result, so called *permanent presidential withdrawals* are being defined as public lands with a particular use (e.g. archaeologic or historic National Monuments), while *temporary presidential withdrawals* are being interpreted and classified as public lands for most other uses (e.g. to prevent immediate destruction of threatened public lands). However, since Congress did not specify through the

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<sup>dd</sup> *United States v. Midwest Oil Co.*, 236 U.S. 456, 466 (1915).

<sup>ee</sup> 236 U.S. 456 (1915).

<sup>ff</sup> 236 U.S. 469-71 (1915).

<sup>gg</sup> According to Getches, "the executive still felt that it possessed all the non-statutory authority it had before the Pickett Act. Whenever the executive felt it needed to do what the Pickett Act would not allow, it would do so unhindered by the statute, on the assumption that it retained the full panoply of withdrawal authority recognized in *Midwest Oil*, virtually unaffected by the legislation."

David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 293.

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## ★ Chapter Four: American Presidential Powers ★

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Pickett Act what constitutes a 'temporary land withdrawal' by the president, the courts have similarly ruled that there are no defined time requirements limited temporary land withdrawals by the President.<sup>hh</sup>

Since 1891 until 1976, presidents were provided no clear statutory language concerning what constitutes a legitimate presidential public land withdrawal and what was not acceptable. In the absence of congressional interpretation, the courts have consistently upheld presidential withdrawals in the event of congressional acquiescence of these responsibilities.

During recent decades these trends continue. In *Portland General Electric Co. v. Kleppe* (1977),<sup>ii</sup> the court reaffirmed *Midwest Oil* (1915) by ruling that the Secretary of the Interior through the executive land withdrawal powers, was entitled to temporarily withdraw 3 million acres of oil shale lands in Wyoming, Colorado and Utah to prevent the loss of these natural resources through private exploration. The court in this ruling stated that, "the Pickett Act did supersede the implied authority of the president to make withdrawals, Congress has [however], by its acquiescence restored that power."<sup>jj</sup>

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<sup>hh</sup> For instance in *Mecham v. Udall*, 369 U.S. 1 (10th Cir. 1966), the federal circuit court ruled that a temporary withdrawal was still legitimate after 36 years; while in *Clinton D. Ray*, 59 Interior Dec. 466 (1947) 13½ years was also ruled as 'temporary.'

<sup>ii</sup> *Portland General Electric Co. v. Kleppe*, 441 F.Supp. 859 (D. Wyo. 1977).

<sup>jj</sup> 441 F.Supp. at 862 (D. Wyo. 1977).

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*Federal Land Policy and Management Act*

The President's Congressional implied land withdrawal powers were significantly modified with the enactment of the *Federal Land Policy Management Act of 1976* (F.L.P.M.A.)<sup>kk</sup> While the President essentially retains many of their earlier powers to set aside public lands through presidential proclamation or executive order, Congress through the F.L.P.M.A. of 1976 expressly repealed 29 statutory provisions of "implied authority of the President to make withdrawal and reservations resulting from acquiescence of Congress,"<sup>ll</sup> including notably the Antiquities Act, Taylor Grazing Act and many others. Essentially, the F.L.P.M.A. greatly simplified the procedures required for public land withdrawals. According to David Getches, while the President was dispossessed of many earlier implied statutory, public land withdrawal powers, "the Secretary [of the Interior] was expressly granted all of the authority that the executive possessed under its formerly implied delegation of authority."<sup>14</sup> Consequently, the executive branch still has tremendous authority to affect public land conservation in the United States; however, now the president must first instruct his Interior Secretary to implement the will of the executive office.

Equally important, the Federal Land Policy Management Act improved cooperation and

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<sup>kk</sup> *Federal Land Policy and Management Act of 1976* (F.L.P.M.A.), Pub. L. 94-579, 90 Stat. 2744 (codified in scattered sections of 7, 16, 30, 40, & 43 U.S.C.).

<sup>ll</sup> Pub. L. No. 94-579, 90 Stat. 2744, [§ 704(a), 90 Stat. At 2792] (codified at 43 U.S.C. § 1701-1782 (1976)).

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public participation among the public, the states and the federal government. This legislation was significant because it deals specifically with Bureau of Land Management lands, which administers approximately 60 percent of the nation's federal public lands and which prior to this act did not have nearly as extensive management directives as the National Park Service, National Forest Service and the National Fish and Wildlife Service.

As a result, contemporary public land management in the United States has increasingly become a product of state and federal cooperation.<sup>15</sup> This public fraternity is far from equal with the federal government maintaining firm *jurisdiction* over nearly all aspects of federal land management, while states maintain nearly the same level of jurisdiction over its much smaller state properties.

However, with the Federal Land Policy Management Act, citizen and state participation has been greatly improved. Also known as the *Organic Act of the Bureau of Land Management*, the F.L.P.M.A. demonstrates a growing national environmental commitment by the public and Congress to retain federal lands which are specifically designated for *multiple-use purposes* (B.L.M. lands), while confirming Congressional intent to utilize 'open lands' for the benefit of the nation and for Western States.<sup>16</sup>

Following thirty years since the inception of the B.L.M., and more than 3,000 often

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## ★ Chapter Four: American Presidential Powers ★

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antiquated and obsolete statutes dictating how B.L.M. lands should be distributed 'pending disposition,'<sup>mm</sup> the Federal Land Policy and Management Act confirmed Congress' intent to retain its remaining B.L.M. lands under multiple-use practices. In addition, through this act and others, including the *National Forest Management Act* of 1976,<sup>nn</sup> Congress radically revised its federal land policies by specifically *requiring* federal land administrators to solicit comment from involved states and from the general public.

State and local participation in federal resource management is a longstanding ideological and political goal of the progressive conservation movement in the United States. These goals were eventually realized with the adoption of the F.L.M.P.A.

In the development and revision of land use plans, the Secretary [of the Interior] shall... to the extent consistent with the laws governing the administration of the public lands, coordinate the land use inventory, planning and activities of or for such lands with the land use and management programs of... the States and local government within which the lands are located... assist in resolving, to the extent practical, inconsistencies between Federal and non-Federal Government plans, and shall provide for meaningful public involvement of State and local government officials, both elected and appointed, in the development of land use programs, land use regulations, and land use decisions for public lands.<sup>oo</sup>

This F.L.P.M.A. attached the Federal Properties clause with Congressional intent, while providing a revolutionary new role for states in public land management. Furthermore,

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<sup>mm</sup> Gail L. Achterman and Sally K. Fairfax, "The Public Participation Requirements of the Federal Land Policy and Management Act," *Arizona Law Review*, 21(1979), 501.

See also: 43 U.S.C. § 1732(a) (1976); and 16 U.S.C. § 528 (1976).

<sup>nn</sup> 16 U.S.C. (472, 476, 500, 513-521, 528, 576, 594, 1600-1614).

<sup>oo</sup> 43 U.S.C. § 1712(c)(9).

## ★ Chapter Four: American Presidential Powers ★

the F.L.M.P.A. revolutionized and transformed federal and state public land relations by providing the following notable provisions.

- 1) Congressional retention of federal lands formally recognized that public lands and specifically public lands used for multiple uses, were a nationally significant resource.<sup>pp</sup>
- 2) Disposal of B.L.M. lands is highly regulated, with all sales of more than 2,500 acres subject to Congressional review and veto.<sup>qq</sup> Likewise, the Secretary of the Interior may only authorize sale only if the land sale serves the public interest, is either difficult or uneconomic to manage, or is unsuitable for other federal purposes or management within another federal agency.<sup>rr</sup> Finally, sales must be under competitive bidding.<sup>ss</sup>
- 3) Land use plans must comply with "applicable state and federal pollution and control laws relating to air, water, noise and others."<sup>tt</sup> Lands with wilderness characteristics must be provided a wilderness study, and until this study is completed, "lands may not be disturbed, "so as not to impair the suitability of the area for preservation as wilderness."<sup>uu</sup>
- 4) The Secretary may also issue regulations protecting these areas. Violation of these regulations is a federal crime, which the Secretary may enforce by direct interaction with state and local law enforcement officers.<sup>vv</sup>

In summary, according to Elizabeth Haslam, "for the first time in public land legislation, Congress has shaped a role for public land states which allows them to join the public land decision-making team. *States must develop their own land use plans or at least*

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<sup>pp</sup> 43 U.S.C. § 1701 (1976).

<sup>qq</sup> 43 U.S.C. § 1713(c).

<sup>rr</sup> 43 U.S.C. § 1713(a)(1&2).

<sup>ss</sup> 43 U.S.C. § 1713(f).

<sup>tt</sup> 43 U.S.C. § 1712(c)(8).

<sup>uu</sup> 43 U.S.C. § 1782 & 1782(c).

<sup>vv</sup> 43 U.S.C. § 1733; 1733(c)(1); and 1733(d) in Frank Gregg, "Symposium on the Federal Land Policy and Management Act: Introduction," *Arizona Law Review*, 21 (1979), 271-283.



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## ★ Chapter Four: American Presidential Powers ★

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*land use objectives for public lands...consistent with federal law and multiple-use and sustained yield. Public land states enjoy an authority to help shape the use of public lands and insure that the need and wants of their citizens are at last represented in Washington.*"<sup>17</sup>

With these wide-ranging *constitutional, explicit*, and judicially sustained congressional *implied* powers, the President of the United States has had a tremendous influence in both conserving public lands when Congress fails to do so, as well as greatly advancing national land policies, management and conservation in the United States.

The ultimate success of America's national land policies and widespread public support for public lands is perhaps best reflected by David Getches, when he recounts, "although the possibility of a presidential veto of a congressional termination of a [public land] withdrawal (or making a withdrawal) exists, no such showdown between the executive and legislative branches has [ever] occurred over a withdrawal decision [throughout American history]."

## Endnotes to Pages 187 To 211

<sup>1</sup>David H. Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 279.

<sup>2</sup>Alexander Hamilton, J. Madison and J. Jay, *The Federalist Papers*, No. 70 (1787-1788; rpt. New York: New American Library, 1961), pp. 423-424.

<sup>3</sup>John C. Shea, *American Government: The Great Game of Politics* (New York: St. Martin's, 1984), pp. 86-87.

<sup>4</sup>*Commonwealth of Australia Constitution Act*; Chapter 2, Section 61.

<sup>5</sup>Graham Maddox, *Australian Democracy: In Theory and Practice* (Melbourne: Longman Cheshire, 1988), p. 81.

<sup>6</sup>Dean Jaensch and M. Teichmann, *The MacMillan Dictionary of Australian Politics*, 3rd ed. (South Melbourne, MacMillan, 1988), p. 164.

<sup>7</sup>Michael Frome, *Whose Woods These Are: The Story of the National Forests* (Garden City, NY: Doubleday, 1962), p. 47.

<sup>8</sup>Frome, p. 47.

<sup>9</sup>Bernard Shanks, *The Struggle to Save America's Public Lands* (San Francisco: Sierra Club, 1984), pp. 42, 45 and 60.

<sup>10</sup>Frome, p. 53.

<sup>11</sup>Staff of House Comm. on Gov't Operations, 85th Cong., 1st sess., *Executive Orders and Proclamations: A Study of a Use of Presidential Powers* 1 (Comm. Print. 1957) in Anne R. Ashmore, *Presidential Proclamations Concerning Public Lands: January 24, 1791 to March 19, 1936* (Washington D.C.: United States Library of Congress, 1981), p. 1.

<sup>12</sup>Ashmore, p. 2.

<sup>13</sup>*General Withdrawal Act of June 25, 1910*, ch. 421, § 1, 36 Stat. 847 (1910). (Repealed by the *Federal Land Policy and Management Act* of 1976).

<sup>14</sup>Getches, "Managing the Public Lands: The Authority of the Executive to Withdraw Lands," *Natural Resources Journal*, 22 (April 1982), 318.

<sup>15</sup>Richard H. Cowart and Sally K. Fairfax, "Public Land Federalism: Judicial Theory and Administrative Reality," *Ecology Law Quarterly* 15 (1988), 409.

<sup>16</sup>Frank Gregg, "Symposium on the Federal Land Policy and Management Act: Introduction," *Arizona Law Review*, 21 (1979), 271.

<sup>17</sup>Elizabeth Haslam, "Federal and State Cooperation in the Management of Public Lands," *Journal of Contemporary Law*, 5 (1978), 162.

## Conclusion

*Every person, every generation needs to believe in something tangible  
that is anchored to the past and will extend into the future.<sup>a</sup>*

Bernard Shanks (1984)

**P**UBLIC LAND POLICIES are expressions of our communities, states, and nations; and reflect many of our values for nature, the outdoors, wildlife, recreation, permanence and of values for humanity. Native societies unfortunately, have often been historically overlooked or hidden from these discussions.

Nonetheless, with the passing of time, students of the environment may begin to understand that the development of public land policies was not a random event. Rather, our current public land policies evolved from centuries of tangible, philosophical and legal precedence. The public and private land policies of the United States and Australia reflect these differences in attitudes.

The study of federalism is one such idiom of this perspective. As this paper has demonstrated, the United States and Australia developed widely different approaches to public land policy. This is reflected by the fact that even though these nations arrived from comparable beginnings with similar constitutions, cultural attitudes and from similar

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<sup>a</sup> Bernard Shanks, *This Land is Your Land, The Struggle to Save America's Lands* (San Francisco: Sierra Club Publishers, 1984), p. 15.

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## ★ *Conclusion* ★

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geographically large countries, these nations, nevertheless, acquired notably different federal approaches to public land management. Namely, the United States developed a national approach to public land management, while Australia developed an approach whereby Australian States are today responsible for the majority of the nation's public land policies and public land management. Australia's state administered public land approaches have been included in this thesis, merely to highlight features of America's nationally administered public land policies.

First, this thesis has attempted to illustrate that this difference in government jurisdiction exists. This was accomplished by comparing public land tenure between the United States and Australia, and by comparing the distribution of public lands in the United States and Australia. Second, this thesis attempts to demonstrate the likely reasons for America's traditionally national approach to land management, and for Australia's historic state approach. Among the comparative arguments reached by this paper include America's unique state's land cession agreement and Northwest Land Ordinances, along with different beliefs affecting property rights, constitutional provision, their nations' physical environments, land philosophies, land settlement strategies, and finally, differences in federal executive powers. Finally, throughout this thesis, this paper has attempted to demonstrate one of the lasting outcomes of America and Australia's public land policies, namely that the United States has historically been much more successful at legally setting aside and legislatively preserving its public

## ★ Conclusion ★

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lands than has either Australia's states or Australia's Federal Government.

The United States developed a national approach to public land management because of unanimous, early agreement among America's states; early governing land laws that solidified the federal government's national land powers; pro-development and later pro-conservation land philosophies; and important presidential initiatives in conservation. The aftermath of a national approach resulted in the United States Government securing *true* national lands, while nationalism and romanticism succeeded in greatly furthering legalized land conservation.

This thesis has been mostly successful in demonstrating the methods and goals of the argument and of the conclusion. However, a critical look at this paper reveals some of the difficulties reaching these conclusions, as well as some unresolved issues. In researching this topic, it has been difficult to obtain precise interpretations and histories of Australia's public land management practices. In fact, in searching available literature in both countries, American-source interpretation of Australian land policies was surprisingly, often more common and complete than was Australian-source interpretation of Australian land policies.

Consequently, it has often not been possible to maintain a parallel analysis of arguments, which on occasion, has unexpectedly resulted in this thesis losing its

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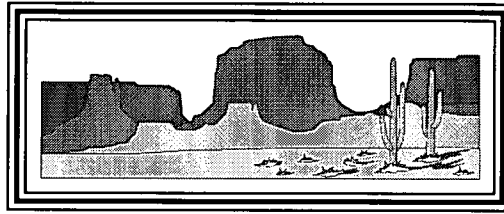
## ★ *Conclusion* ★

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logical cohesion. For this reason, this thesis emphasizes United States policy, while simply utilized available Australian practices to underscore the relevance of United States' national land policies and public land history.

## *A Lakota Prayer*

*T*he Native American  
*L*akota of the north-central plains end their prayers with:



*W*e pray for all our relatives, for all living things.

*T*he elders say we must live our lives and make our choices

*F*or the next seven generations, that the children might live,

*S*o that our young men, our women and our children

*B*e made glad and may peace subsist between us

*S*o long as the sun, the moon, the earth and the water shall endure."

"The Dakota Conflict," A Video Production of KTCA- Twin Cities Public Television  
(Saint Paul, MN: KTCA-TV, 1994).



## Appendices



### ★ *Appendix A:* *The Government Ordinance of 1784* ★

#### **"Report of a committee, on a plan for a temporary government of the Western territory, adopted April 23, 1784"**

**R**esolved, That so much of the territory ceded or to be ceded by individual states to the United States, as is already purchased of the Indian inhabitants, and offered for sale by Congress, shall be divided into distinct states, in the following manner, as nearly as such cessions will admit; that is to say, by parallels of latitude, so that each State shall comprehend from north to south two degrees of latitude, beginning to count from the completion of forty-five degrees north of the equator; and by meridians of longitude, one of which shall pass through the lowest point of the rapids of Ohio, and the other through the western cape of the mouth of the Great Kanhaway; but the territory eastward of this last meridian, between the Ohio, Lake Erie, and Pennsylvania, shall be one State whatsoever may be its comprehension of latitude. That which may lie beyond the completion of the 45th degree between the said meridians, shall make part of the State adjoining it on the south; and that part of the Ohio, which is between the same meridians coinciding nearly with that parallel as a boundary line.

That the settlers on any territory so purchased, and offered for sale, shall either on their own petition or on the order of Congress, receive authority from them, with appointments of time and place, for their free males of full age within the limits of their States to meet together, for the purpose of establishing a temporary government, to adopt the constitution and laws of any one of the original States; so that such laws nevertheless shall be subject to alteration by their ordinary legislature, and to erect, subject to a like alteration, counties, townships, or other divisions, for the election of members for their legislature.

That when any such State shall have acquired twenty thousand free inhabitants, on giving due proof thereof to Congress, they shall receive from them authority with appointments of time and place, to call a convention of representatives to establish a permanent constitution and government for themselves. Provided that both the temporary and permanent governments be established on these principles as their basis.

First. That they shall for ever remain a part of this confederacy of the United States of America.

## ★ *Appendix A: Government Ordinance of 1784* ★

Second. That they shall be subject to the Articles of Confederation in all those cases in which the original states shall be so subject, and to all the acts and ordinances of the United States in Congress assembled, conformable thereto.

Third. That they in no case shall interfere with the primary disposal of the soil by the United States in Congress assembled, nor with the ordinances and regulations which Congress may find necessary, for securing the title in such soil to the bona fide purchasers.

Fourth. That they shall be subject to pay a part of the federal debts contracted or to be contracted, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other states.

Fifth. That no tax shall be imposed on lands, the property of the United States.

Sixth. That their respective governments shall be republican.

Seventh. That the lands of non-resident proprietors shall, in no case, be taxed higher than those of residents within any new State, before the admission thereof to a vote by its delegates in Congress.

That whensoever any of the said states shall have, of free inhabitants, as many as shall then be in any one the least numerous of the thirteen Original states, such State shall be admitted by its delegates into the Congress of the United States on an *equal footing* with the said original states; provided the consent of so many states in Congress is first obtained as may at the time be competent to such admission. And in order to adapt the said Articles of Confederation to the state of Congress when its numbers shall be thus increased, it shall be proposed to the legislatures of the states, originally parties thereto, to require the assent of two-thirds of the United States in Congress assembled, in all those cases wherein, by the said articles, the assent of nine states is now required, which being agreed to by them, shall be binding on the new states. Until such admission by their delegates into Congress, any of the said states, after the establishment of their temporary government, shall have authority to keep a member in Congress with a right of debating but not of voting.

That measures not inconsistent with the principles of the Confederation, and necessary for the preservation of peace and good order among the settlers in any of the said new states, until they shall assume a temporary government as aforesaid, may, from time to time, be taken by the United States in Congress assembled.

That the preceding articles shall be formed into a charter of compact; shall be duly executed by the President of the United States in Congress assembled, under his hand, and the seal of the United States; shall be promulgated; and shall stand as fundamental constitutions between the thirteen original states, and each

★ *Appendix A: Government Ordinance of 1784* ★

of the several states now newly described, unalterable from and after the sale of any part of the territory of such State, pursuant to this resolve but by the joint consent of the United States in Congress assembled, and of the particular State within which such alteration is proposed to be made.



*Appendix B:*  
★ *The Land Ordinance of 1785* ★

**"An Ordinance for ascertaining the mode of disposing of  
Lands in the Western Territories"**

*B*e it ordained by the United States in Congress assembled, that the territory ceded by the individual States to the United States, which has been purchased of the Indian inhabitants, shall be disposed of in the following manner:

A surveyor from each state shall be appointed by Congress, or a committee of the States, who shall take an Oath for the faithful discharge of his duty, before the Geographer of the United States, who is hereby empowered and directed to administer the same; and the like oath shall be administered to each chain carrier, by the surveyor under whom he acts...

The Surveyors, as they are respectively qualified, shall proceed to divide the said territory into townships of six miles square, by lines running due north and south, and others crossing these at right angles, as near as may be, unless where the boundaries of the late Indian purchases may render the same impracticable...

The first line, running north and south as aforesaid, shall begin on the river Ohio, at a point that shall be found to be due north from the western termination of a line, which has been run as the southern boundary of the state of Pennsylvania; and the first line, running east and west, shall begin at the same point, and shall extend throughout the whole territory... The geographer shall designate the townships, or fractional parts of townships, by numbers progressively from south to north; always beginning each range with number one; and the ranges shall be distinguished by their progressive numbers to the westward. The first range, extending from the Ohio to lake Erie, being marked number one. The Geographer shall personally attend to the running of the first east and west line; and shall take the latitude of the extremes of the first north and south line, and of the mouths of the principal rivers.

The lines shall be measured with a chain; shall be plainly marked by chaps on the trees, and exactly described on a plat; whereon shall be noted by the surveyor, at their proper distances, all mines, salt springs, salt licks and mill seats, that shall come to his knowledge, and all water courses, mountains and other remarkable and permanent things, over and near which such lines shall pass, and also the quality of the lands.

The plats of the townships respectively, shall be marked by subdivisions into

## ★ *Appendix B: Land Ordinance of 1785* ★

lots of one mile square, or 640 acres, in the same direction as the external lines, and numbered from 1 to 36; always beginning the succeeding range of the lots with the number next to that which the preceding one concluded...

As soon as seven ranges of townships, and fractional parts of townships, in the direction from south to north, shall have been surveyed, the geographer shall transmit plats thereof to the board of treasury, who shall record the same, with the report, in well bound books to be kept for that purpose.... The Secretary at War shall have recourse thereto, and shall take by lot therefrom, a number of townships, and fractional parts of townships....as will be equal to one seventh part of the whole of such seven ranges, as nearly as may be, for the use of the late continental army; and he shall make a similar draught, from time to time, until a sufficient quantity is drawn to satisfy the same, to be applied in manner hereinafter directed. The board of treasury shall, from time to time, cause the remaining numbers, as well those to be sold entire, as those to be sold in lots, to be drawn for, in the name of the thirteen states respectively, according to the quotas in the last preceding requisition on all the states; provided, that in case more land than its proportion is allotted for sale, in any state, at any distribution, a deduction be made therefore at the next.

The board of treasury shall transmit a copy of the original plots, previously noting thereon, the townships, and fractional parts of townships, which shall have fallen to the several states, by the distribution aforesaid, to the Commissioners of the loan office of the several states, who, after giving notice not less than two or more than six months, by causing advertisements to be posted up at the court houses, or other noted places in every county and to be inserted in one newspaper, published in the states of their residence respectively, shall proceed to sell the townships, or fractional parts of townships, at public vendue, in the following manner, viz. The township, or fractional part of a township, N1, in the first range, shall be sold entire; and N2, in the same range, by lots; and thus in alternate order through the whole of the first range. The township, or fractional part of a township, N1, in the second range, shall be sold by lots; and N2, in the same range, entire; and so in alternate order through the whole of the second range... and thus alternately throughout all the ranges; provided, that none of the lands, within the said territory, be sold under the price of one dollar the acre, to be paid in specie, or loan office certificates, reduced to specie value, by the scale of depreciation, or certificates of liquidated debts of the United States, including interest, besides the expense of the survey and other charges thereon, which are hereby rated at thirty-six dollars the township, in specie, or certificates as aforesaid, and so in the same proportion for a fractional

## ★ *Appendix B: Land Ordinance of 1785* ★

part of a township, or of a lot, to be paid at the time of sales; on failure of which payment, the said lands shall again be offered for sale.

There shall be reserved for the United States out of every township, the four lots, being numbered 8, 11, 26, 29, and out of every fractional part of a township, so many lots of the same numbers as shall be found thereon, for future sale. There shall be reserved the lot N 16, of every township, for the maintenance of public schools, within the said township, also one-third part of all gold, silver, lead and copper mines, to be sold, or otherwise disposed of as Congress shall hereafter direct...

Done by the United States in Congress assembled, the 20th day of May, in the year of our Lord 1785, and of our sovereignty and independence the ninth.



*Appendix C.*  
★ *The Northwest Ordinance of 1787* ★

**"An Ordinance for the government of the territory of the  
United States North West of the river Ohio"**

*B*e it ordained by the United States in Congress Assembled that the said territory for the purposes of temporary government be one district, subject however to be divided into two districts as future circumstances may in the Opinion of Congress make it expedient.

Be it ordained by the authority aforesaid, that the estates both of resident and non- resident proprietors in the said territory dying intestate shall descend to and be distributed among their children and the descendants of a deceased child in equal parts; the descendants of a deceased child or grand child to take the share of their deceased parent in equal parts among them; and where there shall be no children or descendants then in equal parts to the next of kin in equal degree and among collaterals the children of a deceased brother or sister of the intestate shall have in equal parts among them their deceased parent's share and there shall in no case be a distinction between kindred of the whole and half blood; saving in all cases to the widow of the estate her third part of the real estate for life, and one third part of the personal estate; and this law relative to descents and dower shall remain in full force until altered by the legislature of the district. And until the governor and judges shall adopt laws as hereinafter mentioned estates in the said territory may be devised or bequeathed by wills in writing signed and sealed by him or her in whom the estate may be, being of full age, and attested by three witnesses, and real estates may be conveyed by lease and release or bargain and sale signed, sealed and delivered by the person being of full age in whom the estate may be and attested by two witnesses provided such wills be duly proved and such conveyances be acknowledged or the execution thereof duly proved and be recorded within one year after proper magistrates, courts and registers shall be appointed for that purpose and personal property may be transferred by delivery saving however to the French and Canadian inhabitants and other settlers of the Kaskaskies, Saint Vincents and the neighbouring villages who have heretofore professed themselves citizens of Virginia, their laws and customs now in force among them relative to the descent and conveyance of property.

Be it ordained by the authority aforesaid that there shall be appointed from time to time by Congress a governor, whose commission shall continue in force for the

## ★ *Appendix C: Northwest Ordinance of 1787* ★

term of three years, unless sooner revoked by Congress; he shall reside in the district and have a freehold estate therein, in one thousand acres of land while in the exercise of his office. There shall be appointed from time to time by Congress a secretary, whose commission shall continue in force for four years, unless sooner revoked; he shall reside in the district and have a freehold estate therein in five hundred acres of land while in the exercise of his office; It shall be his duty to keep and preserve the acts and laws passed by the legislature and the public records of the district and the proceedings of the governor in his executive department and transmit authentic copies of such acts and proceedings every six months to the Secretary of Congress. There shall also be appointed a court to consist of three judges any two of whom to form a court, who shall have a common law jurisdiction and reside in the district and have each therein a freehold estate in five hundred acres of land while in the exercise of their offices, and their commissions shall continue in force during good behavior.

The governor, and judges, or a majority of them shall adopt and publish in the district such laws of the original states criminal and civil as may be necessary and best suited to the circumstances of the district and report them to Congress from time to time, which laws shall be in force in the district until the organization of the general assembly therein, unless disapproved of by Congress; but afterwards the legislature shall have authority to alter them as they shall think fit.

The governor for the time being shall be Commander in chief of the militia, appoint and commission all officers in the same below the rank of general Officers; All general Officers shall be appointed and commissioned by Congress.

Previous to the Organization of the general Assembly, the governor shall appoint such magistrates and other civil officers in each county or township, as he shall find necessary for the preservation of the peace and good order in the same. After the general Assembly shall be organized, the powers and duties of magistrates and other civil officers shall be regulated and defined by the said Assembly; but all magistrates and other civil officers, not herein otherwise directed shall during the continuance of this temporary government be appointed by the governor.

For the prevention of crimes and injuries the laws to be adopted or made shall have force in all parts of the district and for the execution of process criminal and civil, the governor shall make proper divisions thereof, and he shall proceed from time to time as circumstances may require to lay out the parts of the district in which the Indian titles shall have been extinguished into counties and townships subject however to such alterations as may thereafter be made by the legislature.

So soon as there shall be five thousand free male inhabitants of full age in the district upon giving proof thereof to the governor, they shall receive authority with



## ★ *Appendix C: Northwest Ordinance of 1787* ★

time and place to elect representatives from their counties or townships to represent them in the general assembly, provided that for every five hundred free male inhabitants there shall be one representative and so on progressively with the number of free male inhabitants shall the right of representation increase until the number of representatives shall amount to twenty-five after which the number and proportion of representatives shall be regulated by the legislature; provided that no person be eligible or qualified to act as a representative unless he shall have been a citizen of one of the United States three years and be a resident in the district or unless he shall have resided in the district three years and in either case shall likewise hold in his own right in fee simple two hundred acres of land within the same; proved also that a freehold in fifty acres of land in the district having been a citizen of one of the states and being resident in the district; or the like freehold and two years residence in the district shall be necessary to qualify a man as an elector of a representative.

The representative thus elected shall serve for the term of two years and in the case of the death of a representative or removal from office, the governor shall issue a writ to the county or township for which he was a member, to elect another in his stead to serve for the residue of the term.

The general assembly or legislature shall consist of the governor, legislative council and a house of representatives. The legislative council shall consist of five members to continue in Office five years unless sooner removed by Congress any three of whom to be a quorum and the members of the council shall be nominated and appointed in the following manner, to wit; As soon as representatives shall be elected, the governor shall appoint a time and place for them to meet together, and when met they shall nominate ten persons residents in the district and each possessed of a freehold in five hundred acres of Land and return their names to Congress; five of whom Congress shall appoint and commission to serve as aforesaid; and whenever a vacancy shall happen in the council by death or removal from office, the house of representatives shall nominate two persons qualified as aforesaid, for each vacancy, and return their names to Congress, one of whom Congress shall appoint and commission for the residue of the term, and every five years, four months at least before the expiration of the time of service of the Members of the Council, the said house shall nominate ten persons qualified as aforesaid, and return their names to Congress, five of whom Congress shall appoint and commission to serve as Members of the council five years, unless sooner removed. And the governor, legislative council, and house of representatives, shall have authority to make laws in all cases for the good government of the district, not repugnant to the principles and Articles in the Ordinance established and declared. And all bills having passed by a majority in

## ★ Appendix C: Northwest Ordinance of 1787 ★

the house, and by a majority in the council, shall be referred to the Governor for his assent; but not bill or legislative Act whatever, shall be of any force without his assent. The Governor shall have power to convene, prorogue and dissolve the General Assembly, when in his opinion it shall be expedient.

The Governor, Judges, legislative Council, Secretary, and such other Officers as Congress shall appoint in the district shall take an Oath or Affirmation of fidelity, and of Office; that Governor before the president of Congress, and all other Officers before the Governor. As soon as a legislature shall be formed in the district, the Council and the house in one room, shall have authority by joint ballot to elect a Delegate to Congress who shall have a seat in Congress, with a right of debating, but not of voting during this temporary Government.

And for extending the fundamental principles of civil and religious liberty, which form the basis whereon these republics, their laws and constitutions are erected; to fix and establish those principles as the basis of all laws, constitutions and governments, which forever hereafter shall be formed in the said territory; to provide also for the establishment of States and permanent therein, and for their admission to a share in the federal Councils on an equal footing with the original States, at as early periods as may be consistent with the general interest.

It is hereby Ordained and declared by the authority aforesaid, That the following Articles shall be considered as Articles of compact between the Original States and the people and States in the said territory and forever remain unalterable, unless by common consent, *to wit*.

Article the First. No person, demeaning himself in a peaceable and orderly manner shall ever be molested on account of his mode of worship or religious sentiment in the said territory.

Article the Second. The inhabitants of the said territory shall always be entitled to the benefits of the writ of habeas corpus, and of the trial by Jury; of a proportionate representation of the people in the legislature, and or judicial proceeding according to the course of the common law; all persons shall be bailable unless for capital offences, where the proof shall be evident, or the presumptions great; all fines shall be moderate, and no cruel or unusual punishments shall be inflicted; no man shall be inflicted; no man shall be deprived of his liberty or property but by the judgement of his peers, or the law of the land; and should be public exigencies make it necessary for the common preservation to take any persons property, or to demand his particular services, full compensation shall be made for the same; and in the just preservation of rights and property it is understood and declared; that no law ought ever to be made, or have force in the said territory, that shall in any manner whatever interfere with, or affect private contracts or engagements, bona fide and without fraud previously

## ★ *Appendix C: Northwest Ordinance of 1787* ★

formed.

Article the Third. Religion, Morality and knowledge being necessary to good government and the happiness of mankind, Schools and the means of education shall forever be encouraged. The utmost good faith shall always be observed towards the Indians, their lands and property shall never be taken from them without their consent; and in their property, rights and liberty, they never shall be invaded or disturbed, unless in just and lawful wars authorized by Congress; but laws founded in justice and humanity shall from time to time be made, for preventing wrongs being done to them, and for preserving peace and friendship with them.

Article the Fourth. The said territory and the States which may be formed therein shall forever remain a part of this Confederacy of the United States of America, subject to the Articles of Confederation, and to such alterations therein as shall be constitutionally made; and to all the Acts and Ordinances of the United States in Congress Assembled, conformable thereto. The Inhabitants and Settlers in the said territory, shall be subject to pay a part of the federal debts contracted or to be contracted, and a proportional part of the expenses of Government, to be apportioned on them by Congress, according to the same common rule and measure by which apportionments thereof shall be made on the other States; and the taxes for paying their proportion shall be laid and levied by the authority and direction of the legislatures of the district or districts or new States, as in the original States, within the time agreed upon by the United States in Congress Assembled. The Legislature of those districts, or new States, shall never interfere with the primary disposal of the Soil by the United States in Congress Assembled, nor with any regulations Congress may find necessary for securing the title in such soil to the bona fide purchasers. No tax shall be imposed on lands the property of the United States; and in no case shall non resident proprietors be taxed higher than residents. The navigable Waters leading into the Mississippi and St. Lawrence, and the carrying places between the same shall be common highways, and forever free, as well to the Inhabitants of the said territory, as the Citizens of the United States, and those of any other States that may be admitted into the Confederacy, without any tax, impost or duty therefor.

Article the Fifth. There shall be formed in the said territory, not less than three nor more than five States, and the boundaries of the States, as soon as Virginia shall alter her act of cession and consent to the same, shall become fixed and established as follows, to wit: The Western State in the said territory, shall be bounded by the Mississippi, the Ohio and Wabash rivers; a direct line drawn from the Wabash and post Vincents due North to the territorial line between the United States and Canada, and by the said territorial line to the lake of the Woods and Mississippi. The middle State shall be bounded by the said direct line, the

★ *Appendix C: Northwest Ordinance of 1787* ★

Wabash from post Vincents to the Ohio; by the Ohio, by direct line drawn due North from the mouth of the mouth of the great Miami to the said territorial line, and by the said territorial line. The eastern State shall be bounded by the last mentioned direct line, the Ohio, Pennsylvania, and the said territorial line; provided however, and it is further understood and declared, that the boundaries of these three States, shall be subject so far to be altered, that if Congress shall hereafter find it expedient, they shall have authority to form one or two States in that part of the said territory which lies north of an east and west line drawn through the southerly bend or extreme of late Michigan; and whenever any of the said States shall have sixty thousand free Inhabitants therein, such State shall be admitted by its Delegates into the Congress of the United States, on an equal footing with the original States, in all respects whatever; and shall be at liberty to form a permanent constitution and State government, provided the constitution and government so to be formed, shall be republican, and in conformity to the principles contained in these Articles; and so far as it can be consistent with the general interest of the Confederacy, such admission shall be allowed at an earlier period, and when there may be a less number of free Inhabitants in the State than sixty thousand.

Article the Sixth. There shall be neither Slavery nor involuntary Servitude in the said territory otherwise than in the punishment of crimes, whereof the party shall have been duly convicted; provided always that any person escaping into the same, from whom labor or service is lawfully claimed in any one of the original States, such fugitive may be lawfully reclaimed and conveyed to the person claiming his or her labor or service as aforesaid.

*Appendix D:*  
★ *A Letter from Sydney.* ★  
*The Principal Town of Australasia (1829)*

**"Outline of a System of Colonization"**  
**By: Edward Gibbons Wakefield**



It is suggested,

**Article I**

That a payment in money of \_\_\_ per acre be required for all future grants of land without exception.

**Article II**

That all land now granted, and to be granted, throughout the colony, be declared liable to a tax of \_\_\_ per cent upon the actual rent.

**Article III**

That the proceeds of the tax upon rent, and of sales, form an *Emigration Fund*, to be employed in the conveyance of British Labourers to the colony free of cost.

**Article IV**

That those to whom the administration of the Fund shall be entrusted, be empowered to raise money on that security, as money is raised on the security of parish and country rates of England.

★ *Appendix D: A Letter from Sydney, 1829* ★

**Article V**

That the supply of a Labourers be as nearly as possible proportioned to the demand for Labour at each Settlement; so that Capitalists shall never suffer from an urgent want of Labourers, and that Labourers shall never want well-paid employment.

**Article VI**

That in the selection of Emigrants, an absolute preference be given to young persons, and that no excess of males be conveyed to the colony free of cost.

**Article VII**

That Colonists providing a passage for emigrant Labourers, being young persons and equal numbers of both sexes, be entitled to a payment in money from the Emigration Fund, equal to the actual contract price of a passage for so many labouring persons.

**Article VIII**

The Grants be absolute in fee, without any condition whatsoever, and obtainable by deputy.

**Article IX**

That any surplus of the proceed of the tax upon rent and of sales, over what is required for Emigration, be employed in the relief of other taxes, and for the general purposes of Colonial Government.

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# Epilogue

March 30, 1990

Picture you now, telling your great grandchildren of the year you spent on a small island at the other end of the world. We all shared a certain spirit for adventure and soul searching, and this is why we all got along. You will remember the Southwest [Tasmania], apple macintoshs, Mount Wellington, the day I knocked your glasses off, and running up Churchill Avenue.

Sometimes I feel the people you meet in life, you were meant to, and everything in someone's life, one day fits together. I now see that you were not just my friend or Bridget's friend, you were 'our' friend. I can pay you no greater compliment than that. And when you leave, we will go off and do what we are expected to do, or need to do, or whatever fate brings us. I wish a similar fate awaits you in the future, as the day you turned up on the doorstep of 251D Sandy Bay Road.

Thanks for the spare razor blades, peanut butter and friendship.

The Breakfast Club...

**Darren J. Siely**  
**(1968-1992)**

You see us as you want to see us--in the simplest terms, in the most convenient definitions. But what we found out was that each one of us is a brain, and an athlete, and a basket case, a prince, and a criminal. Does that answer your question...

Sincerely yours,  
The Breakfast Club

Motion Picture, *The Breakfast Club*  
MCA- Universal Pictures, 1985.

## About the Author



Brian L. Haugstad, a native of Rochester, Minnesota, currently resides in Des Moines, Iowa, where he is an Environmental Specialist at the Iowa Department of Natural Resources, Environmental Protection Division. Formerly an Environmental Engineer at I.B.M. Corporation and Cytogeneticist at Mayo Clinic Medical Center, he currently serves as an executive committee member of the North Star Chapter (Minnesota) of the Sierra Club. A graduate, double major in Biology and Environmental Studies at Hamline University, Saint Paul, Minnesota, he also attended university at the Sydney Institute of Education, Sydney University (Sydney, Australia), and at the City of London Polytechnic (London, England), prior to attending postgraduate study at the University of Tasmania in Hobart, Australia. His interests include world, presidential and Native American history; politics; reforestation; and photography.

December, 1995



## Examiner's Evaluation

June/July 1996

*Dear Ms. Fitzgerald and Members of the Review Committee:*

I have reviewed the Master Thesis of Brian Haugstad entitled "A Balanced Federalism: An Examination of Public Lands Policy in the United States with Australia Analogies." The following comments should be considered with the caveat that I am not an expert in Australian public land law. I have visited Australia on a speaking tour and regularly converse with several Australian law professors, including Rob Fowler in Adelaide and Ben Boer in Sydney. Australian (and United States) public lands are a frequent topic of conversation, and I occasionally will review a law review article on the subject, so while I am familiar in a general sense with Australian public land law and politics, I have never independently researched or written on Australian public land law.

### *Overall Quality of Analysis and Research:*

The thesis seems thoroughly researched and exhibits solid original analysis that fully supports the award of a Masters Degree. Mr. Haugstad chose a very broad topic to address-- one that I would have advised him to narrow had I been his thesis advisor. Despite the breadth of the topic, the thesis conveys a clear sense of the broad historic themes that underlie United States and Australian public land management, and how those themes have shaped current public land laws and policies.

Mr. Haugstad's work appears to have two major premises: (1) that the federal government plays a larger role in public land management in the United States, and (2) the larger U.S. federal role, and the historic events that led to that predominantly federal role, have resulted in greater conservation of public lands in the United States.

Mr. Haugstad does a good job of supporting the first premise, both with statistical information from multiple sources and with opinions of other experts. Although the premise may seem self-evident to those already familiar with the public lands of both countries, careful compilations of the statistical data behind "self evident" propositions is a critical exercise in any serious academic research, and often reveals the nuances that are useful

in drawing accurate conclusions based upon underlying "self evident" premises.

Mr. Haugstad did his homework on this subject and placed it where it belongs-- at the beginning of his thesis. This part should prove a useful reference for anyone seeking to compare the current status of public lands in Australia and the United States. I certainly intend to use it for this purpose.

Mr. Haugstad's second premise is more speculative and based more upon secondary sources and the author's experience than upon hard data. The premise (that there is greater conservation of public lands in the United States, arising in part from a greater federal role and in part from a greater conservation ethic) is more problematic. If there is an inherent reason why federal control of public lands would result in greater conservation than state control of public lands, Mr. Haugstad does not clearly identify it. The thesis does, however, do an excellent job of explaining the historical and cultural reasons why federal management in the United States has in fact led to greater conservation of public lands than state management in Australia.

Mr. Haugstad's premise that there is more conservation in the United States is inherently difficult to support with statistical data (unless you merely compare percentages of land set aside). Mr. Haugstad uses his secondary sources convincingly, however, to support this premise.

For example, the number of law protecting public lands, the level of attention paid to conservation in the popular and academic presses, and the amount of financial resources devoted by the government to conservation efforts, all strongly suggest that indeed the United States does place greater emphasis on conservation of its public lands. Of course laws may go unenforced, the press may make mountains out of molehills, and the amount of money spent doesn't always signify the quality of the product obtained. Nevertheless, these factors cumulatively make a strong case establishing Mr. Haugstad's second major premise.

My comments on the individual chapters are as follows:

*Chapter One-- Public Land Tenure:*

This chapter contains an excellent review of the current status of public lands in both countries, and introduces the idea that the predominately federal management in the United States has led to greater conservation than the predominately state management in Australia. The chapter also contains an excellent review of the early history of public lands in the United States and Australia.

It seems to me that Mr. Haugstad's assertion that in Australia "land conservation is primarily a recent event" (pg 64) is a bit conclusionary and even contradicted by some of the examples given by Mr. Haugstad of early Australian conservation efforts. The scale of conservation in early years may not have been the same as in the United States, but as Mr. Haugstad also points out, the pressures to develop lands came much earlier in the history of the United States, and the impetus for growth in the conservation movement (that is, the counter development) began much earlier in the United States as well. Mr. Haugstad alludes to this fact, but I suspect it proves more of the reason for the differences in development of the conservation movement in each country than Mr. Haugstad assumes.

*Chapter Two and Three:*

These two chapters contain a truly excellent and an indepth review of the history of public lands in the two countries. I intend to use them as references. One small criticism of the chapters is that they focus more on early development of public lands in the United States in the East than on the "Western" era, when the public lands West of the Mississippi that form the bulk of our current public lands were aquired and developed. Acquisition of the Oregon territories, of Texas and much of the Southwest in the Mexican-American war, and of Alaska and Hawaii, all played a role in shaping current public land policy in the United States. In general , however, the themes that are identified by Mr. Haugstad in the earlier years of the country were played out again as the country expanded westward, and certainly the conservation movement developed in much the way described by Mr. Haugstad.

As far as the history of Australian public lands, I will merely note that it appears Mr. Haugstad's research on the subject is thorough, and his conclusions plausible.

*Chapter Four:*

Chapter Four's focus on executive powers in the two countries is accurate, but perhaps attributes too much of the credit for the differences in public land policies between the two countries to the differences in executive powers and expectations. At least in the United States, the executive could never have set aside vast public lands without then support of the public and the *ongoing* acquiescence of the legislative branch. While the expectations of executive power are admittedly different in the United States than in Australia, I believe it was more the personalities that filled the office than the nature of the office itself that resulted in massive public lands set asides. A strong executive leader with a deep commitment to public lands and the support of the public is likely to be able to set aside and protect public lands, whether operating with a bicameral legislature or a parliamentary system.

This is more a matter of emphasis than a disagreement, however. I agree with the major point of the Chapter, that in the United States system it is somewhat easier for the executive branch to protect public lands than in the Australian system.

*Conclusion:*

I heartily endorse awarding Mr. Haugstad a masters degree based upon the quality of the research and analysis in his thesis. I appreciate the opportunity to review it, and I apologize that it has taken me so long to provide these comments. If the committee has any specific questions for me, I would be happy to provide a further response.