The Limits of the Law in Claiming Rights to Land in a Settler Colony: South Australia in the Early-to-Mid Nineteenth Century

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In the closing decades of the twentieth century, as indigenous peoples in the United States, Canada, Australia, and New Zealand increasingly filed legal suits to regain their lands or win compensation for lands that they had lost, scholars increasingly devoted themselves to the task of explaining the ways in which European powers had laid claim to indigenous people's territories across the seventeenth, eighteenth, and nineteenth centuries. Their research invariably emphasized the role of the law. This was true not only of legal scholars but of intellectual and cultural historians as well. For example, Patricia Seed asserted that the law was central to all European claims of possession in the New World, because it was "the means by which states created their legitimacy." Most of these scholars argued that particular legal doctrines that were formulated in metropolitan Europe dictated the terms on which imperial powers claimed indigenous people's lands at the peripheries. More particularly, it became commonplace for these scholars to argue that a doctrine called *terra nullius* was especially important in this regard.[1]

1. Brian Slattery, "The Land Rights of Indigenous Canadian Peoples" (PhD diss., University of Oxford, 1979); Henry Reynolds, *The Law of the Land* (Melbourne: Penguin, 1987); Paul McHugh, *The Maori Magna Carta: New Zealand Law and the Treaty of Waitangi* (New York: Oxford University Press, 1991); Patricia Seed, *Ceremonies of Possession in Europe's Conquest of the New World, 1492–1640* (Cambridge: Cambridge University Press, 1995), 6; and Anthony Pagden, "Law, Colonisation, Legitimisation, and the European Background," in *The Cambridge History of Law in America, Vol. 1, Early America (1500–1815)*, ed. Michael Grossberg and Christopher Tomlins (New York: Cambridge University Press, 2008), 17–24.

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In the last two decades, many of these scholars' findings have been challenged in one way or another. For example, socio-legal historians Lauren Benton and Benjamin Straumann have argued that in the context of claim making the law is best understood as a resource that was adapted by imperial agents rather than as a script that provided those agents with clear instructions about the actions they were required to perform in order to establish sovereignty. Benton and Straumann have also argued that claim making typically involved a scattershot approach that comprised many overlapping and even conflicting legal arguments, and that agents operating far from Europe only had a partial, or indirectly acquired, understanding of the legal doctrines that they drew upon. In this regard, Benton has argued that attention needs to be paid to "legal politics," in order to capture the interplay of action and ideas and the connections between legal thought and practice. She and Straumann have also argued that the main objective of imperial agents was to demonstrate that their masters had better title than those of their rivals, rather than to uphold a claim to absolute title, and, therefore, they tended to make vague claims to legitimacy rather than advance strict legal claims.[2]

Another legal historian, Stuart Banner, has suggested that it is a mistake to argue that European claims always encompassed both *imperium*—sovereignty or the right to govern—and *dominium*—lordship over property or title to land—as these matters were often treated differently by imperial and colonial players, and a claim to the former did not necessarily entail a claim to the latter. More recently, James Muldoon has challenged another commonly held view: that a particular legal instrument—colonial charters—played a crucial role in the claiming of territory by granting land to colonial players.[3]

More particularly, Benton and Straumann have been critical of the studies that have exaggerated the role that the doctrine of *terra nullius* or *res nullius* performed in claim making, and have pointed to the part that another doctrine with roots in Roman law, *possessio*, played, often in tandem with other legal doctrines, whereas an intellectual historian, Andrew

2. Lauren Benton and Benjamin Straumann. "Acquiring Empire by Law: From Roman Doctrine to Early Modern European Practice," *Law and History Review* 28 (2010): 3–30, 37–38; Lauren Benton, "Possessing Empire: Iberian Claims and Interpolity Law," in *Native Claims: Indigenous Law against Empire, 1500–1920*, ed. Saliha Belmessous (New York: Oxford University Press, 2012), 19–40; and Lauren Benton "Beyond Anachronism: Histories of International Law and Global Legal Politics," *Journal of the History of International Law* 21 (2019): 1–34.

3. Stuart Banner, *How the Indians Lost their Land: Law and Power on the Frontier* (Cambridge, MA: Belknap Press of Harvard University Press, 2005), 6–8, 14; and James Muldoon, "Colonial Charters: Possessory or Regulatory," *Law and History Review* 36 (2018): 355–81.

Fitzmaurice, has devoted a lengthy study to the role the doctrine of occupation might have performed in the making of claims.[4]

In a rather different vein, historians of culture contact such as Daniel Richter have drawn attention to the fact that, however much imperial powers claimed that indigenous peoples' territory was empty of possession, most colonial players were confronted sooner or later with the fact that land was subject to claims by both indigenous peoples and the agents of other imperial powers, and could not be readily acquired, and so realized that it was best for them to purchase land from an indigenous leader or group, a mechanism that an earlier historian, Francis Jennings, called the "deed game."[5]

Most of this research has done much to nuance our understanding of the means by which Europeans claimed indigenous peoples' territories, yet more work is required to establish the precise roles that the law played in the claiming of land, and to weigh its relative importance. Many recent studies continue to focus on the claim making of imperial agents rather than on the claims made by colonial actors, and these studies have a tendency to attribute a degree of historical significance to the former that is almost certainly unwarranted.[6] Second, many intellectual historians continue to be unduly preoccupied with the texts of famous metropolitan authors or at best with the contexts in which these authors produced those works, rather than investigating the particular circumstances in which those texts were used or invoked by various players in both imperial centers and colonial peripheries. Third, both specialist and more especially general works of history that contend that *terra nullius* was the legal doctrine most commonly invoked in claim making continue to be influential, not least in the broad public domain. Fourth, very few studies seek to chart both the continuities and the changes in the roles that claim making played before, during, and after colonization took place. Finally, and most importantly, there is a tendency in the work of most legal historians to present the claiming of sovereignty and land as though it were a predominantly legal story, thereby exaggerating the role that the law played.

4. Benton and Straumann, "Acquiring Empire by Law," 5–29; Benton, "Possessing Empire"; and Andrew Fitzmaurice, *Sovereignty, Property and Empire, 1500–2000* (Cambridge: Cambridge University Press, 2014).

5. Francis Jennings, *The Invasion of America: Indians, Colonialism, and the Cant of Conquest* (Chapel Hill: University of North Carolina Press, 1975), ch. 8; Daniel Richter, "The Strange Colonial North American Career of *Terra Nullius*," in *Frontier, Race, Nation: Henry Reynolds and Australian History*, ed. Bain Attwood and Tom Griffiths (Melbourne: Australian Scholarly Publishing, 2009), 159–84; and Daniel Richter, "Land and Words: William Penn's Letter to Kings of the Indians," in his *Trade, Land, Power: The Struggle for Eastern North America* (Philadelphia: University of Pennsylvania Press, 2013), 135–54.

6. As I argue in my *Empire and The Making of Native Title: Sovereignty, Property and Indigenous People* (Cambridge: Cambridge University Press, 2020), ch. 1.

In this article, I consider how and to what degree various British imperial and colonial players relied on the law in claiming land and acquiring possession of it in a particular Australian colony in the early-to-mid nineteenth century. I will argue that their reliance on the law was neither as pronounced nor as consistent across time as many historians have assumed or argued. Indeed, I will reveal that there were considerable limits to the role that it played in claim making in the different phases of colonization. Further, I will contend that at several points, various historical, cultural, moral, religious, psychological, and material factors performed a much more important role. Finally, I will contend that the legal doctrine of occupation played a less significant role in the claiming of land than numerous historians have led us to believe.

This article focuses on the British colony of South Australia, as an unusual amount of public debate (at least compared with other Australian colonies) took place about the native people's rights of property in land. This means that there is a relatively large body of historical material available that makes it possible for a historian to investigate in a rigorous fashion the nature of claim making in the particular contexts in which it occurred, rather than to hazard highly speculative arguments on the basis of a very small number of historical sources, as nearly all the extant historiography for the Australian colonies has tended to do.

Imperial Claim Making

To assess the roles that claim making played in the colonization of indigenous people's territories, careful attention must be paid to the particular historical contexts in which this took place, and, therefore, to the actors involved and to the audiences whom they addressed, which in the Australian case, it must be emphasized, invariably comprised Britons alone.

In regard to South Australia, the self-styled colonial reformer Edward Gibbon Wakefield oversaw the drafting of a parliamentary bill in March 1834 for a colonization company, the South Australian Association, in order to provide for the founding of a colony in Southern Australia. This bill provided the basis for the South Australia bill that the British Parliament passed several months later. In it, the colony was described as "consist[ing] of waste and unoccupied lands." In recent decades, it has been argued that this characterization of the territory was legally significant.[7] There can be no doubt that it is open to such an

7. See, for example, Alex C. Castles, *An Australian Legal History* (Sydney: Law Book Company, 1982), 515.

interpretation—and soon after the legislation was passed, it began to be cast in this light by various parties—and yet there are several grounds for doubting that the South Australian Association had a legal purpose in mind in using the terms "waste" and "occupied" at the point the bill was drafted.[8]

At that time, the association had little if any reason to be concerned with any legal matters about title to land. For nearly 50 years, the British crown had been proceeding in the various Australian colonies on the basis that it was the only owner of land, and there were no parties in Britain, let alone in the government or Parliament, who had seriously contested its authority in this regard. Given this, the reasons for the association's representation of Southern Australia as *waste* and *unoccupied* must be sought elsewhere.[9]

This way of figuring the land in question was undoubtedly familiar to the association's principal figures. *Waste* was a term that had powerful associations in English culture. In the twelfth century it referred to land that was unoccupied, or at least occupied only by a few people, but also to land that was uncultivated and therefore regarded as unused; and by the fifteenth and sixteenth centuries, the use of land was increasingly conceived in terms of *improvement*, and land deemed to be unutilized or underutilized was characterized as *waste* as well as *idle* and *desert*. There can be little doubt that this was the way people such as Wakefield saw the lands of North America. This conception of the lands of indigenous peoples was also familiar to the members of the South Australian Association because the British were heirs to an ancient strand of philosophical thought that associated the development of property rights with a society's progress through particular stages of civilization. Therefore, it was believed that peoples who lived in the wilds had never learned to cultivate the land and therefore had never established rights in it. This connection between agriculture and property had deepened in the seventeenth century, as English philosophers such as John Locke articulated it, and still further in the eighteenth century, as Scottish philosophers such as Adam Ferguson developed a stadial theory of history that held that hunters

8. South Australian Bill, March 1834, *British Parliamentary Papers*, 1841, Paper no. 394, Second Report from the Select Committee in South Australia, Appendix, 26; and *British Parliamentary Papers*, 1841, Paper no. 391, Report of the Select Committee on South Australia, 210.

9. John Lefevre to George Groot, April 15, 1834, *British Parliamentary Papers*, 1841, Paper no. 394, Appendix, 37–38; Lefevre to William Whitmore, June 17, 1834, *British Parliamentary Papers,* 1841, Paper no. 394, Appendix, 39; *The Times*, July 2, 1834, 4; and Lefevre to Whitmore July 12, 1834, *British Parliamentary Papers*, 1841, Paper no. 394, Appendix, 43–44.

and gatherers had only a rudimentary notion of property because they merely wandered over the land rather than cultivating it.[10]

The reason that the lands were thought of as *unoccupied* is that it was apparent that the association's members believed that the lands in Australia were thinly inhabited and that its inhabitants had made no improvements to the land because they did not cultivate it. Those responsible for drafting the association's bill probably had both of these meanings of *unoccupied* in mind. It is *possible* that they had a legal purpose in mind in using this term. In Roman law, at least as it had come to be interpreted by later commentators, land that was deemed to belong to no one was susceptible of being acquired by someone else, a mode of acquisition known as *occupation*; and in well-known works on the law of nations, such as Emmerich de Vattel's *Le Droit des Gens* (which appeared in a new English edition in 1834), cultivation of land was invoked as a means of assessing whether or not land was held to be "occupied" in such a way as to prevent newcomers from appropriating it. Yet, there is no contemporary evidence to suggest that this is the reason why the drafters of the South Australia bill used the term *unoccupied*.[11]

Instead, it seems that the association used the terms *unoccupied* and *waste* because this served its *political* purpose. At this point in time, it was engaged in a campaign to persuade a reluctant government to allow it to proceed with its plan. The association largely sought to perform this work by arguing that colonization was in the best interests of Britain and that the area they had chosen was suitable for this purpose. Almost certainly, it was this task that dictated its references to waste and to the land being unoccupied. This is evidenced by several contemporary sources. First, in the bill drafted for the association, the phrase *waste and unoccupied* appears in its preamble—that is, the introductory statement whose tasks were to explain why the proposed enactment was desirable and to set forth the objects of the proposed legislation—rather than in any substantive part of it; furthermore, this phrase appears in a passage that merely sought

10. Edward Gibbon Wakefield, *England and America* (London: R. Bentley, 1833), 2: 118–22, 123–25, 147, 149, 151, 155, 171, 175, 199, 215, 242, 316; George Poulett Scrope, *Principles of Political Economy, Induced from the Natural Laws of Social Welfare, and Applied to the Present State of Britain* (London: Longman, 1833), 18–19; John C. Weaver, "Concepts of Economic Improvement and the Social Construction of Property Rights: Highlights from the English Speaking World," in *Despotic Dominion: Property Rights in British Settler Societies,* ed John A. McLaren, A.R. Buck, and Nancy E. Wright (Vancouver: UBC Press, 2005): 80; Banner, *How the Indians Lost their Land*, 35–36; and Fitzmaurice, *Sovereignty, Property and Empire*, 114–22, 149–66.

11. Emmerich de Vattel, *The Law of Nations or the Principles of the Law of Nature Applied to the Conduct and Affairs of Nations and Sovereigns: A New Edition by Joseph Chitty* (London: S. Sweet, 1834), 100.

to cast this part of Australia as "fit for the purposes of colonisation" and another passage that asserted that British subjects were to be employed "in reclaiming the waste lands . . . and bringing them into a state of productive cultivation," and in the end, these references were considered to be relatively unimportant to the bill's meaning such that they were omitted by the association before it submitted its bill to Parliament. Second, in speeches that members of the association made at a public meeting called in June 1834 to put pressure on the government to introduce its bill to Parliament, they again used the concepts of *waste* and *unoccupied* in order to advance their case that colonization was a good in itself. For example, one of the association's principal figures, William Whitmore, asserted: "All that is wanting is a population, intelligent, active, and industrious. If such is the case—if such means of improvement are alone wanting, and we can boast a superabundance of those means—why should we not supply them, and make that a smiling and a happy land, which is now almost a desert, where hardly an occupant is to be seen, or if seen, in no way advanced in civilisation—almost indeed in a savage state," while one of the Association's members, the political economist and Whig parliamentarian Poulett Scrope asserted: "In America, North and South, in Asia, in New South Wales, nay even in Europe, there are millions of acres of the richest land still in a state of waste, but wanting only to be cultivated by man," and asked "Can any one refuse to believe that it is the intention and the will of that beneficent Creator, that man, his last and noblest work, should proceed to occupy, cultivate, and people these wastes, and develop their hitherto neglected productiveness? Has he not expressly commanded us to 'increase and multiply, and replenish the earth, and subdue it'?"[12]

In few of the instances I have mentioned did the members of the association make reference to the native inhabitants of Southern Australia. There can be little doubt, however, that they realized that the local people could be regarded as the owners of the land that they were seeking to colonize. In the course of (brief) parliamentary debates about the bill, a remark by an MP that drew attention to the fact that the preamble of the bill declared that "it was intended to occupy waste and unoccupied lands" provoked a nervous laugh by one of the association's principal figures, Robert Torrens, which betrayed an awareness of the fact that the land in question was in fact already occupied by another people. Yet, there is no

12. South Australian Bill, March 1834, *British Parliamentary Papers*, 1841, Paper no. 394, Second Report from the Select Committee in South Australia, Appendix, 26; *Act 4 and 5 William IV, Cap. 95*; *Morning Chronicle*, July 1, 1834, 2; and Douglas Pike, *Paradise of Dissent: South Australia 1829–1857*, 2nd ed (Melbourne: Melbourne University Press, 1967), 68.

reason to suggest that this knowledge led the association's principal players to conclude that they should shore up its claim to land by adopting legal measures. Instead, it seems clear that at this point in time, the association deployed a culturally familiar language of *waste* and *unoccupied*, because this met its purpose of trying to persuade the British government and Parliament that they should approve its plan for a new colony.[13]

Nonetheless, there is no gainsaying the fact that these two terms *did* have particular legal meanings and that they could be repurposed once the association's needs changed. Eighteen months after the South Australia bill was passed, Robert Torrens became convinced that the body he now headed—the South Australian Colonisation Commission, which comprised the principal figures of the South Australia Association and which had become the statutory body responsible for overseeing the new British colony of South Australia—was facing a crisis. In the course of responding to a request by the commission to issue some legal instruments to give effect to the South Australia Act, Sir George Grey, the parliamentary undersecretary for the Colonial Office, had expressed concerns about the place where the boundaries of the new colony were to be set and whether the crown or the commission had the authority to determine them. More to the point, Torrens assumed that Grey was actually raising on behalf of the Colonial Office a much more fundamental question about the Aboriginal people's rights of property in land in the territory. Indeed, he feared that the Colonial Office was positively asserting that the native people had such rights and was demanding that the commission respect them (though it is unlikely this was the case).[14]

In this context, the Colonisation Commission assumed that it had to shore up its claim to land by legal means. In doing so, it adopted several strategies, several of which hinged on legal doctrine of *occupation*. In the first instance, one of the colony's planners, John Brown, was of a mind to invoke the declaration in the South Australia Act's preamble that the land was waste and unoccupied. Realizing that the critical question was "the interpretation of the word 'occupy'," Brown expressed the opinion that the land in question was not occupied "according to any law regulating possession which [was] recognised by civilised people." For his part, Torrens was especially anxious that the commission's plans for the colony

13. *British Parliamentary Debates,* House of Commons, July 23, 1834, column 431; and John Brown, Diary, January 4, 1836, State Library of South Australia (hereafter SLSA), PRG 1002/2.

14. Sir George Grey to Robert Torrens, December 15, 1835, National Archives of the United Kingdom (hereafter NA), CO 13/3; Torrens to Grey, December [26] 1835, NA, CO 13/3. See my "Returning to the Past: The South Australian Colonisation Commission, the Colonial Office and Aboriginal Title," *Journal of Legal History* 34 (2013): 62–67.

would be upended if native rights of property in land were recognized by the British government. Consequently, he ordered that correspondence between the association and the government, the relevant acts of Parliament, and pertinent material about the first Australian colony (New South Wales) be immediately gathered and examined by the commission in order to ascertain the course that the government had previously followed in similar situations.[15]

Once this historical task had been completed, Torrens and the commission proceeded to present their case to the Colonial Office. They deployed legal resources of various kinds in order to ensure that native rights of property in land could not be countenanced by the British government, but the way in which they did this was rather different from what historians in recent years have led us to expect, given that they have argued that the doctrines of *terra nullius* or *occupation* were the primary means by which the British claimed sovereignty or land in the Australian colonies. Torrens argued:

> In the colonisation of Australia, it has been invariably assumed as an established fact that the unlocated tribes have not arrived at that stage of social improvement in which a proprietary right to the soil exists. This was assumed as an established fact when New South Wales and Van Diemen's Land and Western Australia were taken possession of; it was assumed as the established fact when the Crown made extensive grants to the Australian and Van Diemen's Land Agricultural Companies and to the first settlers upon Swan River; and it continues to be assumed as the established fact, in all the extensive sales of public lands which are daily taking place in the remote interior of New South Wales where that colony approaches South Australia.

On the face of it, it appears that Torrens was indeed relying here on the doctrine of *occupation* to advance the association's case. Yet a careful reading of this passage reveals that he was not so much asserting the abstract principle that was embedded in that doctrine as he was advancing a more concrete claim that the government had long acted on the basis of this doctrine and was continuing to do so.[16] In other words, Torrens's principal contention here rested on a claim about the government's administrative practice, or at most a claim that rested on the doctrine of *prescription*, rather than on the doctrine of *occupation*.[17]

Nevertheless, it is clear that Torrens also sought to arm the Colonisation Commission by offering to provide the government with particular undertakings that *did* rely on the doctrine of *occupation*. First, it promised the

15. Brown, Diary, December 16 and 17, 1835.
16. This claim was actually spurious.
17. Torrens to Grey, December [26] 1835.

Colonial Office that it would issue instructions to the land commissioners in the colony that they were not to survey or sell land in any district in which "the Aborigines *may* be found occupying, or enjoying, or possessing, any right of property in the soil." Torrens and his fellow commissioners chose these words very carefully: they held that no native people *occupied, enjoyed,* or *possessed* the land in a manner that could affect the interests of a third party, and therefore they believed that the natives would never be found to have title to the land. This is evident in a remark that Torrens made several months later: "It will be the duty of the protector of the aborigines, as I understand, to see that no land which the aborigines *really* have in possession or enjoyment (*I believe they have none*) shall be taken for settlement." Second, the commission offered to guarantee its undertaking to protect the native people's rights of property in land by inserting into the draft of the letters patent for the colony a provision "reserving the right of the Aboriginal natives to any lands that may now be in [their] *actual* occupation or enjoyment." Third, the commission drafted a bill to amend the South Australia Act, in which it worded the sections regarding the rights in land that the native people might have in the same way as the proviso it drafted for the letters patent. Fourth, it sought to protect its enterprise against any encroachments by the government-appointed protector of Aborigines by secretly passing an order that declared that *all* the lands in the colony would be open for public sale (although section 6 of the South Australia Act had already bestowed this authority on the commission). Finally, several months later, the commission issued instructions to the resident commissioner in the colony that seemed to acknowledge that the Aboriginal people had rights of property in land but included the same caveats as the letters patent.[18]

It can be argued that these measures provided the Colonisation Commission with a powerful weapon for upholding its claim to land. Certainly, historians have been inclined to argue that the legal doctrine that underpinned these measures played a crucial role in determining the way that the native people's interests in land were treated. Yet, there is very little reason to conclude that these measures played a decisive role

18. Torrens to Grey, December [26] 1835, my emphases; Draft of Letters Patent, NA, CO 13/3; Torrens to Grey, January 16, 1836, NA, CO 13/5; Draft of a Bill to Amend an Act to empower His Majesty to erect South Australia into a British Province or provinces, and to provide for the Colonisation and Government thereof, NA, CO 13/5; *British Parliamentary Papers*, 1836, Paper no. 512, Report of the Select Committee on the Disposal of Lands in the British Colonies, 130, my emphases; and Second Letter of Instructions by the South Australian Colonisation Commission to James Hurtle Fisher, Resident Commissioner in South Australia, 8 October 1836, *British Parliamentary Papers*, 1837–38, Paper no. 97, Second Annual Report of the Colonisation Commissioners of South Australia, 16.

in the fact that the lands of South Australia were treated as though they were empty of possession. This is so for at least three reasons.

It is apparent that the principal figures in the Colonial Office at this time—Lord Glenelg (the colonial secretary), Sir George Grey (the parliamentary under-secretary), and James Stephen (the permanent under-secretary)—were sympathetic to the concerns that Christian humanitarians had just begun to express about the deleterious impact of British colonization on indigenous peoples in the empire, including those in its Australian colonies. But there is little if any evidence to suggest that these men believed that the Aboriginal people in Southern Australia had any more rights in land than the commission did, or that they wished to implement protective measures of a kind that differed from those proposed by the commission. At the end of negotiations that it conducted with the Colonisation Commission in the winter of 1835–36, the Colonial Office approved the colonization of Southern Australia without seeking any guarantee that the Aboriginal people's rights in land would be respected. Moreover, in the official instructions it drew up for the governor of the colony several months later, it did no more than state that he was to "take care to protect [the native inhabitants] in their persons and in *the free enjoyment of their possessions*." As the historian Mark Hickford has noted, the Colonial Office's principal figures often used formulaic phrases such as the one to which I have just drawn attention, but, however useful they were in conducting political negotiations with organizations such as the Colonisation Commission, they furnished no clear detail about what should be done in a particular colony, let alone in any strict legal sense.[19]

Furthermore, it is apparent that the stance that the Colonial Office adopted toward native title in any colony was determined not so much by the way in which its principal figures conceived of rights of property in land but rather by their highly practical consideration of a colony's affairs. This was profoundly influenced by their perceptions of the relationships of power that were at play between the British Empire and Indigenous people as well as between the principal British parties. As far as the Colonial Office was concerned, there was no point in trying to maintain that Indigenous peoples had rights in land in circumstances in

19. Votes and Proceedings recording Thomas Fowell Buxton's motion, House of Commons, July 2, 1834, Sir Thomas Fowell Buxton Papers, Weston Library, Oxford University, MSS. Brit. Emp. S. 444, Micr. Brit. Emp. 17, vol. 12; Thomas Spring Rice to Sir Richard Bourke, August 1, 1834, *Historical Records of Australia*, series 1, vol. 17, 491–92; Grey to Torrens, January 21, 1836, NA, CO 396/1; Instructions to Governor John Hindmarsh, July 12, 1836, NA, CO 381/6, my emphasis; and Mark Hickford, "Making 'Territorial Rights of the Natives': Britain and New Zealand, 1830-1847" (PhD diss., Oxford University, 1999), v–vi, 16, 74, 122, 162, 229–30.

which the British government lacked the power to uphold those rights. "In the remote part of the vast regions comprised within the range of the Australian colonies the power of the law is unavoidably feeble, when opposed by the predominant inclinations of any large body of the people," Stephen remarked in October 1836. "In such a country unpopular regulations, unless supported by a force either of police or soldiery irresistible and overwhelming, must become little more than a dead letter."[20]

Just as importantly, once a property regime had been established in the Australian colonies on the basis that the British crown was the only source of title to land, it became very difficult to advance a claim for the Aboriginal people's rights in that land. In repudiating a treaty (which was really a land purchase deed) that adventurers from Van Diemen's Land (later Tasmania) had made with the Kulin people in the Port Phillip District of New South Wales in 1835, Colonial Secretary Glenelg maintained that the crown "would subvert the foundation on which all proprietary rights in New South Wales at present rest[ed], and defeat a large part of the most important regulations of the local government" if it were to allow that the Aboriginal people had the right to alienate land to Europeans. Christian humanitarians were of much the same view. However much they held that it was unjust that the Aboriginal people's claims as both sovereigns and the proprietors of the land had been utterly disregarded by the British crown, they believed that there was no reason to suppose that anything would be gained by trying to uphold either native sovereignty or their rights in land. In short, what Stuart Banner has called "path dependency" played a crucial role in determining how native interests in land were treated in any settler colony.[21]

In summary, by the time colonization had begun in Southern Australia, the die was largely cast as to how native rights of property in land would be treated.

Planting the Colony

Once the South Australia Colonisation Commission began to plant its colony, the arena in which claims in regard to land were constructed and contested largely shifted from the imperial metropole to the colonial periphery and the roles that claim making was called upon to play began to change.

20. James Stephen to South Australia Colonisation Commissioners, October 27, 1836, NA, CO 396/1.

21. Lord Glenelg to Governor Richard Bourke, April 13, 1836, CO, 201/47; *British Parliamentary Papers*, 1837, Paper no. 425, Report from the Select Committee on Aborigines [British Settlements] with the Minutes of Evidence, 82–83; Stuart Banner, *Possessing the Pacific: Land, Settlers and Indigenous People from Australia to Alaska* (Cambridge, MA: Harvard University Press, 2007), 45–46, 318.

As the South Australia Association's settlers started to encounter native people, they came face to face with the discomforting fact that the local people regarded themselves as the owners of the land and that they were dispossessing them of it without their consent. In these circumstances, claiming the right of possession began to acquire a vital psychological purpose for the settlers. For example, John Brown, who had become the colony's official emigration agent, found it necessary to insist, in a private letter he wrote to Edward Gibbon Wakefield shortly after his arrival in the colony, that "as to the idea of any right to the land, or any feeling that we are trespassers, *I am sure* that [the natives] think nothing about it." We should be sceptical of Brown's claim of certitude here; indeed, it suggests the contrary. Certainly, other settlers, as will be discussed, found it difficult to turn a blind eye to the fact that they were dispossessing the Aboriginal people of their birthright.[22]

At the same time, the Colonisation Commission redoubled its efforts to ensure that its claims to land were secure. For example, it adopted measures to prevent the protector of aborigines from acting in any way that could subvert its title to land. After postponing his appointment for several months, it instructed the protector that the natives could only be treated as the holders of title in land if they were found to use the land in accordance with the legal doctrine of *occupation*. Thus, the Colonial Secretary of South Australia, Robert Gouger, told the Acting Protector, William Wyatt, in August 1837 that he was to protect the Aboriginal people "in the undisturbed enjoyment of their proprietary rights to such lands as may be *occupied* by them in any especial manner" and Gouger made it clear that this meant whether or not they were "in the practice of making use of land for cultivation of any kind, or if they have a fixed residence on any particular spot."[23]

It soon became apparent that the Colonisation Commission's concerns in regard to the role that a protector of Aborigines might play in protecting native rights in land—and thus undermining the Commission's claims of possession—were not altogether misplaced. In May 1838, Wyatt called upon the governor of the colony, John Hindmarsh, to protect the rights of the Aboriginal people by reserving some land for their use before a particular area was thrown open for selection by settlers. Yet the legal authority in regard to the sale of land that the Colonisation Commissioners had secured for itself vis-à-vis the British crown ensured that this measure

22. Brown to Edward Gibbon Wakefield, February 13, 1837, John Brown Papers, SLSA, PRG 1002/1, my emphasis.

23. Colonial Secretary's Office, Official Instructions to William Wyatt, August 11, 1837, *South Australian Gazette and Colonial Register*, August 12, 1837, 1.

could not be adopted. Consequently, Hindmarsh had to direct Wyatt to apply to the Resident Commissioner, James Fisher, and he ruled that the South Australia Act admitted no reservations of land of any kind.[24]

Nevertheless, the fact that the Colonisation Commission had legal powers of this kind did not, at the very least, prevent questions from being raised about its rights to land vis-à-vis those of the native people. In this instance, Wyatt proceeded to gain the support of an Aborigines committee (which had been established by the governor in March 1838 to provide advice to the protector of the Aborigines) in order to draw Hindmarsh's attention to the fact that the Colonisation Commission had failed to provide its resident commissioner with any instructions to reserve land for Aboriginal use.[25]

What happened next suggests that many settlers were sorely troubled about the way in which the Aboriginal people's interests in land were being trampled upon, and that this raised doubts in their minds about the legitimacy of the enterprise in which they were engaged, and, therefore, questions about *rights* or more strictly about what was *right*. The matter that Wyatt had put before the Aborigines Committee was taken up by the author of a pseudonymous letter to the editor of one of the local newspapers, the *Southern Australian*. O.T.R., who was probably a member of the Aborigines Committee, took at face value the instructions that the Colonisation Commission had issued its resident commissioner in regard to the natives and land, which were the same as those that the commission had inserted in the letters patent. As a result, he argued that they seemed to recognise "a moral if not a legal right of the natives to the land we now occupy." Moreover, O.T.R. contended that all the lands in the colony that had been surveyed and sold to settlers were actually *occupied* by the Aboriginal people in the strict legal sense of that word. "[I]ndeed," he remarked, "the more intelligent part of the natives themselves have often asserted that the land for instance upon which Adelaide [the colony's principal settlement] is situate, belongs to the 'black fellow'." O.T.R. was in no doubt as to how the Aborigines Committee would conclude its discussion of the subject at its next meeting. "[T]he decision will be that the natives of the province have an indefeasible right to the soil."[26]

24. *South Australian Gazette and Colonial Register*, March 17, 1838, 2; William Wyatt to T.B. Strangways, May 15, 1838, State Records of South Australia (hereafter SRSA), GRG 35/211, vol. 1; and Wyatt, Letter to the Editor, *South Australian Gazette and Colonial Register*, May 18, 1839, 2.

25. Wyatt to Strangways, June 11, 1838, SRSA, GRG 24/1/1838; *Southern Australian*, June 2, 1838, 3; and Letter to the Editor, *Southern Australian*, June 16, 1838, 4.

26. Letter to the Editor, *Southern Australian*, June 16, 1838, 4, emphasis in original.

Yet O.T.R. did not call for these rights to be upheld. Rather, he urged the adoption of the same kind of measures that Christian humanitarians in Britain had been recommending, stating: "we must, by every means in our power, and at any expense to ourselves, promote their welfare, support them by a regular supply of the necessaries of life, and . . . mak[e] a zealous and well considered attempt to educate their young [and so] lay the foundation of principles of morality and civilisation among the rising generation." The Aborigines Committee had couched its work in the very same terms: "the natives have . . . a moral right or interests in the soil as fairly entitles them to and justifies this committee in recommending a sufficient provision being made for their maintenance and support."[27]

How are we best to understand the manner in which people such as O.T. R. spoke of native rights? Many historians have been inclined to assume that this "rights talk" was of the same kind as that of recent times. Yet it is more likely that the members of the Aborigines Committee used the notion of rights primarily in the objective sense of something being rightfully done, and therefore a standard for conduct, rather than in the subjective sense of someone having a right to something, which amounts to a right as a kind of personal possession. Christian humanitarians at this time held that the natives had rights that humans held in a state of nature, and, therefore, they argued that this entitled the natives to some kind of consideration as legal subjects; however, these rights were not the same as the rights of a citizen. Those rights rested upon someone's participation in civil society and could only be claimed by those who were deemed to have moral autonomy, which required both the capacity to reason and to decide matters for oneself. In this schema, those such as children, slaves, women, and native people were not regarded as fully autonomous beings, because it was widely believed that they lacked those capacities, which meant that someone else had to act on their behalf. The British and Foreign Aborigines' Protection Society had asserted this very principle at its founding in 1837: "[This organisation] is established as the protector of those who have no power to protect themselves." Consequently, Christian humanitarians were more inclined to talk about the moral duties of Britons towards the natives rather than about the legal rights of the latter. For his part, O.T.R. insisted: "No Act of Parliament, by establishing this colony as a British province, can take away the weight of obligation which rests upon us as colonists."[28]

27. William Nation, Secretary, Aborigines Committee, to James Fisher, June 11, 1838, SRSA, GRG 35/211/1; Letter to the Editor, *Southern Australian*, June 16, 1838, 4.

28. Aborigines Protection Society, *Report of the Parliamentary Select Committee on Aboriginal Tribes* (London: William Ball, 1837), x; Letter to the Editor, *Southern*

There seems to be abundant evidence that many settlers sought to handle the moral dilemma that colonization and the ensuing dispossession of the colony's first peoples had presented by insisting that they, the settlers, had a moral duty toward these peoples, on the basis of the historical fact that the natives were the *aboriginal peoples* in the original Latin sense of the term *ab origine*, that is, from the beginning. Several weeks after O.T. R.'s letter appeared in the *Southern Australian*, an anonymous correspondent wrote to the same newspaper in much the same vein, arguing that "the aboriginal proprietors of South Australia" had "the highest possible claims" on the sympathy of the settlers. Like O.T.R., this letter writer was troubled by the fact that the South Australian Colonisation Commission had claimed possession as though the native people had no rights in land. Styling himself as "Lover of Justice," he attacked the phrase in the preamble in the South Australia Act that I discussed earlier. "[W]e find no mention made of the natives of the country or their rights; on the contrary, the country is set forth as 'waste and unoccupied'; and acting upon the truth of these suppositions, it points out the manner in which these 'waste and unoccupied lands' are to be appropriated. Have we who have come hither found these lands unoccupied? Have we not, on the contrary, found them possessed by native tribes?" Clearly, the *fact* that the Aboriginal people were so evidently in possession of the land raised a profound moral problem for the settlers. "[U]nless we act upon the principle supposed by some to be an exploded one, that 'might makes right'," this settler exclaimed, "we are found possessing that which rightfully belongs to our neighbors." This, he insisted, was not how William Penn, famous for his treaty making in the North American colony that bore his name, would have conducted himself.[29]

This letter writer made clear that in his opinion, the legal resources on which the Colonisation Commission was relying to uphold its claims to land did not resolve the acute problem of moral legitimacy that the colony was now facing. "The rights of the original possessors are not at all affected by Acts of Parliament or Commissioner's Instructions: their

Australian, June 16, 1838, 4; Richard Dagger, "Rights," in *Political Innovation and Conceptual Change*, ed. Terence Ball, James Farr, and Russell L. Hanson (New York: Cambridge University Press, 1989), 294, 298; Knud Haakonssen, *Natural Law and Moral Philosophy: From Grotius to the Scottish Enlightenment* (Cambridge: Cambridge University Press, 1996), 5–6, 314–15, 322, 326, 332, 340; and Lynn Hunt, *Inventing Human Rights: A History* (New York: W.W. Norton, 2007), 21, 27–28.

29. Letter to the Editor, *Southern Australian*, July 28, 1838, 4, emphasis in original; and the entry for "Aborigines" in *Australian National Dictionary: A Dictionary of Australianisms on Historical Principles* (Melbourne: Oxford University Press, 1988), https://australiannational-dictionary.com.au/oupnewindex1.php. (accessed 1 March 2019)

right rests upon principles of justice," he wrote. "It is impossible to deny the right which the natives have to the land on which they were born, from which age after age they have derived support and nourishment, and which has received their ashes." As far as he was concerned, in order to resolve the moral problem that had arisen because the land had not originally been purchased from the Aboriginal people, the settlers had to right this wrong, not by seeking to purchase land from the natives and thereby gain their consent to being dispossessed, but by providing them with compensation for their loss.

This settler was not alone in calling for a measure of this kind. A few months later, a Quaker settler by the name of Robert Cock sent Protector Wyatt a money order for the use of the Aboriginal people (which amounted to 10% of one fifth of purchase price for his property). Cock regarded this payment as the yearly rent he owed the former owners of the land, and made it clear to Wyatt that it was not to be regarded as a donation, grant, or gift, but rather as "a just claim the natives of the district [had] on [him] as an occupier of [their] lands."[30]

This gesture seems to have unsettled other settlers. After Cock publicized it in the pages of the *Southern Australian*, its editor attacked the principle that informed it. He claimed that the settlers wanted to ensure that the Aboriginal people were cared for and their rights protected, but that they did not believe that each landowner should be called upon to pay such a sum, and that they denied that "the natives [could] claim [payment] as a right." It seems that he was correct. None of Cock's fellow settlers appear to have followed his example.[31]

A Major Debate

In April 1839, a major public debate took place that focused partly on whether the Aboriginal people had any rights as a consequence of the fact that they were the country's original inhabitants and, if so, what the nature of those rights was. This is worth considering at some length for several reasons: it was typical of the public discussion about Aboriginal people and their rights in land that occurred sporadically in the Australian colonies in the early-to-mid nineteenth century; it was provoked by a particular issue that did not necessarily bear any relationship to the question of the Aboriginal people's rights in land; it raised several questions about the nature

30. Cock to Protector of the Aborigines, September 7, 1838, in *Southern Australian*, September 15, 1838, 3.

31. *Southern Australian*, September 15, 1838, 3.

of relationship between the settlers and the Aboriginal people more generally; it prompted settlers to adopt a range of stances that were shot through with ambiguity as well as ambivalence; and they employed a range of arguments, only some of which were legal in nature, to lend authority to the position that they adopted in regard to the native people's rights in land.

This is what happened. The government had learned that a white shepherd had been brutally attacked by three Aboriginal men on the Torrens River, and shortly afterwards it heard of two or three more such killings. Until this time, relations between the local people and the settlers had been relatively free of violent conflict. But George Stephen, who was acting as governor in the absence of Sir George Gawler (who had assumed the position 6 months earlier), ordered a police party to pursue the killers and issued a proclamation announcing that the government would withhold the provisions of food and clothing that it had been supplying to the natives.[32]

Stephen's directives were quickly condemned in the colony's press. For example, one settler wrote to the *Southern Australian* to raise the subject of what he called "the much injured original possessors of the soil." He complained that the government seemed to be determined to withhold "JUSTICE for the natives" and attacked Stephen's proclamation as unworthy of the English name. In much the same vein, the newspaper's editor expressed concern that the settlers had "contracted a responsibility" with regard to the natives that they had "scarcely yet begun to fulfil," insisting: "We were not led by Providence so far from our own land for the purpose of mere personal aggrandisement, but chiefly to diffuse around us on this foreign soil the blessings of Christianity and civilisation."[33]

Ten days later, this newspaper published a leading article that was almost certainly penned by a lawyer, Charles Mann, who had been the colony's first advocate-general, who cast the debate in these terms: "What Right have Englishmen in South Australia?" This raised questions about both sovereignty and rights in land. In answering them, Mann advanced three lines of argument. First, he asserted what he called "the *right* of the white man to locate himself in South Australia." Mann was clearly troubled by any suggestion that the settlers were the "usurpers of the rights of the black men." As such, he was keen to challenge the implications of the status that Christian humanitarians had articulated on behalf of the natives, that of being the country's aboriginal or first peoples. In his view, this status bestowed no particular rights upon them: "we have exactly the same right to be here that the older inhabitants have."[34]

32. *South Australian Gazette and Colonial Register*, April 27, 1839, 1.
33. Ibid.; and *Southern Australian,* May 1, 1839, 3.
34. *Southern Australian*, May 8, 1839, 2, emphasis in original.

Second, Mann argued on the basis of the doctrine of *occupation*, that the natives had no rights in land. "From the moment they arrived, until the present," he asserted, "they have not sought, and therefore not acquired as tribes a property in the soil, nor, as individuals, the ownership of things which grow or roam upon its surface." Why was this so? "They have neither erected habitations upon it, nor pierced its bosom to make it minister to their support and comfort," Mann argued. "Generation after generation, their thinly scattered tribes have wandered homeless over its fertile districts, unconscious or heedless of the treasures within them." In ancient Greek thought and in Aristotelian thinking in particular it was held that it was the duty of humans to release the potential in nature by exploiting their knowledge of natural laws, and that they created ownership of such things in doing so. This principle had been codified in Roman law, and later commentators had argued that land whose potential had not been released could not been subject to a claim of ownership. This way of conceptualizing property rights was no doubt very useful in soothing the consciences of settlers. By claiming that the land was empty of possession, they could persuade themselves that they had not actually dispossessed the native people of anything.[35]

This line of argument was undoubtedly very familiar to many settlers, but it is unlikely that this can be attributed to any deep knowledge about the legal doctrine of *occupation.* More likely than not, they were acquainted with this argument because of the profound influence of Christianity in the Australian colonies, or more specifically, the fact that the Bible, or at least a peculiarly English interpretation of the Book of Genesis 1: 28, exhorted them to "[b]e fruitful, and multiply, and replenish the earth." In addition, it is probable that settlers were familiar with the aforementioned argument because it was deeply rooted in an Anglo-Saxon folk culture that stressed the virtues of rendering the land fertile through agriculture. As we noted earlier, this idea had become increasingly popular as the notion of improvement was championed in the seventeenth and eighteenth centuries.[36]

Third, Mann asserted a right to colonize on the grounds that this ensured the spread of civilization and Christianity: "[I]f the civilised man has no right to make his home amid the haunts of barbarians, such portions of

35. *Southern Australian*, May 8, 1839, 2; and Andrew Fitzmaurice, "Moral Uncertainty in the Dispossession of Native Americans," in *The Atlantic World and Virginia, 1550–1624*, ed. P.C. Mancall (Chapel Hill: Omohundro Institute for Early American History, 2007), 385, 399.

36. Seed, *Ceremonies of Possession*, 32–34; and Meredith Lake, *The Bible in Australia: A Cultural History* (Sydney: New South, 2018), 88–90.

the earth as are yet savage must remain unchristianised and uncivilised, or be renovated by means of oppression and injustice."[37]

In the same issue of the *Southern Australian* in which Mann's article was published, there appeared a long letter to the editor by a pseudonymous correspondent, W.B. He was troubled by the moral dilemma that colonization was posing for the settlers, but insisted that there was no point debating whether the English had a right to be in South Australia or had a right to the land: "It is useless now to speak about our *right* to come to New Holland and appropriate a part of it for our subsistence [just as it is] now in vain to talk about the *injustice* of dispossessing the natives of part of their territories, though [i.e. even if] it were granted that they ever possessed them. Every one of us, by coming here, has, in reality, said that we either had such a right, or, not having the *right*, that we, at least had the *might*, and resolved to exercise it." Yet it seems that W.B. was unsure whether the British had a just basis for claiming the right of possession.[38]

W.B.'s principal argument was soon attacked in the pages of the colony's rival newspaper, the *South Australian Register and Colonial Gazette*, by its editor, George Stevenson, who was similarly troubled by the moral questions that colonization was raising, not least because he was aware that in South Australia, unlike in New Zealand, no agreements—or what he called treaties—had been struck with the native people to purchase their land. He remarked: "[The Aborigines] received us as friends, without suspicion and without dread; we took their land without ceremony; we destroyed and extirpated their natural food without compunction; we occupied their plans with our flocks and herds without their permission." Stevenson had previously sought, and held for a while, the position of the colony's acting protector of the Aborigines and realized that any gross violation of their interests ran the risk of being condemned by metropolitan Christian humanitarians and the Colonial Office back in England.[39]

Stevenson was particularly concerned about what he saw as a suggestion by W.B. that the government's provision of food to the natives was an act of charity. He insisted that this was "their due" and part of a "debt of justice" that the settlers owed them. As far as he was concerned, abstract legal arguments of the kind that Mann had made did not resolve the settlers' dilemma because these arguments did not deal with three indisputable

37. *Southern Australian*, May 8, 1839, 2.

38. Ibid., emphases in original.

39. George Stevenson to Glenelg, April 23, 1836, NA, CO 13/5; Hindmarsh to Glenelg, February 7, 1837, NA, CO 13/6; and *South Australian Gazette and Colonial Register*, May 11, 1839, 3–4.

facts: in taking possession of the territory the settlers had found a race of people already there; these people were fellow human beings; and their claim of property in the soil had been recognized by the British crown and Parliament and, therefore, these original peoples had been promised both the rights of British subjects and the blessings of Christianity and civilization. As a consequence, Stevenson concluded, the settlers were bound by "every tie of national justice and honour" to fulfil their obligations towards the Aboriginal people.[40]

This debate came to a head at a public meeting in Adelaide that was called by a group of settlers. The discussion on this occasion fell into two parts. The first, which concerned Stephen's withdrawal of provisions from the native people, once again prompted consideration of whether they had any right to those provisions. One of the first speakers took it for granted that the native people had a right to them on the grounds that they were the original people of the land and had been dispossessed of it. The next speaker, David McLaren, the manager of the South Australian Company, which was headed by a merchant, banker, and Christian humanitarian George Fife Angas, adopted much the same position as Stevenson had; namely, that the legal argument that Aboriginal people had no right to these provisions, because they had no rights of property in the land as they did not bestow their labor upon it, neither altered, nor dealt with, the fact that the natives *were* the aboriginal people of the land. "[I]ndependently of their being supposed to be proprietors of land," he declared, "they have been unquestionably the occupants of the soil, and as such are entitled to us for support and instruction." Rather like Stevenson, McLaren also held that the settlers had to ensure that their conduct to Aboriginal people was informed by considerations of justice as well as "sympathy and love," in accordance with the fact that they were their fellow human beings and brethren.[41]

The second part of the meeting, which concerned Stephen's order for a police party to pursue the Aboriginal people who were responsible for the killing of settlers, raised the question of sovereignty or at least a question of the crown's jurisdiction, not least because Charles Mann, the principal speaker in this part of the meeting, insisted that the legal rule that allowed the settlers to claim possession of the land meant that the colony had the right to assert its authority over the Aboriginal people. As in his article in the *Southern Australian,* Mann then proceeded to make a series of arguments, only one of which was legal in nature, to support this claim.[42]

40. *South Australian Gazette and Colonial Register*, May 11, 1839, 3–4.
41. *Southern Australian*, May 10, 1839, 3–4.
42. Ibid.

This done, Mann moved to deal with the claim that natives had a right to provisions. He was willing to accept that they were entitled to claim an equivalence for the food and clothing that they had been able to acquire before the formation of the colony on the grounds that they had been accustomed to doing this "on the land," but he refused to concede that they had such a right on the basis of any kind of title "in the land." Moreover, he only accepted that the settlers had a duty toward the natives on the grounds that they were fellow men and more especially their Christian brethren.[43]

This meeting resolved to form a committee to make representations to the government about the matters it had discussed. In the course of performing this task, the committee told the governor that they believed that it was essential that provision for the Aboriginal population be put on a permanent basis. Moreover, they argued that this ought to be regarded as a duty that everyone in the settler community had, and therefore recognized as a charge on the whole colony.[44]

This, then, is what the Aboriginal people's rights were to comprise: not an ongoing right of property in the land that they had originally possessed, but an entitlement to compensation on the grounds that they *had* been the original people of the land. It was a stance that implied that the Aboriginal people were no longer the owners of the land, even though they actually remained in possession of much of the colony's territory.

Reservations

I will now turn to another moment in South Australia's early history to pinpoint further the roles that the law played in the claiming of land. In July 1840, Matthew Moorhouse who had been appointed as the new protector of Aborigines in the middle of 1839, recommended to Governor Sir George Gawler that some land be reserved for the Aboriginal people. Moorhouse had acquired some knowledge of the local people's languages and had learned that they *did* possess territorial rights of the kind that the British crown usually respected. Consequently, he laid the claims of a particular Aboriginal man before the governor, who promptly agreed to reserve three small sections of land in a district that was soon to be opened for selection by settlers.[45]

43. Ibid.

44. J.B. Hack and co. to Sir George Gawler, June 12, 1839; and Hack and co. to their constituents, June 17 1839, *Southern Australian*, June 26, 1839, 3.

45. Charles Sturt, Assistant Land Commissioner, to David McLaren and co., July 17, 1840, *South Australian Register*, July 25, 1840, 7–8; and Matthew Moorhouse to the

It seems unlikely, however, that Gawler intended for the course of action that he improvised on this occasion to have any wider application. Eighteen months earlier, he had ruled out the reservation of any land for Aboriginal people on the grounds that they had to assimilate with the Europeans. Yet Gawler's granting of Moorhouse's request turned out to be more consequential than he could have envisaged, as a prominent group of South Australian Company settlers, who owned preliminary land orders in the district where this land had been reserved, protested that it infringed on their prior right of selection, and petitioned Gawler to postpone reserving any land for the natives until they had exercised this right. More to the point, their petition outraged Gawler, provoking him to make a very eloquent statement about the Aboriginal people's rights: "The natives have … very distinct and well defined proprietary rights. These rights afford them protection from other tribes and bodily support. They hunt game upon, catch fish in and eat the food of their own districts just as much as the English gentleman kills the deer and sheep upon or the fish in his private park. The property is equally positive and well-defined." Furthermore, Gawler told this group of settlers that he was very surprised that they should hold that any European could possess rights that were prior to those of the Aborigines, as it was well known that the colony had been founded on principles of the strictest regard for "the original rights" of the Aboriginal people. Indeed, he claimed that the Aboriginal people's "natural indefeasible rights" had been confirmed to them by the government's instructions to the governor and the Colonisation Commissioners' instructions to the resident commissioners, and that the Colonisation Commission had undertaken to respect these rights in its first annual report.[46]

This means that the very legal measure, which rested on the doctrine of *occupation,* that the Colonisation Commission had most relied upon in 1835–36 to secure its claim to land on the assumption that the Aboriginal people would never be found to have rights of property in land, had failed to protect its rights against the claims that were made on behalf of the Aboriginal people. In other words, the doctrine of *occupation* was much less significant in the claiming of possession than historians have previously argued. This is undoubtedly an important point to register. But, more importantly, we must note that this did not really matter, for

Colonial Secretary, July 27, 1840, *British Parliamentary Papers*, 1843, Paper no. 505, Papers Relative to the Affairs of South Australia, 325.

46. Clamor Schürmann, Report to the Committee of the Lutheran Missionary Society, Dresden, February 8, 1839, MS Adelaide Missionaries (Dresden), Box 2, Folder S, Lutheran Archives, Adelaide.

although Gawler acknowledged that Aboriginal people had—or rather had once had had—rights of property in land, he took no steps to entrench those rights. Explaining this outcome will help to clarify the relative importance of the various forces involved in the claiming of land in a settler colony like South Australia.

The adoption of any measures to uphold the Aboriginal people's rights of property in land ran contrary to the policy of assimilation that the British government was inclined to favor. The senior figures in the Colonial Office advocated the absorption of Aboriginal people into colonial society as Christians, workers, and consumers, and held that the assertion of British sovereignty and the incorporation of native peoples into the colonial legal order as British subjects, rather than recognition of indigenous political and legal orders or even indigenous rights, was the best way to protect their interests.[47]

Furthermore, major players at both the imperial center and the colonial periphery tended to treat the Aboriginal people's rights of property in land as though they were a matter of the past rather than of the present. Gawler, as has already been noted, placed them in a pre-colonial past that he claimed had been supplanted as a result of colonization, and in the Colonial Office, Stephen remarked on reading Moorhouse's report of July 1840 (discussed earlier): "It is an important and unexpected fact that these tribes *had* proprietary in the Soil—that is, in particular sections of it which *were* clearly defined or well understood *before* the occupation of their country."[48]

Most importantly, as noted earlier, there was a very real political calculation in the way that British officials chose to treat native people's rights in land. They believed that there was no point in trying to protect these rights in circumstances in which the natives themselves could not uphold them. Gawler believed there could never be any grounds upon which the British could negotiate with the Aboriginal people for the cession of land, because any such treaties would be grossly disadvantageous to them, and although he claimed that this was the case because they were unable to comprehend such an arrangement, his line of reasoning was almost certainly informed by a perception that the Aboriginal people lacked the *power* to drive a good bargain. On arriving in the colony, he

47. P.G. McHugh, *Aboriginal Societies and the Common Law: A History of Sovereignty, Status, and Self-Determination* (Oxford: Oxford University Press, 2004), 65, 150.

48. Sturt to John Morphett and co., July 11, 1840, SRSA, GRG 35/230; and Stephen, Minute, March 14, 1841, on Gawler to Lord John Russell, August 1, 1840, NA, CO 13/16, my emphases.

had declared that "their strength as [compared with] ours is that of the pygmy to the giant."[49]

It is nevertheless apparent that Gawler, like many of the settlers, felt that the matter could not be allowed to rest there. The troubling fact remained that British colonization was dispossessing and displacing a people who had incontrovertibly been the aboriginal owners of the land. For the sake of the settlers and British honor, something needed to be done to legitimize colonization. Gawler remarked: "The invasion of those ancient rights by surveys and land appropriations of any kind is justifiable only on the ground that we should … reserve for the natives an ample sufficiency for their present and future use and comfort under the new state of things into which they are thrown." It is apparent that his newly acquired knowledge that Aboriginal people did have rights in land made it necessary that he act in the right way on behalf of the colony. As he told one of Glenelg's successors as colonial secretary, Lord Russell: "Having ascertained that these people possess well defined and very ancient rights of proprietary and hereditary possession of the available lands of this part at least of the territory, I have thought it right to comply with the requests of some of them and with the probable desires or future requirements of others by giving the Protector of Aborigines the privilege of selecting before all other claimants small portions of land for their own use and benefit."[50]

There is a marked similarity between the position that Gawler took and that of the settlers who responded to the measure that he announced. Two examples must suffice. First, the editor of the *South Australian Register* was willing to concede that the government was under some obligation to provide liberally for the Aboriginal people's wants on the grounds that they had been the land's original inhabitants, even though he was unwilling to accept that the natives had absolute rights of ownership in the lands of the territory.[51]

Second, a correspondent to the same newspaper, writing under the pseudonym of Old Settler, found it necessary to insist that "it [was] … safer and sounder, in place of claiming for the natives rights which are legally untenable, to treat them with kindness, compassion, and forbearance—to supply them permanently with food and raiment, in lieu of that which our presence has deprived them—to teach them, if they can be taught, habits of industry and the arts of civilised life, and to raise them from the foul depravity we

49. *South Australian Gazette and Colonial Register*, October 20, 1838, 2; Sturt to Morphett and co., July 11, 1840 and Sturt to McLaren and co., July 17, 1840, SRSA, GRG 35/230; and Gawler to George Fife Angas, [August] 10, 1840, George Fife Angas Papers, SLSA, PRG 174/1.

50. Sturt to McLaren and co., July 17, 1840; and Gawler to Russell, NA, CO 13/16.

51. *South Australian Register*, August 1, 1840, 4.

found them, to some sense of moral obligation and religious truth," even though he also dismissed any notion that the native people had absolute proprietary rights in the land.[52]

Conclusion

In this article, I have demonstrated that the role that the law played in the claiming of land in one settler colony was rather different, as well as less significant, than the existing historiography has tended to suggest.

In the first instance, the colonization company that proposed the planning of a colony in Southern Australia had no need to make any claims of a legal kind, as it was widely accepted in Britain that the crown was the only source of title to land in the Australian colonies. Although at this point in time the company employed terms that had legal connotations, it did so in order to persuade a reluctant government to approve its proposal to found a new colony, rather than to secure its claim to the land in question.

Only after this company's plans for this colony had been approved by the British Parliament and questions seemed to be raised about its right to the lands occupied by the Aboriginal people did the South Australian Colonisation Commission find it necessary to draw upon legal resources in an attempt to secure its claims to land. In this context, it undoubtedly deployed the legal doctrine that numerous scholars have emphasized in previous studies, namely that of *terra nullius* or *occupation*, in order to insist that a people had no rights of property in land if they merely hunted and gathered rather than cultivated it. Yet it is evident that the commission also chose to rely on a rather different line of argument in order to maintain its claim to land, one that rested on the historical fact that the British crown had never previously recognized the Aboriginal people as having any rights of property in land.

Furthermore, insofar as the Colonisation Commission's claims to rightful possession of the land were actually vulnerable at this moment, the main forces that enabled it to withstand those putative challenges were less those that were provided by the law, let alone the doctrine of *occupation*, than ones that were a product of long-established historical practice and the relationships of power among the major players. By the time the colony of South Australia was being planned, the British crown had been granting land to settlers for nearly 50 years as though it was the only source of title in land in Australian territories. It would have been

52. Ibid.

very difficult for it to turn back on this path. Besides, there were no British parties demanding such a change and the Aboriginal people themselves lacked the military capacity to force such an about-turn, or at least this was the perception of British officials, both at the imperial center and the colonial periphery.

After colonization started and settlers began to encounter Aboriginal people, it is evident that some British settlers sought to legitimize the dispossession of the local peoples whom Christian humanitarians cast as the aboriginal or first peoples, by deploying legal arguments such as those associated with the doctrine of *occupation*, but it is also apparent that most settlers drew upon more familiar notions such as religious precepts and cultural conventions regarding the use of land. It is also clear that all these arguments, not least the legal ones, were of limited use to the settlers in dealing with the psychological discomfort they felt as a consequence of a realization that the land was occupied by the local peoples who regarded it as theirs, and that they, the settlers, were taking it without acquiring the consent of the first peoples or providing them with any compensation.

In these circumstances there was a good deal of "rights talk," but it is doubtful that this was of a kind that many historians have suggested. Settlers were preoccupied with acting in a way that they could persuade themselves was morally right, and thereby uphold a sense of themselves as honorable Britons. Moreover, the settlers did not regard the Aboriginal people as the kind of people who could hold rights other than natural rights, essentially because they considered them to be very weak and therefore in need of protection. Consequently, the settlers did not so much believe that the Aboriginal people had legal rights in the land as they assumed that they, or at least the British crown, had a moral duty to recompense the natives because they were dispossessing them of their land and depriving them of its resources.