RECOGNITION POLICIES, SELF-DETERMINATION, AND ACCESS TO LEGAL REDRESS FOR INDIGENOUS PEOPLES IN THE UNITED STATES, AUSTRALIA, AND CANADA: A COMPARATIVE STUDY

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I. INTRODUCTION

The United States' federal system of devolved sovereignty and the concurrent operation of federal recognition of American Indian

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tribes involves the federal government's acknowledgment of tribes' continuing sovereignty and its granting of eligibility for certain federal benefits. This system, in tandem with state-level recognition practices, provides tribes with a degree of flexibility that allows them to pursue a government-to-government relationship with states in the face of federal unwillingness or inability to grant recognition. While not without limitations, this dual federalist system of Indian sovereignty furnishes a potential model for judicial systems in other common-law countries such as Australia to fill the gaps their legal and constitutional structures have created in guaranteeing the land rights, self-determinative capacities, and social and cultural rights of Indigenous Peoples. Given the recent failure of a nationwide referendum that would have provided Aboriginal Peoples in Australia with constitutional recognition and an advisory body in the Australian Parliament,[1] the governments of individual Australian states and territories possess an opportunity to step in and engage on a regional level where the federal Commonwealth Government has not: that is, with Aboriginal Peoples in their efforts to win greater acknowledgment of their rights to self-determination.

In addition to the alternative models of legal and policymaking autonomy that the United States' federalist system of Indian sovereignty offers to state-recognized tribes in the absence of federal recognition, sources within international law may also supply blueprints for further reform in Canada and Australia as well as in the United States itself. Key human rights treaties and international legal instruments, such as the legally binding International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) and the International Covenant on Civil and Political Rights (ICCPR), as well as the non-binding (though still highly persuasive) United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), set forth legal principles and guidelines for States' implementation of Indigenous Peoples' right to self-determination within domestic territories.[2] The ICERD in particular obligates States Parties, "when the circumstances so warrant," to "take, in the social, economic,

1 Rod McGuirk, *Australians Decide Against Creating an Indigenous Voice to Advise Parliament on Minority Issues*, ASSOC. PRESS (Oct. 14, 2023, 6:47 AM), https://apnews.com/article/australia-indigenous-voice-referendum-6e9a9a7916a6024479d9e985f28e2d5e [https://perma.cc/2MXK-E2HZ].

2 The International Convention on the Elimination of All Forms of Racial Discrimination came into force on January 4, 1969, while UNDRIP passed as a General Assembly Resolution on September 13, 2007.

cultural and other fields, special and concrete measures to ensure the adequate development and protection of certain racial groups or individuals belonging to them, for the purpose of guaranteeing them the full and equal enjoyment of human rights and fundamental freedoms."[3] The ICCPR explicitly enshrines the right of Indigenous Peoples to self-determination and provides that "[b]y virtue of [that] right," all peoples may "freely determine their political status and freely pursue their economic, social and cultural development."[4] It further provides that "[i]n no case may a people be deprived of its own means of subsistence,"[5] obligating States Parties to "promote the realization of the right of self-determination"[6] through domestic legislation and policy.

Whereas the ICERD and ICCPR constitute legally binding instruments, the 2007 UNDRIP, which emerged in the wake of both increased focus within the UN human rights system on Indigenous Peoples' issues and burgeoning global Indigenous activism surrounding issues such as land claims, sets forth non-binding political commitments.[7] It grounds itself in existing rights while also offering a set of interpretive tools on which States may draw in implementing policies that concern Indigenous Peoples, devoting particular attention to Indigenous Peoples' rights to self-determination and autonomy or self-governance.[8] Additionally, it emphasizes Indigenous Peoples' rights not only to "the lands, territories and resources which they have traditionally owned, occupied or otherwise used or acquired," but also "to own, use, develop and control the lands, territories and resources" that traditional ownership has bestowed upon them.[9] Significantly, it calls on States to provide legal recognition and protection to such lands, territories, and resources "with due respect to the customs, traditions and land tenure systems" of Indigenous Peoples.[10]

3 International Convention on the Elimination of All Forms of Racial Discrimination art. 2(2), Mar. 7, 1966, 660 U.N.T.S. 195.

4 International Covenant on Civil and Political Rights art. 1(1), Dec. 16, 1966, 999 U.N.T.S. 171.

5 *Id.* art. 1(2).

6 *Id.* art. 1(3).

7 Marco Odello, *The United Nations Declaration on the Rights of Indigenous Peoples*, *in* HANDBOOK OF INDIGENOUS PEOPLES' RIGHTS 51, 52 (Corinne Lennox & Damien Short eds., 2016).

8 G.A. Res. 61/295, Declaration on the Rights of Indigenous Peoples (Sept. 13, 2007).

9 *Id.* art. 26(1)-(2).

10 *Id.* art. 26(3).

The UNDRIP's provisions relating to self-determination and Indigenous peoples' rights to traditional lands and resources proved most controversial, given that they stand somewhat in tension with foundational principles of international law that uphold the State as the only legitimate international unit of government organization and give primacy of place to State sovereignty and the inviolability of a State's territorial borders.[11] However, considerable evidence exists in support of the designation of the principle of self-determination as a *jus cogens* (or peremptory) norm from which a State may not derogate in its domestic legislation and policymaking. Such evidence encompasses international legal instruments on the subject in addition to the caselaw of international human rights adjudicatory bodies, all of which suggest that the principle of self-determination has acquired *jus cogens* status.[12] Nonetheless, despite such evidence, the question of whether self-determination has achieved the status of a peremptory norm in international law, and the accompanying question of whether States therefore possess non-derogable obligations to enforce it, remains "one of the most unsettled norms in international law" and leaves considerable room for individual States to articulate their own beliefs as to the scope and content of self-determination rights.[13]

Notably, even States that initially objected to the UNDRIP's language of self-determination and self-governance, such as Canada

11 Odello, *supra* note 7, at 59.

12 *See, e.g.*, Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, ¶ 52 (June 21) (interpreting the United Nations Charter to conclude that the development of international law has "made the principle of self-determination applicable to" all non-self-governing territories); Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, 1971 I.C.J. 16, at 79 (separate opinion by Ammoun, J.) (contending that the support of several General Assembly and Security Council Resolutions for the Namibian people's struggle for independence indicated that the right of self-determination was a peremptory norm of international law); Case Concerning East Timor (Portugal v. Australia), 1995 I.C.J. 90, ¶ 29 (June 30) (describing as "irreproachable" the argument that peoples' right to self-determination carries with it *erga omnes* obligations that the State must implement); *Report of the Commission to the General Assembly on the Work of its Fifty-Third Session*, art. 40, ¶ 5, [2001] 2 Y.B. Int'l L. Comm'n 113, U.N. Doc. A/CN.4/SER.A/2001/Add.1 (Part 2) (noting that the principle of self-determination "gives rise to an obligation to the international community as a whole to permit and respect its exercise").

13 Matthew Saul, *The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right?*, 11 HUM. RTS. L. REV. 609, 643-44 (2011).

and Australia, have ratified over the past several decades human rights treaties or otherwise endorsed international resolutions that obligate them to uphold Indigenous Peoples' right to self-determination and require them to consult with Indigenous Peoples and obtain their free, prior, and informed consent (FPIC) regarding any State-sponsored or -supported resource exploitation projects. These international instruments include the ICERD[14] and the UNDRIP itself.[15] The Government of Canada passed the 2021 *United Nations Declaration on the Rights of Indigenous Peoples Act (UN Declaration Act)*,[16] which adopted the UNDRIP and committed the federal government to affirming and providing a framework for the implementation of the UNDRIP in cooperation and consultation with Indigenous Peoples and in accordance with FPIC.[17] While the United States has not ratified any international legal instruments guaranteeing either FPIC or Indigenous Peoples' right to self-determination within U.S. borders, it ultimately endorsed the UNDRIP in late 2010 under the Obama Administration, withdrawing its earlier objections after concerted

14 Canada ratified the ICERD on October 14, 1970, while Australia ratified it on September 30, 1975. *See* GOV'T OF CAN., INTERNATIONAL CONVENTION ON THE ELIMINATION OF ALL FORMS OF RACIAL DISCRIMINATION: NINETEENTH AND TWENTIETH REPORTS OF CANADA, at iii (2011), https://www.canada.ca/content/dam/pch/documents/services/canada-united-nations-system/reports-united-nations-treaties/conv_intnl_elim_discrim-intnl_conv_elim_discrim-eng.pdf [https://perma.cc/723A-NVEH]; *The International Convention on the Elimination of All Form of Racial Discrimination (ICERD)*, AUSTRALIAN HUM. RTS. COMM'N, https://humanrights.gov.au/our-work/race-discrimination/international-convention-elimination-all-forms-racial-discrimination [https://perma.cc/HGL4-3446] (last visited Nov. 19, 2023).

15 Although neither Canada nor Australia has formally signed UNDRIP since its creation in 2007, both have endorsed it both through formal statements, and Canada has implemented its principles through subsequent legislation and policy initiatives. *See Implementing UNDRIP*, AUSTRALIAN HUM. RTS. COMM'N (2021), https://humanrights.gov.au/sites/default/files/2020-10/implementing_undrip_-_australias_third_upr_2021.pdf [https://perma.cc/MD94-D9RL]; *Canada's Statement of Support on the United Nations Declaration on the Rights of Indigenous Peoples*, GOV'T OF CAN. (Nov. 12, 2010), https://www.rcaanc-cirnac.gc.ca/eng/1309374239861/162170113890 [https://perma.cc/F7ZL-GNSM]; *Backgrounder: United Nations Declaration on the Rights of Indigenous Peoples Act*, GOV'T OF CAN. (Dec. 10, 2021) [hereinafter *Backgrounder*], https://www.justice.gc.ca/eng/declaration/about-apropos.html [https://perma.cc/X8JU-WB5V].

16 For the full text of the legislation, see United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.), https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#h-1301591 [https://perma.cc/SHL4-JCXE].

17 *Id.* arts. 4(a)-(b); *Backgrounder, supra* note 15.

petitioning by Indigenous advocacy groups and several rounds of consultations with tribal leaders.[18] Although the State Department endorsement was political and not legal, it suggested at the very least an acceptance of significant principles of customary international law that could provide a basis for future sovereignty[19] These human rights instruments and the reports issued by United Nations officials tasked with promoting Indigenous Peoples' rights, such as the Special Rapporteur on the Rights of Indigenous Peoples, offer a useful framework for holding national governments to their continued application of both binding provisions and general principles of international law as reflected in treaty bodies.

This Note explores the possibility of applying this international framework through an examination of the State practices of the United States, Canada, and Australia regarding Indigenous Peoples, arguing that Australia in particular should implement legal and policy initiatives that delegate greater authority to sub-national governmental units (designated in Australia as states and territories), given the absence of other federal mechanisms or constitutional commands that could enshrine a federal-Indigenous relationship into law. Such policies, alongside a greater commitment to Indigenous self-governance by individual states and territories, would facilitate negotiation with Indigenous Peoples. Furthermore, they would serve as a means of honoring Australia's international legal obligations to promote Indigenous self-determination and Indigenous Peoples' cultural, social, and land rights as well as fulfill Indigenous Peoples' calls for reparations and greater involvement in self-determination and self-governance. The implementation of such policies would not only offer the sub-national governments themselves greater opportunities to advance Indigenous self-determination rights, but also give priority of place to Indigenous Peoples in assuming a more active role in advocating for self-determination in consultation with state- and territory-level governments. In this sense, Australia may be able to learn from the United States' model, which allows for sub-national governments (individual states in the case of the U.S.) and tribes to work together in achieving legal recognition for tribes, legislating for

18 Erin Brock, *Betting on the Tribes: United States Endorsement of the United Nations Declaration on the Rights of Indigenous People and the Indian Regulatory Act*, 3 AM. INDIAN L.J. 381, 390-91 (2015).

19 *Id.* at 391.

and administering Indigenous affairs, and establishing formal legal and political relationships in the absence of federal recognition.

Conversely, Canada's institutionalization of the UNDRIP's provisions could prove an instructive tool in informing the relationships of the American and Australian federal governments with Indigenous Peoples. This Note argues that the American and Australian governments ought to follow Canada's statutory implementation of the provisions of the UNDRIP, which was pursued in hopes of creating a framework that will inform its immediate future efforts at reconciliation and crafting a program of reparations for Canada's Indigenous Peoples.[20] In the United States in particular, statutory adoption of the UNDRIP would not implicate an overhaul of federal recognition procedures or infringe on the federal government's plenary and exclusive power over Indian tribes pursuant to the Constitution. Rather, it would act as a complementary measure that ensures all federal laws remain consistent with the UNDRIP[21] and make good on the United States' earlier 2010 endorsement of the Declaration.[22]

II. UNITED STATES FEDERAL INDIAN LAWS REGARDING TRIBAL RECOGNITION COMPARED WITH NEW YORK STATE INDIAN TRIBAL RECOGNITION LAWS

This Section will explore the similarities and differences in the United States between federal and state laws on tribal recognition, with a specific focus on New York State. It will also set the foundation for the portion of this Note dealing with Indigenous sovereignty in Australia, including the challenges faced by Aboriginal Peoples in maintaining their sovereignty over traditional lands as well as possible remedies in the aftermath of the defeat of a constitutional amendment on October 14, 2023, that would have provided Aboriginal Peoples with a formal government body tasked with providing policy and legal

20 The Canadian federal government has established an action plan to implement the provisions of the *United Nations Declarations on the Rights of Indigenous Peoples Act* over the rest of the decade. *See Backgrounder, supra* note 15.

21 The Government of Canada uses such language in its UN Declaration Act. *See* United Nations Declaration on the Rights of Indigenous Peoples Act, *supra* note 16 (providing that the Government of Canada must "take all measures necessary to ensure that the laws of Canada are consistent with the Declaration").

22 *Announcement of U.S. Support for the United Nations Declaration on the Rights of Indigenous Peoples*, U.S. DEP'T OF STATE (Jan. 12, 2011), https://2009-2017.state.gov/s/srgia/154553.htm [https://perma.cc/9NXW-ZJRZ].

advice to the Australian Parliament on Indigenous issues and inserted Aboriginal Peoples into the text of the Australian Constitution.

Moreover, this Section will examine the legal history and arguments that the Shinnecock Nation, a federally recognized Indian tribe based in the Town of Southampton, New York, and the Unkechaug Nation, a New York State-recognized Indian tribe based in Mastic, New York, have marshaled in their efforts to maintain and expand their sovereignty over and economic activities on their traditional lands. This Note will then undertake a comparative analysis of the policies and statutes that the federal government and New York State have implemented regarding Indigenous rights, examining the divergent legal strategies and challenges of the Shinnecock and Unkechaug Nations as the subject of this analysis. It will further compare these policies to those of Australia and Canada, which, while also operating in a common-law legal system, have taken a markedly different approach in their constitutional, legal, and practical dimensions to Indigenous rights in that they have generally upheld Indigenous sovereignty not through treaties and sovereign-to-sovereign relationships but rather through statutory means.

A. The Historical Background and Context of U.S. Federal and New York State Law

1. Federal Indian Law and Policy

For more than fifty years, federal policy towards Indian tribes in the United States has centered around the principles of self-determination and self-governance.[23] Such policy measures enshrine the idea that the Indian tribe as a political entity constitutes the "primary or basic governmental unit of Indian policy."[24] This pro-self-determination approach to policy advocacy constitutes a rejection of the post-World War II policy of termination, which adopted an integrationist stance that intended to end federal tribal recognition as well as the federal aid and services such recognition entailed.[25] Federal termination policy aimed moreover at weakening the federal

23 FELIX S. COHEN, COHEN'S HANDBOOK OF FEDERAL INDIAN LAW §1.07 (Nell Jessup Newton ed., 2023).

24 *Id.*

25 *Bureau of Indian Affairs Records: Termination*, NAT'L ARCHIVES, https://www.archives.gov/research/native-americans/bia/termination [https://perma.cc/HN5Q-2A8Q].

reservation system by eliminating reservations' trust status and transferring jurisdiction over criminal and civil issues on reservations from the federal government to state officials.[26] Termination itself reflected the increasing hostility of federal policymakers towards the Indian Reorganization Act of 1934,[27] a piece of New Deal legislation that intended to promote tribal self-governance through such measures as encouraging Indian tribes to adopt their own constitutions, permitting the Secretary of the Interior to accept additional tribal lands in trust and create new reservations, and ensuring the ability of Indians to preserve their traditional modes of common ownership of tribal lands by ending the allotment program established by the Dawes Act of 1887.[28]

The efforts of federal termination policy to reduce tribal autonomy by attacking traditional tribal landownership and American Indians' legal autonomy ultimately met with pushback during the Johnson Administration, which espoused an alternative vision of tribal-federal relations under its anti-poverty Great Society programs.[29] Under the legislative initiatives of the Great Society, the Administration treated "Indian communities . . . as viable units of local government capable of delivering services to their constituents" and advanced a policy agenda that rejected termination policies and instead called for self-determination and self-governance as the foundation for the federal government's relationship with Indian tribes.[30] The Nixon Administration reinforced its predecessor's promotion of self-determination for Indian tribes, spearheading legislation that prioritized tribal economic development and enabled tribes to gain control over the administration of federal Indian programs and educational institutions.[31]

Federal authority over recognition of Indian tribes derives in the first place from judicial interpretation of the Constitution's text. In the

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26 *Id.*

27 COHEN, *supra* note 23, §1.06.

28 *Indian Reorganization Act (1934)*, UNIV. ALASKA FAIRBANKS, https://www.uaf.edu/tribal/academics/112/unit-2/indianreorganizationact1934.php [https://perma.cc/HE5J-LMWX]. The allotment program upended tribal communal landownership by subdividing reservation lands into parcels of private property. For the text of the legislation, see Dawes Act of 1887, 25 U.S.C. §§ 331-357, *repealed by* Indian Reorganization Act of 1934, 25 U.S.C. §§ 5101-5129.

29 COHEN, *supra* note 23, §1.06.

30 *Id.*

31 *Id.*; CHRISTINE K. GRAY, THE TRIBAL MOMENT IN AMERICAN POLITICS: THE STRUGGLE FOR NATIVE AMERICAN SOVEREIGNTY 167-98 (2013).

1832 case of *Worcester v. Georgia*, the Supreme Court articulated that the Constitution "confers on Congress the powers of war and peace; of making treaties, and of regulating commerce with foreign nations, and among the several states, and with the Indian tribes,"[32] with Congress' powers "not limited by any restrictions . . . ."[33] The Treaty Clause[34] and the Indian Commerce Clause, which invests Congress with the power "to regulate Commerce . . . with the Indian Tribes,"[35] have historically provided the strongest constitutional support for federal legislation concerning Indian tribes. These textual provisions, in conjunction with Congress's power to give effect to these constitutional provisions as well as the doctrine of federal supremacy, have formed the basis of tribal-federal relationships.[36]

The Treaty Clause in particular assumed a dominant position in the Supreme Court's early Indian law jurisprudence, which relied on the Clause's granting of power to the President to conduct treatymaking as a justification for federal authority over Indian affairs.[37] Indeed, among the most legally and politically significant Supreme Court cases applying the Treaty Clause to interpret the nature of tribal autonomy and the relationship between the federal government and Indian tribes are those dating back to the 1830s, which were decided within the context of President Andrew Jackson's Indian removal policies. In the 1831 case of *Cherokee Nation v. Georgia*, the Court determined that Indian tribes were "domestic dependent nations"[38] and possessed a relationship to the United States "resembl[ing] that of a ward to his guardian."[39] While the Court noted that tribes possessed an inherent sovereignty, this sovereignty was nonetheless limited by their presence within the territorial boundaries of the United States.[40] The Court reiterated the Cherokee Nation's sovereignty in the landmark case *Worcester v. Georgia*, which implicated the question of whether the laws of the state of Georgia or the laws of the federal government applied on the lands of the

32 Worcester v. Georgia, 31 U.S. 515, 559 (1832).

33 *Id.*

34 U.S. CONST. art. II, § 2, cl. 2.

35 *Id.* art. I, § 8, cl. 3.

36 COHEN, *supra* note 23, § 5.01.

37 *Id.*

38 Cherokee Nation v. Georgia, 30 U.S. 1, 17 (1831).

39 *Id.*

40 The Court made clear that the Cherokee were "completely under the sovereignty and dominion of the United States." *Id.*

Cherokee Nation. The Court cited the Treaty Power to conclude that "the acts of Georgia . . . interfere forcibly with the relations established between the United States and the Cherokee Nation, the regulation of which . . . are committed exclusively to the government of the Union."[41] The Court concluded moreover that Georgia laws were "in direct hostility with treaties" that the Cherokee Nation had entered into with the United States in earlier decades.[42]

The Indian Commerce Clause has historically provided the Supreme Court with another constitutional basis for holding that the federal government has exclusive authority over Indian affairs. The Court has interpreted the scope of the Indian Commerce Clause broadly, providing Congress with the authority to regulate tribes based on its constitutionally prescribed plenary and exclusive power over Indian affairs.[43] Pursuant to Supreme Court precedent, the Indian Commerce Clause enables a "greater transfer of power from the States to the Federal Government than does the interstate commerce clause," as evidenced by the fact that while "the States still exercise some authority over interstate trade," they "have been divested of virtually all authority over Indian commerce and Indian tribes."[44] The Commerce Clause moreover provides Congress with authority over federal transactions with individual Indians and tribes alike, even those outside of Indian country, and permits federal regulation of non-Indians engaged in business on Indian reservations or with tribes.[45]

In addition to its decisions concluding that Indian tribes possess an inherent sovereignty subject to the authority of the federal government, the Court has generally reaffirmed the principle that Indian tribes possess a right not to be regulated by individual states due to their sovereign immunity. However, it has modified such rulings over the course of the twentieth century.[46] In *Rice v. Olson*, for example, the Court noted the deep historical tradition in the United

41 Worcester v. Georgia, 31 U.S. 515, 561 (1832).

42 *Id.*

43 *See, e.g.*, United States v. Lara, 541 U.S. 193, 200 (2004) ("[T]he Constitution grants Congress broad general powers to legislate in respect to Indian tribes, powers that we have consistently described as 'plenary and exclusive.'").

44 COHEN, *supra* note 23, § 5.01 (quoting Seminole Tribe v. Florida, 517 U.S. 44, 62 (1996)).

45 *Id.*

46 Brandon Byers, *Federal Question Jurisdiction and Indian Tribes: The Second Circuit Closes the Courthouse Doors in New York v. Shinnecock Indian Nation*, 82 U. CIN. L. REV. 901, 906 (2018).

States of leaving Indians free from state jurisdiction and control.[47] Although the Court in later years opened the door to greater state involvement in Indian affairs "where essential tribal relations were not involved and where the rights of Indians would not be jeopardized,"[48] state governments today remain generally constrained by the principle of sovereign immunity and by a prohibition on impacting Indians' rights to control their own affairs.[49]

Whereas federal-tribal interactions rest on the principle of a sovereign-to-sovereign relationship between the federal government and individual tribes and on Congress's exclusive authority to legislate regarding Indian affairs, individual states may, when dealing with non-federally recognized tribes, fill in the gaps that arise from a tribe's lack of federal recognition by passing legislation and formulating their own policy agendas concerning a particular tribe within the state.[50] The end of the Termination Era during the 1960s and the continuing development of federal self-determination and self-governance policy frameworks that began with the Johnson Administration have created greater opportunities for state-tribal interactions.[51] In fact, the federal government since the Reagan Administration has explicitly encouraged devolution in the design and administration of federally funded programs to state governments as part of the federal self-determination policy, which promoted state discretion in the implementation of federal Indian programs.[52] Further, state recognition has increasingly "becom[e] an important tool in establishing and institutionalizing government-to-government relationships at the state and tribal levels," particularly given the complexity and time-consuming nature of the federal recognition process and the possibility that a tribe might not meet federal criteria.[53] In recent decades, state-tribal intergovernmental relations "have grown exponentially" through the negotiation of compacts that cover issues such as gambling, water and resource management, child

47 *Id.*

48 Byers, *supra* note 46, at 906 (quoting Williams v. Lee, 358 U.S. 217, 219 (1959)).

49 *Id.*

50 ANDREA WILKINS, FOSTERING STATE-TRIBAL COLLABORATION: AN INDIAN LAW PRIMER 9-10 (2016).

51 *Id.* at 9.

52 *Id.* at 9-10.

53 *Id.* at 10.

welfare, and the administration of justice.[54] Under these agreements, state and tribal governments can curtail litigation and, perhaps most significantly, take advantage of jurisdictional ambiguities, thereby avoiding federal constraints on individual states' ability to interact with tribes and formalize relationships on a sovereign-to-sovereign level.[55]

a. The Modern Federal Recognition Process and State Recognition

The Department of the Interior has proffered several regulations that set forth the criteria for federal acknowledgment of an Indian tribe, including: (1) Indian entity identification, meaning that the petitioning tribe has "been identified as an American Indian entity on a substantially continuous basis since 1900"[56]; (2) community, requiring a tribe to demonstrate that "it existed as a community from 1900 until the present"[57]; (3) political influence or authority, meaning that the tribe "has maintained political influence or authority over its members as an autonomous entity from 1900 until the present"[58]; (4) possession of a governing document that represents "the [group's] present governing document including its membership criteria" or, in the absence of this document, "a statement describing in full its membership criteria and current governing procedures"[59]; (5) descent, requiring a tribe to show that its "membership consists of individuals who descend from a historical Indian tribe (or from historical Indian tribes which combined and functioned as a single autonomous political entity)"[60]; (6) unique membership, for which the tribe must demonstrate that its membership "is composed principally of persons who are not members of any federally recognized Indian tribe"[61]; and (7) congressional termination, requiring the Department of the Interior to determine whether a tribe or its members are "the subject of

54 Martin Papillon, *Adapting Federalism: Indigenous Multilevel Governance in Canada and the United States*, 42 PUBLIUS 289, 296-97 (2012).

55 *Id.* at 297-98.

56 25 C.F.R. § 83.11(a) (2024).

57 *Id.* § 83.11(b).

58 *Id.* § 83.11(c).

59 *Id.* § 83.11(d).

60 *Id.* § 83.11(e).

61 *Id.* § 83.11(f).

congressional legislation that has expressly terminated or forbidden the Federal relationship."[62]

By establishing a government-to-government relationship between the tribe in question and the federal government, federal acknowledgment provides the recognized tribe with access to federal government protection and services.[63] Furthermore, federal recognition entitles a tribe to regulate activities on its lands independent of the state and enact its own laws and regulations on tribal lands.[64] Federal recognition also offers Indian tribes a measure of immunity based on their inherent sovereign authority. As per the Court, federally recognized Indian tribes possess "common-law immunity from suit traditionally enjoyed by sovereign powers."[65] Though Congress may abrogate this immunity through legislation, "Indian Nations are exempt from suit without Congressional authorization" because "[i]t is as though the immunity which was theirs as sovereigns passed to the United States for their benefit" after their incorporation into the territory of the United States.[66]

By contrast, individual states may exercise far greater flexibility in their decisions to recognize, collaborate with, and support within their territorial jurisdiction tribal governments that lack federal recognition. Drawing on their authority under the Tenth Amendment, which reserves powers not specifically enumerated in the Constitution to the individual states,[67] state governments have the authority to recognize tribes, whose right to such recognition in turn derives from their inherent sovereignty.[68] Where the federal government fails or refuses to address Indigenous policy issues, a federalist approach

62 25 C.F.R. § 83.11(g) (2024).

63 *See id.* § 83.2(a).

64 *What Is a Federally Recognized Tribe?*, BUREAU OF INDIAN AFFS. (Oct. 2, 2020, 2:11 PM), https://www.bia.gov/faqs/what-federally-recognized-tribe [https://perma.cc/CYD9-FP5M].

65 Santa Clara Pueblo v. Martinez, 436 U.S. 49, 58 (1978).

66 United States v. U.S. Fid. & Guar. Co., 309 U.S. 506, 512 (1940); *see also* United States v. Wheeler, 435 U.S. 313, 323 ("[Indian tribal sovereignty] exists only at the sufferance of Congress. . . . But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute . . . .").

67 U.S. CONST. amend. X.

68 K. Alexa Koenig & Jonathan Stein, *State Recognition of American Indian Tribes: A Survey of State-Recognized Tribes and State Recognition Processes*, *in* RECOGNITION, SOVEREIGNTY STRUGGLES, AND INDIGENOUS RIGHTS IN THE UNITED STATES: A SOURCEBOOK 115, 119 (Amy E. Den Ouden & Jean M. O'Brien eds., 2013).

permits state governments to step in and resolve such issues so long as state authority does not expressly conflict with federal authority.[69] This federalist system enables a degree of flexibility and experimentation by state governments that carries with it the possibility of validating legal pluralism and diversity in governmental relationships within more localized contexts.[70] Thus, state recognition has become a viable alternative to the unwieldy and time-consuming federal recognition process.[71]

i. Case Study: The Shinnecock Indian Nation

The Shinnecock Indian tribe is the only tribe on Long Island to have secured federal recognition. In 1978, the Shinnecock Nation began its campaign to secure federal recognition when it filed a petition with the Department of the Interior, hoping to take advantage of the Bureau of Indian Affairs' newly promulgated regulations that set forth the criteria for recognition.[72] The Shinnecock's application to the Bureau of Indian Affairs (BIA) immediately following the establishment of these regulations rendered the tribe among the first to seek recognition under the new criteria.[73] However, it was not until 2003 that the Bureau of Indian Affairs placed the tribe on its "Ready for Active" list.[74] In 2006, after years of bureaucratic delays, the Shinnecock Nation sued the Department of the Interior in a bid to expedite the recognition process.[75] After a thirty-two-year legal and political battle, the Shinnecock Nation secured recognition in 2010 after the BIA affirmed its late 2009 "Proposed Finding" that the Shinnecock met all seven of the federal recognition criteria, thus paving the way for the Shinnecock to become the 565th federally

69 *Id.* at 119-20.

70 *Id.* at 126.

71 *Id.*

72 Danny Hakim, *U.S. Recognizes an Indian Tribe on Long Island, Clearing the Way for a Casino*, N.Y. TIMES (June 15, 2010), https://www.nytimes.com/2010/06/16/nyregion/16shinnecock.html?hp [https://perma.cc/868E-FA47].

73 Gale Courey Toensing, *Federal Recognition Process: A Culture of Neglect*, UNIV. ARIZ. NATIVE NATIONS INST.: INDIGENOUS GOVERNANCE DATABASE (Jan. 23, 2014), https://nnigovernance.arizona.edu/federal-recognition-process-culture-neglect [https://perma.cc/XL37-X85R].

74 *Shinnecock Indian Nation*, SOUTHHAMPTON TOWN GOV'T (2020), https://www.southamptontownny.gov/DocumentCenter/View/24253/Section-944—-Shinnecock-Indian-Nation [https://perma.cc/7QRW-JBDQ].

75 Hakim, *supra* note 72.

recognized tribe.[76] Crucial to the BIA's approval of the Shinnecock's petition were the holdings of federal court cases that spoke to the Shinnecock's status as a tribe. For example, in *New York v. Shinnecock Indian Nation*, a federal district court found that, in addition to the Shinnecock's longstanding official recognition as a tribe under New York State statutes, it also met the definition of an Indian tribe under federal common law and therefore carried no obligation to obtain approval by the United States to develop a casino on a piece of land it had occupied continuously since approximately 1850.[77]

Nonetheless, despite the Shinnecock Nation's securement of federal recognition, it remains subject to several legal hurdles that have hampered its ability to develop its sovereign ancestral land. For one, the Shinnecock's proposals to construct a casino on its reservation in Southampton, New York, have met with opposition from residents living in the vicinity and local town officials.[78] In recent years, the Shinnecock Nation has found itself embroiled in similar legal and political disputes over the construction of billboards on its land.[79] Furthermore, Shinnecock tribal members have attempted to exercise their traditional fishing rights on the East End of Long Island outside the boundaries of their reservation, arguing that such rights derived from ancient treaties that predate and supersede state government regulations and the founding of New York State itself.[80]

76 *See* Press Release, Bureau of Indian Affairs, Skibine Issues a Final Determination to Acknowledge the Shinnecock Indian Nation of Long Island, NY (June 5, 2010), https://www.bia.gov/as-ia/opa/online-press-release/skibine-issues-final-determination-acknowledge-shinnecock-indian [https://perma.cc/PU93-ZY8T]; Hakim, *supra* note 72; Final Determination for Federal Acknowledgment of the Shinnecock Indian Nation, 75 Fed. Reg. 117 (June 18, 2010), https://www.federalregister.gov/documents/2010/06/18/2010-14733/final-determination-for-federal-acknowledgment-of-the-shinnecock-indian-nation [https://perma.cc/S349-X4WF].

77 New York v. Shinnecock Indian Nation, 400 F. Supp. 2d 486, 492-95 (E.D.N.Y. 2005).

78 Corey Kilgannon, *Why the Shinnecock Tribe Is Clashing with the Hamptons' Elite*, N.Y. TIMES (Apr. 22, 2021), https://www.nytimes.com/2021/04/22/nyregion/casino-hamptons-shinnecock.html [https://perma.cc/FMQ4-H4097].

79 *Id.*; *see also* Lindsay Brocki, *Hamptons Aesthetics vs. Shinnecock Rights: How the Federal Government Is Failing to Protect Indigenous Sovereignty*, CARDOZO J. EQUAL RTS. & SOC. JUST.: ESSAYS (Mar. 3, 2023), https://larc.cardozo.yu.edu/cgi/viewcontent.cgi?article=1020&context=ersj-blog [https://perma.cc/F43R-Q6VL].

80 Corey Kilgannon, *Indians in the Hamptons Stake Claim to a Tiny Eel with a Big Payday*, N.Y. TIMES (Feb. 1, 2018), https://www.nytimes.com/2018/02/01/nyregion/hamptons-shinnecock-indians-eels.html [https://perma.cc/B2SC-URH7].

Officials in New York State's Department of Environmental Conservation rejected the Shinnecock's arguments regarding its ancient fishing rights, reiterating that the State's fishing regulations apply to all people fishing in water over which New York State has jurisdiction.[81] The Shinnecock's legal battles to preserve its sovereignty, whether through its insistence on the right to construct a casino on its land or to exercise traditional fishing rights, indicate the limits of federal recognition despite the access to federal services and programs such recognition grants. Similarly, the sheer length of the recognition process coupled with the numerous regulatory hurdles and time-consuming, expensive litigation that the Shinnecock Nation undertook to achieve federal recognition demonstrate the costs of pursuing federal recognition.

B. New York State Indian Recognition and the Unkechaug (Poospatuck) Indian Nation

Under New York State law, the Unkechaug (also known as the Poospatuck) Indian Nation is a state-recognized tribe.[82] The Unkechaug is based in the Poospatuck Reservation in Mastic, New York, and has maintained a sovereign-to-sovereign relationship with New York State after receiving recognition under colonial laws and in the New York State Constitution during the eighteenth century.[83] However, the Unkechaug, unlike the Shinnecock, has never received federal recognition under the Department of the Interior's criteria.

Recent decades have witnessed a spate of litigation involving the Unkechaug and its efforts to maintain the right to control access to and develop its lands free of outside interference. In *Gristede's Foods, Inc. v. Poospatuck (Unkechauge) Nation*, a federal district court rejected a supermarket chain's claim that the Unkechaug and Shinnecock Nations had run afoul of the Racketeer Influenced and Corrupt Organizations Act and the Lanham Act by selling untaxed cigarettes from the smoke shop on the Poospatuck Reservation.[84] The court found that while the Unkechaug Nation did not possess federal

81 *Id.*

82 N.Y. INDIAN LAW §§ 150-153 (Consol. 2023).

83 *About the Unkechaug Nation*, UNKECHAUG NATION, https://unkechaug.wordpress.com/about/ [https://perma.cc/X9D5-F35Y] (last visited Sept.13, 2023).

84 Gristede's Foods, Inc. v. Unkechauge Nation, 660 F. Supp. 2d 442, 445 (E.D.N.Y. 2009).

recognition, it met the definition of a tribe under federal common law and could therefore assert sovereign immunity.[85] Similarly, in a New York State Supreme Court case concerning issues of the inherent sovereignty among the Unkechaug, the court reiterated that state courts "are courts of limited jurisdiction" in Indian affairs, particularly given Indian nations' ability to resolve internal disputes through their own tribal courts and legal mechanisms.[86] The court concluded that it lacked subject-matter jurisdiction over the question of whether a blood-right member of the Unkechaug Nation was an "undesirable person" within the meaning of the Nation's Tribal Rules, Customs, and Regulations.[87] Instead, it found that the Nation was entitled to make such a determination itself and thus deny the blood-right member the right to occupy land within the Poospatuck Reservation based on the principle of the Nation's retained sovereignty.[88]

The Unkechaug Nation has also been able to leverage its relationship with New York State to advocate for legislation that protects Indian cultural patrimony. For example, in recent negotiations with the state government regarding Native burial sites, the Unkechaug Nation led a push by several tribes to protect such sites from private developers.[89] New York law had for years allowed developers to build on top of Native American burial sites without preserving the remains, prompting several New York State tribal representatives to lobby the State Legislature to take greater action to preserve these burial sites.[90] The collective efforts of these tribes culminated in the passage of legislation that requires private landowners to stop development upon discovery of a burial site on their property and criminalizes the removal, defacement, or sale of any remains.[91]

However, in *Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation*, a federal district court rejected the Unkechaug Nation's argument that the New York State Department of

85 *Id.* at 465-66.

86 Unkechaug Indian Nation v. Treadwell, 192 A.D.3d 729, 732 (N.Y. App. Div. 2021).

87 *Id.* at 730-31.

88 *Id.* at 732.

89 Jay Root, *Native Burial Sites Will Soon Be Protected Under Law for the First Time*, N.Y. TIMES (May 2, 2023), https://www.nytimes.com/2023/05/02/nyregion/ny-hochul-native-graves.html [https://perma.cc/HW8A-FSEF].

90 *Id.*

91 *Id.*

Environmental Conservation (NYSDEC) unlawfully interfered with Unkechaug fishing rights through implementing regulations on the fishing of the American eel on the Poospatuck Reservation and in other customary fishing waters.[92] Among the Unkechaug's contentions were that NYSDEC's regulations interfered both with its tribal self-governance and a "treaty" (referred to as the Andros Order) that the Unkechaug entered into with the New York State governor, Edmund Andros, during the country's confederal period of the 1780s.[93] The Court concluded that the "treaty" which the Unkechaug cited was not a treaty, but rather an executive order that lacked "any indicia the Unkechaug and the Governor—on behalf of the colonial State of New York—were entering into a treaty."[94] Further, the court noted that even if the Andros Order were a "treaty," it did not "grant the Unkechaug immunity from all state regulation with respect to fishing."[95] These cases indicate that the Unkechaug Nation's status as a sovereign Indian Nation, while recognized under New York State law, is nonetheless subject to various restrictions on its actual sovereign authority.

III. AUSTRALIAN ABORIGINAL LAW

In contrast with the constitutionally prescribed relationship between tribes and the federal government in the United States, the constitutional and legal parameters governing the relationship between the Australian government (also known as the Commonwealth Government) and Australian Aboriginal Peoples differ significantly from the parameters that govern tribal-federal interactions in the United States. Most notably, the Australian Constitution does not recognize the inherent sovereignty, or even the existence, of Aboriginal or Torres Strait Islander Peoples.[96] Instead, the Australian government's recognition of Aboriginal land rights—which stands at the core of not only disputes between Aboriginal

92 Unkechaug Indian Nation v. N.Y. State Dep't of Env't Conservation, 677 F. Supp. 3d 137, 143 (E.D.N.Y. 2023).

93 *Id.* at 158, 160.

94 *Id.* at 158.

95 *Id.* at 159.

96 Sarah Maddison, *Indigenous Reconciliation in the US Shows How Sovereignty and Constitutional Recognition Work Together*, THE CONVERSATION (May 16, 2016), https://findanexpert.unimelb.edu.au/news/4373-indigenous-reconciliation-in-the-us-shows-how-sovereignty-and-constitutional-recognition-work-together [https://perma.cc/Y4QP-CR53].

Peoples and the Australian federal and state governments, but also Aboriginal Peoples' economic lives, cultural self-understandings, and knowledge systems[97]—is limited to common law developments and, increasingly but still sparsely in recent years, federal statutes.[98] The landmark 1992 decision by the High Court of Australia, *Mabo v Queensland No. 2*, gave legal force to Aboriginal land title for the first time in the history of Australian common law.[99] Involving a land claim by the Meriem People of Dauer, Waier, and Mer of the Murray Island Group in the Torres Strait, *Mabo* institutionalized Indigenous land title by formally rejecting the legal doctrine of *terra nullius*, under which Australia's government had authorized settlement in traditional Aboriginal lands based on the theory that such areas were either "uninhabited" or "uncultivated" as per Western notions of land possession.[100] Through its decision in *Mabo*, the Australian High Court laid the foundation for future recognition of Aboriginal sovereignty in holding that preexisting Indigenous rights and interests, grouped under the label of "native title," could act independently of and had in fact survived the Crown's acquisition of sovereignty over Australia.[101] According to the court, native title's legal basis lay not in common-law real property rights but rather in the traditional rights of the Aboriginal Peoples to occupy and use various lands and waters.[102] The High Court thereby effected a jurisprudential intervention "in declaring that the common law recognised and protected indigenous rights in land that existed at the time the British acquired sovereignty."[103]

Subsequent negotiations among the Commonwealth Government, state governments, and Aboriginal Peoples themselves

97 *Land Rights*, AUSTRALIAN INST. OF ABORIGINAL & TORRES STRAIT ISLANDER STUD. (Apr. 23, 2023), https://aiatsis.gov.au/explore/land-rights [https://perma.cc/7687-HZ5A].

98 Maureen Tehan, *A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act*, 27 MELB. U. L. REV. 523, 524-25 (2003).

99 *The Mabo Decision*, PARLIAMENT OF AUSTL., https://www.aph.gov.au/Visit_Parliament/Art/Stories_and_Histories/The_Mabo_decision [https://perma.cc/82RN-BF6M] (last visited Sep. 13, 2023).

100 *See Mabo v Queensland [No 2]* (1992) 175 CLR 1, 20, 43 (Austl.).

101 Tehan, *supra* note 98, at 533-34.

102 *Mabo*, 175 CLR at 85, 89; Gary D. Meyers & Sally Raine, *Australian Aboriginal Land Rights in Transition (Part II): The Legislative Response to the High Court's Native Title Decisions in* Mabo v. Queensland *and* Wik v. Queensland, 9 TULSA J. COMPAR. & INT'L L. 95, 98 (2001).

103 Tehan, *supra* note 98, at 532.

to codify the principles of *Mabo* gave rise to the Native Title Act of 1993. This legislation largely reflected the Australian Parliament's imperatives of recognizing and institutionalizing Aboriginal title while also ensuring that the Australian states both met minimum recognition requirements and made efforts to uphold Indigenous land claims against the claims of non-Indigenous peoples in accordance with the Act.[104] It also implemented a Native Title Tribunal and established administrative bodies and mechanisms to carry out the aims of the Tribunal, including the Native Title Registrar to determine the validity of title claims and a mediation process to resolve disputes between Aboriginal applicants and the Tribunal itself.[105] Subsequent amendments to the Native Title Act, particularly those enacted in response to the High Court's 1996 decision in *Wik v Queensland* to uphold the Wik Peoples' assertion of title rights to land that had been leased for pastoral and mining purposes,[106] ultimately chipped away at native title.[107] Rather than further codify native title, the Native Title Amendment Bill 1998 introduced amendments that undercut Indigenous Peoples' right to negotiate with non-Indigenous groups seeking access to develop land.[108] These amendments gave primacy to pastoralist and mining interests in the event of legal disputes and ensured that non-Native title could coexist with Native title.[109] The cumulative effect of the amendments has been to "significantly reduce the capacity for indigenous peoples to have input into activity conducted on their land which does not extinguish native title."[110]

In light of the setbacks that Indigenous Australians faced resulting from legislation of the late 1990s and their continued struggles to gain and retain access to their traditional lands, recent years have witnessed a resurgence of Indigenous political activism to further enshrine Indigenous rights by writing them into the Australian Constitution. In May 2017, more than 250 Indigenous leaders gathered at the First Nations National Constitutional Convention to present the

104 *Id.* at 539-45.

105 *Native Title Act 1993* (Cth) ss 61-68, 72 (Austl.); *see also* Justice Robert French, *Personal Reflections on the National Native Title Tribunal 1994-98*, 27 MELB. U. L. REV. 488, 499-501 (2003); Meyers & Raine, *supra* note 102, at 99-102.

106 *Wik v Queensland ("Pastoral Leases Case")* (1996) 141 ALR 129 (Austl.); *see also* Meyers & Raine, *supra* note 102, at 105-08.

107 Meyers & Raine, *supra* note 102, at 167; Tehan, *supra* note 98, at 555-56.

108 *Native Title Amendment Bill 1998* (Cth) (Austl.).

109 Meyers & Raine, *supra* note 102, at 115, 134-35.

110 *Id.* at 139.

"Uluru Statement from the Heart," a statement that calls for the inclusion of a "First Nations Voice" in the Australian Constitution.[111] This "Voice" could potentially take one of several forms, including a representative body that would provide non-binding legal and policy advice to Parliament regarding issues affecting Indigenous Peoples.[112] The Statement further called for "the establishment of a Makarrata Commission to supervise a process of agreement-making between governments and First Nations and truth-telling about [Indigenous] history."[113] The concept of Makarrata, deriving from a Yolngu word referring to reconciliation after a struggle, is roughly analogous to an agreement or treaty that, unlike the "Voice" in the Australian Constitution, would not require a constitutional referendum.[114] Instead, it would require only Parliamentary legislation.[115]

Unlike the United States Constitution, which provides the federal government with exclusive jurisdiction over treaty-making with Indian tribes, the Australian Constitution delegates responsibility for Aboriginal relations to the federal government and states alike.[116] As originally written in 1901, the Constitution expressly prevented the federal government from exercising authority over Aboriginal Peoples and instead gave states sole jurisdiction under the drafters' belief that Aboriginal Peoples would simply die out or be fully integrated into Australia's white settler population.[117] As enacted pursuant to the Commonwealth of Australia Constitution Act 1900 (a United Kingdom parliamentary statute),[118] the constitutional text provided

111 *Uluru Statement from the Heart*, PARLIAMENT OF AUSTL., https://voice.gov.au/about-voice/uluru-statement [https://perma.cc/6CBV-8B9F] (last visited Sept. 13, 2023).

112 Daniel McKay, *Uluru Statement: A Quick Guide*, PARLIAMENT OF AUSTL. (June 19, 2023), https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1617/Quick_Guides/UluruStatement [https://perma.cc/6WV8-RG7F].

113 *Uluru Statement from the Heart*, *supra* note 111.

114 McKay, *supra* note 112.

115 *Id.*; *The Uluru Statement From the Heart*, AUSTRALIAN HUM. RTS. COMM'N, https://humanrights.gov.au/our-work/aboriginal-and-torres-strait-islander-social-justice/publications/ulurustatementheart#:~:text=The%20Uluru%20Statement%20from%20the%20Heart%20(the%20Statement)%20is%20an,Parliament%20and%20a%20Makarrata%20Commission [https://perma.cc/2NRS-4AB7].

116 Harry Hobbs & George Williams, *Treaty-Making in the Australian Federation*, 43 MELB. U. L. REV. 178, 201 (2019).

117 *Id.*

118 At the time of ratification of the Australian Constitution, Australia had yet to become legally or legislatively independent from the United Kingdom. Australia became formally independent in 1986 with the concurrent enactment of the Australia

that the Commonwealth Parliament had the power to "make laws . . . with respect to . . . the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."[119] The text also specifically excluded Aboriginal Peoples from counting in official population statistics.[120] However, since an amendment to the Constitution pursuant to a 1967 constitutional referendum,[121] the federal and state parliaments have shared concurrent legislative powers over Aboriginal Peoples.[122] The 1967 referendum additionally prompted the repeal of Section 127, permitting Aboriginal Peoples to now be counted in the population statistics of the Commonwealth and individual states.[123] Altogether, the amendment made to Section 51(xxvi) of the Constitution provided that the Commonwealth Government, in addition to the individual Australian states, could legislate on Aboriginal issues under the assumption that it would do so *for the benefit* of Aboriginal Peoples.[124] The High Court, however, has somewhat undermined this reasoning in its judicial interpretation of the amendment, holding not only that Parliament could rely on the amendment in its legislative efforts to protect Aboriginal Peoples, but also that Parliament could make laws "to regulate and control the people of any race in the event that they constitute a threat or problem to the general community."[125]

The efforts of Indigenous leaders to lobby Australian state and territorial governments to become active partners in the treaty-making process has emerged as not only a complement to Indigenous activism targeting the federal government, but also as an alternative to such

Act 1986 in both the Parliament of the United Kingdom and the Australian Commonwealth Parliament. *See* Australia Act, 1986 ch 2 (1986) (U.K.), https://www.legislation.gov.uk/ukpga/1986/2 [https://perma.cc/WWQ6-DLSU].

119 *Australian Constitution* s 51.

120 *Id.* s 127.

121 The amendment rewrote Part V, Chapter 1, Section 51(xxvi) to delete the prohibition against Parliamentary legislation regarding Aboriginal peoples, instead providing that the national Parliament "shall have the power to make laws" with respect to "the people of any race form whom it is deemed necessary to make special laws . . . ." *Id.* s 51.

122 Hobbs & Williams, *supra* note 116, at 202.

123 *See* Sarah Pritchard, *The 'Race' Power in Section 51(XXVI) of the* Constitution, 15 AUSTRALIAN INDIGENOUS L. REV. 44, 49 (2011).

124 *Id.*

125 *Commonwealth v Tasmania ("Tasmanian Dam Case")* (1983) 158 CLR 1, 158 (Austl.); *see also* Pritchard, *supra* note 123.

efforts.[126] Such activism has prompted state governments including those of Victoria, Queensland, South Australia, and the Northern Territory to commit to conducting treaty negotiations with Indigenous Peoples.[127] These strategies propose an alternative method of achieving firmer legal guarantees of Indigenous sovereignty on a sub-national level in the face of longstanding recalcitrance by the Commonwealth Government and legislative measures that have diluted advancements in recognition of Native title.[128] Victoria in particular has made the most progress towards codifying treaty relationships with Aboriginal Peoples within its borders. In 2018, it passed the *Advancing the Treaty Process with Aboriginal Victorians Act 2018*,[129] which provided a legislative basis for future treaty negotiations with Aboriginal Peoples by obligating the government to recognize an Aboriginal-designed representative body that can promote Aboriginal self-determination.[130] In 2017, following more than a decade of protracted litigation in federal courts regarding the land claims of the Noongar People pursuant to the Native Title Act,[131] the South West Aboriginal Land and Sea Council, in concert with the Parliament of Western Australia, enacted state-level legislation to reach a settlement with the Noongar People.[132] Initially signed in 2015, this settlement comprises the largest and most comprehensive agreement to settle Aboriginal land claims in Australian history, covering approximately 200,000 square kilometers and including a package of benefits consisting of a perpetual trust and several land and economic initiatives totaling $1.3 billion in value.[133] The legislation authorized a series of Indigenous Land Use Agreements (ILUAs), voluntary legal instruments originally introduced under the Native Title Act that have facilitated agreements concerning the use of land

126 Dani Larkin, Harry Hobbs, Dylan Lino & Amy Maguire, *Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States*, 41 U. QUEENSL. L. J. 35, 49 (2022).

127 *Id.*

128 *Id.*

129 *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic) (Austl.).

130 *Id.* at 50.

131 Harry Hobbs & George Williams, *The Noongar Settlement: Australia's First Treaty*, 40 SYDNEY L. REV. 1, 30 (2018).

132 *Id.*; *see also* Hobbs & Williams, *supra* note 116, at 204.

133 *Settlement Agreement*, S. W. ABORIGINAL LAND & SEA COUNCIL, https://www.noongar.org.au/about-settlement-agreement [https://perma.cc/4MXL-Q4VY] (last visited Oct. 20, 2023); Hobbs & Williams, *supra* note 131, at 31.

and waters by Aboriginal peoples.[134] Although ILUAs fall short of recognizing Aboriginal self-governance and are liable to change based on shifting political fortunes,[135] they nonetheless provide remedial measures for Aboriginal Peoples and fill the gap left by the ambiguities of the Australian Constitution in a way that mirrors the policies that individual state governments in the United States have implemented.

A constitutional referendum took place on October 14, 2023, to determine whether the Australian Constitution would be amended to include a "First Nations Voice." However, the referendum was defeated, with 60.06% of voters rejecting the proposal and 39.34% approving it.[136] Even though the proposal had the broad support of Aboriginal Peoples and the backing of Prime Minister Anthony Albanese, opposition to the proposal increasingly seized on misinformation campaigns, especially on social media, to sow doubt into voters' minds.[137] Among such inflated fears was the concern that approval of the referendum could ultimately force Australian homeowners to return their lands to Aboriginal people.[138] Additionally, the Liberal Party-led conservative coalition that currently forms the opposition in the Commonwealth Government challenged the lack of detail in the proposed advisory body and assailed the referendum as stoking racial divisions and increasing government bureaucracy.[139] Had Australian voters approved the referendum, the Australian Constitution would have formally recognized the existence of Indigenous Australians for the first time and established a formal governmental body for the purpose of offering policy and legal advice to Parliament.[140] In the wake of the

134 Hobbs & Williams, *supra* note 131.

135 *Id.*

136 *National Results*, AUSTRALIAN ELECTORAL COMM'N TALLY ROOM https://tallyroom.aec.gov.au/ReferendumNationalResults-29581.html [https://perma.cc/D4TC-JUJB] (last visited Oct. 20, 2023).

137 Byron Kaye & Praveen Menon, *Australian Voters' Divisions, Indifference Doom Indigenous Referendum*, REUTERS (Oct. 15, 2023), https://www.reuters.com/world/asia-pacific/australian-voters-divisions-indifference-doom-indigenous-referendum-2023-10-15/ [https://perma.cc/D4TC-JUJB].

138 Yan Zhuang, *Crushing Indigenous Hopes, Australia Rejects 'Voice Referendum'*, N.Y. TIMES (Oct. 14, 2023), https://www.nytimes.com/2023/10/13/world/asia/indigenous-voice-australia-referendum.html [https://perma.cc/S7RC-84MY].

139 Kaye & Menon, *supra* note 137.

140 Tiffanie Turnbull, *Voice Referendum: What Is Australia's Voice to Parliament Proposal?*, BBC NEWS (Aug. 30, 2023), https://www.bbc.com/news/world-australia-62374703 [https://perma.cc/QQ64-DFXB].

rejection of the Indigenous "Voice," Aboriginal leaders at the forefront of the referendum announced a week of silence to mourn the defeat of the proposal.[141]

IV. THE CANADIAN CONTEXT OF ABORIGINAL RIGHTS

A. The Constitutional and Legislative Framework

The Canadian system of Aboriginal land recognition rests on legal principles similar to those undergirding Australia's Native title, leaving some room for individual sub-national units (i.e., Canadian provinces and territories) but largely delegating authority over the administration of Aboriginal rights to the federal government. The legal basis for Aboriginal treaty rights lies in Section 35 of the *Constitution Act, 1982*, which codified Aboriginal and treaty rights at the federal level for the first time by giving Indigenous Peoples a legally sanctioned mechanism to enforce their rights in court.[142] Section 35(1) of the Act specifically provides that "[t]he existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed."[143] The Act prohibits the federal government from extinguishing through legislation or treatymaking any Aboriginal right existing prior to 1982 and further institutionalizes Aboriginal title.[144] The Supreme Court of Canada devised a test for determining whether an Aboriginal group has established Aboriginal title to land in *Delgamuuk v. British Columbia*, wherein the court stated that an Aboriginal group must show that its occupation of claimed land was exclusive to the group in 1867, the year Canada established itself as an independent nation.[145] Notwithstanding such developments in institutionalizing Indigenous land title and treatymaking, Indigenous groups (organized into governmental units

141 Praveen Menon, *'Reconciliation Is Dead': Indigenous Australians Vow Silence after Referendum Fails*, REUTERS (Oct. 15, 2023), https://www.reuters.com/world/asia-pacific/australian-indigenous-leaders-call-week-silence-after-referendum-defeat-2023-10-15/ [https://perma.cc/8SDE-EZJ3].

142 *Aboriginal Rights: Section 35*, CTR. FOR CONST. STUD., https://www.constitutionalstudies.ca/the-constitution/aboriginal-rights/ [https://perma.cc/52MG-6466] (last visited Jan. 27, 2024).

143 Constitution Act, 1982, pt. II, sec. 35(1), *being* Schedule B to the Canada Act, 1982, c 11 (U.K.), https://laws-lois.justice.gc.ca/eng/const/page-13.html [https://perma.cc/65AX-WU3X].

144 *Aboriginal Rights: Section 35*, *supra* note 142.

145 *Id.*

called "band councils") in Canada do not possess the same constitutionally based inherent sovereignty as Indigenous tribes in the United States do. As a result, band councils are "unambiguously defined as creatures of the federal government, with powers and authorities delegated from the latter" and consequently have had to focus their energies on lobbying the federal government for greater self-administration of Indigenous education, health, economic development, and local police programs and greater recognition in the Canadian political landscape of Indigenous Peoples' right to self-governance.[146]

B. Recent Developments in Promoting Indigenous Peoples' Self-Governance

In a July 2023 report, the Special Rapporteur on the Rights of Indigenous Peoples noted that although Indigenous Peoples in Canada negotiate treaties and self-governance agreements primarily with the federal government through its Crown-Indigenous Relations and Northern Affairs cabinet-level department, these negotiations have at times also included provincial and territorial governments.[147] Indeed, provinces such as British Columbia, Ontario, and Québec, and the territorial government of the Northwest Territories, have in recent years made strides in conducting negotiations, agreements, and action plans to address Indigenous rights, particularly by taking steps to implement the provisions of the UNDRIP.[148] The provincial governments of British Columbia and Ontario have also established policy frameworks to recognize the government-to-government relationships between themselves and First Nations Peoples living in these provinces.[149] British Columbia in particular has instituted measures to advance Indigenous Peoples' right to self-determination and self-governance and implemented procedures that aim to integrate Indigenous Peoples' voices more effectively into the legislative process by accounting for the legal duty to consult and engage with Indigenous Peoples on projects that affect their rights. Such efforts include British Columbia's promulgation in 2018 of a comprehensive

146 Papillon, *supra* note 54, at 300-01.

147 José Francisco Calí Tzay (Special Rapporteur on the Rights of Indigenous Peoples), *Visit to Canada: Rep. of the Special Rapporteur on the Rights of Indigenous Peoples*, ¶ 8, U.N. Doc. A/HRC/54/31/Add.2 (July 24, 2023).

148 *Id.* ¶ 13.

149 Papillon, *supra* note 54, at 303.

set of guideline principles that demonstrate its commitment to Indigenous land title and rights.[150] Most significantly, British Columbia passed the *Declaration on the Rights of Indigenous Peoples Act* in late 2019, enshrining in provincial law the provisions of the UNDRIP and providing that the government "[i]n consultation and cooperation with the Indigenous peoples in British Columbia . . . must take all measures necessary to ensure the laws of British Columbia are consistent with the Declaration."[151] British Columbia thus became the first jurisdiction in Canada to legislatively adopt the UNDRIP's provisions.[152]

V. RECOMMENDATIONS

The United States' devolved federalist system of tribal recognition offers a possible solution to the issue of Indigenous Peoples' ability to exercise their rights to self-determination and self-governance in the absence of federal or constitutional guarantees. Although far from perfect and subject to the vagaries of local, state-level politics, state-level recognition of Indian tribes provides safeguards to tribes who have not secured official federal recognition and, at minimum, "can connote official acknowledgment of an Indian tribe and establish a political relationship that can assist tribes in the face of federal intransigence."[153] In countries such as Australia, where the Commonwealth Government has in recent decades repeatedly stymied progress on Aboriginal issues and where the possibility of constitutional recognition of Aboriginal Peoples is foreclosed for at least the immediate future, state- and territory-level recognition may unlock potential avenues for negotiation and redress.

150 PROVINCE OF B.C., DRAFT PRINCIPLES THAT GUIDE THE PROVINCE OF BRITISH COLUMBIA'S RELATIONSHIP WITH INDIGENOUS PEOPLES (2018), https://news.gov.bc.ca/files/6118_Reconciliation_Ten_Principles_Final_Draft.pdf?platform=hootsuite [https://perma.cc/UC76-XYJ3].

151 Declaration on the Rights of Indigenous Peoples Act, S.B.C. 2019, c 44, arts 2(a)-(c), 3 (Can.), https://www.bclaws.gov.bc.ca/civix/document/id/complete/statreg/19044#section2 [https://perma.cc/SBH3-U4QS]; *see also British Columbia: Building Relationships with Indigenous Peoples*, GOV'T OF B.C., https://www2.gov.bc.ca/gov/content/governments/indigenous-people/new-relationship [https://perma.cc/F9SJ-ZQZL] (last visited Nov. 22, 2023).

152 *British Columbia: Building Relationships with Indigenous Peoples*, *supra* note 151.

153 Koenig & Stein, *supra* note 68, at 122.

Despite the decidedly mixed results that state-recognized tribes in the United States, such as the Unkechaug in New York, face in their efforts to preserve and expand their sovereignty, the structural features of the dual system of federal and state recognition harbor the *potential* for state governments to come to their own agreements with non-federally recognized tribes living within their bounds. These agreements may act as a way of compensating these tribes for their lack of federal recognition while still giving them a degree of representation and the ability to negotiate with state governments on a government-to-government level.[154] While these government-to-government relationships cannot act as a substitute for federal recognition, they still offer significant benefits to tribes by affording them the opportunity to engage with state governments on tribal needs and act as sovereigns in their political relationships with these states.[155] Given the recent setbacks that Aboriginal Peoples in Australia have faced in their efforts to secure official constitutional and federal acknowledgment of their sovereignty, Australian state and territorial governments should expedite their efforts to work with Aboriginal Peoples and implement state-level recognition systems akin to those in place in the United States to respond more effectively to Indigenous Peoples' needs and to provide them with a measure of representation in sub-national governments.

On a related note, despite advancements led by subnational government units in both the United States and Australia, the federal governments of each should adopt the UNDRIP principles into law through federally promulgated statutes. In this sense, Canada's efforts may serve as a blueprint for action on Indigenous affairs. Having signaled its commitment to institutionalizing the UNDRIP's provisions in full through its 2021 enactment of the *United Nations Declarations on the Rights of Indigenous Peoples Act*,[156] the Canadian federal government has since released the final draft of its action plan detailing the specific measures it will take to implement the Act.[157]

154 *See* Danielle V. Hiraldo, *"If You Are Not at the Table, You Are on the Menu": Lumbee Government Strategies under State Recognition*, J. NATIVE & INDIGENOUS STUD., Spring 2020, at 36, 36-37.

155 *Id.*

156 *See* United Nations Declaration on the Rights of Indigenous Peoples Act, S.C. 2021, c 14 (Can.), https://laws-lois.justice.gc.ca/eng/acts/U-2.2/page-1.html#h-1301591 [https://perma.cc/SHL4-JCXE].

157 Matteo Cimellaro, *What Is UNDRIP and What Will It Mean for Canada?*, CANADA'S NAT'L OBSERVER (June 21, 2023), https://www.nationalobserver.com/2023/06/21/explainer/ottawas-action-plan-

The action plan includes a wealth of legislative and policy priorities that take into account the interests of several discrete groups of Indigenous Peoples, including First Nations, Inuit, and Métis Peoples. It emphasizes the following: principles of consultation and cooperation[158]; the review and amendment of earlier legislation that may be inconsistent with the Act's provisions[159]; a robust agenda for addressing and redressing systemic racism and discrimination through increased funding for community programs, collaboration with Indigenous health and educational institutions, and an emphasis on culturally informed interventions to combat the unique challenges of gender-based violence faced by Indigenous Peoples[160]; and establishing oversight bodies to ensure compliance with the Act and the UNDRIP.[161] Several of the action plan's objectives envision cooperation between Indigenous Peoples and provincial and territorial governments, hoping to engage these sub-national government units as partners in federal efforts at reconciliation and reparations and in future treatymaking measures.[162]

This action plan provides a comprehensive set of legislative and policy goals that are based on the UNDRIP's provisions, offering a potential model for the United States and Australia to follow in order to recognize and provide reparations to Indigenous Peoples. In the United States, policymakers could leverage this model not only to strengthen the federal government's promotion of Indigenous sovereignty, but also to develop greater coordination between federal and state Indigenous policy frameworks and thereby facilitate to a greater degree Indigenous Peoples' ability to work with individual state governments to advance their objectives on a regional and local level. While the United States' devolved system of sovereignty does have its advantages in providing non-federally recognized Indigenous Peoples with a degree of flexibility in entering into agreements with state governments, the Canadian framework more explicitly showcases the Canadian federal government's commitment to

enshrine-indigenous-rights-coming-heres-what-to-know [https://perma.cc/2SQF-3TED].

158 GOV'T OF CAN., UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES ACT ACTION PLAN 25 (2023), https://www.justice.gc.ca/eng/declaration/ap-pa/ah/pdf/unda-action-plan-digital-eng.pdf [https://perma.cc/5TG2-F7W9].

159 *Id.* at 26.

160 *Id.* at 26-28.

161 *Id.* at 30.

162 *Id.* at 69, 72.

Indigenous sovereignty and self-governance through enshrining the UNDRIP's provisions into law. Similarly, in the United States, the UNDRIP could be incorporated into federal policymaking in a way that gives credence to the important relationships that both federally and state-recognized tribes have developed with state governments and acknowledges their role in advancing Indigenous sovereignty.

In the Australian context, the Commonwealth Government could, rather than enact statutes that undercut Native title in favor of non-Aboriginal mining and pastoral commercial interests, wield its authority to tip the balance in favor of Aboriginal Peoples by implementing the provisions of the UNDRIP and thereby further codify Native title into federal law. These measures would support common-law developments dating back to the 1990s that established Native title as a legal doctrine by placing it on firmer statutory bases. They would also dovetail neatly with the reparative measures undertaken by select individual states and territories such as Victoria and Western Australia, which have taken the initiative in settling Aboriginal land claims and enshrining reparations into law. These states and territories should continue to take an active role in doing so, given the progress that they have already made in reaching agreements on Aboriginal land claims, while other states and territories should follow suit, particularly in light of the failure of the Voice referendum.

Ultimately, the implementation of the UNDRIP's provisions in the United States and Australia, following the example of Canada, would create a legal environment that is more conducive to Indigenous Peoples' ability to preserve and expand their sovereignty and right to self-governance. While both nations may learn much from the Canada's recent legislative initiatives, and while the Canadian experience may present among the most preferable frameworks for mediating relationships between federal governments and widely dispersed, discrete groups of Indigenous Peoples, the absence of such sweeping federal legislation need not sound the death knell for Indigenous Peoples' self-determinative and exercise of sovereignty. Sub-national administrative units such as states and territories may offer alternative structural channels to realize these objectives.