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Unraveling the International Law of Colonialism: Lessons From Australia and the United States

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UNRAVELING THE INTERNATIONAL LAW OF COLONIALISM: LESSONS FROM AUSTRALIA AND THE UNITED STATES

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ABSTRACT

In the 1823 decision of Johnson v. M'Intosh*, Chief Justice John Marshall formulated the international law of colonialism. Known as the Doctrine of Discovery, Marshall's opinion drew on the practices of European nations during the Age of Exploration to legitimize European acquisition of territory owned and occupied by Indigenous peoples. Two centuries later,* Johnson*—and the international law of colonialism—remains good law throughout the world. In this Article we examine how the Doctrine of Discovery was adapted and applied in Australia and the United States. As Indigenous peoples continue to press for a re-examination of their relationships with governments, we also consider whether and how the international law of colonialism has been mitigated or unraveled in these two countries. While we find that the Doctrine lingers, close examination provides several important lessons for all Indigenous nations and governments burdened by colonization.*

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I. INTRODUCTION

The international law of colonialism dates from at least the early fifteenth century.[1] Today, it is known as the Doctrine of Discovery ("DoD" or "the Doctrine") because of the very influential two-hundred-year-old United States Supreme Court case, *Johnson v. M'Intosh*.[2] The Doctrine is one of the earliest examples of international law; that is, the rules that nations agree to abide by in their interactions with other nations. As European powers began their voyages of "discovery" and established colonies and empires, they saw the need to agree on rules of conduct that would control their own competition. Initially developed by the Christian Church, Spain, and Portugal, the DoD was identified as a mechanism to

1. ROBERT J. MILLER, NATIVE AMERICA, DISCOVERED AND CONQUERED: THOMAS JEFFERSON, LEWIS & CLARK, AND MANIFEST DESTINY 9-33 (2006); ROBERT A. WILLIAMS, JR., THE AMERICAN INDIAN IN WESTERN LEGAL THOUGHT: THE DISCOURSE OF CONQUEST 14 (1990).

2. Johnson v. M'Intosh, 21 U.S. 543 (1823). For a brief description of the case, see MILLER, *supra* note 1, at 50-56.

minimize potential clashes between European states when colonizing the non-European, non-Christian world.[3]

Johnson and the Doctrine are still good law in the United States and have heavily influenced the development of the law and history of colonization around the world.[4] Indigenous nations and peoples have long agitated against and fought the pernicious physical, health, sovereign, and territorial impacts of colonization and its legal effects and impacts. But these efforts have produced minimal results to date. Of all the countries in the world, the United States still appears to be the only one that has recognized in the past, and still recognizes today, Indigenous sovereignty. The U.S. Constitution from 1787 clearly recognizes Indian nations as governments that interact with the United States through Congress and treatymaking and explicitly recognizes Indian individuals as citizens of their own governments who were not federal or state citizens.[5]

In recent decades Indigenous nations have used international bodies such as the United Nations and the Organization of American States to fight colonization and to establish their sovereign rights.[6] In addition, many individuals have worked with numerous Christian churches to convince these organizations to take official stands repudiating the DoD. This effort is succeeding. In 2009, the Episcopal Church in the United States adopted such a resolution and in 2010 the Anglican Church in Canada did the same.[7] In 2012, the World Council of Churches executive committee, which represents more than 352 churches, also repudiated the Doctrine.[8] Complementing these approaches, individuals have lobbied the Vatican for decades to withdraw the papal bulls from the fifteenth century that played significant roles in the legal development of this international law.[9]

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3. *Johnson*, 21 U.S. at 573.

4. *E.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005); Robert J. Miller & Olivia Stitz, *The International Law of Colonialism in East Africa: Germany, England, and the Doctrine of Discovery*, 32 DUKE J. COMP. & INT'L L. 1 (2021); Robert J. Miller & Micheline D'Angelis, *Brazil, Indigenous Peoples, and the International Law of Discovery*, 37 BROOK. J. INT'L L. 1 (2011); Robert J. Miller, Lisa Lesage & Sebastian Lopez Escarcena, *The International Law of Discovery, Indigenous Peoples, and Chile*, 89 NEB. L. REV. 819 (2011); ROBERT J. MILLER, JACINTA RURU, LARISSA BEHRENDT & TRACEY LINDBERG, DISCOVERING INDIGENOUS LANDS: THE DOCTRINE OF DISCOVERY IN THE ENGLISH COLONIES (2010).

5. U.S. CONST. art. I, §§ 2 & 8; U.S. CONST. amend. XIV, § 2. All American Indians were made U.S. citizens in 1924. 8 U.S.C. § 1401(b).

6. *See generally* S. JAMES ANAYA, INTERNATIONAL HUMAN RIGHTS AND INDIGENOUS PEOPLES (2009); U.N. Declaration on the Rights of Indigenous Peoples, G.A. Res. 61 /295, U.N. Doc. A/RES/47/1 (2007).

7. *Infra* notes 237 & 238 and accompanying text.

8. *Infra* note 239 and accompanying text.

9. *Infra* note 233 and accompanying text.

In this Article, we compare, contrast, and critique official governmental efforts in the United States and Australia that were and are ostensibly directed at rolling back the Doctrine, both legislatively and judicially.[10] We analyze the effectiveness of these efforts and assess whether either country has provided a model that other countries around the world could or should consider adopting to treat Indigenous peoples and nations with the full respect and governmental and human dignities that they deserve. Section II briefly sets forth the legal and historical origins of the Doctrine, the ten elements or factors that comprise this legal principle, and a survey of how England and other countries applied the DoD to colonize the non-European world. Section III analyzes the attempts to overturn or mitigate the Doctrine in the United States including the U.S. Indian Claims Commission of 1946, other legislation, tribal litigations, and the revocation of the papal bulls. In Section IV, we examine how Aboriginal and Torres Strait Islander peoples began to chisel cracks into Australia's unique approach to colonization in the second half of the twentieth century. We then dissect the crucial Australian High Court decision of *Mabo v Queensland (No 2)*,[11] which offered the first significant attempt to engage with the country's colonial past. Section V examines whether the Australian government has honored the promise of *Mabo*. It focuses on the 1993 *Native Title Act*[12] and more recent governmental efforts, including modern-day treaty making with Aboriginal and Torres Strait Islander nations. We also examine the 2017 Uluru Statement from the Heart, and its powerful call for a First Nations Voice to be enshrined in Australia's Constitution. In our Conclusion, we argue that our own countries can still vastly improve how they deal with Indigenous nations and peoples, but that other countries should consider adapting and adopting some of the initial steps the United States and Australia have taken to address the inhumane, pernicious, and continuing impacts of colonization.

II. THE DOCTRINE OF DISCOVERY AND COLONIALISM

The Doctrine of Discovery is one of the earliest precepts of international law. European countries developed the doctrine to control and lessen competition and risk of war amongst themselves as they sought to establish empires and colonies in the non-European, non-Christian

10. The United States and Australia are a natural comparison. Both were colonized by the British, possess a common law legal system, and are federations. The Australian Constitution was modelled in part on the U.S. Constitution. *See* Zelman Cowan, *A Comparison of the Constitutions of Australia and the United States*, 4 BUFF L.REV. 155 (1955).

11. *Mabo v Queensl. [No. 2]* (1992) 175 CLR 1 (Austl.).

12. *Native Title Act 1993* (Cth) (Austl.).

world.[13] This international law of colonialism was ultimately adopted and applied nearly uniformly by all Euro-American countries from the fifteenth throughout the twentieth centuries. Distinct elements of this international law continue to be applied in settler colonial societies. The devastating results on Indigenous nations and peoples continue to this very day.

In this Section, we provide the background necessary to analyze the attempts of the United States and Australia to deal with their colonial histories and to address the serious ramifications, including ethnic-cleansing and even genocide, imposed upon the Indigenous nations and peoples located within those countries by the Doctrine. We trace the origins of the Doctrine, outline its constitutive elements, and consider how it was adapted and applied in the United States and Australia.

A. *Origins*

Scholars have traced the beginnings of the international law of colonialism that regulated over six hundred years of European colonization as far back as the Crusades to reclaim the Holy Lands in 1096-1271.[14] The Crusades were justified by the idea of a Christian mandate to remake the world and to conquer, convert, and colonize it.[15] But the Doctrine is primarily viewed as having been developed in the fifteenth century by Spain, Portugal, and the Catholic Church.[16] This legal principle began to emerge in the 1430s due to Spain's and Portugal's conflicting claims to colonize and exploit the Canary Islands and the Canary Island people.[17] Spain and Portugal turned to the pope to mediate their differences. At first, Pope Eugenius IV rejected Portugal's request to colonize the Canary Islanders because they were, after all, human beings with certain rights.[18] By 1436, however, Portugal convinced the Pope to issue a decree (called a papal bull) granting Portugal exclusive control of the Islands so that it

13. Johnson v. M'Intosh, 21 U.S. 543, 573 (1823).

14. *See, e.g.*, ANTHONY PAGDEN, LORDS OF ALL THE WORLD: IDEOLOGIES OF EMPIRE IN SPAIN, BRITAIN AND FRANCE C.1500-1800 24 (1995); WILLIAMS, *supra* note 1, at 14; *see generally* THE EXPANSION OF EUROPE: THE FIRST PHASE (James Muldoon ed., 1977) [hereinafter THE EXPANSION OF EUROPE]; CARL ERDMANN, THE ORIGIN OF THE IDEA OF CRUSADE (Marshall W. Baldwin & Walter Goffart trans., 1977; org. ed. 1935).

15. WILLIAMS, *supra* note 1, at 13 & n.4, 29-31, 66-67; JAMES MULDOON, POPES, LAWYERS AND INFIDELS 109-19 (1979); ERDMANN, *supra* note 14, at 155-56; HENRY WHEATON, ELEMENTS OF INTERNATIONAL LAW 225-26 (William B. Lawrence ed., 1936) (1866).

16. MILLER, *supra* note 1, at 9-33.

17. *Id.* at 13-14.

18. MULDOON, *supra* note 15, at 119-21; THE EXPANSION OF EUROPE, *supra* note 14, at 48, 54-56.

could civilize and convert the Islanders to the "one true religion" and "for the salvation of the souls of the pagans of the islands."[19]

As Portugal expanded its explorations and claims along the west coast of Africa, it again turned to the Church. In 1452 and 1453, Pope Nicholas V issued bulls that allegedly extended Portugal's jurisdiction and territorial rights in Africa.[20] More specifically, on January 8, 1455, the pope granted Portugal power over these newly discovered lands

> to invade, search out, capture, vanquish, and subdue all Saracens [Muslims] and pagans whatsoever, and other enemies of Christ wheresoever placed, and the kingdoms, dukedoms, principalities, dominions, possessions, and all movable and immovable goods whatsoever held and possessed by them and to reduce their persons to perpetual slavery, and to apply and appropriate to himself and his successors the kingdoms, dukedoms, counties, principalities, dominions, possessions, and goods, and to convert them to his . . . use and profit . . . [and to] possess, these islands, lands, harbors, and seas, and they do of right belong and pertain to the said King Alfonso and his successors . . . .[21]

These bulls from the 1450s cut Spain off from acquiring possessions in Africa. Not surprisingly, Queen Isabella and King Ferdinand were very interested in Christopher Columbus' claims that he could sail westward and find new lands for Spain.[22] The Spanish monarchs then sent him forth under seven contracts, the first of which promised to make Columbus the Spanish Admiral over any lands he would "discover and acquire."[23] In 1493, after learning that Columbus had discovered islands in the Caribbean unknown to the European world, Spain wasted no time seeking papal approval for these discoveries. Pope Alexander VI issued three bulls and ordered that the lands Columbus had discovered, which were "not hitherto discovered by others," belonged to Spain.[24] The pope further granted

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19. WILLIAMS, *supra* note 1, at 69, 70-72; THE EXPANSION OF EUROPE, *supra* note 14, at 54-56.

20. CHURCH AND STATE THROUGH THE CENTURIES 146-53 (Sidney Z. Ehler & John B. Morrall trans. & eds., 1967).

21. EUROPEAN TREATIES BEARING ON THE HISTORY OF THE UNITED STATES AND ITS DEPENDENCIES TO 1648 23 (Frances G. Davenport ed., 1917) [hereinafter EUROPEAN TREATIES].

22. WILLIAMS, *supra* note 1, at 74-77.

23. *Id*. at 76-78; 2 SAMUEL ELIOT MORISON, THE EUROPEAN DISCOVERY OF AMERICA: THE SOUTHERN VOYAGES 27-44 (1974) [hereinafter THE EUROPEAN DISCOVERY]; SAMUEL ELIOT MORISON, ADMIRAL OF THE OCEAN SEA: A LIFE OF CHRISTOPHER COLUMBUS 105 (1942) [hereinafter ADMIRAL].

24. Papal Bull, Pope Alexander VI, Inter Caetara Divinai (May 1493), *reprinted in* EUROPEAN TREATIES, *supra* note 21, at 56-63 (stating that lands "undiscovered by others"

Spain any lands it would discover in the future if they were not "in the actual possession of any Christian king."[25] In his second bull of Discovery in 1493, the pope drew a line of demarcation from the north to the south poles, one hundred leagues west of the Azores Islands, and granted Spain title to the lands "discovered and to be discovered" west of that line, and granted Portugal the same rights east of the line.[26]

Portugal was unhappy with the line drawn by Pope Alexander. Thus, in 1494, Spain and Portugal signed the Treaty of Tordesillas and agreed to a line of demarcation 370 leagues west of the Cape Verde Islands so as to give Portugal part of the New World, today's Brazil.[27] After Spanish discoveries of the Pacific Ocean in 1513 and 1521, in the Treaty of Zaragoza of 1529, these same countries extended this line of demarcation around the globe and divided the Pacific Ocean and its islands and landmasses.[28] Thereafter, Spain and Portugal claimed the exclusive rights to apply the Doctrine of Discovery in Africa, Asia, and the Americas.[29]

These papal bulls threatened excommunication to any Catholic monarch that interfered with Spain's and Portugal's sovereign and property rights in newly discovered lands. But jealousy to acquire their own empires and riches provoked the Catholic king of England, Henry VII, France, and even Protestant Holland to also adopt the international law of Discovery to claim sovereign, commercial, and property rights in North America and around the world.[30]

Henry VII, for example, carefully complied with the international law of Discovery when he dispatched the Cabots on explorations in 1496-98 to North America. The King ordered his explorers to discover lands "unknown to all Christians" and "not actually possessed of any Christian

found by Columbus belonged to Ferdinand and Isabella). Alexander also granted Spain any lands it might discover in the future provided they were "not previously possessed by any Christian owner." *Id.* at 56. *See also* WILLIAMS, *supra* note 1, at 9-13, 23, 53-56.

25. EUROPEAN TREATIES, *supra* note 21, at 56.

26. THE SPANISH TRADITION IN AMERICA 38 (Charles Gibson, ed., 1968) [hereinafter SPANISH TRADITION]; CHURCH AND STATE THROUGH THE CENTURIES, *supra* note 20, at 156; MORISON, ADMIRAL, *supra* note 23, at 368-73.

27. Miller & D'Angelis, *supra* note 4, at 15-16; WILLIAMS, *supra* note at 1, at 80 (citing authorities); 3 FOUNDATIONS OF COLONIAL AMERICA: A DOCUMENTARY HISTORY 1684 (W. Keith Kavenagh ed. 1973) [hereinafter FOUNDATIONS]; SPANISH TRADITION, *supra* note 26, at 42-51.

28. MORISON, THE EUROPEAN DISCOVERY, *supra* note 23, at 476-77, 490-91, 498.

29. Miller & Stitz, *supra* note 4, at 22-24, 29, 33-34, 43, 45, 49, 52, 56; MILLER, *supra* note 1, at 13-17. *See also* Manuel Servin, The Act of Sovereignty in the Age of Discovery (unpublished dissertation, University of Southern California, 1959); Manuel Servin, *Religious Aspects of Symbolic Acts of Sovereignty*, 13 THE AMERICAS 255 (1957).

30. DISCOVERING INDIGENOUS LANDS, *supra* note 4, at 15-22, 171; MILLER, *supra* note 1, at 17-21, 25-33.

prince."[31] England then relied for centuries on these alleged first discoveries to claim exclusive commercial, sovereign, and property rights in North America.[32] Even after the English monarchs became Protestants, Elizabeth I and James I continued complying with this international law. In 1578 and 1583, Elizabeth I authorized attempts to establish English colonies in North America but only in areas not already discovered or possessed by other Christian nations.[33] In 1606 and 1620, James I authorized the establishment of colonies at Jamestown and in New England in areas undiscovered by other European nations.[34]

France too contested the Spanish claim in North America. King Francis I is said to have replied to the Spanish ambassador in Paris: "I would like to see that clause in Adam's will that excluded me from the partition of the world."[35] France also vigorously challenged English claims to first discovery, claiming its discoveries in what is now Canada and parts of the United States down the Mississippi River to the Gulf, predated England's claims.[36] The Jesuit accounts of French activities in North America demonstrate the common and accepted principles of first discovery and possession of territory as grounds for making legal claims to European sovereignty, jurisdiction, and title.[37] In 1627, Louis XIII established France's first trading company in North America and ordered it to work in "the aforesaid newly discovered lands."[38] In addition, France engaged in a blatant attempt to solidify its Discovery claims in 1749 when it sent a military force throughout the Ohio River country to renew its 1643 Discovery claim by

31. Letters Patents of Henry VII Granted to John Cabot (Mar. 5, 1496-1497), *reprinted in* 1 FOUNDATIONS, *supra* note 27, at 18, 22-29.

32. PAGDEN, *supra* note 14, at 90; WILLIAMS, *supra* note 1, at 161, 170, 177-78; 7 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 31 (Alden T. Vaughan & Barbara Graymont eds., 1998).

33. Letters Patent from Queen Elizabeth I to Sir Humphrey Gilbert (June 11, 1578), *reprinted in* 3 FOUNDATIONS, *supra* note 27, at 1690-93; Charter to Sir Walter Raleigh (Mar. 25, 1583-1584), *reprinted in id.* at 1694-98.

34. Patent of New England Granted by King James I (Nov. 3, 1620), *reprinted in id.* at 22-29; Patent of the Council for New England (Nov. 3-13, 1620), *reprinted in* SELECT CHARTERS AND OTHER DOCUMENTS ILLUSTRATIVE OF AMERICAN HISTORY 1606-1775 23-25 (William MacDonald ed., 1904).

35. HARRY HOBBS & GEORGE WILLIAMS, MICRONATIONS AND THE SEARCH FOR SOVEREIGNTY 130 (2022).

36. Richard Gross, *Mapping the Chicago Portage: Seventeenth-Century Explorations by Jolliet, Marquette, La Salle, and Joutel*, 54 TERRAE INCOGNITAE 162, 165, 174-75 (Aug. 2022).

37. *E.g.*, 1 JOSEPH JOUVENCY, AN ACCOUNT OF THE CANADIAN MISSION 179, 205 (1710); 2 TRAVELS AND EXPLORATIONS OF THE JESUIT MISSIONARIES IN NEW FRANCE 1610-1791 33, 39, 41, 95-97, 105-15, 127, 199, 203, 217-19 (Reuben Gold Thwaites ed., 1959) (arguing that England ignored that France found and had "taken actual possession of all the country" before the English, and because "no Christian had ever been [there] . . . "this hitherto unknown region" . . . was "brought . . . under the jurisdiction of [France]").

38. PAGDEN, *supra* note 14, at 34.

"buri[ng] small lead plates . . . 'as a monument' . . . 'of the renewal of possession.'"[39] British military officials found some of these plates and reported "that the Crown of France assumes a Right to all the Territories lying upon that River."[40] In a similar fashion, in 1616, Holland posted a pewter plate on the west coast of Australia claiming that mainland by Discovery.[41] In the late 1700s, Russia, Spain, and England also raised national flags and crests and buried coins to provide evidence of their discovery and alleged possession of areas in what is now modern-day Alaska.[42]

The DoD is still used today. As late as the 1920s and 30s, the United States, England, and Germany were claiming islands in the Pacific by posting signs and even dropping their national flags onto islands from airplanes.[43] In 1938, a German pilot flew across Antarctica dropping darts inscribed with swastikas to claim the continent.[44] As recently as 2007 and 2010, Russia and China planted their flags on the bottom of the Arctic Ocean and the South China Sea, respectively, to allege ownership and sovereignty over those areas and the resources located there.[45]

This brief recap of the origins of the DoD demonstrates that European countries were eager to have their colonial claims recognized and affirmed by international law and respected by other countries. European nations and the United States sometimes engaged in warfare over their conflicting claims, and they often traded these territorial claims through international treaties.[46] Despite the absurdity of these pretensions, the settler colonial societies that resulted from European colonization of much of the world, including the United States, continue to apply the Doctrine of Discovery against Indigenous nations and peoples today.[47] In the following Part, we examine the precise elements of the Doctrine in more detail.

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39. FRED ANDERSON, CRUCIBLE OF WAR: THE SEVEN YEARS' WAR AND THE FATE OF EMPIRE IN BRITISH NORTH AMERICA, 1754-1766 26 (2000).

40. Journal of Captain Fitch's Journey to the Creeks (May 1726), microformed on I RECORDS OF THE BRITISH COLONIAL OFFICE, CLASS 5: WESTWARD EXPANSION 1700-1783, Reel I, Vol. 12, Frame 0158 (Randolph Boehm ed., 1972) ("It appears by a leaden plate found by the Indians upon the River Ohio, in the year 1749, that the Crown of France assumes a Right to all the Territories lying upon that River.").

41. *See infra* notes 109-110 and accompanying text.

42. Robert J. Miller, *The International Law of Discovery: Acts of Possession on the Northwest Coast of North America*, *in* ARCTIC AMBITIONS: CAPTAIN COOK AND THE NORTHWEST PASSAGE 191, 197-203 (2015).

43. *Id.* at 205; Servin, The Act of Sovereignty, *supra* note 29, at 270, 274-75, 280, 296-97.

44. HOBBS & WILLIAMS, *supra* note 35, at 131.

45. ARCTIC AMBITIONS, *supra* note 42, at 205.

46. *E.g.*, MILLER, *supra* note 1, at 18, 131-36, 156.

47. *E.g.*, City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005); HARRY HOBBS, INDIGENOUS ASPIRATIONS AND STRUCTURAL REFORM IN AUSTRALIA 157-95 (2021); Miller & D'Angelis, *supra* note 4; DISCOVERING INDIGENOUS LANDS, *supra*

B. *The Elements of the Doctrine*

An effective method to better understand and analyze the international law of colonialism, and to compare how different Euro-American nations applied it throughout the world, is to define the constituent elements that make up the Doctrine. Law students, attorneys, judges, and law professors are familiar with identifying the elements of a crime or a tort, for example, that prosecutors and plaintiffs must prove at trial to convict a defendant or to prove a defendant liable for a tort. By analogy, the elements of the DoD make it more understandable and far easier to trace throughout world history and to compare the application of colonization country by country. These elements are discernable by a close reading of *Johnson*. These elements are reflected in the laws, treaties, court cases, policies, and histories of Euro-American settler societies.[48]

The simplest definition of the DoD was stated by the United States Supreme Court in 1823. In *Johnson v. M'Intosh*, two non-Indians claimed ownership of certain land. Johnson inherited shares in a company that had allegedly bought the land directly from individual Indians in 1773 and 1775, before the United States even existed.[49] McIntosh bought his land from the United States in 1815 after it had purchased the land from the Illinois and Piankeshaw Tribes through treaties in 1803 and 1809.[50] The Court held in favor of McIntosh because international law held that tribal nations did not possess the full ownership of their lands after their "discovery" by Europeans.[51] Instead, the European country that held the Discovery power of preemption was the only possible purchaser of the title to

note 4. Scandinavian countries have also applied aspects of the DoD against the Sami peoples. *E.g.*, Landowners and Right-holders in Manndalen v. The Norwegian State, Serial No. 5B/2001, No. 340/1999 (2001) (Supreme Court of Norway); North Frostviken Sami Village v. State, S.Ct. Decision No. DT 2, Case No. 324/76 (1981) (Supreme Court of Sweden); LEHTOLA VELI-PEKKA, THE SAMI SIIDA AND THE NORDIC STATES FROM THE MIDDLE AGES TO THE BEGINNING OF THE 1900S, *IN*, CONFLICT AND COOPERATION IN THE NORTH 183-94 (Kristina Karppi & Johan Eriksson, eds, 2000).

48. *E.g.*, Miller & Stitz, *supra* note 4, at 22-56; DISCOVERING INDIGENOUS LANDS, *supra* note 4, at 41-88, 92-124, 174-92, 209-35.

49. MILLER, *supra* note 1, at 50-53. *See generally* PETER P. D'ERRICO, FEDERAL ANTI-INDIAN LAW: THE LEGAL ENTRAPMENT OF INDIGENOUS PEOPLES (2022); BLAKE A. WATSON, BUYING AMERICA FROM THE INDIANS: *JOHNSON V. MCINTOSH* AND THE HISTORY OF NATIVE LAND RIGHTS (2012); LINDSAY G. ROBERTSON, CONQUEST BY LAW: HOW THE DISCOVERY OF AMERICA DISPOSSESSED INDIGENOUS PEOPLES OF THEIR LANDS (2005).

50. Johnson v. M'Intosh, 21 U.S. 543, 560 (1823); Eric Kades, *The Dark Side of Efficiency:* Johnson v. M'Intosh *and the Expropriation of American Indian Lands*, 148 U. PA. L. REV. 1065, 1088 (2000).

51. *Johnson*, 21 U.S. at 604-05.

those lands.[52] Thus, when the United States allegedly acquired sovereign, property, and preemption rights in this area after signing its peace treaty with England in 1783 (and after signing similar treaties with France in 1803 regarding the Louisiana Territory and with Russia in 1867 regarding Alaska), the preemption right passed to the United States, and the tribal nations were legally only allowed to sell their lands to the United States.[53]

The holding of *Johnson* is best stated in this passage:

> The United States, then, have unequivocally acceded to that great and *broad rule* [Discovery] by which its civilized inhabitants now hold this country. They hold, and assert in themselves, the *title* by which it was acquired. They maintain, as all others have maintained, that discovery gave an *exclusive right to extinguish the Indian title of occupancy*, either by *purchase* or by *conquest*; and gave also a right to such a degree of *sovereignty*, as the circumstances of the people would allow them to exercise.[54]

We discern from this holding and from the entire opinion that the U.S. Supreme Court defined the Doctrine of Discovery as being comprised of ten essential elements or factors.[55]

1. First discovery. The first Euro-American country that discovered lands unknown to other Euro-Americans claimed property, commercial, and sovereign rights over the lands and the Indigenous nations and peoples.[56] Consequently, the Doctrine created a race among Euro-American powers to discover and claim the non-European world. This race is well exemplified by the "Scramble for Africa" in the late nineteenth century.[57] In Australia too, British colonies and outposts were constructed to forestall French claims.[58]

2. Actual occupancy and possession. This element was primarily developed by Queen Elizabeth I and her attorneys in the late 1500s.[59] Thereafter, the Doctrine required that for a Euro-American nation to turn a first discovery into full ownership recognized by other countries, a discovering country had to actually occupy and possess the lands it claimed.[60] Occupancy was

52. *Id*. at 574.

53. *Id*. at 584-85.

54. *Id*. at 587 [emphases added].

55. MILLER, *supra* note 1, at 3-5.

56. *Johnson*, 21 U.S. at 573-76, 587.

57. Miller & Stitz, *supra* note 4, at 22-29; MILLER, *supra* note 1, at 14-21. *See generally* THOMAS PAKENHAM, THE SCRAMBLE FOR AFRICA, 1876-1912 (1991).

58. Peter Johnston, *The Tale of the Coins: France's Eighteenth Century Claim to Western Australia*, 39(2) U.W.A. L.R. 25 (2015).

59. MILLER, *supra* note 1, at 18-19, 21-22.

60. *Johnson*, 21 U.S. at 573, 576-77, 582-84.

usually established by building forts or settlements. The physical occupancy and actual possession had to be accomplished within a reasonable length of time after a first discovery.[61]

3. Preemption. Euro-American countries claimed that first discovery granted them the power or property right of preemption, that is, the exclusive right to buy the lands of Indigenous nations.[62] This is a very valuable property right similar to the modern-day real estate principle of the right of first refusal, which is the right to be the first person allowed to purchase another's land if they ever choose to sell. Furthermore, with only one possible buyer, native nations were egregiously defrauded on the prices they were paid for their lands.[63] Under Discovery, the Euro-American government that held the preemption right prevented, or preempted, any other Euro-American government or individual from buying that land from native nations. Most colonial-settler societies still claim this property right over Indigenous nations and peoples today. In fact, the first Congress that met under the new U.S. Constitution enacted a law in 1790 that explicitly claimed the preemption power for the United States over Indian nations, individuals, and states.[64] That provision is still U.S. law today.[65]

4. Indian/Native title. After a first discovery, Euro-American legal systems claimed that Indigenous nations automatically lost the full ownership of their lands and only retained what is called "Indian title" or "native title."[66] This is still a very valuable property right because it is the right to occupy and use land. These rights could last forever if Indigenous nations never consented to sell to the Euro-American country that claimed preemption. But if Indigenous nations did choose to sell, they were to sell only to the Euro-American government that held the preemption right. The Indian title is a limited property right because it is not the fee simple absolute title as recognized by the Anglo-American property law system. Even worse, Indigenous nations were deemed to have lost the full ownership of their

61. MILLER, *supra* note 1, at 69-70, 74-75, 99-100, 108-10, 122, 131-33, 137, 142-43, 147, 155-56 (discussing many scholars, presidents, and members of Congress claiming the Oregon Country due to the U.S. actual occupancy of the territory).

62. *Johnson*, 21 U.S. at 573-74, 585-88.

63. *E.g.*, MILLER, *supra* note 1, at 96 (President Jefferson's administration paid tribes $0.25 an acre or less and sold them for $1.25 an acre and made vast profits); H.D. ROSENTHAL, THEIR DAY IN COURT: A HISTORY OF THE INDIAN CLAIMS COMMISSION 4 (1990) (stating that the United States obtained about 443 million acres of tribal lands from 1789 to 1844 for about $.10 an acre and sold them for a minimum of a $1.25 per acre).

64. Trade & Intercourse Act, 1 Stat. 138, § 4 (July 22, 1790). Several provisions of this 1790 Act are still law today and scattered throughout Title 25 of the United States Code. The provision exercising the United States right of preemption is at 25 U.S.C. § 177 (2018).

65. 25 U.S.C. § 177 (2018).

66. *Johnson*, 21 U.S. at 574-77, 603-04.

lands and assets without their knowledge, consent, or any compensation.[67] The colonial power could also simply extinguish native title through legislation or executive action.

5. Limited Indigenous sovereign and commercial rights. Euro-Americans claimed that Indigenous nations lost other aspects of their sovereignty and that native peoples lost their rights to engage in international trade and treaty-making after first discovery.[68] Euro-Americans claimed that Indigenous nations could only interact politically and commercially with the Euro-American government that discovered them.

6. Contiguity. Euro-Americans always claimed significant amounts of land contiguous to their actual discoveries and colonial settlements.[69] This element provided that the discovery of the mouth of a river created a claim over all the lands drained by that river.[70] For example, compare the United States' claims to the Louisiana Territory and the Oregon Country and the drainage systems of the Mississippi/Missouri and Columbia Rivers.[71] Claims could be extensive. The initial assertion of British sovereignty over the Australian continent in 1788 extended to the 135th degree of longitude and encompassed more than 1.16 million square miles. Even colonial authorities wondered whether they could lawfully claim such territory "without an actual occupation of every distinct portion of the country."[72]

7. *Terra nullius*. This Latin phrase means a land that is vacant or empty. Under this element, if lands were not occupied by any person or nation, they were available for Euro-American claims.[73] If lands or islands are truly empty this argument makes sense. But Euro-Americans applied this element to lands that were actually occupied by Indigenous societies and governments if they were not being used in a manner that Euro-American legal systems approved. In that case, the lands were considered legally "empty" and available to claim. Euro-Americans often considered lands

67. *See id.* at 574-77. *Cf.* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

68. Cherokee Nation v. Georgia, 30 U.S. 1, 17-18 (1831); *Johnson*, 21 U.S. at 573-79, 587-88, 604-05.

69. *Johnson*, 21 U.S. at 575, 577-78, 582-83.

70. *E.g.*, Thomas Jefferson, *The Limits and Bounds of Louisiana*, *in* DOCUMENTS RELATING TO THE PURCHASE & EXPLORATION OF LOUISIANA 24-37 (1904).

71. For illustrative maps of these territories, *see* https://en.wikipedia.org/wiki/Louisiana_Territory (last visited Jan. 27, 2023); https://en.wikipedia.org/wiki/Oregon_Country (last visited Jan. 27, 2023).

72. Alfred Stephen, *Solicitor-General of Van Diemen's Land, advice to John Burnett, Colonial Secretary*, November 3, 1834.

73. *Johnson*, 21 U.S. at 595. *Accord* Jones v. United States, 137 U.S. 202, 212 (1890); United States v. Rogers, 45 U.S. 567, 572 (1846); Martin v. Waddell's Lessee, 41 U.S. 367, 409 (1842); Fletcher v. Peck, 10 U.S. 87, 121-24, 140-42, 146-47 (1810); MILLER, *supra* note 1, at 21 & n.27, 22 & n.32, 27-28, 63-64, 156 (discussing numerous authorities).

that were actually owned, occupied, and being used by Indigenous nations and peoples to be *terra nullius*, such as Australia.[74]

8. Christianity. From the beginning of colonization throughout the twentieth century, religion has always been a very significant aspect of Discovery. Starting with the Crusades and then the papal bulls of the 1400s, Christians claimed that Indigenous nations and peoples did not have the same rights to land, sovereignty, self-determination, and human rights as Christians.[75] Christians claimed to be superior and that they had a God-given right to valuable lands and assets. Furthermore, Europeans claimed a right and a duty to convert non-Christians. These same ideas are rampant in the United States and Australia's colonial histories.[76]

9. Civilization. From the onset of colonization throughout the twentieth century, Euro-American cultures and civilizations were presumed to be superior to Indigenous peoples and their civilizations.[77] Euro-American countries claimed that the Christian God had directed them to civilize Indigenous peoples and to exercise paternal and guardian powers over them.[78]

10. Conquest. Euro-Americans claimed they could acquire the absolute ownership and sovereignty of the lands of Indigenous nations through military victories.[79] But the element of conquest was also used as a term-of-art to describe the property and sovereign rights Euro-American nations claimed to acquire automatically over Indigenous nations simply by making a first discovery.[80]

These ten elements are almost uniformly present in the histories and even in the modern-day laws and policies of settler societies around the world.[81] These elements were used, and are still being used today, to justify limitations on the sovereign, property, and human rights of Indigenous nations and peoples. However, not every element is applied in the same manner. Given the significant diversity in circumstances it is not surprising that European powers adopted different elements of the Doctrine that best

74. *Infra* notes 117–151 and accompanying text. *See also* DAVID DAY, CLAIMING A CONTINENT, A NEW HISTORY OF AUSTRALIA 27, 30-34, 39-40, 47-58 (2d ed. 2001).

75. *E.g.*, *Johnson*, 21 U.S. at 573-74, 576-77, 589.

76. *E.g.*, MILLER, *supra* note 1, at 13, 28, 36, 139-40, 148, 156, 171 (discussing numerous authorities).

77. *Johnson*, 21 U.S. at 572-73, 587-90.

78. *E.g.*, MILLER, *supra* note 1, at 13-14, 28, 63, 139-41, 148, 156, 161 (discussing numerous authorities).

79. *Johnson*, 21 U.S. at 587-93.

80. *Id.* at 574, 591 ("However extravagant the pretension of converting the discovery of an inhabited country into conquest may appear"); MILLER, *supra* note 1, at 5.

81. *E.g.*, Miller & D'Angelis, *supra* note 4, at 25-61; Miller, Lesage & Escarcena, *supra* note 4, at 850-83; DISCOVERING INDIGENOUS LANDS, *supra* note 4, at 41-88, 92-124, 174-92, 209-35.

suited their goal of acquiring territory. In the next Part we examine in more detail how the Doctrine of Discovery was adapted and applied in the United States and Australia.

C. *Application of the Doctrine in the United States and Australia*

European settler societies justified their existence, their rights, and their operations with the international law of colonialism. The different factual scenarios they encountered around the world, such as the strength or militancy of the Indigenous nations they met, influenced to what extent colonizers could easily establish themselves and exercise their claims to sovereign, commercial, territorial, and jurisdictional rights.[82] In North America, the French, English, and later the United States encountered strong confederacies of tribal nations, and for over two hundred years, colonizers proceeded cautiously and attempted to form political alliances with Indian nations instead of engaging in warfare.[83] In Australia, on the other hand, Aboriginal peoples and communities did not seem to present the same military opposition and risks to the colonizing English.[84] Consequently, the elements of Discovery we set out above were sometimes applied in different ways and some were perhaps barely used in the disparate scenarios Euro-Americans encountered. The colonial experience and the application of the Doctrine were quite different in what is now the United States and Australia. We will briefly review those legal histories to better compare how the Doctrine was used in those two countries and to contrast the nascent attempts that have been undertaken to roll back this international law and its lethal impacts on native peoples and nations.

1. United States

The United States and its Anglo-American legal system descended primarily from English roots. Not surprisingly, then, the U.S. colonial, state, and federal governments adopted English policies and legal principles and applied the DoD in establishing their existence, their relations with native nations, and expanding their territorial borders.

The English colonies, which later became American states, used the Doctrine. There are numerous examples over more than one hundred years in which the colonies relied on England's rights and powers that

82. *Johnson*, 21 U.S. at 573-74, 589-91.

83. *E.g.*, *id.* at 589-91; Letter General George Washington to James Duane, September 7, 1783, *reprinted in* DOCUMENTS OF UNITED STATES INDIAN POLICY 2 (Francis Paul Prucha ed., 3d. ed. 2000). *See also* Robert J. Miller, *Virginia's First Slaves: Indigenous Peoples*, 10 WAKE FOREST J. L. & POL'Y, 195, 197-98 (2020) (discussing numerous authorities).

84. *See, e.g.*, DAY, *supra* note 74, at 40-41, 43-44, 59-60, 67-69.

allegedly arose from first discovery and occupation in North America to also justify the colonies' existence and jurisdiction.[85] For example, in 1754, Benjamin Franklin told the colonial representatives at the Albany Congress that "His Majesties Title [to] . . . America appears . . . founded on the Discovery thereof first made, and the Possession thereof first taken in 1497 . . . ."[86] Accordingly, the American colonies nearly uniformly enacted laws in four general categories that reflected their use of the Doctrine to regulate and control affairs with Indian nations and peoples. Most of the colonies enacted laws to carry out the Crown's authority to purchase Indian lands, that is, to exercise the preemption power and prevent others from buying Indian lands and to seize vacant lands, to control commercial relations and trade with natives, to exercise protective guardianship powers over Indigenous peoples and attempt to convert and civilize them, and to exercise sovereignty over the Indian nations.[87]

One of the clearest examples of colonial claims to Discovery is a 1638 statute enacted by Maryland to control the Indian trade. The Act claimed that its legal authority was based on the King's "right of first discovery" in which the King had become "lord and possessor" and owner of all land in Maryland.[88] The colonies also enacted an enormous number of laws to protect their preemption power over the sales of native lands and the profits they expected.[89] James Madison expressly recognized these colonial claims to "pre-emption" in letters to James Monroe in 1783 and 1784.[90]

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85. *E.g.*, MILLER, *supra* note 1, at 25-26; Letter from Edward Waterhouse to the Honorable Companie of Virginia (1622), *reprinted in* 3 THE RECORDS OF THE VIRGINIA COMPANY OF LONDON 543 (Susan Myra Kingsbury ed., 1933) (stating that Virginia was the King's property because it was "first discouered" at the order of Henry VII by John Cabot who "tooke possession thereof to the Kings vse").

86. Benjamin Franklin, *Statement to the Albany Congress* (1754), *in* 5 THE PAPERS OF BENJAMIN FRANKLIN 368 (Leonard W. Labaree ed., 1962).

87. Robert J. Miller, *The Doctrine of Discovery in American Indian Law*, 42 IDAHO L. REV. 1, 25-27 nn.110-15 (2005) (discussing numerous colonial laws).

88. 2 FOUNDATIONS, *supra* note 27, at 1267-68.

89. Miller, *supra* note 87, at 24 nn.103 & 105 (discussing numerous colonial statutes). *See also* Law to Christianize Indians and Regulate Land Sales (Va. 1656), *reprinted in* 15 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: VIRGINIA AND MARYLAND LAWS 47-48 (Alden T. Vaughan & Deborah A. Rosen eds., 1998); Indian Land Purchase Act (N.J. 1703), *reprinted in* 8 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789: NEW YORK AND NEW JERSEY TREATIES, 1683-1713, at 576-77 (Alden T. Vaughan & Barbara Graymont eds., 1995).

90. Pre-emption "was the principal right formerly exerted by the Colonies with regard to the Indians [and] that it was a right asserted by the laws as well as the proceedings of all of them . . . ." Letters James Madison to James Monroe, VIII THE PAPERS OF JAMES MADISON 156 (Robert A Rutland et al eds., 1983); *id*. XIV, at 442.

The colonies also assumed the Discovery power to control and profit from the Indian trade and enacted numerous laws on this topic.[91]

As the English colonies became the thirteen states of the new United States, they also claimed the rights based on the DoD. In fact, the states claimed that they had inherited the Crown's Discovery powers when they declared independence. Many of the new states adopted constitutions that expressly included the Discovery claim that the state held the preemption power over sales of Indian lands such as the constitutions of Virginia and North Carolina in 1776, New York in 1777, Tennessee in 1796, and Georgia in 1798.[92] Many states, including Virginia, Connecticut, North Carolina, Georgia, Rhode Island, and Pennsylvania, also enacted numerous statutes to protect their Discovery claims over Indian trade and lands.[93]

The new United States also assumed the rights of Discovery. The Articles of Confederation Congress relied on several of the elements of Discovery in 1781-89 in establishing itself and governing the nation. This Congress relied on the preemption power and its alleged exclusive control of Indian affairs and trade to try to keep the states and Indian nations under control.[94]

Continuing questions about the preemption power and governmental control over Indian affairs and trade played a major role in the push for a new U.S. constitution and a new national government.[95] In fact, the father of the Constitution James Madison "cited the National Government's inability to control trade with the Indians as one of the key deficiencies of the Articles of Confederation, and urged adoption of the Indian Commerce Clause, Art. 1, § 8, cl. 3, that granted Congress the power to

91. Robert J. Miller, *Economic Development in Indian Country: Will Capitalism or Socialism Succeed?*, 80 OR. L. REV. 757, 808-09 (2001); FRANCIS PAUL PRUCHA, THE GREAT FATHER: THE UNITED STATES GOVERNMENT AND THE AMERICAN INDIANS 116, 120 (1995); Instructions to Governor Yeardley and Council on Indian Policy (Va. 1626), *reprinted in* 4 EARLY AMERICAN INDIAN DOCUMENTS: TREATIES AND LAWS, 1607-1789 51 (Alden T. Vaughan & W. Stitt Robinson eds., 1983); Assignment and Protection of Indian Lands and Penalty for Indian Trader (Va. 1653), *reprinted in id.* at 70-71. It is still United States law today to control much of Indian trade. 25 U.S.C. §§ 261-264 (2018).

92. VA. CONST. art. II, § XXI (1776), *reprinted in* THE FIRST LAWS OF THE STATE OF VIRGINIA 35 (John D. Cushing ed., 1982); N.C. Const. art. I, § XXV (1776), *reprinted in* FEDERAL AND STATE CONSTITUTIONS 2789; N.Y. CONST. art. XXXVII (1777), *reprinted in* THE FEDERAL AND STATE CONSTITUTIONS, COLONIAL CHARTERS, AND OTHER ORGANIC LAWS OF THE STATES, TERRITORIES, AND COLONIES 2636 (Francis N. Thorpe ed., 1909); TENN. CONST. art. XI, § XXXII (1796), *reprinted in* I Tenn. Code Ann. app. Prior Tennessee Constitutions 994-95 (1995); GA. CONST. art. I, § 23 (1798), *reprinted in* FEDERAL AND STATE CONSTITUTIONS 795.

93. Miller, *supra* note 87, at 35-36 (citing statutes).

94. *Id.* at 41-48 (discussing numerous authorities).

95. Robert J. Miller, *American Indian Influence on the United States Constitution and its Framers*, 18 AM. INDIAN L. REV. 133, 151-54 (1993).

regulate trade with the Indians."[96] Thereafter, one of the major compromises that led to the adoption of the 1787 Constitution was which government, the states or the federal government, would own the preemption, sovereign, and commercial rights allegedly created by the DoD.[97] In response, the very first Congress under the new Constitution enacted the Indian Trade and Intercourse Act of 1790 and took control over the sales of Indian lands, Indian trade, and all Indian affairs.[98] The 1790 Act expressly used the word "pre-emption" to define one of Congress' powers over Indian lands and Indian affairs.[99] Thereafter, Congress dealt with Indian nations on a diplomatic, treaty-based relationship while relying on the elements of Discovery.[100]

Over the ensuing centuries, the federal government has exercised extensive and coercive powers over Indian nations and native peoples. The United States entered 375 treaties with tribal nations, enacted thousands of laws on Indian issues, established official federal Indian policies, and created large federal bureaucracies including the Bureau of Indian Affairs and the Indian Health Service to deal with Indian affairs.[101] The United States came to dominate Indian peoples militarily and economically and tried to convert, "civilize," and assimilate natives.[102] American "Manifest Destiny" became the living embodiment of the Doctrine of Discovery and the ethnic-cleansing and genocide that followed came close to destroying native nations in the United States by the mid-1950s.[103]

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96. County of Oneida v. Oneida Indian Nation, 470 U.S. 226, 234 n.4 (1985) (citing THE FEDERALIST NO. 42, 284 (J. Cooke, ed. 1961)).

97. In 1810, the Supreme Court stated that the debates about which government held the preemption power over Indian lands was a major decision that threatened the very existence of the American union:

> whether the vacant lands within the United States became a joint property, or belonged to the separate states, was a momentous question which, at one time, threatened to shake the American confederacy to its foundation. This important and dangerous contest has been compromised, and the compromise is not now to be disturbed.

Fletcher v. Peck, 10 U.S. 87, 142 (1810). *Accord* Miller, *supra* note 95, at 151-55 & nn. 145-63.

98. 1 Stat. 137 (July 22, 1790).

99. 1 Stat. 138, § 4.

100. Miller, *supra* note 87, at 49-58.

101. *E.g.*, COHEN'S HANDBOOK ON FEDERAL INDIAN LAW 30-108 (2012 ed.) [hereinafter COHEN'S].

102. *E.g.*, PRUCHA, *supra* note 91, at 135-213, 462-581, 611-30, 659-715, 763-89, 1041-59.

103. MILLER, *supra* note 1, at 115-61; CHARLES WILKINSON, BLOOD STRUGGLE: THE RISE OF MODERN INDIAN NATIONS xii-xiii (2005).

2. Australia

Aboriginal and Torres Strait Islander peoples have inhabited the Australian continent for at least 60,000 years.[104] While estimates of the pre-colonial population vary, evidence suggests that between 300,000 and 1 million people, comprising of around 250 distinct political communities and language groups, occupied the landmass prior to British settlement in 1788.[105] Over thousands of generations, these communities developed a complex legal system intimately connected to the particular tracts of Country that they were connected to and responsible for. As Christine Black, a Kombumerri and Munaljahlai legal scholar, explains, "the Land is the source of Law."[106] Indigenous communities across the continent also established frameworks to engage and interact with each other. Members of the Kulin Nation of central Victoria, for example, used a ceremony called the *tanderrum* to regulate access and passage through their country. A formal, diplomatic rite, the *tanderrum* saw host and visitor groups engage in reciprocal gift giving to allow "temporary access and use of the land."[107]

It was not until the seventeenth century, as part of their expeditions to the East Indies, that Europeans reached Australia. The first recorded landing occurred in February 1606 when Dutch navigator Willem Janszoon made landfall on the western shore of what is now Cape York in Queensland. A few months later, Spanish explorer Luís Vaz de Torres sailed through the Strait that bears his name between Australia and New Guinea.[108] Dutch navigators continued to visit over the following century, mapping the northern and western coasts of what they called New Holland.[109] Anticipating a potential later claim, they often left markers to note their presence. In 1616, for instance, Dutch explorer Dirk Hartog nailed a pewter dinner plate to a post in a fissure on a cliff top on what is now Dirk Hartog Island in Shark Bay, Western Australia. Part of the inscription reads:

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104. Peter Veth & Sue O'Connor, *The Past 50,000 Years: An Archaeological View*, *in* THE CAMBRIDGE HISTORY OF AUSTRALIA: VOLUME 1: INDIGENOUS AND COLONIAL AUSTRALIA 17, 19 (Alison Bashford & Stuart Macintyre eds., 2013); Sean Brennan & Megan Davis, *First Peoples*, *in* THE OXFORD HANDBOOK OF THE AUSTRALIAN CONSTITUTION 27, 27 (Cheryl Saunders & Adrienne Stone eds., 2018).

105. Australian Bureau of Statistics, *Aboriginal and Torres Strait Islander Population*, 2008, https://www.abs.gov.au/ausstats/abs@.nsf/0/68AE74ED632E17A6CA2573D200110075?opendocument.

106. CHRISTINE BLACK, THE LAND IS THE SOURCE OF LAW: A DIALOGIC ENCOUNTER WITH INDIGENOUS JURISPRUDENCE (2010).

107. Robert Kenny, *Trick or Treaty? A Case for Kulin Knowing in Batman's Treaty*, 5 HIST. AUST. 38.1, 38.5 (2008).

108. Kenneth Morgan, *From Cook to Flinders: The Navigation of Torres Strait*, 27 INT. J. MAR. HIST. 41 (2015).

109. T.M. Knight, *From Terra Incognita to New Holland*, 6 CARTOGRAPHY 82 (1967).

1616, DEN 25 OCTOBER IS HIER AENGECOMEN HET SCHIP D EENDRACHT VAN AMSTERDAM . . . .[110]

The first English explorer, William Dampier, landed on the north-west coast of the continent in 1688 and 1699.[111] Europeans were not the only visitors. From at least the 1720s and perhaps earlier, Macassar people from Sulawesi in modern-day Indonesia visited Arnhem Land and the Kimberley in northern Australia to harvest and process trepang and trade with Aboriginal peoples in the region.[112] Despite these relatively frequent visits, no attempts to settle and colonize the continent were made. The Dutch were focused on the lucrative spice trade in the islands to the north; New Holland in contrast was peculiarly uninviting. In 1697 explorer Willem de Vlamingh wrote that he "found little beyond an arid, barren and wild land."[113]

The situation soon changed. In 1770, British navigator James Cook was commissioned by the Royal Society to travel to Tahiti and observe the transit of Venus. On this trip, the British government asked Cook to explore further south. His instructions were clear. James Douglas, the president of the Royal Society, explained that if Cook were to come across "natives of the several Lands where the Ship may touch", he should "exercise the utmost patient and forbearance" because "they are the natural, and in the strictest sense of the word, the legal possessors of the several Regions they inhabit."[114] Douglas noted further: "No European Nation has a right to occupy any part of their country, or settle among them without their voluntary consent."[115] The government's secret instructions to Cook were consistent with this position. If Cook found land, he was told to take possession of the "Convenient Situations in the Country" only "with the Consent of the Natives."[116]

Cook mapped the eastern Coast of the continent and encountered Aboriginal people during his voyage. However, on August 22, 1770, on Bedanug Island (renamed Possession Island) off the south-western tip of Cape York, he claimed—without the consent of the natives—possession

110. Translated: "1616, on the 25th October, arrived here the ship Eendracht of Amsterdam."

111. ADRIAN MITCHELL, DAMPIER'S MONKEY: THE SOUTH SEAS VOYAGERS OF WILLIAM DAMPIER (2010) at 1.

112. W. Lloyd Warner, *Malay Influence on the Aboriginal Cultures of North-Eastern Arnhem Land*, 2 OCEANIA 476, 487 (1931).

113. J.M.R. Cameron, *Western Australia, 1616-1829: An Antipodean Paradise*, 140 THE GEOGRAPHICAL J. 373, 373 (1974).

114. RAYMOND EVANS, A HISTORY OF QUEENSLAND 18 (2007).

115. *Id.*

116. SECRET INSTRUCTIONS FROM BARON ED HAWKE, SIR PIERCY BRETT & LORD C SPENCER TO JAMES COOK, 1, July 30, 1768.

of the eastern Australian coastline for King George III. Cook called this new territory New South Wales.[117] British colonization followed in 1788, when Captain Arthur Phillip led a fleet of eleven ships and over 1400 people to Warrane (renamed Sydney Cove) on Gadigal country. Phillip was not instructed to negotiate a treaty with the inhabitants, but he was commanded "to endeavor . . . to open an intercourse with the natives and to conciliate their affections" and live with them in "amity and kindness."[118] Despite several attempts by Eora and Burramattagal leaders to protect their lands and engage with the British in "an enduring reciprocal relationship,"[119] Phillip chose not to negotiate. Phillip planted a flag and asserted British sovereignty over half of the continent, which he named the Colony of New South Wales. Indigenous attempts to protest over the following years were met with detachments of soldiers.[120]

The British decision to simply claim territory without negotiating with the Indigenous owners was incongruous with the approach they took elsewhere. Only a few years earlier, King George III issued the 1763 Royal Proclamation, which confirmed Aboriginal "Nations or Tribes" in North America who had not sold or ceded territory through treaty, owned their land.[121] What accounts for the distinctive approach in Australia? Several theories have been proposed. Some historians have pointed to the model of colonization. As the British arrived with a substantial military force they did not need to negotiate or develop productive relationships with the Indigenous political communities they encountered.[122] Others have suggested that the distinctive foundations of colonialism in Australia (a penal colony) meant there was little opportunity to develop relationships based on trade.[123] Still others argue that the racist attitudes of the day were influential. In 1837 a Select Committee on Aborigines reported to the United Kingdom House of Commons, declaring that Aboriginal people were "barbarous" and "so entirely destitute . . . of the rudest forms of civil

117. GEORGE WILLIAMS & HARRY HOBBS, TREATY 27 (2d ed., 2020).

118. GOVERNOR PHILLIP'S INSTRUCTIONS, APRIL 25, 1778.

119. INGA CLENDINNEN, DANCING WITH STRANGERS: EUROPEANS AND AUSTRALIANS AT FIRST CONTACT 272 (2005).

120. Grace Karskens, *Phillip and the Eora: Governing Race Relations in the Colony of New South Wales*, 5 SYDNEY J. 39, 50 (2016).

121. Stuart Banner, *Why* Terra Nullius*? Anthropology and Property Law in Early Australia*, 23 L. AND HIST. REV. 95, 98 (2005). *See also* John Borrows, *Wampum at Niagara: The Royal Proclamation, Canadian Legal History, and Self-Government*, *in* ABORIGINAL TREATY RIGHTS IN CANADA: ESSAYS ON LAW, EQUALITY, AND RESPECT FOR DIFFERENCE 155, 169 (Michael Asch ed., 1997).

122. PETER RUSSELL, RECOGNISING ABORIGINAL TITLE: THE MABO CASE AND INDIGENOUS RESISTANCE TO ENGLISH-SETTLER COLONIALISM 70-71 (2006); BAIN ATTWOOD, POSSESSION: BATMAN'S TREATY AND THE MATTER OF HISTORY 94 (2009).

123. STUART BANNER, POSSESSING THE PACIFIC: LAND, SETTLERS AND INDIGENOUS PEOPLE FROM AUSTRALIA TO ALASKA 18-19 (2007).

polity, that their claims, whether as sovereigns or proprietors of the soil, have been utterly disregarded."[124] Palawa lawyer Michael Mansell suggests another reason. Mansell argues that the primary reason why no treaty was negotiated is not because Aboriginal people were seen as inferior but because "the character and disposition of the original white settlers in Australia was so rudimentary."[125] In other words, if any people was uncivilized and primitive, it was the British.

Whatever the reason, the consequence was the British and the respective colonial governments never sought to formalize their relationship with Indigenous peoples. Neither did they clearly outline the legal basis for the British acquisition of sovereignty. This soon became a source of contention. In 1819, the Colonial Office in London advised that the Colony of New South Wales had been occupied as a "desert and uninhabited territory."[126] This was of course factually incorrect.[127] Certainly those colonists on the ground in the Sydney settlement could not claim the continent was vacant. In dealing with the original inhabitants, they could understand and recognize that Aboriginal peoples had a complex system of laws and government and possessed the country according to those systems.

The disjuncture between the official legal position and the facts on the ground can be seen in a series of court cases dealing with jurisdiction in the 1820s to 1840s.[128] In 1827, the Supreme Court of New South Wales held that it possessed jurisdiction in cases between Indigenous peoples and Europeans,[129] but this left open the question of whether the Court could hear cases where both parties were Aboriginal. In *R v Ballard*,[130] a case concerning the alleged murder of one Aboriginal man by another within the Sydney settlement, the Court held it did not possess jurisdiction. Noting that Aboriginal people possessed their own "mode of dressing wrongs committed amongst themselves," Chief Justice Francis Forbes held that it "has been the practice of the Courts of this country, since the colony was settled, never to interfere with or enter into the quarrels that have taken

124. GREAT BRITAIN, HOUSE OF COMMONS, REPORT OF THE PARLIAMENTARY SELECT COMMITTEE ON ABORIGINAL TRIBES 125-26 (1837).

125. MICHAEL MANSELL, TREATY AND STATEHOOD: ABORIGINAL SELF-DETERMINATION 105 (2016).

126. *See* HENRY REYNOLDS, FORGOTTEN WAR 163 (2013).

127. *See* Daniel Lavery, *Renovating the Orthodox Theory of Australian Territorial Sovereignty*, 45 U.N.S.W. L.J. 499, 506 (2022).

128. *See generally* LISA FORD, SETTLER SOVEREIGNTY: JURISDICTION AND INDIGENOUS PEOPLE IN AMERICA AND AUSTRALIA 1788-1836 (2010).

129. *R v Lowe* [1827]. *See also* Kelly Chaves, *"A Solemn Judicial Farce, the Mere Mockery of a Trial": The Acquittal of Lieutenant Lowe, 1827*, 31 ABORIGINAL HIST. 122 (2007).

130. *R v Ballard* (N.S.W. Supreme Court, June 13, 1829) (Austl.). Cited in Bruce Kercher, *Australia: R v Ballard, R v Murrell and R v Bonjon*, 3 AUSTL. INDIGENOUS L. REP. 410 (1998).

place between or amongst the natives themselves."[131] Justice James Dowling agreed, explaining:

> Until the aboriginal natives of this Country shall consent, either actually or by implication, to the interposition of our laws in the administration of justice for acts committed by themselves upon themselves, I know of no reason human, or divine, which ought to justify us in interfering with their institutions even if such an interference were practicable.[132]

However, just seven years later the Court reversed itself. In *R v Murrell*,[133] a unanimous Supreme Court held that Aboriginal people are subject to English law for offences committed against one another. In reaching this conclusion, the Court held that the Australian continent had been "unappropriated" before it was taken into actual possession by the King of England. The land was vacant because

> the various tribes had not attained at the first settlement of the English people amongst them to such a position in point of numbers and civilization, and to such a form of Government and laws, as to be entitled to be recognized as so many *sovereign states governed by laws of their own*.[134]

In his notes, Justice William Burton went further, dismissing Aboriginal law as "consistent with a state of the grossest darkness and irrational superstition" and nothing more than "the wildest most indiscriminatory notions of revenge."[135]

The *Murrell* case concerns jurisdiction, but in finding the Court was able to try cases between Aboriginal people, the decision touches on the legal basis for the acquisition of British sovereignty over Australia. In contrast to the approach adopted in the United States, courts in Australia

131. *Ballard* (cited in Kercher), at 413.

132. *Id*. at 414. Note the similarities to the U.S. decision in *Ex parte* Crow Dog, 109 U.S. 556 (1883), where the Supreme Court held that a federal court did not have jurisdiction to try an Indian who killed another Indian on a reservation when that offense had been settled by traditional dispute resolution systems.

133. *R v Murrell* (N.S.W. Supreme Court, April 11, 1836) (Austl.). Cited in Kercher, *supra* note 130, at 415.

134. *Id*. at 415-16 (emphasis in original). The response in *Murrell* maps neatly onto the response to *Ex parte Crow Dog*. In New South Wales, the Court reversed its decision, holding the primitive status of Aboriginal peoples meant they had no law worthy of its name. In the United States, Congress passed the Major Crimes Act of 1885, which placed serious felony offenses under the jurisdiction of the federal government.

135. Bruce Kercher, *Recovering and Reporting Australia's Early Colonial Case Law: The Macquarie Project*, 18 L. & HIST. REV. 659, 664 (2000). Bruce Kercher, *Recognition of Indigenous Legal Autonomy in Nineteenth Century New South Wales*, 4 INDIGENOUS L. BULL. 7, 7 (1998).

considered the continent *terra nullius*. The decision reflected official government policy. The year before *Murrell* was decided, grazier John Batman purported to negotiate a "treaty" with Wurundjeri, Bunurong, and Wathaurung peoples (in what is now southern Victoria) that ceded over 600,000 acres of land.[136] Colonial authorities were unimpressed. Richard Bourke, the Governor of the New South Wales Colony annulled the "treaty," proclaiming that "Every . . . treaty, bargain and contract with the Aboriginal Natives . . . for the possession, title or claim to any Lands . . . is void and of no effect against the rights of the Crown."[137] Bourke's Proclamation was not issued to protect the Wurundjeri from an unfair contract. It was issued because the government did not believe Aboriginal peoples had any legal right to the land. The entire colony was considered "vacant lands of the Crown;"[138] only it had the authority to sell or distribute land.[139]

Not everyone was convinced. In 1841, the Supreme Court of New South Wales for the District of Port Phillip (now Melbourne) heard another case involving one Aboriginal man killing another Aboriginal man. In *R v Bonjon*,[140] Justice John Willis reached a very different conclusion. In a remarkable judgment, Justice Willis held that it is evident Aboriginal people "have laws and usages of their own,"[141] and lamented the fact that "no treaty was made with the Aborigines – no terms defined for their internal government, civilization and protection."[142] Justice Willis noted further that clearly *terra nullius* cannot be the basis for the acquisition of British sovereignty because the continent was not vacant. As the country was not conquered nor ceded by treaty, it was necessary to investigate the situation in other colonies. Justice Willis considered the United States, New Zealand, Jamaica, and Saint Vincent, before concluding that "the Aborigines must be considered and dealt with, until some further provision be made, as distinct, though dependent tribes governed among themselves by their own rude laws and customs."[143] Interestingly, while the language echoes that of Chief Justice Marshall in *Cherokee Nation v. Georgia*,[144] the

136. *See* ATTWOOD, *supra* note 122.

137. PROCLAMATION OF GOVERNOR BOURKE, OCTOBER 10, 1835.

138. *Id.*

139. Batman sought legal advice to strengthen his claims. One counsel, William Burge drew on *Johnson v. M'Intosh* to hold that "the Crown can legally oust the [Port Philip] Association from their possession": *see* Blake A. Watson, *The Impact of the American Doctrine of Discovery on Native Land Rights in Australia, Canada, and New Zealand*, 34 SEATTLE U. L. REV. 507, 515 (2011).

140. *R v Bonjon* (N.S.W. Supreme Court, September 16, 1841) (Austl.). Cited in Kercher, *supra* note 130, at 420.

141. *Id.*

142. *Id.* at 421.

143. *Id.* at 425.

144. 30 U.S. 1, 1 (1831).

case is not cited, though it appears to have been raised by counsel for Bonjon.[145] In any event, given the evident shift from *Murrell*, Justice Willis noted that the question is "too momentous" "to be thus hastily decided." With the agreement of the parties, the trial proceeded without prejudice to the question of jurisdiction.[146] Bonjon was later discharged.

The *Bonjon* case offered an alternative path for British colonization of Australia. The decision accepted that Aboriginal peoples possessed the continent, had a complex system of laws that governed their relationships, and that the British could only acquire sovereignty over the country through treaty or conquest. Consistent with *Cherokee Nation*, *Bonjon* recognized a degree of self-government. However, even this would prove too difficult in Australia. The Governor of New South Wales, George Gipps, Chief Justice Dowling, and colonial society dismissed the judgment,[147] leading Justice Willis to send a copy to the Colonial Office in London. They replied "curtly," noting that *Murrell* remained good law.[148] In 1843, after ongoing disputes between the judge and colonial society, Governor Gipps removed Justice Willis from his post.[149] As far as the British and colonial authorities were concerned, Aboriginal and Torres Strait Islander peoples had no law worthy of its name and no rights or interests in the land they had occupied for 60,000 years.

Perhaps reflecting the official position of government authorities, of these three cases only *Murrell* was formally reported or cited with approval in later decisions.[150] Australian law developed on the fiction that the continent was, as the Judicial Committee of the Privy Council (then Australia's highest court) declared in the 1889 case of *Cooper v Stuart*,[151] "practically unoccupied, without settled inhabitants or settled law."[152] This view, that no inherent rights were held by Indigenous peoples, supported the expansion of settlement into the interior of the continent. It would be many years before *terra nullius* was reconsidered.

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145. Justice Willis cites *Kent's Commentaries* and discusses treaties negotiated between William Penn and "the Indians along the Delaware Bay" in reaching his conclusion. *R v Bonjon* (N.S.W. Supreme Court, September 16, 1841) (Austl.). Cited in Kercher, *supra* note 130, at 422-24.

146. *Id.* at 425.

147. Susanne Davies, *Aborigines, Murder and the Criminal Law in Early Port Philip, 1841-1851*, 22(88) AUSTL. HIST. STUD. 313, 329 (1987).

148. Terri Libesman, *Dispossession and Colonisation*, *in* ABORIGINAL AND TORRES STRAIT ISLANDER LEGAL RELATIONS 3, 17 (Larissa Behrendt et al., 2nd ed., 2018).

149. David Clark, *The Struggle for Judicial Independence: The Amotion and Suspension of Supreme Court Judges in 19th Century Australia*, 12 MACQUARIE L.J. 27 (2013).

150. Kercher, *supra* note 130, at 412.

151. *Cooper v Stuart* (1888) 14 App Cas 286, 291 (Austl.).

152. *Id.*

D. *Key Similarities and Differences across the United States and Australia*

The Doctrine of Discovery was applied in different ways in the United States and Australia but there are key similarities.[153] In both cases, European powers asserted sovereign rights over the land on the basis of discovery, occupation, and possession. The lands they claimed were extensive, far beyond their initial capacity to control, and beyond even their limited exploration into the interior of each continent. These claims were justified by both Christianity and civilization: the Indigenous nations who had possessed their country for generations were considered to be inferior and whatever rights they possessed could be discarded. As this suggests, the acquisition of sovereignty by the British also necessarily diminished any rights that the Indigenous peoples possessed.

It is here where distinctions emerge. In Australia, the rights of Aboriginal and Torres Strait Islander peoples were entirely discarded: the British considered that they were "so low in the scale of social organization that their usages and conceptions of rights and duties are not to be reconciled with the institutions or the legal ideas of civilized society."[154] The concept of *terra nullius* was expanded to include Indigenous nations throughout the Australian continent.[155] In the United States, by contrast, Indigenous nations retained their right to self-government and limited property rights in land.[156] Indian nations were recognised as political communities and treaties were negotiated to develop strategic alliances, facilitate trade, and take land.[157] While the U.S. Supreme Court recognized much later that Indian treaty rights could be stripped by Congress, recognition of sovereignty retains significance today.[158] It ensures that the United States engages on a government-to-government basis with Indian nations. Nevertheless, the Doctrine of Discovery—and its denial of Indigenous rights—continues to marginalize and discriminate against Indigenous nations. In the following Section, we explore efforts at mitigating the Doctrine.

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153. *See, e.g.*, DISCOVERING INDIGENOUS LANDS, *supra* note 4, at 26-88, 171-206.

154. *In re Southern Rhodesia* [1919] A.C. 211, 233-234 (Austl.).

155. Banner, *supra* note 121, at 95.

156. *E.g.*, Worcester v. Georgia, 31 U.S. 515, 556-60 (1832); Cherokee Nation v. Georgia, 30 U.S. 1, 17-18 (1831); Johnson v. M'Intosh, 21 U.S. 543, 573-79, 587-88, 603-04 (1823).

157. *Worcester*, 31 U.S. at 556-60.

158. *E.g.*, McGirt v. Oklahoma, 140 S.Ct. 2452 (2020); Lone Wolf v. Hitchcock, 187 U.S. 553 (1903).

III. ATTEMPTS TO MITIGATE THE DOCTRINE IN THE UNITED STATES

The United States executive and legislative branches have never expressly taken steps to repudiate or roll back the Doctrine. Neither has the United States Supreme Court ever seriously reconsidered the *Johnson v. M'Intosh* decision. In fact, the Court has cited *Johnson* with approval scores of times, most recently in 2005, and the lower federal and state courts cite *Johnson* repeatedly.[159] But this does not mean that the United States has never taken actions, whether by accident or by implication, that addressed Discovery issues and attempted to mitigate the impacts of that legal principle and colonization on Indian nations and peoples. In this Section we analyze examples that were at least implicitly intended to address the egregious colonial impacts of Discovery.

A. *Reparations and the Indian Claims Commission*

The most significant legislative effort directed towards making amends for colonization in the United States is the Indian Claims Commission. In 1946, Congress enacted the Indian Claims Commission Act,[160] and created the Indian Claims Commission ("ICC"). The ICC was an administrative body designed to examine and issue monetary awards in all claims that Indian nations brought against the United States for violations of U.S./Indian treaties, federal laws and duties, and for contract and tort actions. The Act required that all claims be filed with the ICC within five years or be lost forever.[161] Notably, the Act prevented the United States from raising any statutes of limitation or laches defenses.[162] Appeals of ICC decisions went to the Court of Claims with *certiorari* review in the U.S. Supreme Court.[163] Congress also directed the Commission to create an Investigation Division that was to literally assist tribes in researching and establishing their claims.[164] Regrettably, the ICC never created this entity.[165]

By the deadline of August 31, 1951, far more claims had been filed than were ever expected, over 850.[166] The Commission worked slowly,

159. City of Sherrill v. Oneida Indian Nation, 544 U.S. 197, 203 n.1 (2005).

160. 60 Stat. 1049 (1946).

161. *Id.* at 1052, § 12; *On Creating an Indian Claims Commission*, H.R. Committee on Indian Affairs, H.R. REP. NO. 1466, 79th Cong., 1st Sess., 1, 3 & 10 (Dec. 20, 1945), *reprinted in* 1946 U.S.C.C.A.N. 1355.

162. 60 Stat. 1050, § 2; COHEN'S, *supra* note 101, at 439.

163. 60 Stat. 1054-55, § 20.

164. *Id.* at 1052, § 13(b).

165. PRUCHA, *supra* note 91, at 1020.

166. ROSENTHAL, *supra* note 63, at xi.

and Department of Justice attorneys aggressively litigated the cases.[167] Congress was forced to extend the life of the Commission four times, but in September 1978 the Commission was dissolved and approximately sixty-eight remaining cases were transferred to the U.S. Court of Claims.[168] Ultimately, tribal litigants received judgments exceeding $800 million.[169]

All scholars agree that the primary reason Congress enacted the ICC was because it had been hounded for over a century by a continual stream of petitions to allow tribal suits against the United States in federal court.[170] Before the ICC, Indian nations could only sue the United States if granted that right in a special jurisdictional statute enacted by Congress; unsurprisingly, these acts were extremely difficult to obtain.[171] Nevertheless, from 1881-1946, Congress enacted at least 142 jurisdictional statutes that granted a specific Indian nation the right to file a treaty, contract, tort, or human rights claim in a specific federal court.[172] In the ICC, Congress intended that these longstanding tribal claims about colonialism, illegal federal actions, and even morally suspect acts by the United States should be adjudicated once and for all.[173] Obviously, after being continually petitioned by numerous tribes for nearly one hundred years to allow their claims to proceed, Congress was well aware of the charges being made against the United States of broken treaties and the theft of America from Indigenous peoples and nations.

Another reason Congress enacted the ICC was to settle questions about the United States discriminating against Indian nations and peoples. This argument arose because in 1863 Congress withdrew jurisdiction from the U.S. Court of Claims to hear cases by Indian tribes about treaty violations.[174] Consequently, there were no courts where Indian nations could bring their claims. Many charged that this was discrimination against Indian individuals who were, after all, American citizens. Thus, Congress clearly stated in the unanimous House of Representatives report recommending passage of the ICC that the Act was designed "to right a continuing wrong

167. PRUCHA, *supra* note 91, at 1021.

168. *Id.*; COHEN'S, *supra* note 101, at 88; ROSENTHAL, *supra* note 63, at xi.

169. PRUCHA, *supra* note 91, at 1022; ROSENTHAL, *supra* note 63, at xii.

170. H.R. REP., *supra* note 160, at 1, 6-7; PRUCHA, *supra* note 91, at 1017-18; ROSENTHAL, *supra* note 63, at x ("Congress buckled under the labor involved.").

171. COHEN'S, *supra* note 101, at 437-38; Glen A. Wilkinson, *Indian Tribal Claims Before the Court of Claims*, 55 GEO. L.J. 511, 513 n.21 (1966).

172. COHEN'S, *supra* note 101, at 438; Wilkinson, *supra* note 171, at 512.

173. ROSENTHAL, *supra* note 63, at 49 (Congress wanted the Commission to do justice and to wipe the slate clean by adjudicating all the wrongs that weighed on American consciences).

174. Act of March 3, 1863, ch. 92, § 9, 12 Stat. 765, 767; PRUCHA, *supra* note 91, at 1018.

to our Indian citizens" and to prevent this "lingering discrimination."[175] When President Truman signed the ICC into law, he also stated that it was designed to end discrimination against Indians and tribal nations and to grant them access to the Court of Claims to hear their claims.[176]

To accomplish these laudatory purposes, Congress liberally defined five kinds of claims Indian nations could file with the ICC. Under the first two causes of action, tribes were allowed to bring claims in law or equity based on the Constitution, laws, treaties, or executive orders, including tort claims.[177] The third cause of action that Congress authorized was unique and, we allege, demonstrates that Congress wanted to mitigate the impacts of colonization. Congress authorized the Commission to hear "claims which *would result* if the treaties, contracts, and agreements . . . were revised on the ground of *fraud, duress, unconscionable consideration, mutual or unilateral mistak*e, whether of law or fact, or any other ground cognizable by a court of equity[.]"[178] The fourth authorized claim was for the United States taking Indian "owned or occupied" lands without paying an agreed-upon compensation.[179] In effect, the Commission was to "perform the political function of going behind a treaty" to hear cases and to investigate governmental liability for "so-called 'Indian title' or 'aboriginal title.'"[180] It is clear that Congress intended to vest the ICC with jurisdiction "broad enough to include all possible claims."[181]

The fifth type of claim Congress authorized was even more radical and unknown to American law. It explicitly demonstrated that Congress wanted the Commission to adjudicate any and all claims or arguments

175. H.R. REP., *supra* note 160, at 1-2. *See also Hearing before the Committee on Indian Affairs*, House of Representatives, 79th Cong., 1st Sess., on H.R. 1198 & H.R. 1341 (1945).

176. PRUCHA, *supra* note 91, at 1019; DONALD L. FIXICO, TERMINATION AND RELOCATION: FEDERAL INDIAN POLICY, 1945-1960 29 (1986).

177. 60 Stat. 1050, § 2(1)-(2); Nell Jessup Newton, *Indian Claims in the Courts of the Conqueror*, 41 AM. U. L. REV. 753, 776-86 (1992) (analyzing numerous cases that raised these two causes of action).

178. 60 Stat. 1050, § 2(3) [emphases added]; Newton, *supra* note 177, at 786-89 (analyzing cases that raised this cause of action).

179. 60 Stat., § 2(4). Newton, *supra* note 177, at 818-26 (discussing numerous cases that raised this cause of action).

180. Sandra C. Danforth, *Repaying Historical Debts: The Indian Claims Commission*, 49 N.D. L. REV. 359, 388-89 (1973); *accord* COHEN'S, *supra* note 101, at 439 (the ICC allowed recovery for taking of original Indian title, or "aboriginal title," not recognized by a treaty or statute).

181. COHEN'S, *supra* note 101, at 151 (citing H.R. Rep. No. 79-1466, at 10 (1945)).

against the United States about colonization and its impacts on Indian peoples and tribes.[182] This is so because Congress mandated that the Commission hear "claims based upon *fair and honorable dealings* that are *not recognized by any existing rule of law or equity*."[183] Many scholars have called these moral claims. Thus, Congress created a unique type of claim that was "unprecedented jurisdiction for any court" over claims that "arise from moral wrongs."[184] This claim shows that Congress' intent was to address every possible argument or claim by Indian nations and peoples against the United States no matter the basis. Congress wanted to end the shaming of America for colonization, "Manifest Destiny," and its mistreatment of Indigenous nations and peoples.[185] Regrettably, though, the Commission exercised its jurisdiction very narrowly, and apparently only one case ever proceeded to judgment on the moral claim of fair and honorable dealings.[186]

There is only one conclusion to be reached from Congress creating the ICC. Congress wanted to put to rest the shameful allegations that had been heaped on the United States, and in fact still are plaguing the U.S., for its mistreatment of Indigenous nations and for over two centuries of colonization.[187] Some argue that it is time for Congress to consider creating another claims process and to pay even more reparations to Indian nations.[188] The fact that the ICC did not totally fulfill its promise strengthens that argument and suggests a new Claims Commission process should be initiated.

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182. ROSENTHAL, *supra* note 63, at 49, 94 (maintaining that to the credit of Congress, moral issues were faced, debated, and recognized by the ICC).

183. 60 Stat. 1050, § 2(5) [emphasis added].

184. Danforth, *supra* note 180, at 388-89. *Accord* Newton, *supra* note 177, at 776-77, 783 (analyzing the one successful case under this "moral" cause of action).

185. PRUCHA, *supra* note 91, at 1022 ("the very establishment of the Commission indicated a strong willingness on the part of the United States to admit injustice toward the Indians in the past and to make amends.").

186. COHEN'S, *supra* note 101, at 438; Newton, *supra* note 177, at 783 (discussing Aleut Community of St. Paul Island v. United States, 480 F.2d 831 (U.S. Ct. Cl. 1973)).

187. *See, e.g.*, Swagata Banerjee, *Vladimir Putin Says 'West Plundered India'; Mentions Genocide Of Indian Tribes In America*, REPUBLICWORLD.COM (Oct. 1, 2022) (Vladimir Putin highlighted the United States' "genocide of Indian tribes in America"), https://www.republicworld.com/world-news/europe/vladimir-putin-says-west-plundered-india-mentions-genocide-of-indian-tribes-in-america-articleshow.html (last visited Jan. 2, 2023); Robert J. Miller, *Nazi Germany's Race Laws, the United States, and American Indians*, 94 ST. JOHNS L. REV. 751, 767 (2020) (quoting Adolf Hitler in 1928 that America "gunned down the millions of Redskins . . . and now keep the modest remnant under observation in a cage.").

188. William Bradford, *Beyond Reparations: An American Indian Theory of Justice*, 66 OHIO ST. L.J. 1 (2005); William Bradford, *With a Very Great Blame on Our Hearts: Reparations, Reconciliation, and an American Indian Plea for Peace with Justice*, 27 AM. INDIAN L. REV. 1 (2003). This suggestion would be controversial, similar to the controversies about paying

B. *Claims Resolution Act of 2010*

In 1996, Elouise Cobell filed a class action lawsuit against the United States for violating its trust duty to over 300,000 individual Indian beneficial owners of lands which the United States held in trust.[189] The *Cobell* claims were reported to be worth up to $100 billion dollars.[190] After thirteen years of litigation and twenty legal opinions, the District Court for the District of Columbia awarded the plaintiffs $455,600,000 in restitution for monies earned from their properties that had been withheld by the United States.[191] That decision, however, was vacated by the District of Columbia Circuit Court of Appeals.[192]

The Executive Branch and Congress decided to settle the *Cobell* claims and similar lawsuits that had been filed by numerous tribal governments.[193] While the District Court had awarded less than half a billion dollars, Congress enacted the Claims Resolution Act of 2010[194] and approved a settlement of $3.4 billion.[195] One and a half billion dollars was paid to the *Cobell* class members and $1.9 billion was appropriated to buy

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reparations to African-Americans. *E.g.*, Kurtis Lee, *California Panel Sizes Up Reparations for Black Citizens*, N.Y. TIMES (Dec. 5, 2022), https://www.nytimes.com/2022/12/01/business/economy/california-black-reparations.html; Alfred L. Brophy, *The World of Reparations: Slavery Reparations in Historical Perspective*, 3 J. L. SOC'Y 105 (2002). It is worthy to note that Canada recently agreed to pay $2 billion to Indigenous peoples for harms caused by native boarding schools. Ian Austen, *Canada Settles $2 Billion Suit Over 'Cultural Genocide' at Residential Schools*, N.Y. TIMES (Jan. 21, 2022), https://www.nytimes.com/2023/01/21/canada-indigenous-settlement.html. The United States could face similar claims. *See generally* Ann Piccard, *Death by Boarding School: "The Last Acceptable Racism" and the United States' Genocide of Native Americans*, 49 GONZ. L. REV. 137 (2013).

189. Brooke Campbell, Note, Cobell *Settlement Finalized After Years of Litigation: Victory at Last?*, 37 AM. INDIAN L. REV. 629 (2013).

190. *E.g.*, *Native American Trust Fund: Massive Mismanagement*, (Sept. 29, 2016), https://www.fcnl.org/updates/2016-09/native-american-trust-fund-massive-mismanagement (last visited Jan. 27, 2023).

191. Cobell v. Kempthorne, 569 F.Supp.2d 223, 226 (D. D.C. 2008). *See also* COHEN'S, *supra* note 101, at 418, n.15; John W. Ragsdale Jr. *Sacred in the City: The Huron Indian Cemetery and the Preservation Laws*, 48 URB. LAW. 67, 120 n.453 (2016).

192. Cobell v. Salazar, 573 F.3d 808 (D.C. Cir. 2009), *cert. dismissed*, 561 U.S. 1020 (2010).

193. Attorney General Holder, Secretary Salazar Announce Settlement Of Cobell Lawsuit On Indian Trust Management, U.S. Dep't of Justice, Dec. 8, 2009, https://www.justice.gov/opa/pr/attorney-general-holder-secretary-salazar-announce-settlement-cobell-lawsuit-indian-trust (last visited Jan. 27, 2023).

194. Pub. L. No. 111-291, § 101, 124 Stat. 3064.

195. *Id.*; COHEN'S, *supra* note 101, at 418 n.15. *See also* Ragsdale Jr., *supra* note 190, at 120 n.453; Patrick Reis, *Obama Administration Strikes $3.4B Deal in Indian Trust Lawsuit*, N.Y. TIMES (Dec. 8, 2009), https://archive.nytimes.com/www.nytimes.com/gwire/2009/12/08/08greenwire-obama-admin-strikes-34b-deal-in-indian-trust-l-92369.html?source=post_page (last visited Jan. 23, 2023).

interests in land for Indian nations.[196] It is interesting that Congress included the tribal land buy-back program in this settlement. The tribes were not part of the *Cobell* class action, although many Indian nations had filed lawsuits making similar claims that the United States had violated its trust duties to them and had mismanaged tribally owned trust lands.[197] In reaction, the executive branch and Congress proactively reached out to settle these tribal cases along with the vacated judgment in *Cobell*. Congress was seemingly once again eager to put to rest Indian claims of unfair dealing by the United States.

The tribal land buy-back program lasted for ten years and apparently all $1.9 billion was spent to bring back into tribal ownership nearly two million acres of individually-owned fractionated land interests. These fractionated interests on many reservations had been caused by the General Allotment Act of 1887. The operation of that Act led to miniscule, fractionated interests owned by numerous individual Indians in parcels of individually owned trust lands. These small ownership interests often made the property rights nearly unusable and worthless. Congress was well aware that these limited property rights were the result of the federal Allotment Era that lasted from 1887-1934, and it had tried to fix this problem before.[198] Almost all historians, commentators, and tribal nations consider the Allotment Era and that federal policy to have been especially destructive to Indian nations, cultures, reservations, and their land base.[199]

The settlement the Executive Branch negotiated, and that Congress enacted into law, settled the *Cobell* claims for more than seven times the judgment awarded by the district court. This settlement, of course, included the tribal buy-back program that also settled pending tribal lawsuits. In our opinion, the Claims Resolution Act can be viewed as another attempt by Congress to address major problems and inequities that the United States caused native nations and peoples by imposing on them federal policies, laws, colonization, and, in essence, the Doctrine of Discovery.

196. Consultations on Cobell Trust Land Consolidation, https://www.doi.gov/cobell (last visited Jan. 27, 2023). The buy-back program resulted in nearly 2 million acres of land being returned to tribal ownership. Kristen A. Carpenter & Angela R. Riley, *Privatizing the Reservation?*, 71 STAN. L. REV. 791, 839 n.307 (2019).

197. *E.g.*, *Tribes file class action trust accounting lawsuit*, INDIAN COUNTRY TODAY (Jan. 4, 2007), https://www.indianz.com/News/2007/01/04/tribes_file_cla.asp (last visited Jan. 28, 2023).

198. Congress has tried three times to address the fractionalization of land ownership problems in Indian country caused by Allotment in other ways. The Supreme Court, however, struck down the first two attempts as unconstitutional takings. Babbitt v. Youpee, 519 U.S. 234 (1997); Hodel v. Irving, 481 U.S. 704 (1987).

199. *E.g.*, Armen H. Merjian, *An Unbroken Chain of Injustice: The Dawes Act, Native American Trusts, and* Cobell v. Salazar, 46 GONZ. L. REV. 609 (2011).

C. *Other Federal Actions*

The United States has taken other steps that appear to be attempts to address or lessen the impacts of the DoD on the Indigenous peoples in America. In 1928, the Meriam Report,[200] demonstrated graphically the poverty, poor health and living conditions, low educational attainment levels, and short life expectancies of Indian peoples in the United States.[201] This report led to further studies by Congress and the enactment of the Indian Reorganization Act ("IRA") in 1934.[202] The very word "reorganization" demonstrates that Congress knew that colonization had nearly destroyed tribal nations and brought Indian peoples into desperate situations that had to be rectified and that federal Indian policies and objectives had to be reorganized. Consequently, Congress authorized the Secretary of Interior to take new lands into trust for Indian nations in an attempt to restore some of the tribal land base lost to colonialism.[203] The IRA also attempted to help Indian nations restore their governing entities and capacities by encouraging tribal peoples to organize their governments under written constitutions and bylaws.[204] The Act also enabled tribal governments to create tribally-owned corporations under federal corporate charters to assist economic development in an attempt to raise Indian peoples and reservation communities out of the deplorable situations they were in by the late 1920s.[205]

Another example of congressional action regarding colonialism involves Native Hawaiians. Native Hawaiians are not ethnically classified as American Indians but they are, of course, the Indigenous peoples of the Hawaiian Islands.[206] The United States was heavily involved in the 1893 overthrow of the last Hawaiian monarch and later annexed the Islands.[207] On the one hundredth anniversary of that 1893 action, Congress enacted

200. National Indian Law Library, https://narf.org/nill/resources/meriam.html (last visited Jan. 27, 2023).

201. PRUCHA, *supra* note 91, at 808-12, 836-38, 862-63; Gale Archives, *Meriam Report on Indian Administration and the Survey of Conditions of the Indians in the U.S.*, https://www.gale.com/binaries/content/assets/gale-us-en/primary-sources/archives-unbound/primary-sources_archives-unbound_meriam-report-on-indian-administration-and-the-survey-of-conditions-of-the-indians-in-the-u.s.pdf (last visited Jan. 27, 2023).

202. 25 U.S.C. § 461 *et seq*.; COHEN'S, *supra* note 101, at 79-84, 256-61; PRUCHA, *supra* note 91, at 954-73.

203. 25 U.S.C. § 461 *et seq*.; COHEN'S, *supra* note 101, at 79-84, 256.

204. 25 U.S.C. § 476; COHEN'S, *supra* note 101, at 256-57.

205. 25 U.S.C. § 477; COHEN'S, *supra* note 101, at 258-59.

206. COHEN'S, *supra* note 101, at 356.

207. *Id*. at 357-63.

a joint resolution as "an apology to Native Hawaiians on behalf of the United States for the overthrow of the Kingdom of Hawaii."[208]

Finally, the question often gets raised whether the U.S. Supreme Court might reconsider or even reverse *Johnson v. M'Intosh* and its adoption of the Doctrine of Discovery two hundred years ago. In 2018, the Confederated Tribes and Bands of the Yakama Nation specifically requested that the Court reexamine *Johnson* and repudiate the Doctrine.[209] The Nation argued that the Court has reversed longstanding decisions in the past and cited cases on segregated schools, interracial marriage, and poll taxes as examples. In 2022, of course, the Court reversed the forty-nine-year-old case of *Roe v. Wade*.[210] While we will not attempt to predict what the Court might do in regards *Johnson*, it is an intriguing thought experiment to ask what effect, if any, reversing *Johnson* or repudiating the DoD today might actually have on Indian law and policies, and on tribal and individual Indian land and other rights.

D. *Opening the Courts to Tribal Litigation*

A less prominent but no less significant means to redress the pernicious effects of the DoD is through permitting tribes to litigate in federal courts.[211] In 1946, in the Indian Claims Commission, Congress opened the federal government and the U.S. courts to a veritable flood of tribal litigation. But that Act did far more than just create the temporary Commission to hear tribal claims. In the ICC, Congress also opened the U.S Court of Claims to all future tribal lawsuits for any claims that accrue after August 13, 1946.[212] Indian nations have aggressively used that court ever since.

In addition, Indian nations can sue the United States for breach of its trust responsibilities and have filed hundreds of such suits.[213] In a nutshell, the United States has voluntarily taken on the fiduciary duties of a guardian or trustee over Indian nations and their properties and lands, and to some

208. Congressional Apology Resolution, S.J. Res. 19, Pub. L. No. 103-150, 107 Stat. 1510, 1510 & 1513 (1993). *See also* S. REP. NO. 126, 103rd Cong., 1st Sess. (1993), *at* 1993 WL 302141.

209. Brief for Confederated Tribes and Bands of the Yakama Nation as Amici Curiae Supporting Respondent, Washington State Dep't of Licensing v. Cougar Den, Inc., No. 16-1498 (Sept. 24, 2018), 2018 WL 4739661.

210. Dobbs v. Jackson Women's Health Organization, 142 S.Ct. 2229 (2022).

211. For a detailed discussion of this topic see COHEN'S, *supra* note 101, at 416-50. It is relevant to note here that the United States has not waived its sovereign immunity and rendered itself subject to being sued in the Organization of American States Inter-American Court of Human Rights. https://www.corteidh.or.cr/que_es_la_corte.cfm?lang=en (last visited Jan. 21, 2023).

212. 60 Stat. 1055, § 24; 28 U.S.C. § 1505; COHEN'S, *supra* note 101, at 440.

213. COHEN'S, *supra* note 101, at 416-17; Newton, *supra* note 177, at 784-802.

extent over Indian individuals and their properties.[214] A perfect example of the violation by the United States of its trust duty to properly manage, and even to provide a simple accounting of individual Indians' funds on deposit with the United States, was the *Cobell* litigation discussed above. As mentioned, that litigation led to twenty written opinions in the U.S. District of Columbia District and Circuit Courts before the United States settled the case. Tribal breach of trust cases against the United States are filed and won regularly by Indian nations and peoples as demonstrated by recent cases from 2021 and 2022.[215]

Moreover, in the Contract Disputes Act,[216] Congress allows plaintiffs to sue the United States over contract claims. The Act does not contain tribal specific provisions, but it also does not prevent Indian nations from bringing these kinds of suits as Congress did in 1863 for the Court of Claims. Consequently, the currently named U.S. Court of Federal Claims has jurisdiction to hear suits by Indian nations against the United States over contracts.[217]

Furthermore, the federal Administrative Procedure Act ("APA")[218] waives federal sovereign immunity for lawsuits challenging agency actions if they are not seeking money damages.[219] This Act is not tribal specific, but again, Congress did not exclude Indian nations from filing such suits, and tribes regularly do so.[220] The federal trust responsibility discussed above creates a unique feature for tribal lawsuits under the APA. Agency decisions that might ordinarily be deemed within an agency's discretion can nonetheless violate federal trust duties to tribes and be actionable.[221]

In the 1960s and 1970s, federal Indian policy turned to the relatively pro-native Self-Determination Era.[222] In 1975, Congress enacted the Indian Self-Determination and Education Assistance Act ("ISDA").[223] Under this Act, tribal nations enter contracts with the federal government and operate federal Indian programs themselves.[224] A provision in the ISDA

214. *E.g.*, Seminole Nation v. United States, 316 U.S. 286 (1942); COHEN'S, *supra* note 101, at 423-29.

215. *E.g.*, Fletcher v. United States, 26 F.4th 1314 (Fed. Cir. 2022); Navajo Nation v. U.S. Dept. of Interior, 26 F.4th 794 (9th Cir. 2022); Confederated Tribes and Bands of the Yakama Nation v. United States, 153 Fed.Cl. 676 (Ct. Fed. Cl. 2021).

216. 41 U.S.C. § 7101 *et seq*.

217. COHEN'S, *supra* note 101, at 441.

218. 5 U.S.C. § 701 *et seq*.

219. 5 USC §§ 702, 704, 706(2)(A); COHEN'S, *supra* note 101, at 417.

220. COHEN'S, *supra* note 101, at 429-35.

221. *Id*. at 430-31 & n.91 (citing Cobell v. Norton, 240 F.3d 1081, 1104 (D. D.C. 2001); Pyramid Lake Paiute Tribe v. Morton, 354 F. Supp. 252 (D. D.C. 1972)).

222. COHEN'S, *supra* note 101, at 1381-82, 1386-90, 1392-96.

223. 25 U.S.C. § 450 *et seq*.

224. 25 U.S.C. § 450f.

allows tribes to bring monetary claims against the United States for breach of ISDA contracts in the federal district courts, or they can elect to sue in the Court of Federal Claims under the Contract Disputes Act discussed above.[225] In addition, if the Secretary of Interior declines to enter into an ISDA contract with a tribe, the Indian nation may file an administrative appeal or sue the Secretary in federal district court.[226]

Finally, in 1965, Congress enacted an enormous and very significant expansion of tribal access to federal courts when it enabled tribal governments to file their own lawsuits and sue the United States and other defendants in the federal district courts.[227] In 1976, the Supreme Court expressly recognized the import of this change, stating that this statute "open[ed] the federal courts to the kind of claims that could have been brought by the United States as trustee, but for whatever reason were not so brought."[228] The Court noted that "the legislative history" clearly indicated congressional intent to open the federal courts.[229] At least one scholar argues emphatically that this provision was a major expansion of tribal cases and rights in the federal courts because "Indian cases were relatively rare in the federal courts until 1965, when Congress opened the doors of the federal district courts to tribal suits."[230] This same scholar argues that access to the district courts helped Indian nations and Indian law immeasurably because Article III district court judges were far more open to novel tribal claims and developing Indian law than the Article I judges of the Court of Claims.[231]

Under the Indian Claims Commission and the federal laws mentioned above, Indian nations have sued the United States for violations of treaties, fiduciary and trustee duties, and other wrongs.[232] These lawsuits

225. 25 U.S.C. § 450m-1(a), (d); COHEN'S, *supra* note 101, at 441.

226. 25 U.S.C. § 450f(b)(3); 25 U.S.C. § 450m-1(a) & (d).

227. 28 U.S.C. § 1362; COHEN'S, *supra* note 101, at 613.

228. Moe v. Confederated Salish and Kootenai Tribes of Flathead Reservation, 425 U.S. 463, 476 (1976) (citing H.R. REP. NO. 2040, 89th Cong., 2d Sess., 2-3 (1966), U.S. Code Cong. & Admin. News 1966, at 3147, *at* 1966 WL 4399). *Accord* Oneida Indian Nation of New York v. State of N.Y., 691 F.2d 1070, 1080 (2d Cir. 1982); Cayuga Indian Nation v. Cuomo, 565 F.Supp. 1297, 1321 (N.D. N.Y. 1983).

229. *Moe*, 425 U.S. at 472.

230. Newton, *supra* note 177, at 784; *see also id*. at 769-70; COHEN'S, *supra* note 101, at 597 & n.3, 614-14, 1052 & n.21, 1245 & n.2.

231. Newton, *supra* note 177, at 784; 28 U.S.C. 172.

232. See Newton, *supra* note 177, at 769-838 for a discussion of numerous ICC cases; sources cited *supra* note 169 (Indian nations won over $800 million in damages in ICC cases); Reis, *supra* note 195 (individual Indians and Indian nations received $3.4 billion in the *Cobell* litigation settlement). The Navajo Nation suit against the United States for breach of its trust duties in regards to tribal water issues is currently before the United States Supreme Court. Navajo Nation v. U.S. Dep't Interior, 26 F.4th 794 (9th Cir.), *cert. granted*, 143 S.Ct. 398 (2022).

are nothing less than tribal nations fighting federal domination and actions, and ultimately fighting colonization and its impacts. The U.S. Congress could probably have prevented most of these claims from ever being heard in the federal courts. The only conclusion we can reach from the intent and impact of these laws is that the United States and Congress are content to allow Indian nations to protect their rights and fight colonialism in the federal courts.

E. *Revoking the Papal Bulls on Discovery*

Since at least the mid-1970s, international Indigenous leaders and activists have been petitioning the Catholic Church to revoke the papal bulls of the fifteenth century that helped create the international law of colonialism.[233] As already mentioned, papal bulls in 1436, 1452-55, and 1493 played a significant role in developing and defining the DoD. The Church has so far resisted these requests. In fact, the Vatican ambassador to the United Nations explained in 2010 that these bulls had already been impliedly repealed in past centuries and that they are only "historic remnant[s] with no juridical, moral or doctrinal value."[234]

Notwithstanding that argument, when Pope Francis visited Canada in 2022 Indigenous peoples and leaders and others requested that he withdraw or reject these bulls.[235] Many people expected that to happen during the visit. When that did not occur, some reporters, even for Catholic periodicals, expected it to happen in the weeks following the Pope's visit.[236] But, to date, the Vatican has not taken that action.

In contrast, other Christian denominations in several countries have already adopted resolutions expressly repudiating the DoD and suggesting ameliorative solutions. Perhaps the first was the Episcopal Church in the

233. *See, e.g.*, Cecily Hilleary, *Native Groups Call on Vatican to Retract 500-Year-Old Charter*, Voice of America (June 6, 2016), https://www.voanews.com/a/native-groups-call-on-vatican-to-retract-500-year-old-charter/3364215.html (last visited Jan. 21, 2023); Jacqueline Keeler, *Oren Lyons, Onondaga*, Earth Island J. (2015), https://www.earthisland.org/journal/index.php/magazine/entry/oren_lyons_onondaga/ (last visited Jan. 21, 2023).

234. Hilleary, *supra* note 233.

235. *Why the official repudiation of the Doctrine of Discovery is necessary: lawyer*, CTV NEWS (Aug, 2, 2022), https://www.ctvnews.ca/canada/why-the-official-repudiation-of-the-doctrine-of-discovery-is-necessary-lawyer-1.6010798#:~:text=Pope%20Francis%20did%20not%20directly,in%20the%20residential%20school%20system. (last visited Jan. 21, 2023).

236. Michael Swan, *Canadian bishops working with Vatican on statement rejecting 'Doctrine of Discovery*,' CATHOLIC REGISTER, Sept. 20, 2022; Michael Swan, *Statement on Doctrine of Discovery imminent*, CATHOLIC REGISTER, Sept. 18, 2022), https://www.catholicregister.org/item/34774-statement-on-doctrine-of-discovery-imminent (last visited Jan. 21, 2023).

United States which adopted such a resolution at its 76th General Convention in 2009.[237] The Anglican Church of Canada also adopted a resolution in 2010.[238] In 2012, the World Council of Churches Executive Committee adopted a resolution repudiating the Doctrine.[239] The World Council has 352 Christian churches as members and the Catholic Church, while not a member, has worked closely with that organization for over three decades.[240] Various individual churches and dioceses continue to issue statements rejecting the Doctrine and some have even taken concrete steps to try to rectify past wrongs.[241]

We have long believed that such actions are very worthwhile endeavors. Such campaigns and actions bring attention to issues surrounding colonialism, educate people on this issue, and encourage further activism to counteract the adverse impacts of the Doctrine. These church resolutions and the campaigns to adopt them have received news coverage and have educated many people to the existence and pernicious effects of the DoD. We believe that far more attention and worldwide publicity would be brought to this issue if the Catholic Church were to repudiate the relevant bulls. It would surely be a worldwide educational moment that would add considerably to efforts to encourage international organizations and governments to take concrete steps to address the impacts of colonization.

On the other hand, we must point out that the formal withdrawal of these bulls by itself will not somehow change world history, the effects of colonization, governmental policies, or the property laws and human rights in any country. In our opinion, one cannot look to church resolutions or to the possible withdrawal of papal bulls as the end-all, be-all of resisting and reversing the DoD. Unraveling the international law of colonialism is going to take far more than just sympathetic words from churches and efforts directed at Christian denominations.

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237. Gale Courey Toensing, *Episcopal Church repudiates Doctrine of Discovery*, INDIAN COUNTRY TODAY, July 26, 2009; Robert J. Miller, *Will others follow Episcopal Church's lead?*, INDIAN COUNTRY TODAY, Aug. 12, 2009.

238. https://doctrineofdiscovery.org/assets/pdfs/A086-R1-ACIP-Repudiate-the-Doctrine-of-Discovery.pdf (last visited Jan. 21, 2023).

239. World Council of Churches, https://www.oikoumene.org/news/wcc-disowns-doctrine-used-against-indigenous-peoples (last visited Jan. 21, 2023).

240. World Council of Churches, https://www.oikoumene.org/member-churches (last visited Jan. 21, 2023); https://lacatholics.org/2020/11/13/the-world-council-of-churches-wcc-geneva-switzerland/#:~:text=Please%20note%20that%20although%20the,Order%20Commission%20of%20the%20WCC. (last visited Jan. 21, 2023).

241. *E.g.*, *The Episcopal Diocese of Eastern Oregon Repudiation of the Doctrine of Discovery & Steps Toward Conciliation*, September 30, 2022 (hard copy on file with authors); The Coalition to Dismantle the Doctrine of Discovery, https://dofdmenno.org/ (last visited Jan. 21, 2023).

IV. RECONSIDERING TERRA NULLIUS IN AUSTRALIA

Colonization in Australia proceeded on a different basis than in North America. Unlike the situation in the United States, the British did not engage in treaty-making nor attempt to develop treaty relationships with the Indigenous peoples who occupied and cared for the country. This failure to negotiate has had significant consequences. The absence of treaties helped establish a legal framework that denied Aboriginal and Torres Strait Islander peoples' rights to sovereignty and self-determination and ignored their legal interests.[242] While some cracks began to emerge in the 1970s as Aboriginal and Torres Strait Islander peoples contested the official narrative, it was not until the *Mabo* decision in 1992 that Australian law recognized Indigenous peoples' rights to land.[243] The judgment brought Australian law closer into line with other common law settler states like the United States.[244] It nonetheless caused significant discomfort to many non-Indigenous Australians. Drawing on the momentum created by the judgment, the Australian Parliament enacted the *Native Title Act 1993* (Cth) ("*NTA*")[245] which created a narrow but clear legal pathway for Aboriginal and Torres Strait Islander communities to seek legal recognition of their rights and interests in land.

In this Part, we examine how Aboriginal and Torres Strait Islander peoples began to pry open legal and political fissures in the official narrative during the 1970s. Their efforts culminated in the *Mabo* decision in the early 1990s. We then explore that decision in detail, outlining how the judgment offered a partial reassessment of colonization in Australia. This important contextual material will allow fuller discussion of whether and how *Mabo* and the *NTA* have contributed to unravelling the international law of colonialism in Australia.

A. *Chiseling Cracks into the Legal Story of Colonization*

The legal façade of colonization in Australia held firm in the years following *Cooper v Stuart*.[246] Whatever the factual absurdity, the legal position was clear: the continent of Australia was "practically unoccupied"

242. HOBBS, *supra* note 47, at 15-50.

243. *Mabo v Queensl. [No. 2]* (1992) 175 CLR 1 (Austl.).

244. ROSLYN ATKINSON, *Commentary on "Sir Gerald Brennan: The Principled Judge," in* QUEENSLAND JUDGES ON THE HIGH COURT 123, 131 (Michael White & Aladin Rahemtula eds., 2003).

245. *Native Title Act 1993* (Cth) (Austl.).

246. (1888) 14 App Cas 286 (PC).

upon the acquisition of British sovereignty in 1788.[247] It was not until the 1960s and 70s that cracks in this legal façade began to emerge.

In 1963, the Australian government excised more than 115 square miles of land from the Arnhem Land Aboriginal Reserve in northern Australia to facilitate the development of a bauxite mine.[248] There was no consultation with the Yolngu people, the Traditional Owners of the country, let alone compensation. The Yolngu objected strenuously, submitting two petitions to the Australian Parliament. Written in both Yolngu and English, the petitions were set on bark and bounded by designs painted in ochre, illustrating both Yolngu law and their connection to country. The petitions explained that "the land in question has been hunting and food gathering land for the Yirrkala tribes from time immemorial" and "that places sacred to the Yirrkala people, as well as vital to their livelihood are in the excised land." The petitions spoke to the alienation felt by Indigenous peoples in Australia, noting that the "people of this area fear that their needs and interests will be completely ignored as they have been ignored in the past."[249]

A Parliamentary Committee investigated the situation. The Committee concluded that the Yolngu should be compensated for the loss of their traditional territory by granting land rights, royalties from the mining operation, and providing financial compensation for the loss of traditional occupancy "even though these rights are not legally expressed under the laws of the Northern Territory."[250] However, these recommendations were ignored, and the lands granted to mining company Nabalco. The Yolngu took their case to the Northern Territory Supreme Court seeking an injunction to stop the development of the bauxite mine.[251] In *Milirrpum v Nabalco*,[252] the Yolngu asserted they held a communal native title over their lands, and that their legal rights had not been extinguished by Australian law. Justice Richard Blackburn struggled "to reconcile the facts presented to him with the legal fictions he felt bound to uphold."[253] Although acknowledging the Yolngu people possessed "a subtle and elaborate system

247. *Cooper v Stuart* (1888) 14 App Cas 286, 291 (Lord Watson) (PC).

248. MIRANDA JOHNSON, THE LAND IS OUR HISTORY: INDIGENEITY, LAW, AND THE SETTLER STATE 36-38 (2016).

249. YIRRKALA BARK PETITIONS (1963).

250. *Select Committee on Grievances of Yirrkala Aborigines, Arnhem Land Reserve*, Parliament of Australia (29 October 1963) [70].

251. Indigenous Australians were never formally prevented from bringing claims to court like in the United States, but given the limited legal recognition of their rights, the bulk of law reform was focused on the political sphere. In 1972, Mullenjaiwakka became Australia's first Indigenous law graduate. Harry Hobbs & George Williams, *The Participation of Indigenous Australians in Legal Education, 2001-2018*, 42(4) U.N.S.W. L.J. 1294 (2019).

252. (1971) 17 FLR 141 (Austl.).

253. Williams & Hobbs, *supra* note 117, at 117.

[of laws] highly adapted to the country in which the people led their lives,"[254] Justice Blackburn felt bound to follow the precedent in *Cooper v Stuart*. He held that native title "does not, and never has formed, part of the law of any part of Australia."[255]

The Yolngu were "deeply shocked" but determined not to appeal the decision to the High Court.[256] Instead, they adopted a political strategy. In a statement to Prime Minister William McMahon, the Yolngu explained:

> We cannot be satisfied with anything less than ownership of the land. The land and law, the sacred places, songs, dances and language were given to our ancestors by spirits Djangkawu and Barama. We are worried that without the land future generations could not maintain our culture . . . . The Australian law has said that the land is not ours. This is not so. It might be right legally but morally it's wrong. The law must be changed. The place does not belong to white man.[257]

Justice Blackburn may have ruled against the Yolngu, but he believed that their rights to land should be recognized. In a highly unusual confidential memorandum to the Government and Opposition, he noted that the morality of a system of Aboriginal land rights was "beyond question."[258] Following a change in government and inquiry into Aboriginal land rights in the Northern Territory, the Australian Parliament passed the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ('*NT Land Rights Act*').[259] This was the first law by any Australian government to recognize Aboriginal rights to land and to establish a legal basis for Aboriginal people in the Northern Territory to claim land based on customary or traditional occupation.

In *Milirrpum*, an Australian court exposed the factual basis underpinning the decision in *Cooper* as inaccurate. A few years later in the *Western Sahara Advisory Opinion*,[260] the International Court of Justice condemned

254. *Milirrpum v Nabalco* (1971) 17 FLR 141, 267 (Austl.).

255. *Id*. at 245.

256. Brian Keon-Cohen, who was involved in the *Mabo* litigation, supposes that this is "because the plaintiff's advisers feared an adverse result in the High Court." Brian Keon-Cohen, *The* Mabo *Litigation: A Personal and Procedural Account*, 24 M.U. L. REV. 893, 900 n.54 (2000). The High Court of Australia is Australia's top court, the equivalent of the United States Supreme Court.

257. The People of Yirrkala, *Yolngu Statement in the Gupapunyngu Language*, May 6, 1971, http://www.kooriweb.org/foley/resources/pdfs/126.pdf.

258. Memorandum, from Sir Richard Blackburn, *quoted in* FRANK BRENNAN, NO SMALL CHANGE: THE ROAD TO RECOGNITION FOR INDIGENOUS AUSTRALIA 137-138 (2015).

259. *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Austl.).

260. *Western Sahara (Advisory Opinion)* [1975] I.C.J. Rep. 12.

the concept of *terra nullius* as morally repugnant.[261] Nevertheless, Australian law chose not to deviate from the path it initially set out on, perceiving co-existing sovereignties as incompatible.

Consider a 1979 High Court case. In *Coe v Commonwealth*,[262] Wiradjuri man Paul Coe sought to amend his statement of claim to declare that British sovereignty had been wrongly asserted over Australia and that Aboriginal people remained a sovereign nation. In oral argument, Coe drew on the U.S. concept of "domestic dependent nations" to argue that Aboriginal people continued to possess a residue of self-governing powers. Justice Harry Gibbs forcefully rejected the submission. Justice Gibbs noted that "it is fundamental to our legal system that the Australian colonies became British possessions by settlement and not by conquest."[263] Justice Gibbs concluded:

> [T]he history of the relationships between the white settlers and the aboriginal people has not be [sic] the same in Australia and in the United States, and it is not possible to say, as was said by Marshall CJ, at p. 16, of the *Cherokee Nation*, that the aboriginal people of Australia are organised as a 'distinct political society separated from others', or that they have been uniformly treated as a state. The judgments in that case therefore provide no assistance in determining the position in Australia. The aboriginal people are subject to the laws of the Commonwealth and of the States or Territories in which they respectively reside. They have no legislative, executive or judicial organs by which sovereignty might be exercised. If such organs existed, they would have no powers, except such as the laws of the Commonwealth, or of a State or Territory, might confer upon them. The contention that there is in Australia an aboriginal nation exercising sovereignty, even of a limited kind, is quite impossible in law to maintain.[264]

Nevertheless, pressed by Aboriginal and Torres Strait Islander claims, fractures were slowly emerging. In the 1985 case of *Gerhardy v Brown*,[265] High Court Justice William Deane remarked obliquely that the Australian common law "has still not reached the stage of retreat from injustice" which the United States reached in 1823, when Chief Justice Marshall accepted that "the 'original inhabitants' should be recognized as having 'a

261. *Id.* at 86.

262. *Coe v Commonwealth* (1979) 24 ALR 118 (Austl.).

263. *Id.* at 129.

264. *Id.*

265. *Gerhardy v Brown* (1985) 159 CLR 70 (Austl.).

legal as well as just claim' to retain the occupancy of their traditional lands."[266]

The judiciary could only go so far. With the courts seemingly unable to rectify the legal fiction upon which Australia was built, efforts turned to the political sphere. In the 1980s, the Australian government under Prime Minister Bob Hawke promised to implement a national system of land rights for Aboriginal and Torres Strait Islander peoples,[267] and to negotiate a treaty to recognize their "prior ownership, continued occupation and sovereignty."[268] Neither eventuated. National land rights legislation was met with hostile opposition from the large mining states of Western Australia and Queensland, forcing the Labor government to shelve its plans.[269] Similarly, the call for a treaty was attacked by the conservative Liberal-National Opposition, who considered it "a recipe for separatism" and "an absurd proposition that a nation should make a treaty with some of its own citizens."[270] Something was needed to break this impasse.

B. *Mabo (No 2): A Partial Reassessment*

Australian law continued to operate on the view that upon the British Crown's acquisition of sovereignty in 1788, no Indigenous law, customs, or rights, including interests in land, survived. Aboriginal and Torres Strait Islander peoples contested this position. In petitions, protests, and litigation, First Nations peoples fought against the imposed legal system, calling for recognition of their rights.[271] However, while *Milirrpum*, *Coe*, and *Gerhardy* revealed a growing unease within some political and legal circles over the official narrative,[272] it was not until 1992 that the High Court was squarely confronted with this issue.

The *Mabo* case can be traced to a 1981 land rights conference held at James Cook University in North Queensland. Eddie Koiki Mabo, a Torres Strait Islander man, delivered a paper on the land inheritance system on

266. *Id.* at 149.

267. Prime Minister Bob Hawke, *Speech Delivered at Sydney, New South Wales, February 16, 1983*, https://electionspeeches.moadoph.gov.au/speeches/1983-bob-hawke.

268. Prime Minister Bob Hawke, *Statement of the Prime Minister: Barunga Festival* 2(6) LAND RIGHTS NEWS 22 (1988).

269. Nick O'Malley, *Hawke's Support for Indigenous Rights Led to his Removal, PM Believed*, SYD. MORNING HERALD, May 17, 2019, https://www.smh.com.au/national/hawke-s-support-for-indigenous-rights-led-to-his-removal-pm-believed-20190517-p51okl.html.

270. John Howard, *Treaty is a Recipe for Separatism*, *in* A TREATY WITH THE ABORIGINES? 6 (Ken Baker ed., 1988). Note that the Liberal Party in Australia is the main conservative party, while the Australian Labor Party is the main left party.

271. *See* BAIN ATTWOOD & ANDREW MARKUS ED., *THE STRUGGLE FOR ABORIGINAL RIGHTS: A DOCUMENTARY HISTORY* (1999).

272. PETER RUSSELL, *supra* note 122, at 170.

Mer Island, and called for the legal protection of his rights to land.[273] Several other papers explored how Indigenous peoples' rights to land are recognized under international law and the common law of other countries. One paper raised the prospect of a High Court challenge, noting that:

> [W]hether or not [such a claim] was successful, [it] might very well act as a catalyst for action at the political level . . . . A test case brought by a group of Queensland Aboriginals who still live on their tribal lands could influence the attitudes of white Australians and the terms of the Makarrata [treaty]. It might for example lead to the establishment of a Court of Claims and an Aboriginal Claims Commission similar to the ones set up in the U.S.A. to determine the Indian claims to compensation for the loss of tribal lands.[274]

After some discussion, the Mer Islanders decided to launch a *Milirrpum* style claim, with Eddie Mabo as the lead plaintiff.[275] The group sought a declaration that the Australian common law could recognize the land rights of the people of Mer in the Torres Strait.

The conservative Queensland government sought to foreclose the case. In 1985, the State Parliament passed the *Queensland Coast Islands Declaratory Act 1985*,[276] which purported to retrospectively extinguish without compensation any traditional rights to land that might exist in the Torres Strait. When introducing the Bill into Parliament, the Deputy Premier explained that its purpose was to "prevent interminable argument in the courts on matters of history."[277] In debate, the Deputy Premier attacked the case directly, claiming "the islanders were being led by two Melbourne University do-gooders" who are doing nothing more than "leading the Islanders up the garden path."[278] In *Mabo v Queensland (No 1)*,[279] the Court held 4-3 that the Queensland law was inconsistent with the Commonwealth *Racial Discrimination Act 1975* (Cth),[280] as it expropriated Torres Strait Islander peoples' rights to land without compensation, while not

273. Eddie Mabo, *Land Rights in the Torres Strait*, (Address to Land Rights and the Future of Race Relations Conference, August 28-30, 1981), https://www.mabonativetitle.com/info/doc4.htm.

274. Barbara Hocking, *Is Might Right? An Argument for the Recognition of Traditional Aboriginal Title to Land in the Australian Courts*, *in* BLACK AUSTRALIANS: THE PROSPECTS FOR CHANGE 207 (Erik Olbrei ed., 1982). Cited in Keon-Cohen, *supra* note 256, at 906.

275. Keon-Cohen, *supra* note 256, at 907.

276. *Queensland Coast Islands Declaratory Act 1985* (Qld) (Austl.).

277. Queensland, *Parliamentary Debates*, Legislative Assembly, 4740 (April 2, 1985).

278. Queensland, *Parliamentary Debates*, Legislative Assembly, 4944 (Apr. 9, 1985).

279. *Mabo v Queensl. [No 1]* (1988) 166 CLR 186 (Austl.).

280. *Racial Discrimination Act 1975* (Cth) (Austl.).

affecting non-Indigenous peoples' land rights.[281] Section 109 of the Australian Constitution provides that when a State law is inconsistent with a law of the Commonwealth, the Commonwealth law prevails, and the State law is invalid to extent of the inconsistency. The Queensland Act was therefore invalid. Disaster was narrowly avoided.

Mabo v Queensland (No 1) allowed the main claim to continue. In *Mabo v Queensland (No 2)*, in a 6:1 decision, the High Court found for Eddie Mabo and the Mer Islanders. The Court held that the common law recognizes native title,[282] a form of Indigenous land tenure that "has its origin in the traditional laws acknowledged and the customs observed by the [relevant] indigenous people."[283] In sole dissent, Justice Daryl Dawson held that native title was extinguished on annexation or settlement.[284] In reaching their conclusion, the six judges in the majority rejected the position in *Cooper v Stuart*, holding that the Australian continent was neither empty of people nor of laws. The majority also rejected the idea that *terra nullius* "was an appropriate legal foundation for Australia and renounced it as a legal fiction."[285] In doing so, the Court removed one element of the Doctrine of Discovery in Australia.

Mabo marked "the beginning of new national insight."[286] As if to help non-Indigenous Australians come to terms with the decision, the language used by several of the judges in the majority was "unusually emotive."[287] Indeed, the majority is explicit: "judged by any civilized standard," Indigenous dispossession "is unjust,"[288] and "unacceptable in our society."[289] Dispossession constituted "the darkest aspect of the history of this nation,"[290] and left a "national legacy of unutterable shame."[291] The majority's condemnation steps beyond simple formal acknowledgement and delves into a "jurisprudence of regret."[292] Yet, far from a "judicial

281. *Mabo v Queensl. [No 1]* (1988) 166 CLR 186 (Austl.).

282. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1, 76 (Brennan J, Mason CJ and McHugh J agreeing at 15), 119 (Deane and Gaudron JJ), 216 (Toohey J) (Austl.).

283. *Fejo v N. Terr.* (1998) 195 CLR 96, 128 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) (Austl.).

284. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1, 145 (Dawson J) (Austl.).

285. WILLIAMS & HOBBS, *supra* note 117, at 209.

286. Christabel Chamarette, *Terra Nullius Then and Now:* Mabo*, Native Title, and Reconciliation in 2000*, 35 AUSTRALIAN PSYCH. 167, 170 (2000).

287. *Mabo [No 2]* (1992) 175 CLR 1, 120 (Deane and Gaudron JJ) (Austl.).

288. *Id.* at 129 (Brennan J).

289. *Id.* at 140 (Brennan J); 182 (Toohey J).

290. *Id.* at 109 (Deane and Gaudron JJ).

291. *Id.* at 104 (Deane and Gaudron JJ).

292. Jeremy Webber, *The Jurisprudence of Regret: The Search for Standards of Justice in* Mabo, 17 SYD L. REV. 5, 10 (1995). *See also* Harry Hobbs, *Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia*, 39(2) U.N.S.W. L.J. 512 (2016).

revolution"[293] the judgment itself was a "cautious correction"[294] that brought Australian law closer into line with historical fact, basic principles of international law and justice, and the law in comparative settler states such as the United States.

The decision recognized the historical fact that the Australian continent was not vacant, but the Court struggled with the legal consequences of this step. Under international law at the time, a distinction existed between "settled" and "conquered" or "ceded" colonies.[295] In the former case, English laws applicable to the colony apply with immediate force given that there were no people or laws present for the territory. In the latter cases, however, the laws of the original inhabitants would remain in force until and unless they are altered by the new sovereign. We have seen that Australian law had developed on the fiction that the land was vacant, and the continent was settled. If the Court corrected this historical fiction, what would this mean for Australian law? Justice Gerard Brennan articulated the challenge facing the Court: "In discharging its duty to declare the common law of Australia, this Court is not free to adopt rules that accord with contemporary notions of justice and human rights if their adoption would fracture the skeleton of principle which gives the body of our law its shape and internal consistency."[296] The Court avoided this difficulty by reformulating the international law test for the acquisition of sovereignty. Justice Brennan held that the rules appropriate for a conquered colony should also apply for a settled colony, but only in relation to property rights.[297]

This sleight of hand has attracted significant criticism on the grounds that it lacks legal logic and doctrinal consistency.[298] Nevertheless, it created the conceptual space in Australian law for the Court to hold that pre-existing rights and interests in land could have survived the British acquisition of sovereignty. Native title thus exists as a burden on the Crown's radical title. That burden can be removed. The acquisition of British sovereignty

293. *MABO*: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW (Margaret Stephenson & Suri Ratnapala, eds., 1993).

294. Garth Nettheim, *Judicial Revolution or Cautious Correction?* Mabo v Queensl., 16 U.N.S.W. L.J. 1, 20-22 (1993).

295. WILLIAM BLACKSTONE, COMMENTARIES ON THE LAW OF ENGLAND vol. 1, 107 (1765). *See also Milirrpum v Nabalco* (1971) 17 FLR 141, 201 (Austl.).

296. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1, 29 (Austl.).

297. *Id.* at 57.

298. Gerry Simpson, Mabo*, International Law,* Terra Nullius *and the Stories of Settlement: An Unresolved Jurisprudence*, 19 M.U. L. REV. 195 (1993); Daniel Lavery, *No Decorous Veil: The Continuing Reliance on an Enlarged Terra Nullius Notion in* Mabo [No 2], 43 M.U. L. REV. 233 (2019).

meant that native title could be extinguished by a valid exercise of legislative or executive power inconsistent with the continued right to enjoy native title, such as by the grant of land to non-Indigenous settlers.[299]

The decision also explained how native title could be recognized. Aboriginal or Torres Strait Islander communities seeking to have their rights and interests in their land and waters recognized by the common law would need to satisfy two requirements. First, given that native title "has its origin in and is given its content by the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants of a territory," they must first demonstrate they have continued to acknowledge and observe their traditional laws and customs and, as such, maintain the necessary connection to their traditional country.[300] Second, they must demonstrate that their native title has not been extinguished by legislation or government action. These two hurdles impose significant limitations that the Court itself acknowledged. Justice Brennan noted that "since European settlement of Australia, many clans or groups of indigenous people have been physically separated from their traditional land and have lost their connexion with it."[301] For these communities, native title will not be available. Neither will compensation. By 4-3, the Court held that extinguishment of native title did not give rise to a right of compensation at common law.[302] Compensation would only be available for the loss of native title after the passage of the Commonwealth *Racial Discrimination Act* in 1975. It is discriminatory to deny compensation for the diminution of property rights where the property in question is native title, but not for other forms of property. The *Racial Discrimination Act* prevents this.

Notwithstanding these limitations, *Mabo (No 2)* was immediately recognized as momentous. Guugu Yimidhirr lawyer Noel Pearson remarked that the decision "represents a turning point in the history of Australia since white 'settlement'," and "compels the nation to confront fundamental issues concerning the Indigenous people of Australia, issues which have been largely avoidable to date."[303] Pitjantjatjara woman, Lowitja O'Donoghue, the Chairperson of the Aboriginal and Torres Strait Islander Commission agreed, arguing that the decision imposed "a strong moral obligation" on the country: "to ensure that Australia's Indigenous peoples who

299. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1, 63-71 (Austl.).

300. *Id.* at 58.

301. *Id.* at 59.

302. *Id.* This is the same position as in the United States. *See* Tee-Hit-Ton Indians v. United States, 348 U.S. 272 (1955).

303. Noel Pearson, *204 Years of Invisible Title*, *in* MABO: A JUDICIAL REVOLUTION: THE ABORIGINAL LAND RIGHTS DECISION AND ITS IMPACT ON AUSTRALIAN LAW 75, 89 (Margaret Stephenson & Suri Ratnapala eds., 1993).

have maintained links to their traditional lands are given every opportunity to have those links recognized."[304]

However, not everyone was as enthused with the judgment. In a scathing essay, Palawa lawyer Michael Mansell argued that *Mabo* "will prove a great disappointment,"[305] for though it "offers something for those who are grateful for small blessings" it provides "nothing in the way of real justice."[306] Many conservatives also railed against the judgment. In their view, the decision went too far.[307] Mining director Hugh Morgan declared that the Court's "naïve adventurism" had put Australia's "territorial integrity . . . under threat."[308] Richard Court, the Premier of Western Australia and Peter Reith, a federal Liberal politician, called for a referendum to overturn the decision.[309] Legal scholar LJM Cooray considered the recognition of native title would lead to a situation "analogous" to apartheid.[310]

Australian Prime Minister Paul Keating, the leader of the Labor Party, dismissed the extreme nature of these attacks. Keating lauded *Mabo (No 2)* as "a milestone decision," arguing that it "gives Australia a tremendous opportunity to get its relationship with the Aboriginal and Torres Strait Islander people right."[311] Keating believed that legislation was the best way "to do justice to the *Mabo* decision in protecting native title and to ensure workable, certain, land management."[312] Several months of difficult and contentious negotiations with Aboriginal and Torres Strait Islander peoples, mining and pastoralists, and parties in the Parliament followed.[313]

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304. John Gardiner-Garden, *The* Mabo *Debate – A Chronology*, 2 (Parliamentary Research Service, Background Paper No 23, 1993).

305. Michael Mansell, *The Court Gives an Inch But Takes Another Mile: The Aboriginal Provisional Government Perspective*, 1 *ABORIGINAL LAW BULLETIN* 4 (1992).

306. *Id.*

307. Harry Hobbs, *The New Right and Aboriginal Rights in the High Court*, 51 FEDERAL L. REV. 129 (2023).

308. Paul Chamberlin, *Mining Chief Lashes* Mabo, SYD. MORNING HERALD, 2, July 1, 1993.

309. Richard Court, *Referendum on Mabo Decision Sought*, Media Statement, July 10, 1993; Tim Rowse, *How We Got a Native Title Act*, 65(4) THE AUSTRALIAN QUARTERLY 110, 122 (1993).

310. L.J.M. Cooray, *The High Court in* Mabo*: Legalist or L'égotiste*, *in* MAKE A BETTER OFFER: THE POLITICS OF *MABO* 82, 93 (Murray Goot & Tim Rowse eds., 1994).

311. John Laws, *Interview with Paul Keating, Prime Minister of Australia*, Radio Interview, June 17, 1993, http://pmtranscripts.dpmc.gov.au/release/transcript-8895.

312. Commonwealth, *Parliamentary Debates*, House of Representatives, 2878 (Nov. 16, 1993).

313. *See generally* Rowse, *supra* note 309; Maureen Tehan, *A Hope Disillusioned, and Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the Native Title Act*, 27 *M.U. L. REV.* 523, 538-51 (2003).

V. THE IMPACT OF *MABO*

In the 1980s the Australian government failed to enact Aboriginal land rights legislation, let alone open treaty negotiations. Concerted opposition from State governments and the federal Opposition stymied progress, and the Commonwealth government abandoned its efforts.[314] The *Mabo* decision fundamentally changed the political dynamics; it "thrust Aboriginal land rights to the top of the national political agenda for almost a year."[315] Prime Minister Paul Keating described *Mabo* as offering the potential for his government to provide justice to "Aboriginal Australians . . . in a way that [not only] keeps the country cohesive" but moves us "closer to a united Australia."[316] Without *Mabo* there would not be a *Native Title Act*.

This is not to downplay the limitations in the Act itself. The *NTA* was a compromise. Aboriginal and Torres Strait Islander peoples had to accept that native title was extinguished across vast portions of the country and that compensation for much of that extinguishment would not be provided. And yet, at the same time, the Act understood the High Court decision as "something more than a threat to Australia's land tenure system;"[317] it set out a workable path for the determination and protection of native title. In this Section we explore the impact of *Mabo* by examining the *NTA* in detail and considering whether it has contributed to unravelling the Doctrine of Discovery in Australia.

A. *Context: A Limited Legal Response*

The *Native Title Act* was finally passed by the Australian Parliament in 1993.[318] Intended to codify the *Mabo* decision, the Act has four objectives. It aims to: (1) provide for the recognition and protection of native title; (2) establish the ways future dealings affecting native title may proceed; (3) establish a mechanism for determining claims to native title; and (4) provide for the validation of past acts invalidated because of the existence of native title.[319] As this last objective suggests, the Act tries to balance Indigenous and non-Indigenous peoples' rights to land. Indeed, as its

314. WILLIAMS & HOBBS, *supra* note 117, at 37-38.

315. FRANK BRENNAN, ONE LAND, ONE NATION: *MABO* – TOWARDS 2001 viii (1995).

316. Paul Keating, *Speech by the Prime Minister* (Speech delivered at the NSW Labor Party State Conference, Sydney, June 13, 1993); Commonwealth, *Parliamentary Debates*, House of Representatives, 2883 (Nov. 16, 1993).

317. Rowse, *supra* note 309, at 131.

318. *Native Title Act 1993* (Cth) (Austl.).

319. *Native Title Act 1993* (Cth) s 3 (Austl.).

preamble explains, broadly the Act is "intended to further advance the process of reconciliation among all Australians." It acknowledges explicitly:

> The people whose descendants are now known as Aboriginal peoples and Torres Strait Islanders were the inhabitants of Australia before European settlement. They have been progressively dispossessed of their lands. This dispossession occurred largely without compensation, and successive governments have failed to reach a lasting and equitable agreement with Aboriginal peoples and Torres Strait Islanders concerning the use of their lands . . . . The needs of the broader Australian community require certainty and the enforceability of acts potentially made invalid because of the existence of native title. It is important to provide for the validation of those acts.[320]

The Act also adopted a definition of native title drawn from Justice Brennan's judgment in *Mabo (No 2)*. Section 223(1) of the *Native Title Act* provides:

> The expression *native title* or *native title rights and interests* means the communal, group or individual rights and interests of Aboriginal peoples or Torres Strait Islanders in relation to land or waters, where:
>
> (a) the rights and interests are possessed under the traditional laws acknowledged, and the traditional customs observed, by the Aboriginal peoples or Torres Strait Islanders; and
>
> (b) the Aboriginal peoples or Torres Strait Islanders, by those laws and customs, have a connection with the land or waters; and
>
> (c) the rights and interests are recognised by the common law of Australia.[321]

Aboriginal and Torres Strait Islander communities bear the burden of proving each of these three elements.

The *NTA* privileges conciliation. Aboriginal or Torres Strait Islander communities must apply to the Federal Court to have their native title recognized.[322] Applications are referred to the National Native Title

320. *Native Title Act 1993* (Cth) preamble (Austl.).
321. *Native Title Act 1993* (Cth) s 223(1) (Austl.).
322. *Native Title Act 1993* (Cth) pt 6 (Austl.).

Tribunal (NNTT).[323] The NNTT is an independent statutory body that mediates between the parties, assists in the negotiation of Indigenous Land Use Agreements, and can also conduct reviews and special inquiries. Once the application is registered on the Native Title Register, the parties are encouraged to mediate. If mediation is unsuccessful, the claim may go to trial for a decision as to whether native title exists or not. The focus on mediation has worked. As of July 11, 2023, 593 title determinations have been made, with 470 by consent and 67 unopposed. Of those 593 determinations, 485 have held that native title exists in part or all of the determination area.[324]

The Act requires native title holders protect and manage their native title and ensure certainty for governments and other parties interested in accessing land and waters by forming a corporation.[325] These entities are called Prescribed Bodies Corporate (PBC) because their obligations are set out in the *NTA*, the *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (Cth)[326] and accompanying regulations. While these instruments impose certain requirements, the regime differs from the mainstream *Corporations Act 2001* (Cth), which allows PBCs to better reflect and act for the unique interests of its members. PBCs are the point of contact for government and other parties who wish to undertake activities on land subject to native title. PBCs must consult and obtain the consent of native title holders before making any decision that could surrender or affect native title rights and interests. They may also hold money (from compensation payments or benefit sharing agreements from mining) in trust for native title holders, and engage in broader cultural, social, and economic activities. The Quandamooka Yoolooburrabee Aboriginal Corporation, for instance, operates tourism benefits, tenders for business contracts, and performs cultural services.[327]

The *NTA* has proven significant, but before examining its impact in detail, two points are important to note. First, the *NTA* was only one piece of a planned larger legislative response to *Mabo* that had been negotiated

323. *Native Title Act 1993* (Cth) pt 6 (Austl.).

324. National Native Title Tribunal, *Statistics*, http://www.nntt.gov.au/Pages/Statistics.aspx.

325. *Native Title Act 1993* (Cth) pt 2 div 6 (Austl.). *See also Native Title (Prescribed Bodies Corporate) Regulations 1999* (Cth) reg 6 (Austl.). Note the similarities with the Alaska Native Claims Settlement Act 1971, which vests land titles in regional corporations and local village corporations that manage land and distribute funds but do not have self-government powers. Although this was transferred via legislation, native Alaskans were involved in the legislative process; *see* Harry Hobbs & George Williams, *Treaty-Making in the Australian Federation*, 43 M.U.L.R. 178, 192-94 (2019).

326. *Corporations (Aboriginal and Torres Strait Islander Act) 2006* (Cth) (Austl.).

327. *See* Quandamooka Yoolooburrabee Aboriginal Corporation, http://www.qyac.net.au/.

with Indigenous representatives.[328] It was to be accompanied by a land and social justice package. Conscious that many Aboriginal and Torres Strait Islander communities would not be able to obtain recognition of their native title, Parliament passed legislation to establish a Land Fund and an Indigenous Land Corporation.[329] The now Indigenous Land and Sea Corporation (ILSC) was initially provided with indexed funding of AUD 121 million a year for 10 years.[330] Its role is to purchase land and water rights and return it to Indigenous communities and thereby assist them in attaining social, economic, and cultural benefits. In debate on the bill in Parliament, Mark Latham MP explained:

> This land fund is essential not only for the future of Aboriginal people in Australia but also for the concept of reconciliation about the past. It provides a fund and investment strategy from which Aboriginal people will derive ongoing opportunities to purchase land of economic and cultural significance. In one respect, it represents reparations of $1.5 billion over the next 10 years—reparation and compensation for the dispossession of Aboriginal people.[331]

The ILSC has been hampered by an inadequate budget, but it has nonetheless proven effective in building the Indigenous land estate. From its establishment in 1995 to September 2020, the ILSC had purchased 268 land and water interests covering just under 24,000 square miles. More than 75% of this total had been returned to Indigenous title holders.[332]

However, the third planned Act was never passed. The social justice package was directed at a broader comprehensive response to *Mabo*.[333] It was intended to deal with compensation for dispossession of land and the dispersal of Indigenous communities, recognize "the right to control our natural resources and environment and the right to self-determination," and target "the wholesale violation of our basic citizenship rights, like a decent standard of health, the right to an education, rights to housing and

328. Australian Law Reform Commission, *Review of the Native Title Act 1993* (Discussion Paper No 82, October 2014) 63-64 [3.75].

329. *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995* (Cth) (Austl.).

330. *Land Fund and Indigenous Land Corporation (ATSIC Amendment) Act 1995*, s 192Z–193AA.

331. Commonwealth, *Parliamentary Debates*, House of Representatives, 1762 (March 8, 1995).

332. INDIGENOUS LAND AND SEA CORPORATION, UNLOCKING THE INDIGENOUS ESTATE: CORPORATE PLAN 2020-201 STRATEGY TO 2024 8 (2020).

333. ABORIGINAL AND TORRES STRAIT ISLANDER COMMISSION, RECOGNITION, RIGHTS, AND REFORM: A REPORT TO GOVERNMENT ON NATIVE TITLE SOCIAL JUSTICE MEASURES (1995).

essential services and the right to equality before the law. Significantly it was also directly aimed at [Indigenous] future economic development."[334] The failure to enact the social justice package placed significant pressure on the native title system that it was not intended to bear.[335]

Pressure was soon increased. While the *NTA* was a compromise, two events in 1996 changed the terms of that bargain. The national election in March brought into government many individuals who had argued that *Mabo* had been wrongly decided and had voted against the *NTA*.[336] In December that year, the High Court handed down its decision in *Wik Peoples v Queensland*.[337] The question for the Court was whether pastoral leases, which made up a significant portion of the country, automatically extinguished native title. The Court held that because pastoral leases do not necessarily grant exclusive possession to the leaseholder; thus, they do not extinguish native title.[338] The Court also noted however, that where native title rights are in conflict or inconsistent with pastoral interests, the rights of pastoralists would prevail.[339]

Wik was greeted with considerable angst among politically conservative interests who had recently found themselves in government. The National Farmers Federation declared that "the decision has just about ended Aboriginal reconciliation,"[340] while Prime Minister John Howard paraded a map of Australia on national television putatively showing 78% of the continent "under threat" of native title claims.[341] These claims were legally baseless, but they had the desired political effect. In 1998, the Parliament passed amendments to the *NTA*.[342] These amendments increased flexibility by introducing Indigenous Land Use Agreements (ILUAs), a mechanism that provided for voluntary and pragmatic settlements. However, the Act was specifically intended to deliver—in the words of the

334. Mick Dodson, *The Limits of Change*, *in* THE LIMITS OF CHANGE: *MABO* AND NATIVE TITLE 20 YEARS ON xvii, xviii (Toni Bauman and Lydia Glick eds., 2012).

335. Australian Law Reform Commission, *supra* note 328, at 66 [3.87].

336. Patrick Emerton & Jeffrey Goldsworthy, *The Brennan Court*, *in* THE HIGH COURT, THE CONSTITUTION AND AUSTRALIAN POLITICS 261, 270 (Rosalind Dixon & George Williams eds., 2015).

337. *Wik Peoples v Queensl.* (1996) 187 CLR 1 (Austl.).

338. *Id.* at 132–33 (Toohey, J); 155, 167 (Gaudron, J.); 168 (Gummow, J.); 238 (Kirby, J.) (Austl.).

339. *Id.*

340. Asa Wahlquist, *Cultivating Fear*, THE WEEKEND AUSTRALIAN, 23, October 25, 1997.

341. Ravi de Costa, *Reconciliation as Abdication*, 37(4) AUSTRALIAN J. SOC. ISSUES 397, 399 (2002).

342. *Native Title Amendment Act 1998* (Cth) (Austl.).

Deputy Prime Minister—"bucket loads of extinguishment."[343] It succeeded. Among other elements, the right to negotiate was narrowed, the threshold test for claims was increased, and native title was extinguished on mining and pastoral leases granted prior to 1994.[344] Together, the amendments weakened the prospect that the *NTA* could unravel colonialism in Australia.

B. *Opportunities*

The legislative response to *Mabo* proved weaker than initially planned. The vital social justice package was not enacted, and the signature reform, the *NTA*, was undermined in important respects over subsequent years.[345] Nevertheless, the *NTA* has proven a key element in Australia's belated and haphazard attempt to come to terms with colonization. For those who have had their native title rights and interests recognized by Australian law, it has enabled them to re-empower their traditions and culture. It has "paved the way for a new relationship between Indigenous and non-Indigenous Australians. It has opened the door on a range of possibilities that were in the past, just dreams."[346] A successful outcome also reflects the determination and spirit of Indigenous communities. In celebrating the positive determination of Queensland's largest ever native title determination, for example, Kuuku Ya'u elder Father Brian Claudie exclaimed:

> I will get the clapsticks and I will sing. In the back of my mind, I'm thinking about the old people and the culture they have passed on. This claim is special for this generation. It's very important for the future children, generation to generation to generation.[347]

Nevertheless, many challenges remain. In this Part, we assess the positive impact and opportunities provided by the *NTA* as the primary response to *Mabo (No 2)*.

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343. Interview with Deputy Prime Minister Tim Fischer (John Highfield, ABC RADIO NATIONAL, Sept. 4, 1997).

344. Garth Nettheim, *The Search for Certainty and the Native Title Amendment Act 1998 (Cth)*, 22(2) U.N.S.W. L.J. 564 (1999); Gillian Triggs, *Australia's Indigenous Peoples and International Law: Validity of the Native Title Amendment Act 1998 (Cth)*, 23(2) M.U. L. REV. 372 (1999).

345. *See generally* LISA STRELEIN, COMPROMISED JURISPRUDENCE: NATIVE TITLE CASES SINCE *MABO* (2009).

346. Glen Kelly & Stuart Bradfield, *Winning Native Title, Or Winning Out of Native Title? The Noongar Settlement*, 8 INDIGENOUS L. BULL. 14, 14 (2012).

347. Scott Stewart, *Signing of Historic FNQ Native Title Determination Celebrated*, Media Statement, November 26, 2021, https://statements.qld.gov.au/statements/93920.

1. Land justice

Mabo (No 2) and the *NTA* have contributed to a significant Indigenous land estate. The most recent statistics available from the NNTT are dated 30 June 2022. They report that native title has been recognized over a total area of 1,461,719 square miles—approximately 49.2% of the land mass of Australia.[348] An additional 59,318 square miles of sea (below the high-water mark) is also recognized native title.[349] This is a considerable amount of land. However, it is important to remember that native title is a bundle of rights, and it does not necessarily confer exclusive possession. Indeed, most registered native title confers only non-exclusive rights to the Indigenous groups concerned. This includes the right to protect sacred sites, to hunt and fish, to camp or live on country, the right to conduct ceremony, or the right to have a say in the management or development of the land, provided it does not conflict with the rights of a non-native title holder.[350] Exclusive native title which confers the right to exclude non-native title holders accounts for around 435,916 square miles or around 14.6% of the country.[351] Nevertheless, even exclusive native title does not give the right to stop developments, just a right to negotiate.

The Indigenous land estate under native title is significant, but it does not tell the whole story. Native title is not the only legal regime under which Aboriginal and Torres Strait Islander peoples' rights to lands and waters is recognized under Australian law. Motivated by the desire to provide some measure of justice to Aboriginal and Torres Strait Islander peoples, prior to recognition of native title in *Mabo (No 2)*, several governments across Australia had negotiated individual settlements with Indigenous groups to grant or recognize rights to land.[352] Some of these legal regimes delivered expansive rights. For example, the *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA)[353] gave almost 40,000 square miles of inalienable freehold land to traditional owners in the far north-west of South Australia.[354] While most of these agreements were

348. FEDERAL COURT OF AUSTRALIA, ANNUAL REPORT 2021-2022: PART 5: REPORT OF THE NATIONAL NATIVE TITLE TRIBUNAL 87 (2022).

349. *Id.*

350. *W. Austl. v Ward* (2002) 213 CLR 1, [95] (Austl.).

351. National Native Title Tribunal, *Native Title Determinations*, October 1, 2022, http://www.nntt.gov.au/Maps/Determinations_map.pdf.

352. *Aboriginal Lands Trust Act 1966* (SA) (Austl.)*; Aboriginal Lands Act 1970* (Vic) (Austl.); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) (Austl.); *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (Austl.); *Aboriginal Land Rights Act 1983* (NSW) (Austl.); *Maralinga Tjarutja Land Rights Act 1984* (SA) (Austl.); *Aboriginal Land Act 1991* (Qld) (Austl.); *Torres Strait Islander Land Act 1991* (Qld) (Austl.).

353. *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) (Austl.).

354. *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA) ss 15, 17 (Austl.).

'much more limited in scope',[355] they nonetheless constituted a grant of land title to Aboriginal and Torres Strait Islander communities.

One legislative regime is particularly significant. The *NT Land Rights Act* differs considerably from the *NTA*. As we have seen, native title may confer exclusive or non-exclusive possession. In contrast, Aboriginal Land under the *NT Land Rights Act* provides traditional Aboriginal owners ("Traditional Owners") with grants of fee simple land, held by a land trust, and with rights to control access via a permit system. The Act provides Traditional Owners with a veto right over approvals for mining and petroleum exploration licenses.[356] The Act also requires mining companies to pay royalties for projects on Aboriginal land. Data in 2021 reports that about $230 million is paid in royalties each year, while $3.2 billion has been collected into the Aboriginal Benefits Account managed by the Australian government.[357] The account is divided between direct payments to Traditional Owners, Land Councils to support communities obtaining land, and in grants to Indigenous organizations. The Act has proved significant in providing a land base for many Aboriginal peoples and communities: as of 2022, 50% of the Territory's land mass and 85% of its coastline is Aboriginal land under the Act.[358] Other land rights regimes exist across the continent.

It is difficult to clearly delineate the total proportion of lands and waters held by Aboriginal and Torres Strait Islander peoples across native title and various state-based land rights legislation. In 2021, however, *Guardian Australia* developed a database of land ownership across outback Australia. On their assessment, Aboriginal and Torres Strait Islander peoples hold exclusive possession native title and fee simple to around 26% of Australia's landmass. When non-exclusive native title is included, that number rises to 54% of the country (approx. 1.6 million square miles).[359] While this generally covers less heavily settled areas of the country, it compares favorably to the United States where Indian nations in the lower

355. Tehan, *supra* note 313, at 530.

356. *Aboriginal Land Rights (Northern Territory) Act* (Cth) s 42 (Austl.). The NTLRA defines "Traditional Owners" as "a local descent group of Aboriginals who (a) have common spiritual affiliations to a site on the land, being affiliations that place the group under a primary spiritual responsibility for that site and the land; and (b) are entitled by Aboriginal tradition to forage as of right over that land." *Aboriginal Land Rights (Northern Territory) Act* (Cth) s 3 (Austl.).

357. Jane Bardon, Mining Royalties Not Lifting Indigenous Communities Like Tennant Creek Out of Poverty, Community Leader Says, ABC NEWS, September 13, 2021, https://www.abc.net.au/news/2021-09-13/closing-the-gap-mining-royalties/100440358.

358. Northern Land Council, *Our Land and People*, https://www.nlc.org.au/our-land-sea.

359. Josh Nicholas et al., *Who Owns Australia?*, GUARDIAN AUSTRALIA, May 17, 2021, https://www.theguardian.com/australia-news/ng-interactive/2021/may/17/who-owns-australia.

forty-eight states own about 87,500 square miles of land in trust with the United States and individual Indians own about 17,187 square miles in trust. The native title and land rights regimes in Australia have proven significant in unpacking the international law of colonialism.

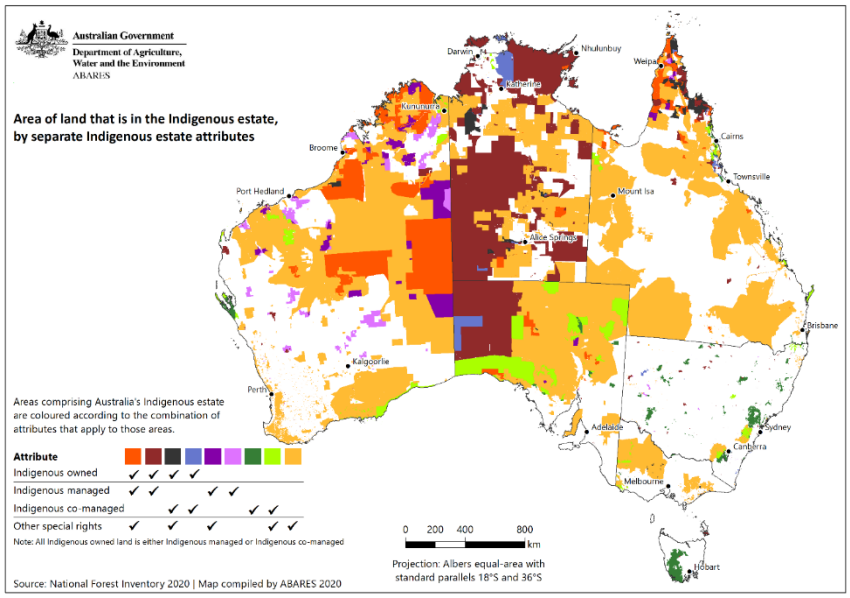

Figure 1: Map of the Indigenous Land Estate in Australia

Map reproduced with the kind permission of the National Native Title Tribunal

2. Financial compensation

It is only recently that the High Court has considered the question of financial compensation for extinguishment of native title.[360] As we noted above, a slim majority of the court in *Mabo* ruled that extinguishment did not give rise to a right of compensation at common law. However, because of the operation of the *Racial Discrimination Act*,[361] compensation would be available for any acts undertaken after 1975. In the *Timber Creek Case*,[362] the Ngaliwurru and Nungali peoples sought compensation for fifty-three

360. *See generally* WILLIAM ISDALE, COMPENSATION FOR NATIVE TITLE (2022).

361. *Racial Discrimination Act 1975* (Cth) s 9 (Austl.).

362. *N. Terr. v Griffiths (Deceased) and Jones on behalf of the Ngaliwurru and Nungali People* (2019) 93 ALJR 327 ('*Timber Creek*') (Austl.).

acts of extinguishment across 0.49 square miles of their country that extinguished or impaired their native title, carried out by the Northern Territory government between 1980 and 1996.

The High Court outlined a three-step approach to assessing compensation. This includes the value of economic loss, calculation of simple interest on that loss, and the value of cultural, or non-economic, loss. The Court held that the Ngaliwurru and Nungali peoples were entitled to $320,250 in compensation for economic loss, and $910,100 in interest.[363] On the third component, the court ruled that $1.3 million was appropriate for the cultural loss.[364] The court reached this figure by noting that cultural loss is to be calculated on a case-by-case basis, to "translate" the "spiritual hurt" and assign an amount that would fit with community expectations.[365] The larger figure was appropriate here because every act that impairs native title is akin to punching "holes in . . . a single large painting"[366] such that its consequences are "incremental and cumulative."[367] The court explained by reference to Aboriginal peoples' religious-cultural concept of the Dreaming:

> [A]n act can have an adverse effect by physically damaging a sacred site, but it can also affect a person's perception of and engagement with the Dreamings because the Dreamings are not site specific but run through a larger area of the land; and as a person's connection with country carries with it an obligation to care for it, there is a resulting sense of failed responsibility when it is damaged or affected in a way which cuts through the Dreamings.[368]

The decision has received considerable attention. Native title expert Sean Brennan has described it as a "moment of reckoning for Australia" requiring the country to "stop and reflect on what harm is involved, when governments take land from Aboriginal people."[369] Certainly the dollar value has attracted notice. If the Ngaliwurru and Nungali peoples are entitled to $2.53 million in compensation for fifty-three acts of extinguishment over 0.49 square miles, just what might the total bill amount to for over 1.5 million square miles of land subject to native title? Even if only

363. *Id.* at [238].

364. *Id.*

365. *Id.* at [155].

366. *Id.* at [205].

367. *Id.* at [206].

368. *Id.*

369. Sean Brennan, *Timber Creek and Australia's Second Chance to Grasp the Opportunity of* Mabo, AUSTRALIAN PUBLIC LAW (Apr. 3, 2019), https://www.auspublaw.org/blog/2019/04/timber-creek-and-australias-second-chance.

1% of native title areas are subject to compensation, the bill will be in the tens of billions of dollars.[370] Unsurprisingly, the Federal Court anticipates the initiation of a "significant number of compensation claims."[371] Some are already emerging.[372] For the Ngaliwurru and Nungali peoples at least, the decision is "a small step in the long continuing journey to set things right."[373]

3. State acknowledgment of effects of colonization

The *NTA* was intended to support the process of reconciliation between Indigenous and non-Indigenous Australians. While determinations do not involve formal processes of truth telling, they do often include apologies for dispossession and colonization given by state actors. These apologies can be criticized as forms of cheap symbolism, but they are important and significant to many Aboriginal and Torres Strait Islander peoples. For instance, as part of a native title settlement between the Noongar people of South West Western Australia and the State government, the Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA).[374] The first piece of legislation in Noongar language, the Act recognizes the Noongar people as the traditional owners of their lands, and the "living cultural, spiritual, familial and social relationship" Noongar people have with their country.[375] On the day the Bill was introduced into the Parliament, Noongar elder Elizabeth Hayden told reporters:

> My heart is weeping with joy. We live with hope because we've been knocked from pillar to post for generations. We've always lived in hope that we would get to a point of being

370. ISDALE, *supra* note 360, at 7-8; Michael Pelly, *High Court's Timber Creek Ruling the Biggest Native Title Decision since Mabo*, AUSTRALIAN FINANCIAL REVIEW, March 14 2019, https://www.afr.com/companies/professional-services/high-courts-timber-creek-ruling-the-biggest-native-title-decision-since-mabo-20190313-h1cc2f.

371. FEDERAL COURT OF AUSTRALIA, ANNUAL REPORT 2016-2017 72 (2017).

372. Isabella Huggins & Sarah Collard, *WA Indigenous group's $290 Billion Compensation Claim could become one of World's Biggest Payouts*, ABC NEWS, December 16, 2019, https://www.abc.net.au/news/2019-11-29/$290-billion-wa-native-title-claim-launched/11749206.

373. Chris Griffiths, Dora Griffiths & Alana Hunt, Northern Territory of Australia v. Griffiths*: The Landmark Native Title Compensation Case in the Tiny Town of Timber Creek*, 18 ANLA ARTS BACKBONE 4, 5 (2019).

374. *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA) (Austl.).

375. *Id.*

> acknowledged as the first people of this nation . . . . The past is past, but we need to move forward to a better future.[376]

Other apologies are equally significant. In 2001, the Aboriginal peoples of Cape York reached an Indigenous Land Use Agreement with mining company, Comalco and the Queensland government. The Settlement recognized traditional ownership and included a range of economic and cultural components.[377] At the signing of the Agreement, the Acting Chief Executive of Comalco apologized that it had taken more than forty years to "face up to unfinished business."[378] The Queensland government also apologized. Premier Peter Beattie delivered a formal written apology to the people of Mapoon, expressing "sincere regret" for government "actions taken between 1950 and 1963 under the laws of the time."[379] More recently, in confirming the registration of the Yamatji Nation's native title, Justice Mortimer noted that:

> The recognition given by determination of native title, for those who have long been denied any recognition by Australian law of their deep and abiding connection to their country is a step in the struggle of Aboriginal and Torres Strait Islander peoples to regain what was taken away from them.[380]

Legal recognition, and state acknowledgment of dispossession and injustice, can have a deep psychological impact. Even if these apologies do not unravel the international law of colonialism or overturn the Doctrine of Discovery, they can help to build positive contemporary relations.

C. *Challenges*

The *NTA* has secured real gains for many Aboriginal and Torres Strait Islander peoples and communities. Most significantly, it has substantially enhanced the Indigenous land estate, providing a space for many Aboriginal and Torres Strait Islander peoples to rebuild their nations and communities and develop an economic base within the Australian State. Nevertheless, the *NTA* falls far short as a mechanism to comprehensively

376. AAP, *WA introduces bill recognising Noongar people as traditional land owners*, GUARDIAN AUSTRALIA, October 14, 2015, https://www.theguardian.com/australia-news/2015/oct/14/wa-introduces-bill-recognising-noongar-people-as-traditional-land-owners.

377. *See* Mark McMillan et al., *Obligations of Conduct: Public Law – Treaty Advice*, 44 M.U.L.R. 602, 619 (2020).

378. *Id.* at 620.

379. *Id.*

380. *Taylor on behalf of the Yamatji Nation Claim v State of W. Austl.* [2020] FCA 42 (7 February 2020) 80 (Austl.).

resolve the "unfinished business"[381] of colonization in Australia, let alone unravel the DoD. We have already seen, for example, that native title generally confers non-exclusive rights that exist alongside non-Indigenous peoples' rights and interests. While it can "offer substantial scope for economic development,"[382] non-exclusive rights are often limited in their economic utility. In this Section, we outline several other key limits to the Act.

1. Unavailable for those most affected by colonialism

The benefits of native title are unevenly distributed. An Indigenous community seeking to have their rights and interests in lands and waters recognized must clear two legal barriers. First, they must demonstrate they have maintained a traditional connection to their country since colonization, and second, that there have been no acts of extinguishment on that country. This poses immediate challenges for many Indigenous communities. As the High Court recognized in *Mabo (No 2)*, Aboriginal and Torres Strait Islander peoples "were dispossessed of their land parcel by parcel, to make way for expanding colonial settlement. Their dispossession underwrote the development of the nation."[383] Those whose traditional lands are located in the most heavily colonized areas of Australia are likely to find that "the tide of history has washed away any real acknowledgment of traditional law and any real observance of traditional customs."[384] Native title will not be available.

High Court decisions have intensified this inherent limitation to native title. In *Members of the Yorta Yorta Aboriginal Community v Victoria* ("*Yorta Yorta*"),[385] the High Court imposed a strict legal threshold that makes it very difficult for Indigenous communities to prove that they have maintained a "traditional" connection to the land and thus that they possess native title. The Yorta Yorta are an Aboriginal Nation whose traditional land extends across north-eastern Victoria and southern New South

381. Patrick Dodson, *Beyond the Mourning Gate: Dealing with Unfinished Business*, *in* THE WENTWORTH LECTURES: HONOURING FIFTY YEARS OF AUSTRALIAN INDIGENOUS STUDIES 192 (Robert Tokinson ed., 2015).

382. Maureen Tehan & Lee Godden, *Legal Forms and their Implications for Long-Term Relationships and Economic, Cultural and Social Empowerment: Structuring Agreements in Australia*, *in* COMMUNITY FUTURES, LEGAL ARCHITECTURE: FOUNDATIONS FOR INDIGENOUS PEOPLES IN THE GLOBAL MINING BOOM 111, 122 (Marcia Langton & Judy Longbottom eds., 2012).

383. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1, 69 (Brennan J) (Austl.).

384. *Id.* at 60 (Brennan, J.).

385. *Members of the Yorta Yorta Aboriginal Community v Vict.* (2002) 214 CLR 422 (Austl.) [hereinafter *Yorta Yorta*].

Wales.[386] The Yorta Yorta "were one of the first" Indigenous communities to lodge a claim following the passage of the *NTA*, seeking recognition of their native title over 710 square miles of their country.[387] Yorta Yorta country has been heavily colonized by non-Indigenous people. The application was thus seen as a test case "to show the likely success of native title applications in such areas of Australia."[388] By 5-2, the High Court ruled the Yorta Yorta did not maintain the necessary connection to their traditional country.

The judgment turned on the meaning of the term "traditional" in traditional laws and customs, for the purposes of Section 223 of the *Native Title Act*. The plurality judgment of Chief Justice Murray Gleeson and Justices William Gummow and Kenneth Hayne explained that "traditional" carries with it several elements. Reflecting the vernacular meaning, they held that tradition refers to the transmission of law and custom, such that a traditional law or custom is "one which has been passed from generation to generation of a society."[389] However, the plurality emphasized that "traditional:"

> [C]onveys an understanding of the age of the traditions: the origins of the content of the law or custom concerned are to be found in the normative rules of the Aboriginal and Torres Strait Islander societies that existed before the assertion of sovereignty by the British Crown. It is only those normative rules that are "traditional" laws and customs.[390]

To possess rights and interests that may be recognized by the common law today, the plurality further explained that "the normative system under which the rights and interests are possessed (the traditional laws and customs)" must have "had a continuous existence and vitality since sovereignty."[391]

Because there is an "inextricable" link between a society and its laws and customs,[392] this account requires that an Aboriginal society continue to exist as a political community which acknowledges and observes those traditional laws and customs. If, as a result of massacre, dispossession, or

386. Yorta Yorta Aboriginal Nation, *Yorta Yorta Country*, https://yynac.com.au/yorta-yorta-country/.

387. Wayne Atkinson, *"'Not One Iota' of Land Justice: Reflections on the Yorta Yorta Native Title Claim 1994-2001*, 5 INDIGENOUS L. BULL. (2001) 19.

388. *Yorta Yorta Lose Native Title Case*, ABC RADIO NATIONAL, December 12, 2002, https://www.abc.net.au/worldtoday/stories/s746029.htm.

389. *Yorta Yorta*, *supra* note 385, at 444.

390. *Id.*

391. *Id.* at 444 [47].

392. *Id.* at 447 [55].

other forms of colonial interference, an Aboriginal society ceases to exist, or ceases to observe and acknowledge its laws and customs, the common law will not recognize a claim for native title.[393] This is the case even if the descendants of a society that has been dispersed revitalize and re-assert their laws and customs. In this situation:

> [T]hose laws and customs will then owe their new life to that other, later, society and they are the laws acknowledged by, and customs observed by, *that later society*, they are not laws and customs which can now properly be described as being the existing laws and customs of the earlier society.[394]

The judgment does not only penalize Indigenous nations who have been more heavily affected by colonialism, but "effectively legitimized colonial violence."[395] Monica Morgan, the group coordinator explained, "Our mob knew we were taking a chance trusting the system of the white man . . . but this is like an annihilation of our culture."[396]

This strict standard seeks to preserve the Australian legal system's monopoly on lawmaking.[397] Although it permits some adaption and change within that law and custom to reflect contemporary realities,[398] it requires those laws and customs to originate in the pre-colonial period. In doing so, it adopts a "frozen in time" approach that requires contemporary First Nations groups to emulate a model "Aborigine standing on the hill with a spear against the sunset."[399] It does not allow Aboriginal nations to evolve and adapt in ways that ensure their rights to sovereignty and self-government, and their laws and culture, can be exercised in contemporary Australia. In practice, it means that many Aboriginal and Torres Strait Islander peoples, particularly those whose traditional lands are located in areas that have been most intensely settled and developed by non-Indigenous people, will be unable to demonstrate that they have maintained a "traditional" connection to the land and thus that they possess native title. Indeed, only four native title claims have been registered on the native title

393. *Id.* at 446 [52].

394. *Id.* at 446 [53] (emphasis in original).

395. Federation of Victorian Traditional Owner Corporations, *A Framework for Traditional Owner Treaties: Lessons from the Settlement Act* (Discussion Paper 5, 2021) 5.

396. *Yorta People Vow to Fight On*, THE AGE, Dec. 19, 1998.

397. Kirsten Anker, *Law in the Present Tense: Tradition and Cultural Continuity in* Members of the Yorta Yorta Aboriginal Community v. Victoria, 28 M.U. L. REV. 1, 18 (2004).

398. *Yorta Yorta*, *supra* note 385, at 456 [89] (Gleeson, C.J., Gummow and Hayne, JJ.) (Austl.); *Bodney v Bennell* (2008) 167 FCR 84, 103 [74] (Austl.).

399. Transcript of Proceedings, *Members of the Yorta Yorta v State of Vict.* (Full Court of the Federal Court, VG34 of 1999, Ron Castan QC, August 19, 1999).

register in Victoria, and only seventeen in New South Wales.[400] No claims have been registered in Tasmania or the Australian Capital Territory.

The two judges in dissent offered a more accommodating approach. Justices Michael Kirby and Mary Gaudron held that "traditional" connection does not need to be physical, nor does it require continuing occupancy. Traditional connection can be maintained through spiritual connection.[401] These judges held further that whether a community continues to exist and continues to observe their traditional laws and customs is a question of whether, following the British assertion of sovereignty "there have been persons who have identified themselves and each other as members of the community."[402] The dissent recognized the challenges that First Nations peoples in the southeast of Australia would face in obtaining native title.

2. Slow, expensive, and bureaucratic

The native title process has been frequently criticized as slow, overly complex, bureaucratic, and expensive. Determination of native title operates as a judgment against the "world at large."[403] This means that all parties "who hold or wish to assert a claim or interest in respect of the defined area of land" need to be represented in proceedings or conciliations.[404] This can include several Indigenous nations with overlapping or conflicting claims over land, as well as pastoralists, mining interests, and state and federal governments. Finalizing areas of common ground can be difficult and lengthy. Governments can also move slowly. Even where the parties agree to conciliation, the process can be lengthy. A 2015 report found that the mean time it took for an application to be determined was more than six years.[405] As this suggests, determinations can drag well beyond this timeframe.

Consider a few examples. The Gumbaynggirr Peoples of the mid-north coast of NSW were finally successful in registering their claim in 2014 after seventeen years.[406] That same year, the Kokatha people in South

400. National Native Title Tribunal, *National Native Title Register*, www.nntt.gov.au/searchRegApps/NativeTitleRegisters/Pages/Search-National-Native-Title-Register.aspx.

401. *Yorta Yorta*, *supra* note 385, at 460.

402. *Id.* at 464 [117].

403. *Dale v W. Austl.* [2011] FCAFC 46 (31 March 2011) [92] (Austl.).

404. *W. Austl. v Ward* (2000) 99 FCR 316, 368–9 [190] (Beaumont and von Doussa, JJ.) (Austl.).

405. Monica Tan & Nick Evershed, *Native Title Review Finds Process Slow, Resource Intensive and Inflexible*, GUARDIAN AUSTL., June 29, 2015, https://www.theguardian.com/australia-news/2015/jun/29/native-title-review-finds-process-slow-resource-intensive-and-inflexible.

406. *Phyball on behalf of the Gumbaynggirr People v A-G (NSW)* [2014] FCA 851 (Austl.).

Australia finalized a consent determination over more than 13,000 square miles of their country that had taken eighteen years.[407] In 2022, the Wakka Wakka people in Southern Queensland celebrated the finalization of their native title claims, in a process that had taken twenty five years.[408] That same year marked the culmination of a twenty eight year fight by the Nukunu people in the north of South Australia.[409] These victories speak to the determination of Indigenous nations across Australia, but they are also a signal failure of the native title system. Only one of the original Nukunu claimants survived to witness their success. Nukunu elder Lindsay Thomas lamented "We have had all that sadness since that first claim."[410] The delay in the native title system has long been recognized. In 2012, Brian Wyatt, CEO of the National Native Title Council noted "we are tired and weary of our old people dying before decisions are made on the native title."[411] These examples reveal the situation has not improved.

Attempts have been made to simplify the process and expedite agreements. As we noted above, the 1998 amendments introduced ILUAs.[412] These are voluntary agreements that may be struck between native title groups and other groups concerning the use of land and waters in the absence of the costly and lengthy native title determination process.[413] Designed to promote quicker, flexible, and pragmatic settlements, the process has proved popular for many native title groups. As of July 2023, there are 1,450 ILUAs registered with the NNTT, compared to 584 native title determinations.[414] Nevertheless, ILUAs are not appropriate or desired in all cases. More needs to be done to simplify and expedite native title determinations.

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407. *Starkey v State of S. Austl.* [2014] FCA 924 (Austl.); The Kokatha Native Title Claim was registered on November 17, 2014 (File No. SC2014/00).

408. *Bell on behalf of the Wakka Wakka People #3 v State of Queensl. [No 2]* [2022] FCA 370 (Austl.).

409. *Thomas on behalf of the Nukunu People (Area 2) Native Title Claim v State of S. Austl.* [2022] FCA 48 (Austl.).

410. Georgia Roberts & Gillian Aeria, *Nukunu People Win Native Title Fight After 28 Years of Struggle*, ABC NEWS, February 3, 2022, https://www.abc.net.au/news/2022-02-03/nukunu-native-title-claim-resolved-after-28-years/100801320.

411. Sally Sara, *Indigenous Leaders Want Faster Native Title Process*, ABC PM, June 6, 2012.

412. *Native Title Amendment Act 1998* (Cth), Schedule 1, item 9, substituting pt 2, div 3, subdiv B (Austl.).

413. Fred Tanner, *Land Rights, Native Title and Indigenous Land Use Agreements*, *in* INDIGENOUS AUSTRALIANS AND THE LAW 147, 157 (Martin Hinton, Daryle Rigney & Elliott Johnson eds., 2d 2008).

414. National Native Title Tribunal, *supra* note 324. Note that many native title determinations include Indigenous Land Use Agreements.

3. No recognition of self-government

Colonization in Australia proceeded on the basis that the British acquisition of sovereignty extinguished all pre-colonial rights and interests. We have seen that in *Mabo (No 2)*, the High Court dismissed this assumption, finding that Aboriginal and Torres Strait Islander peoples' rights and interests in land survived.[415] In recognizing that the source of native title rights and interests is the system of traditional laws and customs of the Indigenous community, *Mabo (No 2)* implicitly acknowledged that Indigenous societies are a "source of authority."[416] If this is the case, could the common law recognize other rights and interests generated from those normative communities beyond land tenure, including a broader entitlement of self-governance?

The court in *Mabo (No 2)* did not explore these and other potential implications of its reasoning, leaving many to wonder whether elements of Indigenous systems of law and governance survived the British acquisition of sovereignty. The following year, Wiradjuri activist Isabel Coe sought a declaration along these lines, arguing that the Wiradjuri were a sovereign nation, or a "domestic dependent nation, entitled to self-government and full rights over their traditional lands, save only the right to alienate them to whoever they please."[417] In striking out the statement of claim, Chief Justice Anthony Mason held that the decision in *Mabo (No 2)*

> is entirely at odds with the notion that sovereignty adverse to the Crown resides in the Aboriginal people of Australia. The decision is equally at odds with the notion that there resides in the Aboriginal people a limited kind of sovereignty embraced in the notion that they are 'a domestic dependent nation' entitled to self-government and full rights (save the right of alienation) or that as a free and independent people they are entitled to any rights and interests other than those created or recognised by the laws of the Commonwealth, the State of New South Wales and the common law.[418]

The High Court has consistently maintained this position. In *Walker v New South Wales*,[419] the Court rejected a submission that Aboriginal criminal law continues to function today, holding that "Australian criminal law

415. *Mabo v Queensl. [No 2]* (1992) 175 CLR 1 (Austl.).

416. Lisa Strelein, *Symbolism and Function: From Native Title to Indigenous Self-Government*, *in* DIALOGUE ABOUT LAND JUSTICE: PAPERS FROM THE NATIONAL NATIVE TITLE CONFERENCES 127, 128 (2010).

417. *Coe v Commonwealth [No 2]* (1993) 68 ALJR 110, 113 (Austl.).

418. *Id.* at 115.

419. *Walker v N.S.W.* (1994) 182 CLR 45 (Austl.).

does not[] accommodate an alternative body of law operating alongside it."[420] Several years later, in *Yorta Yorta*, three members of the Court held that the assertion of sovereignty by the British Crown "necessarily entailed . . . that there could thereafter be no parallel law-making system."[421] In *Love v Commonwealth; Thoms v Commonwealth*, the Court again confirmed this position.[422]

Native title rights are limited to rights over lands and waters.[423] It does not confer a right to self-government on Indigenous communities and nations.[424] The international law of colonialism cannot be unraveled until and unless Aboriginal and Torres Strait Islander peoples' inherent right to sovereignty and self-government is recognized in Australian law.

D. *Beyond The Native Title Act: Treaties and Constitutional Recognition*

The *NTA* remains a significant legislative achievement, but the challenges inherent to the Act have left many lamenting that it has fallen short of the "promise of *Mabo*."[425] As one High Court Justice remarked in the 2002 native title decision of *Western Australia v Ward*:

> You do not have to be a Marxist to recognise that at least on occasions the dominant class in a society will use its power to disregard the rights of a class or classes with less power. On any view, that is what the dominant classes in Australian society did—and in the eyes of many still do—to the Aboriginal people.[426]

These limitations have stimulated the development of alternative political agreements inside and outside the *NTA*. Intriguingly, the center of momentum in Indigenous law reform in Australia is at the state level

420. (1994) 182 CLR 45, 50 (Mason CJ) (Austl.).

421. *Yorta Yorta*, *supra* note 385, at 444 [44] (Gleeson, C.J., Gummow and Hayne, JJ.) (Austl.).

422. *Love v Commonwealth; Thoms v Commonwealth* (2020) 94 ALJR 198, 209 [25] (Kiefel, C.J.), 223 [102] (Gageler, J.); 237 [199] (Keane, J.); 250 [264] (Nettle, J.); 268 [356] (Gordon, J.) (Austl.). *But see* James Aird & Allan Ardill, *A 'Kind of Sovereignty': Toward a Framework for the Recognition of First Nations Sovereignties at Common Law*, 46 M.U.L.R. (Advance Online).

423. *W. Austl. v Ward* (2000) 99 FCR 316 (Austl.).

424. Sean Brennan et al., *The Idea of Native Title as a Vehicle for Change and Indigenous Empowerment*, *in* NATIVE TITLE FROM MABO TO AKIBA: A VEHICLE FOR CHANGE AND EMPOWERMENT? 2, 4 (Sean Brennan et al. eds., 2015); Jeremy Webber, *Native Title as Self-Government*, 22 U.N.S.W. L.J. 600 (1999).

425. Tehan, *supra* note 313, at 571.

426. *W. Austl. v Ward* (2002) 213 CLR 1, 231 [529] (McHugh J) (Austl.).

rather than with the federal government. Conservative national governments have stymied and obstructed reform for many years, leading Aboriginal and Torres Strait Islander peoples to make a pragmatic decision to pursue legal and political change at the subnational level.[427] While potentially at cross purposes from the desire for a nation-to-nation relationship, their efforts have proved effective in some areas. Relying on the principle of laboratory federalism, action in one state has pushed others to match.

Consider Victoria as an example. The *Traditional Owner Settlement Act 2010* (Vic)[428] was designed to enable Traditional Owners to pursue a negotiated out of court "recognition and settlement agreement"[429] with the state government. Intended "to advance reconciliation and promote good relations"[430] agreements can include provisions relating to land, land-use, funding, and natural resources. Settlements are potentially broader than those under the *NTA*, but agreements are registered as ILUAs making them legally binding, and Traditional Owners are required to withdraw any native title claims and agree not to make future claims.[431] While initially praised by the Aboriginal and Torres Strait Islander Social Justice Commissioner as setting "the benchmark for other states to meet when resolving native title claims,"[432] recognition and settlement agreements remain inadequate as an effort to overcome the doctrine of colonialism. Claims resolution has been lengthy and inefficient, settlement outcomes have proven moderate, and the law continues to deny self-government rights. Rather, it treats Traditional Owner organizations as merely service-delivery organizations and "a communication channel with government,"[433] rather than as decision-making bodies themselves. Only three settlements have been finalized.[434]

Western Australia has also experimented with comprehensive agreements. The Noongar Settlement between the Noongar people and the Western Australian government, for instance, has attracted attention as Australia's first treaty.[435] The $1.3 billion settlement is the largest and most

427. Dani Larkin, Harry Hobbs, Dylan Lino & Amy Maguire, *Aboriginal and Torres Strait Islander Peoples, Law Reform and the Return of the States*, 41 U.Q.L.J. 35.

428. *Traditional Owner Settlement Act 2010* (Vic) (Austl.).

429. *Traditional Owner Settlement Act 2010* (Vic) pt 2 (Austl.).

430. *Traditional Owner Settlement Act 2010* (Vic) s 1 (Austl.).

431. *Traditional Owner Settlement Act 2010* (Vic) ss 10, 30 (Austl.).

432. Aboriginal & Torres Strait Islander Social Justice Commissioner, 'Native Title Report 2011' 8 (Australian Human Rights Commission, 28 October 2011).

433. Harry Hobbs & George Williams, *The Noongar Settlement: Australia's First Treaty*, 39 SYD L. REV. 1, 29 (2018).

434. Federation of Victorian Traditional Owner Corporations, *supra* note 395, at 23.

435. Hobbs & Williams, *supra* note 433.

comprehensive agreement to settle Aboriginal interests in land in Australian history,[436] and includes agreement on rights, obligations and opportunities relating to land, resources, governance, finance, and cultural heritage. The agreement is significant. The Noongar Boodja Trust is granted over 1,235 square miles of Crown land and land-use rights over an additional 77,220 square miles.[437] The government will also provide the Trust with $50 million (indexed) capital transfer payments delivered annually for twelve years.[438] There is no scope for Noongar self-government, but the agreement guarantees Noongar people "a sizeable land base, non-exclusive rights to resources over an extended area, a large and sustained financial contribution from the state government, and enhanced cultural heritage protection."[439] It is hoped the agreement will be followed by more extensive self-government agreements.

Recent developments reveal a shift towards treaty-making in Australia that may ultimately fulfill this hope by accepting Aboriginal and Torres Strait Islander peoples' self-government. We have seen that no official treaty or treaties with Aboriginal and Torres Strait Islander peoples was ever struck. The lack of treaty has left the sovereign pillars of Australia "morally suspect"[440] and "legally shaky."[441] It has also helped create a legal framework that fails to recognize Indigenous Australians' right to sovereignty and self-government.[442] Since 2016, however, several State and Territory governments have committed to rectifying this by entering contemporary treaty processes. Victoria is furthest advanced. In 2018, the State Parliament passed Australia's first treaty Act. The *Advancing the Treaty Process with Aboriginal Victorians Act 2018* (Vic)[443] creates a legislative basis for negotiating a treaty with Aboriginal people in the State. The Act requires that a government recognize an Aboriginal-designed representative body that will work with the government to establish a treaty negotiation framework "so clans or mobs or nations here in Victoria can eventually negotiate

436. Gian De Poloni, *WA Premier Signs $1.3 Billion Noongar Native Title Settlement*, ABC NEWS, June 8, 2015, https://www.abc.net.au/news/2015-06-08/premier-signs-noongar-native-title-settlement/6530434; Western Australia, *Parliamentary Debates*, Legislative Assembly, Colin Barnett, Premier, 7313 (October 14, 2015); Western Australia, *Parliamentary Debates*, Legislative Assembly, Colin Barnett, Premier, 8903 (November 25, 2015).

437. *Land Administration (South West Native Title Settlement) Act 2016* (WA) s 10 (Austl.).

438. Hobbs & Williams, *supra* note 433, at 36.

439. *Id*.

440. Patrick Macklem, *Indigenous Recognition in International Law: Theoretical Observations*, 30 MICH. J. INT'L L. 177, 179 (2008).

441. Mick Dodson, *Sovereignty*, 4 BALAYI: LAW, CULTURE AND COLONIALISM 13, 18 (2002).

442. HOBBS, *supra* note 47, at 15-50.

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

their own treaties."[444] In October 2022, agreement on the treaty negotiation framework was reached, and negotiations are expected to begin in early 2024. Other State and Territory governments have followed Victoria. The Northern Territory, Queensland, South Australia and Tasmania have formally committed to entering treaty processes with the First Nations communities whose traditional lands fall within their borders.[445] In February 2021, the Australian Capital Territory government announced funding to facilitate a conversation with the Ngunnawal people "about what treaty means in the ACT and what a treaty process will look like."[446]

It is too early to tell whether the various treaty processes across the country will result in meaningful settlements. However, they have captured attention as Australians consider the place and status of Aboriginal and Torres Strait Islander peoples within the nation and the role of the international law of colonialism in initially framing that conversation. Treaty is increasingly part of this conversation for three reasons. First, treaty has long been an aspiration of Aboriginal and Torres Strait Islander peoples. For generations, Indigenous Australians have called for a formal treaty or treaties to recognize their sovereignty "and set out mutually agreed terms for our relationship with the Australian government."[447] Second, as a political agreement secured via negotiation, treaty respects Aboriginal and Torres Strait Islander peoples' status as distinct political communities and places them on an equitable plane with the Australian State. Assuming a fair negotiation process can be secured, negotiation can also improve the likelihood that important rights and interests will be considered.[448]

Finally, treaty can step outside narrow legal windows imposed by the *NTA* or inherited because of Australia's unique approach to colonization. Contemporary international human rights instruments concerning Indigenous peoples and modern comprehensive land settlements being

444. Lorena Allam, *Victoria a Step Closer to Indigenous Treaty with Creation of First Peoples' Assembly*, GUARDIAN AUSTRALIA, April 11, 2019, https://www.theguardian.com/australia-news/2019/apr/11/victoria-a-step-closer-to-indigenous-treaty-with-creation-of-first-peoples-assembly.

445. *See* Williams & Hobbs, *supra* note 117, at Ch 8. *See also* Kyam Maher, *Next Steps in Implementing the Uluru Statement*, Media Release, July 4 2022, https://www.premier.sa.gov.au/media-releases/news-items-2022/next-steps-in-implementing-the-uluru-statement; Peter Gutwein, *Next Steps on Pathway to Truth-Telling and Treaty*, Ministerial Statement, March 1, 2022, https://www.premier.tas.gov.au/site_resources_2015/additional_releases/next_steps_on_pathway_to_truth-telling_and_treaty.

446. Jasper Lindell, *Funding for First Indigenous Treaty Process in ACT Budget*, CANBERRA TIMES, February 7, 2021, https://www.canberratimes.com.au/story/7115029/funding-for-first-indigenous-treaty-process-in-act-budget/.

447. Patrick Dodson, *Navigating a Path Towards Meaningful Change and Recognition*, *in* IT'S OUR COUNTRY: INDIGENOUS ARGUMENTS FOR MEANINGFUL CONSTITUTIONAL RECOGNITION AND REFORM 180, 181 (Megan Davis and Marcia Langton eds., 2016).

448. Hobbs & Williams, *Noongar Settlement*, *supra* note 433 at 7-10.

negotiated in Canada reveal that modern treaties must recognize that Indigenous nations retain an inherent right to sovereignty. Treaty in Australia must empower Indigenous peoples with some form of decision-making and control that amounts to a form of self-government. Such an outcome is not possible under the *NTA*, nor can it be granted by the judiciary. It requires a political settlement secure via treaty.

Contemporary treaties differ from those negotiated in colonial periods. They are more technical and legally complex and are negotiated against a long history of inequitable relationships. Yet they remain formal agreements defining the status and rights of Indigenous peoples. Treaties acknowledge Indigenous peoples as distinct political communities, are political agreements reached by a fair process of negotiation between equals, and recognize Indigenous peoples' inherent sovereignty by providing for some degree of self-government.[449] In this way, they are a framework for addressing past injustices and building new relationships based on self-determination, justice, and respect. The fact that these processes are occurring at all is significant. It suggests for the first time in Australian history, governments are open to recognizing the status and rights of Indigenous peoples. Nevertheless, it is too early to know whether these processes will result in meaningful settlements that can contribute to unravelling the Doctrine of Discovery.

It is important to note that the move towards treaty has been propelled forward by developments at the national level. Over the last decade, Australians have debated whether and how Aboriginal and Torres Strait Islander peoples should be recognized in the Australian Constitution. In 2017, following a comprehensive Indigenous-led deliberative consultation process across the country, Aboriginal and Torres Strait Islander peoples released the Uluru Statement from the Heart. Grounded in their inherent rights as the "first sovereign Nations of the Australian continent," the powerful Statement calls for three reforms that would empower Indigenous Australians and allow them to take "a rightful place in our own country." Characterized as Voice, Treaty, and Truth, the Uluru Statement calls for a First Nations Voice to be put in the Constitution with the power to advise the Australian Parliament on laws that affect Indigenous peoples, and a Makarrata Commission to oversee a process of treaty making and truth-telling.[450] The Statement explained further, noting "Makarrata is the culmination of our agenda . . . . It captures our aspirations for a fair and truthful relationship with the people of Australia and a better future for our children based on justice and self-determination."[451]

449. *Id.* at 7-14. *See also* Williams & Hobbs, *supra* note 117, at 1-26; Mansell, *supra* note 125.

450. *Uluru Statement from the Heart*, Uluru, May 26, 2017.

451. *Id.*

The Australian government initially dismissed the Uluru Statement.[452] However, a change of government following the federal election in 2022 has revitalized the proposal. In 2023, the government plans to hold a referendum in which Australians will decide whether to change their Constitution to insert an Indigenous representative body that will advise the parliament and government on laws and policies that affect Indigenous Australians.[453] A First Nations Voice will help transform the operation of Australian governance by promoting "Aboriginal participation in the democratic life of the state."[454] In doing so, it holds significant promise of helping to unravel the international law of colonialism.

VI. CONCLUSION

Conquest and colonization have long-term and extremely detrimental impacts on any people or nation. The Euro-American colonization of Indigenous peoples all over the world has produced those same impacts. The international law Doctrine of Discovery has played a large role in colonialism and empire building. In this Article, we have analyzed and contrasted the application of this Doctrine in our respective countries and the inchoate steps taken by the United States and Australia that can be interpreted as attempts to mitigate those negative impacts.

In our opinion, the 1992 Australian High Court case that recognized and enforced the truth about England's colonization of Australia was an admirable step towards dealing with colonialism and the Doctrine. Australia was not *terra nullius*, not empty of peoples and Indigenous governing structures when Lieutenant James Cook claimed the landmass for England in 1770.[455] After *Mabo* rejected *terra nullius* as a legal basis for claiming the continent of Australia in 1992, the Australian Parliament followed the Court's lead and enacted the Native Title Act.[456] As Glen Kelly and Stuart Bradfield explain, "*Mabo* set a new agenda. It broke barriers and created a raft of opportunities that would not have been possible without it."[457] The

452. Harry Hobbs, *The Road to Uluru: Constitutional Recognition and the UN Declaration on the Rights of Indigenous Peoples*, 66:4 AJPH 613 (2020).

453. Lisa Visentin, *Labor Prepares for 'Slow Build' on Voice Referendum as Coalition Demands More Detail*, SYDNEY MORNING HERALD, September 6, 2022, https://www.smh.com.au/politics/federal/labor-prepares-for-slow-build-on-voice-referendum-as-coalition-demands-more-detail-20220906-p5bfsb.html.

454. Megan Davis, *Correspondence, in "Moment of Truth,"* 70 QUARTERLY ESSAY 147, 158 (2018). *See also* Harry Hobbs, 'Special Issue on the Aboriginal and Torres Strait Islander Voice' 34(2) PUB. LR 93-172 (2023).

455. JAMES COOK, CAPTAIN COOK'S JOURNAL DURING HIS FIRST VOYAGE ROUND THE WORLD MADE IN HM BARK "ENDEAVOUR" 1768-71 (1893).

456. *Native Title Act 1993* (Cth).

457. Kelly and Bradfield, *supra* note 346, at 14.

Native Title Act regularized land claims processes in Australia and has resulted in a significant Indigenous land estate. This is impressive. Nevertheless, the Native Title Act has fallen short of its proponents' high hopes. Since then, the High Court has adopted a restrictive interpretation that penalizes Aboriginal and Torres Strait Islander communities most affected by colonization, while the process is slow and limited for those able to avail themselves of the Act. The continuing failure to enact a social justice package that would deal comprehensively with these matters is a source of tension. The Native Title Act has done much but it could do more.

The Uluru Statement from the Heart and the modern-day treaty-making processes underway in Australia offer the potential for a course correction. The prospect of a constitutional First Nations Voice advising the parliament and government on laws and policies that affect Indigenous Australians, and treaties that recognize Indigenous self-government may be some way off, but they would constitute a dramatic step in mitigating the Doctrine and colonization, and a remarkable shift from the pre-*Mabo* era. Together, these three actions by Australia—led by Aboriginal and Torres Strait Islander peoples and communities—are guiding lights for other nations, the United States included, to study and perhaps adopt to counteract the ramifications of colonialism.

In the United States, *Johnson v. M'Intosh* was also based on falsehoods similar to the English claims of *terra nullius* in Australia. Will the United States Supreme Court ever reverse *Johnson* and render a decision such as *Mabo*? Or might the U.S. Congress ever enact a law such as Australia's Native Title Act? Some of the provisions Congress has adopted in the past, as we discuss above, have similar effects; yet the Indigenous land estate in the United States is magnitudes smaller. And regarding the movement in Australia towards treaty-making with Aboriginal peoples and nations, perhaps the U.S. Congress should consider restoring that constitutional process in the United States by reversing the 1871 Act that ended treaty making with Indian nations. A few scholars have stated that its 1871 Act is surely unconstitutional.[458] Perhaps the United States should resume engaging in diplomatic relations with Indian nations and peoples via the constitutionally approved process of treaties. If the United States repealed that 1871 Act and reversed its policy, modern treaties should be negotiated under very different circumstances than in the past. Rather than attempting

458. *E.g.*, David P. Currie, *Indian Treaties*, 10 GREEN BAG 445, 451 (2007) (the author was a professor at Chicago Law School; he argues that the 1871 Act "was flatly unconstitutional"). It is important to note that the decision to stop Indian treaty-making in the first place came about only because of political infighting between the two Houses of Congress. FRANCIS PAUL PRUCHA, AMERICAN INDIAN TREATIES: THE HISTORY OF A POLITICAL ANOMALY 31 (1994).

to take Indian lands and rights through outright fraud,[459] modern treaties should aim to "rectify injustices" and "help build a culture of respect that takes seriously the interests and aspirations" of Indigenous peoples.[460]

Australia started a long way behind the United States in its legal relationship with Indigenous nations. But ever so slowly, it appears to be moving towards a government-to-government treaty-based relationship with Aboriginal and Torres Strait Islander peoples and nations. Soon it might even have a constitutionally entrenched First Nations Voice empowering Indigenous peoples to speak directly to the parliament and government.

Our aim in this Article is to promote understanding of the Doctrine of Discovery and colonialism in our two countries. We hope that this analysis helps Australia and the United States increase their efforts to create more just societies for all their citizens. We also hope that any and all colonizing and colonized countries around the world can find better paths forward out of the international law Doctrine of Discovery and towards a restoration of Indigenous human, sovereign, and commercial rights.

459. *See, e.g.*, The Walking Treaty: Francis Jennings, *The Scandalous Indian Policy of William Penn's Sons: Deeds and Documents of the Walking Purchase*, 37 PA. HIST. 19, 29 (1970).

460. Harry Hobbs & Stephen Young, *Modern Treaty-Making and the Limits of the Law*, 71 U.T. L.J. 234, 235 (2021).