CONSTITUTIONAL RECOGNITION OF AUSTRALIA’S INDIGENOUS PEOPLES: LAW, HISTORY AND POLITICS

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Abstract

When Australians today debate the terms of political association between the peoples indigenous to the Australian continent – the Aboriginal and Torres Strait Islander peoples – and those who have colonised it, they frequently do so using the language of ‘constitutional recognition’. Within the past decade, constitutionally recognising Indigenous peoples has emerged as the leading idea for achieving a just postcolonial settlement in Australia. In academic and broader debates, however, there is little clarity about what exactly ‘constitutional recognition’ is and what it can be expected to achieve.

This thesis examines Indigenous constitutional recognition in historical and theoretical perspective, analysing the period from the 1960s to the present. Viewed historically, Indigenous ‘recognition’ is, the thesis argues, an indeterminate, malleable language of Australian constitutional politics, used by Indigenous and non-Indigenous actors over the past four decades to serve diverse political projects. Drawing on political and constitutional theory, the thesis argues that Indigenous peoples’ struggles over constitutional recognition seek a settler constitutional order that better respects their identities. These struggles target the basic distribution of public power, not only within written, ‘big-C’ Constitutions but also within ‘small-c’ constitutional norms.

The thesis then applies this theoretical account to understand Indigenous constitutional recognition in practice. The central argument is that new forms of recognition are limited by the horizons of politics and identity in which they are negotiated, and are subject to an uncertain future in which their implementation can go in different directions. The thesis reinterprets earlier Indigenous battles over citizenship – the 1967 amendments to the Australian Constitution and the passage of the Racial Discrimination Act 1975 (Cth) – as unappreciated instances of Indigenous constitutional recognition. Flawed and incomplete from the outset, these older forms of recognition have become increasingly inadequate over time, especially as Indigenous politics has shifted from an emphasis on Australian citizenship to Indigenous peoplehood. Turning to contemporary Indigenous struggles for constitutional recognition as peoples, the thesis proposes federalism as a valuable way of understanding and advancing these Indigenous demands. But cautioning against seeing Indigenous–settler federalism as a constitutional endpoint, the thesis concludes that Indigenous constitutional recognition should be understood as an ongoing process of contesting the settler constitutional order in the name of a just postcolonial relationship.
Declaration

This thesis comprises only original work toward the degree of Doctor of Philosophy. Due acknowledgement has been made in the text to all other material used. The thesis is fewer than 100 000 words in length, exclusive of tables and bibliography.

Signed:

Dylan Lino

30 January 2017
Acknowledgements

I grew up on Bundjalung country without realising it. That sort of unawareness isn’t an uncommon experience among settler Australians. By contrast, for Aboriginal and Torres Strait Islander people, that they live in a settler-colonial country is a basic, unavoidable fact of existence. The process of writing this thesis over the past five-and-more years has been an exercise – not simply intellectual but also personal – in grappling with and seeking to transcend the colonial past and present that we’ve all inherited. It’s been written primarily on Wurundjeri country (Melbourne), Wampanoag country (Cambridge, United States) and Noongar country (Perth).

From the following pages, it should be clear that the biggest intellectual inspiration for this thesis is the brilliant Megan Davis. Employer, teacher, supervisor, collaborator, wedding guest: Megan has been all of these things to me in the decade since we first met. The ideas that became this thesis were spurred by research that Megan and I began in 2010 at the Indigenous Law Centre, University of New South Wales, and have since been developed in conversation with Megan and her writings. She showed extraordinary graciousness in supporting my spreading of wings in Melbourne and incredible generosity in agreeing to supervise the project externally. Megan’s fingerprints are all over this thesis. She is my greatest mentor, one of my biggest champions and a very dear friend. Or as Megan would have it: friend first, boss second. Probably entertainer third.

Others at UNSW have also been vital sources of edification from my formative years of Becoming an Academic. Since 2007, when he gave me special permission to take his course on native title, Sean Brennan has been for me a constant paragon of how to be a teacher and scholar committed to social justice, especially in Indigenous–settler legal relations. I strive to follow his example (if only managing a pale imitation) in my teaching and scholarship, and treasure his ongoing support. Another wonderful exemplar from my alma mater is Rosalind Dixon, an unfailingly generous contributor to my intellectual and professional development for many years. Gary Edmond offered invaluable early advice and encouragement for pursuing an academic career. Conversations with Leon Terrill and George Williams on various aspects of this thesis have been helpful. The Indigenous Law Centre has been a crucible of my development as a scholar and has provided important financial support over the years.
Following my move to Melbourne Law School, Adrienne Stone and Cheryl Saunders – originally for me just towering figures – have become inspirational, unstintingly supportive mentors who’ve made Melbourne my second academic home. As joint doctoral supervisors in practice if not on paper, they’ve pressed my ideas in all the places they needed to be pressed, which were many indeed, while being open to my pursuit of my own approaches. Adrienne’s daunting capacity to pinpoint problems of methodology, argument and execution in any piece of scholarship has been a boon to each and every part of this thesis. The project has likewise benefited extraordinarily from Cheryl’s boundless intellectual engagement and unparalleled breadth and depth of comparative constitutional insight. Much life has happened to each of us throughout this PhD, and throughout both Adrienne and Cheryl have been sources of continuous and countless forms of support, including in my moves to the United States and Perth. Under their guidance, the project has transmogrified since its inception, in the best possible ways.

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I was lucky enough to spend two-and-a-half years at Harvard Law School, first and last as a Visiting Researcher and as a Master’s student in the middle. It became, in the process, yet another place to call home. Enormous thanks go to Vicki Jackson for supporting my first research visit and for valuable conversations about my research. My second research visit was supported by Sam Moyn, whose scholarship and example I
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I’m now happily in the process of making a new home at the University of
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Keeping with a worthy convention, let me finish with acknowledgements of my
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to save the world. Since high school, Kandice Varcin has been my closest companion.
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accumulate six degrees (soon seven, I hope (four of which will be mine, but who’s
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***

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**Bibliography**
Chapter 1
Introduction

Q: Well why is there ambivalence towards this idea among the Aboriginal community? You’d think that this would be something that they would embrace as a whole.

A: Well, it depends on what we’re embracing. I mean we’re only talking about a concept at this point, which is recognition. That’s not very clear what that means.

... 

Q: So some think constitutional recognition is not enough.

A: ... I mean I think the question is an important question. What does constitutional recognition mean?¹

‘Constitutional recognition’ has become a dominant language through which Australians debate what is owed to the country’s Indigenous peoples – the Aboriginal and Torres Strait Islander peoples – for achieving a just postcolonial settlement.² Within the past decade, the idea of constitutionally recognising Indigenous peoples has become the subject of community forums and nationwide inquiries, Twitter tirades and prime ministerial speeches, street protests and slick government-funded publicity campaigns. Constitutional recognition has been debated in blog posts, newspaper opinion pieces, extended essays, law review articles, parliamentary reports and several books. It has underpinned amendments to the constitutions of all Australian States, and served as the basis for federal legislation designed to progress amendments to the Australian Constitution, with a national constitutional referendum possibly to be held as early as 2017. Constitutional recognition has inspired impassioned support as well as trenchant


² In this thesis, I use the terms ‘Indigenous’ and ‘Aboriginal and Torres Strait Islander’ interchangeably to encompass the two broad groupings of Australia’s original inhabitants and their contemporary descendants. They are the Aboriginal peoples – the hundreds of political communities who occupied the Australian mainland and Tasmania prior to British colonisation – and the Torres Strait Islander peoples – the political communities who occupied the islands lying in the Torres Strait between Australia’s north-eastern tip and Papua New Guinea prior to British colonisation. I also use ‘Indigenous’ to refer to Indigenous peoples outside Australia.
critique, with proponents and detractors alike to be found among Indigenous and non-Indigenous people, progressives and conservatives.

But what is the constitutional recognition of Indigenous peoples? And what can it be expected to achieve? These are the questions I address in this thesis. Despite the ubiquity of ‘constitutional recognition’ in Australian public debate about Indigenous affairs, these questions – what constitutional recognition is and what it can be expected to achieve – remain wide open. One small indication of constitutional recognition’s opacity can be found in the exchange from late 2015 quoted in the epigraph. The conversation was between a radio presenter and prominent Aboriginal legal scholar Megan Davis, who has been a central participant in, and arguably the most incisive commentator on, debates over constitutional recognition for close to a decade. That even Davis – whose work serves as a guiding light in this thesis – finds the concept of constitutional recognition opaque reveals the uncertainty surrounding an idea that has, in the early decades of the 21st century, become central to Australian political discourse about Indigenous peoples’ place and status within the settler polity.

Having a clear understanding of Indigenous constitutional recognition is vital not only for comprehending the recent history of Indigenous–settler relations in Australia, but also for comprehending those relations’ past and future. Contemporary calls to constitutionally recognise Indigenous peoples arise from dissatisfaction with the way they have been treated under the settler constitutional order in earlier decades, and also from a view that changing the constitutional order now will inaugurate a better Indigenous–settler relationship in years to come. Why then is constitutional recognition needed now, if at all? Haven’t Aboriginal and Torres Strait Islander people already been ‘recognised’ through earlier reforms, such as the well-memorialised constitutional amendments concerning Indigenous people that were endorsed in a 1967 referendum by over 90 per cent of the Australian electorate? How will contemporary proposals for constitutional recognition – such as those reforms already undertaken at the State level, or future national reforms – change that situation? And why constitutional recognition rather than something else, such as the treaty that Indigenous and other critics have increasingly been advocating as an alternative? Is there a difference between constitutional recognition and treaty? These fundamental questions about the past, present and future of Indigenous–settler relations, so pressing in contemporary Australian politics, cannot be answered without an adequate understanding of the nebulous concept of constitutional recognition itself.

2
In this thesis I examine Indigenous constitutional recognition in historical and theoretical perspective, focusing on the period from the 1960s to the present. In addition to providing a history of recent Australian discourse around constitutional recognition, the thesis also offers a critical reflection on that discourse. Aided by political theory on the ‘politics of recognition’ as well as constitutional theory, I offer an account of constitutional recognition that is both broader and more conceptually rigorous than the largely unreflective understandings which have come to prevail in Australian debate today.\footnote{Charles Taylor, ‘The Politics of Recognition’ in Amy Gutmann (ed), Multiculturalism and ‘the Politics of Recognition’ (Princeton University Press, 1992) 25.}

On this account, Indigenous constitutional recognition involves struggles by Indigenous peoples to refashion the settler constitutional order – not only through a written, ‘big-C’ Constitution but also through ‘small-c’ constitutional norms – in ways that better respect their identities. The thesis uses this account to reinterpret earlier Indigenous battles over citizenship rights as struggles for constitutional recognition: different, to be sure, from more recent contests but also in important ways exemplary and instructive. The thesis then applies this account to make sense of contemporary and future contestation over the constitutional recognition of Indigenous peoples \textit{as peoples}. Ultimately, I argue, Indigenous constitutional recognition should be understood not as the achievement of a final postcolonial settlement but as an ongoing process of contesting and renegotiating Indigenous and settler peoples’ basic political relationship.

Before outlining the thesis argument in greater detail, I offer a broad overview of how it is that Australians have come to be talking about constitutionally recognising Aboriginal and Torres Strait Islander peoples, and what are the general contours of that debate.

\section*{I \hspace{1em} The Rise of Indigenous Constitutional Recognition}

At least in their prominence and intensity, debates over constitutionally recognising Aboriginal and Torres Strait Islander peoples are a recent artefact, becoming nationally salient over the past decade and especially in the last five years. Certainly, the language of recognition has long been a feature of Indigenous politics, and the idea of constitutional recognition has a complex lineage going back through several decades of Indigenous activism and policy debate. (That story I will trace in Chapter 2.) But only
recently has the notion of Indigenous constitutional recognition crystallised into a ready slogan of mainstream political discussion and emerged as one of the most dominant languages of Australian Indigenous–settler relations.

The proximate cause for constitutional recognition’s rise is that mainstream politicians, both conservative and progressive, have made the idea matter. The spark came in 2007, when Liberal Prime Minister John Howard, facing an election he ended up losing, committed to achieving reconciliation with Indigenous peoples by recognising them in a new preamble to the Australian Constitution.\(^4\) Howard’s proposal reprised an idea he had unsuccessfully put to a referendum in 1999, along with a failed proposal to transform Australia into a republic.\(^5\) In the wake of that failure, the Victorian Labor Government moved on its own in 2004, incorporating a symbolic Indigenous recognition section into the Constitution Act 1975 (Vic).\(^6\) But it was Howard’s revival of the idea nationally in 2007 that was the key catalyst, with both major parties then taking policies of constitutional recognition to the 2007 and 2010 federal elections.\(^7\)

After the 2010 national election, constitutional recognition began to reach a newfound prominence. The reason was that the re-elected Gillard Labor Government established an Expert Panel on Constitutional Recognition of Indigenous Australians to report ‘on possible options for constitutional change to give effect to Indigenous constitutional recognition’.\(^8\) Comprising 22 Indigenous and non-Indigenous members, the Expert Panel undertook extensive consultations throughout 2011, including with Indigenous communities, and delivered its report in early 2012.\(^9\) Tempering a desire for substantive reform with political pragmatism, the Expert Panel recommended a range of

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\(^6\) Constitution Act 1975 (Vic) s 1A, as amended by Constitution (Recognition of Aboriginal People) Act 2004 (Vic).

\(^7\) Megan Davis and George Williams, Everything You Need to Know About the Referendum to Recognise Indigenous Australians (NewSouth Publishing, 2015) 79–83.

\(^8\) Expert Panel on Constitutional Recognition of Indigenous Australians, Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution (2012) 3.

\(^9\) Ibid.
amendments to the Constitution: rid the document of the language of ‘race’, formally acknowledge Indigenous peoples and cultures within the constitutional text, make Indigeneity (rather than race) the basis of national lawmaking power in Indigenous affairs and constitutionally prohibit racial discrimination by all Australian governments.10

Since the Expert Panel handed down its report, much has happened to keep Indigenous constitutional recognition on the mainstream political agenda. The Labor and Coalition governments in power since the Expert Panel’s report have been broadly supportive of ‘constitutional recognition’ in the abstract, but unwilling to formally commit to any particular vision of it. Instead they have diverted the issue into a range of official processes and inquiries. In 2013, there was bipartisan support for a symbolic statutory placeholder – the Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) – which also legislated a process to review progress towards constitutional recognition.11 In 2013, the Parliament also established a Joint Select Committee on Indigenous Constitutional Recognition, which issued reports in 2014 and 2015 whose recommendations fell broadly along the same lines as the Expert Panel’s.12 Mindful of the need to raise public awareness and support for any future referendum, governments since 2012 have also funded a national publicity campaign called ‘Recognise’.13 And after pressure from Indigenous leaders, the Abbott Liberal Government agreed to hold Indigenous-only constitutional dialogues, along with further community-wide consultations, all of which are being stewarded by a Referendum Council through the middle of 2017.14

10 Ibid xviii.
11 See Aboriginal and Torres Strait Islander Act of Recognition Review Panel, Final Report (September 2014); Aboriginal and Torres Strait Islander Recognition (Sunset Extension) Act 2015 (Cth).
12 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Interim Report (July 2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, Final Report (June 2015).
13 Recognise <http://www.recognise.org.au>; Davis and Williams, above n 7, 85.
Meanwhile, as a national debate has continued, the State governments have stepped into the breach by inserting symbolic Indigenous recognition sections into their own constitutions. Following Victoria’s early lead in 2004, Queensland (2010), New South Wales (2010), South Australia (2013), Western Australia (2015) and Tasmania (2016) have all enacted Indigenous constitutional recognition provisions, through either a preamble or a standalone section. While Indigenous individuals and organisations have typically had input into these sections, their adoption has been driven by (mostly non-Indigenous) politicians.

The recent mainstream political embrace of Indigenous constitutional recognition has represented a partial and tentative return to an earlier politics in Indigenous affairs, one more sympathetic to Indigenous people’s demands for postcolonial reckoning and for recognition of their distinctness as Indigenous peoples. Those Indigenous claims became ascendant from the late 1960s, as Indigenous politics underwent a shift in emphasis from demands for respect as Australian citizens to demands for respect as distinct Indigenous peoples. As I will explore in Chapter 5, a constitutional referendum held in 1967 about Indigenous people’s constitutional status was an important respect a turning point, heralding a transition in Indigenous politics from citizenship to peoplehood. Indigenous peoplehood claims, which grew more radical in the 1970s and 1980s, encompassed calls for land rights, respect for Indigenous cultures and heritage, reparations, self-determination, sovereignty and treaties. These Australian developments paralleled the rise of Indigenous struggles in

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15 Constitution Act 1975 (Vic) s 1A, as amended by Constitution (Recognition of Aboriginal People) Act 2004 (Vic); Constitution of Queensland 2001 (Qld) Preamble, as amended by Queensland (Preamble) Amendment Act 2010 (Qld); Constitution Act 1902 (NSW) s 2, as amended by Constitution Amendment (Recognition of Aboriginal People) Act 2010 (NSW); Constitution Act 1934 (SA) s 2, as amended by Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013 (SA); Constitution Act 1889 (WA) Preamble, as amended by Constitution Amendment (Recognition of Aboriginal People) Act 2015 (WA); Constitution Act 1934 (Tas) Preamble, as amended by Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016 (Tas).

16 The Western Australian provision’s adoption was driven by Kija woman and Labor Opposition politician Josie Farrer by way of a private members Bill: Western Australia, Parliamentary Debates, Legislative Assembly, 11 June 2014, 3699–3700 (Josie Farrer).

17 See further Chapters 5 and 6 of this thesis.

18 See Chapters 2, 5–7 of this thesis.
other parts of the world as well as a wider turn to identity-based politics in the post-war era.19

From the early 1970s through to the mid-1990s, Australian governments showed a relatively high receptiveness to such claims, especially by recognising Indigenous land and heritage rights and supporting the emergence of an ‘Indigenous sector’ to represent Indigenous peoples, deliver services to Indigenous communities and manage Indigenous land.20 At the national level, both conservative and progressive governments at various times demonstrated a willingness to negotiate a treaty or agreement with Indigenous peoples and pursue other constitutional reforms as part of a postcolonial settlement.21 These ideas were under active negotiation between Indigenous peoples and the Keating Labor Government when Labor lost power in 1996.22

With the conservative Coalition Howard Government’s coming to power in 1996 and throughout its following 11 years, the politics of Indigenous peoplehood encountered considerable retrenchment. The Howard Government’s complex history in Indigenous affairs will be addressed in later chapters. Broadly speaking, though, the Howard era involved the winding back of several legal entitlements to land and culture attained earlier by Aboriginal and Torres Strait Islander peoples, and the marginalisation of the institutions of the Indigenous sector.23 This governmental willingness to undermine Indigenous collective entitlements and capacities was accompanied, especially in the Government’s later years, by policies that questioned Indigenous


people’s individual capacities to act responsibly. Most significant in this respect was the 2007 federal ‘Intervention’ into Aboriginal communities in the Northern Territory, which withdrew several Indigenous citizenship entitlements and weakened Aboriginal land rights, and continues in modified form today. Though Howard had held a referendum for a new constitutional preamble in 1999, that idea was relatively conservative and in some ways a defensive means of containing Indigenous aspirations for a wide-ranging settlement that had been encouraged by Howard’s predecessors. Howard’s 2007 proposal for a constitutional preamble mentioning Indigenous people was likewise a modest symbolic gesture whose value was questioned by prominent Indigenous people at the time.

After the experience of the Howard era, in which Indigenous voices and aspirations were often neglected and Indigenous political and legal entitlements wound back, many Aboriginal and Torres Strait Islander people have cautiously welcomed the political opportunities opened up by the support for Indigenous constitutional recognition since 2007. Indigenous people’s ongoing wariness has several bases: suspicion about an agenda that has been driven largely by political elites and the government-funded ‘Recognise’ marketing campaign, concern that constitutional recognition will be purely symbolic, and hostility to government policies that continue to undermine Indigenous rights and interests.

Despite their wariness, Indigenous people have often seen in contemporary debates over constitutional recognition the promise of important institutional reforms in


See further Chapter 2.

See further Chapter 2.

their relationship with the settler state, and they have accordingly used constitutional recognition as a channel for their aspirations. A range of prominent Indigenous figures have been at the forefront of debates over constitutional recognition, often through formal involvement in official processes.\(^{29}\) Many more Indigenous individuals and organisations have participated in debates over constitutional recognition both inside and outside the official processes.\(^{30}\) While Indigenous visions of recognition vary, Indigenous people have overwhelmingly pushed for substantive reforms that alter the ways in which the settler state exercises power over them.\(^{31}\)

Especially in the years since the Expert Panel handed down its report in 2012, there has also emerged an increasingly visible Indigenous opposition to constitutional recognition, with critics sceptical of constitutional recognition’s capacity to realise the aspirations of many Indigenous people for treaties and sovereignty. The clearest manifestation of this perspective came at a Victorian Government consultation with Aboriginal peoples in early 2016, where the 500 Aboriginal participants unanimously rejected constitutional recognition in favour of treaties.\(^{32}\) Significantly, the Victorian Government subsequently committed to treaty negotiations, which are ongoing.\(^{33}\) By the end of 2016, South Australia had also entered into Aboriginal treaty negotiations, and the Northern Territory Government had flagged its intention to investigate possibilities for treaty-making.\(^{34}\)

\(^{29}\) Some of the key figures have been Megan Davis, Patrick Dodson, Tanya Hosch, Mick Gooda, Marcia Langton and Noel Pearson.

\(^{30}\) See, eg, Expert Panel on Constitutional Recognition of Indigenous Australians, above n 8, 4–10.

\(^{31}\) See, eg, ibid 112–15; ‘Statement Presented By Aboriginal and Torres Strait Islander Attendees at a Meeting Held with the Prime Minister and Opposition Leader on Constitutional Recognition’ (2015) 8(19) *Indigenous Law Bulletin* 26; Davis and Langton, above n 28.


While the Indigenous critics have been sceptical of constitutional recognition for the same reasons that many of its proponents have been, a further reason for their resistance is that so much of the recognition debate has centred on the settler state’s written constitutions (both national and State). Among proponents of treaties and Indigenous sovereignty, there is often a view that to start with settler written constitutions is to take too much of settler sovereignty for granted and too little account of Indigenous sovereignty and peoplehood. As I will argue later in this thesis, Indigenous claims for treaty and sovereignty are also claims for constitutional recognition, even as their proponents often reject that language for its more conservative associations.

With Indigenous-only constitutional dialogues scheduled to run through to mid-2017, and potentially a national referendum in the coming years, it is clear that Indigenous perspectives on – and uses of – the vague and contested idea of ‘constitutional recognition’ will continue to evolve.

II Argument and Methodology
In an important sense, the vagueness and uncertainty surrounding Indigenous constitutional recognition in Australian public debate are not so much obstacles to a proper understanding of it as constitutive of such an understanding. I argue that ‘constitutional recognition’ is an indeterminate and malleable concept that has come to be deployed, both supportively and critically, by different actors for particular political projects concerning Indigenous peoples – be it Indigenous empowerment, legal reform, postcolonial settlement and transformation, settler nation-building, conservative containment and resistance, or some combination. Constitutional recognition is a vague and flexible language through which contemporary Australians now channel debates about what principles and institutional arrangements should govern the basic political relationship between Indigenous and settler peoples. That is one important understanding of constitutional recognition that I advance in this thesis, which in a historical vein charts the diverse ways in which the language of constitutional recognition has been used and for what political purposes.

Another valuable way of understanding Indigenous constitutional recognition goes beyond the specificities of recent Australian political debates to consider their place within broader global trends. These Australian debates exemplify the rise in the past half-century of a wider ‘politics of recognition’, as Canadian philosopher Charles Taylor influentially put it in 1992.\(^{37}\) These are political struggles based on identity. Recognition politics take in the struggles of a multitude of diverse groups – from women to nationalist movements, religious minorities to Indigenous peoples – who have increasingly come to demand that the institutions they live under better respect who they are, both in their sameness with fellow citizens and in their distinctness from them. Constitutions have been important targets of these political struggles. And as Taylor’s intervention indicates, the politics of recognition have also been the subject of serious theorising, which has helped to make sense of these political contests over identity.

Drawing on theoretical insights into recognition politics, this thesis argues that Indigenous constitutional recognition involves struggles by Indigenous peoples to have their identities respected within the settler constitutional order. Insights from the rich theoretical investigations into the politics of recognition have so far remained disconnected from Australian discussions over Indigenous constitutional recognition.\(^{38}\) That is true not only of the popular debate – conducted in public forums, newspaper op-eds, online media, essays, submissions to and reports by official inquiries, and the like – but also of the growing scholarship into constitutional recognition, which now includes half a dozen books.\(^{39}\) Most scholarship has been legal, providing often technical and occasionally comparative analyses of particular reforms, as well as normative

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\(^{37}\) Taylor, above n 3.


\(^{39}\) Most books on the subject fall somewhere between the popular and academic: see Noel Pearson, ‘A Rightful Place: Race, Recognition and a More Complete Commonwealth’ (2014) 55 Quarterly Essay 1; Davis and Williams, above n 7; Frank Brennan, No Small Change: The Road to Recognition for Indigenous Australia (University of Queensland Press, 2015); Davis and Langton, above n 28; Damian Freeman and Shireen Morris (eds), The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples (Melbourne University Press, 2016); Michael Mansell, Treaty and Statehood: Aboriginal Self-Determination (The Federation Press, 2016). For more scholarly discussion, see Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives (The Federation Press, 2016).
arguments for or against them.\textsuperscript{40} Some of the scholarship has been historical, detailing earlier constitutional and political reforms concerning Indigenous peoples and the history of debates over constitutional recognition.\textsuperscript{41} But little of the scholarship has been very theoretically grounded, and almost none has seriously engaged with the political theory on recognition.\textsuperscript{42} As a result, the Australian debates have failed to benefit from the sophisticated theoretical enquiries into recognition politics. They have failed to see Indigenous constitutional recognition as exemplary of identity-based political struggles around the world more generally.

The thesis also draws on constitutional theory to argue that such constitutional struggles over recognition concern not only written, ‘big-C’ Constitutions but also ‘small-c’ constitutional norms and instruments that structure the basic distribution of public power. While this broad idea of the constitutional domain – comprising both big-C and small-c constitutional phenomena – is developed in subsequent chapters, it is worth saying a little more about it here, since it is central to the argument from the outset.\textsuperscript{43}


\textsuperscript{43} On the big-C/small-c distinction, see David S Law, ‘Constitutions’ in Peter Cane and Herbert M Kritzer (eds), \textit{The Oxford Handbook of Empirical Legal Research} (Oxford University Press, 2010) 376, 377.
The notion of a big-C Constitution is familiar enough. It describes those instruments typically called ‘The Constitution’ which establish fundamental political and legal institutions and codify basic rules and principles for governing a given political community. Much of the focus within recent Australian debates over constitutional recognition has been on amending big-C Constitutions, both State and national.

But as many constitutional theorists have emphasised, the constitutional domain should also be understood to extend beyond big-C Constitutions to a small-c constitutional field. This field encompasses institutions, practices and norms falling outside a codified constitutional text that nonetheless concern the fundamental distribution of public power within the political community. In this small-c sense, the constitutional recognition of Indigenous peoples can include a host of sites beyond big-C Constitutions: statutes, judicial doctrines, customary norms of political practice and Indigenous–settler treaties. Constitutional recognition is therefore about better respecting Indigenous identity by altering the basic distribution of public power, whether inside or outside a big-C Constitution.

This account of constitutional recognition – respect for Indigenous identity within the settler state’s fundamental distribution of political power – provides a valuable theoretical framework, but it also remains overly abstract. Using the work of Canadian political theorist James Tully, I therefore stress the value of studying constitutional recognition within the context of concrete, historically situated political struggles to institutionalise particular forms of recognition.

When constitutional recognition is studied in practice through particular political struggles, it emerges as a partial, provisional and incomplete achievement. To begin with, new forms of recognition are constrained by the limits, both of politics and of identity, under which they are negotiated. They also typically allow considerable leeway in implementation among the very state actors whose power they are supposed to channel and discipline. Three factors, then – the horizons of Indigenous–settler politics, the horizons of Indigenous identity politics and the vagaries of constitutional implementation – render new forms of constitutional recognition a partial, defeasible

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44 See further Chapters 3–4 of this thesis.

accomplishment. And they make Indigenous constitutional recognition a matter less of final postcolonial settlement and much more of ongoing contestation, both over the terms of existing forms of recognition and for the future modification, supplementation or replacement of that recognition.

This theoretical account helps in seeing beyond the particular understandings of constitutional recognition in recent Australian debate, enabling the study of past struggles through the lens of constitutional recognition as well – in particular, to see earlier contests over Indigenous people’s *citizenship* as struggles for constitutional recognition. Methodologically, the approach involves a kind of historically informed, applied political theory. Adopting this approach, the thesis explores the 1967 constitutional amendments as well as the passage of the *Racial Discrimination Act 1975* (Cth) (‘RDA’) as unappreciated instances of Indigenous constitutional recognition. These were moments when public power was reorganised – including through small-constitutional change – in ways that better respected Indigenous people’s identities as Australian citizens. Both were and remain important constitutional achievements. But both also demonstrate the incompleteness of constitutional recognition in practice. Each involved the foreclosure of more far-reaching proposals for recognition. Each, being based on recognising Indigenous people’s citizenship, neglected another facet of Indigenous identity – *Indigenous peoplehood* – that began to rise to prominence from the late 1960s. And each has been subject to the often disappointing, sometimes repudiatory actions of the settler-state agents responsible for implementing recognition.

The study of earlier forms of Indigenous constitutional recognition and their failings enables clearer thinking about future recognition. Most immediately, it demonstrates the need for constitutional change that more fully takes account of the broad shift in Indigenous politics that began in the late 1960s: from an emphasis on Australian citizenship to an emphasis on collective Indigenous peoplehood.

I conclude by arguing that the conceptual framework of federalism provides a valuable way of understanding and advancing contemporary Indigenous claims (especially for treaty, political representation and Indigenous jurisdictions) to be constitutionally recognised as peoples. Negotiating federal arrangements between Indigenous and settler peoples would not result in a once-and-for-all resolution of

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46 In the context of Indigenous politics, ‘peoplehood’ overlaps and is often synonymous with the concept of ‘nationhood’. Throughout the thesis, I generally opt for the language of peoplehood.
Indigenous claims, for the same reasons that earlier forms of constitutional recognition did not. But it would better respect who Aboriginal and Torres Strait Islander peoples are today, and it would provide a framework for the ongoing contestation of the settler constitutional order in the name of a just Indigenous–settler relationship.

So how to answer the question posed in the epigraph by Megan Davis: ‘What does constitutional recognition mean?’ First, in recent Australian public debate, it has multiple meanings: ‘constitutional recognition’ is a malleable concept that Australians have increasingly used, for diverse political ends, to debate the terms of Indigenous peoples’ political relationship with the settler state. Secondly, these Australian debates fit within wider worldwide trends towards identity-based politics, which have been conceptualised theoretically as the politics of recognition. Seen in this context, with the aid of political and constitutional theory, constitutional recognition concerns struggles by Indigenous peoples to alter the settler constitutional order, including small-c constitutional norms and instruments, in ways that better respect who they are. Thirdly, when studied through historically situated political struggles, new forms of constitutional recognition – from the 1967 constitutional amendments to the RDA and, possibly in the future, to Indigenous–settler federal arrangements – emerge not as postcolonial constitutional endpoints but as provisional achievements. Pursuing Indigenous constitutional recognition involves continually renegotiating rather than completing the Indigenous–settler political relationship.

Before going further, it is critical to acknowledge that this thesis relies on ‘Western’ intellectual traditions of law, history and politics, rather than seeking to develop or apply traditions of Indigenous knowledge. While the thesis draws extensively on Indigenous sources, privileges Indigenous perspectives on constitutional recognition and attends closely to Indigenous histories of advocacy and activism, it does so using methodologies with non-Indigenous origins.

In adopting this approach, I have been intensely conscious that Indigenous epistemologies and intellectual traditions have much to contribute to the questions addressed in this thesis. Applying Indigenous methodologies is vital for gaining anything approaching a complete understanding of constitutional recognition and its prospects for promoting Indigenous wellbeing and emancipation. Several Aboriginal scholars have already undertaken important work into the crucial task of understanding constitutional recognition from within distinctively Indigenous philosophical and
juridical traditions.\textsuperscript{47} I thus adopt my approach with humility, in an awareness that it is speaking within particular traditions that offer only a partial picture. Listening to those speaking within different, Indigenous traditions is essential not only for fully understanding constitutional recognition but also for addressing the broader colonial dynamics that underpin Indigenous peoples’ constitutional grievances.

I have also been keenly aware that the intellectual traditions in law, history and politics that I apply have in various ways been instrumental in practices of colonialism, exploitation and domination.\textsuperscript{48} These are histories which cannot be gainsaid and their legacies in the present must not be ignored. But it should also be remembered that these intellectual traditions have frequently provided resources for more lucidly understanding, and for critiquing, colonialism and its contemporary manifestations.\textsuperscript{49} Indigenous thinkers themselves have long drawn on ‘Western’ modes of thought in productive efforts to both better understand and challenge their colonised circumstances.\textsuperscript{50} I remain convinced that the intellectual traditions I utilise in this thesis, despite their historical colonial entanglements, are not intrinsically complicit in the colonial enterprise – and in fact they can be used in the service of gaining insight into and contesting that enterprise. It is in this spirit that I take up these traditions.

\textsuperscript{47} See especially Parker, above n 42; Ambelin Kwaymullina, ‘Recognition, Referendums and Relationships: Indigenous Worldviews, Constitutional Change, and the “Spirit” of ’67’ in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives (The Federation Press, 2016) 29. See also Davis and Langton, above n 28. For an earlier foray, see Christine Morris, ‘Constitutional Dreaming’ in Charles Sampford and Tom Round (eds), Beyond the Republic: Meeting the Global Challenges to Constitutionalism (The Federation Press, 2001) 290.


\textsuperscript{49} For subtle reflections on this prospect, see Chakrabarty, above n 47, 3–23. For an extended effort to articulate a ‘postcolonial liberalism’, see Ivison, Postcolonial Liberalism, above n 47.

III Outline of the Thesis Chapters

The thesis is divided into two parts. Part I (Chapters 2–4) examines the idea of Indigenous constitutional recognition in historical and theoretical perspective, whereas Part II (Chapters 5–8) studies struggles over Indigenous constitutional recognition in practice.

Chapter 2 offers an intellectual history of the constitutional politics of Indigenous recognition in Australia. I stress the breadth and malleability of the concept of constitutional recognition, and demonstrate its use by different political actors for different purposes. The chapter traces contemporary debates over constitutional recognition back to the often radical Indigenous politics of the late 1970s and 1980s, which called for Indigenous land rights, sovereignty and self-determination. The related struggles over a treaty in these years were centrally concerned with the constitutional recognition of Indigenous peoples (generally in a small-c constitutional sense) and the proponents of treaty adopted the language of recognition to frame their demands. By the end of the 1990s, however, a narrower, more conservative vision of constitutional recognition had become ascendant. Narrower because, driven by wider debates over national and constitutional identity, especially in the push for a republic, discourses of Indigenous constitutional recognition became much more focused on the Constitution. More conservative because constitutional recognition was oriented firmly towards the purely symbolic by the Howard Government, which reacted against and sought to contain Indigenous aspirations in its failed 1999 constitutional amendment for a new preamble.

This relatively conservative vision of Indigenous constitutional recognition – represented by a legally unenforceable reference to Indigenous people in a written constitution – predominated until only recently, and remains prominent within public policy and debate. On this score, from 2004, State governments began incorporating symbolic Indigenous recognition sections into their own constitutions. However, through the work of the 2011–12 Expert Panel on Constitutional Recognition of Indigenous Australians, the debate was broadened to include more substantive, though still Constitution-centred visions of recognition. Meanwhile, an Indigenous opposition to ‘constitutional recognition’ has emerged, promoting instead substantive visions of treaty and sovereignty. Yet as the affinities with earlier treaty debates demonstrate, these critics are also implicitly and often explicitly invoking the concept of recognition,
as well as advocating small-c constitutional change, even as they eschew the phrase ‘constitutional recognition’ for its more conservative associations.

Chapter 3 provides a theoretical account of Indigenous constitutional recognition that informs the rest of the thesis. Drawing on political theory on the politics of recognition, I argue that constitutional recognition involves struggles by particular groups to have their identities respected within the constitutional regimes they live under. That includes not only written, big-C Constitutions but also the small-c constitutional order. The contest over Indigenous constitutional recognition in Australia involves a struggle by Indigenous peoples to refashion the settler constitutional order so that it better respects their identities. This rather abstract definition leaves much room for debate over specifics: especially what features define Indigenous peoples’ identities and what it means to respect those identities within constitutional norms. I emphasise the value of answering these questions by studying concrete, historically situated political struggles, an approach which reveals constitutional recognition to be a provisional and incomplete accomplishment. This is the approach to studying constitutional recognition that I take up in later chapters.

The chapter concludes by addressing a powerful theoretical critique of recognition politics recently advanced by Canadian Indigenous scholar Glen Coulthard, who claims that Indigenous recognition by the settler state tends to reproduce rather than transcend a colonial relationship. I argue that, contrary to Coulthard’s disavowal of recognition politics, his alternative can only be realised through forms of settler recognition – whether constitutional or international – that moderate the exercise of settler sovereignty over Indigenous peoples.

In Chapter 4, I further develop the argument that Indigenous constitutional recognition extends beyond written, big-C Constitutions to encompass small-c constitutional norms and instruments that affect the basic distribution of public power. The chapter thereby supplements a formal approach to defining the constitutional domain with a functional view. The chapter also distinguishes two components of the constitutional domain – the symbolic and substantive – and demonstrates the significance of both constitutional symbolism and substance, as well as constitutional form, for projects of Indigenous recognition. I advance these arguments by way of constitutional theory and comparison. My case studies are two very different forms of Indigenous constitutional recognition. The first involves the Indigenous recognition provisions adopted in all Australian State written constitutions: a form of constitutional
recognition that is formal and purely symbolic. The second involves New Zealand’s Tiriti o Waitangi/Treaty of Waitangi, whose constitutionalisation has come about through small-c constitutional developments: a form of constitutional recognition that is functional and substantive (as well as richly symbolic).

Revealed through the comparison between Australia’s Indigenous recognition provisions and the Treaty of Waitangi’s constitutionalisation is the importance of constitutional form, symbolism and substance to projects of Indigenous recognition. First, the constitutional form through which Indigenous recognition is pursued has symbolic significance, with the very form of treaties (unlike written constitutions) symbolising an Indigenous peoplehood equal to that of the settler polity. Second, the constitutional substance of Indigenous recognition – its substantive impact (or lack thereof) on the distribution of public power – is symbolically important. If Indigenous constitutional recognition is purely symbolic and not substantive, as with Australia’s State Indigenous recognition provisions, this can have negative symbolic effects in itself. Third, the pursuit of purely symbolic constitutional recognition involves the neglect of Indigenous peoples’ grievances about constitutional substance – about how public power is wielded over them. Fourth, constitutional form can have substantive constitutional importance. In particular, the entrenchment and legal supremacy of written constitutions can help render Indigenous recognition an enduring and overriding constitutional concern.

In Part II, using the theoretical account developed in the preceding chapters, Chapters 5 and 6 study earlier Indigenous struggles over citizenship rights – the 1967 constitutional amendments and the 1975 passage of the RDA – as unappreciated examples of Indigenous constitutional recognition. In one sense, these studies provide a valuable prehistory to contemporary debates over Indigenous constitutional recognition, showing how those debates have arisen out of, and in response to the failures of, these earlier struggles. But these studies also reveal constitutional recognition more generally in action: as an incomplete achievement emerging from specific political struggles.

As I argue in Chapter 5, the 1967 amendments recognised Indigenous people’s identities as Australian citizens by transferring ultimate power over Indigenous affairs to the Commonwealth – a higher constitutional authority better disposed than the States to respect Indigenous citizenship. This recognition did not simply rely on the rather spare changes made to the constitutional text. It also relied on activists’ political
mobilisations surrounding the amendments which reshaped the constitutional culture and therefore the possibilities for future implementation of the amendments.

Chapter 6 shows the RDA’s enactment to be another important moment when Indigenous people’s citizenship was constitutionally recognised, here in a small-c constitutional way. The RDA, though a general piece of legislation, owed much in its genesis to Indigenous activism, especially efforts to end the discriminatory legal regime that governed Aboriginal and Torres Strait Islander people in Queensland. Like the 1967 amendments, the RDA constitutionally recognised Indigenous people’s identities as Australian citizens. It did so by constraining the capacity of Australian governments (especially the States and Territories) to pass racially discriminatory laws.

However, against a common claim within contemporary public debate that frames constitutional recognition as a matter of ‘completing the Constitution’, I argue that both the 1967 amendments and the RDA reveal recognition to be partial, provisional and fundamentally incomplete. Important as each was at the time and have been since, they manifest three difficulties besetting Indigenous constitutional recognition generally. These difficulties are: first, power imbalances between the settler state and Indigenous peoples, which constrain possibilities for recognition from the outset (the horizons of Indigenous–settler politics); second, the diverse, contested and changeable nature of Indigenous (and all) identities, and particularly in these cases the ascendance of a politics of Indigenous peoplehood from the late 1960s (the horizons of Indigenous identity politics); and third, an ongoing task of implementing recognition which can fail or be repudiated by state actors (the vagaries of constitutional implementation). Struggles over constitutional recognition should therefore be seen not as processes of constitutional completion but as historically situated political contests beset by the constraints of the present and the openness of the future. In light of some of these difficulties, Chapter 6 concludes with an argument for a strengthened constitutional protection of Indigenous people against racial discrimination, one that takes better account of Indigenous peoples’ collective claims as peoples.

Chapter 7 examines the contemporary struggles of Indigenous peoples to be recognised as peoples. These peoplehood claims confront a conceptual challenge of reconciling Indigenous collective autonomy with an ongoing Indigenous–settler constitutional relationship – of combining international recognition with constitutional recognition. Indigenous peoplehood claims also present the justificatory challenge of
combining robust forms of Indigenous autonomy with the liberal-democratic traditions of the Australian settler state.

I argue that federalism – which can be broadly defined as self-rule combined with shared rule – offers a framework for meeting the conceptual and justificatory challenges that attend the constitutional recognition of Indigenous peoplehood. Globally, federalism has emerged as a way of reconciling the claims to self-rule of distinct peoples within a single, overarching state. I align federalism with major contemporary Australian proposals for constitutionally recognising Indigenous peoplehood: the negotiation of Indigenous–settler treaties, Indigenous parliamentary representation and the establishment of Indigenous States or Territories. All of these can be understood as establishing federal constitutional arrangements between Indigenous and settler peoples. The language of federalism can also be useful in justifying these new forms of recognition, since it fits (while innovating within) both Australian and Indigenous political traditions.

The thesis concludes in Chapter 8 with an overview of the key arguments advanced and themes developed throughout. It also reaffirms the importance of seeing Indigenous constitutional recognition as provisional and incomplete, lest the constitutional recognition of Indigenous peoplehood through federalism be seen as some sort of endpoint. Drawing on comparative experience with Indigenous–settler treaty-making in Canada and New Zealand, I argue for a vision of constitutional recognition as an ongoing process of contesting the settler constitutional order in the name of a just postcolonial relationship.

One final note: given the constant pace with which developments surrounding Indigenous constitutional recognition have evolved, it has been a challenge keeping this thesis up to date. It is current to the end of 2016, when the final draft was completed.

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PART I
INDIGENOUS CONSTITUTIONAL RECOGNITION: HISTORY AND
THEORY OF AN IDEA
Chapter 2

Note: at the end of this chapter there is a glossary that serves as a guide to the various organisations and policies discussed in the chapter.

When Australians today debate the terms of political association between the peoples indigenous to the Australian continent and the people who have colonised it, they frequently do so through the language of ‘constitutional recognition’. To constitutionally recognise Aboriginal and Torres Strait Islander peoples is, for its many supporters, to improve the terms of that association, to advance towards postcolonial reconciliation and justice. But what, more concretely, is constitutional recognition? What does it mean? What would constitutional recognition look like?

On these questions about the meaning and content of Indigenous constitutional recognition, there are many different answers and a considerable degree of uncertainty within Australian public debate. Discernible within the discourse are ‘competing notions of constitutional recognition’, as Aboriginal lawyer and intellectual Megan Davis has put it.1 One of the shrewdest participant-observers in these debates, Davis has concluded that Indigenous recognition is ‘a vexed concept, and there is no clean way out of it’.2

The difficulty is partly due to the multifaceted idea of ‘recognition’ itself, which in everyday language has several different, if often overlapping meanings. In one sense, recognition can mean a symbolic act of acknowledgement. Recognition in this sense might involve honouring another’s worth or achievements; validating particular facts or histories; or affirming another’s suffering and, in relevant cases, accepting one’s own responsibility for causing it. In another sense, recognition can mean identifying or classifying (re-cognising) another in a particular way.3 These identifications of others go beyond mere states of cognition: how we classify others (eg, family member vs

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2 Megan Davis, ‘Seeking A Settlement’, The Monthly (Melbourne), July 2016, 8, 8.
stranger) can have important implications for how we treat them. And when the agent doing this classificatory form of recognising is the state, such identifications can have major material consequences: being recognised by the state as one of its citizens, for instance, standardly brings a range of entitlements and duties. In a third, related sense, recognition by some powerful agent, such as the state, can amount to a ‘constructive act through which recognition’s very object is shaped or brought into being’.

By recognising something – another’s rights, or sovereignty, or international personality – the state, with its extensive material resources and coercive power, can help make that ‘something’ more real, even bring it into existence. All of these different meanings of recognition are evident in debates over Indigenous constitutional recognition.

One response to the opacity surrounding constitutional recognition would be to lament it; another, to try to bring coherence to the concept by developing some new account. In subsequent chapters of this thesis, I will adopt the latter course, developing an account of constitutional recognition that is attentive to theory and history, and sensitive to the idea’s breadth and plurality in public debate. But to move too quickly past the uncertainty over Indigenous constitutional recognition, or to decry it altogether, is to miss something important about the idea itself.

A different approach, which I adopt in this chapter, takes constitutional recognition’s ‘competing notions’ not as a problem to be resolved but as an important feature of it. The chapter is an exercise in intellectual history rather than conceptual clarification. The aim is not to validate one particular vision of constitutional recognition as the right one. It is to show that Indigenous constitutional recognition can be usefully understood as an indeterminate, malleable and contested concept with a history in Australian political debate. ‘Recognition’ is an actors’ category rather than simply an analysts’ category, one that has been used by different actors pursuing different political projects in different times and contexts.

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4 Ibid.

5 This sense of recognition is well-represented in debates about what defines international statehood, with one influential position, the ‘constitutive view’, being that a state is not a state until it is recognised as such by other states. See Hersch Lauterpacht, Recognition in International Law (Cambridge University Press, 1947) chs 4–5.

transformation, postcolonial reckoning, settler nation-building, conservative preservation and containment, and combinations of these.

Building on and extending Davis’s vital work, this chapter offers an intellectual history of Indigenous recognition within Australian constitutional politics between the late 1970s and the present. It ranges more broadly than an intellectual history of Indigenous ‘constitutional recognition’. That phrase has most frequently been used in connection with reform of Australia’s written ‘big-C’ Constitutions, State and national, with growing frequency over the past decade. The broader language of ‘recognition’, by contrast, has been used in many other connections and for much longer, in ways that can still be considered constitutional – even though the word ‘constitutional’ was not necessarily used and even though a big-C Constitution was not necessarily in the frame.

In other words, I examine how different political actors, both Indigenous and non-Indigenous, have used the language of recognition in promoting reform to written constitutions as well as to support ‘small-c’ constitutional change. Advocacy for such small-c constitutional change has especially concerned questions of Indigenous self-determination, sovereignty and treaty. These reforms are constitutional in that they raise fundamental questions about the distribution of public power within the Australian state, even though they may not directly implicate a codified, big-C Constitution. I outlined this expanded understanding of the constitutional domain (i.e., one that incorporates both big-C Constitutions and small-c constitutional matters) in the introductory chapter, and I will elaborate on it in the next two chapters. For now, it suffices to say this: small-c constitutional issues like Indigenous sovereignty, self-determination and treaty have so often overlapped with demands for Indigenous recognition in Australia’s written constitutions that a history of the latter which ignored the former would be radically incomplete.

The chapter begins some three decades before ‘constitutional recognition’ started to assume discursive dominance within debate over Indigenous affairs. From 1979, over roughly a decade, the first national debates over a treaty between Indigenous peoples and the Australian state took place. In these treaty debates, the language of recognition was part of the rhetorical arsenal of Indigenous activists, used to make radical demands for land rights, self-determination and sovereignty. The recognition

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they sought was of an international as well as a constitutional nature – emphatically small-c constitutional, but often with a place for the *Australian Constitution* as a powerful instrument for safeguarding Indigenous rights.

From the late 1980s through to the turn of the millennium, the *Constitution* assumed prominence as a site of Indigenous (non-)recognition in its own right. The *Constitution*’s prominence was due to wider nation-building efforts throughout the 1990s – especially related to the 2001 centenary of Australian federation and the push for an Australian republic – and a relative downgrading of the treaty debate, which the Hawke Government channelled into an official 10-year ‘reconciliation’ process. In this context, major new Indigenous rights organisations, such as the Aboriginal and Torres Strait Islander Commission (‘ATSIC’) and the Council for Aboriginal Reconciliation, adopted the *Constitution* as an important object in Indigenous struggles for symbolic and substantive recognition of status and rights. And after Indigenous peoples’ experience in the early years of the Howard Government, which set about curbing Indigenous rights protections, Indigenous advocates turned increasingly to the *Constitution* as a means of curtailing Commonwealth power over Indigenous peoples. However, the *Constitution* was one part of these organisations’ visions of Indigenous recognition, which were enmeshed with expansive claims for postcolonial settlement. Seeking to contain these broader agendas, the Howard Government appropriated the language of recognition to a more conservative cause – a symbolic reference to Indigenous people within a new preamble to the *Constitution* – which was overwhelmingly rejected by Indigenous leaders and then in a 1999 referendum by the electorate.

In its remaining years, the Howard Government sidelined the more expansive visions of Indigenous recognition of the 1980s and 1990s. It did so by marginalising the institutions that had championed them and through policies which rejected reconciliation’s promise of Indigenous rights and postcolonial reckoning. To the extent that Indigenous constitutional recognition attained political prominence in these years, it was in the conservative, government-promoted guise of a symbolic mention of Indigenous people in a written constitution. With reconciliation faltering at the national level, Victoria stepped modestly into the breach in 2004, inserting an Indigenous recognition section into the Victorian constitution. And then on the eve of an election his Government would lose in late 2007, Prime Minister John Howard revived the idea
at the national level – and started a bipartisan commitment to constitutional recognition that has continued ever since.

The decade after 2007 has seen ‘constitutional recognition’ attain an unprecedented salience within political debate over Indigenous affairs. In that time, the focus has, until very recently, been on Australia’s written constitutions as sites of Indigenous recognition. Largely on government initiative, all of the States have inserted symbolic Indigenous recognition sections into their own constitutions as exercises in reconciliation and State-building. That modest vision of Indigenous recognition has, however, lost its pre-eminence at the national level. Making a major contribution on that score was the 2010–12 Expert Panel on Constitutional Recognition of Indigenous Australians, a national inquiry conducted by Indigenous and non-Indigenous figures which – spurred by consultations with Indigenous communities – promoted a vision of Indigenous recognition in the Constitution that supplemented the symbolic with substantive protections of Indigenous people from governmental discrimination.

But as successive federal governments and oppositions have dithered on how to progress constitutional recognition of Indigenous peoples, substantial Indigenous discontent – including with the idea of ‘constitutional recognition’ itself – has emerged. Long-marginalised agendas of treaty, sovereignty and self-determination have attained a renewed prominence and legitimacy, often promoted by Indigenous advocates and others as an alternative to constitutional recognition. Yet it would be a mistake to see these visions of Indigenous sovereignty and treaty as repudiations of constitutional recognition per se. As the parallels with earlier treaty debates indicate, these can be seen as counter-visions of Indigenous recognition that prioritise reshaping the small-c constitutional order and according international status to Indigenous peoples.

To set the stage for this part of the story: by the late 1970s, Indigenous politics had shifted in a more radical direction towards a politics of Indigenous peoplehood. These

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politics had eclipsed – without displacing the concerns of – earlier political mobilisations that stressed Indigenous people’s status as Australian citizens.\(^9\) The Indigenous politics of citizenship had peaked towards the end of the 1960s, with the successful culmination in 1967 of a decade-long campaign to rid the Constitution of seemingly discriminatory references to Indigenous people and expand the Federal Government’s power in Indigenous affairs.\(^10\) (I discuss the 1967 referendum in Chapter 5.) After the 1967 referendum, Aboriginal and Torres Strait Islander people increasingly sought recognition from the state not (only) as citizens but as peoples, with collective rights to land, culture and autonomy.\(^11\) On this front, Indigenous advocacy began to pay dividends nationally during and after the tenure of the Whitlam Labor Government (1972–75), which under a policy it labelled ‘self-determination’ developed an Aboriginal land rights scheme in the Northern Territory and cultivated the emergence of an Indigenous sector to represent and deliver services to Indigenous people.\(^12\) Buoyed and yet dissatisfied by such developments, Indigenous activists continued to seek greater recognition of Indigenous peoplehood in the language of land rights and self-determination and, by the late 1970s, in the language of sovereignty.\(^13\)

### A Treaty Talk Commences

An important moment in Indigenous politics was the period 1979 to 1983, when the first national debate over a treaty between Indigenous peoples and the Commonwealth

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\(^9\) McGregor, above n 8, 352.


\(^11\) See above n 8.


Government unfolded. It emerged in an era when Indigenous struggles to regain land and community control, though having seen some significant but piecemeal successes, continued to be waged with vigour.\textsuperscript{14} The treaty debate also emerged at a time when, contrary to many people’s expectations after the 1967 referendum, the Commonwealth had proven reluctant to uphold and protect Indigenous rights against State incursions.\textsuperscript{15} In a period when the \textit{Mabo} litigation was only just being conceptualised, and the High Court’s momentous decision a decade off, Australia’s constitutional foundations remained premised on an understanding that the continent had been, in Blackstone’s phrase, ‘desert and uncultivated’ prior to British colonisation, and that no Indigenous rights had survived the British acquisition of sovereignty.\textsuperscript{16} Indigenous people’s increasing international connections also conduced to treaty debate in Australia by revealing precedents in jurisdictions like Canada, New Zealand and the United States, and by providing concepts – sovereignty, self-determination, peoplehood, treaty – by which Aboriginal and Torres Strait Islander people could articulate local claims.\textsuperscript{17}

Both Indigenous and non-Indigenous actors, inside and outside the Commonwealth Government, played roles in these debates over treaty. The issue was pressed in early 1979 by the National Aboriginal Conference, an Indigenous representative and advisory body established two years earlier by the Fraser Coalition Government.\textsuperscript{18} A non-Indigenous Aboriginal Treaty Committee had also begun working on the issue around the same time.\textsuperscript{19} Later in the year, a group of Aboriginal activists set up a National Aboriginal Government at the new Parliament House site in Canberra, and began agitating for a treaty and Aboriginal Bill of Rights.\textsuperscript{20} Faced with these


\textsuperscript{15} Ibid 71.

\textsuperscript{16} Blackstone’s \textit{Commentaries}, as quoted (at 201) and relied upon (at 243–4) by Blackburn J in \textit{Milirrpum v Nabalco} (1971) 17 FLR 141, maintaining the established legal position that Australia was a ‘settled’ colony, rather than a conquered or ceded territory. That position was heavily qualified, though confusingly not completely overturned, in \textit{Mabo v Queensland (No 2)} (1992) 175 CLR 1 (‘\textit{Mabo (No 2)}’).

\textsuperscript{17} De Costa, above n 8, chs 4–5; Johnson, above n 8.

\textsuperscript{18} Fenley, above n 13.

\textsuperscript{19} Rowse, ‘From Enforceability to Feel-Good’, above n 14.

\textsuperscript{20} ‘Aborigines Stake Claim on Capitol Hill’, \textit{The Canberra Times} (Canberra), 8 August 1979, 3; Kevin Gilbert, ‘A Plea for Recognition of Aborigines’ Grievances’, \textit{The Canberra Times
demands, the Fraser Government showed a willingness to negotiate some sort of agreement, but resisted the National Aboriginal Conference’s more significant demands and rejected the language of ‘treaty’ for its internationalist connotations. Anticipating concerns of terminology, the National Aboriginal Conference substituted ‘treaty’ with the Yolngu word makarrata – whose meaning it translated as ‘a coming together after a struggle’ – and from late 1979 began consultations with Indigenous people over a makarrata’s contents. In late 1981, the Senate charged its Standing Committee on Constitutional and Legal Affairs with examining ‘a compact or “Makarrata” between the Commonwealth Government and Aboriginal Australians’, and in its 1983 report the Committee recommended a constitutional amendment for advancing such a compact.

During this period, the language of recognition formed part of the rhetorical repertoire of Indigenous activists as they made demands for a treaty and associated calls for rights, sovereignty and self-determination. Advocates often spoke of an original and ongoing failure of the colonisers to recognise Indigenous peoples. In restitution they sought contemporary recognition – of their prior occupation, historical grievances, land rights, sovereignty and international status.

For instance, as a representative of the self-proclaimed National Aboriginal Government, Aboriginal author and activist Kevin Gilbert wrote to Prime Minister Malcolm Fraser in late 1979 demanding a treaty and Aboriginal Bill of Rights. His letter, published in The Canberra Times under the heading ‘A Plea for Recognition of Aborigines’ Grievances’, critiqued the British colonisation of Australia for ‘refus[ing] to recognise the industry, the commerce, the governments of the Aborigines and their rights to those areas of land clearly defined in tribal boundaries according to Aboriginal law.’ Gilbert argued that ‘Australia is virtually the only country in the world that does

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21 Senate Standing Committee on Constitutional and Legal Affairs, Parliament of Australia, 200 Years Later …: Report by the Senate Standing Committee on Constitutional and Legal Affairs on the Feasibility of a Compact or ‘Makarrata’ Between the Commonwealth and Aboriginal People (1983) 17–21.


23 Senate Standing Committee on Constitutional and Legal Affairs, above n 21, xii, 1.
not concede recognition of true land rights under international law’, and he accordingly sought negotiations between the National Aboriginal Government and the Australian Government to rectify the situation.\textsuperscript{24}

A different organisation, the government-established National Aboriginal Conference, also used the language of recognition in its advocacy surrounding a treaty or makarrata. Reporting on national consultations with Indigenous people, the Conference’s Makarrata Sub-Committee listed as their very first demand that ‘[t]he MAKARRATA recognises that the Aboriginal people were the prior owners of the Australian continent, and the Aboriginal people enter this agreement and negotiate with the Australian Government as an equal party.’\textsuperscript{25} In its position paper on the makarrata published in 1981 and delivered to the World Council of Indigenous Peoples meeting in Canberra, the National Aboriginal Conference presented Indigenous recognition – in particular, international recognition – as a foundational concern for negotiations. Invoking the recent history of decolonisation and international law on self-determination, the Conference proclaimed that ‘[t]he Aboriginal people therefore require that the Australian Government recognise their international standing. … [T]here is no impediment to the Australian Government recognising the Aboriginal Nation as an international entity with which it may treat.’\textsuperscript{26} At the very least, Indigenous people, said the Conference, demanded ‘recognition as a domestic nation in a manner similar to the legal recognition accorded to American Indians over a century ago.’\textsuperscript{27} ‘Providing our nationhood was recognised’, the Conference would be willing to proceed with a treaty enforced through Australian domestic law.\textsuperscript{28}

Indigenous submissions to the 1981–83 Senate Committee inquiry into a treaty similarly sought rectification of Indigenous peoples’ historical and contemporary non-recognition. The National Aboriginal Conference’s submission stressed that ‘Aboriginal communities wish to be recognised as sovereign nations capable of governing themselves’.\textsuperscript{29} Neslie Skuta, a member of the Conference executive, told the Senate

\begin{itemize}
\item \textsuperscript{24} Gilbert, ‘A Plea for Recognition’, above n 20, 12.
\item \textsuperscript{25} National Aboriginal Conference, above n 22, 3.
\item \textsuperscript{26} Ibid 1–2.
\item \textsuperscript{27} Ibid 3.
\item \textsuperscript{28} Ibid 2.
\item \textsuperscript{29} Quoted in Rowse, ‘A Spear in the Thigh’, above n 22, 213.
\end{itemize}
Committee that ‘recognising us as a sovereign race of people means we have an identity – an identity equal to that of the rest of you’. According to the Central Australian Aboriginal Organisations’ submission: ‘The settler state has never recognised the prior ownership of this land belonging to the Aboriginal nation. We demand that the colonial settlers who have seized the land recognise this sovereignty and on that basis negotiate their right to be there.’

The Senate Committee’s report quoted Nelson Gavenor, a witness from Mornington Island, who stated simply: ‘as 200 years had passed since the white man came to Australia it was time that he recognised the Aborigine.’

In its report, the Senate Committee itself adopted the language of recognition from Indigenous people’s submissions. It concluded that foremost among Indigenous people’s objectives for a compact were ‘[r]ecognition of Aborigines and Torres Strait Islanders as separate and distinct peoples with their own cultural identity and heritage’ and ‘recognition that they were the prior owners of this country’. Accompanying such recognition would be self-determination, the return of land, compensation for dispossession and socioeconomic equality, among other things.

During this time, the political mobilisation over treaty had a constitutional dimension. Indigenous demands were standardly constitutional in a small-c sense, frequently putting in question the justice and legality of the British state’s very acquisition of sovereignty over Australia. And by unsettling the moral and legal foundations of settler sovereignty, Indigenous activists opened space for Indigenous peoples’ own small-c constitutional (and international) claims to territory and governing authority. (This small-c sense of ‘constitutional’ was sketched in the introductory chapter and is fleshed out in greater detail in the next two chapters.)

The big-C Constitution also featured in many of these visions of Indigenous recognition, insofar as it was a potentially powerful instrument for securing Indigenous rights. Indigenous peoples’ textual invisibility within the Constitution – a particular kind of non-recognition – was not, however, a concern at this time. This was likely because people believed that the still-recent 1967 referendum had already addressed

30 Quoted in ibid 214.
31 Quoted in Senate Standing Committee on Constitutional and Legal Affairs, above n 21, 10.
32 Quoted in ibid.
33 Ibid 126.
Indigenous constitutional exclusion by deleting explicit constitutional references to Indigenous people. In the early 1980s, the focus of Indigenous activism was rather on how political power could be redistributed to Aboriginal and Torres Strait Islander peoples – and then, only incidentally, on how the Constitution might be a vehicle for such redistribution. The main attraction of the Constitution for treaty and related aspirations was that it could entrench Indigenous rights against repeal by governments. It could ensure that ‘the whiteman can’t go back on his word’, as Gilbert put it at the time.\(^{35}\)

B Unsettling the Bicentenary

After the Hawke Labor Government’s election in 1983, treaty fell off the mainstream political agenda until Aboriginal activists revived it in the lead-up to the 1988 bicentennial celebrations of Australia’s colonisation. In the Hawke Government’s early years, its proposal for national land rights legislation, abandoned in 1986, had displaced momentum for a treaty.\(^{36}\) In treaty’s re-emergence to national prominence, Gilbert was once again an important figure, spearheading a ‘Treaty ’88’ campaign that protested the Bicentenary.\(^{37}\) Later in 1988, the chairs of the Northern and Central Land Councils, Galarrwuy Yunupingu and Wenten Rubuntja, presented Hawke with the Barunga Statement, a painted petition which likewise sought a treaty between Aboriginal people and the Federal Government. Initially promising to negotiate a treaty by 1990, Hawke subsequently reneged and opted instead for an official ‘reconciliation’ process.\(^{38}\)

Once more, in these Indigenous mobilisations for a treaty, the language of recognition was part of the rhetorical mix. Again, there was a constitutional dimension to this advocacy, in both the small-c and big-C senses. Galarrwuy Yunupingu, instrumental in the Barunga Statement’s development, drew on the concept of recognition in a newspaper column in late 1987. Foreshadowing trouble if Australia did

\(^{35}\) Gilbert, ‘Makarrata’, above n 20, 5.


not ‘accept your responsibilities’ to Indigenous peoples on ‘your 200th birthday’, Yunupingu wrote:

Give us justice. Give us recognition in your world and our proper place in ours. Charlie Perkins said last week that it was a time for a Treaty that will recognise Aboriginal sovereignty. We want to help you put your occupation of our country on an internationally accepted legal basis. And we want the same legal recognition of our place in our country. The exact form this takes has to be worked out but we’ll settle for a Treaty and a Constitutional recognition of our law and our rights.39

The Barunga Statement, presented the following year to Hawke, began, ‘We, the Indigenous owners and occupiers of Australia, call on the Australian Government and people to recognise our rights’, including to self-determination, land, compensation, culture and equality.40 And it concluded with a call for ‘a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom’.41

‘Recognition’ likewise featured in the Treaty ’88 campaign, in a way that blended constitutional and international recognition. Gilbert’s 1987 book Aboriginal Sovereignty: Justice, the Law and the Land, which emerged out of Treaty ’88, included a draft treaty that incorporated clauses on everything from land rights and sovereignty to firearms and world peace.42 Underpinning the treaty were the following basic conditions:

- recognition of our Sovereign Aboriginal Nation State;
- Recognition of Aboriginals as a People;
- Recognition that the ‘Federal Government’ and the ‘State Governments’ of Australia have no valid claim or right to title or compensation over those areas of land registered as ‘Crown’ lands, Crown parklands, forest, reserves, national parks, commons.43

41 Ibid.
42 Gilbert, Aboriginal Sovereignty, above n 37, 52–67.
43 Ibid 53.
A Treaty ’88 campaign advertisement made similar claims. It critiqued the earlier government move for a makarrata because it ‘would not recognise us as Sovereign Equals’ and ‘could have been amended and repealed by future legislators’. Through a treaty with constitutional effect, Treaty ’88 sought to ‘force a recognition of our full inherent entitlements’, including ‘[i]nternational recognition of Aboriginals as a people’.44

In the decade of treaty advocacy from the end of the ’70s, Indigenous activists and intellectuals used the language of recognition in the service of quite radical agendas. They criticised Indigenous peoples’ historical experience of non-recognition by the settler state, and sought justice through contemporary forms of recognition: of their prior occupation, rights, culture, grievances and sovereignty. They frequently demanded international recognition – recognition of Indigenous peoplehood and self-determination – while demanding constitutional recognition – a reorganisation of public power within the state that respected Indigenous peoples’ claims for territory and autonomy. Where advocates saw an importance for the Constitution (and they often did), it was because the Constitution could be used to entrench substantive forms of Indigenous recognition against repudiation by the state.

II National Identity, the Constitution and a Postcolonial Settlement, 1988–2000

From the end of the 1980s, and as the 1990s progressed, the Constitution started to garner increasing attention in its own right, not simply as a means for advancing substantive Indigenous claims but as a site of Indigenous (non-)recognition. As I discuss in this section, for the first time, political figures, including Indigenous leaders and organisations, began to present the Constitution’s silence about Indigenous peoples as an unjust exclusion in itself. This heightened focus on the Constitution within Indigenous politics resulted from three developments: wider debates throughout the 1990s about Australia’s national identity; a comparative diminution of treaty and the foundational constitutional questions it raised; and Indigenous peoples’ negative experiences with the Howard Government, whose actions demonstrated to many the need to constrain federal power over Indigenous peoples.

While Indigenous organisations like ATSIC – a major national Indigenous representative and service-delivery body created in 1989 to replace the National Aboriginal Conference – increasingly addressed the Constitution in putting forward proposals for Indigenous recognition, those accounts stressed that recognition was about substantive rights protections, not mere symbolism. Just as importantly, contemporaneous Indigenous visions of recognition also ranged well beyond the Constitution, taking in numerous proposals for small-c constitutional transformation. Before millennium’s end, however, the language of recognition had been appropriated by the Howard Government in the service of a narrower, more conservative agenda: an unenforceable preamble to the Constitution mentioning Indigenous people.

A National Identity and Indigenous Invisibility in the Constitution

Some early groundwork for these developments had been laid in the mid- to late 1980s. In particular, the Hawke Government in late 1985 commenced a comprehensive process of constitutional review – a Constitutional Commission that ran into 1988 – with the goal of enacting reforms to coincide with the 1988 Bicentenary. Within this process of sustained attention on the Constitution – including a spectacularly unsuccessful referendum on four constitutional amendments in late 1988 – the Constitution was positioned as an important site for the construction of national identity, albeit one in need of updating to better reflect contemporary Australian values.45

Not coincidentally, it was through the Constitutional Commission and its Advisory Committees that Indigenous invisibility in the Constitution’s text was first presented as a problem, to be rectified through forms of explicit textual ‘recognition’.46 When it came to questions of Indigenous recognition, the Commission’s final report made only a modest recommendation: to change the Commonwealth’s lawmaking power over Indigenous peoples from its basis in the governance of ‘races’ to a basis in


Indigeneity.\textsuperscript{47} But the Commission and its Advisory Committees canvassed an array of other possibilities for Indigenous constitutional recognition, including provisions facilitating the making of treaties. This process also gave birth to an idea that would become influential in later years: a new constitutional preamble mentioning Indigenous peoples.\textsuperscript{48} According to the Advisory Committee on Rights, which recommended the preamble, ‘[s]uch recognition in the Constitution would be an act of good faith and symbolic importance in furthering reconciliation between Aboriginal and non-Aboriginal Australians’.\textsuperscript{49} The broader point is that the Constitutional Commission’s work had highlighted the Constitution’s role as a national symbol and that, for the first time since the 1967 referendum, Indigenous people’s place within that symbol was starting to be questioned.

Even the most adventurous proposals of the Commission’s Advisory Committees – such as a Commonwealth power to make treaties with Indigenous peoples – fell short of the more radical Indigenous aspirations for recognition that predominated at the time. Responding to the Advisory Committees’ work in September 1987, an article published by the Northern and Central Land Councils in their \textit{Land Rights News} was scathing. Titled ‘Committees Cop Out On Constitution’, the article began by observing that the Committees had dashed ‘[h]opes for full Constitutional recognition of Aboriginal sovereignty’. It was a genuine problem, the article agreed, that the Constitution ‘does not even acknowledge the existence of Aboriginal people’. But the Committees’ recommendations ‘proposed nothing which would be enforceable’ – such as a constitutionally entrenched treaty – and ‘settled instead for a symbolic gesture’. These failings left an open question, the article concluded, of ‘where next do Aboriginal people pursue Constitutional recognition and guarantees of their rights’.\textsuperscript{50}

As it turned out, the Hawke Government sought in 1991 to divert Indigenous activism surrounding a treaty into an official, 10-year process of ‘reconciliation’.\textsuperscript{51} The

\begin{itemize}
\item \textsuperscript{48} Advisory Committee on Individual and Democratic Rights under the Constitution, above n 46, 72.
\item \textsuperscript{49} Ibid.
\item \textsuperscript{50} ‘Committees Cop Out on Constitution’ (September 1987) 2(4) \textit{Land Rights News} 3, 3.
\item \textsuperscript{51} Gardiner-Garden, above n 38, 16–18; Andrew Gunstone, \textit{Unfinished Business: The Australian Formal Reconciliation Process} (Australian Scholarly Publishing, 2009); Angela Pratt, \textit{Practising
reconciliation process was established under the *Council for Aboriginal Reconciliation Act 1991* (Cth), which the Parliament passed unanimously. It set up a formal process of reconciliation timed to coincide with the lead-up to the 2001 centenary of Australian federation. The process would be overseen by a Council of Aboriginal Reconciliation, which would be chaired by an Indigenous person and have over half Indigenous representation. Among the Council’s functions was investigating ‘whether reconciliation would be advanced by a formal document or formal documents of reconciliation’. As discussed later in this chapter, the Council’s activities would truly come to a head at the end of its tenure, as it recommended a broad settlement, including a treaty and constitutional reforms, in the name of reconciliation.

If the reconciliation process had partly displaced treaty, two interrelated processes of constitutional review and their associated nation-building efforts throughout the 1990s – activities surrounding the centenary of Australian federation as well as moves to make Australia a republic – would further orient political attention towards the *Constitution*. The major initiative surrounding the centenary of federation was the Constitutional Centenary Foundation, a non-governmental, non-partisan body emerging out of a major 1991 event, the Constitutional Centenary Conference. Throughout the 1990s, the Foundation undertook numerous activities designed to educate Australians about their constitutional system and foster discussion about its review. Another development, with which centenary-of-federation activities overlapped, was the push to make Australia a republic. Elevated by the Keating Labor Government in the mid-1990s, the republic debate witnessed various official and unofficial processes, including a Constitutional Convention in 1998 to determine the model to be put to referendum. The process culminated in November 1999 with a referendum on the republic, and a separate referendum question to create a new

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54 *Council for Aboriginal Reconciliation Act 1991* (Cth) s 6(1)(g).


constitutional preamble (of which more below). Both proposals were roundly defeated.\footnote{57}

Within these processes of nation-building through constitutional review, as in the Constitutional Commission’s work, the questions of Indigenous recognition which inevitably arose were typically framed as questions of Indigenous peoples’ visibility within the Constitution’s text. They were also often entangled with the language of ‘reconciliation’. Thus, the 1991 Constitutional Centenary Conference resolution proclaimed that ‘[a]s part of the reconciliation process, the Constitution should recognize the Aboriginal and Torres Strait Islander peoples as the indigenous peoples of Australia’.\footnote{58} By then, it seemed obvious that Indigenous peoples were not presently recognised in the Constitution, being unmentioned in its text.

But what form would such recognition take? Did it entail substantive, enforceable Indigenous rights? On these questions, the Conference resolution was more circumspect. It resolved that the reconciliation process should ‘seek to identify what rights the Aboriginal and Torres Strait Islander peoples have, and should have, as the indigenous peoples of Australia, and how best to secure those rights, including through constitutional changes’.\footnote{59} In evidence here was the capaciousness of ‘recognition’ in accommodating different agendas. The Conference’s politically diverse attendees could agree in the abstract on Indigenous recognition in the Constitution, but they left unanswered questions of its form, content and relationship with ‘rights’.

While the turn towards the Constitution partly obscured the foundational questions Indigenous activists had pressed in the 1980s about settler sovereignty, Indigenous sovereignty and treaty, prominent Indigenous figures did come to condemn what they saw as their non-recognition within the Constitution. And at any rate, the shift to the Constitution still presented opportunities to pragmatically advance Indigenous agendas.

For instance, the Constitutional Centenary Foundation and the Council for Aboriginal Reconciliation held an international conference in 1993 looking at


\footnote{58} Constitutional Centenary Conference, above n 55, 155.

\footnote{59} Ibid.
Indigenous peoples’ position in national constitutions. In her speech, Lois (later Lowitja) O’Donoghue – the first Chair of the newly created ATSIC – spoke forthrightly of how the original Constitution had, through exclusionary references to Aboriginal people, provided ‘an entirely negative recognition ... [which] mirrored the doctrine of terra nullius’.\(^{60}\) While the 1967 referendum had removed this ‘negative recognition’, it had left a ‘vacuum of non recognition of indigenous people’.\(^{61}\) She asserted that ‘[a]ny reformed Constitution must recognise the special status and cultural identity of the first Australians. We must be recognised as the original occupiers and owners of this land.’\(^{62}\) Achieving ‘substantial constitutional recognition’, argued O’Donoghue, would involve multiple reforms: a new constitutional preamble recognising Indigenous peoples’ original occupation and ownership, an empowerment of the Commonwealth to negotiate with Indigenous peoples, protect their rights and legislate only for their benefit, and possible constitutional entrenchment of Indigenous rights.\(^{63}\)

### B   Mabo and a ‘Social Justice Package’

The foundational constitutional questions about settler and Indigenous sovereignty, partly obscured since the late 1980s, resurfaced in the wake of the High Court’s 1992 decision in *Mabo v Queensland (No 2).*\(^{64}\) In that judgment, more than two centuries after British colonisation of Australia had commenced, the court held that ‘native title’, a species of property based in Indigenous law and custom, survived the British acquisition of sovereignty and could now be recognised by the common law. Through that belated legal discovery, the *Mabo* decision simultaneously unsettled the foundations of British sovereignty and pointed towards ongoing forms of Indigenous political and legal authority. This was a small-\(c\) constitutional decision of the highest magnitude, and one that amplified pressure for negotiation towards a wider postcolonial settlement.\(^{65}\) Many Indigenous leaders saw the judgment in these terms. As Kevin

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\(^{61}\) Ibid 48.

\(^{62}\) Ibid 42.

\(^{63}\) Ibid 45–6.

\(^{64}\) *Mabo (No 2) (1992)* 175 CLR 1.

\(^{65}\) On *Mabo (No 2)’s* constitutional dimensions, Jeremy Webber, ‘Beyond Regret: *Mabo’*s Implications for Australian Constitutionalism’ in Duncan Ivison, Paul Patton and Will Sanders
Gilbert told an interviewer in 1992, ‘[t]he Mabo case is the turning point for justice for Aboriginal People and indeed the turning point to lay the firm foundations and a vision for the whole of this country’.  

The Prime Minister at the time, Paul Keating, likewise saw Mabo as an important opening, and sought to negotiate a ‘Social Justice Package’ for dealing with broader questions in the Indigenous–settlel relationship. His famous Redfern speech, given in late 1992, spoke of the need for an ‘act of recognition’ about the dark history of settler treatment of Indigenous peoples, and presented Mabo as a ‘historic turning point, the basis of a new relationship between indigenous and non-Aboriginal Australians’. In developing a Social Justice Package, the Government engaged ATSIC and the Council for Aboriginal Reconciliation to consult Aboriginal and Torres Strait Islander peoples nationally and make submissions to the Government about the Package’s contents. This they did in 1994, with assistance from the Aboriginal and Torres Strait Islander Social Justice Commissioner, at the time Aboriginal lawyer Mick Dodson.

The outcome was the production in 1995 by ATSIC, the Council for Aboriginal Reconciliation and the Social Justice Commissioner of wide-ranging reports on social justice for Indigenous peoples. These new Indigenous rights organisations, all government-funded statutory creations, were less radical than many Indigenous activist movements of the 1970s and 1980s. But their visions of ‘social justice’, if less couched in the language of sovereignty, still extended far and deep.


66 Gilbert, Aboriginal Sovereignty, above n 37, 3.


In developing proposals for a post-*Mabo* settlement in 1994–95, these organisations presented the issue of recognition as a fundamental and wide-ranging concern. An issues paper jointly produced in 1994 by the three organisations posed ‘recognition and empowerment’ as one of five broad issues to be addressed in the Social Justice Package.\(^71\) Both reflecting and capitalising on the *Constitution*’s contemporary salience in political debate, the issues paper put forward ‘constitutional recognition’ – understood as incorporating Indigenous distinctiveness into the *Constitution*’s text – as the first concern under the ‘recognition and empowerment’ head.\(^72\) Still, constitutional recognition was understood as a broad aim that could be achieved in numerous ways, from the purely symbolic – a new constitutional preamble – to entrenched ‘rights to self-determination and forms of self governance’\(^73\). Aside from constitutional recognition proper, the issues paper also put under the ‘recognition and empowerment’ head the small-c constitutional issues of Indigenous self-government and regional Indigenous–state agreements.\(^74\)

The centrality of recognition in negotiations over a Social Justice Package was reflected in ATSIC’s report title: *Recognition, Rights and Reform*.\(^75\) In principles drafted as a foundation for future Indigenous–state relations, ATSIC listed one principle first: ‘recognition of indigenous peoples as the original owners of this land, and of the particular rights that are associated with that status’.\(^76\) Here, ATSIC did not equivocate: Indigenous recognition entailed substantive rights. ATSIC saw ‘constitutional recognition’ as a vital dimension of ‘recognition and empowerment’ within a Social Justice Package, since the *Constitution* makes no mention of Aboriginal and Torres Strait Islander peoples’ and reflects ‘a disappointing history of exclusion and non recognition’.\(^77\) ATSIC’s proposals for redressing such constitutional non-recognition were many and far-reaching, including entrenchment of Indigenous rights, Indigenous

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\(^73\) Ibid.


\(^75\) ATSIC, *Recognition, Rights and Reform*, above n 70.

\(^76\) Ibid 10.

\(^77\) Ibid 44.
seats in Parliament, recognition of Indigenous self-government, Indigenous States or Territories within the Australian federation and a treaty.\textsuperscript{78} As in the issues paper, the ATSIC report also proposed small-c constitutional changes – Indigenous political representation, compensation, regional agreements, self-government and treaty – as components of ‘recognition and empowerment’.\textsuperscript{79}

A broad and robust idea of Indigenous recognition was likewise at the heart of Social Justice Commissioner Mick Dodson’s report on the Social Justice Package.\textsuperscript{80} Dodson foregrounded the need for post-\textit{Mabo} constitutional reform, recommending that ‘recognition of the unique place of Indigenous peoples in contemporary Australia be a fundamental principle in any national constitutional review and revision’.\textsuperscript{81} But he warned against ‘taking an exclusive view of constitutional reform and focussing on nothing but the document itself’.\textsuperscript{82} That was because, ‘for Indigenous peoples, what is constitutional is our whole relationship with the society which has dispossessed or disadvantaged us’.\textsuperscript{83} Accordingly, Dodson argued, ‘recognition could be on a grand scale and involve something like a national covenant or reconciliation accord’ between Indigenous peoples and the state, and potentially entrenched in the \textit{Constitution}.\textsuperscript{84} Equally, constitutional recognition might involve protection of Indigenous-specific rights in the \textit{Constitution}, the creation of Indigenous parliaments and courts, the recognition of Indigenous self-government and the negotiation of treaties.\textsuperscript{85} Indeed, Dodson’s report gave considerable emphasis to regional agreements as a means of collective Indigenous empowerment and recognition.\textsuperscript{86} Here, as in ATSIC’s report, was an expansive vision of Indigenous recognition – constitutional in both big-C and small-c senses – to be pursued as part of a postcolonial settlement.

\textsuperscript{78} Ibid 45.
\textsuperscript{79} Ibid ch 4.
\textsuperscript{80} Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Strategies and Recommendations}, above n 70, vol 1.
\textsuperscript{81} Ibid 18.
\textsuperscript{82} Ibid 17.
\textsuperscript{83} Ibid.
\textsuperscript{84} Ibid 10–11 (emphasis omitted).
\textsuperscript{85} Ibid 15–16.
\textsuperscript{86} Ibid 16, ch 2; Aboriginal and Torres Strait Islander Social Justice Commissioner, \textit{Indigenous Social Justice: Regional Agreements} (Office of the Aboriginal and Torres Strait Islander Social Justice Commissioner, 1995) vol 2.
C Containing Recognition and Reconciliation

Whereas *Mabo* had opened a space for these broad visions of social justice and Indigenous constitutional recognition to re-emerge, the Howard Government came to power in 1996 intent on containing them. The Social Justice Package itself withered under government neglect. The new Government went beyond simply ignoring these Indigenous demands, however: it began rolling back existing laws and policies supporting Indigenous rights. Within its early years in power, the Government cut ATSIC’s funding, curtailed Indigenous heritage protections in the ‘Hindmarsh Island affair’ and substantially weakened native title rights Indigenous peoples had won. In a significant departure from his predecessor’s 1992 plea for an ‘act of recognition’ for Indigenous grievance, Prime Minister John Howard rejected what he described as the ‘black armband view of Australian history’ – which emphasised historical injustices done to Indigenous people – and instead insisted that ‘the balance sheet of Australian history is a very generous and benign one’. Accordingly, when the Government was presented with the 1997 report into the Stolen Generations of Indigenous children removed from their families throughout the 20th century, Howard rejected the inquiry’s recommendation for a governmental apology. In this context, when Howard delivered a combative address to the 1997 Australian Reconciliation Conference, the crowd turned their backs on him. Facing re-election in 1998, Howard described the speech as his greatest mistake in office, one he said he wanted to atone for through his own proposal for constitutional recognition.

Acceding to widespread community feeling for reconciliation while seeking to contain that sentiment’s grander ambitions, Howard appropriated the concept of recognition to a more minimalist, conservative cause: mentioning Indigenous people in

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87 Gardiner-Garden, above n 38, 22–3.


a legally unenforceable preamble to the Constitution. The idea of Indigenous recognition in a preamble, originally canvassed by the Constitutional Commission in the late 1980s, had been endorsed in the 1998 Constitutional Convention on an Australian republic. With the country approaching the republic referendum in late 1999, as well as federation’s centenary and the official reconciliation process’s close in 2001, Howard expressed his support for ‘a workable way to recognise in the basic document of our country the prior occupation of the landmass of this country by the indigenous people’. Howard’s solution was in a purely symbolic constitutional preamble, developed in conjunction with Aboriginal Senator Aden Ridgeway. Among other recitations about national identity, the proposed preamble ‘honour[ed] Aborigines and Torres Strait Islanders, the nation’s first people, for their deep kinship with their lands and for their ancient and continuing cultures which enrich the life of our country’. The proposal failed, garnering less than 40 per cent support in the referendum in November 1999, faring more poorly than the simultaneous republic referendum.

This proposal for constitutional recognition differed starkly from the more expansive visions put forward as a vehicle for social justice by ATSIC and the Social Justice Commissioner, not to mention the radical Indigenous agendas of the 1980s. In the Indigenous reports on the Social Justice Package, recognition was closely entwined with extensive constitutional reforms guaranteeing Indigenous rights and autonomy. Howard’s agenda, by contrast, presented Indigenous recognition as a purely symbolic affair. As Ridgeway, the preamble’s co-author, explained in Parliament, the proposal was ‘about recognition, not about rights’. But whereas Ridgeway saw the preamble as a ‘precursor for indigenous rights being recognised and codified in the main body of the Constitution’, the recognition Howard envisioned entailed no such thing.

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93 Commonwealth, Parliamentary Debates, House of Representatives, 8 February 1999, 2061.
94 Constitution Alteration (Preamble) 1999 (Cth) cl 3, Schedule.
96 Commonwealth, Parliamentary Debates, Senate, 12 August 1999, 7374.
Indigenous leaders (apart from Ridgeway) largely rejected the Howard proposal and sought without success to push a broader agenda for constitutional reform.\textsuperscript{98} Certainly, many Indigenous people supported their recognition in a constitutional preamble, and it was Indigenous delegates to the 1998 Constitutional Convention who successfully put this on the republic referendum agenda.\textsuperscript{99} But they objected to what they saw as the preamble’s parsimonious wording and its non-inclusive drafting process.\textsuperscript{100} More importantly, they were pressing for more far-reaching constitutional reform to be pursued concurrently: stronger protections from discrimination, guaranteed seats in Parliament and constitutionally entrenched Indigenous rights, as ATSIC Chairman Gatjil Djerrkura told the Constitutional Convention.\textsuperscript{101} Representatives of the more radical Aboriginal Tent Embassy in Canberra went further, arguing that ‘[a]ny Australian constitutional preamble must recognise continuity of Aboriginal sovereignty’.\textsuperscript{102} ATSIC held an Indigenous Constitutional Convention shortly after the general Convention to progress a broader constitutional agenda, though it had only limited impact.\textsuperscript{103}

Substantive constitutional recognition of Indigenous peoples, wrote ATSIC Chairman Gatjil Djerrkura in a 1998 op-ed, had become more urgent under the Howard Government. Its rollback of Indigenous rights to land and heritage had violated political conventions of Commonwealth beneficence established since the 1967 referendum. (On this, see further Chapter 5.) Accordingly, Djerrkura stressed that, as debate over constitutional reform continued, ‘we will be asking for constitutional recognition of our rights. Our experience with governments leaves us all too aware of the uncertain nature of their interest and commitment and the fragile nature of the spirit of 1967.’\textsuperscript{104} That experience – especially the 1998 native title amendments and the weakening of

\textsuperscript{98} McKenna, Simpson and Williams, above n 95, 407.


\textsuperscript{100} See, eg, ‘Scrap the Preamble: Referendum Question Fundamentally Flawed, Says Leaders’, \textit{The Koori Mail} (Lismore), 25 August 1999, 1.


\textsuperscript{102} Aboriginal Tent Embassy, ‘Preamble Must Recognise Aboriginal Sovereignty’, \textit{The Koori Mail} (Lismore), 25 August 1999, 7. On the Aboriginal Tent Embassy, see further Chapters 5 and 6 of this thesis and Foley, Howells and Schaap, above n 8.


\textsuperscript{104} Gatjil Djerrkura, ‘Retreat from Rights’, \textit{The Australian} (Sydney), 3 January 1998, 16.
Indigenous heritage rights during the Hindmarsh Island affair, both widely seen as contravening the *Racial Discrimination Act 1975* (Cth) – led advocates like Djerrkura to demand that federal constitutional power in Indigenous affairs be limited to beneficial, non-discriminatory laws. But such demands made no headway with an unrepentant government. Constitutional recognition of Indigenous peoples, if it was to come, would be on the Government’s terms, and that meant a symbolic mention in the Constitution’s preamble with no other policy or legal change.

As the Council for Aboriginal Reconciliation concluded its work in 2000, it put treaty and constitutional reform back on the agenda. Again, ‘recognition’ was a central concept in the Council’s vision for reconciliation, and as with the Social Justice Package reports, recognition was closely linked to rights and an expansive reform agenda. A key limb of the Council’s final proposals was a National Strategy to Promote the Recognition of Aboriginal and Torres Strait Islander Rights. Within this framework, the Constitution, which ‘does not recognise the special status of Aboriginal and Torres Strait Islander peoples as the first peoples of Australia’, loomed as an important vehicle for Indigenous recognition. But while such recognition had an important symbolic dimension, the Council insisted that ‘[t]rue recognition of the first peoples of Australia cannot be achieved without legal recognition of the rights that flow from that status’. To this end, the Council envisioned treaty negotiations and greater protection of numerous Indigenous rights, including through constitutional amendment. More immediately, the Council recommended constitutional amendments for a new preamble recognising Indigenous peoples, the entrenchment of

105 On these developments’ inconsistency with the *Racial Discrimination Act*, see Chapter 6 of this thesis.


111 Ibid.
the Council’s Declaration Towards Reconciliation and constraints on the Commonwealth’s capacity to pass racially discriminatory laws.112

Despite strong community support in favour of reconciliation, the prospect of a broad postcolonial settlement under the Howard Government was very dim.113 While a November 2000 poll put community support in favour of a treaty at 53 per cent, the Government remained unmoved by the Council’s proposals.114 Having failed to see its far narrower vision of Indigenous recognition endorsed at referendum, the Government now stuck to an agenda of ‘practical reconciliation’, which meant addressing disparities in socioeconomic status between Indigenous and other Australians.115 On the treaty question, Howard repeated a position he had long held: ‘an undivided united nation does not make a treaty with itself’.116 And in a move that deprived the reconciliation movement of urgency and power, the Government did not formally respond to the Council’s recommendations for two years, and then largely to affirm its own policies.117


With the official reconciliation process’s conclusion in 2000, the agenda associated with it – derided by the Howard Government as the ‘rights agenda’, containing more expansive visions of Indigenous recognition – lost a key source of institutional support.118 In this section, I recount the demise of that agenda. The Government’s alternative was ‘practical reconciliation’: addressing Indigenous people’s socioeconomic disadvantage.119 From around this time, and especially in the Government’s latter years, Indigenous policy would also increasingly question

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112 Ibid.
115 Pratt, above n 51, ch 6.
119 Pratt, above n 51, ch 6.
Indigenous people’s individual and collective capacities to manage their own affairs, particularly through ATSIC’s abolition and the Northern Territory Intervention, as I explain in further detail below.

Though some voices continued to call for expansive forms of Indigenous recognition during the Howard Government’s remaining years, I describe in this section how these visions were increasingly marginalised. In this context, setting a precedent for other States, the Victorian Labor Government took a small step into the reconciliation vacuum in 2004 by inserting a symbolic Indigenous recognition section into the State’s constitution. Then on the eve of his electoral defeat in 2007, Howard revived the same idea at the federal level, promising Indigenous recognition in a constitutional preamble. Though this proposal never eventuated, it was an important catalyst in reopening questions of Indigenous constitutional recognition within mainstream debate.

A Practical Reconciliation and the ‘New Paternalism’

Government opposition to the Council for Aboriginal Reconciliation’s wide-ranging agenda for reconciliation did not deter ATSIC from pursuing its own project on treaty and constitutional reform. From the time the Council finalised its work in 2000, ATSIC sought to progress treaty through advocacy, consultation, awareness raising and research.120 As ATSIC Chair Geoff Clark wrote in an opinion piece on Australia Day 2001, ATSIC was pursuing a campaign to progress ‘new forms of constitutional recognition’ because Indigenous peoples ‘continue to be constitutional strangers in our own land’. According to Clark, ‘proper constitutional recognition’ was about securing Indigenous rights to address deep grievances and move forward in the federation’s second centenary: ‘We want an opportunity to develop a new relationship with the Federation. After all, the word “federation” is an old Latin term for treaty.’121 But though Clark insisted ‘[w]e should not need to justify these aspirations’ for recognition,
he knew that such a project was beleaguered in an era when focusing on anything but Indigenous people’s socioeconomic outcomes drew the Government’s ire.\textsuperscript{122}

As such proposals continued to meet resistance at the federal level, the Victorian Labor Government in 2004 took a small step into the breach, affirming a vision of Indigenous recognition similar to that which the Howard Government had proposed in the 1999 referendum. This was an unenforceable ‘recognition of Aboriginal people’ provision inserted at the start of the \textit{Constitution Act 1975 (Vic)}.\textsuperscript{123} Its language was more sympathetic towards Indigenous demands than that of its failed federal predecessor, acknowledging that Victoria had been established ‘without proper consultation, recognition or involvement of the Aboriginal people of Victoria’ and recognising Aboriginal people as ‘original custodians of the land’ (‘custodianship’ had been rejected by Howard).\textsuperscript{124}

Nonetheless, because of its unenforceability and ceremonial nature, the Victorian provision enacted a relatively conservative vision of recognition: in terms of the distribution of political power, the provision left everything as it was. It emerged not from a broad process of consultation with Victorian Indigenous peoples, but from a government initiative to ‘take an important step towards reconciliation’.\textsuperscript{125} In these respects, Victoria’s recognition provision was akin to the 1999 federal proposal. It would provide a model emulated by other States in the following decade and after. Conservative though it was, Victoria’s provision still came at a time when the prospects for any constitutional reform in the name of reconciliation were otherwise slim.

By this time, it was not only the agenda for a broad postcolonial settlement that was in decline: one of that agenda’s most powerful remaining champions, ATSIC, found its very existence threatened. ATSIC’s authority had been eroded by a government-initiated review that had recommended substantial reforms to the body in 2003, and its credibility undermined by scandals plaguing its leadership (notably its Chair Geoff Clark).\textsuperscript{126} These developments, along with bipartisan support, provided the

\begin{flushleft}
\textsuperscript{122} Ibid.
\textsuperscript{123} \textit{Constitution Act 1975 (Vic) s 1A}, as amended by \textit{Constitution (Recognition of Aboriginal People) Act 2004 (Vic)}.
\textsuperscript{124} \textit{Constitution Act 1975 (Vic) s 1A}; McKenna, Simpson and Williams, above n 95, 407, 408, 410.
\textsuperscript{125} Victoria, \textit{Parliamentary Debates}, Legislative Assembly, 26 August 2004, 186 (Steve Bracks, Premier).
\textsuperscript{126} Angela Pratt and Scott Bennett, ‘The End of ATSIC and the Future Administration of Indigenous Affairs’ (Current Issues Brief No 4, Parliamentary Library, Commonwealth of
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Government with justification to abolish ATSIC, which occurred in 2004–2005.\textsuperscript{127} ATSIC was not replaced, except by an Indigenous advisory council selected by the Prime Minister.\textsuperscript{128} Whatever ATSIC’s merits and failings, with its disappearance went a powerful collective Indigenous voice, which had throughout its existence promoted expansive visions of Indigenous recognition.

From around the same time, government policy in Indigenous affairs turned towards measures that increasingly questioned Indigenous people’s individual capacities to act responsibly – what then Health Minister Tony Abbott termed a ‘new paternalism’.\textsuperscript{129} This culminated in the June 2007 Northern Territory National Emergency Response: ‘the Intervention’, as it became known. Where ATSIC’s abolition was underpinned by governmental scepticism of Indigenous people’s capacities for collective agency, the Intervention added scepticism about Aboriginal people’s capacities for individual agency. Seizing on shocking evidence of poverty, alcohol and drug abuse, and violence and sexual abuse against women and children in Northern Territory Aboriginal communities, the Government introduced a swathe of interventionist measures targeting those communities, with a view to inculcating responsible behaviour among their inhabitants. The measures included compulsory management of welfare payments, restrictions on alcohol and pornography, and reforms diluting Indigenous land rights.\textsuperscript{130} The Intervention was supported by suspension of the

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\textsuperscript{127} Pratt and Bennett, above n 126.
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Racial Discrimination Act and was introduced with virtually no consultation with Indigenous people or the Northern Territory Government.\(^\text{131}\)

### B Symbolic Recognition Revived

Only a few months later, shortly before calling a federal election, Howard returned Indigenous constitutional recognition to the centre of the national political agenda, promising a new constitutional preamble mentioning Indigenous people. In a much-publicised speech titled ‘The Right Time: Constitutional Recognition for Indigenous Australians’, Howard – who had largely scorned symbolic acts of reconciliation since his failed 1999 preamble – now insisted that ‘we must find room in our national life to formally recognise the special status of Aboriginal and Torres Strait Islanders [sic] as the first peoples of our nation’.\(^\text{132}\) As Howard had proposed in 1999, this would involve passing a new preamble to the Constitution recognising Indigenous people’s ‘history as the first inhabitants of our country, their unique heritage of culture and languages, and their special (though not separate) place within a reconciled, indivisible nation’.\(^\text{133}\)

This was a conservative’s version of postcolonial nation-building. Howard was talking about symbolism, not a substantive restructuring of Indigenous–state power relations. Howard saw his ‘new settlement’ as a way of supplementing ‘the Indigenous responsibility agenda’ that his Government had been developing, especially in the Intervention.\(^\text{134}\) The starting point was that ‘individual rights and national sovereignty prevail over group rights’.\(^\text{135}\) Reflecting his long-held position, Howard’s vision of Indigenous recognition did not extend to a treaty, for ‘[w]e are not a federation of tribes. We are one great tribe; one Australia’.\(^\text{136}\) And his overture to reconciliation remained

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\(^{\text{133}}\) Ibid 6.

\(^{\text{134}}\) Ibid 2–3, 5.

\(^{\text{135}}\) Ibid 3.

\(^{\text{136}}\) Ibid 4.
steadfast in rejecting ‘a collective national apology for past injustice’. His audience, he confirmed after the speech, was not so much Indigenous people as it was the constituency of ‘middle Australia who does regard this as unfinished business, but they do not see it being resolved on the basis of guilt and the apportionment of blame’.

Endorsed by a Labor Opposition that had a similar commitment in its platform, Howard’s proposal was generally met with scepticism among Aboriginal and Torres Strait Islander people. Given the Government’s record in Indigenous affairs, many were deeply suspicious of its motives and sincerity. Lowitja O’Donoghue, for instance, questioned the timing, suggesting it was just an ‘election sweetener’: ‘He has had 11 years to do that and all the other things. Why would we believe him now?’ Perhaps most scathing was Central Land Council Director David Ross. Pointing to the Government’s refusal to offer an apology, its abolition of ATSIC, its recent vote against the United Nations Declaration on the Rights of Indigenous Peoples and the Intervention, Ross declared: ‘When a snake sheds his skin, he has a shiny new skin, but he’s still the same old snake, with the same old venom’.

But there were also Indigenous leaders who saw Howard’s move as an important opening, and sought to prise it open further with their own more expansive proposals for recognition and reconciliation. Welcoming the Prime Minister’s move, Pat Dodson insisted on the need for ‘substantive negotiations’ for a ‘reconciliatory resolution to the unfinished business’. President of the Western Australian Aboriginal Legal Service, Dennis Eggington, saw Howard’s proposal as a useful precursor to the recognition of rights, treaty and self-determination. In a wide-ranging speech titled ‘Serious Business’, Galarrwuy Yunupingu likewise presented the moment as an opportunity for advancing a broader agenda. Recounting his Gumatj people’s experience of frontier

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137 Ibid.
massacres and his own long struggle for justice, Yunupingu insisted that ‘[i]f there is to be a settlement at all, the Constitution must not just recognise us – it must recognise what is ours and what has been taken from us’.\footnote{Galarrwuy Yunupingu, ‘Serious Business’ (Speech delivered at Melbourne Law School, University of Melbourne, 26 October 2007) 11 <http://www.bowdennmccormack.com.au/WebsiteContent/news/serious-business/galarrwuy-yunupingu.pdf>;} Yunupingu, who had recently been convinced to support the Intervention, had made his support conditional on constitutional recognition.\footnote{As described in Galarrwuy Yunupingu, ‘Tradition, Truth and Tomorrow’, The Monthly (Melbourne), December 2008–January 2009, 32, 36.} And he advocated a vision of recognition that, pace the Intervention, would have removed from the Constitution the Commonwealth’s power to make laws contrary to Indigenous interests and inserted protections for Indigenous rights, especially to lands and waters.\footnote{Yunupingu, ‘Serious Business’, above n 143, 11.}

With the Howard Government losing the 2007 election, Howard’s last-ditch proposal for Indigenous recognition never eventuated, but it had two important political consequences. First, due to its publicity, Howard’s proposal strengthened the association between Indigenous recognition and purely symbolic constitutional change. Though more expansive visions of recognition had often been put forward in the preceding decades – and proposed by Aboriginal leaders following Howard’s announcement – ‘recognition’ had been prominently appropriated by Howard for a more conservative agenda (as in his 1999 preamble proposal). The second consequence cut somewhat against the first. As figures like Dodson, Eggington and Yunupingu appreciated at the time, Howard’s proposal, for all its modesty, licensed anew the having of discussions about Aboriginal and Torres Strait Islander peoples’ constitutional status – conversations the Government had hitherto played a decisive role in foreclosing. Although those discussions would not truly intensify for several more years, they were undoubtedly reopened by Howard’s actions in 2007, which re-established a bipartisan commitment to constitutional recognition that has continued ever since.

### IV The Rise (and Fall?) of ‘Constitutional Recognition’, 2008 and After

Indigenous constitutional recognition, put back on the mainstream agenda from late 2007, would attain a new prominence – and crystallise into a slogan – after the 2010
federal election, when the Gillard Labor Government established an Expert Panel on Constitutional Recognition of Indigenous Australians. But as I recount in this section, as State parliaments continued to insert unenforceable Indigenous recognition provisions into their own constitutions, the Expert Panel would in its 2012 report push the idea of recognition in a more legally consequential, if still Constitution-centred direction. The Expert Panel’s recommendations, seeking at their most ambitious to constitutionally prohibit government discrimination against Aboriginal and Torres Strait Islander peoples, came up against conservative resistance for threatening parliamentary sovereignty.

In the years since, governments and oppositions, both conservative and progressive, have remained committed to recognition and to holding a constitutional referendum on it – while vacillating on its form and content and channelling the issue into numerous official processes. As some Aboriginal intellectuals have explored alternative visions of recognition to placate conservative objections, others have become disillusioned with, even outright opposed to, the mainstream project of constitutional recognition. In this context, as I elaborate below, Indigenous visions of treaty and sovereignty have re-emerged in a serious way, often in express opposition to constitutional recognition. And they have begun to yield results, with both the Victorian and South Australian Governments beginning treaty negotiations in 2016. Yet as the parallels with earlier treaty debates suggest, there is a sense in which contemporary proponents of Indigenous sovereignty and treaty are proposing their own small-c forms of constitutional recognition, even as they sometimes repudiate the phrase and certain manifestations of it.

A Drift in the Rudd Years

Indigenous constitutional recognition, on the Rudd Labor Government’s agenda from the outset, was an aspiration that the Government left inchoate, prioritising instead its policy of ‘closing the gap’ on Indigenous disadvantage. In the long-awaited apology to the Stolen Generations delivered at the Parliament’s 2008 opening, Prime Minister Kevin Rudd flagged a bipartisan commission to work on constitutional recognition, but only after it had dealt successfully with problems of Aboriginal housing.146 The commission never eventuated. At Rudd’s 2020 Summit, which brought intellectuals and

policymakers together to generate new policy ideas, the Indigenous stream strongly endorsed Indigenous recognition, to be pursued through substantive constitutional reform or a treaty. However, several participants including Pat Dodson and Megan Davis complained that the Summit’s official reporting downplayed these aspirations in favour of the Government’s ‘closing the gap’ agenda.\textsuperscript{147}

Several months later, the leaders of 13 clans from east Arnhem Land presented Rudd with a metre-long bark petition outlining substantial demands for constitutional recognition. Accompanying the petition was also a longer communique. Seeking a raft of policy changes and a new Indigenous relationship with the state, the communique strongly rebuked the Northern Territory Intervention and criticised the way in which Aboriginal people had been ‘marginalised and demeaned over the past decade by the Howard regime’.\textsuperscript{148}

In the bark petition, Yolngu and Bininj clans called for recognition of Indigenous rights within the Constitution, to protect their way of life, land rights, economic independence and control over their future.\textsuperscript{149} One of the petition’s key architects, Galarrwuy Yunupingu, had also been instrumental in developing the Barunga Statement back in 1988. But whereas two decades earlier the call had been for recognition through treaty, he had now concluded that Indigenous recognition oriented towards the Constitution, rather than treaty, was right for the times: ‘treaty is not my bread and butter, not in today’s politics’.\textsuperscript{150} The Yolngu and Bininj people’s Constitution-centred vision of Indigenous recognition was far-reaching, nonetheless. And it was received with a noncommittal politeness by Rudd, who promised further

\begin{footnotesize}
\begin{enumerate}
\item The Yirrkala Petition is extracted in Yunupingu, ‘Tradition, Truth and Tomorrow’, above n 144, 38.
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governmental consideration of constitutional recognition and then recommitted to ‘closing the gap’.151

As such Indigenous visions of recognition were receiving a lukewarm federal hearing, some States began proceeding with their own more minimalist proposals. On the Queensland Parliament’s last sitting day in 2008, Premier Anna Bligh committed to mentioning Aboriginal and Torres Strait Islander people within a new preamble to the Constitution of Queensland 2001 (Qld).152 Timed to coincide with the 150th anniversary of Queensland’s establishment, the new preamble was passed in February 2010 amidst conservative opposition.153 Designed as an act of State-building, it explicitly ‘honour[ed] the Aboriginal peoples and Torres Strait Islander peoples, the First Australians, whose lands, winds and waters we all now share’, and proclaimed other values and commitments of Queensland.154 As with its Victorian predecessor and Howard’s 1999 proposal, the Queensland initiative was accompanied by a ‘no legal effect’ disclaimer.155 A few months after the Queensland provision was enacted, the New South Wales Government set in train its own proposal for symbolic Indigenous recognition in the Constitution Act 1902 (Cth), which passed in September 2010.156

Both recognition provisions drew support from members of the Indigenous community, though some articulated what had become a standard criticism of such provisions’ legal ineffectualness. LesMalezer, head of the Foundation for Aboriginal and Islander Research Action, described the Queensland provision as ‘offensive’: while it was finally an acknowledgment after 150 years ‘that Aboriginal and Torres Strait Islander peoples were here first … it goes on to say “and we have no rights as a result of


152 Queensland, Parliamentary Debates, Legislative Assembly, 4 December 2008, 4147.


154 Constitution of Queensland 2001 (Qld) Preamble, as amended by Queensland (Preamble) Amendment Act 2010 (Qld).

155 Constitution of Queensland 2001 (Qld) s 3A, as amended by Queensland (Preamble) Amendment Act 2010 (Qld).

156 Gareth Griffith, ‘Constitutional Recognition of Aboriginal People’ (E-Brief 11, Parliamentary Library, Parliament of New South Wales); Constitution Act 1902 (NSW) s 2, as amended by Constitution Amendment (Recognition of Aboriginal People) Act 2010 (NSW).
that” and that’s what’s offensive about it'.\textsuperscript{157} Percy Neal, the Mayor of Yarrabah, declared: ‘The preamble should be recognising our rights as the first Australians, but not only recognise our rights, but it also should recognise a treaty, so then we can get some real value out of this process’.\textsuperscript{158}

B \textit{The Expert Panel}

A turning point nationally in the ascendance of constitutional recognition was the 2010 federal election. Amidst criticism about Indigenous policy’s absence in the election and the lack of progress towards constitutional reform, the Labor Government, now under Julia Gillard’s leadership, announced a plan to establish an expert panel on Indigenous constitutional recognition and flagged its intention to hold a referendum on the issue.\textsuperscript{159} The Coalition Opposition likewise reaffirmed its support for a referendum on constitutional recognition.\textsuperscript{160} After the election yielded a hung parliament, Gillard was held to this election promise by the Greens and several crossbenchers as a condition for their support of a minority Labor Government.\textsuperscript{161}

Before the year was out, the Expert Panel on Constitutional Recognition of Indigenous Australians had been constituted, with terms of reference left intentionally broad and the form and content of ‘Indigenous constitutional recognition’ unspecified.\textsuperscript{162} This conceptual vagueness was likely a concession to the widely expressed views of Indigenous people that constitutional recognition had to go beyond the purely symbolic reforms – Howard’s preambles, the States’ Indigenous recognition provisions – with which the idea had become increasingly associated. That being said, the Expert Panel’s brief was still closely tied to amendment of the \textit{Constitution},


\textsuperscript{159} Natasha Robinson and Lex Hall, ‘Macklin Vows to Consider Indigenous Recognition in Constitution’, \textit{The Australian} (Sydney), 9 August 2010, 1.

\textsuperscript{160} Patricia Karvelas and Lex Hall, ‘Coalition to Put Aboriginal Recognition to Referendum’, \textit{The Australian} (Sydney), 10 August 2010, 1.

\textsuperscript{161} Expert Panel on Constitutional Recognition of Indigenous Australians, \textit{Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution} (2012) 2.

\textsuperscript{162} Michael Gordon, ‘PM Seeks Legal Recognition of Indigenous Australians’, \textit{The Age} (Melbourne), 9 November 2010, 4; Expert Panel on Constitutional Recognition of Indigenous Australians, above n 161, 3.
reflecting the narrowing of discussions around Indigenous recognition that had taken place since the 1990s.

Understandably, given the formidable difficulties of constitutional amendment, the Expert Panel was assigned a pragmatic task: to recommend reforms capable of securing widespread support in a referendum. Its 22 members – half of whom were Indigenous, including leading thinkers on constitutional reform Pat Dodson, Megan Davis, Noel Pearson and Marcia Langton – were broadly sympathetic to substantive constitutional change, but were also committed to recommending politically feasible reforms. Throughout the middle of 2011, it consulted widely across the country, including in many Indigenous communities, and received 3500 submissions.

Seizing on its malleable mandate, the Expert Panel did much in its 2012 final report to broaden the mainstream conversation on Indigenous recognition beyond the bounds of purely symbolic reforms, supplementing symbolism with a more substantive, though still Constitution-centred vision of recognition. In extensive nationwide consultations, the Expert Panel was pressed, especially by Indigenous voices, to recommend substantive reforms rather than ‘mere symbolism’ in interpreting the meaning of constitutional recognition. But panel members, faced with a difficult-to-amend Constitution and potential conservative opposition, clearly felt the need for a moderating pragmatism. While Indigenous participants in the Expert Panel’s consultations often raised the issues of treaty, Indigenous sovereignty and self-determination, and the Panel itself had in its discussion paper put forward ‘agreement-making’ as a possibility, it declined to incorporate these ideas into its final recommendations. They represented too controversial a vision of Indigenous recognition, one incapable of endorsement at a referendum.

In the Expert Panel’s account, the project of constitutional recognition involved redeeming the Constitution from its complicity in a long history of exclusionary and discriminatory settler nationalism, under which Indigenous peoples had frequently

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166 Ibid especially 112–15.
One contemporary manifestation of Indigenous exclusion, as proponents of Indigenous recognition had been emphasising for over two decades, was that the Constitution ‘remains silent in relation to the prior and continuing existence of Aboriginal and Torres Strait Islander people. An essential part of the national story is missing.’ Another problem, also critiqued since the Constitutional Commission but elevated to new visibility by the Expert Panel, was the ongoing constitutional reliance on the outdated concept of ‘race’ – both in s 25, a defunct provision which contemplates disqualification from voting on racial grounds, and in s 51(xxvi)’s ‘race power’, the current constitutional basis for many Indigenous-specific federal laws. Panel member Marcia Langton had been a particularly forceful and longstanding critic of the corrosive legacies of racialised rule.

Accordingly, the Expert Panel recommended that race be expunged from the Constitution by repealing s 25 and replacing the race power with a new Indigenous-specific power. Accompanying the new power would be preambular recitals acknowledging Aboriginal and Torres Strait Islander peoples’ original occupation of Australia, their relationships with traditional lands and waters, their cultures and heritage, and their need for ‘advancement’. Another recommendation was for a new provision acknowledging the importance of English and Indigenous languages.

If those proposals for recognition were largely symbolic exercises in Indigenous inclusion and postcolonial nation-building, the Expert Panel’s recommendation for a constitutional ban on racial discrimination by Australian governments represented a more legally substantive form of recognition. Without such a provision, Indigenous recognition would be ‘incomplete’. The Expert Panel framed this recommendation as

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170 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 161, 42.

171 Ibid ch 5.


175 Ibid 131–3.

176 Ibid ch 6.

177 Ibid 167.
a reflection of contemporary Australian values, a respectful acknowledgment of Indigenous peoples’ long list of grievances against settler rule and a guarantee against their repetition.178

It is difficult to avoid the conclusion, though the Expert Panel did not say so specifically, that its proposal for a constitutional ban on racial discrimination was also a reaction against a more recent history. That history was Indigenous peoples’ experiences during the Howard years, when their distinct entitlements and citizenship rights, and the Racial Discrimination Act with them, were wound back on several occasions – most recently with the Northern Territory Intervention.179 The Expert Panel quoted submissions criticising the Intervention and its suspension of the Racial Discrimination Act, along with the prophetic warning in 1993 of one of its members, Noel Pearson, about the Racial Discrimination Act’s vulnerability to repeal absent constitutional entrenchment.180 The Panel highlighted the 1998 Kartinyeri decision, in which the High Court had affirmed the Howard Government’s repeal of Indigenous rights during the Hindmarsh Island affair and intimated that federal power over Indigenous peoples was virtually unrestrained.181 In endorsing a fetter on government power to discriminate against Indigenous peoples, the Panel once more quoted Pearson who, despite being a prominent supporter of the Intervention, now lamented: ‘Still today, we are subject to racially targeted laws with no requirement that such laws be beneficial, and no prohibition against adverse discrimination’.182 A constitutionalised ban on racial discrimination was not just a salve for historical wounds but a prophylactic against policies of the present and recent past.

While both sides of politics reaffirmed their commitment to Indigenous recognition following the Expert Panel’s report, its recommendations received a noncommittal response from the Gillard Government and warnings about overreach.

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178 Ibid ch 1, 167.
179 On this history, see especially Chapter 6 of this thesis. See also ibid 39.
180 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 161, 36, 94, 104, 156.
181 Ibid 38, 137, 150.
182 Ibid 167. For similar views from other Panel members around or before that time, see Marcia Langton, ‘Reading the Constitution Out Loud’ (2011) 70(4) Meanjin 18; Megan Davis, ‘Constitutional Reform and Aboriginal and Torres Strait Islander People: Why Do We Want It Now?’ (2011) 7(25) Indigenous Law Bulletin 8, 10. Since the Expert Panel, see, Davis, ‘Competing Notions’, above n 1, 121–2, 126–7; Megan Davis, ‘A Rightful Place: Correspondence’ (2014) 56 Quarterly Essay 73, 77–8.
from conservatives. Upon receiving the report, the Government declared that it would ‘carefully consider the panel’s recommendations before determining the best way forward’. On the other hand, even before the Expert Panel’s report had been released, Shadow Attorney-General George Brandis had insisted that only a ‘modestly worded and dignified preamble’ – rather than something ‘that might open the door to endless litigation and judicial second-guessing of parliamentary decisions’, like a federal power to make laws only for Indigenous ‘advancement’ or a ban on racial discrimination – would satisfy Australia’s penchant for constitutional conservatism. When the report came down, Opposition Leader Tony Abbott warned that a racial non-discrimination clause could amount to a ‘one-clause bill of rights’. Other constitutional conservatives issued similar warnings.

C After the Expert Panel

Concluding that a referendum on constitutional recognition was premature ahead of further discussions and awareness-raising, the Government and Opposition in February 2013 instead passed a symbolic statutory substitute – an ‘Act of Recognition’ – that pushed any referendum into the next term of government. The Parliament diverted the question of constitutional recognition into two further review processes: a parliamentary Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, and another review panel mandated by the ‘Act of Recognition’. That legislation, the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), contained both a preamble and discrete section in which

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184 George Brandis, ‘Modest Change is Within Reach’, *The Australian* (Sydney), 21 December 2011, 10.


188 *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth) s 4.
the Parliament ceremonially acknowledged Aboriginal and Torres Strait Islander peoples’ original occupation of Australia, ongoing relationships to their lands and waters, and continuing cultures, languages and heritage.\textsuperscript{189} While these provisions were not accompanied by a ‘no legal effect’ disclaimer (as the State constitutional provisions had been), they took the form of ceremonial declarations by the Parliament designed to have no legal effect at any rate.\textsuperscript{190} To generate political momentum for a referendum, the Act included a two-year sunset clause (since extended to five years).\textsuperscript{191} Although the Act left the contents of constitutional recognition to be determined, its form nonetheless strengthened the idea that recognition was a purely symbolic affair.

As the official inquiries into recognition proceeded at the federal level, the States continued with their own projects of Indigenous recognition along what was by then the standard State model: a symbolic mention of Indigenous peoples in the State constitution. Following similar reforms in Victoria, Queensland and New South Wales, South Australia inserted a standalone Indigenous recognition provision within s 2 of the \textit{Constitution Act 1934 (SA)} in mid-2013.\textsuperscript{192} Developed with relatively high input from Aboriginal people, its wording was the most expansive to date, referring to Aboriginal people as ‘the State’s first peoples and nations’ and acknowledging ‘that the Aboriginal peoples have endured past injustice and dispossession of their traditional lands and waters’.\textsuperscript{193} From the outset, however, the Government had insisted that any form of recognition could not create new rights or obligations, and a ‘no legal effect’ clause was duly attached.\textsuperscript{194}

In Western Australia, upon the initiative of Aboriginal Labor politician Josie Farrer, a preambular amendment was introduced to the Western Australian Parliament in early 2014, and eventually passed in late 2015.\textsuperscript{195} The provision was the first and only recognition section not to have a ‘no legal effect’ disclaimer, though this was done

\begin{flushleft}
\textsuperscript{189} \textit{Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) Preamble, s 3.}
\textsuperscript{190} On this point, see Chapter 4.
\textsuperscript{191} \textit{Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth) s 5.}
\textsuperscript{192} As amended by \textit{Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013 (SA).}
\textsuperscript{193} \textit{Constitution Act 1934 (SA) s 2.}
\textsuperscript{194} \textit{Constitution Act 1934 (SA) s 2(3). See Advisory Panel on the Recognition of Aboriginal Peoples in the South Australian Constitution, \textit{Time for Respect} (30 October 2012) 3.}
\textsuperscript{195} \textit{Constitution Act 1889 (WA) Preamble, as amended by \textit{Constitution Amendment (Recognition of Aboriginal People) Act 2015 (WA).}
\end{flushleft}
on the understanding that it would have no legal consequences in any case. At the start of 2015, the Liberal Government in Tasmania – the last remaining State without an Indigenous recognition provision in its constitution – started the process of following suit, which occurred when the Tasmanian Parliament inserted a preambular Indigenous statement in October 2016.

But even as this idea of Indigenous recognition retained traction at the State level, at the federal level it had become more beleaguered, as an insistence on ‘substantive’ recognition in the Constitution took greater hold. The Joint Select Committee on Constitutional Recognition of Indigenous Australians, headed by Aboriginal politicians Ken Wyatt and Nova Peris, conducted inquiries throughout 2014 and 2015, and concluded with the Expert Panel that only substantive constitutional change, rather than a purely symbolic preamble, would satisfy Indigenous peoples and the wider public. It endorsed the Expert Panel’s recommendation for curtailing the state’s power to discriminate against Indigenous peoples, though it floated narrower compromise alternatives to the broad constitutional ban on racial discrimination the Expert Panel had proposed.

Arguably more significant was the intervention of influential Expert Panel member Noel Pearson, who in late 2014 penned an extended and highly publicised essay on Indigenous recognition, ‘A Rightful Place’, which sought to advance substantive reforms to the Constitution while assuaging conservative concerns.

Pearson pressed strongly for rights protections:

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196 Joint Select Committee on Aboriginal Constitutional Recognition, Parliament of Western Australia, *Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia* (March 2015) 35–43, 49–51; Western Australia, *Parliamentary Debates*, Legislative Assembly, 19 August 2015, 5577 (Colin Barnett, Premier).


for indigenous people the movement for constitutional recognition has always been about achieving constitutional protection and recognition of indigenous rights and interests within Australia. It is about reconciling the fact that there were peoples here before the British arrived, and making provision for those peoples and their interests to be recognised within the nation. Symbolism and poetry is only one part of it. Substantive change in the national approach to indigenous affairs is the other.\textsuperscript{201}

He entreated conservatives to recall ‘the history that has driven this conversation about constitutional recognition’ – a history of discrimination and grievance.\textsuperscript{202} But Pearson nonetheless conceded the political reality of conservative intransigence towards ‘unelected judges’ wreaking havoc with a constitutional prohibition on racial discrimination.\textsuperscript{203}

As an alternative that would preserve parliamentary sovereignty, Pearson proposed achieving Indigenous recognition through the creation of an Indigenous advisory body within Parliament. Though its advice would be non-binding, the body would ‘ensure that indigenous peoples have a voice in their own affairs’.\textsuperscript{204} Strikingly, Pearson’s proposal attracted support from several avowed constitutional conservatives.\textsuperscript{205} It also garnered support from a range of Indigenous advocates, including the radical Aboriginal Provisional Government.\textsuperscript{206}

\begin{footnotesize}
\begin{itemize}
  \item[201] Ibid 63.
  \item[202] Ibid.
  \item[203] Ibid 63, 66.
  \item[204] Ibid 67.
\end{itemize}
\end{footnotesize}
The broader point is that, with the interventions by the Expert Panel, the Joint Select Committee and Pearson, the once-dominant idea of an unenforceable reference to Indigenous people in the Constitution’s preamble had lost its grip as the presumptive national vision of Indigenous recognition.

D The Return of Treaty and Sovereignty

Even as the national debate on Indigenous recognition had shifted towards substantive reforms (of some kind) to the Constitution, however, more radical Indigenous visions of sovereignty and treaty had once again started to become visible – often put forward in critique of, and as an alternative to, constitutional recognition. The most striking manifestation of this perspective came at a Victorian Government consultation with Aboriginal peoples in early 2016, where the 500 Aboriginal participants unanimously rejected constitutional recognition in favour of treaties. The Victorian Government subsequently committed to treaty negotiations, which are ongoing. In September 2016, following an election where Yolngu candidate Yingiya Mark Guyula was elected on a treaty platform, the incoming Northern Territory Premier flagged his intention to investigate treaty-making. And in December 2016, the South Australian Government set aside $4.4 million for the negotiation of treaties with South Australian Aboriginal nations over five years.

The Indigenous sovereignty critique of constitutional recognition has been underpinned by several arguments and motivations. One is the association, still undeniably strong in many minds, between constitutional recognition and purely

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symbolic reforms. Resistance to constitutional recognition has also been driven by hostility to government policies like major 2014 cuts to the Indigenous sector’s funding and the ongoing, if modified Northern Territory Intervention.

More fundamentally, Indigenous critics have discerned little intellectual space for sovereignty and treaty within dominant visions of ‘constitutional recognition’. Both the Expert Panel and the Joint Select Committee, for instance, ultimately declined to incorporate sovereignty and treaty into their proposals for recognition. The opponents of constitutional recognition have accordingly argued that it leaves too little space for forms of collective Indigenous autonomy.

There is often, too, a sense among these critics that starting with the Constitution, as dominant understandings of constitutional recognition so often do, is itself part of the problem. Rather than Indigenous peoples ‘being written into a document which was based on the premise of terra nullius’, as Arrernte writer Celeste Liddle has put it, critics of recognition have stressed the need for a more foundational starting point in the Indigenous–settler relationship, such as a treaty. Starting with the Constitution unquestioningly affirms settler sovereignty while neglecting Indigenous sovereignty. If in the 1990s Aboriginal and Torres Strait Islander people had first started to question the negative symbolism of their textual absence from the Constitution, by the mid-2010s some were questioning the negative symbolism of their express inclusion


212 Ibid.


214 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 161, chs 8–9; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 198, ch 7.


216 Liddle, ‘A Rightful Place’, above n 211, 90.
within it. For instance, likening constitutional recognition to terrorism, Githabul elder Uncle Yillah argued ahead of a 2015 conference on Aboriginal sovereignty: ‘We are very close to that point where they want us to sign off on our own extinction by putting us into the constitution’.217

Yet while Indigenous critics have come to eschew ‘constitutional recognition’, the concept of recognition has often been embedded within their demands for sovereignty and treaty – demands which are nothing if not constitutional, at least in a small-c sense. This should not be surprising given the parallels with earlier Indigenous activism surrounding sovereignty and treaty, where the idea of recognition, both constitutional and international, regularly featured. Thus, in articulating a vision for a treaty process, Aboriginal barrister Tony McAvoy has stressed the need to correct a basic falsehood underpinning Australia’s foundation, the notion that the continent was ‘settled’: ‘we should be afforded the same recognition as the Bedouin of North Africa, the Cherokee of North America, or the recognition that the Western world extends to the West Papuans’.218 Narungga elder and activist Tauto Sansbury recently urged a treaty to address the fundamental problem that ‘[w]e’ve never been recognised, we’ve never been negotiated with, we’ve never been spoken to’.219 In a well-publicised critique of constitutional recognition titled ‘Fuck Your Recognition, I Want A Treaty’, Aboriginal writer Nayuka Gorrie argued: ‘The thing we want recognised is our sovereignty. We fought, we were massacred, we were subject to genocidal policies but not once did we give up our sovereignty’.220 Yolngu leader and treaty advocate Yingiya Mark Guyula put it simply: ‘We want our own sovereignty recognised . . . Recognise our power, recognise who we are, recognise that we were here before any law that came and ruled all over us’.221

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That demands for treaty and sovereignty also involve constitutional recognition is a point that has been made by Megan Davis. Drawing on comparative and theoretical work on Indigenous rights, Davis has insisted that constitutional recognition exists on a spectrum:

There is weak recognition: a few words of recognition of a fact, pre-occupation, dispossession and survival. There is strong recognition: treaties, constitutional recognition of treaty rights or Aboriginal rights or Indigenous parliaments. In its most minimalist symbolic incarnation it has never been a significant part of Aboriginal advocacy.\textsuperscript{222}

Pointing to earlier strands of Indigenous activism surrounding treaty, sovereignty and constitutional reform, Davis in late 2015 criticised the distinction that had emerged within contemporary debate over treaty versus constitutional recognition: ‘the point is that treaty is the ultimate form of recognition’.\textsuperscript{223}

How Australia’s constitutional politics of Indigenous recognition will play out in the coming years remains deeply uncertain. In late 2015, after pressure from Indigenous leaders to give Indigenous people a proper say on the issue through Indigenous-only constitutional dialogues, the Abbott Government eventually relented.\textsuperscript{224} A Referendum Council was established to guide dialogues with Aboriginal and Torres Strait Islander communities around the country and conduct wider forms of community engagement from mid-2016.\textsuperscript{225} The idea, popular among some mainstream politicians, to hold a referendum in May 2017 to coincide with the 50th anniversary of the 1967 referendum


has now effectively been abandoned. But with the resurgence of broader demands for a postcolonial reckoning anchored around treaty and sovereignty – and negotiations to that end already under way in several States – it is no longer clear that a referendum to amend the Constitution would establish the kind of recognition that Indigenous peoples most want.

V Conclusion

While the idea of ‘constitutional recognition’ has only become ascendant within Australian debate over Indigenous–settler relations in the past five to 10 years, the language of recognition has a much longer lineage within the history of Indigenous constitutional politics. Those politics not only include Aboriginal and Torres Strait Islander peoples’ visibility, status, rights and power under Australia’s national and State written constitutions, but also small-c constitutional questions going to the foundations and basic distribution of political power within the settler state.

As the history of those politics over nearly four decades demonstrates, the language of recognition is indeterminate and malleable, available for and used in the service of agendas from the radical to the conservative. At its most minimal, Indigenous recognition has been about including a symbolic, unenforceable reference to Indigenous people within a written constitution – the model promoted by the Howard Government and now enshrined within all six State constitutions. Though this idea of Indigenous recognition has not in every case been repudiated by Indigenous people, they have nonetheless overwhelmingly promoted visions of recognition that go beyond the purely symbolic. Indigenous people have often seen a role, both symbolic and instrumental, for settler written constitutions in their aspirations for recognition. But Indigenous demands for recognition have also frequently exceeded those instruments’ bounds, seeing their revision as part of – and sometimes as antithetical to – more expansive projects of reconciliation, rights, sovereignty, treaty and postcolonial reckoning.


Here, then, is one important way of understanding constitutional recognition. It is a vague and flexible language, one used by Indigenous and non-Indigenous actors over the past four decades to support various political projects within Indigenous–settler relations in Australia, and one that has come to discursively dominate those relations in the last half-decade.

VI Glossary

Aboriginal and Torres Strait Islander Social Justice Commissioner
A statutory office established under federal legislation in 1992; designed to advocate for the rights of Indigenous peoples.

ATSIC, the Aboriginal and Torres Strait Islander Commission
A national Indigenous representative and service-delivery body established under federal legislation in 1989; abolished in 2004–05.

Barunga Statement

Constitutional Centenary Foundation
A non-government organisation emerging from the 1991 Constitutional Centenary Conference; in the decade preceding the 2001 centenary of Australian federation, the Foundation sought to educate Australians about the constitutional system and foster discussion about its review.
<table>
<thead>
<tr>
<th><strong>Constitutional Commission</strong></th>
<th>A national inquiry established in 1985 to undertake a comprehensive review of Australia’s constitutional system; concluded its work in 1988.</th>
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<tr>
<td><strong>Constitutional Convention (1998)</strong></td>
<td>A national convention held in 1988 comprising elected and government-appointed delegates; deliberated on and recommended a constitutional model for Australia to become a republic.</td>
</tr>
<tr>
<td><strong>Council for Aboriginal Reconciliation</strong></td>
<td>A statutory body established under 1991 federal legislation; designed to oversee an official 10-year ‘reconciliation’ process; concluded its work in 2000.</td>
</tr>
<tr>
<td><strong>Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples</strong></td>
<td>A federal parliamentary committee established in 2013 to investigate and recommend proposals for Indigenous constitutional recognition; presented its final report in mid-2015.</td>
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<tr>
<td>Term</td>
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<tr>
<td>makarrata</td>
<td>A term used by the National Aboriginal Conference instead of ‘treaty’; a Yolngu word meaning ‘a coming together after a struggle’.</td>
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<tr>
<td>Referendum Council</td>
<td>A national, government-appointed body established in late 2015; designed to undertake national consultations on Indigenous constitutional recognition.</td>
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<tr>
<td>Social Justice Package</td>
<td>A policy proposed by the Keating Government in response to the 1992 <em>Mabo</em> decision; designed to be a broad settlement with Indigenous peoples; abandoned in 1996 by the Howard Government.</td>
</tr>
<tr>
<td>Treaty ’88 Campaign</td>
<td>A short-lived Aboriginal activist organisation established in 1987; protested the 1988 Bicentenary of Australia’s colonisation and advocated for a treaty.</td>
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Chapter 3
Conceptualising Constitutional Recognition

Australia’s recent debates about the constitutional recognition of Indigenous peoples have been many things: impassioned, cynical, strategic, sincere, polemical, stage-managed, personal and, among the constitutional lawyers, technical. The debates have served the immediate ends of practical politics and – technical legal analyses excepted – have been conducted in the registers of practical politics as well. Through the language of ‘recognition’, participants make arguments designed to support particular projects: legal reform, nation-building, Indigenous recovery and empowerment, conservative containment.

What these debates have not been is especially theoretical.¹ That is perfectly understandable. On the rough ground of political contestation, it is persuasive power and strategic utility, rather than conceptual clarity, that are most urgent. Technical legal analyses of reform proposals are also designed to serve a pressing practical need – understanding the likely legal consequences of constitutional reforms – rather than to provide better understanding of the broader phenomenon of constitutional recognition itself.

Unnecessary as theory may seem to political projects of Indigenous constitutional recognition, theory is vital for better understanding it. Thinking more deeply about the central concept through which these debates are channelled helps to clarify the normative claims underlying it, the social and political preconditions for achieving it and the kinds of political projects supported by it.

Fortunately, over the past several decades, there has been much theorising about ‘the politics of recognition’, in Canadian philosopher Charles Taylor’s influential coinage.² Such theorising has been done in connection with just the sort of political struggle as that taking place in Australia now over Aboriginal and Torres Strait Islander


peoples’ constitutional status. This corpus of political theory provides the major theoretical resource I draw on in this thesis. The chapter begins by contextualising the political theory on recognition, which has emerged as a way of understanding the identity-based politics – including Indigenous claims – whose prominence has come to rival class-based distributive politics.

In the main part of this chapter, I use the political theory of recognition to conceptualise constitutional recognition. Struggles over recognition involve claims by particular groups to have their identities respected within public institutions, practices and norms. Struggles for \textit{constitutional} recognition seek to refashion constitutional norms and instruments – not only written constitutions but also the ‘small-c’ constitutional order – and to thereby redistribute public power, in ways that better respect the identities of those claiming recognition. There is a necessary mutuality in recognition struggles, according to which those seeking recognition from the state must recognise its existence and sovereignty in turn. This provides a valuable framework for thinking about constitutional recognition of Indigenous peoples, and it is one that I rely on throughout this thesis.

But useful as it is, this conceptual framework still remains abstract and leaves much room for debate over specifics: what features define Indigenous peoples’ identities, what it means to respect those identities, what counts as \textit{constitutional} recognition. With help from Canadian political theorist James Tully, I emphasise the value of answering these questions within the context of concrete, historically situated political struggles, an approach I adopt in later chapters. Here, the theoretical comes together with the world of practical politics, in a mutually enlightening way. When viewed in this practical light, constitutional recognition manifests in specific institutional forms that are constrained by the horizons of politics and identity in which they are negotiated and that are subject to an unpredictable future. Constitutional recognition in practice is provisional, partial and incomplete.

I conclude the chapter by considering a forceful critique of recognition politics advanced by Canadian Indigenous political theorist Glen Coulthard. For Coulthard, forms of Indigenous recognition enacted by the settler state, far from transcending colonial relations, end up instead reproducing them. Coulthard envisions a politics of ‘Indigenous resurgence’ as an alternative to the politics of recognition. Powerful as Coulthard’s vision is, I argue that it does not escape the need for forms of settler recognition – whether constitutional or international – that moderate the exercise of
settler sovereignty over Indigenous peoples, and therefore does not succeed against the politics of recognition more generally.

I Contextualising Constitutional Recognition

The major impulse for much recent theoretical work on recognition has been the rise of identity politics in the past half-century. These politics involve various claims for just treatment of distinct identity groups within society. They include the claims of nationalist groups, ethnic and cultural minorities, women, religious groups, LGBTI people and, of course, Indigenous peoples. Despite the significant differences between the political struggles of these groups, and their potential to clash in practice, they ‘jointly call cultural diversity into question as a characteristic constitutional problem of our time’. Though many identity-based struggles ‘have histories which predate by centuries the emergence of the concept of “identity politics”’, they have in the past 50 years or more become a central feature of political life globally, and represent in Tully’s words ‘one of the most pressing political problems of the present age’.

Prior to the ascendance of identity politics, matters of distributive justice occupied a more dominant position within political practice and theory. Distributive claims target the ways in which resources, wealth and other goods are distributed within society, typically privileging questions of class over identity. As Nancy Fraser has observed, ‘egalitarian redistributive claims have supplied the paradigm case for most theorizing about social justice for the past 150 years’ – from classically liberal defences of status quo distributions of wealth and opportunity, to socially liberal claims for

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5 Tully, Strange Multiplicity, above n 3, 1–2, 4.


7 Ibid 166.

8 Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in Nancy Fraser and Axel Honneth, Redistribution or Recognition?: A Political–Philosophical Exchange (Verso, 2003) 7, 7.
modest redistributions, to socialist claims for radically egalitarian redistributions. But with the rise of identity-based politics, questions of distributive justice have lost their privileged position – some would lament they have been supplanted – within contemporary politics. That conclusion must be tempered in the wake of 2008’s global financial crisis, which has precipitated a striking resurgence of concerns over inequality globally, from the Occupy Movement to the World Economic Forum. More fundamentally, as I will discuss later in this chapter, the distinction between distributive and identity politics – between redistribution and recognition – fails to capture the ways in which identity claims always involve claims for redistribution (and vice versa). Nonetheless, there is a valid distinction to be made between identity politics and distributive politics, at least analytically – and often also practically in terms of the primary basis of political mobilisation (identity vs class). Undoubtedly, political mobilisation based on identity has become increasingly prominent since the mid-20th century.

Within identity politics, a common demand, and the one that has generated the most controversy, is for differential treatment. That is, identity groups often make claims for public institutions to respect their differences from other members of society by treating them differently. Here, such groups charge that ‘difference-blind’ institutions are not neutral between identity groups but in fact privilege certain dominant groups.

It should not be forgotten, however, that, while many groups seek differential treatment, many (often the very same) also demand that in other ways they be treated

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9 Ibid.
10 For partial lamentation of this shift, see Fraser, ‘From Redistribution to Recognition?’, above n 4; for total repudiation, see Brian Barry, Culture and Equality: An Egalitarian Critique of Multiculturalism (Harvard University Press, 2001).
12 Fraser, ‘Social Justice’, above n 8, 50.
13 For a critique of differential treatment, see Barry, above n 10.
14 Taylor, above n 2, 43; Tully, Strange Multiplicity, above n 3, 5–6, ch 3; Will Kymlicka, Multicultural Citizenship: A Liberal Theory of Minority Rights (Oxford University Press, 1995) ch 6.
the same as their fellow citizens.\textsuperscript{15} In either case, the value of equality is commonly appealed to as a justification.\textsuperscript{16} The idea that equality consists of treating people the same where they are relevantly alike and treating them differently where they are relevantly different has a long intellectual pedigree.\textsuperscript{17}

Domestically, identity politics frequently involve demands that the state reform public institutions, practices and norms so as to better accommodate particular groups.\textsuperscript{18} Such reforms include measures as diverse as changes to educational curricula, alterations to public holidays and official acts of apology or commemoration.\textsuperscript{19} Often the reforms sought will be legal in nature, and include the granting of citizen and group-specific rights, forms of power-sharing and self-government.\textsuperscript{20} These reforms may also be constitutional in nature.\textsuperscript{21} At the limit, identity claims – especially those with a nationalist basis – push beyond reforms within the existing state’s constitutional system and seek the establishment of a new state for the group in question.\textsuperscript{22}

Since the early 1990s, the concept of recognition has emerged within political theory as a key way of understanding such identity-based claims. In the Anglophone world, Charles Taylor’s 1992 essay ‘The Politics of Recognition’ was pivotal in defining the theoretical terrain, with subsequent major contributions coming early on from Nancy Fraser, Axel Honneth, Jürgen Habermas and James Tully.\textsuperscript{23} Theoretical work on recognition has frequently drawn on earlier philosophical conceptualisations of

\begin{itemize}
  \item \textsuperscript{16} Tully, \textit{Public Philosophy}, above n 6, vol 1, 170–1, 304–5; Jones, above n 15, 24. Cf Taylor, above n 2, 41–3.
  \item \textsuperscript{17} Douglas Rae, \textit{Equalities} (Harvard University Press, 1981) 59.
  \item \textsuperscript{18} Fraser, ‘Social Justice’, above n 8, 29.
  \item \textsuperscript{19} See, eg, Kymlicka, above n 14, 113–15; Jacob Levy, \textit{The Multiculturalism of Fear} (Oxford University Press, 2000) ch 8.
  \item \textsuperscript{20} See, eg, Levy, above n 19, ch 5.
  \item \textsuperscript{21} Tully, \textit{Strange Multiplicity}, above n 3.
  \item \textsuperscript{22} Ibid 2; Tully, \textit{Public Philosophy}, above n 6, vol 1, 173.
\end{itemize}
recognition, most notably the struggle for recognition in Hegel’s master–slave dialectic. The political theory of recognition has also adopted the concept of recognition from identity politics themselves, which, as Taylor observed, ‘turn on the need, sometimes the demand, for recognition’. The language of recognition, it has been said, is the ‘natural political expression’ of identity politics, and political theory has taken up that language in order to understand those politics.

Analysing identity politics through the lens of recognition has not simply been explanatory but also normative. For many theorists, recognising identity groups is the appropriate response by the state to identity-based claims. Much recognition theory focuses on the claims of identity groups who are subordinated, since it is these groups who are typically denied recognition and from whom demands for recognition are most frequently heard. For sectors of society whose identities are adequately recognised, it is therefore not that recognition is irrelevant but that it can be generally taken for granted.

Recognition is justified on different bases by different theorists. Some see recognition as necessary for people to realise their authentic selves. Some see recognition of distinct identities as necessary to provide individuals with an effective context for exercising their autonomy. For others, recognition is firmly rooted in equality, which entails respecting the things that matter to people, including their identities. Still others, also emphasising equality, have argued that recognising identity groups enables their members to participate as equals in society. Because of the diversity of identity groups and the claims they make, however, it is difficult to offer general justifications that satisfy all cases. I will later argue in favour of looking at

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24 See, eg, Taylor, above n 2, 26, 35–6, 50; Honneth, Struggle, above n 23, pt 1; Fraser, ‘Social Justice’, above n 8, 10; Patchen Markell, Bound by Recognition (Princeton University Press, 2003) ch 2, 6–8, 90–2; Glen Sean Coulthard, Red Skin, White Masks: Rejecting the Colonial Politics of Recognition (University of Minnesota Press, 2014) ch 1.

25 Taylor, above n 2, 25 (emphasis omitted).


27 Fraser, ‘Social Justice’, above n 8, 46.

28 Taylor, above n 2, 28ff; Honneth, Struggle, above n 23.

29 Kymlicka, above n 14, ch 5.

30 Jones, above n 15.

31 Fraser, ‘Social Justice’, above n 8, 36.
struggles over recognition, including justifications for them, in their particular historical contexts.

Within the political theory on recognition, both the claims of Indigenous peoples and claims for constitutional recognition have been important concerns. Taylor’s 1992 essay, for instance, pointed to the significance of Indigenous claims within recognition politics, and took as its main case study the fractious debate over Quebec’s relationship to Canada’s *Charter of Rights and Freedoms*.32 But it has been Taylor’s fellow Canadian James Tully who has most extensively studied the entwinement of recognition, Indigenous peoples and constitutionalism. As Tully observed in his important 1995 book *Strange Multiplicity*, ‘[t]hroughout the world, [Indigenous peoples] are fighting to be recognised as First Nations in international law and in the constitutions of modern societies that have been imposed over them during the last five hundred years of European expansion and imperialism’.33 Tully’s book took Indigenous struggles for constitutional recognition as exemplary of recognition politics more generally and devoted the bulk of its attention to them.34 This and subsequent work by Tully serves as a key theoretical resource for my own study of Indigenous constitutional recognition in Australia. It also demonstrates that both constitutional norms, as well as the status of Indigenous peoples, are central to the politics of recognition more generally.

II Defining Constitutional Recognition

Drawing on this corpus of political theory, it is easy enough to provide a general definition of recognition politics. Contests over recognition involve struggles by particular groups to have their identities respected within public institutions, practices and norms. As a subset of these struggles, constitutional recognition concerns constitutional norms and instruments as sites of recognition. More specifically still, contests over the constitutional recognition of Indigenous peoples in Australia involve struggles by Indigenous peoples to refashion the settler constitutional order so that it better respects their identities.


33 Tully, *Strange Multiplicity*, above n 3, 3.

That definition requires some elaboration, which is what I undertake below, examining the idea of identity and what it means for identity to be respected; the relationship between recognition and redistribution; the ‘constitutional’ dimension of constitutional recognition; and the mutual, relational character of recognition. Even after unpacking the concept of recognition, though, much remains abstract, leaving a great deal of room for debate over specifics. Later in this chapter, I emphasise the value of fleshing out the specifics of recognition by studying concrete, historically situated political struggles.

A Identity

Identity consists of ‘the mutual identification of individuals with one another around shared social markers’. These shared social markers encompass gender, ethnicity or ‘race’, nationality, religion, sexual orientation and – the focus of this thesis – Indigeneity, among other characteristics. Such features ‘carry social expectations about how a person of the particular group is expected to think, act, and even appear’, though these expectations will be diverse, contested and mutable. Members of an identity group will mutually identify around the group’s shared social features: to some extent at least, they will internalise those features as being constitutive of who they are and abide by the social expectations that accompany them. These social markers make a difference to who they understand themselves to be, how they act and options they see themselves as having.

In practice, identities are multiple and diverse, contested and open to change. Ordinarily there will be ‘no precisely agreed boundaries’ of an identity group; there will be different ways of being part of a given identity group. Identity, as Tully observes, is not ‘separate, bounded and internally uniform’ but ‘multiplex or aspectival’; it is not ‘fixed or authentic’ but negotiated and contested, ‘a construct of practical and

36 Ibid 9.
37 Ibid.
39 Ibid; Gutmann, above n 35, 9–10.
40 Tully, Strange Multiplicity, above n 3, 9–11; Tully, Public Philosophy, above n 6, vol 1, 167.
Intersubjective dialogue’.\textsuperscript{41} Identities, moreover, are not natural but are rather the product of social, political and economic forces, and they may change as these forces shift.\textsuperscript{42} This is not to suggest that, at a political level, identities are in an extreme state of flux and indeterminacy: identities may be relatively stable over time. Though ‘identity is potentially open to transformation’, as Courtney Jung has rightly emphasised, ‘whether or not transformation in fact occurs depends on the context’.\textsuperscript{43} The potential for group identities to change, however, is undeniable.

As I bring out later in this chapter and elaborate in subsequent chapters, these characteristics of identity – as multiple and diverse, contested and open to change – pose significant challenges to finding single, definitive, final forms of constitutional recognition. That is not to deny the possibility or importance of recognition. Tully has rightly noted that ‘[i]t is certainly possible to bring a group of people to agree together in defence and promotion of one aspect of their identity … across their other identity-related differences’.\textsuperscript{44} An identity ‘can still be well supported rather than imposed, reasonable rather than unreasonable, empowering rather than disabling, liberating rather than oppressive’.\textsuperscript{45} A majority of those seeking recognition ‘must be convinced that the present recognition they are accorded is unjust in some sense and then convinced that the proposed form of recognition is just and worth the struggle’.\textsuperscript{46} But the nature of identity makes any such resolution partial and provisional.

A defining theme of later chapters is that starting around the late 1960s there occurred a shift in emphasis within Indigenous identity politics. That shift was from an emphasis on Indigenous demands for recognition as citizens to demands for recognition as peoples. It is in the complex afterlife of that shift that older forms of Indigenous constitutional recognition (the 1967 constitutional amendments, the \textit{Racial Discrimination Act 1975} (Cth)) have continued to evolve and negotiations for new forms of constitutional recognition have taken place.


\textsuperscript{43} Jung, above n 42, 55;

\textsuperscript{44} Tully, ‘Identity Politics’, above n 41, 519.

\textsuperscript{45} Ibid.

\textsuperscript{46} Ibid.
B Respecting Identity

Recognition is about the state giving *respect* to the identities of particular groups within public institutions, norms and practices. This point is made in much of the political theory on recognition. But what exactly does giving respect mean? In a classic essay, Stephen Darwall describes what he terms (felicitously) ‘recognition respect’ as ‘giving appropriate consideration or recognition to some feature of [the] object [of respect] in deliberating about what to do’ and ‘to act accordingly’.48 As Patchen Markell has put it, being recognised ‘makes a difference in the way [a recognised group] is treated’.49

When it comes to respecting identities in practice, there are no hard-and-fast rules, just a need for context-specific sensitivity to the identity groups in question and the claims they make for recognition. In Fraser’s words:

In some cases, [identity groups] may need to be unburdened of excessive ascribed or constructed differences. In other cases, they may need to have hitherto underacknowledged distinctiveness taken into account. In still other cases, they may need to shift the focus onto dominant or advantaged groups, outing the latter’s distinctiveness, which has been falsely parading as universal.50

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48 Stephen Darwall, ‘Two Kinds of Respect’ (1977) 88 *Ethics* 36, 38. Darwall distinguishes ‘recognition respect’ from ‘appraisal respect’, which consists of ‘a positive appraisal of a person or his character-related features’: at 41. Appraisal respect is often referred to as ‘esteem’ and recognition respect simply as ‘respect’: see Robin Dillon, *Respect* (21 June 2010) Stanford Encyclopedia of Philosophy <http://plato.stanford.edu/entries/respect>. For Honneth, esteem, along with respect, is an important dimension of recognition; Taylor also invokes a notion of esteem when he discusses recognising the value of different cultures: see Honneth, *Struggle*, above n 23, ch 5; Taylor, above n 2, 64, 66–7. Some have criticised the notion that esteeming identities is an appropriate form of state recognition, especially because esteem is inherently egalitarian: see, eg, Jones, above n 15; Fraser, ‘Social Justice’, above n 8, 99 n32, n33. Without denying that esteem might be an appropriate form of constitutional recognition, I do not advocate it here.


50 Fraser, ‘Social Justice’, above n 8, 47.
While discussions about recognition frequently focus on respecting identity groups’ difference, respecting identity groups’ sameness can, as Fraser and others make clear, also constitute an important form of recognition. The ‘liberal form of recognition as “free and equal” individuals ... is a norm of recognition among others’. For groups whose status as citizens has been denied within public norms, changing those norms to reflect the group members’ citizenship can be an important form of recognition. In other cases, it is supposedly difference-blind norms that are the problem, for failing to respect the distinct identities of particular groups. Recognising identity groups’ distinctness seeks to ensure that ‘assimilation to majority or dominant cultural norms is no longer the price of equal respect’.

It is vital, however, that proposed forms of recognition reflect the perspectives of and are endorsed by the group being recognised. This is on grounds of democratic principle: where one group will be especially affected by a particular government decision, that group’s views ought to be given special consideration. However, respecting the perspectives of a to-be-recognised group is more fundamental to the idea of recognition itself. Recall that recognition’s object is identity, and that identity consists of ways in which people mutually identify on the basis of shared social features. If a proposed form of recognition cannot be endorsed by the people being recognised – if they cannot identify with it – then there is no respect for their identity. For an action to constitute recognition, it must reflect an identity that a group is capable of endorsing from a first-person perspective.

**C Recognition and/as Redistribution**

As I observed earlier, a valid analytical distinction can be made between political projects of recognition and those of (re)distribution. Recognition involves political mobilisation around identity, with particular identity groups demanding respect for who they are within the public sphere. Redistribution involves political mobilisation around

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52 Tully, *Public Philosophy*, above n 6, vol 1, 294 (emphasis omitted).

53 Fraser, ‘Social Justice’, above n 8, 7.


questions of material wellbeing, and the ways that wealth, resources, opportunities and other social goods are distributed among members of a political association.

But it is clear that recognition claims also entail demands for redistribution.56 For one thing, recognition involves the distribution of what Tully calls ‘recognition capital’: intangible forms of status and respect accorded by the state on behalf of the political association as a whole.57 Recognition also redistributes economic and political power and resources – ‘the more traditional objects of distribution’ – to groups demanding that their identities be respected.58 Affirmative action policies are one obvious example, whereby economic opportunities are redistributed to marginalised groups in recognition of their history of subordination as well as their citizenship.59 On a much grander scale, contemporary claims for recognition by national minorities and Indigenous peoples frequently involve the redistribution of political power, as exemplified in demands for territorial jurisdiction.60

The converse principle is also true: redistributive claims also involve recognition claims. The central question of distribution, ‘who gets what’, has the politics of recognition built into it: the ‘what’ can only be distributed on the basis of the ‘who’. In an example given by Seyla Benhabib, ‘[i]n any society, we are entitled to health benefits by virtue of being wage earners, senior citizens, welfare mothers, and so forth. As members of one kind of social group, we have an entitlement to certain rights claims and not to others’.61 Benhabib rightly concludes that while ‘[r]edistribution and recognition are analytically distinguishable … in practice these kinds of claims are deeply implicated in each other’.62

Although this thesis focuses on questions of recognition, those are also questions of redistribution, as will become clear throughout. First, demands for Indigenous recognition are often entwined with socioeconomic claims. A central element of

56 See generally Fraser, ‘Social Justice’, above n 8, 11–26; Tully, ‘Struggles’, above n 55, 470–1. Compare Honneth’s account, which treats recognition as the key to addressing all injustice: Honneth, Struggle, above n 23; Honneth, ‘Redistribution as Recognition’, above n 47.
57 Tully, ‘Struggles’, above n 55, 470.
58 Ibid.
59 Ibid.
60 Ibid.
62 Ibid.
Indigenous claims to be constitutionally recognised as citizens during the 1960s, which I study in Chapter 5, was a desire for special policies addressing Indigenous people’s material deprivation. And Indigenous demands for recognition as peoples, which began to dominate Indigenous politics from the late 1960s, have standardly involved claims for the redistribution of land and capital as a basis for Indigenous self-government. Aside from their connections with the redistribution of economic resources, Indigenous demands for constitutional recognition typically seek to alter the basic distribution of political power within the settler state. I now turn to elaborate this ‘constitutional’ dimension of constitutional recognition.

D Constitutional
What is constitutional recognition, as distinct from other, non-constitutional kinds of recognition? The simplest answer focuses on those codified instruments called ‘The Constitution’ possessed today by most nation-states and many subnational polities (states, provinces, etc).63 Constitutional recognition, on this view, involves respecting the identity of particular groups within ‘written constitutions’.64 Taylor’s seminal essay on recognition politics focused on just this sort of recognition in its main case study. There, Taylor examined the adoption of the 1982 Canadian Charter of Rights and Freedoms and Quebec’s charge that the Charter failed to properly respect the French-speaking province’s historical and linguistic uniqueness.65 One of Quebec’s major counter-initiatives in this period involved seeking to have Quebec constitutionally recognised as a ‘distinct society’, so that the Canadian Constitution’s other provisions, including the Charter, would be interpreted in ways that respected Quebec’s distinct identity.66 Likewise, in contemporary Australian debates over Indigenous constitutional recognition, written constitutions at both the national and State levels have been major focal points, as I discussed in the previous chapter and will also address in the next.

63 For a defence of this approach, see Zachary Elkins, Tom Ginsburg and James Melton, The Endurance of National Constitutions (Cambridge University Press, 2009) ch 3. On subnational constitutions, see, eg, G Alan Tarr, Robert F Williams and Josef Marko (eds), Federalism, Subnational Constitutions, and Minority Rights (Praeger, 2004).


65 Taylor, above n 2, 52–61.

66 Ibid. See further Webber, above n 32, ch 5.
Undoubtedly, written constitutions are important sites of contestation within recognition politics, and constitutional recognition certainly encompasses struggles by particular groups to have their identities respected within written constitutions.

But to associate constitutional recognition solely with written constitutions is to exclude much that is also commonly understood as constitutional. There are of course a handful of contemporary nation-states that do not have a traditional written constitution, including among them the United Kingdom. In these places, ‘the constitutional’ is typically understood as comprising various important statutes, judicial doctrines and political practices. Even in jurisdictions with a written constitution, especially in the common-law world, it is standard to see the constitutional domain as encompassing institutions and norms outside ‘The Constitution’: from constitutional conventions governing the conduct of the executive and legislature, to statutory bills of rights (Canada, New Zealand, Australia) and ‘superstatutes’ (the US), to judicial doctrines such as the ‘principle of legality’. Beyond the confines of particular nation-states, it is now widely accepted that transnational legal arrangements can possess a constitutional dimension as well. The best-known example of such ‘transnational constitutionalism’ concerns the institutions governing an integrated Europe, but other transnational arrangements, such as the United Nations and the World Trade Organization, are also commonly conceptualised in constitutional terms.

67 For a nuanced discussion of the United Kingdom’s ‘unwritten’ constitution, see Adam Tomkins, Public Law (Oxford University Press, 2003) ch 1. On nation-states without a codified constitution, see Elkins, Ginsburg and Melton, above n 63, 6, cf 49.


72 See, eg, Petra Dobner and Martin Loughlin (eds), The Twilight of Constitutionalism? (Oxford University Press, 2010).

In Indigenous struggles over recognition, there is another important institution that, while generally falling outside of written constitutions, is frequently regarded as constitutional. That institution is the treaty, which has featured in Indigenous–settler interactions from the very beginning.\(^{74}\) As Lumbee legal scholar Robert Williams Jr has written, North America’s Indigenous peoples have historically understood their treaties with settlers as instantiating sacred constitutional values, customs and bonds.\(^ {75}\) Other North American Indigenous scholars have conceptualised Indigenous–settler treaties in constitutional terms as ‘treaty federalism’.\(^ {76}\) New Zealand’s Tiriti o Waitangi/Treaty of Waitangi is now widely accepted not only among Māori but also among settler state institutions as a constitutional foundation for the polity.\(^ {77}\) For Tully, the early-modern North American practice of what he calls ‘treaty constitutionalism’ is a paragon of constitutional recognition, modelling norms of reciprocity, consent and continuity that are valuable for all recognition struggles.\(^ {78}\) Because treaties have also regularly been understood to possess an international character, they can be seen as early examples of transnational constitutionalism.\(^ {79}\)

To limit the study of constitutional recognition to struggles over written constitutions is therefore deeply underinclusive, excluding from consideration many institutions, practices and norms that are widely regarded as possessing a constitutional character. These phenomena can be described as ‘small-c’ constitutional, as distinct

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from the written, ‘big-C’ Constitution. But given the constitutional domain’s evident diversity, how to define it? I will explore this issue more extensively in Chapter 4. Here is a working definition: in addition to written constitutions, the constitutional domain encompasses those institutions, practices and norms that concern the fundamental distribution of public power within a political association. Constitutional recognition therefore involves struggles by particular groups to alter the basic distribution of public power so as to better respect their identities. (Notice, finally, how questions of constitutional recognition are also questions of redistribution.)

E   The Mutuality of Recognition: Recognising the State

Theoretical treatments of recognition since Hegel have emphasised recognition’s relational and mutual character. Hegel’s famous struggle for recognition between master and slave ends (to quote Taylor’s gloss) in ‘a regime of reciprocal recognition among equals’. Even before the achievement of such recognition, the two parties involved must, in Honneth’s words, ‘already have accepted the other in advance as a partner to interaction upon whom they are willing to allow their own activity to be dependent’. There is thus a relationship between two agents that precedes any mutual exchange of recognition.

Within recognition politics, however, where the struggle for recognition is not between individual subjects but rather between the state and subordinated groups governed by it, the exchange looks distinctly one-sided. The state emerges as the recogniser, its marginalised subjects as the recognised. However, as Patchen Markell has astutely observed, the state no less than its constituent members makes its own demands for recognition. These demands are often taken for granted and ‘enjoy the

80 On the distinction, see David S Law, ‘Constitutions’ in Peter Cane and Herbert M Kritzer (eds), The Oxford Handbook of Empirical Legal Research (Oxford University Press, 2010) 376, 377.
82 Taylor, above n 2, 50.
84 Markell, Bound by Recognition, above n 24, 25–30. Markell goes on to reject the politics of recognition partly for this reason, but I do not subscribe to Markell’s view on this score.
privilege of appearing pre- or extrapoli
tical’.85 Yet ultimately, the state can only
continue to exist and function as a state if it is recognised as such by its members,
including the subordinated among them, and by other states.86 Particularising this
general fact to the politics of recognition: ‘to appeal to the state for the recognition of
one’s own identity … is already to offer the state the reciprocal recognition of its
sovereignty that it demands’.87 The state is therefore ‘both a participant in and an
artifact of the politics of recognition’.88 Those seeking the state’s recognition must
affirm its sovereignty and right to exist. (This is not to say that such mutual exchanges
of recognition are necessarily equal; on the contrary, these struggles are frequently
characterised by deep power imbalances.89 The power asymmetries that constrain
struggles over recognition comprise a central theme of this thesis’s later chapters.)

The mutuality built into the politics of recognition – whereby those seeking state
recognition must recognise the state in the process – can appear to present serious
problems for Indigenous claims. That is because Indigenous demands often forcefully
challenge the settler state’s origins and its historical and contemporary right to rule over
them.90 If the politics of recognition demands that Indigenous peoples accept the settler
state as a partner of interaction, does it not rule out the very political projects –
challenging settler sovereignty, reinstating Indigenous sovereignty – that many
Indigenous peoples want to pursue?

In fact, as a conceptual matter, recognition-based politics only rule out political
projects that would seek the state’s total dissolution. Those projects – revolutionary
struggles that aim to overthrow and replace the existing state, or anarchist movements
that aim to dismantle and not replace the state – clearly disavow the mutuality
underpinning recognition politics. They do not accept the state ‘as a partner to
interaction upon whom they are willing to allow their own activity to be dependent’.91

85   Ibid 30.
86   Ibid 31.
87   Ibid (emphasis omitted).
88   Ibid 28.
89   Ibid 30.
90   See generally James Tully, ‘The Struggles of Indigenous Peoples for and of Freedom’ in in
Duncan Ivison, Paul Patton and Will Sanders (eds), Political Theory and the Rights of
91   Honneth, Struggle, above n 23, 45.
While such political projects are not necessarily normatively suspect, they cannot be accommodated conceptually within the frame of recognition politics.

Although the politics of recognition requires claimants of state recognition to reciprocally recognise the state’s existence, that does not mean they need to accept the state’s origins as legitimate or uphold its current configuration of sovereignty. It does not even mean that they need to accept the state’s exercise of sovereignty over them. In a struggle over recognition, the state must continue to exist, but not necessarily in its present form. In practice, transforming the state as it is presently constituted is precisely the aim of many struggles over recognition. That includes nationalist movements for independence from an existing state. While such movements seek to radically reconfigure the sovereignty of the state that currently rules them, they do not aim to abolish it. Struggles for independence are a straightforward manifestation of recognition politics: they involve a political collective seeking recognition – international rather than constitutional recognition – from the state that governs them (and from other states). Nationalist movements reject the legitimacy of the state’s rule over them and its current configuration of sovereignty, but ultimately they do seek its recognition and, in the process, they recognise it in turn.

Rather than excluding more radical Indigenous claims – except those that would abolish the settler state itself – recognition-based politics are necessary for their realisation. Anything short of a complete rejection of the state’s existence brings Indigenous claims back into the realm of recognition politics – and the reciprocal recognition of the state which that entails. The reason is that Indigenous peoples and the state are already in a relationship, one in which the state enforces its sovereignty (however illegitimately) over Indigenous peoples as a fact. Challenging the origins and contemporary exercise of that sovereignty requires Indigenous peoples to make recognition claims: claims that the settler state failed historically, and continues to fail presently, to recognise Indigenous peoples themselves as sovereign and self-determining. If this misrecognition is not to be corrected through the settler state’s total abolition, it can only be addressed through new forms of recognition, whether constitutional or international, that alter the way that settler sovereignty is exercised over Indigenous peoples. I take this argument up again at this chapter’s end when discussing Coulthard’s important contribution to the political theory of recognition.

Tully, Strange Multiplicity, above n 3, 2; Tully, Public Philosophy, above n 6, vol 1, 173.
Constitutional recognition involves a particular kind of relationship between the state and those being recognised by it. It is a relationship of joint membership within a single political association. The terms of that membership can manifest in many different ways, from ordinary citizenship rights to federalism and shared sovereignty. As suggested by the rise of ‘transnational constitutionalism’ and by the history of Indigenous–settler treaty-making, constitutional recognition can also involve forms of international recognition. The treaty constitutionalism of early modern North America, according to Tully, created Indigenous–settler constitutional associations premised upon ‘the mutual recognition of both parties as independent and self-governing nations’. While constitutional and international recognition can overlap, constitutional recognition cannot accommodate group demands for total independence: these demands move into the realm of pure international recognition.

III Practising Constitutional Recognition: Historically Situated Political Struggles

The definitional exercise I have undertaken above provides a valuable framework for conceptualising the constitutional recognition of Aboriginal and Torres Strait Islander peoples. Constitutional recognition involves Indigenous struggles to reshape the settler state’s constitutional system so that it better respects who they are. It encompasses changes to written, big-C Constitutions as well as the small-c constitutional order, so as to effect a more just basic distribution of public power. And consistent with recognition’s inherent mutuality, constitutional recognition requires that Indigenous peoples accept the settler state’s existence and remain in a joint political association with it.

But that conceptual framework is still exceedingly abstract. One immediate implication of this abstractness is that, in practice, constitutional recognition exceeds any one particular form or set of measures. It is an abstract ideal that can only be realised ‘by means of specific measures which stand for recognition’ but which do not exhaust the ideal itself.

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93 See above nn 72–79 and accompanying text.
94 Tully, Strange Multiplicity, above n 3, 119.
95 Anna Elisabetta Galeotti, Toleration as Recognition (Cambridge University Press, 2002) 221.
In practice, then, recognition is plural. It may well be institutionalised in many ways, not only between different claimant groups but also for a single group itself. To expand on Taylor’s major example, while Quebec in the late 1980s and early 1990s sought constitutional recognition by way of a ‘distinct society’ provision in the Canadian Constitution, Quebec was already constitutionally recognised (inadequately, claimed Quebec) within federal constitutional arrangements securing provincial self-government, language rights and so on.

Another implication of the abstractness of constitutional recognition is that much about its practical application to particular cases remains uncertain. What features define Indigenous peoples’ identities? What reforms are required to respect those identities? What, in particular, is required to respect those identities within constitutional norms?

In fleshing out what the abstract ideal of constitutional recognition means in practice, I emphasise the value of studying it through concrete, historically situated political struggles. Here I follow Tully, who has perceptively critiqued the theorist’s tendency to search from on high for ‘a definitive and final solution’ to struggles over recognition.96 Tully’s critique is based on a desire to democratise recognition, which in practice ‘has to be worked out as far as possible by means of dialogues among those in the field who are subject to the contested norm of mutual recognition’.97 It is also based on the insight that, when seen in the light of actual political practice,

struggles over recognition … are not amenable to definitive solutions beyond further democratic disagreement, dispute, negotiation, amendment, implementation, review, and further disagreement. Recognition in theory and practice should not be seen as a telos or end state, but as a partial, provisional, mutual, and human-all-too-human part of continuous processes of democratic activity in which citizens struggle to change their rules of mutual recognition as they change themselves.98

Recognition in practice demonstrates that the search for finality is illusory. Contests over recognition ‘are not struggles for some definitive recognition but struggles over

96 Tully, Public Philosophy, above n 6, vol 1, 300.
97 Ibid 301, 301–5. See further Tully, ‘Struggles’, above n 55, 475.
what form of acknowledgment will count as recognition for a time in the course of the continual “conversation” among the members of a constitutional association’.  

Accordingly, Tully makes this methodological injunction:

If the study of struggles over recognition is to be critical and enlightening, then it should be practical and ‘permanent’ rather than theoretical and end-state oriented: it should analyse and learn from the recognition and distribution aspects of the entire circle of activity we have canvassed, from the initial dissent through to implementation and the new round of dissent it provokes.  

This approach involves studying recognition as it emerges concretely from particular historical circumstances and political struggles:

the question of just and stable forms of recognition must now be reformulated for the twenty-first century as an open-ended series of questions addressed to specific struggles and experiments with institutional solutions to them within the broader horizon of recognition as a long-term activity of politics.

It fills in the abstraction of ‘constitutional recognition’ and its associated components (identity, respect, constitutional) by ‘examining actual cases to see what the conflict is about … [and] listening to the people engaged in the struggles over the prevailing norms of recognition in their own terms’. It involves being attentive to the horizons of political possibility at given historical moments and the relations of power built into them (the horizons of Indigenous–settler politics). It requires sensitivity to the multiple, contested and mutable character of identities, which are not given but always caught in processes of historical formation (the horizons of Indigenous identity politics). And it entails paying attention to what happens after a new form of constitutional recognition is enacted, during which struggles over its meaning and consequences continue rather than reach a harmonious endpoint (the vagaries of constitutional implementation).

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99 Tully, *Public Philosophy*, above n 6, vol 1, 208–9. Tully borrows the idea of a constitutional conversation from Webber, above n 32.

100 Tully, ‘Struggles’, above n 55, 477.

101 Tully, *Public Philosophy*, above n 6, vol 1, 189.

102 Ibid 305.
I apply this approach to understanding Indigenous constitutional recognition, undertaking a kind of historically informed, applied political theory. Key case studies, examined in Chapters 5 and 6, are the amendments made to the Australian Constitution in 1967 concerning Aboriginal and Torres Strait Islander people, as well as enactment of the Racial Discrimination Act 1975 (Cth). These are not typically understood as forms of Indigenous constitutional recognition today because contemporary disputants are caught up in their own contextualised understandings of what constitutional recognition means. These case studies also demonstrate the fundamental partiality, provisionality and incompleteness of constitutional recognition, an argument I further develop later. In the thesis’s concluding chapter, I argue that any new forms of constitutional recognition, including treaties between Indigenous and settler peoples, would also be subject to the same incompleteness. For these reasons, struggles over Indigenous constitutional recognition should be seen as ongoing processes of contesting the settler constitutional order, towards the end – but never the endpoint – of a just constitutional relationship.

IV Rejecting Constitutional Recognition? Coulthard’s Radical Critique

A powerful and important intervention into the political theory of recognition, especially as it applies to Indigenous peoples, has recently been made by Glen Coulthard, a Canadian political theorist and member of the Yellowknives Dene First Nation.103 Weaving together Indigenous, anticolonial, Marxist and feminist thought, Coulthard rejects what he terms the ‘colonial politics of recognition’, arguing that it entrenches rather than transcends the settler domination of Indigenous peoples.104 While Coulthard’s focus is on Canada, he sees his analysis as applicable to other settler-colonial situations, including Australia.105 Coulthard’s intervention offers a potent alternative vision for self-determination and decolonisation and a strategy for achieving them. I argue, however, that Coulthard’s critique does not succeed, because realising his own alternative actually depends on settler recognition itself.

103 The work of Mohawk scholars Taiaiake Alfred (one of Coulthard’s mentors) and Audra Simpson, among others, has taken similar positions to Coulthard’s, but engaged less extensively with recognition theory: see Taiaiake Alfred, Peace, Power Righteousness: An Indigenous Manifesto (Oxford University Press, 1999); Audra Simpson, Mohawk Interruptus: Political Life Across the Borders of Settler States (Duke University Press, 2014).

104 Coulthard, Red Skin, above n 24.

105 Ibid 2.
The crux of Coulthard’s critique is that, within settler contexts, the politics of recognition entrenches rather than overcomes unjust, fundamentally colonial relations between Indigenous peoples and the settler state. Drawing heavily on North American Indigenous intellectuals and movements along with Fanon and Marx, Coulthard disavows

the now expansive range of recognition-based models of liberal pluralism that seek to ‘reconcile’ Indigenous assertions of nationhood with settler-state sovereignty via the accommodation of Indigenous identity claims in some form of renewed legal and political relationship with the Canadian state.\(^{106}\)

The forms of Indigenous recognition subject to Coulthard’s critique include land and self-government settlements, cultural rights and constitutional protections (such as the recognition of Aboriginal and treaty rights inserted into the *Canadian Constitution* in 1982).\(^{107}\) While adopting such measures ‘may alter the intensity of some of the effects of colonial-capitalist exploitation and domination, it does little to address their generative structures, in this case a capitalist economy constituted by racial and gender hierarchies and the colonial state’.\(^{108}\) Indigenous recognition is therefore fundamentally flawed because it ‘does not throw into question the background legal, political, and economic framework of the colonial relationship itself’.\(^{109}\) The colonial system of recognition, Coulthard argues, sustains itself partly by producing a false consciousness in Indigenous peoples, who come, in Fanon’s terms, to hold “psycho-affective” attachments to these master-sanctioned forms of recognition’.\(^{110}\)

As an alternative to recognition politics, Coulthard proposes that Indigenous peoples ‘turn away’ from the state, and instead practise a politics of Indigenous ‘resurgence’ and ‘self-recognition’.\(^{111}\) Such a politics would be

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106 Ibid 3.
107 Ibid 2, 35, 40–1.
108 Ibid 35.
109 Ibid 41.
111 On turning away from the state, see ibid 18, 24, 45, 48, 178–9. On Indigenous resurgence, see ibid 18, 24 and Conclusion, especially 154–9. On self-recognition, see ibid 23, 48.
less oriented around attaining legal and political recognition by the state, and more about Indigenous peoples empowering themselves through cultural practices of individual and collective self-fashioning that seek to *prefigure* radical alternatives to the structural and subjective dimensions of colonial power …  

The ‘prefigurative’ dimension of Indigenous resurgence eschews the distinction between political means and ends, so that Indigenous peoples come to practise their goals of decolonisation in the very struggle to attain them. In this self-affirming and self-transformative process, Indigenous people can break their psycho-affective attachments to the settler state, its values and its forms of recognition. To realise this alternative vision, Coulthard advocates that Indigenous peoples engage in an array of concrete practices. These include forms of direct action (such as blockades and unilateral reclamation of Indigenous lands); non-capitalist, communal, land-based economic activities; alliance-building between urban and rural Indigenous peoples; and overcoming gendered violence and misogyny within Indigenous communities.

The problem for Coulthard’s alternative is not in its substance – it is a compelling vision that may prove attractive to Indigenous peoples and politically effective for achieving self-determination and decolonisation – but in the notion that it can escape the need for recognition by the settler state. The problem stems from this unavoidable fact: however illegitimately, the settler state presently exercises sovereignty over Indigenous peoples and their territories. Due to the vast power imbalance between the settler state and Indigenous peoples, the former can make its sovereignty effective against the latter. That exercise of sovereignty is, as Coulthard says, based on a fundamental misrecognition of who Indigenous peoples are: self-determining peoples,

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112 Ibnd 18.  
113 Ibid 159.  
118 Ibid 176–8.  
119 Tully, ‘Freedom’, above n 90.
rather than ‘subjects of empire’.\textsuperscript{120} It is undoubtedly based upon a deep and abiding history of injustice – the dispossession of Indigenous peoples and the imposition of an alien legal system upon them.\textsuperscript{121}

But regardless of its unjust origins and present manifestations of domination, the effectiveness of settler sovereignty is nonetheless a material reality of Indigenous peoples’ contemporary circumstances. If, for instance, Indigenous peoples blockade their traditional territories from development, the settler state, (mis)recognising them as its own law-breaking citizens, may ultimately decide to bring its monopoly on violence to bear upon them. The deadly potential of this eventuality was demonstrated in Canada’s 1990 Oka crisis, the armed standoff between Kanien’kehaka people and Canadian troops over a golf course development on Kanien’kehaka territory.\textsuperscript{122}

There are only two ways to alter the reality of the settler state’s exercise of sovereignty over Indigenous peoples. The most radical solution would be to dissolve the state itself. But while Coulthard probingly challenges the historical and present-day legitimacy of the settler state, and advocates a turning away from it, he does not deny the state’s right to exist. In some basic sense, Coulthard continues to recognise the settler state. I know of no contemporary critique of settler colonialism that does otherwise.

Aside from seeking the settler state’s dissolution, the only other solution is for Indigenous peoples to demand forms of recognition – whether constitutional or international, or a combination of both – that modify the exercise of settler sovereignty over them. Only in a world in which the settler state no longer exists can Indigenous peoples afford to forgo all demands for recognition by it. For even if Indigenous ‘subjects of empire’ turn away from the settler state, it will not turn away from them – at least, not while it continues to (mis)recognise Indigenous people as its subjects. Changing this reality requires a change in the settler state’s recognition of Indigenous people: from subjects or citizens to self-determining peoples exercising their own

\textsuperscript{120} ‘Subjects of Empire’ is the title of Coulthard’s introductory chapter: Coulthard, \textit{Red Skin}, above n 24, 1. It was also the title of an earlier article on which his book is based: Glen S Coulthard, ‘Subjects of Empire: Indigenous Peoples and the “Politics of Recognition” in Canada’ (2007) \textit{6 Contemporary Political Theory} 437.

\textsuperscript{121} Tully, ‘Freedom’, above n 90.

\textsuperscript{122} Kiera L Ladner and Leanne Simpson (eds), \textit{This is an Honour Song: Twenty Years Since the Blockades: An Anthology of Writing on the ‘Oka Crisis’} (Arbeiter Ring Publishing, 2010).
authority, either in association with or independent of the settler constitutional framework.

At crucial points, Coulthard effectively concedes as much. In the concluding paragraph of his book, Coulthard clarifies that the ‘turning away’ from the settler state he advocates is not absolute; indeed, engaging with the state’s institutions is a necessity, because ‘[s]ettler colonialism has rendered us a radical minority in our own homelands’. What would this engagement look like? Enacted through a politics of Indigenous resurgence, Coulthard envisions

a restructuring of the fundamental relationship between Indigenous nations and Canada.

… Land has been stolen, and significant amounts of it must be returned. Power and authority have been unjustly appropriated, and much of it will have to be reinstated.

Indigenous resurgence is in part directed towards ‘gaining some solid commitment by the state to curtail its colonial activities’. Coulthard’s demand – for a ‘solid commitment by the state’ to redistribute territory and jurisdiction back to Indigenous peoples – is undeniably for settler recognition (constitutional, international or both) of Indigenous peoplehood. To be sure, the methods Coulthard proposes to achieve this are distinctive and do entail a relative disengagement from core settler institutions (courts, parliaments, government inquiries, and so on), where much past Indigenous political activism has been channelled. But if Indigenous resurgence is to be effective in achieving Indigenous self-determination and decolonisation, sooner or later it must be because settler institutions are convinced to recognise Indigenous peoples as peoples rather than subjects.

So despite appearances, Coulthard’s alternative is not a rejection of the politics of recognition: it is a demand for a particular kind of recognition and a political strategy for achieving it. It is also a vision for a particular Indigenous future, devoted to an adapted Indigenous traditionalism that practises anti-capitalist, anticolonial and feminist ideals. Coulthard’s striking proposals may present a program that proves inspirational for Indigenous peoples throughout Canada and the world. They may well also prove

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123 Coulthard, Red Skin, above n 24, 179.
124 Ibid 168.
125 Ibid 166.
politically effective in achieving the ends of self-determination and decolonisation. Whether Coulthard’s vision ought to be pursued is ultimately for Indigenous peoples themselves to decide. But whether it will actually be implemented depends, no doubt as a matter of deep injustice but also as a matter of fact, on the settler state’s willingness to recognise it.

V Conclusion
Drawing on theoretical work on the politics of recognition, I have argued that contests over constitutional recognition involve struggles by particular groups to have their identities respected within the constitutional norms and instruments, both big-C and small-c, they live under. The contest over Indigenous constitutional recognition in Australia involves a struggle by Indigenous peoples to refashion the settler constitutional order’s distribution of public power so that it better respects who they are. This demands a minimal form of respect for the settler state from Indigenous peoples, who in claiming state recognition – even of an international character – must reciprocally recognise the state’s existence and sovereignty. This theoretical framework for understanding constitutional recognition is valuable but vague. I have argued in favour of fleshing out the abstraction of constitutional recognition by studying it through its concrete manifestations in historically situated political struggles. That approach demonstrates the provisionality, partiality and incompleteness of constitutional recognition, which is met with the constraints of the present in which it is negotiated and the openness of the future.
Chapter 4
Constitutionalising Indigenous Recognition

When Australians today debate whether and how to ‘constitutionally recognise’ Aboriginal and Torres Strait Islander peoples, they usually have in mind amending a written constitution, either State or federal. That constitutional recognition is the exclusive preserve of Australia’s written constitutions has become so widely assumed that it goes without saying. As Megan Davis has written, ‘[t]here is a curious devotion to the written Constitution as the epitome of recognition’.1 Partly for this reason, a disjuncture has emerged in contemporary Australian debates between Indigenous constitutional recognition on the one hand and treaty-making between Indigenous and settler polities on the other: the former occurs within written constitutions, the latter does not.

But to conflate the ‘constitutional’ in Indigenous constitutional recognition with written constitutions is to take an unduly narrow approach, a claim I have already made in preceding chapters.2 In this chapter I further elaborate that argument, supplementing a formal view of the constitutional domain – written constitutions and their contents – with a functional view, which focuses on ‘small-c’ constitutional norms and instruments that affect the basic distribution of public power. As well as broadening the idea of constitutional recognition beyond the bounds of written, ‘big-C’ Constitutions, the chapter charts differences between constitutional recognition which occurs within written constitutions and that which occurs outside them, especially through treaty. The chapter also disentangles two different elements of the constitutional domain – the symbolic and the substantive – and articulates their roles within projects of Indigenous constitutional recognition.

The chapter is an exercise in constitutional theory and comparison. I begin with theory, elaborating an understanding of the constitutional domain that incorporates the formal and the functional as well as (what is slightly different) the symbolic and the substantive. The chapter then moves to comparison, looking at two different approaches to constitutionalising Indigenous recognition. They are by no means the only

1 Megan Davis, ‘Seeking A Settlement’, The Monthly (Melbourne), July 2016, 8, 10.
approaches to Indigenous constitutional recognition, but they helpfully illustrate the different facets of the constitutional domain. The first approach, adopted in every Australian State since 2004, involves inserting an explicit Indigenous recognition statement within the State’s written constitution. The second approach is that adopted in New Zealand with the Tiriti o Waitangi/Treaty of Waitangi, which has over the last three decades developed a small-c constitutional status, especially within the norms and practices of the Pākehā (settler) political branches. Put broadly, the difference in these approaches is between constitutional recognition that is formal and purely symbolic (the Australian States’ Indigenous recognition provisions) and one that is functional, symbolic and substantive (the Treaty’s constitutionalisation).

Comparing these two approaches – Australia’s Indigenous recognition provisions and the Treaty of Waitangi’s constitutionalisation – illuminates the relevance of constitutional form, symbolism and substance for projects of Indigenous recognition. First, constitutional form can have symbolic importance. Written constitutions can symbolise Indigenous peoples’ fundamental importance to the wider polity; treaties can also do this while foregrounding Indigenous peoples’ status as first peoples equal in standing with the settler state. Second, the constitutional substance of Indigenous recognition (or lack thereof) has symbolic importance: if constitutional recognition is purely symbolic, this dims its symbolic power and will for many people render it hollow. Third, purely symbolic recognition neglects and potentially obscures Indigenous peoples’ grievances about constitutional substance – about how public power is wielded over them. Fourth, constitutional form can have substantive constitutional importance. In particular, written constitutions’ special entrenchment and supremacy can render Indigenous recognition an especially durable and potent concern within the wider polity. Ultimately, my aim is not to advocate for any one approach to constitutionalising Indigenous recognition but rather to clarify the stakes involved in adopting one approach or another.

I Understanding the Constitutional Domain

A Identifying the Constitutional Domain: Form and Function

In order to understand constitutional forms of recognition, there is a need for criteria distinguishing the constitutional domain from the non-constitutional. One way to determine the constitutional domain’s boundaries is by approaching them as a matter of
form – in particular, by focusing on ‘written constitutions’. Most nation-states and many subnational polities (such as the Australian States) now possess a codified legal instrument called ‘The Constitution’ or something similar. These instruments typically create and define the authority of the major governmental institutions, and determine the powers and rights of the members (individual citizens and constituent polities) of the political association as a whole. They are for this reason usually vitally important for the government of the political communities to which they are attached. Adopting a formal approach to the constitutional domain involves attending to written constitutions and their contents.

Written constitutions are often formally distinctive in being especially entrenched and legally supreme. Entrenched constitutional norms possess a legal status not enjoyed by ordinary laws: they can only be changed through a special and more onerous procedure than regular lawmaking (such as referendum). Entrenchment’s flipside is legal supremacy: ‘ordinary law which conflicts with the constitution is invalid or inapplicable’. The supremacy of constitutional norms presupposes ‘an institution with the authority in the event of conflict to check the constitutionality of governmental legal acts’. In constitutional orders globally, that institution has increasingly become the judiciary. These two special features commonly possessed by written constitutions – their entrenchment and supremacy – mean that their contents

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4 At the national level, see Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) ch 3; at the subnational level, see, eg, G Alan Tarr, Robert F Williams and Josef Marko (eds), *Federalism, Subnational Constitutions, and Minority Rights* (Praeger, 2004).


7 Ibid.


may be relatively enduring and legally potent, though the extent to which this is true in practice varies with context.10

Conceptualising the constitutional domain in formal terms, by focusing on written constitutions, is useful so far as it goes, but it does not go far enough. As I described in Chapter 3, defining the constitutional domain exclusively by reference to written constitutions excludes many norms, practices and institutions that are frequently regarded as possessing a small-c constitutional character. For the few nation-states without a formal, big-C Constitution – including New Zealand, a fact relevant to this chapter’s later discussion – the constitutional domain must be defined purely by reference to small-c constitutional norms and instruments contained variously in important legislation, judicial doctrines and political practices.11 Moreover, it is widely acknowledged, especially in the common-law tradition, that states with written constitutions – even the United States, where the Constitution is so central to public life – also possess small-c constitutional norms and instruments.12 Scholars also increasingly perceive a small-c constitutional dimension to various legal arrangements transcending national boundaries, none more so than the European Union.13 Finally, and of particular relevance to this chapter and the thesis more generally, treaties concluded between Indigenous and settler peoples are frequently understood as possessing a small-c constitutional dimension.14 Where concluded as nation-to-nation agreements, treaties can also be understood as a form of transnational constitutionalism.15

To understand the constitutional domain beyond written constitutions, there is a need to think functionally rather than formally: to look for those norms and instruments that establish, channel and limit the most fundamental dimensions of public power within a political association.16 This approach is familiar from the British constitutional

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12 See Chapter 3, nn 69–71 and accompanying text.
13 See, eg, Petra Dobner and Martin Loughlin (eds), The Twilight of Constitutionalism? (Oxford University Press, 2010).
14 See Chapter 3, nn 74–9 and accompanying text.
15 Ibid.
16 See, eg, Young, above n 5.
tradition, where, in the absence of a written constitution, it has been a necessity. As
British scholar AV Dicey put it, the constitutional domain encompasses ‘all rules which
directly or indirectly affect the distribution or the exercise of the sovereign power in the
state’.\textsuperscript{17} That includes rules establishing, and determining the relative powers of, state
institutions (most fundamentally, legislatures, executives and courts).\textsuperscript{18} It also includes
the relations between the state and the political association’s constituent members.\textsuperscript{19}
Among those members are individual citizens along with, in many cases, collective
polities – which in Dicey’s United Kingdom included not only the nations of the British
Isles but also the far-flung peoples under the rule of the British Empire.\textsuperscript{20}

Certainly, where written constitutions exist, they themselves typically perform
the constitutional function of distributing public power at the most foundational level. They will usually be the most concentrated and important codification of norms
regarding the distribution of public power. Written constitutions will also often perform
these constitutional functions in a distinctive way because of their special entrenchment
and supremacy.

But neither in theory nor in practice do written constitutions have a monopoly on
the basic distribution of public power. If written constitutions matter constitutionally
because they distribute and regulate public power, there is good reason to focus on how
public power is distributed and regulated more generally – wherever that may be –
rather than on fixating on one particular means to those ends.

Another qualification is that small-c constitutional norms and instruments, no
less than written constitutions, have a form, and their form can matter. It matters where
two formally distinct small-c constitutional norms conflict: for instance, a common-law
norm coming up against a statute. Later in this chapter, I show how the Treaty of
Waitangi’s form has significance for both constitutional symbolism and substance. The
underlying point, though, remains that for small-c constitutional instruments such as the
Treaty, it is their function, not form, that defines them as constitutional.

A functional approach towards defining the constitutional domain tends to
amplify the vagueness surrounding it. Certainly, within written constitutions there is

\begin{flushend}
\textsuperscript{17} Dicey, above n 3, 22.
\textsuperscript{18} Ibid 22–3.
\textsuperscript{19} Ibid.
\textsuperscript{20} Dylan Lino, ‘Albert Venn Dicey and the Constitutional Theory of Empire’ (2016) 36 Oxford
Journal of Legal Studies 751.
\end{flushend}
often considerable uncertainty about where they end and begin and what their terms mean.21 A functional approach, however, tends to increase the uncertainty: there is much room for debate over which instruments and norms regulate ‘the most fundamental dimensions of public power’ (to quote my earlier definition). There is no getting around this problem, which simply has to be confronted and, to the extent possible, settled within political and legal discourse.22 And indeed it is possible to attain widespread agreement on core components of the small-c constitutional order, even as disagreement continues over components at the margins.23

This uncertainty over the bounds of the constitutional domain is nonetheless a price worth paying to overcome the underinclusiveness that accompanies strict constitutional formalism. A formal approach to defining the constitutional domain should be supplemented by a functional approach that attends to small-c constitutional norms and instruments. These, no less than written, big-C Constitutions, are the subject of recognition politics and a proper concern in the study of those politics.

B Dimensions of the Constitutional Domain: Symbolism and Substance

In studying constitutional recognition, it is also useful to analytically distinguish two different dimensions of the constitutional domain itself: the symbolic and the substantive.24 There is a correspondence between this distinction and the form–function distinction described above, but the objective in each case is different. Whereas form and function distinguish the constitutional from the non-constitutional, symbolism and substance distinguish different elements within the constitutional domain itself.

The symbolic dimension of constitutional norms and instruments concerns their role as expressive, cultural artefacts of the polities to which they are attached.25 Constitutional norms and instruments reflect features of the political community

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21 See Rosalind Dixon and Adrienne Stone (eds), The Invisible Constitution in Comparative Perspective (Oxford University Press, forthcoming).

22 On this problem, see James Bryce, Studies in History and Jurisprudence (Clarendon Press, 1901) vol 1, 155–9.


whence they come. They in turn can shape the political community by ‘help[ing] to
define as authoritative certain ways of seeing’ and ‘serv[ing] to organize people’s
knowledge of the past and present and their capacity to imagine the future’.26 Political
symbols, including those of the constitutional order, have a very real capacity to affect
those exposed to them, shaping ‘what they want, what they fear, what they regard as
possible, and even who they are’.27 From this perspective, constitutional norms and
instruments are a sort of cultural production, in the manner of public holidays, national
monuments, museums, official commemorations and educational curricula.

Consider first the symbolic dimension of written constitutions.28 As Jeremy
Webber has rightly observed in the Australian case, ‘[e]ven if we wanted to, we could
not eradicate symbolism from our Constitution. Language always carries connotations,
implications, and points of resonance.’29 By organising a polity in a particular way, a
written constitution will, even in its most mundane provisions, necessarily embody
certain values, attitudes and histories. A written constitution may also be expressive in
an explicit, self-conscious way, even acting as a ‘mission statement’ by adopting a
preamble, directive principles of the state, a bills of right and the like.30

Written constitutions have considerable power, at least compared with other
laws, to symbolise what is of basic importance to the polity. This is partly because
written constitutions, where they exist, are typically the primary sites for establishing
and regulating foundational public institutions and elaborating the rights and powers of
the political community’s members.31 The symbolic potency of written constitutions
may be amplified where they are legally entrenched and supreme, and where they enjoy
a democratic pedigree resulting from public participation in their drafting, adoption and

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26 Steven Lukes, ‘Political Ritual and Social Integration’ (1975) 9 Sociology 289, 301.
28 See, eg, Jeff King, ‘Constitutions as Mission Statements’ in Denis Galligan and Mila Versteeg
(ed), Social and Political Foundations of Constitutions (Cambridge University Press, 2013) 73;
Law 193.
29 Webber, ‘Constitutional Poetry’, above n 24, 267. On the Australian Constitution’s symbolic
role, see also Elisa Arcioni and Adrienne Stone, ‘The Small Brown Bird: Values and Aspirations
30 King, above n 28.
31 Cf Grimm, above n 28, 194.
While written constitutions are everywhere symbolic cultural artefacts, in some places they assume an especially prominent place in a polity’s public life. The United States, with its *Constitution* often regarded as a kind of sacred text in American civic discourse, is the best known example, but there are others too, such as Germany, with its post-war ‘never again’ *Basic Law*.

The small-c constitutional order has a symbolic dimension as well. Its components may lack the entrenchment, supremacy and democratic pedigree that often attend written constitutions. But because small-c constitutional norms and instruments by definition regulate the basic distribution and exercise of public power, they still symbolise what is of fundamental importance to a political community. And they no less than written constitutions can assume a major place within a polity’s civic life. The unwritten British Constitution as a whole has long been the object of public reverence in the United Kingdom, not just in spite of its ‘unwrittenness’ but frequently because of it. One of the British Constitution’s oldest components, the Magna Carta, is also a symbol of liberty in the United Kingdom and indeed globally, venerated by time and tradition rather than legal supremacy or popular will. A much more recent Australian example that I will come to in Chapter 6 is the *Racial Discrimination Act 1975* (Cth), whose role in many iconic struggles over Indigenous rights has established its place as an important symbol of Indigenous recognition in Australia. And as I will discuss later in this chapter, New Zealand’s Treaty of Waitangi, a vital symbol of Māori recognition, is now widely regarded as New Zealand’s founding instrument.

How is the constitutional domain’s symbolic dimension relevant to the politics of recognition? In struggles over recognition, constitutional norms and instruments are liable to critique on the basis that, in projecting the polity’s identity, they express only the values, beliefs and histories of dominant groups while neglecting those of...
marginalised members. Recognition-based contestation over constitutional symbolism involves demands that the constitutional order be changed so as to symbolically respect and validate the perspectives, experiences and identities of subordinated groups, and thereby render constitutional symbols more inclusive of the polity as a whole. The symbolic side of recognition can help generate a sense of belonging and self-respect among those recognised.37

The substantive dimension of constitutional norms and instruments concerns not their role as public symbols but their role in distributing and regulating public power. There is overlap here with the functional approach to determining the constitutional domain, which I outlined earlier. But there the point was to use functional criteria to differentiate the constitutional from the non-constitutional. Here the point is to distinguish a particular quality of the constitutional domain itself – a substantive role in distributing public power – from its other characteristics, such as symbolism. Attending to the substantive dimension of constitutional norms and instruments involves thinking about how they empower and limit the institutions of the state, such as legislatures, executives and courts. It involves looking to the basic rights and powers of individual citizens vis-à-vis state institutions. And it involves considering the powers and roles of any collective members of the political association, such as the States in a federation.

Both written constitutions and small-c constitutional norms perform this substantive role of distributing public power. Indeed, small-c constitutional norms and instrument do it by definition. For polities that possess written constitutions, these are typically the most concentrated sites for regulating public power, and often they will do this in a distinctive way by virtue of special entrenchment and legal supremacy. But that does not mean that a written constitution’s entire contents are substantively constitutional. Some provisions may have no effect on how public power is arranged and exercised; some provisions may be entirely symbolic.38 That is the case with the Indigenous recognition provisions inserted into Australia’s State constitutions, as I discuss below.

Where recognition politics intersect with the constitutional domain’s substantive dimension, the key concern is to redistribute public power in ways that better respect the


38 King, above n 23, 7.
identities of the political community’s marginalised members. There are many possible ways to do this, and it will depend on the nature of the claimant group in question as to which are appropriate. Possible constitutional reforms include guarantees of citizenship rights, equality and non-discrimination; guarantees of representation in government institutions; protections of collective rights to culture, language and territory; and the creation of federal arrangements to enable collective self-government. These arrangements all allocate public power in particular ways among state institutions, most basically legislatures, executives and courts. They also distribute public power among the constituent members – both individual citizens and collective peoples – of the wider political association, including the marginalised groups being recognised. Ultimately, all of these arrangements address the question of who can wield public authority over subordinated groups – including the groups themselves – as well as the conditions and limits upon the exercise of that authority.

II Two Approaches to Indigenous Constitutional Recognition

A Indigenous Recognition Provisions in Australia’s Written Constitutions

As I described in Chapter 2, since the late 1990s, Australian governments at the national level have proposed, and in every State have now enacted, constitutional provisions designed to formally recognise Aboriginal and Torres Strait Islander peoples within their respective written constitutions. This idea first came to prominence during a time of relatively sustained focus on Australia’s national and constitutional identity, when debates over an Australian republic oriented attention towards the Australian Constitution’s role in reflecting contemporary Australian values. The idea also attained initial prominence as it was promoted by the Howard Government in response to political ferment surrounding Australia’s historical and contemporary relations with Indigenous peoples. Rejecting more radical calls – especially in debates over treaty, sovereignty and reconciliation – for a wide-ranging postcolonial settlement, the Howard Government developed a proposal for a new constitutional preamble that would, inter alia, formally recognise Indigenous people. Put to the electorate in a 1999 referendum, the preamble proposal was roundly defeated (as was a simultaneous proposal for a republic).

Following the 1999 referendum’s failure, State governments began stepping into the breach by incorporating Indigenous recognition sections into their own constitutions. These provisions have all been created by ordinary legislation, which is generally all that is required to amend State constitutions. Victoria was the first to move in 2004, followed by Queensland (2010), New South Wales (2010), South Australia (2013), Western Australia (2015) and Tasmania (2016). Propelling these amendments has been the re-emergence of a national debate about Indigenous constitutional recognition from around 2007. Relatedly, the Federal Parliament passed its own Indigenous recognition legislation in 2013 (renewed in 2015), which was intended to progress constitutional recognition nationally but also to serve as a statutory placeholder in the meantime.

The Indigenous recognition provisions in Australia’s written constitutions, along with the defeated 1999 federal proposal, take the form of a formal declaration from ‘the people’ or ‘the parliament’ acknowledging certain dimensions of Indigenous difference. These declarations are contained either in a constitutional preamble or a stand-alone


42 Constitution Act 1975 (Vic) s 1A, as amended by Constitution (Recognition of Aboriginal People) Act 2004 (Vic); Constitution of Queensland 2001 (Qld) Preamble, as amended by Queensland (Preamble) Amendment Act 2010 (Qld); Constitution Act 1902 (NSW) s 2, as amended by Constitution Amendment (Recognition of Aboriginal People) Act 2010 (NSW); Constitution Act 1934 (SA) s 2, as amended by Constitution (Recognition of Aboriginal Peoples) Amendment Act 2013 (SA); Constitution Act 1889 (WA) Preamble, as amended by Constitution Amendment (Recognition of Aboriginal People) Act 2015 (WA); Constitution Act 1934 (Tas) Preamble, as amended by Constitution Amendment (Constitutional Recognition of Aboriginal People) Act 2016 (Tas).

43 See Chapter 3 of this thesis.

44 Aboriginal and Torres Strait Islander Peoples Recognition Act 2013 (Cth); Aboriginal and Torres Strait Islander Peoples Recognition (Sunset Extension) Act 2015 (Cth).

45 The Western Australian provision’s adoption was driven by Kija woman and Labor Opposition politician Josie Farrer through a private members Bill: Western Australia, Parliamentary Debates, Legislative Assembly, 11 June 2014, 3699–3700 (Josie Farrer). On Indigenous input elsewhere, see, eg, Advisory Panel on the Recognition of Aboriginal Peoples in the South Australian Constitution, Time for Respect (30 October 2012).
section towards the beginning of the constitution. Most prominently, the provisions allude to Indigenous peoples’ occupation of the Australian landmass before the arrival of settlers. This is typically expressed in references to Aboriginal and Torres Strait Islander peoples as first people\(^{46}\) (Australians,\(^{47}\) peoples\(^{48}\) or nations\(^{49}\)). Another aspect of Indigenous identity referred to is Indigenous peoples’ unique relationships to their ancestral lands and waters; some provisions refer to Indigenous peoples as traditional or original custodians, occupants or owners.\(^{50}\) Some of the recognition provisions also refer to Indigenous cultures, values and heritage,\(^{51}\) and to the special contribution Indigenous peoples have made to society.\(^{52}\) Several provisions gesture towards an Indigenous collective political capacity by adopting the language of ‘peoples’ or ‘nations’.\(^{53}\) Finally, two provisions identify Indigenous people as having been wronged through the process of colonisation.\(^{54}\) Within most of these provisions, there are also declarations that such acknowledgements of Indigenous identity are about respecting,\(^{55}\) honouring\(^{56}\) or otherwise valuing\(^{57}\) Aboriginal and Torres Strait Islander peoples.

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\(^{46}\) Constitution Alteration (Preamble) 1999 (Cth) sch; Constitution Act 1975 (Vic) s 1A(2); Constitution Act 1902 (NSW) s 2(1); Constitution Act 1889 (WA) Preamble; Constitution Act 1934 (Tas) Preamble.

\(^{47}\) Constitution of Queensland 2001 (Qld) Preamble.

\(^{48}\) Constitution Act 1934 (SA) s 2.

\(^{49}\) Constitution Act 1902 (NSW) s 2(1); Constitution Act 1934 (SA) s 2(2)(a).

\(^{50}\) Constitution Act 1975 (Vic) s 1A(2)(b); Constitution Act 1902 (NSW) s 2(2)(b); Constitution Act 1934 (SA) ss 2(2)(b), 2(2)(b)(i); Constitution Act 1889 (WA) Preamble; Constitution Act 1934 (Tas) Preamble; cf Constitution of Queensland 2001 (Qld) Preamble; Constitution Alteration (Preamble) 1999 (Cth) sch.

\(^{51}\) Constitution of Queensland 2001 (Qld) Preamble; Constitution Alteration (Preamble) 1999 (Cth) sch; Constitution Act 1934 (SA) s 2(2)(b)(i)–(ii).

\(^{52}\) Constitution Act 1975 (Vic) s 1A(2)(c); Constitution Act 1902 (NSW) s 2(2)(b); Constitution Act 1934 (SA) s 2(2)(b)(iii); Constitution Act 1934 (Tas) Preamble; cf Constitution Alteration (Preamble) 1999 (Cth) sch; Constitution of Queensland 2001 (Qld) Preamble.

\(^{53}\) Constitution of Queensland 2001 (Qld) Preamble (‘peoples’); Constitution Act 1902 (NSW) s 2(1) (‘nations’); Constitution Act 1934 (SA) s 2 (‘peoples and nations’).

\(^{54}\) Constitution Act 1975 (Vic) s 1A(1); Constitution Act 1934 (SA) ss 2(1)(b), 2(2) (referring to an earlier parliamentary apology made to Aboriginal peoples), 2(2)(c).

\(^{55}\) Constitution Act 1934 (SA) s 2(2)(a).

\(^{56}\) Constitution Alteration (Preamble) 1999 (Cth) sch; Constitution Act 1902 (NSW) s 2(1); Constitution of Queensland 2001 (Qld) Preamble.

\(^{57}\) See, eg, Constitution Act 1902 (NSW) s 2(2)(b) (‘Aboriginal people ... have made and continue to make a unique and lasting contribution to the identity of the State’).
These forms of Indigenous recognition are designed to be wholly symbolic rather than constitutionally substantive: they have no effect on how public power is distributed or can be exercised. One major contributing factor is that these Indigenous recognition sections, bar the recent Western Australian and Tasmanian provisions, have been accompanied by explicit disclaimers denying them any legal effect. The New South Wales provision, for instance, stipulates:

Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.\(^{58}\)

Simpler, but probably having the same impact, is the South Australian disclaimer: ‘The Parliament does not intend this section to have any legal force or effect.’\(^{59}\) The Victorian and Queensland provisions, and the failed Commonwealth proposal, are accompanied by similar clauses.\(^{60}\) Such clauses render the forms of recognition they attach to null as possible means for legally redistributing public power.

But even without their ‘no legal effect’ clauses, none of these provisions proclaims any rules or principles governing the exercise of public power with respect to Indigenous peoples, and they thereby disavow any constitutionally substantive role. Had these provisions been framed as directive principles governing the Indigenous–settler relationship, they might have served as the basis for constitutional conventions to be upheld in the practice of the settler political branches, even in the absence of legal enforceability.\(^{61}\) Instead, all of the provisions are written in ceremonial language which declares factual and evaluative beliefs but which offers little in the way of normative guidance.

Consider the brief Western Australian provision: ‘whereas the Parliament resolves to acknowledge the Aboriginal people as the First People of Western Australia and traditional custodians of the land, the said Parliament seeks to effect a reconciliation

\(^{58}\) Constitution Act 1902 (NSW) s 2(3).

\(^{59}\) Constitution Act 1934 (SA) s 2(3).

\(^{60}\) Constitution Act 1975 (Vic) s 1A(3); Constitution of Queensland 2001 (Qld) s 3A; Constitution Alteration (Preamble) 1999 (Cth) cl 4.

\(^{61}\) See, eg, King, above n 28, 83–4.
with the Aboriginal people of Western Australia’. While acknowledging Aboriginal people’s Indigenous status and relationship with traditional lands, the provision delineates no (Indigenous) rights or (settler) obligations flowing from these facts, and so serves to offer limited guidance for the development of customary norms of political practice. It affirms the status quo distribution of public power. It was in appreciation of the provision’s lack of normative language that the Western Australian Government felt comfortable in enacting it without a ‘no legal effect’ disclaimer.

To date, the evidence suggests that these Indigenous recognition provisions have not catalysed political conventions governing the basic relationship between Indigenous peoples and the settler polities in question. Parliamentary debates offer a fair indication of parliamentary and executive attitudes on this score. For instance, in Victoria, where an Indigenous recognition provision has been in place the longest (since 2004), the provision has only been referred to in Parliament on a handful of occasions since its enactment. Though in two instances the provision was briefly mentioned in parliamentary speeches supporting new legislation concerning Aboriginal Victorians, in no case was the provision understood to affect how power could be exercised by the Parliament or executive. The Indigenous recognition provisions in the other States do not appear to have fared any differently.

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62 Constitution Act 1889 (WA) Preamble.

63 Joint Select Committee on Aboriginal Constitutional Recognition, Parliament of Western Australia, Towards a True and Lasting Reconciliation: Report into the Appropriate Wording to Recognise Aboriginal People in the Constitution of Western Australia (March 2015) 35–43, 49–51; Western Australia, Parliamentary Debates, Legislative Assembly, 19 August 2015, 5577 (Colin Barnett, Premier). For similar conclusions regarding the Tasmanian provision, see House of Assembly Standing Committee on Community Development, Parliament of Tasmania, Inquiry into the Constitutional Recognition of Aboriginal People as Tasmania’s First People (2015) 47–53.

64 Victoria, Parliamentary Debates, Legislative Assembly, 18 November 2004, 1756 (Heather McTaggart); Victoria, Parliamentary Debates, Legislative Assembly, 9 December 2004, 2263 (Steve Bracks, Premier); Victoria, Parliamentary Debates, Legislative Assembly, 16 June 2005, 1753 (Heather McTaggart); Victoria, Parliamentary Debates, Legislative Assembly, 17 November 2005, 2248 (Steve Bracks, Premier); Victoria, Parliamentary Debates, Legislative Assembly, 11 August 2010, 3134 (Steve Herbert).

65 Victoria, Parliamentary Debates, Legislative Assembly, 18 November 2004, 1756 (Heather McTaggart); Victoria, Parliamentary Debates, Legislative Assembly, 11 August 2010, 3134 (Steve Herbert).

66 On the New South Wales provision, for instance, see New South Wales, Parliamentary Debates, Legislative Council, 11 May 2011, 681 (John Hatzistergos); New South Wales, Parliamentary Debates, Legislative Assembly, 23 June 2011, 3304 ( Clover Moore); New South Wales, Parliamentary Debates, Legislative Assembly, 7 March 2012, 9213 (Anna Watson); cf New South Wales, Parliamentary Debates, Legislative Council, 28 October 2010, 27 056–7 (Ian
These provisions therefore seek to instrumentalise the symbolism of written constitutions. The concern is for the written constitution as a symbol of the polity’s identity, as a ‘foundational constitutional document’ in which matters of basic importance to the polity find expression.\(^{67}\) The symbolic dimension of written constitutions is foregrounded whenever proponents of constitutional recognition draw attention to the fact that the constitution in question, whether State or national, makes no mention of Indigenous peoples. For example, discussing Indigenous recognition in Parliament in 2013, Prime Minister Julia Gillard referred to ‘the great Australian silence which fell upon our founding document’:

among the 128 sections of the Constitution there is no acknowledgement of Australia’s first peoples – no mention of their dispossession, their proud and ancient cultures, their profound connection to the land or the unhealed wound that even now lies open at the heart of our national story.\(^{68}\)

When the issue of Indigenous constitutional recognition is posed in this way, what matters first and foremost is what and who the written constitution makes visible, not how it organises public power. The focus is not on the failure of the state to respect Indigenous identity when exercising the power granted to it under the written constitution. Rather, the focus is on the written constitution as a cultural artefact and its failure to respect Indigenous identity in constructing an image of the polity.

In sum, then, the Indigenous recognition provisions inserted into Australia’s written constitutions enshrine a form of constitutional recognition that is purely formal and symbolic rather than substantive.

**B Tiriti o Waitangi/Treaty of Waitangi**

Consider now a very different form of Indigenous constitutional recognition: New Zealand’s Tiriti o Waitangi/Treaty of Waitangi.\(^{69}\) Drafted in both English and Māori,

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\(^{67}\) The quote is from House of Assembly Standing Committee on Community Development, above n 63, 8.


\(^{69}\) The English and Māori versions of the Treaty can be found, respectively, in *Treaty of Waitangi Act 1975* (NZ) sch 1; *Treaty of Waitangi Amendment Act 1985* (NZ) sch 1.
the Treaty was signed in 1840 by representatives of the British Crown and over 500 Māori chiefs. The British had sought a Treaty with Māori in order to secure British sovereignty and proceed more surely with colonisation in New Zealand. Though Māori rationales for entering the Treaty differed, prominent among their reasons were to protect Māori against other European powers, prevent further encroachment by the British on Māori lands and arrest British erosion of Māori authority. The British did not fully explain their understanding of the Treaty’s meaning and import to the chiefs, and the differences in English and Māori wording resulted in different beliefs about the nature of the agreement – differences which persist today. While there is a sound case for seeing the Treaty as an international treaty (of cession or protection), there remain debates over the extent to which the Treaty was legally necessary for British acquisition of sovereignty and over how, if at all, it figured within New Zealand’s settler constitutional system in the years immediately following its conclusion.

What is clear is that the Treaty’s fortunes within the settler constitutional order, such as they were, generally declined from the time of the Treaty’s signing, until a revival from the 1970s onwards. The story of that constitutional shift in the last quarter of the 20th century is exceedingly complex, involving the interplay of Māori – who from the 1970s became increasingly vocal in protesting historical and contemporary injustices – and the institutions of settler government, which became increasingly open to the Treaty in response to Māori demands. The Treaty’s rise is both reflected in and has been reinforced by the creation in 1975 of the Waitangi Tribunal, whose reports and recommendations on Māori grievances under the Treaty

71 Ibid 2–3, ch 3.
73 Ibid 40–3, 46.
have been pivotal in elaborating the Treaty’s principles and elevating its public status.\textsuperscript{77} Since the mid-1980s, the Parliament has referenced the Treaty’s principles through ‘Treaty clauses’ in numerous pieces of legislation, thereby making the Treaty relevant to those Acts’ interpretation and application.\textsuperscript{78} Māori litigation under one of those clauses in the late 1980s provided the courts an opportunity to elaborate the Treaty’s principles in a series of high-profile cases, most notably the 1987 \textit{Lands} case.\textsuperscript{79} These court decisions in turn pushed the Executive into Treaty-based negotiations with Māori, further developing a pre-existing cognisance of and commitment to the Treaty within Executive processes and decision-making.\textsuperscript{80} As a result of these and other developments since, the Treaty is now widely accepted as a constitutional document by Māori and Pākehā, including the institutions of settler government.\textsuperscript{81}

While the Treaty’s terms and principles (and their differing English and Māori versions) remain the subject of ongoing contestation, negotiation and elaboration, broadly speaking the Treaty can be said to recognise both Māori peoplehood and citizenship. Textually, the Treaty contains three articles: the first grants a form of governing authority (‘sovereignty’/‘\textit{kawanatanga}’ or ‘governance’) over New Zealand territory to the British; the second recognises a set of distinct Māori entitlements (‘full exclusive and undisturbed possession of their Lands and Estates Forests Fisheries and other properties’/‘\textit{tino rangatiratanga}’ or ‘chieftainship’, as well as the property-like ‘\textit{taonga katoa}’ or ‘treasured things’); the third guarantees to Māori the protection of the British Crown as well as the rights and privileges of British subjects.\textsuperscript{82} In practice, the Treaty and its principles have come to serve as a channel for the advancement and recognition of numerous Māori claims, including Māori peoplehood claims (for

\textsuperscript{77} Sharp, \textit{Justice}, above n 76, pt 2; McHugh, ‘What a Difference’, above n 75, 89–90.


\textsuperscript{81} Palmer, \textit{Treaty}, above n 74, ch 5.

recognition and protection of their autonomy, lands, fisheries and language) as well as provision of rights and entitlements to Māori as New Zealand citizens.  

Unlike the Indigenous recognition provisions in Australia, the Treaty’s constitutional status is not based on formal inclusion in a written constitution. Indeed, New Zealand is usually counted among the handful of states that lack a written constitution, in the sense of a single, codified instrument of government. New Zealand’s Constitution is more political than legal, with the distribution of public power weighted heavily towards the Parliament and Executive. In political if not legal terms, the successful negotiation of the Treaty was the condition precedent for the emergence of a New Zealand constitutional order in the first place. In contemporary New Zealand, the Treaty has become a distinct part of that constitutional order, along with various statutes, certain common-law principles and constitutional conventions.

Along with the Treaty’s broadly recognised symbolic status as New Zealand’s ‘foundation document’, the constitutional status of the Treaty derives from its functional role in substantively regulating the distribution and exercise of public power. Today, the Treaty’s substantive effect on public power is principally instantiated in broad principles – especially of partnership, good faith, honour and reasonableness – that govern the relationship between Māori and the Crown. Though the burgeoning legal force and judicial elaboration of the Treaty’s principles have played a major part in consolidating the Treaty’s constitutional status, much of its constitutional substance is extra-legal, embedded within norms and conventions of political practice. Since 1984, incoming governments have affirmed a commitment to the Treaty, and it is no longer open to governments to ignore or repudiate the Treaty, at least generally. As Paul

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83 Sharp, Justice, above n 76, pt 2; Palmer, Treaty, above n 74, ch 3.
84 See, eg, Elkins, Ginsburg and Melton, above n 4, 6, cf 49.
86 McHugh, Māori Magna Carta, above n 74, 21–41; Palmer, Treaty, above n 74, ch 2.
McHugh has observed, this general Crown commitment to the Treaty has manifest in a more specific constitutional convention, evident since the early 1990s, that Māori ought to be consulted about and substantially consent to major changes in law or policy affecting them. Though not legally enforceable and sometimes disobeyed, this constitutional convention has to an extent been formalised within Cabinet procedures and legislative drafting guidelines, and it acts as a real constraint on how the political branches exercise power in relation to Māori. The convention ‘reconcile[s] the Crown’s exercise of its paramount constitutional authority to pass legislation with recognition of its Treaty partners’.

Manifested in the Treaty, then, is a form of Indigenous constitutional recognition which is very different from that pursued to date within Australia’s State constitutions. Whereas Australia’s Indigenous recognition provisions derive their constitutional status from formal inclusion in written constitutions, the Treaty derives its constitutional status from its functional role in substantively regulating the exercise of public power by the Crown, as well as its symbolic import as a ‘foundation document’. There is a broad similarity between these Antipodean forms of Indigenous recognition, in that legal enforceability plays only a minor role in the case of the Treaty and no role in the case of the Australian provisions. But unlike the Australian provisions, which consist of declaratory statements that offer limited normative guidance, the Treaty, and especially the principles derived from it, consist of broad directives that in the realm of political practice shape and constrain the settler government’s conduct towards Māori. In short, the difference is between Indigenous constitutional recognition that is formal and purely symbolic versus constitutional recognition that is functional and substantive as well as symbolic.


93 McHugh, ‘What a Difference’, above n 75, 94.

94 Cooke, above n 88.
III Evaluating the Two Approaches

A The Symbolic Importance of Form

One point to emerge from these two different approaches to constitutional recognition is that the form – the particular constitutional norm or instrument – in which Indigenous recognition finds expression itself carries symbolic weight. It is clear that being formally acknowledged in a settler polity’s written constitution holds a symbolic resonance for many Indigenous people, whose perspectives and histories, and even their very existence, have repeatedly been ignored and denied within public life. The symbolic importance of written constitutions to many Indigenous people ought not to be dismissed. As Aboriginal and Torres Strait Islander Social Justice Commissioner Mick Gooda said in 2013 upon the passage of South Australia’s Indigenous recognition provision:

Recognising Aboriginal and Torres Strait Islander people in Australian constitutions and indeed our founding national document will improve our resilience, self-worth, and most importantly build and cement stronger relationships between Aboriginal and Torres Strait Islander peoples and the broader Australian community and relationships with governments.

As founding documents in which many of a polity’s basic legal and political institutions are established and regulated, written constitutions have a symbolic power to express Indigenous peoples’ foundational importance to the polity. In the examples from the Australian States, that symbolic power is lessened somewhat by the fact that the recognition provisions have all come about through ordinary legislation, rather than amendments to specially entrenched and legally supreme constitutional texts enacted through onerous procedures and involving heightened public participation (as through a


referendum). But even still, these State constitutions carry symbolic weight as legally and politically consequential founding documents. For many Aboriginal and Torres Strait Islander people, being explicitly acknowledged as first peoples within these documents is an important expression of respect for who they are and of their foundational importance to the polity as a whole.

As a site for Indigenous recognition, the form of the Treaty of Waitangi, and of other Indigenous–settler treaties, carries a different symbolic charge to written constitutions. Certainly, like a written constitution, the Treaty is widely regarded as a founding document for the New Zealand polity. But there are differences in the kind of founding document it is. For unlike Australia’s written constitutions, the central concern of the Treaty was to address the fundamental relationship between Indigenous and settler peoples, and to do this before all other constitutional matters were dealt with. The Treaty puts the Indigenous–settler relationship at the symbolic heart of the New Zealand constitutional order, rather than positioning it as one constitutional issue among many, as under the Australian States’ approach to Indigenous recognition. There is a dimension of timing here as well: the Treaty’s negotiation and agreement preceded the creation of the rest of New Zealand’s constitutional order. It now carries the symbolic imprimatur of being the first and oldest constitutional instrument in New Zealand. While Australia’s written constitutions are also among the polity’s oldest constitutive instruments, the Indigenous recognition provisions have been inserted into them only very belatedly and so lack the gravitas of time.

The Treaty also takes the form of an agreement between two parties – the Crown and Māori tribes – suggesting a greater degree of reciprocity in their relationship and equality in their status than that signified by Indigenous recognition in the settler polity’s written constitution. The Treaty issues from the authority of Indigenous and settler peoples, whereas settler written constitutions issue from the authority of the settler polity alone. That the Treaty was drafted in both Māori and English versions, each of which is now authoritative, further adds to the symbolic impression of equality between the Treaty partners.

For many Aboriginal and Torres Strait Islander people, these are important reasons why treaties are more attractive as forms of constitutional recognition than an

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97 Note, however, that the Victorian provision is accompanied by a manner and form provision which requires approval in a referendum prior to repeal: see further below nn 117–18 and accompanying text.
acknowledgement in the settler polity’s written constitution. Indigenous critics of the latter idea contend that to start with a settler polity’s written constitution takes too much of settler sovereignty (of which the written constitution is a manifestation) for granted, and takes too little account of an Indigenous sovereignty which both predated and now continues alongside the settler state.98 Pursuing constitutional recognition through treaty, by contrast, is bound up with an understanding that Indigenous identity is defined both historically and currently by an original, sovereign and self-determining peoplehood: that Indigenous peoples are and have always been the ‘Sovereign Equals’ (as the Treaty ’88 Campaign put it) of the settler state, whose rule over them is based on illegitimate usurpation.99 There is also a sense that treaties symbolise the equality of Australia’s Indigenous peoples not only with the settler polity but also with Indigenous peoples in other British colonies (including New Zealand), where treaties have long been a feature of Indigenous–settler interaction.100 Of course, it is precisely the symbolism of Indigenous peoplehood (and its potentially more substantive implications) that conservative opponents of treaty reject: as John Howard said, ‘an undivided nation does not make a treaty with itself’.101

To summarise, the form of constitutional instrument in which Indigenous recognition is enacted has symbolic implications. One’s preferred constitutional instrument for Indigenous recognition is partly bound up with one’s understanding of who Indigenous peoples are. As sites of Indigenous recognition, written constitutions can symbolise Indigenous peoples’ fundamental importance to the broader political community. Treaties do this as well, but their form, as agreements between Indigenous and settler peoples, foregrounds Indigenous peoples’ status as peoples equal in standing and authority with the settler state. Certainly, this sort of symbolism might also be achieved through particular kinds of Indigenous recognition adopted in settler states’ written constitutions – such as federal arrangements recognising Indigenous sovereignty.

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and jurisdiction – but unlike with treaties, that symbolism is not embedded in the written constitutional form itself and is in some ways undermined by it.

B The Symbolic Importance of Substance

The symbolism of Indigenous constitutional recognition is also affected by whether or not it has a substantive constitutional impact on the distribution of public power. To quote Webber once more:

> the very effectiveness of symbolism can depend upon it being taken seriously, and this may mean that one has to allow it to have some consequences. ... There does seem to be a difficulty in claiming certain principles to be fundamental to our political life, but then forbidding anyone from taking them into account.102

Substantive constitutional forms of Indigenous recognition, which alter the ways in which public power is exercised over Indigenous peoples, are more symbolically powerful and coherent than forms of Indigenous constitutional recognition that are purely symbolic.

This problem has dogged the Australian States’ Indigenous recognition provisions, whose symbolic potency and sincerity has been undermined by their lack of constitutional substance. The main cause has been the ‘no legal effect’ clauses accompanying these provisions (except in Western Australia and Tasmania). Recall that much of the expressive power of written constitutions stems from their status as key sites in which the basic distribution of state power is worked out. This pillar of written constitutions’ expressive power is knocked out from under purely symbolic provisions in written constitutions. Through the disclaimers explicitly denying the Indigenous recognition provisions any substantive constitutional force, those provisions’ capacity to symbolically affirm Indigenous peoples’ importance to the polity is diminished.

Indeed, there is a sense in which these provisions commit a performative contradiction. On the one hand, by referring to Indigenous identity in the polity’s main site of constitutional norms, they symbolise the constitutional significance of Indigenous peoples. On the other hand, the disclaimers attached to Indigenous

102 Webber, ‘Constitutional Poetry’, above n 24, 268.
recognition provisions symbolically (and legally) repudiate that constitutional significance, with negative symbolic consequences.

As a result of Indigenous critiques that such provisions are tokenistic and insincere, there has been a move away from the use of ‘no legal effect’ disclaimers. The Expert Panel recommended against including such a disclaimer in any recognition provisions incorporated into the *Australian Constitution*.\(^{103}\) The *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth), a statutory placeholder enacted in lieu of a federal constitutional amendment, was drafted without a disclaimer, as was the 2015 Western Australian provision and the 2016 Tasmanian provision.\(^{104}\)

The problem remains, however, that such provisions, even without ‘no legal effect’ clauses, have nonetheless been drafted to be purely symbolic.\(^{105}\) They take the form of ceremonial, declaratory statements rather than normative rules or principles concerning the distribution and exercise of public power. This continues to undermine their symbolic potency, for they still fail to recognise the substantive constitutional importance of Indigenous peoples to the wider polity.

A similar problem beset the Treaty of Waitangi throughout roughly the first decade of its political and legal revitalisation from the mid-1970s, before it had begun to form the locus of a substantive reorganisation of public power in New Zealand. Though the Parliament had passed legislation in 1975 setting up the Waitangi Tribunal, a lack of enthusiasm from a newly elected conservative government meant that the Tribunal itself did not begin operating until 1977.\(^{106}\) With a shoestring budget, a jurisdiction that did not yet encompass historical claims and only limited institutional capital, the Tribunal in its early operations had only a very modest impact.\(^{107}\) The other institutions of Pākehā government were also yet to take the Treaty particularly seriously at all in exercising their authority. In this period, a number of Māori activists, especially those of a more

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\(^{104}\) Explanatory Memorandum, Aboriginal and Torres Strait Islander Peoples Recognition Bill 2012; Joint Select Committee on Aboriginal Constitutional Recognition, above n 63, 48–51; House of Assembly Standing Committee on Community Development, above n 63, 47–53.


\(^{107}\) Ibid.
radical bent, loudly proclaimed that the Treaty was a ‘fraud’.\textsuperscript{108} It was only from the early 1980s onwards, as the Treaty began taking on a more substantive constitutional role, that those Māori who proclaimed it a fraudulent symbol of Pākehā duplicity and domination ceased to do so, and that its symbolic fortunes among other Māori and Pākehā constituencies rose further.\textsuperscript{109}

When it comes to Indigenous recognition, there is clearly a strong link between constitutional symbolism and constitutional substance. Without substantive changes to the way public power is wielded over Indigenous peoples, Indigenous constitutional recognition will ring less loudly and, to many, will ring hollow.

\textbf{C \hspace{0.5cm} The Substantive Failures of Pure Symbolism}

Purely symbolic forms of Indigenous constitutional recognition also neglect Indigenous grievances concerning the way that public power is wielded over them. This is a fact brought out most clearly with Australia’s Indigenous recognition provisions. For a great many Aboriginal and Torres Strait Islander people, the central reason for pursuing constitutional recognition is to substantively alter the distribution of public power in ways that better respect who they are – whether that is as citizens constitutionally protected against invidious discrimination by the settler state or as first peoples with collective rights to their territories and jurisdictional authority. The symbolic recognition provisions inserted in State constitutions do nothing to address those demands for substantive constitutional change.

Indeed, purely symbolic constitutional recognition may be designed to contain and counteract Indigenous peoples’ substantive constitutional grievances. That motivation was partly behind the failed 1999 preamble proposal by Prime Minister John Howard, who was strongly opposed to Indigenous demands for a treaty and to what was often labelled the ‘rights agenda’, which had received a more sympathetic hearing under the Keating Government and its predecessors.\textsuperscript{110} More recently, while Tony Abbott in his time as Prime Minister promoted the idea that Indigenous recognition would ‘complete the Constitution’, his vision of ‘constitutional completion’ was resistant to

\textsuperscript{108} Ibid 86–7; Johnson, above n 76, 107–12.

\textsuperscript{109} Sharp, \textit{Justice}, above n 76, ch 5.

\textsuperscript{110} See Chapter 2 of this thesis.
substantive proposals for constitutional change, such as a constitutional ban on racial

As Pierrebeenne scholar Maggie Walter told the 2015 Tasmanian parliamentary committee inquiring into Indigenous constitutional recognition:

there is a serious risk here … that those words [of symbolic acknowledgement] will be taken as ‘enough’ in and of themselves: that adding a mention of Aboriginal people to The Constitution Act 1934 is the end of the matter, that Aboriginal and non-Aboriginal Tasmania is reconciled, nothing more needs to be said or done. … If this is what happens then perhaps Constitutional Recognition will do more harm than good.\footnote{Walter, above n 95, 3–4.}

For Walter, a symbolic constitutional acknowledgement of Aboriginal Tasmanians – as first peoples, equal in standing to the settler polity – should be accompanied by a concrete mechanism to enact it: a Parliamentary Aboriginal Council.\footnote{Ibid 4.}

This is one vision among many proposed by Aboriginal and Torres Strait Islander people for substantive constitutional recognition. What these visions have in common is a desire for a redistribution of public power as it affects Indigenous peoples. Today it is common to demand a redistribution of power away from the settler political branches and to the courts or to Indigenous peoples themselves. As I demonstrate in the following chapter, a central aim of proponents of the 1967 constitutional amendments was to redistribute power over Indigenous peoples away from the States and to the Commonwealth Government. But these more substantive visions for constitutional change remain unrealised under – and can even be occluded by – state-led proposals for purely symbolic constitutional recognition.

D \textit{The Substantive Importance of Form}

The final point is that the constitutional form in which Indigenous recognition is manifest can have substantive constitutional implications. Consider in particular the
consequences of enshrining substantive recognition in a written constitution that is specially entrenched and legally supreme. A written constitution’s entrenchment can help to ensure that Indigenous peoples are respected by the state into the future by making Indigenous recognition especially difficult to legally undo. Whereas forms of recognition enacted in legislation, proclaimed in a court’s decision or agreed to in a treaty might be overturned relatively easily by ordinary future legislation, forms of recognition entrenched in a written constitution cannot be so easily bypassed. This entrenchment can be particularly important for Aboriginal and Torres Strait Islander peoples, given that their voices and perspectives may otherwise be easily overwhelmed within ordinary governmental decision-making.

Relatedly, when constitutional recognition is incorporated into written constitutions, their legal supremacy offers the potential for Indigenous recognition to become an overriding concern within the polity, usually enforced by the judiciary. In other words, substantively recognising Indigenous peoples within a legally supreme written constitution can help to ensure that they are respected by the institutions of the settler state. Far less amenable to being overridden by majoritarian or dominant interests, legally supreme Indigenous rights can serve to trump other considerations. To be sure, in practice, the courts may be no more willing to uphold Indigenous recognition than the political branches.  

Within Australia’s State Indigenous recognition provisions, the distinctive substantive potential of written constitutions’ form – stemming from their entrenchment and supremacy – has remained unrealised. One reason for this is that the Indigenous recognition provisions (with Victoria a possible exception), along with State constitutions generally, are not entrenched or legally supreme. In general, State constitutions can be amended by ordinary legislation – except for the legally complex category of laws entrenched through ‘manner and form’ clauses, which can only be enacted in limited circumstances. Only one Indigenous recognition provision, the Victorian provision, has been accompanied by a manner and form requirement that

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116 See above n 41.
prevents it being repealed without approval in a referendum.\textsuperscript{117} But even if this purported entrenchment is legally effective (something open to debate), there is a broader problem here: written constitutions’ entrenchment and supremacy are not constitutionally substantive in and of themselves.\textsuperscript{118} It is only where they are attached to provisions which affect the basic distribution of public power that they can have substantive constitutional bite by overriding conflicting laws or government decisions. And here, the Victorian provision, like those in the other States, has not capitalised on the substantive power offered by the written constitutional form’s entrenchment and supremacy.

The Treaty of Waitangi is not formally entrenched or legally supreme (within the Pākehā legal system, it is not in itself directly legally enforceable at all), and so it cannot have the overriding effect against settler institutions that it might have under a written constitution. In this sense, it stands in contrast to Indigenous treaty rights in Canada, which were recognised and affirmed in s 35 of the \textit{Constitution Act, 1982}.\textsuperscript{119} As I described earlier, much of the Treaty of Waitangi’s constitutional status is based upon constitutional conventions developed over the past three decades within the Pākehā political branches to respect the Treaty principles and consult and negotiate with Māori when making decisions affecting them. Those conventions are not legally enforceable and are liable to repudiation by the political branches, as was demonstrated in the 2004 controversy over the Parliament’s decision to legislatively constrain Māori common-law rights to the foreshore and seabed.\textsuperscript{120}

While many contemporary Australian proponents of treaty have sidelined the \textit{Australian Constitution} from their proposals, earlier treaty advocates often saw the \textit{Constitution} as an especially powerful vehicle for securing the durability and supremacy of any treaty’s terms. For instance, during treaty debates in the late 1970s and 1980s, Aboriginal writer and activist Kevin Gilbert was particularly insistent on the importance of constitutionally entrenching a treaty. Indeed, when treaty proposals emerged to national prominence in 1979, Gilbert showed some scepticism for precisely the reason

\textsuperscript{117} \textit{Constitution Act 1975} (Vic) s 18(1B)(a).

\textsuperscript{118} For doubts about such a provision’s effectiveness, see Joint Select Committee on Aboriginal Constitutional Recognition, above n 63, 34.

\textsuperscript{119} But see Palmer, ‘Constitutional Realism’, above n 85.

\textsuperscript{120} Harris, above n 92, 201–5; Charters, above n 92; Charters and Erueti, above n 92.
that any treaty could be ‘broken at political whim’. He advocated an Aboriginal Bill of Rights enshrined in the Constitution, which he came to fold into treaty demands. The Treaty ’88 Campaign that Gilbert spearheaded to coincide with the bicentenary of British colonisation in Australia also stressed that any treaty needed ‘constitutional effect’ to prevent its future amendment or repeal. Within the settler constitutional order, the Constitution’s entrenchment and supremacy offer Indigenous recognition something substantive that other constitutional forms like treaty do not.

It is worth concluding with some qualifications about the substantive value of written constitutions’ entrenchment and supremacy for projects of Indigenous constitutional recognition. First, while one of the purposes of constitutionally recognising Indigenous peoples is to empower them against the settler state, effecting that recognition through a written constitution will frequently also empower an institution of the settler state itself – the courts. This demonstrates a more general paradox besetting projects of Indigenous recognition, which is that, as Duncan Ivison has said, ‘to reduce the presence of the state in one sphere of life requires that it be increased in others, acting at a distance’. And there is no guarantee that newly empowered courts will interpret and develop constitutional recognition in accordance with Indigenous views and aspirations. They may, from Indigenous people’s perspectives, distort it out of shape. It is partly for this reason that some Māori and their organisations have been wary of constitutionally entrenching the Treaty: for in redistributing public power to the judiciary, such an entrenchment might diminish Māori moral and political power over the Treaty’s meaning and operation.

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123 Treaty ’88 Campaign, above n 98, 1. See also Kevin Gilbert, Aboriginal Sovereignty: Justice, the Law and Land (3rd ed, Burrambinga Books, 1993).


The fact remains, however, that to leave forms of Indigenous recognition unentrenched, as with the Treaty, is to leave considerable power in the hands of the settler political branches. That situation may ultimately be preferable, or at least tolerable, for Māori, who themselves possess significant political influence due to their relatively large numbers and guaranteed representation in Parliament. It may be less preferable for Aboriginal and Torres Strait Islander people, who constitute a much smaller percentage of the population and wield less influence within settler politics than Māori. When it comes to making these choices – Indigenous recognition within or outside a written constitution, empowerment of the courts or the political branches – there is no precise science, only contextualised political judgment. As I will emphasise in subsequent chapters, uncertainties such as these render any form of constitutional recognition provisional and incomplete, ‘open to on-going review and revision in the light of experience with its institutionalisation’.

A second caveat about the value of written constitutions’ entrenchment concerns the fact that identities can and do change over time. The mutability of identity and the challenge it represents for Indigenous constitutional recognition is a theme I take up further in the following chapters. Entrenching Indigenous recognition within a written constitution rather than outside it therefore runs a greater risk that such recognition will become ossified, unable to respond to important changes in who Aboriginal and Torres Strait Islander peoples are and how they see themselves. One possible solution may be to draft broadly worded provisions capable of evolution and adaptation, along the lines of the Treaty of Waitangi itself – though such vagueness may also confer too much power and impose too little constraint upon the settler state’s institutions. In the end, the risk of ossification may well be a price worth paying for the benefits of entrenchment and legal supremacy. Here again, decisions about the value of written constitutions as a


128 Tully, above n 39, vol 1, 182.

129 See, eg, Nancy Fraser, ‘Social Justice in the Age of Identity Politics: Redistribution, Recognition, and Participation’ in Nancy Fraser and Axel Honneth, Redistribution or Recognition?: A Political–Philosophical Exchange (Verso, 2003) 7, 82.
vehicle for Indigenous recognition must be made in particular political contexts under imperfect knowledge, and they should be open to revisitation in the future.

IV Conclusion

As this excursion into constitutional theory and comparison has shown, conflating Indigenous constitutional recognition with Indigenous peoples’ textual visibility in written, big-C Constitutions – the model of Indigenous recognition adopted in all of the Australian States – is exceedingly narrow. It involves an excessive fixation on constitutional form, to the neglect of functionally constitutional norms and instruments outside written constitutions that affect the basic distribution of public power within a political association. The constitutionalisation of New Zealand’s Treaty of Waitangi offers an illustration of how the constitutional recognition of Indigenous peoples can be achieved through small-c constitutional norms – including norms that are political rather than legal.

A comparison between the Treaty’s constitutionalisation and Australia’s Indigenous recognition provisions also brings out the importance of questions of constitutional form, symbolism and substance for projects of Indigenous recognition. The constitutional form in which Indigenous recognition is enacted has symbolic significance, with treaties in their very form suggesting an equality between Indigenous and settler peoples. Also symbolically significant is whether a form of constitutional recognition has a substantive effect on the distribution of public power: making Indigenous recognition purely symbolic can have negative symbolic effects in itself. Purely symbolic Indigenous constitutional recognition also works to ignore and to potentially obscure Indigenous grievances over constitutional substance – over how public power is exercised over them. Finally, the distinctive form of written constitutions – in particular, their entrenchment and legal supremacy – can have substantive constitutional significance, helping to render Indigenous recognition a durable and overriding concern within the polity as a whole.

The next chapter draws on these insights and takes them further, focusing on the 1967 amendments to the Australian Constitution as a form of Indigenous constitutional recognition. Unlike the Indigenous recognition provisions inserted into Australian State constitutions over the past decade, these amendments were about removing Indigenous people’s visibility within the Constitution’s text. But they were about much more than that, for they redistributed ultimate power over Aboriginal and Torres Strait Islander
people from the States to the Commonwealth and altered the broader constitutional culture to position the Commonwealth as the defender of Indigenous citizenship. The 1967 amendments also illustrate one of the central arguments of this thesis: that Indigenous constitutional recognition, emerging from particular historical contexts and struggles, is always partial, provisional and incomplete.
PART II
INDIGENOUS CONSTITUTIONAL RECOGNITION IN PRACTICE
Chapter 5
The Incompleteness of Indigenous Constitutional Recognition: Lessons from 1967

History is inextricably linked to the recognition project.¹

The idea that the constitutional recognition of Indigenous peoples is an endpoint, something done once and for all, has become prominent in contemporary debates. Its most notable exponent was former Prime Minister Tony Abbott, who repeatedly posed Indigenous recognition as a matter of ‘completing’ the Constitution.² Other participants within these debates, including the official inquiries, have likewise seen in constitutional recognition the prospect of constitutional completion.³ The commonly used language of ‘unfinished business’ also presents, albeit implicitly, constitutional recognition as something that might ultimately be ‘finished’. Consider, for instance, how former Prime Minister John Howard represented his 2007 proposal to pursue Indigenous constitutional recognition if re-elected: ‘a permanent, decisive step towards completing some unfinished business of this nation’.⁴

Within this endpoint orientation towards constitutional recognition, the 1967 referendum occupies an ambivalent place. That referendum, held on 27 May 1967, removed clauses from the Constitution that expressly excluded Indigenous peoples from the Federal Parliament’s lawmaking power and from the population counts that the Constitution relies on to distribute benefits and burdens to the States.⁵ On the one hand, exponents of recognition routinely celebrate the referendum and its remarkable endorsement by over 90 per cent of the electorate. As then Prime Minister Julia Gillard observed in 2013, the referendum ‘gives us abundant cause for … hope. In an era when the nation was perhaps less open and socially

¹ Megan Davis, ‘A Rightful Place: Correspondence’ (2014) 56 Quarterly Essay 73, 75.
⁵ Constitution ss 51(xxvi), 127.
aware than our own time, the ballot yielded the highest yes-vote ever recorded in an Australian referendum’.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 13 February 2013, 1121.}

On the other hand, the referendum is viewed as inadequate. Gillard observed in the same speech that ‘[i]n 1967, the people of Australia sought restitution and repair, but their work was incomplete. Today a new generation dreams of finishing the job’.\footnote{Ibid 1120.} In the words of constitutional lawyer George Williams, ‘the referendum left unfinished business’ because ‘it did not add any text to the constitution recognising Aboriginal people and their history’ and ‘failed to deal with clauses that allow discrimination on the basis of race’.\footnote{George Williams, ‘Time to Fix a Stain in the Constitution’, \textit{The Sydney Morning Herald} (Sydney), 18 July 2014, 18.} For Noel Pearson, too, while ‘the 1967 referendum reversed our exclusion’, ‘it left us with a Constitution that now makes no mention at all of this nation’s indigenous history and heritage’ and ‘still contains racially discriminatory provisions’.\footnote{Noel Pearson, ‘Next Step is for the Nation to Leave Race Behind’, \textit{The Australian} (Sydney), 25 May 2013, 19.} Though ‘[t]he 1967 referendum did not fix these problems … we have the opportunity to fix them soon’.\footnote{Ibid.} Advocates of constitutional recognition often construct a teleological narrative in which the 1967 referendum becomes a way station – important but inadequate – on a journey to full recognition, a journey that enlightened contemporary Australians are now poised to finally complete.\footnote{Indeed, Recognise, the publicly funded body tasked with promoting constitutional recognition, launched a ‘Journey to Recognition’ on 26 May 2013, the eve of the 1967 referendum’s anniversary. The Journey is travelling around the country to generate community awareness and support. See Oliver Laughland, ‘Journey to Recognition Relay Begins’, \textit{The Guardian} (online), 26 May 2013 <http://www.theguardian.com/world/2013/may/26/journey-of-recognition-relay-begins>.}

In this chapter, I argue that the 1967 amendments are indeed both incredibly important and fundamentally inadequate, but this is not because they were a halfway stop on an inevitable and soon-to-be-completed trajectory towards final constitutional recognition of Indigenous peoples. It is because the amendments are an exemplary form of constitutional recognition themselves: partial, provisional and incomplete. The 1967 amendments were limited by the historical horizons of politics and identity that attended their emergence, and they have been subject to an uncertain future in which their implementation could and did go in different directions.
The ‘incompleteness’ of the 1967 amendments as a form of Indigenous constitutional recognition is not peculiar to them. Besetting all struggles over recognition, including those taking place today, are both the constraints of the present and the openness of the future. Though the promise of ‘completing the Constitution’ may be a useful strategy to garner support for Indigenous constitutional recognition, as a way of understanding it, such constitutional eschatology is fundamentally misleading.

This chapter begins by showing how the 1967 amendments were a form of constitutional recognition of Aboriginal and Torres Strait Islander people. In contrast to many contemporary proposals for Indigenous recognition, these amendments removed existing references to Indigenous people from the constitutional text rather than inserted new ones. I argue that these amendments were an important recognition of Indigenous people’s identities as Australian citizens. This recognition was not just symbolic but substantively constitutional, for it entailed a shift in ultimate power over Indigenous affairs to a ‘higher authority’ – the Commonwealth Government – which was more powerful and better disposed than the States to respect Indigenous people as citizens. It was a form of Indigenous recognition that took place by altering the structure of Australian federalism.

To properly understand the amendments as constitutional recognition, there is a need to look beyond the rather spare changes to the Constitution’s text. One part of their importance as recognition lay in their transfer of ultimate constitutional authority over Indigenous peoples to the level of government, the Commonwealth, most politically accountable to the international sphere. The other reason to see the changes as constitutional recognition is that political mobilisations surrounding the referendum reshaped the constitutional culture and therefore the possibilities for future implementation of the amendments. As a result of this shift in constitutional culture, it became wholly unfeasible after the referendum for the Commonwealth to remain inactive in Indigenous affairs or to exercise its newfound power in ways that disrespected Indigenous citizenship.

The second part of the chapter demonstrates the incompleteness of constitutional recognition by examining the circumstances of the 1967 amendments’ enactment and their subsequent implementation. Here I draw heavily on the work of political theorist James Tully, who has persuasively critiqued what he calls the ‘finality orientation’ towards

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recognition. I emphasise three reasons to view constitutional recognition as provisional and incomplete. First, the horizons of Indigenous–settler politics: power imbalances between Indigenous and settler peoples in negotiations render any form of recognition an imperfect compromise. Second, the horizons of Indigenous identity politics: the identities that get recognised are contested and changeable, something reflected after 1967 in the shift in Indigenous identity politics from citizenship to peoplehood. Third, the vagaries of constitutional implementation: constitutional recognition must be implemented on an ongoing basis. This is an uncertain process which leaves much to the actions of future state actors, and it is a process that can fare better or worse where recognition is concerned. These are the reasons why the 1967 amendments are inadequate and why any future forms of recognition ought to likewise be seen as provisional.

I Indigenous Constitutional Recognition in 1967

A Indigenous People and the Original Constitution

Understanding the 1967 amendments’ significance requires an understanding of how the Constitution dealt with Indigenous Islander people before the referendum. The original Constitution contained two references to Indigenous people, both of them exclusionary and both of which would be removed in 1967. One reference was in s 127, which excluded ‘aboriginal natives’ from constitutional operations that depended on population. In effect, s 127 meant that where other sections of the Constitution sought to distribute benefits (eg, seats in the Lower House) or burdens (eg, liability for Commonwealth expenditure) to the States on a per capita basis, ‘aboriginal natives’ would be excluded from the population figures. The rationale appears to have been that ‘aboriginal natives’ – officially people of more than half Aboriginal descent – were socially and geographically beyond the bounds of settler commerce, politics and law, and so should not be considered members of State polities in the distribution of federal goods and impost. (Contrary to popular belief, the provision did not prevent Indigenous people being counted in censuses: they were counted in every

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census before 1967, though published population statistics enumerated ‘aboriginal natives’ in separate tables.17)

The second, more legally significant provision – s 51(xxvi), or the ‘race power’ – gave the Commonwealth Parliament the power to make laws with respect to ‘the people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws’. It was a federal power to make race-based laws, whether benign or invidious, but it did not extend to Indigenous people residing in the States.18 The provision appears to have reflected a view of the framers that, unlike the affairs of non-white migrants, whose threatening influx was of the utmost national concern, the affairs of Indigenous people, widely believed to be an unthreatening ‘doomed race’, were to remain primarily a State responsibility.19

After federation, the Commonwealth assumed a limited role in Indigenous affairs, though this was as much a matter of political custom as constitutional doctrine. The governance of Indigenous people remained largely a matter left to the States, who adopted policies that ruled Indigenous people with a mixture of neglect, paternalism and authoritarianism, as ‘citizens without rights’.20 The specific action the Commonwealth did take regarding Indigenous people was squarely within its own powers and broadly in line with the States: express exclusions of Indigenous people from federal entitlements, such as the right to vote and welfare benefits;21 and paternalistic governance of the majority Aboriginal population in the Northern Territory, which came under Commonwealth control in 1911.22 Yet despite the apparent constraint of the race power, there were various powers that the Federal Parliament had at its disposal in Indigenous affairs: the power to make conditional grants to the States (s 96), the ‘reference power’ (s 51(xxxvii)),23 possibly the

20 See generally Chesterman and Galligan, above n 16.
21 Ibid ch 4.
external affairs power (s 51(xxix))\(^{24}\) and perhaps even with some creative legal argument the race power itself.\(^{25}\) The Commonwealth did not, however, utilise these options.

In fact, from the earliest days of federation, the Federal Parliament and members of Government explicitly and repeatedly refused requests by Indigenous people and others to expend federal funds on Indigenous welfare or to override the States, on the basis that constitutional responsibility for Indigenous affairs belonged to the States.\(^{26}\) This became a matter of entrenched political custom that endured until the 1967 referendum.\(^{27}\)

**B The Campaign for Constitutional Change**

In the late 1950s, Indigenous and non-Indigenous activists began a campaign targeting the explicit constitutional exclusions of Indigenous people and the federal division of power in Indigenous affairs – a campaign that would culminate in the most electorally popular referendum in Australian history.\(^{28}\) The reformists’ ultimately successful demands were for the repeal of s 127 and removal of Indigenous people’s exclusion from the race power.\(^{29}\) Though many organisations and individuals were involved, both Indigenous and non-Indigenous, the multi-ethnic Federal Council for the Advancement of Aborigines and Torres Strait Islanders was the main actor.\(^{30}\) Reform proponents sent petitions to Parliament, lobbied


\(^{25}\) One argument would be that the race power only prohibited the making of federal laws about Indigenous people in any one State; it otherwise supported Indigenous-specific laws made across all the States. Prior to its amendment in 1967, the scope of the race power was never judicially determined. But see *Robtelmes v Brenan* (1906) 4 CLR 395, 415 (Barton J); *Attorney-General (Victoria) v Commonwealth* (1962) 107 CLR 529, 577 (Windley J).


\(^{30}\) Attwood and Markus, *1967 Referendum*, above n 26, chs 3–6; Taffe, *FCAATSI*, above n 28, ch 4. Prior to 1964, the organisation’s name was the Federal Council for Aboriginal Advancement.
parliamentarians, held public meetings, wrote letters, published opinion pieces and appeared on radio and television.\textsuperscript{31}

Under pressure from this grassroots campaign and mindful of potential international opprobrium, the Holt Coalition Government in early 1967 passed with unanimous parliamentary support a referendum Bill acceding to the campaigners’ demands.\textsuperscript{32} The referendum, held on 27 May 1967, garnered the approval of over 90 per cent of the electorate, a level of support not seen before or since.\textsuperscript{33} There were many reasons for this enormous success: the grassroots campaign for reform, the discussion of the reforms over many years, an international environment increasingly hostile to racism and discrimination, cross-party political support which resulted in there being no official ‘No’ case put to voters, and the lack of opposition from the States.\textsuperscript{34}

To understand the push for constitutional change, it is necessary to know that by the mid-20\textsuperscript{th} century, Aboriginal and Torres Strait Islander people had increasingly claimed the identity of Australian citizen and the entitlements that accompanied it. Though Indigenous people shared the formal legal status of citizen with other Australians from its inception in 1948 (and the status of British subject before that), numerous legal differentiations at the State and federal levels continued through the mid-20th century to deny Aboriginal and Torres Strait Islander people the rights that accrued to other Australians.\textsuperscript{35} As they came to identify more as citizens, Aboriginal and Torres Strait Islander people sought an end to the many longstanding legal differentiations that distinguished them from other Australians and advocated special government programs to alleviate their serious socioeconomic deprivation and put them on the same footing as other Australians.\textsuperscript{36} The emergence of an Indigenous sense of citizenship was underpinned by social changes, often government-directed or

\textsuperscript{31} See the sources cited in the previous footnote.
\textsuperscript{35} Chesterman and Galligan, above n 16, 2–3.
\textsuperscript{36} McGregor, \textit{Indifferent Inclusion}, above n 16, 33–4, ch 3; Bain Attwood and Andrew Markus, \textit{The Struggle for Aboriginal Rights: A Documentary History} (Allen & Unwin, 1999) 6, 12, 19 and many of the documents in pt 2; Chesterman, \textit{Civil Rights}, above n 32, chs 2–3.
coerced, which had involved Aboriginal and Torres Strait Islander people becoming more similar to and integrated with non-Indigenous society.\(^{37}\)

To be sure, Indigenous people widely and resolutely resisted governmental attempts to erase their distinctness, and indeed from the 1960s increasingly sought public recognition of that distinctness, most prominently through demands for land rights on the basis of traditional ownership.\(^{38}\) But the dominant theme in Indigenous activism through to the 1960s was for respect of Indigenous people’s identities as Australian citizens, even though those identities had ultimately been brought about through the imposition of colonisation.\(^{39}\) Indeed, Indigenous activists were at the vanguard of the quest for recognition of their citizenship, with white activists only taking up the call afterwards.\(^{40}\) Such Indigenous activism discloses that ‘a colonial category such as “citizen” can be a felt identity that projects deeply appealing possibilities’ for colonised people.\(^{41}\) If they were to form part – albeit a determinedly discrete part – of the Australian people, Aboriginal and Torres Strait Islander people generally felt they ought to be treated as such by Australian governments.

Participating in this turn to citizenship, the Indigenous and non-Indigenous referendum campaigners presented the constitutional amendments as a question of the recognition of Indigenous citizenship, an argument which made sense on the symbolic level.\(^ {42}\) Certainly, as numerous scholars have correctly pointed out, the original Constitution did not deny Indigenous people either the formal status of citizenship (which they possessed) or the core rights customarily associated with it (which often they did not possess): both were

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\(^{37}\) Consider as one indicator the increasing number of Indigenous children being educated under mainstream criteria: see McGregor, *Indifferent Inclusion*, above n 16, 74. Indigenous integration such as this was higher in comparison to earlier times. There remained, of course, many differences between Indigenous and non-Indigenous people: material, legal, social, cultural and historical.


the province of ordinary legislation. But the Constitution’s express provisions on Indigenous people singled them out for differential treatment on a basis that was difficult to justify in light of their growing integration into the Australian political community. In this respect, the Constitution did indeed symbolically deny Indigenous citizenship broadly conceived, and the campaigners had a sound argument that the provisions’ repeal would affirm Indigenous people as citizens. Scholars who repudiate any connection between citizenship and the 1967 amendments focus too narrowly on citizenship as a formal legal category and fail to appreciate citizenship as a discursively constructed ‘form of collective identity and sentiment’.

Less obviously true, however, was a narrative recited by reformists according to which the formal expansion of Commonwealth power in Indigenous affairs – a result of the race power’s amendment – would lead to citizenship for Indigenous people in the sense of equal rights and treatment. As Bain Attwood and Andrew Markus have observed, the referendum campaigners ‘equated the constitutional changes proposed with the Commonwealth assuming a greater Commonwealth role in Aboriginal affairs, the overthrow of racially discriminatory laws and the winning of rights or citizenship for Aborigines.’ This narrative had a pedigree going back many decades, though during the referendum campaign it became more widespread.

There are two major difficulties with this narrative. One is that while the amendment of the race power would formally expand the Commonwealth’s power over Indigenous people, there was nothing to oblige the Commonwealth to use that power. Referendum campaigners had visions of the Commonwealth overriding discriminatory State laws and funding measures to support impoverished Indigenous citizens, but the amendments guaranteed nothing of the sort. The Commonwealth might remain, in accordance with entrenched political convention, just as aloof as it had since federation. A second difficulty


44 Linda Bosniak, ‘Citizenship Denationalized’ (2000) 7 Indiana Journal of Global Legal Studies 447, 455. Chesterman and Galligan acknowledge that their approach (which concerns citizenship not only as formal legal status but also as suite of rights) does not address the ‘less formal social and cultural aspects of citizenship’: Chesterman and Galligan, above n 16, 5.

45 Attwood and Markus, 1967 Referendum, above n 26, 44.

46 Ibid 9–11, 12, 14, 30, 44.

with the narrative is that the Commonwealth had, in its pre-‘67 action in Indigenous affairs, been instrumental in the denial of citizenship rights to Indigenous people, both with respect to federal entitlements and in the Northern Territory.\textsuperscript{48} There was nothing in the amendments – no strongly constraining language in the race power, for instance – that obviously prevented the Commonwealth from exercising its power in such a discriminatory way in the future.

Despite these difficulties, I argue below that the transfer of constitutional authority to the Commonwealth was indeed linked with Indigenous citizenship. In fact, this shift in federal arrangements \emph{constitutionally recognised} Aboriginal and Torres Strait Islander people as citizens. The referendum involved altering constitutional norms – those surrounding the federal division of power in Indigenous affairs – in ways that better respected Indigenous people’s identities as Australian citizens.

\textbf{C \quad How the 1967 Amendments Constitutionally Recognised Indigenous People}

The constitutional recognition of Indigenous citizenship in 1967 lay in the shift in ultimate constitutional power over Indigenous people to a ‘higher authority’. Drawing the higher authority idea from Aboriginal leader Mick Dodson, Ravi de Costa has demonstrated that appealing to higher authorities has been an enduring political strategy for Aboriginal and Torres Strait Islander peoples throughout colonisation.\textsuperscript{49} Whereas de Costa has emphasised the transnational dimension of those appeals – in, for instance, Indigenous petitions to imperial authorities against colonial governments – it is clear that such appeals have often also had a constitutional dimension, broadly conceived. Indigenous demands made to colonial governors over local administrators,\textsuperscript{50} or to the monarch over domestic authorities,\textsuperscript{51} or to parliament over the executive,\textsuperscript{52} or to the Federal Government over the States\textsuperscript{53} are all

\textsuperscript{48} See above nn 21–2 and accompanying text.

\textsuperscript{49} De Costa, \textit{Higher Authority}, above n 12. Colonial-era appeals to higher authorities were not confined to Australia or to Indigenous appellants: see Sahlia Belmessous (ed), \textit{Native Claims: Indigenous Law Against Empire, 1500–1920} (Oxford University Press, 2012); Lauren Benton, ‘Just Despots: The Cultural Construction of Imperial Constitutionalism’ (2013) 9 \textit{Law, Culture and the Humanities} 213.

\textsuperscript{50} For instance, the Aboriginal people on Flinders Island in the 1840s petitioned the Lieutenant Governor and then Queen Victoria for the removal of the local administrator: see Ann Curthoys and Jessie Mitchell, “Bring this Paper to the Good Governor’: Aboriginal Petitioning in Britain’s Australian Colonies’ in Sahlia Belmessous (ed), \textit{Native Claims: Indigenous Law Against Empire, 1500–1920} (Oxford University Press, 2012) 182, 186–7.


instances of Indigenous people relying on the settler constitutional hierarchy and appealing to a higher authority to have their claims upheld.

United in the concept of a higher authority are two overlapping ideas: first, a set of broad, even universal norms against which to measure local grievances; and second, an institution with the power and willingness to uphold those norms against unjust local authorities.\textsuperscript{54} For the 1967 amendments, the broad normative ideals were those associated with Indigenous claims to equal citizenship: claims to non-discrimination and for special measures to provide Aboriginal and Torres Strait Islander people with opportunities equal to those of their fellow Australians. The institution with the power and willingness to uphold those claims to citizenship was the Commonwealth as against the States. In the transfer of ultimate authority over Indigenous people to the Commonwealth, the 1967 amendments better respected Indigenous people’s identity as Australian citizens. In other words, the amendments constitutionally recognised Indigenous people as citizens. Not without reason, ‘the call for federal control has carried a remarkably powerful resonance for Aboriginal people’.\textsuperscript{55}

Clearly, after the referendum, the Commonwealth formally possessed the legal power to act as a higher authority upholding Indigenous people’s claims to citizenship. In addition to the Commonwealth’s existing (if largely unused) general powers to legislate in support of Indigenous citizenship, the repeal of the ‘aboriginal race’ proviso from s 51(xxvi) removed a constitutional barrier to the Commonwealth crafting special laws in fulfilment of obligations to Indigenous citizens throughout Australia. The Commonwealth could now use its power to legislate for ‘the people of any race’ in relation to the formerly exempted ‘aboriginal race in any State’. Significantly, because Commonwealth legislation prevails over State legislation in the event of a conflict, the Commonwealth post-1967 would have, as referendum campaigners foresaw, ample power to override any States denying Indigenous citizenship through discriminatory laws and policies.\textsuperscript{56}

\textsuperscript{53} See, for instance, the demand put to the Prime Minister by organisers of the 1938 Day of Mourning protest for federal grants to the States to provide for Aboriginal welfare: Attwood and Markus, \textit{Struggle}, above n 36, 90.

\textsuperscript{54} De Costa, \textit{Higher Authority}, above n 12, 4.

\textsuperscript{55} Attwood, \textit{Rights}, above n 26, 64.

\textsuperscript{56} \textit{Constitution} s 109. On referendum campaigners’ awareness of this possibility, see Taffe, \textit{FCAATSI}, above n 28, 118–19.
The Commonwealth’s power to uphold Indigenous claims to citizenship was financial as well as legal, a fact appreciated by proponents of constitutional change. The story of Australia’s fiscal federalism has overwhelmingly been one of growing federal dominance at the expense of the States, a dominance greatly enhanced by the Commonwealth’s seizure of sole responsibility for income taxation in the 1940s and 1950s. By mid-century, the Commonwealth’s financial ability to secure Aboriginal and Torres Strait Islander people’s civic entitlement to a decent standard of living had increased significantly, when compared with the States. In legal and financial power, then, the Commonwealth after the referendum was plainly equipped to assume the role of a higher authority recognising Indigenous claims to citizenship.

But while the post-’67 Commonwealth formally possessed the power of a higher authority, where were the constitutional guarantees of its willingness to act as one? As I observed above, the referendum campaigners repeatedly told a story that equated Commonwealth power in Indigenous affairs with respect for Indigenous citizenship. However, there were no explicit guarantees in the constitutional text that the Commonwealth would use its newly augmented power concerning Indigenous people at all, or if it did, that the Commonwealth would act to respect Indigenous citizenship. Indeed, the Commonwealth’s own past record in Indigenous affairs, while arguably more enlightened than the States in the decades preceding the referendum, left much to be desired. On their face, the words of the amended race power – a Commonwealth power to legislate for ‘the people of any race, for whom it is deemed necessary to make special laws’ – left open the twin possibilities of continued Commonwealth inaction in Indigenous affairs and adversely discriminatory laws. Where were the assurances that the Commonwealth would enter the field to uphold Indigenous claims to non-discrimination and special measures in recognition of their citizenship?

There are two parts to the answer. One can be found in the constitutional structures of political accountability: in particular, accountability to the international sphere. The Commonwealth, not the States, was ultimately responsible for Australia’s foreign affairs and

60 Chesterman, Civil Rights, above n 32; Chesterman and Galligan, above n 16.
so was held accountable by the international community for the treatment of Aboriginal and Torres Strait Islander people.\textsuperscript{61} Especially in the post-war period, as anti-racism and anti-colonial movements came to global prominence and a nascent international concern for Indigenous people emerged, the international pressure on Australia to respect Indigenous citizenship grew considerably (and indeed was decisive in generating governmental support for the referendum itself).\textsuperscript{62} This pressure, which emphasised non-discrimination and special measures for Indigenous citizens, was manifest in international instruments such as the 1957 \textit{International Labour Organization Convention (No 107) on Indigenous and Tribal Populations} and the 1965 \textit{Convention on the Elimination of All Forms of Racial Discrimination}.\textsuperscript{63} Not being constitutionally responsible for Australia’s foreign affairs, the States were far less responsive to that pressure than the Commonwealth.\textsuperscript{64}

Bearing out the significance of these differential degrees of international accountability was the Commonwealth’s relatively enlightened record in Indigenous affairs, compared with the States’ records, in the decade or more before the 1967 referendum. Certainly, the Commonwealth was not beyond reproach in Indigenous affairs, with its policy of assimilation for Indigenous people rightly criticised at the time and since for that policy’s hostility towards Aboriginal and Torres Strait Islander people’s retention of distinct cultures and identities.\textsuperscript{65} But while assimilation sacrificed Indigenous difference to the vision of a single, culturally unified Australian nation, it also ultimately aimed at granting Indigenous people ‘the same rights and privileges … as other Australians’.\textsuperscript{66} During this time, the

\begin{flushright}
\textsuperscript{61} This had not always been the case: for the first few decades after federation, Australia’s foreign relations were largely the responsibility of the British Imperial Government. See George Winterton, ‘The Acquisition of Independence’ in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), \textit{Reflections on the Australian Constitution} (The Federation Press, 2003) 31, 33–6.


\textsuperscript{64} Chesterman, \textit{Civil Rights}, above n 32, 104; Attwood and Markus, \textit{1967 Referendum}, above n 26, 25.


\textsuperscript{66} \textit{The Policy of Assimilation: Decisions of the Commonwealth and State Ministers at the Native Welfare Conference, Canberra, January 26\textsuperscript{th} and 27\textsuperscript{th}, 1961} (Commonwealth Government Printer, 1961) 1; Haebich, above n 62, 207–9.
\end{flushright}
Commonwealth led the way among Australian jurisdictions in removing legislative discrimination against Aboriginal and Torres Strait Islander people and cajoled recalcitrant States to do the same. Playing a major role in spurring the Commonwealth into action, as numerous historians have demonstrated, was the threat of international opprobrium.67

By placing final responsibility for Indigenous affairs with the Commonwealth rather than leaving it with the States, the 1967 referendum entrusted the governance of Indigenous people to the level of government most susceptible to international pressure and thus most likely to respect Indigenous citizenship. These structures of political accountability were appreciated and often exploited by referendum campaigners.68 The Commonwealth’s constitutional responsibility to the international sphere was one important though by no means failsafe assurance that, after the referendum, it would be positively inclined to act as a higher authority protective of Indigenous citizenship.

The second reason why the amendments constitutionally recognised Indigenous people was because the political mobilisation leading up to the 1967 referendum, along with the referendum itself, deeply shaped the possibilities for future constitutional implementation – especially by the Commonwealth – in the governance of Indigenous people. The prevailing narrative created by supporters of reform powerfully and repeatedly linked the constitutional amendments with Commonwealth control in Indigenous affairs and with respect for Indigenous citizenship.69 This popular narrative ‘talking up the referendum’ was no doubt questionable as a matter of strict legal doctrine, but that is to a large degree beside the point.70 The campaigners succeeded in reshaping the constitutional culture, which in turn both enabled and constrained state actors in new ways.

Because of the campaigners’ narrative linking the amendments with Commonwealth control, along with the unprecedented approval of the referendum by voters, it became unfeasible after the referendum for the Commonwealth to persist in its relative inaction in Indigenous affairs. After the poll, Prime Minister Holt confided to Cabinet that ‘the electorate will undoubtedly look increasingly to the Commonwealth Government as the centre of policy

67 See above n 62.
68 Chesterman, Civil Rights, above n 32, 87–96; Clark, above n 62, ch 8; Attwood and Markus, 1967 Referendum, above n 26, 25–6.
70 Ibid 125.
and responsibility on Aborigine questions.\textsuperscript{71} The Government’s actions from 1968 onwards, while initially quite modest and unsatisfactory to many Indigenous people, were the first truly national entry into Indigenous affairs: the funding of several national programs to improve Indigenous wellbeing and the creation of both a Minister and an Office of Aboriginal Affairs.\textsuperscript{72} The coming to power of the Whitlam Government in 1972 ramped up Commonwealth action significantly, with the Government invoking the referendum as a mandate.\textsuperscript{73}

The revised text of the Constitution required none of this, and indeed much of the early Commonwealth activity in Indigenous affairs almost certainly could have occurred before the referendum using existing constitutional powers.\textsuperscript{74} What this strongly suggests, however, is the success of the referendum campaigners in changing the constitutional culture: dismantling the longstanding political custom of a hands-off Commonwealth and strongly fostering the emergence of an active Commonwealth. And the enormous approval of the referendum by the voters created a mandate for federal government action.\textsuperscript{75} (Later in this chapter, I will describe the vagaries of post-referendum constitutional implementation in greater detail.)

The referendum campaign also made unfeasible the Commonwealth using its newfound power in a way that disrespected Indigenous people’s identities as citizens. This was because the amendments had been so potently equated with the achievement of equal citizenship for Indigenous people. Though the text of the amended Constitution bore no trace of this popular story about Indigenous citizenship, that narrative had reshaped the broader constitutional culture and conditioned the scope for future constitutional implementation by the Commonwealth. This shift was reflected in the activities of several successive Commonwealth governments after the referendum, which pursued – with varying degrees of vigour – policies in recognition of Indigenous citizenship. These policies consisted of special measures to improve the socioeconomic status of Indigenous people and actions to eliminate racial discrimination against Aboriginal and Torres Strait Islander people, including by overriding the States. (These issues are examined more fully later in the chapter.) Such

\begin{footnotes}
\item[71] Quoted in Attwood and Markus, 1967 Referendum, above n 26, 61.
\item[72] Ibid 61–2.
\item[73] Ibid 62.
\item[75] Attwood and Markus, 1967 Referendum, above n 26, 64.
\end{footnotes}
actions reflected the successful mobilisation by referendum campaigners linking the constitutional changes with Indigenous citizenship.

Referendum proponents thus made, Attwood has observed, an ‘imaginative leap’ in claiming that the constitutional amendments

would as a matter of course see the Commonwealth seize control, use its new authority to enact ‘special laws’ to overturn the states’ discriminatory laws, and introduce a programme of legislative reforms that would result in equality for Aborigines. Yet … this was the story campaigners came to tell. Moreover, in so doing they not only persuaded themselves and others it was true. They eventually made it so.76

This fundamental reorientation of constitutional culture, combined with the Commonwealth’s political accountability to the international sphere, rendered the newly empowered Commonwealth Government a higher authority in Indigenous affairs, better inclined than the States to respect Indigenous people as citizens. By recalibrating the basic distribution of political power over Indigenous people in these ways, the 1967 amendments constitutionally recognised Indigenous citizenship.

II The Incompleteness of Constitutional Recognition

A Horizons of Indigenous–Settler Politics

The enactment of a particular form of constitutional recognition – whether by referendum, passage of legislation, court decision, negotiated agreement or other means – will necessarily take place through a contested and messy political process. The political difficulties inherent in the recognition process have been most incisively identified by James Tully.77 One of the inescapable issues is the asymmetries in power that come into play in negotiations over constitutional recognition, particularly between a marginalised group seeking recognition on the one hand and, on the other, the dominant groups and political elites needed for effecting constitutional change.78 Indeed, where a constitutional change is to be effected through majoritarian or supermajoritarian means (such as a referendum), there emerges a cruel irony:

76 Attwood, Rights, above n 26, 165–6.
77 See also, eg, Duncan Ivison, Postcolonial Liberalism (Cambridge University Press, 2002).
in seeking to overcome oppression of their identities by dominant majority norms, minorities must run the very majoritarian gauntlet they seek to transcend.\textsuperscript{79} As Tully notes, ‘[s]uch asymmetries can scarcely be bracketed in the negotiations and their procedures of argumentation’.\textsuperscript{80} Rather, ‘[t]he aim of entering into negotiations is precisely to change unequal circumstances’.\textsuperscript{81} These power asymmetries therefore affect the possible outcomes of any struggle over recognition, typically to the disadvantage of the group seeking recognition. For this reason, and also because of the diverse interests and perspectives that a campaign for recognition in any complex society must take into account, any form of recognition will be a compromise rather than a consensus.\textsuperscript{82} These are the political conditions, the constrained political horizons, of typical struggles over constitutional recognition.

These political conditions can be discerned in the processes which led to the enactment of the 1967 amendments. It is clear that power imbalances between those fighting for the constitutional recognition of Indigenous citizenship and dominant groups and elites conditioned which reform proposals would be taken up. In fact, the Federal Government under Prime Minister Menzies staunchly resisted reformists’ demands for the amendment of s 51(xxvi), in late 1965 agreeing only to the very modest idea of repealing s 127.\textsuperscript{83} Only after Menzies was replaced by Harold Holt did the Government change its position: the amendment of s 51(xxvi), having been excluded from the Government’s original reform agenda, was added to a revised referendum proposal barely a few months out from the vote in February 1967.\textsuperscript{84} The referendum campaigners had succeeded largely because of their own determined campaigning and their ability to leverage the potential negative impact on Australia’s international reputation that would come if s 51(xxvi) remained unamended.\textsuperscript{85}

Though in the case of s 51(xxvi) government elites were eventually convinced to support its repeal, they easily resisted a more far-reaching proposal to constitutionally

\begin{itemize}
  \item \textsuperscript{80} Tully, ‘Struggles’, above n 78, 475.
  \item \textsuperscript{81} Tully, ‘Consent’, above n 78, 247.
  \item \textsuperscript{82} Tully, ‘Struggles’, above n 78, 476.
  \item \textsuperscript{83} Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 11 November 1965, 2638–9 (Sir Robert Menzies, Prime Minister); Constitution Alteration (Repeal of Section 127) Bill 1965 (Cth). See further Attwood and Markus, \textit{1967 Referendum}, above n 26, 35–7.
  \item \textsuperscript{84} Attwood and Markus, \textit{1967 Referendum}, above n 26, 40–3.
  \item \textsuperscript{85} See Part I(B) of this chapter.
\end{itemize}
recognise Indigenous citizenship than what was ultimately adopted. This was the proposal put forward in Parliament in 1966 by Liberal backbencher William Wentworth (later the first Federal ‘Minister-in-Charge’ of Aboriginal Affairs) and supported by Indigenous and non-Indigenous campaigners.\footnote{Constitution Alteration (Aborigines) Bill 1966 (Cth); Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 March 1966, 121–36; Attwood and Markus, \textit{1967 Referendum}, above n 26, 37, 40–1, 114–15, 136; Taffe, \textit{FCAATSI}, above n 28, 106–7.} Going beyond the repeal of s 127, Wentworth’s Bill involved two additional amendments. One was the replacement of s 51(xxvi) with a power to make laws for ‘[t]he advancement of the aboriginal natives of the Commonwealth of Australia’. The other amendment was for a new constitutional guarantee in s 117A:

\begin{quote}
Neither the Commonwealth nor any State shall make or maintain any law which subjects any person who has been born or naturalised within the Commonwealth of Australia to any discrimination or disability within the Commonwealth by reason of his racial origin:

Provided that this section shall not operate so as to preclude the making of laws for the special benefit of the aboriginal natives of the Commonwealth of Australia.\footnote{Commonwealth, \textit{Parliamentary Debates}, House of Representatives, 10 March 1966, 123 (William Wentworth).}
\end{quote}

Both amendments were aimed at preventing invidious racial discrimination of the sort that had been imposed upon Indigenous people by governments in the past, while at the same time allowing for special laws to address Indigenous people’s disadvantage relative to other Australian citizens.

Whereas the amendment to s 51(xxvi) that was actually adopted left the question of how the Federal Parliament would respect Indigenous citizenship largely in the hands of Parliament itself, Wentworth’s amendments would have made the Federal Parliament’s exercise of its power (and the States’) subject to judicial oversight. Wentworth’s approach was well beyond the pale for the Government, which worried about its freedom being constrained by the courts.\footnote{Anne Twomey, ‘The Race Power – Its Replacement and Interpretation’ (2012) 40 \textit{Federal Law Review} 413, 421–2.} Met with this governmental intransigence, Wentworth’s Bill went nowhere, forcing the campaigners to settle for the more modest proposals that eventually won the day.
Some ideas that Indigenous and non-Indigenous reformists favoured were not even raised within the context of the referendum debate: in the face of dominant forces, they were simply too radical and potentially could have jeopardised prospects for achieving the other amendments. One of these ideas, put forward by Indigenous activists since the early 1930s, was for reserved seats in the Federal Parliament. Though today this idea is most likely to be justified on the grounds of Indigenous self-determination, in the early to mid-20th century the justification for guaranteed Indigenous parliamentary representation was typically to better respect the otherwise-neglected voices of Indigenous citizens, none of whom had ever sat in Parliament.

The idea of reserved Indigenous parliamentary seats had at times garnered elite political attention, including in the 1961 Select Committee on Voting Rights for Aborigines, whose activities coincided with the grassroots campaign for constitutional amendments. Many Indigenous witnesses to the Select Committee spoke out in support of reserved Indigenous seats or had done so earlier, including activists already involved in the campaign for constitutional change, such as Doug Nicholls, Kath Walker and George Abdullah. But this more ambitious idea for constitutional reform was well outside the realms of political feasibility and did not get proposed by reformists alongside the other constitutional amendments.

Another emerging Indigenous demand that reformists quarantined from their campaign for constitutional change was that of land rights. While Indigenous claims to land have featured in Indigenous politics in various ways since colonisation began, it was only really from the 1960s onwards that Indigenous land rights emerged to national prominence and came to be articulated on the basis of recognising distinct Indigenous identities grounded

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in ancestral territorial connection. Notably, many of those individuals and organisations pushing for the 1967 constitutional amendments were also simultaneously articulating demands for land rights.

And yet these political struggles were kept separate, with talk of land rights almost never entering the debate over constitutional reform. A major reason for this, as I explore later in this chapter, is that an Indigenous attachment to land, while remaining for many Indigenous peoples a core part of their communal life, was only just becoming prominent as a dimension of a politicised Indigenous identity. However, another reason why activists did not bring land rights into the conversation over constitutional reform was strategic: doing so could endanger the referendum campaign’s success. Because the idea of land rights was still new and controversial, campaigners did not suggest that the Commonwealth might use a newly expanded race power to legislatively secure land rights. And it was unthinkable that land rights might be afforded direct constitutional protection themselves.

In a variety of ways then – the near-failure to amend the race power, the rejection of the Wentworth proposals, the sidelining of more radical ideas like guaranteed Indigenous parliamentary representation or land rights – demands for Indigenous constitutional recognition in 1967 were shaped and constrained by the bounds of political feasibility. Confronted with actual or likely opposition from powerful sectors of settler society, reformists had to be pragmatic. The outcome, while still a remarkable and important achievement, was not therefore some perfect form of constitutional recognition but one inevitably marked by negotiation and compromise. This ought to temper enthusiasm that takes the achievement of constitutional recognition as a postcolonial endpoint.

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95 Taffe, ‘Role of FCAATSI’, above n 94; Taffe, FCAATSI, above n 28, 119–20; McGregor, Indifferent Inclusion, above n 16, 159–61.

96 Here I echo the distinction between private and public ethnicity made in Sally M Weaver, ‘Struggles of the Nation-State to Define Aboriginal Ethnicity: Canada and Australia’ in Gerald L Gold (ed), Minorities and Mother Country Imagery (Institute of Social and Economic Research, 1984) 182, 184.

97 Taffe, ‘Role of FCAATSI’, above n 94.
The power asymmetries and the absence of consensus in struggles over recognition occur not only between the recognised group and dominant groups, but also within the recognised group itself. This is because identity, as Tully observes, is not ‘separate, bounded and internally uniform’ but ‘multiplex or aspectival’; it is not ‘fixed or authentic’ but negotiated and contested, ‘a construct of practical and intersubjective dialogue’. To be sure, ‘[i]t is certainly possible to bring a group of people to agree together in defence and promotion of one aspect of their identity … across their other identity-related differences’. On this score, an identity ‘can still be well supported rather than imposed, reasonable rather than unreasonable, empowering rather than disabling, liberating rather than oppressive.’ A majority of those seeking recognition ‘must be convinced that the present recognition they are accorded is unjust in some sense and then convinced that the proposed form of recognition is just and worth the struggle’. Nonetheless, any new form of recognition accepted by a majority of a marginalised group will prioritise certain aspects of group identity to the exclusion of others, and will be enacted in the face of disagreement and exclusion of some group members.

Beyond the negotiated, contested nature of identity at any given time, identities change and evolve across time, so that forms of recognition can become anachronistic if they do not change and evolve accordingly. To quote Tully again, ‘the identities of those seeking recognition, as well as those to whom the demand is made, change in the course of the negotiations and implementation of any resolution.’ As such, ‘any formal recognition at best will be a codification of the state of processes of identity negotiation at a particular time’. As intragroup politics shift over which aspects of their identities should be privileged, and as group identities undergo more fundamental alterations, existing forms of recognition will need to alter in turn – if they are to remain forms of recognition rather than misrecognition or non-recognition. In some cases, it may be possible for extant forms of recognition to be adapted and reinterpreted. In other cases, it may be necessary for more

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99 Ibid.
100 Ibid.
101 Ibid.
102 Tully, ‘Struggles’, above n 78, 476.
103 Ibid 477.
extensive change through the replacement of old forms with new ones. But in any event, forms of recognition, just like the identities they aim to respect, should be understood not as unanimous and settled but contestable and provisional. They are limited by the horizons of identity politics.

The Indigenous campaigners for the 1967 constitutional amendments privileged the identity of citizen over other possibilities, especially possibilities beginning to emerge from Indigenous people’s more assertive affirmations of their distinctness. As I explained earlier, many of those actively involved in the referendum campaign had been the most vocal critics of assimilation on the basis that they and other Indigenous people wished to retain their distinct identities as Indigenous peoples. And yet in the referendum campaign, they sidelined these growingly visible facets of their identity to demand recognition of Indigenous people as Australian citizens instead. While some people questioned the value of focusing on the overarching constitutional framework rather than more directly addressing Indigenous living conditions, the identity politics surrounding the referendum were strikingly free of public dissent, reflecting a broad Indigenous acceptance of the campaigners’ decision to privilege citizenship and, indeed, an identification with citizenship itself.\(^\text{104}\)

But it is important to acknowledge that, while the referendum campaign was an unprecedented political mobilisation of Aboriginal and Torres Strait Islander people across the country in demands for recognition of citizenship, those who were instrumental in the reform movement were predominantly from more settled parts of the country and relatively well-educated according to settler standards.\(^\text{105}\) There were still many Aboriginal people, especially in remote parts of the country, who were far less integrated – geographically, culturally, politically and economically – into the broader society and whose ways of life had been far less disrupted by colonisation. Some of these people had given evidence to the 1961 Select Committee on Voting Rights for Aborigines and had often shown considerable ambivalence towards their ‘citizenisation’ through being granted the right to vote and being educated in how to use it.\(^\text{106}\) Their voices went largely unheard in the campaign for constitutional change.

That some Indigenous perspectives were absent from or neglected during the 1967 referendum campaign should not lead to a rejection of the amendments or to a denial of their

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\(^\text{105}\) See generally Taffe, *FCAATSI*, above n 28, ch 4.

status as constitutional recognition. For one thing, the struggle for the recognition of Indigenous citizenship, of the sort achieved through the 1967 amendments, had been a longstanding feature of Indigenous activism across the country; the identity of Australian citizen was one broadly capable of endorsement among Aboriginal and Torres Strait Islander people at the time. Second, in the achievement of any form of recognition, the exclusion and rejection of some voices and views is inevitable. This by no means results in a total vitiation of the recognition achieved, but it should lead to an understanding of those reforms as provisional and contestable rather than settled and unanimous.

More significant than the contested and differentiated nature of Indigenous identity during the referendum campaign, however, is the decisive shift in emphasis from Indigenous citizenship to Indigenous peoplehood that began in the referendum’s immediate aftermath and has continued in the decades since. Indeed, the years of campaigning associated with the referendum and related political struggles, through the unparalleled forging of links between Aboriginal and Torres Strait Islander activists and organisations across the country, was important in generating the pan-Indigenous solidarity that came to be expressed after the referendum in terms of nationalism and peoplehood. Such solidarity was based on a shared sense of grievance over common experiences of dispossession and discrimination, as well as cultural similarities including attachments to land.

The referendum also fostered a more radicalised Indigenous politics because it raised Indigenous people’s hopes enormously – hopes which were thoroughly (and probably to some extent inevitably) disappointed by the Coalition Government’s relatively modest policy responses. Further influenced by discourses of Black Power and Indigenous rights that began circulating internationally in this era, Indigenous people in Australia, especially a younger generation of activists, became more forthright in their demands for recognition as a people or nation. In 1972, these claims were spectacularly dramatised by the erection of the

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108 Taffe, FCAATS, above n 28, 222–33; Bain Attwood, The Making of the Aborigines (Allen & Unwin, 1989); Attwood, Rights, above n 26, xii.


Aboriginal Tent Embassy on the lawns of Parliament House, after the McMahon Government’s belated and underwhelming response to Indigenous demands for land rights.\(^\text{111}\) This pan-Indigenous peoplehood identity has been supplemented, complicated and contested by more localised assertions of Indigenous peoplehood based on language, kin relationships and historical attachments to particular territories.\(^\text{112}\)

Certainly, the claims for the recognition of Indigenous people’s citizenship that had dominated the referendum campaign – claims for the end of discrimination and for special government programs improving Indigenous people’s living conditions – persisted in Indigenous activism after the referendum, and persist to this day.\(^\text{113}\) But the post-referendum politics of Indigenous identity, partly as a result of political activity surrounding the referendum itself, demoted such demands and elevated claims of Indigenous peoplehood: claims for land rights, reparations, cultural renewal and institutions of self-determination.\(^\text{114}\) In other words, Indigenous identities ‘change[d] in the course of the negotiations and implementation’ of the 1967 amendments.\(^\text{115}\) The emphasis on peoplehood, albeit with complex articulations and contestations, remains a defining feature of Indigenous political aspirations today.\(^\text{116}\)

Virtually from its inception, then, the constitutional recognition of Indigenous citizenship achieved in 1967 came under strain to accommodate Indigenous claims to peoplehood because of a shift in Indigenous identity. The textual openness of the amendments – formally, extending the Federal Parliament’s power to make ‘special laws’ about ‘the people of any race’ to the previously excluded ‘aboriginal race in any State’ – left much room for future adaptation and reinterpretation, including in response to emergent Indigenous claims for their peoplehood to be recognised. The trajectories of such post-referendum adaptations are traced in the next section. Here, the crucial point revealed by the 1967 amendments is that identities can change, and constitutional recognition of those

\(^{111}\) See Foley, Howells and Schaap, above n 110.
\(^{112}\) Julia Martínez, ‘Problematising Aboriginal Nationalism’ (1997) 21 Aboriginal History 133.
\(^{114}\) Ibid.
\(^{115}\) Tully, ‘Struggles’, above n 78, 476.
identities must change accordingly – through adaptation, supplementation or replacement – if it is not to become obsolete.

C The Vagaries of Constitutional Implementation

I have argued that any new form of constitutional recognition will be constrained by the political and historical circumstances of its enactment: the unequal power between settler and Indigenous peoples, political and identity differences among Indigenous people themselves and the historically contingent and changeable nature of identity. For these reasons, any form of recognition should be seen as imperfect, incomplete and provisional. It will be flawed from the outset, even before it comes to be implemented.

But a struggle over constitutional recognition does not terminate with the achievement of constitutional change, even if the perfect form of recognition could somehow be enacted. This is because new forms of substantive recognition purport to alter the basic structures and norms for the exercise of political power into the future, which gives rise to an open question of how recognition comes to be implemented. Ordinarily, there will be many possible ways for a form of recognition to be implemented, and some will be more in keeping with state respect for the recognised group’s identity than others. As Tully observes, ‘[a]ny agreement can be interpreted in different ways, and this gives rise to disagreement over the institutions that are supposed to implement the agreement and over the way those institutions operate’.117

Ironically, while a key motivation for constitutionalising recognition is to channel and constrain the future exercise of political power, the authoritative interpretation and implementation of such recognition will be in the hands of the very actors – governments, parliaments and courts – whose power was supposed to be disciplined by constitutional recognition in the first place. Recognition is therefore incomplete for additional reasons: because it must be implemented in an ongoing fashion over time, and because the state actors undertaking such implementation can fail to respect the recognised group’s identity.

Call these uncertain processes the vagaries of constitutional implementation. The state actors engaging in constitutional implementation will change over time, being composed of different personnel with different ideological dispositions. Moreover, these actors will be influenced by wider political mobilisations, including social movements.118


struggles over constitutional recognition do not end with recognition’s enactment but continue throughout processes of constitutional implementation.

While much constitutional thinking focuses on the role of courts in interpreting and implementing constitutional text, I emphasise here that the actions of non-judicial actors – in particular, the political branches of the Commonwealth Government – can have constitutional significance. That notion is not an unfamiliar one within British-influenced constitutional thought, where important political customs and conventions among executive and parliamentary actors are understood to possess constitutional status. More relevant for my purposes here, a growing number of North American constitutional scholars have emphasised how the emergence of new government policies and practices and the enactment of new legislation – frequently under the influence of wider political mobilisations and social movements – can constitute important means of implementing constitutional purposes, institutions and roles.

Here I trace the Commonwealth Government’s post-1967 development of a constitutional role as a higher authority in Indigenous affairs, focusing on constitutionally significant changes in government policy, practice and legislation. The key question addressed is this: to what extent has the Commonwealth been willing, particularly in the face of State recalcitrance, to uphold the norms of Indigenous citizenship and – in response to subsequent Indigenous political mobilisation – the norms of Indigenous peoplehood? My focus, then, is principally on the actions of the Commonwealth, both Parliament and Executive, in building out the constitutional role conferred upon it in 1967, as influenced by significant Indigenous and non-Indigenous political mobilisations.

This is therefore not a story about courts, which have with only minor exceptions confirmed the practices of constitutional implementation engaged in by the Commonwealth in the decades since 1967. Aside from that fact, the most significant feature of the courts’
role in this history has been their reluctance to incorporate into constitutional doctrine the referendum campaigners’ story of a purely benevolent Commonwealth. That judicial reticence can with some justice be seen as a failure of the referendum campaigners to succeed in inserting any explicit evidence of their intention into the constitutional text. But it can also be seen as the judicial refusal of a plausible reading of the post-1967 Constitution, and to this extent as a constitutional implementation that has (so far) failed as a form of Indigenous constitutional recognition.

The general story told below is one of the Commonwealth in the three decades post-1967 developing, in a faltering and imperfect way, a constitutional role as a higher authority willing to protect Indigenous citizenship and – pressured by new Indigenous mobilisations after the referendum – Indigenous peoplehood against the States. The election and reign of the Howard Government represents a decisive shift in constitutional implementation and a substantial repudiation of this higher authority role. Narrating this story not only reveals constitutional recognition as an ongoing (and so necessarily incomplete) process of implementation, but also as a process that can fail to be fully realised and can in fact be repudiated by state actors.

1 Constitutional Implementation and Indigenous Citizenship

As I argued earlier in this chapter, political mobilisation surrounding the referendum reshaped constitutional culture by positioning the Commonwealth as a higher authority willing to uphold Indigenous claims to be recognised as citizens. Referendum campaigners repeatedly linked the constitutional changes with the establishment of national programs for improving Indigenous wellbeing and with the termination of racial discrimination. This political mobilisation, along with the massive ‘Yes’ vote in the referendum, significantly

constitutional validity of sections of the World Heritage Properties Conservation Act 1983 (Cth) relating to Aboriginal heritage); Western Australia v Commonwealth (1995) 183 CLR 373 (upholding the constitutional validity of all but one provision of the Native Title Act 1993 (Cth)); Kartinyeri v Commonwealth (1998) 195 CLR 337 (‘Kartinyeri’) (upholding the constitutional validity of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) as partially repealed by the Hindmarsh Island Bridge Act 1997 (Cth)); Wurridjal v Commonwealth (2009) 237 CLR 309 (upholding the constitutional validity of the Northern Territory Intervention legislation).

Kartinyeri (1998) 195 CLR 337, especially 361–4 (Gaudron J), 381–3 (Gummow and Hayne JJ). Note, however, that Gaudron J adopted a test for constitutional validity under the race power which meant, in effect, that Parliament could pass only beneficial laws concerning Indigenous people.

On the argument’s plausibility, see Commonwealth v Tasmania (1983) 158 CLR 1, 242 (Brennan J), 273 (Deane J); Kartinyeri (1998) 195 CLR 337, 413 (Kirby J).

Compare the similar, if more truncated, narrative recounted in Birrell, above n 13, 130–1.
affected the constitutional implementation that took place in the years and decades after the referendum.

The most enduring form of constitutional implementation made in response to this mobilisation has been the Commonwealth’s emergence as the leading actor in creating and funding special welfare programs for Indigenous citizens. In a drastic shift from pre-1967 constitutional practice, specific Commonwealth programs providing socioeconomic assistance to Indigenous people on a national basis began (albeit modestly) in 1968 and have grown enormously since then. Indeed, in 1973, the Whitlam Government successfully negotiated with the States for a transfer to the Commonwealth of primary responsibility for policy planning and coordination (along with a transfer of State public servants) in Indigenous affairs. This action was taken, said Whitlam, in recognition of the mandate given to the Commonwealth in 1967 and of the Commonwealth’s political accountability to the international sphere.

That these measures for Indigenous wellbeing have generally assisted the States rather than challenged them is a key factor in explaining their early emergence after the referendum and their entrenchment in the post-referendum landscape. Though federal funding has inevitably been subject to ups-and-downs, the long-term trend has been to consolidate the Commonwealth’s leading role for funding Indigenous wellbeing. These enduring actions of successive Commonwealth Governments since the 1967 referendum amount to an important and relatively intact form of constitutional implementation, one affirming the


Initiatives passed in 1968 were the State Grants (Aboriginal Advancement) Act 1968 (Cth), which allocated funding to the States for Aboriginal welfare; the Aboriginal Enterprises (Assistance) Act 1968 (Cth), which offered federal funding to Aboriginal people for business enterprises; and the Aboriginal Study Grants Scheme (later known as ABSTUDY). For Commonwealth funding in Indigenous affairs since 1968, see John Gardiner-Garden and Joanne Simon-Davies, ‘Commonwealth Indigenous-Specific Expenditure 1968–2012’ (Background Note, Australian Parliamentary Library, 28 September 2012).


Gardiner-Garden and Simon-Davies, above n 126.
Commonwealth’s higher-authority status in the recognition of Indigenous people’s identities as Australian citizens.

A second way in which the Commonwealth has implemented its post-'67 constitutional authority for Indigenous citizenship has been through legislation aimed at protecting Indigenous people from racial discrimination. Though post-referendum Coalition Governments held out against domestic and international pressure for federal action to override State policies that discriminated against Indigenous people, by the early 1970s the Gorton Government was threatening to exercise the Commonwealth’s ‘paramount responsibility for Aborigines’ against laggard States, especially Queensland.131 The new constitutional practice began to take legislative shape when the Whitlam Government came to power in 1972 with commitments to passing federal anti-discrimination legislation and overriding discriminatory State policies. These actions were proposed as an acknowledgment of the post-1967 status of the Commonwealth as a higher authority. As Whitlam’s campaign speech put it, ‘[i]n 1967 we, the people of Australia, imposed upon the Commonwealth the constitutional responsibility for aborigines and Torres Strait Islanders’.132

Of most significance was the passage of the Racial Discrimination Act 1975 (Cth) (‘RDA’). While the RDA finds its constitutional support not in the post-1967 race power but in the Parliament’s power to legislate on external affairs, its enactment was only possible because of the demise of Commonwealth deference to the States that the 1967 referendum had done so much to achieve.133 And even though the RDA is a general rather than Indigenous-specific law, a primary motivation for the RDA was the protection of Indigenous people from racial discrimination, including in law and policy.134 With respect to the States, the RDA has effectively acted as a constitutional constraint, because when combined with the constitutional supremacy of federal law guaranteed by s 109 of the Constitution, the RDA


133 On the RDA’s constitutional basis, see Koowarta v Bjelke-Petersen (1982) 153 CLR 168.

134 See Chapter 6 of this thesis.
renders discriminatory State legislation inoperative.\textsuperscript{135} The RDA remains of enduring significance and, as I explore in the next chapter, is itself a notable (though heavily battered and outdated) form of constitutional recognition, not only of Indigenous citizenship but also of Indigenous peoplehood.

The other development, more momentary and less successful, involved the Commonwealth’s attempts in the 1970s and 1980s to override remaining discriminatory policies affecting Indigenous Queenslanders. Unlike the other Australian jurisdictions, which by the 1967 referendum had largely wound back legal discrimination against Indigenous people, Queensland persisted into the 1980s with heavily paternalistic policies that denied Indigenous people the rights enjoyed by non-Indigenous Queenslanders.\textsuperscript{136} These policies the Commonwealth sought to override, first through Indigenous-specific provisions in the RDA and then through standalone legislation in 1975 and 1978, as well as less direct and negotiated forms of pressure.\textsuperscript{137} However, faced with the intransigence and legal creativity of the Bjelke-Petersen Government in Queensland, the Fraser Government faltered in its will to enforce these measures legally.\textsuperscript{138} To be sure, the significant pressure the Commonwealth brought to bear on Queensland evinced a federal willingness to intervene in the States on behalf of Indigenous people that would have been unthinkable before 1967. That in itself demonstrated an important form of constitutional implementation by the Commonwealth in the post-referendum era. But this episode also revealed the limits of Commonwealth resolve when confronted with a State government resolute in its determination to disregard the norms of non-discrimination in dealing with the Indigenous peoples living within its borders.

Whereas this confrontation with Queensland showed limits to the Commonwealth’s preparedness to impose respect for Indigenous citizenship on recalcitrant States under its post-referendum constitutional role, another event four decades after the 1967 referendum – the 2007 Northern Territory Emergency Response, otherwise known as the Intervention – demonstrated that the Commonwealth itself could wield its constitutional authority to violate

\begin{itemize}
\item \textsuperscript{135} RDA s 10.
\item \textsuperscript{136} Kidd, above n 129, chs 9–10; Nettheim, \textit{Victims}, above n 131; Chesterman, \textit{Civil Rights}, above n 32, 148–74.
\item \textsuperscript{137} RDA s 10(3); \textit{Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975} (Cth); \textit{Aboriginal and Torres Strait Islanders (Queensland Reserves and Communities Self-Management) Act 1978} (Cth). See further Kidd, above n 129, ch 9; Nettheim, \textit{Victims}, above n 131, ch 2.
\item \textsuperscript{138} Kidd, above n 129, 293–300.
\end{itemize}
Indigenous citizenship within the federation’s subunits.\textsuperscript{139} Motivated by disturbing reports of child sexual abuse and more general dysfunction within Aboriginal communities in the Northern Territory, the Howard Government introduced a swathe of sweeping measures aimed at addressing these issues.\textsuperscript{140} The Intervention was developed and implemented with incredible haste and virtually no consultation – with Indigenous people, the Northern Territory Government or the public more generally.\textsuperscript{141}

While many Indigenous people welcomed the influx of funding and services that the Intervention promised after years of neglect, a great many also decried key Intervention measures for winding back the ordinary citizenship rights of Aboriginal people.\textsuperscript{142} For Aboriginal people in the communities targeted by the Intervention, half of their welfare payments were ‘quarantined’ and managed by the Government, their right of appeal to the Social Security Tribunal was removed and their access to alcohol and pornography restricted.\textsuperscript{143} Tellingly, though the Intervention legislation deemed its contents ‘special measures’ under the RDA, it also suspended the operation of the RDA, an apparent concession that many of its measures were racially discriminatory.\textsuperscript{144} The Intervention was also inconsistent with norms of Indigenous peoplehood and self-determination, as I discuss in the next section.

This sort of Commonwealth action would have been unimaginable in the three decades following the referendum, given the decisive reshaping of constitutional culture during the campaigning for the 1967 amendments. Indeed, it was these sorts of policies –

\begin{itemize}
\item See generally Jon Altman and Melinda Hinkson (eds), \textit{Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia} (Arena Publications, 2007). The publications of an organisation called Concerned Australians have continued to trace and criticise the Intervention as it has evolved: see, eg, \textit{A Decision to Discriminate: Aboriginal Disempowerment in the Northern Territory} (Concerned Australians, 2012); Rosie Scott and Anita Heiss (eds), \textit{The Intervention: An Anthology} (Concerned Australians, 2015).
\item Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, \textit{Ampe Akelyernemane Meke Mekarle – ‘Little Children Are Sacred’} (Northern Territory Government, 2007).
\item See, eg, Larissa Behrendt, ‘The Emergency We Had to Have’ in Jon Altman and Melinda Hinkson (eds), \textit{Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia} (Arena Publications, 2007) 15.
\end{itemize}
stressing the need for Indigenous people to undergo tutelage before they could be considered eligible for citizenship rights – that had been roundly rejected by activists and the Commonwealth itself in the decade leading up to the referendum. The Intervention reprised ideas of Aboriginal people as wards rather than a recognition of them as citizens. The erosion of the post-1967 constitutional culture in the Howard Government era is a complex story, but central dimensions include the narratives of failure and crisis in Indigenous affairs cultivated by the Howard Government, its ideological sympathy for individual responsibility over rights, its often antagonistic relationships with Indigenous peoples and the international sphere, and its undermining of Indigenous advocacy organisations such as the Aboriginal and Torres Strait Islander Commission (‘ATSIC’). Supported by Labor in opposition and then in government, as well as the subsequent Coalition Government, the Intervention substantially remains in place. The Rudd and Gillard Governments were somewhat more sensitive to Indigenous peoples’ concerns over the Intervention and to the critical international attention Indigenous and non-Indigenous activists have been able to generate. Subsequently, after several reviews and consultations with Aboriginal people, the Intervention has been revised several times and some of its


discriminatory elements reversed, including through the express reinstatement of the RDA.\textsuperscript{148} However, the meaningfulness of the Indigenous consultations has been questioned, the policy retains many of its original features and it arguably continues to discriminate – and to that extent, impliedly repeals the RDA.\textsuperscript{149}

The ongoing Intervention has undermined the Commonwealth’s constitutional standing as a higher authority prepared to defend Indigenous citizenship, a standing that had been developed by Commonwealth practice in the decades surrounding the 1967 referendum. It represents a partial winding back of the constitutional implementation the Commonwealth had hitherto pursued post-referendum as the protector of Indigenous citizenship. To be sure, the Commonwealth has remained relatively firm in the responsibility it assumed post-1967 for funding special programs to secure Indigenous citizens’ wellbeing. However, the Intervention has substantially eroded faith in the Commonwealth’s willingness to uphold norms of non-discrimination, not only against the States but also in its own policies. As a consequence, the Intervention has prompted Indigenous demands for new forms of Indigenous constitutional recognition that place ultimate authority for enforcing non-discrimination norms with the courts rather than the Commonwealth.\textsuperscript{150}

2 \textit{Constitutional Implementation and Indigenous Peoplehood}

Whereas the political mobilisations for the 1967 amendments had fixated on the constitutional recognition of Indigenous people’s identities as citizens, Indigenous activism in the referendum’s aftermath pressured the Commonwealth to adapt its newfound status as a higher authority in Indigenous affairs to uphold Indigenous claims to peoplehood. The text of the race power seemed to be broad enough to encompass such measures. In the Commonwealth-controlled Northern Territory, the Commonwealth was confronted directly


with Indigenous claims for land rights, notably the ongoing Gurindji strike that had begun in 1966 and the first legal case for native title, launched by the Yolngu people in 1968.\textsuperscript{151} Along with these and other land rights claims around the country, Indigenous people were also increasingly asserting demands for reparations, cultural protection and forms of collective autonomy.\textsuperscript{152}

In the five years after the referendum, such demands were resisted by the Coalition Governments in power, with the McMahon Government’s aversion to land rights spurring in January 1972 one of the most significant Aboriginal protests in Australian history – the Aboriginal Tent Embassy.\textsuperscript{153} As explained by historian and Tent Embassy activist Gary Foley, ‘we regarded the politicians and bureaucrats of the Federal Government as responsible because of their failure to implement the policy changes expected after the 1967 referendum’.\textsuperscript{154} These Indigenous claims represented not a repudiation of the 1967 amendments but a demand to make good on the amendments’ promise of the Commonwealth becoming a higher authority, albeit with significant adaptations to accommodate the newly insistent demands of Indigenous peoplehood. Much of this and subsequent activism leveraged the Commonwealth’s international accountability for the treatment of Indigenous peoples, which had, as referendum campaigners foresaw, been heightened with the 1967 amendments’ removal of constitutional obstacles to federal action.\textsuperscript{155}

This and later activism significantly reshaped the Commonwealth’s implementation of its constitutional authority in Indigenous affairs, beginning with Whitlam, who came to call his new policy in Indigenous affairs ‘self-determination’.\textsuperscript{156} Over the next two decades, the Commonwealth proved itself willing to recognise Indigenous peoplehood in three major ways. First, the Commonwealth developed initiatives to grant land to Indigenous peoples. This involved legislating both land claims processes – most notably the \textit{Aboriginal Land Rights (Northern Territory) Act 1976} (Cth) and the \textit{Native Title Act 1993} (Cth) – and

\begin{itemize}
  \item \textit{Milirrpum} v \textit{Nabalco} (1971) 17 FLR 141. See further Attwood, \textit{Rights}, above n 26, chs 11–12; Miranda Johnson, \textit{The Land is Our History: Indigeneity, Law, and the Settler State} (Oxford University Press, 2016) ch 2.
  \item See generally nn 107–16 and accompanying text.
  \item See above n 109–12 and accompanying text.
  \item See, eg, de Costa, \textit{Higher Authority}, above n 12, chs 4–6.
  \item Whitlam, ‘Aboriginals and Society’, above n 127.
\end{itemize}

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instituting measures for Indigenous acquisition of land on the open market.\textsuperscript{157} Second, the Commonwealth enacted measures for the protection of Indigenous cultural heritage.\textsuperscript{158} Third, through legislation and funding, the Commonwealth facilitated the emergence of an ‘Indigenous sector’, comprising thousands of Indigenous-run corporate bodies and organisations to hold and manage Indigenous land, deliver services to Indigenous people and represent Indigenous views and interests.\textsuperscript{159} From land councils to Aboriginal medical services to national representative bodies such as the now-abolished ATSIC (and its predecessors), the Indigenous sector represented – and continues to represent – the dominant means for realising Indigenous collective capacities for self-government within the settler state.

Through to the Keating Government era, the Commonwealth showed a willingness to act as a higher authority protecting Indigenous peoplehood against the States, a significant form of constitutional implementation. The establishment of the Indigenous sector enabled the Commonwealth to circumvent the States by directly funding Indigenous organisations, which was a key part of the Commonwealth’s original motivation.\textsuperscript{160} The Commonwealth maintained control of the \textit{Aboriginal Land Rights (Northern Territory) Act} in the face of often-fierce protestations from the Northern Territory, which became self-governing two years after the enactment of land rights.\textsuperscript{161} To the outrage of some State governments, federal land acquisition policies enabled Indigenous people to acquire land in States where land rights did not exist.\textsuperscript{162} Indigenous cultural heritage legislation was enacted to overcome State

\textsuperscript{157} The first federal land acquisition legislation was the \textit{Aboriginal Land Fund Act 1974} (Cth). The current arrangements are in \textit{Aboriginal and Torres Strait Islander Act 2005} (Cth) pt 4A.

\textsuperscript{158} \textit{World Heritage Properties Conservation Act 1983} (Cth) ss 8, 11 (this legislation was replaced by the \textit{Environment Protection and Biodiversity Act 1999} (Cth); \textit{Aboriginal and Torres Strait Islander Heritage Protection Act 1984} (Cth)).

\textsuperscript{159} Tim Rowse, \textit{Indigenous Futures: Choice and Development for Aboriginal Australia} (UNSW Press, 2002) 1–25. The Indigenous sector’s formation was enabled by the \textit{Aboriginal Councils and Associations Act 1976} (Cth), since replaced by the \textit{Corporations (Aboriginal and Torres Strait Islander) Act 2006} (Cth).


\textsuperscript{161} On Northern Territory agitation for control over land rights, see Alistair Heatley, \textit{Almost Australians: The Politics of Northern Territory Self-Government} (ANU North Australia Research Unit, 1990) 70–1, 149–50, 172.

incursions.\textsuperscript{163} And the Commonwealth’s approach to native title, both in litigation and legislation, also positioned the Commonwealth as a bulwark – though not a steadfast protector – against hostile States.\textsuperscript{164} For instance, without the overriding power of the RDA, Eddie Mabo’s native title claim would have been extinguished by legislation that the Bjelke-Petersen Government built just for that purpose.\textsuperscript{165}

While the Commonwealth proved itself open to the new norms of self-determination and Indigenous rights through to the 1990s, its will to impose these norms on the States as a constitutional higher authority faltered at times, especially when it came to land rights. Whitlam confined his land rights scheme to the Northern Territory, where the Commonwealth had possessed sole constitutional responsibility since 1911. And when confronted with deep hostility from Queensland’s land-rights opposing Bjelke-Petersen Government, the Whitlam Government also balked at using Commonwealth authority to give Indigenous Queenslanders ownership and control over their reserves, as had occurred in other States.\textsuperscript{166} When the Bjelke-Petersen Government abruptly seized control of the Aurukun and Mornington Island reserves from Indigenous-sympathetic church administration in 1978, the Fraser Government similarly equivocated: while it passed legislation to guarantee Indigenous self-management of reserves, the Government refused Indigenous pleas to enforce this legislation in the face of Queensland resistance.\textsuperscript{167} A year later in Western Australia, the Fraser Government refused to intervene to protect the Aboriginal-owned Noonkanbah

\begin{footnotes}


\textsuperscript{165} \textit{Mabo v Queensland} (1988) 166 CLR 186.

\textsuperscript{166} Scholtz, above n 164, 408–10.

\end{footnotes}
pastoral lease against mining approved by Western Australia’s Court Government. The Hawke Government abandoned its plans to institute a national land rights regime, predominantly because of recalcitrance from Western Australia. The Native Title Act walked a delicate tightrope between Indigenous rights and States’ rights, and indeed partly wound back the RDA, rather than resolutely upholding Indigenous rights against the States. Commonwealth actions such as these reflected a failure of the Commonwealth to fully accede to Indigenous demands that the constitutional recognition of 1967 be developed into a customary norm for the unswerving protection of Indigenous peoplehood against the States.

The coming to power of the Howard Government saw not simply a Commonwealth unwillingness to override the States but an active dismantlement of existing Commonwealth measures recognising Indigenous peoplehood. Faced in the mid-1990s with the fractious Hindmarsh Island affair in South Australia, during which Ngarrindjeri women had sought to protect a culturally significant site from a State-approved bridge development using federal Indigenous heritage law, the Howard Government in 1997 legislated (with Labor support) to excise the site from and thereby partially repeal the heritage legislation. Howard’s deeply contentious 1998 amendments to the Native Title Act engaged in a fresh round of native title extinguishment and significantly weakened native title protections. From the outset, the Government also had a fraught relationship with ATSIC, which commenced with substantial funding cuts in 1996 and ended in 2004 with ATSIC’s abolition. The termination of ATSIC, which had dispersed funds to smaller Indigenous organisations as well as spent them itself on service delivery and advocacy, resulted in a significant Commonwealth

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168 Stephen Hawke and Michael Gallagher, Noonkanbah: Whose Land, Whose Law (Fremantle Arts Centre Press, 1989). The Noonkanbah incident, which had provoked Indigenous protests and generated international attention, was a motivation for the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth): Commonwealth, Parliamentary Debates, House of Representatives, 9 May 1984, 2129 (Clyde Holding, Minister for Aboriginal Affairs).


170 Rowse, ‘Native Title Act’, above n 164; Scholtz, above n 164, 140–4.


reengagement with the States and Territories and diminishment of the Indigenous sector.\textsuperscript{174} Finally, while the Northern Territory Intervention represented an assault on Indigenous citizenship rights, it also undermined Indigenous peoplehood rights, particularly with respect to Indigenous people’s control over their land.\textsuperscript{175} All of these Howard-era policies were typically introduced with minimal or no consultation or negotiation with Indigenous peoples.

Cumulatively, these actions represented a major shift in constitutional implementation: a retrenchment of earlier Commonwealth recognition of Indigenous peoplehood and a substantial repudiation of the higher-authority position the Commonwealth had been tentatively developing on this front since Whitlam. They emerged out of a period in which, with the reaction against the Keating Government’s attempts to refigure national identity and the concomitant rise of the racially intolerant One Nation Party, the public was increasingly receptive to Howard’s longstanding ideological discomfort with Indigenous peoplehood claims.\textsuperscript{176}

To be clear, the Howard Government, while chipping away at and reshaping the policy edifice of the self-determination era, still left much of it in place. Land rights, native title, cultural heritage and the Indigenous sector came under assault but were by no means wound back in their entirety. But the Howard era, with its government relatively resistant to international criticism and frequently unwilling to give Indigenous voices anything more than a very selective hearing, revealed that the status of existing Commonwealth recognitions of Indigenous peoplehood was fundamentally precarious. The broader constitutional significance of the Howard era, then, was its dismantlement of the Commonwealth’s role as a higher authority protecting Indigenous peoplehood.

In the almost-decade since Howard’s demise, there has been some revival of Commonwealth willingness to countenance Indigenous claims to peoplehood, but this has largely been in the context of new proposals for constitutional recognition rather than through attempts to rehabilitate the constitutional recognition adopted in 1967.

\textsuperscript{174} Sullivan, above n 125, ch 7.
III Conclusion

This chapter has sought to demonstrate that the constitutional recognition of Indigenous peoples is not an endpoint or a project of ‘completion’. Forms of constitutional recognition are ‘negotiated, provisional and contextual settlements which involve compromise and an element of non-consensus, and require review and often revision’. On this front, the amendments made to the Constitution in 1967 are an exemplary instance of Indigenous constitutional recognition. They recognised Indigenous people’s identities as Australian citizens by transferring ultimate power over Indigenous affairs to the Commonwealth, a higher authority better disposed than the States to respect Indigenous citizenship. But important as the amendments were at the time and have been since, they manifest the difficulties besetting all forms of recognition: power imbalances between the recogniser and recognised; the multiple, contested and changeable identities of the recognised; and the ongoing task of implementation which can fail or be repudiated by state actors. For these reasons, the constitutional recognition of Indigenous people achieved in 1967 should be understood as inadequate and incomplete.

This understanding of the 1967 referendum should not lead to self-assurance on the part of contemporary Australians that the task of Indigenous constitutional recognition is now poised for completion. Rather, a proper understanding of the 1967 referendum should lead to the realisation that constitutional recognition is not something that can be done once and for all. Instead, the constitutional recognition of Indigenous peoples should be understood as a process of ongoing contestation of the settler constitutional order in the name of a just relationship between Indigenous and settler peoples.

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Chapter 6
Indigenous Constitutional Recognition and Racial Discrimination: Lessons from 1975

Unlike the United States, we have no bill of rights: unlike the United States our Constitution says nothing about civil liberties. There is a need to spell out in an enduring form the founding principles of our civilization, and in particular the principle that all Australians, whatever their colour, race or creed, are equal before the law and have the same basic rights and opportunities. If our bill lacks the rhetorical grandeur of the American documents, it will have, I trust, the same compelling and lasting force.¹

So pronounced Prime Minister Gough Whitlam on 31 October 1975, upon the proclamation of the Racial Discrimination Act 1975 (Cth) (‘RDA’). While the RDA may have wanted for ‘rhetorical grandeur’, Whitlam’s speech characteristically did not, invoking a comparison between the RDA and the United States Constitution, and discerning in both one of ‘the founding principles of our civilization’. Instantiated with ‘compelling and lasting force’ in each document was the liberal norm of equality before the law. Whitlam’s overblown language aside, in claiming constitutional significance for this new legislation, he was onto something.

Following Whitlam’s lead, I argue in this chapter that the RDA, like the 1967 constitutional amendments before it, is another pre-existing instance of Indigenous constitutional recognition. While the RDA is a general piece of legislation, few appreciate how much the RDA’s emergence owed to Indigenous activism and to efforts to end the discriminatory legal regime that continued to govern Indigenous people in Queensland into the 1970s and after. Like the 1967 amendments, the RDA constitutionally recognised Indigenous people’s identities as Australian citizens. It did so through a redistribution of public power effected under its own s 10, which for the first time constrained the capacity of Australian governments (especially the States and Territories) to pass racially discriminatory laws. Embedded in legislation only, it is a ‘small-c’ form of constitutional recognition. Symbolically at least, the RDA’s enactment also recognised a pan-Indigenous peoplehood constituted by a shared history of discrimination, though its terms offered no express protections of Indigenous

peoples’ collective rights. In time, its guarantee of equality before the law would be judicially extended to encompass protection of native title, and so effect a partial constitutional recognition of Indigenous peoplehood.

Understanding the RDA as a form of Indigenous constitutional recognition sheds light on contemporary debates over recognition, where a central focus has been on whether and how to constitutionally prohibit governmental discrimination against Aboriginal and Torres Strait Islander people. For many Indigenous people and organisations, creating stronger protection from governmental discrimination has been a baseline concern in the recognition debate.²

Studying the RDA is instructive for three reasons. First, it demonstrates how protection of Indigenous people from governmental discrimination can constitute an important form of recognition. Most plainly, the RDA has constitutionally recognised Indigenous people as citizens, the need for which has been grounded in Indigenous communities’ long experience of governmental discrimination. Additionally, by convincing the courts to protect native title under the RDA, Indigenous litigants have also succeeded in integrating some recognition of Indigenous peoplehood into the RDA’s guarantee of equality before the law. More generally, partly because there have been few other overarching legal protections of Indigenous peoples in Australia, the RDA’s anti-discrimination norms – honoured as much in the breach as in the observance – have been central in many major battles over Indigenous rights during the past four decades. With the RDA’s history in view, it becomes clear why many Indigenous people continue to see protection from racial discrimination as a core minimum of their relationship with the settler state and a fundamental form of constitutional recognition.

Second, following one of the central arguments of this thesis, the RDA’s history demonstrates how constitutional recognition is partial, provisional and incomplete. This is for the same reasons as with the 1967 constitutional amendments. First, the horizons of Indigenous–settler politics: when the RDA was enacted, possibilities for

constitutional recognition were constrained by the power relations built into the status quo, rendering the RDA an imperfect, partial compromise. Second, the horizons of Indigenous identity politics: on its face, the RDA recognised only one dimension – citizenship – of a complex and evolving Indigenous identity, neglecting and potentially even undermining another increasingly important dimension: Indigenous peoplehood. Third, the vagaries of constitutional implementation: like all constitutional recognition, the RDA left much in the hands of future state actors when it came to implementation. While Indigenous legal and political mobilisation has been important in shaping the RDA’s implementation, both the courts and the political branches have in significant ways undermined the recognition achieved in the RDA. The RDA’s incompleteness as constitutional recognition serves as an important reminder about the provisionality of future constitutional recognition and about the need for an ongoing contestation of the settler constitutional order.

Third, studying the RDA highlights the need for better constitutional protection of Indigenous peoples from state-practised racial discrimination. The need partly arises from the proven vulnerability of the RDA’s guarantee of equality before the law to repeal by the Federal Parliament: it has been wound back on four separate occasions, all involving the retrenchment of Indigenous rights. This history supports calls for a more deeply entrenched prohibition on racial discrimination. While there are many ways of achieving this, one unexplored option would involve entrenching the RDA itself with a ‘manner and form’ provision. But beyond deeper entrenchment, there is also a need for revised constitutional norms of anti-discrimination to take Indigenous peoplehood – especially collective Indigenous autonomy – much more seriously than the RDA does.

I Indigenous Constitutional Recognition in the RDA

A Indigenous Activism and the RDA’s Emergence

Though the RDA outlaws racial discrimination generally, few realise how much the RDA’s emergence owed to domestic Indigenous activism in combination with international pressure. The RDA’s enactment was also deeply entangled with the fight to end the discriminatory legal regime that governed Queensland’s Indigenous people well after the 1967 referendum. From the outset, the RDA has held special importance

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3 John Chesterman has rightly emphasised the international dimension involved in the passage of the RDA, along with the indirect role played by domestic activists in raising public awareness about racial discrimination: John Chesterman, *Civil Rights: How Indigenous Australians Won*
for Aboriginal and Torres Strait Islander people. This is not to deny the role of other concerns, such as the treatment of non-white immigrants, in the RDA’s enactment, but simply to draw out one central strand of the story.

The RDA’s passage in 1975 is in some ways an anachronism, a belated fulfilment of the anti-racist campaigns for Indigenous equality of the preceding decades. An enactment into Australian law of the 1965 Convention on the Elimination of All Forms of Racial Discrimination, the RDA is of a piece ideologically with events like the 1965 Freedom Ride highlighting discrimination against Aboriginal people in rural New South Wales and the 1967 referendum campaign. As a result of concerted campaigning from Indigenous rights organisations, along with political pressure from an international community increasingly rejecting racism and colonialism, much of the statutory discrimination against Indigenous people at both national and States levels had been repealed by the late 1960s. At the close of the 1960s, activism for the recognition of Indigenous people’s citizenship was being overshadowed by a newly visible and vocal politics of Indigenous peoplehood, as I argued in Chapter 5. Rather than prioritising claims for non-discriminatory treatment, the politics of Indigenous peoplehood prioritised rights to land, culture and self-determination.

Yet into the 1970s, racial discrimination remained vividly real for Indigenous people in their daily lives, especially for those living on reserves in Queensland, where the discrimination was government-imposed. Even after the Queensland reserve regime was modified in 1971 as a result of Indigenous and Commonwealth pressure, it retained an array of discriminatory measures. Those measures conferred extensive discretionary power on reserve administrators, who were empowered to determine who could reside on reserves, set residents’ wages, manage residents’ income and property, and administer disciplinary order and justice with limited oversight. By-laws on one reserve variously mandated that ‘[a]ll able-bodied persons over the age of fifteen years

Formal Equality (University of Queensland Press, 2005) 98–100. I supplement Chesterman’s account by emphasising that domestic activism against racially discriminatory laws, especially those in Queensland, also had a direct effect in pressuring the Commonwealth to enact the RDA.


… shall … perform such work as is directed by the [reserve] Manager’ and that ‘[a] householder shall wash and drain his garbage bin after it has been emptied by the collector’. In Western Australia, less-extensive legal discrimination against Aboriginal people – most notably, restricting alcohol consumption – remained until 1972. Federally, only in 1973 were restrictions on Indigenous people’s overseas travel repealed. Beyond explicit legal provisions, discrimination against Indigenous people continued to be deeply entrenched in the law’s operation and administration (especially policing), the provision of goods and services, and everyday social interactions.

Immediately after the 1967 referendum, Indigenous rights campaigners sought national legislation to overcome legal and social discrimination against Aboriginal and Torres Strait Islander people. This reflected activists’ support during the referendum campaign for incorporating a ban on racial discrimination into the Constitution. Leading Aboriginal activist Charles Perkins had written to Prime Minister Holt in the referendum’s wake calling for federal anti-discrimination laws, a point he reiterated in 1968 along with the need for a constitutional ban on racial discrimination. That same year, Indigenous rights organisations including Perkins’s Foundation for Aboriginal Affairs and the Federal Council for the Advancement of Aborigines and Torres Strait Islanders marched on Parliament House calling for both land rights and anti-discrimination laws. Like Perkins, the Federal Council had advocated for anti-discrimination laws in a letter to Holt after the referendum. In 1968, disillusioned by the general lack of Commonwealth action, the Federal Council issued a world plea to highlight how Australian governments continued to deny Indigenous people their rights and to bring global attention to ‘Australia’s shame and humiliation over discrimination.

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7 Ibid 98.
8 Chesterman, Civil Rights, above n 3, 141–7.
9 Migration Act 1958 (Cth) s 64, repealed by Migration Act 1973 (Cth).
14 Jennifer Clark, Aborigines & Activism: Race, Aborigines and the Coming of the Sixties to Australia (University of Western Australia Press, 2008) 201.
and injustice to the Aborigines’.\textsuperscript{15} Such discrimination the Minister-in-Charge of Aboriginal Affairs, WC Wentworth, was forced to deny a month later when it was raised at the United Nations by the Soviet Union.\textsuperscript{16} Unsatisfied with continued Commonwealth inaction, the Federal Council maintained the pressure, and at its 1969 annual conference, after hearing of Indigenous grievances about discrimination, called for anti-discrimination legislation and a constitutional bill of rights.\textsuperscript{17}

For the Coalition Governments that ruled nationally after the 1967 referendum to late 1972, the domestic and international pressure to overcome discrimination against Indigenous people therefore remained intense. As I described in Chapter 5, the activism surrounding the 1967 referendum, which not only altered the constitutional text but also the broader constitutional culture, had made it exceedingly difficult for the Commonwealth to remain idle in the face of legal and societal discrimination against Indigenous people. The Council for Aboriginal Affairs, created after the referendum to advise the Federal Government, pushed from early 1968 for anti-discrimination legislation.\textsuperscript{18} In an apparent concession to such pressure, Prime Minister John Gorton committed in his 1969 election platform to abolishing remaining State and federal laws discriminating against Indigenous people, and after the election negotiated with Queensland’s Bjelke-Petersen Government on this score.\textsuperscript{19}

Pressure on the Federal Government intensified in 1971. It was the United Nations International Year for Action to Combat Racism and Racial Discrimination, as well as the year of major anti-apartheid protests against the Springboks’ Australian rugby tour, in which Indigenous activists participated and highlighted racism against Aboriginal people.\textsuperscript{20} The year also witnessed the (British) Commonwealth Prime

\textsuperscript{15} ‘Aborigines World Plea’, \textit{The Canberra Times} (Canberra), 14 August 1968, 3.

\textsuperscript{16} ‘Discrimination Denied’, \textit{The Canberra Times} (Canberra), 9 September 1968, 3.

\textsuperscript{17} ‘Call for a Bill of Rights’, \textit{The Canberra Times} (Canberra), 7 April 1969, 3.


Ministers’ Conference in Singapore, where African countries successfully pushed for a strongly worded declaration against the ‘evil’ of racial discrimination – and Bruce McGuinness of the Aborigines Advancement League telegraphed several Commonwealth member-nations accusing Australia of being a ‘racist nation’.21 While holding fast to the White Australia policy, Prime Minister Gorton was pressed at the Conference to reiterate his commitment to overcoming legislative discrimination against Indigenous people, the Queensland version of which Kath Walker publicly labelled at the time ‘subtle genocide’.22 By the end of 1971, the Gorton Government had cajoled Queensland’s Bjelke-Petersen Government into modifying but not abandoning its discriminatory regime.23 Indigenous rights organisations continued to be strongly critical of both the Queensland laws and the Australian Government’s ineffectiveness.24

Even for the radical Aboriginal activists associated with Black Power and the Aboriginal Tent Embassy, the fight against discrimination remained important.25 Indeed, it was in no small part the Indigenous experience of discrimination that cemented Tent Embassy and other activists’ demands for recognition of their peoplehood: racial discrimination was a unifying factor across Indigenous communities that helped ground a pan-Indigenous nationalism.26 Tent Embassy activists had been pivotal in the 1971 anti-apartheid protests.27 As they campaigned for land rights and


23 Nettheim, Out Lawed, above n 6, 4–15.


27 Foley, above n 20, 13–15; Clark, above n 14, 223–33.
other radical demands, they also visited rural towns like Taree and Wee Waa in New South Wales to support the fight against discrimination faced by local Aboriginal people. A 1972 letter to the Queen by John Newfong, a key Tent Embassy member, highlighted not only the need for land rights and Aboriginal involvement in government but also the persistence of the discriminatory Queensland regime – ‘one of the worst pieces of social legislation and probably the most racially oppressive in the whole of the British Commonwealth’. In late 1972, Tent Embassy activists were hosted in China, where their mission was to reveal ‘how we are being discriminated against by a racist Government’, as Chicka Dixon put it.

The Whitlam Government – coming to power in late 1972 with considerable sympathy for Indigenous demands and a promise to fulfil what it perceived as the 1967 referendum’s neglected mandate – proposed the national prohibition of racial discrimination and the overriding of Queensland’s reserve regime as central commitments in its Indigenous affairs platform. Back in 1970, the Whitlam Opposition had sought unsuccessfully to make federal grants to the States for Indigenous welfare conditional on the repeal of discriminatory State laws. Shortly after Labor’s coming to power, the new Minister for Aboriginal Affairs, Gordon Bryant, toured northern Australia with promises of anti-discrimination legislation and federal intervention in Queensland, making specific promises to Palm Islanders. By September 1973, however, Bryant was being visited by a delegation from Palm Island, who protested the lack of Commonwealth Government action. Also dismayed at


perceived Commonwealth inaction were Tent Embassy activists, 70 of whom in October 1973 hosted a sit-in on Parliament House’s steps in protest. Among their seven demands were ‘the immediate abolition of the racist Queensland Act’ and ‘the immediate introduction of anti-discrimination legislation all over Australia’. Whitlam responded with a commitment to bringing in the legislation before the year’s end.

In November 1973, the RDA was introduced to Parliament, and its significance for Indigenous people, especially in Queensland, was plain and repeatedly emphasised. As Whitlam had told a reporter earlier that year, the Queensland regime conflicted with the Convention for the Elimination of All Forms of Racial Discrimination, and the Government’s plan to implement the Convention in federal law would ‘enable us to override the Queensland legislation’. Upon the RDA’s introduction to Parliament, Attorney-General Lionel Murphy, a driving force behind the RDA, remarked in the Bill’s second-reading speech: ‘Perhaps the most blatant example of racial discrimination in Australia is that which affects Aboriginals’. The RDA’s preamble invoked not only the Convention but also the Constitution’s race power – the provision amended in 1967 to enable the passage of federal laws for Indigenous people. The Bill’s importance for Aboriginal and Torres Strait Islander people was confirmed by its original ‘special measures’ provision, which was confined to Indigenous people only (though it was made general in the enacted legislation).

Most significantly, the RDA contained a provision especially designed to overcome Queensland’s management of Indigenous people’s income and property, along with a general prohibition on racially discriminatory Commonwealth, State and Territory laws. As an article in The Sydney Morning Herald observed upon the RDA’s introduction, ‘[t]he major effect of the racial discrimination bill will be to allow the Australian Government to overrule the States’, with Queensland ‘affected first because

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36 ‘Promise on New Laws’, above n 35.
39 Racial Discrimination Bill 1973 (Cth) cl 7(1).
40 RDA s 10.
the Federal move will overrule Queensland legislation on Aborigines and Torres Strait Islanders’.

In June 1975, after facing heavy weather in the Senate, the RDA was finally enacted. The intervening period had seen pressure for the legislation from the new National Aboriginal Consultative Committee, the first national Indigenous advisory body, which had been set up in 1973. Whitlam had also been visited by an Indigenous delegation from Mornington Island in 1974, who he assured that the Government would soon be using its constitutional powers in Indigenous and international affairs to override Queensland’s reserve system. That same year also saw tense protests against the Queensland legislation in Brisbane by Indigenous and non-Indigenous activists.

For good measure against the Queensland regime, the Government complemented the RDA with the Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975 (Cth). Some 11 days before the Government’s dismissal, the RDA came into force. Upon the RDA’s proclamation, Whitlam extolled its likeness to the United States Bill of Rights, stressed its significance for Indigenous people and foreshadowed its relevance to the ‘one State’ where ‘discriminatory laws still remain on the statute book’.

B How the RDA Constitutionally Recognises Indigenous People

The RDA was and remains a fundamental recognition of Indigenous people as Australian citizens. In fact, the RDA’s enactment recognised all Australians’ citizenship, enshrining for the first time in federal law broad liberal norms of non-

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45 This legislation was designed to capture aspects of the Queensland legislation that were ‘discriminatory in their operation’ but not on their face. Such laws, the Attorney-General believed, may not have been invalid under the RDA: see Lionel Murphy, Attorney-General, and JL Cavanagh, Minister for Aboriginal Affairs, ‘Aboriginals and Torres Strait Islanders: Queensland Laws’, Cabinet Submission No 1372, 27 September 1974, [3], NAA, A5915, 1372 <http://recordsearch.naa.gov.au/SearchNRetrieve/Interface/DetailsReports/ItemDetail.aspx?Barcode=7100934> (at 3 of the electronic record).

46 Whitlam, RDA Speech, above n 1, 1, 3.
discrimination. But despite the RDA’s general application, the circumstances which helped bring it forth disclosed its special importance for Indigenous people, who had overwhelmingly borne the brunt of invidious racial discrimination in law and society, treated as ‘citizens without rights’.\(^\text{47}\) As Noel Pearson has written in the contemporary context, ‘[e]limination of racial discrimination is inherently related to Indigenous recognition because Indigenous people in Australia, more than any other group, suffered much racial discrimination in the past’.\(^\text{48}\) Indigenous people’s demands for the recognition of their citizenship did not terminate with the 1967 referendum, as moderate and radical activists alike repeatedly called for national anti-discrimination protections. A central battle in the fight for such protections was over Queensland’s reserve system, which endured well after similar regimes elsewhere had been dismantled. That battle with Bjelke-Petersen-era Queensland remains memorialised in s 10(3) of the RDA, which confirms that the RDA overrides laws which authorise the non-consensual management of Indigenous people’s property.

The RDA’s enactment also served to recognise Indigenous peoplehood in a broad symbolic sense, though not explicitly through its substantive provisions. This was not a peoplehood based on continuity with pre-colonial Indigenous collectives united by tradition, language and attachment to particular territories, as would come to be recognised under the native title regime.\(^\text{49}\) It was rather a pan-Indigenous peoplehood based on a common historical experience of oppression and a shared sense of grievance over that history. This was an identity that had become increasingly widespread among Indigenous people around the country as they became more mobile and interconnected.\(^\text{50}\) The RDA’s enactment recognised this identity, not only by acknowledging Indigenous people’s historical experience of discrimination, but also by seeking to prevent the past repeating itself. This kind of ‘never again’ response, made concrete in binding law, is an important way of expressing respect for the identity of people who have suffered past mistreatment.\(^\text{51}\) As I shall argue below, however, the

\(^{47}\) Chesterman and Galligan, above n 5.

\(^{48}\) Quoted in Expert Panel on Constitutional Recognition of Indigenous Australians, above n 2, 167.

\(^{49}\) See, eg, Manuhia Barcham, ‘The Limits of Recognition’ in Benjamin R Smith and Frances Morphy (eds), *The Social Effects of Native Title: Recognition, Translation, Coexistence* (Centre for Aboriginal Economic and Policy Research, 2007) 203.

\(^{50}\) See above n 26 and accompanying text.

RDA’s capacity to protect distinct Indigenous rights based on Indigenous peoplehood has been much more doubtful and fraught.

The RDA’s status as an important form of Indigenous recognition is confirmed by its iconic role in major Indigenous rights struggles over the past four decades. Megan Davis has rightly characterised the RDA as ‘the most important statute for Indigenous peoples in their continuing fight against racial discrimination and for equality’.\(^5\)\(^2\) In battles for the recognition of native title, the RDA has been pivotal – including in Bjelke-Petersen’s Queensland.\(^5\)\(^3\) Indeed, without the RDA to override the Bjelke-Petersen Government’s opposition to Indigenous land rights, there would have been no Mabo case and possibly no native title (mixed blessing as native title has been).\(^5\)\(^4\) In the Commonwealth Law Reports, the names of Indigenous litigants – some successful, some not – signify key jurisprudential developments surrounding the RDA: John Koowarta, Robert Brown, Eddie Mabo, the Wororra, Yawuru and Martu peoples, Joan Maloney.\(^5\)\(^5\) Of the six High Court cases to have applied s 10, five concern Indigenous rights and interests.\(^5\)\(^6\)

The RDA’s hallowed status in Indigenous struggles has most clearly emerged when the Act has been threatened or actually dishonoured by Australian governments. The recent campaigns to repeal the RDA’s s 18C protections against racial vilification – campaigns which have been spurred by the successful civil action of Indigenous litigants, and which have prompted widespread Indigenous condemnation – are only the

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latest example. I discuss four other examples specifically concerning repeal of s 10 of the RDA later in this chapter. For Australia’s Indigenous peoples, whose peoplehood has been given limited legal recognition, the RDA’s liberal norms of anti-discrimination have served as one of the few legally enshrined baselines against which to judge government action. Negative departures from the RDA’s protection have strengthened Indigenous people’s attachment to it as a core minimum of their relationship with the settler state.

But what makes the RDA a constitutional form of Indigenous recognition? Despite Whitlam’s rhetoric, the RDA is not a constitutionally entrenched, American-style bill of rights; it is merely federal legislation. However, as I have emphasised throughout this thesis, recognition need not form part of a ‘Big-C’ Constitution to possess a constitutional dimension. Constitutional norms are those that structure and regulate the basic distribution of public power, and this includes ‘small-c’ constitutional norms outside Big-C Constitutions.

There are two reasons to see the RDA as a constitutional form of recognition, in a small-c constitutional sense. First, it formed part of the constitutional recognition of Indigenous citizenship achieved in the 1967 referendum. As I argued in the previous chapter, the 1967 constitutional amendments had established the Commonwealth as a higher authority in Indigenous affairs, more powerful and better disposed than the States to respect Indigenous people as citizens. The RDA implements that higher authority role, securing national protection of Indigenous citizenship against racial discrimination.

The second reason to see the RDA as a constitutional form of recognition is because it limits the basic exercise of law-making power by Australian governments over Indigenous people (and indeed over everyone in Australia), overriding laws that have a racially discriminatory purpose or effect. Section 10 overrides Commonwealth, State or Territory laws which deny one racial group the equal enjoyment of a right enjoyed by another racial group. The RDA is alone among Australian anti-


58 RDA s 10. On s 10’s application to both the purpose and effect of laws, see Ward (2002) 213 CLR 1, 99 (Gleeson CJ, Gaudron, Gummow and Hayne JJ).
discrimination statutes in explicitly constraining law-making power in this way – almost certainly a record of federal struggles to overcome Queensland’s reserve laws.59

Most plainly demonstrating the RDA’s constitutional dimension is s 10’s constraint upon State and Territory law-making. Where a State or Territory law fails on racially discriminatory grounds to make enjoyment of a right universal, s 10 acts as a safety net, supplementing the impugned law so that the right is enjoyed equally.60 Where by contrast a State or Territory law imposes a burden on one group in a racially discriminatory fashion, s 10 acts as a sword, rendering the impugned law inoperative.61 In these latter cases, the RDA’s supremacy is ultimately guaranteed by the Constitution.62 In the States and Territories, then, the RDA does indeed operate like a constitutionally entrenched ban on racial discrimination.

The Federal Parliament’s law-making power is much less constrained by the RDA than that of the States – for Indigenous people, notoriously so. The reason is because the RDA’s s 10 comes up against a basic norm of Australia’s constitutional system: the laws that the Federal Parliament enacts it may just as easily repeal later on.63 This is a tenet of parliamentary sovereignty, a British inheritance that survived Australia’s transition to a judicially reviewable written constitution.64 Whereas s 10 of the RDA will prevail over inconsistent State and Territory laws because of the operation of the Constitution, it will be repealed by later inconsistent Commonwealth laws because of the doctrine of parliamentary sovereignty. As I discuss later in this chapter, parliamentary sovereignty has overborne the RDA’s protection of Indigenous people’s rights on four separate occasions: the enactment of the Native Title Act 1993 (Cth) (‘NTA’), the Hindmarsh Island Bridge Act 1997 (Cth), the Native Title Amendment Act 1998 (Cth) and the Northern Territory Intervention legislation.

59 Other national anti-discrimination statutes do not directly constrain law-making power in this way. They apply to the actions of persons, as under the RDA’s s 9: see, eg, Sex Discrimination Act 1984 (Cth) ss 5–7b, pt 2.
64 For the locus classicus, see AV Dicey, Introduction to the Study of the Law of the Constitution (Macmillan and Co, 8th ed, 1915) 38.
That being said, the RDA is not completely ineffective in disciplining the Commonwealth’s power to pass laws that discriminate against Aboriginal and Torres Strait Islander people. First, s 10 of the RDA itself repeals inconsistent earlier legislation passed by the Federal Parliament.65 Second, s 10 overrides inconsistent delegated legislation at the Commonwealth level.66 This principle is important given that, in the past, facially neutral primary legislation has supported a raft of racially discriminatory delegated legislation denying Indigenous rights.67 Avoiding conflict between delegated legislation and the RDA may have partly motivated the RDA’s explicit suspension under the Northern Territory Intervention legislation, whose operation relied on various regulation-making powers.68 Third, following settled practices of statutory interpretation, the courts will endeavour to interpret later Commonwealth legislation consistently with s 10 of the RDA.69 Though the RDA can be overridden by clear parliamentary intention or necessary implication, the existence of s 10 makes it less likely that the courts will interpret subsequent federal legislation as being racially discriminatory. Weak though these constraints on Commonwealth law-making power may be, they are not nothing.

II The Incompleteness of Constitutional Recognition

Just as the constitutional recognition achieved in the 1967 amendments was incomplete, partial and provisional, so too was the constitutional recognition achieved through the

65 There are no cases holding that s 10 of the RDA impliedly repealed earlier Commonwealth legislation. However, partly in response to the Convention on the Elimination of All Forms of Racial Discrimination, on which the RDA is based, the Commonwealth had since the mid-1960s sought to repeal remaining racially discriminatory laws, with a view to ratifying the Convention. See John Chesterman, ‘Defending Australia’s Reputation: How Indigenous Australians Won Civil Rights, Part Two’ (2001) 32 Australian Historical Studies 201, 205–7.


RDA, and for the same reasons. First, the horizons of Indigenous–settler politics: power imbalances between Indigenous and settler peoples constrained possibilities for recognition, rendering the RDA an imperfect compromise. Second, the horizons of Indigenous identity politics: Indigenous identity is complex and contested, and the RDA squarely addressed only one dimension – citizenship – of it, largely ignoring (and even threatening to undermine) a newly ascendant Indigenous peoplehood. And third, the vagaries of constitutional implementation: the task of implementing constitutional recognition is an ongoing, uncertain process that leaves much discretion with future state actors, whose actions can undermine recognition. Both the courts and the political branches have played a part in undermining the constitutional recognition achieved through the RDA.

A Horizons of Indigenous–Settler Politics

The possibilities for constitutionally protecting Indigenous people against discrimination were significantly constrained by the power relations built into the status quo when the RDA was passed. That the struggle for national anti-discrimination legislation and federal intervention in Queensland was so protracted demonstrates the difficulty faced by supporters. To be sure, the change in constitutional culture engendered by the 1967 referendum had made Commonwealth inaction in the face of State-based discrimination near-untenable. That was no guarantee, however, of direct federal legislative override, as the Gorton and McMahon Governments’ relatively conciliatory approach demonstrated. While the Whitlam Government came to power committed to legislating against racial discrimination and overriding Queensland, it took almost three years – and constant pressure from Indigenous activists – for those promises to be realised.

In this period, other more potent proposals for protecting Indigenous people against racial discrimination were resisted. During the 1967 referendum campaign, Indigenous and non-Indigenous advocates had called for a constitutional ban on racial discrimination, a demand easily dismissed by the Menzies Government. After the referendum, organisations like the Federal Council for the Advancement of Aborigines and Torres Strait Islanders continued to push for constitutionally entrenched protections of citizenship rights. In 1969, the Federal Council passed a resolution advocating for a

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70 See Chapter 5 of this thesis.
constitutional bill of rights, something the organisation advocated into the 1970s.\textsuperscript{71} One
of the most influential Aboriginal figures of the era, Charles Perkins, similarly pushed
for constitutionally entrenched rights protections.\textsuperscript{72} As the Assistant Secretary of the
Commonwealth Department of Aboriginal Affairs and the most senior Aboriginal
bureaucrat, Perkins concluded in remarks to a 1973 conference that a constitutional bill
of rights was needed to ‘protect Aboriginal people right throughout the nation’. He
concluded that ‘until this Bill of Rights is inserted in the Federal Constitution, I think
that I would not see much to encourage us – well, not encourage me – to think any
differently towards the law than I do at the present time’, which was with deep
pessimism.\textsuperscript{73}

Such ideas, though not beyond the pale of the political mainstream, encountered
considerable conservative opposition. From 1967, the federal Labor Party platform
pledged to create new constitutional protections for civil liberties and human rights.\textsuperscript{74}
Indeed, the RDA was initially twinned with a Human Rights Bill that would have
implemented the \textit{International Covenant on Civil and Political Rights} in domestic
law.\textsuperscript{75} Like the RDA, the Bill included guarantees of equality before the law and non-
discrimination, and applied to State, Territory and Commonwealth legislation.\textsuperscript{76} But it
went beyond the RDA by seeking to impose a ‘manner and form’ provision on future
Commonwealth legislation, so that federal laws inconsistent with human rights would
be without ‘any force or effect’ unless they were expressly declared to operate
notwithstanding the human rights legislation.\textsuperscript{77} This model was based on the legislated
\textit{Canadian Bill of Rights}, whose own ‘notwithstanding clause’ had in 1970 been
enforced by the Canadian Supreme Court.\textsuperscript{78} However, the Australian statutory bill of
rights – unlike its more modest and contained companion Bill, the RDA – foundered in

\textsuperscript{71} ‘Call for a Bill of Rights’, above n 17; ‘Groups Set Out Ways to End Discrimination’, \textit{The Sydney Morning Herald} (Sydney), 30 November 1971, 24.
\textsuperscript{72} ‘Perkins Wants New Law’, above n 12.
\textsuperscript{73} Charles Perkins, ‘Aboriginal Attitudes to Law’ in Garth Nettheim (ed), \textit{Aborigines, Human Rights and the Law} (Australian and New Zealand Book Co, 1974) 8, 12.
\textsuperscript{75} Human Rights Bill 1973 (Cth); ibid 357–9.
\textsuperscript{76} Human Rights Bill 1973 (Cth) cl 5(1), 7–8.
\textsuperscript{77} Human Rights Bill 1973 (Cth) cl 5(2)–(3).
\textsuperscript{78} \textit{Canadian Bill of Rights}, SC 1960, c 44, s 2; \textit{R v Drybones} [1970] SCR 282.
the face of conservative antipathy and the intransigence of several States (including Queensland).79

The RDA’s relative timidity becomes even more apparent when considered in light of contemporaneous, more radical but less successful Indigenous aspirations for recognition. Most significant were demands by Indigenous people around the country for land rights. Struggles over land rights came to a head in the early 1970s: the first legal claim for native title was rejected in the courts in 1971, the Federal Government continued to resist acting on its own volition, and Indigenous activism accordingly became more militant, most notably with the Tent Embassy in early 1972.80

Along with claims for land rights – indeed frequently as part of those claims – Indigenous people were also demanding respect for Indigenous cultures and increased political power, including forms of jurisdictional authority.81 Such Indigenous peoplehood claims often possessed a small-c constitutional character, questioning the British acquisition of sovereignty over Indigenous peoples and territories and demanding Indigenous autonomy. Certainly, land rights and other claims to peoplehood would begin to receive government solicitude around the same time as the RDA was passed, as I discussed in the previous chapter. But at their highest, demands for land rights presaged significant redistributions of political power to Indigenous peoples. Measured against this aspiration, and compared with the acceptance of antidiscrimination norms, the embrace of land rights by Australian governments in the 1970s was piecemeal and reluctant.

Beset by power imbalances built into the status quo, the constitutional recognition achieved in the RDA was marked by compromise from the beginning. It did not and does not amount to some ultimate, complete recognition of Indigenous peoples.

B Horizons of Indigenous Identity Politics

A closely related reason to see the constitutional recognition achieved through the RDA as incomplete is that it did not squarely address Indigenous peoplehood, an identity

79 Galligan, above n 74, 357–9.
81 This was especially evident in the claims of the Tent Embassy activists. See Foley, Howells and Schaap, above n 80, chs 8–10.
newly ascendant within Indigenous politics at the time. While Indigenous peoplehood claims, like calls for legal protection against discrimination, would begin to receive a sympathetic hearing from the Whitlam Government, the important point is that the RDA itself, at least on its face, simply did not encompass the claims arising from Indigenous peoplehood. To be sure, as I described earlier, protection from racial discrimination in one broad sense recognised a pan-Indigenous peoplehood constituted by a shared historical and contemporary experience of discrimination. However, liberal anti-discrimination norms were ultimately directed towards protecting Indigenous people’s rights as individual citizens, not at enabling Indigenous groups to exercise collective rights as peoples. To practise their peoplehood, Indigenous groups demanded more than the RDA offered: rights to land, culture and autonomy. In this sense, the RDA was a partial recognition, responsive to only one dimension – citizenship – of a complex politicised Indigenous identity.

More fundamentally, there were unacknowledged tensions between the constitutional recognition of Indigenous citizenship – as under the RDA – and the recognition of Indigenous peoplehood. The former promised equality of civil, political and economic status between Indigenous and non-Indigenous Australians; the latter promised distinct entitlements based on historical and contemporary circumstances unique to Aboriginal and Torres Strait Islander peoples. Certainly, Indigenous activists did not typically see any inconsistency between protection from racial discrimination and, for instance, protection of land rights, and strongly advocated for both simultaneously. However, to the extent that distinct entitlements were contemplated within dominant liberal norms of citizenship at the time, this was as temporary ‘special measures’ (to use the language of the Convention and the RDA) designed to remediate disadvantage, not as permanent rights designed to recognise collective Indigenous claims. As Garth Nettheim and Neil Rees observed in 1983, the Convention underpinning the RDA was arguably ‘assimilationist in tone’ and ‘does not clearly address the claims of indigenous populations for differential status on a long term basis’.82

One issue, then, was whether the RDA would result in the invalidation of distinct Indigenous rights themselves as unjustifiable discrimination against non-

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Indigenous citizens. If Indigenous rights could survive a challenge under the RDA, a second issue was whether and how the RDA, with its orientation towards individual rights, might nonetheless come to protect collective Indigenous rights to peoplehood. These were ultimately questions of constitutional implementation, and I discuss them in the next section.

Here, then, is the second reason to see the constitutional recognition under the RDA as incomplete, partial and provisional. Confronted with the complex and diverse nature of Indigenous identity, the RDA on its face only addressed one dimension of that identity (citizenship) and threatened to undermine another (peoplehood).

C The Vagaries of Constitutional Implementation

When it comes to the implementation of the RDA’s small-c constitutional protection of Indigenous people against racial discrimination, there are two stories to tell. One is about the courts and how they have incorporated – and in some ways refused to incorporate – protection of Indigenous peoplehood within the RDA. On the one hand, the courts have upheld (if uneasily) the consistency of land rights with the RDA, and interpreted the RDA’s equality guarantee as a protection of native title. On the other hand, they have declined to incorporate another incident of Indigenous peoplehood, collective autonomy, into the RDA – and in the process undermined the RDA’s protection of Indigenous citizenship. The second, parallel story is about the role of the federal political branches in implementing the RDA: in particular, their curtailment of Indigenous rights by partially repealing the RDA. Shaping implementation by both the courts and political branches are legal and political mobilisations by Indigenous and non-Indigenous actors. This account follows the approach adopted towards constitutional implementation in Chapter 5 – albeit with more attention paid to the courts, whose role in implementing the RDA’s constitutional recognition has been more significant than their role in implementing the constitutional recognition achieved in the 1967 constitutional amendments.

1 The Courts and the Challenge of Indigenous Peoplehood

Given the RDA’s origins in Indigenous and federal struggles against Queensland’s reserve system, it is a striking fact in need of explanation that no legal challenges against the Queensland laws were launched under the RDA. On the Commonwealth
side, a preference for negotiation with Queensland rather than judicially enforced federal intervention was a major factor. On the Indigenous side, contributing factors may have been a lack of funding to pursue litigation and, more broadly, limited awareness about the potential for a successful legal challenge using the RDA.

Arguably the most important factor was the RDA’s lack of obvious protection for Indigenous peoplehood, especially land rights. Under the Queensland reserve system, discriminatory as it was, Indigenous communities were at least allowed to live on reserve lands. If the reserve laws were rendered inoperative by an RDA challenge, the minimal land security that reserve residents possessed would be lost. As a 1976 pamphlet by Queensland’s Black Resource Centre Collective warned, ‘[y]ou might get a situation where the Act gets abolished and the Director and the Premier decide to move everybody into the cities.’ The pamphlet concluded that ‘[w]e want the Act smashed but only if our rights to ownership and community control of Reserve and tribal lands is what follows’.  


The problem was highlighted when in late 1980 the Bjelke-Petersen Government proposed the reserve system’s complete repeal: a move which, as Garth Nettheim told a 1981 conference in Townsville, ‘would leave a vacuum situation in regard, particularly, to land rights and community self-management’.  

84 At that same conference, Eric Kyle, a Palm Islander and President of the Queensland Aboriginal and Torres Strait Islander Legal Service, said that Palm Islanders had come to a similar conclusion. They worried that ‘[w]hen the Act goes, the land is going to go and we’re going to go. We’ll be kicked off here, and what’s going to happen to us?’  

85 A 1978 survey of reserve residents conducted by the Legal Service and the Foundation for Aboriginal and Islander Research Action confirmed the overwhelming preference of residents (85.6 per cent) to own the reserves themselves.  

86 With the Bjelke-Petersen Government still determinedly resisting land rights, and the Commonwealth unwilling...
to compulsorily acquire Queensland reserves let alone secure land rights more generally, a successful RDA challenge to the Queensland reserve laws may well have proven a deeply pyrrhic victory.

Appropriately enough, the first legal challenge under the RDA – the 1982 High Court case *Koowarta v Bjelke-Petersen* – raised questions of land rights and discrimination, in a tussle between Aboriginal claimants and the Commonwealth on one side and Queensland’s Bjelke-Petersen Government on the other.87 A Winychanam man, John Koowarta, had applied in 1974 to the newly created federal Aboriginal Land Fund Commission for the acquisition of a pastoral lease over his people’s traditional territory in northern Queensland. The purchase was blocked by the Bjelke-Petersen Government because of an official policy disfavouring the acquisition of large landholdings ‘by Aborigines or Aboriginal groups in isolation’.88 Seeking to bend the RDA’s liberal norms towards the protection of land rights, Koowarta launched a challenge to the Queensland policy under ss 9 and 12 of the RDA. In response, Queensland challenged the RDA’s constitutional validity in High Court demurrer proceedings.

By a bare majority, and against the entrenched power of States’ rights, the High Court upheld the RDA’s constitutional validity – a fundamental if tenuous first step in judicial implementation of the small-c constitutional protection achieved by the RDA. The RDA, concluded four judges against three, was a valid exercise of the ‘external affairs’ power in the Constitution, for it enacted the *Convention on the Elimination of All Forms of Racial Discrimination* into domestic law.89 In a nod to the RDA’s origins in post-1967 federal attempts to override Queensland laws, Chief Justice Gibbs also noted that the RDA’s Indigenous-specific provision (s 10(3)’s protection of Indigenous property against non-consensual management) would likely be supported by the race power.90 The decision did not result in victory for Koowarta, however: the land he had

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88 Ibid 176 (Gibbs CJ).
90 Ibid 187 (Gibbs CJ).
sought was, by the legal creativity of the Queensland Government, quickly gazetted as a national park and thereby made unavailable for acquisition.\[91\]

Another fundamental question lurking unresolved in the background of Koowarta – how to reconcile the liberal norms of non-discrimination (Indigenous citizenship) with Indigenous rights to land (Indigenous peoplehood) – soon arose for its first judicial consideration, and received an uneasy resolution. The 1985 case Gerhardy v Brown concerned the compatibility of South Australian land rights legislation, the *Pitjantjatjara Land Rights Act 1981* (SA), with the RDA’s s 10 guarantee of equality before the law.\[92\] The South Australian legislation recognised the Pitjantjatjara people’s power to control entry onto their lands by non-Pitjanjatjara, a power they exercised against an Aboriginal man from New South Wales, Robert Brown, who was charged for being on Pitjantjatjara lands without a permit. An initial RDA challenge to the South Australian legislation by Brown succeeded in the South Australian Supreme Court.\[93\] Had that decision stood, Nettheim and Rees warned in 1983, ‘all State land rights legislation may be invalid’.\[94\]

In a context in which Australian jurisdictions were increasingly responsive to Indigenous demands for land rights legislation, the South Australian land rights legislation was upheld by the High Court under the RDA. But the basis of that holding left land rights in a legally tenuous position: the court found the land rights legislation to be prima facie inconsistent with s 10 of the RDA.\[95\] Land rights survived only as a ‘special measure’ exception to the RDA’s norms of non-discrimination.\[96\] The High Court’s decision thereby positioned land rights as a temporary measure designed to remedy disadvantage, rather than as a legitimate, non-invidious distinction directed

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92 (1985) 159 CLR 70.

93 *Gerhardy v Brown* (1983) 34 SASR 452.

94 Nettheim and Rees, above n 82, 2.

95 *Gerhardy* (1985) 159 CLR 70, 86–7 (Gibbs CJ), 100–4 (Mason J), 107 (Murphy J), 122–3 (Brennan J).

96 Ibid 89 (Gibbs CJ), 106 (Mason J), 108 (Murphy J), 113 (Wilson J), 143 (Brennan J), 153–4 (Deane J), 162 (Dawson J).
towards the permanent recognition of Indigenous peoplehood. Gerhardy was a shaky reconciliation of Indigenous peoplehood with the RDA’s constitutional recognition of citizenship.

The same broad issue – the relationship between the RDA’s recognition of citizenship and the recognition of Indigenous peoplehood through land rights – re-emerged in the High Court soon after, as Eddie Mabo and other Meriam claimants sought to protect their common-law native title claim against Bjelke-Petersen Government legislation designed to thwart it. The Queensland Coast Islands Declaratory Act 1985 (Qld) declared that the Crown’s 1879 annexation of islands in the Torres Strait had effected the non-compensable extinguishment of ‘all other rights, interests and claims of any kind whatsoever’. In a demurrer proceeding, Mabo and his co-plaintiffs argued that the Queensland Act contravened s 10 of the RDA.

In a 4:3 judgment later described by one of the claimants’ lawyers as ‘a very close run thing indeed’, the High Court in 1988’s Mabo (No 1) case held that s 10 of the RDA overrode the Queensland legislation. The Queensland law, concluded the majority, would have extinguished only Indigenous people’s property rights while leaving non-Indigenous property rights unaffected: an infringement of the RDA’s s 10. For the dissenters, the problem was that native title was not (or had not yet been proved to be) the same as other, non-Indigenous property rights so as to attract the RDA’s protection. Justice Wilson went the furthest, concluding that far from infringing equality before the law, the Queensland legislation ‘remove[d] a source of inequality formerly existing between the plaintiffs and persons of another race because … the plaintiffs were alone in the enjoyment of traditional rights’.

97 For a cogent critique of the decision on these grounds, see Wojciech Sadurski, ‘Gerhardy v Brown v The Concept of Discrimination: Reflections on the Landmark Case That Wasn’t’ (1986) 11 Sydney Law Review 5.
99 Queensland Coast Islands Declaratory Act 1985 (Qld) ss 3, 5.
103 Ibid 206.
then, the High Court in *Mabo (No 1)* accepted the idea that the liberal norm of non-discrimination protected – rather than extinguished – Indigenous land rights.

More soundly than *Gerhardt*, *Mabo (No 1)* incorporated the protection of Indigenous peoplehood into legislation that was originally designed for the protection of citizenship. It reflected the success of Indigenous litigants in refashioning anti-discrimination norms so as to accommodate a complex Indigenous identity that equally sought protection from racial discrimination and affirmation of Indigenous distinctness. This was a major step in the judicial implementation of the Indigenous constitutional recognition achieved by the RDA.

Only through the RDA, then, was the recognition of native title in 1992’s *Mabo (No 2)* made possible, as was the subsequent judicial defeat of further State attempts to override native title. After *Mabo (No 2)*, as the Keating Federal Government began negotiations over a legislative scheme regulating native title, several States pushed for native title rights to be heavily curtailed, not only in federal law but through their own legislation.104 Western Australia’s Court Government went the furthest, passing legislation in late 1993 that extinguished all native title, replaced it with weaker ‘rights of traditional usage’ and validated all existing non-Indigenous titles.105 A legal challenge quickly launched by the Martu, Wororra and Yawuru peoples attacked the Western Australian legislation for inconsistency with s 10 of the RDA; it was heard together with a counterattack by Western Australia on the constitutionality of the Commonwealth’s own legislative response to *Mabo (No 2)*, the NTA. In a joint decision of six judges, the High Court in the 1995 case of *Western Australia v Commonwealth* held the Western Australian native title legislation to be inconsistent with s 10 of the RDA.106 (The Court also unanimously upheld the constitutionality of the NTA.) The judgment consolidated the reconciliation that had been achieved in *Mabo (No 1)*

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105 *Land (Titles and Traditional Usage) Act 1993* (WA).
between the RDA’s citizenship protections and native title’s recognition of Indigenous peoplehood.107

Whereas the courts have seen fit to incorporate protection of native title into the RDA, they have resisted incorporating another incident of Indigenous peoplehood – collective political autonomy – into the RDA’s structures. As historian Tim Rowse surmised in 1997, ‘the RDA may not be adequate to the recognition of indigenous political forms’, a reality that has come to pass in subsequent judicial constructions.108 Coinciding with this resistance has been the courts’ reluctance to interpret the RDA according to post-1975 developments in international law, both surrounding racial discrimination norms and Indigenous rights.

These legal developments have unfolded within a broader ideological shift since the early 2000s – dubbed the ‘new paternalism’ by Tony Abbott – in which Australian governments have become more sceptical of Indigenous people’s collective capacities for self-government and individual capacities to responsibly exercise citizenship rights.109 This tendency towards governmental paternalism has been most clearly manifest in the Federal Government’s Northern Territory Intervention and its successor policy Stronger Futures, under which Indigenous communities have been the target of compulsory income management, alcohol and pornography restrictions and measures weakening Indigenous land rights.110 Along with similar policy measures undertaken in

107 However, the majority’s analysis of the NTA, drawing on Gerhardy, kept alive the possibility that Indigenous rights to land constituted temporary ‘special measures’, rather than the permanent, non-discriminatory recognition of Indigenous peoplehood: Western Australia v Commonwealth (1995) 183 CLR 373, 483–4 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).


some States, such measures in some ways reprise the sorts of policies Indigenous people sought to prevent in campaigning for the RDA.

The question of how to reconcile this government paternalism with the RDA and Indigenous peoples’ collective autonomy made its way to the High Court in 2013, in *Maloney v The Queen*. The decision followed other cases in the lower courts, in which Indigenous litigants had begun (with little success) to contest the new policies’ consistency with the RDA. Challenged in the *Maloney* case were alcohol restrictions imposed on the Palm Island Aboriginal community in 2006 by the Queensland Government, under which Aboriginal woman Joan Maloney had received a criminal fine. Maloney’s lawyers argued that the alcohol restrictions violated the RDA’s s 10 guarantee of equality before the law, and that they could not be redeemed as temporary ‘special measures’ designed to remedy disadvantage. For such restrictive laws to qualify as special measures, argued Maloney, there needed to be consultation with the Palm Island community directed towards obtaining their consent – a standard established under the *United Nations Declaration on the Rights of Indigenous Peoples* as well as the General Recommendations of the United Nations Committee on the Elimination of Racial Discrimination. A similar argument was made in amicus curiae briefs by the National Congress of Australia’s First Peoples and the Australian Human Rights Commission.

Rebuffing Maloney’s attempt to incorporate standards of collective Indigenous autonomy into the RDA, the High Court unanimously rejected the idea that community consultation or consent were prerequisites to the valid enactment of restrictive special measures. While conceding that Queensland’s Indigenous-specific alcohol restrictions were a prima facie violation of the RDA’s s 10, the Court held that the restrictions were saved as special measures. There was no need for Indigenous community consultation

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115 Ibid.
or consent to such measures, even if that was a requirement of international law.116 Five of the six sitting judges gave little or no weight to subsequent developments in international law, such as the Declaration on the Rights of Indigenous Peoples or interpretations of the Convention on the Elimination of All Forms of Racial Discrimination by its associated Committee.117 A lack of community consultation or consent, said the Court, might only disqualify a special measure where it revealed an illegitimate government purpose or absence of proportionality.118

In a context where Australian courts remain resistant to incorporating international standards into domestic law, and where government paternalism towards Indigenous peoples has once again become common, the Maloney case has revealed the RDA’s limits as a form of Indigenous constitutional recognition. First, in undertaking the task of constitutional implementation for the RDA, the courts have sanctioned the RDA’s ‘special measures’ clause as a means for governments to impose the sort of restrictive laws that the RDA was originally designed to prevent. This is a repudiation of the RDA’s constitutional recognition of Indigenous citizenship. More than that, the courts have refused to balance that repudiation against standards of Indigenous consultation and consent. This rejection of Indigenous collective autonomy is a repudiation of Indigenous peoplehood.

2 The Political Branches and the Temptation of Partial Repeal

To read the RDA’s s 10 today is to read essentially the same text passed by Parliament in 1975.119 That fact is not insignificant: it is a testament to a general commitment from the Commonwealth to uphold the constitutional recognition achieved through the RDA. And yet s 10’s unaltered text is also misleading. Hanging over it like so many invisible asterisks are four moments in which the RDA’s protection, and Indigenous people’s rights along with it, have been partially retrenched by Parliament in other legislation. These moments illustrate the fragility of the constitutional recognition achieved in the

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116 Maloney (2013) 252 CLR 168, 185–6 (French CJ), 208 (Hayne J), 219–22 (Crennan J), 238 (Kiefel J), 257 (Bell J), 300–1 (Gageler J).
117 Ibid 181–2, 185–6 (French CJ), 198–9 (Hayne J), 221–2 (Crennan J), 233–5 (Kiefel J), 255–6 (Bell J); cf ibid 292–3, 300 (Gageler J).
118 Ibid 186 (French CJ), 208 (Hayne J), 221 (Crennan J), 260 (Bell J), 300 (Gageler J).
119 Bar a couple of minor word changes: ‘Australia’ was replaced by ‘the Commonwealth’ in 1980, and ‘him’ was replaced by ‘the person’ in 1986.
As a form of ordinary federal legislation, it is susceptible to repeal by future federal legislation. More broadly, these moments demonstrate the incompleteness of constitutional recognition: it involves an ongoing and uncertain process of implementation, a process which leaves open opportunities for repudiation by state actors.

The first partial repeal of the RDA’s s 10 protection took place with the NTA passed in 1993 by the Keating Government. For settler governments and corporate interests (especially the mining and pastoralist industries), one of *Mabo (No 2)*’s most concerning outcomes was that, because native title had (unbeknownst to everyone) enjoyed protection from discriminatory extinguishment since the RDA’s enactment in 1975, the validity of all post-1975 land grants was rendered uncertain. Validating existing land titles was one of Keating’s first priorities, as it was of the Coalition Opposition, the States, business and considerable sections of the wider public.  

Accordingly, the NTA validated all titles that were otherwise in doubt due to native title’s existence. Though the NTA explicitly disclaimed having any effect on the RDA in s 7(1), s 7(2) then expressly exempted the validation provisions from that disclaimer: effectively an admission that, by validating post-1975 titles, the NTA had partially repealed the RDA’s protection of native title.

Importantly, however, Indigenous peoples were able in this case – through activism, litigation and canny negotiation with a relatively sympathetic government – to exercise some power over the eventual outcome, including by invoking the RDA. As Keating moved forward with negotiations over legislating native title, Indigenous claimants around the country launched high-profile native title litigation. Representatives of Aboriginal land councils and legal services developed an Aboriginal Peace Plan, which laid out their conditions for accepting the validation of post-1975 titles. Some 400 Aboriginal and Torres Strait Islander people later convened at a national meeting in the Northern Territory and developed the Eva Valley Statement, which further set out Indigenous demands, including that ‘the Commonwealth honour

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120 See generally Rowse, ‘Native Title Act’, above n 104.
121 NTA pt 2 div 2.
123 Rowse, ‘Native Title Act’, above n 104, 110–11.
its obligation under International Human Rights Instruments and International Law'.  

When it appeared that the Commonwealth might move to validate titles without further negotiations, Indigenous leaders and organisations strongly denounced the move as discriminatory and contrary to the RDA. The RDA proved to be a powerful bargaining chip: eventually, in exchange for publicly accepting the validation provisions as a ‘special measure’, Indigenous negotiators were able to extract numerous concessions in the NTA along with the promise of a broader ‘Social Justice Package’. As one of the lead Aboriginal negotiators, Mick Dodson, would later admit, ‘[w]e agreed to a huge act of racial discrimination in 1993 in the validation provisions, but on balance we thought … that the discrimination was cancelled out’.  

Whereas the Keating Government proved itself willing to negotiate with Indigenous peoples over the RDA’s partial repeal concerning native title in 1993, its successor, the Howard Coalition Government, showed no such inclination in its own wind-back of native title and the RDA. Following the High Court’s 1996 decision in *Wik Peoples v Queensland*, which held that native title was not necessarily extinguished by the pastoral leases held over vast tracts of remote Australia, the Howard Government – already committed to weakening the NTA – seized the initiative to shore up pastoral interests and more generally diminish native title rights. In early 1997, Howard warned: ‘[t]here’s no law in Australia which is so sacrosanct that it can never be changed. So we mustn’t get hung up on this idea that you can never ever, ever amend the *Racial Discrimination Act*.’  

The *Native Title Amendment Act 1998* (Cth) enacted a fresh round of non-native title validation – the ‘bucket loads of extinguishment’ foreshadowed by the Deputy Prime Minister Tim Fischer – along with a raft of other measures treating native title

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less favourably than other property rights. The 1998 amendments impliedly repealed the RDA’s protection of native title yet again, but, unlike five years earlier, did so without compensatory benefits negotiated with Indigenous peoples. The amendments prompted the United Nations Committee on the Elimination of Racial Discrimination in late 1998 to initiate its early warning and urgent action procedures against Australia, and in 1999 to conclude that the amendments were racially discriminatory. The Howard Government, however, was vocally critical of these findings and proved resolute in the face of broad Indigenous condemnation.

The third partial repeal of the RDA also took place during the early years of the Howard Government. Precipitating the repeal was South Australia’s ongoing Hindmarsh Island affair, a nationally controversial dispute in which Ngarrindjeri women had invoked federal Indigenous heritage law to protect a culturally important site from a bridge development. With eventual support from the Labor Opposition, the Government legislated in 1997 to exempt the bridge development from the heritage protection legislation. The Hindmarsh Island Bridge Act 1997 (Cth) entailed an implied partial repeal of the RDA with respect to the Ngarrindjeri, who unlike other Indigenous people were denied the right to apply for heritage protection. In an acknowledgement of the 1997 legislation’s potential incompatibility with the RDA, the Government rejected an Opposition amendment which would have expressly declared that the RDA

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132 See the previous footnote.

133 Committee on the Elimination of Racial Discrimination, Decision 2(54) on Australia, UN Doc CERD/C/54/Misc.40/Rev.2 (18 March 1999).


prevailed over the *Hindmarsh Island Bridge Act*.\(^\text{137}\) When Ngarrindjeri people in 2001 lodged a communication with the United Nations on their plight, their first complaint was, as Ngarrindjeri elder Tom Trevorrow wrote, ‘that the government has failed to uphold its obligations under the Convention on the Elimination of All Forms of Racial Discrimination by contravening the *Racial Discrimination Act 1975 (Cth)*’.\(^\text{138}\)

Bookending the Howard Government’s time in office was the fourth RDA repeal, which occurred with the 2007 Northern Territory Intervention. Harrowing documentation of child sexual abuse within remote Aboriginal communities, along with evidence of more general destitution, prompted the Government to introduce wide-ranging measures to combat these dire conditions. The key measures undertaken in the affected Aboriginal communities were the compulsory management of half of all welfare recipients’ payments, the removal of rights to appeal to the Social Security Tribunal, the prohibition of alcohol and pornography, and the undermining of Indigenous land rights.\(^\text{139}\) All of this was done without consultation with the affected communities or Indigenous representatives more generally.\(^\text{140}\) In the enacting legislation, the Intervention measures were deemed ‘special measures’, though the operation of the RDA was also suspended anyway.\(^\text{141}\)

The RDA’s suspension was one of the most frequently voiced grievances among the Intervention’s many Indigenous critics.\(^\text{142}\) Notably, in 2009, a group of Aboriginal Territorians lodged a request for urgent action over the Intervention to the Committee on the Elimination of Racial Discrimination, damning the suspension of the RDA and the Intervention’s discriminatory measures.\(^\text{143}\) The Committee concurred with these


\(^{139}\) See above n 110.


concerns in its next report on Australia. Although the post-Howard Labor Governments, under domestic and international pressure, reinstated the RDA in 2010, the RDA’s implied repeal arguably continues today under the Intervention’s successor policy, Stronger Futures.

III The Future of Constitutional Recognition and Racial Discrimination Protection

The RDA has been and remains an important form of Indigenous constitutional recognition. As contemporary debates over constitutional recognition make clear, a great many Aboriginal and Torres Strait Islander people and organisations continue to see protection from racial discrimination as vital, even as they also push for other forms of recognition. It is also clear that there is a need to go beyond the RDA as it now operates. First, the RDA’s proven vulnerability to selective repeal demonstrates the need for a more-strongly entrenched protection of Indigenous people from racial discrimination. Second, Australian norms of racial non-discrimination must better take account of Indigenous peoplehood by incorporating international legal developments, especially surrounding Indigenous consultation and consent.

In light of the ease with which the RDA’s protection of Indigenous rights – and only Indigenous rights – has been wound back by ordinary federal legislation at critical junctures in the past, there is a need to entrench norms of racial non-discrimination more deeply than they are at present. The most obvious way to do this would be by inserting an analogue of the RDA’s s 10 into the Australian Constitution. This idea has been widely canvassed in contemporary discussions about Indigenous constitutional recognition. Inserting a ban on governmental racial discrimination into the Constitution was one of the major proposals of the Expert Panel on Constitutional Recognition of Indigenous Australians, after consulting with Indigenous and non-Indigenous

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144 Committee on the Elimination of Racial Discrimination, Concluding Observations: Australia, 77th sess, UN Doc CERD/C/AUS/CO/15-17 (13 September 2010).


146 See above n 2.
communities around the country. The Expert Panel’s proposal for a new s 116A would have applied to the Commonwealth, States and Territories, and would have prohibited the practice of racial discrimination by both parliaments and executives. This and related proposals were also recommended in 2015 by the Federal Parliament’s Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples.

However, inserting a general ban on racial discrimination into the Constitution has encountered considerable conservative opposition. The major worry of conservatives has been that a constitutional ban on racial discrimination would too radically undermine parliamentary sovereignty and impermissibly empower the judiciary. Of course, for many Indigenous people, with fresh memories of the RDA’s repeal and a much longer historical experience of legislated racial discrimination, undermining parliamentary sovereignty is precisely the point. It is a deep irony that, in order to circumvent the settler majoritarian decision-making that governs them, Indigenous peoples must overcome the settler state’s majoritarian hurdle par excellence: a constitutional referendum, requiring approval not only by Parliament but also by a majority of voters nationally and majorities in at least four States.

With a difficult-to-amend Constitution stacking the deck in favour of the existing distribution of public power, supporters of a ban on racial discrimination have put forward a range of weaker alternatives as compromises. One idea is to give the Federal Parliament a new power to make laws about Indigenous peoples, but qualify it with the proviso that it does not allow laws that adversely discriminate. Unlike s 116A, this provision would not constrain the States or Territories or the Commonwealth Executive, and perhaps not even the Federal Parliament in all of its

149 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 2, ch 5.
151 Australian Constitution s 128.
powers, nor would it apply to groups besides Indigenous peoples.153 Another rather
different idea, developed by Noel Pearson and others, is for the creation of an
Indigenous body to advise the Federal Parliament when it legislates about Aboriginal
and Torres Strait Islander peoples.154 While this body would be advisory only, the idea
is that its opinions would serve as a politically powerful prophylactic against racial
discrimination and also give Indigenous peoples a voice in the laws made about them.155
These are important proposals deserving of consideration.

In the context of contested political negotiations over constitutional recognition,
there are other ideas worth exploring too, including strategies for strengthening the
RDA itself. One approach would be to adopt a ‘manner and form’ provision – or more
specifically, just a form provision – within s 10 of the RDA.156 This would make partial
repeal of the RDA more difficult by prescribing that legislation repealing the RDA’s
protection must take on a prescribed form to be effective.157 Such a provision was
proposed in the RDA’s doomed companion Bill, the Human Rights Bill 1973: it
provided that subsequent federal laws inconsistent with the Bill would be without force
or effect unless they included an express declaration affirming that they operated
‘notwithstanding’ their inconsistency with human rights.158 The statutory precursor to
Canada’s Charter of Rights and Freedoms, the Canadian Bill of Rights, includes a
similar provision, whose effectiveness has been upheld by Canada’s Supreme Court.159

If legally effective in Australia (a matter I will come to), incorporating a manner
and form provision in s 10 of the RDA would prevent implied repeal of the RDA’s

153 Dixon and Williams, above n 152, 87–8.
154 See especially Noel Pearson, ‘A Rightful Place: Race, Recognition and a More Complete
Commonwealth’ (2014) 55 Quarterly Essay 1, 66–7; Shireen Morris, ‘The Argument for a
Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws
Advisory Body: Addressing the Concerns About Justiciability and Parliamentary Sovereignty’
of Aboriginal and Torres Strait Islander Peoples, above n 2, 33–8.
155 Pearson, ‘Rightful Place’, above n 154, 66–7; Morris, ‘Constitutional Procedure’, above n 154,
168–9, 179.
156 See George Winterton, ‘Can the Commonwealth Parliament Enact “Manner and Form”
157 Jeffrey Goldsworthy, Parliamentary Sovereignty: Contemporary Debates (Oxford University
158 Human Rights Bill 1973 (Cth) cl 5(2)–(3).
159 Canadian Bill of Rights, SC 1960, c 44, s 2; R v Drybones [1970] SCR 282.
guarantee of equality before the law. A protection like this would not prevent a determined government from having its way, but it would raise the political costs of overriding the RDA by forcing governments to own up to what they were doing – with all the negative national and international attention such an admission can bring. If a government was not explicit about overriding the RDA, the courts could declare the infringing legislation inoperative.

There is an unresolved legal debate in Australia about whether a manner and form provision could be effective at the federal level, but this is no argument against inserting one into the RDA. The debate revolves around the nature of parliamentary sovereignty: would not a manner and form provision violate the Parliament’s power to, as Dicey famously put it, ‘unmake any law whatever’? At least at the federal level, the issue has never arisen in the Australian courts. There is, however, a strong argument that the Federal Parliament’s sovereignty is not violated (or not unduly so) by provisions which merely require that repealing legislation be in a particular form. At any rate, the only way of definitively resolving the debate in Australia would be to enact the provision and then have the courts decide the issue. If the insertion of a manner and form provision into the RDA was bolstered by significant Indigenous and non-Indigenous political support, it would arguably take a bold court indeed to render it ineffective.

By being pushed to propose weaker alternatives than a constitutional ban on racial discrimination, contemporary proponents of this form of Indigenous constitutional recognition are confronted with the political reality of struggles over recognition. These struggles are shaped by the unequal power relations that proponents of recognition are trying to transcend, and they therefore involve compromise from the outset. Indeed, even a full-blown constitutional prohibition on racial discrimination can be seen as a compromise, neglecting other, more radical demands for Indigenous

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161 At the State level, manner and form requirements have long been upheld, due to a colonial-era hangover within State constitutional arrangements. See Jeffrey Goldsworthy, ‘Manner and Form in the Australian States’ (1987) 16 *Melbourne University Law Review* 403.

162 Dicey, above n 64, 38.

163 Winterton, above n 156; Goldsworthy, *Parliamentary Sovereignty*, above n 157, ch 7. The situation is arguably different for ‘manner’ provisions, which prescribe that repealing legislation must be enacted in a particular manner (eg, pass through a referendum).
constitutional recognition that enjoy widespread Indigenous support, such as treaty-making and recognition of Indigenous sovereignty.\textsuperscript{164} (I discuss these in the remaining chapters.) How far to compromise is ultimately a matter for contextualised political judgment. And any form of constitutional recognition negotiated under these circumstances should be seen as provisional, part of an ongoing process of contesting the current constitutional order.

But even if strengthened protection against governmental racial discrimination could be negotiated, there is a real danger that it would simply replicate the flawed interpretation currently given to the RDA. Recall that, according to the High Court in \textit{Maloney}, Indigenous people’s basic rights can be validly wound back under the guise of government-imposed ‘special measures’, and without any need for collective Indigenous consultation and consent. This dual repudiation of Indigenous citizenship \textit{and} peoplehood by the Court took place through another repudiation – of the connection between the RDA and contemporary international legal developments surrounding racial discrimination and Indigenous rights. Without remedying these defects in the courts’ approach, a more deeply entrenched protection against racial discrimination may only marginally improve on the status quo under the RDA.

The most direct solution would be to explicitly incorporate standards of Indigenous consultation and consent into protection from racial discrimination. Section 19 of the \textit{Declaration on the Rights of Indigenous Peoples} provides an internationally accepted standard on this score:

\begin{quote}
States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.
\end{quote}

A provision modelled on this standard could be incorporated into a new protection against racial discrimination. Within the context of an amended RDA, the consultation-and-consent standard could be added to s 8’s ‘special measures’ provision, clarifying that a measure will only qualify as ‘special’ where affected Indigenous communities

\textsuperscript{164} See, eg, Expert Panel on Constitutional Recognition of Indigenous Australians, above n 2, chs 8–9.
have granted their free, prior and informed consent (or have at least been consulted in
good faith with the goal of obtaining such consent).

Less directly, an interpretive provision could be incorporated into a racial non-
discrimination clause, requiring the courts to consider relevant developments in
international law. This interpretive provision could specifically direct the courts to
consider the Declaration on the Rights of Indigenous Peoples and the work of the
United Nations Committee on the Elimination of Racial Discrimination. Adopting this
approach would connect norms of racial non-discrimination to contemporary
international standards, overcoming the High Court’s reluctance to take this approach
under the RDA. However, an interpretive provision of this sort would still leave much
judicial room for manoeuvre in interpreting protection from racial discrimination: after
considering international standards, the courts might simply decline to follow them. An
interpretive provision therefore would not guarantee the incorporation of standards of
Indigenous consultation and consent, but it would nevertheless improve on the courts’
current approach to the RDA.

IV Conclusion

It is difficult to understand contemporary Australian debates over Indigenous
constitutional recognition, and particularly the prominence of concerns about racial
discrimination, without appreciating the RDA’s history. The RDA emerged partly in
response to Indigenous activism and as a way of combating the legislative regime
governing Aboriginal and Torres Strait Islander residents of Queensland reserves into
the 1970s and later. In the four decades since its enactment, the RDA has served as a
constitutional shield against racially discriminatory laws and – during times when its
protection of Indigenous people has been threatened or actually wound back by
Parliament – as a political instrument for criticising government action. The RDA’s
guarantee of equality before the law has itself been an important form of Indigenous
constitutional recognition, respecting Indigenous people as citizens and, as a result of
the Mabo litigation, also partly respecting Indigenous peoplehood.

But studying the history of the RDA’s enactment and operation also reveals how
Indigenous constitutional recognition is partial, provisional and incomplete. This history
supports contemporary calls for a new form of constitutional protection against racial
discrimination: one that is better entrenched against repeal and that better recognises
Indigenous peoplehood. That history also cautions against seeing any such new forms of
constitutional recognition as themselves anything more than provisional efforts negotiated in particular historical circumstances that attempt imperfectly to create a more just Indigenous–settler constitutional relationship.

Indeed, upon looking closer at contemporary Indigenous struggles over recognition, it is clear that, vital though a reformed ban on racial discrimination is, it could only partially address Indigenous aspirations that have grown stronger in the decades since 1975. Those are Indigenous aspirations to be properly recognised as peoples. In their contemporary political struggles, Aboriginal and Torres Strait Islander people are not simply seeking to incorporate a recognition of their peoplehood within suitably revised norms of Australian citizenship (such as a constitutional ban on racial discrimination). They are also seeking new forms of recognition altogether: recognition of Indigenous sovereignty, self-determination, collective autonomy – recognition as peoples. These are the central Indigenous constitutional struggles of the present and future. It is to these struggles – and the constitutional challenge they present to the Australian settler state – that I now turn.
Chapter 7
Constitutionally Recognising Indigenous Peoplehood: Towards Indigenous–Settler Federalism

Sovereignty, self-determination, treaty: these are words that have become more and more prominent in contemporary Australian debates over Indigenous constitutional recognition. They are words that Aboriginal and Torres Strait Islander people themselves have successfully injected into a discourse mostly preoccupied with narrower questions about Australia’s State and federal constitutions. They are words that recall Indigenous political struggles which first emerged to national consciousness more than four decades ago, as Indigenous people’s demands for the recognition of their identities as Australian citizens started to be overshadowed by new claims for recognition. They are words of Indigenous peoplehood.

They are also words that present difficult challenges for projects of Indigenous constitutional recognition within settler states. While Indigenous peoples’ demands to be recognised as peoples overwhelmingly do not involve claims to secede from the Australian settler state, they undoubtedly envisage forms of collective Indigenous autonomy that rival the settler state’s own. Moreover, as the internationalist pedigree of peoplehood (self-determination, sovereignty, treaty) implies, Indigenous peoplehood claims often move beyond the realm of constitutional recognition and into the realm of international recognition, even as they seek to maintain an Indigenous–settler constitutional relationship. Indigenous demands to be recognised as peoples therefore present a conceptual challenge: how to reconcile collective Indigenous autonomy, up to and including forms of international recognition, with a continuing Indigenous–settler constitutional association? Indigenous peoplehood claims present a justificatory challenge as well. The challenge is how to justify the robust recognition of Indigenous peoplehood within the liberal-democratic constitutional traditions of the Australian settler state.

To meet these conceptual and justificatory challenges, I introduce another word to the vocabulary of Indigenous peoplehood claims in Australia: federalism. The idea of federalism – broadly defined as self-rule combined with shared rule – offers a conceptual framework for understanding and meeting contemporary Indigenous
demands to be constitutionally recognised as peoples.\textsuperscript{1} Federalism has occasionally been proposed as a useful concept for descriptive or normative projects concerning Indigenous rights in Australia, including recently by Aboriginal scholar Mark McMillan.\textsuperscript{2} Nonetheless, federalism remains underexplored in the constitutional recognition debate.

I show how three major contemporary proposals to constitutionally recognise Indigenous peoplehood – Indigenous parliamentary representation, treaties and the establishment of Indigenous States and Territories – can all be understood as federal arrangements between Indigenous and settler peoples. Furthermore, the idea of Indigenous–settler federalism offers a justification for constitutionally recognising Indigenous peoplehood that creatively adapts Australia’s own constitutional traditions. Indeed, federalism and the arrangements institutionalising it are also a creative adaptation of Indigenous traditions of self-rule, innovative as well as preservative and restorative. Federalism provides a way of conceptualising and justifying the recognition of Indigenous peoplehood that falls between settler and Indigenous traditions.

Foreshadowing an argument I will make in the next, concluding chapter of this thesis, the successful enactment of Indigenous–settler federal arrangements would – like the 1967 amendments and the \textit{Racial Discrimination Act 1975} (Cth) – not represent some ultimate, final form of Indigenous constitutional recognition. Contemporary struggles over the recognition of Indigenous peoplehood, too, take place within historically constrained horizons of politics and identity. Any new forms of recognition that emerge from these struggles should be seen as provisional, partial and incomplete,

\begin{footnotesize}
\textsuperscript{1} On federalism as self-rule combined with shared rule, see Daniel Elazar, \textit{Exploring Federalism} (University of Alabama Press, 1987).

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subject to renegotiation and contestation in the name of a just postcolonial relationship. I will pick up this argument in the next chapter.

I The Rise and Constitutional Challenge of Indigenous Peoplehood
Since the late 1960s, Aboriginal and Torres Strait Islander people have become vocal in their identification as peoples and have demanded recognition as such. In the previous two chapters, I discussed how the late 1960s political rise of Indigenous peoplehood represented a shift in emphasis away from (though not a total displacement of) a politics of citizenship. Going beyond the shared civil, political and social rights of citizens, Indigenous peoplehood claims variously encompass demands for land rights, cultural protections, reparations and – most relevantly for this chapter – forms of collective autonomy. From the time of their ascendance, Indigenous peoplehood claims have frequently drawn strength from Indigenous peoples’ historical and contemporary practices of self-government and law, along with the memory of Indigenous independence prior to its colonial disruption and curtailment. Common Indigenous experiences of oppression have also fostered pan-Indigenous solidarity and nationalism, giving support to pan-Indigenous peoplehood.

The language of peoplehood – and its corollary, self-determination – is a language of international law, and this too has bolstered Indigenous demands. When the collective right of peoples to self-determination became prominent in the decolonisation era, Indigenous minorities in settler colonies were not seen to be among the right’s beneficiaries (at least not independently of the settler states in which they resided). But especially from the 1970s onwards, Indigenous advocates globally, including in Australia, appropriated the linked ideas of peoplehood and self-determination to frame

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3 See, eg, Milirrpum v Nabalco (1971) 17 FLR 141; Coe v Commonwealth (1979) 24 ALR 118.
their political struggles. Through Indigenous peoples’ transnational advocacy, international law and institutions themselves have developed gradually towards the recognition of Indigenous peoplehood and self-determination. Indigenous peoples’ most striking success on this score was the passage in 2007 by the United Nations General Assembly of the Declaration on the Rights of Indigenous Peoples, with the principle of self-determination at its centre. Such developments have been symptomatic of the rise of Indigenous claims to peoplehood globally – and a source of support for them.

For around four decades now, the Australian state has shown solicitude, in varying degrees, towards Indigenous peoplehood claims. As I argued in Chapter 5, Indigenous peoplehood has been legally recognised – partially, imperfectly and with notable moments of retrenchment – in three main ways: the establishment of distinct Indigenous entitlements to land; the protection of Indigenous cultural heritage; and the support of an ‘Indigenous sector’ to represent, deliver services to and manage land for Indigenous peoples.

At least some of these recognitions of Indigenous peoplehood have had a small constitutional character to them. The Mabo (No 2) decision especially enacted a form of constitutional recognition by conditioning the British acquisition of sovereignty over Australia with a degree of respect for the original inhabitants. As the High Court ruled, that acquisition of sovereignty was not so total as to wholly obliterate Indigenous peoples’ customary rights to land. Mabo (No 2)’s grounding of Indigenous entitlements to land in continuing Indigenous law also seemed to give implicit constitutional


Mabo v Queensland (No 2) (1992) 175 CLR 1.
recognition to an ongoing Indigenous capacity for self-government, though that prospect has since been denied in the courts.11

But as the contemporary debates over Indigenous constitutional recognition have clearly demonstrated, Indigenous people widely regard existing state responses to their peoplehood as deeply unsatisfactory – especially when it comes to recognising Indigenous autonomy. There is widespread malaise among Indigenous peoples at the fact that the power to govern their communities is overwhelmingly concentrated in settler institutions, over which they exercise limited control. In its consultations with Indigenous communities in 2011, for instance, the Expert Panel on Constitutional Recognition of Indigenous Australians was frequently confronted with demands for increased Indigenous political power and autonomy, treaty and the recognition of Indigenous self-determination and sovereignty.12

These demands have only grown stronger since the Expert Panel delivered its report, coming to overshadow other constitutional reform proposals.13 The Victorian Aboriginal community’s successful push in early 2016 for a treaty, and the subsequent adoption of a similar policy in South Australia, are major developments on this front, and they reflect the aspirations of many Indigenous peoples around the country.14 There is a burgeoning Indigenous sovereignty movement, according to which Indigenous individuals and groups have proclaimed their independence from Australia, issued their own drivers’ licenses and passports, legally contested the applicability of Australian law to them and pursued diplomatic relations with the United Nations and foreign states.15

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15 See, eg, Joshua Robertson, ‘Tolerance of Travellers with Aboriginal Passports Amounts to Recognition, Says Activist’, The Guardian (online), 20 April 2015.
Figures associated with the activist organisation the Aboriginal Provisional Government, such as Michael Mansell, have been advocating for the establishment of an Aboriginal State within the Australian federation. Even those closely involved with official processes surrounding constitutional recognition have increasingly emphasised the importance of Indigenous autonomy and self-determination. Notably, influential Aboriginal leader and Expert Panel member Noel Pearson has proposed the creation of an Indigenous parliamentary advisory body to increase Indigenous peoples’ political power. I will discuss three of these ideas – Indigenous parliamentary representation, treaties and Indigenous States or Territories – in more detail later in this chapter.

Indigenous peoplehood demands often involve calls for international recognition of some kind. That is partly due to the historical resonances of peoplehood and self-determination, which in their most prominent application – post-war decolonisation – involved the transition of colonised peoples globally to independent statehood. That Indigenous advocates have developed the concept of peoplehood by participating directly in international institutions such as the United Nations has only added to its internationalist connotations: such participation itself is a form of international recognition. The widespread idea of negotiating a treaty between Indigenous peoples and the settler state echoes the practice of international diplomatic relations between

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two nations who recognise one another as equals. Indigenous sovereignty movements frequently question the settler state’s original foundations and ongoing right to rule over Indigenous peoples, and engage in practices that prefigure Indigenous independence, such as the issuing of Aboriginal passports and the conduct of foreign relations. As one of the members of the Aboriginal Provisional Government, Callum Clayton-Dixon, put it in 2015, ‘[i]t’s the vision for Aboriginal people to take our place among the nations and peoples of the world, not beneath them’.

And yet at the same time, Indigenous peoplehood claims are overwhelmingly not secessionist. Certainly, some Indigenous people have sought total independence from the settler state. For instance, complete independence has sometimes been the stated goal of members of the Aboriginal Provisional Government, along with some Torres Strait Islanders. But as I will explore below, those advocates have more often supported forms of collective Indigenous autonomy to be exercised in the context of an ongoing constitutional relationship with the settler state. As Aboriginal lawyer Larissa Behrendt has observed, Indigenous peoples in Australia “generally do not have aspirations of secession and do not seek separation from the Australian state”. After charting the different uses of ‘sovereignty’ by Indigenous people, Behrendt astutely concludes that “[v]ery few activists … claim that sovereignty embraces notions of statehood and secession”. Many Aboriginal and Torres Strait Islander people continue to identify as Australian citizens and value being recognised as such, even as they also seek recognition as self-determining peoples. For those who reject the identity of


22 See above n 15.


Australian citizen, they generally do not advocate a complete severing of constitutional ties with the Australian state.

Indigenous peoples’ demands – on the one hand, for collective autonomy up to and including international recognition, while on the other hand, for an ongoing constitutional relationship with the settler state – present a conceptual challenge. That challenge is to find a constitutional language and framework for meeting and understanding a set of Indigenous demands that, to a significant degree, pull in different directions. It is the challenge of reconciling diversity with unity, collective Indigenous autonomy with a continuing Indigenous–settler constitutional association. And when it comes to more radical Indigenous demands, it is the challenge of reconciling international recognition of Indigenous peoplehood with constitutional recognition.

Claims of Indigenous peoplehood, even those of a less radical character, also present a normative and political challenge: how can they be justified within the liberal-democratic context of a settler state like Australia? The prospect of recognising Indigenous peoplehood through forms of Indigenous autonomy often provokes fears of separatism and the fracturing of an indivisible sovereignty that many believe should be exercised on behalf of all Australians, Indigenous or otherwise. As Prime Minister John Howard, an implacable opponent of treaty, put it, ‘a united undivided nation does not make a treaty with itself’.27 When treaty-talk first emerged to national prominence in the late 1970s and early 1980s, federal politicians generally disavowed the term ‘treaty’ for its internationalist connotations (with the Yolngu word makarrata put forward at the time as a less threatening substitute).28 Recognising Indigenous peoplehood also sits uncomfortably with prominent understandings of the liberal norms of equality and non-discrimination, which on some accounts reject the making of legal distinctions between citizens on racial or ethnic grounds. Even very modest proposals for Indigenous recognition, such as symbolically mentioning Indigenous peoples in a written constitution, are met with the objection that they violate principles of equality and unity.29

Federalism, I argue, provides a valuable answer to these conceptual and justificatory challenges. It offers a way to conceptualise Indigenous claims which reconciles Indigenous peoplehood with an ongoing Indigenous–settler constitutional association, and a justification for constitutionally recognising Indigenous peoplehood that draws upon and creatively adapts Australia’s own constitutional traditions. The next two parts of the chapter demonstrate how federalism provides a useful conceptual framework for meeting and understanding Indigenous peoplehood claims. The final part of the chapter addresses how federalism provides a justification for recognising Indigenous peoplehood that innovates within Australian constitutional traditions – and, I will also argue, within Indigenous traditions as well.

Before proceeding, I want to emphasise the element of creative adaptation of Australian federalism involved here, a point I will return to at the end of the chapter. Federalism within Australian popular and scholarly discourse is (understandably) strongly associated with the Australian federation itself – its six States, two self-governing mainland Territories and Commonwealth Government, and the political and legal relations between them. Conceiving of Indigenous–settler political relationships in federal terms requires borrowing from this federal tradition but also developing and expanding it, by utilising federal ideas and practices from elsewhere and by highlighting features of Australian federal history and practice that are often overlooked.

II Constitutionally Recognising Indigenous Peoplehood Through Federalism

Not only within Australian popular and academic debate but also in much of the theoretical scholarship on federalism, the idea is closely associated with federations. A federation, to borrow Ronald Watts’s definition, is

a compound polity combining constituent units and a general government, each possessing powers delegated to it by the people through a constitution, each empowered to deal directly with the citizens in the exercise of a significant portion of its legislative, administrative, and taxing powers, and each directly elected by its citizens.

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That model of federalism is familiar to Australian eyes as a fair description of Australia’s federal system.\(^{32}\) It is also familiar from much federal theory, which has conventionally used federations — especially Australia, Canada, Switzerland and the archetypal United States — as its case studies for more general theorising and analysis.\(^{33}\)

But to equate federalism with federations is to confuse a broad principle of political organisation with one of its particular institutional manifestations.\(^{34}\) It is widely accepted that, as a principle of political organisation, federalism involves *self-rule combined with shared rule*: self-rule by autonomous political units ‘that maintain their identity and distinctiveness’; shared rule for matters of common concern among those constituent units.\(^{35}\) Federalism demonstrates that, to paraphrase United States Justice Anthony Kennedy, the atom of sovereignty can be split — sovereignty need not be monolithic but can be shared.\(^{36}\) Equally, federalism might allow for contentious questions around sovereignty to be deferred or ignored.\(^{37}\) Unlike citizenship, which establishes a constitutional relationship between individuals and the state, federalism establishes a constitutional relationship between multiple *collective* political agents. While federations are the canonical institutionalisation of the federal principle, it can take many other forms, including unions, confederations, federacies, associated states, condominiums, leagues and consociations.\(^{38}\) Understood in this broader way, federalism is a capacious and flexible principle of political organisation. It has become a pervasive feature of political organisation within states.\(^{39}\)

\(^{32}\) Though in Australia the idea of governments ‘possessing powers delegated to [them] by the people’ is complicated by the fact that as a formal matter, Australian governments’ power was delegated to them by the Imperial Parliament at Westminster. This remains the case under the *Constitution*.

\(^{33}\) Choudhry and Hume, above n 30.

\(^{34}\) Elazar, *Exploring Federalism*, above n 1, 6–7.

\(^{35}\) Watts, above n 31, 118. The self-rule/shared rule definition was influentially promoted by Elazar: Elazar, *Exploring Federalism*, above n 1.


\(^{37}\) I am indebted to Cheryl Saunders for this point. On strategies of constitutional deferral in divided societies, see Hanna Lerner, *Making Constitutions in Deeply Divided Societies* (Cambridge University Press, 2011).

\(^{38}\) Elazar, *Exploring Federalism*, above n 1, 6–8.

\(^{39}\) Ibid ch 4; Daniel Elazar, ‘From Statism to Federalism: A Paradigm Shift’ (1995) 25(2) *Publius* 5; Choudhry and Hume, above n 30.
When federalism is conceptualised as self-rule combined with shared rule, there is not even a requirement that it must be territorially based, at least for the self-rule dimension. Certainly, for some theorists, territorial self-rule is of the essence of federalism, which, they argue, necessarily involves regional self-government.\(^4\) Undoubtedly, the self-rule side of federalism is territorially based in many of its real-world manifestations. But there is no logical requirement that the ‘self’ in self-rule must be defined territorially. For this reason, some theorists speak of non-territorial or ‘corporate’ federalism, under which self-rule is based on a particular ethnic or cultural group’s exercise of personal rather than territorial jurisdiction.\(^4\)

This broad understanding of federalism, as self-rule combined with shared rule, has strong affinities with Indigenous people’s aspirations for recognition of their peoplehood. On the one hand, federal arrangements can, as many Indigenous advocates demand, guarantee diverse forms of Indigenous self-rule, in recognition of Indigenous peoplehood. On the other hand, federalism would also involve the continuation of an Indigenous–settler constitutional association through institutions of shared rule that recognise both Indigenous and settler peoplehood. To paraphrase Dicey, federalism would allow for Indigenous–settler union without unity.\(^4\) Later in the chapter, I show how federalism provides a conceptual framework for understanding three contemporary Indigenous demands for constitutional recognition: Indigenous parliamentary representation, treaties, and Indigenous States and Territories.

Federalism’s suitability for recognising Indigenous peoplehood is confirmed by the turn within both practice and theory towards federalism as a means of facilitating mutual coexistence between different peoples within ethnically diverse states.\(^4\) This turn represents a departure from the traditional idea of federalism as the ‘coming together’ of pre-existing political collectives into a single nation and establishing an

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\(^4\) See, eg, Watts, above n 31.


overarching federal government for dealing with matters of shared concern. Rather than a ‘coming together’, federal arrangements are now frequently adopted as a kind of ‘holding together’. The core idea in holding-together federalism is to guarantee powers of self-rule for distinct substate nations or peoples while still maintaining an overarching state exercising shared rule.

Federal states on this model make trouble for the common equation of one people or nation with one state: they are not nation-states but multinational states. While the best known and most-studied example is Canada (also, interestingly enough, a model for classical federal scholarship as well), there are many other examples, including India, Ethiopia and, on some accounts, the United Kingdom. Federal arrangements of a multinational kind constitutionally recognise the peoplehood of the different peoples comprising the state as a whole. These developments demonstrate that federalism represents a conceptual framework hospitable to the accommodation of Indigenous and settler peoplehood within a single constitutional association.

A further indication of federalism’s potential as a framework for Indigenous–settler political relationships can be found well before the recent multinational turn within federal theory and practice, in the history of decolonisation. Especially in the case of the French Empire, federalism proved attractive to leading anti-colonial figures in the mid-20th century, with Senegal’s Léopold Sédar Senghor and Martinique’s Aimé Césaire among numerous others advocating federal arrangements for decolonising their political relationship with the imperial metropole. Rather than seeking the complete dissolution of their colonial constitutional ties to France, these anti-colonial leaders sought full citizenship for French colonial subjects alongside robust forms of African and Caribbean autonomy within a multinational, post-imperial federation. As French citizens with guaranteed representation in central institutions, impoverished peoples of the former colonies could thereby leverage much-needed forms of redistribution from the metropole. Complete independence, on the other hand, would terminate

44 Alfred Stepan, Arguing Comparative Politics (Oxford University Press, 2011) 320; Choudhry and Hume, above n 30, 363.
45 Stepan, above n 44, 320.
46 Gagnon and Tully, above n 43.
47 See above n 43.
metropolitan France’s redistributive obligations to the peoples it had colonised and exploited.49 (As it turned out, Senegal gained independence and Martinique was made an overseas department of France, outcomes which in opposite ways fell short – Senegal with too much independence, Martinique with too little – of the arrangements originally envisioned by Sénghor and Césaire.) For contemporary Indigenous peoples’ struggles, this history demonstrates the potential for achieving decolonisation through federalism rather than secession.

Even more relevant for Aboriginal and Torres Strait Islander peoples’ peoplehood demands is the theory of ‘treaty federalism’ developed by Indigenous legal scholars in North America.50 In fact, the idea of treaty-making is embedded in federalism’s etymology: its Latin root, foedus, means ‘covenant’, ‘compact’ or ‘treaty’.51 The basic idea of treaty federalism is that the treaties negotiated between Indigenous and settler peoples constitute ‘a form of political recognition and a measure of the consensual distribution of powers’ between Indigenous and settler peoples, and thereby structure an ongoing federal constitutional relationship.52 Treaties are, in Cree scholar Keira Ladner’s terms, ‘nation-to-nation agreements that enable nations to co-exist peacefully as autonomous entities within the same territory’, including by ‘delegat[ing] power and jurisdiction from Indian nations to the Crown’.53 While the idea of treaty federalism builds on histories of treaty-making that are absent in Australia, the concept remains of broader utility in revealing the potential federal dimensions of treaty relationships, whether past, present or future.54 Indeed, it is the (re)construction of more robust Indigenous–settler federal relationships in the present, rather than a simple


51 Aroney, above n 30, 23.

52 Barsh and Henderson, above n 50, 270.


re-telling of history, that has motivated the North American proponents of treaty federalism.\(^{55}\) I will return to the idea of treaty-based federalism later in this chapter.

As will be implicit from much of the foregoing discussion, constitutionally recognising Indigenous peoplehood through federalism does not mean that Indigenous peoples must forego claims to international recognition. Indeed, a kind of international recognition can actually occur within Indigenous–settler federal relationships themselves. The turn to multinational federalism within theory and practice shows how federal arrangements can blur the boundaries between the national and international, establishing constitutional relationships between multiple nations or peoples. Even more striking on this score is the emergence of the European Union as a kind of transnational federalism between the Union’s culturally diverse, sovereign member states.\(^{56}\) Perhaps most relevant for Indigenous peoples’ contemporary struggles is the fact that the treaty federalism established between Indigenous and settler peoples in North America often historically possessed an international dimension – something partly revived in contemporary discourses of ‘government-to-government’ or ‘nation-to-nation’ relationships between Indigenous and settler peoples.\(^{57}\) All of these developments demonstrate that, far from necessitating the complete domestication of Indigenous peoplehood, federalism can itself be a means of providing international recognition to Indigenous peoples. It can amount to a form of ‘transnational constitutionalism’.\(^{58}\)

Outside of the international recognition achievable through federal arrangements themselves, Indigenous peoples can also conduct relations with international actors beyond their relationship with the settler state. As a general matter, the conduct of foreign relations by the constituent units of federal polities, a practice known as


\(^{56}\) See, eg, JHH Weiler, The Constitution of Europe: ‘Do the New Clothes Have an Emperor?’ and Other Essays on European Integration (Oxford University Press, 1999).


‘paradiplomacy’, has become common, including among national minorities such as Quebec. For Indigenous peoples, even in the absence of federal arrangements, they have already been able to attain standing in several international forums, most notably the United Nations Permanent Forum on Indigenous Issues. If Indigenous advocacy on the international level continues to be as successful as it has been in the past four decades, Indigenous peoples’ international standing in such forums may well expand further.

Beyond participating in international forums, Indigenous peoples can also conduct international relations with other Indigenous and non-Indigenous peoples, as they have done for millennia. This capacity is protected under Article 36 of the Declaration on the Rights of Indigenous Peoples, which guarantees Indigenous peoples ‘the right to maintain and develop contacts, relations and cooperation, including activities for spiritual, cultural, political, economic and social purposes, with … other peoples across borders’. Some international law scholars have conceptualised this right as a manifestation of ‘external self-determination’, an appellation more typically reserved to describe the international recognition achieved by a people through the attainment of independent statehood. All of these forms of international recognition for Indigenous peoples are perfectly consistent with their simultaneously maintaining an ongoing federal relationship with the settler state.

Federalism, to be sure, is a language with roots in Western rather than Indigenous intellectual and political traditions. As with many concepts and practices of Western statecraft – sovereignty, liberalism, citizenship, self-determination – federalism has been instrumental in histories of European imperialism and

59 See, eg, Francisco Aldecoa and Michael Keating (eds), Paradiplomacy in Action: The Foreign Relations of Subnational Governments (Frank Cass, 1999).

60 Anaya, above n 5, chs 6–7.


62 Rights of Indigenous Peoples Committee, above n 20, 835, 848.

colonialism.\textsuperscript{64} And yet, like those other concepts, federalism is also capacious and open-textured, available for appropriation by Indigenous peoples in their own political struggles for freedom and justice.\textsuperscript{65} Several Australian Indigenous intellectuals have seen in the idea of federalism close parallels with their own traditional practices of government, a point I will return to at the end of the chapter.\textsuperscript{66}

The concept of federalism, I hope to have shown, offers a valuable conceptual language for framing Indigenous claims to be recognised as peoples – a language capable of meeting both the constitutional and international dimensions of those claims. I return now to the specifics of Indigenous peoplehood claims in Australia, to show how three contemporary proposals for constitutional recognition – Indigenous parliamentary representation, treaties and Indigenous States and Territories – can be understood as demands for forms of Indigenous–settler federalism.

III Three Contemporary Examples

A Indigenous Parliamentary Representation

A prominent idea for constitutionally recognising Indigenous peoplehood is to secure forms of Indigenous representation in Australian parliaments. There are different possibilities for achieving that representation. One idea is to set aside Indigenous-only parliamentary seats. Within the history of Indigenous political activism, this idea has a provenance extending back to the 1930s and has often been invoked with the New Zealand example of Māori parliamentary seats in mind.\textsuperscript{67} In debates over constitutional recognition in the past decade or so, the idea of Indigenous parliamentary seats has been regularly proposed by Indigenous advocates, from the more moderate to the more radical.\textsuperscript{68} Guaranteed Indigenous parliamentary representation is most commonly

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\textsuperscript{66} Morris, above n 2, 294–99; McMillan, above n 2.


\textsuperscript{68} See, eg, Expert Panel on Constitutional Recognition of Indigenous Australians, above n 12, ch 7; Michael Mansell, ‘An Indigenous Female Prime Minister? Fairer Representation Would Be a
advocated and justified today as a means of implementing Indigenous self-determination, and can thus be understood to constitutionally recognise Indigenous peoplehood.69

Another possibility for Indigenous parliamentary representation has recently emerged to prominence after backing from influential Aboriginal intellectual Noel Pearson. Pearson’s proposal, developed through his Cape York Institute and own writings, is to create an Indigenous body that the Federal Parliament would consult with and receive advice from when legislating about Aboriginal and Torres Strait Islander peoples.70 The idea has received support from surprisingly diverse quarters: not only from relatively conservative non-Indigenous intellectuals and lawyers but also from members of the more radical Aboriginal Provisional Government.71 As it has been elaborated in most accounts, the body would have only advisory power, with no procedural control over the passage of legislation or guaranteed say over its substance.72 Still, the intention and hope of its proponents is that the body will be able to exert a

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71 See, eg, Damien Freeman and Shireen Morris (eds), The Forgotten People: Liberal and Conservative Approaches to Recognising Indigenous Peoples (Melbourne University Press, 2016); Megan Davis and Marcia Langton (eds), It’s Our Country: Indigenous Arguments for Meaningful Constitutional Recognition and Reform (Melbourne University Press, 2016); Morris, ‘Constitutional Procedure’, above n 70, 172.

72 Morris, ‘Constitutional Procedure’, above n 70; Twomey, above n 70.

Both of these proposals for constitutionally recognising Indigenous peoplehood – securing Indigenous parliamentary representation through reserved Indigenous seats or an advisory body – are quasi-federal.\footnote{Cf Saunders, ‘Implications of Federalism’, above n 2, 268. Barsh and Henderson’s visions for treaty federalism include Indigenous representation in settler legislatures: Barsh and Henderson, above n 50, 281; Henderson, ‘Empowering Treaty Federalism’, above n 50, 324–7.} Returning to the idea of federalism as self-rule combined with shared rule, these mechanisms establish forms of Indigenous–settler shared rule. Indigenous parliamentary representation guarantees that Indigenous peoples will have a say about how settler jurisdiction is exercised, especially how it is exercised over Indigenous peoples themselves. An instructive parallel can be found in federal upper chambers such as the Australian Senate, which ensure the equal representation of the federation’s constituent polities and (in theory) facilitate the input of those constituent units into the shared rule exercised by the federal polity.\footnote{‘In theory’, because an upper chamber may not in practice, as in Australia, operate as a ‘States’ house’: Campbell Sharman, ‘The Australian Senate as a States House’ (1977) 12(2) Politics 64.}

Both an Indigenous advisory body and Indigenous parliamentary seats would function in a similar way, by ensuring the representation of Indigenous peoples in the exercise of shared rule by the Federal Parliament.

Seeing Indigenous parliamentary representation in federal terms also helps draw attention to what this approach leaves out. That is, it only addresses one side of the federal equation, shared rule, without providing forms of Indigenous self-rule. By contrast, to continue the earlier analogy, the Australian States not only participate in shared rule through equal representation in the Federal Senate; they also have extensive powers of self-rule secured under the Australian federal system, in constitutional recognition of their status as distinct polities. To the extent that Aboriginal and Torres Strait Islander people see collective autonomy as a crucial dimension of their status as peoples – and it seems very many people do – parliamentary representation alone will
not be enough as constitutional recognition of Indigenous peoplehood. Even on its own, however, it may function as a stepping stone to a broader package of federal arrangements in which Indigenous self-rule features.\textsuperscript{77}

B \hspace{1cm} \textbf{Treaties}

Treaty-making between Indigenous and settler peoples has emerged over the past four decades of Australian political life as one of the leading ideas for constitutionally recognising Indigenous peoplehood. Unlike in other British settler colonies, colonial officials in the Australian colonies, while seriously contemplating treaties in certain places, did not negotiate formal treaties with Indigenous peoples as a basis for coexistence.\textsuperscript{78} It was only in 1972, when Darwin’s Larrakia people petitioned the Prime Minister and then the Queen for a treaty on land rights and political representation, that the idea of treaty-making reappeared.\textsuperscript{79}

As I described in Chapter 2, the idea first began to be taken seriously by the Commonwealth Government between 1979 and 1983 when a treaty (or makarrata) was pushed by the National Aboriginal Conference and a non-Indigenous Aboriginal Treaty Committee. Treaty again became nationally prominent in the lead-up to Australia’s Bicentenary in 1988, as Aboriginal activists in the south (the Treaty ‘88 Campaign) and the north (the Barunga Statement) pressed the issue. Prime Minister Bob Hawke, after initially committing to negotiating a treaty by 1990, deflected the issue into an official 10-year ‘reconciliation’ process undertaken by a Council for Aboriginal Reconciliation – which in its final report in 2000 recommended the negotiation of a treaty. In the interim, the idea of treaty had again been raised by key Indigenous rights organisations in their negotiations with the Keating Government for a post-\textit{Mabo} Social Justice Package.


\textsuperscript{79} Judith Wright, \textit{We Call For a Treaty} (Fontana, 1985) 14–17.
Within present debates over Indigenous constitutional recognition, many Indigenous people have pushed for treaty negotiations, a demand to which the Victorian and South Australian governments have now acceded.\footnote{Wahlquist, ‘Indigenous Leaders’, above n 14.} In a February 2016 meeting with Victorian Aboriginal people over constitutional recognition and self-determination, the roughly 500 Aboriginal attendees voted near-unanimously in favour of commencing a treaty process throughout Victoria ‘with complete collaboration with all Sovereign Peoples and Nations’.\footnote{Chris Graham, ‘Recognise Rejected: Historic Meeting of 500 Black Leaders Unanimously Opposes Constitutional Recognition’, New Matilda (online), 8 February 2016 <https://newmatilda.com/2016/02/08/recognise-rejected-historic-meeting-500-black-leaders-unanimously-opposes-constitutional-recognition>.} That process was started by the Victorian Government soon after, with consultations with Aboriginal people throughout Victoria beginning in April 2016.\footnote{Victorian Government, Aboriginal Victoria, Self-Determination for Aboriginal People in Victoria <http://consult.aboriginalvictoria.vic.gov.au/Open-Meeting>.} At the end of 2016, the South Australian Government announced its intention to enter treaty negotiations with the Aboriginal nations of that State over five years, and committed several million dollars to the task.\footnote{Fitzpatrick, above n 14.} Following elections in the Northern Territory in September 2016, which saw a change of government as well as the election of Yolngu man Yungiya Mark Guyula on a treaty platform, the incoming Labor Premier signalled his interest in opening treaty discussions.\footnote{Helen Davidson, ‘Northern Territory Labor Government Announces Majority Female Cabinet’, The Guardian (online), 12 September 2016 <https://www.theguardian.com/australia-news/2016/sep/12/northern-territory-labor-government-announces-majority-female-cabinet>.}

Even before these treaty developments began, Aboriginal and Torres Strait Islander peoples had in many ways already become involved in processes of agreement-making that are not so far removed from treaties. While the bulk of agreement-making concerns Indigenous land, and occurs with both the state and private parties (especially mining companies), agreements have also been negotiated on other matters, such as environmental management, health and criminal justice.\footnote{Marcia Langton and Lisa Palmer, ‘Modern Agreement Making and Indigenous People in Australia: Issues and Trends’ (2003) 8(1) Australian Indigenous Law Reporter 1; Marcia Langton et al (eds), Settling with Indigenous People: Modern Treaty and Agreement-Making (Federation Press, 2006).} One of the most notable recent processes has taken place in southwest Western Australia, where the Noongar people have been in negotiations with the Western Australian Government for the
surrender of their native title in exchange for a wide-ranging settlement including land, compensation and community development measures.\textsuperscript{86} While such agreements have not yet entrenched robust forms of Indigenous jurisdiction, they might pave the way for such a development in the future.

Though at this stage it is unclear what outcomes will emerge from the Victorian and South Australian treaty processes, the broad aspirations underlying Indigenous people’s interest in treaty are well known. At a general level, Indigenous demands encompass, as the Barunga Statement put it, ‘a Treaty recognising our prior ownership, continued occupation and sovereignty and affirming our human rights and freedom’.\textsuperscript{87} More specifically, through the negotiation of a treaty or treaties Aboriginal and Torres Strait Islander people typically seek land rights, reparations and compensation, collective autonomy and jurisdiction, representation in settler institutions and the establishment of principles, rights and duties governing the Indigenous–settler relationship into the future.\textsuperscript{88}

With these Indigenous demands in mind, treaties can be fruitfully understood to constitutionally recognise Indigenous peoplehood by establishing a federal framework. So much is clear from the theory of treaty federalism developed by Indigenous scholars in North America, which I discussed earlier.\textsuperscript{89}

First, on the self-rule side of federalism, treaties could include the exercise of either (or both) territorial or personal jurisdiction by Indigenous peoples.\textsuperscript{90} Within that broad compass, treaties could variously guarantee security for Indigenous territories as well as recognise Indigenous jurisdiction over such issues as the use of land and natural resources, education, family arrangements, language, cultural heritage, health, law and order, taxation, private enterprise and so on. Treaties could incorporate secure funding

\textsuperscript{86} Glen Kelly and Stuart Bradfield, ‘Negotiating a Noongar Native Title Settlement’ in Sean Brennan et al (eds), Native Title from Mabo to Akiba: A Vehicle for Change and Empowerment? (Federation Press, 2015) 249.


\textsuperscript{88} See, eg, Aboriginal and Torres Strait Islander Commission, Native Title Social Justice Advisory Committee, Recognition, Rights and Reform: A Report to Government on Native Title Social Justice Measures (Aboriginal and Torres Strait Islander Commission, 1995) [4.79]–[4.87].

\textsuperscript{89} See above nn 50–5 and accompanying text.

arrangements for the financing of Indigenous self-rule, thereby addressing the insecurity of funding experienced by the current institutions of the Indigenous sector.  

Second, beyond making arrangements for Indigenous self-rule, treaties could also specify the terms of shared rule between Indigenous and settler institutions. Accordingly, they could address areas of concurrent or exclusive settler jurisdiction – laying out, for instance, the scope and limits of Indigenous peoples’ powers to conduct foreign relations as against the external affairs powers of the settler state. Treaties could specify principles and rights disciplining the exercise of settler jurisdiction over Indigenous peoples, like the broad principles set out in the Treaty of Waitangi, which provide a general framework for Māori–Crown negotiations.  

And subject to constitutional formalities, treaties could provide for Indigenous representation in settler institutions, such as seats in Parliament or an Indigenous parliamentary advisory body along the lines suggested by Pearson.  

The world of Indigenous–settler treaty-making is multitudinous and complex, and this discussion has only sketched its broad outlines. Left out of the picture are many questions and problems. There are difficult decisions to be made about who should be the treaty partners, what legal and political mechanisms should be involved in implementing and enforcing a treaty, and numerous constitutional niceties within the Australian legal system. I cannot hope to address those questions here (though I reflect on some of the difficulties in the concluding chapter of the thesis). My main goal has been to show that treaty-making as conceived by Aboriginal and Torres Strait Islander peoples can be usefully understood to establish federal relationships of self-rule and shared rule between Indigenous and settler polities – relationships which constitutionally recognise Indigenous peoplehood.

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92 See further Chapter 4.


Most easily comprehended in federal terms are the proposals to recognise Indigenous peoplehood by establishing Indigenous States or Territories within the Australian federation. The idea of an Aboriginal State was proposed as early as the 1920s, when white humanitarians advocated (and Aboriginal people equivocated about) an Aboriginal State in the Northern Territory or South Australia to protect Aboriginal peoples from the depredations of white contact.\textsuperscript{95} Aboriginal activists involved in the 1972 Aboriginal Tent Embassy demanded that the Northern Territory be made a State with a predominantly Aboriginal Parliament.\textsuperscript{96} More contemporary proponents of Indigenous States and Territories can and do draw upon the (now former) example of Norfolk Island as an Australian precedent for small-scale but robust self-governance, and upon the Canadian example of Nunavut, a Canadian Territory governed and populated predominantly by Inuit.\textsuperscript{97}

In the Torres Strait Islands, there is a long history of Islanders demanding greater autonomy from the settler state, which they have at times sought to fulfil through the creation of a distinct Australian Territory for the Torres Strait Islands.\textsuperscript{98} Eddie Mabo had been an early proponent of Torres Strait Islander autonomy, advocating in 1976 for the Torres Strait to become ‘an autonomous region within the Commonwealth of Australia with its own sovereign rights and the right to secede’.\textsuperscript{99}


\textsuperscript{97} See, eg, Noel Loos, ‘Koiki Mabo: Mastering Two Cultures – A Personal Perspective’ (1996) 5 Lectures on North Queensland History 1, 11; Aboriginal and Torres Strait Islander Commission, above n 88, [3.31]; Mansell, ‘Aboriginal 7th State’, above n 16.


Though at times in the 1980s some Torres Strait Islanders pursued total independence from Australia – including by legal action in the High Court challenging the validity of the Islands’ annexation in the late 19th century – Islander aspirations have more typically been for self-governing Territory status within the Commonwealth federation.100 Islander demands for their own Territory have been met with relative open-mindedness by Australian governments – with, for instance, Queensland Premier Anna Bligh in 2011 petitioning the Federal Government to advance Territory status for the Torres Strait Islands.101

Members of the Aboriginal Provisional Government such as Michael Mansell have also advocated for the creation of a separate Aboriginal State.102 Territorially comprised of existing Indigenous landholdings, this Aboriginal State would be a pan-Indigenous jurisdiction, with a single government having authority over Indigenous peoples and their territories, though it could make provision for the application of Aboriginal customary law in certain areas.103 Along with the powers and rights of existing Australian States, including representation in the Australian Senate, Mansell’s Aboriginal State would also have a degree of international standing, sending its own delegations to international institutions and possibly establishing a system of Aboriginal passports.104 For Mansell, the creation of an Aboriginal State would amount to proper recognition of Indigenous peoplehood: something achieved in different ways for the peoples of East Timor, Nunavut, Scotland and indeed ‘more than 80 former colonies’ since 1945, but so far denied to Aboriginal people in Australia.105

That Indigenous States and Territories would involve federal arrangements of Indigenous self-rule and shared rule is plain. As for self-rule, an Indigenous State or

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102 Mansell, Treaty and Statehood, above n 16; Mansell, ‘Aboriginal 7th State’, above n 16. Unfortunately, I was unable to obtain a copy of Mansell’s recent book prior to completing this thesis.
104 Ibid 4.
105 Ibid 1.
self-governing Territory would be afforded territorial jurisdiction with either plenary authority or enumerated powers in particular areas, such as land administration, natural resource management, education, taxation, and law and order.\textsuperscript{106} Indigenous jurisdictions could be incorporated into the redistributive funding arrangements that apply to existing States and Territories and in this way would gain greater funding security and autonomy than the Indigenous sector currently enjoys.\textsuperscript{107} In terms of shared rule, Indigenous jurisdictions, as with other States and Territories, would be subject to federal supremacy in areas of concurrent power and barred from legislating in areas of exclusive federal power.\textsuperscript{108} Indigenous jurisdictions could be included in existing intergovernmental arrangements, such as the Council of Australian Governments. And as a further instantiation of shared rule, Indigenous jurisdictions could be afforded representation in Parliament.\textsuperscript{109}

While the prospect of creating Indigenous States and Territories raises many complex and often untested questions of Australian constitutional law, it would seem that these federal arrangements could be pursued through ordinary legislation rather than by amending the \textit{Australian Constitution}.\textsuperscript{110} As Anna Rienstra and George Williams have recently observed, the \textit{Constitution} was drafted with a vision of a dynamic federation in mind and so made the creation of new federal jurisdictions relatively easy.\textsuperscript{111} The creation of new Territories from existing States in the past, such as the Northern Territory (from South Australia) in 1911, has been achieved through legislation passed by the relevant State Parliament and the Federal Parliament.\textsuperscript{112} Though no new States have been created since federation, there is a strong argument that these too could be created by way of ordinary legislation.\textsuperscript{113} Of course, as a matter of democratic legitimacy and political expediency, it would also be vital to obtain the

\begin{itemize}
\item \textsuperscript{106} Ibid 4.
\item \textsuperscript{107} Sanders, ‘Indigenous Order’, above n 91, 11–12.
\item \textsuperscript{108} \textit{Constitution} ss 52, 109, 122.
\item \textsuperscript{109} \textit{Constitution} ss 121–2; Mansell, ‘Aboriginal 7th State’, above n 16, 5.
\item \textsuperscript{110} \textit{Constitution} Ch V. See further Anna Rienstra and George Williams, ‘Redrawing the Federation: Creating New States from Australia’s Existing States’ (2015) 37 \textit{Sydney Law Review} 357.
\item \textsuperscript{111} Rienstra and Williams, above n 110, 360–6.
\item \textsuperscript{112} \textit{Northern Territory Surrender Act 1908} (SA); \textit{Northern Territory Acceptance Act 1910} (Cth).
\item \textsuperscript{113} Commonwealth legislation only, if created purely from an existing Territory; or a combination of State and Commonwealth legislation, if created from an existing State: Rienstra and Williams, above n 110, 366–8.
\end{itemize}
agreement (through referendum or other means) of the Indigenous peoples gaining self-governing status, and maybe also of the jurisdiction from which they are to secede.\textsuperscript{114} Mansell claims that an Aboriginal State, though a creation of ordinary legislation, could not as a matter of Australian constitutional law then be abolished except by way of formal constitutional amendment.\textsuperscript{115} But this claim, while constitutionally arguable, has never been tested in the courts.

\section*{IV Federalism Between Settler and Indigenous Traditions}
Federalism offers a justification for the recognition of Indigenous peoplehood that fits well within the culture and practice of Australia’s existing constitutional system.\textsuperscript{116} As one of the world’s oldest federations, Australia has longstanding experience of dividing sovereignty and sharing rule between a central government and constituent units. Most prominently, those units include the six Australian States, but they also take in the self-governing Territories – the Northern Territory, the Australian Capital Territory and, at least until very recently, Norfolk Island – as well as a handful of small, non-self-governing external Territories.\textsuperscript{117} As I have tried to show in the earlier parts of this chapter, Indigenous demands for recognition as peoples can be advanced and fruitfully understood in federal terms, as claims for self-rule combined with shared rule.

Framed in federal terms, Indigenous peoplehood claims appear not as foreign and threatening to Australian constitutional culture but as fundamentally consistent with it in important respects. When John Howard rejected the idea of a treaty because ‘a united undivided nation does not make a treaty with itself’, he neglected that Australia’s federal \textit{Constitution} is in important respects just that: a compact, a covenant, a treaty between different political communities that united to form a common political

\begin{thebibliography}{99}
\bibitem{114} But see Avigail Eisenberg, ‘When (If Ever) Are Referendums on Minority Rights Fair?’ in David Laycock (ed), \textit{Representation and Democratic Theory} (UBC Press, 2004) 3.
\bibitem{115} Mansell, ‘Aboriginal 7th State’, above n 16, 2–3.
\end{thebibliography}
Indigenous peoplehood claims can be justified as a means of respectfully and consensually, if belatedly, bringing Australia’s original political communities into that political association.

Because federalism in Australia has been traditionally championed by conservatives, federal justifications for Indigenous recognition can also increase its conservative appeal – or at least make conservative opposition more difficult. In ideological inclination if not always in governmental practice, Australian conservatives have conventionally been attracted to federalism as a form of government that is divided and therefore limited, that is closer to the people at the State level and that respects pre-existing political communities. Indeed, there is a venerable if minority strand of conservative thought that insists on the value of creating new States within the Australian federation. And in at least one recent case, that conservative position has translated into sympathy for the creation of Indigenous jurisdictions.

Contemporary proponents of Indigenous constitutional recognition, including those most sensitive to assuaging conservative opposition, have so far neglected the justificatory potential of federalism. Noel Pearson, for instance, has been particularly committed to winning over constitutional conservatives to the cause of Indigenous recognition. Faced with conservative backlash over the spectre of unelected activist courts enforcing a constitutional ban on racial discrimination, Pearson has developed his proposal for an Indigenous parliamentary body in part to preserve, while innovating within, Australia’s tradition of parliamentary sovereignty. But unremarked by Pearson is that his proposal also innovates within federalism, another Australian

118 Quoted in Interview with John Laws, above n 27.
120 Rienstra and Williams, above n 110, 358–9.
122 Pearson, above n 18, 63–7.
constitutional tradition enamoured of conservatives. As I have argued above, it seeks to provide a pan-Indigenous polity a say within the shared rule dimension of Australia’s federal system. Other proposals for recognising Indigenous peoplehood, such as treaty and Indigenous States and Territories, similarly represent extensions of Australian federalism to Indigenous polities. What this demonstrates is that the traditional opponents of Indigenous constitutional recognition might be won over to the cause by appealing to their traditional support for federalism. At the very least, conservatives will be compelled to justify why their support for the federal principle does not extend to political communities that are millennia older than those presently recognised within Australia’s federation.

It is important to acknowledge, though, that Indigenous–settler federalism represents a creative adaptation of Australian constitutional tradition rather than a straightforward continuation of it. First, there is an undoubted dimension of formal innovation in Indigenous–settler federalism, especially if institutionalised through treaty-making. A treaty negotiated between Indigenous and settler polities would in many ways be formally distinct from the basic instrument of Australian federalism, the Constitution. As a conceptual matter, then, conceiving of a treaty as a federal arrangement requires abstracting somewhat from the historical and institutional particulars of Australian federalism to reframe it in terms of a more general political principle – self-rule combined with shared rule. Only then do the connections between the recognition of Indigenous peoplehood through treaty-making and the Australian constitutional tradition of federalism become clear.

Second, Indigenous–settler federalism would involve a reconceptualisation of Australian federalism away from a taken-for-granted, monolithic nationalism and in a more multinational direction. Here, proponents of recognising Indigenous peoplehood can draw support from contemporary federal practices widespread outside Australia. As I showed earlier, federalism in theory and practice is now increasingly seen as a means of enabling the peaceful coexistence of diverse peoples within a single, overarching political association. For instance, the canonical example of Canada, with its distinctive federal arrangements for French-speaking Quebec as well as its treaty federalism with Indigenous peoples, demonstrates that multinational federalism can function relatively well within a liberal-democratic state possessed of a common-law heritage.

In addition to appealing to successful multinational federal practices beyond Australia, proponents of Indigenous constitutional recognition can also draw attention to
aspects of Australia’s federal history that are often neglected. Beyond the six States and two self-governing mainland Territories, Australia’s federation is comprised of several small, external Territories with distinct political communities living under various forms of rule. Most significant among these, at least until recently, was Norfolk Island, a small, culturally distinct community which for several decades exercised a very robust form of self-rule, even including powers over immigration. Beyond these neglected examples within the current Australian federation are several political communities that are no longer part of it: the culturally distinct peoples of Papua, New Guinea and Nauru, over whom the Australian federation ruled for much of its existence.  

At their worst, those practices of rule were deeply arrogant, imperialistic and destructive; at their best, however, they came to accept the importance of Indigenous self-rule, initially within the confines of the Australian federation and then on the basis of complete independence. All of these examples add up to a kind of counter-history of Australian federalism, one that reveals it to be flexible, adaptive and at its best capable of accommodating culturally diverse political communities through varying political arrangements. Reconstructing this vision of Australia’s federal tradition can help in the task of justifying Indigenous peoples’ contemporary demands for recognition of their peoplehood.

Just as the idea of Indigenous–settler federalism represents an effort to creatively adapt while still preserving Australian constitutional tradition, so too does it represent an attempt to remain faithful to Indigenous tradition while innovating within it. This same point has been made by Aboriginal legal scholars Christine Black and Mark McMillan. Both have conceptualised Indigenous peoples’ pre- and post-invasion relationships with one another in federal terms and have proposed federalism as a model for reconstructing Indigenous–settler legal relationships going forward.

On the one hand, Indigenous demands for federal arrangements draw justificatory power from Indigenous peoples’ own practices of self-government, both historical and contemporary, and seek to restore to fuller status and power an original

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124 See above n 117.
126 See generally Dunoon, above n 125.
127 Morris [now Black], above n 2, 294–99; McMillan, above n 2.
Indigenous sovereignty subsequently suppressed and thwarted by the might of settler-colonial rule. As Yolngu leader Yingiya Mark Guyula recently put it in arguing for a treaty, ‘[r]ecognise our power, recognise who we are, recognise that we were here before any law that came and ruled all over us’. Guyula, now a member of the Northern Territory Legislative Assembly, is seeking to negotiate a treaty on behalf of the Yolngu Nations Assembly, for which he is a spokesperson and of which he is a member. The Yolngu Nations Assembly is a regional governmental body representing several Arnhem Land clans, based on the enduring Maḏayin system of law and on its members’ status as ‘inheritors and practitioners of social, cultural, economic and political traditions … which are distinct from those of the dominant society in which we live’. A central aim of Yolngu in seeking settler recognition of their peoplehood through a treaty is to more fully secure the continued vitality of these traditions, of which the arrangements established under a treaty would be an extension.

On the other hand, federal arrangements, in seeking a recognition of Indigenous peoplehood, also involve elements of creative adaptation and cultural change. As Jeremy Webber has argued about projects of Indigenous recognition more generally, ‘[i]nevitably, interests that are recognised are expressed in a form that involves some accommodation to the need for the rights to be intelligible within the broader legal framework’ of the settler state, so that there is always ‘a measure of translation and adjustment in the very act of recognition’. While federal initiatives, such as Indigenous parliamentary representation, treaties and Indigenous States and Territories, certainly have strong affinities with and seek to incorporate Indigenous traditions of self-government, their enactment would also bring Indigenous peoples into new relations of governance and authority, relations that must necessarily be bound up with and intelligible to the settler state. To quote Ronald Niezen, ‘there is no way to defend traditional societies without in some way transforming them – without, above all, taking on some of the trappings of bureaucracy and written law’.


130 Webber, above n 11, 66.

131 Niezen, above n 6, 142.
Consider again the Yolngu Nations Assembly and its quest for recognition through a treaty. The Assembly has emerged not simply as an expression of the Maḏayin system of law but as a means of enabling ‘engagement between the indigenous Maḏayin form of tribal government and the Westminster forms of governments’.  

Though firmly based in the Maḏayin legal system, the Assembly has also been designed to be ‘compatible with Australian Systems of Law’ and has accordingly been incorporated under the Corporations (Aboriginal and Torres Strait Islander) Act 2006 (Cth). The Assembly’s Constitution translates Yolngu legal concepts and institutions into British (or more generally European) ones, such as peace, order and good government (mägayamirr), separation of powers (Yothu Yindi) and parliament (Därra). If the Assembly were recognised through federal arrangements with the settler state – say, a guaranteed form of Yolngu self-rule – this recognition would further embed the Yolngu into the settler state’s practices and ideologies of governance, producing further adaptations of Yolngu traditions (and adaptations of settler traditions as well). In recent work studying the constitutional systems of the Gunditjmara and Ngarrindjeri peoples, Anna Dziedzic and Mark McMillan have likewise emphasised the extent to which those Indigenous systems have adapted to and become entangled with the settler legal order.

Even as they aim to respect an Indigenous peoplehood with roots in pre-colonial traditions, federal forms of constitutional recognition therefore also involve adaptation of those traditions by Indigenous peoples. That Indigenous peoples might seek out recognition on these terms is consistent with the capacity for choice embedded in the notion of self-determination, and such choices deserve respect. As Tim Rowse has observed:

Indigenous self-determination … is not only conservative and restorative, but also exploratory of progressive change. Self-determination necessitates a politics of cultural revision and adaptation in which Indigenous people cannot avoid debating among

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133 Ibid; *Rule Book of Yolngu Nations Assembly*, above n 125, 1.
themselves what elements of their traditions they wish to preserve and what they would give up for the sake of adaptive innovation.136

In proposing various federal arrangements, Aboriginal and Torres Strait Islander people are engaging in such a ‘politics of cultural revision and adaptation’. In debating ways for their peoplehood to be constitutionally recognised and their self-determination more fully realised, Indigenous people are pursuing innovation as well as preservation and restoration. Their voices ought to be heard. Proper respect for Indigenous peoplehood demands no less.

V Conclusion
As Aboriginal and Torres Strait Islander peoples continue struggling in the coming years for the recognition of their sovereignty and right of self-determination – for the recognition of their peoplehood – their demands will confront conceptual and justificatory burdens. I have argued in this chapter that federalism provides a valuable constitutional framework and language for meeting those burdens. Understood as self-rule combined with shared rule, federalism can meet the conceptual challenge of reconciling diversity with unity, Indigenous collective autonomy with an ongoing Indigenous–settler constitutional relationship, international recognition with constitutional recognition. And in fact, it provides a useful way for conceptualising three major contemporary Indigenous peoplehood demands: Indigenous parliamentary representation, treaties, and Indigenous States and Territories. As a language of normative and political justification, federalism also fits comfortably within Australia’s constitutional traditions, even as the idea of Indigenous–settler federalism innovates within them. Likewise, federalism and the arrangements that fall within its remit respect and recuperate, as well as renovate, Indigenous traditions of self-rule.

If Indigenous peoples can succeed in these contemporary struggles to have their peoplehood constitutionally recognised, that will not, however, prove the end of the matter – it will not be the perfected endpoint of Indigenous and settler peoples’ constitutional relationship. These struggles take place within messy, historically particular circumstances that constrain their potential and longevity in a range of ways.

New federal forms of recognition, imperfectly just compromises from the outset, would also face a future in which the Indigenous identities underlying them are liable to contestation and change, and in which their implementation can travel in different directions, including deeply disappointing ones. Constitutionally recognising Indigenous peoples is about the continual renegotiation of the settler constitutional order in the name of justice, rather than its completion. I turn now to substantiate this argument in the concluding chapter.
Chapter 8
Conclusion

As Australians continue to debate the terms of political association between Indigenous and settler peoples through the language of Indigenous constitutional recognition, that idea remains, to quote Megan Davis once more, an ‘inchoate Australian project’. The aim of this thesis has been to render the contours of that project more definite: to show what constitutionally recognising Aboriginal and Torres Strait Islander peoples is and what it can be expected to achieve. Answering those questions is crucial to understanding the recent history and potential future pathways of Indigenous peoples’ relationship with the Australian settler state. For it is through the constitutional recognition of Aboriginal and Torres Strait Islander peoples that Australians have increasingly come to imagine that relationship’s future, as a means of transcending its questionable past. My approach has been to examine the idea of Indigenous constitutional recognition itself, from both historical and theoretical perspectives (Part I), and then to study Indigenous constitutional recognition as it is manifest in practice through historically situated political struggles (Part II).

While Indigenous constitutional recognition remains a vague, confused and contested language of contemporary debate about Indigenous–settler relations in Australia, to simply lament that uncertainty – or overhastily move to overcome it through one’s own account of recognition – is to miss something important. In a vital sense, the uncertainty and multiple meanings that attach to the idea of recognition are constitutive of, rather than barriers to, adequately understanding it. As I demonstrated in Chapter 2, the history of the language of recognition within Indigenous constitutional politics since the late 1970s reveals the idea to be an indeterminate and malleable one, taken up by different actors – Indigenous and non-Indigenous, conservative and radical, officeholders and activists – for different political purposes at different times. By suspending the desire for a single, coherent meaning of what constitutional recognition means, and first attending to the varying uses to which it has been put, it becomes possible to see constitutional recognition as a flexible language of political contestation.

This is an important insight into what constitutional recognition is. It is not simply a political and legal status (of some kind) enjoyed by Indigenous peoples, or an

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1 Megan Davis, ‘Seeking A Settlement’, *The Monthly* (Melbourne), July 2016, 8, 8.
analytical category for examining Indigenous–settler relations. It is also unmistakeably an actors’ category taken up for various political projects and possessing a varied history in Australian public debate. If this historical understanding of the idea of Indigenous constitutional recognition destabilises – or at least postpones – the quest for conceptual clarity, it also opens up political possibilities in the present and future. By uncovering the diverse ends to which the language of Indigenous constitutional recognition has been put, it reveals that language to be available for appropriation in the present for a range of political projects. To those dismayed by and critical of some of the narrower, more conservative associations of Indigenous recognition, the history of the concept serves as a reminder that it is also available for more progressive, even radical projects of postcolonial reckoning. It serves as a reminder that the language of recognition, so dominant within contemporary discourse over Indigenous–settler relations, presents political opportunities rather than simply constrains them.

But the thesis has done more than simply uncover the multiple strands of recent Australian discourse on Indigenous constitutional recognition: it has also critically reflected on and contributed to that discourse. Contending that debates over Indigenous constitutional recognition reflect a broader political trend around the globe towards identity-based political struggles – the politics of recognition – the thesis has drawn on recent political theory addressing these developments as a way of better understanding the Australian situation. Australian popular and academic conversations about Indigenous constitutional recognition have up until now remained near-oblivious to the insights available from the political theory on recognition and the comparative experiences on which they have been based. The recent Australian conversations over constitutional recognition have also been unreflectively wedded to an overly formalistic account of its ‘constitutional’ side – the contents of big-C Constitutions – thereby neglecting the important role that small-c constitutional norms and structures can play in projects of Indigenous recognition.

Combining political and constitutional theory, I have argued in Chapters 3 and 4 that Indigenous constitutional recognition concerns the struggles by Indigenous peoples to refashion the settler constitutional order, big-C and small-c, in ways that better respect their identities. This account reveals matters of recognition to be a much more expansive, fundamental and enduring dimension of the Indigenous–settler political relationship than might otherwise be gleaned from dominant strands in Australian discourse over Indigenous constitutional recognition.
To render this relatively abstract account of Indigenous constitutional recognition more concrete, I have applied it in Part II of the thesis by studying historically situated political struggles. The two major historical case studies were the 1967 constitutional amendments (Chapter 5) and the enactment of the *Racial Discrimination Act 1975* (Cth) (Chapter 6). Both can be understood as major earlier instances of Indigenous constitutional recognition, though they are not appreciated as such today because of unduly atheoretical and ahistorical contemporary understandings of Indigenous recognition. These reforms involved constitutional changes – significant redistributions of public power – that better respected Indigenous people’s identities as Australian citizens, consistent with widespread Indigenous demands at the time.

Studying successful struggles over constitutional recognition like the 1967 amendments and the *Racial Discrimination Act* in their historical specificity also reveals them to be partial, provisional and incomplete achievements. Relying especially on the work of James Tully, I suggested three reasons for this. First, the horizons of Indigenous–settler politics: imbalances in the power of Indigenous and settler peoples which constrain what can be achieved from the beginning. Second, the horizons of Indigenous identity politics: like all identities, the identities of Indigenous peoples are diverse, contested and changeable, which makes any new form of recognition partial and liable to obsolescence. So far as the 1967 amendments and the *Racial Discrimination Act* are concerned, this point is most strongly reflected in the late 1960s shift from an Indigenous politics of citizenship to a politics of peoplehood. Third, the vagaries of constitutional implementation: new forms of recognition must be implemented on an ongoing basis, and this is a process which can fail or be repudiated in various ways by the state actors tasked with that implementation.

Understanding the shortcomings of these earlier constitutional recognitions of Aboriginal and Torres Strait Islander peoples helps to explain and support new projects of recognition. Consistent with the post-1960s ascendance of peoplehood as a politicised mode of identification among Aboriginal and Torres Strait Islander Australia, those projects most strongly emphasise the need for collective Indigenous autonomy and self-determination as means of respecting Indigenous peoples as peoples. I have argued in Chapter 7 that federalism offers a conceptual framework that is capable of balancing the constitutional and international dimensions that attend the recognition of Indigenous peoplehood. It offers a powerful way of understanding contemporary Indigenous demands to be recognised as peoples: demands for political representation,
treaty and jurisdiction. Federalism also offers a justification for constitutionally recognising Indigenous peoplehood that creatively adapts settler and Indigenous political traditions.

But while new projects of recognition like Indigenous–settler federalism may be supported by an understanding of the failings of earlier ones, that historical experience also cautions against imagining the achievement of postcolonial closure through contemporary and future reforms. Federalism institutionalised through treaty-making, Indigenous parliamentary representation or Indigenous States or Territories might appear to be ultimate and final forms of Indigenous constitutional recognition. As against the 1967 amendments and some of the less far-reaching contemporary proposals to ‘complete’ the Constitution through Indigenous recognition, Indigenous–settler federalism may seem to be a true constitutional completion. But it is not. All of the same factors that rendered the 1967 amendments and the Racial Discrimination Act ‘incomplete’, partial and provisional as Indigenous constitutional recognition apply equally to federal arrangements.

In the remaining part of this conclusion, I examine recent Australian recognition proposals alongside Canadian and New Zealand experience with treaty-making, and offer a broad sketch of the ways in which even robust Indigenous–settler federalism, like all forms of constitutional recognition, is defeasible, not a constitutional endpoint.

I The Incompleteness of Constitutional Recognition

A Horizons of Indigenous–Settler Politics

First, the negotiations over Indigenous constitutional recognition today are beset by deep power asymmetries between Indigenous and non-Indigenous parties. It is obvious from contemporary Australian debates over Indigenous recognition that to even put federal possibilities on the negotiating table, let alone institutionalise them, is profoundly difficult. The most politically feasible quasi-federal option currently possible, an Indigenous parliamentary advisory body, has been put forward by its...
proponents as a compromise, not an ideal position. This demonstrates that Aboriginal and Torres Strait Islander peoples seeking constitutional recognition of their peoplehood are confronted with a daunting task: convincing the settler state and its non-Indigenous constituents to accept significant redistributions of political power. To the extent that federal arrangements also involve financial settlements, secure funding for Indigenous governing institutions and Indigenous control over territories and natural resources, the settler state must also agree to significant redistributions of economic power and resources. And if constitutional recognition is to take place through formal amendment of the Constitution, the task may seem virtually insurmountable. The status quo is weighted extraordinarily heavily in favour of the majority non-Indigenous party. Contemporary struggles over Indigenous constitutional recognition are deeply shaped by the power imbalances that they seek to transcend.

This is not to say that federalism is an impossible dream for Indigenous peoples, but that making it a reality would require concerted and likely extended political mobilisation by Aboriginal and Torres Strait Islander peoples and their allies, both inside and outside official processes. Consider the modern era of treaty-making in the Canadian province of British Columbia, where few treaties were signed historically. The contemporary process came about through decades of Indigenous political protest and direct confrontation, litigation, coalition-building and strategic engagement with government – what Ravi de Costa has characterised as ‘a campaign of systematic economic and political disruption’.

This Indigenous success in prompting the settler state’s willingness to treat reflects the hard truth that ‘states view treaties primarily as an instrument for managing their own interests’. To bring the settler state to the negotiating table, it must see treaty-making as serving its own interests, and that is only likely to happen through political mobilisation which makes treaty-making – and not intransigent adherence to the status quo – seem like the best response to Indigenous demands. Indigenous practices of

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5 Tully, ‘Consent’, above n 3, 246–52.
7 De Costa, above n 6, 2.
enacting self-determination – from creating Aboriginal passports to reclaiming territories – can be politically potent strategies that may even change the realities on the ground, giving the settler state little choice but to recognise them. Wider political contingencies can also be significant in creating openings for proponents of constitutional recognition to exploit. A good example is the campaign for the 1967 constitutional amendments, which utilised the political opportunities made available in an era of anti-racist and anti-colonial internationalism and associated Cold War rivalry.

But even when federal possibilities to recognise Indigenous peoplehood can be seriously put on the table, the power inequalities built into the status quo – though mitigated, perhaps substantially, through new forms of constitutional recognition – continue to constrain the outcomes. Consider once more the British Columbian treaty-making process. In what is no small advance, this process recognises Aboriginal peoples as First Nations and makes it possible for those First Nations to negotiate for their self-government and jurisdiction, as well as land rights, to be recognised and constitutionally protected. However, as Andrew Woolford has observed in his major study of the treaty process, even as it provides new openings for constitutional recognition:

> the material and symbolic advantages possessed by the non-Aboriginal governments provide them with the opportunity to define the nature of the negotiations in a manner that privileges visions of certainty that affirm the socioeconomic and legal status quo over visions of justice that demand a serious moral reckoning with the continuing harms of colonialism.

These circumstances seriously limit the territories that are available for Indigenous reclamation, the financial resources that will be redistributed for reparation and for financing Indigenous self-government, and the jurisdictional power Indigenous peoples are recognised as possessing.
Federal forms of Indigenous recognition are therefore not some perfect, final achievement but a compromise negotiated in circumstances where the Indigenous parties are at a systematic disadvantage. Though these power imbalances are not an inevitable feature of Indigenous–settler relations – much historical treaty-making in North America and New Zealand took place in far more equal conditions – after centuries-long entrenchment of settler dominance, these inequalities are now a pervasive feature of most post-colonial societies, including Australia, and their transcendence will not come quickly or easily. Federal arrangements like treaties can be very significant forms of Indigenous constitutional recognition that provide greater respect for Indigenous peoplehood. However, because they are imperfect compromises that fail to fully redress injustice from the outset, they should be understood as provisional and renegotiable, not final.

B Horizons of Indigenous Identity Politics

The second reason why federal forms of constitutional recognition should be seen as provisional and incomplete is the multiple, internally contested and changeable nature of identity. To begin with, there are Indigenous debates over the relative importance of Australian citizenship and Indigenous peoplehood as bases of identity, with one (conservative) extreme effectively rejecting Indigenous peoplehood and another (radical) extreme rejecting Australian citizenship – and many more people in the middle who see the value of both. This is not to deny the possibility of broad Indigenous agreement at a particular time on forms of constitutional recognition appropriate to the differing facets of Indigenous identity. Indeed, such broad agreement seems to have


been achieved today in favour of a constitutional ban on racial discrimination (recognising citizenship) combined with some sort of constitutional recognition of Indigenous peoplehood (eg, treaty-making, an Indigenous advisory body). But a comparison with the earlier experience of the 1967 amendments, which were supported by a broad Indigenous concurrence in favour of privileging Australian citizenship over a nascent Indigenous peoplehood, shows how historically contingent and mutable the politics of identity are (see Chapter 5).

The issue of how to reconcile settler citizenship, Indigenous peoplehood and other modes of identification – and the forms of recognition associated with them – is contested among Indigenous people, changes over time and is not amenable to final resolution. Take as another example the constitutional recognition of Indigenous peoplehood achieved in Canada in 1982 under s 35 of the Constitution Act 1982, which protects Aboriginal and treaty rights. In a constitutional conference only one year after s 35’s enactment, Aboriginal women’s groups successfully pushed – against the resistance of many Aboriginal band leaders and the Assembly of First Nations – for a new subsection guaranteeing Aboriginal and treaty rights equally to men and women. In subsequent constitutional negotiations over Indigenous rights, including to self-government, these tensions about the relationship between Indigenous peoplehood and gender identity and equality have continued to surface, though there is now wider Indigenous acceptance of the importance of securing gender equality in the constitutional recognition of Indigenous peoplehood. The ultimate point is this: because recognition is about respecting identity, forms of recognition must be as open to supplementation, contestation and change as identity is.

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17 Canada Act 1982 (UK) c 11, sch B s 35 (‘Constitution Act 1982’). See further Michael Asch, Home and Native Land: Aboriginal Rights and the Canadian Constitution (UBC Press, 1984); Ardith Walkem and Halie Bruce (eds), Box of Treasures or Empty Box: Twenty Years of Section 35 (Thetys Books, 2003).


Beyond the contention between different bases of Indigenous identity, there is also Indigenous debate about the substance of each identification itself, including Indigenous peoplehood. This is a matter of who is the ‘self’ in self-determination. If federalism constitutionally recognises an Indigenous people, what characteristics define that collectivity?20

Embedded within federal-type proposals to constitutionally recognise Indigenous peoplehood, there are different and more or less equally plausible conceptions of what constitutes an Indigenous people. One dominant vision sees Indigenous peoplehood based at a local or regional level on custom, kinship and ancestral or historical connections to particular territories.21 This conception of Indigenous peoplehood would be constitutionally recognised by subnational treaties (as in North America) and by the creation of regional Indigenous States or Territories, as for the Torres Strait Islands. Another leading vision is of an Australia-wide (or State-level), pan-Indigenous people – an ‘imagined community’ based predominantly on a common Indigenous consciousness of a shared history of colonial dispossession, discrimination and oppression.22 This pan-Indigenous conception of peoplehood typically implicitly underlies proposals for an Indigenous parliamentary advisory body, Indigenous parliamentary seats and a national treaty, though these proposals sometimes seek to accommodate more local Indigenous peoplehood as well.23

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21 Gover, above n 20; Julia Martinez, ‘Problematising Aboriginal Nationalism’ (1997) 21 Aboriginal History 133.

22 On the historical emergence of this pan-Indigenous peoplehood, see especially Chapter 5 of this thesis. On nations as imagined communities, see Benedict Anderson, Imagined Communities: Reflections on the Origin and Spread of Nationalism (Verson, rev ed, 2006).

peoplehood also underlies Mansell’s proposal for an Aboriginal State, even as it too seeks to accommodate local Indigenous peoplehood.  

To take a comparative example, different visions of Indigenous peoplehood continue to contend with one another in claims made under New Zealand’s Treaty of Waitangi. Andrew Sharp has captured these competing visions under the labels of ‘Māori constitutionalism’, recognising a pan-tribal Māori people, and ‘whakapapa constitutionalism’, recognising distinct tribal collectives. In fact, the Māori ‘Treaty partners’ recognised today are arguably even more diverse than this, including not only local tribal groups and pan-Māori groupings and organisations, but also Māori service delivery organisations and urban collectives.

It is certainly possible at a given time to achieve broad Indigenous agreement on the forms of recognition (if any) appropriate to different understandings of Indigenous peoplehood. And indeed different conceptions of Indigenous peoplehood are not necessarily mutually exclusive. For instance, a pan-Indigenous people might be constitutionally recognised through an Indigenous parliamentary advisory body at the same time as local Indigenous peoplehood is constitutionally recognised through subnational treaty-making. Or perhaps local Indigenous nations could be guaranteed representation in an Indigenous parliamentary advisory body – itself a pan-Indigenous organisation.

But because identity is not something amenable to final resolution, decisions about how to constitutionally recognise Indigenous peoplehood should not be closed off to future revisitation. Identity is too diverse, contestable and subject to change to ground a form of Indigenous constitutional recognition that is not similarly contestable and revisable.


27 Morris, above n 23, 190.
The third reason why federal forms of Indigenous recognition should be seen as provisional is that their implementation is an ongoing, uncertain process which can fall short or even fail.\(^28\) Once enacted, constitutional recognition can typically be implemented in a host of ways by the state actors whose power the new constitutional norms are supposed to discipline. Those state actors will be influenced by a range of factors, including but certainly not limited to the political mobilisations of Aboriginal and Torres Strait Islander peoples themselves. The implementation of constitutional recognition is a process that can therefore fare better or worse from the perspective of respecting Indigenous peoplehood. Throughout that process, therefore, struggles over constitutional recognition continue.

To consider one example from the contemporary Australian debate, the establishment of an Indigenous parliamentary advisory body represents an innovative attempt to give Indigenous peoples more of a say in the way that settler rule over them is exercised while mollifying conservative concerns about intrusions – whether judicial or Indigenous – into parliamentary sovereignty.\(^29\) Accordingly, the body would be advisory only.\(^30\) Though the body would be written into the Constitution, almost all specifics of its composition and functions would, for understandable reasons, be left to legislation.\(^31\)

While this idea for constitutional recognition has much merit, there are nonetheless very real questions about whether this body would be meaningfully consulted by the Parliament, whether its advice would be heeded in national lawmaking about Indigenous peoples, even whether its very existence could be assured.\(^32\) Wary of Australia’s ill-fated Inter-State Commission and Aboriginal and Torres Strait Islander

\(^{28}\) Tully, ‘Identity Politics’, above n 13, 532. See also Tully, ‘Struggles’, above n 3, 476.

\(^{29}\) Pearson, above n 4, 63, 66–7.


\(^{31}\) Morris, above n 23; Twomey, above n 30.

Commission, proponents of an Indigenous advisory body have suggested useful strategies for ensuring the body’s effectiveness and longevity. One institutional possibility not yet contemplated would be to constitutionalise non-justiciable directive principles of state policy in Indigenous affairs, so as to foster the emergence of constitutional conventions within the political branches when dealing with the advisory body. But whatever its design, there would still be wide latitude for the body to be ignored, circumvented, repudiated or even abolished by the state actors tasked with its implementation. That the body would almost certainly be dependent on the settler state for its funding offers an effective and well-worn mechanism for the body’s undermining.

Beyond the specifics of institutional design, the advisory body would no doubt enjoy the stature and legitimacy conferred both by the broad democratic pedigree of a constitutional referendum and by entrenched constitutional status. As I argued in Chapter 5, the 1967 referendum and its preceding campaign altered Australian constitutional culture in ways that exceeded the spare, underdetermined constitutional amendments themselves. The same reshaping of constitutional culture might occur with a successful referendum over an Indigenous parliamentary advisory body. But even if it did, the 1967 amendments demonstrate the defeasibility of such an achievement. As the 1967 referendum mandate grew more distant and the ideologically unsympathetic Howard Government entered a lengthy period of government, that constitutional culture was again transformed, in ways that disavowed the constitutional recognition achieved by the referendum. My point here is not to denigrate what is a worthy proposal to constitutionally recognise Indigenous peoplehood but to emphasise that its achievement must be understood as contingent, provisional and certainly not guaranteed into an uncertain future.

For illustrative comparative experience, consider again the New Zealand experience with the Treaty of Waitangi. For over a century, the Treaty was all but ignored by the New Zealand Government – like many treaties in North America, whose

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33 See especially Morris, above n 23, 179–92.

34 For a more general endorsement of these kinds of constitutional provisions, see Jeff King, ‘ Constitutions as Mission Statements’ in Denis J Galligan and Mila Versteeg (eds), Social and Political Foundations of Constitutions (Cambridge University Press, 2013) 73.

35 Appleby, above n 32, 104–5.

36 Morris, above n 23, 185, 187.
terms and spirit have for much of their history been marked by neglect and violation by the settler parties. The Treaty’s revitalisation within New Zealand constitutionalism from the 1970s was not preordained but the product of contingent historical circumstances, including Māori activism, Pākehā legal improvisation in response, the institutional success of the Waitangi Tribunal, sympathetic Pākehā governments, strategic Māori litigation and supportive judicial interventions, and even opportunities opened up by neoliberal policies such as privatisation of state assets. Revealing the contingency of the Treaty’s ascendance is the fact that through the 1970s and into the early 1980s, radical young Māori activists proclaimed that the Treaty was ‘a fraud’ that failed to properly recognise Māori sovereignty. If the Treaty’s place as an important and legitimate constitutional recognition of Māori peoplehood seems secure today, that status has only been a product of the past three or four decades.

And while few Māori proclaim the Treaty to be a fraud anymore, many Māori have found much to criticise in the way the Treaty has been interpreted and implemented (or failed to be implemented) by state actors since its revitalisation. The most significant recent episode concerned the Parliament’s decision in 2004 to legislatively constrain Māori common-law rights to the foreshore and seabed, arguably violating the Treaty and its principles in the process. Accordingly, there are regular demands from Māori for the Treaty to be reinterpreted, supplemented and strengthened, including through judicially enforceable constitutional entrenchment and increased

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37 On the Treaty’s history, see Orange, above n 12. For a history of treaty-making in North America, see, eg, Francis Paul Prucha, American Indian Treaties: The History of a Political Anomaly (University of California Press, 1997).


Māori autonomy. If the Treaty is ‘always speaking’, as it is often said today, the substance and implications of what it says – a bilingual document composed mainly of high-level principles – remain contested and open to ongoing development and revision.

As for finding enduring, federal-style arrangements to constitutionally recognise Indigenous peoplehood, the Treaty may offer the most that can be expected: a constitutional focal point, a channel for continual disputation and negotiation, a set of constitutional principles subject to reinterpretation and supplementation. That the Treaty will continue to play such a role into the future seems likely – though, if past neglect is any indication, it is by no means inevitable.

In the Australian context, there is the possibility that a similarly durable constitutional recognition of Indigenous peoplehood may be found, perhaps in a nationwide treaty like the Treaty of Waitangi. Then again, as a form of Indigenous constitutional recognition, the Treaty has been sanctified by time and by its constitutive role in New Zealand’s political existence, and there are considerable difficulties trying to belatedly manufacture these in contemporary Australian circumstances. Moreover, the Treaty was negotiated in conditions where the Indigenous partners possessed much more bargaining power than do the Aboriginal and Torres Strait Islander peoples seeking constitutional recognition today. In the Australian context, therefore, maybe the forms of Indigenous constitutional recognition will continue to be more multiple and prone to obsolescence than the Treaty seems, though the Treaty is certainly no less subject to the vagaries of constitutional implementation.


This is not to say that Australia is entirely bereft of historical precedents that could serve a similar constitutional function to the Treaty in recognising Indigenous peoplehood in Australia. See, eg, for New South Wales (and perhaps Australia as a whole), the official injunction to Captain James Cook to take possession of parts of Australia ‘with the consent of the natives’: Secret Instructions to Lieutenant Cook, 30 June 1768, Documenting Our Democracy <http://www.foundingdocs.gov.au/item-did-34.html>; see, eg, in South Australia the protections of Aboriginal rights outlined in Letters Patent Establishing the Province of South Australia, 19 February 1836, Documenting Our Democracy <http://www.foundingdocs.gov.au/item-sdid-38.html>.

Note that the Treaty is also supplemented by Māori seats in Parliament, and so is not singular as a form of constitutional recognition in any case. The Treaty is also not the only historical
II  Concluding Remarks

Where does all of this leave contemporary and future struggles for the constitutional recognition of Aboriginal and Torres Strait Islander peoples? For those committed to just relations between Indigenous and settler peoples, these conclusions about the incompleteness of Indigenous constitutional recognition may be sobering, but they should not be disabling. New forms of Indigenous recognition may be imperfect and provisional, but they can still be vital achievements towards a just postcolonial reordering of public power. So much is clear from the accomplishments of the 1967 referendum and the *Racial Discrimination Act*, and from reforms in New Zealand and Canada for the constitutional recognition of Indigenous peoplehood. If these developments dispel fantasies of constitutional completion, they simultaneously demonstrate the significance of constitutional reform.

They suggest, too, that struggles over constitutional recognition continue after the negotiation of new forms of recognition. For supporters of Indigenous recognition, this realisation calls simultaneously for ongoing action to overcome the enduring injustices that constrain political possibilities in the present and future, for an openness to revising existing constitutional arrangements as circumstances change, and for vigilance as state actors implement earlier promises to respect Indigenous peoples within settler constitutional practices. It calls for an ongoing contestation of the settler constitutional order in the name of just relations between those peoples indigenous to the place we now call Australia and those who have colonised it.

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