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# WHAT IS CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES?

by Dylan Lino

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‘Constitutional recognition’ has emerged as a dominant language through which Australians now debate what is owed to Aboriginal and Torres Strait Islander peoples by the settler state. But what is it? There are different ways of answering that question, depending on the goal. If one’s goal is to support a particular political project—be it legal reform, nation-building, Indigenous empowerment, conservative resistance or some combination—then one will simply adopt an account of constitutional recognition to suit that project. But a different methodology is needed where the goal is to understand constitutional recognition as a social, political and legal phenomenon. In this article, my goal is to understand rather than to advocate. I begin by exploring two different approaches to understanding constitutional recognition: first, through a brief survey of how, and to what ends, the idea has been used in Australian policy and debate; and second, through a theoretical study of the concept of constitutional recognition. I then attempt to bring these two approaches together, showing how the theory provides a clarifying framework for thinking about the politics of Indigenous constitutional recognition in Australia.

## CONSTITUTIONAL RECOGNITION IN AUSTRALIAN PUBLIC DEBATE AND POLICY

One way to understand constitutional recognition of Aboriginal and Torres Strait Islander peoples is to look at how it has been conceptualised in recent Australian public discourse and policy. This approach, which might be loosely labelled intellectual history, examines how different political actors have used the language of constitutional recognition and for what purposes. I can only hope to provide a selective and cursory survey.

### *THE MINIMALIST POSITION: SYMBOLIC ACKNOWLEDGEMENT*

Probably the most prominent, and certainly the most conservative, vision of Indigenous constitutional recognition is of a legally unenforceable acknowledgement of Indigenous peoples in a written constitution. This idea first came to prominence during the early years of the Howard Government. Reacting against and seeking to contain Indigenous and progressive aspirations for a

wide-ranging postcolonial settlement, the Howard Government developed a proposal—ultimately defeated at a referendum in 1999—for a new, purely symbolic constitutional preamble mentioning Indigenous people.<sup>1</sup> In the wake of that referendum failure, State governments, starting with Victoria in 2004, began stepping into the breach by incorporating symbolic Indigenous recognition sections into their own constitutions.<sup>2</sup> Towards the end of its time in office, the Howard Government revived this idea at the federal level by promising another referendum for a new constitutional preamble, a policy which both major parties then took to the next two elections.<sup>3</sup>

Though this idea of Indigenous constitutional recognition—a symbolic mention in a written constitution—no longer predominates like it once did, it still continues to be prominent within public policy and debate. In late 2015, Western Australia adopted this model of Indigenous constitutional recognition, and it is likely to be adopted soon in Tasmania as well.<sup>4</sup> This understanding of constitutional recognition is reinforced whenever the debate is framed around a written constitution’s ‘silence’ on Aboriginal and Torres Strait Islander peoples.<sup>5</sup> Its adoption has largely been government driven: despite its prominence, the idea has rarely enjoyed enthusiastic Indigenous support on its own, and it has often occasioned vehement Indigenous opposition for its seeming tokenism.<sup>6</sup>

### *THE EXPERT PANEL’S POSITION: SUBSTANTIVE REFORM WITH PRAGMATISM*

Through the work of the 2011–12 Expert Panel on Constitutional Recognition of Indigenous Australians—established by the Gillard Government and comprising 22 Indigenous and non-Indigenous members generally sympathetic to constitutional reform—the debate was broadened to include more substantive, though still *Constitution*-centred, visions of constitutional recognition.<sup>7</sup> In achieving this, the Expert Panel was aided by the Gillard Government’s terms of reference, which left the idea of ‘Indigenous constitutional recognition’ undefined and therefore malleable.<sup>8</sup> The Expert Panel was also pressed in its nationwide consultations,

especially with Indigenous communities, to recommend 'substantive' reforms rather than 'mere symbolism' in interpreting the meaning of constitutional recognition.<sup>9</sup> But panel members clearly felt the need for a moderating pragmatism in the face of a difficult-to-amend *Constitution* and potential conservative opposition.<sup>10</sup>

The Expert Panel's vision of Indigenous constitutional recognition supplemented symbolic acknowledgement of Indigenous peoples with more substantive reform, and also extended the concept of recognition to a repudiation of 'race' and racial discrimination. On the symbolic side, the Expert Panel recommended the repeal of s 25 of the *Constitution* (a defunct provision which contemplates disqualification from voting on the basis of race) and the replacement of s 51(xxvi)'s 'race power' (the present constitutional basis for many Indigenous-specific federal laws) with a new Indigenous-specific power that incorporates preambular provisions acknowledging Indigenous peoples.<sup>11</sup> Another largely symbolic recommendation was for a new provision acknowledging the importance of both English and Indigenous languages.<sup>12</sup>

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More far-reaching was the Expert Panel's proposal for a general constitutional ban on racial discrimination by Australian governments, without which, said the Panel, Indigenous recognition would be 'incomplete'.<sup>13</sup> It framed this and its other recommendations as a counterpoint to the long history of exclusionary and discriminatory settler nationalism, under which Indigenous peoples had frequently suffered.<sup>14</sup> The idea of constitutionalising a ban on racial discrimination received wide endorsement from Indigenous and non-Indigenous people at the time and continues to have broad support.<sup>15</sup> But this idea, though modest by comparative and international standards (which the Expert Panel duly referenced), has encountered considerable conservative resistance, chiefly because of its potential to empower the judiciary and undermine the prerogatives of the political branches.<sup>16</sup> That resistance has prompted new ideas to mollify conservative concerns, such as a more confined, Indigenous-specific ban on discriminatory federal laws, as well as the creation

of an Indigenous body to advise parliament when laws are made about Aboriginal and Torres Strait Islander peoples.<sup>17</sup>

### **INDIGENOUS OPPOSITION: TREATIES AND SOVEREIGNTY**

Since the Expert Panel handed down its report in early 2012, Indigenous opposition to constitutional recognition has been growing in visibility. This position negatively contrasts constitutional recognition with the negotiation of treaties and the recognition of Indigenous sovereignty. 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.<sup>18</sup> The Victorian Government subsequently committed to treaty negotiations, which are ongoing.<sup>19</sup> During the Expert Panel's consultations some five years earlier, and then during the more recent work of a Parliamentary Joint Select Committee on the issue, Indigenous participants often raised the issues of treaty, Indigenous sovereignty and self-determination. But both the Expert Panel and the Joint Select Committee declined to incorporate these ideas into their recommendations about the content of constitutional recognition.<sup>20</sup> For the Expert Panel, the reason was not that treaty and sovereignty were distinct from constitutional recognition, but that they were too politically controversial as manifestations of it.<sup>21</sup> The Joint Select Committee, by contrast, framed the issues of treaty and sovereignty as separate from constitutional recognition, to be pursued (if at all) in a different process and at a later date.<sup>22</sup>

The Indigenous critique of constitutional recognition is based on several different arguments and motivations. The critique stems in part from the strong ongoing association between constitutional recognition and purely symbolic reforms, as well as a sense of exclusion from and suspicion of debates over constitutional recognition, which have, since the Expert Panel's consultations, been driven by political elites (including conservatives) and a government-funded 'Recognise' campaign.<sup>23</sup>

But more fundamentally, Indigenous critics of constitutional recognition often also argue that it leaves too little space for forms of collective Indigenous autonomy and self-rule.<sup>24</sup> There is often, too, a sense among these critics that starting with the Australian *Constitution* 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 stress the need for a more foundational starting point in the Indigenous-settler relationship, such as a treaty.<sup>25</sup> The idea is that to start from the *Constitution* takes too much of settler sovereignty (of which the *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.

This broadbrush and selective survey does not give a single answer to the question of what constitutional recognition is, nor does it supply criteria for adjudicating what the 'right' answer is. Instead, it provides a sense of what Cobble Cobble legal scholar Megan Davis has called 'competing notions of constitutional recognition': the range of uses to which the language of constitutional recognition is put within contemporary Australian discourse and policy, as well as the political projects served by those uses.<sup>26</sup> The approach shows 'constitutional recognition' to be an indeterminate and malleable concept, one available for relatively conservative ends but also for more substantive and reformist projects, though not so much in practice for Indigenous sovereigntist projects.

### CONSTITUTIONAL RECOGNITION IN THEORY

A different way of understanding constitutional recognition is to take a step back from the rough-and-tumble of current political debates and think more deeply about the central concept through which those debates are channelled. The debates over Indigenous constitutional recognition have understandably not been particularly theoretical, serving as they do the ends of practical politics and (technical legal analyses excepted) being conducted in the registers of practical politics as well. Adopting a theoretical approach can help to clarify the kinds of political projects supported by constitutional recognition and the normative justifications underpinning them. It shows that claims for constitutional recognition are demands by particular groups to have their identities respected within the constitutional order that governs them.

### THE POLITICS OF RECOGNITION: RESPECT FOR IDENTITY

Over the past two decades or more, there has in fact been a great deal of theory developed about 'the politics of recognition', in Canadian philosopher Charles Taylor's influential coinage.<sup>27</sup> This political theory on recognition has emerged as a way of understanding just the sort of political struggle that is taking place in Australia now over Aboriginal and Torres Strait Islander peoples' constitutional rights and status. These are political struggles over identity, which include a diverse and sometimes conflicting array of claimant groups: minority nations (such as Quebec), ethnic and cultural minorities, women, religious groups, LGBTI people and, of course, Indigenous peoples.<sup>28</sup> Within political theory on recognition, both the claims of Indigenous peoples and claims for *constitutional* recognition have been important concerns.<sup>29</sup>

Identity-based struggles, though often having very long histories, have risen in prominence over the past half-century so that they now rival class-based claims concerning the distribution of wealth, resources and other goods as a basis for political mobilisation.<sup>30</sup> It is important to note that identity-based claims almost always involve claims for redistribution: of intangible forms of status, respect and esteem, of economic resources, of political power, and so on.<sup>31</sup> Nonetheless, there is a valid analytical distinction to be made between identity politics and distributive politics—between recognition and redistribution—as well as a practical one in terms of the primary basis of political mobilisation (identity versus class).<sup>32</sup> 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.<sup>33</sup>

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As much of the political theory emphasises, contests over recognition involve struggles by particular groups to have their identities *respected* within public institutions, practices, norms and symbols.<sup>34</sup> But what exactly does giving respect mean? In a classic essay, Stephen Darwall describes what he (feliculously) terms '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'.<sup>35</sup> As Patchen Markell has put it, being recognised 'makes a difference in the way [a recognised group] is treated'.<sup>36</sup>

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

In some cases, [subordinated 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.<sup>37</sup>

While discussions about recognition frequently focus on respecting identity groups' difference, respecting the *sameness* of identity

groups can, as Fraser and others make clear, also constitute an important form of recognition.<sup>38</sup> Put differently, the ‘liberal form of recognition as “free and equal” individuals ... is a norm of recognition among others’, one conventionally reflected in a common set of citizenship rights among members of a political community.<sup>39</sup> For groups whose status as citizens has been denied within public norms, changing those norms to respect the group members’ citizenship can be an important form of recognition. In other cases, it is supposedly neutral, difference-blind norms that are the problem, for they fail to accord respect to 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’.<sup>40</sup>

**Anything short of a complete rejection of the state’s existence brings Indigenous claims—including demands for the extensive reallocation of sovereignty and territory—back into the realm of recognition politics, and the reciprocal recognition of the settler state which that entails.**

### ***THE UNAVOIDABLE MUTUALITY OF RECOGNITION POLITICS***

There is a necessary mutuality built into the politics of recognition, so that claimant groups seeking state recognition must in the process recognise the state’s existence and sovereignty in turn.<sup>41</sup> As a conceptual matter, recognition-based politics cannot accommodate projects that would seek to dissolve the state in its entirety, such as revolutionary struggles that aim to overthrow and replace the existing state. But, interestingly and perhaps counter-intuitively, the mutuality condition rules out far fewer political struggles than it may first seem and is actually even necessary for many of them to succeed.

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 the current configuration of state sovereignty. In a struggle over recognition, the state must continue to exist in some form, but not necessarily as it is presently constituted. And in practice, transforming the state as it is presently constituted is precisely the aim of many struggles over recognition. Even secessionist movements for independence, which call into question an existing

state’s legitimacy and its sovereignty over them, are a manifestation of recognition politics: they involve a political collective seeking recognition—of an international character—from the state that presently governs them.<sup>42</sup>

What about Indigenous peoples’ claims, which so often and so powerfully challenge the illegitimate origins of the settler state, as well as its historical and contemporary right to rule over them? Here too mutuality is typically involved. Anything short of a complete rejection of the state’s existence brings Indigenous claims—including demands for the extensive reallocation of sovereignty and territory—back into the realm of recognition politics, and the reciprocal recognition of the settler state which that entails. Challenging the origins and contemporary exercise of settler 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 total abolition of the settler state, it can only be addressed through new forms of recognition—whether constitutional or international—that alter the way that settler sovereignty is presently exercised over Indigenous peoples. Rather than ruling out far-reaching Indigenous claims (bar revolutionary ones), recognition-based politics are in fact necessary for their realisation.

### ***CONSTITUTIONAL RECOGNITION: THE BIG-C AND THE SMALL-C***

Finally, what is *constitutional* recognition, as distinct from other kinds of recognition? The simplest answer to that question focuses on those codified instruments called ‘The Constitution’ possessed by most nation-states around the world today.<sup>43</sup> But to limit constitutional recognition to struggles over ‘written constitutions’ is deeply under-inclusive, excluding from consideration a whole host of important institutions, practices and norms that are widely regarded as possessing a constitutional character. These can generally be described as ‘small-c’ constitutional, as distinct from the ‘big-C’ Constitution, and include conventions governing the executive and legislature, important statutes and judicial doctrines, and so on.<sup>44</sup> Their constitutional character comes not from provenance in a written constitution but from the fact that they regulate the basic distribution of public power within the state.<sup>45</sup> The small-c constitutional domain—no less than big-C Constitutions—falls within the remit of contestation over constitutional recognition.

In the context of Indigenous peoples’ struggles over recognition, there is another important institution that, while generally falling outside of written constitutions, is frequently regarded as small-c

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constitutional nonetheless. That institution is the treaty between Indigenous and settler peoples, which has featured in their interactions (though not in Australia) from the very beginning.<sup>46</sup> North American Indigenous scholars have conceptualised Indigenous–settler treaties in constitutional terms as a kind of ‘treaty federalism’.<sup>47</sup> New Zealand’s Tiriti o Waitangi/Treaty of Waitangi is widely accepted not only among Maori but also among Pakeha (including the institutions of settler government) as a constitutional foundation for the polity.<sup>48</sup> For Canadian political theorist James Tully, the early modern practice in North America of ‘treaty constitutionalism’ (as he calls it) is an exemplary form of constitutional recognition.<sup>49</sup>

To summarise this excursion into theory, constitutional recognition involves struggles by particular groups to refashion the constitutional domain—not only big-C Constitutions but also the small-c constitutional order—and to thereby redistribute public power in ways that better respect their identities. The contests over constitutional recognition of Aboriginal and Torres Strait Islander peoples in Australia involve struggles by Indigenous peoples to refashion the settler constitutional order so that it better respects who they are.

### **APPLYING THE THEORY TO AUSTRALIAN DEBATES OVER INDIGENOUS CONSTITUTIONAL RECOGNITION**

That rather abstract theoretical definition of Indigenous constitutional recognition still leaves much room for debate over specifics, but it provides a useful framework for thinking about the contemporary Australian politics of Indigenous constitutional recognition.

First, it helps to clarify that the Indigenous critics of constitutional recognition, while repudiating the phrase and particular institutional visions of it, are in fact proposing their own small-c forms of constitutional recognition. Indeed, the language of recognition is difficult to dispense with in demands surrounding treaty and sovereignty. As Yolngu leader and treaty advocate Yingiya Mark Guyula recently put it: ‘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.’<sup>50</sup>

Second, the theory on constitutional recognition illustrates that what is at stake in the Australian debates are different (though not necessarily mutually exclusive) visions of Indigenous identity—of who Aboriginal and Torres Strait Islander peoples are—and different understandings of the basic arrangements of public power required to respect that identity.

### **SYMBOLIC RECOGNITION**

The proponents of purely symbolic constitutional recognition typically claim to respect Indigenous peoples’ identity as First Peoples. The language of *first* Australians, people, peoples or nations, along with the language of ‘traditional custodians’ and the like, is used in all of the recognition sections inserted into State Constitutions.<sup>51</sup> But by leaving the present distribution of public power undisturbed, these symbolic provisions suggest that, aside from an unjustified symbolic exclusion, the pre-existing constitutional arrangements already properly respect Indigenous peoplehood. These symbolic provisions also often emphasise Indigenous people’s identities as citizens—members of the polity who have made special contributions to it—but again, without seeing any need to redistribute political power in order to better respect this identity.<sup>52</sup>

### **SUBSTANTIVE RECOGNITION**

By contrast, critics of purely symbolic recognition, such as the Expert Panel, argue that the present distribution of public power fails to properly respect Indigenous identity and must be changed accordingly. For the Expert Panel, the central problem was that the existing constitutional arrangements had enabled parliaments and governments in the past to repeatedly discriminate against Indigenous people by misrecognising them as a ‘race’ and disregarding their rights.

To correct this problem, the Expert Panel proposed a constitutional ban on racial discrimination, which would redistribute power away from the political branches to the courts. A constitutional ban on racial discrimination was in part about respecting Indigenous people’s ‘full and equal citizenship’.<sup>53</sup> And to the extent that anti-discrimination norms now protect distinct Indigenous entitlements such as native title, it was about respecting Indigenous peoplehood too.<sup>54</sup> Perhaps most of all, it was about respecting Indigenous Australians collectively as a historically aggrieved people, a people treated unjustly by the largely unrestrained power of settler political institutions, a people who have (as panel member Noel Pearson put it), ‘more than any other group, suffered much discrimination in the past’.<sup>55</sup>

### **SOVEREIGNTY AND TREATY AS CONSTITUTIONAL RECOGNITION**

Proponents of Indigenous sovereignty and treaty are seeking a more respectful redistribution of public power as well, but this time a redistribution to Indigenous polities rather than simply among the institutions of the settler state. They typically claim that settler recognition of more extensive forms of Indigenous political power and jurisdiction is necessary to respect who they are as peoples.<sup>56</sup> And they seek to effect that redistribution, at least initially, through

a small-c constitutional instrument—a treaty—rather than through the *Constitution*.<sup>57</sup>

Pursuing constitutional recognition through treaty is often in part a claim that Indigenous peoples in Australia are equal to Indigenous peoples in other British settler colonies, where treaties have long been a feature of Indigenous-settler interaction.<sup>58</sup> This choice of instrument, an international agreement negotiated between two equal parties, is also bound up with an understanding that Indigenous identity is defined both historically and currently by sovereign and self-determining peoplehood: that Indigenous peoples are the ‘Sovereign Equals’ of the settler state (as the Treaty ‘88 campaign put it) rather than subordinate to it.<sup>59</sup>

## CONCLUSION

Here then are three different ways of understanding what constitutional recognition is. The first, by surveying contemporary Australian debates about constitutional recognition, shows that it is an indeterminate and flexible concept, capable of appropriation for political projects ranging from the conservative to the substantive and far-reaching, if not in practice for the Indigenous sovereigntist position. The second, by studying political and constitutional theory, shows that constitutional recognition involves struggles by particular groups to refashion the constitutional domain (including the small-c constitutional order) and to thereby redistribute public power in ways that better respect their identities. The third, by combining the other two approaches, shows that even the Indigenous critics of constitutional recognition who favour sovereignty and treaty are proposing their own forms of small-c constitutional recognition. And it shows that underlying the varying positions in the Australian debates—from the conservatively minimalist to the substantively reformist and Indigenous sovereigntist—are different understandings both of Indigenous identity and of the ways in which public power should be distributed in order to respect that identity.

*Dylan Lino is completing a PhD on Indigenous constitutional recognition at Melbourne Law School and is currently a Visiting Researcher at Harvard Law School.*

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2 Davis and Williams, above n 1, 77–8.

3 Ibid 79–83.

4 *Constitution Amendment (Recognition of Aboriginal People) Act 2015* (WA); 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).

5 See, for example, Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, Parliament of Australia, *Final Report* (June 2015) v.

6 Davis and Williams, above n 1, 77–8.

7 Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution* (2012).

8 Ibid 3.

9 Ibid, especially 112–15.

10 See the principles the Expert Panel adopted, as well as its terms of reference: ibid 3–4.

11 Ibid chs 4–5.

12 Ibid 131–3.

13 Ibid 167.

14 Ibid ch 1, 167. See also Luke Beck, ‘Jack Balkin’s Constitutionalism and the Expert Panel on Constitutional Recognition of Indigenous Australians’ (2014) 37 *UNSW Law Journal* 407.

15 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 7, ch 6; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 5, ch 5; ‘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.

16 Shireen Morris, ‘Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition’ (2014) 40 *Monash University Law Review* 488, 495–503.

17 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 5, xiv–xv; Rosalind Dixon and George Williams, ‘Drafting a Replacement for the Races Power in the Australian Constitution’ (2014) 25 *Public Law Review* 83, 87–8; Noel Pearson, *Quarterly Essay, Volume 55: A Rightful Place: Race, Recognition and a More Complete Commonwealth* (Schwartz Publishing, 2014) 66–7; Shireen Morris, ‘The Argument for a Constitutional Procedure for Parliament to Consult with Indigenous Peoples When Making Laws for Indigenous Affairs’ (2015) 26 *Public Law Review* 166; Anne Twomey, ‘An Indigenous Advisory Body: Addressing the Concerns About Justiciability and Parliamentary Sovereignty’ (2015) 8(19) *Indigenous Law Bulletin* 6.

18 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>>.

19 Calla Wahlquist, ‘Indigenous Leaders Praise Victoria’s Commitment to Talk About Treaty’, *The Guardian* (online), 3 March 2016 <<http://www.theguardian.com/australia-news/2016/mar/03/indigenous-leaders-praise-victorias-commitment-to-talk-about-treaty>>.

20 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 7, chs 8–9; Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 5, ch 7.

21 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 7, 199–202, 213–13.

22 Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, above n 5, ch 7.

- 23 See, for example, Celeste Liddle, 'A Rightful Place: Correspondence' (2014) 56 *Quarterly Essay* 87, 87–88.
- 24 See, for example, ibid 89; Calla Wahlquist, 'Treaty Push Should Replace Recognise Campaign, Says Yolngu Leader', *The Guardian Australia* (online), 11 March 2016 <<http://www.theguardian.com/australia-news/2016/mar/11/treaty-push-should-replace-indigenous-recognise-campaign-says-yolngu-leader>>; Liam McLoughlin, 'Treaty Yeah! Momentum Grows for National Agreements', *New Matilda* (online), 13 March 2016 <<https://newmatilda.com/2016/03/13/treaty-yeah-momentum-grows-for-national-agreements>>.
- 25 Liddle, above n 23, 90.
- 26 Megan Davis, 'Competing Notions of Constitutional "Recognition": Truth and Justice or Living "Off the Crumbs that Fall Off the White Australian Tables"' in Paula Waring (ed), *Papers on Parliament: Lectures in the Senate Occasional Lecture Series, and Other Papers – Number 62* (Department of the Senate, 2014) 113.
- 27 Charles Taylor, 'The Politics of Recognition' in Amy Gutmann (ed), *Multiculturalism and 'the Politics of Recognition'* (Princeton University Press, 1992) 25.
- 28 James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge University Press, 1995) 1–3; Nancy Fraser and Axel Honneth, 'Introduction: Redistribution or Recognition?' in Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political–Philosophical Exchange* (Verso, 2003) 1–2.
- 29 See especially Tully, *Strange Multiplicity*, above n 28; James Tully, *Public Philosophy in a New Key* (Cambridge University Press, 2008) vol 1.
- 30 See generally Nancy Fraser and Axel Honneth, *Redistribution or Recognition?: A Political–Philosophical Exchange* (Verso, 2003).
- 31 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, 11–26; James Tully, 'Struggles over Recognition and Distribution' (2000) 7 *Constellations* 469, 470–1.
- 32 On the analytical distinction between these types of political projects, see Fraser, above n 31, 50.
- 33 Michael Kenny, *The Politics of Identity: Liberal Political Theory and the Dilemmas of Difference* (Polity Press, 2004) 148.
- 34 See, for example, Taylor, above n 27, 43; Fraser, above n 31, 36; Tully, *Public Philosophy in a New Key*, above n 29, vol 1, 171. Note that Fraser prefers to talk about 'status' instead of 'identity', though I think that less turns on the distinction than Fraser does.
- 35 Stephen Darwall, 'Two Kinds of Respect' (1977) 88 *Ethics* 36, 38.
- 36 Patchen Markell, 'Recognition and Redistribution' in John Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2006) 450, 450.
- 37 Fraser, above n 31, 47.
- 38 See also, for example, Tully, *Public Philosophy in a New Key*, above n 29, vol 1, 166–7; Peter Jones, 'Equality, Recognition and Difference' (2006) 9 *Critical Review of International Social and Political Philosophy* 23, 42.
- 39 Tully, *Public Philosophy in a New Key*, above n 29, vol 1, 294 (emphasis omitted).
- 40 Fraser, above n 31, 7.
- 41 On the state as recogniser, see Patchen Markell, *Bound by Recognition* (Princeton University Press, 2003) 25–30. On the mutuality of recognition more generally, see, for example, Tully, *Strange Multiplicity*, above n 28, 7–14, 24–29, 116–24.
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- 43 For an articulation and defence of this approach to constitutions, see Zachary Elkins, Tom Ginsburg and James Melton, *The Endurance of National Constitutions* (Cambridge University Press, 2009) ch 3.
- 44 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.
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- 46 Saliha Belmessous (ed), *Empire by Treaty: Negotiating European Expansion, 1600–1900* (Oxford University Press, 2015).
- 47 See, for example, Russel Lawrence Barsh and James Youngblood Henderson, *The Road: Indian Tribes and Political Liberty* (University of California Press, 1980) ch 23; Keira L Ladner, 'Treaty Federalism: An Indigenous Vision of Canadian Federalisms' in Miriam Smith and Francois Rocher (eds), *New Trends in Canadian Federalism* (Broadview Press, 2nd ed, 2003) 167.
- 48 Matthew Palmer, *The Treaty of Waitangi in New Zealand's Law and Constitution* (Victoria University Press, 2008) ch 5.
- 49 Tully, *Strange Multiplicity*, above n 28, 116–39.
- 50 Wahlquist, 'Treaty Push', above n 24.
- 51 Constitution Alteration (Preamble) 1999 (Cth) schedule; *Constitution of Queensland 2001* (Qld) Preamble; *Constitution Act 1902* (NSW) s 2(1); *Constitution Act 1934* (SA) s 2; *Constitution Act 1889* (WA) Preamble.
- 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); cf Constitution Alteration (Preamble) 1999 (Cth) schedule ('their ancient and continuing cultures which enrich the life of our country'); *Constitution of Queensland 2001* (Qld) Preamble ('their unique values, and their ancient and enduring cultures, which deepen and enrich the life of our community').
- 53 Expert Panel on Constitutional Recognition of Indigenous Australians, above n 7, xi.
- 54 Ibid 157–8, 162–4.
- 55 Ibid 167.
- 56 See above n 24.
- 57 'At least initially', because treaty proponents sometimes seem to suggest that constitutional amendments could follow a treaty: see, for example, Liddle, above n 23, 89.
- 58 See, for example, McLoughlin, above n 24.
- 59 Treaty '88 Campaign, 'Aboriginal Sovereignty – Never Ceded' (1988) 91 *Australian Historical Studies* 1, 1.