A RIGHTFUL RELATIONSHIP:

TOWARDS A DELIBERATIVE PRACTICE OF CONSTITUTIONAL RECOGNITION OF ABORIGINAL AND TORRES STRAIT ISLANDER PEOPLES IN AUSTRALIA

Amy Preston-Samson

Institute of Comparative Law, Faculty of Law

McGill University, Montreal

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Abstract

Australia is struggling to forge a new relationship between Aboriginal and Torres Strait Islander peoples, non-Indigenous Australians and Australian governments based on mutual understanding, recognition and respect. Constitutional recognition is currently being considered as a step towards such a relationship. Reaching agreement on how to institutionalize such recognition is proving difficult. The greatest disagreement is over whether or not legislative power in relation to Aboriginal and Torres Strait Islander peoples should be limited, for instance, by an express prohibition on discrimination or by a requirement that the laws be beneficial. However, this focus on whether or not legislative power should be expressly limited fails to acknowledge that the majoritarian nature of our current parliamentary model suffers from a democratic legitimacy problem. That is, it does not give Aboriginal and Torres Strait Islander peoples an adequate say over laws and measures that affect their rights and interests.

This thesis argues that: first, a deliberative democratic, rather than liberal/nationalist accommodationist, approach addresses this legitimacy problem in a way that eases the tension between majoritarian democracy and rights entrenchment; and second, democratic experimentalism offers a promising framework for institutionalizing such a deliberative approach. Rather than focusing on Parliament or the courts, it focuses on the public sphere acting through legally empowered deliberative forums to solve problems in a way that is constitutive of a new relationship characterized by mutual understanding, recognition and respect.

L'Australie s'efforce de forger une nouvelle relation fondée sur la compréhension mutuelle, la reconnaissance et le respect entre les peuples autochtones, les Australiens non autochtones et les gouvernements australiens. La reconnaissance constitutionnelle est aujourd'hui envisagée comme étant une étape supplémentaire vers cette nouvelle relation. Cependant, parvenir à un accord sur la façon d'institutionnaliser la reconnaissance s'avère une tâche difficile. Le désaccord le plus important traite de la question de savoir si le pouvoir législatif concernant les peuples autochtones devrait être constitutionnellement limité ou non, en particulier par une interdiction expresse de discriminer ou par une exigence que les lois leur soient favorables. Toutefois, cette attention particulière donnée aux garanties

constitutionnelles ne permet pas de prendre en compte le problème de légitimité démocratique dont souffre notre système parlementaire. En effet, les autochtones n'ont qu'une influence très limitée à l'égard des lois et des mesures qui affectent leurs droits et intérêts.

Le présent mémoire soutient en premier lieu que la théorie de la démocratie délibérative, en apaisant la tension entre démocratie majoritaire et constitutionnalisation des droits, répond plus adéquatement à ce problème de légitimité que les théories libérales ou nationaliste fondées sur les accommodements. En second lieu, ce mémoire avance l'idée selon laquelle la théorie de l'expérimentalisme démocratique offre un cadre prometteur pour institutionnaliser une telle approche délibérative. Cette théorie se concentre sur la façon dont la sphère publique, par l'intermédiaire de forums délibératifs légalement habilités à résoudre des problèmes, pourrait permette le développement d'une nouvelle relation caractérisée par la compréhension mutuelle, la reconnaissance et le respect.

Acknowledgements

Looking back on the trajectory of this thesis project, it is hardly a coincidence that in coming and going from the McGill Faculty of Law I often passed through the door, above which is the inscription "*Audi Alteram Partem.*" This principle seems to have underpinned much of my study, either directly (as it appears in work of James Tully, for example), or indirectly, as an ethos fostered by the Faculty's encouragement to consider views that challenge one's own. Of course, I also acknowledge that this project has, until this point, mostly taken the form of a monologue and there is much more listening to be done.

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Introduction

Australia is struggling to forge a new relationship between Aboriginal and Torres Strait Islander peoples,[1] non-Indigenous Australians and Australian governments based on mutual understanding, recognition and respect.

In light of this aspiration, the non- or mis-recognition of Aboriginal and Torres Strait Islander peoples by the *Australian Constitution* ("*Constitution*") has been described as "a constitutional fault line we must mend, an historical injustice we must address, a national test that we for too long have failed to pass."[2] With growing widespread public and bipartisan support, it seems the time for recognition is ripe. However, disagreement on fundamental questions presents significant obstacles to preparing a proposal to put to a referendum to change the *Constitution* to effect constitutional recognition. These fundamental questions include: *What* kind of constitutional amendment is required? *How* should such recognition be effected and *who* should be included?

The question of *how* such change is to be effected – by referendum – is largely dictated by section 128 of the *Constitution*. However, attention has been paid to the adoption of a pre-referendum process that is more inclusive of Aboriginal and Torres Strait Islander peoples in light of their complete exclusion from the original design and enactment of the *Constitution*.

Precisely *what* kind of recognition we should pursue has been the subject of lengthy consideration by an Expert Panel on Constitutional Recognition of Indigenous Australians ("Expert Panel"),[3] a Recognition Review Panel,[4] and a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ("Joint

[1] In this thesis I will, where possible, refer to "Aboriginal and Torres Strait Islander peoples". I note that the accepted conventions concerning terminology in Australia differ those in Canada. I have chosen "Aboriginal and Torres Strait Islander peoples", because this seems to be the terminology consistently used when discussing constitutional recognition. There does not appear to be consensus in Australia: see Luke Pearson, "Why We Will Never Find The 'Most Appropriate' Term To Refer To All Indigenous Australians", *IndigenousX* (10 November 2015), online: <http://indigenousx.com.au/>.

[2] The Hon Bill Shorten MP, "Speech to RECOGNISE Gala Dinner" (2014) 8:16 Indigenous L Bull 12 cited in Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra, 2015) at 9 (para 2.11).

[3] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Canberra: Department of Families, Housing, Community Services & Indigenous Affairs, 2012).

[4] Review Panel, *Final Report of the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel* (Canberra: Department of the Prime Minister and Cabinet, 2014).

Committee"),[5] in consultation with Aboriginal and Torres Strait Islander peoples and non-Indigenous Australians.

In its final report[6] in June 2015, the Joint Committee recommended the following constitutional amendments be considered by Parliament:

First, the express references to race in the *Constitution* (in sections 25 and 51(xxvi)) should be removed.[7] Second, a new, stand-alone, legislative power "to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples" should be inserted, accompanied by a preambular statement of recognition of Aboriginal and Torres Strait Islander historical presence as well as their distinct languages and cultures. Third, any legislative power granted in respect of Aboriginal and Torres Strait Islander peoples should be qualified to prevent discrimination.[8]

It is this third recommendation that has led to the most disagreement, between those who regard an express constitutional right or freedom appropriate and necessary, and those who regard such right or freedom as inconsistent with Australia's constitutional system, which does not include a bill or charter of rights.

Partly in response to the disagreement raised by the third recommendation, Noel Pearson has suggested a further option for reform that would "ensure that indigenous people can take more responsibility for [their] own lives within the democratic institutions already established."[9] Specifically, Pearson proposed: the removal of the references to "race" in sections 25 and 51(xxvi) of the *Constitution*; the insertion of a replacement legislative power to enable the Commonwealth Parliament to pass necessary laws with respect to Aboriginal and Torres Strait Islander peoples; the insertion of a complementary duty to consult Indigenous peoples in relation to the laws and policies that affect them; and the creation of a new representative body to facilitate this consultation. This proposal is said to address "[t]he

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[5] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (Canberra, 2014); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (Canberra, 2013); Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 2.

[6] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 2.

[7] *Ibid* at xiii (Recommendations 3 and 4).

[8] *Ibid* at xiii–xv (Recommendation 5).

[9] Noel Pearson, "A Rightful Place: Race, Recognition and a More Complete Commonwealth" (2014) 55 Quarterly Essay 1 at 69.

fact that our law and institutions do not require proper consultation with indigenous people where laws and measures affect their rights and interests" which is a regarded as "a clear deficiency in our current system."[10]

Even though the Joint Committee has not endorsed it,[11] Pearson's proposal to effectively constitutionally enshrine a duty to consult Aboriginal and Torres Strait Islander peoples on laws, specific or general, that affect them offers an important perspective that complicates the disagreement over whether to include a non-discrimination provision. It does this by highlighting a 'democratic problem' in the constitutional relationship between Aboriginal and Torres Strait Islander peoples and the Australian state – namely that Aboriginal and Torres Strait Islander peoples were neither part of the democratic process that gave rise to the Australian *Constitution*, nor are they adequately involved in the democratic process that gives rise to laws that specially affect them – and brings it into the debate on constitutional recognition.

By raising this democratic problem, Pearson highlights a deficiency in the current proposals and debate. The current focus is on constitutional provisions that confer and limit (predominantly legislative) power in relation to Aboriginal and Torres Strait Islander peoples. However, the relationship between these constitutional provisions and the constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples is currently omitted from the discussion. What is the role of constitutional recognition in this broader relationship, as it currently exists and as it might exist in the future?

In my view, we cannot legitimately resolve the disagreement concerning the constitutional amendment proposals without first addressing this broader question.

To this end, in this thesis I will consider how we might achieve constitutional recognition to facilitate the new relationship to which we aspire: one characterized[12] by mutual understanding, recognition and respect, along the lines of that articulated by James Tully.[13]

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[10] *Ibid* at 158.

[11] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 2 at 38 (paras 4.59–4.62).

[12] A note on spelling: this thesis will follow the *Canadian Oxford English Dictionary* throughout, except in citations of foreign source material using alternative spelling.

[13] See James Tully, *Strange Multiplicity: Constitutionalism in an Age of Diversity* (Cambridge: Cambridge University Press, 1995); James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008).

In Chapter 1, I will use Pearson's proposal and the democratic problem it seeks to address to frame my discussion of the history of the constitutional relationship that currently exists between the Australian state and Aboriginal and Torres Strait Islander peoples. The democratic problem arises from a culmination of three features of the Australian constitutional and political framework in relation to Aboriginal and Torres Strait Islander peoples: race; representative democracy; and the relationship between the Commonwealth and Aboriginal and Torres Strait Islander peoples, which is underpinned by a history of colonialism.

In Chapter 2, I will consider how a liberal state, such as Australia, can recognize Indigenous minorities and the conditions under which such recognition may be regarded as legitimate in the face of such a democratic problem. First, I will explain, generally, how constitutional recognition manifests and why it is important in light of the kinds of constitutional misrecognition challenged by Aboriginal and Torres Strait Islander peoples in Australia.

Second, I will situate such constitutional misrecognition in the broader 'politics of recognition' and its two iterations, the 'politics of universalism' and the 'politics of difference'. These iterations offer a new perspective from which we can consider the challenge of constitutional recognition in Australia. We learn that adequate constitutional recognition must manifest as both equal respect and respect for the distinct identity of Aboriginal and Torres Strait Islander peoples.

Finally, I will consider and contrast liberal/nationalist and democratic approaches to the challenge of affording both kinds of respect. Although these theoretical approaches are not explicitly engaged by the current proposals for recognition, they are alluded to. Consequently, I will bring each to the forefront of the discussion and consider the extent to which they address the legitimacy concerns necessitating recognition. Ultimately, I will argue that deliberative democratic theory provides the most compelling response because it addresses concerns about legitimacy in a way that eases the tension between democratic inclusion and rights entrenchment created by liberal and traditional democratic approaches.

That is, the answer is not to be found either in constitutional entrenchment of a right to equality or freedom from discrimination, or by following a constitutionally institutionalized democratic process. Instead, it is more likely to be found in a deliberative democratic process, that is, a process in which public decisions are made following an exchange of public reasons that one could reasonably expect those affected by the decision to accept. Irrespective of its

institutional form, this process, is underpinned by a recognition and respect for citizens as equally capable of autonomous agency and thus as having equal responsibility for reproducing and shaping constitutional values and laws that give effect to them. It is this kind of recognition that could give rise to a legitimate constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples.

If so, the next challenging question concerns how this is to be instituted. By constitutional amendment (along the lines of Pearson's proposal), or some other way?

In Chapter 3, I will argue that democratic experimentalism offers a promising institutional framework for conceiving of a new and legitimate constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples, for two reasons. First, by adopting a deliberative democratic conception of legitimacy, it responds to challenges to the *Constitution's* legitimacy and decisions taken under it that go to both the substance of such decisions (including their potentially discriminatory nature) and the process by which they are made (which currently lacking adequate participation of Aboriginal and Torres Strait Islander peoples). Second, by promising to create the institutional framework within which constitutional norms can be formed and revised, democratic experimentalism also provides an open and inclusive constitutional relationship outside the context of formal constitutional law.

In so doing, democratic experimentalism shifts the debate over constitutional recognition away from considering either Parliament (which is viewed as inadequately inclusive) or the courts (which are criticized as being inconsistent with the Australia's "state-of-the-art democratic constitution"[14]) as holding the key to legitimacy. Instead, it looks to the public sphere acting through empowered deliberative forums to solve problems in a way that is constitutive of a new relationship. A new relationship characterized by mutual understanding, recognition and respect.

[14] Helen Irving, "Amending the Constitution: Achieving the Democratic Republic" in Benny Jones & Mark McKenna, eds, *Project Republic : Plans and Arguments for a New Australia* (Collingwood, Vic: Black, 2013) 155 at 164.

– Chapter 1 –

Recognizing the Democratic Problem

1 INTRODUCTION

At Australian federation in 1901, racial diversity was regarded as a threat to the unity of the Australian Commonwealth, and so it was seen necessary to equip the Commonwealth Parliament with the "power to make laws for the peace, order, and good government of the Commonwealth 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" (*Constitution*, s 51(xxvi)) ("Races Power").

Although the Races Power was only applicable to races "other than the aboriginal race", as a result of constitutional amendment by referendum in 1967 Aboriginal and Torres Strait Islander peoples were brought within the ambit of this legislative power. This inclusion has created a challenging question for Australian democracy. To what extent should subjects of laws be consulted on, or be able to challenge, their effect? The *Constitution* does not contain a charter of rights, and there are limited mechanisms[1] through which to challenge ordinary laws with universal effect. In circumstances where Parliament possesses such a specific power, and the Parliamentary system neither specifically nor adequately represents persons of "any race" that could be the subject of laws, concerns about democratic legitimacy arise.

These concerns about democratic legitimacy have given rise to a longstanding debate about the need for constitutional reform to recognize Aboriginal and Torres Strait Islander peoples. The origin of this debate can be traced to the 1988 Constitutional Commission Report,[2] which recommended that section 51(xxvi) of the *Constitution* be amended to replace it with an unqualified power to make laws with respect to "Aborigines and Torres Strait Islanders."[3]

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[1] Unless a law infringes one of the few express freedoms, challenges are generally framed in terms of arguments that a law is beyond power, interferes with the separation of judicial power or federalism, or infringes implied freedom of political communication.

[2] Jason O'Neil, "Indigenous Constitutional Recognition and the Politics of Distraction" (2015) 8:15 Indigenous L Bull 15; Geoffrey Lindell, "The Constitutional Commission and Australia's First Inhabitants: Its Views on Agreement Making and a New Power to Legislate Revisited" (2011) 15:2 Australian Indigenous L Rev 25 at 27 (In 1985, the Hawke Government established a Constitutional Commission to review the Australian Constitution. The Commission provided two reports to the Government in 1988, after its two advisory committees (the Advisory Committee on the Distribution of Powers, and the Advisory Committee on Individual and Democratic Rights under the Constitution) presented their reports to the Commission in 1987).

[3] Lindell, *supra* note 2 at 34, 36.

Constitutional change, particularly that recognizing the unique first peoples status of Aboriginal and Torres Strait Islander peoples, gained wide public support during the 1990s as an important way of achieving formal reconciliation.[4] As this coincided with discussions on whether Australia should become a republic, a proposed constitutional preamble that sought to acknowledge Aboriginal and Torres Strait Islander people as the original inhabitants and custodians of Australia was included in the republic referendum in November 1999,[5] which ultimately failed.

The project of constitutional recognition has remained a work in progress since the failed 1999 referendum. It has been the subject of election platforms and public statements made by Prime Ministers Howard, Rudd, Gillard and Abbott.[6]

The next step towards constitutional change was taken in December 2010,[7] when Prime Minister Gillard established the Expert Panel on Constitutional Recognition of Indigenous Australia ("Expert Panel") to assess the best possible options for a constitutional amendment to be put to referendum.[8] The Expert Panel is made up of Indigenous and community leaders, constitutional experts and parliamentary members, appointed on the basis of public nominations.[9] Consultations and submissions ultimately led to the drafting and presentation of a report with recommendations designed to "contribute to a more unified and reconciled nation; be of benefit to and accord with the wishes of Aboriginal and Torres Strait Islander peoples; and be capable of being supported by an overwhelming majority of Australians from across the political and social spectrums."[10]

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[4] This public support was apparent when the Council for Aboriginal Reconciliation (CAR) undertook consultations in the early 1990s. The CAR was to be constituted by between 15 and 25 members appointed by the Governor-General on advice from the Minister for Aboriginal Affairs, including the Chairperson and Deputy Chairperson of the ATSIC. In addition to the Chairperson, who must be Indigenous, at least 12 members in total must be Aborigines and at least 2 must be Torres Strait Islanders: *Council for Aboriginal Reconciliation Act 1991* (Cth), sec 14.

[5] Megan Davis & Dylan Lino, "Constitutional Reform and Indigenous Peoples" (2010) 7:19 Indigenous L Bull 3 at 5.

[6] Anne Twomey, "A Revised Proposal for Indigenous Constitutional Recognition" (2014) 36:3 Sydney L Rev 381 at 381.

[7] *Ibid*.

[8] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Interim Report* (Canberra, 2014) at 35.

[9] Expert Panel on Constitutional Recognition of Indigenous Australians, *Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution: Report of the Expert Panel* (Canberra: Department of Families, Housing, Community Services & Indigenous Affairs, 2012) at 2 (Specifically, it was co-chaired by Professor Patrick Dodson and Mr Mark Leibler AC).

[10] *Ibid* at 4; See also Shelley Bielefeld, "Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples: Exploring the Limits of Benevolent Language" (2014) 8:15 Indigenous L Bull 22 at 22.

The Panel's recommendations were then put to a Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples ("Joint Committee"),[11] and a Review Panel[12] to assess levels of support of Aboriginal and Torres Strait Islander peoples, the wider Australian public, and State and Territory governments for a referendum generally, and in respect of particular recommendations. Neither the Joint Committee (comprised solely of Senators and Members of Parliament[13]) nor the Review Panel (situated within the Department of Prime Minister and Cabinet) was constituted so as to include members from the wider Aboriginal and Torres Strait Islander communities. However, each contained members who identify as Aboriginal or Torres Strait Islander peoples. The Joint Committee's membership included Mr. Ken Wyatt AM MP, the first Indigenous member of the House of Representatives), and the Review Panel's membership included Ms. Tanya Hosch, a Torres Strait Islander woman who is also the Deputy Campaign Director of RECOGNISE.[14]

On 2 December 2013, the Joint Committee was reconstituted to "build a secure strong multi-partisan parliamentary consensus around the timing, specific content and wording of referendum proposals for Indigenous constitutional recognition"[15] and "to inquire into and report on the steps that can be taken to progress towards a successful referendum on Indigenous constitutional recognition."[16] The Committee held public hearings at locations around Australia in 2014.[17]

The Joint Committee released its final report on 25 June 2015.[18] Substantively, the majority of its proposals for reform currently revolve around symbolic recognition and modifying and

[11] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 8 at 36 (The Panel was appointed on 28 November 2012).

[12] The Review Panel was formed by the Minister for Indigenous Affairs in compliance with the *Aboriginal and Torres Strait Islander Peoples Recognition Act 2013* (Cth).

[13] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra, 2015) at iii (Senator Trish Crossin (Chair), Senator the Hon. George Brandis SC (Attorney General) (Deputy Chair), Senator the Hon. Nigel Scullion (Minister for Indigenous Affairs), Senator Rachel Siewert, Senator the Hon. Kim Carr (Shadow Minister for Higher Education, Research, Innovation and Industry), Mr. Robert Oakeshott MP, Ms. Janelle Saffin MP, Mr. Ken Wyatt AM MP).

[14] The Review Panel was comprised of the Deputy Prime Minister (the Hon Mr John Anderson AO (as Chair)), Mr Richard Eccles, (Deputy Secretary of the Department of the Prime Minister and Cabinet), and Ms Tanya Hosch: Minister for Indigenous Affairs, Media Release, "Next Step Towards Indigenous Constitutional Recognition", (28 March 2014), online: <minister.indigenous.gov.au/media/>.

[15] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Progress Report* (Canberra, 2013) at v.

[16] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 8 at v.

[17] *Ibid* at 32.

[18] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 13.

limiting legislative power to preclude racially discriminatory laws.

The Joint Committee also considered an alternative proposal, put forward by Noel Pearson, that seeks to modify the *way* in which legislative power is exercised. In its Final Report, the Joint Committee noted that Pearson's proposal would require a significant change to the *Constitution*, and expressed concerns "about the way that an advisory body would operate within the Westminster system of government."[19] Consequently, the Committee did not recommend that the proposal be considered for referendum. Instead, the Committee noted that "the establishment of an advisory council in the future need not be viewed as an alternative to constitutional recognition"[20] but one which "Aboriginal and Torres Strait Islander peoples may consider […] has merit and may wish to pursue […] in the future."[21] The Committee ultimately concluded that "the creation of such a body would require much more discussion within the community, with constitutional law experts and a much more thorough examination of the benefits and risks."[22]

Even though the Joint Committee has not recommended it for further consideration,[23] Pearson's proposal, which would effectively constitutionally enshrine a duty to consult Aboriginal and Torres Strait Islander peoples on laws that affect them, highlights a deficiency in the current way in which we are thinking about constitutional recognition. It does this by highlighting a 'democratic problem' in the constitutional relationship between Aboriginal and Torres Strait Islander peoples and the Australian state that, I will argue, is central to constitutional recognition.

Moreover, Pearson's attempt to address this democratic problem appears to reflect the concerns and wishes of the broader Aboriginal and Torres Strait Islander community in relation to constitutional recognition, in a way that the current proposals do not. Indeed, Pearson's proposal for a parliamentary body and constitutionalized duty to consult was the only proposal that gained majority support in a recent voluntary survey of members of Aboriginal and Torres Strait Islander communities.[24]

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[19] *Ibid* at 38 (para 4.61).

[20] *Ibid* at 38 (para 4.62).

[21] *Ibid*.

[22] *Ibid* at 38 (para 4.61).

[23] *Ibid* at 38 (paras 4.59–4.62).

[24] Celeste Liddle, "Constitutional Recognition Survey", (2015), online: *IndigenousX* <indigenousx.com.au>.

Consequently, in this Chapter, I will first set out the substance of Pearson's proposal. I will not, however, engage in a detailed analysis of the support and criticism that Pearson's proposal has received, as this has been done elsewhere.[25] My interest is in why this proposal was raised, and what it reflects in terms of Aboriginal and Torres Strait Islander peoples' concerns about the current democratic system.[26]

Second, I will set out the democratic problem that Pearson's proposal seeks to address. This democratic problem results from a culmination of three features of the Australian constitutional and political framework in relation to Aboriginal and Torres Strait Islander peoples: race, representative democracy and the history of colonialism that underpins the relationship between the Commonwealth and Aboriginal and Torres Strait Islander peoples.

This elaboration of the democratic problem, and the circumstances in which it arises, will form the basis of the subsequent chapters. Although this democratic problem is currently regarded (at least by the Commonwealth) as separate from the question of constitutional recognition, it will become evident that this problem goes to the heart of constitutional recognition, and the conditions under which recognition should occur.

2 PEARSON'S PROPOSAL FOR CONSTITUTIONAL CHANGE: A DUTY TO CONSULT

Noel Pearson, an Indigenous Australian lawyer, land rights activist and Director of the Cape York Institute for Policy and Leadership,[27] "seek[s] to make a case for constitutional reform recogni[z]ing Indigenous Australians."[28] Pearson made this case, outside his role as member of the Expert Panel on the Recognition of Indigenous Australians, in his Quarterly Essay: "A Rightful Place: Race, Recognition and a More Complete Commonwealth."[29]

[25] See e.g. Michael Starkey, "Indigenous Constitutional Recognition: A Duty to Consult", (26 October 2014), online: *Constitutional Reform Unit Blog* <blogs.usyd.edu.au/cru/>; Kristyn Glanville, "Recognition of Indigenous People in the Constitution: What Will It Take To Bring About Change?" (2011) 7:25 Indigenous L Bull 42.

[26] These are questions that Megan Davis has suggested did not get enough attention, particularly by the media following the announcement of the proposal: Megan Davis, "Gesture politics", *The Monthly* (1 December 2015), online: <www.themonthly.com.au>.

[27] "What We Stand For", (October 2014), online: *Cape York Partnership* <capeyorkpartnership.org.au> ("The Cape York Partnership is an Indigenous organi[z]ation that has stood up to lead a comprehensive reform agenda to turn this on its head. We want to ensure that Indigenous rights and responsibility exist in proper balance, and Indigenous people are truly enabled to be the masters of their own exciting destinies").

[28] Noel Pearson, "A Rightful Place: Race, Recognition and a More Complete Commonwealth" (2014) 55 Quarterly Essay 1 at 18.

[29] Pearson, *supra* note 28.

Pearson's proposal for constitutional recognition has four elements: removal of the references to 'race' in the *Constitution* (ss 25 and 51(xxvi)); insertion of a replacement legislative power to enable the Commonwealth Parliament to pass necessary laws with respect to Aboriginal and Torres Strait Islander peoples; insertion of a complementary duty to consult Aboriginal and Torres Strait Islander peoples in relation to the laws and policies that affect them; and creation of a new representative body to facilitate this consultation.

The first two elements of the proposal are consistent with the recommendations of the Expert Panel,[30] the Review Panel[31] and the Joint Committee.[32] However, the third and fourth elements, which are offered as an alternative to the options to prevent racial discrimination, are novel.

To give effect to this proposal, Pearson has suggested the insertion of a new Chapter 1A into the *Constitution*, establishing an advisory body that would produce advice to the Parliament on matters relating to Aboriginal and Torres Strait Islander peoples and oblige the Parliament to table it, by the Prime Minister or through some other mechanism, in both Houses.[33] To preserve the principle of Parliamentary sovereignty, the advice of the Aboriginal and Torres Strait Islander body would not be binding on Parliament, only highly persuasive and authoritative. Although the advice would not be binding, Parliament would be required to articulate the reasons why it may or may not accept the body's advice.[34] According to Megan Davis, "[w]hile some may regard this as falling on the weak end of the recognition spectrum because Parliament is not compelled to amend the legislation, the tabling of the advice provides a public ventilation of the affected communities' views and it also creates a formal, publicly accessible repository or record of the Parliament's dealing with the body."[35]

Pearson did not provide detailed specification as to the form and function of the advisory body. He envisaged that such details would be established by legislation rather than the

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[30] Expert Panel on Constitutional Recognition of Indigenous Australians, *supra* note 9 at 137.

[31] Review Panel, *Final Report of the Aboriginal and Torres Strait Islander Peoples Act of Recognition Review Panel* (Canberra: Department of the Prime Minister and Cabinet, 2014) at 5.

[32] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 8 at 12–19 (Recommendations 1–3).

[33] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 13 at 34 (citing Submission 136 at 1).

[34] *Ibid* at 35 citing Cape York Institute, *Submission to the Joint Select Committee: Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples* (Cape York Partnership, 2014) at 15.

[35] Megan Davis, "Constitutional Reform and Aboriginal and Torres Strait Islander People: Why Do We Want It Now?" (2011) 7:25 Indigenous L Bull 8 at 9.

Constitution. One detail that will challenge future legislators in creating any such advisory body is how to achieve representation of Aboriginal and Torres Strait Islander communities.[36] How can it be ensured that the body is representative of Aboriginal and Torres Strait Islander peoples rather than the government?[37] As this is a challenge that faces all democracies, it is likely to be one that will arises in any proposal to address the democratic problem.

The object of Pearson's proposal is twofold: first, and substantively, it seeks to address what Pearson identifies as 'the democratic problem' in the *Constitution* in relation to Aboriginal and Torres Strait Islander peoples; and second, as a matter of process, it also seeks to overcome the national challenge of reaching the necessary consensus to achieve constitutional reform. I am concerned primarily with the first of these objects, which will be the focus of the remainder of this Chapter. Although the process of constitutional amendment is also important, as will become clear, the requisite national consensus is less of an immediate concern if our focus shifts to a practice of recognition outside formal constitutional law.

3 THE DEMOCRATIC PROBLEM IN THE AUSTRALIAN CONSTITUTION

According to Pearson, the 'democratic problem' arises due to a culmination of three attributes of Aboriginal and Torres Strait Islander peoples within the Commonwealth of Australia: first, they are an extreme minority, geographically dispersed; second, they are putative members of a 'race'; and third, they are indigenous to Australia.[38]

In order to understand the significance of these attributes and why they create a 'democratic problem', it is necessary to also understand three correlating features of the Australian constitutional and political framework: first, the importance of representative government (captured by ss 7 and 24 of the *Constitution*) and the assumptions that underpin it; second, the relevance of race in the *Constitution*; and finally, the relationship between Aboriginal and Torres Strait Islanders and the Commonwealth, particular since 1967 when the Commonwealth obtained legislative power in respect of Indigenous affairs.

[36] Alexander Reilly, "A Constitutional Framework for Indigenous Governance" (2006) 28 Sydney L Rev 403.

[37] Kristyn Glanville, "Recognition of Indigenous People in the Constitution: What Will It Take To Bring About Change?" (2011) 7:25 Indigenous L Bull 42.

[38] Pearson, *supra* note 28 at 43–44.

3.1 Inadequate Representation: Sections 7 and 24 of the *Constitution* and Aboriginal and Torres Strait Islander Peoples' 'Extreme Minority' Status

The *Constitution* is based on the principle of representative and responsible government, taken from English constitutionalism.[39] Although Australia adopted the narrow view of constitutionalism adopted by the United States,[40] the *Constitution* is not a people's constitution.[41] There was nothing in Australia's historical circumstances that "created expectations of extensive limitations upon legislative power for the purpose of protecting the rights of individuals."[42]

Instead, Parliament was regarded as securing, rather than threatening, individual liberties.[43] This strong faith in Parliament is reflected in the popular sovereignty foundation of the *Constitution* (particularly the reference to "the people" in the preamble to the *Constitution* and sections 7 and 24).[44] However, the House of Representatives, the popular (lower) house, is underpinned by the idea that the legislature should represent individual citizens equally.[45] Representation is proportionate to the national population, unaffected by artificial state and local boundaries.[46]

This constitutional structure of representative[47] and responsible government reflects a strong sentiment of egalitarianism. This "strong egalitarian streak"[48] is underpinned by "an

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[39] Haig Patapan, "Competing Visions of Liberalism: Theoretical Underpinnings of the Bill of Rights Debate in Australia" (1997) 21 Melbourne UL Rev 497 at 499.

[40] A narrow conceptualization of constitutionalism as a means of limiting legislative and executive power, informed by Thomas Hobbes and John Locke dominated the formation of Australian political institutions at the time of federation: *Ibid* at 502.

[41] George Williams, "Race and the Australian Constitution: From Federation to Reconciliation" (2000) 38 Osgoode Hall LJ 643.

[42] *Roach v Electoral Commissioner*, [2007] HCA 43, 233 CLR 162 at 172 (para 1).

[43] Patapan, *supra* note 39 at 500.

[44] Elisa Arcioni, "Excluding Indigenous Australians from the People: A Reconsideration of Sections 25 and 127 of the Constitution" (2012) 40 Federal L Rev 287 at 292 citing *McGinty v Western Australia*, [1996] HCA 48, 186 CLR 140.

[45] Nicholas Aroney, *The Constitution of a Federal Commonwealth : The Making and Meaning of the Australian Constitution* (Cambridge, UK: Cambridge University Press, 2009) at 232.

[46] *Ibid*.

[47] The identification of a system of representative government within the Constitution occurred over a series of cases: see e.g. *Attorney-General of the Commonwealth; ex rel McKinlay v The Commonwealth* (1975), 135 CLR 1; *McGinty v Western Australia*, *supra* note 44; *Langer v The Commonwealth* (1996), 186 CLR 302 cited in Arcioni, *supra* note 44 at 292.

[48] Ron Levy, "Breaking the Constitutional Deadlock: Lessons from Deliberative Experiments in Constitutional Change" (2010) 34:3 Melbourne UL Rev 805 at 825.

assumption of the inherent superiority of the coloni[z]ing culture."[49] This assumption gives rise to preference for the "liberal values of equality through uniformity."[50] It is partly for this reason that Australia has been called a "utilitarian democracy."[51] Australian settlement coincided with the birth of utilitarianism.[52] It is perhaps unsurprising then that Australian colonization was seen as an opportunity to create a political community with all the necessary conditions for utilitarianism to thrive. It was decided that homogeneity (a 'White Australia'[53]) would enable equality to be achieved.

The aspirations of a high level of cultural homogeneity or uniformity,[54] coupled with a narrow conception of a constitutional system, resulted in an absence of substantive recognition of (or more accurately protection of) minorities, including Aboriginal and Torres Strait Islander peoples.[55] Protection from, or subjection to, discrimination is left entirely at the whim of Parliament.

The makeup of Parliament was not, however, something that racial minorities were able to influence at all. Following federation, Aboriginal and Torres Strait Islander peoples, along with "natives of…Asia, Africa [and] the Pacific Island except New Zealand"[56] were excluded from the Commonwealth franchise,[57] unless already entitled to vote in State elections.[58] This policy of exclusion shifted from 'assimilation' to 'integration' even prior to the 1967 referendum.[59] This shift is reflected in the fact that, in 1962, the right to vote in

[49] Michael Dodson & Lisa Strelein, "Australia's Nation-Building: Renegotiating the Relationship between Indigenous Peoples and the State" (2001) 24 UNSWLJ 826 at 827.

[50] *Ibid* at 832.

[51] Megan Davis, "Indigenous Rights and the Constitution: Making the Case for Constitutional Reform" (2008) 7:6 Indigenous L Bull 6 at 7.

[52] Marian Sawer & Peter Brent, "Equality and Australian Democracy: Democratic Audit Discussion Paper", (2011), online: *Democratic Audit* <democraticaudit.org.au> at 3.

[53] Geoffrey Brahm Levey, "The Political Theories of Australian Multiculturalism" (2001) 24 UNSWLJ 869 at 872; Jeremy Webber, "Multiculturalism and the Australian Constitution" (2001) 24 UNSWLJ 882 at 884, 885; George Williams, "Should Aboriginal Peoples Be Recognised in the Australian Constitution?" (2013) 17 U Western Sydney L Rev 13 at 17.

[54] Webber, *supra* note 53 at 884.

[55] Reilly, *supra* note 36 at 426.

[56] *Commonwealth Franchise Act 1902* (Cth), sec 4.

[57] *Commonwealth Franchise Act 1902*, *supra* note 56 discussed in ; Brian Galligan & John Chesterman, "Aborigines, Citizenship and the Australian Constitution: Did the Constitutional Exclude Aboriginal People from Citizenship?" (1997) 8 Public L Rev 45.

[58] Arcioni, *supra* note 44 at 307.

[59] Royal Commission into Aboriginal Deaths in Custody, *National Report* (Canberra: Australian Government Publishing Service, 1991), para 20.3.18.

Commonwealth and most[60] State elections was granted for those Aboriginal and Torres Strait Islander peoples who were not already entitled to vote.[61]

The right to vote does not, however, equal representation. Pearson argues that Aboriginal and Torres Strait Islander peoples are "effectively shut out of the Australian democracy"[62] because representative democracy depends on numbers and geographic regions. The combined fact of being an extreme minority (three per cent of the population) spread throughout the country dissipates electoral presence.

3.2 Race: Sections 25, 51(xxvi) and 127 of the *Constitution* and the 1967 Referendum

Notwithstanding, or perhaps precisely because of, the preference for political egalitarianism, the drafters of the *Constitution* "abandoned liberal democratic principles with respect to race."[63] Racial diversity – as a result of both the pre-existing nationalities already present in the colonies[64] and the potential for aliens to enter the country through immigration[65] – was regarded as a threat to the unity of the Australian Commonwealth. Consequently, the Commonwealth Parliament was equipped with the "power to make laws for the peace, order, and good government of the Commonwealth 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" (s 51(xxvi)) ("Races Power"), which was drafted entirely to facilitate racially discriminatory laws.[66] "People of …the aboriginal race" were initially excluded from this provisision because the power was initially conceived as a complement to the "Aliens Power" (in s 51(xix)[67]) to empower the Commonwealth government to deal with "alien races allowed into Australia".

[60] Queensland did not confer the right until 1965: Arcioni, *supra* note 44 at 305.

[61] Royal Commission into Aboriginal Deaths in Custody, *supra* note 59, para 20.3.29; Galligan & Chesterman, *supra* note 57.

[62] Pearson, *supra* note 28 at 42.

[63] *Ibid* at 49.

[64] Galligan & Chesterman, *supra* note 57 at 50.

[65] *Ibid* at 51.

[66] Williams, *supra* note 41; George Williams, "The Races Power and the 1967 Referendum" (2007) 11 Australian Indigenous L Rev 8.

[67] The Aliens Power confers on the Commonwealth Parliament the "power to make laws for the peace, order, and good government of the Commonwealth with respect to…naturalization and aliens".

To provide a disincentive for the States to disenfranchise people on the basis of race,[68] section 25 was included, which provided:

> For the purposes of [section 24, concerning the constitution of the House of Representatives], if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

Aboriginal and Torres Strait Islander peoples did not take part in drafting the *Constitution*.[69] Perhaps it is not entirely surprising, then, that it does not reflect their interests and aspirations.[70]

The exclusion[71] of Aboriginal and Torres Strait Islander peoples from the *Constitution* manifests itself in two ways. First, in the Races Power which conferred legislative power on the Commonwealth Parliament to make laws with respect to "[t]he people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws [emphasis added]."[72] Second, in section 127, which excluded "aboriginal natives" from being counted "in reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth."[73]

These exclusions can be understood as resulting from the fact that at the time of federation, Aboriginal and Torres Strait Islander peoples were regarded as a matter for the colonies, and then the States,[74] rather than the Commonwealth. The drafters of the *Constitution* were concerned to protect the pre-existing colonial mechanisms and institutions, including those that excluded Aboriginal and Torres Strait Islander peoples.[75] To this end, "giving the Commonwealth a special power to deal with Aboriginal and Torres Strait Islander peoples

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[68] Arcioni, *supra* note 44 at 306.

[69] Williams, *supra* note 66 at 8.

[70] Dodson & Strelein, *supra* note 49 at 829.

[71] Pearson, *supra* note 28 at 43; Garth Nettheim, "Indigenous Australian Constitutions" (2001) 24 UNSWLJ 840 at 843.

[72] *Australian Constitution*, sec 51(xxvi).

[73] For drafting history in relation to this provision, see Galligan & Chesterman, *supra* note 57.

[74] Geoffrey Sawer, "The Australian Constitution and the Australian Aborigine" (1966) 2 Federal L Rev 17.

[75] Galligan & Chesterman, *supra* note 57 at 47.

would have been out of sync with the structural design of the federal system that was being put in place."[76]

From federation until the mid-1960s, the Commonwealth government had managed racial diversity (primarily from immigration) through an assimilationist 'White Australia' policy,[77] which sought to encourage migration from Britain while discriminating against, or excluding, other migrants. Throughout this era, Aboriginal and Torres Strait Islander peoples remained primarily a concern of State governments.

Both of the exclusionary provisions (ss 51(xxvi) and 127) were amended by the 1967 constitutional referendum. Section 51(xxvi) was amended to remove the exclusion of "aboriginal race in any State" to bring Aboriginal and Torres Strait Islander peoples within the ambit of the Races Power. Section 127, which had provided that "[i]n reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted", was repealed. The resulting constitutional framework has thus been described as "neutral"[78] or "silent"[79] in respect of Aboriginal and Torres Strait Islander peoples because there remains no explicit reference to them. For this reason, it is said, "[t]he 1967 referendum was an important turning point in the place of [Aboriginal and Torres Strait Islander peoples] within the Australian legal structure."[80]

This turning point, however, was only partial. Although there was a desire to remove discriminatory references to Aboriginal and Torres Strait Islander peoples from the *Constitution,*[81] the 1967 referendum failed to "establish a new pattern or vision of the place of Indigenous peoples within Australia's political and legal structure."[82]

The only real constitutional shift in relation to Aboriginal and Torres Strait Islander peoples was recognizing that the Commonwealth government, rather than the States, should have

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[76] *Ibid*.

[77] Levey, *supra* note 53 at 872.

[78] Noel Pearson, "Aboriginal Referendum a Test of National Maturity", *The Australian* (26 January 2011), online: <www.theaustralian.com.au>.

[79] Melissa Castan, "The Recognition of Indigenous Australians in the Teaching of Federal Constitutional Law" (2014) 7 J Australian L Teachers Assoc 87; Lindell, *supra* note 2; Dodson & Strelein, *supra* note 49.

[80] Williams, *supra* note 41 at 652.

[81] Sawer, *supra* note 74 at 35; Williams, *supra* note 41 at 653.

[82] Williams, *supra* note 66 at 11.

legislative power in relation to Indigenous affairs.[83] However, there has been little shift in terms of the nature of the relationship between the Commonwealth and Aboriginal and Torres Strait Islander peoples. As members of 'any race', they remain an object of policy and legislative power, as they had prior to 1967.[84] The nature of the power isn't different. Further, the scope of the power isn't different. Despite the anti-discrimination agenda of the 1967 referendum, it remains an open question whether the legislative power allows discriminatory, in addition to beneficial, laws.[85] Finally, although the exclusion by section 127 was nullified, section 25[86] consequently became applicable to exclude Aboriginal and Torres Strait Islander peoples in the reckoning of the number of people in a State or of the Commonwealth in the event that the State disqualified Aboriginal and Torres Strait Islander peoples from voting.[87]

In this way, as George Williams puts it, "the *Constitution* in its text and operation still runs counter to the idea of [Aboriginal and Torres Strait Islander peoples] as equal members of the community."[88] As potential subjects of a specific legislative power without a mechanism for representation or engagement, "the possibility of exclusion and discrimination remains."[89]

3.3 Commonwealth-Aboriginal and Torres Strait Islander Relationship

Following the 1967 referendum, with Commonwealth legislative power came a responsibility for Indigenous affairs, which necessitated the creation of new ministerial portfolios and government departments.[90]

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[83] *Ibid* at 9.

[84] This discussion is evident in the drafting history of s 51(xxvi), see *ibid* at 8–9.

[85] *Kartinyeri v Commonwealth*, [1998] 195 CLR 337 (HCA); Williams, *supra* note 66; Melissa Castan, "Constitutional Deficiencies in the Protection of Indigenous Rights: Reforming the 'Races Power'" (2011) 7:25 Indigenous L Bull 12.

[86] Section 25 provides "For the purposes of [section 24, concerning the constitution of the House of Representatives], if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted".

[87] Anne Twomey, "An Obituary for Section 25 of the Constitution" (2012) 23 Public L Rev 125 at 135–136.

[88] Williams, *supra* note 53 at 17.

[89] Williams, *supra* note 66 at 11.

[90] Following the referendum, the Gorton Government established an advisory Council for Aboriginal Affairs (CAA), and a small Office of Aboriginal Affairs (OAA) within the Department of the Prime Minister. Following a change of government in March 1971, the McMahon Government shifted the OAA to the Department of the Vice-President of the Executive Council and then to the newly created Department of Environment, Aborigines and the Arts (DEAA) in May 1971, see: Angela Pratt, *Make or Break? A Background to the ATSIC Changes and the ATSIC Review*, Current Issues Brief No 29 2002-03 (Canberra: Parliamentary Library, Parliament of Australia, 2003).

The application of the Races Power to Aboriginal and Torres Strait Islander peoples raised different issues than its application to persons of 'any (other) race', because of the colonial history that underpinned the relationship between the crown and Indigenous peoples. As Pearson explains, "Indigenous people therefore have a unique historical and legal relationship with the Australian government,"[91] which differentiates them from other racial minorities. This was acknowledged in the 1970s when the politics of exclusion and assimilation (which sought to protect Australia as an outpost of British heritage by limiting immigration and requiring any immigrants to give up distinctive characteristics) was replaced by the politics of self-determination,[92] which coincided with a shift towards multiculturalism and non-discrimination as formal government policy.

3.3.1 Multiculturalism

The policy of 'multiculturalism' entered Australian parlance in 1973,[93] following its introduction in Canada some time before.[94] Unlike the Canadian model, however, the Australian model did not emphasize maintenance of linguistic and cultural diversity.[95] Instead, Australian multiculturalism meant migrant-absorption and integration,[96] coupled with a move towards racial non-discrimination. It is clear that the Australian policy of multiculturalism conflated the separate issues of culture and race, with race being maintained as the subject of protection. For example, the *Racial Discrimination Act 1975* (Cth) was passed by the Federal Parliament, which had the effect of overriding state and territory legislation that discriminated on the basis of "race, colour, descent or national or ethnic origin"[97] in areas of employment, land, housing or accommodation, provision of goods and services, access to public places and facilities, advertising, and trade union membership. This policy of non-discrimination was also an important corollary to the Commonwealth shift in policy to self-determination in relation to Aboriginal and Torres Strait Islander peoples.

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[91] Pearson, *supra* note 28 at 42.

[92] Dylan Lino, "The Politics of Inclusion: The Right of Self-Determination, Statutory Bills of Rights and Indigenous Peoples" (2010) 34:3 Melbourne UL Rev 839.

[93] Elsa Koleth, *Multiculturalism: A Review of Australian Policy Statements and Recent Debates in Australia and Overseas*, Research Paper No 6 2010-11 (Canberra: Parliamentary Library, Parliament of Australia, 2010) at 4.

[94] Levey, *supra* note 53 at 872.

[95] *Ibid* at 872–73.

[96] *Ibid* at 870.

[97] *Racial Discrimination Act 1975* (Cth), sec 9.

Although 'multiculturalism' challenges Australia's political egalitarianism, Australia's response to multiculturalism is consistent with it. Australian multiculturalism incorporates the principle of non-discrimination, which seeks to protect the individual rights and liberties of all citizens by outlawing discrimination on the basis of race, religion, ethnicity and other group characteristics.[98] This 'colour-blind' policy seeks to ensure that "common citizenship rights are truly common."[99]

Australian multiculturalism remains committed to the liberal idea that the ultimate unit of moral worth is the individual.[100] This means that the value of cultural diversity is affirmed but only on the basis of 'colour-blind' individualism.[101] It does not accommodate group rights that would allow enable cultural communities to be self-governing and which would undermine the common citizenship status of the members of these communities.[102] In the framework that results, "rights to cultural expression and non-discrimination are honoured, cultural diversity is valued as a public good, and the big question of what it means to be an Australian is largely left up to all of us, individually, and collectively to answer."[103]

It has been suggested that the pre and post-1970s positions are more similar than different, in that they share an illusion that culture is a single entity, which is to say that rather than a shift from monoculturalism to multiculturalism, there was a shift from monoculturalism to plural monoculturalism,[104] where cultures are still isolated and disconnected identity blocks.

It is in this context that Pearson was inspired by a vision of "biculturalism as the goal for the Aboriginal future in Australia,"[105] which could facilitate bonding between cultural groups.

3.3.2 Self-Determination

In 1971, then Prime Minister McMahon foreshadowed a move to self-determination when he "acknowledged the right of Aboriginal people to choose the pattern and determine the pace of

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[98] Joseph Raz, *Ethics in the Public Domain: Essays in the Morality of Law and Politics* (Oxford: Clarendon Press, 1994) at 157–58.

[99] Levey, *supra* note 53 at 8.

[100] *Ibid* at 873–74.

[101] *Ibid* at 873; Cf. Kymlicka's version of liberal individualism discussed in Will Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Oxford, UK: Clarendon Press, 1995).

[102] Levey, *supra* note 53 at 874.

[103] *Ibid* at 871.

[104] Pearson, *supra* note 28 at 35 citing Sen's analysis in Amartya Sen, *Identity and Violence: The Illusion of Destiny* (New York: W W Norton & Co, 2006).

[105] Pearson, *supra* note 28 at 39.

their future development, and…said that Federal policies would allow them that choice."[106] Once implemented, however, it became apparent that 'self-determination' meant only that Aboriginal people should be involved in the *management* of their own affairs.[107]

This much is evident in the history of the experiments with "government-sponsored Aboriginal representative structures," [108] which started when the National Aboriginal Consultative Committee ("NACC") was established in 1973[109] as an advisory body to the Minister for Aboriginal Affairs[110] intended to provide Aboriginal people with "their first national political voice." [111] The NACC was constituted as an elected assembly of 41 Aboriginal and Torres Strait Islander members from 41 electorates that encompassed 800 Aboriginal communities. In 1977, the NAC was replaced by the National Aboriginal Conference ("NAC").[112] The structure of the NAC differed from that of the NACC in that it included representatives elected to state branches, from which a ten member national executive was formed.[113] The representative capacities of both were challenged, as both lacked real independence from government and administrative capacity.[114]

In an attempt to counter both the issues of independence and capacity, the Aboriginal Development Commission ("ADC") [115] was established in 1980.[116] The representative capacity of the ADC was diminished by the fact that although constituted by Aboriginal commissioners, they were appointed by the Governor General,[117] rather than elected.

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[106] Royal Commission into Aboriginal Deaths in Custody, *supra* note 59, para 20.2.2, and see also para 20.3.

[107] Tim Rowse, *Obliged To Be Difficult: Nugget Coombs' Legacy In Indigenous Affairs* (Cambridge, UK: Cambridge University Press, 2000) at 107; Pratt, *supra* note 90.

[108] Will Sanders, "Reconciling Public Accountability and Self-Determination/Self-Management: Is ATSIC Succeeding?" (1994) 53:4 Australian J Public Administration 487 at 475; Pratt, *supra* note 90.

[109] Pratt, *supra* note 90 (The NACC was constituted as an elected assembly of 41 Aboriginal and Torres Strait Islander members from 41 electorates, which sought to represent 800 Aboriginal communities).

[110] *Ibid*.

[111] Quentin Beresford, *Rob Riley: An Aboriginal Leader's Quest for Justice* (Canberra: Aboriginal Studies Press, 2006) at 122.

[112] Pratt, *supra* note 90.

[113] *Ibid*.

[114] Beresford, *supra* note 111 at 123.

[115] The ADC was charged with the general function of furthering the economic and social development of Aboriginals by, amongst other things: assisting Aboriginal people and communities acquire land, engage in business, obtain finance; assisting in related training of Aboriginal peoples; advising the Minister; and administering and control the Capital Account: *Aboriginal Development Commission Act 1980* (Cth), sec 8.

[116] *Ibid*, sec 3.

[117] *Ibid*, sec 13.

The Aboriginal and Torres Strait Islander Commission ("ATSIC") was established[118] in 1990 following consultations with Aboriginal community groups and organizations[119] and calls[120] to establish "[a] national elected Aboriginal and Islander organization to oversee Aboriginal and Islander affairs."[121] The ATSIC combined the representative and advisory roles that had previously been reflected in the NACC and NAC executive and program administrative roles exercised by the DAA and the ADC. It was hoped that a combination of such roles would overcome the shortcomings of the previous bodies and "allay the criticism that decision-making power over Aboriginal affairs had never been fully given to Aborigines."[122] It was hoped that "the creation of ATSIC would be the boldest reform that the administration of Aboriginal affairs had yet seen."[123]

The establishment of the ATSIC was heralded as "the legitimate voice of black Australia, subject to requirements of public accountability and parliamentary review expected of all statutory authorities."[124] However, it was also acknowledged that the ATSIC was caught between two requirements of representation. On the one hand, its executive arm, which aimed only at 'self-management', was accountable to Parliament. On the other hand, its representative/advocacy arm, which was accountable to the Aboriginal and Torres Strait Islander peoples, aspired to 'self-government'. [125]

To remedy this tension in the interests of salvaging ATSIC, Uhr proposed self-representation as a mid-way between self-management and self-government, which could be achieved through the establishment of a joint council made up of ATSIC commissioners and Parliament's committee on Aboriginal Affairs, to operate as an advisory body to Parliament as a supplement to the existing advice being provided to the Minister from ATSIC. [126] Whatever its faults, ATSIC was regarded by some as containing the "core attributes

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[118] *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth), sec 3.

[119] Pratt, *supra* note 90.

[120] Dodson & Strelein, *supra* note 49 at 831 (In June 1988, the "Barunga Statement" was presented to Prime Minister Hawke at the Barunga festival stating Indigenous claims for self-determination).

[121] "Barunga Statement presented to Prime Minister Bob Hawke in 1988", (2008), online: *Australian Government* <www.australia.gov.au/about-australia/australian-story/bark-petition-barunga-1988>.

[122] Pratt, *supra* note 90.

[123] *Ibid*.

[124] John Uhr, *Deliberative Democracy in Australia: The Changing Place of Parliament* (Cambridge, UK: Cambridge University Press, 1998) at 236.

[125] *Ibid*.

[126] *Ibid* at 237.

necessary for a framework of Indigenous governance,"[127] in that it at least recognized the role of Indigenous governance in decision-making. It was, however, never to be improved because Indigenous governance was abandoned in 2005 when the Howard Government abolished [128] the ATSIC declaring that "the experiment in elected representation for Indigenous people" had been a failure[129] and that a policy of "practical reconciliation"[130] focussing on service delivery, rather than Indigenous governance, was preferable.[131] What followed was largely a return to the post-1967 situation, in which government departments rather than specialized bodies took charge of Indigenous affairs.[132]

The abolition of ATSIC was detrimental to the political participation rights of Aboriginal and Torres Strait Islander peoples.[133] Further, the accompanying shift in focus to service delivery on the basis of 'disadvantage' reduced the different between Indigenous and non-Indigenous Australians to a matter of economics and reduced the solution to one of resource allocation.[134] Although the importance of community consultation in determining resource allocation was still acknowledged by the Howard Government,[135] there was a marked shift away from focus on direct Indigenous governance.[136] In other words, although the policy of 'practical reconciliation' did not necessarily exclude the input of Aboriginal and Torres Strait Islander peoples in government decision making, they were to be "merely consulted as another minority interest group." [137] This shift is thus said to evidence a rejection of "[Aboriginal and Torres Strait Islander] peoples' distinct constitutional identity."[138]

This refusal or failure to acknowledge the distinct constitutional identity of Aboriginal and Torres Strait Islander peoples arguably endures.

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[127] Reilly, *supra* note 36 at 435.

[128] The ATSIC was abolished by the *Aboriginal and Torres Strait Islander Commission Amendment Act 2005* (Cth).

[129] "Clark vows to fight as ATSIC scrapped", *Sydney Morning Herald* (15 April 2004), online: <www.smh.com.au>.

[130] "Practical reconciliation" has been described as a term that is consistent with a liberal democratic model of unitary government and individual responsibility: Dodson & Strelein, *supra* note 49 at 832.

[131] Reilly, *supra* note 36 at 418.

[132] The policy and coordination role of the ATSIC moved to the Office of Indigenous Policy Coordination, which was within the Department of Families, Community Services and Indigenous Affairs before shifting to the Department of Prime Minister and Cabinet in September 2013 and becoming the Indigenous Affairs Group.

[133] Melissa Castan, *supra* note 85.

[134] Reilly, *supra* note 36 at 404.

[135] *Ibid* at 418.

[136] *Ibid* at 419.

[137] Dodson & Strelein, *supra* note 49 at 834.

[138] *Ibid*.

Consultation of appointed advisory bodies remains the current model of Indigenous participation. Most recently, in September 2013, Prime Minister Abbott established an eleven member appointed Indigenous Advisory Council ("IAC")[139] "to advise Government on practical changes which can be made to improve the lives of [Aboriginal and Torres Strait Islander] people[s]."[140] However, there was no consultation of Aboriginal and Torres Strait Islander communities and no election of the Council members, which has resulted in a lack of confidence in government by Aboriginal and Torres Strait Islander peoples.[141]

Although the National Congress of Australia's First Peoples was formed in 2010 as a national representative body of Aboriginal and Torres Strait Islander peoples,[142] it lacks constitutional and political status. The Congress differs from the other representative bodies in that it was incorporated as a company limited by guarantee and is owned and controlled by its membership and is independent of government.[143]

Recent executive and legislative measures, such as the closure of remote communities in Western Australia[144] and perceived punitive Commonwealth amendments to the Remote Jobs and Community Program,[145] have reignited the concern about inadequate consultation and the need to change the relationship between Aboriginal and Torres Strait Islander peoples and the Commonwealth. Constitutional recognition is seen as one way of addressing such concerns.

4 CONCLUSION

The *Constitution* faces a democratic problem in relation to Aboriginal and Torres Strait Islander peoples in Australia. This problem arises as a result of the culmination of three distinct but related factors. First, Aboriginal and Torres Strait Islander peoples are an extreme minority. Second, the Commonwealth currently treats Aboriginal and Torres Strait Islanders as persons of a 'race' who are the objects of a specific legislative power. Third, the

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[139] Jessica Kitch, "Constitutional Recognition: Recognising The Flaws In Indigenous Affairs" (2014) 8:15 Indigenous L Bull 18 at 20.

[140] Department of Prime Minister and Cabinet, "Terms of Reference", online: *Prime Minister's Indigenous Advisory Council* <iac.dpmc.gov.au>.

[141] Jessica Kitch, *supra* note 139 at 20.

[142] Jody Broun, "Shaping Change: The National Congress of Australia's First Peoples Explores the Path Towards Constitutional Reform" (2011) 7:25 Indigenous Law Bulletin 37.

[143] "About Us", online: *National Congress of Australia's First Peoples* <nationalcongress.com.au>.

[144] Megan Davis, *supra* note 35.

[145] Megan Davis, "Political Timetables Trump Workable Timetables: Indigenous Constitutional Recognition and the Temptation of Symbolism over Substance" (2014) 8:15 Indigenous L Bull 6.

vulnerability brought about by the first two factors arises in the context of a colonial relationship.

At present, this democratic problem is regarded (at least by the Commonwealth government bodies responsible for recommending proposals for constitutional reform) as separate from the question of constitutional recognition. By contrast, in Chapter 2, I will show how this problem goes to the heart of constitutional recognition, and under what conditions it may be remedied.

– Chapter 2 –

Beyond Constitutional Misrecognition

1 INTRODUCTION

Recognition plays an important role in the development of a new relationship between the Australian state and Aboriginal and Torres Strait Islander peoples. However, the notion of recognition at play is multidimensional and multi-directional.

'Recognition' is neither a status to be 'attained' by Aboriginal and Torres Strait Islander peoples, nor it something to be 'granted' by the Australian state. The conception of recognition as something entirely in the control of the state has given rise to suspicion about the 'politics of recognition' in the context of the relationship between Indigenous minorities and Commonwealth states with a history of colonialism.[1] This suspicion comes from concern that the 'granting' or 'attainment' of recognition cannot change the fundamental nature of the relationship at stake. Consequently, it is sometimes claimed that a new relationship needs something more than recognition.[2]

However, recognition is not uni-directonal or monological. Demands for recognition by Indigenous minorities are responsive. They challenge an intolerable situation of misrecognition experienced over the long and tumultuous relationship with the colonizing liberal state. Such demands are bound up with questions of equality and pluralism, reconciliation and reparation for past injustice, as well as with competing notions of justice, fairness, and legitimacy. Consequently, demands for recognition call into question the constitutional identity of the state as much as the constitutional identity of Indigenous minorities.

It follows that the question is more complicated than 'how can the liberal state recognize Indigenous minorities'. Instead, it is necessary to also consider the conditions under which

[1] See, e.g. Glen Sean Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437; Glen Sean Coulthard, "This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy" (2008) 77:1 U Toronto Q 164; Glen Sean Coulthard, "Resisting Culture: Seyla Benhabib's Deliberative Approach to the Politics of Recognition in Colonial Contexts" in David Kahane et al, eds, *Deliberative Democracy in Practice* (Vancouver: University of British Columbia Press, 2010) 138; Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014).

[2] Megan Davis, "Gesture politics", *The Monthly* (1 December 2015), online: <www.themonthly.com.au>.

such recognition can be legitimate, both from the perspective of the state and the Indigenous minority demanding recognition.

In this Chapter, I will contend that the liberal state can, in principle, recognize and accommodate Indigenous minorities. However, recognition in accordance with liberal principles is not sufficient for legitimacy and stability. Rather, legitimacy and stability depend upon the process through which recognition occurs, which must meet certain conditions. These conditions are provided by deliberative democratic theory.

In Part 2, I will first explain, generally, how constitutional recognition manifests and why it is important. Then I will go on to set out the kinds of constitutional misrecognition challenged by Aboriginal and Torres Strait Islander peoples in Australia.

In Part 3, I will situate such constitutional misrecognition in the broader 'politics of recognition' and argue that adequate constitutional recognition must reflect both equal respect and respect for the distinct identity of Aboriginal and Torres Strait Islander peoples.

Finally, in Part 4, I will consider and contrast liberal/nationalist and democratic responses to the challenge of affording both kinds of respect, and argue that the deliberative democratic approach offer more promise.

2 UNDERSTANDING CONSTITUTIONAL RECOGNITION

2.1 Recognition: Identity and Status

Recognition has been described as a "vital human need."[3] Its significance comes from its impact on a person's psychological and normative status.[4] Psychologically, our identity is defined "always in dialogue with, sometimes in struggle against"[5] the things others, and more generally, society as a whole, see or want to see in us. The core of recognition is thus the notion of mutuality:[6] "[r]ecognition is a genuinely interpersonal endeavour."[7]

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[3] Charles Taylor, "The Politics of Recognition" in Amy Gutmann, ed, *Multiculturalism Examining the Politics of Recognition* (Princeton: Princeton University Press, 1994) 25 at 26.

[4] Mattias Iser, "Recognition" in *Stanford Encyclopedia of Philosophy*, Fall ed by Edward N Zalter (Stanford: The Metaphysics Research Lab, Centre for the Study of Language and Information, Stanford University, 2013) at 1.

[5] Taylor, *supra* note 3 at 32–33.

[6] Iser, *supra* note 4 at 4.

[7] *Ibid* at 6.

What is 'seen' in us also has implications for our normative status. [8] The person recognizing a certain feature not only 'sees' that feature but also adopts a positive attitude in relation to us for having it.[9] As a result of that attitude, the person may grant us a certain normative status, which bringing with it commitments and entitlements.[10]

Conversely, misrecognition or inadequate recognition occurs when a person is "depicted by the surrounding others or the societal norms and values in a one-sided or negative way."[11] Not only does it "violate the identity"[12] of the object of recognition, it also may deprive them of a certain normative status that is enjoyed by others who are appropriately recognized.

This is one reason why it is suggested that victims of racism and colonialism suffer psychological harm. The recognition of the racial or colonized feature of such victims coupled with a normative evaluation of those features has the effect of demeaning and deeming them as inferior.[13]

Even though recognition is interpersonal, it is generally accepted that "groups of persons may be the subject and object of (mis)recognition because a group can share collective intentions as well as certain features for which it can be misrecognized (especially when these features are integral to the group's self-understanding)."[14]

Despite the personal nature of recognition,[15] it is also generally accepted that institutions, such as constitutions, can misrecognize and disrespect persons because "institutions, besides regulating behaviour, express and reinforce underlying attitudes and values of those who

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[8] It is the element of normative evaluation (particularly positive affirmation) that is said to distinguish recognition from related notions of identification and acknowledgement: *Ibid* at 3–4 citing Stanley Cavell, "Knowing and Acknowledging" in Stanley Cavell, ed, *Must We Mean What We Say?* (Cambridge: Cambridge University Press, 1969) 238; Patchen Markell, *Bound by Recognition* (Princeton: Princeton University Press, 2003); Cf. Heikki Ikäheimo & Arto Laitinen, "Analyzing Recognition: Identification, Acknowledgement and Recognitive Attitudes Towards Persons" in Bert van der Brink & David Owen, eds, *Recognition and Power: Axel Honneth and the Tradition of Critical Social Theory* (Cambridge: Cambridge University Press, 2007) 33 at 34–37.

[9] Iser, *supra* note 4 at 1.

[10] *Ibid* at 11 citing Robert B Brandom, "The Structure of Desire and Recognition: Self-consiousness and Self-constitution" (2007) 33 Philosophy & Social Criticism 127 at 136.

[11] Iser, *supra* note 4 at 1.

[12] *Ibid*.

[13] *Ibid* citing Frantz Fanon, *Black Skin, White Masks*, translated by Richard Philcox (New York: Grove Press, 1952).

[14] Iser, *supra* note 4 at 6.

[15] *Ibid* at 7.

designed or keep on reproducing them."[16] It is these underlying attitudes that constitute misrecognition.

2.2 Kinds of Constitutional Recognition & Misrecognition: Of Autonomy and Identity

Constitutions relate to recognition in two ways: first, a constitution may institutionalize the conditions necessary for recognition; and second, a constitution itself, as an institution, may 'recognize' or 'misrecognize' an individual or group. The second relationship depends on the kind of recognition sought. I will address the subject of recognition in general first, before returning to the formal role of constitutions.

Constitutional recognition, or misrecognition, is more than a merely textual matter. It may occur at the level of the constitutional text, and at the level of principles and values underlying the text. Often, recognition (which is comprised of acknowledgement of a feature, a positive evaluation of that feature, and the granting or denying of normative status according to that feature) is constituted by the constitutional text and underlying principles working together.

Further, misrecognition can be of two kinds, corresponding with two kinds of features, each of which emphasizes a different personal 'feature' or identity: namely, *capacity* as an autonomous agent; and second, *particular identity* as, for example, an Aboriginal or Torres Strait Islander person.

The first kind of recognition is "recognition respect,"[17] which entails treating everyone with equal worth and dignity regardless of status. It results from an "elementary" form of recognition of a person's capacity as an autonomous agent who can share and respond to reasons.[18] The corresponding misrecognition denies that they are equally "capable of responsibly reproducing and shaping the social norms of their communities."[19] Consequently, they are denied equal legal and/or moral standing.[20] Such misrecognition occurs where people are regarded as 'second-class citizens', for example, due to their gender or race.[21]

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[16] *Ibid* citing Avishai Margalit, *The Decent Society* (Cambridge, Mass: Harvard University Press, 1996) at 1–2.

[17] Iser, *supra* note 4 at 12 citing Stephen L Darwall, "Two Kinds of Respect" (1977) 88 Ethics 36.

[18] Iser, *supra* note 4 at 11.

[19] *Ibid* at 13.

[20] *Ibid* at 12–13.

[21] *Ibid* at 13 citing Taylor, *supra* note 3 at 37.

The second kind of recognition manifests as esteem or 'appraisal respect' and involves valuing *particular* properties of a person rather than the general fact that she is capable of autonomous agency.[22] As I will develop below, often this kind of recognition is placed in tension with the first by attempts to institutionalize equal respect. The challenge is how to relieve this tension where both kinds of recognition are at stake.

2.3 Australian Constitutional (Mis)recognition

The struggles of Indigenous minorities over recognition have often engaged both recognition as equal respect and recognition as esteem of particular identity. This is the case in Australia, where both kinds of recognition are also engaged by the question of constitutional recognition of Aboriginal and Torres Strait Islander peoples.

Generally, such struggles have often occurred in two distinct, consecutive, stages of what has been called the 'politics of recognition'. Part of the complexity of the Australian situation can be attributed to the fact that, at least at a constitutional level, these two struggles appear to be happening simultaneously, rather than consecutively.

In order to respond to both, constitutional recognition must manifest equal respect for the capacity of Aboriginal and Torres Strait Islander peoples' capacity as autonomous agents, while also manifesting respect for their identity as such.

The history of the 'politics of recognition' offers insight into how this challenge can be overcome, which we can use to reflect more deeply on the proposed approaches to constitutional recognition in Australia.

3 The Politics of Recognition: From 'Difference Blind' to Recognition of Difference

3.1 Politics of Universalism

Indigenous minorities were historically often attributed 'second-class citizenship' status. This differential legal status prompted claims for inclusion and full citizenship. This first iteration of the 'politics of recognition', referred to as 'the politics of universalism',[23] sought a

[22] Iser, *supra* note 4 at 12.

[23] See, for example, Taylor, *supra* note 3.

universal or 'difference blind' model of citizenship underpinned by liberal egalitarianism.[24] Difference was recognized only insofar as it was necessary to ensure that it was no longer a defensible ground for excluding or treating minorities unfairly. In other words, the 'difference blind' model was concerned with preventing the negative evaluation of certain characteristics (such as race) and the consequent normative implications.

This approach was underpinned by the view that states should not pursue cultural integration or cultural engineering but rather a 'politics of indifference' or 'benign neglect'[25] towards minority groups. It was thought that by granting cultural groups special protections and rights, the state would be overstepping its role to secure civility, and that this would risk undermining individual rights of association (which were thought to equally cover membership of cultural groups).

In Australia, the proposals to remove the references to race in sections 25 and 51(xxvi) of the *Constitution* and the proposals for anti-discrimination clauses both seem directed at achieving recognition as equal respect through universalism.

However, the struggle for recognition by Aboriginal and Torres Strait Islanders is not *merely* one seeking equal respect through universalism. Rather, it also seeks recognition of particular identity. This is evident in the fact that is not suggested that section 51(xxvi) of the *Constitution* should be removed without replacement. Instead, some distinct status of Aboriginal and Torres Strait Islander peoples is contemplated.

Further, merely extending or universalizing pre-existing general rights cannot achieve constitutional recognition in Australia. First, there are currently no positive constitutional law rights affording protection from discrimination on the grounds of personal characteristics.[26] Further, to the extent to which such rights are proposed, they are proposed only as a condition of, or to accompany, a specific legislative power in respect of Aboriginal and Torres Strait Islander peoples.

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[24] See, for example, Brian Barry, *Culture and Equality* (Cambridge, Mass: Harvard University Press, 2001).

[25] The "benign neglect" referred to by Kymlicka is that adhered to by Nathan Glazer, Barry Hindess, Richard Rorty, and Chandran Kukathas: see Will Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Oxford, UK: Clarendon Press, 1995) at 108.

[26] Other anti-discrimination provisions do appear in the *Constitution*, in sections 51(ii) (which prevents discrimination between the states in the exercise of tax power) and 117 (which prevents discrimination between the residents of different states).

In my view, it follows that adequate constitutional recognition cannot be achieved by a 'colour-blind' approach. It is thus necessary to turn to the 'politics of difference', which also challenged the notion that equal respect was satisfied by such an approach.

3.2 Politics of Difference

With efforts made at ensuring formal equality – and thus realizing recognition respect – attention turned to the recognition of particular characteristics differentiating groups, known commonly as the 'politics of difference'.

Proponents argued that extension of uniform legal status and an ideal of 'common citizenship' and 'benign neglect' was not sufficient to accommodate diversity and advance equality.[27] Instead, a more inclusive "multicultural"[28] model of citizenship[29] was advocated.

This kind of recognition is at the heart of the aspirational 'new' relationship between the Australian state and Aboriginal Torres Strait Islanders peoples in Australia and their current struggles for recognition.

Specifically, this kind of recognition underpins claims for, and recommendations concerning, textual recognition of Aboriginal and Torres Strait Islander peoples' prior ownership of the continent and their distinct culture and languages. It is an attempt to overcome the fact that the *Constitution* was drafted "in the spirit of *terra nullius*" and "the illusion of vacant land."[30] Although there may be disputes about how such recognition should be instituted, claims for such recognition are largely uncontentious.[31]

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[27] Taylor, *supra* note 3 at 40.

[28] This notion of multicultural citizenship is broad and its usage has a tendency to over simplify. I will differentiated between three different models of "multicultural citizenship": I will first address, here, the "differentiated citizenship" to refer to the liberal egalitarian model of multicultural citizenship, proposed by Kymlicka, which maintains a focus on legal status, but one which affords group-differentiated rights. I will consider the alternative nationalist and post-colonial models of citizenship in the following parts, as they proceed on a different dimension of citizenship.

[29] This could extend to liberal egalitarian, nationalist and post-colonial models of citizenship.

[30] Patrick Dodson, "Welcoming Speech" (Speech delivered at the Position of Indigenous People in National Constitutions Conference, June 4, 1993) [unpublished] quoted in; Bain Attwood & Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution* (Canberra: Aboriginal Studies Press, 2007) at 146–47.

[31] The dispute concerning recognition and acknowledgement that Australia was first occupied by Aboriginal and Torres Strait Islander Peoples, and recognition of their traditional lands and culture relates to technical matters, such as whether it should be included in the preamble or in a particular section, rather than to its merit, see e.g. Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *Final Report* (Canberra, 2015) at 31–33.

The greatest challenge is presented by the Races Power (currently in section 51(xxvi) of the *Constitution*), even if replaced. The text of the *Constitution* has been silent regarding Aboriginal and Torres Strait Islander peoples since 1967. However, Aboriginal and Torres Strait Islander peoples have been treated as persons of a 'race'. The struggle over recognition is not only directed at non-recognition but also at misrecognition on the basis of race. This is evident in the fact that although it seems to be taken as a given that some legislative power should remain in relation to Aboriginal and Torres Strait Islander peoples,[32] there are those who argue that the basis of recognition should change from race to group identity.[33]

There is some concern, not unfounded, that in light of historical experience, any legislative power with respect to Aboriginal and Torres Strait Islander peoples could still be used in a discriminatory manner.[34] This concern has driven the proposal for some limitation on the power's use[35] in the form of a general prohibition against discrimination on the grounds of race, colour or ethnic or national grounds or requirement that the power can only be used to make beneficial laws.[36]

Another way of expressing this concern is that a specific legislative power, such as that proposed, merely 'acknowledges' Aboriginal and Torres Strait Islander peoples but is neutral or silent as to its evaluation and normative consequences. It lacks the positive affirmation that is required for it to count as 'recognition'. The struggle is thus not for recognition in the distinct sense of identity, but rather for *recognition* as opposed to mere *acknowledgement,* which risks slipping into *misrecognition*. This distinguishes the Australian 'politics of recognition' from comparative examples where formal constitutional equality is a given.

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[32] Of course I recognize that those Aboriginal and Torres Strait Islanders who seek sovereignty and some consequent self-determination do not accept this. Instead, I mean to suggest that it is not proposed (nor seemingly supported by a majority) that such a power be completely removed, due to the consequent effect that it would have on existing legislation perceived as beneficial.

[33] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 31 at xiii (Recommendations 3 and 4).

[34] *Kartinyeri v Commonwealth*, [1998] 195 CLR 337 (HCA).

[35] Joint Select Committee on Constitutional Recognition of Aboriginal and Torres Strait Islander Peoples, *supra* note 31, chap 5.

[36] By the inclusion of a provision specifying that "[a] law of the Commonwealth, a State or a Territory must not discriminate adversely against Aboriginal and Torres Strait Islander peoples".

Nevertheless, even where formal equality is a given, the normative basis of differentiated recognition of a particular identity and what is required for adequate recognition of a particular identity remains a contentious question.[37]

4 CHALLENGING AND DEVELOPING NORMS OF RECOGNITION OF DIFFERENCE

Two predominant yet divergent theoretical approaches have developed in response to struggles over recognition of difference: a liberal egalitarian/nationalist theory of group rights and a deliberative democratic approach. Both attempt to manifest equal respect while still countering a universalist approach.

I will demonstrate that the second approach is preferable because, at least in the context of Aboriginal and Torres Strait Islander peoples, it accommodates difference in a way that does not compromise equal respect for autonomous capacity.

4.1 Recognition through Group-Differentiated Minority Rights

4.1.1 Kymlicka's Culturist Challenge to Difference-Blind Egalitarianism and Uniform Nationalism

Claims for recognition of a distinct identity challenge difference-blind universalism and uniform nationalism.

Kymlicka provides perhaps the most influential theory that addresses the basis on which liberals can accept the demand for group-differentiated rights by minorities who share a "societal culture",[38] including Indigenous minorities.[39] A 'societal culture' is "a culture that provides its members with meaningful ways of life across the full range of human activities, including social, educational, religious, recreational, and economic life, encompassing both public and private spheres."[40] A desire to maintain a distinct societal culture does not amount to a desire for cultural isolation or mean that there cannot be exchange and influence between cultures.[41] Instead, it means that it should be up to each culture to decide what, if anything, to borrow from other cultures. Consequently, Kymlicka challenges the significance of

[37] Iser, *supra* note 4 at 14.

[38] Kymlicka, *supra* note 25, chap 5.

[39] *Ibid* at 34.

[40] *Ibid* at 76.

[41] *Ibid* at 103.

Waldron's 'cultural hybridity' problem (i.e. that it is impossible to determine where one culture ends and another begins).[42] Kymlicka argues that although individuation of societal cultures is not possible, it is also not necessary for clear lines to be drawn for us to recognize some cultures as distinctive.[43]

Kymlicka's early defence of group-differentiated rights challenged the ideal of 'benign neglect' (that is, the normative argument that difference-blind universalism is necessary for equality). However, Kymlicka has since deplored the fallacy of 'benign neglect' not only as normatively indefensible but also as not accurately reflecting reality because "the state unavoidably promotes certain cultural identities and thereby disadvantages others"[44] through the practice of nation-building.

Kymlicka's reconceptualization of the question in terms of nation building had the effect of reframing societal groups as 'national' minorities. In multinational states, national minorities have resisted integration into the dominant culture and instead seek to protect their separate existence by consolidating their own societal cultures.[45] Minority 'peoples' exhibit the same capacity and motivation to form and maintain a distinct culture as is exhibited by 'nations'.[46] Consequently, resistance in response to state nation-building attempts can thus be characterized as a kind of 'minority nationalism'. Indigenous minorities' claims to internal self-determination and territorial self-government are examples of such minority nationalism.[47]

As a result of this reconceptualization, the question of recognizing and accommodating national minorities has shifted from 'why should the state *not* be neutral in relation to culture' to 'since the state is *not* neutral in relation to culture, what are the conditions for legitimate nation-building attempts (including in response to minority nationalism[48])?'

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[42] Jeremy Waldron, "Minority Cultures and the Cosmopolitan Alternative" in Will Kymlicka, ed, *The Rights of Minority Cultures* (Oxford, UK: Oxford University Press, 1995) 93.

[43] Kymlicka, *supra* note 25 at 102.

[44] *Ibid* at 108.

[45] *Ibid* at 79.

[46] *Ibid* at 80.

[47] Will Kymlicka, *Politics in the Vernacular: Nationalism, Multiculturalism, and Citizenship* (Oxford, UK: Oxford University Press, 2001), chap 1; Will Kymlicka, *Contemporary Political Philosophy: An Introduction* (Oxford: Oxford University Press, 2002) at 343–46.

[48] Kymlicka, *supra* note 47, chap 1; Kymlicka, *supra* note 47 at 343–46.

Kymlicka contends that state nation-building based on assimilation or suppression cannot be justified empirically or normatively.[49] Instead, he argues that state, or majority, nation-building is only legitimate to the extent that minorities can also nation-build to enable them to maintain themselves as a distinct 'societal culture'.[50]

Kymlicka provides two normative bases upon which he argues that access to one's distinct 'societal culture' is consistent with liberal egalitarianism's most basic commitments to principles of freedom and equality.[51]

Kymlicka's first argument depends on a connection between individual freedom and membership in a national or societal cultural group. Freedom involves making choices. It "allows people to choose a conception of the good life and then allows them to reconsider that decision and adopt a new and hopefully better plan of life."[52] Such individual freedom is dependent on the presence of, and access to, societal culture. One's societal culture not only provides options but it also makes them meaningful.[53] That is, one's "capacity to make meaningful choices depends on access to a cultural structure."[54]

Further, Kymlicka argues that access to *any* societal culture (such as the majority culture) is not sufficient. Instead, we should treat access to one's *own* societal culture as something that people can be expected to want, whatever their more particular conception of the good,[55] because "most people have a deep bond to their own culture and […] a legitimate interest in maintaining this bond."[56]

Kymlicka's second argument in favour of group-differentiated rights is based on their capacity to promote *inter*-group equality between the majority and minority groups.[57] Insofar as members of the majority ordinarily have access to the majority societal culture some group rights will be required to ensure that members of minority groups have equal access to their societal culture.

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[49] Kymlicka, *supra* note 47 at 351.

[50] *Ibid* at 362.

[51] Kymlicka, *supra* note 25 at 34.

[52] *Ibid* at 80.

[53] *Ibid* at 83.

[54] *Ibid* at 84.

[55] *Ibid* at 85–86.

[56] *Ibid* at 107.

[57] *Ibid* at 52.

However, Kymlicka also acknowledges that individual freedom may be limited by some societal cultures. Consequently, in the interest of individual freedom and *intra*-group equality, Kymlicka distinguishes between 'external protections'[58] and 'internal restrictions'[59] and argues that "liberals can and should endorse certain external protections, where they promote fairness between groups but should reject internal restrictions which limit the right of group members to question and revise traditional authorities and practices."[60] This distinction is underpinned by an overarching commitment to individual autonomy over group tolerance.[61]

Kymlicka concedes that it is not enough to show that minority group rights are consistent in principle with liberal notions of freedom and justice. They must also be consistent with "the long-term requirements of a stable, liberal democracy, including the requirement of a shared civic identity that can sustain the level of mutual concern, accommodation, and sacrifice that democracies require."[62] Kymlicka suggests that group rights also contribute to stability because "people from different national groups will only share allegiance to the larger polity if they see it as the context within which their national identity is nurtured, rather than subordinated."[63]

Nurturing measures must be context specific. While 'colour-blind laws' may suffice in some situations, group-specific rights may be warranted so as to acknowledge the distinct culture and community of a minority group.[64] Where circumstances call for the latter, Kymlicka presents two different kinds of rights for national minorities:

First, Kymlicka proposes "group-differentiated self-government rights," which are aimed at "compensate[ing] for unequal circumstances which put the members of minority cultures at a

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[58] *Ibid* at 35–36 (External protections are claims of a group against the larger society, intended to protect the group from the impact of external decision).

[59] *Ibid* (Internal restrictions are claims of a group against its own members, intended to protect the group from the destabilizing impact of internal dissent).

[60] *Ibid* at 37.

[61] *Ibid* at 159–163. (Kymlicka is not persuaded by Rawls' attempt in *Political Liberalism* to look beyond liberalism's commitment to autonomy as a basis for government in a pluralistic society. He instead argues that in order to defend the full range of liberal freedoms, and not just group tolerance, "we must endorse the traditional liberal belief in personal autonomy" (at 163).)

[62] *Ibid* at 173.

[63] *Ibid* at 189.

[64] Kymlicka distinguishes between the principle in Brown v Board of Education and the reasoning of the Canadian government in 1969 to remove the special constitutional status of Indians: see *ibid* at 58–59.

systematic disadvantage in the cultural marketplace."[65] Kymlicka proposes a kind of "multinational federalism"[66] as "one way of giving effect to self-government because it divides people into separate 'peoples' each with its own historic rights, territories and powers of self-government; and each therefore with its own political community,"[67] without going so far as secession.

Second, Kymlicka suggests that special representation rights may be granted to ensure increased and differentiated representation in existing state democratic institutions. Special representation rights are important because they relate to the way in which group-differentiated rights are to be institutionalized. This is an issue that Kymlicka suggests needs to be "resolved politically on a case by case basis, by good faith negotiations and the give and take of democratic politics."[68] Kymlicka thus emphasizes the 'fairness', not only of the rights he defends, but also the process by which such rights are formulated, instituted, applied, and interpreted.[69] Fairness requires that "the interests and perspectives of the minority be listened to and taken into account."[70] Kymlicka defends group representation rights as one possible model of ensuring such political equality and asserts that such rights are not illiberal or undemocratic[71] if granted to overcome systemic disadvantage or to secure self-government.[72]

4.1.2 Group-Differentiated Recognition in Australia

Other than the contentious non-discrimination guarantees, the current proposals for constitutional recognition do not propose group-differentiated rights in favour of Aboriginal and Torres Strait Islander peoples, at least not of the kinds proposed by Kymlicka – namely, special representation or self-government rights.

Insofar as the proposals envisage that future laws may be made for the benefit of Aboriginal and Torres Strait Islanders under the ambit of an express legislative power, the proposals are consistent with the suggestion that the adoption of group rights should occur as a result of

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[65] *Ibid* at 113.

[66] Kymlicka, *supra* note 47, chap 8.

[67] Kymlicka, *supra* note 47 at 114.

[68] Kymlicka, *supra* note 25 at 131.

[69] *Ibid*.

[70] *Ibid*.

[71] *Ibid* at 138–143.

[72] *Ibid* at 141–143.

democratic politics. However, Australia's current model of democratic politics does not ensure the kind of fairness envisaged by Kymlicka. At a minimum, a mechanism to ensure more adequate representation of Aboriginal and Torres Strait Islander peoples in political decision making concerning exercises of legislative power under a replacement of section 51(xxvi) would be required, in addition to a formal non-discrimination right.

Consequently, it seems that even if viewed from the perspective of Kymlicka's recognition as group differentiated-rights, the current proposals for Australian constitutional recognition are arguably incomplete.

4.1.3 Criticisms: Falling Short of Equal Respect of Autonomy

Kymlicka's work (along with that of others, including Charles Taylor[73] and Anthony Laden[74]) has been acknowledged as making "liberalism and nationalism more sensitive to the complex conditions of belonging in culturally diverse societies."[75] Nevertheless, problems endure. The set of rights granted tend to reify the minority in a particular "configuration of recognition,"[76] minorities within the group granted recognition often lack protection, and the rights granted do not necessarily engender, amongst the members of the minority group, a sense of affinity or solidarity with the larger polity (i.e. the problem of national[77] stability and identity).[78] Taken together, these problems ultimately undermine equal 'respect recognition' because they tend to deny the capacity of such minorities to equally participate in society and the development of its norms, including those relating to recognition.

Tully attributes these problems to two features of the 'recognition as group-differentiated rights' approach. First, the recognition solutions tend to be 'monological'; that is, they are imposed from above (by courts, legislators, policy makers or theorists) rather than being self-imposed through the democratic process of will-formation by those subject to them. Although Kymlicka acknowledges the role of the democratic process, he assumes a particular model of

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[73] See e.g. Taylor, *supra* note 3.

[74] See e.g. Anthony Simon Laden, *Reasonably Radical: Deliberative Liberalism and the Politics of Identity* (Ithaca: Cornell University Press, 2001).

[75] James Tully, *Public Philosophy in a New Key* (Cambridge: Cambridge University Press, 2008) at 172.

[76] James Tully, "Recognition and dialogue: the emergence of a new field" (2004) 7:3 Critical Review of International Social and Political Philosophy 84 at 91.

[77] I use "national" here in the sense of the broader national polity, rather than as synonymous with societal cultures.

[78] Tully, *supra* note 76 at 90–91.

democracy (namely, majoritarian representative democracy), which generally excludes minorities. For reasons I will explain below, the addition of minority seats, pursuant to a policy of special representation, does not adequately address such exclusion.

Second, group-differentiated rights are presented as definitive and final resolutions to the struggles over recognition, and are thus perceived as a "strait jacket"[79] that impedes dialogical civic freedom and negotiation.

Deliberative democratic theorists (including Tully[80]) have attempted to overcome these problematic features by reconceptualizing the way we think about struggles over recognition and their solutions, as dialogical and non-final, by drawing on theories of deliberative and agonistic democracy.[81]

4.2 Deliberative Democratic Approaches to Struggles Over Inter-subjective Norms of Mutual Recognition

4.2.1 The Deliberative Turn in Approaches to Recognition

Recognition theories and deliberative and agonistic democracy existed in parallel for some time before an intersection between them was finally acknowledged in the last decade.[82] More recently, this intersection has been described as "becoming less an intersection and more a merger."[83]

This 'deliberative turn' in recognition theory is not only away from a focus on liberal and nationalism theories; it is also a turn away from the model of aggregative democracy assumed by such theories.

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[79] *Ibid* at 91 citing *Reference Re Secession of Quebec*, [1998] 2 SCR 217 (Supreme Court of Canada).

[80] Although Tully is often identified as a radical or agonistic, rather than deliberative, democrat, this distinction turns on Tully's view about the possibility of consensus, and his emphasis on democracy over other institutional solutions (such as rights). For the purposes of the discussion that follows, I will characterize Tully as a deliberative democrat.

[81] Andrew Schaap, *Political Reconciliation* (London: Routledge, 2005) (Schaap has employed agonistic democracy as applicable to the question of Indigenous constitutional recognition in the Australian context).

[82] Tully, *supra* note 76 at 84.

[83] Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Annual Rev Political Science 307 at 322 citing Pablo De Greiff, "Deliberative Democracy and Group Representation" (2000) 26:3 Social Theory & Practice 397; Jorge M Valadez, *Deliberative Democracy: Political Legitimacy and Self-Determination in Multicultural Societies* (Boulder, Colo: Westview, 2001); Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era* (Princeton: Princeton University Press, 2002).

The aggregative conception of democracy takes citizens' preferences as a given, and seeks to combine them in a way that is efficient and fair. In the face of reasonable disagreement[84] between citizens' preferences, aggregative theories either let citizens (or their representatives) decide by vote (in a majoritarian model), or let experts filter citizens' preferences through a utilitarian cost-benefit analysis.[85] It could be argued that the Prime Minister's appointment of the Indigenous Advisory Council to advise the Commonwealth government on changes that can be made to benefit or improve the lives of Aboriginal and Torres Strait Islander peoples[86] comes close to an expert 'cost-benefit' or utilitarian model.

Further, no justification is required for the preferences themselves. The collective outcome is justified by the majoritarian or utilitarian assumptions supporting the aggregating method. Reasons are only relevant insofar as they may assist in predicting or correcting misinformed preferences.[87]

In general, the aggregative conception of democracy is criticized on the basis that it "accepts and may even reinforce existing distributions of power in society,"[88] which is exacerbated by the fact that it "do[es] not provide any way for citizens to challenge the methods of aggregation themselves."[89] These two concerns are heightened in cases of minority groups seeking recognition.

By contrast, "[d]eliberative democracy [is] a form of government in which free and equal citizens (and their representatives) justify their decisions in a process in which they give one another reasons that are mutually acceptable and generally accessible, with the aim of

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[84] Amy Gutmann & Dennis Thompson, *Why Deliberative Democracy* (Princeton: Princeton University Press, 2004) at 14 (Gutmann & Thompson liken the presence of "reasonable disagreement" to Rawls' "fact of reasonable pluralism", and cite); John Rawls, *Political Liberalism* (New York: Columbia University Press, 1993) at 36, 37, 63, 136, 141, 144, 152f, 216f; Joshua Cohen, "Moral Pluralism and Political Consensus" in David Copp, Jean Hampton & John E Roemer, eds, *The Idea of Democracy* (Cambridge: Cambridge University Press, 1993) 270).

[85] Gutmann & Thompson, *supra* note 84 at 14–15.

[86] Department of Prime Minister and Cabinet, "Terms of Reference", online: *Prime Minister's Indigenous Advisory Council* <iac.dpmc.gov.au>.

[87] Gutmann & Thompson, *supra* note 84 at 15.

[88] *Ibid* at 16.

[89] *Ibid* at 16–17.

reaching conclusions that are binding in the present on all [particularly affected] citizens but open to challenge in the future."[90]

According to Tully, there are three reasons for the 'deliberative turn' in approaches to recognition. First, as a result of a "deliberative turn" (led in part by Rawls[91] and Habermas[92]) in liberal and constitutional theory, principles of legitimacy and constitutionalism have been "reconceived around the ideal of the exchange of public reasons among free and equal citizens who work up the principles themselves."[93] This notion of legitimacy has been adopted by recognition theory. In order for a new norm of mutual recognition to be legitimate, it must be acceptable to those affected, which depends on it passing through an inclusive dialogue not merely adhering to a constitutionally prescribed democratic procedure.

Second, as both deliberative democrats and recognition theorists acknowledge, identities (like preferences) do not pre-exist their articulation, and are only constituted by the dialogical exchange of reasons for them.

Third, as a result of the non-homogeneity of members of minority groups seeking recognition, the only way to 'work up' an acceptable norm of recognition is to ensure that all affected (including minorities within minority groups) have a say in their formulation.

Such a deliberative turn is also thought to resolve the problem of affinity to the greater polity, which was a concern of nationalism theorists. Tully argues that affinity to the polity emerges not because it protects certain rights, but because it allows one to participate "in the practices and institutions of one's society, through having a say in them and over the ways one is

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[90] *Ibid* at 7 (Gutmann & Thompson give this definition on the basis of what they believe to be the essential characteristics of deliberative democracy. However, they also acknowledge that deliberative democrats do not agree on all of these features. They refer to the following as representative of the divergent views concerning the essence of deliberative democracy; James Bohman & William Rehg, eds, *Deliberative Democracy* [Cambridge, Mass: MIT Press, 1997]; John Elster, *Deliberative Democracy* [Cambridge: Cambridge University Press, 1998]; Stephen Macedo, ed, *Deliberative Politics* [Oxford: Oxford University Press, 1999]; John Dryzek, *Deliberative Democracy and Beyond: Liberals, Critics, Contestations* [Oxford: Oxford University Press, 2000]; David Estlund, ed, *Democracy* [Oxford: Blackwell, 2002]; Frank Cunningham, *Theories of Democracy* [London: Routledge, 2002]).

[91] Rawls, *supra* note 84.

[92] Jürgen Habermas, *Moral Consciousness and Communicative Action* (Cambridge, Mass: MIT Press, 1995) at 66.

[93] Tully, *supra* note 76 at 92 citing Rawls, *supra* note 84; Laden, *supra* note 74; James Tully, "The Unfreedom of the Moderns in Comparison to their Ideals of Constitutional Democracy" (2002) 65:2 Mod L Rev 204 at 204–11.

governed."[94] Where recognition by the polity's constitution is challenged, affinity comes from people being allowed to engage in the activities of struggling over recognition.[95] Even citizens who do not 'win' the struggle may feel this affinity. They may have gained recognition in a compromised agreement. Even if they did not, by being involved in the deliberation, they may come to realize and respect that there are good reasons on the other side and their own reasons are likely to have been recognized as reasonable and worth fighting for. Most importantly, they realize they are free to challenge the provisional norm of recognition in the future.

4.2.2 Deliberative Democratic Approach to Mutual Recognition

Deliberative democratic theory specifies two essential certain characteristics or conditions for deliberation: the provision of public reason, and provisionality. In this section, I will set out how those conditions may be challenged by, and modified to apply in, struggles over recognition.

4.2.2.1 Justification, Public Reasons and Reasonableness

The "first and most fundamental" [96] characteristic of deliberative democracy is its requirement that citizens (and their representatives) give reasons justifying their decisions. The provision of reasons is crucial because it not only produces a justifiable decision, but also expresses and reaffirms the mutual respect of participants.[97] It follows that the reasons must be 'public' in the sense that deliberation must take place in public (rather than in one's mind), and the content of the reasons must be reasonably likely to be accepted by those to whom they are addressed.[98]

This requirement of the 'reasonableness' of public reason and limitations on its content was initially construed according to a strict standard of rationalism, which required impartiality in respect of particularities of identity. However, this requirement was challenged by diversity

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[94] Tully, *supra* note 76 at 100 citing Catriona McKinnon & Iain Hampsher-Monk, eds, *The Demands of Citizenship* (London: Continuum, 2000) at 1–12; Jocelyn Maclure, *Quebec Identity: The Challenges of Pluralism* (Montreal: McGill-Queens University Press, 2003); Jocelyn Maclure, *Disenchantment and Democracy: Public Reason under Conditions of Pluralism* (PhD Thesis, University of Southampton, 2003) [unpublished].

[95] Tully, *supra* note 76 at 100.

[96] Gutmann & Thompson, *supra* note 84 at 3.

[97] *Ibid* at 4.

[98] *Ibid*.

theorists on the basis that it risks excluding the reasons of minorities as "unreasonable."[99] Consequently, deliberative democrats have generally expanded their understanding of what counts as "public reason"[100] to include, for instance, Indigenous story-telling and greeting.[101]

Tully proposes a standard of reasonableness applicable in the context of "demands for recognition as a nation and for the corresponding change in the constitutional identity of the multinational society as a fair system of social cooperation".[102] Specifically, such demands should meet two conditions of informal practical reasoning with others who disagree.

First, claims should be "internally cogent" [103] with the constitutional identity of the multinational state. The claims are essentially that the current form of recognition is unacceptable and that the proposed amendments to the constitutional identity will give rise to a society that functions as a fair system of social cooperation. The reasons given in support of such claims should draw "on the principles, values and goods of the constitution."[104] Tully suggests that these principles will often include "freedom, equality, respect for diversity, due process, the rule of law, federalism, mutual respect, consent, self-determination and political, civic and social minority rights" because "struggles to overcome an imposed identity and to gain public recognition are *not* normally a direct challenge" to such principles.[105]

Second, the demand should be formulated by "taking into account and responding in some way to the legitimate concerns of other members."[106] That is, it should comply with the principle of reciprocity, the immanent rule of which is *audi alteram partem* (always listen to the other side) even in relation to other members of the minority seeking recognition.

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[99] Chambers, *supra* note 83 at 321 citing Iris Young, "Communication and the Other: Beyond Deliberative Democracy" in Seyla Benhabib, ed, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton: Princeton University Press, 1996) 120; Monique Deveaux, *Cultural Pluralism and the Dilemmas of Justice* (Ithaca: Cornell University Press, 2000); Melissa Williams, *Voice, Trust, and Memory: Marginalized Groups and the Failings of Liberal Representation* (Princeton: Princeton University Press, 1998).

[100] Chambers, *supra* note 83 at 321 citing James Bohman, "Public Reason and Cultural Pluralism: Political Liberalism and the Problem of Moral Conflict" 23 Political Theory 253; Benhabib, *supra* note 83.

[101] Chambers, *supra* note 83 at 322.

[102] James Tully, "Introduction" in Alain-G Gagnon & James Tully, eds, *Multinational Democracies* (Cambridge, UK: Cambridge University Press, 2001) at 26.

[103] *Ibid* at 13.

[104] *Ibid*.

[105] Tully, *supra* note 75 at 170.

[106] Tully, *supra* note 102 at 26.

4.2.2.2 Provisionality

Although deliberation aims at producing a binding decision, and can thus be distinguished from mere discussion, any decision based on deliberation must be provisional.[107]

Although this characteristic is "neglected by many of its proponents,"[108] it is important for two reasons. First, we make imperfect decisions. Even if sound today, we cannot be sure that our decisions will not be unjustified in the face of new evidence.[109] Second, decisions are not likely to be consensual as unreasonable disagreement is likely to persist post-deliberation. Although deliberative democrats disagree (between agonistic and consensus democrats) as to whether we should be aiming for consensus, they all agree that "the primary aim is to justify decisions […] that citizens and their representatives impose on one another."[110]

Tully is one agonistic deliberative democrat who rejects the 'ideal of consensus' in favour of the accommodation of reasonable disagreement.[111] Specifically, Tully challenges the assumption of consensus democrats "that under some considerations of justice and stability, members will reach agreement on a definitive form of recognition for all affected."[112] Particularly in the context of "struggles over recognition" by national minorities, the requirement of consensus is problematic.[113] This is because there is no definitive and permanent form of 'mutual recognition' of a nation in a multinational society, to which *all* members "could reasonably agree."[114] Consequently, all forms of mutual recognition "will always involve reasonable disagreement and varying degrees of the injustice of misrecognition."[115] It follows that at any time, the rules of the game itself, or the prevailing forms of recognition must be treated as provisional rather than final.[116]

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[107] Gutmann & Thompson, *supra* note 84 at 4.

[108] *Ibid*.

[109] *Ibid* at 6.

[110] *Ibid* at 26.

[111] Tully, *supra* note 75 at 143. This was also acknowledged by Rawls: Tully, *supra* note 76 at 95 citing Rawls, *supra* note 84 at 54–8; John Rawls, *The Law of Peoples, with "The Idea of Public Reason Revisited"* (Cambridge, Mass: Harvard University Press, 1999) at 129–80.

[112] Tully, *supra* note 102 at 6.

[113] Tully, *supra* note 76.

[114] Tully, *supra* note 102 at 213.

[115] *Ibid*.

[116] Tully, *supra* note 75 at 143.

In order to understand the disagreement over forms of constitutional recognition in Australia as 'reasonable' or 'unreasonable', it is important to note, however, that even pluralist or agonistic democrats distinguish between two kinds of disagreement. First, there are disagreements that should not be resolved because they are between views that cannot be reasonably rejected. Second, there are those disagreements that "cry out for democracy to confirm its commitment to the principle of non-discrimination and equal opportunity in their core form."[117]

On a substantive view of deliberative democracy, any procedure that allows for the possibility of unjust outcomes cannot be reasonably justifiable to those affected. This includes majoritarian democracy wherein there may not be protections against the discrimination of minorities. Thus, disagreement about whether racial discrimination should be allowed, even as a possibility, cannot be the subject of "reasonable disagreement."[118]

Further, a distinction needs to be drawn between accepting 'reasonable disagreement' as inevitable and avoiding deliberation on the assumption that no agreement can be reached. The latter is the concern of consensus democrats.[119] This is a particularly important distinction in the context of struggles for recognition of a particular cultural identity. In order for respect to be authentic it must follow from a merits-based consideration in the course of deliberation. Authentic respect does not follow from an avoidance of deliberation on the basis that disagreement is inevitable due to cultural differences.[120] So, even if reasonable disagreement is inevitable, reasons must still be exchanged.

The non-consensual nature of decisions is exacerbated where the mechanism employed for decision taking reinforce structural power imbalances that may have contributed to the struggle for recognition in the first place. Tully expresses concern that the "power of exchange of reasons…to unsettle prejudices and alter the outlooks of the most powerful groups"[121] does not generally apply to decision taking mechanisms themselves.

That decision-taking mechanisms are not themselves often open to deliberation is not a failing of deliberative democratic theory, but rather of institutional design. Deliberative

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[117] Gutmann & Thompson, *supra* note 84 at 28.

[118] *Ibid* at 24, elaborated in Chapter 3 ("Deliberative Democracy Beyond Process").

[119] *Ibid* at 27.

[120] *Ibid* at 20.

[121] Tully, *supra* note 76 at 101–102.

democratic theory does not, itself, specify a particular mechanism for decision taking. This means that consistently with its commitment to provisionality, deliberative democratic theory accommodates the opening up of its own procedures to deliberation.[122] As a consequence, deliberative democratic theorists have recently paid more attention to particular institutional models that could better facilitate the deliberative ideal.

4.2.3 Constitutional Institutionalization of Conditions for Mutual Recognition

As acknowledged at the outset, in addition to being a means of (mis)recognition (or at least reflecting the attitudes of subjects of (mis)recognition), constitutions may also be able to institutionalize the preconditions necessary for mutual recognition.

Despite their commitment to provisionality, deliberative democrats acknowledge that constitutional provisions should be more insulated from deliberation than ordinary laws, but not completely.[123] In essence, the appropriate degree of insulation is proportional to the confidence in its justification.[124]

Theories of deliberative democracy are sometimes criticized for presuming that participants are on equal footing, or that there is mutual respect between them.[125] Such a presumption is said to be 'blind' to the inability of marginalized groups to participate in deliberation,[126] which is said to limit the usefulness of deliberative democracy a vehicle for struggles of recognition. This concern is particularly relevant in the case of deliberation envisaged within existing political institutions in Australia, from which Aboriginal and Torres Strait Islander peoples have not been on 'equal footing'.

One solution ventured by Tully is that we should be aiming for "the institutionalization and protection of a specific kind of democratic freedom."[127] The 'specific kind' of democratic

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[122] Gutmann & Thompson, *supra* note 84 at 57.

[123] *Ibid* at 53–54; See also John J Worley, "Deliberative Constitutionalism" (2009) 2009:2 BYUL Rev 431 in which Worley reconciles the principles of constitutionalism (particularly entrenchment) with those of deliberative democracy (particularly provisionality).

[124] Gutmann & Thompson, *supra* note 84 at 54.

[125] See also Chambers, *supra* note 83 at 322; Bashir Bashir, "Accommodating Historically Oppressed Social Groups: Deliberative Democracy and the Politics of Reconciliation" in *The Politics of Reconciliation in Multicultural Societies* (Oxford, UK: Oxford University Press, 2008) 48.

[126] Chambers, *supra* note 83 at 322 citing Nancy Fraser, *Justice Interruptus: Critical Reflections on the "Postsocialist" Condition* (New York: Routledge, 1997); Melissa Williams, "The Uneasy Alliance of Group Representation and Deliberative Democracy" in Will Kymlicka & Wayne Norman, eds, *Citizenship in Diverse Societies* (Oxford: Oxford University Press, 2000) 124.

[127] Tully, *supra* note 75 at 310.

freedom Tully proposes is 'dialogical civic freedom', which is the freedom of having "an effective say in a dialogue over the norms through which they are governed."[128] The 'effectiveness' is ensured by "duty on the part of the powerful to listen to [the voices of those who speak out against oppressive, exclusionary or assimilative norms of mutual recognition] and to respond with their reasons for the status quo."[129] This fundamental freedom is violated when any norm is presented and imposed as final. Tully suggests therefore that specific systems of governance should be "more inclusive and dialogical; open to the ongoing negotiation of those subject to them."[130]

It is this democratic freedom that could be constitutionalized, in a manner consistent with the ideals of deliberative democracy, to ensure the presence of the preconditions for recognition.

5 CONCLUSION

The liberal and nationalist accommodationist approaches provide a possible basis upon which Indigenous minorities may be 'recognized' from the perspective of the state. These approaches indicate that guarantees of non-discrimination may not be adequate and offer asymmetrical federalism and special representation as a potential way of accommodating multiple nations while maintaining the stability of one state. However, these approaches assume the possibility of a fixed outcome, which will not necessarily give rise to a stable shared identity, and may fail to properly address democratic legitimacy problems.

Struggles over recognition need to be resolved, albeit provisionally, through a deliberative process. The deliberative process is underpinned by a recognition and respect for citizens as equally capable of autonomous agency and thus as having equal responsibility for reproducing and shaping constitutional values and laws that give them effect. It is this kind of recognition that holds promise for establishing a legitimate constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples.

However, two key weaknesses of Tully's dialogical democratic approach to struggles for mutual recognition have been identified.[131] First, although Tully envisages 'practices of

[128] Tully, *supra* note 76 at 99.

[129] *Ibid*.

[130] *Ibid* at 103; Tully, *supra* note 93 at 217–225.

[131] Kenneth A Armstrong, "Inclusive Governance? Civil Society and the Open Method of Co-ordination" in Stijn Smismans, ed, *Civil Society and Legitimate European Governance* (Cheltenham, UK: Edward Elgar, 2006) 42 at 57.

governance', he does not specify actual structures for realizing dialogical civic freedom. Second, Tully's approach to constitutionalism, which flows from his commitment to provisionality, is also challenged as being a "performative contradiction,"[132] because it cannot both entrench institutions and allow them to be subject to deliberation.

In Chapter 3, I will address both of these perceived weaknesses, as well as the ways of institutionalizing requisite conditions of equality.

[132] Emilios Christodoulidis, "Constitutional Irresolution: Law and the Framing of Civil Society" 9:4 Eur LJ 401.

– Chapter 3 –

Towards Constituting a Legitimate Relationship

1 INTRODUCTION

"Democratic experimentalism"[1] as developed by Charles Sabel,[2] Joshua Cohen[3] and Michael Dorf,[4] draws together the threads of two parallel emerging schools in democratic theory, which both respond to different but interrelated challenges faced by the liberal-democratic state concerning the tension and balance between the fundamental principles of freedom and equality.

First, acknowledging that state intervention is sometimes necessary for justice and equality (as recognized by welfarist models), yet also acknowledging the cost to freedom of top-down regulation,[5] democratic experimentalism tries to find a middle ground that respects and reconciles these two antinomies. Second, it also necessarily must address the tension between liberal and republican notions of freedom: that is, between freedom as non-interference protected by rights, and freedom as democratic participation and self-government. In this regard, democratic experimentalism adopts the deliberative democratic attempt to reconcile these two freedoms as co-original.

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[1] The term "democratic experimentalism" seems to have been coined by Dorf and Sabel. Other terms such as "reflexive law" or "directly deliberative polyarchy" have also been used to describe a similar idea. I will refer to "democratic experimentalism" throughout, unless it is necessary to distinguish between the nuances of these different ideas.

[2] Michael C Dorf & Charles F Sabel, "A Constitution of Democratic Experimentalism" (1998) 98:2 Colum L Rev 267; Joshua Cohen & Charles F Sabel, "Sovereignty and Solidarity: EU and US" in Jonathan Zeitlin & David M Trubek, eds, *Governing Work and Welfare in a New Economy: European and American Experiments* (Oxford: Oxford University Press, 2003) 345; Charles F Sabel & Jonathan Zeitlin, "Experimentalism in the EU: Common ground and persistent differences: Experimentalism in the EU" (2012) 6:3 Regulation & Governance 410; Charles F Sabel & William H Simon, "Epilogue: Accountability without Sovereignty" in Gráinne De Búrca & Joanne Scott, eds, *Law and New Governance in the EU and the US* (Oxford: Hart Publishing, 2006) 395; Joshua Cohen & Charles Sabel, "Directly-Deliberative Polyarchy" (1997) 3:4 Eur LJ 313; Charles F Sabel & William H Simon, "Destabilization Rights: How Public Law Litigation Succeeds" (2004) 117 Harv L Rev 1015; Charles Sabel, "Dewey, democracy, and democratic experimentalism" (2012) 9:2 Contemporary Pragmatism 35; Charles F Sabel, "Design, Deliberation, and Democracy: On the New Pragmatism of Firms and Public Institutions" (Paper delivered at the conference on Liberal Institutions, Economic Constitutional Rights, and the Role of Organizations, December 15, 1995) [unpublished]; Charles F Sabel, "A Quiet Revolution of Democratic Governance: Towards Democratic Experimentalism" in OECD Forum for the Future, ed, *Governance in the 21st Century* (Paris: Organization for Economic Co-operation and Development, 2001) 121.

[3] Cohen & Sabel, *supra* note 2; Joshua Cohen, *Philosophy, Politics, Democracy: Selected Essays* (Cambridge, Mass: Harvard University Press, 2009); Cohen & Sabel, *supra* note 2.

[4] Dorf & Sabel, *supra* note 2; Michael C Dorf, "The Domain of Reflexive Law" (2003) 103 Colum L Rev 384.

[5] Simone Chambers, "Deliberative Democratic Theory" (2003) 6 Annual Rev Political Science 307 at 312.

Although these challenges face the state generally, they are particularly acute in the context of the relationship between the Australian state and Aboriginal and Torres Strait Islander peoples.

In attempting to chart this middle ground, democratic experimentalism is heavily influenced by the work of John Dewey.[6] Dewey established "an ideal of democracy as that form of self-government which…affords the greatest possible scope to the social intelligence of problem solving and the flourishing of individual character as its condition and product."[7] Dewey's ideal of democracy was characterized by three essential elements: it is local, deliberative, and provisional.[8]

Consistently with Dewey's emphasis on the local democratic experimentalists argue that policy-making should not only be deliberative but should also be delegated to local deliberative bodies.[9] Their central claim is that "the quality of public decisions will be improved to the extent that they are the product of deliberation by those who are most directly familiar with the relevant problems and the resources available for solving them."[10]

However, democratic experimentalism also addresses "the relationship between conventional institutions of political representation and participatory-deliberative arrangements," which presents a significant obstacle[11] in the project to achieve the ends of radical democracy. That is, directly deliberative arrangements cannot replace conventional politics, but if they can be connected to conventional institutions, each may transform and strengthen the other.

In this Chapter, I will argue that democratic experimentalism provides the architecture for a relationship between Aboriginal and Torres Strait Islander peoples and the Australian state that may be characterized as legitimate, or at least goes some way to address the legitimacy problems currently plaguing that relationship.

This overarching argument rests upon two premises. First, the relationship between the Australian state and Aboriginal and Torres Strait Islander peoples is one that is, or can be,

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[6] John Dewey, *The Public and Its Problems* (New York: Holt and Company, 1927); John Dewey, *Reconstruction in Philosophy* (New York: Holt and Company, 1920); John Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: Macmillan, 1916).

[7] Sabel, *supra* note 2 at 35.

[8] William H Simon, "The Institutional Configuration of Deweyan Democracy" (2012) 9 Contemporary Pragmatism 5 at 5.

[9] Eric MacGilvray, *Reconstructing Public Reason* (Cambridge, Mass: Harvard University Press, 2004) at 199.

[10] *Ibid*.

[11] Cohen, *supra* note 3 at 347.

grounded in constitutionalism, which is based on, amongst others things, "a sufficiently shared willinness to use law rather than force to resolve disagreements".[12] The legitimacy of action and exercises of power in the context of this relationship are thus determined by the requirements of the rule of law. The conception of the rule of law on which I rely is that advanced by David Dyzenhaus: namely, the rule of law as the rule of a culture of justification. This conception of the rule of law attempts to chart a course between democratic positivist conceptions, such as that offered by Bentham, and liberal anti-positivist conceptions, such as that advanced by Dworkin.[13] In the context of a constitutional legitimacy deficit, such as that challenging the constitutional relationship between Aboriginal and Torres Strait Islander peoples and the Australian state, this rule of law as a project offers the most promise, whereas the former risks simply justifying the existing constitutional and legal framework, and the latter tends to refer to extra constitutional principles that remain uncontestable.

Second, democratic experimentalism facilitates or gives effect to this commitment to a culture of justification in the context of the current relationship that exists between Aboriginal and Torres Strait Islander peoples and the Australian state.

Accordingly, this Chapter will be divided into two Parts. In Part 2, I will set out the legitimacy problems currently facing the Commonwealth state in relation to its relationship with Aboriginal and Torres Strait Islander peoples, and how addressing these legitimacy problems requires a particular understanding of the rule of law, namely as a commitment to justification. In Part 3, I will argue that democratic experimentalism provides an institutional framework in which this commitment may be realized and sustained.

2 ACUTE LEGITIMACY PROBLEMS

Before turning to address the institutional model itself, it is necessary to first clarify the perceived legitimacy deficits current facing the current Australian constitutional framework in relation to Aboriginal and Torres Strait Islander peoples, which I will argue can at least be partly addressed by a democratic experimentalist model.

[12] Vicki C Jackson, "What's in a Name: Reflections on Timing, Naming, and Constitution-Making" (2007) 49 William & Mary L Rev 1249 at 1254.

[13] See discussion of these two counter positions in David Dyzenhaus, "Recrafting the Rule of Law" in David Dyzenhaus, ed, *Recrafting the Rule of Law: The Limits of Legal Order* (Oxford: Hart Publishing, 1999) 1.

The optimal means of normative justification for constitutional democracy is legitimation based on consent,[14] although how this requirement of consent is satisfied is contested. On any view, formerly colonial states face acute questions concerning legitimacy not faced by other democracies because Indigenous minorities have "little reason to owe allegiance to a legal and political system to which they have never consented."[15]

The legitimacy problems occur on two levels: at the constitutional level, and at the sub-constitutional level. At the constitutional level, on one view, since Aboriginal and Torres Strait Islander peoples were not consulted in constitution making process the ongoing legitimacy of the *Constitution* is called into question. This depends on a theory of legitimacy based upon 'origins' or 'founding', which invokes something closer to a requirement of actual consent rather than hypothetical consent. This kind of legitimacy deficit cannot easily be addressed.[16]

Alternatively, the legitimacy of the *Constitution* could be assessed according to the extent to which it currently adequately protects the rights of Aboriginal and Torres Strait Islander peoples – that is, whether it is a just constitution. In such a theory, legitimacy still derives from a basic theory of consent, but consent is treated as hypothetical rather than actual. The legitimacy of the *Constitution* is called into question on this basis, because of the absence of rights protections for Aboriginal and Torres Strait Islander peoples. However, for the reasons set out in Chapter 2, this standard of legitimacy is problematic in any event because "it is highly implausible that in any pluralistic constitutional democracy there would be unanimity on a sufficient core of constitutional fundamentals"[17] to legitimate the constitutional structure once and for all, all the way down.

Applying a deliberative democratic conception of legitimacy responds to concerns about consent and participation while providing the possibility of rectifying past legitimacy problems. In a deliberative democracy, law is legitimate when it is produced in accordance with appropriate democratic procedures, and is not contingent on a match between its content

[14] Michel Rosenfeld, "The Rule of Law and the Legitimacy of Constitutional Democracy" 74 S Cal L Rev 1307 at 1312.

[15] Paul Patton, "Rawls and the Legitimacy of Australian Government" (2009) 13 Australian Indigenous L Rev 59 at 60.

[16] See discussion of the "paradox of the founding" in Kevin Olson, "Paradoxes of Constitutional Democracy" (2007) 51:2 American Journal of Political Science 330.

[17] Rosenfeld, *supra* note 14 at 1315.

and a pre-ordained set of moral values.[18] The 'appropriate democratic procedures', however, are not simply those set out in the constitution but are immanent in the idea of the rule of law itself. The relevant conception of the rule of law is the 'rule of law as a project', which is developed by Dyzenhaus drawing on the work of Dworkin and Fuller.[19] Dyzenhaus understands the rule of law as the 'rule of a culture of justification' rather than a 'culture of reflection' or 'culture of neutrality'. In other words, the rule of law as a project requires an ongoing commitment to public justification and the institutions needed to facilitate that justification.

The rule of law as a project is based on a particular understanding of 'law' and legal subjects. Legal subjects are understood to be rational and self-determining "reasonable agents"[20] who are capable of actively participating in governance. Law is thus understood not as the command of a sovereign but "a conversation between sovereign and subject about the appropriate terms of their relationship."[21] It follows from this acknowledgement of subjects' rational capacity to engage with law that public officials acting under the law must make decisions in a form that respects that capacity. Specifically, public officials must offer 'justification' in the form of reasons to the legal subject. Importantly, those reasons must not only demonstrate fidelity to the law as a source of authority, but must also be directed to the legal subject.

Although Aboriginal and Torres Strait Islander peoples were not afforded the opportunity to participate in the initial decisions concerning the content of the *Constitution*, they may yet be afforded the opportunity to participate in *consequential* deliberations about their constitutional relationship with the Commonwealth.

This conception of legitimacy has implications for the legitimacy of legislative and executive decisions made in respect of Aboriginal and Torres Strait Islander peoples.

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[18] David Dyzenhaus, "The Legitimacy of Legality" (1996) 46:1 UTLJ 129 at 154.

[19] See e.g. David Dyzenhaus, "Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order" (2005) 27 Cardozo L Rev 2005; David Dyzenhaus, "Preventative Justice and the Rule-of-Law Project" in Andrew Ashworth, Lucia Zedner & Patrick Tomlin, eds, *Prevention and the Limits of the Criminal Law* (Oxford University Press, 2013).

[20] This idea comes from Fuller and is extended by Dyzenhaus, see discussion in: Jocelyn Stacey, *The Constitution of the Environmental Emergency* (DCL Thesis, McGill University Faculty of Law, 2015) [unpublished] at 126 citing Lon L Fuller, *The Morality of Law*, revised ed (New Haven: Yale University Press, 1969).

[21] Nathan Edward Hume, *Constitutional Possibilities: An Inquiry Concerning Constitutionalism in British Columbia* (JSD Thesis, University of Toronto Faculty of Law, 2012) [unpublished] at 54 citing Dyzenhaus, *supra* note 18 at 171–174.

The same two kinds of legitimacy problems appear in relation to legislation made in respect of Aboriginal and Torres Strait Islander peoples because: on one view, as a matter of democratic process, they may be passed by a Parliament which is not *representative* of Aboriginal and Torres Strait Islander people; and one another view, as a matter of substance, they may be discriminatory and therefore be inconsistent with fundamental rights.

These two potential legitimacy deficits are in tension on two levels. At one level, there is the classic tension between between democratic freedom and justice and equality, and at another level there is also the tension between the private and public autonomy of the citizen.[22]

In the parts that follow, I will argue that democratic experimentalism provides an institutional model that seeks to ensure deliberative legitimacy both at the level of legislative and executive decisions, and at the level of constitutional values. It does this by linking the achievement of equality and justice (and core constitutional values) with the exercise of democratic freedom, in a way that makes those constitutional values subject to revision.

3 Crafting a Democratic Experimentalist State Structure to Realize the Culture of Justification

Having identified the ideal nature of the relationship between the state and Indigenous peoples, characterized by a joint commitment to justification, the challenge then becomes how to conceptualize and design institutions in order to realize the culture of justification.

In this Part, I will argue that democratic experimentalism provides the architecture for institutional design that offers promise for the realization of such a culture in the Australian context, and I will sketch out the particular institutional framework that could apply. In advancing democratic experimentalism here, it is not my intention to suggest that it is the only institutional design option that follows from a commitment to the rule of law. The relationship between deliberative democracy (and democratic experimentalism) and the rule of law and legal theory is the subject of a much broader and more complex discussion, which is beyond the scope of this Chapter.[23] Having said that, there have been recent attempts to

[22] Dyzenhaus, *supra* note 18 at 177–78.

[23] See, for example, Ron Levy, "The Law of Deliberative Democracy: Seeding the Field" (2013) 12:4 Election LJ 355; Hoi L Kong, "Election Law: and Deliberative Democracy: Against Deflation" (2015) 10 JPPL 999.

argue that democratic experimentalism and Dyzenhaus' rule of law project are complementary.[24]

Democratic experimentalism has not yet, to my knowledge, been applied in the context of the forging a new constitutional relationship between Indigenous minorities and the state.[25] Whether or not it will achieve the culture of justification it promises will have to be tested by experimentation. Nevertheless, I am cautiously optimistic that its general framework can be applied in the context I propose.

The democratic experimentalist structure I propose has four necessary constituent interrelated institutions. I will first set out the role that each of these institutions play in the democratic experimentalist ideal, and then suggest how each institution might operate in the Australian context.

3.1 Legislative Devolution to Local Directly Deliberative Bodies

Legislative delegation is the cornerstone of the democratic experimentalist structure, rather than being merely instrumental. It is the fact that the legislature has governed "by law" that gives rise to the rule "of law"[26] that sustains the culture of justification.

Despite its importance, the legislature is no longer responsible for comprehensively solving a problem through the prescription of means and ends. Instead, an experimentalist legislature's role is three-fold. First, the legislature must identify and publicly declare a framework goal. In so doing, however, the legislature must respect the provisionality of means and ends. The end must be stated without any means being preferred, and must not be stated so narrowly that that certain means are necessarily dictated.[27]

Second, the legislature must authorize local deliberative bodies to realize the framework goal. The legislature should also exercise restraint in prescribing the identity, composition and scope of the local bodies to be authorized. This is because "[t]he dimensions of effective government will change according to the particulars of the problem of governance 'local'

[24] See e.g. Hume, *supra* note 21; Stacey, *supra* note 20.

[25] Although Hume's thesis discusses constitutional experimentalism in the context of the Crown-Indigenous relationship in British Columbia, it offers a different perspective because its focus is on existing mechanisms that have already provided for decades of "experimentation", which is then evaluated. Hume, *supra* note 21.

[26] Stacey, *supra* note 20 at 137.

[27] Dorf & Sabel, *supra* note 2 at 341.

actors, whatever their limitations, know best when 'local' is improperly sized."[28] The experimentalist legislature should defer to the relevant central administrative agency in identifying the jurisdiction or body that will act as the 'protagonists' of a particular experimentalist programs. Of course, from a mechanical point of view, in order for legislative authorization to occur, the relevant deliberative body will need to have an identity sufficiently certain enough for this to occur.

Finally, the legislature must make such authorization and conferral of discretion conditional upon the relevant body both giving their reasons for the chosen means and exposing those reasons to public evaluation against benchmarked standards.[29] This relies on a positive law obligation to facilitate and ensure the giving of reasons.

In the Australian context, section 51(xxvi) of the *Constitution* arguably accommodates such legislative authorization. In view of the fact that some narrow legislative power concerning "Aboriginal and Torres Strait Islander peoples" is envisaged as enduring despite any constitutional amendments, any equivalent power would similarly provide warrant for such legislative authorization.

Of course, pointing to a source of power is not sufficient; the constitutional responsibility of legislatures under the rule of law project is to "justify their legislation to free and equal citizens."[30] Insofar as these bodies seek to create a mechanism for the deliberation of constitutional values, the requisite justification can be offered.

3.2 Administrative Agencies

Although local deliberative bodies are to have a significant degree of power and discretion, they do not operate autonomously. In this way, the democratic experimentalist model is one of "coordinated decentralization,"[31] finding a middle ground between democratic centralism and autonomous decentralization.[32]

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[28] *Ibid* at 343.

[29] *Ibid* at 288.

[30] Dyzenhaus, *supra* note 18 at 163.

[31] Archon Fung & Erik Olin Wright, "Thinking About Empowered Participatory Governance" in Archon Fung & Erik Olin Wright, eds, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (London: Verso, 2003) 3 at 21.

[32] *Ibid*.

A superordinate central administrative agency serves facilitative and monitoring roles.[33] Both roles are fulfilled though the agency first pooling information concerning the 'experiments' of dispersed bodies, and then disseminating that information for the benefit of such bodies.[34]

The agency attempts to define 'ends' (rather than 'means'), but rather than seeking definitive answers to empirical and policy questions, these agencies set temporary standards of conduct based on 'best practices' that emerge from communication between deliberations of individual actors concerning their 'common goal'.[35]

To achieve its monitoring function, the agency issues 'benchmark' regulations in the form of 'rolling best-practice rules', which require the use of processes that are at least as effective in achieving legislative objective as the best practice identified by the agency at any given time. Central administrative agencies are thought to be well placed to 'benchmark' because "of their ability to survey many jurisdictions from many points of view."[36]

The process of benchmarking may be complicated by differences between localities, which result in different local innovations and the emphasis of different ends.[37] Democratic experimentalists are nevertheless hopeful that "common systems of measurement will be possible."[38] Moreover, the value of the benchmarking is not the setting of rolling rule itself, but the fact that it contributes to further deliberation as to what that rule should be. Dorf and Sabel explain that "the aim of benchmarking is simply to reveal sufficiently large differences in performance and approach to provoke local debate about the possibilities of improvement, and, subsequently, about the improvement of groupings, characterizations, and measures themselves."[39] It is in this project of learning and justification that localities are alike, despite their emphasis of different ends: they have "a common interest in learning more about the relation between various ends."[40]

In this way, the agency's monitoring role feeds back into its facilitative role because benchmarking is not merely an assessment of adherence to legislative authorization and

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[33] *Ibid*.

[34] Cohen, *supra* note 3 at 212.

[35] Cristie L Ford, "In Search of the Qualitative Clear Majority: Democratic Experimentalism and the Quebec Secession Reference" (2001) 39 Alta L Rev 511 at 529.

[36] Dorf & Sabel, *supra* note 2 at 345.

[37] *Ibid* at 346.

[38] *Ibid*.

[39] *Ibid* at 347.

[40] *Ibid*.

objective, but also improves and encourages local deliberation concerning the means of attaining that objective. In other words, the law not only reflects deliberation or public debate, but the outcomes of law are similarly subject to the same kind of deliberation or debate.[41]

In Australia, there is currently no administrative agency in existence that could be given experimentalist functions. The Minister for Indigenous Affairs currently administers his portfolio through the Office of Indigenous Policy Coordination, which is a division of the Department of the Prime Minister and Cabinet. However, a commission-type agency similar in form to the previous Aboriginal and Torres Strait Islander Commission ("ATSIC"),[42] abolished in 2005, would be an appropriate agency. This idea is not new. Nearly 20 years ago, Larissa Behrendt recognized that ATSIC, with a bureaucracy run by elected Aboriginal people, "would have provided an excellent opportunity for institutional experimentalism."[43]

Although similar to ATSIC, to achieve its experimentalist function any new body would need to differ in its functions and also its relationship to local deliberative bodies in which Aboriginal and Torres Strait Islanders could participate.[44] Specifically, one key difference would be that the deliberative local bodies overseen by the centralized agency (like ATSIC) would have substantial power and would not be "mere advisory bodies."[45]

3.3 Protagonist Local Deliberative Bodies: Ensuring Deliberation through Equality

Democratic experimentalism does not prescribe the constitution of local deliberative bodies. Local bodies to engage local Aboriginal and Torres Strait Islander peoples in deliberation could take for the form of state constituted Aboriginal corporations, or regional council type bodies as previously existed under the ATSIC. Although the Annual Forum of Delegates to National Congress of Australia's First Peoples could serve as a deliberative body, its current status as a non-government voluntaristic and autonomous body and its consequent inability to "colonize state power"[46] precludes it from being the appropriate deliberative body.

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[41] This reflects Habermas' view of the communicative nature of law: see discussion in Dyzenhaus, Legitimacy of Legality.

[42] Established under the *Aboriginal and Torres Strait Islander Commission Act 1989* (Cth).

[43] Larissa Behrendt, "Meeting At the Crossroads: Intersectionality, Affirmative Action and the Legacies of the Aborigines Protection Board" (1997) 4:1 Austl J H R 98, n 8.

[44] Quite apart from the democratic experimentalist model, some of these aspects of ATSIC were identified as needing change in the review commissioned in 2003, discussed in Chapter 1.

[45] Fung & Wright, *supra* note 5 at 20.

[46] *Ibid* at 22.

Ultimately, the identity of the body is less important than its membership and scope. In this regard, there are two important guiding principles. First, directly deliberative bodies should be open to *affected parties*. In a context where Aboriginal and Torres Strait Islander peoples are the subjects of a legislative objective, at a minimum the deliberative bodies should be open to such peoples. However, on what basis? Although democratic experimentalism envisages a more direct form of democracy, it is likely that some kind of representation model will be employed. Any model of representation raises a question about the identity of representatives particularly in a context where group identity, as well as individual identity, is important.

Consistently with its concern for equality and the contestability of membership and scope of deliberative bodies, "democratic experimentalism contests […] the notion that stable social groups should be permitted to entrench their roles in the deliberations, to hoard authority and to limit others' access to the forum, to foreclose internal debate or external challenge, and to insulate themselves from change."[47]

This contesting of groups raises an important question about the applicability of democratic experimentalism in a context, such as multicultural or multinationalism, where group identity is important. This question has been considered by Ford, who suggests that democratic experimentalism's disentrenchment of social groups "does not necessarily mean denying that group membership matters to individual identity, democracy or justice"[48] or require that "individuals […] bargain away central, socially-derived constituents of their identities".[49] Instead, democratic experimentalism merely brings into question "the ability of any group legitimately to speak for all of its members, on every issue, across time and space".[50] So, democratic experimentalism recognizes that both individual and group identities are entitled to space and respect, but they should also be "complicated and contestable"[51] so mechanisms should be provide for those constructs to be "moving and fluid."[52] In this sense, democratic experimentalism offers a way of protecting the internal heterogeneity of diverse minority groups. This is important in the context of recognition and inclusion of Aboriginal and Torres

[47] Ford, *supra* note 35 at 555.
[48] *Ibid*.
[49] *Ibid*.
[50] *Ibid*.
[51] *Ibid*.
[52] *Ibid* at 555–556.

Strait Islander peoples, where it has been acknowledged that "[t]here is no such thing as 'the Aboriginal perspective'."[53]

Participation may also be extended to non-affected parties (for example, organizations) if they have "essential special relevant information" or "can articulate a point of view in ways that foster deliberation among alternative solutions."[54] In other words, their inclusion is justified on the basis of improved justification and deliberation. Above all, the composition and scope of the body should itself be subject to contestation and deliberation, particularly where "objectionably discriminatory."[55]

The second guiding principle concerns the conditions necessary to ensure that *deliberation* occurs. At a minimum, there should be 'rough' (rather than absolute) equality among participants in respect of participation entitlements and power.[56] Rough equality should be sufficient to make alternatives (such as strategic domination or exit from the process) less possible, and deliberation more attractive.[57]

Generally, empirical studies have shown that rough power balances sufficient for deliberation may be brought about in three ways:[58] by self-conscious institutional design, by accident or unintended consequence, or by the participation of particular groups. Critics of democratic experimentalism doubt that the requisite rough equality can be achieved, whether by these approaches or any others, where there are entrenched asymmetries of power, which "cannot be evaporated merely through institutional experimentalism and innovation".[59] Specifically, asymmetries of power resulting from colonialism are thought to be "simply too pervasive and entrenched to be addressed by experimentation".[60]

I acknowledge that this presents the greatest challenge to the application of democratic experimentalism in a post-colonial context. At this stage, however, the challenge is practical rather than one of principle. Whether or not institutional experimentalism and innovation can move us through and beyond such challenges depends on the outcome of such experiments.

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[53] Anthony Dillon, "A Just Republic, Not Just a Republic" in Benny Jones & Mark McKenna, eds, *Project Republic: Plans and Arguments for a New Australia* (Collingwood, Vic: Black, 2013) 76 at 79.

[54] Cohen, *supra* note 3 at 209–210.

[55] *Ibid*.

[56] *Ibid* at 209; Fung & Wright, *supra* note 31 at 23.

[57] Fung & Wright, *supra* note 31 at 23.

[58] *Ibid*.

[59] Michael Wilkinson, "Between Constitutionalism and Democratic Experimentalism? New Governance in the EU and the US" (2007) 70:4 Mod L Rev 680 at 686.

[60] Hume, *supra* note 21 at 90; See also Wilkinson, *supra* note 59 at 692.

3.4 Courts

Democratic experimentalists advocate "a two-fold transformation in judicial decision-making" as a pre-condition to and as a consequence of the commitment to a culture of justification and deliberation.[61]

The first transformation concerns a matter of procedure: namely, the court's role in assessing the decision-makers' decision. Deference is still appropriate, but is conditioned upon the decision-makers' production of reasons that makes evaluation of their linking principle and practice possible. That is, the production of reasons is key.

When reviewing the agency action in setting the standard, the court cannot assess whether the rolling rule is 'best' practice. Instead, the court is to assess "whether the agency in fact undertook the kind of information organizing and coordinating effort necessary to generate rolling best-practice standards."[62]

If so, the 'rolling rules' set by the administrative agency provide a baseline for assessing the 'reasonableness' of approaches taken by local bodies. Reasons must reveal justification on the basis of efforts and views of peer institutions.[63] Non-complying bodies would have the burden of justifying why the rolling standard set by the agency is either not superior to their own, or why it is not applicable to local circumstances.

Judicial review "is thus procedural in the sense that it asks what entities, jurisdictions and agencies did to look for solutions, rather than whether the solutions were the right ones."[64] More precisely, the focus is on participation, but it differs from "traditional procedural jurisprudence" which tends to seek "the eternal requisite of fair process."[65] Instead, "the experimentalist court asks whether the parties whose actions are challenged have satisfied their obligation to grant those rights of participation revealed to be most effective by comparison with rolling best practice elsewhere."[66]

The second transformation concerns a matter of substance: the court's role in interpreting and defending 'core constitutional norms'. Most importantly, these core constitutional norms are

[61] Dorf & Sabel, *supra* note 2 at 389.
[62] *Ibid* at 397.
[63] *Ibid* at 399–400.
[64] *Ibid* at 397.
[65] *Ibid* at 403.
[66] *Ibid*.

to be identified and understood as 'always provisional.'[67] This has the effect of creating spaces for innovation in the organization of public administration,[68] which is necessary to sustain the experimentalist model.

It is not only the means of achieving constitutional norms that are provisional; the court's articulation of those constitutional norms is also contestable. This is because, just like the other branches of government, experimentalist courts "function by a form of direct deliberation."[69] They too must offer reasons for decisions, which should prompt further deliberation about whether the court's articulation accurately reflects both the nature of our fundamental constitutional norms and how best to achieve them. Dorf and Sabel contend that "judicial review by experimentalist courts accordingly becomes a review of the admissibility of the reasons private and political actors themselves give for their decisions, and the respect that they actually accord to those reasons."[70] Judging permissibility of reasons and the respect accorded to them in particular cases will be informed by doctrine that "set limits to the reasons permitted in directly democratic deliberation."[71] The limits will be "the rights that define the freedom and equality of citizens."[72]

3.5 Core Constitutional Values: A Common Normative Departure Point?

3.5.1 The Centrality of Constitutional Values

Core constitutional values are central to democratic experimentalism. At one level, democratic experimentalism provides an institutional framework "for translating a community's most deeply held beliefs and values into practice,"[73] so that members of the community can test, *ex post*, the best *means* of achieving ends. However, at another level, through democratic experimentalism's conscious and structured evaluative process of means and ends, those community values are themselves opened to critical discussion and revision.[74]

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[67] *Ibid* at 387.

[68] Sabel & Simon, *supra* note 2.

[69] Dorf & Sabel, *supra* note 2 at 388.

[70] *Ibid* at 389.

[71] *Ibid* at 404.

[72] *Ibid*.

[73] Ira Struber, "Framing Pragmatic Aspirations" (2003) 35 Polity 491; Stu Woolman, *The Selfless Constitution: Experimentalism and Flourishing as Foundations of South Africa's Basic Law* (Cape Town, S Afr: Juta, 2013) at 203.

[74] Ford, *supra* note 35 at 534.

This focus on process has meant that democratic experimentalists deny the need for any "normative departure point"[75] by reference to which the ends may be identified. Indeed, it is referred to as 'experimentalist' because "it takes its own starting points as arbitrary and corrects its assumptions in the light of the results that they produce."[76] Nevertheless, critics have argued that some "normative departure point" seems necessary "not just as an objective source of authority, but appealed to as a subjective source of an ongoing commitment …to put things in common."[77]

The normative departure point may be determined by the text of a constitution and various publics, networks or associations that operate within an "objective, normative value order."[78] Perhaps this is why the notion of 'democratic experimentalism' has only been applied[79] in the context of giving effect to or enforcing constitutional rights or values, or an "aspirational normative framework provided by the text of the Constitution."[80]

Although positive constitutional law may provide a convenient starting point, democratic experimentalism's radicalization of constitutional values indicates that positive constitutional law is not the only source of constitutional values. In my view, express political or moral values in a constitutional text are relevant but not necessary. Although constitutionals values may be disclosed by constitutional text, to suggest that they are *only* to be found in constitutional text is to adopt a positive view of law that is inconsistent with both Dyzenhaus' conception of the rule of law and democratic experimentalism. To the extent to which there *are* such values enshrined, they are a possible but not a *necessary* starting point. This distinction becomes particularly important in a context where positive constitutional law does not provide the relevant values and principles. It follows from Dyzenhaus' conception of the rule of law that in the absence of positive law, it cannot be the case that there is a complete absence of governing values and principles – that there is a legal black hole.

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[75] Discussed in Woolman, *supra* note 73 at 203; Dorf & Sabel, *supra* note 2 at 284–285.

[76] "Democratic Experimentalism: What To Do About Wicked Problems After Whitehall (And What Scotland May Just Possibly Already Be Doing)" (Paper delivered at the, February 28, 2000) [unpublished].

[77] ing withWilkinson, *supra* note 59 at 698 citing Neil Walker, "EU Constitutionalism and New Governance" in Gráinne De Búrca & Joanne Scott, eds, *Law and New Governance in the EU and the US* (Oxford: Hart, 2006) 15 at 30–31.

[78] Woolman, *supra* note 73 at 202.

[79] The two most prominent examples are: giving effect to particular economic, social and cultural rights in the South African Constitution (see Brian Ray, "Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases" (2009) Utah L Rev 797), or the interpretive provision in section 27 of the *Canadian Charter of Rights and Freedoms* (see Faisal Bhabha, "Between Exclusion and Assimilation: Experimentalizing Multiculturalism" (2009) 54 McGill LJ 45).

[80] Woolman, *supra* note 73 at 202.

Such questions have not been considered head-on by democratic experimentalists, because democratic experimentalism was developed in the context of the *United States Constitution*, where the relevant constitutional values were enshrined in positive constitutional law. However, such questions are squarely raised by the Australian context, in which positive constitutional law currently does not prescribe the constitutional norms governing the relationship between Aboriginal and Torres Strait Islander peoples and the Australian Commonwealth.

The *Secession Reference*[81] provides an example of an "experimentalist"[82] decision in the absence of relevant positive constitutional law. The Supreme Court of Canada articulated "four fundamental and organizing principles of the [Canadian] Constitution": "federalism; democracy, constitutionalism and the rule of law; and respect for minorities."[83] The Court then developed a framework for negotiating secession in a way that respected these principles. The relevance to the Australian context is found in the practice of articulating the underlying principles and the resultant framework for negotiation, rather than the principles' particular content.

In the Australian context, some of the general principles and values underpinning the *Constitution* have been identified and articulated by the High Court,[84] including, relevantly, the principle of 'political equality', which seeks to ensure that citizens have an equal voice over governmental decisions.[85]

However, such values are "often not enunciated in judicial decisions",[86] perhaps due to debates about strict legalism.[87] Acknowledging this, Chief Justice Allsop has attempted, extra-curially, to collate the values that underlie the *Constitution* and Australian public law, sourced in historical struggles, societal recognition, the law of Equity, and the fact that the

[81] *Reference Re Secession of Quebec*, [1998] 2 SCR 217 (Supreme Court of Canada).

[82] Ford, *supra* note 35.

[83] *Reference Re Secession of Quebec*, *supra* note 81 at 240.

[84] See e.g. *Eastman v The Queen*, [2000] HCA 29, 203 CLR 1, paras 134–158; *Kartinyeri v Commonwealth*, [1998] 195 CLR 337 (HCA); *Lange v Australian Broadcasting Corporation*, [1997] HCA 25, 189 CLR 520; *McGinty v Western Australia*, [1996] HCA 48, 186 CLR 140; *Australian Capital Television Pty Ltd v Commonwealth*, [1992] HCA 45, 177 CLR 106.

[85] *McCloy v New South Wales*, [2015] HCA 34 34.

[86] Chief Justice Allsop, "Values in Public Law" (The James Spigelman Oration delivered at the Federal Court of Australia, Sydney, October 27, 2015) [unpublished] at 61.

[87] James Stellios, *Zines's The High Court and the Constitution*, 6th ed (Annandale, NSW: The Federation Press, 2015) at 638–650.

Constitution is founded upon sovereignty of the people and the rule of law.[88] Chief Justice Allsop identified at least five groups of values: namely, "reasonable certainty"; "honesty and fidelity to the Constitution, and to the freedoms and free society that it assumes"; "a rejection of unfairness, unreasonableness and arbitrariness"; "equality"; and "humanity, and the dignity and autonomy of the individual."[89]

Further, reciprocity and consent have been recognised as fundamental principles upon which some Aboriginal and Torres Strait Islander laws and customs are founded. In *Akiba v Queensland (No 2),*[90] Justice Finn accepted that the claimant Torres Strait Islander group had "a body of laws and customs founded upon the principle of reciprocity and exchange and that that principle is dominant and pervasive in relationships in general."[91]

More specifically, however, there has been no judicial articulation of the constitutional norms relevant to Aboriginal and Torres Strait Islander peoples. This is not to say that the general principles already identified do not, or could not, govern the constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples, but this has not historically been the case. For this reason, Australia's history, especially as it relates to Australia's Aboriginal and Torres Strait Islander peoples,[92] is not a source of constitutional values to which we can look for the future.

I do not propose to identify the particular constitutional norms that might govern the relationship between the Australian state and Aboriginal and Torres Strait Islander peoples. Instead, I seek only to identify potential sources and mechanisms through which they could be identified and then become the subject of deliberation and refinement through "an important national conversation."[93]

What then is the source of such values? Dyzenhaus, rejecting the positivist and anti-positivist conceptions, suggests that morality is contingent upon deliberation.[94] This is consistent with Ford's suggestion that although democratic experimentalism is usually concerned with

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[88] Chief Justice Allsop, *supra* note 86, para 59.

[89] *Ibid*, para 20.

[90] *Akiba v Queensland (No 2)*, [2010] FCA 643, 204 FCR 1.

[91] *Ibid*, para 507.

[92] Larissa Behrendt, "Beyond Symbolism: Indigenous Peoples in an Australian Republic" in Benny Jones & Mark McKenna, eds, *Project Republic: Plans and Arguments for a New Australia* (Collingwood, Vic: Black, 2013) 62 at 64.

[93] *Ibid* at 70.

[94] Dyzenhaus, *supra* note 18 at 154, 176.

reflection on existing constitutional principles, the experimentalist process is also where "new elaborations on fundamental constitutional principles should properly arise."[95] The open-ended and pragmatic deliberative process envisaged by democratic experimentalism is said to provide both an effective and legitimate mechanism for talking about constitutional rights and values.[96]

However, despite this possibility, the theory of democratic experimentalism has not yet been put into practice in "its most ambitious form" as "a mechanism for articulating and developing community-based fundamental constitutional norms."[97] It is this ambitious form that I propose could facilitate the articulation and development of fundamental constitutional norms to govern the relationship between the Australian state and Aboriginal and Torres Strait Islander peoples.

What is the minimum required to start deliberation on such values? Dyzenhaus suggests that "nothing more is needed to found [the project of the rule of law] than a commitment to institutionalizing the recognition by all citizens of each other as free and equal" and an "attempt to create and sustain a culture in which they attempt to justify to each other what they hold should be done in the name of a common good."[98]

In my view, recent scholarship indicates that we already have the resources to make such a commitment. It has been argued a "new constitutional settlement" between the Australian state and Aboriginal and Torres Strait Islander peoples could be "built on the concept of equality contained in the notion of 'a fair go'" ,[99] which is a value "most Australians can embrace"[100] and which is already, in colloquial terms, claimed to be part of the Australian culture.[101] As the foregoing discussion has made clear, equality is important but not merely as an end in itself, but instead because it creates the conditions for public deliberation. To this

[95] Ford, *supra* note 35 at 534.

[96] *Ibid* at 536.

[97] *Ibid* at 539.

[98] Dyzenhaus, *supra* note 18 at 177.

[99] Mark McKenna, "The Search for a Meaningful Republic" in Benny Jones & Mark McKenna, eds, *Project Republic: Plans and Arguments for a New Australia* (Collingwood, Vic: Black, 2013) 10 at 22; Behrendt, *supra* note 92 at 64.

[100] Behrendt, *supra* note 92 at 68.

[101] *Ibid*.

end, it has also been argued that the Australian civil society should be shaped by values of "difference […] and collective and democratic involvement in decisions which affect us."[102]

3.5.2 How Important is Entrenchment?

Although, as discussed above, constitutional values are not sourced from positive law, it may nevertheless be legitimate and necessary to entrench constitutional rights and values to sustain a 'culture of justification'.

According to Dyzenhaus, such entrenched values will be "necessary where, in their absence, citizens do not have the legal mechanisms they need in order to ensure that the law is indeed justified to them,"[103] and "legitimate insofar as they express the constitutional responsibilities of legislators to justify their legislation to free and equal citizens."[104]

Due to the absence or current weakness of 'symbolic resources' of reciprocity, republicanism and equality, it is argue that principles of due process and equality before the law and freedom from racial discrimination and equality of opportunity should be entrenched, and the relationship between Aboriginal and Torres Strait Islander peoples and the Commonwealth should be formalized.[105]

A project of democratic experimentalism certainly does not preclude formalizing such values. However, whether it is necessary depends on the extent to which it is necessary to ensure justification, or whether justification can be otherwise ensured.

4 CONCLUSION

In this Chapter, I have argued that there are two reasons why democratic experimentalism offers a promising framework for conceiving of a new, and legitimate, constitutional relationship between the Australian state and Aboriginal and Torres Strait Islander peoples.

First, by adopting a deliberative democratic conception of legitimacy, it responds to challenges to the legitimacy of the *Constitution* and action taken under it that go to the substance of decisions (their potentially discriminatory nature) and the process by which such decisions are made (lacking adequate participation of Aboriginal and Torres Strait Islander

[102] Eva Cox, "Towards a Utopian Road Movie" (The 1995 Boyer Lectures: "A Truly Civil Society" broadcast on ABC Radio National, December 13, 1995) [unpublished] discussed in; Behrendt, *supra* note 92 at 70.

[103] Dyzenhaus, *supra* note 18 at 163.

[104] *Ibid*.

[105] Behrendt, *supra* note 92 at 74.

peoples).

Second, by promising to create the institutional framework within which constitutional norms can be formed and revised, democratic experimentalism also provides an open and inclusive constitutional relationship outside the context of formal constitutional law.

In so doing, democratic experimentalism shifts the debate over 'constitutional recognition' away from considering either Parliament (which is viewed as inadequately inclusive) or the courts (which are criticized as being inconsistent with Australia's "state-of-the-art democratic constitution"[106]) as holding the key to democratic legitimacy, which seems to be a primary concern of many Aborginal and Torres Strait Islander peoples in relation to constitutional recognition project.[107] Instead, it looks to a public sphere acting through empowered deliberative forums to solve problems in a way that may be constitutive of a new relationship.

[106] Helen Irving, "Amending the Constitution: Achieving the Democratic Republic" in Benny Jones & Mark McKenna, eds, *Project Republic : Plans and Arguments for a New Australia* (Collingwood, Vic: Black, 2013) 155 at 164.

[107] See e.g. Celeste Liddle, "Constitutional Recognition Survey", (2015), online: *IndigenousX* <indigenousx.com.au> as discussed above.

Conclusion

Many Australians regard constitutional recognition as a necessary step towards a new relationship between Aboriginal and Torres Strait Islander peoples, non-Indigenous Australians and Australian governments based on mutual understanding, recognition and respect.

However, optimism is dwindling in the face of recent efforts by the Commonwealth government to formulate proposals for amending the *Constitution* to institutionalize such recognition. It is starting to look like the form of constitutional recognition most likely to gain majority parliamentary and popular support is a preambular statement of recognition coupled with a removal of references to race.

Such recognition is regarded as inadequate by many Aboriginal and Torres Strait Islander peoples: "We are not seeking recognition. We are seeking more. We are seeking formal, institutionalized safeguards [from racial discrimination] and the right to be consulted, and to participate actively in decision-making."[1] This right to participate in decisions that affect them has been "continually denied," which has meant that Aboriginal and Torres Strait Islander peoples "continue to be the victims of legislation imposed upon [them]."[2] What is sought is "a recognition that Aboriginal people know what's best for Aboriginal people."[3]

These statements seem to reflect the more broadly held sentiment of Aboriginal and Torres Strait Islander peoples in relation to the proposals for constitutional reform. In the absence of, and to advocate for, a national Indigenous plebiscite, a voluntary survey of members of Aboriginal and Torres Strait Islander communities was conducted. This survey reflected that there would be minimal (i.e. only minority) support for a proposal that prohibited racial-discrimination. The only proposal that gained majority support was Pearson's proposal for a parliamentary body and constitutionalized duty to consult.[4]

Indeed, it seems that the concern about a lack of participation in decisions made concerning Aboriginal and Torres Strait Islander peoples – a lack of self-government – drives both

[1] Megan Davis, "Gesture politics", *The Monthly* (1 December 2015), online: <www.themonthly.com.au>.

[2] Celeste Liddle, "Constitutional Recognition Survey", (2015), online: *IndigenousX* <indigenousx.com.au>.

[3] Suzanne Naden, Chief Executive of Bungree Aboriginal Association, quoted in Calla Wahlquist, "Indigenous leaders take 'empowered communities' overhaul to the people", *The Guardian* (1 April 2015), online: <www.theguardian.com>.

[4] Liddle, *supra* note 2.

support for, and opposition to, the project of constitutional recognition. It seems that 'black nationalists' and treaty supporters who oppose constitutional recognition are similarly concerned about the implications of constitutional recognition on the consequent ability of the Commonwealth government to "just make laws *for* Aboriginal people."[5]

This focus on participation and self-government, rather than on the notion of 'recognition', echoes resistance and suspicion about the "politics of recognition expressed in other Commonwealth states with a history of colonialism."[6] If it is to offer promise for a new relationship, the politics of recognition needs to be "less orientated 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" [emphasis in original].[7] That is, we need to practice a different relationship before entrenching it in institutions.

Democratic experimentalism offers a (moderate) model for decision-making that is not merely a "reified process,"[8] but one that is driven by engagement of, and open and reciprocal deliberation between, those affected by the decisions, through which the power of the state is 'colonized' to enhance the quality of decisions, the resources to implement initiatives and the capacity to learn and improve.

Further, the fact that this democratic experimentalism presupposes, demands and reinforces the equality of all participants also means that it is consistent with the fundamental principle that seems to be driving arguments for and against constitutional recognition amongst the broader Australian community: equality.

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[5] Oliver Milman, "Indigenous Australians want treaty, not constitutional recognition, says elder", *The Guardian* (12 July 2015), online: <www.theguardian.com/australia-news/> quoting Tauto Sansbury, winner of the NAIDOC ((National Aboriginal and Islander Day Observance Committee) week lifetime achievement award.

[6] Glen Sean Coulthard, *Red Skin, White Masks: Rejecting the Colonial Politics of Recognition* (Minneapolis: University of Minnesota Press, 2014); Glen Sean Coulthard, "Resisting Culture: Seyla Benhabib's Deliberative Approach to the Politics of Recognition in Colonial Contexts" in David Kahane et al, eds, *Deliberative Democracy in Practice* (Vancouver: University of British Columbia Press, 2010) 138; Glen Sean Coulthard, "Subjects of Empire: Indigenous Peoples and the 'Politics of Recognition' in Canada" (2007) 6:4 Contemporary Political Theory 437; Glen Sean Coulthard, "This Is Not a Peace Pipe: Towards a Critical Indigenous Philosophy" (2008) 77:1 U Toronto Q 164.

[7] Coulthard, *supra* note 6 at 18.

[8] Noel Pearson has expressed concern at the focus on process, over substance, in relation to the process for constitutional recognition. Although process is important, it needs to be one that involves public engagement and debate: Noel Pearson, "Process of Recognition", *The Monthly* (1 August 2008), online: <www.themonthly.com.au>.

Three potential criticisms could frustrate the application of this democratic experimentalist approach or give rise to scepticism about its appropriateness.

First, on its face, this pragmatic solution does not offer a guarantee of inclusion in the parliamentary process, and so for that reason it fails the aspirations of Aboriginal and Torres Strait Islander peoples, or at least those who support substantive constitutional reform.

The advantage of the pragmatic solution, however, is that it can be put into place immediately, and it can accompany any ongoing discussion on the amendment of constitutional law.

Further, the possibility of a future constitutional amendment to include a formal duty to consult is not precluded by a democratic experimentalism approach. In fact, the experience gained through democratic experimentalism could provide valuable insight into precisely how such a duty could be instituted.

Second, there could be concern that democratic experimentalism is just another Aboriginal and Torres Strait Islander Commission ("ATSIC"), which was regarded, by some, as a failed experiment. However, consistently with the experimentalist ethos, both the successes and failures of the ATSIC experiment are valuable and can inform the creation of any new body. The ATSIC experience suggests that any failure resulted from its lack of power, rather than its general structure. Further, the experimentalist model seems to be consistent with recent initiates proposing empowered local Indigenous governance.[9]

The third criticism presents the greatest challenge. The criticism flows from the fact that democratic experimentalism and deliberative democracy presuppose a particular kind of citizen and a "political culture of empathy."[10] It has been acknowledged that the kind of citizen and relationship required for deliberation is made even more difficult where extreme asymmetries of power exist as a result of colonialism. To the extent that the deliberative capacity of individuals is undermined by historically unjust relationships, the intersection of deliberative democratic and reconciliation theories attempts to address these issues.[11]

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[9] See, e.g. Empowered Communities, *Empowered Communities: Empowered Peoples (Design Report)* (Canberra: Wunan Foundation, 2015).

[10] Will Kymlicka, *Multicultural Citizenship: A Theory of Minority Rights* (Oxford, UK: Clarendon Press, 1995) at 141.

[11] Bashir Bashir, "Accommodating Historically Oppressed Social Groups: Deliberative Democracy and the Politics of Reconciliation" in *The Politics of Reconciliation in Multicultural Societies* (Oxford, UK: Oxford University Press, 2008) 48.

However, the challenge is not one limited to the state's relationship with Aboriginal and Torres Strait Islander peoples. This is a broader question of discussion in deliberative democratic theory concerning the best means of facilitating deliberation, both inside and outside of institutions.

However difficult, these are questions worthy of pursuit. As was outlined in Chapter 3, this shift to deliberation and democratic experimentalism has broader implications for all Australians in how we fundamentally think about our relationship with the *Constitution* and the rule of law.

Although this thesis started with the primary focus of considering formal constitutional amendment to achieve '*Constitutional* recognition', in the sense of recognition *in* the *Constitution*, it ultimately ended up focussing on 'constitutional recognition', in the sense of recognition that goes to the core of the relationship between Aboriginal and Torres Strait Islander peoples and the Australian state.

However the relationship between the Australian state and Aboriginal and Torres Strait Islander peoples is institutionalized in the future – in positive constitutional law, or a treaty between nations or polities – the relationship is likely to be governed by a commitment to the rule of law, rather than arbitrary power. This means that what will be necessary is a commitment to justification between equals on the basis of shared reasons such that we practice our underlying constitutional values in a way that means we can question and affirm them.

While I am hopeful about the possibilities this shift in perspective could create, this is only the beginning. The way forward will require reflecting upon experiments already in motion, including the recent Empowered Communities initiative.[12] It will also require engaging with the broader conversations, in communities, public policy and scholarship, not only about the value of deliberation but also institutional design to foster deliberation in traditional and new institutions, and to consider the role that law plays in the empowered deliberative project.

[12] Empowered Communities, *supra* note 9.

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