Constitutional Recognition and Reform: Developing an Inclusive Australian Citizenship through Treaty

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Abstract

Almost eight years after the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Australian Constitution was established, institutional reform to empower Indigenous peoples in this country has not been realised. This article argues that the persistent failure to progress constitutional reform stems, in part, from dominant conceptions of Australian citizenship that deny Aboriginal and Torres Strait Islander peoplehood. It follows that meaningful institutional reform is possible only if Australian citizenship is reconceptualised in a manner that makes room for the distinctive status of Aboriginal and Torres Strait Islander peoples. Treaties offer a path forward to develop this new understanding of Australian identity and ground institutional reform.

Key words: citizenship, treaty, Aboriginal and Torres Strait Islander, Indigenous, shared-fate, constitutional reform, constitutional recognition

I. INTRODUCTION

Australia has long debated constitutional reform to protect and empower Aboriginal and Torres Strait Islander people. In recent years, that debate has been reinvigorated by a series of parliamentary and expert bodies designed to raise awareness of the need for change, propose options for that change, and build a community consensus around those proposals. Conducted under the auspices of 'recognising' Aboriginal and Torres Strait Islander people in the Australian Constitution, a significant focus of this debate has been on *institutional* change. Proposals for institutional change have included both 'big-C' constitutional reforms relating to the text of the Australian Constitution, and 'small-C' constitutional change concerning the norms, customs, and traditions governing the exercise and distribution of public power within Australia (Lino 2016, 6). In large part, the focus on institutional change is understandable. Aboriginal and Torres Strait Islander motivation for reform rests on their desire that any reform 'empower our people [to] take *a rightful place* in our own country' (Referendum Council 2017, i, emphasis in original). As Australia's existing constitutional and political framework disempowers Aboriginal and Torres Strait Islander peoples, reform of those institutions is the primary vehicle through which their aspirations may be realised.

Aboriginal and Torres Strait Islander aspirations for reform are, of course, not limited to institutional change. The First Nations of Australia have long identified a 'culture of disrespect' (Davis 2006) that permeates Indigenous-state relations. This culture constructs a 'wall of indifference' (Colbung 1975, 28) that discounts Indigenous values and worldviews and results in legislation and policy that operates to deny Indigenous rights (Dodson and Cronin 2011, 189). As such, attitudinal and relational shifts are a high priority. In the Uluru Statement from the Heart, for example, Aboriginal and Torres Strait Islander peoples called for a Makarrata Commission to supervise a process of truth telling and agreement making, both extra-institutional reforms. These calls echo previous proposals for treaty and sit neatly within a more broadly conceived goal of reconciliation. Nonetheless, while institutional change is not the only type of reform desired, it remains a primary goal, for, as Larissa Behrendt has argued, 'the institutional form given to the recognition of Indigenous rights and democratic ideals' (2003, 16) shapes societal and cultural attitudes. For many Aboriginal and Torres Strait Islander people then, institutional change remains key.

Eight years after the establishment of the Expert Panel on Recognising Aboriginal and Torres Strait Islander Peoples in the Constitution, however, institutional reform has not been achieved. Despite polls indicating considerable support for constitutional change throughout the Australian public, a broad consensus within the Aboriginal and Torres Strait Islander community on specific proposals, and the support of government-initiated expert bodies, constitutional change appears distant. Several reasons have been identified for this failure, ranging from the difficulty of securing constitutional reform through s 128 of the Constitution, philosophical dispute over rights protection, and politicians wary of expending political capital or even reading reports they have commissioned (Davis in Fitzpatrick 2017). There is no one reason why institutional change has not succeeded; each has merit. In this article, I propose another reason why constitutional reform has proven so difficult: prevailing conceptions of Australian citizenship do not permit such institutional change.

Meaningful structural reform to the politico-legal framework of Australian governance is, in part, normatively based on Indigenous peoplehood. While Australian citizenship is broader and more inclusive than it historically has been, it is still often conflated with a 'dominant idea of a culturally homogenous nation' (Pitty 2009, 29). This understanding is marshalled to promote a false dichotomy between equality and difference that operates to deny the peoplehood status of Aboriginal and Torres Strait Islanders (Dodson 1997, 59; Rowse 2000, 86). Constitutional reform that establishes institutional structures to express Indigenous peoplehood is therefore unlikely unless Australian citizenship is reconceptualised (Peterson and Sanders 1998, 26). A substantively inclusive Australian citizenship would recognise and accommodate both Indigenous and non-Indigenous peoplehood, laying the foundation for institutional reform to empower Aboriginal and Torres Strait Islander peoples and enable them to take a rightful place in our shared country.

This article commences the project of developing and articulating a truly inclusive Australian citizenship. It begins by exploring how existing understandings are predicated on a culturally homogenous nation that denies differentiated rights. It then sketches a citizenship built on the fact of Aboriginal and Torres Strait Islander peoplehood. In a final section, it identifies treaty as a means to both ground this new understanding of Australian citizenship and develop institutional mechanisms to articulate this distinct status.

II. CITIZENSHIP AND IDENTITY

Citizenship has both legal and normative dimensions. In its former connotations, citizenship refers to the legal status of an individual and differentiates between classes of persons on the basis of this status. As a normative concept, however, citizenship is broader and is often associated with questions of belonging and social membership, irrespective of legal categorisations (Rubenstein 2000, 578). Of course, legal and normative dimensions of citizenship interact and intersect, shaping the content and contours of each other. In this Part, I explore understandings of Australian citizenship as it relates to Aboriginal and Torres Strait Islander peoples, tracing its history from colonial origins to the modern day. As legal exclusions have been chipped away, Australian citizenship has become a broad and inclusive notion, predicated on individual equality and flexible enough to encompass Aboriginal and Torres Strait Islander people. This broad conception of the Australian political community secures important democratic goals, ensuing that 'everyone who is affected by the decisions of a government [has the] right to participate in that government' (Dahl 1970, 49). And yet, the terms of Aboriginal and Torres Strait Islander inclusion into the Australian community are problematic. Australian citizenship is often articulated in an exclusionary manner, emphasising formal individual equality that conflicts with Indigenous peoplehood (Archer 1997; see also generally Levy 2012). If lasting reform to Australia's political and legal governance framework is to be realised, this understanding of Australian citizenship must be reconceived to make room for Aboriginal and Torres Strait Islander nationhood as co-sovereigns on and of this land.

A. *Aboriginal and Torres Strait Islander People and Australian Citizenship*

In both their legal and normative dimensions, rules governing membership of the Australian community have become more inclusive over time. Colonial governments initially considered Aboriginal and Torres Strait Islander peoples to be 'living representatives of primitive man', and expected that they 'would be exterminated by the progress of civilisation' (McGregor 1997, 14-22). This was understood as a two-stage process: 'people of full descent would soon "die out"' and Aboriginality 'would disappear altogether through biological absorption' (Ellinghaus 2003, 186). The 'dying race' (Rowley 1970, 124) theory became 'so embedded in the belief system of whites' that it 'contributed significantly to the pervasive ideologies that formed the racist, protectionist policies framed by' colonial governments (Holland 2013). Aboriginal and Torres Strait Islander people were thus excluded from the Australian state, and played no meaningful role in the drafting of the Constitution (Williams 2000, 648), which expressly discriminated against them (Constitution of Australia, ss 25, 51(xxvi), 127). At 1901 then, Australian democracy was conditioned on the removal of Indigenous peoples, and the Australian community was conceived as British and white (Arcioni 2015, 175).

Recognising that Aboriginal and Torres Strait Islander people were not dying out, government policy shifted in the 1930s towards assimilation (Chesterman and Douglas 2004, 48). These new policies recognised that Aboriginal and Torres Strait Islander peoples were excluded from, and conceptually placed outside the Australian polity, and consequently sought to rectify this injustice via inclusion. As Paul Hasluck, the Aboriginal Affairs Minister explained in a 1963 policy statement, however, 'inclusion' was to be unidirectional; the identity of the Australian political community was not expected to change:

> The policy of assimilation means that all Aborigines and part-Aborigines will attain the same manner of living as other Australians and live as members of a single Australian community enjoying the same rights and privileges, accepting the same responsibilities, observing the same customs and influenced by the same beliefs, hopes and loyalties as other Australians (1988, 93).

Debate persists as to whether this shift in policy is responsible for the extension of the franchise to all Indigenous peoples at the Commonwealth level in 1962, but it is undeniable that 'a certain philosophical consistency' exists between enfranchisement and assimilation (Chesterman 2005, 18; Goot 2006). Indeed, in introducing the legislation extending the franchise, the Minister for the Interior, Gordon Freeth, expressed hope that it would 'proclaim to the world that…the Aboriginal people of Australia enjoy complete political equality with the rest of the [white Australian] community' (*Hansard* 1962, 861), while Hasluck lauded its passage as 'one step further towards the ideal of one people in one continent' (*Hansard* 1962, 1771).

The excision of s 127 and alteration of s 51(xxvi) in the 1967 referendum both reflected and contributed to the broadening of Australian citizenship and identity. Section 127 did not legally exclude Aboriginal and Torres Strait Islanders from being counted as citizens, but it excluded them from 'membership of the constitutional community' (Arcioni 2014, 17-18). Similarly, while the states could make laws for Aboriginal and Torres Strait Islander people, alteration of s 51(xxvi) empowered the Commonwealth to do so on the same basis as all other 'races'. The referendum result thus symbolically and practically expanded the idea of Australian identity by making room for First Nations. That inclusion was however, very much on the terms of the settler-state. The absence of any explicit recognition of Aboriginal and Torres Strait Islander normative distinctiveness recorded their citizenship in neutral terms (Pearson 2011).

The gradual inclusion of Aboriginal and Torres Strait Islander people into the Australian community has brought many positives. As citizens, Aboriginal and Torres Strait Islanders today possess a broad and equal distribution of the formal political resources. At least since 1983, when compulsory voting was extended to Aboriginal and Torres Strait Islander peoples, they have enjoyed 'full equality' in the electoral arena (Sawer and Brent 2011, 21) as Australian citizenship has come to denote membership of a 'single-status community' (Nootens 2013, 58). On the same basis as non-Indigenous citizens, Indigenous Australians may stand for Parliament, freely discuss political and governmental matters, and

assemble and associate for that purpose. Undifferentiated citizenship rights also serve important unifying goals, ensuring that citizenship is understood as 'a common bond, involving reciprocal rights and obligations' (*Australian Citizenship Act 2007* (Cth), preamble). While we may have cultural, ethnic, or other group affiliations, as Australian citizens we are encouraged to transcend these particularities and 'to think and act as a member of a [single] political community' (Parekh 2000, 181).

At a Federation Conference Banquet in 1890, Henry Parkes, the 'Father of Federation', characterised the relationship of the peoples of the colonies as bound together by a 'crimson thread of kinship' (Cole 1971). Invocations of blood may no longer feature in mainstream accounts of Australian identity, but the modern emphasis on undifferentiated citizenship rights is nonetheless problematic for Aboriginal and Torres Strait Islanders as it serves to deny their status as distinct *peoples*. The challenge for Aboriginal and Torres Strait Islander people is that their claims go beyond 'shared civil, political and social rights of citizens' and encompass 'demands for land rights, cultural protections, reparations and forms of collective autonomy' (Lino 2017, 120). These aspirations connect to broader global debates over the 'politics of recognition', whereby marginalised groups contest that public institutions and politico-legal frameworks fail to give due regard to their distinctiveness (Taylor in Gutmann 1994; Fraser and Honneth 2003). In the case of Aboriginal and Torres Strait Islander peoples, their claims are embedded in and drawn from long histories as self-governing communities operating under their own source of laws prior to colonisation. When citizenship is understood as membership of a single-status community, these claims cannot be heard.

Recognition as 'peoples' at international law was finally realised in 2007 with the adoption of the United Nations *Declaration on the Rights of Indigenous Peoples* (UNDRIP). Indigenous delegates were directly and actively involved in drafting the Declaration, and while it reflects tensions within Indigenous polities and between Indigenous political communities and states, its norms 'substantially reflect Indigenous peoples' own aspirations' (Anaya 2010, 17). The UNDRIP affirms a multinational ordering of the state (Kymlicka 2011, 188), guaranteeing that Indigenous peoples have the right 'to a nationality' (UNDRIP, art 6) as well as the right to 'belong to an Indigenous community or nation' determined in accordance with the 'traditions and customs of the community or nation concerned' (UNDRIP, art 9). Recognition of the plurinational basis of states that house Indigenous peoples is also inherent to Article 33, which expressly guarantees that membership in an Indigenous nation 'does not impair the right of Indigenous individuals to obtain citizenship of the States in which they live' (see also UNDRIP, arts 8(1)-(2), 36(1)).

The Australian state has made some attempts to recognise a differentiated status. As Dylan Lino notes, recognition comes in three major forms: the establishment of distinct entitlements to land; protection of cultural heritage; and the emergence of an Indigenous sector to 'represent, deliver services to and manage land for Aboriginal and Torres Strait Islander peoples' (Lino 2017, 121). Consistent with this conceptual shift, Australia endorsed the UNDRIP in 2009. These legislative advances and executive actions suggest that normative conceptions of Australian citizenship are broad enough to accommodate and recognise Indigenous peoplehood. These successes are, however, only partial; 'the dominant institutions such as law and government, and their epistemologies, remain anglicised' (Moreton-Robinson 2017) and understandings of Australian identity continue to marginalise Aboriginal and Torres Strait Islander peoplehood in favour of 'the *sameness* that is at the core of the national identity' (Davis 2016, 86 emphasis in original; Stokes 1997, 168). Indeed, Australia initially refused to adopt the UNDRIP, remarking that it could not accept an instrument that would 'apply a standard for Indigenous peoples that does not apply to others in the population' (Hill 2007, 11).

The resistance to and eventual abolition of the Aboriginal and Torres Strait Islander Commission (ATSIC) reveals the importance of conceptualisations of citizenship to lasting structural reform in this country. Established in 1989, ATSIC was a nationally representative Indigenous body with considerable authority, enabling Aboriginal and Torres Strait Islander representatives to identify funding priorities, formulate and implement regional plans, make decisions over public expenditure, protect cultural material and information, and speak directly to government (*Aboriginal and Torres Strait Islander Commission Act 1989* (Cth) s 7). As such, ATSIC served as an acknowledgment that public policy

affecting Indigenous peoples should not be devised and implemented by the Australian population as a whole but by those affected by it.

The Commission therefore directly challenged the dominant conceptualisation of Australian citizenship, inviting virulent criticism. In debate on the ATSIC Bill, for instance, the Commission was condemned as a 'black parliament' (*Hansard* 1989, 395, 641, 1341), which 'smacks of separatism of the worst possible kind in a nation' (*Hansard* 1989, 2014) and its establishment denounced as inflicting 'a monumental disservice to the Australian community' striking 'at the heart of the unity of the Australian people' (*Hansard* 1989, 1328). This language periodically reappeared in debate over ATSIC throughout its life (see e.g. Johns 2003), and ultimately served as a justification for its eventual abolition in 2005. In announcing this decision, Prime Minister Howard declared that 'the experiment in separate representation, elected representation, for Indigenous people has been a failure' (2004). Amanda Vanstone, the Minister for Immigration and Multicultural and Indigenous Affairs (a portfolio that encapsulated the assimilative tendencies of the state) defended the decision in an address to the Bennelong Society later that year, remarking that, 'for too long we have let ideological positions like self-determination prevent governments from engaging with their Indigenous citizens' (2004, 4). For Vanstone, the Commission—and the very notion of Indigenous difference—demarcated Aboriginal and Torres Strait Islander people from other Australians in a manner incompatible with Australian citizenship. While real structural and governance problems beset the Commission (Sanders 2004), it is difficult to avoid the conclusion that an exclusionary form of Australian citizenship contributed to its demise.

Similar attitudes are prevalent in the contemporary debate on constitutional recognition (Patrick 2016), suggesting that the dominant conceptualisation of Australian citizenship is a primary challenge for advocates of reform. A few examples will suffice. In 2016, Tony Abbott rejected growing calls for a treaty between First Nations and the Australian state, noting that: 'A treaty is something that two nations make with each other, and obviously Aboriginal people are the first Australians, but in the end we're all Australians together, so I don't support a treaty' (McIlroy 2016). Likewise, in a research brief distributed to all parliamentarians following the release of the Referendum Council report, the Institute for Public Affairs set out four reasons to reject the Council's recommendations, three of which implicitly rested on a conception of Australian citizenship that denied Indigenous peoplehood. As the IPA explained, 'Indigenous Australians already have a voice to Parliament'—they can vote in the federal Parliament like every other citizen (Institute of Public Affairs 2017). Most recently, in announcing the government's decision to reject the Referendum Council recommendations, Prime Minister Turnbull echoed the IPA research brief. Turnbull explained that 'our democracy is built on the foundation of all Australian citizens having equal civic rights', and that a constitutionally enshrined Indigenous representative (advisory) body would 'undermine the universal principles of unity, equality and "one person one vote"' (Department of Prime Minister and Cabinet 2017).

At the core of these statements is an understanding of Australian citizenship that denies Indigenous peoplehood. Such denial is a political strategy that aims to relegate First Nations aspirations and demands to that of a minority ethnic or cultural group (Watson 2015, 2-3; Moreton-Robinson 2007, 98-99; Barker 2005, 16). This strategy robs First Nations of the normative grounds for distinctive institutions, for if Aboriginal and Torres Strait Islander people are merely Australian citizens, albeit ones with a particular connection to land and culture, a key component of the justification for institutional reform is lost. Rather, constitutional reform would unfairly 'establish the Aboriginal people as a favoured class of Australians entitled to pursue advantageous claims not available to others' (Maley 2014). As meaningful structural reform is in part premised on Indigenous peoplehood, understandings of the normative dimension of Australian citizenship must be reconceptualised in order to provide a firm foundation for institutional change. The following section sketches some initial thoughts on this project.

B. *Towards an Inclusive Australian Citizenship*

In contrast to previous generations, legal and normative accounts of Australian citizenship are inclusive of Aboriginal and Torres Strait Islander people. The terms of that inclusion, however, continue to be

framed by the settler-state, as dominant understandings of Australian identity and citizenship operate to deny Aboriginal and Torres Strait Islander peoplehood. To some degree, this is unsurprising. Most accounts of citizenship are obliquely based on cultural or national identity. As such, notwithstanding changing demographics and migration patterns, 'race' remains an implicit component of the liberal image of citizenship (Connolly 2000, 183), often operating as a 'pretext for imposing the majority nationality upon minority communities' (Keating 2001, 9). If lasting structural reform to the exercise and distribution of public power in Australia is to be achieved, Australian citizenship must be reconceptualised such that it can recognise and accommodate Aboriginal and Torres Strait Islander peoplehood. This understanding of citizenship would be both formally and substantively inclusive.

In recent years, the idea of citizenship as 'shared fate', rather than shared identity, has emerged as a way to ground this plural and inclusive view of citizenship between and within multiple peoples or normative communities. Scholars exploring this concept have addressed it from diverse perspectives, but all are engaged in examining how democracies can meaningfully reckon with the politics of recognition (Taylor in Gutmann 1994, 25; Honneth 1995; Fraser 1997). There is, however, an important distinction between these two approaches.

Recognition politics can defend and justify departures from difference-blind treatment, providing the conceptual impetus to acknowledge distinct Indigenous rights. As Nancy Fraser has argued, the central injustice of misrecognition, of ignoring Indigenous difference, is that it denies Aboriginal and Torres Strait Islander peoples 'the status of full partners' in Australian society (Fraser in Fraser and Honneth 2003, 29). However, while Fraser's account of recognition sees transformation of the politico-legal framework that generates those inequalities as a necessary remedy (Fraser 1997, 24), many Indigenous theorists argue that 'recognition' inherently positions the state above marginalised groups whom must wait to be 'accorded' recognition, and is therefore unable to alter, 'let alone transcend' structural inequities (Coulthard 2014, 31; Alfred 2009a). For this reason, it does not serve as an appropriate mechanism to build an inclusive Australian citizenship. In contrast, while citizenship as shared fate emerges from the same impetus of recognition politics, it avoids these complications. As this section will illustrate, citizenship as shared fate displaces the primacy of existing—unequal—arrangements by deprivileging the dominant community.

Sigal Ben-Porath is a political theorist who focuses on the philosophy and politics of civics and education reform. In exploring this contested terrain, Ben-Porath explicitly eschews citizenship as shared identity, preferring, instead, to reconceptualise citizenship as shared fate for a more realistic way forward in liberal democracies. Ben Porath's approach provides conceptual and practical 'space' for minority groups, who's 'sense of personal identification…is sometimes stronger than national affiliation', to maintain and develop (with some state support) their own identities (2012, 387), while encouraging their participation in the construction of the national community (2006, 30). Ben-Porath's citizenship as shared-fate takes Indigenous aspirations seriously, recognising that the state should empower Indigenous peoples to maintain and develop their own forms of belonging. However, her approach contains some problematic elements for Indigenous peoples, as her focus is squarely on building civic nationalism. Indeed, Ben-Porath's defence of subnational groups appears tied to toleration, rather than flowing from intrinsic understandings of peoplehood. While I agree that the state has an obligation 'to educate members about their shared fate and about ways in which they can respond to it and shape it' (Ben-Porath 2012, 387), it is important not to elide asymmetrical histories of exclusion, domination and annihilation. This all-too-recent history is a salient fact for Aboriginal and Torres Strait Islander people. A citizenship as shared fate that emphasises democratic patriotism (Ben-Porath 2012, 392), cannot help but privilege existing politico-legal structures—an arrangement that Indigenous peoples have strong claims to critique. Developing democratic citizenship from the 'fact of enduring pluralism' (Ben-Porath 2013, 90) is a positive step, but it must be sensitive to Indigenous peoples' normative distinctiveness.

Melissa Williams' account of citizenship as shared fate is more attuned to the situation of Indigenous peoples and thus offers firmer potential to ground citizenship in a plurinational community. Working within contemporary democratic theory, Williams has explored the relationship between citizenship and

Indigenous identity in several works (2003, 2014). Broadly speaking, Williams seeks to rehabilitate a 'pragmatic or functional account of citizenship' that is stripped from associations of 'historical institutions and practices' (2003, 227). In distilling the concept of citizenship to its fundamental ideal, Williams understands it as imbued with the democratic notion of 'agency', or influence and control, over the 'political structures that shape our lives' (2014, 104). But what are these structures? In some respects Williams' answer is contingent on existing political arrangements, as she identifies interlinked 'webs of relationship', voluntarily assented to or not, as grounding the community joined by a shared fate (2003, 229) There is a risk that this approach may prioritise those existing arrangements that operate to marginalise Indigenous peoplehood, but Williams is careful to explain that her conception, 'does not presuppose that any particular community is the privileged or exclusive site of citizenship' (2003, 232). In this way, Williams argues that settler-states should constitute three analytically distinct normative and legal spaces, providing exclusive room for Indigenous self-government, non-Indigenous institutions, and a domain of shared jurisdictions and ethical concerns, that delineates the boundaries of the other two spaces (2014, 108).

In forcing us to question why our existing politico-legal arrangements so vastly privilege the non-Indigenous domain, Williams pushes the onus of justification from Indigenous to non-Indigenous individuals. The burden of justification is also addressed in Siobhan Harty and Michael Murphy's defence of multinational citizenship (2005, 3; see also Ivison 2016, 16). Harty and Murphy begin by accepting the existence and normative force of substate nations and construct a defence of citizenship that accepts this reality. Their multinational model of citizenship accepts that 'there can be multiple sources of legally sanctioned political power that exist in parallel, concurrent or overlapping forms that correspond with different territories within a state's borders' (2005, 13), and is thus able to 'respond to the continuing resilience of national identities and the normative claims which are made on their behalf' (2005, 79). While accepting the reality of a multiplicity of normative political communities challenges traditional accounts of sovereignty, it rests (in part) on democratic theory and equality. It demands that each party 'recognise the other as a distinct people and polity, equal in status and in stature, and each with the right to determine freely their own futures and to be governed by their own traditions, priorities and institutions' (2005, 87). Similarly to Williams, Harty and Murphy envisage analytically distinct normative and legal domains, including a common framework of shared-rule that governs relations between equal peoples. This 'common framework' serves as the scaffold upon which a common identity hangs.

Seyla Benhabib does not explore citizenship as shared fate, but her discussion of deliberative democracy and 'multicultural dilemmas' helps to illuminate how a common framework could be constructed. Benhabib envisages diverse cultural groups engaged in 'free and reasoned deliberation' as 'moral and political equals' (2002, 105). If we understand Benhabib's cultural groups as (perhaps overlapping) normative political communities, as contested and negotiated sites of citizenship construction, we can imagine multiple citizen-groups reaching agreement on a common framework with which to ground their broader association. The open and deliberative process is critical, because it displaces settler-state forms of identity that recognition politics can take for granted. Indeed, the very point of a common framework is to recognise that Indigenous peoples 'have their own ways of life that deserve protection rather than recurrent repression' (Hendrix 2008, 561). That framework must therefore be 'developed within a shared political community…that takes account of Indigenous and settler claims, and takes both these claims seriously' (Sanderson 2011, 179). Taking both claims seriously requires treating Indigenous worldviews, laws and practices as worthy of respect (Patton 2005, 257) and accommodating 'Aboriginal voices on their own terms' (Turner 2006, 95; Tully 2005, 213-4).

These accounts are useful to articulate a conception of citizenship that moves away from its traditional focus on national or cultural identity, but it is not clear whether citizenship as shared fate is strong enough to ground and maintain a common civic identity to prevent these distinct normative communities falling into civil strife. Indeed, citizenship as shared fate still has work to do. Like all forms of citizenship, it must be rigid enough to articulate and reflect some minimum set of expectations, values, and behaviours that comprise the civic identity of each citizen within each political community. Citizenship as shared fate must therefore still rest on something like a Rawlsian overlapping consensus

whereby 'the public agreement on questions of political and social justice supports ties of civic friendship and secures the bonds of association' (Rawls 1999, 327). The value of citizenship as shared fate, however, comes from its flexibility. Consistent with its de-privileging of the settler-state, those shared political values should be agreed to via a process of negotiation between Indigenous and non-Indigenous polities, rather than values imposed on Indigenous peoples who are all-too-often simply included in ongoing settler-state projects.

This is necessarily abstract, for negotiation will reveal the values that underlie such association (Tully 1995, 7), but one consideration is worth noting. While the core features of Benhabib's deliberative model could be attractive to Indigenous peoples, many scholars have questioned whether it is possible in practice (for discussion see Hobbs 2017, 368-372). Putting to one side very real disparities in negotiation power, can common values be found? In particular, considerable debate exists over the extent to which liberal societies can or should tolerate illiberal communities (see e.g. Kymlicka 1995, ch 7). Could illiberal practices preclude the possibility of common values binding disparate political communities? Certainly, this conception of citizenship decentres settler-state values—values that either may be wrongly assumed to be common or are hardly liberal themselves—potentially leading to conflict. In the case of Indigenous peoples, however, this tension may be more imagined than real. The UNDRIP carries within it important language connecting Indigenous rights to global human rights standards. In particular, Article 34 provides that Indigenous peoples have the right to promote, maintain and develop their culture 'in accordance with international human rights standards', clarifying that Indigenous peoples already 'walk in two worlds' (Referendum Council 2017, i).

III. Citizenship and Treaty

Framing a plural and substantively inclusive Australian citizenship on shared fate may appear ambitious, but it could be accomplished via a process of treaty making between First Nations and Australian governments. Treaties are an appropriate mechanism to develop this new conception of Australian citizenship, as treaties inherently concern relationships between peoples. In articulating these relationships, treaties tell a story about the interaction between different normative communities that share the land, and the values and responsibilities that secure the bonds of association between and among those communities.

Over the years, many agreements have been reached between Aboriginal and Torres Strait Islander peoples and state and federal governments, but no treaty has ever been recognised. Treaties are a distinct form of agreement that must satisfy three conditions (Hobbs and Williams forthcoming; Brennan et al 2005, 3-11; Mansell 2016, 99-102). First, a treaty recognises Indigenous peoples as a polity, distinctive from other citizens of the state, based on their status as prior self-governing communities. Second, a treaty is reached by a fair process of negotiation conducted in good faith and in a manner respectful of each participant's standing as a polity. Third, a treaty recognises or establishes concrete outcomes, including some form of decision-making and control that amounts to at least a limited form of self-government. Treaties between the State and Indigenous peoples are therefore distinct from legal contracts; rather, they are 'constitutional accords' that 'articulate basic terms and conditions of social co-existence' and 'establish the constitutional parameters of state power' (Macklem 2017, 12). Indigenous nations enter into treaties 'as keepers of a certain place' (Henderson 1997, 46), and their settlement constitutes 'a form of political recognition and a measure of the consensual distribution of powers' (Barsh and Henderson 1980, 270).

In distributing sovereignty, treaties acknowledge Indigenous peoplehood and recognise or establish mechanisms for self-rule. In substance then, treaties can lead to institutional reform necessary to empower Aboriginal and Torres Strait Islander peoples to 'take a rightful place in [their] own country' (Referendum Council 2017). But treaties also do far more than this. In their relational aspect, treaties can ground the political culture necessary to build the moral bonds that bind citizenship as shared fate, by accommodating the diverse needs of Indigenous and non-Indigenous peoples. For James Tully, through treaties, multiple peoples come together in a 'mediated peace' settled in accord with the five conventions of justice; mutual recognition, intercultural negotiation, mutual respect, sharing, and mutual

responsibility (1995, 29-30; 2008, 239). Through this process—a process akin to Benhabib's deliberative dialogues—shared political values are uncovered and a new political association that accommodates diversity is agreed to.

Historic treaties between First Nations and European states understood this, and articulate analytically distinct normative and legal spaces underneath a shared framework of common values and interaction. For instance, the *Gus-Wen-Tah*, or Two-Row Wampum Treaty, signed in 1613 by representatives of the Five Nations of the Haudenosaunee and representatives of the Dutch government in what is now upstate New York consists of two rows of purples shells embedded in a sea of white beads. Haudenosaunee scholars explain that the parallel purple shells symbolise two distinct polities, while situating them within a sea of white indicates a shared future based on interdependence and mutual respect (Alfred 2009a, 76). While western states largely honoured these treaties in the breach, those shared political values remain key, and contemporary scholarship involves recovering and implementing these principles in both historic and modern treaties (Borrows and Coyle 2017).

Although no treaties were signed at contact in Australia, similar visual metaphors exist. The Yolŋu people of East Arnhem Land illustrate the coming together of two distinct knowledge systems through the concept of *ganma*. *Ganma* is a coastal lagoon within the mangroves in which two streams of water flow and meet: one stream is tidal and salt from the sea; the other is fresh from rain on the land. As the streams enter the lagoon, there is ebb and flow as the water circulates silently underneath, catalysing a chaotic froth of foam on the surface. Eventually, the swelling and retreating of the tides establishes a recognisable pattern as the streams merge within the lagoon. But within this brackish water the separate identity of the streams is not entirely lost. Underneath the surface the streams continue to exist, complementing, interacting and relating to one another, but never losing their distinctiveness as separate and opposed parts of the whole (see Marika 2015, 187-8; Yunupingu 1994, 8-9).

Treaties may offer a path to developing an inclusive understanding of Australian citizenship, but it is important to be realistic. First, historic treaties signed between First Nations and European states may legitimate the status and aspirations of those Indigenous nations who signed the agreements, but their terms generally betray an assimilative rationale designed to subsume Indigenous peoples within non-Indigenous governance systems (Alfred 2009b, 46). Second, the resurgence of treaty-making in Canada, especially under the British Columbia Treaty Process, suggests that contemporary treaties also may not always respect the status of Indigenous nationhood. Many scholars have criticised these agreements as subverting Indigenous claims and translating Indigenous communities into municipalities with limited authority (Alfred 2001; Tully 2000; Barker, Rollo and Lowman 2017, 158). If treaties are to establish a grounds for citizenship based on shared fate, the state must not foreclose certain outcomes but must enter into negotiations in a spirit of equal partnership, based on 'mutual recognition, mutual respect, sharing, and mutual responsibility' (Patton 2014, 250). Nonetheless, even if in practice contemporary treaties sometimes fail to meet this standard, for many First Nations who have signed them, they are a medium through which, in the words of Edward Allen, CEO of the Nisga'a Lisims Government, 'we have negotiated our way into Canada, to be full and equal participants of Canadian society' (Allen 2004, 234).

It is all the more important to reflect on these potential pitfalls because in recent months, the prospect of treaties between Aboriginal and Torres Strait Islander peoples and Australian governments has been reinvigorated. Victoria and South Australia have established working groups and committed funding to consultative forums around the state as a first step at ascertaining Indigenous views and interests, while the Northern Territory government and Tasmanian opposition have both promised to drive public discussions on treaties (Hobbs and Williams forthcoming). Similarly, at the First Nations Constitutional Convention at Uluru in May 2017, around 250 Aboriginal and Torres Strait Islander delegates called on the Commonwealth to establish a Makarrata Commission. Makarrata is a Yolŋu word meaning 'a coming together after a struggle', and the delegates explained that it 'captures our aspirations for a fair and truthful relationship with the people of Australia' (Referendum Council 2017, i). Although the government rejected the Referendum Council recommendations, it remains open to an agreement-

making process (Scullion in Walhquist 2017), and in any case, developments at the state level continue to move forward.

Of most significance is the 2015 settlement between Western Australia and the Noongar people. This agreement is the largest and most comprehensive to settle Aboriginal interests in land in Australian history, involving approximately 30,000 Noongar people and covering around 200,000 km². Totalling about $1.3 billion, the treaty includes agreements on rights, obligations and opportunities relating to land, resources, governance, finance and cultural heritage. In exchange for this package, the Noongar have agreed to surrender all current and future claims relating to historical and contemporary dispossession (Western Australia 2017). The Noongar Treaty recognises the Noongar as both traditional owners of the land and as a distinct polity, differentiated from other Western Australians, and establishes and resources institutions and structures of culturally appropriate governance and means of decision-making and control that amount to at least a limited form of self-government.

The Noongar Treaty recreates some of the problems of contemporary Canadian treaties. This is most clearly seen in relation to its limited self-rule; there is no Noongar government and the people are not entitled to pass legislation. As Australia's first treaty this is understandable, and it is hoped that the settlement will 'pave the way' for more 'robust forms of Indigenous jurisdiction' (Lino 2017, 131) into the future. This may indeed be possible. Upon notification that the Noongar had voted to accept the settlement, Premier Barnett issued a press release, declaring that the agreement provides the Noongar 'with a real opportunity for independence' (Barnett 2015). Glen Kelly, CEO of the South West Land and Sea Council and Noongar lead negotiator, agrees, arguing that the treaty 'will have a massive and revitalising effect on Noongar people and culture' (Diss 2015).

Ultimately, however, while the content of the Noongar treaty is valuable, the stories that it tells are more important, as they have the potential to imbue a new understanding of Australian citizenship. As part of the agreement, the Western Australian Parliament enacted the *Noongar (Koorah, Nitja, Boordahwan) (Past, Present, Future) Recognition Act 2016* (WA). The first piece of legislation in Western Australia to include the Noongar language, the Act recognises the Noongar people as the traditional owners and occupiers of South West Western Australia, and their continued cultural, spiritual, familial and social relationship with country (preamble, and s 5). In the second reading speech, the Minister for Aboriginal Affairs, Peter Collier, acknowledged the deep injustices that had been done to the Noongar people since the British arrival in 1826, but noted that despite this 'history of oppression and marginalisation', the 'Noongar people have survived' and continue 'to assert their rights and identity' (*Hansard* 2016, 1496-7). This is critical, for, as Nicole Roughan has explained, treaties are 'fundamentally about citizenship – not of a homogenized Nation-State, but of a multinational state where differentiated political communities must work out their ongoing interactions' (2005, 294). Through the Noongar Treaty, new stories of our shared history and shared political values are emerging.

IV. CONCLUSION

Australian citizenship in its legal and normative dimensions is broad enough to encompass Aboriginal and Torres Strait Islanders. The terms of that inclusion, however, largely deny their peoplehood status, inhibiting our ability to make institutional and structural changes to Australia's governance framework. Meaningful institutional reform requires a new understanding of Australian citizenship, an understanding that makes room for Aboriginal and Torres Strait Islander peoples as co-sovereigns on and of this land. Treaties are the ideal mechanism through which this new understanding can be developed. An intercultural dialogue that takes seriously distinctive worldviews and recognises Indigenous peoples as equal participants in the design of a shared future, may deepen and enrich our citizenship, instilling a 'plural and inclusive view of national identity' (Parekh 2000, 236). Further, in establishing mechanisms of self-rule, treaties can ground the institutional reform necessary to empower Aboriginal and Torres Strait Islanders in our shared country.

Treaties also tell stories. Understood in this way, treaties are a process of 'belated state-building' (Daes 1993, 9), whereby the political and legal foundations of the nation are legitimated, and a new form of

citizenship and identity is constituted. Treaties provide a language for citizens within and across diverse political communities to converse, to articulate common aspirations and values that are embedded in a shared history and expressed in shared institutions (Webber 1994, 192-3). In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islanders drew on the importance of sharing to invite non-Indigenous Australians 'to walk with us in a movement of the Australian people for a better future' (Referendum Council 2017, i). This partnership of sharing 'must begin with sharing of political power' (Mansell 2016, 5). Although the government rejected the recommendations of the Referendum Council, the Noongar Treaty, and similar developments across Australia, suggests that many Australians are ready to join this movement.

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