IS FEDERALISM BEING UNDERMINED IN THE CURRENT SURGE TO 'RECOGNISE' INDIGENOUS AUSTRALIANS IN (AND INTO) THE COMMONWEALTH CONSTITUTION?

by Mark McMillan

INTRODUCTION

When Aboriginal and Torres Strait Islander peoples think within a federalist frame, it is not the settler state's concept of federalism. As a Wiradjuri person, I can see that a modern Wiradjuri nation could be characterised as a federation. Federalism is then, for me, an idea that binds and respects levels of autonomy of peoples existing at a local level; and where the local laws are respected as the foundation of the negotiated sharing of sovereignty to create and maintain another level of governance. These are the federalist principles still deployed by the Iroquois Confederacy of Nations.

Australia's *Constitution* was heavily influenced by the constitutional arrangements of the United States of America. Indeed, the foundational principles of federalism, nationalism and relationships with Native American tribes that emerged in the United States constitutional arrangements were influenced by Native American tribal organisation—in particular, the Iroquois Confederacy of Nations (the six nations of the Mohawk peoples). What was not transferred to the Australian context was the conscious relationship of Native American tribes with the United States through its constitutional development.

This paper explores: the relationship between constitutional emergence of relationships with Indigenous people and the US; the influence (or lack therefore) of the US's concepts into the Australian context, despite the reliance in Australia on the very principles of federalism and nationalism but without the appreciation of their etymology vis-a-vis Indigenous relationships; and whether the current proposal for constitutional recognition of Aboriginal and Torres Strait Islander peoples could be re-imagined with a better appreciation of federalism as accepted from the United States by noting the approaches to constitutional recognition of two states of Australia.

INDIGENOUS NATIONS AS FEDERATIONS: THE UNITED STATES EXAMPLE

Wiradjuri nation would not be the only Indigenous nation that could characterise and name itself as a federation. Many native nations in North America are federations.[1] Indeed, the Iroquois Confederacy of Nations directly influenced the emergent United States of America when 'founding fathers' were establishing the principles on which their own federation was to be endowed. The influence (historic and contemporary) of the Iroquois Confederacy of Nations on the United States was acknowledged in 2nd session of the 100th Congress in 1988. The US Congress's Senate and House of Representatives passed concurrent resolution 331. The concurrent resolution stated *inter alia*:

> To acknowledge the contribution of the Iroquois Confederacy of Nations to the development of the United States Constitution and to reaffirm the continuing government-to-government relationship between Indian tribes and the United States established in the Constitution.
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> …
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> Whereas the original framers of the Constitution, including, most notably, George Washington and Benjamin Franklin, are known to have greatly admired the concepts of the Six Nations of the Iroquois Confederacy;
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> …
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> Whereas the confederation of the original Thirteen Colonies into one republic was influenced by the political system developed by the Iroquois Confederacy as were many of the democratic principles which were incorporated into the Constitution itself …[2]

THE AUSTRALIAN FEDERATION AND THE CONSTITUTION

Indigenous nations within what is now Australia (including our long-established federations) seemed to have had little influence on the emergent conceptions of federalism within the British colonies of Australia in the late 19th century. Even though such approaches of the colonies were thought to ignore Indigenous nations, the United States concepts of federalism (and to a lesser extent—nationalism) were prevalent and heavily relied on by the framers of the Australian *Constitution*. It is only a matter of logic then that we should (and I believe must) use the consciousness of

federalism to examine its role and place in the current suggestions that the Australian *Constitution* be amended to 'recognise' Aboriginal and Torres Strait Islander peoples.

More importantly, using the consciousness, and therefore the possibilities, of what federalism was essentially about, we can see if federalism might offer something new to the discussion regarding sovereign relationships in the constitutional recognition debate. Federalism is, for me, about the maintenance of sovereign relationships and the recognition of the status of sovereigns within a deliberately organised structure.

The framers of the Australian *Constitution* were also concerned with relationships that were already in existence—that is, the colonies themselves. The colonies had already been given governing status by the Westminster Parliament prior to federation. They had already been granted the 'institutions of representative and responsible government prior to federation'.[3]

What was not imbued in the national government was a possible relationship with Indigenous peoples.

The colonies were not organising the federation to give away their hard-fought sovereign power. Instead, they were adding a new element *onto* the existing relationships. The caveat (and presumed power) was that the federation could only exist because of them, and for them. The federation was a structure of relationships. However , 'there is comparatively little attention given to the very particular relationships between the colonies and the Indigenous peoples within their borders, prior to Australia becoming a federation in 1901'.[4]

Indigenous peoples in Australia have always and continue to demand a sovereign relationship with the colonies and states. Indigenous peoples continue to act in accordance within their own constitutional arrangements in this way.[5]

In their book *Australian Public Law,* Reilly et al suggest that:

> In Australia … the federation was predominantly a compact between the colonies rather than of the people of Australia.[6]

Reilly et al reinforce the point that within the Australian context, the role of 'the people' was not as pronounced— if in fact it existed at all. This differential was identified by Reilly against the backdrop of the United States model, which sought to constrain state power and protect individuals and their rights against the state itself. It should also be noted that a particular purpose of the United States federating was to create a nation.

Therefore, a tension was identified—and created—between 'nationalist' and 'federalist' conceptions of government. Those concepts and the tensions between them remain as a manageable issue in the United States. Such tensions were identified and articulated in various manifestations with the Federalist Papers. The Federalist Papers:

> were a series of eighty-five essays urging the citizens of New York to ratify the new United States Constitution. Written by Alexander Hamilton, James Madison, and John Jay, the essays originally appeared anonymously in New York newspapers in 1787 and 1788 under the pen name 'Publius.' The Federalist Papers are considered one of the most important sources for interpreting and understanding the original intent of the Constitution.[7]

In particular Federalist No 10 (*The Union as a Safeguard Against Domestic Faction and Insurrection*) and Federalist No 39 (*The Conformity of the Plan to Republican Principles*)[8] deal with these tensions between national government and federalist principles.

Within the United States federalist principles, the national government was to have a government-to-government relationship with Native American tribes.[9] The US federation—and nation—was imbued with a particular investment of relationship with its Indigenous peoples. It is this concept of relationship with Native American tribes operating within the federation and nation of the United States that I think is worthy of notice and attention in the Australian constitutional context—both about federalism and nationalism.

A nation state was not supposed to be born in Australia in 1901. A 'national government' was the intention.[10] Davis and Williams refer to a speech made by the then Premier of the colony of New South Wales, Henry Parkes, at Tenterfield in New South Wales in 1889 as the moment in which the 'federation movement began in earnest'.[11] From the words of the speech, the federation was about 'national government' rather than the emergence of a nation. Australia and its colonies already had a nation . . . the United Kingdom. Australia, the 'nation state', only emerged in the 1940s.

Referencing 'nation' and 'nation government' within the initiating debates (containing foundation principles) of federating the colonies of Australia, Parkes makes 'national government' a point of differentiation from the United States. This articulation of national government (as opposed to nation) was the beginning of a lost opportunity to connect relationships with Indigenous peoples and

nations to the colonies through a new constitutional framework. Relationships between colonies and the Indigenous peoples were already in existence at the time of Parkes' calls for federation. Those relationships continue to this day.

Instead of a nation, a federation was created to form a national government. Our federation was imbued with similar tensions between state power and national government. However, what was not imbued in the national government was a possible relationship with Indigenous peoples.

Examining the historical basis of 'a federation' formed on a basis of understanding of Indigenous nation organisation (the Iroquois Confederacy on the United States of America Constitution)[12] might also assist non-Indigenous people to grapple with the pervasiveness and consciousness of 'sovereign relationship' and 'sovereign relationality' as understood and practised by Indigenous nations and peoples in Australia.[13] Such examination may expose some of the influences of Indigenous peoples in Australia to, again, demand that a treaty (or series of treaties) be undertaken instead of, or in conjunction with, constitutional recognition. These long-held demands for treaty are more about our practising of our sovereignties and how we understand the concepts of relationships within a federation than they are about the settlor state 'recognising' us.

The current 'either/or' debate about sovereignty, treaty and being 'recognised' in the *Constitution* masks the slippage in the debate around the tension of federalism and nationalism. Moreover, such conflation erodes the capacity to interrogate the influences that federalism and nationalism have on the current proposals for 'recognition'. The constitutive elements of the federation deliberately withheld from the national government an ability to share a relationship with Indigenous nations.

THE RACE POWER

The states were the driving forces that sought to undertake benevolent acts such as 'smooth the dying pillow'[14] of Aboriginal and Torres Strait Islander peoples. As a consequence, the federation was imbued with such possibilities of the racialised eradication of Aboriginal and Torres Strait Islander peoples

The newly created Commonwealth of Australia was, by agreement of the states, to be prohibited from having concurrent legislative powers with them when it came to Aborigines.[15] As a note, the fact that Aboriginal people were excluded from the 'race power'—which is the power to legislate for 'race'—does not that mean that Aboriginal people were not racialised for the purpose of the *Constitution*.

Making sense of how race and Aboriginality have been dealt with as a distinctly Australian constitutional issue is difficult. This difficulty has arisen because of how the High Court of Australia has dealt with 'race' more generally and specifically with 'Aboriginailty' when interpreting the *Constitution*. McMillan and Clark have said:

> When it comes to constitutional interpretations of the concept of 'race', the extent and reach of the 'race power' as considered by Australian judges, and the constitutional relationship between Indigenous peoples and the State … constitutional scholars have spent little time investigating.[16]

The issue of a constitutional amendment to recognise Aboriginal and Torres Strait Islander peoples to date can easily be characterised as one of a 'nation' issue rather than a 'federation' issue.

Constitutional scholarship in Australia to date has rightfully focused on Indigenous peoples as 'subject' and whether laws enacted pursuant to valid head of power was 'authorised' with respect to the relevant power.[17] The demand for removal of the 'race power' in current debates about 'recognition' further complicates a thorough analysis of where the 'relationships' between Indigenous peoples and the state may exist—or have always existed

By expressly excluding Aborigines from the Commonwealth's reach when it came to power to legislate for 'other' races—that is, those who are neither white nor Aboriginal—the states and Westminster Parliament forever entrenched Aborigines (which includes Aboriginal and Torres Strait Islander peoples) as a racial construct in the newly articulated constitutional arrangements of Australia.[18]

In addition, when the worth of Aboriginal peoples was considered for how representation was to be constructed for the Commonwealth Parliament, Aboriginal peoples were expressly excluding from have any value.[19] Aboriginal people were relegated to be less than people for the purpose of who could be 'people' of the new Commonwealth. A reminder: this was the agreement of the *states*. The Commonwealth (and the nation as we now know it) was not in existence.

This issue of how federalism has impacted the lawful *relationship* between the states of Australia, the Australian nation and Indigenous peoples and nations of Australia might be observed through the discussions *of* the federation itself, and what might

be the effect on federalism after a constitutional referendum to 'recognise' us in the *Constitution*. The issue of a constitutional amendment to recognise Aboriginal and Torres Strait Islander peoples to date can easily be characterised as one of a 'nation' issue rather than a 'federation' issue.

Will any proposed amendments to the *Constitution* alter the federation's delicate power balance? More importantly, how are states attempting to make sense of this constitutional amendment to recognise Indigenous Australians?

THE STATES AND THE CURRENT DEBATE

The complicated approach of states can be seen in two states thus far. In particular, relationships between the states and their Indigenous peoples and nations are influencing how they might proceed with their own participation in constitutional referenda.

Victoria and South Australia have approached their participation to the proposed constitutional amendments in distinctly different ways.

SOUTH AUSTRALIA

South Australia has committed itself to endorse the 'Recognise' campaign by becoming a 'Campaign Partner' of that campaign. One interpretation of the effects of the endorsement of the 'Recognise' campaign could be that it could lead to South Australians being 'urged' to vote 'yes' to any question put forward. This could have negative consequences if the ultimate question and effect is detrimental to Aboriginal and Torres Strait Islander peoples and their interests.

However, South Australia has made its endorsement conditional. That condition is that any amendment supported by South Australia must achieve two things: it must recognise Aboriginal and Torres Strait Islander peoples, and must amend the *Constitution* so that it no longer permits discrimination on the basis of race.

It follows that South Australia is endorsing a commitment to a 'yes' campaign, despite the fact that this might not be what Aboriginal and Torres Strait Islander peoples of South Australia want. This issue speaks of the need to be deliberately talking about sovereign relationships *within* 'recognition' and ending racial discrimination discussions.

Efforts to cure the defect in the *Constitution* with respect to racial discrimination do little to explain how relationships between the state and its Indigenous nations actually operate now, and how they will operate into the future. Should the state actually ask Indigenous South Australians their views on the proposed referendum so as to inform itself (and ultimately all South Australians) of what the relationship is now between them and the state?

The state of South Australia is proactive about its relationships with its Indigenous peoples through a very specific Aboriginal Nation (Re)Building framework. This *is* about relationships between Indigenous peoples and the state. Constitutional recognition might allow for a greater acknowledgement that this referendum moment *is* also about relationships between Indigenous nations and the states.

VICTORIA

Victoria has had a very different approach, whether by design or by inadvertence. The issue was a clear focus of the Victorian Government when the Victorian executive established 'a new engagement framework with Aboriginal leaders to inform policy priorities and action'.[20]

On 3 February 2016, the Minister for Aboriginal Affairs (Victoria) issued a press release saying that 'self-determination and recognition of Aboriginal people in Australia's *Constitution* will be on the table for discussion [that day], at a gathering of Victorian Aboriginal community representatives hosted by the Andrews Labor Government.'[21] Further, this was a *formal* gathering—convened by the executive arm of government. Minister Hutchins reinforced the formal nature of the gathering when she stated that the forum was a 'valuable opportunity for the Government to formally hear from the broader Aboriginal community about a model for self-determination and views on constitutional recognition'.[22]

Constitutional recognition was absolutely rejected by the Aboriginal people at the formal gathering of Aboriginal leaders. It has been reported that there were 500 Aboriginal leaders at the gathering, and that they rejected any proposed amendment to the *Constitution* that sought to 'recognise' them.[23] The gathering made three resolutions:

- We as Sovereign People reject constitutional recognition
- We demand the state resources a treaty process, including a framework for treaties, with complete collaboration with all Sovereign Peoples and Nations, and treaties are finalised and agreed upon by December 2016 (with one Aboriginal leader voting against)
- We demand the state resources an Elders Council of South Eastern Australia, which is comprised of all Sovereign Peoples (one vote against).[24]

As a result of this formal gathering in February 2016, the Victorian Government announced it 'will begin talks to work out Australia's

first treaty with Indigenous people within weeks'.[25] Those public consultations have commenced.

The conundrum, for the purposes of this paper, is not about the treaty or a treaty framework, but what this rejection of constitutional recognition by Aboriginal leaders in Victoria means for Victoria's relationship with the federation on the issue of constitutional recognition. The stakes are particularly high because for a referendum to be successful it must be carried by a majority of people and a majority of states.[26]

The issue that confronts Victoria is what to do about the rejection of constitutional recognition. There clearly needs to be scholarly work done on what the rejection means for the federation and the nation; and what roles those relationships established (or not) by federation should play in understanding the demands of Aboriginal and Torres Strait Islander people in their articulation of what this will mean *for* them—not *at* them—as they pursue their sovereign relationships with the state of Australia, and the states of Australia.

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1 The Confederated Tribes of the Colleville Reservation; Confederated Tribes of the Warm Springs; Confederated Tribes of Siletz Indians of Oregon; Confederated Salish and Kootenai Tribes these are some of the examples of modern 'federations' of tribes.

2 A Concurrent Resolution to Acknowledge the Contribution of the Iroquois Confederacy of Nations to the Development of the Unites States Constitution and to Reaffirm the Continuing Government-to-government Relationship between Indian Tribes and the United States Established in the Constitution, H Con Res 331, 100th Congress (1988).

3 Gabrielle Appleby, Alexander Reilly, and Laura Grenfell, *Australian Public Law* (Oxford University Press, 2011) 44.

4 Adrian Little and Mark McMillan, 'Invisibility and the Politics of Reconciliation in Australia: Keeping the Conflict in View' *Ethnopolitics* (forthcoming).

5 Anna Dziedzic and Mark McMillan, 'Australian Indigenous Constitutions: Recognition and Renewal' (2016) 44 *Federal Law Review* (forthcoming).

6 Ibid.

7 The United States Library of Congress, *Primary Documents in American History*, Congress.gov <https://www.congress.gov/resources/display/content/The+Federalist+Papers>.

8 Ibid.

9 As expressed and understood in United States Constitution art 1 § 2; art 1 § 8, amendment XIV § 2.

10 Megan Davis and George Williams, *Everything You Need to Know About the Referendum to Recognise Indigenous Australians* (NewSouth Publishing, 2015) 12.

11 Ibid; Sir Henry Parkes, 'Tenterfield Oration' (Speech delivered at Tenterfield School of Arts, New South Wales, 24 October 1889).

12 H Con Res 331, above n 2.

13 Dziedzic, above n 5.

14 Australian Human Rights Commission, 'Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', (Human Rights and Equal Opportunity Commission, 1997) Chapter 2.

15 *Australian Constitution* s 51(xxvi): the people of any race for whom it is deemed necessary to make special laws; the referendum to amend the *Australian Constitution* on 27 May 1969 deleted the reference to 'other than the Aboriginal race in any State' thereby allowing the Commonwealth concurrent legislative power with the states.

16 Mark McMillan and Martin Clark, 'Making Sense of Indigeneity, Aboriginality and Identity: Race as a Constitutional Conundrum since 1983' (2015) 24 *Griffith Law Review* 106, 106.

17 Ibid.

18 Ibid; Appleby, Reilly and Grenfell, above n 3, 44–5.

19 *Australian Constitution* s 127 as written on 1 January 1901: 'In 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'.

20 Natalie Hutchins, 'Aboriginal Victoria to Advance Self-Determination', (Media Release, 1 December 2015). <http://www.premier.vic.gov.au/aboriginal-victoria-to-advance-self-determination/>.

21 Natalie Hutchins, 'Action on Aboriginal Self-Determination', (Media Release, 3 February 2016). <http://www.premier.vic.gov.au/action-on-aboriginal-self-determination/>.

22 Ibid.

23 Chris Graham, 'Recognise Rejected: Historic Meeting of 500 Black Leaders Unanimously Opposes Constitutional Recognition', *New Matilda* (online), 8 February 2016 <https://newmatilda.com/2016/02/08/recognise-rejected-historic-meeting-500-black-leaders-unanimously-opposes-constitutional-recognition/>.

24 'Victorian Originals Reject Constitutional Recognition', *Treaty Republic* (online), 4 February 2016. <http://treatyrepublic.net/content/victorian-originals-reject-constitutional-recognition>.

25 Hamish Fitzsimmons, 'Victorian Government to Begin Talks with First Nations on Australia's First Indigenous Treaty', *ABC News* (online), 26 February 2016 <http://www.abc.net.au/news/2016–02–26/victoria-to-begin-talks-for-first-indigenous-treaty/7202492>.

26 *Australian Constitution* s 128.