Journal of Institutional Economics (2023), **19**, 36–51
doi:10.1017/S1744137422000170

CAMBRIDGE UNIVERSITY PRESS

RESEARCH ARTICLE

Constitutional catallaxy and indigenous rights: the Australian case

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(Received 13 May 2022; revised 25 June 2022; accepted 28 June 2022; first published online 20 July 2022)

Abstract

This paper interrogates certain contractarian theoretical presumptions concerning the development and maintenance of political constitutions. Specifically, the extent to which constitutional agreement is said to be inclusive of all persons affected by the activation of proposed provisions, and the extent to which such provisions remain agreeable, is critically appraised. For example, rectifying historical exclusions of indigenous peoples from constitutional agreement procedures, and the constitutional accommodation of demands for racial equality and recognition of indigenous rights, presents as an important motivation for constitutional change in actually existing societies. The objective of this paper is to interpret constitutional developments on matters of indigenous rights as the manifestation of complex, adaptive arrangements, instituted by actions seeking to restructure political rules and reframe the boundaries of permissible political action. Taking the Australian case, this paper illustrates how acts of constitutional entrepreneurship by indigenous groups have contributed to constitutional changes such as racially non-discriminatory treatment and recognition of indigenous governance. Entrepreneurship is seen as a part of broader endogenous processes reshaping constitutions, including constitutional arbitrage by activists between legislatures and judiciaries, and mobilizing popular support for indigenous rights. The framework presented in this paper extends constitutional political economy insights regarding the evolution of basic political institutions.

Key words: Constitutional entrepreneurship; constitutions; indigenous rights

1. Introduction

The historical exclusion of indigenous peoples from constitutional negotiations, and challenges surrounding the constitutional accommodation of indigenous rights and perspectives, remains a significant source of socio-political tension within several nations. The constitutional exclusion, or discriminatory treatment, of indigenous peoples is a particular issue for settler-colonial states, which are also grappling with legacy issues regarding the dispossession of land and property, loss of indigenous lives, due to violent conflict, spread of disease, and diminished quality of life, as well as the destruction of traditional customs and practices. Discussions over the constitutional specification of indigenous rights, and the means by which those rights are constitutionally registered, are increasingly intertwined with broader debates over the legitimacy of political sovereignty over territories previously occupied by groups of indigenous peoples. As this paper will attempt to illustrate, questions concerning the constitutional treatment of indigenous issues also pose as a continuing challenge to scholarship, including with regard to the study of institutions.

Over the past few decades, intellectual innovations have emerged within economics, law, and political science that aim to better understand the processes underpinning constitutional design and maintenance. Particular focus is trained upon the intellectual discipline of 'constitutional political economy' (CPE), which focuses upon those institutional rules conditioning the actions and choices

of individuals as they engage one another within the political domain. Largely attributed to the works of scholars specializing in Virginia political economy, especially James M. Buchanan (Buchanan, 1987, 1990; Buchanan and Tullock, [1962] 1999), CPE applies economic principles and analysis to the study of constitutional configurations. In addition to this positive function, CPE normatively articulates a consent-based justificatory framework for constitutional design and maintenance. Specifically, political activity exemplified by governmental coercion would be deemed as acceptable insofar as the exercise of such coercion is consistent with constitutional rules pre-determined and agreed-upon by the members of the citizenry. This agreement to be coerced not only addresses the paradox of comprehending the legitimacy of coercion in a democratic context, but carries normative weight in that the terms and conditions of the constitution, which bound and guide coercive political conduct, are conceived as the product of agreement.

CPE presents an idealized framework of political exchange between the principals (citizen-voters) who assent to constitutional rules of political order, and the political agents who agree to enforce constitutional stipulations. To what extent does CPE serve to explain actual political events concerning the origination, retention, and variation of a constitution is, ultimately, an empirical matter. It is in this regard that the contractarian idealism of CPE has been critically scrutinized, and such scrutiny may extend to the constitutional treatment of indigenous persons. Proponents and detractors of CPE alike have been prone to ask: did the constitution emerge as a result of consent *qua* genuine agreement by all, or did it itself arise through acquiescence felt by, or duress applied to, certain sub-populations? This question assumes salience given that any political delegation in respect to, and setting boundaries regarding who is seen as appropriately the subject of, constitutional negotiations has been seen as working to the exclusion of indigenous peoples.

Furthermore, the inherently evolutionary character of economic, social, and political preferences and priorities raises another question of relevance to indigenous circumstances. Does the constitution accommodate change in a procedurally appropriate fashion, providing mechanisms for individuals and groups to reveal their constitutional concerns and to have them addressed in a satisfactory manner? Consistent with the key questions already raised here, the observation of continuing advocacy for constitutional change by indigenous groups poses additional issues over the appropriateness of CPE. How reasonable are theoretical presumptions about the relative stability, or fixity, of constitutional rules over time if population sub-groups were excluded from the initial design phase (Salter, 2020; Wagner, 2017)? How might CPE explain a process of ongoing constitutional management, including the proposal and ratification of amendments, in a diverse world exemplified by heterogeneity of beliefs, perspectives, and values (Haeffele and Storr, 2018)?

The key contribution of this paper is to extend the CPE framework, and address the possibility of separation between constitutionalism, idealism, and realism, by recognizing the significance of a 'catallactical' orientation to the study of political exchanges with respect to constitutional bargaining. Originating in the 1830s invocation by Richard Whately to consider political science a science of exchange, the term 'catallaxy' was used by the likes of Ludwig von Mises, Friedrich Hayek, and Buchanan to reinforce the desirability of an exchange-based, as opposed to allocated-based, vision for political economy (Snow, 2019). In this paper, the term 'constitutional catallaxy' is frequently invoked as a descriptor for constitutional-level bargaining amongst heterogeneous agents in the pursuit of satisfactory political arrangements. This orientation emphasizes an open-ended process of rule-setting, with the significance of constitutional catallaxy resting upon entrepreneurial action by individuals seeking to alter the constitutional rules under which they, and all other agents, interact politically.

Under the constitutional catallaxy approach, the effective understanding of the workings and application of the constitution is pluralistic in nature, and is subject to contestation and change. Constitutional analysis conventionally provides for a distinction between the *de jure* specification of a written (or otherwise formalized) constitution and its *de facto* elements perceived to be actually operative (incorporating written and other provisions) at the level of constitutional rules. Constitutional catallaxy recognizes that initially established constitutional terms are impermanent,

https://doi.org/10.1017/S1744137422000170 Published online by Cambridge University Press

and that constitutional change may proceed in both *de jure* and *de facto* senses. Constitutional amendment can take place formally, say via public referenda procedures, or through judicial, policy, and other implicit changes, both of which have the capacity to alter rules pertaining to such things as who counts as a person with rights to participate in constitutional and other key political processes. The normative implications of *de jure* or *de facto* constitutional change may be scrutinized in their own right, but the key point with constitutional catallaxy I wish to raise is its recognition that constitutional change is not an anomaly, or bug, but an enduring feature of political life wherein entrepreneurial impulses influence constitutional decision-making.

This paper is structured as follows. Section 2 introduces the key elements of constitutional catallaxy, and describes how this approach is inclusive of constitutional entrepreneurs actively aiming to reshape the configurations of the constitution and, more fundamentally, of public governance. This is followed, in section 3, by a case study applying the catallactical framework to constitutional encounters between indigenous and non-indigenous peoples in Australia. In doing so, I illustrate the contributions of political activism, judicial decision-making, and policy changes toward constitutional change that aims to promote indigenous voting rights, as well as formal recognition of indigenous governance practices and political self-determination. Concluding remarks are provided in section 4.

2. Constitutional catallaxy: a positive account of constitutional change processes

CPE has emerged as a major approach in the determination of constitutional-level political rules, and as an important strand of political economy in its own right. In Buchanan's theoretical scheme, individuals will rationally negotiate a constitutional agreement determining the rights of individuals, the likely distribution of benefits and burdens, and obligations and entitlements, into the future (Meadowcroft, 2011). The reason of rules, set constitutionally, is that 'without them we would surely fight. We would fight because the object of desire for one individual would be claimed by another. Rules define the private spaces within which each of us can carry on our own activities' (Brennan and Buchanan, [1985] 2000: 5). This agreement is necessarily one involving all individuals comprising the polity, who are to enjoy the benefits and bear the obligations associated with the constitution. The insistence that constitutional legitimation be grounded in participation and consultation implies that the provisions of the constitution are broadly, if not unanimously, agreed to by all those affected by it.

A key feature of Buchanan's approach is to imagine as if individuals are deliberating over the terms and conditions of the constitution under a 'veil of uncertainty'. It is supposed people will rationally focus upon aspects of public interest when agreeing to constitutional terms and conditions, since that the veil of uncertainty removes from individuals' consideration how a constitution might specifically affect their relative economic and social situations in the future. As stated by Buchanan and Tullock, '[t]he uncertainty that is required in order for the individual to be led by his own interest to support constitutional provisions that are generally advantageous to all individuals and to all groups seems likely to be present at any constitutional stage of discussion' (Buchanan and Tullock, [1962] 1999: 78–79).

The operation of the veil of uncertainty occurs during the first of two stages of constitutional existence, a so-called 'constitutional' stage concentrating upon the origination of constitutional rules for political order. The second stage is that individuals engage with one another once the rules of the constitution have been laid down and made publicly available, creating the prospect for a variety of possible socio-economic outcomes to unfold which cannot be known in advance. In effect, this second, 'post-constitutional' stage period presents a distinction between rules and actions within rules, not unlike that which characterizes a board or card game or sporting contest: '[s]ocial interactions – particularly in larger groups and groups of any complexity – take place within frameworks of rules or institutions. Aggregate social outcomes are the result of the choices that individuals make *within* these rules' (Vanberg, 2018: 203).

The constitutional and post-constitutional stages of constitutional existence are separable but presumably interdependent, because a constitution provides structure to politics and politics shapes constitutional possibilities (Martin, 2010; Voigt, 1997). However, a more practical sense of indeterminacy

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between the stages or, more generally, a blurring between constitutional political rules and post-constitutional outcomes (Brennan and Buchanan, [1985] 2000) should not necessarily be discounted as a possibility. This is because, from a catallactical approach to the study of political phenomena, constitutions remain a source of contestation amongst diverse political actors even well after their initial construction and imposition, in effect providing an endogenous source of change to some of the fundamental rules of public governance.

The metaphorical likening of constitutional construction with a game with agreeable participants does not correspond with empirical observations that constitutional-level political exchange 'often include unwilling third parties as forced riders … whose consent is no more than resignation of acquiescence' (Salter, 2020: 175). The implication of such observations is that '[t]o *acquiesce* in a constitutional system is not the same as to *agree* with it' (Wagner, 2014: 970). The provisions of the designed constitution may not be unanimously agreed upon, and in any event are unlikely to actively involve the participation of everyone in the community in a first-stage 'constitutional moment', raising the possibility that certain rules eventually become contestable. In other words, it is not unreasonable to posit that feelings of acquiescence and duress may fuel motivation, and sharpen incentive, amongst some individuals and collectives to demand, and to deploy political strategies and tactics in seeking to enact, constitutional change.

One of the critical propositions outlined by the constitutional catallaxy approach is that contestation over the terms and conditions of a constitution brings forth the prospect of 'constitutional entrepreneurship' on the part of various actors involved in the political domain. As defined by Alexander Salter and Richard Wagner, constitutional entrepreneurship is conceived as action by individuals in an attempt to alter the constitutional-level rules under which they, and all other agents, interact politically. Whereas actions within the purview of constitutional entrepreneurship relate to a broader conception of exchange interactions in a political context, the constitutional entrepreneur is not an analytically separable agent in the sense that:

> the 'referee' is part of the political system. Rather than being a disinterested overseer incapable of interacting with players on the same plane as players, referees in constitutional systems meet players on equal terms in the sense that player-referee political bargains are not fundamentally different from player-player political bargains. These features of constitutional exchange are the source of genuine constitutional innovation (Salter and Wagner, 2018: 286).

Speaking of innovation in a constitutional sense, the constitutional entrepreneur aims to project imaginative mental frames of alternative constitutional possibilities in relevant discourses, with successful frame-projection persuading others of the need for constitutional amendment and which motivates them to act (Aukes *et al*., 2018; Koppl *et al*., 2015). The mental frames diffused by constitutional entrepreneurs may be expressed in an instrumental (or interest-based) paradigm, or could be expressive (or affective, or values-based) in nature (van Winden, 2007). As mentioned, it is possible that certain actors would attempt to cloak their interests in expressive rhetoric as the terms and conditions of the constitution are in the process of being debated. Perceptions as to what kinds of gains may be achieved by constitutional entrepreneurs, in a process of contestable deliberation with others, can be varied.

Whereas the prospect of entrenching new constitutional arrangements that yield pecuniary payoffs could be a motivation for some, non-pecuniary considerations, such as the pursuit of fame, power, and prestige, may also be significant (Cowen and Sutter, 1997; Salter and Wagner, 2019; von Wieser, [1926] 1983). Importantly, Martin and Thomas argue that differing motivations for constitutional amendment may be interwoven with a sense of frustration that past attempts at policy change were proven unsuccessful: '[t]argeting the rules of the political game may be a rational response by political entrepreneurs when their efforts at policy change (or maintenance) are foiled' (Martin and Thomas, 2013: 22). In any event, the framework of constitutional catallaxy gives rise to the existence of constitutional entrepreneurship as a driving, and potentially decisive, force of influence within the polity.

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The inherent complexities of constitutional construction and amendment correspond with the widespread co-involvement of multiple actors, all seeking to influence the shape of constitutional rules in line with their idiosyncratic preferences. Specifically, 'because political bargains take place between actors, whether individuals or groups, that each have their own goals in mind, the constitutional system itself cannot be considered reducible to the choice of any one individual or group' (Salter and Wagner, 2018: 287). In addition to members of the political executive of government seeking to entrench constitutional provisions to derive political profit opportunities (including through rearranging the distribution of public powers), members of legislatures and the judiciary may also be seen as deeply involved in the unfolding dramas of constitutional catallaxy.

Additional kinds of actors are also implicated in the catallactics of constitutional change. A variety of collective groups may also engage in collective actions intended to orchestrate constitutional change, whether it be through proposals to change *de jure* constitutional specifications or by reframing shared understandings about how a constitution is to be, in a *de facto* sense, interpreted. Some of these entities, such as professional associations and interest groups, are closely entangled with prominent political actors. Others, such as social movements, attempt to position themselves as contentious 'outsiders' to the political *status quo* but, nevertheless, are typically proactive in promulgating agendas for constitutional change. The leaders and key activists of movements oftentimes act as constitutional entrepreneurs as part of efforts to pressure political actors and build popular support for constitutional amendments (Cummings, 2017; Novak, 2021).

Working along various margins to secure constitutional change in typically novel ways, the constitutional entrepreneur may bring about a new constitutional situation which strikes accord amongst the citizenry at large. In this context, the constitutional change is consistent with growth in knowledge giving rise to new opportunities for social cooperation (Runst and Wagner, 2011). However, recounting our previous discussion that the emergent outcomes of constitutional catallaxy do not necessarily command widespread satisfaction, it is conceivable that any given iteration of constitutional amendment may foment new rounds of animosity and conflict within the political scene. In other words, constitutional moments constantly unfold. As stated by Salter and Wagner, '[c]onstitutions are perpetually renewed in the course of politics, where friends and enemies build coalitions and contend for desirable goods' (Salter and Wagner, 2019: 93). In effect, the two-stage, bifurcated framework of CPE, of pre- and post-constitutional action, collapses into one: '[t]here is no way to prevent constitutional bargains that themselves take place outside of the established revision procedures, because there is no categorical fine line between pre- and post-constitutional bargains in actual political exchange' (Salter and Wagner, 2018: 287).

Under the constitutional catallaxy approach, it is considered that the most appropriate description of constitutionalism is that it is an evolving, open-ended agenda. Now, constitutional catallaxy theory is not necessarily intended to undermine the normative significance of CPE and its individualistic approach to political exchange at the constitutional level. The distinction between the two approaches is, rather, between subscription to analytical openness *versus* closedness: '[i]t should not be thought that open systems and closed systems represent antagonistic conceptualizations, in which case one must be superior to the other. To the contrary, these offer different analytical windows onto the same phenomena. The open window presents a situation from the perspective of a *participant*. The closed window presents that situation from the perspective of an *observer*' (ibid.: 285). The key issue raised is that it is not possible to foresee or predict, with any great precision, the future condition of a constitution into the future, given the active participation of many people entrepreneurially higgling and jostling for advantageous constitutional-level rules intended to be applicable to all of society.

A key claim made in this paper, which exemplifies the relevance of studying indigenous participation in developing constitutions and other basic institutions of contemporary polities, is that it embraces the political realism of heterogeneous actors harboring disagreements over how the political order ought to be structured. In *The Calculus of Consent*, Buchanan and Tullock ([1962] 1999) contend that the capacity to generate constitutional bargains, to the unanimous (or near-unanimous) satisfaction of the population, is potentially constrained by two key factors. The first is the presence of

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vetoing 'holdout' actors who are intransigent with respect to their viewpoints or, in some other regard, refuse to constitutionally negotiate in good faith. The second factor is the existence of strong heterogeneity – whether they are in the form of divergent identities and social stratification, or strong attitudinal and perspectival diversities – undermining the ability of the population to forge constitutional consensus.

These assertions are the subject of a recent assessment, which considers that 'unreasonableness' and 'heterogeneity' cannot stand as grounds preventing the realization of a constitutionally ordered political community: '[i]t is unclear why we should expect constitutions to tend toward general, inclusive rules if there are defensible strategies to exclude certain individuals from the constitutional process' (Haeffele and Storr, 2018: 112). Indeed, political actors active in the development of a constitution must confront the fact that 'real-world communities *are* populated by unreasonable and heterogeneous agents' (ibid.: 113; emphasis added). Recognition of the catallactical dimensions of constitutional change is seen to productively confront the unavoidable institutional frictions – but, equally, potentials for dialogue and political learnings – arising from constitutional-level disagreements amongst actors with differing backgrounds, ideologies, interests, and worldviews. Disagreement may also arise from the exclusion of minorities and other groups from constitutional processes, bringing into question the legitimacy of a constitution as an expression of collective political agreement and purpose (Lemke, 2020).

Scholars have pointed to the connection between CPE and the normative individualism of classical liberalism, in that the demands and values of all individuals are to be accounted for in the construction of rules ordering political exchanges (Buchanan, [1975] 2000; Thrasher, 2019). A constitution should ideally be reflective of the perspectives of those governed under its rules and, yet, actually existing constitutions are frequently observed to depart from such standards (Buchanan, 1972). The risks of discrimination led Hutt (1966) to advance a non-discrimination condition that supplements the constitutional design rules originally advanced by Buchanan and Tullock ([1962] 1999). By no means does the approach articulated in this paper invalidate the validity of non-discrimination norms in institutional development; indeed, constitutional catallaxy is capable of describing a process wherein minorities aim to assert their fundamental rights when real-world constitutions fail to live up to the standards of non-discrimination in political exchange. This scenario is considered to be relevant to the case of Australian indigenous rights, which is discussed in the following section.

3 Australian indigenous rights: a case study in constitutional catallaxy

3.1 A brief profile of indigenous Australia

Australia's indigenous peoples were organized into tribal groupings whom, on the basis of recent archaeological evidence, have continuously resided on the Australian mainland and surrounding islands for at least 65,000 years. At the time of British colonization in the late 18th century, it was estimated that over 250 distinctive indigenous groups existed (Hendry and Tatum, 2016). Representing one of the oldest and enduring civilizations of humankind, indigenous peoples in Australia developed and maintained elaborate forms of knowledge, norms, and practices. These relate to matters as diverse as language, mythology and belief systems, cultural and social practices, customary laws and regulations, navigations, and ecological management (e.g. Gammage, 2011). From an economic perspective, it is notable that Indigenous groups maintained a diversity of property rights configurations, including rules of land tenure, and trading relationships (e.g. Banner, 2005; Macknight, 1972; McBryde, 1996).

The events surrounding the British declaration of 'discovery' and possession of (initially, the eastern half of) Australia in 1770 by James Cook, and subsequent settlement of Europeans from 1788, may be interpreted as representing an acute form of 'tectonic clashing' (Wagner, 2016) of perspectives concerning the ownership of land. Contravening the deep senses of connection between indigenous people and their lands, the British assumed occupation under the pretense that the Australian continent was effectively unoccupied (*terra nullius*) and reinforced this assertion by claiming indigenous peoples along the eastern coastal fringes apparently showed Cook 'no cause' to contest or negotiate the British acquisition of territory (Nielsen, 2016). The sense in which these events connote a tectonic clash of

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political dimensions was compounded by European jurisprudential understandings, closely connected with the 'empire-building' project of colonization, that territorial occupation mapped onto some basic notion of political sovereignty.

The spread of settler-colonialism across Australia from the late 18th century reflected the insufficient recognition by the colonizers of longstanding indigenous relationships with land. Further, the replication of largely British economic, legal, and political institutions in Australia was correlated with the denigration and suppression, if not elimination, of numerous facets of indigenous governance, compounding the inherent sense of dispossession felt by indigenous peoples. Consider, for example, that indigenous Australians were excluded from the 1890s Constitutional Conventions amongst key colonial-era political actors to establish a constitution for a proposed federal system for Australia. Whereas the implications of this exclusion will be discussed later, it is noted that this lack of representation evidently fails to meet the inclusiveness criterion of constitutional development advanced in CPE, and sets the scene for subsequent constitutional catallaxy exemplified by contention and disagreement over the treatment of indigenous peoples.

Acts of dominion over Indigenous people were met with varying forms of resistance since the earliest years of British occupation (O'Connor, 2002). From the mid-20th century, certain Indigenous Australians undertook efforts to work within the bounds of legal-politico-institutional legacies of settler-colonialism in order to establish a sense of political recognition, or, at the very least, ratification of racially non-discriminatory provisions, within the Australian Constitution. Indigenous peoples and their allies have proven reasonably effective at establishing social movements, organizing political petitions, convening rallies and mass protests, and establishing interest groups, to contest discriminatory legal and policy treatments systematically imposed by governments, and to win legislative as well as constitutional concessions (e.g. Attwood and Markus, 1999; Lino, 2018; Taffe, 2005). In the wake of political pressures, both domestically and internationally, Australian governments established political routes to channel and facilitate the expression of indigenous political perspectives. These included official commissions and inquiries, as well as statutory authorities (such as the federal Aboriginal and Torres Strait Islander Commission, which existed between 1990 and 2005). All of these avenues for political participation, and more besides, have been embraced by indigenous interests as part of efforts to secure, at times, foundational political change at the constitutional level.

3.2 1967 referendum

Although indigenous people were not represented at the Constitutional Conventions, they were spoken for, albeit sparingly, by the non-indigenous attendees at the Conventions. The treatment of indigenous peoples and their interests in this context largely reflected the stereotypical notion of the period that indigenous Australians were a 'dying race', implying their long-term interests need not be constitutionally contemplated by the political majority. The numbers of indigenous peoples living at the time, nevertheless, remained considerable, especially in colonies such as Queensland and Western Australia (Briscoe, 2003). Recognition of this fact led to the framers inserting race-based clauses in the Australian Constitution surrounding indigenous status and treatment, which was enshrined as law together with the establishment of the Australian Federation in 1901. Again, indigenous people 'took no part in debates about the instrument and played no role in the political settlement that brought a new nation on their ancestral lands' (Williams, 2021: 177).

At the conception of Australian federalism, three constitutional clauses were substantively addressed toward the indigenous peoples (Arcioni, 2012; McAnearney, 2014). Section 25 disallowed persons of any race from voting at the commonwealth (federal) level if they were already disqualified from voting in their state, a provision which remains in the Constitution today but is now widely viewed as anachronistic and outmoded. Section 51 (xxvi), or the so-called 'race power', created a power for the commonwealth government to make 'special laws' for the people of any race, *except* those of the 'Aboriginal race in any state'. Finally, Section 127 indicated that 'Aboriginal natives' were not to be counted in official censuses as amongst Australia's citizens.

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It appears that key rationales for Sections 51 (xxvi) and 127 are somewhat interrelated. The exclusion of indigenous persons from the race power reflected the view of the constitutional framers that indigenous affairs policies are the preserve of colonial (subsequently state) governments, rather than a major concern for the newly formed commonwealth government. The exclusion of indigenous Australians from the census count as indicated in Section 127 derives, in part, from the race power. A number of delegates to the Constitutional Conventions expressed disquiet that the distribution of commonwealth funds to the states may be influenced by the inclusion of indigenous persons in a census – Queensland and Western Australia would receive relatively greater shares of population-based funding by virtue of their significant shares of Indigenous residents (Chesterman and Galligan, 1997). Estimates of resident population within each state also influence the distribution of the number of seats in the federal parliament. It followed, in the opinion of the framers, that Section 127 was necessary to facilitate the commonwealth's immunity with respect to the policy management of peoples seen, at Federation, as a state responsibility.

The constitutional treatment of indigenous Australians created several dilemmas. Inter-jurisdictional policy variations meant that indigenous peoples could not be guaranteed equality of treatment, irrespective of their location. Voting disqualifications prevented indigenous people from exercising their political rights, including attempts to enforce their rights in the face of governmental fiscal, legal, and regulatory discrimination. To be certain, discriminatory settings entrenched within the Australian Constitution were firmly *not* the product of population-wide agreement as normatively benchmarked under CPE. It is unsurprising that indigenous individuals and groups and their allies, located both domestically and internationally, should come to regard constitutional settings as an appropriate focal point through which to agitate for fundamental changes in indigenous and non-indigenous political relations, in the direction of racial equality.

One of the significant episodes of constitutional catallaxy in the Australian context occurred in the form of the successful 1967 referendum, amending the Section 51 race power and repealing Section 127. The referendum took place against a general background of indigenous people and supporters in non-indigenous communities mobilizing resources, collating finances, and expending time and energy to prosecute the case against discrimination and other kinds of majoritarian ill-treatment. In 1963, the Yolgnu nation in the Northern Territory submitted the Yirrkala petition, inscribed on eucalypt paper-bark, to the commonwealth opposing the grant of a mining lease on their traditional lands without their consent. Student activists toured regional New South Wales on a 'Freedom Ride' in 1965 to publicly illustrate to non-indigenous Australians the extent of discrimination against Indigenous peoples, whilst, a year later, indigenous cattle stockmen and women in the Northern Territory striked against discrimination in pay and working conditions. Meanwhile, interest groups such as the Federal Council for the Advancement of Aborigines and Torres Strait Islander (FCAATSI) campaigned for a more expansive commonwealth policy role on behalf of the indigenous community (Gardiner-Garden, 2007).

Constitutional catallaxy entails the contestation between individuals and groups with respect to preferred specifications, meanings, and interpretations of a constitution. Certain indigenous activists and their supporters successfully prosecuted a case for constitutional change as entailing the realization of gains, constitutionally, for repressed indigenous peoples, at negligible inconvenience to other Australians. The implicit assumption appeared to be that, by transforming indigenous affairs policy into a concurrent field of constitutional responsibility, the commonwealth would assert fairer, non-discriminatory policies, and constitutionally override (non-harmonized, and discriminatory) state policies to the extent of any inconsistency at law. As noted by the public face of the eventual referendum campaign, indigenous activist Faith Bandler: 'Aboriginal people lived under six different laws … there was a great need to abolish those state laws and to bring everyone under … the federal law' (Parliamentary Education Office, 2013).

The reform posture advanced by the supporters of constitutional amendment obviously represented a challenge to the *status quo* prior to 1967. However, there was little effective opposition against the proposed changes to the Australian Constitution, save for isolated public objections from small

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numbers of individuals (Attwood and Markus, 1997). Importantly the final referendum proposal received bipartisan political support by Australia's two major political parties (Australian Labor Party, and Liberal Party of Australia), even if legislators debated the language of the referendum question and certain technical provisions. For their part, indigenous activists and their supporter groups instigated constitutional entrepreneurship in persuading (largely non-indigenous) Australian voters to endorse change. This entrepreneurship came in the form of the communicative framing of political messages and slogans in often (but not exclusively) highly affective, and expressive forms, exuding notions of equality in Australian citizenship and humanism through ending legal discrimination against indigenous peoples. One of the more enduring images of the 1967 referendum campaign was, for example, the public placement of posters showing an indigenous child and the emblazoned message 'Right Wrongs Write Yes for Aborigines on May 27' (McGregor, 2017). This constitutional development similarly resonates with recent developments in political economy, which emphasize the significance of 'sympathetic exchange' (Snow, 2019) and 'open impartiality' (Dold, 2019), within a broader process of reasoning between indigenous and non-indigenous Australians over the need to rectify injustices experienced by the former.

The referendum, held on 27 May 1967, received near-unanimous support from Australian voters with a substantial 90.77% vote nationally (Bennett, 1985). This decision affirmed public support for the removal of Section 127 from the Constitution and the amendment of the Section 51 race power to repeal the exclusion of members of the 'Aboriginal race'. However, a number of activists and scholars have subsequently remarked that the initial hopes of Bandler and other activists that this constitutional moment would translate into enlightened, non-discriminatory public policy, sustainably improving living standards for Indigenous Australians, had not necessarily translated into practice (e.g. Behrendt, 2007). Whilst the passage of the 1967 referendum constitutional amendments is widely recognized as providing enduring symbolic value with respect to political equality on the basis of race, the senses of disaffection, misplaced hopes, and frustrated ambitions over policy outcomes are likely to have motivated additional rounds of catallactical involvement in the constitutional space regarding the status and treatment of indigenous peoples.

3.3 Mabo High Court decision

In the early 1980s, a male member of the Meriam nation from Mer (Murray Island) in the Torres Strait sought to return to his home island. However, he was denied access by Queensland's Department of Aboriginal and Islander Affairs and sent back to the mainland. This man, Eddie Koiki Mabo, learned that his traditional land, where he had intended to retire, was not his under Australian law and that officials could arbitrarily deprive him of his property (Loos and Mabo, 1996). In 1982, Mabo and four other Torres Strait Islanders commenced legal proceedings in the High Court of Australia seeking a declaration of their traditional land rights, asserting ownership of land based on local custom, original ownership, and actual possession (Brooks *et al.*, 2003). This action was taken under the circumstance that a number of state jurisdictions (but not Queensland at the time, of which the Torres Strait Islands are officially declared a part) previously enacted land rights legislation for indigenous people, enabling recognition of Indigenous ownership of certain tracts of land across the Australian mainland.

Although the British Empire declared the interior of Australia to be *terra nullius*, providing a legal rationale for colonization, the vastness of the country practically meant that British annexation took many decades to complete. The annexation of the islands off the Queensland coast was undertaken in two legal stages: first, by Letters Patent issued in 1872 which annexed islands within 60 miles of the coastline and, second, by Letters Patent of 1878 extending the boundaries of Queensland to include all islands of the Great Barrier Reef and in the Torres Strait. The 1878 Letters Patent took effect only after the Queensland colonial legislature passed the *Queensland Coast Islands Act 1879* providing for the legal absorption of the islands into the colony (Lumb, 1993: 1). Whilst Mabo and his fellow complainants to the High Court conceded sovereignty to the British Crown, they suggested that their rights of occupation and enjoyment of their traditional land had actually not been validly extinguished under law.

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Deliberations over the legal status of land ownership in Mer took little over a decade, by which time Eddie Mabo passed away in January 1992. The findings of the substantive Court decision, *Mabo vs. Queensland* [*No 2*], were delivered by the seven High Court judges on 3 June 1992. In a majority (6–1) decision, the Court declared that colonial-period annexation did not extinguish the right of the indigenous people of Mer to own and use their traditional lands as they see fit, even though the Queensland authorities (and the Crown) had mechanisms for extinguishment, for as long as they expressed the clear intention to do so, of such 'native title' (Anker, 2014). In the specific case considered, the Court found the relevant governmental authorities (including those represented by the defendant) did not extinguish the plaintiff's (Mabo's) right to native title in his homeland.

The Mabo decision holds great and enduring significance for indigenous peoples throughout Australia, acknowledging their first occupation of Australia's lands and waters (Australian Law Reform Commission, 2015). Significantly, when rendering their legal judgement, the High Court majority declared that Australia was not *terra nullius* at the time of British colonization (Fitzmaurice, 2007). However, key legal questions were not explicitly addressed in the majority judgement, such as to what extent is native title extinguished by the sovereign's land-leasing arrangements. The Keating federal government enacted legislation (*Native Title Act 1993*) that developed an administrative apparatus for native title, in doing so attempting to address some of the legal questions opened by the High Court. The administration would deal with matters of applicability of native title relating to various kinds of leasing arrangements developed over two centuries by Australian governments, as well as the management of native title claims by indigenous groups. From a constitutional perspective, an immediate, and subsequent, appeal to the High Court by the Western Australian government to not apply the Act to that state was rejected by the Court. Specifically, the Act was held to be a constitutionally valid commonwealth law under the Section 51 race power (French, 2004), thus entrenching the status of the Mabo decision as yet another constitutional moment in Australia's relatively short existence.

Eddie Mabo is interpreted as playing a constitutionally entrepreneurial role in refuting the underlying legal doctrine falsely holding that Australia and its surrounds were unoccupied by indigenous peoples. The Mabo decision also successfully challenged the constitutional validity of political efforts to retrospectively extinguish the claimed rights of the Meriam peoples to Mer, an act attempted by the Queensland government through extinguishment provisions contained in the (subsequently constitutionally nullified) *Torres Strait Islands Coastal Act 1985*. The decision, and the subsequent development of legislation to codify native title nationwide, offers a good example of constitutional change of a catallactical character, in that native title considerations must now be considered as part of the fundamental rules for the purpose of considering any proposal for certain land acquisitions. Incidentally, the Mabo High Court decision underlines the importance of the judiciary as actors eliciting constitutional change (Vanberg, 2011).

The constitutional significance of the Mabo decision and subsequent policy changes cannot be doubted. As Webber (2000: 60) has indicated, Mabo has constitutional implications through its impact 'on the general framework of presumptions and concerns that inform our understanding of public action and that are used to explain and justify the exercise of governmental power within … society'. However, there remain some doubts about whether the native title administrative regime genuinely reflects indigenous aspirations to achieve self-determination. Indigenous lawyer and activist Noel Pearson suggested that the retrospective validation of all interests granted prior to Mabo under the *Native Title Act* effectively relegated native title to 'a remnant title', subordinate to other interests (Anker, 2014: 51). It has also been noted that no compensation has been made available for past native title extinguishments, contrary to the spirit of Section 51 (xxvi) of the Constitution requiring 'just terms' of compensation for the acquisition of property. The unsuccessful High Court case of *Members of the Yorta Yorta Aboriginal Community vs. Victoria* served as an illustration of the high threshold tests (including evidences of continuous connection with land) legally held against native title claimants in their quest to secure ownership and sovereignty over traditional indigenous lands (ibid.).

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It should be unsurprising that the interpretation and significance of native title, including over questions of territorial sovereignty, remains a fount of constitutional contestation at least from Indigenous perspectives. Judges in the Mabo case asserted that recognition of native title rights, and the falsity of *terra nullius* in the Australian context, did not call into question the veracity of monopoly Crown sovereignty. As discussed in the section to follow, this legal-constitutional assertion has been seen by many indigenous peoples as sitting uncomfortably with traditional connection with land, in itself connoting sovereignty.

3.4 Recent developments

It should be reasonably clear by this juncture that constitutional catallaxy has surely arisen in Australia, in no small part, by virtue of indigenous disagreement over the imposition of the British settler-colonial territorial model throughout Australia and its surrounding islands. Indeed, the Australian indigenous experience is exemplified by over two centuries of contestation in response to sovereignty assertions in the dominant settler-colonial frame (Broome, 2010). The efforts of indigenous activists such as Jimmy 'King Billy' Clements, William Cooper, Jack Patten, Doug Nicholls, Charles Perkins, and Oodgeroo Noonuccal, and non-indigenous allies such as Jessie Street, to draw attention to indigenous dispossession and discriminatory treatment have been notable. The erection of the Aboriginal Tent Embassy in Canberra in 1972, near the site of Clements's 1927 protest at the opening of the-then Parliament House, serves as another expression of indigenous claims to recognition and self-determination, during a period in which recognition of Indigenous identity and calls for land rights began to build momentum.

Attempts by indigenous peoples to foster change to the Australian Constitution continue. The agenda for formal constitutional recognition of indigenous Australians is a case in point. Notable recognition proposals canvassed over recent decades have included: amending the preamble of the Australian Constitution acknowledging the distinct status of Indigenous peoples and affirmation of their land custodianship; repealing Section 25 of the Constitution and amending (or repealing) the Section 51 race power; and explicit Indigenous representation in the Australian Parliament (Parliament of Australia, 2018). In May 2017, 250 indigenous leaders released a 'Uluru Statement from the Heart' that expressed a demand for constitutional change, indicating that sovereignty, expressed as connection with traditional lands for Indigenous peoples, was never ceded or extinguished.

A key element of demand for constitutional change contained in the Uluru Statement is the call for a First Nations 'Voice', a body to advise national government on matters affecting indigenous peoples, to be enshrined in the Australian Constitution (Yu, 2022). It is reasonable to suggest, however, that this constitutional proposal, and more fundamental measures to enhance self-determination and sovereignty, has remained contentious (Burns, 2022; Lino, 2018). Certain commentators have aired concerns over the implications of the Voice from the standpoint of racial equality and democratic representation, and whether constitutional contestations would effectively entrench the Voice as a binding, rather than advisory, body over future parliaments (Bolt, 2022; Sheridan, 2022). In light of the election of a new Australian national government in May 2022, with an electoral commitment to hold a referendum on constitutionally enshrining the Voice, public contention over constitutional change is likely to intensify in coming years.

A related aspect of indigenous activism in Australia has been the longstanding demands for ratifying formal treaties between indigenous and non-indigenous peoples. In light of a perceived political intransigence over the development of a treaty at a federal level, most Australian state and territory governments have instigated their own treaty negotiation processes with indigenous groups. For example, the Western Australian state government recently agreed to a native title settlement with the Noongar nation, recognizing the Noongar as traditional owners of lands in the south-west of that state (Hobbs, 2018). The state of Victoria is also advanced in the development of a treaty with its indigenous peoples, with the announcement in early 2022 of a governmental treaty agency to oversee treaty negotiations (Ilanbey, 2022). These formalistic processes are aside from efforts by certain

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groups of indigenous Australians in establishing secessionist independence movements, including small-scale 'micro nation' initiatives such as the Murrawarri Republic (located on the Queensland-New South Wales border) and the Yidindji Tribal Nation (North Queensland) (Trigger, 2017).

It is estimated that more recent challenges to the state of Australian constitutional affairs by indigenous peoples reflect, in part, shifts in political perceptions concerning the nature of their involvement in the constitutional catallaxy process. Demands for explicit recognition of the unique status of indigenous people in Australian life, including through the ratification of treaties, appear to reflect the emergence of an explicit indigenous identity (and identities), and, relatedly, the desire by indigenous Australians to preserve their knowledge and ways of life. Implicitly, arguments regarding the need to constitutionally promulgate racial equality through common citizenship for all – a sentiment prevalent during the 1967 referendum period – seem increasingly relegated to the background of a contemporary constitutional discourse orientated about difference and uniqueness of indigenous experiences and insights. This strategic repositioning over the constitutional treatment of indigenous people may be viewed, from the catallactic standpoint, as an element of the continual propounding of novelty with respect to the evolving constitutionalization of a polity, which in itself will induce a host of additional, and unexpected, pressures for institutional change.

Whilst this paper focuses upon an Australian case study, it is conceivable that future research may extend the catallactical approach to questions over the constitutional status of other indigenous people globally. It is noted that indigenous groups have been active in promoting legal and policy changes in locations such as the United States, Canada, New Zealand, Europe, and elsewhere. For example, Cornell and Kalt (1997, 2007), and Lofthouse (2019) have identified the institutional influences upon economic development outcomes in Native American reservations, and described how tribes have agitated, in legal and policy terms, for greater autonomy in governance and management on their lands. Where relevant, it is supposed the constitutional catallaxy approach can complement these institutional approaches to indigenous matters, as well as be extended to better understand group bargaining over indigenous input with regard to other issues, such as access to, and use of, public goods.

It is also pertinent to note the theoretical relatedness between the catallactical approach to constitutions and other scholarly contributions, such as those developed by Friedrich Hayek and Vincent and Elinor Ostrom. Hayek's political philosophy accounts for the evolution of constitutions, and other basic institutional configurations, with a particular emphasis on the rule of law as a basis for maintaining political equality and ameliorating discriminatory treatment of minority groups (Hayek, 1960). An Ostromian account of institutions incorporates the possibility of active co-production amongst negotiating citizens over the constitutional terms under which they shall politically co-exist. The diversity of peoples and the heterogeneity of their priorities is said to lend itself to polycentric formalities, such as constitutional federalism, which may further be regarded as a potential bulwark against institutionalized discriminations by possessors of concentrated political power (Ostrom, 1997). Constitutional catallaxy also bears resemblances to the growing literature on the economics of institutional evolution, especially its recognition of the bidirectional influences between individuals and institutions (Hodgson, 2002). There are opportunities to further integrate, and to explore any outstanding variations between, constitutional catallaxy and the aforementioned alternative approaches to constitutional amendment and reform.

4. Conclusion

This paper contributes toward an understanding of the processes of constitutional change. In particular, the constitutional catallaxy approach is an attempt to comprehend the multiplicity of outlets through which change in the fundamental working rules of a polity may be funneled. The matter of constitutional relations between indigenous peoples and their non-indigenous counterparts is conceived as a useful case study not only to illustrate the process of constitutional change, but also to

https://doi.org/10.1017/S1744137422000170 Published online by Cambridge University Press

analytically capture the reality of pluralities in constitutional interpretation and meaning in actually existing societies. As Tebble (2016) indicates, it is unsurprising that involuntarily incorporated national minorities, such as the indigenous peoples of Australia, have clear and strongly held perspectives about their preferred arrangements with respect to the political order. These have been contentiously expressed through formal channels of constitutional change, such as judicial and public referenda systems, and in a range of informal ways, wherein indigenous groups advocate and press for renovated understandings about the appropriate configuration of constitutional rules.

The notion of constitutional catallaxy bears some family resemblances with the 'constitutional pluralism' and, more generally speaking, the 'critical discourses' literature (Anker, 2014; Avio, 1996; Mac Amhlaigh, 2017; Tully, 1995). Incidentally, Vanberg and Buchanan (1989) attempted to incorporate such considerations into the CPE framework, regarding the revelations ensuing from discourse about constitutional matters as part of the 'informational set' which influence constitutional choice (c.f., Avio, 1997). In terms of the accommodation of indigenous rights, these strands of scholarship explicate the desirability of constitutional change as the reflection of continuing political engagement between distinct, idiosyncratic individuals and their groupings about how their political systems should be organized. The 'meeting of minds' of peoples possessing quite different knowledge bases and perspectives is likely to elicit constitutional change in forms and frequencies, and with consequent efficiencies, not fully considered in the CPE framework.

Constitutional catallaxy represents a research program with great applicability, potentially aligning with a great assortment of political issues and to political institutions. How the movement for greater indigenous rights is interpretable from this perspective is the central focus of this paper, with particular application to the Australian situation. As indicated in this paper, the catallaxy approach to the study of constitutions may be extended to circumstanced faced by indigenous minorities, and other marginalized groups, in other countries. Far from sounding an end to constitutional government, and the esteemed principles that have inspired this important political institution, an appreciation of catallactical tendencies in constitutionalism has the potential to underline the robustness and resilience of a dynamic, yet functional, liberal-democratic political order which fulfils the legitimate expectations and ambitions of all peoples.

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Cite this article: Novak M (2023). Constitutional catallaxy and indigenous rights: the Australian case. *Journal of Institutional Economics* **19**, 36–51. https://doi.org/10.1017/S1744137422000170