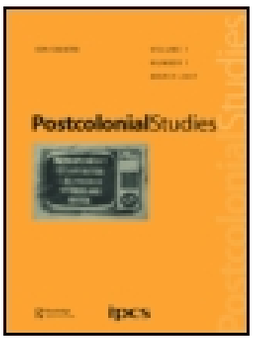

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Constituting settler colonialism: the 'boundary problem', liberal equality, and settler state-making in Australia's Northern Territory

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ABSTRACT

Between Indigenous sovereignty and settler colonisation lie contested frontiers. I suggest Australia's Northern Territory is one such frontier. This paper explores the 1998 settler campaign for Northern Territory statehood, the key to which was the framing of a constitution designed to eliminate Indigenous autonomy and empower settlers. I make three contributions. First, I showcase how settler colonialism is metapolitical, implicating political theory's notorious 'boundary problem' in an effort to reconstitute Indigenous territories as 'ours' and Indigenous demoi as 'us'. Second, I show that settlers may wage this metapolitical campaign using individual rights, to challenge as illiberal, and thus de-constitute, Indigenous demotic and territorial boundaries. Finally, I show that when Indigenous peoples resist by seeking to constitutionally entrench their own, alternate answers to the 'boundary question', there arises a dilemma over whether settler rights or Indigenous boundaries are the rightful 'subject of justice'.

KEYWORDS

Settler colonialism; constitutions; metapolitics; Northern Territory; boundary question

Introduction

Of all the political units in the developed world, the most dichotomous may be Australia's Northern Territory. On the map it is an arbitrary rectangle, nearly as big as Mongolia, overlaying '*outback par excellence*'[1] – the monsoonal tropics of the Top End, scrubby rangeland, and the parched deserts of the Red Centre. Jurisdictionally it is 'a land left over',[2] the only large swath of Australia lacking statehood. Whereas Australia's states are constitutionally sovereign, the Northern Territory is a ward of the federal government, which adopted it in 1911 after first New South Wales and then South Australia found it too hard to tame. Even today it remains 'the least successfully colonised political unit in Australia'.[3] Vast expanses are *de facto* Indigenous domains where 'settler' Australians still rarely intrude. Thus, the territory has been characterised as an ideational frontier, caught 'between the known and the unknown, the civilized and the rude, the safe and the dangerous, the ordered and the anarchic'.[4] I suggest it is also a *metapolitical* frontier, where demoi and territory are in limbo.

Is the Northern Territory theirs or ours? Are its people us or them? Who decides, and how? Questions like these are the stuff of metapolitics. They may seem esoteric. Far from

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it. I submit they are constitutive, establishing the foundations from which polities rise. Underpinning any political community are subjective claims about who 'we, the people' are and what place is rightfully ours. If those underpinnings erode – or, as I will suggest in this article, if they are deliberately subverted – the community, atomised and dispossessed, will be no more.

This study examines the clash in 1998 between Indigenous peoples and settlers over whether the Northern Territory should become Australia's seventh state, and over the drafting and entrenchment of antithetical charters to either constitute the new state in the image of Australia's other, settler-colonial states, or, conversely, to guard and augment the region's unique degree of Indigenous self-determination.

My aim is threefold. First, by revealing how the Northern Territory government, as a key to its statehood bid, propounded a constitution that would in effect absorb Indigenous demoi and territory, I hope to show how settler colonisation is at base metapolitical, confronting political theory's 'boundary question' in an effort to reconstitute Indigenous territories and demoi as 'ours' and 'us'. Second, I will show that, as on other modern settler frontiers, this metapolitical campaign in the Northern Territory was waged largely by leveraging liberal rights, wielded to impugn as illiberal, and thus de-constitute, Indigenous boundaries. Finally, I will show that, when Indigenous peoples defended their demotic and territorial legitimacy, propounding constitutions that substantiated their own, alternate answers to the 'boundary question', there arose a contest over the 'framing of justice' – over whether individual settler rights, on one hand, or Indigenous boundaries, on the other, were the rightful 'subject of justice'.

I proceed thusly. First I lay out a theory of the metapolitics of settler colonialism. Then I explore the historical, demographic, political and legal circumstances of the Northern Territory. Next, I consider the 1998 Northern Territory Constitutional Convention, examining it – its composition, mandate, speeches, amendments, resolutions, protests, media coverage, and resultant draft constitution – through the lens of settler metapolitics. I then do the same with two subsequent, countervailing Indigenous constitutional conventions. Finally, I analyse and conclude.

Settler colonialism and the 'boundary problem'

The world teems with others – with peoples, occupying places, exercising or demanding to exercise self-determination. Where once the very notion of self-determination was controversial, today most leaders, lawyers and theorists agree it is a right.[5] Yet this agreement is, Margalit and Raz observe, 'but the eye of a raging storm concerning the precise definition of the right, its content, its bearers, and the proper means of its implementation'.[6] Few problems are more vexing: Who is a political self, and where may they self-determine?

This problem is vexing in part because neither democracy nor liberalism can solve it. Indeed, it presents a chicken-and-egg dilemma – political theory's 'boundary problem'. If democracy is rule by the people, who are the people and where do they rule? The first part of this problem was captured by Jennings: 'the people cannot decide until someone decides who are the people'.[7] He meant democracy is useless for identifying political communities. Liberalism is barely more helpful. A core liberal tenet is egalitarianism, holding that all individuals are moral equals.[8] Another common liberal principle is universalism,[9] 'affirming the moral unity of the human species'.[10] Thus liberals, while

backing self-determination in theory, are loathe to discriminate between 'we, the people' and others.

The second part of the problem, 'where do the people rule', is similarly difficult. Typically, self-determination is associated with territorial authority. Indeed, the two mutually reinforce. Americans are those people who govern in America, that place governed by Americans. Yet, as with identifying demoi, staking territory cannot happen democratically. How can voters vote on their voting district? Similarly, despite attempts by liberal thinkers from Locke[11] to Kolers[12] and Stilz[13] to articulate theories of rightful territory, few justice problems remain so intractable as how to divide up the world.

Boundaries, then, are unacceptable yet inevitable – illiberal and undemocratic on one hand, essential to self-determination on the other. Hence Issacharoff calls bounding a 'first order challenge', that must be considered in a manner 'constitutionally prior' to democracy itself.[14] This of course means, to make a political community, bounding must occur first. Bounding is politics' primordial event, constituting the 'who' and 'where' of governance. But it also means for a community to endure, its bounds must remain, if not precisely fixed, then at least under its control. A political community, like an edifice, requires stable underpinnings. If exogenous actors subvert its boundaries, it is unmade.

Due to the boundary problem, democracies' creation stories are often unsavoury. Frequently their boundaries emerged from pre-liberal history, were forged in violence, or were fixed in the extra-legal vacuum of a 'constitutional moment'. Regardless, once 'who are the people and where do they rule' was determined, state-makers could move on to less-messy matters, including 'second order' arrangements. Unlike first-order bounding decisions, which frame demoi and territories, second-order arrangements relate to individuals. Rather than enshrining collective self-determination, they formalise and protect liberal rights.

Yet even in the most venerable liberal democracies, liberal protections are never separable from the state's illiberal roots. Individual rights complexly interact with 'constitutionally prior' demotic and territorial boundaries. Often, these interactions exhibit an 'upstream/downstream' dynamic. A familiar example involves US federalism. Because of the Great Compromise, Wyoming, the least populous state, and California, the most, enjoy equal representation in the US Senate. This first-order deal has staggering consequences 'downstream', on second-order rights. Because senatorial representation is equal *qua* state it is unequal *qua* voter. Individual Wyomingites wield more voting power than Californians, transgressing 'one person, one vote'. Clearly, the illiberalism of America's upstream federal bounding decisions has downstream ramifications, impinging on liberal rights.

Where these bounding decisions are constitutionally enshrined, their effects are unyielding. Despite how Californians may feel about Wyoming's equality *qua* demos, the Great Compromise seems here to stay. But what if boundaries are *not* enshrined? Then a dilemma arises over their legitimacy. As noted, democracy cannot resolve such dilemmas. Nor can liberal justice: Which should prevail, collective self-determination or individual rights? Hence Fraser situates such dilemmas within 'abnormal justice'.[15] 'Normal justice' is about balancing the proverbial scale of justice until equilibrium is achieved. But in 'abnormal' conditions, where 'constitutionally prior' assumptions are in dispute, Fraser suggests deciders must begin with meta-questions. Which is the

correct scale to use? How should justice be framed? Who or what is the appropriate 'subject of justice'? Such questions are fundamental because the frame may foreordain the result.

Consider the 1964 US Supreme Court case *Reynolds v. Sims*. There, voters from populous Jefferson County, Alabama, challenged the apportioning of state senate seats equally *qua* county, arguing it diminished their voting power relative to voters in less populous counties. Alabama responded with the 'federal analogy' – if the US Senate does it, why can't we? But the high court found that, unlike states, 'subdivisions of states – counties, cities, or whatever – never were and never have been considered as sovereign entities'.[16] The court in effect ruled that Alabama's counties are not legitimate first-order polities. Unlike Wyoming, they are not owed collective self-determination. Hence, concern for their demotic integrity did not trump downstream rights. By framing the plaintiffs, not the counties, as the appropriate subjects of justice, the result was foreordained. 'One person, one vote' became the law of the land.

For the purposes of this paper, *Reynolds* imparts three lessons. First, not all boundary questions are resolved at the time of state-making. As in Alabama, such questions may erupt, precipitating clashes between first-order boundaries and second-order rights. Second, where these clashes are won by the second order, the effect may flow *upstream*, impacting the first order. *Reynolds* helped spur the US 'redistricting revolution', compelling almost every state to overhaul its apportionment practices. America's peoples and places were re-bound. The third lesson is these upstream/downstream dynamics may be leveraged to strategic advantage. Yes, the *Reynolds* plaintiffs won voting equality. But that was not their prime goal. They were reformers for whom voting equality was a means to an end: swinging state politics leftward.[17] By leveraging second-order rights they achieved a first-order victory, re-constituting Alabama to their own political advantage.

While the US redistricting revolution was distinctly impactful, rights-versus-boundaries clashes are surprisingly common. They arise when countries enter confederal arrangements, such as the Maastricht Treaty, which triggered charges by German voters that their 'electoral weight' was being invidiously watered down,[18] or when power-sharing is imposed, such as by the Dayton Accords, which prompted claims of electoral discrimination by members of non-consociating ethnic groups in Bosnia and Herzegovina.[19] They occur when restive peoples seek to enhance their internal self-determination, as with Quebecois nationalists and their possibly illiberal *La charte de la langue française*.[20] And most relevant to this paper, rights-versus-boundaries clashes happen when people from one place assert jurisdiction over another, as in settler colonialism.

Settler colonialism is, as Wolfe[21] famously claimed, an insidious, tenacious variant of the sort of conventional colonialism that once flourished in the Global South. Generally speaking, conventional colonialism exploited native populations to enrich the European metropole. Settler colonialism, conversely, aims to *remove* native peoples, making space for settlers to *reproduce* the metropole – to found New Englands, New Zealands, New Caledonias and so forth.

As I have suggested elsewhere[22], settler colonialism can be understood as a metapolitical conquest conducted through demotic and territorial re-bounding. Indigenous dominions, like anywhere, comprise *people* and *places*, demarcated by *boundaries*. Settler colonialism targets those boundaries, undermining them and instituting new boundaries

within which setters dominate. In short, settlers colonialism re-makes 'theirs' as ours, often by making 'them' us.

Historically, settlers did this largely through force and deception. Hence, by the early 1900s, they had absorbed hundreds of Indigenous dominions very nearly spanning whole continents. Since then settler colonialism has been primarily about maintenance. Indigenous boundaries, having been dissolved, were simply kept that way. Still, a few unconquered frontiers endured. Well into the late twentieth century, in Alaska and northern Canada,[23] in US offshore territories,[24] and, as this paper will suggest, in Australia's Northern Territory, Indigenous nations and homelands had not, and perhaps still have not, been definitively reconstituted as 'ours'. In these contested spaces, I suggest that settler colonialism can be observed in a metapolitical offensive, preparing the ground for settler takeover. On these frontiers, where Indigenous peoples cling to *de facto* and even *de jure* control, settlers embark on the primordial act of re-bounding – of de-constituting, and replacing, Indigenous demoi and territories.

More so than in previous eras, such modern settler-colonial re-constitutions work by leveraging liberal rights. Again, first-order bounding arrangements are inherently illiberal. Hence, Indigenous boundaries constrain liberal rights of settlers. In turn, settler challenges to those constraints push upstream, threatening Indigenous boundaries. Such challenges target border regimes that prevent settlers from swamping Indigenous homelands and legal regimes demarcating Indigenous demoi and territories. Indigenous groups, of course, resist. Like the state of Alabama in *Reynolds*, their challenge is to constitutionally entrench, and/or keep entrenched, their metapolitical boundaries. In such contests, between rights and boundaries, what ensues is a conflict over Fraser's 'framing of justice'.

Such conflicts are not uncommon – and often, settlers prevail. For example, recently in the US territory of the Commonwealth of the Northern Mariana Islands, rights-wielding settlers broke down land-alienation protections that guarded Indigenous territorial sovereignty.[25] In the US territory of Guam, settlers asserted their voting rights to block an Indigenous-only vote on decolonisation.[26] And in Canada's Northwest Territories, settlers pushing for voter parity have repeatedly challenged electoral-boundaries regimes guarding Indigenous peoples' share in the territorial 'balance of power'.[27]

In 1998 there played out a similar settler-colonial rights-versus-boundaries conflict in Australia's Northern Territory. As I will show, it was a literal clash of constitution, with settlers and Indigenous peoples duelling to draft and entrench founding charters that would consecrate their own, antithetical answers to the boundary problem. Indigenous peoples sought to fix boundaries that would guard their lands and polities in the last major Indigenous redoubt in Australia. Settlers, keen to tame this 'last frontier',[28] sought to unbound Indigenous lands and polities and constitutionalise new boundaries that would in effect empower settlers. To do this, settlers appealed to liberal rights. Victory would be foreordained by the 'framing of justice' – by deciding whether the appropriate 'subject of justice' was upstream Indigenous sovereignty or downstream settler rights.

Australia's Northern Territory as a settler-colonial 'frontier'

The Northern Territory's residents, numbering barely 250,000, inhabit 'two solitudes'.[29] Seventy per cent are non-Indigenous, mostly bunched into the seaside capital, Darwin.

They are disproportionately young, male and mobile; every year nearly one in six moves into or out of the territory.[30] Indigenous people comprise the other 30%, far more than elsewhere in Australia. They are 'permanent residents among a sea of transient[s]'.[31] Beyond Darwin they predominate, three-quarters living 'out bush', in remote towns and outstations.[32] They belong to dozens of distinct nations, their languages, customary laws and traditional cosmologies relatively intact, inhabiting the same 'countries' their forbears did for 60,000-plus years.

Intact, too, is their sense of political distinctiveness, a perception sharpened by the Northern Territory's fraught history. After European settlement, the territory became one of the continent's last battlegrounds. Like elsewhere in Australia, miners and pastoralists eschewed treaty-making in favour of the doctrine of *terra nullius*, defining the country as empty to claim it for themselves. But, observe Pedersen and Phillpot, 'what was different about northern Australia was the sustained Aboriginal struggle against European incursion'.[33] Spearings of frontiersmen were common. Colonial authorities responded with massacres well into the 1920s. For decades, the territory experienced 'a bloody war'.[34]

Eventually, much of the far north and central desert were deemed unconquerable and made into Indigenous reserves. Elsewhere, cattle stations took root, their solvency hinging on cheap Indigenous labour.[35] In 1966 Gurindji stockmen, fed up with feudal working conditions, walked off the Wave Hill cattle station and demanded their traditional lands back. At around the same time, the Yolngu of the Gove Peninsula, opposing the establishment of a bauxite mine, issued the Bark Petition, a landmark native-title challenge. These protests helped awaken urban Australia to the cause of Indigenous rights.[36]

Flowing from this awakening, two federal laws in the 1970s reshaped territorial politics, placing Indigenous peoples and settlers 'on a collision course'.[37] First, the federal Whitlam government championed Indigenous land reform. Facing opposition from the states, the government initiated reform in the key jurisdiction under its control, the Northern Territory. The 1976 *Aboriginal Land Rights Act* was transformative, giving Indigenous peoples inalienable title to 19% of the territory and opening far more to land claims.[38] Within a few decades, half the territory was Indigenous-owned. A permit system was established to regulate public access to this vastness of Indigenous country. Established as well were the Northern and Central Land Councils, 'para-governmental bodies'[39] answerable to Indigenous voters. The councils became powerful political actors, providing glimmerings of self-determination. Together these reforms placed Indigenous peoples in the Northern Territory in a uniquely powerful position relative to their brethren elsewhere in Australia.[40]

The second federal initiative was countervailing. The Northern Territory, as a federal subject, had for decades been run by Canberra. Local settlers bristled at this 'remote control'.[41] In 1948 the federal government conceded to create a territorial council, though up until 1974 just two-thirds of its seats were elected.[42] Finally, in 1978, came the *Northern Territory (Self-Government) Act*, providing the territory with Westminster-style 'responsible government', and granting it most of the powers of a state. There were, however, exceptions. The Northern Territory received 2, not 12, federal senators. The federal government could override territorial legislation. Most seminally, Indigenous land rights remained under federal purview.

From the start, Northern Territory settlers protested these 'serious and continuing irritants'.[43] The territory's founding governing party, the pro-development Country Liberals (CLP), made patriation of Indigenous land legislation a *cause célèbre*. The CLP became notorious for 'Arcadian populism'.[44] Supporters were cast as rugged, pioneering 'Territorians'. Canberra was an oppressor, strangling the frontier's prospects. And then there was the 'frightening' Indigenous agenda.[45] As Smith observes, for the CLP, 'Whilst the battle was about land, the electoral tactics were about race'.[46] Those tactics worked; the CLP held power for 27 unbroken years, earning it the nickname the 'Territory Party'. (The opposition Labor Party, though more sympathetic to Indigenous concerns, was also predominantly settler-oriented. From 1978 to 1998, Indigenous membership in the territorial legislature never exceeded 2 of 25.[47])

The CLP governed as provocatively as it campaigned. Within months of forming government in 1978, it moved to thwart Indigenous land claims by extending the city limits of major municipalities.[48] Had the plan succeeded, Darwin would have expanded 30-fold, becoming the world's biggest city. In 1983, when the federal government vowed to return the territory's iconic landmark, Uluru, or Ayers Rock, to the Anangu people, the territory's chief minister protested with the rallying cry 'Let's Rock Canberra'.[49] His successor boycotted the hand-over ceremony. In 1994 the territory moved to transfer all Crown land into a territory-owned company, again to defeat land claims. In 1993 another CLP chief minister told international journalists Indigenous peoples were 'centuries behind us in their cultural attitudes and aspirations'.[50] In 1997 a further CLP chief minister, during a media interview at the territorial legislature, called the Northern Land Council chair a 'whingeing, whining, carping black'.[51]

Integral to the territorial government's quest for land-control – talismanic, even – was its push for statehood. In Australia, Indigenous land-rights legislation is typically under state authority. Hence for territorial settlers, statehood was 'the lever through which such control might be wrested from the commonwealth government'.[52] Chief Minister Marshall Perron once characterised statehood as, 'the stuff that dreams are made on. This is especially true here in the Northern Territory where successive generations have been struggling for the degree of control over our affairs that other Australians take for granted'.[53] Unsurprisingly, Indigenous groups opposed statehood. Indigenous leader Galarrwuy Yunupingu observed, 'The rallying cry of "Statehood!" has often been the first sound in a battle to defeat our rights'.[54]

In 1985 the Northern Territory government officially launched a bid for statehood. To that end, the legislature established a bipartisan Sessional Committee on Constitutional Development, comprising three CLP and three Labor members. Public hearings commenced in 1988, with visits to 54 communities.[55] More than 40 of these were primarily Indigenous; in some places 'the entire community of 200 people turned out to have input'.[56] While government and even opposition Labor leaders celebrated these attempts at consultation, others condemned them as disingenuous, poorly resourced and 'farcical'.[57] Constitutional drafting began in 1990 and continued for half a decade.

Around this time, elsewhere in Australia, Indigenous rights were gaining ground. The Australian High Court, in its 1992 *Mabo* and 1996 *Wik* decisions, renounced the doctrine of *terra nullius*, recognised that Indigenous land title had survived European settlement, and opened up Crown lands – including leased grazing lands – to native-title claims. In concession, the federal government passed the 1993 *Native Title Act*, establishing a legal

framework for recognition, protection and compensation of native title. While these developments shook Australia's states, they were of lesser consequence in the Northern Territory. There, under the *Aboriginal Land Rights Act*, Indigenous land-owners had little incentive to make title claims.[58] If anything, these moves toward national reconciliation prompted settlers in the Northern Territory to speed their bid for control.

With the accession of the CLP's Shane Stone to the chief ministership in 1995, the statehood campaign gained momentum. That year the Sessional Committee released a draft constitution, which was tabled in the assembly.[59] In matters of Indigenous rights, the draft was in ways a compromise. It included a non-binding preamble that would be the first in Australia to acknowledge the historical role of Indigenous peoples. Section 2.1.1 proposed to recognise, and perhaps even deem enforceable, Indigenous customary law. Section 7.3 authorised the potential enactment of 'Aboriginal self-determination'. Finally, in Part 7, the draft sought middle ground on Indigenous land rights. Rather than patriating the *Aboriginal Land Rights Act* as regular legislation, as the CLP preferred, or leaving it in federal hands, as Indigenous groups urged, land rights would be protected in territorial 'organic laws'. Unlike regular laws, organic laws would be amendable only by a super-majority of the territorial legislature. However, they would also be amendable by a simple majority of voters in a referendum. Moreover, Indigenous lands would be alienable if a court agreed it was in the landholders' interest. And, the bar would be lowered for the taking of Indigenous lands under 'eminent domain'.[60]

In late 1997, Chief Minister Stone, having resoundingly won re-election on a pro-statehood platform, and with the statehood-friendly Howard government in Canberra, moved to bring statehood to fruition. He called a constitutional convention where delegates would review and finalise the Sessional Committee's draft constitution. The statehood question would then go before territorial voters in a referendum. With a majority 'yes' vote, and with the federal government's approval, the territory would become Australia's seventh state, and the *Northern Territory (Self-Government) Act* would be replaced by the new constitution.

The Northern Territory Constitutional Convention

The convention took place in Darwin over eight days between 26 March and 9 April 1998. Even before it began it was dogged by controversy. Of the 53 convention seats, 27 were reserved for government-appointed delegates. Some were appointed to represent specific interests; others were 'special' delegates with no set constituency. The remaining 26 delegates were chosen by predetermined stakeholder groups. Indigenous stakeholders were offered nine seats, or 17%. The most influential Indigenous stakeholders, the Central and Northern Land Councils, were offered just one seat between them. In protest, they boycotted the convention. Other Indigenous groups, despite reservations, sent delegates 'to get Indigenous peoples' views on the record'.[61]

From the moment of the convention's opening address the tone was confrontational. Keynote speaker Frank Alcorta, a former Darwin journalist, though noting the Northern Territory's bloody history, stated, 'a constitution does not have a past'. He urged that the new constitution not give Indigenous peoples a 'special place' – in effect, that it not recognise them as a distinct, rights-bearing demos:

> [I]f that is done, it will be at a horrendous long-term cost because it will entrench difference and division between the races forever. It will institutionalize Aboriginality precisely at a time when it is becoming less significant than at any other time in our written history … . The constitution should be a document that makes absolutely no distinction, none whatsoever, between one group of people and another.[62]

Next, each delegate gave an opening statement. More than a dozen, echoing Alcorta, championed the principles of liberal universalism and equality. For example, special delegate Kay Rose stated, 'I do not believe there are Chinese Territorians, Aboriginal Territorians, Queensland Territorians. There is just one kind – a Territorian'.[63] Bob VanderWal, representing small-business interests, attacked Indigenous protections as illiberal: 'To give people special rights based on their colour in the constitution would make it a racist document … '.[64] Ed Ferrier, representing seniors, agreed, calling the *Aboriginal Land Rights Act* unjust:

> One quarter of the Northern Territory population, the Aboriginal quarter, now controls half the land area … while the three-quarters of the population who are not Aboriginal cannot enter their half without special permission. … It may not be politically correct to say so, but the present system is discrimination and segregation based on race, and the name of that is apartheid.[65]

Both Pryce Dale, representing youth, and Karen Smith, representing agricultural interests, urged that the constitution infix universalism by referring only to 'we the people'.[66] Gino Antonino, representing ethnic communities, said the same: 'With all due respect to our Aboriginal friends, I do not think there is a place in a constitution for land rights or specific rights … . The wording of the constitution should refer only to 'we, the Australian people'.[67]

Indigenous delegates challenged these ostensibly liberal appeals. For example, Josie Crawshaw, representing the Aboriginal and Torres Strait Islander Commission, condemned settler universalism and proclaimed the justice of Indigenous self-determination: 'All of the efforts through history to define us simply as Australians and to treat us on terms set by the majority culture have, in fact, denied us our rightful place in this land'.[68]

On the morning of the convention's second day, Denis Burke, a CLP government minister, tabled an alternate draft constitution – an ostensibly egalitarian document he called 'as simple as possible',[69] with no mention of land rights, self-determination or customary law. The move outraged non-CLP delegates, including John Ah Kit, an Indigenous Labor Party member of the legislative assembly (MLA), who stated: 'We have the Indigenous delegates coming in here in a spirit of reconciliation. Now we have seen 12 years' work thrown out and a takeover by a document that surfaced … to hijack the process. It is all a set-up'.[70]

After Burke's alternate draft constitution was tabled, delegates continued with opening statements, many similar in tone to the day before, decrying Indigenous difference as illiberal. Eventually Indigenous special delegate Gatjil Djerrkura rose on a point of order, to 'draw a line in the sand and say that enough is enough. … When you talk about a simple constitution, really you are talking about a document that keeps us invisible'.[71] He warned that if Indigenous delegates' concerns were not addressed – if they were not recognised in the constitution as, in effect, first-order rights-bearers – they might leave the convention.

Through the next few days, as delegates discussed the new state's legislative, executive, financial and judicial functions, almost no mention was made of Indigenous matters. Then, on the morning of the fifth day, debate commenced on Part 2 of the draft constitution, concerning the proposed legal system of the new state, including special 'organic' laws. Several delegates expressed opposition, including James Robertson, representing the territorial government, who characterised 'organic' laws as offensive to equal rights:

> Let us not hide from the real reason why organic laws are suggested in the [draft constitution]. It is not an accident. It is to try to accommodate the position that relates to 25 percent of our population. … [They] will have laws relating to their land that will see it dealt with differently from the land of 75 percent of the people that comes under different laws. I simply ask delegates if that is what we want our subsequent generations to inherit. My answer is no.[72]

Special delegate Kay Rose stated, 'I believe firmly that all men and women are created equal. I do not like the thought of a law that would upset that concept … '.[73] Later that same afternoon, George Roussos, representing ethnic communities, moved Motion 25, that the constitution eschew special 'organic' laws. As well, Lawrence Ah Toy, representing agricultural interests, moved Motion 28, endorsing 'the absolute and unqualified equality of all its people as the fundamental platform upon which all laws of the state shall be based … '.[74] Both motions – the former decrying upstream boundaries, the latter cheering downstream rights – were moved to the resolutions group to be drafted into formal resolutions, which would be voted on at the end of the convention.

That afternoon there occurred what for Indigenous peoples was 'the coup of the convention'.[75] Special delegate Djiniyini Gondarra advanced Motion 32, that 'Aboriginal customary law be recognized as a source of law in the constitution'.[76] Six other Indigenous delegates spoke in favour. John Ah Kit stated, 'It is beyond the pale to accept that we should stand by and watch as people try to wind back the clock to the frontier days of this land. … Today we strive for justice'.[77] In the course of the ensuing 90-minute debate, several previous opponents of Indigenous customary law, including Dennis Burke, pronounced themselves converts.[78] Gondarra's motion was advanced to the resolutions group.

The sixth day of the convention was devoted to Part 7 of the draft constitution, dealing with Indigenous rights. Gatjil Djerrkura proposed Motion 45, that land rights remain under federal jurisdiction, constitutionally exempted from the authority of the new state. He stated:

> [W]e have no reason to trust the Northern Territory government … . We say it for the very good reason that the government has spent taxpayers' money to oppose every single land claim made under the *Aboriginal Land Rights Act* since 1976, and we say it because, at every opportunity, the government has said that it would remove some of our rights if it gains control of the act.[79]

Fellow Indigenous delegates spoke in favour, as did Charlie Phillips, a non-Indigenous delegate representing labour interests, who stated, 'I say again you cannot build statehood on the coffin of Indigenous rights'.[80] The motion was referred to the resolutions group.

That same day, in the opposite vein, Motion 51, moved by special delegate Julian Swinstead, called on Indigenous land-rights legislation to be transferred to the territory as

ordinary law without constitutional protection. Supporters included Gino Antonino, who appealed for Indigenous bounding – demotic, cultural, economic – into the settler demos:

> I think all these laws and all these requests for laws do nothing but separate the races. They are all trying to put the Aboriginals back where they came from, in a tribal situation. What is wrong with that? There is nothing wrong, if they were to live by themselves … . But it is very, very wrong because Aboriginal tribal life and culture are the antithesis of the dynamic economy of the year 2000.[81]

Meanwhile, special delegate Nigel Scullion moved Motion 52, 'That the constitution, so as to preserve the indissoluble nature of the Northern Territory, not include a specific clause relating to Aboriginal self-determination'.[82] In defending this motion Scullion stated,

> When I came to this convention, I had a vision of we, as a people … black, white and brindle together, living as one. In terms of sovereignty, that vision does not really include a federation of the Northern Territory made up of a black, independent state … .[83]

Djerrkura disagreed: 'To gain the consent of Aboriginal Territorians to statehood, a new constitution must recognize … as do governments all over the world, that Indigenous people have inherent rights to govern ourselves'.[84] Both Scullion's and Swinstead's motions advanced to the resolutions group.

On the seventh day of the convention, several more controversial motions appeared. Chris Lugg, a CLP MLA, proposed Motion 40, overhauling the preamble to declare, in capital letters, the territory's devotion to holistic equality:

> NOW WE THE PEOPLE OF THE NORTHERN TERRITORY, proudly calling ourselves Territorians, wishing to preserve a harmonious, tolerant, culturally diverse and united society, and affirming our intention that the life and liberty and property of all the people of the Territory should be protected and that all shall stand as equals before the law in enjoyment of that protection, declare this to be the Constitution of the State of the Northern Territory.[85]

Djerrkura protested, asserting justification for Indigenous first-order difference: 'In coming here, we have sought recognition in the preamble … . We have no links to other lands and cultures. It is here that you find our Jerusalem, our London, our Rome, our beginning. This is our land'.[86] Lugg's motion was referred to the resolutions group.

In the afternoon, as the plenary sessions were wrapping up, Djerrkura announced he and his fellow Indigenous-group delegates were leaving. The walkout 'threw the statehood convention into turmoil'.[87] Josie Crawshaw told the media, 'We just aren't going to be conned into colluding in our own oppression'.[88] Labor-appointed delegate Bob Collins called the walkout 'appalling' and 'a real blow to reconciliation and race relations in the territory'.[89] The final remaining Indigenous delegate, Labor MLA John Ah Kit, replied,

> I think the outburst from delegate Collins is appalling. … I have made a quick analysis of motions put up with regard to Indigenous concerns and, for every one of those, there has been a counter-motion knocking or defeating or wanting to defeat it.[90]

Collins retorted, 'That is called democracy',[91] in effect defending the notion that bounding may be done by majority rule.

On the morning of the eighth and final day of the convention, Charlie Phillips declared that in solidarity with Indigenous delegates he too was leaving. The remainder of the day

was devoted to voting on the resolutions. For much of it John Ah Kit abstained, telling the media, 'This is a bulldozing, rubber-stamping exercise I'm not going to be a party to'.[92]

The vote results were no surprise. Concerning the preamble, Resolution 2, based on a motion by Djerrkura, calling for 'recognition that Aboriginal people have continuing rights by virtue of their status as the Northern Territory's Indigenous peoples' and 'a respect for Aboriginal rights in land and for Aboriginal cultural heritage',[93] was defeated through a show of hands. Instead, by a vote of 26 in favour, the convention adopted Chris Lugg's liberal preamble.

Resolution 6, that 'Aboriginal customary law is recognized as a source of law' and that it be enacted as written law following consultations with Indigenous groups, carried with just two dissenting votes. However, support for that resolution was used to justify removing protections for Indigenous self-determination. Said Bob Collins, 'We now have a much stronger proposition in terms of the ultimate self-determination of Aboriginal people than we ever expected to have …. So 7.3 [the self-determination section] simply is unnecessary'.[94] The section was eliminated by a vote of 32–10.

Concerning Indigenous land rights, Resolution 49, resolving that the *Aboriginal Land Rights Act* remain federal legislation and 'the principles underpinning such legislation that protects Aboriginal rights be anchored in the new constitution', was defeated 26–10. Instead, by a show of hands, supermajoritarian 'organic laws' were removed from the constitution, eliminating the possibility of guarding Indigenous lands in that manner. Then, by a 32–10 vote, all references to the protection of Indigenous land and sacred sites were cut.

In the end, following votes on 59 resolutions, much of the work of the bipartisan Sessional Committee was rejected, as were almost all proposals by Indigenous delegates. The revised draft constitution affirmed Indigenous customary law but made no mention of self-determination or land-rights protection, thus framing the territory as a single, holistic demos committed to individual equality and majority rule. The delegates had responded to the boundary question – to 'who are the people and where do they rule?' – with the answer, 'all of us indivisibly, over all of the territory'. In his final act as chair of the convention, Austin Asche gave one last cheer for such universalism, proclaiming: 'We are all Territorians, thank heavens. We are extraordinarily lucky to live in this place and so extraordinarily lucky to have had a hand in pushing this wonderful territory forward to become the seventh and best state of Australia'.[95]

The Kalkaringi and Batchelor conventions

In August 1998 the Northern Territory legislature adopted the statehood convention's revised draft constitution. Australian Prime Minister John Howard then announced his government would grant statehood to the territory subject to a 'yes' vote in a territory-wide referendum. The referendum was scheduled for 3 October 1998. Voters would be asked, 'Now that a constitution for the state of the Northern Territory has been recommended by the statehood convention and endorsed by the Northern Territory Parliament: Do you agree that we should become a state?'.

Indigenous groups 'immediately damned' the statehood convention's revised draft constitution and mobilised in opposition to statehood.[96] Key in that effort were two Indigenous constitutional conventions. The first met from 17–20 August at Kalkaringi. It drew

Indigenous, federal and territorial leaders and more than 700 other attendees from 15 Indigenous nations, who 'camped in the heat and dust for several days and talked of their concern for families, communities and lands, and how to develop their vision of the future and plan for its implementation'.[97]

Delegates unanimously condemned the Northern Territory's bid for statehood under the revised draft constitution. As well, 'Many delegates criticized the government's failure to consult with Aboriginal representatives in relation to statehood, as well as the inadequate acknowledgement of Aboriginal law and Aboriginal rights in the draft constitution'.[98] Galarrwuy Yunupingu told the audience, 'Our voice has not been heard in the NT Government's current proposal. The question is: Will the Northern Territory Government engage with Aboriginal people in a real debate about statehood and the constitution?'.[99] Dennis Burke, the territorial government's representative at the convention, was unapologetic in his commitment to a liberal charter, telling attendees: 'The constitution is for all Territorians. Aboriginal people are 30 percent and are very important, not because you are Aboriginal but because you are Territorians'.[100]

On the final day of the convention, delegates adopted the Kalkaringi Statement. Its preamble began:

> The Aboriginal Nations of Central Australia are governed by our own constitutions (being our systems of Aboriginal law and Aboriginal structures of law and governance, which have been in place since time immemorial). Our constitutions must be recognized on a basis of equality, co-existence and mutual respect with any constitution of the Northern Territory.[101]

The preamble further noted the decades of hostility directed at Indigenous peoples by successive Northern Territory governments and lamented the failings of the revised draft constitution.

After the preamble, the Kalkaringi Statement made a series of pronouncements. Key among these was that consent to statehood would be withheld until 'good-faith negotiations' with Indigenous peoples 'leading to a constitution based upon equality, co-existence and mutual respect'.[102] The federal government was enjoined to directly fund Indigenous communities rather than entrust such moneys to the territorial government, and to conduct an inquiry into the experience of Indigenous peoples under Northern Territory self-government.

The statement then demanded constitutional recognition of Indigenous peoples' 'inherent right to self-government'. (Dunstan reports that among settlers this demand was a 'bombshell', alienating some who understood it as a call for secession.[103]) The statement insisted the territorial government affirm Indigenous peoples' status as a discrete polity, by negotiating on 'the sharing of power', providing 'effective levels of representation' in the territorial legislature, and insuring 'that any changes to a Northern Territory constitution which concern Aboriginal rights … be approved not only a by a majority of electors at a referendum but also by a majority of people of the Aboriginal nations of the Northern Territory'.[104] Finally, the statement insisted Indigenous land rights remain a federal rather than territorial matter, that sacred sites be protected, and that the territorial constitution 'recognize Aboriginal law through Aboriginal law makers, and Aboriginal structures of law and governance'.

The second Indigenous constitutional convention met 30 November–4 December in the town of Batchelor. More than 120 delegates attended from across the territory. In anticipation of the event Yunupingu told the media, 'Either we get action or we actively fight against statehood'.[105] Chief Minister Stone was invited to attend but declined, telling the media, 'Reconciliation seems to have become a one-way street. It's either done Mr Yunupingu's way or there's no reconciliation. People are sick of being lectured, hectored and stood over'.[106]

The convention endorsed the Kalkaringi Statement and pressed the territorial government to commit to several constitutional principles, including that the outcome of the convention be respected as Indigenous peoples' authoritative political position. The convention further produced 42 'Resolutions of the Northern Territory Aboriginal Nations on Standards for Constitutional Development'. Most fleshed out Kalkaringi pronouncements. For example, the Batchelor delegates resolved to explore enhancing political participation in the territory, possibly through first-order means such as 'reserved Aboriginal seats in parliament' or 'special assemblies for Indigenous peoples and issues'. As well, they called for research on reducing 'the impact of white law on Aboriginal people'.[107] Other Batchelor resolutions were entirely new, including rejecting a federal report on the *Aboriginal Land Rights Act* that proposed weakening the permit system regulating access to Indigenous land.

It can be seen, then, that at Batchelor, and before that at Kalkraingi, Indigenous delegates responded to the boundary question far differently than had settlers at the Darwin statehood convention. Rather than defining 'who are the people' as all Territorians, Indigenous delegates insisted that constitutional boundaries demarcate their own specific demoi. Opposing universalism, they called for recognition of their political selfhood, so as to self-determine. And, rather than defining 'where do they rule' as coextensive with the territory as a whole, they called for the bounding of their own discrete homelands and sacred sites. Again, contrary to settler holism, they pressed to infix distinctions between 'ours' and 'theirs', 'us' and 'them'.

Between the Kalkaringi and Batchelor conventions came the 3 October statehood referendum. In the lead-up, Indigenous opposition was intense. The Northern and Central Land Councils targeted Indigenous voters with newspaper and radio advertisements urging a 'no' vote. In the *Land Rights News*, published by the land councils, a cartoon associating statehood with white supremacy was blasted by territorial government leaders as 'racially divisive'.[108] The CLP accused land-council officials of fear-mongering to guard their personal power. The CLP also accused Labor of 'playing a double game' by formally backing statehood while campaigning against it in the bush.[109] Yet because statehood officially had bipartisan support, all public-information materials championed the 'yes' case.[110] Most commentators predicted statehood would win easily.[111]

Yet on voting day statehood was rejected by a 'no' vote of 51.3%. The result was a shock, prompting immediate post-mortems. Labor suggested statehood had been fumbled away by the CLP's arrogance, especially its manipulation of the constitutional convention. The CLP attributed the loss to voters' concerns regarding the future state's finances. Yet ballot returns revealed that in urban areas, 'yes' had won. 'No' votes, meanwhile, were extremely high at remote 'mobile voting booths', serving predominantly Indigenous voters. All but one mobile booth recorded an overwhelming 'no' vote. Overall, 73.3% of mobile voters rejected statehood.[112] According to Heatley, 'there is little doubt Aboriginal opposition

was the strongest factor in producing the negative outcome'.[113] Indeed, the academic consensus was that Northern Territory statehood was 'lost in the bush'.[114]

Analysis and conclusion

This article presented a theory of the metapolitics of settler colonialism, employing it to examine the 1998 statehood campaign in Australia's Northern Territory. In doing so, this article made three contributions. First, it showcased how settler colonialism can be understood as at base metapolitical – how settler colonies are 'constituted' by dissolving Indigenous demotic and territorial boundaries and replacing them with new, broader boundaries within which settlers dominate. Put another way, settler colonialism nullifies Indigenous answers to the 'boundary problem', redefining 'who are the people and where do they rule' so the settler 'us' and 'ours' absorb the Indigenous 'them' and 'theirs'.

As was displayed, the Northern Territory Constitutional Convention was rife with rhetorical attacks on the legitimacy of Indigenous boundaries. Indigenous demotic and territorial difference (e.g. a 'special place', a 'tribal situation', a 'division between the races') was variously condemned as a historical artefact, unsuited to the 'dynamic economy of the year 2000'; as divisive, serving to 'separate the races' and prevent 'black, white and brindle together, living as one'; and as undesirable for 'subsequent generations to inherit'. Instead, settler delegates maintained the new state should constitute a uniform people and place – that it should be 'harmonious', 'indissoluble', a 'united society', making 'no distinction, none whatsoever, between one group of people and another', consisting only of 'we the people' or 'Territorians'.

Such views were then etched into the new state's founding document. By declining to enshrine Indigenous self-determination or guard the *Aboriginal Land Rights Act*, settler delegates framed a constitution that would expunge Indigenous peoples as a collective first-order polity. Instead, politically atomised and territorially dispossessed, Indigenous peoples would be subsumed into a new, all-inclusive, 'Territorian' polity, delimited only by 'we the people'. Within that new polity, settlers, due to the democratisation of property rights, would enjoy unfettered access to land. Moreover, by dint of their greater numbers, they would wield majority rule.

Second, this article displayed how such a transformation may be engineered using liberal rights. During the statehood convention, settlers complained that, under existing law, they were denied both political equality and fair access to land. This, settlers argued, was 'discrimination', 'segregation', even 'apartheid'. The prospect of infixing such mistreatment in the new state constitution was said to be 'horrendous', 'racist', and offensive to the principle 'that all men and women are created equal'.

Yet the right of equality invoked by settlers is, as has been shown, an individual, second-order right. Second-order rights are inevitably constrained by upstream, first-order bounding decisions, made to facilitate the self-determination of political communities. Where such bounding decisions are entrenched or otherwise deemed legitimate, their downstream effects are irreversible. However, where such bounding decisions are not entrenched, then individual-rights charges may push upstream, challenging the legitimacy of, and potentially toppling, extant political communities. If 'they' and 'theirs' are dissolved, the jurisdiction is re-bound.

It seems clear this was the aim of settlers at the Northern Territory statehood convention. The discrimination they cited was not, in their telling, an epiphenomenal consequence of upstream, first-order Indigenous self-determination. Rather, they maintained that Indigenous peoples were, in effect, akin to the Alabama counties in *Reynolds* – entities that 'never were and never have been considered as sovereign'. Instead, Indigenous people were fellow 'Territorians', with no right to invidiously discriminate against their co-citizens. In this manner, settlers attacked the legitimacy of Indigenous difference. They then appealed for the oppressive laws to be reformed – indeed, for those reforms to be anchored in the new state constitution. Going forward, bias would be abolished and all individuals would be equal. Such liberalisation, though pitched as a seemingly innocuous second-order reform, would have transformative upstream impacts, swallowing Indigenous polities into the greater settler demos.

Third and finally, this article showed that when Indigenous peoples resisted such settler manoeuvres by championing the constitutional entrenchment of their own first-order demotic and territorial status, there ensued a clash over the appropriate 'framing of justice' – over whether first-order Indigenous boundaries or second-order liberal rights should be seen as the legitimate 'subject of justice' in the founding of Australia's seventh state.

At the statehood convention, and then at the Indigenous constitutional conventions at Kalkaringi and Batchelor, Indigenous leaders proclaimed their peoples were legitimate first-order political communities, with ancient, sacrosanct ties to their homeland and 'no links to other lands and cultures'. Vowing to 'strive for justice' and secure 'our rightful place in this land', they called for the constitutional affirmation of their special status, including their 'inherent right to self-government', power-sharing, reserved seats in parliament, and the protection of their customary laws, lands and sacred sites. In effect, they likened their position to that of Wyoming in the US Senate – a sovereign, respect for whose boundaries must trump downstream individual rights.

So, would first-order Indigenous boundaries or second-order liberal rights prevail as the legitimate 'subject of justice' in the constitution of the new state? Indigenous actors won this clash, prevailing upon Indigenous voters, and perhaps other supporters, to vote in accordance with the view that the appropriate 'subject of justice' was Indigenous boundaries. Settlers, unable to dissolve the Indigenous 'them' into the settler 'us', failed to achieve power over Indigenous peoples and lands. They could not 'constitute settler colonialism'.

It was a substantial victory. Five months after the referendum, Shane Stone was removed as chief minister. In 2001, for the first time since territorial self-government, the CLP lost power to the Labor Party. Today the Northern Territory is still not a state. Subsequent statehood campaigns have foundered, vanishing into the gulf separating settler and Indigenous ambitions. Nor has the territory patriated the *Aboriginal Land Rights Act*. And a treaty process is underway, perhaps promising recognition of the sort of Indigenous rights demanded at Kalkaringi and Batchelor.

Still, the security of Indigenous boundaries remains elusive. In 2007 the federal Howard government staged the notorious Northern Territory Intervention. Conducted ostensibly to interdict the flow of alcohol and drugs into Indigenous communities, and to stem a purported epidemic of child sexual abuse, Canberra unilaterally suspended elements of the *Aboriginal Land Rights Act* and severely curtailed Indigenous self-determination. At the

same time, the territorial government in Darwin introduced its 'super shires' reforms, dissolving community level governments often controlled by Indigenous people in favour of more expansive, regional-level governments where settlers dominate. On Australia's 'last frontier', the metapolitical contest wears on.

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