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The Australian Constitution and National Identity

Alexander Reilly and Anna Olijnyk

What does Australia's constitution say about national identity? A conventional answer might be 'not much'. On this view, the Australian Constitution is concerned with structures and institutions of government, and is deliberately silent on values, aspirations and identity.¹ Nor are Australians inclined to rally around their constitution as a focal point of national pride.²

And yet ...

Reflection on the last few years in Australian constitutional law reveals a wealth of examples of constitutional issues that implicate national identity. Claiming victory in the 2022 election, Anthony Albanese opened his acceptance speech by committing to the Uluru Statement from the Heart's call for a First Nations Voice enshrined in the Constitution. In 2020 the High Court held Aboriginal Australians could not be 'aliens'³ and in 2022 the High Court heard a case in which the Commonwealth sought to overturn that position.⁴ In 2017, many Australians were affronted to

1 See, eg, Jeffrey Goldsworthy, 'Constitutional Cultures, Democracy, and Unwritten Principles' (2012) *University of Illinois Law Review* 683.

2 Justice Patrick Keane, 'In Celebration of the Constitution' (Speech delivered at the Banco Court, Brisbane, 12 June 2008).

3 *Love v Commonwealth* (2020) 270 CLR 152.

4 *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery* (High Court of Australia, S192/2021). This case was withdrawn in August 2022.

discover that, in a country in which about half of the population were born overseas or have a parent born overseas,⁵ our constitution prohibits dual citizens from sitting in Parliament.⁶ A series of cases have examined the limits of Australians' right to protest⁷ and communicate about politics.⁸ The Australian Republic Movement continues its advocacy for an Australian Head of State.⁹ The COVID-19 pandemic brought federalism to the fore, with closed borders and competing priorities pitting State against State, and State against Commonwealth governments.

These constitutional controversies all raise questions about *who we are*. Who are the Australian people? What is the relationship between Indigenous and non-Indigenous Australians? What kind of democracy do we have? Furthermore, does our constitution reflect who we are, or who we want to be? Is it equipped to support our nation in a future with new and emerging challenges?

This book begins to explore the relationship between Australia's national identity and the Australian Constitution. Because this is not purely a legal question, the book draws on historians and political scientists as well as legal scholars to examine the political and social dimensions of the Australian Constitution. The chapters in this book offer a variety of perspectives on how our Constitution might—and does—reflect or shape national identity.

Overall, the book does not take a normative position on whether the Constitution should influence or reflect Australia's national identity. As we discuss later, there is considerable debate about the merits of a strong national identity and about the appropriateness of constitutions as repositories of this identity. However, contributors take various normative positions in their individual chapters.

5 On the dual citizenship crisis, see <www.abc.net.au/news/2017-12-06/fact-file-the-dual-citizenship-scandal/9147418>. On Australian population statistics see, *Australian Bureau of Statistics* <www.abs.gov.au/statistics/people/population/migration-australia/latest-release#:~:text=In%202019%20the%20proportion%20of%20Australia's%20population%20born%20overseas%20was%2030%25>.

6 Australian Constitution s 44(i).

7 *Brown v Tasmania* (2017) 261 CLR 328; *Clubb v Edwards* (2019) 267 CLR 171.

8 Recent cases on this issue include *Comcare v Banerji* (2019) 267 CLR 373 and *Unions NSW (No 2)* (2019) 264 CLR 595; *LibertyWorks Inc v Commonwealth* (2021) 95 ALJR 490.

9 Australian Republic Movement <republic.org.au/>.

This collection is not, of course, exhaustive. Many aspects of national identity are not explored here. Much could be written, for example, on gender as part of constitutional identity,¹⁰ our Constitution's silence on human rights, the implied freedom cases, the voting rights cases and the s 44 cases. The stories of the Uluru Statement and the republic are far from over. We hope this book prompts further reflection on these issues.

I. What is national identity?

Historians and political scientists have developed an extensive scholarship on the concept of national identity.

In his classic work on the nature of nations, Benedict Anderson argues that nations are 'imagined communities'.¹¹ Nations are *imagined* because they are socially constructed; a nation is not merely a defined territory and population. Ernest Gellner explains that '[n]ationalism is not the awakening of nations to self-consciousness; it *invents* nations where they do not exist'.¹²

In Anderson's terms, national identity might be conceived of as the feat of imagination that binds people into a state-based political community. Similarly, Anthony D Smith describes national identity as the 'bonds of solidarity among members of communities united by shared memories, myths and traditions that ... are entirely different from the purely legal and bureaucratic ties of the state'.¹³ Smith explains that nations 'provide individuals with "sacred centres", objects of spiritual and historical pilgrimage, that reveal the uniqueness of their nation's "moral geography"'.¹⁴

Smith uses the concept of 'homeland' to connect national identity to physical geography. He describes 'homeland' as:

a repository of historic memories and associations, the place where 'our' sages, saints and heroes lived, worked, prayed and fought ... Its rivers, coasts, lakes, mountains and cities become 'sacred' places of veneration and exaltation whose inner meanings can be fathomed only by the initiated, that is, the self-aware members of the nation.¹⁵

10 For an exploration of this topic, see Helen Irving, *Gender and the Constitution: Equity and Agency in Comparative Constitutional Design* (Cambridge University Press, 2008), doi.org/10.1017/CBO9780511619687.

11 Benedict Anderson, *Imagined Communities* (Verso Books, revised ed, 2006).

12 Ernest Gellner, *Thought and Change* (University of Chicago Press, 1964) 169.

13 Anthony D Smith, *National Identity* (Penguin, 1991) 15.

14 Ibid 16.

15 Ibid 9.

Although historical memories provide the foundation for national identity, theorists of history such as Hayden White observe just how shaky this foundation is.¹⁶ The histories of events that form the foundation of national identity are ‘cherry-picked’ from the past to build an ideologically driven grand narrative. White describes stories as ‘emplotted’ using a range of literary devices. For example, national identities might draw on ‘Romance’, which is ‘a drama of self-identification symbolized by the hero’s transcendence of the world of experience, his victory over it, and his final liberation from it’.¹⁷ The contest over national identity in Australia illustrates well the role of romantic stories. A story of colonial struggle and ultimate success against the elements to create the modern Australian nation has been subject to critical scrutiny by First Nations people and historians particularly in the last 50 years. For many, what was cast as a peaceful settlement was more accurately an invasion. In recent years, this contest of the myth of national origin has coalesced around the appropriateness of the day of first white settlement, 26 January, to commemorate the nation.

The work of Smith, Anderson, White and others provides us with ideas to make sense of national identity, but its formation remains an imprecise and inherently contestable exercise, easier to recognise than define.

Inevitably, views will differ on the value of national identity. There is a close link between a strong sense of national identity and nationalism, with its attendant dangers. But national identity can also be a source of pride and kinship.

II. Does Australia have a national identity?

At the time of federation, by ignoring the existence of Indigenous Australians and non-British immigrants, the Australian nation was declared to share ‘one blood or stock or race’, a ‘glorious heritage (Britain’s)’ and ‘one religion’.¹⁸ The nature of Australian identity has only grown more complex since then. The arc of the historical record is highly contested, as the ‘history wars’ of the 2000s illustrated. One narrative celebrated Australia’s history as manifesting the advance of Western civilisation; another recognised both

16 Hayden White, *Metahistory: The Historical Imagination in Nineteenth-Century Europe* (Johns Hopkins University Press, 1973).

17 Ibid 7.

18 John Hirst, *The Sentimental Nation: The Making of the Australian Constitution* (Oxford University Press, 2000) 16.

the violence of colonisation and the survival of First Nations as unique, sovereign entities. For more recent migrants and their children, neither of these versions resonate.

In light of these unresolved (perhaps unresolvable) debates, we will not attempt to define an Australian identity for the purposes of this book. Instead, we identify and reflect on some focal points around which Australian identity might coalesce and ask questions about the adequacy of these different visions of Australia.

Smith's idea of homeland has a distinctly European feel to it. And yet, it is instructive for Australia. Despite the existence of a pre-existing deep, complex, diverse and ancient connection to the homeland, colonists quickly asserted their own mythological connection to the new country.¹⁹ This was based on the presumption that the land was empty prior to European settlement.²⁰ With this convenient fiction in place, colonisation occurred through naming the land using the identities and idioms of the coloniser.²¹ Like North America, the nation was built on myths of discovery and conquest, and on economic growth.

Today, the non-Indigenous sense of homeland in Australia is, arguably, not strong. It is built on the conquest of the outback, the development of agriculture and mining; yet, for more than a century, most Australians have lived in urban areas. Tellingly, the strongest non-Indigenous national myth occurs outside Australian territory, in Gallipoli.

By way of contrast, the sense of connection to homeland among Indigenous Australians is extremely powerful—based on an ancient connection, with rich stories that are ontological, mythical and historical. There is strength in never having ceded to the coloniser, solace in continuity with that past. Can an Indigenous sense of 'homeland' be the foundation for an Australian national identity?

Multiculturalism has broken down the hegemony of Australian ethnic identity focused around British heritage. Certainly, if there is an Australian national identity, it is much less British-oriented today than in 1901. Running counter to this, there has been a recent focus on common cultural bonds (and hence the expression of new requirements around 'unity')

19 See Bill Gammage, *The Biggest Estate on Earth: How Aborigines Made Australia* (Allen & Unwin, 2011); Sean Ryan, *The Cartographic Eye: How Explorers Saw Australia* (Cambridge University Press, 1997).

20 Ryan (n 19).

21 Paul Carter, *Road to Botany Bay* (Faber and Faber, 1987).

‘integration’, ‘language’ and ‘Australian values’), but without a clear idea of the character of these bonds. Has multiculturalism been able to provide a sufficiently strong narrative to construct an alternative sense of national identity? Can Australia develop a post-ethnic identity that is nonetheless based on a tangible connection to nation/country/homeland?

Some more recent conceptions of Australia’s national identity draw together the strands of Indigenous, British and multicultural influences. Noel Pearson’s proposed ‘Declaration of Australia and the Australian People’ asserts that Australians are united by ‘three stories’: ‘the Ancient Indigenous Heritage which is [Australia’s] foundation, the British Institutions built upon it, and the adorning Gift of Multicultural Migration’.²² Is it possible to construct a coherent modern national identity from these three stories?

A related question is the values that might form part of a coherent national identity. Does Australia’s national identity include a commitment to any particular values—perhaps democracy, meritocracy, community,²³ freedom, equality, egalitarianism, prosperity?

III. Constitutions and national identity

The relationship between constitutions and national identity is multidimensional and context specific. There are probably as many variations on this relationship as there are constitutions.

Constitutions can *reflect* an existing national identity. Dylan Lino describes constitutional norms and instruments as ‘expressive, cultural artefacts of the polities to which they are attached’.²⁴ Constitutions can also *shape* national identity by articulating the aspirations of a community and setting the boundaries on government action. Jeff King has argued that constitutions can serve as ‘mission statements’, expressing ‘the political ideas that animate the constitution and polity more broadly’.²⁵

22 Cape York Institute, 2 June 2018 <capeyorkpartnership.org.au/constitutional-recognition/in-the-spirit-of-getting-the-ball-rolling-noel-pearson-offers-this-declaration-of-australia-and-the-australian-people/>.

23 These three values are nominated as distinctive Australian values by Benjamin T Jones, *This Time: Australia’s Republican Past and Future* (Redback, 2018) 158–9.

24 Dylan Lino, *Constitutional Recognition: First Peoples and the Australian Settler State* (Federation Press, 2018) 102.

25 Jeff King, ‘Constitutions as Mission Statements’ in Denis J Galligan and Mila Versteeg, *Social and Political Foundations of Constitutions* (Cambridge University Press, 2013) 73, 81, doi.org/10.1017/CBO9781139507509.006.

Manifestations of national identity in constitutions can be either *symbolic*, such as a preamble or statement of recognition, or *operative*, such as the entrenchment of a representative form of government.²⁶ Of course, many substantive provisions have a symbolic dimension. For example, the choice of a representative form of government may express a community's commitment to democracy and equality.

Constitutional expressions of national identity can be *intentional* and *explicit* in the constitutional text. There are many examples of such provisions.²⁷ The Constitution of South Africa, for instance, famously opens by acknowledging the injustices of apartheid. But constitutions can also say something *implicit* and perhaps *unintentional* about national identity. Jeremy Webber argues that: 'Even if we wanted to, we could not eradicate symbolism from our Constitution. Language always carries connotations, implications, and points of resonance.'²⁸ So, for example, Marcia Langton argues that the text and history of the Australian Constitution show that '[c]oncepts of race are fundamental to Australian polity and civic life'.²⁹ Even omissions from the text can be telling. What does the absence of any mention of First Nations in the Australian Constitution say about the importance of First Nations to Australian political institutions? Arguably this silence echoes the 'great Australian silence'³⁰ about the place of First Nations in Australia's origin story.

The potential for intersections between constitutions and national identity expands if we take an expanded view of 'constitutions'. Many scholars have conceptualised the domain of constitutional law as extending beyond the constitutional text and its interpretation.³¹ On this view, constitutional law embraces convention, usage, shared understandings, common law decisions and "scattered" fragments of ordinary law.³² Australia's 'constitutional canon'³³ might include such pivotal moments in

26 See Jeremy Webber, 'Constitutional Poetry: The Tension Between Symbolic and Functional Aims in Constitutional Reform' (1999) 21 *Sydney Law Review* 260, 268.

27 For a collection of examples, see King (n 25) 83–4.

28 Webber, 'Constitutional Poetry' (n 26) 267.

29 Marcia Langton, 'Why "Race" is a Central Idea in Australia's Construction of the Idea of a Nation' (1999) 18 *Australian Cultural History* 22, 24.

30 WEH Stanner, *The Dreaming and Other Essays* (Black Inc. Agenda, 2009) 176.

31 See, eg, Jeremy Webber, 'Multiculturalism and the Australian Constitution' (2001) 24(3) *University of New South Wales Law Journal* 882, 883; Gabrielle Appleby, *The Role of the Solicitor-General: Negotiating Law, Politics and the Public Interest* (Hart Publishing, 2016) 3–4.

32 Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017) 19.

33 *Ibid* 8.

the evolution of our identity as *Mabo v Queensland (No 2)*³⁴ and the *Statute of Westminster*. Even the way a constitution is understood by its constituents can reflect and build national identity. Bruce Ackerman argues that, for Americans, ‘the narrative we tell ourselves about our Constitution’s roots is a deeply significant act of collective self-definition; its continual re-telling plays a critical role in the ongoing construction of national identity’.³⁵

It is clear, then, that a constitution *can* be a source and a record of shared national values and aspirations, and a key part of a nation’s grand historical narrative.

Whether, and to what extent, constitutions *should* play this role is a contested normative question. Jeremy Webber argues that ‘[w]ritten constitutions are poor instruments for defining a country’.³⁶ Attempts to capture identity in the constitutional text risk excluding those who do not share the view expressed in the text, falling into tepid platitudes, and becoming anachronisms.³⁷ Constitutions tend to represent the will of the majority, sometimes ignoring or disadvantaging minorities.³⁸ A further objection is that a strong sense of national identity is not necessarily a good thing. It can be a short step from pride in national identity to an insular or even aggressive form of patriotism.

In light of these debates, our project is to identify, describe and critique some points of intersection between the Australian Constitution (and, more broadly conceived, Australian constitutional law) and Australian national identity.

IV. The Australian Constitution and national identity

Does the Australian Constitution play the role of articulating and shaping national identity that we observe in some other constitutions? As we indicated at the beginning of this chapter, some would say no: it does not attempt to do so. But, as we have shown, it seems inevitable that a constitution says

34 (1992) 175 CLR 1.

35 Bruce Ackerman, *We the People: Foundations* (Belknap Press, 1991) 36.

36 Webber, ‘Multiculturalism’ (n 31) 882.

37 Webber, ‘Constitutional Poetry’ (n 26) 267.

38 Lino (n 24) 104.

something about the nation. A small but growing literature explores this possibility, albeit describing the identity revealed in the Constitution in modest terms: a ‘small brown bird’.³⁹

At federation, the Constitution arguably provided a sense of identity shared by much of the population. Helen Irving has argued that ‘the Australian Constitution was a product of a particularly Australian political culture’: ‘a local product, typical of a particular culture and region’.⁴⁰ In 1901, the Constitution was comfortably familiar, taking on elements of the US Constitution, while entrenching the Westminster system. It was British, Christian and white, reaffirming Australia’s place in the Empire. Yet even then, the Constitution was open to the criticism that it ignored large sections of the community, being written by a small, homogeneous group of men with largely similar interests. As we have observed above, it is strongly arguable that Australia’s national identity can no longer be understood in these terms. Yet the Constitution remains largely unchanged.

In the past few years an apparent dissonance between Australia’s Constitution and its national identity has been increasingly evident. The Constitution’s silence on the political status of Aboriginal and Torres Strait Islander peoples, its prohibition on dual citizens running for Parliament, and its continuing links to a British Crown with no legal or political authority and decreasing symbolic significance for Australia have generated concrete proposals for constitutional amendment. The time seems right to ask: how does Australia’s constitution relate to Australia’s national identity?

V. The structure of this book

The chapters in this book are divided into three sections.

Part One explores the role of the Constitution in forming and reflecting national identity. It introduces the major themes of the book: Australia’s national identity; the relationship between constitutions and national identities; and the extent to which Australia’s constitution, taken as a whole, reflects or shapes national identity.

39 Elisa Arcioni and Adrienne Stone, ‘The Small Brown Bird: Values and Aspirations in the Australian Constitution’ (2016) 14(1) *International Journal of Constitutional Law* 60, doi.org/10.1093/icon/mow003, quoting Justice Patrick Keane (n 2).

40 Helen Irving, *To Constitute a Nation: A Cultural History of Australia’s Constitution* (Cambridge University Press, 1999) ix.

In Chapter 2, Elisa Arcioni builds on this conceptual foundation. This chapter provides a broad doctrinal overview of the question of national identity as it has developed within the formal context of the Constitution, concluding that the picture of national identity revealed by the Constitution is at best incomplete and evolving. Many of the topics raised in Arcioni's chapter are developed by other authors in later chapters.

In Chapter 3, Anna Olijnyk asks how the interpretation of the Constitution might reflect national identity. Drawing on American scholarship on popular constitutionalism, Olijnyk argues that, despite obvious differences between the American and Australian contexts, the High Court's interpretation of the constitutional text sometimes reflects the evolving values and identity of the Australian people.

Lorne Neudorf adds a comparative perspective in Chapter 4 by looking at the experience of the *Canadian Charter of Rights and Freedoms*.⁴¹ Unlike Australia, Canada self-consciously sought to build national identity through constitutional change. The chapter evaluates 40 years of successes, failures and unexpected outcomes in this ambitious identity-constituting project.

In Chapter 5, Peter D Burdon examines the potential of eco-constitutionalism in Australia. Advocates of eco-constitutionalism are optimistic about the role of constitutions in bringing about environmental protection. Burdon is critical of eco-constitutionalism generally, and in the Australian context. The chapter highlights the gap that can exist between idealist discourse (such as eco-constitutionalism or other identity-based aspirations) and the social forces that operate in a community.

Finally, in Chapter 6, Kim Rubenstein uses the lens of citizenship to reflect on the many changes in Australian society and government since the Constitution came into force. There have been profound changes in Australia's relationship with the United Kingdom and in the cultural make-up of the Australian people. Rubenstein argues for constitutional reform to promote an inclusive national identity that resonates with the lived experience of current Australians and with the rightful place of First Nations.

41 *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*').

Part Two interrogates the legal concepts that have been responsible for the definition and manifestation of national identity within the Australian State. Concepts such as citizen, alien, character, values and allegiance set the boundary between inclusion in, and exclusion from, the nation. These concepts are fundamental in defining the type of national community that is formed under the Constitution.

In Chapter 7, Alexander Reilly examines the notion of membership of, and exclusion from, the nation. Reilly observes that, while the Constitution sets the framework for determining membership, much of the work of drawing distinctions between members and non-members is left to Parliament. The chapter critiques the use of 'character' as a determinant for national membership, contrasting the exclusionary orientation of current migration policy with the inclusive philosophy that characterised Australian identity between the 1970s and 1990s.

Taking up the theme of exclusion, in Chapter 8, Joe McIntyre presents a historical analysis of the alien's power. McIntyre argues that the power was designed to impose domestic disabilities on aliens, rather than to define, through citizenship law, who was a member of the community. The chapter advocates frank acknowledgement of the darker aspects of constitutional history, in order to reframe the Constitution in line with the identity to which we aspire.

Writing from a liberal political theory standpoint, in Chapter 9, Tiziana Torresi asks what role national identity does, and should, play in our conception and practice of citizenship. The chapter contrasts communitarian and cosmopolitan ideas of shared identity, and the ways in which these ideas can be conducive to the rise of right-wing populism. Torresi considers how the institutional framework of constitutions interacts with extra-constitutional social and political factors.

In another piece of political theory analysis, in Chapter 10, Robyn Hollander analyses one of the most prominent features of the Australian Constitution: federalism. Hollander argues that the overlap, duplication and redundancy inherent in the federal system can give voice to minorities. Accordingly, federalism is an important mechanism for reflecting the diverse identities that make up Australia.

Part Three explores some key issues of constitutional reform.

In Chapter 11, Lydia McGrady scrutinises the concept of sovereignty that is foregrounded in the Uluru Statement from the Heart. The chapter questions how 'sovereignty' has been employed to both limit and promote Indigenous peoples. McGrady argues that multiple forms of sovereignty can coexist, and that the notion of Indigenous sovereignty remains crucial to constitutional reform.

In Chapter 12, Benjamin T Jones explores the potential of a new preamble as a source of 'moral power'. The chapter takes a historical perspective, reviewing the failed 1999 referendum and other key moments in the constitutional story. While acknowledging that a preamble may lack legal force, Jones argues that a preamble can be a repository of commonly held ideas about the civic good.

The book concludes in Chapter 13 with Sarah Sorial's insights into the processes that may need to support any movement towards a more identity-based reform of the Constitution. Present levels of constitutional awareness and interest in Australia present a barrier to changing the Constitution by referendum. Sorial introduces the use of citizens' assemblies as a way of improving citizens' democratic literacy and motivating public debate.