

Federation and the History of the Administration of Indigenous Affairs in Canada, the United States, and Australia: New Insights through a Transnational Approach

Ted Binnema

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Article abstract

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Abstract

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Résumé

On ne peut réellement comprendre l'importance des décisions en ce qui concerne l'attribution de la juridiction des affaires autochtones dans les États fédéraux que lorsqu'on les étudie comparativement, au niveau transnational. Il semble que les historiens canadiens ne se soient jamais

* I thank Bain Attwood and Stephen J. Rockwell for their extremely helpful feedback on the Australian and American sections of this paper. This article is much better than it would have been without their comments and suggestions. Readers wanting to understand this topic fully ought to consult their indispensable publications cited below. Some legitimate scholarly disagreement still remains, so I want to emphasize that I accept all responsibility for any weaknesses from which this article may suffer. I also wish to thank the journal's three anonymous peer reviewers.

penchés sur le fait que l'Acte de l'Amérique du Nord britannique a conféré au gouvernement fédéral canadien la juridiction exclusive des affaires indiennes, même si cette stipulation est unique parmi les documents constitutionnels d'États fédéraux comparables (les États-Unis et l'Australie). Cet article explique que les articles des lois constitutionnelles au Canada, aux États-Unis et en Australie sont le produit des relations historiques antérieures entre l'État et les Autochtones dans chacun de ces pays, mais qu'ils ont en retour profondément influé sur l'histoire subséquente de chacun de ces pays. Malgré des différences marquées, les tendances qui ont influencé ces trois pays se discernent dans des développements similaires et parallèles.

When negotiators hammered out the British North America (BNA) Act (1867), they could refer to the United States constitutions for precedents. Those documents offered two possibilities when it came to allocating jurisdiction over Indian Affairs.¹ Under Article 9 of the Articles of Confederation, which governed the United States from 1781 to 1789, each state managed Indian affairs within its own borders, with Congress having authority only in the territories. Thereafter, Article 1(8) of the 1789 Constitution specified that “Congress shall have Power ... to regulate Commerce with ... the Indian Tribes.”

Article 9 of the Articles of Confederation and Article 1(8) of the Constitution find their analogue in section 91(24) of the BNA Act, which stipulates that the “exclusive Legislative Authority of the Parliament of Canada extends to all Matters” related to “Indians, and the Lands reserved for the Indians.” By stark contrast, section 51(26) of the Australian Constitution (1901) stipulated that the Commonwealth (federal) government would have *no* right to make special laws respecting Aboriginal Peoples: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.”²

What was the significance of federation for the way Indigenous affairs were administered? Historians of Canada do not

appear to have asked that question. In *Skyscrapers Hide the Heavens*, J. R. Miller dispenses with federation by noting only that “in 1867 the British North America Act assigned jurisdiction for ‘Indians and lands reserved for the Indians’ to the federal government and parliament of the Dominion of Canada.”³ In *I Have Lived Here since the World Began*, Arthur J. Ray does not mention the BNA Act at all.⁴ By contrast, at the time of Australia’s centennial, Patricia Grimshaw argued that the Australian constitution marked a significant but ominous milestone in Australian history.⁵ In her view, “Federation was a turning point in Australian history because British colonists finally defeated one of the competing narratives about Aborigines, a narrative that asserted the moral entitlement of Aborigines to dedicated reserves and fair compensation as the original owners of the land, and that promised an optimistic outcome of the ‘civilizing mission,’ and equal place in the new white society, in its economy, work, churches, schools, law, and political system.”⁶

The stark differences between Australia, Canada, and the United States have puzzled Australian historians. In 1973, Peter Biskup noted that “the constitution of the United States of America and of the Dominion of Canada, to which the founding fathers of the Commonwealth looked for guidance, made the care of the indigenous population a federal matter, and one would have expected the framers of the Australian constitution to follow this example.”⁷ In 2007, Bain Attwood and Andrew Markus observed that the approach of the Australian fathers of federation

to this matter of jurisdiction differed markedly from that of their counterparts in two comparable countries. Unlike the Australian Constitution, the constitutions of both the United States and Canada gave their federal governments substantial powers over Indigenous peoples. At the time of federation in these two countries, the national governments had claimed responsibility for vast territories comprising Indigenous-controlled lands from which new states and provinces were to be carved, whereas at the time of federation in Australia the Indigenous people had largely been dispossessed

of their lands. The former perceived a need for their federal governments to have considerable powers in Indigenous affairs, the latter did not.⁸

After identifying the enigma, those historians did not attempt to solve it. There has been no systematic study of the significance that decisions about the allocation of responsibility for Indigenous affairs have played in those three countries. But when viewed from a transnational perspective, the BNA Act takes on significance previously overlooked. Section 91(24) represented a greater break with the past than the scholarly literature suggests. Historians have viewed 91(24) as unremarkable. Yet, it was unlike analogous provisions in American and Australian constitutions — and the different provisions had very important implications in all three countries. Canada's provision is the only one that explicitly placed exclusive powers with the federal government. In the United States, constitutional change, federal law, court rulings, and practical administration of policy, eventually gave the federal government exclusive powers, but in Australia, even a protracted campaign failed to achieve anything like Canada's 91(24). A transnational approach to the history of constitutional provisions shows that bureaucrats and politicians in each place chose from an array of possibilities when they decided how to administer Indigenous affairs. Finally, in the longer term, as the relevance of — or the memory of the relevance of — Indigenous affairs to national security changed, all three federal governments grew increasingly reluctant to retain or assume responsibility for Indigenous affairs.

The Federalization of Indian Affairs in the United States of America, 1776-1834

The history of the allocation of responsibility for Indian affairs in the United States may have influenced negotiators of the BNA Act and almost certainly negotiators of the Australian Constitution. Until 1755, each British (and Dutch) North American colony administered its own Indian affairs. Governors and assem-

blies of colonies concluded land-cession and peace treaties with the leaders of Indigenous communities, in the case of land-transfer treaties often without the authorization, acknowledgement, or ratification of metropolitan authorities.⁹ These treaties are important for American and Canadian history, since they set precedents for subsequent treaties in both countries. But when the Great War for the Empire (1754-1763) erupted in 1754, British officials were convinced that military exigencies demanded that jurisdiction over Indian affairs must be centralized, as it was in French North America.¹⁰ Accordingly, Lord Halifax, President of the Board of Trade (which supervised the British Crown's interest in the American colonies), revoked each colony's jurisdiction over Indian affairs, and created the Indian Department under the supervision of the Commander-in-Chief of the British military forces in North America.¹¹ In a way, that Indian Department is the forerunner of both the Canadian Department of Indian Affairs and the American Bureau of Indian Affairs. When thirteen of Great Britain's North American colonies declared independence in 1776, however, the history of the bureaucracies diverged significantly.

Canada has never been a confederation. The United States, on the other hand, was a confederation — sovereign states united by a weak central government — from 1776 to 1789. Not surprisingly, then, American constitutions stipulated that states retained all powers not allocated to Congress. Section 2 of the Articles of Confederation stated that “each state retains its sovereignty, freedom, and independence, and every power, jurisdiction, and right, which is not by this Confederation expressly delegated to the United States, in Congress assembled.”¹²

Francis Paul Prucha was right when he wrote that “the principles incorporated in the Articles of Confederation gave a decisive turn to American Indian policy.”¹³ Those who drafted a constitution for the United States (and those who sought to form a Continental Congress for the colonies before independence) faced a crucial question: where should authority over Indian affairs be vested? Especially since no documents shed light on deliberations leading to Canada's 91(24), records from other countries are particularly interesting. As early as July 1775, a special committee on

Indian affairs announced that “securing and preserving the friendship of the Indian Nations appears to be a subject of the utmost moment to these colonies.”¹⁴ Thus, most of delegates to the Continental Congress, including Benjamin Franklin, believed that it was in the states’ security interests that Indian affairs should be vested in the most senior branch of government. In a draft constitution for the “United Colonies of North America,” completed on 21 July 1775, Franklin implied that Indian affairs should be handled by the Continental Congress.¹⁵ Shortly after the colonies declared independence, John Dickinson proposed language very similar to what Canadian delegates would adopt 91 years later. Article 18 of his draft Articles of Confederation (1776) unambiguously stipulated that “the United States assembled shall have the sole and exclusive Right and Power of ... Regulating the Trade, and managing all Affairs with the Indians.”¹⁶

Franklin and Dickinson did not get their way. Their position was defended primarily by arguments related to national security. Button Gwinnett of Georgia (a frontier state in which the management of Indian affairs was delicate and expensive) wanted to be rid of jurisdiction, because “Georgia is not equal to the expense of giving the donations to the Indians, which will be necessary to keep them at peace. The emoluments of the trade are not a compensation for the expense of donations.”¹⁷ James Wilson of Pennsylvania concurred:

No lasting peace will be [made] with the Indians, unless made by some one body. ... No power ought to treat with the Indians, but the United States. Indians know the striking benefits of confederation; they have an example of it in the union of the Six Nations. The idea of the union of the Colonies struck them forcibly last year. None should trade with Indians without a license from Congress. A perpetual war would be unavoidable, if everybody was allowed to trade with them.¹⁸

Edward Rutledge and Thomas Lynch of South Carolina disagreed. They wanted their state to control its lucrative deerskin trade. Delegates had to compromise to achieve a confederation,

so they could not ignore Rutledge and Lynch. Virginia representative Carter Braxton proposed the compromise that carried the day: Giving the Continental Congress powers over Indian affairs in United States territories west of the state boundaries, but having states retain jurisdiction in regard to Indian “Nations tributary” to the states.¹⁹ In the end, Article 9 of the Articles of Confederation stipulated that “the United States in Congress assembled shall ... have the sole and exclusive right and power of ... regulating the trade and managing all affairs with the Indians, not members of any of the States, provided that the legislative right of any State within its own limits be not infringed or violated.”²⁰ Indians were also mentioned in Article 6, which illustrates the degree to which Indians were seen as potential military threats. It stipulated that “no State shall engage in any war without the consent of the United States in Congress assembled, unless such State be actually invaded by enemies, or shall have received certain advice of a resolution being formed by some nation of Indians to invade such State, and the danger is so imminent as not to admit of a delay till the United States in Congress assembled can be consulted.”²¹

The relationships between the United States and Indian nations during the years of the Continental Congress (1781–1789) were dreadful, certainly in large part because of the decentralized administration of Indian affairs. However “perfect” the union might have been, by the mid-1780s, moves towards a “more perfect union” had begun. One of the crucial shortcomings of the Confederation was that the Continental Congress was so militarily weak that it was unable actually to control much of the western territories or those territories’ Indian denizens. Furthermore, when Indian affairs were managed haphazardly by different states, the entire confederation risked long and costly warfare with Indian nations. In other words, the experience under the Articles of Confederation seemed to vindicate those who had argued that the Continental Congress should be given sole and exclusive authority over Indian affairs. The crisis was so deep that some proponents of central control even reasoned that, despite the wording of the Articles of Confederation, “the parties

to the confederation must have intended to give them [powers over Indian affairs] entire to the Union.”²² The context might explain why the question of jurisdiction apparently generated little debate during the Constitutional Convention of 1787. Francis Prucha suggested that “the lack of debate on the question indicates, perhaps, the universal agreement that Indian affairs should be left in the hands of the federal government.”²³

If Prucha was right, why did the members of the Constitutional Convention not revert to John Dickinson’s unambiguous wording that Congress would “have the sole and exclusive Right and Power of ... Regulating the Trade, and managing all Affairs with the Indians”? They probably hesitated because they wanted to avoid controversy over states’ rights.²⁴ At any rate, Article 1(8) of the 1789 Constitution was brief and vague on the question of Indian Affairs: “Congress shall have Power ... to regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.” Dickinson’s “sole and exclusive” and “all affairs” were conspicuously absent.

What section 1(8) actually meant, in light of the previous Articles of Confederation, would be determined over the ensuing decades.²⁵ Did the federal government enjoy exclusive power, or did the federal and state governments share concurrent or overlapping powers? The granting of certain powers to a government, particularly when those powers are not exclusive, does not guarantee that the government will actually exercise them. In the United States between 1789 and 1828, the federal government did exercise the powers given it, but “still new and weak” in the earliest years, it did so cautiously, but increasingly assertively.²⁶ After 1789, the federal government did appoint Indian agents and a Superintendent of Indian Trade (within the War Department). Moreover, it passed Trade and Intercourse Acts (starting in 1790) that fit within a narrow interpretation of Article 1(8). But not until 1824 did the Secretary of War, John C. Calhoun, create the Bureau of Indian Affairs — with a broader mandate — and even then, he did so unilaterally, without the sanction, authorization, or approval of Congress.²⁷ The fact that George Washington’s government spent an astounding 80 percent of its

budget to fight Indian wars that did successfully bring the western territories under government control certainly elevated the stature of the federal government.²⁸ But after 1789, some governments behaved as though they enjoyed concurrent powers over Indian affairs, with states sometimes defying the federal Trade and Intercourse Acts to administer Indians and conclude land-transfer treaties unilaterally.²⁹ To avoid showdowns during the earliest years, especially with powerful states such as New York, federal officials sometimes cooperated with the states and ratified their treaties. In later years, by excluding state officials from important deliberations and decisions, the federal government asserted exclusive authority.³⁰ So, by use of effective strategy, and with the acquiescence of most states, the federal government did assume near exclusive control over Indian affairs quite quickly after 1789. Nevertheless, it remained constitutionally unclear whether federal power was exclusive or concurrent with states' powers.

Emboldened by the election of Andrew Jackson in 1828, Georgia immediately seized upon the Constitution's ambiguities. Strongly supported by the southern vote, Jackson was a proponent of Cherokee removal from Georgia, and, many people believed, an advocate of states' rights. Counting on a supportive White House, Georgia passed several controversial laws between 1828 and 1830, the effect of which was to claim exclusive state jurisdiction over the Cherokee.³¹ Rather than contest Georgia's right to do so, Jackson explicitly endorsed the state's actions. But, the Cherokee and their allies, including clergy, missionaries, and women activists such as Catherine Beecher, challenged Georgia in public and in the courts.³² Thus, in 1832, it fell to the Supreme Court to decide the precise meaning of Article 1(8).

The Chief Justice of the Supreme Court of the United States, John Marshall — always eager to render decisions that enhanced the power of the federal government — seized the opportunity to establish a federalist interpretation of Article 1(8). On 3 March 1832, in *Worcester v. Georgia*, Marshall claimed (not without some historical licence) that before independence, authority over Indian affairs “in its utmost extent was admitted to reside in the Crown,” not the colonies. Thus, he opined, Congress, not the states, inher-

ited those powers upon independence. After thus simplifying the history of Indian affairs before 1776, Marshall construed the Articles of Confederation as anomalous. He ruled that while the Articles of Confederation had “ambiguous phrases” that caused “discontents and confusion,” the Constitution had clarified matters; the powers conferred upon the federal government in Article 1(8) of the Constitution “comprehend all that is required for the regulation of our intercourse with the Indians. They are not limited by any restrictions on their free action. The shackles imposed on this power, in the confederation, are discarded.”³³ Thus, although not yet with the actual ratification of the Constitution in 1789, but with John Marshall’s ruling in *Worcester v. Georgia* (1832), all affairs having to do with Indians in the United States can be said to have been constitutionally under the sole and exclusive jurisdiction of the federal government. *Worcester* is best known for clarifying the nature of Indian sovereignty in the United States, but as Stephen J. Rockwell has pointed out, its significance “lies less in the paper protections it afforded the Cherokee, and more in its clarification of the fact that the federal government, not the states, still controlled Indian policy and administration.”³⁴

Marshall’s ruling appears to have made a tangible difference soon thereafter. Thomas McKenney, the Superintendent of Indian Affairs from 1824 to 1830, had tried to place the Indian Office on a solid and stable footing, but it was not until 9 July 1832, a few months after Marshall’s decision, that Congress gave the Commissioner of Indian Affairs statutory authority.³⁵ Two years later, Congress revamped and solidified the place of the Department of Indian Affairs.³⁶ Thanks to the ambiguities of Article 1(8), federal-state conflict over the management of Indian affairs in the United States continues into the twenty-first century, but Marshall’s 1832 decision marked an important turning point in defining the federal government’s role in Indian affairs.

Federalizing Indian Affairs in the British North America Act, 1867

Not all of the British North American colonies declared independence in 1776. The administration of Indian affairs in the

loyal colonies evolved before and after American independence. Canadian historians appear to assume — probably correctly — that it was almost certain that negotiators would vest Indian affairs with the federal government in 1867. But, we should not overlook the fact that the management of Indian affairs in British North America in the years before Canadian federation was complicated. Marshall's words that "in its utmost extent," power "resided in the Crown," may have applied to British North America in 1755, but it was not always so. Indeed, soon after the Treaty of Paris (1763) was signed, the exigencies of war passed and London began to loosen its grip on Indian affairs. Some colonies gradually assumed more control, with London's acquiescence.³⁷ In 1766, John Stuart, British Superintendent of Indian affairs in the southern colonies, warned that

persons residing as Traders in the Indian Countries being employed by the respective Governors to call Meetings and transact Business for their Provinces without the participation or Interposition of the Superintendent or his Deputy residing in such Indian Country has a tendency to lesson [sic] the Authority and Influence of the Superintendent and his Officers and to destroy that Subordination which is necessary to the Government of the Traders and the Introduction of Order amongst the Indians which I humbly submit. ... every Governor acts as if no other Person had a concern in Indian Affairs and every Province makes Laws for Regulating Indian Trade ... without knowing or attending to the inconveniences with may result thereform.³⁸

Rather than resist, the British government relinquished significant control over matters related to Indian trade to individual colonies in 1768, a move that permitted it to reduce greatly the expenses of the British Indian Department, but which also permitted colonial governments to ignore, and even actually to commit, abuses against Indian communities.³⁹ Indigenous leaders and humanitarians protested this devolution of responsibility to the colonies, especially where legislative assemblies seized

that power. During the late 1830s when humanitarians briefly exercised significant influence over the British Colonial Office, they had opportunity to have their views expressed within government. The British Select Committee on Aborigines recommended in 1837 that

the protection of the Aborigines should be considered as a duty peculiarly belonging and appropriate to the Executive Government, as administered either in this country [Great Britain] or by the Governors of the respective Colonies. This is not a trust which could conveniently be confided to the local Legislatures, ... the settlers in almost every Colony, having either disputes to adjust with the native tribes, or claims to urge against them, the representative body is virtually a party, and therefore ought not to be the judge in such controversies.⁴⁰

Notwithstanding the recommendations of humanitarians and Indigenous leaders, the legislative assemblies of the Maritime colonies, like other British North American colonies formed before 1776, but unlike Upper and Lower Canada, did assume significant control over Indian affairs. In those colonies, the governors essentially delegated their authority to the elected assemblies, which appointed Indian Commissioners, and, as a result, legislation and policy in the Maritime colonies strongly reflected settler interests. For example, New Brunswick, in 1844, and Nova Scotia, in 1859, passed legislation that explicitly gave the legislature the legal authority to remove land from Indian reserves without the consent of the Indians.⁴¹

Québec and the Canadas were different. The governors of Québec (1774–1791) were well positioned to defend Indian peoples against settlers because they were not encumbered with an elected assembly. The constitutions of Upper and Lower Canada (1791–1841) also ensured that the London-appointed governors were less beholden to the assemblies than were governors in other British North American colonies. During the period of the Union of the Canadas (1841–1867), the elected legislature

did gradually assume more power until responsibility for Indian affairs was formally transferred from London to Canada in 1860. That transfer was very controversial. Many, including Indian leaders, feared that the transfer would make the Indian Department vulnerable to the whims of the Canadian elected assembly. Some Indian leaders in the colony of Canada even suggested that it would be better to abolish the Indian Department altogether than to put the control of the department in the hands of the legislature.⁴² The reluctance of the Canadian government to accept responsibility for Indian affairs — probably for financial reasons — appears to have delayed the transfer, although officials in the British government believed that longstanding mutually beneficial relations between Indians and Canadians, and Canada's political maturity, justified the transfer.⁴³ According to John Milloy, as it turned out, the transfer of responsibility did not bring about a significant change in the administration of Indian affairs in the colony of Canada.⁴⁴

Despite 26 years of union, the government of the Province of Canada never merged the Indian Departments (and several other bureaucracies) of Upper and Lower Canada. It passed different legislation, applied different policies, and maintained separate offices until 1867. In sum, the administration of Indian affairs differed significantly among the colonies that formed the Dominion of Canada in 1867. There were distinct traditions in the Maritime colonies, and two Indian Departments and two legislative and policy regimes in the Province of Canada — four distinct bureaucracies and legislative regimes among the three founding colonies.

The lack of records makes it impossible to know whether there was any debate over whether the provinces would retain jurisdiction over Indian affairs at federation, as there had been in the United States. Under the circumstances in which Canadian federation was negotiated, it is not difficult to understand how the negotiators reached a consensus on Section 91(24). Although Indians were no longer important militarily in 1867, the Indian communities in the Province of Canada at least had a long history of economic partnership and military alliance with Euroamericans. The Royal Proclamation of 1763 and land transfer treaties

also tied Indian communities to the British Crown. Negotiators certainly must have understood — especially in light of the controversy over the transfer of responsibility from London to Canada in 1860 — that if the provinces retained responsibility over Indian affairs after 1867, Indian leaders (and the British government) would interpret such a decision as a provocative breach of faith with the British Crown’s historic allies. So, in Canada, as in the United States, the important historic Native-newcomer relationships certainly must have influenced the decision makers.

Other factors also probably played a role. The BNA Act centralized political power more than American or Australian constitutions did. In contrast to the Articles of Confederation and the Australian Constitution, the BNA Act stipulates that all residual powers are vested in the federal government.⁴⁵ Thus, the BNA Act had to include a section (s. 92) that listed those powers delegated to provinces, as well a section identifying those powers vested in the federal government (s. 91). Of course, although vesting residual powers with the federal government was very important, the federal government would still not have had exclusive jurisdiction over Indian affairs unless the BNA Act specifically said it did. Thus, it was decisive that the BNA Act vested “exclusive Legislative Authority . . . to all Matters” related to “Indians, and the Lands reserved for the Indians” to Ottawa. While the provision has not prevented federal-provincial conflict over the management of Indian affairs, interjurisdictional disputes have been less thorny in Canada than in the United States.

Counter-factual history is a risky enterprise, but if we consider why some people in the United States and Australia resisted the federalization of Indigenous affairs, it will be easier to imagine how delegates might have argued that Canadian provinces should retain jurisdiction. The Indians of the Maritime colonies had never been British allies in war, although they had concluded peace treaties with representatives of the Crown. There were no land-transfer treaties in the Maritimes, and the fur trade had long been economically unimportant there by the 1860s. The Maritime colonial governments established and managed Indian reserves very differently than Upper Canadian reserves. Finally,

because the Indian population was small in Nova Scotia and New Brunswick, Maritime delegates could anticipate that Maritime taxpayers would end up paying a disproportionately large share of the expenses of a federal department of Indian affairs. Also, had the colony of British Columbia had delegates at those negotiations, those delegates would have had reasons to insist that, because the circumstances of British Columbia's large Indian population were so distinct, because British Columbia Indian policy was so different than Canadian policies, because the fur trade was still very important in much of British Columbia, and because the headquarters of a federal department was to be so far from British Columbia, British Columbia should retain jurisdiction over its Indian affairs. Finally, negotiators could have argued that because provinces were to retain control over Crown land, education, and health, it would be very difficult for the federal government to administer Indian affairs effectively and efficiently. Even if we discount counter-factual musings, we should acknowledge that writing that "the British North America Act assigned jurisdiction ... to the federal government,"⁴⁶ obscures the fact that *people negotiated* the BNA Act. Writing "those who negotiated the BNA Act decided to transfer control over Indian affairs from the individual colonies to the newly created federal government" better captures reality.

We should also acknowledge that federal politicians and bureaucrats chose how to exercise power over Indian affairs.⁴⁷ Given that the Province of Canada never harmonized Indian affairs in the two halves of the colony before 1867, it was not inevitable that the Dominion government would do so after. Because the federal government had exclusive legislative powers, it could not neglect those powers, but politicians and bureaucrats pursued the harmonization of Indian policies with remarkable zeal. Already in May 1868, after federal bureaucrats had collected information about Indian affairs in the Maritime provinces, the federal government passed legislation that placed the Department of Indian Affairs within the new Department of the Secretary of State, repealed legislation respecting Indians in New Brunswick and Nova Scotia, and extended throughout

the Dominion certain legislation from Upper and Lower Canada.⁴⁸ Thereafter, politicians and officials continued the process of making policy and legislation uniform. Although not often presented this way, the *Indian Act* of 1876 represents an important step in that process.⁴⁹ Thus, although faced with the challenge of harmonizing the very different legislative, administrative, and policy regimes in the provinces, and faced with Indian communities in different circumstances, the Canadian government quickly undertook a process of federalization and harmonization.

Complicating matters, by the time the government passed the *Indian Act* in 1876, Canada's land mass — and its Indigenous population — had increased dramatically. Section 146 of the BNA Act stipulated that, with the agreement of the legislative assemblies of Newfoundland, Prince Edward Island, and British Columbia, and with the agreement of the Queen, Rupert's Land and the "North-western Territory," might be added to the federation. Canada acquired Rupert's Land and the North West Territory in 1870. Two colonies, British Columbia and Prince Edward Island, negotiated entry into the Dominion in 1871 and 1873 respectively. So, only four years after federation, Canada's Indigenous population had more than doubled. Moreover, the circumstances of Canada's Indigenous peoples varied far more than they had in 1867. These different circumstances led the federal government to administer Indigenous affairs differently in different parts of the country. For example, it passed different legislation for Indian communities depending on their level of "advancement." In his annual report of 1872, Superintendent General of Indian Affairs, Joseph Howe (who, as Indian Commissioner in Nova Scotia in the 1840s, had admired Canadian Indian policy), wrote that "in dealing with the new Provinces of British Columbia and Manitoba, and the wide Territories of the North West, it has become already apparent that Indian affairs cannot be managed by the application of the old machinery which has been found to work so well in the Canadas."⁵⁰ Howe overconfidently asserted that "before long the general system of management, tested by the experience of the two Canadas, must be, in whole or in part, extended to those Provinces;

but in the meantime my attention has been directed to such measures as appeared to press for immediate consideration and adjustment.”⁵¹ The very different circumstances of Indigenous peoples, and resistance from and conflict with some Indigenous communities and provinces, made that impossible. For several decades beginning in 1872, the federal government maintained separate superintendencies to administer Indian affairs in British Columbia, and in Manitoba and the North-West Territories. But, although realities prevented the application of a uniform legislative, administrative, or policy regime, the federal government did exercise its exclusive powers in Indian affairs with considerable fervour in the early decades of federation.

In some respects, most notably in the realm of people of mixed Indigenous and European ancestry, Canada’s acquisition of Rupert’s Land very significantly influenced the administration of Indigenous affairs throughout Canada.⁵² As Gerhard Ens and Joe Sawchuck have explained, before 1870, both the American and British North American governments considered (or accepted) “half breeds” as Indian or non-Indian depending on their lifestyles, level of affiliation with Indian communities, and preferences, but they had never had a separate status.⁵³ In the United States, “half breeds” who were not members of an Indian tribe at the time of treaty might be offered scrip at treaty time, but they were thereafter regarded as full citizens of the United States. It was only because of the very effective resistance of some Métis to the expansion of Canadian control over the Red River Colony, that the Canadian government agreed to a number of Métis demands, including adopting the American practice of granting scrip to “half breeds” who were not members of Indian tribes. However, Canada’s agreement to grant 1.4 million acres of land to the children of Métis heads of households, as enshrined in the *Manitoba Act* (1870), resulted in the first “new status category for Natives of mixed ancestry.”⁵⁴ Although the Canadian government intended in 1870 that Manitoba would be an exception in that regard, through a complex process, the Canadian government eventually expanded to other regions its policy of dealing with the Métis as distinct peoples. In fact, beginning in 1899, the govern-

ment even sent out Métis scrip commissions together with treaty commissions.⁵⁵ There is no evidence from the late nineteenth or early twentieth century, however, that anyone contemplated that the Métis fell under 91(24) of the BNA Act.

Negotiating Australian Federation, 1890-1901

The negotiations towards Australian federation unfolded very differently from their American or Canadian counterparts. Negotiations towards an Australasian federation proceeded comparatively slowly (1890–1901), and without great urgency. The Australasian negotiations were more public than either the Canadian or American deliberations. Moreover, unlike Canada and the United States, which were comparatively small at the time of federation but subsequently grew dramatically (in surface area, Indigenous population, and number of states or provinces), Australia comprised an entire continent in 1901, but added no additional states, and virtually no territory, thereafter.⁵⁶ That was not inevitable.

Australian federation was preceded by the Federal Council of Australasia (FCA) (1883–1901), but New South Wales and New Zealand never joined the FCA, and South Australia participated only from 1888 to 1890. So, it was far from inevitable that all of the parties to negotiations would join a Commonwealth. The governments of each colony could decide whether or not to join. While perceived external threats partly explain the formation of the FCA and the Commonwealth of Australia, issues of defence and security against external threats were more urgent during the formations of Canada and the United States.

New Zealand had never joined the FCA, but was party to the crucial early negotiations towards an Australasian federation. New Zealand withdrew from negotiations in 1897, but Article 6 of the Constitution listed (and still lists) New Zealand as a possible state of the Commonwealth of Australia. Thus, New Zealand's interests influenced Australian constitutional negotiations from beginning to end. In 1902, Western Australian parliamentarian, Hugh Mahon, wrote that his inquiries suggested that the provision in the 1901 Constitution that left Aboriginal affairs

in the hands of the states, originated in the insistence of New Zealand negotiators that New Zealand would retain jurisdiction over Maori affairs.⁵⁷ Mahon's information may be incorrect, and, even if correct, probably oversimplifies the negotiations. Still, the involvement of New Zealand, and the prospect — even in 1901 — that New Zealand might still join the federation, does partially explain the decentralized nature of Australian federation. Given the distance between New Zealand and the continent, New Zealanders were particularly leery of a strong central government.

According to James Bennett, New Zealanders in the 1890s held two important beliefs regarding Indigenous peoples that influenced their approach to federation: That Maori were superior to Australia's Aboriginal peoples, and that Maori had been treated better than any other colonized people.⁵⁸ Bennett warned against accepting at face value the many invidious comparisons made by New Zealand delegates, but without dismissing the significance of their perceptions.⁵⁹ It is worth examining them. At the 1890 conference held in Melbourne, Captain William Russell, one of the New Zealand delegates, summarized his view of Maori-Pakeha (settler) history to explain why it would be essential that New Zealand government retain jurisdiction over Maori affairs. He said that

Not only have the settlers had to struggle against the forces of nature, but against a proud, indomitable, and courageous race of aborigines. That native race has been treated in a manner so considerate that the condition of no other native and savage race on the face of the globe can be compared to it.

Their right to their lands was recognised from the first. I do not boast that our public men were more pure in spirit than those of other countries, but as the colonization of New Zealand was effected originally through missionary zeal, through that, to a large extent, our hearts and policy were softened. But in addition to this feeling, the natives could defend their own interests and look down the sights of a rifle better than any other savage people.

They were many, and the white settlers were few, and when our hearts were not softened by the missionary, we were controlled by the thought of the Maoris' numbers, and of their rifles. Therefore we recognised their right to their own land, and instead of confiscating it we admitted their claim to its full possession, administration, and disposal.

Members of the Conference may perhaps ask, why am I giving this short historical sketch? It bears materially upon the question of federation. The whole of New Zealand politics for years hinged almost entirely upon the native question. That question destroyed more Governments than anything else in New Zealand. All turned upon the necessity for keeping the natives at peace, and yet obtaining enough of their lands to further colonization. I am happy to say, and I thank God for it, that the day is past in which there is any probability — nay, any possibility — of another native war occurring. But one of the most important questions in New Zealand politics for many years to come must be that of native administration, and were we to hand over that question to a Federal Parliament — to an elective body, mostly Australians, that cares nothing and knows nothing about native administration, and the members of which have dealt with native races in a much more summary manner than we have ventured to deal with ours in New Zealand — the difficulty which precluded settlement for years in the North Island might again appear.

It is extremely improbable that hostilities would again break out between the natives and the white settlers, but the advance of civilization would be enormously delayed if the regulation of this question affecting New Zealand was handed over to a body of gentlemen who knew nothing whatever of the traditions of the past.⁶⁰

Russell's description of the history of Maori-Pakeha relations is reminiscent of the North American contexts. But Russell used the contrast between the significance of Maori and insignificance of Australian Aboriginal peoples (and their legacies) to defend his argument that Maori affairs had to be managed from New Zealand. The example of New Zealand makes it easy to imagine that, had delegates from British Columbia attended negotiations in Charlottetown and Québec City in 1864, they might have argued that provinces should retain jurisdiction over Indian affairs.

The delegates from the Australian colonies probably agreed with Russell that Indigenous affairs should be a state power. Western Australia saw federation as a way to gain control over its Aboriginal affairs. When the British government granted Western Australia self-government in 1890, it was so concerned about the treatment of Aboriginal peoples there that it did so on the condition that the British Colonial office would continue to oversee Aboriginal affairs in the colony.⁶¹ States with relatively small Aboriginal populations (Tasmania, Victoria, and New South Wales) would not have to subsidize the bureaucracy in the other states. Thus, while Russell argued forcefully against placing Indigenous affairs in the hands of the federal government, and Mahon appears to have been convinced that New Zealand's concerns had been influential, there is no reason to believe that there was any dissent. Indeed, Mahon also identified another factor. He believed that the consensus regarding Indigenous affairs was "probably due to the reluctance of the Federalists to assume a burden rather than to the determination of the States to preserve a right."⁶²

Australasian negotiators always envisioned that a constitution would vest residual powers in the state governments, and that the federal government would not have power to legislate on matters relating to Aboriginal or Maori affairs. It appears as though in each of the constitutional conventions (1890, 1891, 1897, and 1898) and in the eventual Constitution, no serious thought was ever put to the possibility that jurisdiction would be transferred to the Commonwealth.⁶³

In 1891, when participants anticipated that the federation would include New Zealand, clause 33 of the draft constitution stated that the federal government would have

full and exclusive power and authority ... with respect to all or any of the matters following ... 33. The affairs of people of any race with respect to whom it is deemed necessary to make special laws not applicable to the general community; but so that this power shall not extend to authorize legislation with respect to the affairs of the aboriginal native race in Australia and the Maori race in New Zealand.⁶⁴

The position of Indigenous peoples in Australia was very different than it had been in North America. No Indigenous people participated in the drafting of any of the founding constitutional documents, of course, but Aboriginal peoples had experienced far fewer economic and military partnerships with settlers, and had enjoyed far less military importance than Indigenous peoples in North America and New Zealand. Accordingly, representatives of the British Crown had never found it expedient to conclude treaties (either peace treaties or land-cession treaties) with Aboriginal communities in Australia.

The Australian Constitution, 1901

There are noteworthy similarities and differences amongst the founding documents of the Australian, American, and Canadian federations. The Australian Constitution, like the American Articles of Confederation and Constitution, stipulated that all powers not explicitly granted to the federal government were retained by the state governments.⁶⁵ That explains why the Australian Constitution does not have a provision analogous to the BNA Act's 91(24), or the American Constitution's 1(8) that explicitly delegates authority over Aboriginal affairs.

In 1901, the Australian Constitution mentioned Aboriginal peoples in two places. Section 51 included a revised version of the Aboriginal affairs clause first proposed in 1891:

The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ...
(xxvi) The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws.⁶⁶

Meanwhile, Section 127 stipulated that “in reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted.”⁶⁷ This provision did not (as some people have believed) forbid the federal government from including Aboriginal people in its census.⁶⁸ It meant that when population was calculated for the purpose of the allocation of tax money collected by the federal government, and the allocation of seats in the House of Representatives, Aboriginal populations would not be included.⁶⁹ So, it had the same purpose as — and may have been inspired by — Article 1(2) of the United States Constitution (now repealed) which stipulated that when the number of elected representatives was apportioned among the states, “Indians not taxed” would be excluded from the calculations.⁷⁰

Aboriginal Affairs and the Australian Constitution, 1901-1967

The campaign in Australia to federalize Aboriginal affairs sets Australian history apart from Canadian and United States history, but historians of North America should nevertheless be interested in the history of the Australian campaign.⁷¹ It is noteworthy that, during the decades-long, public, and political campaign, advocates for federalization consistently portrayed their cause as a just one: That federalization was in the best interests of Aboriginal peoples, although they also often referred to Australia’s national honour and international reputation. That they never appealed to Australia’s national security interests is unsurprising, but that they never (as far as I have been able to determine) referred the BNA Act or the American Constitution is more surprising. Indeed, the proponents of federalization could

have rebutted many of their skeptics' arguments by reference to Canada and the United States, but appear not to have done so.

A few people soon began calling for constitutional change that would have had the Commonwealth (federal) government assume control over Aboriginal affairs. The campaign, which gathered strength over the decades, attracted advocates from a broad range of Australian society, including politicians and political parties (especially the Labor Party after 1961), bureaucrats (including prominent officials within state departments of Aboriginal affairs such as A.O. Neville), missionaries and church leaders, women's and feminist organizations (including the Australian Federation of Women Voters), humanitarians and reformers, prominent anthropologists and scientific organizations (including A.P. Elkin and the Australian Association for the Advancement of Science), labour unions, and sporting groups.⁷² During the early years, most of these advocates and organizations spoke patronizingly on behalf of (not in concert with) Aboriginal leaders, but grew more likely to cooperate with Aboriginal leaders and organizations as time went on. Beginning in the 1920s, Aboriginal leaders and organizations themselves became increasingly prominent, vocal, and effective activists for federalization. They included Shadrach James (1859–1946), William Cooper (1861–1941), Douglas Nicholls (1906–1988), Bill Ferguson (1882–1950), Bill Onus (1906–1968), and their organizations, ranging from the Australian Aborigines' League (AAL), and Aborigines Protective Association, to the Council for Aboriginal Rights, and the Federal Council for the Advancement of Aborigines, which was renamed the Federal Council for the Advancement of Aborigines and Torres Strait Islanders (FCAATSI) in 1964.⁷³ Aboriginal voices, at least until the late 1950s, were dominated by moderate, educated, Christianized, relatively acculturated Aboriginal leaders. Public support for constitutional change grew haltingly until constitutional change was finally accomplished in 1967.

Because of the amending formula laid out in the Constitution itself, campaigners had to convince federal and state governments to cooperate to hold a referendum that, if passed,

would result in constitutional change. Particularly noteworthy early opportunities to accomplish change arose when a Royal Commission on the Constitution met between 1927 and 1929,⁷⁴ when premiers met in Adelaide in August 1936, and when Aboriginal leaders held their famous Aboriginal Day of Mourning on 150th anniversary of British colonization in Australia (26 January 1938). In each case advocates were disappointed.

Finally, in a 1944 referendum, Australians were asked to approve the transfer of fourteen powers to federal control for a period of five years.⁷⁵ A “yes” vote would have changed s. 51 so that the federal government would “have the power to make laws ... with respect to ... (xiv) the people of the aboriginal race.”⁷⁶ Charlie Fox was probably right when he argued that “the Aboriginal clause was placed last on the list of powers to be transferred in the referendum — underlining its status as an afterthought — and, in the national and state debates about Commonwealth powers in the wider referendum campaign, it was generally marginalised, overshadowed by seemingly weightier issues such as repatriation and employment.”⁷⁷ Most scholars agree that voters almost certainly would have approved the Aboriginal clause if they had been asked to vote on each of the fourteen powers separately, but because voters rejected the entire package, the proposal relating to Aboriginal affairs failed.⁷⁸ Had the Aboriginal clause passed, the wording of the Australian Constitution would have been similar to the wording of Article 1(8) of the American Constitution: It would not have stipulated that the federal government had sole and exclusive authority in Aboriginal affairs, but neither would it have explicitly given states any power over Aboriginal affairs. We can only speculate as to how the Australian state and federal governments or High Court would have interpreted the amended clause.

The referendum that finally did amend the Constitution occurred in 1967. However, a “yes” vote in the 1967 referendum changed the Constitution very differently than a “yes” vote would have in 1944. The actual referendum question was vague: “Do you approve the proposed law for the alteration of the Constitution entitled — ‘An Act to alter the Constitution so as to omit

certain words relating to the People of the Aboriginal Race in any State and so that Aboriginals are to be counted in reckoning the Population?”⁷⁹ In other words, the “yes” vote resulted in striking all of section 127 that stipulated that “in reckoning the numbers of people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives shall not be counted,” and striking eight words from section 51 as follows: “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: ... (xxvi) The people of any race, ~~other than the aboriginal race in any State~~, for whom it is deemed necessary to make special laws.” So, the “yes” vote in 1967 resulted in the elimination of all references to Aboriginal affairs or Aboriginal people from the Australian Constitution. That fact offers an important clue as to the government’s intentions.

Because of the long history of activism, the vague referendum question, and the lack of any campaign for a “no” vote, it is understandable that many Australians were, and still are, uncertain about the intent and effect of the 1967 referendum.⁸⁰ By 1967, potential change to section 51(26) had become so closely associated with the goal of federalizing Aboriginal affairs, that it was easy to assume that the referendum would accomplish that goal. In fact, much evidence suggests that the federal government had very different goals in mind in 1967. Historians of North America will see that the Australian government’s goals were very similar to the goals of American and Canadian governments at about the same time.⁸¹

A sample of some of the arguments made during the long federalization campaign helps explain why many Australians assumed that any change to the Aboriginal clause would result in federalization. Already in 1902, the enigmatic Australian Labour Party Member of Parliament for Coolgardie, Hugh Mahon argued that as long as Section 51 remained unchanged, “the Federation is powerless to ameliorate the condition of the natives — or to take effective steps, should such be necessary, to vindicate the ways of the white man towards them.”⁸² He continued:

The aboriginal demands, sympathetic but undeviating treatment. Centralisation would give that; and, in addition, promote economy and efficiency; while also, it may be hoped, infusing a little more humanity into the management of the natives ... The national executive is not amenable to the influence of those who profit by the serfdom of the natives. To at least five constituencies in Western Australia the continuance of this system was of great importance. The State Ministry could not always afford to disregard the votes of the five gentlemen who represented these districts. ... The Commonwealth must shoulder a share of the "white man's burden" in these seas. ... no local interest is strong enough to intimidate it [a national government] from a policy dictated by humanity, and which will redeem the good name of Australia. The expectation is also based on experience of Imperial administration. It is true of more than one colony that the natives were treated with greater clemency before the concession of responsible government than after.⁸³

Similarly, proponents of change argued before the Royal Commission on the Constitution (1927–29) that federal control would facilitate uniform policies and administration, would reduce the influence of local interests hostile to Aboriginal peoples, would ensure better funding, and would improve Australia's image in the world.⁸⁴

In anticipation of the 1936 Premiers' conference, William Cooper wrote a letter on behalf of the AAL calling for federalization of Aboriginal affairs:

We do plead for one controlling authority, the Commonwealth and request that all aboriginal interests be absolutely federalised. This will enable a continuous common policy of uplift, which we trust will contain provision for the exploitation of all natives' reserves by the natives. ... We plead for this, but if the Premiers are not willing to lose a responsibility they do not wish to retain

we plead for a common policy under Commonwealth control or influence with a subsidising of the States on the aboriginal per capita basis. We have no hope where the States with large aboriginal populations cannot adequately finance their obligations and the States with small aboriginal populations, or none, as in the case of Tasmania, should not be freed from responsibility.⁸⁵

During the famous Aboriginal Day of Mourning, held in January 1938 to protest celebrations of the 150th anniversary of British colonization of Australia, one of the demands of the Aborigines Progressive Association was for “a National Policy for Aborigines” and “Commonwealth Government control of all Aboriginal Affairs.”⁸⁶

There is little doubt that the 1944 referendum was about federalization. In the lead-up to the 1944 referendum, Attorney-General, H.V. Evatt asserted that “Few will deny that the care and welfare of the Australian aborigines should, in principle, be a national responsibility.”⁸⁷ Also in the lead-up to the referendum, A.P. Elkin published a 109-page pamphlet that stated the case for federalization. For example, he explained four main reasons for federalizing, and three possible approaches to federalization (including two that could be pursued even if the referendum failed).⁸⁸ Even if the referendum had passed, it is unlikely that the federal government would have attempted to develop and administer one national Aboriginal policy regime.

Even as late as 1964, Billy Snedden, Attorney General in Robert Menzies’ government, said words in the House of Representatives, that show that he assumed that changes to the Constitution would result in the federalization of Aboriginal affairs (something he opposed):

the problems of the Victorian aboriginal natives are vastly different from those of the aborigines in the Northern Territory or in north-west Western Australia. At present the States have the power. If this proposed change were accepted it would create a situation where the Commonwealth was vested with power which, if it

chose to exercise it, would take away the power of the States. ... There would be no point in going through this procedure unless the Commonwealth were to exercise the power and I am sure that I could not contemplate a situation where that is desirable.⁸⁹

Finally, even during the 1967 referendum campaign FCAATSI leaders, such as Jack Horner and Faith Bandler, publicly stated that a “yes” vote would result in the federal government taking responsibility for Aboriginal affairs (although they also used the rhetoric of equal rights).⁹⁰ Clearly then, the close connection between the drive to change s. 51(26) and the federalization of Aboriginal affairs was so longstanding by the mid-1960s that many activists must have seen the 1967 referendum as the government’s acceptance of that aim. If so, they were mistaken.

Beginning in the late 1950s, civil rights and equal rights activists put forward new arguments in favour of constitutional amendment.⁹¹ The influential socialist and feminist, Jessie Street, and the Australian Federation of Women Voters (AFWV) called for constitutional change, not so that the federal government would take responsibility for Aboriginal affairs, but so that Aboriginal people would achieve equal rights. Street incorrectly argued that changes to the Constitution would end racial discrimination and give Aboriginal people citizenship.⁹² From that time on, the discourse of full equality, full citizenship, and anti-discrimination co-existed with (although dominated) the discourse of federalization. When the government of Harold Holt proposed to amend the Constitution in 1967, it adopted the goals and rhetoric of anti-discrimination, equality, and full citizenship, not of federalization.

Attorney General Billy Snedden had opposed constitutional change in 1964, but suddenly proposed it to cabinet in 1965. Why? Cabinet minutes show that when Snedden proposed the referendum bill to cabinet in 1965, “he informed his colleagues that it was very unlikely the government would want to use the new powers it would obtain by the amendment of this section [51] of the Constitution.”⁹³ Even thus reassured, the cabinet

balked. It was only after Harold Holt replaced Robert Menzies as prime minister in 1966, that the inertia was broken. Holt, eager to set himself apart from his long-serving predecessor, proceeded towards referendum.⁹⁴ Even then, there was opposition within cabinet. Charles Barnes, Minister for External Territories, feared that if the referendum succeeded, “the Commonwealth would have to take responsibility for Aboriginal welfare throughout the Commonwealth . . . or be subjected to increasing criticism for not doing so.”⁹⁵ Barnes was right to be worried. After the referendum, Australian governments have often been criticized for failing to take responsibility for Aboriginal affairs. However, the Holt government clearly intended that a “yes” vote in 1967 would have a very different result than a “yes” vote would have had in 1944.

What is striking is that advocates for federalization appear not to have protested the proposed wording in 1967. They appear never to have suggested that the language used in 91(24) of the BNA Act, or Article 1(8) of the American Constitution should be used as a model for change to 51(26). They did not even call for the wording of the 1944 referendum.⁹⁶ Granted, had they insisted, the Holt government certainly would have refused. Perhaps advocates for federalization, including those within FCAATSI, hoped that Charles Barnes’ fears could be made real: that political pressure would force the federal government to assume responsibility for Aboriginal affairs after 1967.⁹⁷

Snedden did convince his cabinet colleagues to proceed with the 1967 referendum, but there is no reason to believe that Harold Holt did so with any intention of taking responsibility for Aboriginal affairs. Holt had no record as an advocate for Aboriginal peoples. In his memoirs, Paul Hasluck, expressed dismay that Holt received any credit on Aboriginal issues: “In sixteen years with him in Cabinet I had never known him to show any interest in Aborigines and when he was Treasurer from December 1958 to January 1966 he had certainly been much less responsive than [Aurthur] Fadden had been to my bids for funds for Aborigines.”⁹⁸ Hasluck himself did not believe that the federal government should assume responsibility for Aboriginal affairs, even if he believed that the federal government’s role should

grow.⁹⁹ Moreover, Hasluck believed that few Australians voted “yes” in 1967 expecting their vote to result in federalization:

My view is that the large majority who voted for a change were expressing a strong opinion that more should be done for Aborigines and that any appearance of discrimination against them should be removed. I doubt whether the voters were making a considered judgement on the question of Federal and State powers or that they required the Federal Government to take the principal role in the administration of aboriginal affairs.¹⁰⁰

The material given to Australians in preparation for the referendum certainly supports Hasluck’s interpretation. That material explained what a “yes” vote would mean:

First, it will remove words from our Constitution that many people think are discriminatory against the Aboriginal people.

Second, it will make it possible for the Commonwealth Parliament to make special laws for the people of the Aboriginal race, wherever they may live, if the Parliament considers it necessary.¹⁰¹

Although almost 90 percent of Australians did vote “yes,” many must have been unsure or mistaken about what they were voting for. Some long-time proponents of federalization did try to lower people’s expectations. In a column in the *Sydney Morning Herald* shortly before the vote, A. P. Elkin supported a “yes” vote but cautioned readers about what a “yes” vote would mean: “The States as a whole have not been prepared to hand over to the Commonwealth the administration of Aboriginal affairs, nor are they willing to do so now.”¹⁰²

Attwood and Markus concluded that “the government’s belated decision to conduct the referendum was a rather uninterested, even cynical, one that had little if anything to do with any program of change in Aboriginal affairs, and much more to do with maintaining the status quo, shoring up the government’s

position at home, and bolstering Australia's image abroad."¹⁰³ Those familiar with North American history could add one more apparent motivation. The Holt government's actions and rhetoric were consistent with liberal-individualist governments' efforts in North America to make Indigenous people constitutionally and statutorily indistinguishable from non-Indigenous people. Or, stated differently, the goals and rhetoric of the Holt government in 1967 were strikingly like the goals and rhetoric associated with the American government's assimilationist Termination Policy.¹⁰⁴ Oddly, although not officially repudiated until 1970, Termination's days were numbered in 1967, thanks to rising Indian protests. Two years after the referendum, Pierre Trudeau's Canadian government espoused the same goals, and used the same rhetoric in its 1969 White Paper.¹⁰⁵ Within a year, Trudeau retreated from his policy proposal in the face of opposition and protest. Still today, among Aboriginal leaders in the United States and Canada, the words "termination" and "White Paper" are short-hand for governments' assimilationist agendas. Australia's 1967 referendum did not result in federalization, because federalization was not the government's goal. It is ironic, then, that resistance eventually defeated "equal citizenship" policies in North America, while many Australian Aboriginal people cheered the results of the 1967 referendum with euphoria.¹⁰⁶

Not surprisingly, Harold Holt and his Liberal-Country coalition successors did nothing to seize any of the federal government's expanded powers. Holt gave himself the responsibility for and created a three-member Council for Aboriginal Affairs, consisting of three non-Indigenous people, including the prominent economist and public servant, H. C. (Nugget) Coombs as Chair, and anthropologist, W. E. H. Stanner, and diplomat, Barrie Dexter as members. The council was instructed "to advise the Government in the formulation of national policies for the advancement of the aboriginal citizens of Australia."¹⁰⁷ Holt also created an Office of Aboriginal Affairs (with Dexter in charge) to service that council.¹⁰⁸ However, Holt made it clear that the government was intent on maintaining the status quo.¹⁰⁹ After Holt died suddenly in late 1967, his successor, John Gorton (1968–1971) handed responsi-

bility for Aboriginal affairs to the Minister of the Environment, with W. C. Wentworth as minister.¹¹⁰ Then, during his short term, William McMahon (1971–1972) created a Department of the Environment, Aborigines, and the Arts — surely one of the most unusual combinations of portfolios ever shoehorned into one department — with Peter Howson as minister.

Gough Whitlam and the Labor Party made much of the government's inaction. During the 1972 election campaign, a time of considerable Aboriginal activism in Australia, Whitlam stated that "in 1967 we, the people of Australia, by an overwhelming majority imposed upon the Commonwealth the constitutional responsibility for aborigines and Torres Strait Islanders. The Commonwealth Parliament has still not passed a single law which it could not have passed before and without that referendum." He promised that, if elected, "there will be a separate Ministry for Aboriginal Affairs; it will have offices in each State to give the Commonwealth a genuine presence in the States."¹¹¹ The election of Whitlam ushered in what one scholar described as a period of "legislative zeal."¹¹² The Department of Aboriginal Affairs was created in December 1972, with Gordon Bryant as minister. The *Aboriginal Affairs (Arrangements with the States) Act* of 1973 signalled an intent to increase federal government involvement in and provided for the possibility that the federal government would take over responsibility (with the agreement of states).¹¹³ Whitlam's government also passed legislation overriding discriminatory state legislation, and outlawing discrimination on the basis of race. That period of zeal ended in 1975 with the end of Whitlam's government, and the federal government has never assumed responsibility for Aboriginal affairs in any way comparable to the federal governments in North America.

Opinions have been divided on the result of the 1967 referendum. In 1981, Matt Foley argued that "The only conclusion we can come to is that the Federal Government must be made to do the job the people of Australia asked it to do via the 1967 referendum."¹¹⁴ Paul Hasluck disagreed. In 1988, he decried the growth of the federal department:

The original intention in the creation of Council and the Office of Aboriginal affairs appears to have been that it would advise and co-ordinate policy and provide for Federal-State consultation and there does not seem to have been any plan to create a new department. ... In less than ten years the new Department had proliferated all over the continent, with warrens on every bare hillside — a Central Office in Canberra, Regional and Area offices in all States and at least a dozen commissions, councils, conferences and institutions studying, arguing, consulting, and drawing their travelling allowances and sitting fees. Money glistened everywhere like flowers in the desert after rain.¹¹⁵

In 1989, Scott Bennett summed up the legacy of the 1967 referendum in the following way:

When we look at the history of Commonwealth-State activity in Aboriginal affairs [in Australia] since 1967, we might well wonder whether a massive, if unintentional confidence trick was played on Aborigines in the referendum. The overwhelming message of the 1967 campaign was of a new dawn for Aborigines because of the coming involvement of the Commonwealth in their affairs, but there is no evidence of anyone attempting to alert Aborigines to the pitfalls placed in the path of reformers by the presence of the federal system.¹¹⁶

There was, however, nothing unintentional about the Holt government's plan. It seems that the cause of Indigenous peoples in all three countries was swept up by a broad movement for civil rights that included women's liberation and racial equality (the fact that Australian Indigenous peoples are also "Blacks," adds to the complexity of the Australian context).¹¹⁷ Those who advocated for special (not merely equal) Aboriginal rights made little headway until the last years of the 1960s — in time to block the terminationist agendas of the Canadian and American govern-

ments, but not before a major goal of the terminationists had been accomplished in Australia.¹¹⁸

Moves towards Provincialization and Federalization in Canada, 1924–2016

Australia's government was not the only federal government seeking to avoid responsibility for Indigenous affairs. Canadian and American governments also unsuccessfully attempted to "terminate" federal departments of Indian affairs during the 1950s and 1960s. By that time, the Canadian federal government had already grown averse to including Indigenous peoples under 91(24). There were few if any "Eskimos" (Inuit) within Canada's 1867 boundaries, but that changed thanks to territorial expansion in 1870 and 1880. As the reach of the Canadian state expanded northward, the government had to decide how to deal with "Eskimos." William Lyon Mackenzie King's government introduced an amendment to the *Indian Act* in 1924 that proposed to treat "Eskimos" as status Indians, but, responding to pressure from the opposition, revised the legislation to state merely that the Superintendent of Indian Affairs would have "charge of Eskimo affairs."¹¹⁹

By the 1930s, the federal government sought to divest itself completely of responsibility for the Inuit within the provinces. That provoked a dispute with the government of Québec, which insisted that the federal government take responsibility. Thus, the federal and Québec governments referred the following question to Supreme Court: "Does the term 'Indians,' as used in head 24 of section 91 of the *British North America Act*, 1867, include Eskimo inhabitants of the Province of Québec?" The Supreme Court decided in the affirmative, thus federalizing Eskimo affairs.¹²⁰ Nevertheless, the government administered the Inuit as though they had the same rights and responsibilities as non-Indians. When the government passed the amended *Indian Act* of 1951, it clarified that "a reference in this Act to an Indian does not include any person of the race of aborigines commonly referred to as Eskimos."¹²¹

The federal government also avoided taking responsibility for the Indigenous peoples of Newfoundland when that colony joined Canada in 1949. Newfoundland had never created any apparatus or legislation specific to Indigenous peoples; there had been no special department, no treaties, and no reserves.¹²² An early draft agreement stipulated that when Newfoundland became a province, “the Indians and Eskimos ... would be the sole responsibility of the federal government.”¹²³ However, in September 1948, officials in the Canadian Department of Indian Affairs (DIA) suggested that it would be improper to place people who had never had any special legal status under the *Indian Act*.¹²⁴ According to Adrian Tanner, DIA officials believed that applying the *Indian Act* in Newfoundland would undermine the aim of assimilation, while incurring large additional costs for the federal government.¹²⁵ In October 1948, K. J. Carter, Newfoundland Secretary of Natural Resources, agreed that Canada would transfer money to the government of Newfoundland for the purposes of administering Indigenous peoples, but that “it would be a retrograde step to bring the Indians and Eskimos under the restrictive provisions of the Indian Act.”¹²⁶

Tanner attributed Newfoundland’s acquiescence to the fact that Newfoundland did not consider Aboriginal issues to be a high priority.¹²⁷ Yet, reflecting in 1998 on the arrangement, he concluded that “it is difficult to make a convincing case that Newfoundland, by following this distinctive policy, ... has benefited from this decision.”¹²⁸ David MacKenzie has observed that the decision, made without consultation with Indigenous leaders, was prelude to decades of lobbying on the part of those leaders: “Over the years the issue grew into one of great significance to the native peoples of Newfoundland, especially among those who felt excluded and denied the benefits and services accorded to other aboriginal people in Canada.”¹²⁹ Indeed, over time, the federal government did take more responsibility for Indigenous affairs in the province. In 1984, the Mi’kmaq at Conne River (Miawpukek) became a band under the *Indian Act*, and in 1997, after tragic circumstances at Davis Inlet made interna-

tional headlines in 1992 and 1993, the federal government took responsibility for the Innu in Labrador.¹³⁰

The process of federalization of Indigenous affairs continued into the very recent past. On 14 April 2016, the Supreme Court of Canada rendered its ruling in the Daniels case.¹³¹ In that case, the plaintiffs sought a declaration that “that Métis and non-status Indians are ‘Indians’ under s. 91(24).” That it was plausible that the Supreme Court might make such a declaration was the result of long and complicated historical processes and events, perhaps none more significant than that Section 35 (2) of Canada’s *Constitution Act* of 1982, which stipulates that “‘the aboriginal peoples of Canada’ includes the Indian, Inuit, and Metis peoples of Canada.”¹³²

Courts, of course, make legal, not anthropological or historical decisions. So, we might say that the court ruled that the word “Indian” in 91(24) should now be interpreted to include all aboriginal people. The “Reasons for Judgment,” written by J. Abella, state that “both federal and provincial governments have, alternately, denied having legislative authority over non-status Indians and Métis. . . . This results in these Indigenous communities being in a jurisdictional wasteland with significant and obvious disadvantaging consequences.”¹³³ This ruling might have caused considerable disruption, given that section 91(24) explicitly extends *exclusive* authority of the federal government to Indians. One might expect that the court would have declared all provincial legislation relating to Métis people invalid, and that for the future, provincial governments were unable to legislate on matters relating to the Métis. But, the court ruled that federal jurisdiction “does not mean that all provincial legislation pertaining to Métis and non-status Indians is inherently *ultra vires*.”¹³⁴ In essence, the court ruled that the term “Indian” in 91(24) “can be equated with the term ‘aboriginal peoples of Canada’” as used in the Constitution Act of 1982, but that in Métis affairs, the federal and provincial governments share powers.

Conclusion

When placed in the context of earlier developments in the United States and subsequent developments in Australia, the fact that the BNA Act immediately and unambiguously vested Indian affairs with the Canadian federal government, and that the government attempted to develop one uniform administration of Indian affairs, takes on significance that Canadian historians have overlooked. Even if we assume that delegates never seriously considered a possibility other than federal control in Canada, we might view Canadian history differently when we realize that delegates never seriously considered anything but state control in Australia, and that federal and state control evolved in complex ways in the United States. The consequences in the three countries were significant.

It is impossible to know whether it is more true that the long Australian federalization campaign deflected people's attention away from other pressing Aboriginal issues, or that the constitutional issue inspired activists (Aboriginal and non-Aboriginal) who otherwise might not have become politically active. But, it is significant that activists in Australia expended countless hours, incalculable expense, and immeasurable energy in a failed attempt to achieve constitutional provisions that existed in Canada at the moment of federation, and in the United States without a large public campaign.¹³⁵

Despite the significant differences, however, there are common themes in the history of the three countries. Canadian and American history may be less distinct from Australian history than Biskup and Attwood and Markus assumed. The evidence presented in this article suggests that negotiators were influenced by the degree to which Aboriginal peoples had been significant to colonial economies, national security, and imperial and international rivalries when they decided whether or not Indigenous affairs should be federalized in any jurisdiction. Where Aboriginal peoples had developed formal connections with the British Crown (as economic partners, military allies or enemies, and as

treaty partners) it would have been provocative to undermine the connection at federation.

Time, however, also appears to have been a factor. In each country, Indigenous leaders themselves consistently argued that national governments, not state or provincial governments, should take responsibility for Indigenous affairs. Over time, and especially after World War II, federal governments increasingly sought to avoid extending their jurisdiction over Indigenous peoples, and sought to divest themselves of special powers where they existed. After World War II, politicians and the public (including to some extent, Aboriginal peoples) in all three countries perceived that older Indigenous policies had failed, that assimilation was the proper goal of Indigenous policies, and that the avoidance of or elimination of all constitutional and statutory distinctions between Indigenous and non-Indigenous peoples not only served the goal of assimilation, but was just and fair. Thus, policies in all three countries geared towards the termination of all statutory Indigenous status, were manifestations of an international equal rights movement. Canada's 1969 White Paper has parallels in the United States and Australia.

TED (THEODORE) BINNEMA is Professor of History at the University of Northern British Columbia, where he teaches and researches Indigenous and environmental history in comparative and transnational perspective.

TED (THEODORE) BINNEMA est professeur d'histoire à l'University of Northern British Columbia, où il enseigne et effectue des recherches sur l'histoire des Autochtones et de l'environnement dans une perspective comparative et transnationale.

Endnotes

- 1 In a historical/legal/constitutional study such as the present one, it is essential that I use terms such as *Indian*, *Indian Affairs*, *Eskimo*, and *half breed*, rather than more contemporary terms.
- 2 *Australian Constitution* (1901), s. 51 (26).
- 3 J.R. Miller, *Skyscrapers Hide the Heavens: A History of Indian-White Relations in Canada* 4th ed. (Toronto: University of Toronto Press, 2018), 162. On page 123, Miller sarcastically adds that “Indigenous peoples in the Province of Canada knew by now what could be expected from that quarter.”
- 4 Arthur J. Ray, *I Have Lived Here since the World Began: An Illustrated History of Canada’s Native People* Rev. 4th ed. (Kingston and Montreal: McGill-Queen’s University Press, 2016). This neglect of the BNA Act in general surveys reflects the neglect of the provision in more focussed scholarly literature. See Sidney L. Haring, *White Man’s Law: Native People in Nineteenth-Century Canadian Jurisprudence* (Toronto: University of Toronto Press, 1998), 104, 126; James Douglas Leighton, “The Development of Indian Policy in Canada, 1840–1890,” (Ph.D. diss., University of Western Ontario, 1975); John L. Tobias, “Protection, Civilization, Assimilation: An Outline History of Canada’s Indian Policy,” in *As Long as the Sun Shines and Water Flows: A Reader in Canadian Native Studies*, ed. Ian A. L. Getty and Antoine S. Lussier (Vancouver: University of British Columbia Press, 1983), 39-55; and John S. Milloy, “The Early Indian Acts: Developmental Strategy and Constitutional Change,” in *ibid.*, 56-64; L. F. S. Upton, *Micmacs and Colonists* (Vancouver: University of British Columbia Press, 1979), 172.
- 5 She argued that federation “marked a turning point in the intertwined history of settlers and Aborigines in Australia.” Patricia Grimshaw, “Federation as a Turning Point in Australian History” *Australian Historical Studies* 33, No. 118 (2002): 26.
- 6 Grimshaw, “Federation as a Turning Point,” 41. Grimshaw’s characterization is out of step with the more nuanced scholarship published before and after 2001.
- 7 Peter Biskup, *Not Slaves, Not Citizens: The Aboriginal Problem in Western Australia, 1898–1954*. (St Lucia: University of Queensland Press, 1973), 52.
- 8 Bain Attwood and Andrew Markus, *The 1967 Referendum: Race, Power and the Australian Constitution*, 2nd ed. (Canberra: Aboriginal Studies Press, 2007), 3. Biskup and Attwood and Markus oversimplify the history of Canada and the United States, but their main point is valid. At Australian federation, the United States, Switzerland, and Canada offered the only existing models of federal constitutions. For a discus-

- sion regarding the degree to which the United States and Canadian precedents influenced the Australians, see J. A. La Nauze, *The Making of the Australian Constitution* (Melbourne: Melbourne University Press, 1971), v, 4, 5, 14-18, 24-8, 49-52.
- 9 See William C. Wicken, *Mi'kmaq Treaties on Trial: History, Land, and Donald Marshall Junior* (Toronto: University of Toronto Press, 2002), *passim*, but see especially, 61-4, 140-59. To understand the process by which colonies, and particularly legislative assemblies within colonies, gathered power to themselves, see Jack P. Greene "The Role of the Lower Houses of Assembly in Eighteenth-Century Politics," *Journal of Southern History* 27 (1961): 451-474, and James Henretta, *"Salutary Neglect": Colonial Administration under the Duke of Newcastle* (Princeton: Princeton University Press, 1972). Wicken (141) recognized that "salutary neglect" had a significant effect on the administration of Indian affairs in the Maritime colonies before 1755.
 - 10 Wilbur R. Jacobs, ed., *The Appalachian Indian Frontier: The Edmond Aitken Report and Plan of 1755* (Lincoln: University of Nebraska Press, 1967), especially 3-4, 7-9, 78-9.
 - 11 Anthony J. Hall, "The Red Man's Burden: Land, Law, and the Lord in the Indian Affairs of Upper Canada, 1791-1858," (Ph.D. diss., University of Toronto, 1984), 30.
 - 12 Articles of Confederation, s. 2.
 - 13 Francis Paul Prucha, *The Great Father: The United States Government and the American Indians* (Lincoln: University of Nebraska Press, 1984), 36.
 - 14 Prucha, *The Great Father*, 35-6.
 - 15 Benjamin Franklin's Articles of Confederation, July 21, 1775, *Journals of the Continental Congress 1774-1779* (hereafter *JCC*), 2: 197-8. Found online at http://avalon.law.yale.edu/18th_century/contcong_07-21-75.asp <Accessed 30 October 2018>.
 - 16 Article 18, John Dickenson's Articles of Confederation and Perpetual Union, 12 July 1776, *JCC*, 5: 546-54. Found online at http://avalon.law.yale.edu/18th_century/contcong_07-12-76.asp <accessed 30 October 2018>
 - 17 *JCC*, 6: 1078,1077-78 (26 July 1776).
 - 18 *JCC*, 6: 1078, 1079 (26 July 1776).
 - 19 *JCC*, 6: 1077 (26 July 1776).
 - 20 Articles of Confederation (1 March 1781), Article 9.
 - 21 Articles of Confederation (1 March 1781), Article 6.
 - 22 Committee Report on the Southern Department, 3 August 1787, in *Documents of United States Indian Policy* 2nd ed., ed. Francis Paul Prucha (Lincoln: University of Nebraska Press, 1990), 11. For a discussion, see Stephen J. Rockwell, *Indian Affairs and the Administrative State in the Nineteenth Century* (New York: Cambridge University Press, 2010), 53.

- 23 Prucha, *The Great Father*, 50. Prucha's sentence would have been more accurate if he had replaced "left in" with "transferred to."
- 24 Rockwell reminds us that, in the context in which a rebellion to throw off the authority of a centralizing British government was a recent memory, the drafters of the Constitution had to worry about public reaction to a centralizing Constitution. Rockwell, *Indian Affairs and the Administrative State*, 51.
- 25 It should be noted that the Tenth Amendment (1791) of the United States Constitution stipulates that "the powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people." Thus, it was possible to argue that federal and state governments had concurrent powers in Indian Affairs, particularly in matters not related to commerce.
- 26 Alan Taylor, *The Divided Ground: Indians, Settlers, and the Northern Borderland of the American Revolution* (New York: Vintage, 2007), 307.
- 27 Prucha, *The Great Father*, 164. The policy of "civilization" received considerably more emphasis after 1824.
- 28 Stephen Aron, "Lessons in Conquest: Towards a Greater Western History," *Pacific Historical Review* 63 (1994): 139.
- 29 See for example Taylor, *Divided Ground*, especially, 23-42, 302-09, 390-2.
- 30 The complex process is discussed in Rockwell, *Indian Affairs and the Administrative State*, 55-62.
- 31 Daniel Walker Howe, *What Hath God Wrought: The Transformation of America, 1815-1848* (New York: Oxford University Press, 2007), 346. A perusal of the *Acts of the General Assembly of the State of Georgia* reveals that the State began passing acts in 1828. See "An Act to protect the Frontier Settlements of this State from the intrusion of the Indians of the Creek Nation," and "An Act to add the Territory lying within the limits of this State, and occupied by the Cherokee Indians, to the counties of Garroll, DeKalb, Gwinnett, Hall and Habersham," *Acts of the General Assembly of the State of Georgia 1828* (Milledgeville: Camak & Ragland, 1829), 87-88; "An Act to add the Territory lying within the chartered limits of Georgia, and now in the occupancy of the Cherokee Indians, to the counties of Carroll, DeKalb, Gwinnett, Hall and Habersham," *General Assembly of the State of Georgia 1829* (Milledgeville: Camak & Ragland, 183), 98; "An Act to prevent the exercise of assumed and arbitrary power, by all persons under pretext of authority from the Cherokee Indians, and their Laws," and "An Act to declare void all contracts hereafter made with the Cherokee Indians, so far as the Indians are concerned," *Acts of the General Assembly of the State of Georgia* (Milledgeville: Camak & Ragland, 1831), 114-18. Also at stake here, was Georgia's frustration that the United States had not yet lived up to

- commitments made in 1802. In 1802, Georgia relinquished its western land claims on the condition that the federal government, at its own expense, would extinguish Indian land title in the state. See Ronald N. Satz, *American Indian Policy in the Jacksonian Era* (Lincoln: University of Nebraska Press, 1974), 3.
- 32 Howe, *What Hath God Wrought*, 348-50.
- 33 Prucha, *The Great Father*, 51.
- 34 Rockwell, *Indian Affairs and the Administrative State*, 143.
- 35 United States Congress, "An Act to Provide for the Appointment of a Commissioner of Indian Affairs, and for Other Purposes," 4 Stat. 564, chap. 174. Also found in Charles J. Kappler, *Indian Affairs: Laws and Treaties* (Vol 1, *Laws*), Washington: Government Printing Office, 1904), 1-2.
- 36 United States Congress, "An Act to Provide for the Organization of the Department of Indian Affairs," 4 Stat. 735, chap. 162. Also found in Prucha, *Documents of United States Indian Policy*, 68-71; Prucha, *Great Father*, 294-302. In some minor respects, there has been defederalization since then. For example, in 1953, the United States Congress passed Public Law 83-280 (67 Stat. 588), which handed to certain states, certain powers (criminal jurisdiction over American Indians on reservations, and civil litigation that had until then been handed by tribal or federal courts).
- 37 Paul Chrisler Phillips, *The Fur Trade*, Vol. 1 (Norman: University of Oklahoma Press, 1961), 569-72.
- 38 William L. Saunders, ed., *The Colonial Records of North Carolina*, Vol. 7 (1765-1768) (Raleigh: Josephus Daniels, 1890), 234, 240.
- 39 Phillips, *Fur Trade*, 1: 583, 615-22; Julian Gwyn, "Sir William Johnson," *Dictionary of Canadian Biography* Vol 4 (1979), 396.
- 40 Great Britain, Parliament, House of Commons. *Report of the Parliamentary Select Committee on Aboriginal Tribes, (British Settlements)* (Cape Town: C. Struik, 1966 [1837]), Vol. 1, Part 2, 77.
- 41 See "An Act to Regulate the Management and Disposal of the Indian Reserves of this Province." Statutes of New Brunswick, 1844, c. 47; and "An Act Concerning Indian Reserve," Statutes of Nova Scotia, 1859, c. 14. For a survey of Indian policy history in the Maritimes, see L.F.S. Upton, *Micmacs and Colonists: Indian-White Relations in the Maritimes, 1713-1867* (Vancouver: University of British Columbia Press, 1979), esp. 81-113, 171-81.
- 42 John S. Milloy, "The Era of Civilization: British Policy for the Indian of Canada, 1830-1860," (D.Phil. diss., Oxford University, 1978), 316, 326-333.
- 43 Milloy, "Era of Civilization," 32-9; Leighton, "Development of Indian Policy," 182.

- 44 Milloy, "Era of Civilization," 333.
- 45 BNA Act, 1867, s. 91: "It shall be lawful for the Queen, by and with the Advice and Consent of the Senate and House of Commons, to make Laws for the Peace, Order, and good Government of Canada, in relation to all Matters not coming within the Classes of Subjects by this Act assigned exclusively to the Legislatures of the Provinces."
- 46 J.R. Miller, *Skyscrapers Hide the Heavens*, 197.
- 47 My interpretation here is inspired by the fact that in 1944 A. P. Elkin discussed "three possible forms [parallelism, convergence, and unification] of control for the administration of a national policy for Aborigines in Australia." A. P. Elkin, *Citizenship and the Aborigines: A National Aboriginal Policy*, (Sydney: Holland & Stephenson, 1944), 54-58.
- 48 *An Act Providing for the Organization of the Department of the Secretary of State and for the Management of Indian and Ordnance Lands*, Statutes of Canada, 1868, c. 42.
- 49 In 1949, the Australian scholar, A. Grenville Price wrote that "there is only one Indian Act and Indian administration in the Dominion and the simplicity of the Canadian system has won the envious praise of expert observers from the United States." A. Grenville Price, *White Settlers and Native Peoples* (Melbourne: Georgian House, 1949), 81.
- 50 Joseph Howe, *Annual Report on Indian Affairs*, 1872 (Ottawa: I. B. Taylor, 1873), 2. Howe was critical of the pre-federation management of Indian affairs in the Maritimes but explained (p. 2) that he had tried to introduce, "so far as the funds would enable me, some faint resemblance to the Canadian system."
- 51 Joseph Howe, *Annual Report on Indian Affairs*, 1872, 3.
- 52 For a recent sophisticated analysis co-authored by a historian and an anthropologist, see Gerhard J. Ens and Joe Sawchuck, *From New Peoples to New Nations: Aspects of Métis History and Identity from the Eighteenth to the Twenty-First Centuries* (Toronto: University of Toronto Press, 2016).
- 53 Ens and Sawchuck, *From New Peoples to New Nations*, 190.
- 54 Ens and Sawchuck, *From New Peoples to New Nations*, 131.
- 55 The complexities of this history are described well in Ens and Sawchuck, *From New Peoples to New Nations*, 131-89.
- 56 Great Britain transferred some off-shore islands, including Norfolk Island, Christmas Island, Cocos (Keeling) Islands, and some unpopulated islands to Australia after 1901.
- 57 Hugh Mahon, "The Native Races Under the New Constitution" *The Austral Light*, 1 March 1902, 198.
- 58 James Bennett, "Maori as Honorary Members of the White Tribe" *Journal of Imperial and Commonwealth History* 29, No. 3 (September 2001): 33-54.

- 59 Bennett, "Maori as Honorary Members of the White Tribe," 39. Bennett (40) notes that until 1951, Aboriginal people of all nations needed a special permit to enter New Zealand. Also see F. L. W. Wood, "Why did New Zealand not join the Australian Commonwealth in 1900-1901?" *New Zealand Journal of History*, 2 (1968), 118, 123.
- 60 *Record of the Proceedings and Debates of the Australasian Federation Conference*, 1890, 125. Russell expressed the same concerns at the 1891 conference, *Report of the National Australasian Convention Debates*, 1891, 66.
- 61 Grimshaw, "Federation as a Turning Point," 30.
- 62 Mahon, "The Native Races," 199.
- 63 John McCorquodale, "Aboriginal Identity: Legislative, Judicial and Administrative Definitions" *Australian Aboriginal Studies* 2 (1997): 25. For evidence that negotiators always assumed that the Australian federation would be far less centralized than Canadian federation, and that the constitution would give residual powers to the states, see La Nauze, *Making of the Australian Constitution*, 16-17, 27-8.
- 64 *Victorian Year-Book, 1890-91*, (Melbourne: Government Printer, 1891), 40. These words stayed essentially the same until the redrafting of 1897-98 removed the words "not applicable to the general community," and "and in the Maori race in New Zealand." Several historians have made a strong case for the argument that negotiators inserted this provision to protect Aboriginal people from laws that the federal government was expected to pass (whether protective, regulatory, or discriminatory) in relation to various groups (including Polynesian, Chinese, Indian, and Malay people), not with the intention of preventing the federal government from passing laws that would benefit aboriginal people. See Geoffrey Sawer, "The Australian Constitution and the Australian Aborigine" *Federal Law Review* 2 (1966): 23; La Nauze, *The Making of the Australian Constitution*, 67; John Chesterman and Brian Gilligan, *Citizens without Rights: Aborigines and Australian Citizenship* (Cambridge: Cambridge University Press, 1997), 69.
- 65 *Australian Constitution* (1901), s. 107: "Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."
- 66 *Australian Constitution* (1901), s. 51 (26). The provision should not be misunderstood. Under this section, the federal government did not have power to pass legislation specific to aboriginal people; it did have power to pass laws respecting Australian people generally, including aboriginal people. In fact, between 1901 and 1967 the federal government did pass legislation that affected Aboriginal people differently than

non-aboriginal people, and such laws were never challenged. Sawer, "The Australian Constitution and the Australian Aborigine," 24-25. As a convention, the section came to be interpreted to mean that the states had jurisdiction over aboriginal affairs, and that the federal government could not intervene. Attwood and Markus, *The 1967 Referendum*, 19. We should keep in mind that we now know much more about the history of 51(26) than was known at crucial moments in the past. As La Nauze has written, "perhaps not one of the electors who voted in 1967 to remove this reference from the Constitution could have explained how it ever got there in the first place." La Nauze, *The Making of the Australian Constitution*, 67.

- 67 For a discussion of 127 see Sawer, "The Australian Constitution and the Australian Aborigine," 25-30. This provision also existed in drafts published in the 1890s. Section 51 cannot have deterred New Zealand from joining the federation, but Section 127 certainly would have been one of the deterrents. For that reason, we must be cautious of the argument that the offence that New Zealanders took with aboriginal policies in Australia goes a long way to explaining why New Zealand did not join the federation. Grimshaw, "Federation as a Turning Point," 27.
- 68 Records of the negotiations, and the fact that Aboriginal people have been included in all of Australian censuses, corroborate this interpretation.
- 69 La Nauze argued that "the exclusion of the Aborigines from the reckoning was not based on the impossibility of counting nomads, nor on views about their inferiority, nor on any of the reasons alleged in 1967." La Nauze, *The Making of the Australian Constitution*, 68. La Nauze might well have added, however, that the very parliamentarians who incorrectly cited the reasons for the exclusion in 1967, were probably ignorant of the true reasons.
- 70 This is the same section that stipulated that slaves would count as three-fifths of a free person. One must assume that s. 127 was a deal-breaker for New Zealand, where Maori not only were counted, but had had representation in parliament since 1867.
- 71 The history is long, and the scholarship is large, so only a brief summary is presented here. Attwood and Markus focus on the 1967 referendum, but discuss the entire history. See their *The 1967 Referendum*, and Attwood and Markus, "Representation Matters." For the interwar period, see Fiona Paisley, "Federalising the Aborigines? Constitutional Reform in the late 1920s," *Australian Historical Studies* 29, no. 111 (1998): 248-66, and Fiona Paisley, *Loving Protection?: Australian Feminism and Aboriginal Women's Rights, 1919-1939* (Melbourne: Melbourne University Press, 2000). Also see Charlie Fox, "The Fourteen Powers Referendum of 1944 and the Federalisation of Aboriginal Affairs," *Aboriginal Hist-*

- ory 32 (2008): 27-48. For the FCAASTI involvement after 1958, see Sue Taffe, *Black and White Together, FCAATSI: The Federal Council for the Advancement of Aborigines and Torres Strait Islanders 1958–1973* (Brisbane: University of Queensland Press, 2005), x, 12, 85-124. Taffe argued that “the campaign for constitutional reform was the longest, most widely supported and best remembered of all the Federal Council’s activities.” Taffe, *Black and White Together*, 85.
- 72 Most groups are discussed in detail in the literature already cited. Unions and sporting groups are mentioned in Richard Broome, *Aboriginal Australians: A History since 1788*, 4th ed. (Crows Nest, NSW: Allen & Unwin, 2010), 221. Of course, membership in these categories overlapped. Elkin, for example, was an anthropologist, a churchman, and a president of the Association for the Protection of Native Races (APNR). Bill Ferguson was an aboriginal activist, but also a churchman, and trade unionist. The role of women’s groups and feminist organizations has been particularly well studied.
- 73 George E. Nelson, “James, Thomas Shadrach (1859–1946),” *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/james-thomas-shadrach-10610/text18855>, published first in hardcopy 1996, <accessed 16 February 2017>; Markus, *Blood from a Stone*; Jack Horner, *Vote Ferguson for Aboriginal Freedom: A Biography* (Brookvale: ANZ Books, 1974); Jack Horner, “Ferguson, William (Bill) (1882–1950),” *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/ferguson-william-bill-6160/text10581>, published first in hardcopy 1981 <viewed 16 February 2017>; Richard Broome, “Nicholls, Sir Douglas Ralph (Doug) (1906–1988)” *Australian Dictionary of Biography*, National Centre of Biography, Australian National University, <http://adb.anu.edu.au/biography/nicholls-sir-douglas-ralph-doug-14920/text26109>, published first in hardcopy 2012, <viewed 9 February 2017>; Attwood and Markus, *The 1967 Referendum*, 12; Attwood and Markus, “Representation Matters,” 121-2; Attwood and Markus, *The 1967 Referendum*, 99-100, 102-3.
- 74 Paisley, “Federalising the Aborigines,” 252; Attwood and Markus, *The 1967 Referendum*, 6-9.
- 75 For a detailed discussion, see Charlie Fox, “The Fourteen Powers Referendum of 1944 and the Federalisation of Aboriginal Affairs,” *Aboriginal History* 32 (2008): 27-48. The constitution amendment would have given the federal government powers to legislate respecting the reintegration of fighting forces; employment and unemployment; marketing of commodities; companies; trusts, combines, and monopolies; profiteering; production and distribution of goods; overseas exchange

- and investment; air transport; uniformity of railway gauges; national infrastructure; national health; family allowances; and “the people of the aboriginal race,” *Constitution Alteration (Post-war Reconstruction and Democratic Rights) Act*, 1944.
- 76 *Australian Parliament*. House of Representatives. *A Bill for an Act to Alter the Constitution by vesting in the Parliament certain additional Powers until the Expiration of Five Years after Australia Ceases to be Engaged in hostilities in the present War*. s. 2.
- 77 Charlie Fox, “The Fourteen Powers Referendum of 1944 and the Federalisation of Aboriginal Affairs,” *Aboriginal History* 32 (2008): 27-48, 27-8.
- 78 Attwood and Markus, *The 1967 Referendum*, 12; Fox, “The Fourteen Powers Referendum,” 28.
- 79 Jennifer E. Eastick, “The Australian Aborigine: Full Commonwealth Responsibility under the Constitution.” *Melbourne University Law Review* 12, no. 4 (Dec. 1980): 521; *The Arguments for and against the Proposed Alteration together with a Statement Showing the Proposed Alteration*, 13.
- 80 For a very insightful examination of the significance of the lack of a “no” campaign, see Russell McGregor, “An Absent Negative: The 1967 Referendum,” *History Australia* 5, no. 2 (2008): 44.1-44.9. Russell (44.5) convincingly argues that the lack of any substantial debate over the question largely accounts for the “profusion of misunderstandings about the consequences of the proposed changes.”
- 81 Historians of all three countries will be intrigued by the parallels with Alaska in the postwar period. See Jessica Leslie Arnett, “Unsettled Rights in Territorial Alaska: Native Land, Sovereignty, and Citizenship from the Indian Reorganization Act to Termination.” *Western Historical Quarterly* 48, no. 3 (Fall 2017): 233-54.
- 82 Mahon, “The Native Races,” 198.
- 83 Mahon, “The Native Races,” 200-01. See Fiona Paisley, *Loving Protection? Australian Feminism and Aboriginal Women’s Rights, 1919-1939* (Melbourne: Melbourne University Press, 2000), 100.
- 84 Paisley, “Federalising the Aborigines,” 261.
- 85 William Cooper, Secretary Australian Aborigines’ League, to the Rt Hon. The Prime Minister, Joseph Lyons, 22 July 1936, as published in Attwood and Markus, *The 1967 Referendum*, 93.
- 86 Attwood and Markus, *The 1967 Referendum*,
- 87 Attwood and Markus, *The 1967 Referendum*, 11, 98.
- 88 A.P. Elkin, *Citizenship and the Aborigines: A National Aboriginal Policy* (Sydney: Holland & Stephenson, 1944).
- 89 Australia, House of Representatives, Hansard, 25th Parl. 1st Sess, 14 May 1964.

- 90 Bain Attwood and Andrew Markus, "(The) 1967 (Referendum) and All That: Narrative and Myth, Aborigines and Australia," *Australian Historical Studies* 111 (1998): 274-5, 280-1. Taffe wrote that FCAATSI saw federalization as "the best hope for improving conditions for Aboriginal Australians." Taffe, *Black and White Together*, 92. Thus, if Chesterman and Gilligan intended to generalize when they asserted that "the proposal was not viewed at the time as one that would transfer power over Aboriginal affairs to the Commonwealth," they oversimplified the reality. Chesterman and Gilligan, *Citizens without Rights*, 186.
- 91 Attwood and Markus, *The 1967 Referendum*, 14.
- 92 The Constitution did not address citizenship or voting rights at all. Neither would the changes to the constitution in itself address racial discrimination. Attwood's discussion suggests that Street deliberately persisted with her arguments even after having been corrected. Attwood and Markus, *The 1967 Referendum*, 14-20.
- 93 Attwood and Markus, *The 1967 Referendum*, 36. Also see Attwood and Markus, "(The) 1967 (Referendum) and All That," 271.
- 94 Attwood and Markus, *The 1967 Referendum*, 41-2. For a detailed description of the complex history leading up to the referendum, readers should turn to Attwood and Markus, *The 1967 Referendum*. It is noteworthy that in 1966, Geoffrey Sawer, one of Australia's most influential law professors, published a paper arguing that "Having regard to the dubious origins of the section [52(26)], and the dangerous potentialities of adverse discriminatory treatment which it contains, the complete repeal of the section would seem preferable to any amendment intended to extend its possible benefits to the aborigines." He added that "There is much to be said for the Commonwealth taking over complete responsibility for the welfare of aboriginal people. ... But the Commonwealth is not well placed to handle the integration of the aborigines, where that is the main object of policy." Sawer, "The Australian Constitution and the Australian Aborigine," 35.
- 95 Attwood and Markus, *The 1967 Referendum*, 42.
- 96 FCAATSI had earlier endorsed the simple removal of the eight words in 51(26), although some people did call for the addition of constitutional language that would have called for the advancement of aboriginal people. Taffe, *Black and White Together*, 93, 108.
- 97 Joe McGinnes noted already in June 1967 that the "yes" vote was only a step in the process: "the government is showing no hurry to legislate for us on education, housing, wages, trade training, land grants and many other things we need." Taffe, *Black and White Together*, 123.
- 98 Paul Hasluck, *Shades of Darkness: Aboriginal Affairs, 1929-1965* (Melbourne: Melbourne University Press, 1988), 124. Hasluck, who entered politics in 1949, was Minister for External Affairs in 1967, but had, as

- Minister for Territories (1951-1963) had been responsible for aboriginal affairs in the Northern Territory. He was very knowledgeable about aboriginal living conditions in Australia. Sue Taffe described him as “the most articulate exponent of liberal individualism as applied to Indigenous Australians.” Taffe, *Black and White Together*, 47.
- 99 During his time as minister for the territories, Hasluck “had pursued a new federal/states cooperative approach to Aboriginal affairs.” Taffe, *Black and White Together*, 53. Also see Robert Porter, *Paul Hasluck: A Political Biography* (Perth: University of Western Australia Press, 1993), 194-5.
- 100 Hasluck, *Shades of Darkness*, 123.
- 101 *The Arguments for and against the Proposed Alteration together with a Statement Showing the Proposed Alteration*, 11. The passage is also quoted in Attwood and Markus, *The 1967 Referendum*, 126. In Parliament, Holt had said that “the Government has been influenced by the popular impression that the words now proposed to be omitted from section 51 (xxvi) are discriminatory — a view which the Government believes to be erroneous but which, nevertheless, seems to be deep rooted.” *Hansard*, House of Representatives, 1 March 1967, (p. 263).
- 102 A. P. Elkin, “A Yes Vote for Aborigines,” *Sydney Morning Herald*, 16 May 1967, 2, as quoted in Attwood and Markus, *The 1967 Referendum*, 129. Elkin, who had advocated for federalization in the 1940s, came to believe during the 1950s that constitutional change was of relatively little importance. Attwood and Markus, *The 1967 Referendum*, 19.
- 103 Attwood and Markus. “Representation Matters,” 125; Attwood and Markus, *The 1967 Referendum*, 42-43; Attwood and Markus, “(The) 1967 (Referendum) and All That,” 273.
- 104 The beginnings of the Termination Policy can be traced to the end of World War II, and the policy remained in place until the early 1970s, but its goals are best encapsulated in the House Concurrent Resolution 102 (1 August 1953). That resolution stated that “it is the policy of Congress, as rapidly as possible, to make the Indians within the territorial limits of the United States subject to the same laws and entitled to the same privileges and responsibilities as are applicable to other citizens of the United States, to end their status as wards of the United States and to grant them all of the rights and prerogatives pertaining to American citizenship.” U.S. Statutes at Large, 67:B132. Also see Prucha, *Documents of American Indian Policy*, 233.
- 105 The White Paper stated that Indians deserved “the right to be treated within their province as full and equal citizens, with all the responsibilities and all the privileges that this might entail.” Canada. Department of Indian Affairs and Northern Development, *Statement of the Government of Canada on Indian Policy* (Ottawa: Indian Affairs, 1969).” Oddly,

- Trudeau denied that the White Paper resembled Termination. I am not aware that North Americans made any comparisons with Australia.
- 106 Evelyn Scott later recalled that on the night of the referendum, “There was screaming when I heard it on the radio.” Taffe, *Black and White Together*, 114.
- 107 Hasluck, *Shades of Darkness*, 123.
- 108 Hasluck, *Shades of Darkness*, 123.
- 109 Attwood and Markus, *The 1967 Referendum*, 62.
- 110 Hasluck, *Shades of Darkness*, 124.
- 111 Gough Whitlam, “Australian Labour Party Policy Speech, “It’s Time for Leadership,” Blacktown Civic Centre, 13 November 1972, 30. The speech is found online at <http://whitlamdismissal.com/1972/11/13/whitlam-1972-election-policy-speech.html>. <accessed 30 October 2018>
- 112 Eastick, “The Australian Aborigine,” 540.
- 113 The preamble to the act reads “whereas by reason of an amendment made to the Constitution in the year 1967, certain powers to make laws for the benefit of the Aboriginal people of Australia in the States became vested in the Parliament. . . .the Australian Government, after consultation with the Governments of the States . . . will assume increased responsibilities for the development of the Aboriginal people of Australia including responsibilities for the planning, co-ordination and financing of such activities as are designed to promote the economic, social and cultural advancement of that people and are at present the responsibilities of the States and their authorities.” Section 5 (2)(d) provides for “the assumption by the Australian Government of responsibilities of the State concerned and its authorities relating to Aboriginal affairs.”
- 114 Matt Foley, “Social’ Law Reform: Aboriginal and Islander Laws in Queensland,” Part 2 *Legal Service Bulletin* 6 (1)(February 1981): 27.
- 115 Hasluck, *Shades of Darkness*, 124.
- 116 Scott Bennett, *Aborigines and Political Power* (Sydney: Allen & Unwin, 1989), 82.
- 117 In many respects, the circumstances of Australian “Blacks” in the 1950s and 1960s were more similar to the circumstances of Blacks in the United States than to North American Indians at the same time, and many Aboriginal activists in Australia drew at least as much inspiration from the African American movement for equal rights as from movements for special Indigenous rights. Although the discourse surrounding Aboriginal rights in all three countries betrayed a tension between the goals of equal rights and Aboriginal rights, on balance, Aboriginal and non-Aboriginal Australians were more amenable to the view that equality, rather than special rights, as the key to addressing the challenges faced by Aboriginal people.

- 118 Although it is outside the scope of this paper to discuss the many changes in Australia since the 1960s, readers should understand that the notion that Indigenous people have differential rights has gained growing acceptance in Australia as it has in Canada and the United States.
- 119 “An Act to Amend the Indian Act,” Statutes of Canada 1924, c.47, s. 1; Constance Backhouse, *Colour-Coded: A Legal History of Racism in Canada, 1900–1950* (Toronto: University of Toronto Press, 2000), 27, 292n51.
- 120 *Re Eskimo* [1939] SCR 104; Adrian Tanner, “The Aboriginal Peoples of Newfoundland and Labrador and Confederation,” *Newfoundland Studies* 14 (2)(1998): 241.
- 121 *Indian Act* Statutes of Canada 1951 (15 Geo.VI), c. 29, s. 4 (1).
- 122 In 1949, there were about 700 Inuit and 275 Innu in Labrador, and about 535 people of aboriginal descent on the island. David MacKenzie, “The Indian Act and the Aboriginal Peoples of Newfoundland at the Time of Confederation,” *Newfoundland and Labrador Studies* 25(2) (2010): 162; Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 243.
- 123 MacKenzie, “The Indian Act,” 166; Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 244.
- 124 Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 244.
- 125 Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 249.
- 126 MacKenzie, “The Indian Act,” 172-3; Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 245.
- 127 Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 250. Tanner argued that it was probably by oversight that this agreement was not included in the terms of reference for the entry of Newfoundland into the Canadian federation, but the governments did act according to the agreement. Nevertheless, the transfers of money were sporadic at first, and the per capita spending appears to have lagged consistently behind spending on status Indians elsewhere in Canada.
- 128 Tanner, “Aboriginal Peoples of Newfoundland and Labrador,” 247-8.
- 129 MacKenzie, “The Indian Act,” 176.
- 130 MacKenzie, “The Indian Act,” 177. In 2002 the Labrador Innu were registered as status Indians under the *Indian Act*, and in 2003 and 2006 the lands of the communities of Natuashish and Sheshatshiu were registered as Indian reserves; Innu Nation: Innu Rights & Government. http://www.innu.ca/index.php?option=com_content&view=article&id=10&lang=en <accessed 30 October 2018>.
- 131 *Daniels v. Canada*, 2016 SCC 12.
- 132 Again, readers are well advised to turn to Ens and Sawchuck, *From New Peoples to New Nations* (in this case, especially 325-418), for a nuanced and relatively dispassionate analysis of this complex history.

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133 *Daniels v. Canada*.

134 *Daniels v. CANADA*.

135 We might also consider that the long years of aboriginal activism related to constitutional change (and civil rights), gave many aboriginal activists the skills and confidence that they subsequently employed to articulate their case for aboriginal rights. That is the argument made in Taffe, *Black and White Together*, 124.