

Aboriginal Sovereignty and the Politics of Reconciliation: The Constituent Power of the Aboriginal Embassy in Australia

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As a re-occupation of land immediately in front of Parliament House for six months in 1972, the Aboriginal Embassy was an inspiring demonstration of Aboriginal self-determination and land rights. The Embassy re-appeared intermittently throughout the 1970s and 1980s, with a demonstration held at the site annually on Australia/Invasion Day. It has maintained a continuous presence in Canberra since it was reinstated on its twentieth anniversary in 1992 to declare Aboriginal sovereignty in opposition to the formal reconciliation process. Reconciliation is understood as aligned with a progressive politics within mainstream public discourse in Australia. In this paper, we examine the reactionary politics of reconciliation vis-à-vis the struggle for land rights that the Embassy embodies. To this end we examine a debate within legal theory about the relation between ‘constituted power’ (state sovereignty) and ‘constituent power’ (democratic praxis). Following Antonio Negri, the Embassy can be understood as one manifestation of the constituent power of Aboriginal people (and their non-Aboriginal supporters) that the Australian state appropriates to shore up its own defective claim to sovereignty. We illustrate this by comparing the symbolism of the Aboriginal Embassy with that of Reconciliation Place in Canberra. We complicate this analysis by discussing how the Embassy strategically exploits the ambiguous status of Aboriginal people as citizens within and without the community presupposed by the Australian state. In doing so the Embassy makes present the possibility of a break with the colonial past that is often invoked in the politics of reconciliation but which the Australian state has failed to enact.

The question of the relation between constituent and constituted power goes to the heart of the issue of political legitimacy in a democratic society. If constituted power refers to the institutionalized authority of the offices of state, with whose authority are these offices instituted? In a democracy, ultimate authority rests with 'the people', the constituent power that the state represents. Yet if the people are the ultimate authors of the law, does this entail that a people must exist independently of the constitution through which it represents itself? Or is it only by virtue of a constitution (and hence its formal representation) that a people is able to recognize itself as a political subject in the first place? The political stakes of this conceptual paradox are particularly acute in colonial societies, which excluded first nations from the constituent power that authorized their constitutions. Such states have only retroactively recognized indigenous people as citizens as they have sought to overcome the irresolution at the heart of a constitutional order founded by internal colonization. In this context, the question emerges whether the original exclusion of first nations from the constituent power of the people can be overcome immanently by drawing on the normative resources inherent within the existing constitutional order. Or is a more fundamental rupture with the constituted order of the colonial state required, which would fundamentally reconfigure the identity of the political community?

We take up this question in the Australian context by examining the politics of reconciliation against claims for Aboriginal sovereignty. In the 1990s, Australia sought to redress its colonial origin by instituting a policy of reconciliation. Reconciliation processes are often criticized for demanding that the victims of state repression relinquish their legitimate claims to justice for the sake of national unity. In the absence of a constituent moment that would provide the foundation for a new regime, reconciliation processes in settler-colonial societies are particularly vulnerable to this critique. In Australia, critics claim that the formal reconciliation process was a further stage in the colonial project of assimilating the Aboriginal population into the colonizing society. Against reconciliation,

many Aboriginal people insist that their sovereignty was never ceded. This claim represents both an assertion of the right to self-determination and a refusal to recognize the legitimacy of the settler-colonial state that has incorporated them as citizens.

We present the formal reconciliation process as an attempt to redress the legitimacy crisis of the Australian state from within the constituted order. In contrast, we treat the Aboriginal Embassy protest in Canberra as a constituent act that contests the constituted order of the Australian state from *without* by demonstrating Aboriginal sovereignty. Understanding these two modes of constitutional politics in terms of the antagonistic relation between constituent and constituted power provides a basis for further thematizing the reactionary politics of reconciliation. However, we also consider the limits of understanding the relation between constituent and constituted power in terms of a binary opposition between creation and reaction. In this light, we discuss how the political effectiveness of the Embassy depends on exploiting the ambiguous position of Aboriginal people as both inside and outside the constituted order, as citizens within *and* without the political community presupposed by the constitutional order

Breaking with the Colonial Past: Aboriginal Sovereignty Versus National Reconciliation

In 1991, the Labor government initiated a ten-year formal reconciliation process in Australia. The primary remit of the newly established Council for Aboriginal Reconciliation (CAR, 1991-2001) was to improve relationships between Aboriginal and Torres Strait Islander peoples and the wider Australian community through education. In 1994 a public inquiry was established to investigate the widespread practice of removing Aboriginal children of mixed descent from their families throughout most of the twentieth century. By the time it published its report in 1996, a conservative government was in power. The Howard government questioned the validity of the report's findings (most notably that the practice of child

removal constituted an act of genocide) and failed to implement its recommendations (which included an apology by the Australian government). A polarising debate ensued within the mainstream media over the issue of the genocide perpetrated against Aboriginal people in Australia, which became known as the history wars. Howard's refusal to apologize mobilized significant popular support for reconciliation from many non-Aboriginal people, through organizations such as Australians for Native Title and Reconciliation (ANTaR) (see Short 2008).

When Labor returned to power in 2008, Prime Minister Kevin Rudd said sorry to the stolen generations in the first sitting of Parliament. Although the formal reconciliation process came to an end in 2001, Rudd's apology appeared to many as the crowning achievement of the reconciliation process, which had been stalled by the Howard government (1996-2007). The apology provided official recognition of the devastating impact of the removal policies on individuals, families and communities. Yet Rudd (2008) also attributed a broader historic importance to his apology since he sought to enact a constituent moment in the nation's history that would establish a 'new beginning' (see Muldoon & Schaap forthcoming). This was not simply an opportunity for 'sentimental reflection', Rudd claimed, but 'one of those rare moments in which we might just be able to transform the way in which the nation thinks about itself' (Rudd 2008).¹

The apology was broadly welcomed by Aboriginal and Torres Strait Islander people as long overdue official recognition of the suffering inflicted on them (Moses 2011). However, many resisted the sense of resolution in Rudd's rhetoric, insisting that 'unfinished business' remains. This unfinished business referred to the need for reparative measures such as compensation (Muldoon 2009). But it also referred to the status of Aboriginal people within the constitution. In a speech given on the day of the apology, for instance, Patrick Dodson (2008, 22), a former Chairman of the CAR, pointed to the outstanding need to 'cement an

honoured and respected place for Indigenous people within our polity.’ So long as Aboriginal people were ‘still unrecognised within the constitution’, he said, the legitimacy of the country would remain compromised: ‘the concept of *terra nullius* persists’ (Dodson 2008, 21). In contrast to the culture war waged by social conservatives, the reconciliation movement understood itself to be progressive. But this ignored the fact that reconciliation emerged in the first place as a reaction to the campaign for a treaty by Aboriginal people throughout the 1970s and 1980s.²

Against the impulse of the reconciliation movement to enact a moment of closure on the colonial past, the insistence on unfinished business by Aboriginal people highlights the continuing dynamics of colonization in the present (e.g. Kelly 1993, 3).³ Kevin Gilbert provided a powerful statement of this at the beginning of the reconciliation process in 1992. Deploring the turn in official policy from a treaty to reconciliation, Gilbert asked:

What are we to reconcile ourselves to? To a holocaust, to a massacre, to the removal of us from our land, from the taking of our land? The reconciliation process can achieve nothing because it does not...promise justice. It does not promise a Treaty and it does not promise reparation for the taking away of our lives, our lands and our economic and political base. Unless it can return to us those very vital things...what have we? A handshake? A Symbolic dance? An exchange of leaves and feathers or something like that? (Gilbert 1993, 2)

For Gilbert and many others, the possibility of breaking with the colonial past depends on the recognition of Aboriginal sovereignty. The legitimacy of the Australian state rests on the presumption that there was no recognisable legal or political organisation on the continent prior to the arrival of the British Crown. Consequently, the insistence on Aboriginal sovereignty fundamentally contests the basis of the constitutional order: it is the ‘polar opposite of *terra nullius*’ (Nicoll 2002, 4).

For many Aboriginal people, the Tent Embassy camped on the lawns in front of Old Parliament House is an important demonstration of the sovereignty they have never ceded to the colonizing state and society. Over the past four decades, the Embassy has been erected and re-erected in response to attempts by the Australian state to defuse claims for Aboriginal rights. The original protest in 1972 united Aboriginal people around the demand for uniform national land rights. The 1960s had seen the development of a pan-Aboriginal political consciousness and the assertion of self-determination by taking control of organizations such as the Federal Council for Aborigines and Torres Strait Islanders (FCAATSI) (Foley 2010). While ownership of land has always been central to local struggles for justice by Aboriginal people, the demand for uniform national land rights found renewed national expression in the Embassy protest (Goodall 1996; Robinson 1993).

The four activists who initiated the demonstration by plating a beach umbrella on the lawn in front of Parliament House on 26 January 1972 did so in protest against Prime Minister McMahon's rejection of land rights.⁴ McMahon instead endorsed a weak form of title called general purpose leases for communities still living on their traditional land, which would ensure the continued exploitation of the land by the mining and pastoral industries. Since McMahon's statement effectively relegated Aboriginal people to the status of 'aliens in our own land', recalls Gary Foley (2001), 'as aliens we would have an embassy of our own'. Michael Anderson, declared that the Aboriginal Embassy would remain indefinitely: 'We mean business. We will stay until the Government listens to us' (cited in Attwood & Markus, 1999, 257). In that year, the Embassy protest swelled into one of the largest and most significant demonstrations in Australia's history (see Peters-Little 1992; Robinson 1994; Foley 2001; Lothian 2007).⁵

Significantly, the Aboriginal Embassy has maintained a continuous presence in the Parliamentary Triangle since it was re-erected on its twentieth anniversary in protest against

the Labor government's abandonment of a treaty in favour of the ten-year formal reconciliation process. Although the 1972 demonstration had put land rights on the national agenda and helped to remove McMahon's conservative government, the protestors pointed out that little had changed for Aborigines in Australia in the intervening decades (Canberra Times 1992; Aubin 1992; Easterbrook 1992; Foley & Anderson 2006). The following day around sixty Aboriginal people, together with non-Aboriginal supporters, occupied the then disused Old Parliament House and flew the Aboriginal flag from it. At a press conference in King's Hall, Billie Craigie (one of the four original protestors) said that the Embassy had transferred its operations to Old Parliament House. It would stay 'indefinitely until we can work out our own Aboriginal government and maybe fill up the rest of the building with elected members from our own, Indigenous, sovereign nation' (cited in The Advertiser 28/1/1992). On 28 January, Paul Coe (also a central figure in the 1972 protest) presented the Minister for Aboriginal Affairs, Robert Tickner, with a Declaration of Aboriginal sovereignty and demanded an internationally supervised treaty.⁶ Later that evening the demonstrators withdrew from Old Parliament House to the Embassy, leaving four people to be arrested and charged with trespass under the Public Order Act.⁷ The Embassy activists hoped the arrests would strengthen their sovereignty case in the High Court and in the International Court of Justice in the Hague, if necessary (Chamberlain 1992).

The Constituent Power of the Aboriginal Embassy

The much-debated constitutional paradox is fundamentally a chicken-or-the-egg problem. Which came first: the people or the law? This raises important questions about the relative priority of constituent action and constitutional order. Jürgen Habermas purports to resolve the paradox by appealing to the co-originality of the constituent power (democratic praxis) and the constituted power (rule of law). In his view, there is no need to accord priority either

to democratic will (constituent power) or legal reason (constituted power) because they stand in a relation of mutuality: ‘one is not possible without the other, but neither sets limits on the other’ (Habermas 2001, 767). This resolution depends on adopting a dynamic understanding of the constitution as a future-oriented source of norms rather than a backward-looking constraint on the present. As Habermas would have it, the allegedly paradoxical relation between constituent and constituted power resolves itself in the dimension of historical time as the democratic assembly progressively realises the immanent potential of the original constitutional settlement. From this perspective, political struggles are part of a self-correcting learning process in which the hitherto poorly satisfied conditions of constitutional legitimacy are gradually corrected through the inclusion of marginalised groups and the empowerment of deprived classes (775).⁸ The historical violence through which every polity is constituted in fact, is redeemed (over time) by reference to the virtual consensus to which the constitutional order appeals through law.

Against this view, Antonio Negri (1999) characterises the relationship between constituent and constituted power as one of irreducible antagonism. In Negri’s account, the distinction between constituent and constituted power correlates to two antithetical modes of politics.⁹ Negri identifies constituent power with democratic praxis but characterizes constituted power as fundamentally anti-democratic. While constituted power is reactive and can produce nothing on its own, constituent power is inherently creative: it coincides with the experience of free action, which ‘becomes public space, constituting a communicative relation, its own conditions of possibility’ (Negri 1999, 15). It does not only produce legal norms but also community. As such, constituent power exceeds its representation in institutional forms. Its creativity threatens the constituted power and gives rise to efforts to contain it. Like the relation between capital and living labour, constituted power is parasitic on the productivity of constituent power, which it captures and channels for its own ends.

Negri's analysis presents some conceptual difficulties.¹⁰ For our present purpose, however, we want to accept his political rationale for insisting on a fundamental antagonism between constituent and constituted power. In short, the co-originality principle becomes ideological in the context of actually existing democracies. For it obscures the social struggle in which constituent power is enacted by subordinating it to the terms of representation available within the constituted order (see Schaap 2008). In practice, the doctrine of the co-originality of constituent and constituted power means that social conflict is re-presented as already internal to the political community that the constituted power presupposes. But to view constituted power from the perspective of these struggles is to recognize the political in the moment of antagonism – the moment in which the possibility of constituting the polity *otherwise* appears (Christodoulidis 2007, 189). Focusing on antagonism enables us to recognize that social struggle is not simply about conflict between particular interests or identities and their possible reconciliation. It also entails disagreement over the political: the common interest, identity and/or norms in terms of which conflict is represented, mediated and potentially resolved.

In this section we thematize the opposition between Aboriginal sovereignty and the politics of reconciliation in terms of the antagonism between constituent and constituted power. We contrast the Aboriginal Embassy with Reconciliation Place according to their spatial, temporal and subjective dimensions. This phenomenological analysis serves to illuminate the political stakes of the constitutional paradox in a community founded by colonization. Importantly, the distinctions we draw here are not anthropological but political. The point of the juxtaposition is not to work out which embodies the more authentic version of Aboriginal politics, but to highlight the different modes of constitutional politics that each site symbolises and enacts. Reconciliation Place represents conflict as something internal to the political community, resolvable through appeals to existing constitutional norms of civic equality and non-discrimination. The Aboriginal Embassy, in contrast, seeks a register for the

conflict beyond its constitutional mediation in order to contest the legitimacy of the constituted power. By challenging the right of the colonizing society to occupy and rule the territory known as Australia, the Embassy politicises the foundation of the constitutional order and demonstrates the possibility of its radical transformation.

The Presence of the Aboriginal Embassy

Constituted power codifies and polices territory. It polices space through the prohibition of certain activities and movements. But it also renders action meaningful in specific ways. It determines, for instance, whether people are involved in a properly public activity (such as protesting) or a properly private one (such as camping). Constituent power, in contrast, is a generative force that creates public places. It re-orders the space of constituted power by re-configuring what can be seen, done and named within it. While constituted power is concerned with *policing* public space to regulate, codify and sanction action, constituent power is concerned with *producing* public places in which people can enact and articulate alternative forms of political community.

Reconciliation Place exemplifies the constitutional ordering of space. Located in the ceremonial precinct of the Australia's capital city, it complements and reinforces the monumental landscape of the Parliamentary Triangle whose axial lines connect the major institutional symbols of the Australian State. Reconciliation Place was commissioned by the Federal Government's National Capital Authority (NCA) to acknowledge and commemorate the journey of reconciliation as a joint undertaking between Indigenous and non-Indigenous Australians. The composition consists of a grove of sculptural slivers, each of which represents an episode in the reconciliation process. This grove can be navigated in multiple ways. The variety of perspectives afforded by this arrangement suggests the contestability of reconciliation. This apparent multiplicity is over-ridden, however, by the way the site of

Reconciliation Place reinforces the axial geometry of the landscape by forming a pedestrian link between the National Library and the National Gallery (Vernon 2002). In this context, it elides any reference to the colonial legacy to which reconciliation is supposed to respond. Instead, like the structures it binds and connects, Reconciliation Place memorialises the civil order constituted by the Australian state.

The neo-classical structure of Old Parliament House is nestled within the apex of the Parliamentary triangle with the imposing new Parliament House located above and behind it on Capital Hill. But as you look out to the National War Memorial from the steps of Old Parliament House an Aboriginal flag flying from a natural wooden pole disrupts the symmetry of the monumental vista. The flag is flown by the Aboriginal Embassy: a semi-permanent encampment comprised of a range of makeshift and constantly changing structures. These include a shipping container, a demountable shed, an array of gunyahs [traditional shelters], a perpetual fire, a collection of tents, a mural painting and several native trees that have been planted by activists over the years (Vernon 2002). This pointedly anti-monumental architecture suggests both invasion and inversion. On the one hand, it is reminiscent of Aboriginal camps on the outskirts of rural towns and the material conditions that many Aboriginal people continue to endure (Dow 2000). On the other hand, as a re-assertion of sovereign entitlement it evokes a prior order of occupation that preceded that which the colonial state seeks to monumentalize. In both modes, the Embassy not only displaces the monumental order and its formal public sphere, it constitutes an alternative public space to that authorized by the state. It brings into being a subaltern counter-public (Cowan 2001; Jaireth 1999).

The potent symbolism of the Embassy thus stands in marked contrast to the pallid symbolism of Reconciliation Place. Its indefinite presence within the Parliamentary Triangle unsettles and discomforts, provoking attempts to sanitize it (De Lorenzo 2005). The

construction of Reconciliation Place was motivated (at least, in part) by the desire of officials and politicians to replace the ‘eyesore’ of the Embassy with a more pleasing re-presentation of the place of Aboriginal people within the nation (Dow 2000). It was intended to be a ‘permanent memorial that all Australians would be proud of [and which] might have more reconciliation value’ than the Embassy (Mac Donald cited in Canberra Times 1999; Lawson 2001; Canberra Times 2002). What some officials characterise as an eyesore, however, activists characterise as ‘counter-memorialising’ (Dwyer 2006, 199). Unlike Reconciliation Place, which is purposefully designed to blend in to its surrounds, the Aboriginal Embassy employs the landscape as a medium of protest, frustrating attempts by the constituted power to monopolise the meaning of public space (Harris 2003). As Irene Watson (2009a, 30) writes, the Embassy is a ‘space in which the dispossession of land rights and sovereignty are spoken back to the state’ by the ‘unsettled native.’ As an unauthorized and indefinite occupation, the Embassy inserts a place for unmediated political communication within an official public space that is designed only for circulation (Iveson 2001, 368).

The Event of the Aboriginal Embassy

Constituted power presupposes a unitary and linear conception of time that establishes an unbroken relation between the origin, present and end of the political community. This enables the history of the nation to be represented as a progressive widening and deepening of its imperfect democratic origin. In contrast, constituent power appears as an event that ruptures the temporal order of constituted power, drawing its authority from its own potential. Constituted power reacts to the event of constituent power by representing it as a crisis that provides an opportunity for reinstating the ruptured context. But the event of constituent power resists such domestication precisely because the beginning it enacts overflows the significations available within the temporal order of the constituted power.

The linear conception of time through which the constituted power legitimates itself is the underlying organisational principle at work in Reconciliation Place. The site memorializes the gradual inclusion of Aboriginal and Torres Strait Islander people within the Australian nation as equal citizens. The path used to navigate the site symbolizes the journey of reconciliation as visitors encounter slivers that commemorate moments of recognition and political achievement. Over time new slivers will be commissioned to commemorate further events in an apparently open-ended and ever-inclusive process. The flip side of this presumption of progress is that the site remains deaf to political regressions and back-flips. For instance, sliver three (called 'strength, service and sacrifice') pays homage to Aboriginal servicemen. However, it fails to acknowledge that the soldiers demobbed after World War II returned to a racially discriminatory society prepared to confiscate their land and remove their children while they were away and refuse them entry to the Returned Servicemen League upon their return (De Lorenzo 2005, 116; Curthoys 2000). Nothing appears in Reconciliation Place that contradicts the narrative of progressive inclusion through which the Australian nation seeks to redeem itself from its colonial origins (Jaireth 1999).

In contrast, as Oliver Feltham (2004) argues, the Aboriginal Embassy is marked as a singular event by its discontinuity with this narrative. Construed as the progressive democratization of the Australian polity through the recognition of the rights of Aboriginal people *as equal citizens*, the journey of reconciliation is predicated on the tragic loss of Aboriginal sovereignty and entitlement to land. Even as the constituted power pursues normative redemption through the belated recognition of past wrongs, it re-inscribes the absence of a distinct Aboriginal polity and system of tenure.¹¹ The Embassy disrupts this temporal order of representation by making present what the constituted order presupposes as absent: the sovereignty of Aboriginal people. The demonstration makes the time of Aboriginal possession contemporaneous with the present (not to mention any possible future) of the Australian polity. This disruption of the temporal sequence of settler-colonial

occupation receives poignant representation through the names the Ambassadors assign to 26 January: the anniversary of the arrival of the British in 1788, which the colonizing society commemorates as 'Australia Day'. On the one hand, the Ambassadors re-signify the national holiday as *Invasion Day*, contesting the legal assumption that Australia was founded as a 'settlement' rather than 'conquest'. On the other hand, they re-signify it as *Sovereignty Day*, implicitly commemorating 26 January as the anniversary of the founding of the Embassy when the pan-Aboriginal entitlement to universal national land rights found dramatic political expression.

Predictably the crisis that the Embassy represents for the constituted power has prompted attempts to reinstate its own temporal order. In 1988 Old Parliament House, in front of which the Tent Embassy continues to be encamped, was vacated as the seat of government. Old Parliament House now houses the National Museum of Democracy, which showcases the history of Australian Democracy.¹² The Museum depicts the struggle for Aboriginal rights in Australia as part of what Habermas would characterize as the self-correcting process of a constitutional democracy. Tellingly the Museum re-presents the 1972 Tent Embassy demonstration as an historical event within this narrative of democratization, politely ignoring the unfolding event of the Embassy across the road.¹³ In this setting the constituent power of the Aboriginal Embassy is folded into the self-legitimizing narrative of the Australian state according to which the struggle for land rights and sovereignty is resolved through progressive legislation (in this case the *Northern Territory Land Rights Act 1975* and the *Native Title Act* of 1993). The reactionary nature of this revisionist history is most profoundly seen in the constituted power's appropriation of the concept of self-determination as a policy instrument.¹⁴ However the Embassy resists this appropriation by demonstrating Aboriginal self-determination, not as a norm to be redeemed by reference to the constitutional origin, but as fact actualised in the present. As the Embassy insists: 'Always was, always will be Aboriginal land'.

The Community of the Aboriginal Embassy

Constituted power posits a people as the origin of its legitimacy. In doing so, it presupposes a political community (an identity of interests among citizens) that it claims to represent. This presupposition is the basis a legal order founded on the principle of state sovereignty. For it represents all conflict as potentially resolvable in terms of the shared norms of the political community. The political community that the constituted power represents is thus overdetermined: any claim that would contest the basis of this political community cannot be heard in law (see Schaap 2009). In contrast, the community that constituent power produces is an open set of relations that is always in the process of becoming common. Antagonism is a condition of possibility of the creativity of constituent power since it leads to a reflexive awareness both of a common oppression and a shared resolve to refuse this oppression. In refusing the mediation of conflict within the prevailing terms of political discourse, antagonism anticipates a proto-political community that is beyond the representational order of the constituted power.

To the extent that Reconciliation Place recognises conflict it construes it as internal to ‘the people’. The site acknowledges the existence of conflicts (symbolised by several of the slivers) only to domesticate them through their incorporation within the boundaries of the existing normative order (symbolised by Reconciliation Place). At the official opening of Reconciliation Place in 2002, then PM John Howard, described the site as ‘a focal point for Australians of different backgrounds who reflect upon those things that bind us together and give us our common values as Australians’ (Howard 2002). This centripetal orientation is reflected in the content of the slivers themselves, most of which commemorate hesitant steps towards the inclusion of Aboriginal and Torres Strait Islander people as civic equals. To pass through Reconciliation Place is to understand the Aboriginal struggle as a struggle for

inclusion. The colonial wrong to which Reconciliation Place responds is not the appropriation of Aboriginal land and sovereignty but discrimination. From this perspective, the possibility of post-invasion legitimation rests on recognition of Aboriginal and Torres Strait Islanders as part of the people.

By setting up the Embassy and flying the Aboriginal flag, the protestors fundamentally contested this representation of Australia as a unified people in waiting. On the one hand, they explicitly rejected their (nominal) inclusion in the people from which the constituted power draws its legitimacy. As aliens they could have no part in the 'we' whose basic normative agreements find expression in the constitutional document and whose identity of purpose underwrites the laws that regulate the common life. The constituted power could thus neither draw legitimacy from them nor claim to be representative of them. On the other hand, they invoked a pan-Aboriginal political community whose consent was fundamental to the legitimacy of the constituted power. In contrast to Reconciliation Place, which functions as a sign of community and provides a site for mediating conflict, the Embassy functions as a sign of division and provides a site for making visible an antagonism between different understandings of the people.

The Aboriginal Embassy disturbs many non-Aboriginal people because it signals a secessionist movement. Yet the Embassy also prefigures another possible form of being together. As such, the Ambassadors' refusal of citizenship should not be seen as a refusal of *all* community with non-Aboriginal people but of the particular form of political association presupposed by the constituted order. The Aboriginal Embassy has always been a place where Aboriginal people and non-Aboriginal supporters come together on terms that are determined by Aboriginal political actors. In this way, it prefigures another possible political community. This alternative polity is also implicit in the claim by Embassy activists that they do not need the Australian state to recognize Aboriginal sovereignty. Rather, the Australian state needs the

recognition of Aboriginal people to become legitimate since it ‘cannot acquire a legal, valid title except by entering into a legal, binding TREATY of international status with Aboriginal People of this our country’ (Gilbert 1993, 52). The call for a treaty can thus be understood as a call to reconfigure the terms of political association between Aboriginal and non-Aboriginal people in Australia. As an act of constituent power, the Embassy does not just make visible the antagonism between the interests of Aboriginal and Torres Strait Islander peoples and that of the Australian people presupposed by the constituted order. It also reveals how political community between Aboriginal and non-Aboriginal people might be constituted differently.

Resignifying Theft and Trespass: the Immanent Outside of the Constituted Power

Throughout our analysis we have drawn a clear distinction between two modes of politics. Following Negri, we have valorised the constituent power of the Aboriginal Embassy as a creative demonstration that reveals the reactionary nature of the politics of reconciliation, which is tied to an immanent constitutionalism. This is undoubtedly reductive. Both modes of politics are clearly more complex than this.¹⁵ However, our purpose has not been to differentiate authentic from inauthentic expressions of Aboriginal politics but to interpret the different constitutional registers on which the Embassy and the reconciliation process work. This has involved a double move. First, we have looked to the Embassy as a source of political knowledge about the Australian state and society. This drew our attention to how the reconciliation movement was a reaction to the struggle for land rights and sovereignty. Second, in responding to the Aboriginal Embassy, we have sought to understand the significance of the claim it makes upon the Australian state and society. And we have tried to amplify that claim by exploring its resonance within the philosophical debates about the concept of sovereignty that the Embassy strategically invokes. The value of considering the politics of reconciliation and Aboriginal sovereignty in relation to the constitutional paradox

is that it reveals these as two modes of politics that work in different ways to politicize or depoliticize the constitution of the Australian polity.

In this final section, we consider the limits of Negri's approach in order to complicate our analysis of the Embassy's constitutional politics. Negri's insistence on the antagonism between constituent and constituted power provides an interpretive grid for recognizing some conditions of possibility for fundamental social transformation. Viewed as an expression of constituent power, the Embassy demonstrates the possibility of a break with the colonial past that is frequently invoked in the politics of reconciliation but which the constituted power is incapable of enacting in its own right. The formal reconciliation process tames the social antagonism for which the Aboriginal Embassy seeks to find a political register by representing the Aboriginal struggle over sovereignty and land as a struggle against cultural discrimination that is remediable through attitudinal change. As a demonstration of Aboriginal sovereignty in the here and now, the Embassy exposes the ideological nature of this separation of the political and the economic. Its presence makes visible the economic dimensions of oppressive social relations within a settler-colonial capitalist democracy and points to a more fundamental rupture with the existing order that is required to begin the process of decolonization (Wadjularbinna 2005, 106).¹⁶

Yet there are some difficulties with Negri's political ontology. His vitalistic understanding of the subject of constituent power as a purely creative force neglects the extent to which constituent acts typically entail a negative moment of dis-identification alongside a positive moment of self-creation (see Rancière 2010, 84f.). Tony Coorey's spontaneous idea to name the protest in 1972 the Aboriginal Embassy was undoubtedly highly creative (Foley 2010).¹⁷ But it also shows the way in which the constituent power of the Embassy relies on a moment of negation.¹⁸ This moment of dis-identification is key to understanding how an antagonistic conflict that cannot be accommodated by the constituted power might

nonetheless find a register within that constitutional order. We explore this line of inquiry by examining two key events at the Embassy: firstly, the removal of a Bronze Coat of Arms from old Parliament House in 2002 and secondly, the apparent discovery of a right to camp at the Embassy in 1972. In both cases, it is the act of dis-identification that leads to a reflexive questioning of the right of occupation. By strategically utilising their ambiguous status as Aboriginal citizens, the protestors succeed in bringing another order of signification into play, allowing accusations of theft and trespass to be turned back upon the constituted power in an indictment of its own illegitimacy.

Theft

On the thirtieth anniversary of the Aboriginal Embassy in 2002 Arabunna elder, Kevin Buzzacott reclaimed the totems of Emu and Kangaroo from the constituted power by removing a bronze Coat of Arms from old Parliament House to the Embassy. ‘These people’ claimed Buzzacott, ‘are not the real government of this country, they don’t have authority to steal our animals, the kangaroo and emu, and claim them to be theirs’ (Buzzacott cited in Probyn 2002). Though Buzzacott was later convicted under the Crimes Act this was clearly no ordinary theft (*Regina v Buzzacott* 2004). As an attack on the symbols of the nation committed by one of its own citizens, the removal of the Coat of Arms spoke of a disloyalty bordering on treason. Yet, by dis-identifying as an ordinary member of the people, Buzzacott signified his act as one of repatriation rather than theft. In asserting his status as an Arabunna man, he turned the removal of the Coat of Arms into a public judgment upon an earlier act of theft: the appropriation of Aboriginal land and the usurpation of Aboriginal sovereignty by the Australian state. By refusing his assigned identity as an ordinary citizen, in other words, Buzzacott’s act recalls (and symbolically corrects) that crime of the invaders that was no ordinary theft.

Buzzacott's explicit division of society into 'us' and 'them' recalls Negri's radical opposition between constituent and constituted power. Yet, the symbolic power of Buzzacott's attempt to repatriate the Emu and Kangaroo hinges upon the moment of dis-identification: the moment when two different orders of signification are crossed and their meaning reconfigured. Buzzacott's removal of the Coat of Arms provokes reflection upon the invading society's right of occupation because it first conjoins the symbols of sovereignty and appropriation in the discursive framework of the constituted power. By reclaiming the emblem of the constituted power, Buzzacott establishes a link between sovereignty and theft that is then subverted through dis-identification. As the act of an Aboriginal man rather than a citizen of Australia, the removal of the Coat of Arms ceases to be a sign of disloyalty and becomes a sign of fidelity. In effect it says: this is not what we have done to you, but what you have done to us. It is often assumed that the Embassy mimics and parodies the sovereign state by, for instance, flying a flag and appointing a minister for Caucasian affairs. In contrast, Buzzacott's strategic manipulation of the symbols of power reveals how it is the Australian state that mimics the Aboriginal sovereignty it usurps. His act of repatriation reveals how the constituted power lacks the sovereignty that Aboriginal people possess.¹⁹

Trespass

The Aboriginal Embassy began when four men pitched a beach umbrella on the lawns of Old Parliament House. According to Gary Foley, the plan originally decided by the activists in Redfern (Sydney) in 1972 was to stage a small demonstration in Canberra on the national holiday with the aim of the four protestors getting arrested. This would attract media attention ahead of a larger protest that was to be held on the weekend. When met by Australian Capital Territory police, however, the four protestors sitting beneath a beach umbrella were surprised to be informed that there was no law to prevent them from camping on the lawn, so long as there were fewer than eleven tents. This prompted them to return the next day with a proper

tent to serve as the office of the Aboriginal Embassy in front of which they placed a letterbox, which began receiving mail the following day (Foley 2010, 16). As Roberta Sykes recalled, the activists seemed to have discovered that they enjoyed a unique right, as Aboriginal people, to camp on Crown land in front of Parliament House:

At the time, the Northern Territory was just that, a territory, administered by the politicians and public servants in Canberra, and containing quite large sections of Crown land. The government had framed a law that there was to be no camping on Crown land. However, because Crown land in the Northern Territory was home to dispossessed Aboriginal people who had nowhere else to live, this law specifically excluded Aborigines. The expanse of land in front of Parliament House was also Crown land, but it had obviously never entered the minds of the politicians that Aborigines would set up camp there. (Sykes 2001, 236-237)

The often repeated story of the legal loophole by which the Embassy became an indefinite presence in the Parliamentary Triangle highlights the importance of dis-identification to the symbolic power of the protest. In this instance, however, the politicisation of the constitutional order derives, not from the refusal of a certain representation of citizenship, but from the refusal of a certain representation of Aboriginality. As Sykes makes clear, the Aboriginal entitlement to camp on Crown land (an entitlement apparently not enjoyed by other citizens) derives from their particular history of dispossession. It is only because they have 'nowhere else to live' that they are excluded from the general prohibition and excused of trespass. However the naming of the site as the Aboriginal Embassy marks a dis-identification with this de-politicised, abject Aboriginal who survives in the constituted order only in the form of an exception. By asserting sovereignty, the Ambassadors claimed full possession over land in which the constituted power permits them nothing more than a usufructory right. The politicisation of the lawns of Old Parliament House turns upon this act

of dis-identification in which the Ambassadors draw upon their anomalous status as Aboriginal citizens only to subvert it to another end. The Ambassadors are allowed to ‘camp’ indefinitely because they have supposedly been made homeless by history, but this indefinite encampment becomes a permanent protest because they reject such a limited view of who they are and the kind of rights they (now) possess.

In July 1972, the government sought to close the ‘loophole’ in the law that protestors had inadvertently exposed, by introducing the *Trespass on Commonwealth Lands Ordinance* (1972). Immediately after it was gazetted the police moved on the Embassy in two violent clashes with the protestors. The ordinance was self-evidently intended to re-assert the right of the constituted power to define public space. Yet its dependence upon recasting the Embassy activists as ordinary citizens guilty of criminal activity rendered it a dismal failure. Undertaken under the auspices of an Aboriginal entitlement to camp, the erection of the Embassy proved difficult to re-characterise as an act of trespass in the order of symbolic forms. On the contrary, the need for the constituted power to pass the ordinance merely confirmed the invader society as the original trespasser. As Paul Coe (2011) recently reflected, in provoking the government in this way, the Embassy made visible white violence. It revealed to a national audience the structural violence that Aboriginal people suffer everywhere in Australia as a consequence of dispossession. Official sensitivity to this fact was patently apparent when the Aboriginal people arrested at the site in July 1972 were issued with traffic offences rather than charged under the *Trespass on Commonwealth Lands Ordinance* published that morning. This, as Sykes comments, was a way of ensuring that they could not claim to be political prisoners (Sykes in Cavadini 1972).

It is for this same political reason that Aboriginal people effectively continue to exercise a de facto entitlement to camp at the Embassy site, even though the camp remains technically illegal. Consistent with its espoused democratic principles, the Australian state acknowledges

the right of Aboriginal people to *protest* in front of the Old Parliament House in their role as citizens (or authors of the law). Yet the Australian government and the National Capital Authority have often sought to remove the Aboriginal Embassy on the grounds that no citizen (as addressee of the law) is permitted to *camp* within the Parliamentary precinct. The Embassy activists break down this dichotomy by insisting that camping is an integral aspect of their protest as Aboriginal people. In this way they have managed to sustain a protest of indefinite duration that would be impossible for other citizens (Brisbane City Enterprises 2003, 23; Mutual Mediations 2005).

In their own way, each of these episodes highlights the ambiguous status of Aboriginal people as citizens both within and without the community presupposed by the Australian state. As such, the speaking position of alien that the Aboriginal Embassy affords is not one of a simple exclusion from the constituted order. For this exclusion is constitutive of the terms of citizenship that the Embassy contests. This ambiguous status has proved a double-edged sword for Aboriginal people. Most devastatingly, it makes Aboriginal people susceptible to discriminatory treatment in which their cultural difference serves as a pretext for the restriction or suspension of their rights as citizens. This is exemplified in the ongoing Northern Territory National Emergency response, which has involved among other things, the suspension of the Racial Discrimination Act (1975) (see Watson 2009b; Moreton-Robinson 2009; Tedmanson & Wadivel 2010). Yet, to some extent, it enables Aboriginal people to find a register within the constituted order to bring their claim against it. The Embassy activists are able to present a rival image of political community to that presupposed by the constituted order by virtue of their status as ‘immanent outsiders’ to that order (Isin 2002).

By exploiting this status as immanent outsider, the Embassy succeeds in demonstrating the possibility of a break with the colonial past that the Australian state often glibly invokes

but never enacts. Yet most politicians and citizens refuse to seize the political opportunity that the Embassy affords. The Australian state and society might be impelled by its own legitimacy crisis to seek to resolve the constitutional paradox through an immanent constitutionalism of reconciliation. At the same time, however, it is compelled to defuse Aboriginal claims to sovereignty and land because it identifies the interest of the national community with that of the mining and pastoral industries from which the colonizing society has always derived its wealth. If the constituent power of the Embassy ultimately depends on the mobilization of non-Aboriginal supporters in order to bring about fundamental change, it remains to be seen what social, economic and cultural events might incite such action. In the meantime, the presence and event of the Embassy in the national capital continues to prefigure another possible community between Aboriginal and non-Aboriginal people.

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¹ Pre-empting the judgment of history, he expressed his hope that the day be remembered as one in which 'we' finally stepped away from 'our' racist past and brought 'the first two centuries of our settled history to a close' (Rudd 2008). As an act of purification and unification, the apology would 'remove a great stain from the nation's soul' and help to forge a 'fully united and fully reconciled people' (Rudd 2008).

² In 1988, Labor Prime Minister Bob Hawke promised that a treaty would be negotiated. But this was reneged on in favour of the reconciliation process announced in 1991. Notably, the formal reconciliation process concluded in 2001 with the recommendation by the Council for Aboriginal Reconciliation (CAR) that a treaty be negotiated.

³ Far from breaking with the past, the continuity of reconciliation with the history of colonial relations was highlighted in a cartoon that appeared in the Canberra Times in 1991. An Aboriginal Elder is talking to two young people, explaining, 'A long time ago we had decimation...then we had assimilation...after that, integration...and then, along came self-determination'. One of the youngsters asks, 'What have we got now?' Behind the boy, Robert Tickner, Minister for Aboriginal and Torres Strait Islander Affairs is jumping about down crying 'Yoo Hoo!', while waving a flag that says 'Reconciliation'.

⁴ The activists were Michael Anderson, Bertie Williams, Billie Craigie and Gary Williams

⁵ The Embassy was removed by police on three occasions in July 1972. It reappeared intermittently throughout the 1970s and 1980s. In 1979, for instance, it was temporarily established on Capitol Hill, the site on which the new Parliament House (which opened in 1988) was to be constructed.

⁶ 'We, the members of the Aboriginal Nation and Peoples, do hereby give notice of invoking our claim to all the land of the Territories of our ancestors. Accordingly, we invoke the Rule of International Law that we have never surrendered nor acquiesced in our claim to these lands and territories. This occupation of the site of old Parliament building is evidence of our right to self-government and self-determination in our lands and

territories. We therefore draw the attention of the International Community and the United Nations to our peaceful and lawful right of occupation to our lands and territories' (reproduced in Gilbert 1993, 62).

⁷ The four were Isabel Coe, Ian Williams, Sonya Laughten-Brown and Harold Williams.

⁸ 'All the later generations', Habermas (2001, 774) writes, 'have the task of actualising the still-untapped normative substance of the system of rights laid down in the original document of the constitution'.

⁹ Negri revives a distinction between *potenza* (strength) and *potestas* (power). As *potenza*, constituent power is a 'basis', an incomplete and ultimately infinite repository of strength actualised by the multitude than manifests in revolution. As *potestas*, constituted power is a 'summit', a rigid and formal structure of power lodged in the sovereign that manifests in containment (Negri 1999, 13).

¹⁰ In particular, he has a vitalistic conception of the subject of constituent power and he presupposes a metaphysics of presence (e.g. see Frank 2000; Rancière 2010). We will consider some of the limits of Negri's approach in the final section of this paper.

¹¹ Indeed the burden of proof is now placed on Aboriginal peoples to demonstrate their ongoing traditional connection to ancestral lands in order for a weak form of access right called 'native title' to be recognized in law).

¹² In personal conversation, a senior curator within the Museum of Australian Democracy speculated that the institution owes its existence to the Tent Embassy. For while Old Parliament House had been disused since 1988, within a month of its occupation by Aboriginal protestors in January 2002, the federal government found a use for it.

¹³ Another senior curator at the Museum of Australian Democracy told me that the institution had remained essentially passive in its relation to the Embassy.

¹⁴ This is consistent with a revisionist history currently underway in Australia as exemplified in the recent television documentary, *The First Australians* and advocated by high profile Aboriginal media commentators such as Noel Pearson. These commentators erroneously attribute the principle of self-determination to policies pursued by the Australian state since the 1970s, which they argue have failed. Instead, Pearson argues for

economic participation and individualism as the way forward for Aboriginal people. As Gary Foley (2011) highlights, however, self-determination was never a principle of the state but is what the Aboriginal struggle has always been about: it cannot have failed since it has never been tried by the state.

¹⁵ For instance, many Aboriginal people were involved in the formal reconciliation process and sought to win incremental gains in their struggle for justice by engaging in it. Local Ngamberrri woman, Matilda House, supported the construction of Reconciliation Place and gave the first welcome to country at Parliament House on the day of Rudd's apology. Matilda House defended the Embassy in 1972 and is a cousin of Isobelle Coe who, together with her family, has committed herself to keep the Embassy going for the last forty years. On the other hand, while most Aboriginal people support the on-going presence of the Embassy in Canberra, some question the authority of the current Tent Ambassadors to represent them. Some of the key players in the 1972 protest do not support the on-going protest at the site. And some traditional land owners in Canberra, including Matilda House, have called on the people currently camped at the Embassy to leave on the basis that they have not shown proper respect for country (ABC 2005).

¹⁶ In an open letter to (then) Prime Minister John Howard, Wadjularbinna Nulyarimma (Gungalidda Elder and a Member and Elder of the Aboriginal Tent Embassy) wrote in 2005: 'Reconciliation without justice is genocide... Since we don't have a national voice and there is much unfinished business, it is important that the Aboriginal Embassy remains as a place of self-determination, which flows from our sovereign right in this land... Aboriginal people from all parts of Australia come to the Embassy, because grass-roots Aboriginal people are out of sight and out of mind. We see the Embassy as a place of unfinished business and a place where people from all walks of life can come together and for that to happen we reach out to non-Aboriginal people who are living in fear and confusion' (Wadjularbinna 2005, 106)

¹⁷ Significantly, the Embassy and the Black Power movement in Redfern was seminal to the resurgence of Aboriginal cultural creativity in urban centres, particularly in theatre, film and music, led by influential figures such as Murray Islander, Bob Mazza.

¹⁸ The dis-identification that the Embassy speaks back to the constituted order is put bluntly by Kevin Gilbert (1993, 13): ‘You are not a people to be proud of... We do not wish to shake hands and blot out the horror, effacing it by joining you as assimilated citizens thank you very much.’ The purpose of this act of dis-identification is not to discredit those Aboriginal people who identify as Australian (albeit ambivalently) and recognize citizenship as the hard-won victory of political struggle (Chesterman 2005; Maddison 2009). It is rather to highlight the injustice of expropriation in regards to which citizenship is inadequate compensation.

¹⁹ This point was succinctly put in a sign displayed at the Embassy in 1992, a time when Prime Minister Paul Keating has initiated a public debate about replacing the British Queen with an Australian head of state: ‘Where will the Republic get its sovereignty?’