Love and Thoms: Implications for Indigenous Constitutional Recognition

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Introduction
The landmark Love and Thoms decision in the High Court\(^1\) considered whether Indigenous non-citizens are ‘aliens’ under s 51(xix) of the Australian Constitution. Delivering seven separate judgements, the High Court by a 4:3 majority found that Indigenous people, due to their ancient connection with the Australian continent, are not ‘aliens’ under s 51(xix) regardless of citizenship status. The judgments revisited ongoing conceptual tensions relating to the position of Indigenous peoples under the Constitution, raising practical policy questions and igniting fresh political backlash relevant to ongoing debates about Indigenous constitutional recognition and a First Nations constitutional voice.\(^2\) This article focusses on implications for Indigenous constitutional recognition – an issue of historic significance for the nation.

The article proceeds in five parts. The first part recaps the debate about Indigenous constitutional recognition and explains the problem this reform seeks to fix. It notes that constitutional recognition seeks substantive reform to the relationship between Indigenous peoples and the Australian state, to ensure it is fairer than in the past. The Uluru Statement shows how this should occur: it calls for a First Nations constitutional voice, to guarantee Indigenous peoples fairer input into their affairs.

The second part explains the facts and highlights key differences in the majority and minority approaches in Love and Thoms. The third part considers two conceptual questions explored but not decisively resolved in the judgements. First, I consider how the judgements struggle to reconcile the sui generis position of Indigenous peoples under Australian law with the theoretical ideal of equality – concepts in tension both in the judicial reasoning and in constitutional recognition debates. Though unresolved, the judgements in differing ways confirm, whether explicitly or implicitly, that Indigenous peoples, as well as being equal citizens, are a distinct constitutional constituency with a special relationship with the Australian continent and state. The majority tended to see it as the Court’s role to confer more explicit recognition of the unique position of Indigenous peoples, while

\(^1\) Love v Commonwealth of Australia, Thoms v Commonwealth of Australia [2020] HCA 3 (‘Love’).
the dissenters tended to defer to Parliament and the people – which is perhaps why they prompted political action on Indigenous constitutional recognition. Drawing on the judgements, I suggest that a First Nations voice aligns with the Australian Constitution’s nuanced expression of the principle of equality and its layered, federal approach to reconciling communitarian difference with national unity. A First Nations voice fits with the design and philosophy of the Constitution.

Second, I consider the judgements’ predictably limited findings on Indigenous sovereignty and suggest that the Court’s adherence to precedent on such issues demonstrates the extent to which this is a primarily political question, that cannot be adequately resolved by courts. Surviving First Nations sovereignty can best be fully recognised and peacefully reconciled with Australian state sovereignty through constitutional reform authorised by Parliament and the people. While Love and Thoms reaffirms the special place of Indigenous peoples in Australia, and the majority judgements in particular traverse more nuanced conceptions of Indigenous sovereignty that allow for recognition of Indigenous political communities, the decision of itself does not entail the substantive structural reform that Indigenous constitutional recognition requires – its practical consequences are too limited. Genuine constitutional recognition of the kind envisioned by the Uluru Statement requires political action, which some judgements appear to prompt.

The fourth part explores two elements of the political backlash to Love and Thoms, which carry implications for debates about Indigenous constitutional recognition. First, I argue that allegations of judicial activism enlivened by this case, rather than demonstrating the risks of a First Nations voice, actually illustrate the foresight of the proposal: a First Nations voice was specifically designed to be non-justiciable and therefore intended to address such concerns. It is the only proposal that provides a political and procedural approach to constitutional recognition, rather than a litigious approach. Second, I refute the claim that Love and Thoms introduced a new, race-based distinction into the Constitution. Such distinctions already exist in the Constitution’s text and operation. The objection that the decision undermines “racial equality” under the Constitution is therefore weak: the Constitution already divides us by race.

The fifth part offers some high-level policy suggestions to address two practical issues arising from Love and Thoms. With respect to the three-part test of Indigenous identity, I warn against further entrenchment of arguably discriminatory burdens of proof that have arisen since Mabo, which is relevant to the potential design of a First Nations voice. I also suggest some proactive policy

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3 *Mabo v Queensland (No. 2) (1992) 175 CLR 1 (‘Mabo’).*
incentives to encourage Indigenous non-citizens resident in Australia to seek Australian citizenship, helping preclude threats of deportation like those faced by Love and Thoms.

1. The Indigenous Constitutional Recognition Debate in Australia

The argument for Indigenous constitutional recognition proceeds on the understanding that Indigenous peoples are a unique constitutional constituency with a special relationship with the Australian state. Indigenous constitutional recognition seeks to reform this relationship, to ensure it is fairer than in the past. Constitutional recognition therefore seeks more than a static, symbolic statement of no operational effect. Rather, Indigenous people seek “serious constitutional reform” to ensure past wrongs are not repeated.

The Uluru Statement clarifies how this should occur. In May 2017, following a series of regional dialogues, Indigenous Australians formed an unprecedented national consensus on how they want to be constitutionally recognised. Their consensus was articulated in the Uluru Statement, which called for a singular constitutional reform: a First Nations voice in the Constitution. This was a historic moment in Indigenous peoples’ struggle for constitutional recognition. Most Indigenous advocacy of the past emanated from particular regions: never before had a national Indigenous consensus position been realised. Although seven of the 250 delegates dissented, the majority position was powerful and reflected views expressed at every dialogue calling for a constitutional voice.

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9 Referendum Council report, 33-35.

10 It also called for a Makarrata Commission, set up in legislation, to oversee First Nations agreement-making with government and truth-telling about history.


12 Referendum Council report, 9-16.
The consensus stepped away from removal of references to ‘race’ and insertion of symbolic statements into the Constitution. It also moved away from a racial non-discrimination clause as a means of achieving constitutional empowerment through litigation, the predominant solution recommended by past reports.\(^\text{13}\) The shift was sensible: a First Nations voice is deeply in keeping with Australian constitutional culture and design – more so the insertion of poetic statements into what is fundamentally a practical rulebook of government\(^\text{14}\) and more so than insertion of a racial non-discrimination clause into Australia’s bill of rights-free Constitution.\(^\text{15}\)

Australia’s Constitution is all about voices: the federal system provides mechanisms for the historic political communities (the former colonies) to always be heard by the might of the majority.\(^\text{16}\) The constitutional compact affords these political communities constitutional recognition, such than even the smallest former colonies, like Tasmania, are guaranteed an equal voice in the Senate. However, the First Nations – the most ancient of political communities – were not at the negotiating table during the constitutional conventions and were wrongfully omitted from the compact of 1901. There are thus no constitutional mechanisms for Indigenous peoples to be specifically heard in their affairs, even in laws and policies made directly about them – notwithstanding that there are more Indigenous Australians than Tasmanians.\(^\text{17}\) In asking for a constitutionally enshrined voice, the Uluru Statement makes a reasonable and constitutionally congruent request.\(^\text{18}\)

In 2017, former Prime Minister Malcolm Turnbull rejected the call for a First Nations voice, misleadingly suggesting it would breach principles of equality, and erroneously describing it as a


‘third chamber of Parliament’ that Australians would reject at referendum. Independent polling contradicted the latter claim. A 2017 Omnipoll showed 61 per cent of Australians would vote ‘yes’ to a First Nations voice in the Constitution and a February 2018 Newspoll showed 57 per cent support. By July 2019, research showed support at 66 per cent, despite opposition from government.

In 2018, a Joint Select Committee endorsed a First Nations voice as the only viable pathway for Indigenous constitutional recognition and called for further consultation to progress design details. A co-design process has begun, however the Prime Minister has also indicated opposition to the body being constitutionalised. Attorney-General Christian Porter says he needs to see the “precise words” of the amendment before it can be supported. Meanwhile National Party member, Barnaby Joyce, who initially coined the misleading ‘third chamber of Parliament’ phrase, later admitted the mischaracterisation and apologised unreservedly.

A key continuing challenge remains in making the argument for this constitutional reform and educating politicians and the public about why this proposal aligns with the Australian Constitution.

2. The High Court’s Reasoning in Love and Thoms

Facts and Findings

Love and Thoms concerned whether a person of Aboriginal and/or Torres Strait Islander (Indigenous) ancestry, who is not an Australian citizen, can be classified as an ‘alien’ under s

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19 No ‘third chamber of Parliament’ was proposed. The Indigenous advisory body would be external to Parliament, created by Parliament, and would have no veto or power to make laws. No reform to the Houses of Parliament was proposed. The equality claim was also incorrect, as will be explained below.
24 Joint Select Committee on Constitutional Recognition Relating to Aboriginal and Torres Strait Islander Peoples, Final Report, November 2018.
29 For brevity I use the word ‘Indigenous’ where possible.
51(xix), the aliens power. Both plaintiffs claimed Indigenous heritage but were born outside Australia – Love in Papua New Guinea and Thoms in New Zealand – and were citizens of those countries, but not Australia. Both lived in Australia for long periods under visas which permitted residence, but which were subject to revocation. Neither ever sought to become Australian citizens,\(^{30}\) though that course was open to them.\(^{31}\) Love and Thoms both committed violent offences that received jail sentences of 12 months or more. Under s 501(3A) of the Migration Act 1958 (Cth), the Minister for Home Affairs is required to cancel the visa of a person who has been convicted of an offence receiving a sentence of imprisonment of 12 months or over.\(^{32}\) Upon cancellation, the plaintiffs became unlawful non-citizens liable to be deported.\(^{33}\)

The plaintiffs challenged the legality of their visa cancellations, their detention and their attempted deportation, arguing that s 51(xix) did not apply to Indigenous people. The plaintiffs contended that Indigenous people, due to their unique connection to the Australian continent (a connection recognised in common law),\(^{34}\) could not be aliens under the constitutional meaning of the term.\(^{35}\) Therefore it was argued that the aliens power, which supports the Migration Act and the Citizenship Act 2007 (Cth), did not apply to Love and Thoms. Rather, the plaintiffs occupied a special category of ‘non-citizen non-aliens’,\(^{36}\) by virtue of their Indigeneity. The relevant provisions of the Migration Act therefore did not support their deportation. This was the first time the relevance of Indigeneity for s 51(xix) had been judicially considered.

Bell, Gordon, Nettle and Edelman JJ in the majority found that “Aboriginal Australians (understood according to the tripartite test in Mabo [No 2]) are not within the reach of the “aliens” power conferred by s 51(xix) of the Constitution.”\(^{37}\) The majority drew upon the common law recognition of native title to acknowledge what Gordon J termed the “deeper truth” that Indigenous people, as the “first peoples of this country”, carry a unique “spiritual or metaphysical”\(^{38}\) connection with the Australian continent.\(^{39}\) This connection, being “older and deeper than the Constitution”,\(^{40}\) influences the meaning of ‘alienage’ under the Constitution. As Nettle J described, it “runs deeper than the

\(^{30}\) Love, 2.
\(^{31}\) Ibid, 65, 147, 152, 156.
\(^{32}\) Migration Act 1958 (Cth), s 501(6)(a), s 501(7)(c). These provisions are explained by Keane J at Ibid 153, see also 240 (Nettle J).
\(^{33}\) Migration Act 1958 (Cth), ss 13, 14; Love, 154, 228, 235.
\(^{34}\) Love, 21, 52, 70, 115.
\(^{36}\) Ibid, 3, 23, 112.
\(^{37}\) Ibid, 81. All majority judgements used differing reasoning to reach this conclusion.
\(^{38}\) Ibid, 289.
\(^{39}\) Ibid, 73, 263, 276.
\(^{40}\) Ibid, 363.
accident of birth in the territory or immediate parentage”,\textsuperscript{41} thus presenting, as Edelman J explained, an “underlying fundamental truth” that could not be “altered or deemed not to exist by legislation”.\textsuperscript{42} The majority therefore held that Indigenous people are not aliens and accordingly could not be deported – even if they are non-citizens.\textsuperscript{43} Edelman J found that an Indigenous person could be a ‘non-citizen, non-alien’ – a unique constitutional class.\textsuperscript{44} Thoms as a native title holder, and potentially Love (depending on matters of proof), inhabited this class.

A key preliminary factor distinguishing the minority and majority positions was whether the meaning of ‘alien’ was to be determined by legislation or judicial interpretation. The majority viewed this as a question of constitutional fact,\textsuperscript{45} which the High Court should properly determine. Its meaning did not rely on legislative definition, because “statutory concepts cannot control constitutional concepts.”\textsuperscript{46} By contrast, Kiefel, Gageler and Keane JJ in the minority saw the definition of alien as a political question to be determined by Parliament. Gageler J explained that s 51(xix) is a ‘subject matter’ power, which confers broad discretion on Parliament to legislate to regulate and define that subject matter:

\begin{quote}
To the extent that s 51(xix) of the Constitution confers legislative power to determine the existence and consequences of a legal status, it resembles the legislative powers conferred by s 51(xvii) (with respect to "bankruptcy"), s 51(xviii) (with respect to "copyrights, patents ... and trade marks") and s 51(xxii) (with respect to "marriage").
\end{quote}

The minority found that ‘alien’ was simply the antonym of ‘citizen’, a legal category that is legislatively determined.\textsuperscript{48} It was not a matter of constitutional fact for the High Court to elucidate through legal reasoning,\textsuperscript{49} but a status conferred through legislation.\textsuperscript{50} As Kiefel CJ noted:

\begin{quote}
It is not for this Court to determine whether persons having the characteristics of the plaintiffs are aliens. Such an approach would involve matters of values and policy. It would usurp the role of the Parliament.
\end{quote}

\textsuperscript{41}Ibid, 276.  
\textsuperscript{42}Ibid, 451.  
\textsuperscript{43}Ibid, 284.  
\textsuperscript{44}Ibid, 447.  
\textsuperscript{45}Ibid, 244, 263. In line with the understanding of ‘alien’ as a “constitutional term”. See Ibid, 300.  
\textsuperscript{46}Ibid, 305, 334.  
\textsuperscript{47}Love, 86.  
\textsuperscript{49}Love, 86-89.  
\textsuperscript{50}Ibid, 130, 172, 177.  
\textsuperscript{51}Ibid, 4. See also Gageler J at 133.
Accordingly, the minority found that Indigeneity is irrelevant to statutory citizenship and alienage: under the *Migration Act*, Love and Thoms were not citizens and therefore aliens.

The minority judgements demonstrate greater deference to Parliament on policy questions, which is also reflected in their references to current debates about Indigenous constitutional recognition. Keane J proposed that political action on constitutional recognition is needed precisely because the Constitution does not presently afford such recognition, suggesting it was not the Court’s role to confer it through constitutional interpretation – rather Parliament and the people should bestow due recognition to Indigenous peoples through constitutional reform. Gageler J similarly deferred not only to Parliament, but also to Indigenous voices, on the contentious policy matters raised by this case, noting that:

The hearing of the special cases in these proceedings has been conducted at a time when a national conversation is occurring about the appropriateness of amending the Constitution to include an Aboriginal and Torres Strait Islander "Voice" to the Commonwealth Parliament. Noticeably absent from the viewpoints represented at the hearing has been the viewpoint of any Aboriginal or Torres Strait Islander body representing any of the more than 700,000 citizens of Australia who identify as Aboriginal or Torres Strait Islander. On the basis of the case as presented, I cannot presume that the political and societal ramifications of translating a communal, spiritual connection with the land and waters within the territorial limits of the Commonwealth of Australia into a legislatively ineradicable individual connection with the polity of the Commonwealth of Australia are able to be judicially appreciated.

Another differentiating factor was the emphasis given to common law in relation to the Constitution. The majority largely accepted the plaintiffs’ argument that the connection between Indigenous peoples and the Australian continent, recognised in the common law application of native title, could be extrapolated to impact the constitutional meaning of ‘alien’. Nettle J found that the common law’s recognition of Indigenous societies and their laws and customs meant that Indigeneity (as determined by the three-part test), confers a status “necessarily inconsistent with alienage”, thereby impacting constitutional meaning. Gordon J similarly held that “[f]ailure to recognise that Aboriginal Australians retain their connection with land and waters would distort the

52 Ibid, 178.
53 Ibid, 134.
54 Ibid, 269.
55 Ibid, 271.
56 Ibid, 272.
concept of alienage by ignoring the content, nature and depth of that connection” and “would fly in the face of decisions of this Court that recognise that connection and give it legal consequences befitting its significance.”\(^{57}\) Drawing on the common law as informing constitutional concepts,\(^{58}\) Gordon J concluded that because an “Aboriginal Australian is not an "outsider" to Australia”,\(^{59}\) Indigenous people could not meet the description of ‘alien’ as a “constitutional term”.\(^{60}\)

The minority, by contrast, found that the common law could not trump the Constitution: to the extent of inconsistency, the common law must yield.\(^{61}\) This again demonstrates increased deference to political processes, because it declines to elevate the authority of the common law (judge-made law) such that it impacts the meaning of the Constitution (which under s 128 must be altered by Parliament and the people). Further, while the Indigenous connection to land was relevant to native title, for the minority it was not necessarily relevant to other areas of law.\(^{62}\) Allowing common law notions of Indigenous connection to be extrapolated into an Indigenous-specific limitation on the aliens power was thus rejected, described by Gageler J as unjustified judicial creativity – an exercise in “supra-constitutional innovation.”\(^{63}\)

The majority nonetheless held that the ancient Indigenous connection to the continent carried constitutional implications, such that Indigenous persons are not ‘alien’ to Australia. Accordingly, the aliens power did not extend to Indigenous people and the Commonwealth had no power to deport Indigenous non-citizens. Thoms, who is a native title holder and whose Indigeneity had therefore already been proven, was subsequently released from detention.\(^{64}\) The factual question as to Love’s Indigeneity was remitted to the Federal Court.

### 3. Conceptual Tensions Relevant to Debates About Indigenous Constitutional Recognition

There are two ways in which the Love and Thoms decision perpetuates and restates, but does not conclusively resolve, conceptual and theoretical tensions relevant to debates about Indigenous constitutional recognition. First, the case engages with tensions between the historical and cultural reality of Indigenous difference in Australia – a fact recognised in law – and the realised theoretical ideal of equality before the law. Second, the judgements predictably shy away from

\(^{57}\) Ibid, 298.

\(^{58}\) Ibid, 347.


\(^{60}\) Ibid, 300, 360.

\(^{61}\) Ibid, 41-42, 128.

\(^{62}\) Ibid, 45.

\(^{63}\) Ibid, 133.

\(^{64}\) Elizabeth Byrne and Josh Robertson, ‘High Court rules Aboriginal people cannot be deported for criminal convictions, cannot be ‘alien’ to Australia’, ABC News, 11 February 2020.
fulsomely reconciling notions of surviving First Nations sovereignty with Australian settler state sovereignty, demonstrating that this may be better dealt with politically.

I. Reconciling Indigenous Difference with Equality

Indigenous peoples occupy a position of historical, legal and political difference in Australia. This arises from their position as the first occupants of the continent, the historical fact of dispossession and the discrimination they have suffered, and the contemporary reality that Indigenous peoples attract certain unique rights and interests that do not apply to other citizens. As noted, the argument for Indigenous constitutional recognition proceeds on the understanding that Indigenous peoples are a distinct constitutional constituency, with a special relationship with the Australian state. Yet Indigenous people have also over time been included as equal citizens – at least formally if not substantively – though equal treatment is not guaranteed by or reflected in the Constitution.

In grappling with conceptual tensions between Indigenous difference and equality, the judgements engage with, but do not fully explain or resolve, ambiguities arising from the layered nature of citizenship in a multicultural, federal, settler democracy like Australia, in which citizens can sustain multiple simultaneous political, religious, cultural and other community allegiances that coexist peacefully with citizenship. In the dialectical struggle between Indigenous difference and equality, the majority leans more towards Indigenous difference, while the minority pulls more towards equality before the law. All judgements also traverse the grey areas in between both conceptual extremes, without clearly explaining why and how Indigenous difference and equality are simultaneously supported. That is, while Indigenous people may now be equal citizens; they still occupy a position of historical, political and legal difference. This is because citizenship in a federal, settler democracy like Australia is layered, and Australia’s Constitution accordingly employs a nuanced understanding of equality.

Emphasising the Indigenous difference side of the equation, Bell and Gordon JJ in the majority explain that Indigenous peoples hold a sui generis position under Australian law. This insight is not new, but is relevant in making the case for constitutional recognition and refuting the overly simplistic Institute of Public Affairs (IPA) style equality objection (which also characterised former

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65 See references at above n 4.
69 Love, 74, 333.
Prime Minister Malcolm Turnbull’s rejection of the Uluru Statement,\(^{70}\) that Indigenous Australians should be treated only as equal citizens without any differentiation.\(^{71}\) The judgements in their complex ways reiterate that it is not ‘either, or’. They variously confirm that Indigenous peoples are now formally equal members of the Australian political community,\(^{72}\) but also that they have a unique status which entitles them to certain rights not available to other Australians – like native title.\(^{73}\)

Edelman J further explains that expansion of Indigenous rights had not “assimilated Aboriginal people within a unitary, homogenous political community that is defined almost entirely by legislative norms of citizenship”.\(^{74}\) Indigenous societies existed and still exist. To deny recognition of Indigenous difference on the basis of equality, Edelman J held:

> misunderstands the concept of equality before the law. To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference.\(^{75}\)

Nettle J went further. His honour found that the common law contemplates a “unique obligation of protection owed by the Crown” to Indigenous societies,\(^ {76}\) thus framing the special relationship between Indigenous peoples and the state as something akin to a Canadian-style fiduciary relationship\(^ {77}\) - a finding bolstered by Australia’s recognition of state obligations to Indigenous peoples in international law.\(^ {78}\) Nettle J also found that Indigenous people recognised as being under permanent protection of the Crown reciprocally owe “permanent allegiance” to the Crown\(^ {79}\) – a notion which some Indigenous people might find questionable and which Keane J in his dissent rejected as “rank paternalism”.\(^ {80}\)

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\(^{71}\) Shireen Morris ‘False Equality’ in Shireen Morris (ed), A Rightful Place: A Roadmap to Recognition (Black Inc 2017).

\(^{72}\) Love, 9 (per Kiefel CJ), 161 (Keane J).

\(^{73}\) Ibid, 27-29, 32 (per Kiefel CJ), 73 (Bell J), 127 (Gageler J). This insight is not new – it affirms what has long been accepted in Mabo and other cases.

\(^{74}\) Love, 453.

\(^{75}\) Ibid.

\(^{76}\) Ibid, 272-273, 276.

\(^{77}\) R v Sparrow [1990] 1 SCR 1075, 1108. These fiduciary duties tend to arise out of the treaty relationships now recognised in the Canadian Constitution. Such arguments have not been recognised in Australia, where there is no treaty and where Indigenous rights are not constitutionally recognised, though Toohey J in Mabo suggested fiduciary duties may arise because of the vulnerable nature of native title rights and the power of the Crown to extinguish such rights. See Mabo, 203–4.

\(^{78}\) Love, 274.

\(^{79}\) Ibid, 279.

\(^{80}\) Ibid, 217.
The minority tended to emphasise equality over Indigenous difference. While the dissenting judgments recognised the unique relationship between Indigenous people and the Australian continent, they struggled more in reconciling the theoretical ideal of Indigenous people as equal citizens with the historical reality that Indigenous peoples were treated in a deeply discriminatory way. Equality before the law was an unrealised ideal, but not a lived nor legal reality for Indigenous peoples in the colonisation and development of Australia. Demonstrating ongoing confusion on this point, Kiefel CJ following Mabo, stated that “[f]rom the time of British settlement the legal status of Aboriginal persons in Australia – as subjects of the Crown – has not been different from other Australians.” As Brennan J similarly stated in Mabo, “in a settled colony in inhabited territory, the law of England was not merely the personal law of the English colonists; it became the law of the land, protecting and binding colonists and indigenous inhabitants alike and equally”. Yet, while under the British law (had it been non-discriminatorily applied), Indigenous peoples should have been treated equally, this was not the case in practice. The discrepancy between theory and reality is stark: there were unofficial policies of frontier killing of Indigenous people, official policies which included forced removal of Indigenous people into protective missions, as well as laws and policies denying equal voting rights, denying equal wages, dictating who they could marry and controlling where they could live, and denying equal property rights. The legalistic ideal of

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81 Ibid, 28-29 (Kiefel CJ), 127-128 (Gageler J), 194 (Keane J).
82 Mabo, 37-38 per Brennan J, with whom Mason CJ and McHugh J agreed, 80 per Deane and Gaudron JJ, 182 per Toohey J.
83 Love, 9. See also Gageler J at 108, 110.
84 Mabo, 37.
86 In Frantz Fanon, The Wretched of the Earth (Grove Press, 1963) 309–12, Fanon poetically observes this apparent incongruence between colonial principle and practice. See also Bain Attwood, Telling the Truth about Aboriginal History (Allen and Unwin 2005) 128–30.
89 E.g. The Elections Act 1885 (Qld), s 6 provided that “no aboriginal native of Australia, India, China or of the South Sea Islands shall be entitled to be entered on the roll except in respect of a freehold qualification.” The Constitution Amendment Act 1899 (WA), s 26 provided that “no aboriginal native of Australia, Asia, or Africa, or person of the half-blood, shall be entitled to be registered, except in respect of a freehold qualification.” The Electoral Code 1896 (SA), s 16 provided that “in the Northern Territory immigrants under the Indian Immigration Act 1882 and all persons except natural-born British subjects and Europeans or Americans naturalized as British subjects, are disqualified from voting.”
91 The Protection Acts empowered appointed protectors and boards to control many day to day aspects of Indigenous people’s lives. See e.g. Aborigines Protection Act 1886 (WA), Aborigines Protection Act 1869 (Vic), Aboriginals Preservation and Protection Act 1939 (Qld).
92 Full discussion in Mabo.
equality before the law, espoused in several judgements, is more theoretical than realistic – a point subtly acknowledged by Nettle J.93

This tension between the theory and practice of legal equality pervades the dissenting judgements. Gageler J notes that though Indigenous people were included as members of the Australian political community, they were nonetheless subject to constitutional exclusions and “gross legislative denial of political rights” – which was a “monstrous thing”.94 Keane J similarly observes that the discriminatory exclusions of Indigenous people from the Constitution (including through s 127 which excluded Indigenous people from being counted as part of the population for voting purposes), once deleted in 1967, left a Constitution that affords no explicit recognition of Indigenous peoples at all.95 Did that result in a situation of formal equality? On the question of whether descent can be grounds for differential treatment in matters of citizenship, Keane J asserted (following Gaudron J in *Kartinyeri*),96 that “[r]ace is simply irrelevant ... to the question of continued membership of the Australian body politic”.97 Yet given his honour’s acknowledgement that Indigenous people were excluded under s 127, and Gageler J’s acknowledgement of past discrimination in citizenship rights, not to mention the historic operation of the White Australia Policy and the continued existence of the race power which demonstrate that racial discrimination in citizenship is constitutionally sanctioned,98 this seems a confusing statement. Perhaps his honour meant that judicially-determined race-based qualifications to citizenship are not constitutionally sanctioned, while politically-determined race-based discrimination, through legislation, is constitutionally sanctioned.

Though Keane J argues that the post-1967 wording of s 51(xxvi) suggests that the Constitution “does not create or recognise persons of Aboriginal descent as a special privileged group among those who constitute the people of the Commonwealth”,99 this ignores that fact that the power’s *operation* indicates that Indigenous people are a distinct group of citizens for whom it is necessary to make special laws – a fact pointed out in a 2019 speech by Gleeson CJ.100 A tension between how the law appears on paper and how it works in practice is again evident. Formal equality might be a nice idea, but it is not a reality of the Australian Constitution, which retains race-based provisions,101 has

93 *Love*, 267.
94 Ibid, 110.
95 Ibid, 178-180.
96 (1998) 195 CLR 337 at 366 [40].
97 *Love*, 177. See also at 256 (per Nettle J).
99 *Love*, 182.
101 Ss 51(xxvi), 25.
overseen extensive discrimination and still empowers differential treatment, especially of Indigenous people. Yet Keane J found that “[t]here is no support in the text or structure of the Constitution for” the existence of “a special class within the people ... who, by virtue of their biological descent ... enjoy a constitutionally privileged political relationship with the Australian body politic”. Indeed, the special status of Indigenous people under the Constitution has historically been one of exclusion, not privilege. This is the very problem Indigenous constitutional recognition seeks to fix, which is perhaps why Keane J hints at the need for political action to effect the necessary constitutional reform. This appears the key difference between the majority and minority positions: the majority found it was open to the High Court to determine further consequences of the special position of Indigenous peoples under the Constitution and the appropriate balance between Indigenous difference and equality in relation to the aliens power. The minority at least implicitly, if not as explicitly, also acknowledges the special position of Indigenous peoples, but defers to Parliament as the actor constitutionally empowered to determine the consequences of this special position and the correct balance with equal citizenship.

There is nonetheless much conceptual agreement in the majority and minority positions, reflecting well-established judicial understandings of Australian history. All judgements affirm the unique legal and constitutional status of Indigenous people under Australian law that gives rise to the common law recognition of native title. Implicit in all judgements is acknowledgment that Indigenous peoples are the only group that was dispossessed by British settlement. They were the only group especially excluded from the constitutional arrangements of 1901, particularly as noted by some judgements, through sections 127 and 51(xxvi). They are therefore the only group that has particular rights and interests arising out of this history. These rights and interests, as the justices all note, are recognised at common law. There is also Indigenous-specific legislation recognising Indigenous native title rights and Indigenous cultural heritage, and well as efforts at closing the gap to address legacies of past discrimination. Further, Indigenous peoples are the only group for whom the Commonwealth makes such laws and the only group for whom the Commonwealth requires a special legislative head of power to do so – section 51(xxvi) has only ever been used with respect to Indigenous peoples. The history and operation of the Constitution thus demonstrate

102 Love, 178.
103 Ibid, 178, 184.
104 Ibid, 110 (Gageler J), 179-180 (Keane J), 355 (Gordon J)
105 Native Title Act 1993 (Cth).
106 Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth).
107 Love, 126, 130 (per Gageler J), 370 (per Nettle J). Before 1967 it was never used.
the practical reality of Indigenous difference: Indigenous peoples are a distinct constitutional constituency, with a unique relationship with the Australian state.

The history above also reflects legal and political efforts at trying to remedy constitutionally-enabled past discriminatory denial of Indigenous rights, and reveals an evolution towards something approaching a highly imperfect equality in citizenship (taking into account ongoing discriminatory provisions in the Constitution, necessary recognition of Indigenous rights in legislation and common law and persisting substantive inequalities). A more complete account of Indigenous difference and its interaction with equality in Australia, however, would acknowledge that a simplistic equality paradigm cannot provide a fulsome answer to past injustice, nor a thorough account of Indigenous rights. Theoretically, there are limitations to an individualistic non-discrimination framework as the sole means for understanding collective Indigenous interests and identities.108 As Menno Boldt explains with respect to Canadian law, a simple non-discrimination paradigm “robs Indians of the most significant elements of Indian identity – their history, nationhood, cultures, and languages – and thereby undermines their historical and moral claims to self-determination.”109 Adherence to strict equality does not answer existential struggles for Indigenous recognition: the Indigenous desire to survive as distinct and collective peoples; in other words, the Indigenous desire for self-determination.110 Yet the right to self-determination is inherently related, and should not be seen as contradictory, to the right to equality.111 That the doctrine of terra nullius denied equal Indigenous property rights, equality under the law and thus their right to exist and prosper as Indigenous peoples, demonstrates the extent to which the two principles are inter-related and can be simultaneously denied. Equality and Indigenous self-determination can also be simultaneously promoted.112

Apparent tensions between the legal and political recognition of Indigenous difference and ideals of equality appear less fractious when one considers the nature of Australia’s Constitution. The Constitution enshrines no right of equality; it contains discriminatory provisions.113 It does not require strict equality in individual voting rights; instead it ensures the historic political communities

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109 Menno Boldt, Surviving as Indians (University of Toronto Press 1993) xv.
110 See art 1 of both the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, and art 3 of the UN Declaration on the Rights of Indigenous Peoples.
112 The UN Declaration on the Rights of Indigenous Peoples (DRIP) preamble affirms “that indigenous peoples are equal to all other peoples, while recognizing the right of all peoples to be different, to consider themselves different, and to be respected as such”. The articles also recognise both Indigenous rights to equality and non-discrimination, and rights to self-determination and distinct cultural and other rights.
113 See ss 25 and 51(xxvi).
– even the very small ones – are heard in their affairs. Australia’s federal Constitution therefore recognises the equality of the pre-existing political communities more than it recognises individual equality. As Gleeson CJ notes, such realities demonstrate the weakness of simplistic equality objections to Indigenous recognition:

To say that the Constitution treats all Australians equally sounds reassuring, but is it true? Consider the example of representation in Parliament. Under the Constitution, about half a million Tasmanians are represented by the same number of Senators as about seven and a half million people of New South Wales. Is that equality? Or is it inequality? It is both, but, more to the point, it is Federalism.

Under the federal constitutional compact, a citizen can be Australian, Victorian and of Indian heritage all at the same time (like the author). If I was Tasmanian, this would entitle me to a more powerful proportional voice in the Senate. So, too, can a citizen be Australian, Victorian and Indigenous at the same time – the difference being that a citizen’s Indigeneity may give rise to certain legal rights (like native title) not available to the Indian Victorian Australian. Citizenship in a settler federation is multi-layered. It enables co-existing layers of identity, affiliation and loyalty – united by a common national union under the Constitution.

Just as federalism is a mechanism reconciling plurality with unity in aid of political stability, so too would constitutional inclusion of the First Nations through increased constitutional dialogue peacefully balance historic and cultural difference with unity and inclusion. A constitutionally guaranteed First Nations voice would not breach Australian constitutional expressions of equality; rather it would belatedly recognise the Indigenous political community in a way that aligns with the principle as understood under Australia’s Constitution.

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115 Gleeson, above n 101, 15.


II. Reconciling First Nations Sovereignty with Australian State Sovereignty

Following Mabo and other cases, the judgements seem at pains to emphasise that they are not recognising any surviving Indigenous sovereignty. What does this mean for Indigenous constitutional recognition?

The word ‘sovereignty’ has different meanings and uses, depending on context. Separatist or external understandings should be distinguished from internal, inclusive notions. External nation-state sovereignty is aptly described as the “supreme authority within a territory”. Practically speaking, such sovereignty is question of military and political might, not legal or moral right – which explains why the courts of a sovereign government tend to resile from adjudicating that sovereignty. A court cannot question the authority that gives rise to its own power.

But there are other more nuanced understandings of sovereignty. Distinguishing Australia from the US, Gageler J explained that:

Australian courts before and after Mabo ...as well as in the reasoning in Mabo itself, have consistently rejected the existence of Aboriginal or Torres Strait Islander sovereignty. That rejection has meant that, unlike the "Indian Tribes" recognised in the Constitution of the United States, Aboriginal and Torres Strait Islander societies have never been treated constitutionally as "distinct political societies" or as "domestic dependent nations" the members of which have owed "immediate allegiance to their several tribes".

On one hand, this seems to pull against my argument that Indigenous peoples are historic political communities with special constitutional status in Australia. On the other hand, it demonstrates that this constitutional status remains unrecognised – it is constitutionally implicit in the history, text and operation of the Constitution, but not yet explicit. Indigenous peoples are the omitted historic political community because their sovereignty went unrecognised by the colonisers who were...

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119 Love, 25, 37 (Kiefel CJ), 102 (Gageler J), 197, 199-202 (Keane J), 264 (Nettle J), 356-357 (Gordon J),
123 As Gibbs J stated in 1975, “[t]he acquisition of territory by a sovereign state for the first time is an act of state which cannot be challenged, controlled or interfered with by the courts of that state.” New South Wales v. The Commonwealth (1975) 135 CLR 337, 388.
124 Love, 102.
asserting their own competitive sovereignty. But Australian courts cannot unilaterally solve this problem, though as Brennan J noted in *Mabo*, they can deal with its consequences. Historically, sovereignty was a question decided through violence and war, with devastating results. Where peaceful resolution is possible, competing sovereignties are reconciled usually through politically-driven constitutional and structural reform, including through treaties.

That said, the majority judgements on some views traverse the grey area between judicially recognising a more nuanced form of Indigenous sovereignty and merely dealing with the consequences of its non-recognition. Gageler J describes the plaintiffs (and by implication the majority) as coming “perilously close” to recognising Indigenous sovereignty by allowing “membership of an indigenous society” to exhaustively determine “the question of whether they are non-aliens” under the Constitution. Kiefel CJ similarly finds that enabling an Indigenous community to determine whether a person is an alien (a policy consequence of the majority finding which relies on the three-part test for Indigeneity and includes the criteria of community acceptance) would be to “attribute to the group the kind of sovereignty which was implicitly rejected by Mabo … and expressly rejected in subsequent cases.” Yet this seems to overstate the implications of the majority decision, which only impacts a very small group of Indigenous non-citizens and which, as some judgements note, can be reversed through legislative action - demonstrating the supreme authority of Parliament to undo the consequences of any theoretical recognition of Indigenous sovereignty bestowed by the majority. Parliament and the people are ultimately sovereign when it comes to recognising Indigenous sovereignty, not the courts.

A nuanced conception of surviving Indigenous sovereignty might implicitly, if not explicitly, be being employed by the majority. Yet just as the judgements grapple with, but do not clearly articulate, the layered nature of citizenship in a federal, settler democracy, they similarly oscillate around but do not clearly explain the layered nature of sovereignty, in a settler state that still does not formally recognise surviving Indigenous sovereignty. A non-separatist, non-military, inclusive notion of surviving Indigenous sovereignty was articulated by International Court of Justice judge, Fouad Ammoun, in the *Western Sahara case*. Ammoun described Indigenous peoples’ sovereignty as

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127 Brennan J held that: “Although the question whether a territory has been acquired by the Crown is not justiciable before municipal courts, those courts have jurisdiction to determine the consequences of an acquisition under municipal law.” *Mabo*, 32.
128 *Love*, 125.
a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the man who was born therefrom, remains attached thereto, and must one day return thither to be united with his ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. 

Edelman J echoed this language to conclude that “an Aboriginal child whose genealogy and identity includes a spiritual connection forged over tens of thousands of years between person and Australian land, or “mother nature” could not be considered alien under the Constitution.

Whether or not one agrees with the judicial conclusion, this conceptual understanding of Indigenous sovereignty (which is not new, but follows Mabo) is helpful for conversations about Indigenous recognition, because it co-exists peacefully and inclusively with the sovereignty of Australian governments. Recognition of this kind is the middle ground alternative to assimilation and annihilation of Indigenous peoples on one hand, and separatism and fragmentation of the state on the other. It is the radical centre to which constitutional recognition aspires. As the Uluru Statement puts it, paraphrasing the Western Sahara case:

*This sovereignty is a spiritual notion: the ancestral tie between the land, or ‘mother nature’, and the Aboriginal and Torres Strait Islander peoples who were born therefrom, remain attached thereto, and must one day return thither to be united with our ancestors. This link is the basis of the ownership of the soil, or better, of sovereignty. It has never been ceded or extinguished, and co-exists with the sovereignty of the Crown …*

With substantive constitutional change and structural reform, we believe this ancient sovereignty can shine through as a fuller expression of Australia’s nationhood.

The Uluru Statement calls on Parliament and the people to rectify the historic exclusion of Indigenous peoples, and the historic suppression of Indigenous sovereignty, by affording them a constitutional voice in their affairs. The fact that such recognition is conferred by Parliament and polity demonstrates that Indigenous constitutional recognition is inclusive, rather than separatist, in its understanding of Indigenous sovereignty. It does not seek Indigenous sovereign dominance; rather it seeks peaceful co-existence and constitutional inclusion.

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131 Western Sahara (Advisory Opinion) [1975] ICJ Rep 12, 85–86 (Vice-President Ammoun). See also Mabo, 41.
132 Love, 466.
134 James ‘Youngblood’ Henderson describes Aboriginal sovereignty as engaging notions of knowledge, understanding and relationships, rather than absolute dominance and force: James (Sa’ke’) Youngblood Henderson, ‘Constitutional Vision and Judicial Commitment: Aboriginal and Treaty Rights in Canada’ (2010) 14(2)
activists who harbour aspirations for separate-state sovereignty tend not to support constitutional recognition for precisely this reason – constitutional recognition is inclusive and, to genuine separatists, it is problematically integrationist.135

Constitutional recognition could mean a carving out of Indigenous authority and a sharing of power, not through judicial adjudication – the Referendum Council makes clear that a First Nations constitutional voice should be non-justiciable136 – but through an increased Indigenous voice in political processes with respect to Indigenous affairs, making constitutional space that allows First Nations sovereignty, hitherto surviving though suppressed by the sovereignty of the colonising state, to “shine through” and express itself more effectively.137 Given a First Nations voice would entail no veto,138 the reform would respect parliamentary supremacy and Australian sovereignty. This would be a practical recognition of surviving and co-existing Indigenous sovereignty in a form compatible with the sovereignty of the Australian state.

Tensions between external conceptions of sovereignty, which requires total dominance within the territory, and internal sovereignty which can co-exist peacefully with the sovereignty of Australian governments, permeate the judgements. Yet the unwillingness of the Court to more explicitly articulate such nuanced notions of surviving Indigenous sovereignty, or to show how such sovereignty can be reconciled with the sovereignty of Australian governments, highlights the reality that this may be better dealt with politically. As noted, even the Court’s limited findings as to the consequences of non-recognition of Indigenous sovereignty can be overruled by Parliament. This demonstrates that courts alone cannot confer such recognition under Australia’s system of parliamentary supremacy. Eloquent judicial affirmations of Indigenous connection to the land may be symbolically powerful, but they do not constitute substantive structural reform to the relationship between Indigenous peoples and the state that Indigenous constitutional recognition (as envisioned in documents like the Uluru Statement) requires.

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136 Referendum Council report, 38.

137 As Macklem explains, the value of using the language of ‘sovereignty’ in such arguments is that: “[i]t represents a legal or constitutional space in which a community can express its collective identity... sovereignty attaches to collectivities, not individuals... The distribution of sovereignty ought to be judged by reference to equality of peoples, not equality of individuals.” Patrick Macklem, ‘Distributing Sovereignty: Indian Nations and Equality of Peoples’ (1993) 45(5) Stanford Law Review 1311, 1353.

138 Referendum Council report, 36.
Accordingly, there is a sense in some judgements of deferring to, but also subtly prompting, political action on such questions. Echoing Gageler J, Edelman J observes that the proceedings afforded no opportunity for “any of the population of more than half a million Aboriginal or Torres Strait Islander people or their representative bodies, the opportunity to be heard” on the issues in contention, highlighting the need for a First Nations voice. Keane J similarly prompt political action:

A strong moral case can be made for special recognition of Aboriginal people in the Constitution because of their special place as the first inhabitants of the continent and the historical injustices suffered by them. Indeed, the case for special recognition is the subject of public debate at the present time.  

4. Political Backlash and Implications for Indigenous Constitutional Recognition

Political backlash to this case coalesced around two entwined themes. First, commentators complained that this was an example of judicial activism. Second, objectors argued that the decision introduced an unjustified race-based distinction into the Constitution. Both these arguments were used as evidence of why Indigenous constitutional recognition should not be pursued.

I. The Judicial Activism Concern is Answered by Non-Justiciability

Objectors cited the case as an example of judicial activism, fresh evidence of why any form of constitutional recognition would be mis-used by the High Court. Such objections are not new. Warnings about judicial activism have been wielded regularly throughout the constitutional recognition debate. Nonetheless, Love and Thoms gave objectors new fodder. Albrechtsen argued the “court’s activism” would “help convince Australians it would be a grave mistake to insert a race-based voice into our Constitution.” Merritt agreed that the decision “added an unpredictable element of risk to the push for constitutional recognition”, which meant the community was “right to ask what the activist majority would do with the “voice”.” James Allan reiterated his belief that any constitutional change “will be used by the judges as an activist tool to deliver politically correct,

139 Love, 134.
140 Ibid, 467.
141 Ibid, 178.
144 Janet Albrechtsen, ‘High Court in the crossfire of runaway judicial activism’, The Australian, 14 February 2020.
identity politics outcomes”. For Allan, this case proved his “longstanding point” that constitutional recognition would enable “even more virulent judicial policymaking.”146

Judicial activism is the criticism that a court has inappropriately exceeded its adjudicatory function in breach of parliamentary supremacy and the separation of powers, “betraying its own constitutional role”.147 Yet as many commentators have pointed out, judges in Australia are usually criticised for being activist when their decision, usually one upholding the rights of a minority, displeases political conservatives.148 Professor George Williams has argued:

The label is normally only applied when someone disagrees with a High Court decision that is viewed as liberal or progressive, perhaps because it protects the rights of someone like an asylum seeker or prisoner. By contrast, decisions that uphold strong, even draconian, government action against the same people tend to attract little comment.149

The irony is that a First Nations constitutional voice is the only proposal for Indigenous constitutional recognition that answers concerns about judicial activism, because it is the only proposal specifically designed to uphold parliamentary supremacy and eliminate High Court uncertainty, through non-justiciability.150 Those anxious about the new judicial interpretation of the aliens power because it narrows parliament’s legislative capacity and creates legal uncertainty, should therefore heed the wisdom and pragmatism of the Uluru Statement. As the Referendum Council recommended, a First Nations voice is intended to be non-justiciable.151

In the Indigenous recognition debate, concern to avoid legal uncertainty and maintain parliamentary supremacy has regularly been expressed through ‘no legal effect clauses’ in State constitutions that

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148 For this trend as it manifests in the USA, see Ernest A Young, ‘Judicial Activism and Conservative Politics’ (2002) 73(4) University of Colorado Law Review 1139.
149 George Williams, ‘When the Umpire Takes a Stand’, Sydney Morning Herald 12 November 2011. However, these examples may not be considered symmetrical: striking down a law is usually considered more interventionist than upholding a law. See also Justice Michael Kirby, ‘Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty’ (2006) 30(2) Melbourne University Law Review 576.
150 Shireen Morris, ‘A voice for First Nations should be beyond the reach of the judiciary,’ The Australian, 21 Feb 2020.
151 Referendum Council report, 38.
have recognised Indigenous peoples in preambles or specific clauses.\footnote{eg, the Constitution Act 1975 (Vic) recognises Indigenous peoples in s 1A, and s 1A(3) provides that: ‘The Parliament does not intend by this section – (a) to create in any person any legal right or give rise to any civil cause of action; or (b) to affect in any way the interpretation of this Act or of any other law in force in Victoria.’ The Constitution Act 1902 (NSW) recognises Indigenous peoples in s 2, and s 2(3) provides that: ‘Nothing in this section creates any legal right or liability, or gives rise to or affects any civil cause of action or right to review an administrative action, or affects the interpretation of any Act or law in force in New South Wales.’ The Constitution of Queensland 2001 (Qld) recognises Indigenous peoples in its preamble, providing a ‘no legal effect clause’ in relation to the preamble in s 3A. The Constitution Act 1934 (SA) recognises Indigenous peoples in s 2, and s 2(3) provides a ‘no legal effect’ clause. Western Australia and Tasmania are the only States to have recognised Indigenous peoples in the preambles to their constitutions without a ‘no legal effect’ clause. See Constitution Act 1889 (WA) and Constitution Act 1934 (Tas).} However, it has previously been established that ‘no legal effect’ clauses would not be supported by Indigenous people.\footnote{See, eg, ss 53, 54, and 56.} Fortuitously, there are non-justiciable provisions in the Constitution which can be emulated,\footnote{See Anne Twomey, ‘An Indigenous Advisory Body: Addressing Concerns about Justiciability and Parliamentary Sovereignty’ (2015) 8(19) Indigenous Law Bulletin 6.} which do not include explicit ‘non-justiciable’ or ‘no legal effect’ specifications but are nonetheless generally treated by the High Court as non-justiciable.\footnote{The non-justiciable character of s 53 was discussed in Osborne v Commonwealth (1911) 12 CLR 321, 336, 339; Western Australia v Commonwealth (1995) 183 CLR 373, 482. Geoffrey Lindell, ‘The Justiciability of Political Questions: Recent Developments’ in HP Lee and George Winterton (eds), Australian Constitutional Perspectives (The Law Book Co 1991) 180–81; Gabrielle Appleby and Andrew Webster, ‘Parliament’s Role in Constitutional Interpretation’ (2013) 37(2) Melbourne University Law Review 255, 272; JA Thompson, ‘The Judicial Branch: Non-justiciability and the Australian Constitution’ in Michael Coper and George Williams (eds), Power, Parliament and the People (The Federation Press 1997) 57.} Both the drafters of the Constitution\footnote{With respect to s 53, Sir Samuel Griffith explained: ‘Secs 53 and 54 deal with “proposed laws” – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law’: Osborne v Commonwealth (1911) 12 CLR 321, 336, 339; Western Australia v Commonwealth (1995) 183 CLR 373, 482.} and the High Court have viewed such sections as non-justiciable\footnote{Henry Burmester, ‘Locus Standi in Constitutional Litigation’ in HP Lee and George Winterton (eds), Australian Constitutional Perspectives (Law Book Company Ltd 1992) 178.} because the provisions refer to ‘proposed laws’, indicating they are internal rules to govern Parliament’s law-making.\footnote{Victoria v Commonwealth (1975) 134 CLR 81, 138. See Kirsty Magarey, ‘Alcopops Makes the House See Double: “The Proposed Law” in Section 57 of the Constitution’ (Law and Bills Digest Section, Parliamentary Library, Research Paper No 32 2008–09).} Non-justiciability is a way of recognising “the primacy of the political process and the subsidiary role of the judiciary”,\footnote{Henry Burmester, ‘Locus Standi in Constitutional Litigation’ in HP Lee and George Winterton (eds), Australian Constitutional Perspectives (Law Book Company Ltd 1992) 178.} thus avoiding the uncertainty of judicial interpretation. The High Court’s role is to deal with laws, not proposed laws. Non-justiciability reflects the fact that, in the words of McTiernan J: “Parliament is master in its own household.”\footnote{With respect to s 53, Sir Samuel Griffith explained: ‘Secs 53 and 54 deal with “proposed laws” – that is, Bills or projects of law still under consideration and not assented to – and they lay down rules to be observed with respect to proposed laws at that stage. Whatever obligations are imposed by these sections are directed to the Houses of Parliament whose conduct of their internal affairs is not subject to review by a Court of law’: Osborne v Commonwealth (1911) 12 CLR 321, 336, 339; Western Australia v Commonwealth (1995) 183 CLR 373, 482.}
The constitutional amendment requiring the establishment of a First Nations voice should be drafted to emulate such existing non-justiciable constitutional clauses.\textsuperscript{161} Professor Anne Twomey has shown how this could be achieved.\textsuperscript{162} Twomey explains that, though the requirement for Parliament to consider advice is non-justiciable, it would operate as a “political and moral obligation upon members of parliament to fulfil their constitutional role in giving consideration to such advice, but it would be for the houses, not the courts, to ensure that this obligation is met.”\textsuperscript{163} I would go further: the obligation would be constitutional. It would not be justiciable, because Parliament is immune to review of its internal procedures. But Parliament would be bound by the Constitution to fulfil this requirement, which would be enforced and adjudicated by Parliament rather than the judiciary. Yet it should not be assumed that non-justiciable constitutional clauses carry less authority. As Gleeson CJ has noted, “the rule of law does not require all possible disputes to be justiciable, or all grievances to be resolved by litigation”.\textsuperscript{164} While the reality of a non-justiciable constitutional amendment is that there would be no recourse to the High Court where advice was not properly considered, or if advice was rejected,\textsuperscript{165} a constitutional voice would nonetheless carry special authority.\textsuperscript{166}

Objections that point to \textit{Love} and \textit{Thoms} as evidence that the judiciary would misuse the voice amendment are therefore misplaced, because non-justiciability is a defining characteristic of the proposal. By contrast, the Expert Panel’s proposal for a racial non-discrimination guarantee was intended to be justiciable.\textsuperscript{167} Similarly, a “minimalist” model, like a new preamble, would be justiciable: it would incorporate ambiguous symbolic words (as opposed to the technical, institutional language that would characterise the amendment setting up a First Nations voice) which could enliven uncertain judicial interpretation of the Constitution.\textsuperscript{168} Former prime minister

\begin{enumerate}
\item Anne Twomey, ‘Putting words to the tune of Indigenous constitutional recognition’, The Conversation, 20 May 2015.
\item This is pointed out in Megan Davis and Rosalind Dixon, ‘Constitutional Recognition through a (Justiciable) Duty to Consult? Towards Entrenched and Judicially Enforceable Norms of Indigenous Consultation’ (2016) 27(4) Public Law Review 249.
\item Morris, above n 15.
\end{enumerate}
John Howard tried to address this problem through a “no legal effect” clause accompanying his failed preamble in 1999, but some suggested such a caveat would be ineffective. Others argue it would render recognition statements disingenuous. Besides, what’s the point of putting something into the Constitution — a practical, working document — if is not intended to have any practical effect?

A First Nations voice stands apart from these proposals as the only substantive and operational yet non-justiciable option for Indigenous constitutional recognition – the only proposal that addresses Indigenous aspirations for structural reform and constitutionally conservative concerns to uphold parliamentary supremacy and minimise legal uncertainty. While concerns about judicial activism might nonetheless prompt some to worry about whether the High Court would abandon long-established traditions in relation to non-justiciability of Parliament’s intramural activities, it is the only proposal that specifically attempts to address such concerns while still delivering structural reform. A non-justiciable constitutional voice is the safest option for avoiding judicial activism.

II. The Equality Objection is Spurious: the Constitution Already Divides Us By Race

Objectors also used the decision as fodder for the equality-based objection to Indigenous constitutional recognition. “The High Court has created a new class of citizenship based according to identity which offends the basic moral principle of racial equality,” the IPA claimed. As Allan put it, the High Court was “constitutionalising identity politics — differential treatment solely on race-based grounds.”

These objections are unpersuasive, firstly, because there is no “basic moral principle of racial equality” under the Australian Constitution. There is the opposite: provisions demonstrating

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169 Constitution Alteration (Preamble) Bill 1999.


172 Or that the High Court might use the provision to inform findings about the text and structure of the Constitution.


inequality on the basis of ‘race’. As Heydon J explained in *Kruger*, “[g]uarantees of equality before the law ... were specifically rejected” in the drafting of the Constitution, and “the Constitution is in many respects inconsistent with a doctrine of legal equality”. The High Court has accordingly declined to read in any guarantee of equality before the law, precisely because discriminatory provisions and history demonstrate clear inequality. As Gleeson CJ observed: “The race power, by its very existence, calls into question the assumption of equality.”

Such provisions demonstrate that “differential treatment solely on race-based grounds” is allowed and promoted under the Constitution. Unlike most other democracies, the Australian Constitution contains no bill of rights and no constitutional guarantee of equality before the law. Past pushes to insert a racial non-discrimination guarantee have been unsuccessful (and, ironically, were also opposed by the commentators and organisations now complaining that the High Court has inserted a race-based distinction into the Constitution). If identity politics are constitutionalised, this has been the case since 1901, when the founders excluded Indigenous peoples from the Constitution under ss 127 and 51(xxvi). Though these exclusions were removed in 1967, the subsequent Indigenous-specific operation of the race power demonstrates that Indigenous people are already subject to Indigenous-specific laws, and thus are already a special class within Australian citizenship. The majority in *Love and Thoms* built on common law and legislative corrections of past discrimination and exclusion to develop a more positive common law recognition of this special class. To a small degree – for the decision only impacts a small group of Indigenous non-citizens – the decision sought to make this constitutional relationship fairer than in the past. A First Nations voice would similarly pursue a more substantive, rather than simplistically formalistic, understanding of equality that aligns with the principle as understood under Australia’s federal Constitution. As noted, the Constitution emphasises the equality of political communities more than of individuals.

Of course, objectors would respond that the answer to racial discrimination in the Constitution is to remove the offending provisions, not to insert new differentiations, whether through a politically-inserted First Nations voice or a judicially-determined Indigenous exception to the aliens power. But

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175 See ss 25 and 51(xxvi).
177 *Ibid* 64.
179 Gleeson, above n 101, 15.
181 E.g. the IPA has made clear it opposes the “similarly vague but objectionably more dangerous proposals such as prohibitions against racial discrimination, in effect creating a one-clause bill of rights.” Simon Breheney and Morgan Bagg, ‘Race Has No Place in Constitutional Reform’, 2016, [https://ipa.org.au/ipa-review-articles/race-has-no-place-in-constitutional-reform](https://ipa.org.au/ipa-review-articles/race-has-no-place-in-constitutional-reform).
removal of ss 25 and 51(xvi) do not solve the problem. Section 25 is already dead-letter, so its removal would be mostly cosmetic, and other powers apart from s 51(xxvi) can also be used to discriminate (like s 122 which supported the Northern Territory Intervention). The IPA’s argument that removal of racially discriminatory constitutional provisions would result in a situation of equality is deliberately obscurant in this regard. The only way to guarantee to equality before the law would be to insert a racial non-discrimination or equality guarantee, as was proposed by the Expert Panel in 2012 – a proposal the IPA opposed. The argument that Love and Thoms introduced racial inequality into the Constitution is therefore unpersuasive. Whether it was the High Court's proper role to extrapolate the special position of Indigenous peoples into a curtailment of the aliens power is another question, however. A fairer criticism might be that an Indigenous-specific limitation on the aliens power may be unjustified given such a qualification is not present in the text of that provision, or that the common law should not be extrapolated to curtail constitutional heads of powers. But the equality objection is spurious in the context of a Constitution that mandates racial inequality.

Perhaps the real objection is, as Allan puts it, that the Constitution’s lack of prohibition (and explicit allowance) of racial discrimination is “aimed at parliament — not at four unelected top judges remaking the Constitution in their own image.” Given Allan also objected to the insertion of a racial non-discrimination guarantee that would curtail such discriminatory legislative powers, this attitude appears to favour retaining Parliament’s ability to enact adversely racially discriminatory laws (as it has often in the past particularly in relation to Indigenous people) while opposing the High Court’s ability to read in any positive differentiations in relation to Indigenous people. The attitude seems to callously dismiss the legitimate concerns of Indigenous peoples, who seek a constitutional guarantee that they will be treated more fairly than in the past.

5. Some Brief Policy Suggestions Responding to Love and Thoms
Before concluding, I briefly offer two high-level policy suggestions arising from Love and Thoms, one regarding the three-part test of Indigeneity, the other concerning policy incentives for Indigenous non-citizens to apply for citizenship.

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185 Love, 8, 65, 133.
186 Ibid, 128
I. The Test for Indigenous Identity

The tripartite test of Indigenous identity articulated in *Mabo*\(^{189}\) and applied in this case,\(^{190}\) on some interpretations risks becoming an unjust and discriminatory burden of proof.\(^{191}\) Nettle J in particular perpetuates the idea that proof of Indigeneity requires recognition “according to laws and customs continuously observed since before the Crown’s acquisition of sovereignty.”\(^{192}\) His honour’s approach perhaps confuses the tripartite test of Indigeneity for the purposes of government policies like ABSTUDY,\(^{193}\) with the more stringent test applied to determine native title. The judgement echoes reasoning in *Yorta Yorta*, where it was held that, due to forces of colonisation, the Yorta Yorta’s traditional practices had been interrupted, so their native title could not be recognised.\(^{194}\) The claimants noted the destruction wrought by dispossession which meant that “much had changed in Aboriginal society as a result of European settlement”.\(^{195}\) The traditions and customs practised were thus in “adapted form”. However, this did not fulfil what Court held was required to prove surviving native title rights: the claimants needed to prove continuous and uninterrupted survival of *pre-colonisation* traditional laws and customs.\(^{196}\) Such reasoning traces back to Brennan J’s judgement in *Mabo*, which held that “when the tide of history has washed away any real acknowledgement of traditional law and...customs, the foundation of native title has disappeared.”\(^{197}\)

Nettle J seemed to apply a similarly onerous approach to the test of Indigeneity to be applied to determine the scope of the aliens power. Yet his honour acknowledged this could produce ‘invidious’ consequences:

> because there would be two classes of resident noncitizen persons of Aboriginal descent: those identifying and accepted as members of an Aboriginal society according to traditional laws and customs continuously observed since before the Crown's acquisition of sovereignty; and those who are not.\(^{198}\)

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\(^{189}\) *Mabo*, 70.

\(^{190}\) *Love*, 81, 185, 196, 458.


\(^{192}\) *Love*, 280.

\(^{193}\) For more on the test of Indigeneity see Kirsty Gover, *Tribal Constitutionalism: States, Tribes, and the Governance of Membership* (Oxford University Press, 2010) 56-59.


\(^{195}\) *Ibid*, 435.

\(^{196}\) *Ibid*, 434, 444

\(^{197}\) *Mabo*, 59.

\(^{198}\) *Love*, 282.
Kiefel CJ in dissent similarly observed that not all Indigenous people would be able to make out this three-part test, the Yorta Yorta example being “a case in point”.\textsuperscript{199}

In my view, it is unjust to apply this stringent approach, which creates a double injustice: those Indigenous people most harmed by colonisation, dispossession and cultural loss would be least likely to succeed in legally proving they are Indigenous, in order to access measures intended to redress past injustice. Given the realities of colonisation, this requirement is unfair.

Nettle J notes these consequences can be altered by legislation\textsuperscript{200} and Edelman J similarly states that the tripartite test articulated in common law and legislation is “not set in stone”,\textsuperscript{201} suggesting it should not be interpreted as carrying constitutional status. Indeed, Parliament should legislate to make burdens of proof under native title law less onerous.\textsuperscript{202} There is also a lesson here for the potential design of a First Nations voice. The three-part test is now widespread in its usage\textsuperscript{203} and could be maintained for a First Nations voice, if Indigenous people choose. However, efforts should be made to ensure proof requirements do not operate in a way that is overly burdensome or unjust in their impact. Yorta Yorta type outcomes should be avoided: Indigenous communities deserve representation in a First Nations voice regardless of whether they are able to prove continuing practice of law and customs as they existed since before British colonisation. The legislation should make clear this is not necessary.

\textbf{II. \hspace{1em} Fast-Tracking Indigenous Citizenship}

The High Court decision impacted only a handful of Indigenous non-citizens.\textsuperscript{204} But Love and Thoms would not have faced deportation if they had become Australian citizens, and this litigation could have been avoided. As many judgements noted, both men lived in Australia for long periods and could have applied for citizenship.\textsuperscript{205}

Given the importance of the Indigenous connection to this continent has now been affirmed by the High Court, it is now open to the Commonwealth to implement policy to proactively prevent the difficult situation that faced Love and Thoms recurring in future. Indigenous non-citizens resident in

\footnotesize{\textsuperscript{199} Love, 26.}
\footnotesize{\textsuperscript{200} Ibid, 282.}
\footnotesize{\textsuperscript{201} Ibid, 458. Citing Tasmanian Dam Case (1983) 158 CLR 1, 274.}
\footnotesize{\textsuperscript{203} See e.g. Aboriginal Land Rights Act 1983 (NSW), s 4 ‘definitions’.}
\footnotesize{\textsuperscript{204} Lorena Allam, ‘More than 20 Aboriginal Australians may be in detention after high court rules they can’t be deported’, \textit{The Guardian}, 3 March 2020.}
\footnotesize{\textsuperscript{205} Love, 65, 147, 152, 156.}
Australia should be incentivised to apply for citizenship. The Commonwealth should now ensure it is as easy as possible for Indigenous non-citizens to become Australians – though of course, it must still be their choice.

First, the Commonwealth should fast-track applications for citizenship from Indigenous non-citizen residents, where Indigeneity is proven – employing a fair test of identity that is not overly onerous, as discussed above. Second, the Commonwealth should waive or heavily discount application fees for Indigenous applications, to make it easier to apply. Third, the relevant provisions of the Migration Act should be amended to make Indigeneity a positive factor weighing in favour of applicants, for the Minister to take into account in processing citizenship applications.

Conclusion
The various judgements in Love and Thoms in differing ways conceptually bolster arguments for Indigenous constitutional recognition by confirming, whether explicitly or implicitly, that Indigenous peoples are a distinct constitutional constituency with a special relationship with the Australian continent and state. In doing so the judgements engaged with, but did not decisively resolve, ongoing tensions between the idea of Indigenous difference and the unrealised theoretical ideal of equality before the law – a struggle also evident in the Indigenous constitutional recognition debate. The majority tended to see it as the Court’s role to confer more explicit recognition of the special place of Indigenous peoples within Australia through judicial interpretation, while the dissenters deferred to Parliament and the people – which is perhaps why they prompted political action on Indigenous constitutional recognition. What the judgements did not clearly explain is that Australia’s constitutional understanding of equality is nuanced, reflective of the layered nature of citizenship and sovereignty in a federal, settler democracy.

Love and Thoms did not confer the substantive constitutional recognition that Indigenous advocacy requires. The decision does not entail fulsome structural reform to the relationship between Indigenous peoples and the state. The consequences of the decision only affect a narrow group of Indigenous non-citizens. That Parliament can likely reverse many of its consequences demonstrates that Courts cannot confer Indigenous constitutional recognition unilaterally. Further, that the High Court resiled from productively reconciling notions of surviving Indigenous sovereignty with the sovereignty of the Australian state demonstrates the extent to which this may be better dealt with politically, by Parliament and the people through constitutional reform. Political action is now required to make a First Nations voice a reality, enabling surviving First Nations sovereignty to more effectively “shine through”, creating a “fuller expression of Australia’s nationhood”.

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The political backlash to this decision is illuminating. Allegations of judicial activism that use this case as evidence for why a First Nations voice should not be pursued are misplaced: this is the only proposal that pre-emptively addresses such concerns through non-justiciability. Likewise, objections that argue the case has inserted new race-based divisions into the Constitution ignore the reality that the Australian Constitution already divides us by race.

*Love* and *Thoms* may also demonstrate that political action is needed to ensure the three-part test of Indigeneity does not entail a discriminatory burden of proof that compounds injustices against those Indigenous people most harmed by colonisation. The potential design of a First Nations voice should also take this into account. Likewise, it is now open to the Commonwealth to enact policy and legislation to encourage Indigenous non-citizens to become Australian citizens, to preclude threats of deportation like those faced by Love and Thoms.