Losing our legend: Why our Washminster is vulnerable to entrenching identity?

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Introduction

At a time when the Supreme Court of the United States of America has re-embraced the Constitution's 1868 equal protection clause, our country is proposing to insert an inequality clause. There is something profound going on here. And it's not that the US and Australia are going in opposite directions. We are in fact addressing the same big questions: it's just that in the United States, as is often the case, the Supreme Court gets to make the call on their big equality issue, and in Australia, our big equality issue will be decided (unusually) by the people.

Today, I ask and seek to answer the question how and why our country will, in less than two months' time, head to the polling booths to vote on a proposal to change the Constitution to insert a new body that will provide positive political rights for a group which comprises only 3.8% of us. At those polling booths people will be hurling racial abuse at each other because the proponents on each side of this debate truly believe that the other side is racist. This audacious proposal to insert identity politics into our Constitution puts the character of our modern, prosperous, egalitarian, multicultural, yet tolerant and harmonious liberal democracy – yes, our very own legend - at risk.

For reasons I will explain, it is close to inconceivable that this could happen elsewhere, at least at this point in time. How on earth did we get here?

I see three factors at work. The first is related to the scourge of identity politics. This is the first attempt to entrench the politics of identity in a written Constitution of a first-world liberal democracy in a palpable way. It raises mammoth equality and, therefore, rule of law issues for our country.

Second, in Australia, we are vulnerable because it is fair to say that, relatively speaking, we are a society without an intimate understanding of our history. As a polity, we lack awareness of and are not inclined to celebrate the foundations of the society in which we prosper. We can see this clearly going back to 1901 by what our founders chose to include, and perhaps more importantly not to include, in the written text of our Constitution. For

better and worse, those choices define us today.

Lastly, for whatever reason, we have collectively failed our Aboriginal people, or at least a good number of them. That ongoing failure makes us vulnerable in a polarised, populist era to a solution grounded in overreach. However, it also gives the impression that those of us who defend the core tenets of liberal democracy in the Voice debate are defending a system that has provided no answers.

Today, I want to explore these points so that beyond this seismic but terrible lose-lose event in our nation's history, whatever the outcome, some reflection on why it happened might help us to better heal and solve the very big problems that are coming our way.

Identity politics and the Voice

First, we need to understand that *this* Voice is a manifestation of identity politics. What do I mean when I use that term, and why is it a very bad idea to entrench it in a written constitution?

What is the significance of this phenomenon that has acquired almost quasi-religious status in our elite institutions in the last decade or so?

Why is it a threat to the equality of citizenship and the rule of law? Well, that part is simple: at the very apex of the conception of the rule of law is the notion that every citizen is equal before the law, and yet central to the conception of identity-based politics is that there should be different rules for different people.

Fukuyama

To explain identity politics, I always start with Fukuyama.

In 1989, a young little-known political scientist, Francis Fukuyama published an essay titled 'The End of History?'[1] In 1992, a book titled *The End of History and the Last Man*[2] followed. Fukuyama argued that the Cold War marked the endpoint of mankind's ideological evolution and the triumph of liberal democracy as the final form of human government. The reference to Nietzsche's Last Man suggested that the end state would not be exactly utopian. Man would be complacent, uninspired and passive, but he would be safe from major political upheaval because all of the world's political order would

[1] Fukuyama, Francis. "The End of History?" *The National Interest*, vol. 16, no. 4, 1989, pp. 3-18.
[2] Fukuyama, Francis. *The End of History and the Last Man.* Free Press, 1992.

ultimately be settled. It was a big call, but understandable. By the time the book was published, the Berlin Wall had fallen (1989), Germany had reunified (1990), the Soviet Union had collapsed (1991), Thatcher (then in 1990, Major) and Reagan was in power, Mandela was released (1991), and apartheid in South Africa was coming to an end (1994). Democracy was in rude health, apparently strong and spreading.

Subsequent events, however, including the rise of new kinds of populism, unexpected new conflicts, and the increasing de-liberalisation – as opposed to liberalisation - of China's politics soon began to put a dent in Fukuyama's thesis.

Fast forward to Trump and Brexit and beyond, by 2018, Fukuyama had changed his tune in a big way. In his book titled *Identity: The Demand for Dignity and the Politics of Resentment,*[3] Fukuyama suggests that the need to affirm identity is deeply rooted in the human psyche but posits that fragmentation based on identity is a direct threat to democracy at the point when identity – or tribal - politics begins to override national unity. Fukuyama is not the only centrist or even left-leaning scholar to raise these concerns. But he is the most interesting because of the way his views have evolved. Like so many others, he now sees identity politics as a genuine threat to liberal democracy.

Fukuyama distinguishes between different kinds of tribes. He argues that identity-based claims made around universal characteristics such as group-based economic interests are ultimately not a threat to democracy. But he says identity claims focused on immutable characteristics of gender, race, sexuality, religion, ethnicity (etc.) are unsustainable and destructive of democracy when taken too far because those groups are exclusionary.

Identity politics promotes social justice but can unravel everything

The academic roots of identity politics are intertwined with a range of social justice movements and theoretical frameworks such as feminism, critical race theory, civil rights generally, Indigenous and queer movements – that emphasise identity in shaping individual experiences, relationships, and interactions within broader society. These intellectual currents have influenced how people engage with the issue of diversity, inequality and social change. Proponents of identity politics argue it brings vitality to democracy and facilitates social justice. They're right.

[3] Fukuyama, Francis. *Identity: The Demand for Dignity and the Politics of Resentment*. Farrar, Straus and Giroux, 2018.

But at what cost? Well, if it gets out of hand, the cost is serious division.

By focusing too much on group-based grievances, identity politics leads to fragmentation of the polity. The emphasis on distinct identities supersedes the shared sense of citizenship that is essential to a healthy democracy. It's impossible to think of a better example of this than the big question that is dividing us now.

Scholars from the United States and Europe highlight how identity politics can fuel political polarisation and gridlock. When political discourse revolves around identity, it obliterates the standing or authority to engage by those who are not members of the identity group. It goes something like: "Y*ou can't understand or even criticise my grievance because you have no connection with my identity*." It becomes almost impossible to find common ground or to engage in constructive debates. We have seen this from Voice activists and the Prime Minister, who argue that the Garma model is what Indigenous people want, so that is the end of the debate.[4]

Related to this is the idea that there are different rules for different groups of people. By prioritising group-specific interests over universal principles – described as "Particularism" by moral philosopher Martha Nussbaum - it erodes the idea of equal rights for all citizens.[5] This hinders effective policy development and breaks down ordinary democratic processes. Think: the deliberate lack of provision for any public debate for the Voice referendum, especially regarding the question of equality and the ready dismissal of equality concerns as simply being too complex.[6] Yet, in the end, the proposal suggested is permanent special rights, confirming the inherent inequality in the proposal.[7]

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[4] Grattan, Michelle. 'Albanese says nearly 90% of Indigenous people support the Voice, which embodies the 'spirit of the fair go,' *The Conversation*, 28 May 2023.

[5] Nussbaum, Martha. 'Why practice needs ethical theory: particularism, principle, and bad behavior' in Brad Hooker & Margaret Olivia Little (eds.), *Moral Particularism*. Oxford University Press. 2000 at 227—55.

[6] Saunders, Cheryl. Submission No. 194 to the Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, 2023. Saunders writes: "A second reservation expressed in some early commentary on the Uluru proposals is that they involved a departure from 'equality.' Equality is a *complex* notion that, if used in this context, needs to be carefully unpacked." at [10], [emphasis added]. The subsequent unpacking by Professor Saunders argues that this is a special case for Indigenous people, thereby implicitly acknowledging the inequality in the proposed amendment.

[7] Joint Select Committee on the Aboriginal and Torress Strait Islander Voice Referendum, Official Committee Hansard, 14 April 2023 at 43. Walker SC: "It's the combination of recognition and a kind

And, of course, there is a terrible impact on crucial public discourse. Identity politics stifles the free exchange of ideas by imposing norms of political correctness. Even far-left controversial philosopher and cultural critic Slavoj Žižek warns that this can lead to a culture of self-censorship, undermining the vibrant public discourse that is essential for a healthy democracy. This has an echo-chamber effect, compounds the exclusionary narrative, highlights 'otherness' shuts down, or worse, cancels defectors.[8] The result is that debate and critical evaluation of the claims of the identity group are diminished, and insufficient scrutiny is afforded to those claims. Think: the claims of racism directed at No advocates generally.[9] Worse, those tactics have been deployed by one of the country's most prominent lawyers against dissenting lawyers.[10] Worse again, legal representative bodies have declined to provide platforms for lawyers to respectfully debate and interrogate the insertion of an entirely new chapter into our Constitution. The result is that many Australian lawyers who would have serious standing and authority in this debate and who have enormous concerns about this proposal are self-censoring.

So we are left with a model of a Voice that 18 million people are asked to vote on that has not been publicly interrogated or scrutinised. The lack of interrogation of the highly contestable legal claims of the Voice means we have not even begun to consider any unintended consequences.

This is a recipe for disaster.

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of reparation which, in my opinion, means that this cannot possibly, seriously or *charitably*, be seen as an exercise of inequality."

[8] *See generally, Žižek, Slavoj. The Courage of Hopelessness: Chronicles of a Year of Acting Dangerously, Penguin, 2017. See also 'The Prospects of Radical Politics Today' International Journal of Baudrillard Studies, Volume 5, Number 1, January, 2008: "Let us take two predominant topics of today's American radical academia: postcolonial and queer (gay) studies. The problem of postcolonialism is undoubtedly crucial; however, "postcolonial studies" tend to translate it into the multiculturalist problematic of the colonized minorities' "right to narrate" their victimizing experience, of the power mechanisms which repress "otherness," so that, at the end of the day, we learn that the root of postcolonial exploitation is our intolerance toward the Other…"*

[9] Pelly, Michael. 'Top silk Bret Walker attacks 'doomsday' take on Voice,' *The Australian Financial Review*, 10 March 2023.

[10] Pelly, Michael. 'Lawyers have said enough on Voice: leading silk Bret Walker,' *The Australian Financial Review*, 6 August 2023.

Other Australian manifestations of identity politics

Of course, in Australia, the Voice is Exhibit A - but just the latest manifestation of an increasingly aggressive identity politics which is pulsing through our political, media, sporting, professional and corporate institutions.

In recent years, the calamitous way in which mere allegations – seriously contested sexual assault allegations - against both former Attorney General Christian Porter and Bruce Lehrmann were pursued not just by Brittany Higgins but by powerful political and media actors has also exposed this country's defences to the politics of identity as almost non-existent. Driven by a #metoo movement infused with identity mantras and with an acute sense of political opportunity, the forces determined to use these allegations – one of them three decades old with a dead complainant - to frame a government as having so-called "problem with women." Just about every rule in the book was broken. The movement undermined the presumption of innocence by abandoning what we all assumed were rules and norms of professional practice, media reporting, and other institutional responses. These episodes divided us, damaged us and continue to do so. The message out of this on the #metoo side is that if you are a member of a group that is high on the identity hierarchy, you can prosecute your case in a highhanded manner, behave with impunity, breach pretty much every convention and yet get special privileges and favours at the end of it. If you are not a member of an identity group or a paid-up supporter, watch out, because if you don't sign up one day, you too could be a target. In other words, different rules are applied, or rules are applied differently for different people.

This is and has been poison to our democracy. Your average Australian senses it, and it makes them angry.

The Australian Constitution: why our Washminster makes us vulnerable

Words in constitutions matter and help to define societies. We are vulnerable here in Australia because we have no formal defences to identity politics in our Constitution. For the most part, the choices made by our founders have served us incredibly well and stood the test of time. Yet our expressed and implied so-called constitutional limitations and the unexpressed conventions and norms that hold the show together are not written down in one place, and they do not come from our own history. They come from the histories of other countries.

We don't have a history whereby we installed a new King and Queen, passed first

substantive parliamentary Bill of Rights establishing a constitutional monarchy and ended a centuries-long bloody, sectarian history between the Magna Carta and the Glorious Revolution. All of that culminated in what we in the anglosphere still refer to as the famous 'English liberties.'

We never established a 'republic of virtue' based on liberty, equality, and fraternity.

And our Washminster was not predicated by arguably the most iconic political declaration of all modernity in which it was announced that certain truths were "self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights."[11] Likewise, we have no world-famous speech by Martin Luther King that we can draw on.

The best we've conjured up in this Voice debate is words from an excellent speech given by Prime Minister Bob Hawke in 1988 that in Australia, there is no hierarchy of descent, and there must be no privilege of origin.[12] These are terrific words, but I confess I had never heard of this speech before.

We know why our founders did not include a Bill of Rights or any other rights framework in the Constitution. At the time, we were very English, and that legal tradition relied on the protection of rights through the common law, statutes, and conventions. The Constitution established a federal system of government, which itself was considered a safeguard against concentration of power and abuses. This required the American bit: in order to allocate power between the Commonwealth and the States and to define the limits of the three arms of government we took a lot from America, and of course, we had to write it down. But we put the cloak of Westminster over this, framing a system of representative and responsible government with a little being codified but a lot left out. The aim was to create a flexible and adaptable constitutional framework that could accommodate changing circumstances over time. The innovative, distinctly non-Westminster style s 128, which requires a direct vote from the people to change the Constitution, was key to that.

We also know that at the time of the formation of all of the advanced liberal democratic Constitutions, whether they had colonial histories or not, real, substantive equality did not exist in those Constitutions or the societies. But over time, as the arc of history, justice and

[11] United States, Congress. (n.d.), The Declaration of Independence.

[12] Hawke, Robert. Speech by the Prime Minister to the Federation of Ethnic Communities Councils of Australia, Canberra, 30 November, 1988.

indeed, equality kept marching, we all got there. In the United States, after the Bill of Rights was ratified there were many more equality moments, notably after the Civil War, with the following amendments to the United States Constitution: the 13th (abolition of slavery, 1865) 14th (equal protection clause, 1868) and 15th, (right to vote for all, 1870) 19th (women's right to vote, 1920), 24th (removing poll taxes as a voting entitlement, 1964) and 26th (voting age lowered for all to 18, 1971). In Australia, our single equality moment was the 1967 referendum, a unifying moment for us. But true to form, there were no expressed values, no entrenched right: we just took out of the text what we thought were the bad bits and made it possible for the Commonwealth to make beneficial, special laws for Indigenous people.

It is probably a futile thought experiment to ask whether, in defeating the Voice and protecting our Washminster from identity politics, we would be better off if we had some words, somewhere, to point to so we could say: this is who we are; this is what makes all of us one; and we have these values for all time. Because if we did have those things, we would likely be a somewhat different society. We would probably have less of the lackadaisical in our culture. We would have a High Court more regularly adjudicating on political questions. In an age of polarisation and populism we would likely have a more muscular and contested polity. But it is worth contemplating the fact that if our Constitution contained an equality clause, the academics who designed this Voice model would likely not have gone near this. And even without an equality clause, if Washminster set out a clear set of defined individual political rights which apply equally to everyone, it might have militated against entrenching inequality because we would better understand – as a society - that an unprecedented positive, express political group right that operates over and above the unexpressed political protections of other citizens is a skewer through the heart of liberal democracy.

Think about that. In Australia, after 123 years since the Federation we are skipping wholesale over any kind of entrenchment of individual political rights and running headlong into entrenching a group right. I am not the only one for years to have lamented the lack of civics education in our schools. But imagine how the Voice will be taught in our schools. It is totally foreseeable that this pervasive lack of education in Australia about our history and our democratic values will continue, but the new group rights for Indigenous Australians will be taught and celebrated to the exclusion of other democratic values. The mind boggles at where this ends up. By political science and philosophy standards, when

put in its unique Australian historical and constitutional context, this proposal can be regarded as nothing other than completely radical.

Many say it's not. Some say the proposal is a logical and desirable evolution of democracy. Respected political philosopher Professor Duncan Ivison argues that the Voice is not a repudiation of liberalism but rather an expression of liberal democratic values now deeply informed by a true reckoning with our colonial past and present. He says: "It is not a simple assertion of identity claims. It's not a call for separatism. Rather, the Voice is a call for democratic innovation in how we address our past and chart a better future." However, Ivison's eloquent and optimistic assessment of the democratic consequences of the Voice ultimately contains an unsupportable claim. He asserts: "This is about *democratising* identity politics, *not entrenching* it."[13]

Of course, this is incorrect as the Voice does, in fact, entrench identity politics. That is why we are heading to a referendum to change our Constitution. By entrenching a technically small right for the Voice to make representations on laws and policies of general application, we will put front and centre and, therefore, politicise forevermore the claims, rights and interests of Indigenous Australians over and above the rest of us.

If the referendum is carried, prepare yourselves for a flurry of exultant identity practitioners out of the global academy celebrating the enormity of what has happened. As our own Professor Simon Rice, a human rights lawyer from the University of Sydney, wrote: "The international legal community will applaud it."[14] This is true, but given the magnitude of the proposal and its running counter to the arc of all of modern political history, there will also be some shock and even concern from some parts of the academy, including and even from moderate progressives and centrists out of the US and Europe.

Students for Fair Admissions v. Harvard

This brings me back to the United States and *Students for Fair Admissions v. Harvard*[15] and its companion case, relating to the University of North Carolina. In June, the Supreme

[13] Ivison, Duncan. 'Voice a chance to evolve culture of liberal democracy,' *The Australian*, 15 August 2022, emphasis added.

[14] *Rice, Simon. 'The voice is all about human rights, not 'special measures',' The Weekend Australian, 4 February 2023.*

[15] *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College* 600 U. S. ____ (2023) ('***Harvard***').

Court effectively overturned a fractured line of cases that began in 1978[16] but, especially since 2003,[17] permitted race to be an explicit positive factor in university admissions policies. The majority judgment written by Chief Justice Roberts brought this to an end, holding that the Equal Protection Clause of the Fourteenth Amendment applies "without regard to any difference of race, of colour, or of nationality" and thus must apply to every person. Accordingly, "Eliminating racial discrimination means eliminating all of it."[18] In a concurring opinion, Justice Thomas wrote:

"The great failure of this country was slavery and its progeny. And, the tragic failure of this Court was its misinterpretation of the Reconstruction Amendments….. We should not repeat this mistake merely because we think, as our predecessors thought, that the present arrangements are superior to the Constitution.

[This Court] sees the universities' admissions policies for what they are: rudderless, race-based preferences designed to ensure a particular racial mix in their entering classes. Those policies fly in the face of our colourblind Constitution and our Nation's equality ideal. In short, they are plainly—and boldly—unconstitutional……

While I am painfully aware of the social and economic ravages that have befallen my race and all who suffer discrimination, I hold out enduring hope that this country will live up to its principles so clearly enunciated in the Declaration of Independence and the Constitution of the United States: that all men are created equal, are equal citizens, and must be treated equally before the law."[19]

These are the headline statements, and the case is much more nuanced than this. Its impact has already been grasped. The Biden Administration has issued guidelines to Colleges to ensure they comply with the Court's decision. It confirms that "the Court limited the ability of colleges and universities to consider an applicant's race "*in and of itself as a factor* in deciding whether to admit the applicant." However, Universities can give weight to "any quality or characteristic of a student that bears on the institution's admission decision, such as courage, motivation, or determination," including if the student "ties that

[16] *Regents of the University of California v. Bakke*, 438 U.S. 265 (1978).

[17] *Grutter v. Bollinger*, 539 U. S. 306 (2003).

[18] *Harvard* (slip op. at 15).

[19] *Harvard*, THOMAS, J., concurring (slip op. at 58). The concurring decision of Justice Thomas is notable for its extensive analysis of the history of raced based laws, policy and practical preferencing throughout the history of the United States, and its litany of failures.

characteristic to their lived experience with race." This emerges from Chief Justice Roberts' opinion which said the decision does not prohibit universities "from considering an applicant's discussion of how race affected his or her life." Universities will still be able to implement strategies to recruit and retain talented students from underprivileged backgrounds based on more 'universal' characteristics. This will pick up students who possess these exclusionary, immutable characteristics who are also disadvantaged.[20]

There is no bright line of correctness in any of these thorny issues. Bearing in mind prior to this case nine American States had already outlawed positive discrimination in College admissions, it is easy to conclude that the Supreme Court is, in fact, moving with an increasing recognition in the United States by some that extreme affirmative action that had overreached, was achieving very little while at the same time resulting in damaging adverse reverse discrimination. As the Chief Justice said: "the guarantee of equal protection [meant] one thing when applied to one individual and something else when applied to a person of another colour."[21]

Many will differ, but *Students for Fair Admissions v. Harvard* and other developments in the United States, despite being heavily contested, shows that wherever the bright line is, it requires a commitment to true equality, balance and practical solutions on the ground. The case is an extraordinary and timely counterpoint to outright rejection of equality, and lack of balance and common sense that is inherent in the Voice proposal.

Indigenous people in both the Constitution and in society

This brings me to the final reason we are where we are with the Voice.

In the other directly comparable countries with colonial histories – the US, Canada and NZ - many Indigenous people are not doing well, but they're not doing as badly as our worst-off Indigenous people who are the most incarcerated and dispossessed in the world. Those other countries all have either historical or more recent what I call 'light touch' so-called

[20] Department of Justice, Department of Education. Questions and Answers regarding the Supreme Court's decision in *Students for Fair Admissions, Inc. v. Harvard College and University of North Carolina,* 14 August 2023.

[21] *Harvard*, (slip op. at 15).

'recognition' in their constitutions.[22] But none provide substantive constitutional political rights to Indigenous people over and above other citizens.[23] As Professor Ivison says, this proposal is unique globally.[24] Also, none of those comparable democracies is without one or a few historical treaties between the coloniser and the colonised - which in those countries has alleviated in symbolic and sometimes practical ways some of the harm caused by the original dispossession. So again, this recognition gap in our Constitution, together with the absence of historical treaties, means that in this era of identity we must find our own solution.

Since 2007, all Australian coalition leaders have expressed commitment to recognition of Indigenous people in the Constitution. So it must be acknowledged that the failure – for whatever reason - by the coalition during a decade in power to seize the initiative on Indigenous recognition to drive this project in a way consistent with moderate conservative values is another reason we are where we are today.

However, no failure of the coalition justifies what in 2023 is now being dished up as the solution for so-called 'recognition' in the Australian Constitution of Indigenous people. The project is nothing of the sort.

Today is not a day to dwell on the features of the Aboriginal and Torres Strait Islander Voice, as they are now well known. There is no doubt that its very worst feature is that the advisory function extends to "matters affecting" Aboriginal and Torres Strait Islander people. This is code for a Voice on everything because it extends to laws and policies of general application that affect all Australians. This is the dangerous part of the proposal that creates the wholesale inequality over and above other citizens. Also, the extension of the right to make representations to the Executive Government and not just the Parliament and the insistence that the new body be forever entrenched as the 'Voice' are two further reasons that the proposed new chapter in our Constitution will effect significant changes

[22] Ivison, Duncan. 'Far from undermining democracy, The Voice will pluralise and enrich Australia's democratic conversation,' *The Conversation*, 29 May 2023.

[23] *The Constitution Act 1982, of Canada at cls 25, 35 recognises pre-existing treaty rights. Also at cl. 35.1(b) provides a minuscule group right to aboriginal peoples of Canada to participate in a constitutional conference where there is a proposal to change the enumerated provisions in the Constitution which refers to Indigenous people. This has been invoked on one occasion since 1982.*

[24] Ivison, Duncan. 'Far from undermining democracy, The Voice will pluralise and enrich Australia's democratic conversation,' *The Conversation*, 29 May 2023.

our system of government.

Professors Gerangelos and Aroney have confirmed this combination of features means that the Aboriginal and Torres Strait Islander Voice will assume similar constitutional status to the other branches of government in the first three Chapters of the Constitution (i.e. The Parliament, the Executive and the High Court).[25] Accordingly, it is quite reasonable to characterise the Aboriginal and Torres Strait Islander Voice as a novel, advisory fourth arm of government.[26]

The custodians of this Voice have been dreaming big. They correctly regard the body as a "foundational institution of State" which will "provide an important reordering of the hierarchy of the State" [and] ... "provide[s] a form for the transformation in Australia's established constitutional institutions."[27] Members of the Expert Group have recently confirmed that the Voice would involve "a change to the structure of Australia's public institutions and would redistribute public power via the Constitution, Australia's highest law."[28]

So this is truly an enormous proposal. And yet there is nothing in the Uluru Statement from the Heart (either the one-pager or the controversial supporting documents) or the *Referendum Council Final Report* in 2017, or indeed in former Chief Justice Murray Gleeson's 2019 landmark speech[29] that required an Indigenous body's powers in the Constitution to extend to a right to make representations on laws and policies of general application, or to be housed in a new chapter.

Had the body been limited to providing representations on 'special laws' under the s

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[25] Gerangelos, Peter and Aroney, Nicholas, Submission No. 92, Joint Select Committee on the Aboriginal and Torres Strait Islander Voice Referendum, 2023.

[26]Appleby, Gabrielle and Williams, John. 'The First Nations Voice: An Informed and Aspirational Constitutional Innovation,' Indigenous Constitutional Law blog, 25 March 2021, https://www.indigconlaw.org/home/the-first-nations-voice-an-informed-and-aspirational-constitutional-innovation, accessed 24 February 2023.

[27] Appleby, Appleby and Synot, Eddie. 'Constitutional conversation, institutional listening and the First Nations Voice,' AusPubLaw Blog, 4 March 2021 https://www.auspublaw.org/blog/2021/03/constitutional-conversation-institutional-listening-and-the-first-nations-voice, accessed 23 February 2023.

[28] Williams, George and Davis, Megan. 'Without the Indigenous voice to parliament, a treaty is vulnerable,' *The Australian*, 29 July 2003.

[29] Murray Gleeson, Murray. 'Recognition in keeping with the Constitution: a worthwhile project,' Uphold and Recognise, Sydney 2019.

51(xxvi) races clause, or even simply to 'Indigenous Affairs' so that an entrenched representative body was limited to responding to special measures or 'beneficial' laws[30] and policies, many more would have embraced such a model.[31] Many of us now opposed to this model would have supported significantly more minimalist models drafted by Professor Twomey in 2020.[32] These minimalist solutions, while proposing significant constitutional amendments, would not have offended any principle of equality and could not be said to have been grounded in identity politics.

Alas, there were easier ways through this which could have provided both symbolic recognition and a much more restrained, and therefore safer and more unifying substantive right for Indigenous Australians.

The fact that the proposed s 129 is a maximalist rather than a minimalist model is another reason we are heading to the most divisive referendum in Australia's history.

Conclusion

If the proposed 129 becomes the new Chapter IX in the Constitution, expect future division and discord. While Voice proponents seem to think the Voice will enhance the moral authority of Indigenous Australians, it will likely do the opposite.[33]

Political scientists would say the exercise of political power and moral authority are almost mutually exclusive. In the context of political institutions – and the Voice would undoubtedly be one of those - moral force or authority is usually held by those who do not wield political power or who resist wielding political power. Think the King or our High Court, or senior judges. If moral authority is to be maintained, the deployment of political power must be resisted or used sparingly. Those who seek moral authority understand this because they observe that those who frequently deploy political power – politicians in

[30] There have been 16 new laws made under s 51(xxvi) and/or s 122 since the 1967 referendum.

[31] See more generally, Clegg, Louise. 'A modest voice can define and unite us' at the forum 'Indigenous Constitutional Recognition through a Voice,' Uphold & Recognise, PM McGlynn Institute, Sydney, 28 February 2023.

[32] See Twomey, Anne. 'There are many ways to achieve indigenous recognition in the Constitution – we must find one we can agree on,' *The Conversation*, 8 July 2020, https://theconversation.com/there-are-many-ways-to-achieve-indigenous-recognition-in-the-constitution-we-must-find-one-we-can-agree-on-142163, accessed 23 February 2023.

[33] See expansion of this argument in Clegg, L. 'Inevitably the voice will become hated. Inequality of citizenship is too big a risk to take,' *The Spectator Australia*, 6 April 2023.

particular – are almost always, over time, despised.

The Aboriginal and Torres Strait Islander Voice proposal is a high-octane political proposal. Amongst the twenty-four Voice politicians operating out of Canberra invoking the entrenched constitutional right to advise on everything, there will be the good and bad, the superstars and duds. In this sense, the Voice politicians will be no different from Westminster politicians. There will be some demographics, especially those with larger numbers of non-Indigenous Australians, whose rights and interests will be impacted adversely by the Voice (such as farmers and mining workers), which will initially respond very negatively to the Voice. Over time, it is inconceivable that it will not lead to resentment, and as a result, bleed negatively more generally into the attitudes of non-Indigenous Australians towards Indigenous Australians. This is because, as a repository of power which exists for 3.8% of us the Voice will unapologetically exercise political power which impacts, to a greater or lesser degree, on all of us. This permanently entrenched disproportionate political power will be on vivid display every day in our national discourse. It is almost certain to fail in any aspiration to unite us as Herny Ergas has shown that there are lessons from history that tell us that formalising inequality with a view to ameliorating serious disadvantage has always been disastrous.[34]

It was Edmund Burke who said that a State without the means of change is a State without the means of its conservation.[35] But Burke argued for gradual reforms that would take into account existing traditions and institutions rather than radical change that would lead to chaos due to the loss of hard-wired values.

The whole of the history of the West has shown we humans are hard-wired for equality. As the United States Supreme Court's treatment of race-based College admissions over several decades shows, equality is indeed a complex issue. It reveals that the constitutional entrenchment of equality throws up the thorniest of issues, and that is one thing. But the notion that we should entrench inequality is something else.

All of us, but especially our precious Indigenous people, should be terrified of what the Aboriginal and Torres Strait Islander Voice will likely do over time to our tolerant and harmonious country.

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[34] Ergas, Henry. 'Talmudic sages gave lessons in equality for all citizens,' *The Australian*, 24 August 2023.

[35] Burke, E. *Reflections on the Revolution in France*, 1790.