

## Indigenous Exceptionalism and the Constitutional 'Race Power'

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**Constitutional recognition** of Indigenous Australians is a fraught topic, presenting legal as well as moral challenges, and involves a large set of issues beyond my scope here. I want to explore in this chapter the problem of how to recognise Indigenous Australians in the Constitution, a matter given much thought by the members of the Expert Panel appointed by Prime Minister Gillard in December 2010. Upon the release of the Expert Panel Report in January 2012, some commentators made extraordinary and mistaken claims about its recommendations and findings. One person contended that Aboriginal child bride practices would be legalised, should the government accept these recommendations. Another claim was that it was a racist attack on Australians. None of this is the case, of course, but the hysterical response to the propositions of the Expert Panel, well founded in constitutional law and history, tells us something. Most Australians know very little about our Constitution; few have read it, and even fewer understand it. The main challenge for those who agree with our findings is the poorly understood friction between bringing Indigenous Australians firmly into the national polity, and maintaining their exceptionalist status as inexorably different. I hope to suggest a solution to this dilemma; it is not original,

but is a new synthesis of a powerful idea drawn from human rights theory and the Expert Panel's work.

I am arguing that defining Aboriginal people as a 'race', as the Constitution does, sets up the conditions for indigenous people to be treated, not just as different, but exceptional, and inherently incapable of joining the Australian polity and society. The history of legislation and policy applied to Indigenous Australians demonstrates this in a number of ways: not citizens until after the 1967 Referendum; the shameful effects of the nearly half-century old Community Development Employment Program (a work-for-the-dole scheme); the Northern Territory Emergency Intervention; and this is to only name a few of the exceptionalist initiatives that have isolated the Aboriginal world from Australian economic and social life. In turn, many Indigenous Australians have developed a sense of entitlement, and adopt the mantle of the 'exceptional indigene', the subject of special treatment on the grounds of race. My experiences across Australia during the past 50 years have impressed upon me how this exceptionalist status, to which many Aboriginal people have ascribed unwittingly, involves a degree of self-loathing, dehumanisation, and complicity in racism.

As the exotic, Aboriginal people are not required to be normal, such as attending school regularly, or competing in a meritocracy (except in the AFL and NRL and some other sports codes). In the slowly building campaign for constitutional recognition of Indigenous Australians, it is vital that we broaden the understanding that the constitutional tradition of treating Aborigines as a 'race' must be replaced with the idea of 'first peoples'. By this I mean simply what is proposed in the UN Declaration on the Rights of Indigenous People: It recognises that: 'Indigenous peoples are equal to all other peoples, while recognising the right of all peoples to be different, to consider themselves different, and to be respected as such.' The very next part of the Declaration states:

Affirming further that all doctrines, policies and practices based on or advocating superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences are racist, scientifically false, legally invalid, morally condemnable and socially unjust.

The problem is not 'race', but racial discrimination. Indigenous people define themselves according to their lineages and cultures that tie them to places and ways of life that existed long before colonisation. If we accept these principles of defining the status of Australia's indigenous people, then the power that 19th century race theories have had on our society through our Constitution and scores of legislative acts becomes null and void. Not immediately, of course, but over time. This would not be a simple task, I need to say.

During the consultations that we Expert Panel members conducted throughout Australia, I found myself with two other Aboriginal members facing an angry crowd in the hall at Maningrida in Arnhem Land. They were under the impression, thanks to various advisers, that we had come to talk about the Northern Territory Intervention. Quite a number appeared to be high on kava, the drug of choice in those parts. In various rambling speeches by men who purported to be leaders, we were harangued about their racial purity: 'I am a full blood', one repeated mantra-style during a half-hour exposition of his entitlement to sovereignty, freedom, government largesse, his resentment of our presumed wealth; how only 'full blood Aborigines' had real culture, and other matters that seemed to be of great importance to him, but which I could not fathom. It was not difficult to figure out that their diatribes at us were arguments for unfettered access to alcohol and stimulants. They felt that they were being racially discriminated against in having restrictions placed on access to alcohol. Outside the Northern Territory, similar restrictions apply to everyone.

Others at the meeting joined the refrain, and the four interpreters who were contracted to explain the reasons for our visit, as valiantly as they tried, were unable to communicate effectively with the rambunctious, inebriated men who dominated the meeting. The interpreters gave up and sat at the back silently. I explained to the gathering my own Aboriginal background and the conditions of our appointment — not as public servants, but as ordinary citizens who were employed in other fields: Mr Burrarrwanga in his tourism venture, Lauren Ganley at Telstra, and me at a university. At this point, two of the men recognised me through their kava haze, because I had worked with them in the 1980s on various ventures. Suddenly, a man I have known for many years, one of the so-called 'half castes' of the community, came to the front, took the microphone and pleaded with us not to use the term 'half caste' in our report. I answered him, and addressing the meeting, said: 'I guarantee you that the term "half-caste" will not be used in the report.'

In that meeting, the social poison of race theories, imparted by the early protectors and Native Affairs officials to the ancestors of these people over 60 years ago was revealed in the tirades against those of us who were thought to threaten the bizarre privilege of being a member of a community established and maintained to preserve racial purity. The history and purpose of these race theories, deployed in Australia since the 19th century in ongoing policy experiments, such as isolating and controlling remnant, unwanted populations to deprive them of citizenship of the Australian polity, was not a subject that had penetrated the intellectual life in these parts.

This passionately defended sense of entitlement, based on racial ascription, has been argued throughout the Aboriginal world in various ways. The 'Bolt case', argued in Melbourne before the court by the legal counsel group of Aboriginal litigants accused of falsely claiming to be Aboriginal to obtain

financial and other benefits, is a diametrically opposed and extreme manifestation of this phenomenon. The ‘racial’ appearance of the litigants — all of them fair-skinned, as Justice Mordecai Bromberg put it — did not fit the stereotype of the Aborigine and hence their skin colour was the grounds for the mishmash of half truths and gossip published about them in the *Sun Herald* in Andrew Bolt’s column.

Justice Bromberg ruled that by communicating words to the public that are reasonably likely ‘to offend, insult, humiliate or intimidate another person or a group of people’, and doing so ‘because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group’, they have committed an unlawful act referred to in the *Racial Discrimination Act* (18C) as ‘Offensive behaviour because of race, colour or national or ethnic origin’. It is alarming that Tony Abbott supports Andrew Bolt’s campaign for ‘freedom of speech’ — his presumed right to express racial hatred — and amendment of the *Racial Discrimination Act*, especially the removal of Section 18C.

Bolt and his defenders are crying about an imagined right to unrestricted ‘free speech’. This argument works if you don’t know about the legal protection against defamation, or the legal protections offered by the *Trade Practices Act*, for instance, with regard to false claims about products, or the duty to report factually and in accordance with legislation relating to public information in a prospectus or similar document relating to commercial or company matters. But this is, in an underhanded way, Bolt’s point. Only people of a ‘race’ — never defined, of course — or adopting a ‘racial ascription’ and having an approved skin colour to match the stereotype are entitled to such protections, if I am to understand his arguments. His claim to the right of unlimited ‘free speech’ also works with his followers if the presumption is that ‘white people’ like him and his followers are not members of a ‘race’, but normal. These are not explicitly stated beliefs, but the

undertow of a set of beliefs and attitudes that are so often difficult to fathom if one is aware of modern day evolutionary theories about our species, *homo sapiens*.

It is a very common belief in Australia that only the undesirable 'others' are members of a 'race', and hence, being a member of a 'race' is constituted as inherently a bad thing. This thinking is not so much spoken out loud, but the silent assumptions of a code of 'racial hygiene' that is older than this nation itself. It was ideas about 'racial purity', 'racial hygiene', 'the master race', 'the inferior races', a perverted idea about 'the survival of the fittest' and other such nonsense that led to the incarceration of Aboriginal people in reserves in the 19th century to prevent 'mixing' of the 'races' and later, the segregation laws that specified where and how 'half castes' and other 'castes' could live. Many more attempts were made to destroy the identity of Aboriginal people. In effect, they used various policies to cause terror.

People who live in fear, it was thought, would not identify as Aboriginal and continue the struggle to hold onto their lands and their homes. These policies were used in every Australian jurisdiction in different ways, and continued in many places until the 1970s.

For those people who persisted in identifying as Aboriginal, however 'fair skinned' they were, to use the words of Justice Bromberg, life was miserable. As every person who has been raised by an Aboriginal parent or parents knows, we must be 'twice as good as the white man' to finish school and get a job and suffer the endless racist slurs while doing so; those 'fair-skinned' Aboriginal people raised by an Aboriginal parent or parents must be twice as good and also suffer the endless racist slurs implied by idiots who say things like: 'You don't look Aboriginal. Why don't you identify as white?' What are our children and grandchildren to say to these fools? Deny their mothers, fathers, siblings, grandparents, and other family members because one of Bolt's ilk is offended by their

Aboriginal identity? Why do some Australians believe that they can intimidate and terrify Aboriginal people into sneaking away and pretending to be 'white', to deny their Aboriginal parentage and upbringing and the values and worldview learnt in an Aboriginal family? There were many Aboriginal people who were so intimidated and did sneak away and pretend to be 'white'. They were the ones who sneaked back to take advantage of the miserable 'benefits' that came with policy reform in the 1970s. They identified only on paper when they filled in a form. They did not identify as Aboriginal in the community. Many Aboriginal people called them 'very late identifiers'. I call them 'part-time Aborigines'. And the reason is obvious: identifying as Aboriginal is almost certainly likely to lead to being run out school by racists, and to unemployment and jail. Why would you deliberately choose this as your fate if you didn't have to, because of the way you look? The statistics tell the story. That's why the 'Close the Gap' campaign is aimed at reducing Third World rates across almost every socioeconomic indicator.

What Andrew Bolt cannot suspect is that many Aboriginal people, including me, are just as cynical and sceptical about all the claims made to 'Aboriginality' or, to use the even more modern and meaningless phrase, 'Indigeneity', by people raised in relative comfort in the suburbs. They cannot be described as disadvantaged, unless you take seriously the racist proposition that one is automatically disadvantaged by having an Aboriginal ancestor and a trace of Aboriginal 'racial' characteristics. Yet they are eligible for special Aboriginal non-government scholarships and, yes, as Bolt argued, although in a highly defamatory way about the particular individuals he targeted, special consideration for enrolment in universities. I have served on scholarship selection committees, and I contend that economic disadvantage must be one of the grounds for selection, and not simply identifying as indigenous. It is nonsense to hand out scholarships funded by philanthropic efforts to people who are

not economically disadvantaged. Being descended from an Aboriginal or Torres Strait Islander person who lived before British annexation of our lands is not sufficient reason by itself to hand out money to people who make a claim to being indigenous. This attitude of entitlement is poisoning Aboriginal society just as much as it is poisoning Australian attitudes to indigenous people.

In a more innocent time, Australians understood the proposition about the rights of Aboriginal people, although perhaps in a less sophisticated way. Australians voted overwhelmingly in favour of removing discrimination against Aboriginal people in the Referendum on 27 May 1967. They were clear in their intent of removing racial discrimination. That referendum comprised three questions, two of which concerned the specific references made to Aboriginal people in the Constitution. The first question, referred to as the 'nexus question', is in Section 24 of the Constitution, which required that the number of members in the House of Representatives be as near as possible to twice the numbers of members in the Senate. This section has the purpose of preventing the overwhelming of the Senate's power in the case of a joint sitting following a double dissolution election. The question was:

Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution so that the number of members of the House of Representatives may be increased without necessarily increasing the number of Senators'?

This question was rejected by the Australian voters and did not achieve a majority of states in favour. The second question concerned two clauses, Section 127 and Section 51 (xxvi), which were the only references to Aboriginal people in the Constitution:

51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:—

... (xxvi) The people of any race, other than the aboriginal people in any State, for whom it is necessary to make special laws.

127. In reckoning the numbers of the people of the Commonwealth, or of a State or other part of the Commonwealth, aboriginal natives should not be counted.

The question was:

Do you approve the proposed law for the alteration of the Constitution entitled 'An Act to alter the Constitution' so as to omit certain words relating to the people of the Aboriginal race in any state so that Aboriginals are to be counted in reckoning the population?

In 1967 Australians almost unanimously agreed that the words 'other than the aboriginal people in any state' should be deleted so that, like all other Australians, the Australian Parliament could make legislation for them. By amending the 'race power' to remove the words excluding Aboriginal people from the clause at Section 51, which had set out the powers of the parliament to make laws that enabled the parliament to discriminate against us, it now reads:

Part V — Powers of the Parliament 51. The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to:

... (xxvi) The people of any race for whom it is deemed necessary to make special laws.

After the expression of the racist undertow by Pauline Hanson and the popular acceptance of her flawed logic, the removal of the 'race power' may yet prove to be the most difficult challenge in reforming our Constitution.

In 1998, the Federal Government used its 'race power' to implement John Howard's so-called '10-point Wik plan' to extinguish native title in all pastoral leases; it also used it to allow the Hindmarsh Island Bridge in South Australia to be

built. The Ngarrindjeri women, who asserted that they are custodians of a sacred site on the island affected by the bridge proposal, lodged a case in the High Court seeking to overturn that legislation.

The central issue, answered by the six Justices sitting on the High Court in the Hindmarsh Island case, is whether the 'race power' can be used to pass laws to the detriment of Aboriginal people or whether it can only be used to pass laws for their benefit. As Justice Callinan removed himself from the Bench in this case because of his previous involvement in the matter, the answers provided by the remaining six Justices do not clarify the matter sufficiently to provide guidelines for other legislation. While it was acknowledged that Australia's Constitution was conceived with racist purposes, two Justices found that governments could not act with manifest abuse of power; and one, Justice Kirby, found that no act could be racially discriminatory. The other three found that legislation enacted by a state could be amended. Another view was that a majority on the High Court found that the Australian Constitution permitted laws to be made to the detriment of the people of any race — at least, that is the interpretation of the judgment that was followed by the Howard government.

Megan Davis is an Indigenous constitutional lawyer and legal academic with a sound grasp of the Australian Constitution and its failure to acknowledge the existence of Aboriginal and Torres Strait Islander peoples. Like many others, I agree with her on the most significant issue to be put to a referendum on the question of whether or not to recognise Indigenous Australians in the Constitution.

Davis puts it this way: 'One of the strongest cases for constitutional change is deleting or amending the races power. It is unacceptable for a modern liberal democracy like Australia to have a races power in the Constitution.'<sup>1</sup> She argues that it is most important to include a non-discrimination and equality provision in the Constitution and that this proposal is more

likely to succeed at a referendum than other proposals. This is the solution that the Expert Panel agreed to in its recommendations to Prime Minister Gillard, although couched in more detailed terms, in a rather heavy tome that includes an account of our constitutional history and, among other things, an account of what Australians from many backgrounds said to us during the consultations.

Three prime ministers have agreed with the proposition that Indigenous Australians should be recognised in the Constitution, although there is variance of opinion on how to do so. Rudd, Howard and Gillard have each made statements to this effect.

*Prime Minister Julia Gillard, 2010:*

Now is the right time to take the next step and to recognise in the Australian Constitution the first peoples of our nation; now is the right time to take that next step to build trust and respect, and we certainly believe that constitutional recognition is an important step to building trust and respect, it's an important step to building and acknowledging that the first peoples of our nation have a unique and special place in our nation.<sup>2</sup>

*Former prime minister, John Howard, during the election period in 2007:*

My goal is to see a new Statement of Reconciliation incorporated into the preamble of the Australian Constitution ... I would seek to enlist wide community support for a 'Yes' vote. I would hope and aim to secure the sort of overwhelming vote achieved 40 years ago at the 1967 Referendum. If approached in the right spirit, I believe this is both realistic and achievable.<sup>3</sup>

Former prime minister Kevin Rudd revived John Howard's 2007 pre-election proposal to amend the preamble to the Australian Constitution to recognise Aboriginal and Torres Strait Islander people. Rudd's announcement was prompted after Yolgnu and Bininj elders presented him with a Statement

of Intent at the Federal Government's Community Cabinet meeting in Yirrkala, Northern Territory. Prior to that, constitutional reform had been raised by participants in the Indigenous stream at the Federal Government's 2020 Summit in Canberra and at the Barunga Festival in the Northern Territory. In fact, it has been a perennial focus of unfinished business between Indigenous peoples and the state.

Some proponents of the preamble concept do not agree that the 'race power' is an unacceptable provision in the constitution of a liberal democracy. It has been proposed that the clause remain so that legislation could be passed by the parliament to deal with matters of national security and other 'just in case' scenarios.

However, how it is proposed to identify the 'race' of any particular person is never explained, nor how abuses of power might be prevented if officials had a free hand. Some people speak in mumbled tones about 'Muslims'. When I point out to them that 'Muslim' is not a racial category but a religious one, they are strangely silent. They are also silent when I explain that 'Ethiopian' or 'Sudanese' are not racial ascriptions but refer to the original nationality of persons. I find it difficult to believe that an Australian court would find that being Ethiopian or Sudanese or Bosnian places someone in a 'racial category'. What most Australians don't know is how absurd and ridiculous the race theories they unwittingly believe in are when subjected to the cold light of day. How could 'race' be defined in the 21st century, hundreds of years after it was first developed in the imperial era as the British and Europeans ventured across the seas and discovered people of colour and classified them as the 'inferior races'? How, when the human genome has been thoroughly investigated and mapped, proving convincingly that we are one species with millions of variations, not just the crude categories of 'race' developed to justify colonialism: Negroid, Mongoloid, Caucasoid, and my favourite, Australoid?

An unknown number of Australian citizens and immigrants with permanent residency status have been held unlawfully in immigration detention centres by the Federal Government over the past 10 years. There were a few high-profile cases. One involved Vivian Solon, an Australian who was unlawfully removed to the Philippines by the Department of Immigration and Multicultural and Indigenous Affairs in July 2001. Another was 'Mr T', a mentally ill Australian citizen originally from Vietnam who was detained three times. The Federal Government accepted liability for these cases, but the threat of such abuse of power by officials is a relevant issue in considering the 'race power', the findings of the High Court in the Hindmarsh Island case, and the question of how we, the citizens, would want our Constitution to read as the foundational document of the nation.

## **Section 25**

Section 25, which was not the subject of the questions put in the 1967 referendum, and which remains in the Australian Constitution, is more difficult to comprehend. It states:

25. For the purposes of the last section, if by the law of any State all persons of any race are disqualified from voting at elections for the more numerous House of the Parliament of the State, then, in reckoning the number of the people of the State or of the Commonwealth, persons of that race resident in that State shall not be counted.

According to constitutional law scholar Brian Costar, this 'obscure, puzzling, contested but largely neglected Section 25 of the constitution ... mandates not who should have the vote but how many House Representatives' divisions each state shall be entitled'.<sup>4</sup> Some constitutional lawyers assert that it is 'a mild deterrent to discrimination on racial grounds', while others view it as 'odious and outmoded'. Costar's thinking on this clarifies the debate for those of us who are not trained in the dark arts of legal jousting: to assume that the section has

been voided by the passage of legislation deeming discrimination on the grounds of race illegal would be false for the simple reason that such legislation may be repealed or amended by parliament. Furthermore, the right to vote is not explicitly enshrined in the Constitution, and Section 30 has been interpreted as giving to the Federal Parliament the authority (subject to the Constitution) to determine its electoral procedures.

We can only speculate as to whether any future legislation restricting the right to vote on grounds of race, gender, class, and so forth would be held by the High Court to be in breach of the 'directly chosen by the people' words of Sections 7 and 24. Given that uncertainty, a case can be mounted that Section 25 should be retained until the right of citizens to vote is unambiguously guaranteed in the written Constitution or firmly embedded by judicial review in the unwritten one.<sup>5</sup>

However, to bring the matter to a close, Costar, among many others, supports its removal for at least two reasons. He cites Justice Gibbs, who

held in McKinlay's case (1975) that Section 25 could be interpreted in such a manner as to deny the franchise to certain people on the grounds of race. Second, 'race' is now such a discredited biological and social construct that its citation in a democratic constitution is undesirable.<sup>6</sup>

I believe, despite all that I have said here, that the referendum on the question of recognising Indigenous Australians should be delayed. There are several reasons for my own hesitation about a referendum proceeding on this matter. The obvious one is that should the referendum question be defeated by the voters, it would not be put before the Australian voters again in my own lifetime. There is also the disappointment and bitterness that such a defeat would engender throughout Aboriginal Australia. Another reason is that to set the standard too low — to appear to be complicit in a referendum question

that proposed only a preamble with no legal effect — would be, even if successful, a slap in the face for many Aboriginal Australians whose aspirations are for so much more.

One of the most vociferous debates that the Expert Panel members engaged concerned — to my surprise — whether Noel Pearson's proposition that our recommendation for a referendum question on the recognition of Aboriginal Australians include the right to speak and maintain indigenous languages. It was self-evident, it seemed to me, that if we were arguing for the question on the matter of recognition to be based on our prior occupation of these lands (and not race), the recognition of the languages spoken by our ancestors and still spoken today was a logical and necessary corollary to our proposed new Section 51A as a replacement for the racial definition of Aboriginal people. The proposed Section 51A reads:

**Recognising** that the continent and its islands now known as Australia were first occupied by Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the continuing relationship of Aboriginal and Torres Strait Islander peoples with their traditional lands and waters;

**Respecting** the continuing cultures, languages and heritage of Aboriginal and Torres Strait Islander peoples;

**Acknowledging** the need to secure the advancement of Aboriginal and Torres Strait Islander Peoples;

the Parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth with respect to Aboriginal and Torres Strait Islander peoples.

With a more than usual determination and ferocious timbre in his voice, Pearson argued his case — and won. The proposed new section to be put in the referendum question is a new section: Section 127A: Recognition of languages:

(1) The national language of the Commonwealth of Australia is English.

(2) The Aboriginal and Torres Strait Islander languages are the original Australian languages, a part of our national heritage.

The opposition retreated. Why would Aboriginal and Torres Strait Islander people — people claiming to be such — argue against this? There is at least one answer. I will give you only one by way of an anecdote. Indigenous people who speak their ancestral language or languages, whether here or elsewhere in the world, are often wont to remind an audience of the existence of their language by opening a speech with a few words of it. Recently, one of our fair-skinned brothers chided Aboriginal people who spoke initially in their mother tongue at a meeting, saying that they were speaking in their language to differentiate themselves from other Aboriginal people who didn't speak their language, and thereby making a statement about their lack of authenticity as Aboriginal people. Any reasonable person would regard this statement as paranoid nonsense and support the right of anyone to open a speech in her mother tongue, especially if it is an endangered language, as all Aboriginal languages are. But this tells us something important. The debate about what constitutes an authentic Aboriginal identity is so fraught and toxic, even the fact of speaking an Aboriginal language is now contested by those who are insecure in adopting this identity. These latter people are keen to redefine the grounds of Aboriginal identity. Anything from growing up in the suburbs with a family that denied its Aboriginal roots to 'feeling very spiritual' are being touted as legitimate grounds for claiming to be Aboriginal. Not just Andrew Bolt, but also hundreds of Aboriginal people who suffered because they did not want to hide their identity are fed up with this creeping postmodernist ideology of Indigenism and indigenous exceptionalism. The key reason for our contempt for this lifestyle option is that most of its proponents, having never suffered racial discrimination or lived with family members who did, often on a daily basis, simply do not

understand that the most urgent and authentic fact of Aboriginal life is the need to be free of racial discrimination, or at least to have effective remedies and ways of preventing it. This is why part of our proposed Bill to alter the Constitution to be put to the Australian people includes this proposition:

**Section 116A Prohibition of racial discrimination**

(1) The Commonwealth, a State or a Territory shall not discriminate on the grounds of race, colour or ethnic or national origin.

(2) Subsection (1) does not preclude the making of laws or measures for the purpose of overcoming disadvantage, ameliorating the effects of past discrimination, or protecting the cultures, languages or heritage of any group.

There was one problem that Noel Pearson raised in his submission as Director of the Cape York Institute for Policy and Leadership that the majority of Expert Panel members dismissed as a matter for legislation only. And this was the problem of how to gauge the progress in removing disadvantage and thereby remove from legislation the special measures designed to address them once the goals were achieved. This is an absolutely necessary part of the puzzle I have outlined here. We must address this problem in order to remove the scourge of racism from the constitutional wheels of our social machine. It is a part of human rights practice to allow for special measures that discriminate in favour of a disadvantaged group, but these measures must be temporary or the fabric of human rights law and principle is breached. There is a growing Aboriginal middle class. The climb out of poverty and disadvantage has paid off for their children as well, and for these children, no special measures are required. They should continue to identify as Aboriginal, they should learn and practise their culture, but there are no human rights grounds for them to receive any special assistance except in some circumstances, such as a disability.

There is a logical approach to delineating the question or questions that we would put to the Prime Minister in our final report, and the logic is one that confronts the problem of 'race'. The largely ignorant and mischievous media reports that greeted the article in which Megan Davis and I reported on the final report in January 2012<sup>6</sup> focused on a version of what I have argued here, We were viciously attacked by the usual suspects — Keith Windschuttle, for instance<sup>7</sup> — who accused us of calling all Australians racist and who denied that the Constitution included the 'race power'. Our intent was — as you could guess — to give Australians a graceful exit from the embarrassment of an overwhelmingly negative vote at a referendum on this constitutional question. 'Wait,' we said, because a 'No' vote would confirm in the eyes of the international audience Australia's reputation as a racist country. The nation's reputation is at stake on this question, a matter that Windschuttle is oblivious to.

We expected this kind of response, but we were astonished at the vicious rejection by *The Australian*, which published the accusation that Aboriginal child bride practices would be legalised should the government accept these recommendations. For his part, Nicolas Rothwell opined that these matters were simply too complicated for Australians to consider, or perhaps he meant that our report had made them too complicated.<sup>8</sup> He is mistaken in taking this view. We sought the advice of a wide range of constitutional legal scholars. Thus, I have come to understand the difficulty of constitutional change, the problem of unintended consequence, and the invisible power of the idea of 'race' in our body politic. To remove the 'race power' is to pull at the weft and warp of the Constitution. A reconstitution of the issues was required, not just an expedient Preamble, that would have caused damage to the Constitution.

This is why I hope a robust but intelligent debate on the issues I have raised will begin. And it begins with imagining that an Aboriginal man or woman is not some version of the

‘noble savage’, but a person who should have the opportunity to fulfill her potential. Removing the barriers to that aspiration means ending the colonial commitment to ‘race’ and the era of indigenous exceptionalism. It also requires imagining the Australian society in which we see each other as individuals — each unique and with a multitude of characteristics. Being Aboriginal in that circumstance would not be extraordinary or contentious or reason for hatefulness. Our status as the first peoples would be a simple acknowledgement of historical fact and our aspiration for cultural maintenance an unarguably reasonable one. Other Australians would feel secure in their status as another kind of Australian — descendants of those who came after 26 January 1788. The burden of history would then be resolved in its proper domain, as Australia’s history with its attendant social problems of winners and losers, the advantaged and disadvantaged — and the irresolvable question of guilt — would no longer be the issue. The question of how to ameliorate the conditions of the disadvantaged would be the issue, not because of their presumed racial difference, but because of their inheritance of intergenerational historical conditions. Morgan Freeman, the American actor, explained in an interview why he hates the idea of Black History Week, even though he is on one side of his family the descendant of an African slave. There is no White History Week; Black history is American history, he said. When you think about it, our historians and intellectuals should have reached this realisation without the trauma of the ‘culture wars’. I hope we can put this idiocy behind us and define human beings in ways that does not involve outdated and unscientific concepts and the prejudices that have grown up around them.

## Endnotes

- 1 M Davis, ‘Indigenous rights and the constitution: making the case for constitutional reform’. *Indigenous Law Bulletin*, vol. 7, 2008, p. 8.
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- 3 J Howard, 'Reconciliation must be written into our constitution', *Sydney Morning Herald*, 12 October 2007. Retrieved from <http://www.smh.com.au/news/opinion/reconciliation-must-be-written-into-our-constitution/2007/10/11/1191696078360.html>
  - 4 B Costar, 'Odious and Outmoded? Race and Section 25 of the Constitution', in *Selective democracy: race, gender and the Australian vote*, J Chesterman and D Philips (eds), Melbourne Publishing Group, Melbourne, 2012.
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  - 6 M Langton and M Davis, 'An answer to the race question', *The Australian*, 21 January 2012. Retrieved from <http://www.theaustralian.com.au/national-affairs/opinion/an-answer-to-the-race-question/story-e6frgd0x-1226249768982>
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  - 8 N Rothwell, 'Experts' double message hard to sell', *The Australian*, 20 January 2012. Retrieved from <http://www.theaustralian.com.au/national-affairs/opinion/experts-double-message-hard-to-sell/story-e6frgd0x-1226248797750>



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