THE AGE

First Peoples' triumph or two-edged sword?

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For years the political class has been debating whether to grant constitutional recognition of the unique place of Indigenous Australians. There was even a campaign – "Recognise". This week the High Court just did it.

The court did it in a judgment that "is really important and vastly overlooked in the flurry of the week's media," as Stan Grant, an accomplished international journalist and Wiradjuri man, put it. It's "one of the most remarkable documents I've ever read in Australia".

Illustration: John Shakespeare

The court considered "the fundamental principle of what it is to be an Australian and what it is to be Aboriginal", Grant says. And, as it happens, the highest court in the land found that there is a difference. You can be an Australian and not an Aboriginal person, but you can't be an Aboriginal person and not an Australian.

The court ruled that an Aboriginal person can't be considered an "alien" under the constitution. So what? Aren't aliens the things that the big radio telescopes are looking for?
Perhaps, but for the purposes of Australia's constitution, an alien is a person who doesn't belong here. Until now, that generally has meant a person who isn't an Australian citizen. Until now, your Australianness depended on whether you were a citizen. Until now, race was irrelevant.

And, until now, if you're in Australia, you're not a citizen, and you commit a serious crime, the federal government will deport you. That's the policy.

But what about a case of someone who is all of these things – a person in Australia, a non-citizen and a criminal – who is also Aboriginal?

The Morrison government said that Aboriginality was irrelevant. It ordered that two men, claiming to be Aboriginal but born overseas and lacking Australian citizenship, be deported for failing to meet the test of good character. Both were convicted criminals.

But the two men took their case to the High Court. And the seven judges, by a majority of four to three, decided that Aboriginal people cannot be "alien" because they have a deeper connection to this land than citizenship can bestow.

Add to shortlistSo the federal government had no authority to deport them, even though they were not citizens. The court's 1992 decision in the Mabo case already recognised that Indigenous Australians had a unique connection, predating British colonisation, to the land and waters of Australia. Now, as one of the majority judges, James Edelman, put it, this connection is “an underlying fundamental truth that cannot be altered or deemed not to exist by legislation”.

Or, as Stan Grant put it to me, "fundamentally they are saying there's a connection to this country that predates British settlement and survives British settlement and continues to constitute a unique status. Indigeneity sits outside the bounds of citizenship."

But won't every non-citizen crook now avoid deportation by just claiming to be Aboriginal?
Not so fast. The High Court applied the same three-part test as the Mabo judgment did, further entrenching this as the benchmark – you have to be the biological descendant of Aboriginal people who lived in Australia before British settlement, you have to identify as Aboriginal, and you have to be recognised by an Aboriginal community and its elders.

In the case of the two men before the court this week, the court found that Brendan Thoms, who served jail time for domestic violence, was an Indigenous Australian even though he’d been born in New Zealand and is an NZ citizen. It couldn’t be satisfied of the Aboriginality of the other, Daniel Love. He was born in Papua New Guinea. He had been jailed for inflicting grievous bodily harm in a separate matter. The High Court sent

the question to the Federal Court to decide. But his name has given the whole case its short title – the Love case – under which both men are bundled.

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The ruling "makes me feel good to be an Australian", says Stan Grant. But the noted Jesuit jurist and long-time advocate for Aboriginal rights, Father Frank Brennan, had a very different reaction. He said that "my heart sank when I heard the news".

How so? "I thought, there goes the Voice to Parliament, there goes anything in the form of constitutional recognition through a referendum."

"This now gives conservatives a cause," Brennan tells me. "Conservatives will argue that 'the constitution presently doesn't mention Aborigines, but the High Court has found a way to recognise two types of people, Aborigines and non-Aborigines. If we then add a clause that specifically mentions them, where will it stop?'"

And indeed the immediate objection to the Love judgment was that it creates two classes of citizens. One class is subject to all the laws of the Parliament, and the other, by virtue of race, is not. Morgan Begg of the Institute of Public Affairs attacked this as "a total repudiation of racial equality" and "a direct attack on the sovereignty of the Crown".

Grant doesn't dispute that the judgment creates two distinct groups: "Yes, there are two classes of Australians. I don't enter Australia through settlement or through immigration. I enter Australia through deep ancestral connection. The courts recognised that earlier through the Mabo judgment on native title, and on the basis of that we have this judgment that starts to flesh out the implications of Mabo."

He emphasises that Aboriginal sovereignty was never ceded. Other British offspring, such as the US and NZ, have always recognised two distinct groups by striking early treaties between the colonists and the Indigenous peoples. However flawed those treaties, they established clarity of at least some sovereign rights for their first peoples.

Australia is groping its way towards doing the same thing but very incrementally, through political argument and judicial ruling. Frank Brennan's concern is that while this may be all very heartening, it's not very practical. In the world of realpolitik, he fears, the Love judgment could backfire badly.

On one level, Brennan, now rector of Newman College at the University of Melbourne, thinks that the decision is really just a matter of common sense – "How can you say someone ethnically Aboriginal is an alien simply because they're not born in Australia?"

But on another he fears it will provoke a political reaction that kills off any near-term hope of parliamentary progress. The constitutional scholar Anne Twomey, of Sydney University, agrees. "This doesn't give anything practical to Indigenous people, at least

that we know of." The only practical beneficiaries are non-citizen Aboriginal people who the government is trying to deport, and this is a mere handful.

Add to shortli"Unlike the Voice to Parliament, a way to give well-considered, practical and useful advice to the Parliament on laws that will affect Aboriginal people. So if the outcome of this case is to destroy the prospects of the reform that is the Voice to Parliament, it may have an effect on Aboriginal people that's quite detrimental. This judgment may spook people who therefore decide not to do anything more."

And some of the detail and composition of the judgment troubles Twomey and Brennan alike. Twomey points out that the four judges in the majority each wrote a separate judgment: "They got to the same place but through quite different ways. We have no idea what is going to pulled out of this in future cases."

Brennan calls the fact of these separate judgments "a sign of potential trouble ahead". So, too, he says, is the fact that the dissenting minority comprises the Chief Justice, Susan Kiefel, and "the two strongest intellectuals on the court", Stephen Gageler and Patrick Keane.

Indeed, Gageler objected to the majority's "inference of a race-based constitutional limitation on legislative power", which he called "creativity". And this will be at the core of criticism of the Love decision – that it is judicial creativity or "activism" rather than a black-letter interpretation of the constitution.

The Morrison government's immediate reaction certainly wasn't a happy one. The Attorney-General, Christian Porter, described it as "a pretty novel sort of a decision" and said he was "absolutely" in agreement with the reasoning of the minority. Porter said that while it "might not be a very large group of people" affected, it was nonetheless "a group who will now have to be treated differently from all other persons in the same circumstances".

Peter Dutton, responsible for immigration, said the judgment "creates another class of people, which I think is a very bad thing". He said the government would consider "what our options are to legislate where we can and to try and restrict the damage".

Porter said that the government would now consider deportations through another head of power. Three could be possible – the race power, the immigration power and the nationhood power, according to Twomey. But none might be worth the effort. "The Commonwealth will look at it but I suspect they might decide it doesn't want to poke the court like that."

Another blowback from this judgment is that it energises conservatives calling for a more politicised process of High Court appointments, taking Australia closer to an Americanised court. The IPA's Begg points out that two of the four judges in the majority will reach retirement age in the next 13 months, and he urges Morrison to replace them with "explicitly capital-C conservatives".

Frank Brennan says "it must really stick in the craw that three of the four judges in the majority were appointees of the Abbott and Turnbull governments". Anne Twomey says "it's quite stupid to choose judges on the basis of their political ideology because in the end they will decide according to what they genuinely believe is the right legal answer". That will not discourage committed conservatives from trying.

The Pandora's Box is now open and no one can be sure of what has been unleashed. The judgment in Love could end up reaping confusion and anger, political reaction against judicial progressivism