
On Representation and the Politics of Aboriginal and Torres Strait Islander Voice

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This article analyses the proposed Aboriginal and Torres Strait Islander Voice to Parliament through the lens of democratic theory and the concept of representation. We outline two conceptions of representation, the dyadic and constitutive perspectives, and argue that the constitutive perspective better illuminates the democratic value and political power of an institutionalised Voice to Parliament. From a constitutive perspective, the political power of Indigenous representation is grounded in existing fields of representation that both precede and exceed the Australian State. On this perspective, the political power of the Voice lies not only in the ability to directly affect political decisions, but also in the way that authoritative representative claims can shape public attitudes, values and decision-making by setting agendas, attracting the views of affected communities and shaping the terms of debate. We argue that the Voice to Parliament expands and empowers existing fields of Indigenous representation by acting as “connective tissue” between Indigenous peoples and state institutions that cannot be politically severed. Its representative power emanates not just from its legal authorisation but also from its political function as a new communicative lever with the potential to transform the national public and political discourse.

INTRODUCTION

Since its inception in the Final Report of the Referendum Council¹ in 2017, the proposal for an Aboriginal and Torres Strait Islander Voice to Parliament has largely been addressed in terms of its constitutional authorisation and legal function. Debates have focused on the constitutional text that authorises specific rights for a group; the legal mechanisms by which this group representation is constituted, institutionalised, and connected to Parliament and the Executive; and the legal status of the representations emanating from the Voice in the policy- and law-making process. These issues need to be finalised within legal frameworks, but they are also matters that attend very explicitly to political power. To highlight these matters, this article examines the Voice proposal through the lens of democratic politics and the concept of representation. In this case, democratic politics is taken to involve the representative processes and practices through which diverse peoples and their political institutions are empowered to discuss, contest and decide the course of their common life together, thereby constituting themselves as a political community despite deep divisions and disagreements. That is, we are concerned with the *political* authorisation and *representative* function of the Voice as *a constitutionally derived political power operating in a democratic polity*.

Since Prime Minister Anthony Albanese recommitted to a referendum on a constitutionally enshrined Voice at the 2022 Garma Festival, much of the public debate has shifted towards these more political matters. While these debates might appear in the media as party or personality driven, we contend that the various political positions reflect different understandings of what constitutes a democratic political community, the function of representation in democracies, and the effectiveness of representation as a

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¹ Referendum Council, *Final Report of the Referendum Council* (30 June 2017).



form of political power. From this angle, three key questions are raised about the Voice proposal: (1) In what ways do forms of Indigenous representation constitute political power?; (2) What value will the representative functions of an Aboriginal and Torres Strait Islander Voice have in the context of ongoing colonisation?; and (3) To what extent might a Voice yield transformative effects upon either Indigenous groups or the colonial government?

In this article, we briefly answer these questions by first introducing theories of democratic representation; second, by examining the existing politics of Indigenous representation; and finally, by offering a brief analysis of the representative principles in the Indigenous Voice Co-design Model. In our analysis of this model, we demonstrate its careful attention to key principles of democratic representation and the politics of Indigenous representation, but also argue that it conceives of the representative function of the Voice in institutional rather than political terms. Specifically, we answer the three questions above with the following arguments:

- (1) Representation constitutes forms of *political power* through its institutionalisation and wider contestation in a democratic system.
- (2) Indigenous representation has always shaped relationships within and across nations and communities prior to the colonial encounter (where it is simply *representation*). These practices coexist with Indigenous representations made in critical engagement with the state (where it becomes *Indigenous representation*) and should be understood as forms of political power because they inform, shape and transform public attitudes, values and decisions. The Voice will expand upon this broad representative landscape and build new connective tissue between it and political institutions.
- (3) Understood in constitutive terms, the representative power of the proposed Voice will contribute to the ongoing potential of Aboriginal peoples and Torres Strait Islanders to shape the future politics of this continent. From the vantage point of democracy, this potential will be realised to the extent that it injects Indigenous knowledge into policy making and acts as an attractor for wider Indigenous representations that shape and contest Australian politics.

ON REPRESENTATION

The concept of political representation has a long history in Western political theory stretching back to early modern thinking about representative government. In the work of Thomas Hobbes, an “epoch-making” connection was established between representation and sovereignty by theorising how a multitude of individuals in a state of nature are made present in the person of the sovereign through a social contract of authorisation.² More recently, Hannah Pitkin argues that modern representation involves a paradoxical dualism of presence and absence: making something present *in some sense* which nevertheless is not present literally or in fact.³ For Pitkin, political representation involves making present the people who are physically absent in political institutions through “independent action in the interest of the governed”.⁴ In contemporary political theory, however, representation tends to be framed in more explicitly democratic terms relating to principles of popular sovereignty and electoral legitimacy, citizenship rights, the accountability of state institutions, and the wider deliberation and contestation in a pluralist civil society. Not surprisingly, there are a variety of contested views on what precisely makes representation *democratic*. Here, we will focus on two broad approaches that can help to frame how we think about the Voice proposal.

The first is the “dyadic perspective” in which political representation is viewed as a relationship of substitution between citizens and their representatives established through an authorising contract that delegates certain powers. In this perspective, representation is a necessary and second-best alternative to direct participation and decision-making, which is the most democratic method for enacting the will of the people. But given the scale and complexity of contemporary social life, authorised representatives

² Quentin Skinner, “Hobbes on Representation” (2005) 31(2) *European Journal of Political Theory* 155, 177.

³ Hannah Pitkin, *The Concept of Representation* (University of California Press, 1967).

⁴ Pitkin, n 3, 221.

must stand in the place of the represented people and translate the interests and opinions, desires and problems of their constituents into deliberative and decision-making institutions. Consequently, normative debates about political representation centre on the proper nature of the dyadic relationship and the proper composition of legislative institutions to accurately reflect the identities and interests of citizens. On the former issue, the classic debate is about whether a representative should be mandated with instructions from constituents (delegate) or should be independent and free to take decisions on their behalf (trustee). On the composition issue, debates centre on to what extent individual representatives and political institutions should share key attributes of the people they represent. In these debates, many have argued for “descriptive representation”:⁵ only members of a group can speak for that group; and political institutions should mirror the society they represent, not least to ensure that the experiences of social groups historically marginalised because of their race, religion or gender, for example, are included in democratic processes.⁶ In this approach, good representation is therefore a question of accurately substituting an ordinary people with an authorised representative body and ensuring that representatives abide by the terms of the delegative (usually electoral) contract.

The second is the “constitutive perspective” in which practices of political representation are viewed as constituting a broader system of democratic politics involving multiple sites of deliberation and contestation in and around political institutions. Instead of narrowing political representation to dyadic electoral relationships, this perspective views political representation as a systemic process mediated by actors and institutions that represent society – including the state, political parties, unions, NGOs and media – encouraging the broad development of extra-institutional forms of political participation and contestation. In this view, representation is not a necessary substitute for direct action, but a system with democratic value in its own right. For Nadia Urbinati, the broader constellation of activities that create, sustain and contest political representation signal that “democracy is actively in place”.⁷ Indeed, “[t]he multiple sources of information and the varied forms of communication and influence that citizens activate through media, social movements and political parties set the tone of representation in a democratic society by *making the social political*. They are constitutive components of representation, not accessories.”⁸ From this perspective, political institutions are empowered to make representations and thereby constitute the interests and identity of a political community for specific purposes without replacing or silencing the other representations circulating around them. These broader processes of deliberation and contestation expand representative politics beyond moments of debate and decision in formal institutions and serve to judge and hold to account the representations made within them. In this sense, the political power of representation exceeds institutional politics and its actors. In democracies, the representative powers of citizens in civil society are not extinguished or replaced by formal representative institutions.

Adopting this constitutive perspective, it becomes possible to understand the Voice as a form of *political* rather than legal power. Instead of focusing on debates about the legal relationship in the Voice-State dyad – for example, the power to compel or veto government action, or the legal scope and remit of the Voice – this perspective locates political power and its democratic value in representation itself. In so doing, it demands that we pay attention to the variety of ways in which representative claims are made, contested and validated in contemporary political life. Attending to these broader representative processes and how they inform, shape and challenge political decisions, enables us to identify the people and communities who are and, importantly, *are not* informing those decisions. That is, it becomes possible to account for political power not only in the exercise of specific decisions but in the broader *representative system* that shapes decision-making. By attracting and channelling Indigenous representation, the Voice proposal

⁵ Jane Mansbridge, “Should Blacks Represent Blacks and Women Represent Women? A Contingent ‘Yes’” (1999) 61(3) *The Journal of Politics* 628.

⁶ Anne Phillips, “Dealing with Difference: A Politics of Ideas, or a Politics of Presence?” in Seyla Benhabib (ed), *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press, 1996) 141.

⁷ Nadia Urbinati, “Continuity and Rupture: The Power of Judgment in Democratic Representation” (2005) 12(2) *Constellations* 194, 199.

⁸ Nadia Urbinati, *Representative Democracy: Principles and Genealogy* (University of Chicago Press, 2006) 24.

seeks to effect change in the pursuit of systemic justice without necessarily being able to point to the direct and immediate outcomes it will achieve. While this relationship between the broad representative field and institutional decision-making is indirect, the constitutive perspective highlights their consequential relationship and locates democratic value in the connections and interactions between them. From this perspective, the history of Australian Indigenous policy has been defined by the tenuous and often fractured relationship between the Indigenous representative landscape and government decisions. Governments have too easily been able to tune out Indigenous representations of their interests, or only tune into those it already agrees with. The Voice proposal can be understood as a remedy to this.

In the next section, we explain that Indigenous political representation should be understood as both preceding and exceeding engagement with the Australian State, as well as critically engaging and negotiating with it. We argue that the Voice proposes an institutional expansion of the representative field, rather than a device to supplant or diminish the existing representative practices of Indigenous communities.

ON THE POLITICS OF INDIGENOUS REPRESENTATION

Indigenous laws of this continent precede those of the Commonwealth of Australia. This need not be any more controversial than stating that the establishment of the states preceded federation in 1901. We start with this incontrovertible claim as a basis for describing how “Indigenous” representation can be understood both as preceding and exceeding the colonial encounter. We place “Indigenous” in quote marks here to delineate the modes of political representation as they existed before they were conceptualised and named as “Indigenous” (or “Aboriginal” or “Torres Strait Islander”) through European encounters. In their engagements within their own forms of community, and between neighbouring communities and nations, a political landscape of representation should be understood to have always existed.⁹

For example, in Northern Australia, accounts of pre-colonial Macassan trade and exchange stretching from the Kimberley coast to north-east Arnhem land, remind us that Aboriginal peoples have been engaged in international relations for hundreds of years prior to European contact.¹⁰ Archaeologists and historians, particularly informed by Yolngu and Macassan peoples’ knowledge, have been able to describe rich and expansive forms of intercultural exchange.¹¹ This has included some accounts of political diplomacy and negotiations between the two nations. Denise Russell describes places in which Aboriginal peoples asserted “a right to exclude” Macassan fishers, and makes a case for the existence of negotiated agreements between Aboriginal and Macassan people.¹² Ian McIntosh has further argued that the “current Yolngu vision of intercultural diplomacy is based on former negotiated partnerships, which could be considered treaties”.¹³ This is just one well documented example of pre-colonial relationships in which Indigenous peoples have represented themselves, their laws and protocols, in their negotiation and navigation of a political life with others.

A further example of legal and political practices that precede and exceed¹⁴ the existence of the Australian State is provided by the concept of *Kaldowinyeri* of the ruwe of the Tanganekald and Meintangk people. Legal scholar Irene Watson describes Kaldowinyeri as a time when “song, stories and law were birthed,

⁹ Irene Watson, *Aboriginal Peoples, Colonialism and International Law: Raw Law* (Routledge, 2015); Christine Black, *The Land Is the Source of the Law: A Dialogic Encounter with Indigenous Jurisprudence* (Routledge, 2010).

¹⁰ Lyndon Ormond-Parker, “Aboriginal Trade with Macassan Seafarers” (2020) 55(3) *Agora* 3, 3.

¹¹ Ormond-Parker, n 10, 3; Marshall Clark and Sally May, *Macassan History and Heritage: Journeys, Encounters and Influences* (ANU Press, 2013); Denise Russell, “Aboriginal-Makassan Interactions in the Eighteenth and Nineteenth Centuries in Northern Australia and Contemporary Sea Rights Claims” (2004) 1 *Australian Aboriginal Studies* 3.

¹² Russell, n 11, 15.

¹³ Clark and May, n 11, 217, citing Ian McIntosh, “A Treaty with the Macassans? Burrumarra and the Dholtji Ideal” (2006) 7(2) *The Asia Pacific Journal of Anthropology* 153.

¹⁴ To the extent that traditional laws and customs remain in practice, even forms augmented by the colonial experience.

as were the ancestors – out of the land”.¹⁵ She describes Kaldowinyeri as being animated in part by the question, “‘what will you do now?’, where the ‘doing’ is to reposition our ‘lawful being’ ... [as a] way of knowing the world from within a space that is occupied and dominated by the colonisers’ legal history with its foundation of terra nullius”.¹⁶ There is law, Watson tells us, that precedes colonisation and informs her Peoples about how to encounter the arrival of another legal history. When that other legal history asserted itself on this Country, that first law did not cease to inform and shape Indigenous social and political life.

In considering how the Voice proposal expands upon (rather than creates anew) fields of Indigenous representation, we can also point to numerous direct and critical political engagements between Aboriginal people, Torres Strait Islanders, and the state. Frequently cited are documents that directly assert Aboriginal sovereignty and call for the respect of rights (both as they exist in traditional law and in the Western tradition). These include the 1963 Yirrkala Bark petitions demanding recognition of Yolngu rights, the 1988 Barunga Statement calling for the recognition of Indigenous rights,¹⁷ and the 1998 Kalkaringi Statement objecting to Northern Territory statehood being pursued prior to good faith negotiations between the Territory government and Aboriginal peoples of the area.¹⁸ These, and many others, express forms of Aboriginal sovereignty and seek to realise the return of rights to Aboriginal peoples that have always been theirs. These documents, and the conversations, negotiations and commentary that have circulated around them since they were publicised, are important examples of Indigenous political representation.

In the area now known as the Torres Straits, furthermore, Martin Nakata describes how prior to colonisation, Islanders “lived in politically autonomous but inter-connected communities” with trade and kinship connections north into Papua New Guinea and south to Cape York, as well as having a record of trading with voyagers passing through the Strait.¹⁹ Like the documents above, the Islander history since colonisation is one of deliberate, strategic and critical engagement with the state as a means to acquire respect for already existing rights, laws and customs. As early as 1899, local Island councils were in place, helping to create the conditions for the 1937 First Islanders Councillors Conference, which would prove effective in negotiating for the removal of government restrictions on Islanders’ lives both in the laws of the time²⁰ and in the decades that followed. By 1967, when the Commonwealth entered into the governing of Islanders’ affairs, most restrictions on Islanders’ lives had been removed as a result of the strategic political engagements between the Island Councils and the state. Torres Strait Islanders also worked to inform the terms of the 1978 Torres Strait Treaty between Australia and Papua New Guinea, attempting to clarify the management of maritime borders and relationships across communities that had been impacted by the imposition of a colonial border. Islanders today must navigate this international treaty on a daily basis, despite not being a formal party to it. More recently, in 1997, the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs delivered “a report on greater autonomy for Torres Strait Islanders” which acknowledged that “Torres Strait Islanders could take responsibility for their own affairs”, and that greater autonomy can be understood as “returning a right”.²¹ The report recommended the redesign of the Torres Strait Regional Assembly so that it could

¹⁵ Watson, n 9, 11.

¹⁶ Watson, n 9, 11.

¹⁷ The Barunga Statement also included the call for “a national elected Aboriginal and Islander organisation to oversee Aboriginal and Islander affairs”: Australian Institute for Aboriginal and Torres Strait Islander Studies, *The Barunga Statement* <<https://www.aiatsis.gov.au/sites/default/files/2020-09/thebarungastatement.pdf>>.

¹⁸ Agreements, Treaties and Negotiated Settlements Project, *Kalkaringi Statement* (1 January 1998) <<https://www.database.atns.net.au/agreement.asp?EntityID=1071&SubjectMatter=24>>.

¹⁹ Martin Nakata, “Treaty and the Self-determination Agendas of Torres Strait Islanders: A Common Struggle” in ATSI and AIATSIS (eds), *Treaty: Let’s Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003) 182, 187.

²⁰ See *Torres Strait Islander Act 1939* (Qld).

²¹ Nakata, n 19, 184.

lead to self-government under Territory status.²² While this did not eventuate,²³ the Torres Straits have arguably come as close as anywhere on the continent to achieving self-government.

Aboriginal people and Torres Strait Islanders have also represented themselves at the global level through their participation in the United Nations system, most notably through the Working Group on Indigenous Populations and later the UN Permanent Forum on Indigenous Issues. Both these forums would drive the development of the UN Declaration on the Rights of Indigenous Peoples over more than two decades. Prior to its abolition, the Aboriginal and Torres Strait Islander Commission (ATSIC) sent delegations to the Working Group but many others, including Indigenous academic observers and the National Aboriginal and Torres Strait Islander Legal Services Secretariat and Torres Strait groups, have been regular participants.²⁴ This is a further example of how Indigenous peoples represent their political interests beyond the state, and also of how efforts to exceed the state can be part of a strategy to effect critical change within it.

Other examples of Indigenous representations that critically engage the state emerge from within government processes. Notable among these are the Royal Commission Into Aboriginal Deaths in Custody (1991),²⁵ the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families (1997),²⁶ the work of the 2000 ATSIC National Treaty Think Tank,²⁷ and the Royal Commission and Board of Inquiry into the Protection and Detention of Children in the Northern Territory (2017).²⁸ In these examples, the representative field is not restricted to the formal records of these processes, the reports themselves, the evidence and testimony collected, or the recommendations and subsequent government responses, but also include the public responses they mobilise, including the organisation of rallies and protests. From this perspective, the Indigenous representative field includes both the institutional records and public discourse surrounding land rights litigation, and more recently Indigenous-led climate change litigation. The constitutive perspective draws our attention to this constellation of activities and helps to widen our understanding of the political power and effect of Indigenous representative claim-making.

Yet, beyond these examples, the broader Indigenous representative field is perhaps most visible in the sustained political protests against commemorating the arrival of the First Fleet, particularly since the 1938 Day of Mourning. These protests have transformed the discourse of “Australia Day” as an unquestioned moment of national unity into that of “Invasion Day” (or “Survival Day”). These shifts in discourse (concerning representation of European arrival) demonstrate how representative acts can shape public discourse, and in turn transform public attitudes and values. While such transformations can rightly be criticised for being more symbolic than substantive, they can have important consequences in political decision-making. In Victoria, some local councils have ceased calling 26 January “Australia Day” or changed the way they engage with the public on this day. These shifts also have compounding effects as protests become lightning rods for highlighting other sites of urgent action and thereby constitute and mobilise social movements on issues such as policing practices, sacred sites, land rights, calls for treaty, and the respect for sovereignty.

²² House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs, Parliament of Australia, *Torres Strait Islanders: A New Deal* (1997).

²³ The Torres Strait Regional Authority operates under Commonwealth Ministerial authority, and the *Aboriginal and Torres Strait Islander Act 2005* (Cth).

²⁴ Megan Davis, “International Human Rights Law and the Domestic Treaty Process” in ATSIC and AIATSIS (eds), *Treaty: Let’s Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003) 148.

²⁵ Elliot Johnston, *Royal Commission into Aboriginal Deaths in Custody National Report* (1991).

²⁶ Ronald Wilson, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (Human Rights and Equal Opportunity Commission, 1997).

²⁷ ATSIC and AIATSIS (eds), *Treaty: Let’s Get It Right!* (Australian Institute of Aboriginal and Torres Strait Islander Studies Press, 2003).

²⁸ Margaret White and Michael Gooda, *Final Report of the Royal Commission and Board of Inquiry into the Protection and Detention of the Children in the Northern Territory* (2017).

We have provided these diverse examples to emphasise that the field of Indigenous political representation is vast, dynamic, active and impactful. This representative landscape is grounded in the practices of existing political sovereigns that precede and exceed the colonial state, while also critically engaging with the state today. A constitutive perspective on representation illuminates this activity as having political power and democratic value in itself. We contend that this has two important implications for how the Voice proposal is being debated: (1) that the absence of a legal power for the Voice to compel or veto government action does not empty it of political power; and (2) that while the Voice will create a new institution of political representation, its most valuable democratic innovation will be to act as connective tissue between the broader field of representation that we have described and the political institutions of the colonial state. Understood as “connective tissue”, the Voice will both attract and focus existing Indigenous representation and establish a constitutionally protected channel of Indigenous representation to the Australian system of government. In contrast, ATSIIC (1990–2005), although composed of elected representatives, can be identified as a limited form of Indigenous representation. It was limited due to its dual purpose, in which its representative function existed alongside administrative responsibilities for monitoring, developing and implementing policies that fell within its ever-changing remit (due in part to its existence as a statutory rather than constitutional authority). This mixed function, combined with weak legitimacy arising from low voter turnout, resulted in ATSIIC functioning less as a connective tissue between community and government and more as an Indigenous surrogate for executive decision-making that took place beyond its reach.

In all, we argue here that the proposed Voice is likely to affirm and strengthen Indigenous political representation as it already exists, and as it has always existed. We argue its strengthening effect arises from the transformative potential of acting as a lightning rod within this broader representative field, irrespective of which interests come to be formally represented in the membership model of the Voice at a given point in time.

INDIGENOUS REPRESENTATION AND THE VOICE CO-DESIGN MODEL

We have argued that the constitutive perspective is what best enables us to see the existing field of Indigenous representative claim-making, and to locate within that field the power of political representation to effect changes in public attitudes, values and decisions. This constitutive perspective is particularly valuable in understanding the democratic potential of the Voice because the debate has largely focused on institutional questions (taking a largely dyadic perspective). In this final section, we address the key aspects of the Voice Co-Design Final Report (“Final Report”) and identify two key opposing arguments to the Voice: concerns that the proposal goes too far in limiting the authority of the Parliament, and concerns that it does not go far enough. We argue that the Final Report and the opposition to the Voice proposal are grounded in an institutional perspective that takes a narrow view of what political representation can and cannot affect. While the Final Report focuses on the institutional mechanism for injecting Indigenous knowledge into policy making, it also leaves open wider possibilities for generating, attracting and focusing the Indigenous representations to shape and contest Australian politics.

The Final Report reflects centuries long efforts by Aboriginal and Torres Strait Islander peoples to realise their aspirations within the limited legal space that the Commonwealth is able and willing to provide. The Final Report responds to strict terms of reference,²⁹ which in part explains its strong emphasis on institutional issues and the dyadic relationship between existing Indigenous community bodies at the local and regional level, and the Parliament and government. The Final Report proposes a National Voice body of up to 24 members. These 24 members are to be composed of two representatives from each state and territory and the Torres Strait, a third remote representative from New South Wales, Queensland, Western Australia, South Australia and the Northern Territory, and a representative for mainland Torres Strait Islanders, as well as the option to appoint two further representatives on the basis of expert skill.³⁰

²⁹ Sana Nakata, “On Voice, and Finding a Place to Start”, *AusPubLaw* (3 March 2021) <<https://www.auspublaw.org/blog/2021/03/on-voice-and-finding-a-place-to-start>>.

³⁰ Marcia Langton and Tom Calma, *Indigenous Voice Co-design Process: Final Report to the Australian Government* (National Indigenous Australians Agency, 2021) 18.

This National Voice is to be connected to Local and Regional Voices, intended to build upon existing arrangements and be community-led, community designed, and community-run.³¹ A key example of its institutional focus lies in its innovatively broad approach to descriptive representation, committing not only to geographic representation but also to gender, youth and disability representation, while also ensuring that the Voice is a “workable size”.³² Here, the emphasis on geographic representation at the state and territory level, rather than on the larger number of language groups/nations, likely reflects this challenge of workability. Yet, the commitment to gender balance by requiring two representatives from each state and territory to be of different genders, and the requirement of a Co-Chair model to have two different genders in its leadership, demonstrate a willingness to expand membership to enable greater representation. The establishment of two permanent advisories to the Voice, one each for Youth and Disability, also demonstrate how the pressure to achieve “workability” need not diminish valuable forms of descriptive representation. Despite these descriptive requirements, a 24-member Voice cannot hope to capture the diverse interests and perspectives of all Aboriginal and Torres Strait Islander peoples. However, our analysis here emphasises that the representative field goes beyond its institutional form: the existence of an institutionalised Voice does not just yield representative claims from within its members but also activates a wider public discourse. As it stands, the Final Report remains a proposal only and it will be for the Parliament to determine the structure of the Voice after a successful referendum.

As a result, it is at this level of institutional design that calls for more detail have focused. Questions of how many representatives, how they are selected, and who they can be reasonably understood to represent, have primarily emerged from conservative opposition who tend not to be otherwise persuaded of the need for a distinct form of representation for the country’s First Peoples. Conservative opposition has also focused upon the scope of consultation and legal power of the Voice to compel or veto government action. These concerns take an institutional perspective on representation: they are focused upon (1) dyadic relations between the represented and the representative, interpreting any independence as a weakness; and (2) dyadic relations between the Voice and the Parliament vis-à-vis decision-making, interpreting any direct power of the Voice as a threat to the Parliament’s supreme authority.

Another set of criticisms of the Voice proposal has emerged from within the Indigenous community who express concerns about its lack of “real” power, question its representativity, and claim it places Indigenous sovereignty at greater risk than Treaty.³³ While the third criticism involves much more than questions of representation, and noting that concerns about sovereignty can be alleviated on a number of grounds, we return to the argument that Indigenous engagements with the state are practices of ongoing sovereignty, not evidence of its cession or subjugation. Focusing on representation, these criticisms identify “real” power as only existing in the moment of political decision, and therefore the inability of the Voice to formally mandate Parliament or government means it has no power. This institutional perspective relies on the assumption that the value of representation lies in its operation as a necessary but poor substitute for direct action. While the Co-Design group proposes transparency mechanisms that include Voice statements on Bills, the tabling of its advice, and a new Joint Standing Committee tasked with the permanent and ongoing role of engaging with the Voice,³⁴ this is interpreted by some as more of the same ineffectual bureaucracy. Afterall, the numerous reports arising from Inquiries and Commissions are similar government-sanctioned processes that produced high quality evidence, advice and recommendations that Parliaments and governments can ignore if they wish. These are legitimate and understandable criticisms, borne out of centuries of systemic injustice. However, as we have argued above, these criticisms also take a narrow perspective on representative power that does not recognise those processes as part of a broader representative field that have shaped public attitudes, values *and decisions*. A constitutive perspective regards political power as more dynamic and indirect than the moment of institutional decision.

³¹ Langton and Calma, n 30, 10.

³² Langton and Calma, n 30, 116.

³³ Jake Evans, “Senator Lidia Thorpe Quits Greens over Divisions on Voice to Parliament”, *ABC News*, 6 February 2023 <<https://www.abc.net.au/news/2023-02-06/lidia-thorpe-to-quit-greens-over-voice-disagreement/101935534>>.

³⁴ Langton and Calma, n 30, 168.

Our argument here is that a constitutive perspective allows us to see how the Voice proposal sits within a wider representative landscape and raises important arguments for improving democratic politics; while exclusively fixating on dyadic relationships underpins key criticisms of the Voice and focuses the debate on the “detail” of constitutional powers and institutional scope. In each of these criticisms, we observe that the Voice is being thought of as a “transmission belt” that assumes a direct and linear path from a represented people to the moment of decision. This is a perspective that fails to consider the constitutive effects of the Voice. In addition to changing the way Indigenous policy is made, the Voice also holds the potential to create and publicise new expressions of problems, change political agendas at multiple levels, and even contribute to building new coalitions, political identities and imaginaries of justice. In making this observation, we do not wish to romanticise Indigenous representation or the Voice proposal as a silver bullet or ideal model. Nor do we need to regard the value of Indigenous representation as limited to the task of improving Australian democracy (though it may well do that). Rather, the value of connecting the existing Indigenous representative field to political decision-making is to address the key failure in Indigenous governance: the lack of meaningful and constitutionally protected input of Indigenous people into the government decisions that affect them. By creating this new point of connection between the representative field and state decision-making, we maintain that a Voice is not a substitute for Indigenous self-determination nor a substantive justice outcome in and of itself. Rather, it has value as a communicative lever with potential to shape and transform the public and political discourse. It is not all of what achieving justice for Aboriginal people and Torres Strait Islanders demands, but it is a necessary and effective contribution to it.

CONCLUSION

The lack of political power that has shaped the colonial conditions of Aboriginal peoples and Torres Strait Islanders has not been due to the absence of their voices from the political landscape but the lack of connective tissue between those voices and governments. The traditional mechanism of representation, the ballot box, does not work well for Indigenous people in overturning systemic injustice. In responding to this deficiency, the Voice proposal expands and attracts existing Indigenous representations and creates a constitutionally protected form of political power for connecting them to the Commonwealth. On a constitutive view, it is often a slow and indirect path from representation to political decision, but it is important to remind ourselves that in a democracy these decisions are shaped by a dynamic field of representative claim-making.

Through formal mechanisms of government, Committees, independent legal action, social media campaigns, strikes, and protest, Aboriginal peoples and Torres Strait Islanders have consistently sustained their political demands for justice, and urgently called for action that improves the conditions of their everyday lives. Over and over again, Aboriginal peoples and Torres Strait Islanders have provided highly expert and evidence-based advice to government authorities, inquiries and Commissions. The representative landscape of these processes, as described above, have included the testimonies of trauma given by those removed from their families and communities as children, those who continue to encounter discriminatory child protection services, those who grieve for family who have died in custody, and those who stand at the shores of rising sea levels and witness the bones of their ancestors wash away. Through these processes – formal and informal, government sanctioned and not – hundreds upon hundreds of recommendations and solutions have been presented to governments. All of this representative work has taken place in addition to the tireless and expert labour of individuals within their communities who succeed most often in spite of governments rather than because of them. Any failure of these efforts to have more concrete and positive transformative effects has not been for the lack of Indigenous political representation, but because of the lack of a direct, sustained and protected connection between Indigenous representation and the Commonwealth Parliament and Executive. By constitutionalising this connection, the Voice does not subsume Indigenous people within the settler colonial state or supplant or diminish the existing representative field, but rather expands and empowers it.