ORIGINAL CONSTITUTIONAL LESSONS: MARRIAGE, DEFENCE, JURIES, AND ALIENS

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I INTRODUCTION

In 1891, on a Friday morning at the end of March, the Queensland government yacht, the SS Lucinda, set out from Port Jackson bound for the Hawkesbury River. Aboard the yacht was an august assembly, almost all of whom were delegates at the 1891 Constitutional Convention.[1] They included Griffith, Kingston, Downer, Wrixon, Thynne, Wise, and Barton (the latter of whom took the place of Inglis Clark who was ill). Under the leadership of Griffith, their task for the weekend was to finalise a draft of the *Commonwealth Constitution*.[2]

After a day of heavy swell on Friday[3] when, in the words of Wise, 'the occasional missing of the happiest turn of phrase by these distinguished draftsmen may have been due to the sea-sickness',[4] ground was made up on Saturday when, for 13 hours non-stop, Griffith, Kingston, and Barton worked intensely on the draft in the smoking room of the upper fore-cabin.[5] Despite being struck by influenza, Griffith continued work on the Sunday, and the group was joined by a convalescent Inglis Clark.[6] Clark was a man with a deep knowledge of United States constitutional law, including an ability to quote long passages ex tempore from Hamilton, Madison, Jefferson, Webster, Clay and Sumner. His depth of learning in this area was invaluable in the drafting and revisions of the *Commonwealth Constitution* which borrowed heavily in many areas from the *United States Constitution*.[7]

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1 Wise was not a delegate: JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 64–5.

2 Ibid.

3 Ibid 65.

4 Bernhard Ringrose Wise, *The Making of the Australian Commonwealth 1889–1900: A Stage in the Growth of the Empire* (Longmans, Green, and Co, 1913) 126.

5 Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000) 80.

6 La Nauze (n 1) 65.

7 John Reynolds, 'AI Clark's American Sympathies and His Influence on Australian Federation' (1958) 32(3) *Australian Law Journal* 62, 63.

The completed draft was sent to the printer at 9pm on Sunday evening.[8] When the draft was presented to the Convention on the following Tuesday, Griffith said that he and the other drafters had endeavoured to 'lay down a broad and just foundation' upon which the Commonwealth could be established.[9] He said that 'we are framing a constitution for the future'.[10] Years later, Downer remarked that with the judiciary lay 'the obligation of finding out principles which are in the minds of this Convention in framing this Bill and applying them to cases which have never occurred before, and which are very little thought of by any of us'.[11] This article focuses, 130 years later, upon how the judiciary has approached, and should approach, that task of understanding the principles expressed in constitutional concepts and applying them to cases that might never have been thought of before. It does so by reference to examples concerning four constitutional concepts: aliens, defence, juries, and marriage.

II ORIGINALISM AND CREATIONISM

I begin with a distinction between what might be called originalism and what might be called creationism. The point made by Sir John Downer was that constitutional interpretation proceeds by reference to the principles or concepts that would reasonably be understood to have been intended in the framing of the *Constitution*. The intention is not a search for the subjective views of Members of Parliament or the participants in the constitutional conventions. Such an attempt to attribute a subjective 'collective mental state to legislators' or to founders would be a fiction.[12] Rather, it is a search, by principles of interpretation, for what the construct of the notional enacting body is reasonably understood to have intended. In other words, legislative intention is shorthand for 'the intention that held by a notional body that is taken to have enacted the relevant provision'. The use of a construct as a means to ask what was intended by words used is essential to statutory and constitutional interpretation.[13] It would be a nonsense to speak of the 'purpose' of the notional Parliament in passing the law unless the concern were to ascertain the intention of that notional Parliament. And without the use of a notional intention it would be impossible to justify interpretations that give sentences their opposite meaning when drafting errors occur.

8 John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 164.

9 *Official Report of the National Australasian Convention Debates*, Sydney, 31 March 1891, 532 (Sir Samuel Griffith).

10 Ibid 529 (Sir Samuel Griffith).

11 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 275 (Sir John Downer).

12 *Zheng v Cai* (2009) 239 CLR 446, 455 [28] (French CJ, Gummow, Crennan, Kiefel and Bell JJ). See also *Lacey v A-G (Qld)* (2011) 242 CLR 573, 592 [43] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

13 See also James Edelman, '2018 Winterton Lecture: Constitutional Interpretation' (2019) 45(1) *University of Western Australia Law Review* 1, 11–13.

There is one significant effect of asking what was intended by the notional body that enacted the provision. As Griffith CJ said in 1908 in *R v Barger*, in a joint judgment with Barton and O'Connor JJ, 'whatever [a constitutional provision] meant in 1900 it must mean so long as the *Constitution* exists'.[14] The notion that, subject to the rules of precedent, a statutory or constitutional provision has a meaning that cannot change has been recognised in many decisions of the High Court of Australia and has been described by judges of the High Court as 'beyond controversy' and 'beyond question'.[15] Today, that approach is sometimes described as 'originalism'. There are problems with the label 'originalism'. First, originalism is a retronym. It is a modern label that broadly describes a concept that has existed for centuries. But the modern label suggests that the concept is novel or recent. Secondly, the label is misleading because it can incorrectly suggest that constitutional adjudication is concerned *only* with original meaning. Thirdly, as explained below, it is a label that means different things to different people.

Nevertheless, one thing that is common to all senses in which originalism is used is that constitutional interpretation is anchored, to some degree, to original meaning. In this sense, there is no Australian judge of constitutional law who is *not* originalist. It is unchallenged orthodoxy that words of the *Constitution*, like those of a statute, must be understood by reference to their context and purpose. Context is original context. Hence, the High Court commonly has regard to Convention Debates and contemporary legislation prior to 1901. And purpose is original purpose, not some newly created and applied purpose. Hence, the High Court commonly considers underlying functions and purposes that constitutional provisions were intended to serve. Context and purpose — that is, original context and original purpose — are not magical ingredients to be applied with text in order to produce meaning in a secret process of judicial prestidigitation. Rather, context and purpose are two factors which, together with text, are used to discern what was reasonably intended in the same way that we approach meaning in everyday discourse. It would be very unfortunate if judges were to claim that the interpretation of an instrument as fundamental as our *Constitution* involved a mystical process known only to judges and one that did not have, at its core, the use of ordinary language techniques involving original context and purpose to understand its meaning.

The opposite of originalism might be called creationism. A form of interpretation which is unanchored to original meaning would permit the judge to create new meaning without any concern for what was reasonably understood to have been intended. This type of creationism can be how a literary critic approaches a poem or a short story. In the summer of 1971, Stanley Fish was teaching two consecutive classes in New York.[16] One class was concerned with linguistics and literary criticism. The other was concerned with English religious poetry of the 17th

14 (1908) 6 CLR 41, 68.

15 See *Chetcuti v Commonwealth* (2021) 392 ALR 371, 385 [57] (Edelman J) ('*Chetcuti*'), quoting *Lansell v Lansell* (1964) 110 CLR 353, 366 (Taylor J) and *R v Jones* (1972) 128 CLR 221, 229 (Barwick CJ).

16 Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press, 1980) 322.

century. In the first class, he wrote on the board the names of the following famous linguists, with a question mark next to the last one because Fish could not remember if Ohmann had one 'n' or two.[17] It read:

Jacobs-Rosenbaum
Levin
Thorne
Hayes
Ohman (?)[18]

The names were arranged in the shape of a capital T, with Jacobs-Rosenbaum at the top and the others directly below. To the linguists in the first class, Fish's manifest intention in writing those names was plainly to make remarks about these linguists.

The class on linguistics then concluded. Different students entered for a second class on religious poetry. Immediately, the students in this class began to comment on the words on the board. They were not concerned with the intention of the writer. The first student immediately noted that the words were arranged in the shape of a cross or altar. Another identified the reference to Jacobs at the top of the list as a reference to Jacob's ladder, and the ascent to heaven. Another pointed out the beauty of the poem in that the ascent to heaven was not by means of a ladder but by a rose tree or rosenbaum. Another pointed out that the Virgin Mary was a rose without thorns, the emblem of immaculate conception. It was then observed that the poem was asking how a man can climb to heaven by means of a rose tree. Another student said that the answer was being the fruit of Mary, namely Jesus and the 'Thorne' in the third line was said to be a reference to Jesus' crown of thorns. Levin was a double reference to the priestly tribe of Levi whose faith was epitomised by Jesus, and Ohman was the omen of prophesy or the amen of conclusion.[19]

These meanings were *created* by the class on religious poetry. The aim of the class was not to discern the best understanding of the meaning intended by the author. They sought to create their own meaning. Interpretation in this literary sense, in Fish's words, is 'not the art of construing but the art of constructing. Interpreters do not decode poems; they make them'.[20] This is not true of ordinary communication. And it is not true of the interpretation of legal texts, including written constitutions. Of course, judges make *law* when they interpret statutes to resolve a legal dispute. But judges do not make the *meaning*; they interpret and apply it. The thing that keeps judges from crossing the Rubicon from interpretation as discerning meaning to interpretation as creating meaning is fidelity to objective intention. It is only that fidelity that allows judges to say, as the High Court did in

17 Ibid 322–3.

18 Ibid 323.

19 Ibid 323–5.

20 Ibid 327.

2018, that questions of interpretation have only one correct answer.[21] The same cannot be said of meaning created from poetry.

III IDENTIFYING ESSENTIAL MEANING OF EXPRESS TERMS

What I have said so far does not mean that in constitutional law the answer to any dispute is fixed as at 1901. Such a conclusion is the most extreme caricature of originalism. Even Scalia J of the United States Supreme Court, who, as I will explain later, claimed to have a strict originalist approach to constitutional interpretation, did not subscribe to such a caricature. For instance, Scalia J explained that the Eighth Amendment to the *United States Constitution*, which prohibits the infliction of cruel and unusual punishments, was 'an abstract principle' capable of application 'to all sorts of tortures quite unknown at the time [of] the Eighth Amendment'.[22] Although, as I will explain, there are problems with the approach that Scalia J took to originalist interpretation, his basic point, long accepted in Australia,[23] was to draw a distinction between meaning which cannot change and application of that meaning which can change.

The divide in constitutional interpretation between what has been described as meaning and application of an express term has also been described as a difference between interpretation and construction, between connotation and denotation, between concept and conception, or between essential meaning and non-essential meaning. One common distinction historically was between interpretation and construction. AV Dicey's colleague, James Bryce, whom Alfred Deakin described as 'an authority to whom our indebtedness is almost incalculable',[24] remarked that interpretation in the 'strict sense of the term' concerned the meaning of a term or phrase whilst construction concerned the application of the *Constitution* to the solution of a case.[25] That distinction has mostly disappeared today, with interpretation and construction commonly used interchangeably. With the demise of that distinction, and the misunderstandings of JS Mill's distinction between connotation and denotation,[26] the best language is perhaps that of essential meaning and non-essential meaning or, in simpler terms, essential meaning and application.

21 *Minister for Immigration and Border Protection v SZVFW* (2018) 264 CLR 541, 549 [4], 552 [18] (Kiefel CJ), 564–6 [53]–[56] (Gageler J), 582 [127], 591 [150], 593 [154] (Edelman J).

22 Antonin Scalia, *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 145.

23 See above n 16.

24 La Nauze (n 1) 19, quoting *Official Report of the National Australasian Convention Debates*, Adelaide, 30 March 1897, 288 (Alfred Deakin).

25 James Bryce, *The American Commonwealth* (Macmillan, 1888) vol 1, 367.

26 John Stuart Mill, *A System of Logic: Ratiocinative and Inductive* (Longmans, Green, Reader, and Dyer, 9th ed, 1875) vol 1, 31–42.

Not much turns upon these labels, although the distinct advantage of the label of 'essential meaning' is that it directs attention to the issue of abstraction by highlighting the need to identify the essence of the meaning of an express term. As we shall see, however, there are two questions of great importance: (1) *how abstract* should the essential meaning of a constitutional provision be taken to be? (2) what considerations should be taken into account when *applying* this meaning to concrete facts? In this article I will focus upon the former question, although I will turn briefly to the latter question towards the conclusion. The two questions are not independent. The more abstract the essential meaning of a provision, the more that its application might change over time.

For the remainder of this article I will use the expressions 'essential meaning' and 'application' to describe this distinction and to illustrate the manner of interpretation of express terms by reference to High Court decisions in relation to four constitutional concepts: marriage, defence, juries and aliens. As will be seen, the process of identifying the level of abstraction or of generality at which the meaning of the express term is expressed cannot be 'ascertained by merely analytical and *a priori* reasoning from the abstract meaning of words'.[27] In ascertaining the essential meaning, the court should generally 'lean to the broader interpretation unless there is something in the context or in the rest of the *Constitution* to indicate that the narrower interpretation will best carry out its object and purpose'.[28] But, ultimately, the essential meaning should reflect the object and purpose of the provision. As we will see, this approach contrasts with the different approach to identification of original meaning that was suggested by Scalia J in the United States of America.

IV MARRIAGE

The first example is the interpretation of s 51(xxi) of the *Constitution* concerning the power of the Commonwealth Parliament to make laws with respect to marriage. There are a range of possible meanings that might be said to be the essence of the express term 'marriage', ranging from the most specific to the most abstract as follows:

1. At the most specific level of meaning immediately prior to 1901, marriage might have been said to require: (i) a legally formalised; (ii) consensual union; (iii) between humans; (iv) of whom there are only two; (v) one of whom is a man and the other of whom is a woman; (vi) for life.
2. At a more abstract level, the essential meaning of marriage might not have included the sixth element, namely, that the consensual union be for life.

27 *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 576 (Windeyer J) ('*Marriage Act Case*'), quoted in *Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, 455 [15] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

28 *Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, 368 (O'Connor J). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 332 (Dixon J).

3. Then at a more abstract level, the essential meaning might also not include the fifth element: a union between a man and a woman. Hence, the Commonwealth Parliament might legislate for same-sex marriage.
4. At an even more abstract level, the essential meaning of marriage might also remove the fourth element: a union between two persons. Hence, the Commonwealth Parliament might legislate for polygamous marriages as well as same-sex marriages.
5. At a still further abstract level, the essential meaning of marriage might remove the third element: a union of natural persons. The Commonwealth Parliament would then have power under s 51(xxi) of the *Constitution* to legislate even for the merger or marriage of corporations or a human and a non-human.

The first, most specific meaning can be seen in the 1866 decision of Lord Penzance in *Hyde v Hyde*, where his Lordship said of marriage that 'its essential elements … in Christendom, may for this purpose be defined as the voluntary union for life of one man and one woman, to the exclusion of all others'.[29] In 1901, Quick and Garran also embraced this definition as the 'essence' of marriage.[30]

But the meaning that was selected by Higgins J in 1908 was almost the most abstract meaning, requiring only a legally formalised, consensual union between humans: 'Under the power to make laws with respect to "marriage" I should say that the Parliament could prescribe what unions are to be regarded as marriages.'[31] Justice Higgins probably intended to include the qualification that the union be between humans although he did not expressly say so. His focus was upon essence, or essential meaning. Indeed, his remarks were made in the context of considering the essential meaning of 'trade marks' in s 51(xviii) of the *Constitution*, where he considered the range of meanings in 1900 to identify what he described as 'the only essential *differentia* from other marks'[32] or, as Isaacs J put it, 'the really essential characteristics of a trade mark'.[33]

This same abstract meaning was also adopted as the essential meaning by the High Court in *Commonwealth v Australian Capital Territory* in a judgment which quoted with approval from Higgins J.[34] In a joint judgment, the High Court held that decisions like *Hyde v Hyde* 'reflect no more than the then state of development

29 [1866] LR 1 P & D 130, 133.

30 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 608, citing *Re Bethell; Bethell v Hildyard* (1888) 38 Ch D 220.

31 *A-G (NSW) v Brewery Employes Union of New South Wales* (1908) 6 CLR 469, 610 ('*Union Label Case*').

32 Ibid 608 (emphasis in original).

33 Ibid 560.

34 *Commonwealth v Australian Capital Territory* (n 27) 458 [20]–[21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Union Label Case* (n 31) 603, 610–11.

of judge-made law'[35] and that the 'social institution of marriage differs from country to country'.[36] The essence of marriage did not require monogamy nor did it require a union between a man and a woman. It required only 'a consensual union formed between natural persons' which 'the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations'.[37]

These essential features of marriage, which inform its essential meaning, could only be determined by the purpose of the marriage power. That purpose in 1900 involved respect for individual autonomy — hence the need for the union to be consensual — in the creation of a legally sanctioned family in which life could be shared.[38] The marriage need not last for life as the existence of a power over divorce in s 51(xxii) recognises.

The purpose of individual autonomy is, and must be, expressed more broadly than the purposes that might be insisted upon by the notion of a Christian or a Judeo-Christian marriage. As s 116 of the *Constitution*, concerning freedom of religion, demonstrates, the *Constitution* was not written as a Christian or a Judeo-Christian constitution. It was also well-known at the time of Federation that polygamy was practised in parts of Turkey,[39] Persia,[40] and British India.[41] Alfred Deakin himself gave a lecture describing polygamy in parts of the Empire such as India where he had travelled.[42] Newspaper articles had observed that indigenous peoples could be polygamous and have a communal family life[43] and that a polygamist and leader of the Mormon Church, Mr Brigham Roberts, had been elected to the House of Representatives, although his polygamy had caused controversy[44] and ultimately he was denied a seat in the House.

There is, however, a contrary view that might be taken to an approach that selects essential meaning at such a high level of generality for a provision such as

35 *Commonwealth v Australian Capital Territory* (n 27) 461 [30].

36 Ibid 462 [35].

37 Ibid 461 [33].

38 See also *Marriage Act Case* (n 27) 554 (Kitto J).

39 Sir ME Grant Duff, 'Notes from a Diary', *The Age* (Melbourne, 1 May 1897) 4; 'English Wives and Native Husbands', *The Age* (Melbourne, 10 January 1891) 10; 'The July Magazines', *The Age* (Melbourne, 3 August 1895) 11.

40 'Notes from Various Sources', *The Age* (Melbourne, 5 June 1897) 4; 'English Wives and Native Husbands' (n 39).

41 'Marriage Customs at Quetta', *The Age* (Melbourne, 26 December 1896) 5; 'Notes from Various Sources', *The Age* (Melbourne, 5 July 1890) 13.

42 A Deakin, 'Creeds of the Empire', *The Age* (Melbourne, 22 April 1895) 5.

43 Hardy Lee, 'The Dominion of Fiji', *Sydney Morning Herald* (Sydney, 12 May 1877) 3; Robert Louis Stevenson, 'The South Seas', *The Age* (Melbourne, 28 November 1891) 4.

44 'Our Californian Letter', *The Age* (Melbourne, 25 February 1899) 14; 'Notes from Various Sources', *The Age* (Melbourne, 26 August 1899) 4; 'Wise and Otherwise', *The Age* (Melbourne, 13 January 1900) 4.

s 51(xxi). That contrary view, associated with Scalia J in the Supreme Court of the United States, is that the proper role of the judiciary should be to minimise the choices that can be made and therefore always to select the meaning at the lowest level of generality or greatest level of specificity.

A case in which Scalia J explained this approach was the decision of the majority of the Supreme Court of the United States in *Michael H v Gerald D*.[45] The appellant, Michael, was the biological father of a child whose married parents were Carole and Gerald. In the early years of the child's life, her mother, Carole, had lived with both Michael and Gerald at different times. Michael, supported by the child's court-appointed guardian, sought to establish visitation rights based upon his biological paternity. Carole and Gerald opposed the action on the basis of an irrebuttable presumption in Californian law that a husband is the father of a child born into his family. Michael sought to invalidate that law by claiming that he had a substantive due process right, being a constitutionally protected liberty interest to his relationship with his biological child.[46] He relied upon a protected liberty interest recognised by the Supreme Court in 'the unitary family'.[47] A majority of the Supreme Court rejected Michael's claim. In the majority, Scalia J insisted that for a fundamental liberty interest to be protected it needed to have historically existed. The historic view, expressed by Blackstone, was that there were very few circumstances in which a presumption of legitimacy could be rebutted. There was, therefore, no historic liberty interest to a relationship between a person who was not a legal parent and a biological child.[48] Justice Brennan, with whom Marshall and Blackmun JJ joined, dissented. He retorted that the *United States Constitution* was not a 'stagnant, archaic, hidebound document steeped in the prejudices and superstitions of a time long past'.[49] Why should 'parent' be defined as a parent based upon marriage simply by reference to historical tradition? In other words, if the essential meaning of parent were not expressed at a level of low generality, then it could be applied to new and different circumstances. That type of reasoning is powerfully echoed by the expectations of the founders of our *Constitution* about the manner in which the *Constitution* would be interpreted.

But the answer, according to Scalia J, was that '[w]e refer to the most specific level at which a relevant tradition protecting, or denying protection to, the asserted right can be identified'.[50]

Applied to 'marriage' in s 51(xxi) of our *Constitution*, the identification of the tradition at its most specific level would require a consensual union for life, between only two persons, who are natural persons, one of whom is a man and the

45 491 US 110 (1989).

46 Ibid 113–15.

47 Ibid 123 (citations omitted).

48 Ibid 123–5.

49 Ibid 141.

50 Ibid 127–8 n 6. See also Laurence H Tribe and Michael C Dorf, 'Levels of Generality in the Definition of Rights' (1990) 57(4) *University of Chicago Law Review* 1057.

other of whom is a woman. In the United States, the approach would also have incorporated racial restrictions on marriage, the removal of which in 1967 by the decision in *Loving v Virginia*[51] 'worked deep transformations'[52] in the structure of marriage. And yet, when this question arose in relation to whether the due process clause protected a liberty to 'marry', the minority decision of Roberts CJ, with whom Scalia and Thomas JJ joined in *Obergefell v Hodges*, held that racial restrictions were not within the 'core meaning of marriage'.[53] The core meaning was not defined at the most specific level at the time of the 14th Amendment in 1868, but was instead defined as the union of a man and a woman. In a significant historical error, this was said to be because for millennia, across all civilisations, marriage referred to only one relationship: the union of a man and a woman.[54] The majority of the Supreme Court defined marriage at an even higher level of generality, saying that the 'essential attributes of [the right to marry]' did not require marriage between a man and a woman, although the majority held that it required a bond between two people only.[55]

V DEFENCE

Another case in which Scalia J departed from an approach of focusing upon the most specific level at which the original meaning of an express provision can be articulated concerns a United States analogue to the defence power in s 51(vi) of the *Constitution*. In *District of Columbia v Heller*,[56] delivering the decision of the majority, Scalia J relied upon a higher level of generality in selecting the essential meaning of the express provision.

The Second Amendment to the *United States Constitution* reads: 'A well regulated Militia, being necessary to the security of a free State, the right of the people to keep and bear Arms, shall not be infringed.' If the most specific level of generality were applied to the Second Amendment, it would mean that in 1791 the 'the right of the people to keep and bear Arms' would have been confined to those arms that existed in 1791. It would not extend to a liberty to purchase a semi-automatic assault weapon from Walmart. The most specific level of generality would also require the right to bear arms to be limited to men if, as Scalia J said, the 1791 meaning of a 'well regulated Militia' meant 'all males physically capable of acting in concert for the common defense'.[57] But, consistently with his perception of the purpose of the Second Amendment as an individual right, Scalia J treated the meaning of arms at a higher level of generality as '[w]eapons of offence, or armour

51 388 US 1 (1967).

52 *Obergefell v Hodges*, 576 US 644, 660 (Kennedy J for the Court) (2015).

53 Ibid 692.

54 Ibid 690–2.

55 Ibid 665–6 (Kennedy J for the Court).

56 554 US 570 (2008).

57 Ibid 595, quoting *United States v Miller*, 307 US 174, 179 (McReynolds J for the Court) (1939).

of defence'[58] and treated the right as applying to both men and women.[59] A minority of the court set the meaning of 'to keep and bear Arms' in the Second Amendment at a lower level of generality, meaning 'to serve as a soldier',[60] because they saw the purpose of the provision as military defence. The minority focused upon the history and contemporary context of the phrase '[a] well regulated Militia, being necessary to the security of a free State' and concluded that the purpose of the Second Amendment was concerned with the right to possess and use guns for military purposes. With that expressed purpose, the minority adopted a level of generality that limited the essential meaning of the Second Amendment to a right to bear arms for the purpose of a well-regulated militia.[61]

In Australia, the defence power confers power upon the Commonwealth Parliament to legislate with respect to two limbs: first 'the naval and military defence of the Commonwealth and of the several States' and, secondly, 'the control of the forces to execute and maintain the laws of the Commonwealth'.[62] The defence power differs from marriage because it is concerned with a purpose rather than a subject matter. Once again, there are a range of possible essential meanings.

The least abstract, or most specific, essential meaning might be: (i) military measures to protect (ii) the existence of the Commonwealth of Australia (iii) from the use or threat of physical force (iv) by an external actor (v) which is a state. An approach that is not far from this degree of specificity was given by Gavan Duffy and Rich JJ in dissent in *Farey v Burvett*.[63] Their Honours saw the defence power as concerned with the defence of Australia from a threat of external physical force by means of naval and military operations. Hence, in their view, the power would extend to nothing more than

> the raising, training and equipment of naval and military forces, to the maintenance, control and use of such forces, to the supply of arms, ammunitions and other things necessary for naval and military operations, to all matters strictly ancillary to these purposes …[64]

An approach at a similarly low level of generality, or high level of specificity, was taken by Dixon J and Fullagar J in *Australian Communist Party v Commonwealth*

58 *District of Columbia v Heller* (n 56) 581, quoting *A Dictionary of the English Language*, vol 1 (4th ed, 1773) 'arms'.

59 *District of Columbia v Heller* (n 56) 612, quoting *Nunn v Georgia*, 1 Ga 243, 251 (Lumpkin J) (1846).

60 *District of Columbia v Heller* (n 56) 646 (Stevens J), quoting *Oxford English Dictionary* (2nd ed, 1989) 'to bear arms' (def 4c).

61 *District of Columbia v Heller* (n 56) 646–51 (Stevens J).

62 *Australian Constitution* s 51(vi).

63 (1916) 21 CLR 433, 465.

64 Ibid.

('*Communist Party Case*').[65] In that case, Fullagar J spoke of the meaning of 'defence' as 'the defence of Australia against external enemies', saying that the power 'is concerned with war and the possibility of war'.[66] Justice Dixon tied this level of specificity to purpose by asserting that the purpose of s 51(vi) was 'the protection of the Commonwealth from external enemies'.[67] The expression of the purpose of the defence power in these narrow terms led their Honours to express the essential meaning of defence at a very specific level.

A much broader approach to the purpose of the defence power, and hence to its essential meaning, was taken by a majority of the High Court in *Thomas v Mowbray*.[68] Gummow and Crennan JJ,[69] with whom Gleeson CJ and Heydon J agreed on this point,[70] held that the purpose of the defence power was to protect the realm generally. Hence, the defence power was not confined to military responses: the existence of the second limb illustrated that 'naval' and 'military' were words of extension, not words of limitation.[71] Their Honours also considered that the purpose of s 51(vi) was not confined to external attacks. The purpose needed to take into account the second limb of that power, concerned with the control of the forces to execute and maintain the laws of the Commonwealth. And, as five members of the High Court had observed in *New South Wales v Commonwealth*,[72] they considered that this was related to the power in s 119 of the *Constitution* for the Commonwealth, on the application of the Executive Government of a State, to protect the States against 'domestic violence'.[73]As Gummow and Crennan JJ also observed in *Thomas v Mowbray*, the defence power had been included in the *Constitution* against a 'long history in English law' which concerned 'defence of the realm against threats posed internally'.[74] In the same case, Hayne J and Callinan J observed that a clear or bright line could not be drawn between internal and external threats.[75]

Although Gummow and Crennan JJ did not say so expressly, by upholding the interim control order regime in the *Criminal Code Act 1995* (Cth) ('*Code*') on the basis of the defence power, they treated the protection of the realm as not confined to protection from physical attack. They treated the purpose as to protect against any significant 'disturbance, by violent means … of the bodies politic of the

65 (1951) 83 CLR 1 ('*Communist Party Case*').

66 Ibid 259.

67 Ibid 194.

68 (2007) 233 CLR 307 ('*Mowbray*').

69 Ibid 361 [140].

70 Ibid 324 [6] (Gleeson CJ), 511 [611] (Heydon J).

71 Ibid 360 [137] (Gummow and Crennan JJ), quoting *Farey v Burvett* (n 63) 440 (Griffith CJ).

72 (2006) 229 CLR 1, 125–6 [212] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ), citing *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 327–8 [61] (Gummow J).

73 *Mowbray* (n 68) 361–2 [140]–[141] (Gummow and Crennan JJ).

74 Ibid 361 [140].

75 Ibid 451 [420] (Hayne J), 504–5 [589] (Callinan J).

Commonwealth and the States',[76] where 'violent means' might include non-physical means such as 'seriously interfer[ing] with … electronic system[s]', which in turn was part of the definition of a terrorist act in s 100.1 of the *Code*. Each of the more specific elements of the meaning of the defence power thus became inessential. With the meaning of the defence power chosen at a high level of generality: (i) it did not require military measures for protection; (ii) it did not require that the threat be to the very existence of the Commonwealth of Australia; (iii) it did not require that the threat be of the use of physical force; (iv) it did not require that the threat be by an external actor; and (v) it did not require that the external actor be a state. Nevertheless, the essential meaning given by their Honours would not, as they explained, empower the legislation considered in the *Communist Party Case*, which had the vice that it was 'not addressed to suppressing violence or disorder' and did not 'take the course of forbidding descriptions of conduct [with] objective standards or tests of liability upon the subject'.[77]

VI JURIES

A third example which again illustrates the selection of the essential meaning of an express constitutional term at a level of generality that is tied to its purpose is the meaning of a 'trial … by jury' in s 80 of the *Constitution*, which provides, in part, that the 'trial on indictment of any offence against any law of the Commonwealth shall be by jury'. The provision was drafted by Clark and modelled on art III § 2 cl 3 of the *United States Constitution*, which provided for all crimes cognisable by any court to be tried by jury.

At the lowest level of generality, a trial by jury in 1900 might be said to be (i) an adjudication, (ii) by a body that adjudicates upon facts, (iii) constituted by random and impartial representatives of the community, (iv) who are unanimous in their decision, (v) who are required to preserve confidentiality, (vi) who are anonymous, (vii) who are kept sequestered, (viii) who swear an oath, (ix) who are men, and (x) who own property. Hence, if the essential original meaning were set at the lowest level of generality, then women or persons who do not own land would not be able to serve on juries.[78]

On the other hand, if the purpose of s 80 had simply been to ensure a proper trial of an accused person, then the only essential features might have been (i) an adjudication (ii) by a body that adjudicates upon facts. Indeed, that was the view of Higgins in the Convention Debates in his opposition to the inclusion of s 80. He said:

76 Ibid 363 [145].

77 *Mowbray* (n 68) 363–4 [147] (Gummow and Crennan JJ), quoting *Communist Party Case* (n 65) 192 (Dixon J).

78 See, eg, *Jurors and Juries Consolidation Act 1847* (NSW) s 1; *Juries Act 1890* (Vic) s 5; *Jury Act 1862* (SA) s 4; *Jury Act 1867* (Qld) s 1; *Jury Act 1898* (WA) ss 3, 5; *Jury Act 1899* (Tas) s 4.

> The issue is whether we are to stereotype this in the *Constitution*, and to say, no matter what changes may come about in legal procedure and in the mode of dealing with crimes, that we must have a jury, and that nothing but a change in the *Constitution* can bring about an alteration.[79]

The view of Higgins did not prevail, although the provision was confined to Commonwealth trials on indictment.

The purpose of s 80, as expressed by Wise, was to preserve a 'necessary safeguard' to 'individual liberty'.[80] This purpose suggests that the essential features of the 'jury' are, at least, (i) independent adjudication (ii) by randomly chosen persons. In 1909, O'Connor J had asked '[w]hat are the essential features of a trial by jury?' and answered 'the method of trial in which laymen selected by lot ascertain under the guidance of a Judge the truth in questions of fact'.[81] A century later, Gleeson CJ and McHugh J, quoting from a decision of the Supreme Court of the United States, said:

> The purpose of the jury trial … is to prevent oppression by the Government. … Given this purpose, the essential feature of a jury obviously lies in the interposition between the accused and his accuser of the commonsense judgment of a group of laymen, and in the community participation and shared responsibility that results from that group's determination of guilt or innocence.[82]

But was anything else apart from the participation of a randomly chosen group of laypersons essential for a trial by jury to fulfil the purpose of a safeguard of individual liberty?

Two additional requirements recognised as essential were that the jury be unanimous and that it be representative. In 1897, Brewer J, delivering the unanimous decision of the Supreme Court of the United States in *American Publishing Co v Fisher*, had held that unanimity was necessary for a trial by jury to serve its purpose as a guarantee of liberty independent of government.[83] The same conclusion was reached in the decision of the High Court in *Cheatle v The Queen* ('*Cheatle*')[84] in which the High Court held that the 'essential features'[85] of a jury were that it was an adjudicative body, comprised of representatives of the

79 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 351 (Henry Higgins).

80 Ibid 350 (Bernhard Wise).

81 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 375 ('*Huddart*').

82 *Brownlee v The Queen* (2001) 207 CLR 278, 288 [21] ('*Brownlee*'), quoting *Williams v Florida*, 399 US 78, 100 (White J for the Court) (1970).

83 166 US 464, 468 (1897).

84 (1993) 177 CLR 541, 552, 562 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Cheatle*').

85 Ibid 557, quoting *Huddart* (n 81) 375 (O'Connor J). See also *Cheatle* (n 84) 559–60.

community, who were unanimous in any decision reached.[86] On the other hand, as the High Court recognised in *Brownlee v The Queen* it was not, in the words of Gaudron, Gummow and Hayne JJ, an 'essential feature'[87] of a trial by jury that jurors be kept separate and sequestered or that the deciding jurors be 12 in number.[88] As Gleeson CJ and McHugh J expressed the point in *Brownlee*, the history of keeping jurors separate was not an essential feature because that was only one way of protecting against outside influence[89] and, provided that jurors are unanimous and representative, then the purpose of a jury trial would be achieved even by six jurors.[90]

VII ALIENS

I turn finally to the same issue in relation to the essential meaning of the term 'alien' in s 51(xix) of the *Constitution*. The discussion that follows reflects the detailed reasoning that I have expressed in recent decisions.

One misunderstanding can be dispelled immediately. In 1900, the express term 'alien' did not, at any level of generality, bear the meaning 'non-citizen'. When debating a proposed clause concerning the rights and privileges of citizenship, the founders of the *Constitution* consciously rejected any constitutional notions of citizenship, in part because of the uncertainty of that concept.[91] As Mr Barton explained, '"[c]itizens" is an undefined term, and is not known to the *Constitution*'.[92] At a very low level of generality, the relevant concept in 1900 was subjecthood not citizenship. In 1902, Salmond wrote that '[t]here are citizens in France and in the United States of America, but the law and language of England know of subjects only'.[93] Even if a wholly new meaning were to be given to alienage, since citizenship is a purely statutory concept the power over which itself derives from the aliens power, it would be circular to define a constitutional term 'alien' by reference to the statutory concept of citizenship which depends on that constitutional power. Finally, even if this wholly new meaning were considered as a possible definition despite its circularity, it is hard to see how it could be justified as a matter of principle to create a constitutional concept by which, under a system

86 *Cheatle* (n 84) 549, 552.

87 *Brownlee* (n 82) 298 [54].

88 Ibid 297–8 [53]–[54], 302–4 [65]–[74].

89 Ibid 290 [27].

90 Ibid 288–9 [20]–[22].

91 *Love v Commonwealth* (2020) 270 CLR 152, 306–7 [434] (Edelman J) ('*Love*'), referring, amongst other matters, to *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1788, 1797; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 677; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 2 March 1898, 1751, 1761.

92 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 3 March 1898, 1786 (Edmund Barton).

93 John W Salmond, 'Citizenship and Allegiance' (1902) 18(1) *Law Quarterly Review* 49, 49.

of free government, the rule of law was that 'a group of citizens temporarily in office can deprive another group of citizens of their citizenship'.[94] Quick and Garran thought that the essential meaning of 'alien' should bear a different meaning but also one at a low level of generality, namely 'a person who owes allegiance to a foreign State, who is born out of the jurisdiction of the Queen, or who is not a British subject'.[95] On that approach, every British subject, born in a dominion, who did not owe a foreign allegiance, was a non-alien. A similar approach was taken by McHugh J in his dissenting judgment in *Singh v Commonwealth*: 'the essential meaning — the connotation — of the term "alien" was a person who did not owe permanent allegiance to the Crown'.[96] There is a much more compelling case that the relevant concept to apply in 1900 in the meaning of 'alien' was subjecthood rather than the expressly rejected notion of citizenship.

One problem with treating the essential meaning of alienage as a non-subject is that in 1900 an alien included many people who were British subjects and who had been born in a dominion of the Queen. These were people who were seen at the time as members of what were described on many, many occasions in the Constitutional Conventions as 'alien races'.[97] The association of alienage with race was not merely a matter of common assumption at the Constitutional Conventions. It was an assumption made in early decisions of this Court and in popular press reports. The notion that members of so-called 'alien races' were aliens irrespective of their British subjecthood underpinned the decision of the High Court in 1906 in *Robtelmes v Brenan*, in which the High Court treated Pacific Islanders who had come to Australia as aliens although many of them were British subjects.[98] At the relevant time, the Pacific Islanders included Torres Strait Islanders, and those from British colonies such as Fiji and British New Guinea.[99]

If one were then to turn to the plausible essential original meanings of 'alien' in s 51(xix), there are a number of possibilities with varying degrees of specificity. To express those from the most specific to the most abstract, they are as follows:

1. A person who is not a British subject *or* who is a member of an 'alien race';

94 *Afroyim v Rusk*, 387 US 253, 268 (Black J for the Court) (1967), quoted in Elisa Arcioni and Rayner Thwaites, '*Chetcuti* and Constitutional Membership: Context, Case and Implications' *Australian Public Law* (Blog Post, 13 October 2021) <https://www.auspublaw.org/2021/10/chetcuti-and-constitutional-membership-context-case-and-implications/>.

95 Quick and Garran (n 30) 599.

96 (2004) 222 CLR 322, 343 [38].

97 See *Love* (n 91) 293–6 [404]–[409] (Edelman J).

98 (1906) 4 CLR 395.

99 See the discussion in Peter Prince, '"Australia's Most Inhumane Mass Deportation Abuse": *Robtelmes v Brenan* and Expulsion of the "Alien" Islanders' (2018) 5(1) *Law and History* 117, 133–4.

2. A person who is not a subject of the Crown (whether it be the Crown of the United Kingdom or any future Crown of Australia) *or* who is not a member of an 'alien race';
3. A person who is not a member of the Australian political community; or
4. A person who is not a member of the Australian community.

It is important to emphasise that whatever was meant by an 'alien race' in 1900, it did not include Aboriginal people. Even the race power in s 51(xxvi) of the *Constitution*, at inception, did not include Aboriginal races just as it did not include, as Professor Sawer observed, any 'person … of "Caucasian origin"'.[100] The express exclusion of Aboriginal people from the race power removed any doubt about this and was not the subject of any debate. As Sawer said, 'it was simply taken for granted that [Aboriginal people] should be excluded'.[101] They were not members of an alien race. Similarly, at the time of Federation, newspaper articles contrasted 'alien' labourers with Aboriginal Australian labourers[102] and contrasted alien races with the Aboriginal race.[103]

There are two reasons why the essence of s 51(xix) would be too narrow if it were to be expressed at either of the first two low levels of generality which include British subjecthood or subjecthood of the Crown. First, in a *Constitution* which is intended to endure, an essential meaning based upon norms of subjecthood and, consequently, allegiance, would be too narrow. It could not have been thought impossible that Australia, with its own constitution, might one day become independent or that its population might one day no longer be subjects of the British Crown or even a separated Australian Crown. Further, the notion of subjecthood generally was one that was in a state of flux at the time of Federation, particularly due to the Royal Commission in 1868.[104] As the joint judgment of three members of the High Court said in *Shaw v Minister for Immigration and Multicultural Affairs*, '[t]here never was a common law notion of "British subject" rendered into an immutable element of "the law of the *Constitution*"'.[105] This

100 Geoffrey Sawer, 'The Australian Constitution and the Australian Aborigine' (1966) 2(1) *Federal Law Review* 17, 23.

101 Ibid 18.

102 Wirr, 'The Shearers' Dispute: A Visit to Wolfang Station', *The Age* (Melbourne, 30 March 1891) 6.

103 'Wise and Otherwise', *The Age* (Melbourne, 15 April 1893) 4.

104 *Report of the Royal Commissioners for Inquiring into the Laws of Naturalization and Allegiance: Together with an Appendix Containing an Account of British and Foreign Laws, and of the Diplomatic Correspondence Which Has Passed on the Subject, Reports from Foreign States, and Other Papers* (Report, 1869). See also *Re the Stepney Election Petition; Isaacson v Durant* (1886) 17 QBD 54; Clive Parry, *British Nationality: Including Citizenship of the United Kingdom and Colonies and the Status of Aliens* (Stevens & Sons, 1951) 7; Clive Parry, *Nationality and Citizenship Laws of the Commonwealth and of the Republic of Ireland* (Stevens & Sons, 1957) 78–9.

105 (2003) 218 CLR 28, 42 [28] (Gleeson CJ, Gummow and Hayne JJ) ('*Shaw*').

statement was affirmed by six members of this Court last week in *Chetcuti v Commonwealth* ('*Chetcuti*').[106]

A second problem with the two most specific levels of generality of 'alien' is that the racist notion that British subjects could be aliens due to their membership of 'alien races' involved concepts that were highly uncertain and very slippery. Between 1890 and 1900, the phrase 'alien race' appeared thousands of times in newspapers, gazettes, magazines, and newsletters, used in many different ways. Sometimes it was used to describe differences in skin colour. In one article, Alfred Deakin described a journey he took in India to learn about irrigation and described a handful of 'whites' who were resident amongst populous 'alien races'.[107] On other occasions, it was used to describe differences in religion. In one article, Benjamin Disraeli was described as a member of the Jewish 'race'.[108] On further occasions, it was used to describe different nationalities. Two articles describe German and Austrian colonists as members of an 'alien race'[109] and another article distinguishes between 'the English and French races'.[110] The essence of all of these slippery usages of 'alien race', however, like the essence of subjecthood, was the notion of being an outsider or foreigner to the community. The recognition that the essence of alienage is being an outsider to the community or the political community, rather than the evolving notions of subjecthood or slippery notions of race, permits the *Constitution* to develop consistently with its underlying purposes as circumstances and understandings change and develop.

The remaining possibilities for the correct level of generality are therefore the two most general: (3) being an outsider to the Australian political community or, even more generally, (4) being an outsider to the community generally.

The fourth approach would align the notion of alienage with the associated immigration power, s 51(xxvii). Under the immigration power, a person ceases to be an immigrant when the person has been absorbed into the community.[111] It might be asked, rhetorically, why should the *Constitution* prohibit the deportation of a person under s 51(xxvii) of the *Constitution* where the person has been integrated into the Australian community only to permit exactly the same deportation under s 51(xix)? The fourth approach would also avoid treating the definition of an autonomous constitutional concept as one that is shaped by Parliament. It would tie the essential meaning of alien to its most natural, ordinary meaning. Like the reason for the development of the concept of domicile in private

106 *Chetcuti* (n 15) 375 [14]–[16] (Kiefel CJ, Gageler, Keane and Gleeson JJ), 381 [40] (Gordon J), 387 [61] (Edelman J).

107 Alfred Deakin, 'Up the Sirhind Canal', *The Age* (Melbourne, 26 September 1891) 13.

108 Editorial, *The Age* (Melbourne, 21 August 1899) 4.

109 CC Schardt, 'German Colonists in Australia', *The Age* (Melbourne, 22 February 1893) 7; 'The Austrian Gum Diggers: The Immigration Restrictions in New Zealand', *The Age* (Melbourne, 6 January 1899) 6.

110 'Literary Culture in Canada', *The Age* (Melbourne, 4 September 1897) 4.

111 *Love* (n 91) 299–301 [416]–[421] (Edelman J).

international law, it would avoid the enormous difficulties inherent in slippery and changing concepts of nationality, subjecthood or citizenship.

However, the fourth approach to the aliens power was rejected in *Pochi v Macphee* ('*Pochi*').[112] That rejection, which was not carefully reasoned,[113] was not challenged in cases like *Falzon v Minister for Immigration and Border Protection*[114] or *Chetcuti*,[115] where the plaintiffs had lived in Australia for, respectively, 61 and 73 years. Whilst no challenge is made to this aspect of *Pochi*, existing precedent, even precedent which exists without a single clear test, requires a more restricted essential meaning than ordinary norms of community membership involved in concepts such as domicile. The more restricted meaning that has emerged is not really a meaning of 'alien' at all. Instead, it focuses upon who is *not* an alien rather than an essential meaning of who *is* an alien. It is perhaps unsatisfactory for a constitutional concept to leave the essential meaning of who *is* an alien as an undefined norm to be chosen by Parliament subject only to an outer limit. Nevertheless, in this approach to who is *not* an alien, s 51(xix) requires focus upon those narrower norms of community membership that are treated as providing the most fundamental connection with the body politic which comprises territory, government and people. Two such norms that were well-recognised at Federation and which continue to be recognised are birth in the country (as a metaphysical connection to territory) and citizenship of parents (as a connection to people). A third, involving also a connection to the territory of Australia, which is at least as significant as the coincidence of place of birth or the happenstance of the citizenship of a person's parents, is Aboriginality which usually includes all elements of descent, identity, and recognition involving powerful connection with country.

VIII APPLYING ESSENTIAL MEANING

By answering the question of the essential meaning of a provision, it can often be a simple exercise to apply that meaning to the facts of a case. But cases will remain where difficult questions of application will arise. Sometimes these questions will require the court to find constitutional facts in order to determine whether the facts of the case fall within the essential meaning. Sometimes the application of the essential meaning to the facts will require an exercise of judgment. There are difficult questions that surround the application of constitutional facts and the exercise of constitutional judgment. But, like the selection of the appropriate level of generality, the purposes of the provision and of the *Constitution* should be the guiding principle. It suffices for current purposes simply to give examples in each of the areas discussed.

112 (1982) 151 CLR 101, 111 (Gibbs CJ).

113 *Love* (n 91) 299–301 [418]–[421] (Edelman J).

114 (2018) 262 CLR 333.

115 *Chetcuti* (n 15).

In relation to the marriage power in s 51(xxi), a question of application that divided the High Court 4:3 in *Attorney-General (Vic) v Commonwealth* was whether a law which legitimated a child whose parents were married after the child's birth was a law with respect to marriage.[116] The essential meaning of marriage, in short, a union of two natural persons, does not dictate the answer to the issue. In the minority, Dixon CJ reasoned that the operation of the legitimacy law affected 'questions of the custody, guardianship and maintenance of infants', and the interpretation of statutes on many subjects which were 'not with respect to marriage'.[117] But arguably this approach paid too little attention to the purpose of s 51(xxi). As Kitto J in the majority explained, the essence of marriage is the legal recognition of family relationships and this was a law concerned with those family relationships: 'a law joining with other laws to fix the bounds of the legal changes which marrying is to bring about'.[118]

In relation to juries in s 80, a hypothetical issue discussed in *Cheatle* was whether a law could validly exclude women or people who did not own property from sitting on a jury. Neither the exclusion of women nor the exclusion of unpropertied persons on juries was an essential feature of a trial by jury in 1900. But the essential feature that the jury be representative meant that it could be said by 1993 that, in the application of the requirement of representativeness, a law that excluded women or unpropertied persons from a jury would be invalid.[119] The application of s 80 has changed over time by applying the purpose of the provision in light of the social and political facts of the time.

Turning then to s 51(vi), the defence power is perhaps the most commonly cited instance of a power where changing constitutional facts lead to changes in application of essential meaning. In *Andrews v Howell*, Dixon J said of the defence power:

> [T]hough its meaning does not change … its application depends upon facts, and as those facts change so may its actual operation as a power enabling the legislature to make a particular law. … The existence and character of hostilities, or a threat of hostilities, against the Commonwealth are facts which will determine the extent of the operation of the power. Whether it will suffice to authorize a given measure will depend upon the nature and dimensions of the conflict that calls it forth, upon the actual and apprehended dangers, exigencies and course of the war, and upon the matters that are incident thereto.[120]

Issues of judgment, upon which reasonable minds might differ, are again involved in relation to the application of the defence power. A recent example which saw a division in the High Court concerned the application of the power to make laws under the second limb of the defence power, being for the 'control of the forces to

116 *Marriage Act Case* (n 27).

117 Ibid 545–6.

118 Ibid 554.

119 *Cheatle* (n 84) 560–1 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

120 (1941) 65 CLR 255, 278.

execute and maintain the laws of the Commonwealth' in *Private R v Cowen*.[121] In that case, various members of the Court considered whether the defence power could be applied to support laws conferring jurisdiction upon service tribunals over members of the defence forces for minor offences, such as speeding while driving or chopping down a tree without permission.[122] Five members of the Court considered that it could.[123] In my view, the proper application required recognition that the purpose of the 'control of the forces' in s 51(vi) included what Clode described in 1874 as ensuring 'habits of obedience'[124] since

> 'nothing (even in Civil affairs) can be more dangerous than to allow the obligations to obey a law to depend on the opinion entertained by individuals of its propriety,' and in military affairs it would be intolerable.[125]

In applying that purpose with the understanding of the circumstances of the 21st century, I borrowed from a public submission by General Cosgrove, then Chief of the Defence Force, who said that in times of both peace and conflict 'the margin for error or omission without tragic consequences will often depend upon inculcated habits of discipline to instantly obey lawful directions and orders'.[126]

The same approach, requiring the consideration of constitutional facts and the exercise of judgment, is taken to the aliens power in s 51(xix). Like the changing application of what it means to be representative, the application of what it means to fall within a political community can change. The racist understanding of political community in 1900, which excluded 'alien races', would not be applied today. Nor could notions of subjecthood, which have generally been replaced by notions of citizenship. The key factor for a determination of membership of the political community today is citizenship. Nevertheless, it is extremely well-established a person will not fall outside the political community simply because Parliament prevents them, or a category within which they fall, from being citizens.

In each of *Love v Commonwealth* ('*Love*')[127] and *Chetcuti*,[128] it was, rightly, common ground between the parties that two central norms of political community

121 (2020) 271 CLR 316, 391 [192] (Edelman J) ('*Private R*').

122 Ibid 373 [152], 375 [157].

123 Ibid 343–4 [78]–[79] (Kiefel CJ, Bell and Keane JJ), 355 [108] (Nettle J), 392 [193]–[194] (Edelman J).

124 Charles M Clode, *The Administration of Justice under Military and Martial Law: As Applicable to the Army, Navy, Marines, and Auxiliary Forces* (John Murray, 2nd ed, 1874) 75 (citations omitted).

125 *Private R* (n 121) 392 [193] (Edelman J), quoting Clode (n 124) 75 (citations omitted).

126 *Private R* (n 121) 392 [193] (Edelman J), quoting Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (Report, June 2005) 10 [2.11], quoting PJ Cosgrove, Submission No P16 to Senate Foreign Affairs, Defence and Trade References Committee, Parliament of Australia, *The Effectiveness of Australia's Military Justice System* (23 February 2004) 6 [2.5].

127 *Love* (n 91).

128 *Chetcuti* (n 15).

that, in combination, cannot be unilaterally extinguished by a citizenship law are norms of place of birth and citizenship of parents. Hence, it was common ground in both cases that whatever citizenship legislation might provide, a person who has never renounced connection to Australia cannot be an alien if they have no other citizenship and are born in Australia to two parents who are both Australian citizens only. Norms of connection to Australia were also recognised by a majority of the High Court in *Love* as depriving Aboriginal people of the possibility of being aliens.[129] This conclusion, it should be noted, was not a change from the application of s 51(xix) in 1901 because the Aboriginal people were never considered to be an 'alien race'. They were not, prior to 1901, considered to be foreigners to our political community.

Without the racist application of s 51(xix) based on 'alien races', the modern application of the concept of a foreigner to a political community requires that like people should be treated alike. Hence, a relevant person with the norms of birth and parentage discussed above is treated differently from someone without those metaphysical connections to Australia, and cannot be made an alien by Parliament. The strength of connection to the Australian polity of the coincidence of a person's birth should not be overstated. Indeed, in 1869 the Lord Chief Justice of England said that place of birth was not a particularly strong connection at all. He said that '[t]he place of birth is an accident; the associations connected with it are fleeting and uncertain; while the domestic ties and the relations of family and kindred are powerful and enduring'.[130] To acknowledge that Aboriginal identity involves a connection with Australia of at least the same force as parental citizenship and place of birth is to do little more than to acknowledge social and legal facts including the foundations of the common law recognition and the legislative recognition of native title. To conclude, therefore, that Aboriginal identity does not have the same degree of connection with Australia as the metaphysical connection that prevents a person from being an alien because of the citizenship of their parents and the place of their birth requires either that Aboriginal people be treated differently, and inferior, to those others or it requires blindness to common law and legislative facts.

IX CONCLUSION

In this speech I have sought to use four constitutional categories where the essential meaning of constitutional words has led to a number of decisions of the High Court that were controversial to the wider public. Perhaps the most controversial of these decisions was the *Communist Party Case*. Within six months of the decision, the Prime Minister, Robert Menzies, had called a referendum to amend the *Constitution*, seeking to reverse the effect of the decision. Although the referendum was ultimately defeated, as Goot and Scalmer observed, the 'editorial line of the

129 *Love* (n 91).

130 Sir Alex Cockburn, *Nationality: Or the Law Relating to Subjects and Aliens, Considered with a View to Future Legislation* (William Ridgway, 1869) 188.

metropolitan press was almost uniformly supportive of the Yes case'[131] and '[t]he *Courier-Mail* was not alone in inviting its readers to "Finish the Job"'.[132] In 2007, the High Court delivered its decision in *Mowbray*,[133] which chose an essential meaning of the defence power at a much higher level of generality than the majority of the High Court in the *Communist Party Case*. There was some public criticism of that decision for the alleged failure by the Court to abide by the spirit of the decision in the *Communist Party Case*. There was, of course, no doubt that the result in the *Communist Party Case* was correct. The dispute following *Mowbray* was instead about whether the essential meaning of the defence power had been set at too high a level of generality. The day after the decision in *Mowbray*, *The Age* newspaper summarised the dissenting judgment of Kirby J, saying that 'Australians who accepted the foresight, prudence and wisdom of the Communist Party decision would look back with regret and embarrassment at this latest decision'.[134] By contrast, in reasons for decision in October 2001, one month after the terrorist attacks of September 11, Lord Hoffmann remarked upon the importance of the judiciary affording latitude to other arms of government in matters of national security. In remarks which could equally have been made about a broad purpose and a high level of generality being given to the essential meaning of the defence power in Australia, he said that these events were a reminder that 'the cost of failure can be high. … such decisions, with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process'.[135] These contrasting approaches might seem to suggest that a political choice was being made by the judges. But the question was actually a particularly boring legal one: what level of generality did the underlying constitutional purposes require for the essential original meaning?

The more that it is perceived that such constitutional decisions are made by judges as a matter of their idiosyncratic political policy choices, the more damaged the institution of the judiciary will be. The answer to such expressions of anguish lies in a clear, transparent articulation of judicial reasoning in constitutional interpretation. It has been said more than once in the High Court that

131 Murray Goot and Sean Scalmer, 'Party Leaders, the Media, and Political Persuasion: The Campaigns of Evatt and Menzies on the Referendum to Protect Australia from Communism' (2013) 44(1) *Australian Historical Studies* 71, 77.

132 Ibid 78, quoting Editorial, 'Finish the Job', *The Courier-Mail* (Brisbane, 11 August 1951) 1.

133 *Mowbray* (n 68).

134 Brendan Nicholson, 'Kirby Lashes Judges over Terror Case Ruling', *The Age* (online, 3 August 2007) <https://www.theage.com.au/national/kirby-lashes-judges-over-terror-case-ruling-20070803-ge5hwv.html>.

135 *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153, 195 [62].

> diverse and complex questions of construction of the *Constitution* are not answered by adoption and application of any particular, all-embracing and revelatory theory or doctrine.[136]

Whether or not that is correct, there are many decisions of this Court that have adopted an approach to constitutional interpretation which begins with the identification of the essential meaning of a provision. Indeed, even in those decisions that do not overtly do so, it is very hard to see how this is not what is implicitly occurring. Of course, as I have explained, there will often be a margin for choice in selecting the appropriate level of generality at which essential meaning is to be fixed, but this must be done by reference to the purposes of the provision and the constitution generally. In some cases, there will also be contested questions of constitutional fact. But by showing that constitutional interpretation requires identification and application of essential meaning, and that this is not a process of creating or changing meaning, there can at least be rational debate based upon a shared set of premises. That probably would have pleased the passengers on the Lucinda 130 years ago.

136 *Wong v Commonwealth* (2009) 236 CLR 573, 582 [20] (French CJ and Gummow J). See also *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41] (Gummow J); *Commonwealth v Australian Capital Territory* (n 27) 455 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).