ALL'S FAIR IN LOVE AND WAR: THE HIGH COURT'S DECISION IN *LOVE & THOMS*

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INTRODUCTION

Six months after a change in the composition of the Bench, Barwick CJ suggested the *First Territory Senators Case*[2] be promptly challenged, 'if the decision is to be reconsidered, that reconsideration should take place before … [it] becomes entrenched in constitutional practice by the mere passage of time.'[3] Not one to miss a hint, the State of Queensland quickly challenged the decision, with the High Court hearing the *Second Territory Senators Case*[4] less than two years after the first was handed down. No doubt, Barwick CJ's warning will be echoing across the country again after the High Court's narrow and divisive ruling in *Love & Thoms*[5] radically altered the meaning of the 'aliens' power.[6] However, with two of the majority Justices in *Love* reaching the mandatory retirement age within the year,[7] there is a significant possibility that a reconstituted Bench would reconsider the decision in the event of challenge.

In Part I, this paper will detail the relevant legal background, outlining the facts of the case, the law pre-*Love*, and the decision of the majority. Part II will explain why the decision in *Love* is entirely unsatisfactory for reasons of judicial activism, policy-making, and racial divisiveness. Part III will explore what options are open to the government in seeking to remedy this situation, including referendum, legislating under a different head of power, and challenging *Love* under a reconstituted Bench. Finally, in Part IV, this paper will look at judicial appointments going forward, detailing the importance of assessing candidates for their judicial methodology, and possible lessons that can be learnt from the experience of the US Federalist Society.

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[2] *Western Australia v Commonwealth* (1975) 134 CLR 201 ('*First Territory Senators Case*').

[3] *Attorney-General (NSW) (Ex rel McKellar) v Commonwealth* (1977) 139 CLR 527, 532 ('*AG NSW v Commonwealth*').

[4] *Queensland v Commonwealth* (1977) 139 CLR 585 ('*Second Territory Senators Case*').

[5] *Love v Commonwealth of Australia*; *Thoms v Commonwealth of Australia* [2020] HCA 3 ('*Love'*).

[6] *Australian Constitution* s 51(xix).

[7] Justice Nettle in December 2020 and Justice Bell in March 2021.

I. LEGAL BACKGROUND

A *The Facts*

The plaintiffs in *Love* – Daniel Love and Brendan Thoms – were born in Papua New Guinea and New Zealand respectively, and were citizens of those countries.[8] Both plaintiffs resided in Australian on visas capable of being revoked.[9] They were not citizens of Australia under the *Citizenship Act 2007* (Cth).[10]

In 2018, Mr Love was convicted of assault occasioning bodily harm contrary to s 399 of the *Criminal Code Act 1899* (Qld) ('*Criminal Code*'), and was sentenced to 12 months' imprisonment.[11] Under s 399(1) of the same *Criminal Code*, Mr Thoms was convicted of a domestic violence related offence occasioning bodily harm, and was sentenced to 18 months' imprisonment.[12] Consequently, both men were in breach of the character test under s 501(7)(c) of the *Migration Act* 1958 (Cth) ('*Migration Act*'). Their visas were subsequently cancelled by the Minister for Home Affairs pursuant to s 501(3A) of the *Migration Act*.[13] Under ss 13 and 14 of the *Migration Act* they thus become unlawful non-citizens and liable for deportation.[14] The plaintiffs subsequently launched a High Court challenge, claiming that as Aboriginal people they are not within reach of the 'aliens' power which provides the legal basis for the *Migration Act*.[15] Mr Love is a descendant of the Kamilaroi group and has been accepted as such by one Elder.[16] Mr Thoms identifies as a member of the Gunggari people and has been accepted as such.[17] Additionally, he is a common law native title holder.[18]

[8] *Love* (n 4) [2] (Kiefel CJ).
[9] Ibid [2].
[10] Ibid [150], [156] (Keane J).
[11] Ibid [153].
[12] Ibid [159].
[13] Ibid [153], [159].
[14] Ibid [2] (Kiefel CJ).
[15] Ibid [3].
[16] Ibid [155] (Keane J).
[17] Ibid [158].
[18] Ibid.

Prior to the outcome in *Love*, it was relatively settled law that an 'alien' is the inverse of a 'citizen', such as that if one is not an Australian citizen then they must be an alien.[19] At the 1898 Constitutional Convention, a proposed head of power for citizenship was rejected,[20] with the 'naturalisation and aliens' and 'immigration and emigration'[21] powers regarded as sufficient for grounding a statutory basis for citizenship.[22] As such, the Court has long left it to Parliament to create, define and set the criteria for citizenship and its antonym – alienage.[23] Additionally, the Court has previously rejected the existence of a category of 'non-citizen, non-alien'.[24]

B *The Decision*

In 7 separate judgements, the High Court, by a majority of 4-3, found that persons satisfying the tripartite test for Aboriginality[25] are not within reach of the 'aliens' power conferred by s 51(xix) of the *Constitution*.[26] The majority rejected the existing line of precedent, holding that alienage and citizenship are not inverse concepts,[27] thereby creating an entirely new category of 'non-citizen, non-alien'. Relying on the 'unique connection to land' Aboriginal Australians are said to have, the majority concluded that Aboriginal persons cannot be considered 'aliens'.[28] The minority vehemently disagreed, rejecting the existence of a category of 'non-citizen, non-alien'.[29]

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[19] See *Pochi v Macphee* (1982) 151 CLR 101 ('*Pochi*'); *Nolan v Minister for Immigration and Ethnic Affairs* (1988) 165 CLR 187 ('*Nolan*'); *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 ('*Shaw*'); *Koroitamana v The Commonwealth* (2006) 227 CLR 31.

[20] Kim Rubenstein, 'Citizenship and the Constitutional Convention Debates: A Mere Legal Inference' (1997) 25(2) *Federal Law Review* 295, 295.

[21] *Australian Constitution* s 51(xxxvii).

[22] *Singh v Commonwealth* (2004) 222 CLR 322, 345 [45] (McHugh J).

[23] *Love* (n 4) [5] (Kiefel CJ), [100] (Gageler J), [166], [172] (Keane J). But see *Pochi* (n 18) 109 (Gibbs CJ). Gibbs CJ indicates that 'aliens' cannot be defined to include those who could not possibly answer the description of 'aliens' in the ordinary meaning of the word. While the minority in *Love* acknowledged this, they held that this case did not fall within that exception. See *Love* (n 4) [7] (Kiefel CJ), [87] (Gageler J), [168] (Keane J).

[24] *Shaw* (n 18) 35 [2] (Gleeson CJ, Gummow and Hayne JJ), 87 [190] (Heydon J).

[25] *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 70 (Brennan J) ('*Mabo*').

[26] *Love* (n 4) [81] (Bell J), [285]-[286] (Nettle J), [366], [374] (Gordon J), [458], [468] (Edelman J).

[27] Ibid (n 4) [64] (Bell J), [252] (Nettle J), [304] (Gordon J), [447] (Edelman J).

[28] Ibid [71], [74] (Bell J), [335], [347] (Gordon J), [396], [438] (Edelman J). Nettle J relies on the notions of 'obligation of protection' and 'permanent allegiance' in reaching the same conclusion. See *Love* (n 4) [272]-[272].

[29] Ibid (n 4) [5], [19] (Kiefel CJ), [132] (Gageler J), [147] (Keane J).

II. IMPLICATIONS

The majority's reasoning in *Love* is entirely unsatisfactory for a number of reasons.

A *Judicial Activism*

First, the majority engage in judicial activism, interpreting the 'aliens' power in a manner unguided or and unbound by the *Constitution*. Kiefel CJ immediately points this out, stating:

> Section 51(xix) is not expressed to be subject to any prohibition, limitation or exception respecting Aboriginal persons. The task of this Court, in interpreting a provision of the *Constitution*, is to expound its text and where necessary to ascertain what is implied in it.[30]

Instead, the majority rely on vague concepts such as 'metaphysical bonds',[31] 'connection with land or waters',[32] and 'deeper truth'[33] – none of which appear expressly or impliedly in the *Constitution* nor have been recognised as constitutional concepts at any point before.[34] Gageler J decries this as judicial 'creativity',[35] resulting in the creation of an 'unexpressed limitation or exception'[36] to the 'aliens' power. Such a drastic change to the *Constitution* is supposed be brought about by referendum, not judicial activism.[37] The *Constitution* should not so dramatically change by the actions of an unelected group of people, deciding on the basis of policy preference rather than law. Kiefel CJ warns against this type of judicial approach, stating:

> Questions of constitutional interpretation cannot depend on what the Court perceives to be a desirable policy regarding the subject of who should be aliens or the desirability of Aboriginal non-citizens continuing to reside in Australia. The point … is that in the absence of a relevant constitutional prohibition or exception … it is not the proper function of a court to limit the method of exercise of legislative power.[38]

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[30] Ibid [8].
[31] Ibid [396] (Edelman J).
[32] Ibid [373] (Gordon J).
[33] Ibid [289] (Gordon J).
[34] Ibid [178] (Keane J).
[35] Ibid [131].
[36] Ibid [1] (Kiefel CJ).
[37] Gageler J emphasises this, arguing 'the *Constitution* should be amended to produce that result by referendum'. See *Love* (n 4) [135].
[38] Ibid (n 4) [8].

She goes on to conclude that the approach submitted by the plaintiffs (and accepted by the majority) is 'antithetical to the judicial function since they involve an appeal to the personal philosophy or preferences of judges'.[39]

Keane J also points out an important contradiction: if Aboriginal people occupy a special or privileged constitutional position vis-à-vis their connection with the land (as put by the majority),[40] then why is there need for constitutional recognition of indigenous Australians?[41] Isn't the fact the *Constitution* is silent on Aboriginality the very reason why constitutional recognition is advanced in the first place?[42] The answer to these questions is that the majority's reasoning is not grounded in the *Constitution*. To borrow the language of Kiefel CJ, it's grounded in external matters of values and policy, usurping the role of Parliament.[43] It's 'constitutional interpretation wholly unmoored from the constitutional text'.[44] Simply put: it's judicial activism.

Further, in discarding a long line of 'aliens' power jurisprudence, the majority relies on *Mabo* to provide legitimacy to their reasoning – but does so in an 'erroneous' manner.[45] For instance, the majority uses the common law native title requirement of connection to land to answer a constitutional question.[46] Such an approach is 'wrong as a matter of law and logic'.[47] Further, *Mabo* itself acknowledges that connection to land can be lost,[48] while the majority in *Love* seem to assume that *all* Aboriginals have a special connection with the land that cannot be broken.[49]

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[39] Ibid (n 4) [46]. Gageler J also points this out, stating that while he is 'not unmoved by the growing appreciation of the depth of cultural connection to country and the extent of historical dispossession of Aboriginal and Torres Strait Islander peoples' such an approach is 'not within the scope of the acknowledged judicial function'. See *Love* (n 4) [127], [133].
[40] Ibid [71], [74] (Bell J), [335], [347] (Gordon J), [396], [438] (Edelman J).
[41] Ibid [178]-[182] (Keane J).
[42] Ibid.
[43] Ibid [4].
[44] James Allan, 'Constitutional Interpretation Wholly Unmoored from Constitutional Text: Can the HCA Fix Its Own Mess?' 48(1) *Federal Law Review* 30, 30.
[45] *Love* (n 4) [31] (Kiefel CJ).
[46] Ibid.
[47] Ibid.
[48] *Mabo* (n 24) 64, 69-70 (Brennan J).
[49] Additionally, the majority seem to attribute sovereignty to indigenous societies, which was rejected in *Mabo* and subsequent cases. This is discussed below.

B *Policy Implications*

There are two immediate policy consequences stemming from the decision in *Love*. First, it creates a loophole in the government's policy of deporting non-citizens who've been convicted of serious crimes, allowing dangerous non-citizens to avoid deportation if they can show Aboriginality. Gageler J criticises this judicially created loophole, arguing that it will generate 'complications and uncertainties … for the maintenance of an orderly national immigration program under the *Migration Act'*.[50] Unfortunately, we are already beginning to see this play out. Less than one month after *Love* was handed down, 23 immigration detainees came forward with claims of Aboriginality.[51] Department of Home Affairs general-counsel, Ms De Veau, said that in some cases those seeking release had no evidence beyond their own assertions to back up their claims.[52] Further exploitation of this 'supra-constitutional innovation'[53] can be expected after Shane Martin, the father of AFL star Dustin Martin, claimed he was Aboriginal when faced with deportation to New Zealand.[54] As an aside, it's ironic that some in the mainstream media have celebrated this decision as a supposed win for indigenous rights while overlooking the fact that a domestic violence offender in Mr Thoms has been enabled to remain in the country. It's an interesting arrangement of priorities from the adherents of identity politics.

Second, the decision outsources control over immigration and security policy from the legislature to Aboriginal societies.[55] This is because determinations of Aboriginality under the *Mabo* test require biological descent, self-identification, and *acceptance by the relevant indigenous community*.[56] In essence, this gives Aboriginal and Torres Strait Islander societies

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[50] *Love* (n 4) [140].
[51] Ben Packham, 'Immigration detainees claim 'I'm indigenous' after High Court Ruling', *The Australian* (online, 3 March 2020) <https://www.theaustralian.com.au/nation/immigration-detainees-claim-im-indigenous-after-high-court-ruling/news story/0ffbc16235db7648f92d92797b505fde>.
[52] Ibid.
[53] *Love* (n 4) [133].
[54] Evan Young, ''A very bad thing': Peter Dutton slams High Court's Aboriginal 'aliens' ruling', *SBS News* (online, 13 February 2020) https://www.sbs.com.au/news/a-very-bad-thing-peter-dutton-slams-high-court-s-aboriginal-aliens-ruling>.
[55] In *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162, 171 [24] ('*Te*') Gleeson CJ describes this power as vital to the welfare, security and integrity of the nation.
[56] *Mabo* (n 24).

the capacity to decide who is and is not an alien,[57] thereby 'depriving the Commonwealth Parliament of an aspect of its power … under s 51(xix)'.[58] As Gageler J eloquently states, it cedes to 'a non-constitutional non-representative non-legally accountable sub-national group a constitutional capacity greater than that conferred on any State Parliament'.[59] Kiefel CJ follows, that '[t]o accept this effect would be to attribute to the group a kind of sovereignty which was implicitly rejected in *Mabo [No 2]*'.[60] Further troublingly, Bell and Edelman JJ appear open to weakening the tripartite test from *Mabo*, indicating that it may be possible to successfully claim Aboriginality without fulfilling the three-part test.[61] It would be most disturbing if biological descent or self-identification were alone to be sufficient.

However, what is most concerning about this decision are the yet to be realised implications arising from the majority's reasoning. For instance, Nettle J concludes that the Crown owes a 'unique obligation of protection' to Aboriginal societies.[62] Exactly what this duty of obligation imposes on the government and how far it extends into other areas of constitutional law is unclear at this stage.[63] Keane J warns that such a duty 'does not come without costs'.[64] Indeed, if Aboriginal Australians are exempt from the 'aliens' power by virtue of a unique duty or special connection with the land, what other areas of law are they exempt from? Alarmingly, these notions of 'obligation of protection' and 'connection with the land' are elevated to constitutional concepts, meaning that unlike native title they cannot be curtailed or legislated away.[65] On the other hand, by grounding non-alienage in whether one is a 'belonger' to the

[57] *Love* (n 4) [137] (Gageler J).
[58] Ibid [138] (Gageler J).
[59] Ibid [137].
[60] Ibid [25]. See also *Coe v Commonwealth* (1993) 118 ALR 193, 200 (Mason CJ); *Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 443-444 (Gleeson CJ, Gummow and Hayne JJ).
[61] Ibid [80] (Bell J), [458] (Edelman J).
[62] Ibid [272]-[273].
[63] Anne Twomey, 'High Court deportation ruling puts focus on Aboriginal equality', *The Australian* (online, 11 February 2020) <https://www.theaustralian.com.au/commentary/high-court-deportation-ruling-puts-focus-on-aboriginal-equality/news-story/8f32c4b49ced7f3c7663f5e2a268f4ed>.
[64] *Love* (n 4) [217].
[65] Native title is recognised by the common law and is thus subject to extinguishment. See *Mabo* (n 24) 64, 69-70 (Brennan J). However, while native title is recognised by the common law, it is not an institution of the common law. See *Mabo* (n 24) 59 (Brennan J). In comparison, the concepts expounded by the majority in *Love* act as constitutional concepts and thus cannot be curtailed.

Australian political community,[66] Edelman J leaves space for further groups of people to argue that they inhabit the category of 'non-citizen, non-alien'.[67] Thus, it is entirely possible this new category of people could be broadened beyond Aboriginals, further diminishing the Commonwealth's power to deport criminal non-citizens.[68] Gageler J concludes that such concepts 'inject an element of indeterminacy into the administration of the legal status of alienage'.[69] The majority have opened up one big constitutional can of worms.

C *Divisiveness*

The decision is *Love* is also politically divisive – dividing the those who reside in Australia along racial lines. For example, the finding that indigeneity provides for an exception to s 51(xix) results in the creation of 'a race-based constitutional limitation on legislative power'.[70] Gageler J protests that he cannot 'be party to a process of constitutional interpretation' with this consequence.[71] As a result, convicted criminals facing deportation under identical circumstances will receive differential treatment according to race. While the Australian community was previously divided along citizenship lines (citizens and aliens), we now have an entirely new class based on race (non-citizen, non-alien). As Caroline Di Russo has claimed, 'it's ethno-nationalism frocked up as progress'.[72] Indeed, the theorised 'obligation of protection'[73] owed by the Crown to Aboriginal societies reeks of 'rank paternalism'.[74] In a modern, egalitarian Australia, these sorts of distinctions drawn by the Court are objectionable – working only to divide Australians rather than to unify. As Keane J rightly concludes, 'considerations of race … [should be] irrelevant to the requirements for membership of the Australian body politic'.[75]

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[66] *Love* (n 4) [394], [437].
[67] Gageler J describes this category as a 'constitutional netherworld'. See *Love* (n 4) [131].
[68] It also possibly opens the doorway for the absorption doctrine (discussed further below) to be applied to the 'aliens' power.
[69] *Love* (n 4) [138].
[70] Ibid [133] (Gageler J).
[71] Ibid.
[72] Caroline Di Russo, 'Love and Thoms: this isn't closing the gap, but entrenching our differences', *The Spectator Australia* (online, 14 February 2020) <https://www.spectator.com.au/2020/02/love-and-thoms-this-isnt-closing-the-gap-but-entrenching-our-differences/>.
[73] *Love* (n 4) [272] (Nettle J).
[74] Ibid [217] (Keane J).
[75] Ibid (n 4) [177].

III. REMEDIES

There are three possible options open to the government in seeking to remedy the decision in *Love*.

A *Referendum*

First, the government could pursue a referendum on the matter.[76] However, referendums are a costly exercise, and very rarely deliver the desired result. For example, only 8 of 44 referendums in Australia have been successful – a success rate of 18%.[77] The prospects of a referendum on the 'aliens' power also faces additional barriers. For instance, the economic and health impacts of COVID-19 would make it difficult for the government to justify that spending in its current priorities. It is also likely that advancing a referendum on *Love* will invite a simultaneous referendum on constitutional recognition of indigenous Australians. Indeed, advancing a referendum on *Love* may end up being a counterintuitive pursuit for constitutional conservatives. Efforts to remedy the decision should perhaps be deployed elsewhere.

B *Using a Different Head of Power*

In his dissenting judgement, Gageler J raises two alternatives to the 'aliens' power which the government could possibly rely on to legislate for the deportation of Aboriginal non-citizens.[78]

1 *The 'Immigration and Emigration' Power*

First, Gageler J suggests that the government revert 'to the approach of relying on the power conferred by s 51(xxvii)'.[79] However, the Commonwealth's ability to deport persons under the 'immigration' power is severely limited by the doctrine of absorption.[80] In *Ex parte Walsh; Re*

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[76] *Australian Constitution* s 128.
[77] Australian Electoral Commission, *Referendum dates and results* (Web page) <https://www.aec.gov.au/Elections/referendums/Referendum_Dates_and_Results.htm>.
[78] *Love* (n 4) [140].
[79] Ibid.
[80] Michelle Foster, 'An 'Alien' by the Barest of Threads' – The Legality of the Deportation of Long-Term Residents from Australia' 33(1) *Melbourne University Law Review* 483, 493. See also Sangeetha Pillai, 'Non-Immigrants, Non-Aliens and People of the Commonwealth: Australian Constitutional Citizenship Revisited' 39(2) *Monash University Law Review* 568, 585.

Yates,[81] the Court held that once immigrants (who remain non-citizens) are absorbed into the Australian community, they cannot be deported under the 'immigration power'.[82] This found clearest expression in the judgement of Knox CJ, who stated:

> a person who has originally entered Australia as an immigrant may, in course of time and by force of circumstances, cease to be an immigrant and becomes a member of the Australian community. He may, so to speak, grow out of the condition of being an immigrant and *thus become exempt from the operation of the immigration power*.[83]

While this proposition was contentious for some time, it is now settled law that absorption takes one outside the scope of the 'immigration' power.[84] For instance, in *Ex parte Henry*, Jacobs J reiterated that 'a day comes … when an immigrant is absorbed into the Australian community so that he *cannot thereafter be deported under the immigration power*'.[85]

In *Johnson v Minister Immigration and Multicultural and Indigenous Affairs (No 3)*[86], French J provided a detailed and 'non-exhaustive' list of possible 'factors relevant' as to whether one 'has become … [absorbed into] the Australian community'. These factors include:[87]

1. The time that has elapsed since the person's entry into Australia;
2. The existence and timing of the formation of an intention to settle permanently in Australia;
3. The number and duration of absences;
4. Family or other close personal ties in Australia;
5. The presence of family members in Australia or in the commitment of family members to come to Australia to join the person;
6. Employment history;
7. Economic ties including property ownership;
8. Contribution to, and participation in, community activities;
9. Any criminal record.

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[81] (1925) 37 CLR 36.
[82] Ibid 64 (Knox CJ), 109-112 (Higgins J), 137-138 (Starke J).
[83] Ibid 64 (emphasis added).
[84] *R v Director General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 269, 371 (Barwick CJ), 374 (Gibbs J), 377-379 (Stephen J), 380 (Mason J), 383 (Jacobs J) ('*Ex parte Henry*').
[85] Ibid 385 (emphasis added).
[86] (2004) 1236 FCR 494, 510-511 ('*Johnson*').
[87] Foster (n 79) 502, citing *Johnson* (n 85).

This extensive array of factors makes it quite easy for immigrants to become absorbed into the Australia community, thus providing little scope for deportation under the 'immigration' power. It is for this reason the Hawke government introduced the *Migration Amendment Act 1983* (Cth), which switched the constitutional basis of the *Migration Act* from the 'immigration' power to the 'aliens' power – making deportation easier.[88] As such, while the deportation of Aboriginal non-citizens would be possible under the 'immigration' power, the Commonwealth's ability to do so would still be severely restricted by the doctrine of absorption.

2 *The 'Race' Power*[89]

Turning to an entirely new approach to deporting Aboriginal non-citizens, Gageler J suggests 'the Commonwealth Parliament might consider itself obliged to address them through racially targeted legislation enacted under s 51(xxvi) of the *Constitution*.'[90] Amended at the 1967 referendum, s 51(xxvi) gives the Commonwealth power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws'. It is well settled that the 'race' power allows the making of laws for benefit of Aboriginal peoples.[91] However, there is no clear ratio on whether s 51(xxvi) as it stands post-referendum can be used to the detriment of Aboriginal peoples. There is obiter both for and against this proposition. For example, Murphy J in both *Koowarta v Bjelke-Petersen*[92] and *Commonwealth v Tasmania*[93] argued that the power is limited to laws benefiting Aboriginal people. Brennan CJ similarly suggested in *Tasmanian Dams* that the referendum meant that the primary object of the power was beneficial.[94] However, Gibbs CJ in *Koowarta*[95] and Deane J in *Tasmanian Dams*[96] suggested otherwise. Its status remained uncertain after *Kartinyeri v Commonwealth*,[97] with Gummow and Hayne JJ concluding that the power can be used for detriment,[98] Gaudron and

[88] Ibid 504.
[89] *Australian Constitution* s 51(xxvi).
[90] *Love* (n 4) [140].
[91] See *Commonwealth v Tasmania* (1983)158 CLR 1 ('*Tasmanian Dams*'); *Western Australia v Commonwealth* (1995) 183 CLR 373.
[92] (1982) 153 CLR 168, 242 ('*Koowarta*').
[93] *Tasmanian Dams* (n 90) 180.
[94] Ibid 242.
[95] *Koowarta* (n 91) 186.
[96] *Tasmanian Dams* (n 90) 273.
[97] (1998) 195 CLR 337
[98] Ibid 382.

Kirby JJ concluding that it can only be used for benefit,[99] and Brennan CJ and McHugh J not considering the issue at all. As such, the precise scope of the 'race' power as it relates to making laws that operate to the detriment of Aboriginal people is far from certain.

Both of these approaches involve considerable risk and ultimately fail to entirely remedy the problem at hand. It is almost certain that both legislative approaches would face a High Court challenge. Though, as Gageler J concludes, 'on a correct understanding of the scope of the power conferred by s 51(xix), neither is a course which the Commonwealth Parliament ought to be driven to take.'[100] However, can a 'correct understanding' of the 'aliens' power be restored?

C *Challenging Love*

While it lies beyond the power of Parliament to restore s 51(xix) to its pre-*Love* meaning, the High Court can overturn *Love*, thereby reverting to its previous jurisprudential understanding of the 'aliens' power. This outcome is not entirely out of the question. With two of the majority Justices leaving the Bench within a year, there a significant possibility that the decision could be overturned in the event of a challenge. This prospect invites an analysis of the High Court's jurisprudence regarding to the doctrine of *stare decisis*.

As the final court of appeal, the High Court has always asserted its ability to reconsider and overrule its past decisions.[101] In *Agricultural Co v Federated Engine-Drivers and Firemen's Association of Australia*, Isaacs J famously proclaimed it as such, '[i]t is not … better that the Court should be persistently wrong than that it should be ultimately right'.[102] While this view was accepted by the Court, a more cautious approach to overturning precedent was ultimately endorsed. In *Ex parte the Brisbane Tramways Co Ltd*, Griffith CJ stated:[103]

> it is impossible to maintain as an abstract proposition that the Court is either legally or technically bound by its previous decisions. Indeed, it may in a proper case be its duty to disregard them.

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[99] Ibid 368, 411.
[100] *Love* (n 4) [140].
[101] *New South Wales v Commonwealth* (2006) 229 CLR 1, 313 [760] (Callinan J) ('*Workchoices*').
[102] (1913) 17 CLR 261, 278. This statement is not surprising given Isaacs J was eyeing off overturning the reserve powers doctrine. See *Workchoices* (n 100), 309 [749] (Callinan J).
[103] (1914) 18 CLR 54, 58 (emphasis added).

> But the rule should be applied with *great caution*, and only where the previous decision is *manifestly wrong*.

The clearest expression of what conditions make it easier to depart from precedent can be found in the *Second Territory Senators Case*.

In the *Second Territory Senators Case*, the High Court was invited to overturn a 4-3 decision it had made just two years earlier in the *First Territory Senators Case*. However, the composition of the Bench had changed, with Aickin J replacing McTiernan J from the original majority. Given the short length of time that had elapsed since the original decision, the Court discussed the doctrine of precedent at great length. Some of the salient factors the Court identified as making it easier to overturn a previous decision included where:[104]

1. The earlier case is manifestly wrong;
2. The earlier case is isolated nor part of a well-established stream of cases;
3. The earlier case is contrary to long established authority;
4. The earlier case is decided by a narrow minority;
5. The earlier case is on a constitutional question;
6. The earlier case is recent.[105]

Such factors clearly apply in the case of *Love*. In addressing the importance of the *Constitution* as compared to precedent, Barwick CJ came down firmly on the side of the *Constitution*:

> 'it is the duty … of each Justice … to decide what in truth the *Constitution* provides. The area of constitutional law is pre-eminently an area where the paramount consideration is the maintenance of the *Constitution* itself … [C]onvinced of their error, the duty to express what is the proper construction is paramount'.[106]

However, Barwick CJ was ultimately unsuccessful. While finding the decision in the *First Territory Senators Case* to be wrongly decided, Gibbs and Stephen JJ nevertheless applied it.[107] While acknowledging the above factors as legitimate considerations, Gibbs J held that a

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[104] Vincent Robinson, 'Queensland v The Commonwealth' 9(3) *Federal Law Review* 375, 385. See also R C Springall, 'Stare Decisis as Applied by the High Court to its Previous Decisions' 9(4) *Federal Law Review* 483.

[105] Though, this has not stopped the High Court from overturning long held constitutional precedent. See generally *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *Strictland v Rocla Concrete Pipes Ltd* (1971) 124 CLR 468; *Cole v Whitfield* (1988) 165 CLR 360.

[106] *Second Territory Senators Case* (n 3) 593.

[107] Robinson (n 103

change in the composition of the Bench was not a sufficient reason to overturn precedent.[108] Though, he did warn that any further deterioration in the federal balance would cause him to reconsider his position.[109] The legislation was thus upheld by an increased majority of 5-2. Speaking extra-curially on the matter, Sir Harry Gibbs also emphasised 'the importance of certainty in the law' when he upheld the precedent, noting that Senators for the Northern Territory had already been elected.[110] He 'regarded it as a most drastic step to deprive citizens of a right to representation in Parliament given by legislation previously upheld by the High Court.'[111] On the other hand, overturning *Love* would only increase certainty in the law, given the discussion above.

The outcome in the *Second Territory Senators Case* can be contrasted with two contemporary examples where the High Court has swiftly overturned constitutional precedent upon a change in the composition of the Bench. First, in *Gould v Brown*[112] and *Re Wakim; Ex parte McNally*.[113] In *Gould*, the Court upheld the validity of a jurisdictional cross-vesting scheme under Chapter III of the *Constitution*.[114] However, one year later, the Court completely reversed the decision, invalidating the exact same scheme after Gleeson CJ and Hayne and Callinan JJ joined the Bench.[115]

The second example relevantly concerns the 'aliens' power. In a 4-3 split judgement in 2001, the Court in *Re Patterson; Ex parte Taylor*[116] held that certain non-citizen British subjects in Australia could not be considered aliens, creating for the first time a category of 'non-citizen, non-alien'. Nevertheless, the decision was overturned just two years later in *Shaw v Minister for Immigration and Multicultural Affairs,*[117] when Heydon J replaced Gaudron J on the Bench.

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[108] Ibid 386-388.
[109] Ibid.
[110] Sir Harry Gibbs, 'The Doctrine of Precedent Today' (Speech, Bar Practice Centre, 3 November 1983) 27-28.
[111] Ibid.
[112] (1998) 193 CLR 346 ('*Gould*').
[113] (1999) 198 CLR 511 ('*Re Wakim*').
[114] Gian Boeddu and Richard Haigh, 'Terms of Convenience: Examining Constitutional Overrulings by the High Court' 31(1) *Federal Law Review* 167.
[115] Ibid.
[116] (2001) 207 CLR 391 ('*Patterson*') 412 [50] (Gaudron J); 421 [91] (McHugh J); 491 [302] (Kirby J); 518 [377]-[378] (Callinan J). But see *Re Minister for Immigration and Multicultural Affairs; Ex parte Te* (2002) 212 CLR 162 in which the Court refused to extend this category beyond British subjects.
[117] (2003) 218 CLR 28 ('*Shaw*').

The new majority in *Shaw* returned its earlier jurisprudence,[118] holding that non-citizens are aliens.[119] Gageler J acknowledges this about-face in *Love*, describing the creation of a category of 'non-citizen, non-alien' as a 'constitutional cul-de-sac', implying that the Court is embarking on a 'similar path' to *Patterson* and *Shaw*.[120] Therefore, just as *Patterson* has come to be considered a 'momentary departure'[121] from 'aliens' power jurisprudence, it is entirely possible that *Love* will too. Indeed, the result in *Patterson* and *Shaw* is certainly more analogous to situation in *Love* than the *Second Territory Senators Case* is.

Given this, it generally seems the approach of the High Court in recent years is a greater flexibility and penchant for overturning constitutional precedent, even when there has been a reconstitution in the Bench. Barwick CJ's view 'seems to have won the somewhat guarded support of the Court in *Lange*: "Errors in constitutional interpretation are not remediable by the legislature, and the Court's approach to constitutional matters is not necessarily the same as in matters concerning the common law or statutes"'.[122] In any event, the view espoused by Callinan J in *Workchoices* is the most desirable approach:

> No doubt careful deference should be paid to the doctrines of the Court as and when they can be identified and can seen to be consistent, but it is not right for a judge to seek refuge in those doctrines to avoid the undertaking of an independent analysis, informed by the past, of the *Constitution.*[123]

Certainly, under this approach, *Love* should be overruled.

This is by no means an exhaustive outline of the High Court's history and jurisprudence regarding overturning constitutional precedent. However, it is illustrative of a key point: while a range of common factors towards overturning precedent emerge, ultimately '[t]he fact is that different judges take different views of how much respect to pay past precedents'.[124] Predicting whether the minority Justices would overrule *Love* in a subsequent challenge is therefore a fraught exercise. Notwithstanding some of the applicable factors already identified, there is nonetheless some reason to believe they would overturn *Love* if given the chance. For instance,

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[118] See *Pochi* (n 18); *Nolan* (n 18).
[119] *Shaw* (n 18) 35 [2] (Gleeson CJ, Gummow and Hayne JJ), 87 [190] (Heydon J).
[120] *Love* (n 4) [132].
[121] Kim Rubenstein, *Australian Citizenship Law* (Lawbook Co, 2nd ed, 2017) 98.
[122] *Workchoices* (n 100) 310 [754] (Callinan J) (citations omitted).
[123] Ibid 314 [762].
[124] James Allan, 'When does Precedent become a Nonsense?' (Conference Paper, Samuel Griffith Society, August 2007) 19, 21.

Gageler J continually refuses to apply the majority test of structured proportionality in implied freedom of political communication cases, preferring to apply his own test of calibrated scrutiny.[125] Given this refusal, it seems quite unlikely he would rule to uphold *Love*, particularly given the vigour with which he dissented: 'I am unable to accept the plaintiff's argument in any of its variations … the plaintiff's argument … is not legally sustainable.'[126] Kiefel CJ and Keane J are similarly strong in their dissent.[127] Indeed, Kiefel CJ notes that the decision in *Love* goes further than that which was accepted in *Patterson* and overruled in *Shaw*.[128] Ultimately though, the outcome of any challenge will turn on the attitude of the minority Justices towards constitutional precedent. If recent history provides any trend, it seems likely they would re-state their position from *Love*. As such, challenging *Love* under a re-constituted Bench is the preferred approach.

IV. FUTURE JUDICIAL APPOINTMENTS

Given that three of the four majority Justices in *Love* were appointed by the current government,[129] many conservative commentators have queried how such an activist result could arise, labelling it an 'utter failure of the federal Coalition'.[130] Such concerns are not entirely misplaced. So, what can be done about this sorry state of affairs? As Morgan Begg correctly points out, '[t]he two upcoming High Court appointments are the two most consequential appointments since Federation. Australians cannot afford to get these appointments wrong'.[131]

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[125] See *McCloy v New South Wales* (2015) 257 CLR 178; *Brown v Tasmania* [2017] HCA 43; *Clubb v Edwards; Preston v Avery* [2019] HCA 11; *Comcare v Banerji* [2019] HCA 23. See also Gordon J in the same line of cases, who similarly refuses to apply the majority test, preferring to apply the original reasonably appropriate and adapted formula from *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520. This further implies a general reluctance by members the current Bench to apply constitutional precedent they are in disagreement with.

[126] *Love* (n 4) [127]-[128].

[127] Ibid [4] (Kiefel CJ), [178]-[179] (Keane J).

[128] Ibid [39].

[129] Justices Nettle, Gordon and Edelman.

[130] John Roskam, 'Why the Aboriginal citizenship ruling is alien to all ideas of law', *Australian Financial Review* (online, 20 February 2020) <https://www.afr.com/politics/federal/why-the-aboriginal-citizenship-ruling-is-alien-to-all-ideas-of-law-20200220-p542o6>.

[131] Chris Merritt, 'Judging the High Court's justices', *The Australian* (online, 19 February 2020) <https://www.theaustralian.com.au/inquirer/judging-the-high-courts-justices/news-story/6c819b096c60180d761d0ca9ab38b2eb>. See also Olivia Caisley and Nicola Berkovic, ''Activism' puts focus on High Court vacancies', *The Australian* (online, 19 February 2020)

A *Judicial Methodology*

Looking to judicial appointments in future, it is imperative that candidates are screened for their judicial methodology. This must be done with great care and consultation. The overriding factor in judicial selection must be a black-letter approach to constitutional interpretation. This means selecting judges who will interpret the *Constitution* based on original intent and meaning, not based on righting perceived wrongs contained in policy or the *Constitution* itself. Dyson Heydon spoke extra-curially to the distinction between a black-letter judge and an activist judge in 2002. He stated that a black-letter judge is 'an independent arbiter not affected by self-interest or partisan duty, applying a set of principles, rules and procedures', while the activist judge decides cases according to 'some political, moral or social programme'.[132] We can clearly see this distinction playing out in *Love*. Such appointments should safeguard the *Constitution* from further judicial alteration by activist judges.

While some may construe this as an attempt to politicise the Bench, let's be clear: we are talking about screening candidates for their judicial methodology, not their political affiliation. A black-letter judge is not someone who votes for or supports the Liberal Party. That is not what is being advocated. In fact, what is being advocated is quite the opposite: that judges be appointed who interpret and apply the *Constitution* based on original intent, not based on their own politics. What is required is strict fidelity to the words of the *Constitution*, not strict fidelity to any political party. Indeed, appointing black-letter judges will curb the influence of politics on the Bench, not encourage it. It is activist judges who harm the independence of the judiciary after all. As Sir Harry Gibbs noted, '[i]t is disturbing that … there is a perception that some federal court judges decide cases according to their ideological biases rather than according to law'.[133] The appointment of black-letter judges will thus only serve to bolster the independence of the judiciary. And let's not pretend that Labor doesn't nominate political appointees.

It is also desirable that judges possess a certain level of social skill, including skills of persuasion, relationship management, and the ability to build consensus around good ideas.

<https://www.theaustralian.com.au/nation/politics/activism-puts-focus-on-high-court-vacancies/news-story/9cb395e022d2950d638b5e303d0d9c0c>.

[132] Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (Speech, Quadrant, 2002).

[133] Sir Harry Gibbs, 'Concluding Remarks' (Speech, Samuel Griffith Society Conference, 2001).

This will produce a greater number of majority judgements in support of the black-letter methodology. Additionally, as the final court of appeal in a federation of states, considerations including state of origin and attitude towards maintaining the federal balance must also be considered when making appointments.[134]

While it's all well and good to suggest that judges with a black-letter methodology be appointed, how can we be certain they subscribe to such a method? And more importantly, how do we ensure the next generation of judges aren't activist, given the sustained rise of intellectual leftism across our universities? The answer may be more obvious than we think.

B *An Enlarged Role for the Samuel Griffith Society*

Judicial conservatives in Australia might consider adopting a similar strategy to that pursued by the US Federalist Society. Established in 1982 primarily as a network for young legal conservatives, the Federalist Society has been instrumental in wrestling the left's hold of legal institutions across the US, particularly the courts.[135] Fortunately, a similar organisation already exists in Australia – the Samuel Griffith Society. There are two areas in which the Samuel Griffith Society may endeavour to follow the path set by their US counterparts.

1 *Counselling Judicial Appointments*

The Federalist Society has played a key role in counselling US Presidents and their advisers on judicial appointments. For example, they were the prime source of advice for President George W. Bush, while President Trump's list of potential nominees was constructed with their assistance.[136] It should be common practice for a Liberal Attorney-General, or a Labor one for that matter, to consult with the Samuel Griffith Society with respect to potential nominees. Like their US counterparts, the Samuel Griffith Society should be insistent that nominees have a black-letter approach to constitutional interpretation. Additionally, they can serve as an important screening mechanism, aiding the government in being careful to appoint judges with a black-letter methodology. The reliability of this screening would be enhanced by the cultivation of young conservative legal talent.

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[134] James Allan, 'Judicial Appointments: Need for a Policy' (Conference Paper, Samuel Griffith Society, August 2015) 98, 104-105.
[135] Julian E. Zelizer, 'How Conservatives Won the Battle Ove the Courts', *The Atlantic* (online, 7 July 2018) < https://www.theatlantic.com/ideas/archive/2018/07/how-conservatives-won-the-battle-over-the-courts/564533/>.
[136] Ibid.

2 *Recruitment and Development of Law Students and Young Lawyers*

A central aim of the Federalist Society is the recruitment and development of law students and young lawyers who have been identified as having an 'originalist' interpretation of the US Constitution.[137] In his book, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law*, US political scientist, Steven Teles, gives a detailed account of how the Federalist Society has been successful in recruiting law students.[138] The key has been a strong commitment to intellectual debate on university campuses.[139] Rather than simply sponsoring speakers for external events, the Society emphasises debate, holding events directly on university campuses, inviting both students and academics to participate.[140] By being open, reasoned and willing to engage with students, the Society presents itself as an appealing alternative to the university left, who are closed off, elitist and largely unwilling to debate.[141] As a result, students are more willing to be convinced of the Society's ideals – ideals not given much weight by most law school professors.[142] This has gone some way to restoring ideological balance in US law schools.[143]

Once recruited, students and young lawyers are supported as their career unfolds, offered a network with senior mentors, clerkships with conservative judges, and opportunities to extol their judicial beliefs through written work and events.[144] The long-term benefit of this approach are is that Federalist Society members – recruited and fostered since law school – provide a pipeline of potential judicial nominees with a black-letter methodology.[145] For example, Supreme Court Justice Thomas Clarence – a central figure in the Federalist Society – has had more of his former clerks nominated to federal judgeships under President Trump than other Supreme Court Justice.[146] Other notable Federalist Society members now sitting on the US

[137] Ibid.
[138] Steven M. Teles, *The Rise of the Conservative Legal Movement: The Battle for Control of the Law* (Princeton University Press, 2008) 135-180.
[139] Ibid 179.
[140] Ibid 144.
[141] Ibid.
[142] Ibid.
[143] Ibid 173.
[144] Emma Green, 'The Clarence Thomas Effect', The Atlantic (online, 10 July 2019) <https://www.theatlantic.com/politics/archive/2019/07/clarence-thomas-trump/593596/>. See also Teles (n 137) 179.
[145] Ibid.
[146] Ibid.

Supreme Court include John Roberts, Samuel Alito, Neil Gorsuch and Brett Kavanaugh. Teles further notes, '[b]y encouraging intense and sustained interactions among its members, the [Federalist] Society has created the deliberative conditions necessary for convergence in the ideas of the conservative legal movement's various factions'.[147] Federalist Society members are thus socially adept, comfortable with debate, and are able to build consensus around ideas – skills identified above as desirable for judges in Australia.

It is vital to remember that today's law students are tomorrow's judges. If we are to uphold the virtues preserved by the Australian *Constitution*, we must be ready to challenge the grip the left has on our university law students. Failure to do so could prove detrimental for the judiciary and the *Constitution* in the decades to come.

CONCLUSION

The High Court's decision in *Love* is truly disturbing. It strays completely from the written text of the *Constitution* into matters of values and policy, dividing the community along racial lines. And for what noble pursuit? To allow convicted criminals to remain in Australia by virtue of their race? It's judicial activism mixed in with identity politics. This paper has canvassed three options the government could pursue in seeking to remedy the decision: referendum, legislating under a different head of power, and challenging the decision under a reconstituted Bench – with the latter the preferred option. Indeed, if left unchallenged for too long, there is no telling how far down this constitutional can of worms we will go. As Portia from Shakespeare's *The Merchant of Venice* proclaimed, 'Twill be recorded for a precedent, And many an error by the same example will rush into the state'.[148]

[147] Teles (n 137) 146.
[148] Quoted in Gibbs, 'The Doctrine of Precedent Today' (n 109) 5.