The High Court *Love* decision

The High Court's decision to exempt Indigenous people from aspects of Australia's immigration law amounts to a radical change to constitutional law that will have profound implications for many years to come.

Ruling in the case of *Love v Commonwealth*; *Thoms v Commonwealth*[1], a narrow High Court majority of four to three determined that Aboriginal Australians are outside the scope of Parliament's power to make laws with respect to "naturalisation and aliens" – the constitutional provision that forms the basis of the *Migration Act 1958*. In effect, the Court's majority created a new category of "non-citizen non-alien", which grants immunity from deportation to members of Indigenous communities, regardless of whether not they are Australian citizens.

As all three dissenting justices made clear, the decision comes perilously close to granting sovereignty to Indigenous communities. It raises questions about the place of Indigenous Australians in our political system and it undermines the fundamental principles of equality, the rule of law, and the nature of our democratic system of government. It is a warning of the risks of recognising Indigenous Australians in the Constitution, and a reminder of the importance of the considering the judicial philosophy of candidates for appointment to the High Court. This should include an intellectually honest discussion about the stark differences between being a constitutional conservative and a political conservative.

A novel argument

The case before the Court involved two foreign citizens who had their visas cancelled for character reasons, after each was separately convicted of assault occasioning bodily harm. Both men were taken into immigration detention, in order to await deportation, on the day they were set to be released on parole. The case would have been fairly straight forward, if not for the men's Aboriginal identity.

Daniel Love and Brendan Thoms were both born overseas. Daniel Love is a citizen of Papua New Guinea who has resided in Australia on a permanent residency visa since he was six years old. His father was an Australian citizen and he is descended from Aboriginal Australians who inhabited Australia prior to European settlement. He identifies as a member of the Kamilaroi tribe and is recognised as a member by an elder of the community.[2]

Brendan Thoms was born in New Zealand to an Aboriginal Australian mother and a New Zealand father. He is a citizen of his country of birth, but like Love he moved to Australia in his early childhood. Thoms is a descendant of the Gunggari People; he both identifies and is accepted as a member of the community, and he is also a common law holder of native title. [3]

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[1] [2020] HCA 3.

[2] High Court of Australia, *Judgment Summary* (11 February 2020), https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-3-2020-02-11.pdf

[3] High Court of Australia, *Judgment Summary* (11 February 2020), https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-3-2020-02-11.pdf

As Plaintiffs in the case, Love and Thoms argued that even though they are not Australian citizens, as Indigenous Australians they have a special connection to Australia and cannot be considered "aliens" within the meaning of Section 51(xix) of the *Constitution*. As a result, they each have a continuing right to remain in Australia regardless of whether or not they have citizenship or a valid visa.[4]

Justice Stephen Gageler – one of the three dissenting Judges – described this as a novel argument,[5] and that although it is morally and emotionally engaging, it is "not legally sustainable."[6]

A judgement about spiritual and metaphysical connections

While both Justice Patrick Keane and Chief Justice Susan Mary Kiefel agreed with Gageler's assessment, the remaining four justices sided with the plaintiffs in a decision that is sure to have profound consequences for many years to come.

Justices Virginia Bell, Michelle Gordon, James Edelman, and Geoffrey Nettle all wrote their own separate judgments. They all agreed that Parliament could not treat an Aboriginal as an alien because they did not meet the description according to the ordinary understanding of the word.[7]

The four justices were also united in their recognition of the importance of the connection Indigenous Australians have with the land.

Justice Bell argued that this connection is "essentially spiritual",[8] and for Justice Nettle, this spiritual connection "runs deeper than the accident of birth in the territory or immediate parentage."[9]

According to Justice Gordon, this spiritual and metaphysical connection was the "deeper truth"[10] underlying the decision of *Mabo v Queensland (2)*[11] (*Mabo*). Gordon also argued that one of the central pillars of *Mabo* was that the common law recognises that Indigenous peoples can and do possess certain rights and duties that non-Indigenous Australians do not and cannot possess.[12]

Justice Edelman not only claimed that Aboriginal people are tied to the land through "metaphysical bonds" far stronger than those of birth or nationality,[13] but that these bonds are "an underlying fundamental truth that cannot be altered or deemed not to exist by legislation…"[14]

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[4] High Court of Australia, Short Particulars, https://cdn.hcourt.gov.au/assets/cases/02-Brisbane/b43-2018/Love_and_Thoms_No.2.pdf
[5] [2020] HCA 3 at 41 [113] per Gageler J
[6] [2020] HCA 3 at 44 [123] per Gageler J
[7] High Court of Australia, *Judgment Summary* (11 February 2020), https://cdn.hcourt.gov.au/assets/publications/judgment-summaries/2020/hca-3-2020-02-11.pdf
[8] [2020] HCA 3 at 23 [70] per Bell J
[9] [2020] HCA 3 at 97 [276] per Nettle J
[10] [2020] HCA 3 at 101 [289] per Gordon J
[11] [1992] HCA 23; (1992) 175 CLR 1.
[12] [2020] HCA 3 at 122 [357] per Gordon J
[13] [2020] HCA 3 at 133 [396] per Edelman J
[14] [2020] HCA 3 at 162 [451] per Edelman J

A rejection of Mabo on sovereignty

To say that the three dissenting justices disagreed with their colleagues in the majority is an understatement.

Chief Justice Kiefel asserted that by ruling on whether the plaintiffs are aliens the Court was usurping the role of parliament.[15]

This is an important point about the nature of our democratic political system. But the High Court's decision not only usurps the role of parliament, it also deprives Australian citizens of their right to determine the laws under which they live.

Justice Keane took aim at the majority's misreading of *Mabo*, pointing out that while the common law recognised native title, "[this] does not entail the recognition of an Aboriginal community's laws".[16]

Justice Gageler's strongest point undoubtedly came on the issue of equality before the law.

Realising the likely racial division that the majority was creating, Gageler said that he "could not be party to a process of constitutional interpretation or constitutional implication which would result in the inference of a race-based constitutional limitation on legislative power."[17] In his view, this is "not within the scope of the acknowledged judicial function".[18]

But it is on the issue of sovereignty that the dissenting judges were most united in their criticism.

The majority had agreed that in determining aboriginality, the Court should rely on the tripartite test outlined by Justice Brennan in *Mabo*[19]. According to this standard, for an individual to be a member of an Indigenous community they must be a person of aboriginal descent, they must identify as a member of an Indigenous community, and they must be accepted as a member by that same Indigenous community.

This tripartite test has become commonly used in native title cases. The problem is that by ruling that Aboriginals cannot be considered aliens and then using the tripartite test to determine aboriginality, the High Court has effectively granted Indigenous communities a measure of sovereignty that the parliament has not even considered, let alone agreed.

All three dissenting justices condemned this. With Justice Keane saying, "to suggestion members of Aboriginal groups have authority to make choices that bind the Commonwealth of Australia is to attribute to those persons a measure of political sovereignty."[20]

All three justices also pointed out that this is contrary to *Mabo* and subsequent cases that have all rejected Aboriginal sovereignty whenever it has been raised.[21]

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[15] [2020] HCA 3 at 2 [4] per Kiefel CJ
[16] [2020] HCA 3 at 64 [202] per Keane J
[17] [2020] HCA 3 at 46 [133] per Gageler J
[18] [2020] HCA 3 at 47 [136] per Gageler J
[19] [1992] HCA 23 at 41 per Brennan J
[20] [2020] HCA 3 at 63 [197] per Keane J

A warning about the risks of an Indigenous 'Voice' to Parliament

The robust and forthright criticism from the three dissenting judges did little to dampen the enthusiasm with which many prominent Indigenous Australians greeted the High Court's decision.

Indigenous journalist and author Stan Grant said that the decision was "one of the most remarkable documents I've ever read in Australia,"[22] and that the judge's opinions were "profound, wise, and sensitive".[23]

Grant was joined in celebration by Labor MP Linda Burney, who is both a Wiradjuri woman and shadow minister for Indigenous Australians. Burney described the judgement as "incredibly significant", because it "reaffirms the important connection, the special connection, that Aboriginal people have to Australia and their historical connection."[24]

However, as supporters of an Indigenous voice to Parliament, Burney and Grant ought to stop to consider the implications of the High Court's decision on the campaign for constitutional recognition of Indigenous Australians. This is because the Court's decision is likely to only increase the natural scepticism and caution most Australians have about constitutional change, such as the creation of a voice to Parliament.

This realisation prompted Father Frank Brennan to tell the *Sydney Morning Herald,* "my heart sank when I heard the news."[25] As he explained: "there goes the voice to Parliament, there goes anything in the form of constitutional recognition through a referendum."[26]

The sentiment was echoed by Chris Kenny, also a supporter of the voice proposal, who wrote that "A complex and historic area of national and Indigenous reform has been jeopardised by the ruling of four High Court Judges…"[27]

What both Brennan and Kenny realise is that the High Court's decision perfectly illustrates the warnings constitutional conservatives have long been making about the legal risks of recognising Indigenous Australians in the Constitution.

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[21] [2020] HCA 3 at 63 [200] per Keane J

[22] Peter Hartcher, 'First peoples triumph or two edged sword', *Sydney Morning Herald* (14 February 2020), https://www.smh.com.au/politics/federal/first-peoples-triumph-or-two-edged-sword-20200214-p5410a.html

[23] Stan Grant, 'The High Court has widened the horizon on what it is to be Indigenous and belong to Australia, ABC (15 February 2020), https://www.abc.net.au/news/2020-02-15/unresolved-question-of-indigenous-sovereignty-haunts-australia/11962834

[24] Paul Osborne, Attorney examines court indigenous ruling, *Forbes Advocate* (12 February 2020), https://www.forbesadvocate.com.au/story/6626496/attorney-examines-court-indigenous-ruling/

[25] Peter Hartcher, 'First peoples triumph or two edged sword', *Sydney Morning Herald* (14 February 2020), https://www.smh.com.au/politics/federal/first-peoples-triumph-or-two-edged-sword-20200214-p5410a.html

[26] Peter Hartcher, 'First peoples triumph or two edged sword', *Sydney Morning Herald* (14 February 2020), https://www.smh.com.au/politics/federal/first-peoples-triumph-or-two-edged-sword-20200214-p5410a.html

[27] Courts on the horns of an indigenous Dilemma, *The Australian,* https://www.theaustralian.com.au/commentary/court-on-the-horns-of-an-indigenous-dilemma/news-story/cc994d8794a7074acfe3f365cffe999f

As many of us have warned, all forms of Indigenous recognition – even symbolic proposals such as the addition of a preamble – carry legal risk. If this is what the current High Court, a majority of whose justices was appointed by Coalition governments, can do with a narrow and conservatively drafted constitution, imagine what a future even more activist court could do with an Indigenous voice to Parliament. It is not difficult to imagine how its role could one day be expanded by a future High Court well beyond its intended design.

The risk a voice to parliament could become or be seen as a third chamber of parliament was cited by former prime minister Malcolm Turnbull when he rejected the idea as "[n]either desirable or capable of winning acceptance in a referendum" after it was first proposed by the Referendum Council in 2017.[28]

Of course, the claim that an Indigenous voice to Parliament would be a third chamber has been criticised by advocates of the proposal, with the Noel Pearson calling it "ridiculous" and "dishonest."[29]

But it is a lot harder to dismiss the risk that future High Court decisions could grant additional powers to a representative body for Indigenous Australians when the High Court has just effectively created a new right for members of Indigenous communities – regardless of whether or not they are Australian citizens – which in the words of Chief Justice Kiefel, "is of such a nature that it may not be altered either by statute or by the Constitution."[30]

It is possible, for example, that a future High Court could view the voice to Parliament as the legitimate representative body of Indigenous people in Australia, and the partial sovereignty that Indigenous communities have effectively been given by this case could be vested in the voice.

With this change alone, the voice to Parliament would come to resemble much more than a de-facto third chamber of Parliament; it would be an alternative representative body with its own exclusive powers.

This may seem far-fetched, but as Justice Gageler wrote in his dissent:

> "To concede capacity to decide who is and who is not an alien from the perspective of the body politic of the Commonwealth of Australia to a traditional Aboriginal or Torres Strait Islander society or to a contemporary Aboriginal or Torres Strait Islander community, or to any other discrete segment of the people of Australia, would be to concede… a constitutional capacity greater than that conferred on any State Parliament."[31]

[28] Prime Minister - The Hon. Malcolm Turnbull MP, Attorney General - Senator The Hon. George Brandis QC, and Minister for Indigenous Affairs - Senator The Hon. Nigel Scullion, *Response to Referendum Council's report on Constitutional Recognition* (Media Release, 26 October 2017) https://ministers.pmc.gov.au/scullion/2017/response-referendum-councils-report-constitutional-recognition

[29] Deborah Snow, 'Noel Pearson welcomes former Chief Justice's backing for Indigenous voice', *Sydney Morning Herald* (18 July 2019), https://www.smh.com.au/politics/federal/noel-pearson-welcomes-former-chief-justice-s-backing-for-indigenous-voice-20190718-p528mm.html

[30] [2020] HCA 3 at 14 [46] per Kiefel CJ

[31] [2020] HCA 3 at 47 [137] per Gageler J

By revealing this risk to the general public, the High Court has almost certainly made it more difficult for most if not all Indigenous recognition proposals to gain the necessary double majority required at a referendum.

Section 128 grants the Australian people the exclusive right to change the Constitution. Unfortunately, as has now been made abundantly clear, the High Court is more than willing to decide cases in ways that radically alter the meaning of the constitution. And as Emeritus Professor Jeffrey Goldsworthy argues, this equates to changing the constitution itself.[32]

These changes don't just occur in the area of Indigenous affairs. Take the area of federalism, for example; since federation there have been a whole host of cases that have radically altered the division of powers between the Commonwealth and State governments. The *Engineers* case[33], the first and second *Uniform Tax* cases[34], and the *WorkChoices* case[35] are just some of the more prominent alterations to our federal structure. As a result of these and other decisions, Australia now has one of the world's most centralised federal systems.[36]

In other words, unless something is done to reduce the level of judicial activism on the High Court, advocates of Indigenous recognition could end up getting all the constitutional changes they want without ever needing to win a democratic mandate at a referendum.

Judicial appointments and the politicisation of the courts

The High Court's decision in *Love v Commonwealth; Thoms v Commonwealth* has already sparked considerable debate about judicial activism, the appointment of judges, and the politicisation of the courts.

In a series of criticisms of the High Court's decision, the University of Queensland's Garrick Professor of Law James Allan took aim at the Coalition government's record on judicial appointments, pointing out that three of the four judges who sided with the majority were nominated by Attorney General George Brandis during the Abbot and Turnbull governments.[37] Allan described this as "astounding," asserts that "We now have to rely on Labor to give us constitutional conservatives, as they did well with Gageler and Keane."[38]

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[32] Goldsworthy, Jeffrey Denys 'The Case for Originalism', in G Huscroft and B W Miller, eds, *The Challenge of Originalism; Theories of Constitutional Interpretation* (Cambridge University Press, 2011)

[33] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("Engineers case")

[34] *South Australia v Commonwealth* (1942) 65 CLR 373 ("First Uniform Tax case"), and *Victoria v Commonwealth* (1957) 99 CLR 575 ("the Second Uniform Tax case")

[35] *New South Wales v Commonwealth* (2006) 229 CLR 1 ("WorkChoices case")

[36] NSW Treasury, *NSW Review of Federal Financial Relations: Working together for a better future* (Discussion Paper, October 2019), https://www.treasury.nsw.gov.au/sites/default/files/2019-10/NSWTR_300144_Stakeholder%20discussion%20paper%20Commonwealth%20and%20State%20government%20relations_FA%20WEB%20EXT.pdf

[37] James Allan, 'High Court of Wokeness: how on earth did the Coalition allow this to happen?', *The Spectator* (21 February 2020) https://www.spectator.com.au/2020/02/high-court-of-wokeness/

[38] James Alan, 'High Court ruling: Activist justices' alien view of court's power', *The Australian* (14 February 2020), https://www.theaustralian.com.au/business/legal-affairs/activist-justices-alien-view-of-courts-power/news-story/bfff4c2f860a65426dddaf5f91cf9ff6

In a similarly critical piece, which prompted its own flurry of responses from the legal community, Institute of Public Affairs research fellow Morgan Begg called for the appointment of judges who are "capital-C conservatives."[39]

According to University of NSW dean of law George Williams, attempt to "appoint judges based on their political views"[40] would undermine public confidence in the judicial system and result in a US-style system of hyper-partisan appointments. Judicial Conference of Australia President Justice Judith Kelly echoed these points, arguing that Australia had "fortunately avoided the approach adopted in the US".[41]

For his part, George Brandis responded to James Allan's critique by explaining that he was only ever concerned with one thing when nominating judges: "their eminence and ability as lawyers."[42] He too warned that an ideological test for judicial appointments would politicise the judiciary and undermine public confidence in its impartiality.[43]

Brandis is right to highlight the importance of legal ability as a criteria for appointing judges. It is a self-evidently appropriate criteria for appointment to any court. But this should not be the only factor when considering an individual as a potential High Court justice.

Appointment to the High Court comes with enormous responsibility and considerable influence over Australia's political system. During their secured tenure on the Court, judges are nothing short of guardians of the Australian Constitution. Because of this, Australian governments should absolutely consider the judicial philosophy of candidates; to do otherwise is to gamble with the future of Australia's political system.

None of this is to say that a candidate's *political* views ought to matter. It is irrelevant who a judge votes for and it should remain so. It shouldn't matter whether a judge supports privatisation or greater action on climate change, or what their views are on foreign policy.

Originalist judges, not political conservatives

Morgan Begg expanded on his position with the following comments to *The Australian's* Chris Merritt:

"Being a legal conservative means being a unifier, not a divider. It means interpreting the Australian Constitution in a way that was originally intended at Federation, including by

[39] Morgan Begg, 'Activist judges misrepresent Mabo to create privileged class', *The Australian* (12 February 2020), https://www.theaustralian.com.au/commentary/activist-judges-misrepresent-mabo-to-create-privileged-class/news-story/6c9d0372378f803a16ef6c68067bc2b1

[40] George Williams, 'There is no place for politics in the appointment of High Court judges', *The Australian* (15 March 2020), https://www.theaustralian.com.au/commentary/there-is-no-place-for-politics-in-the-appointment-of-high-court-judges/news-story/cb079fb6b8670df86d34ca7995c4c4a4

[41] Judith Kelly, 'No place on High Court bench for politics', *The Australian* (19 March 2020), https://www.theaustralian.com.au/business/legal-affairs/no-place-on-high-court-bench-for-politics/news-story/61ee5b321a0e0d7f0914aee16351068f

[42] George Brandis, 'Diary', *The Spectator* (18 April 2020), https://www.spectator.com.au/2020/04/diary-211/

[43] George Brandis, 'Diary', *The Spectator* (18 April 2020), https://www.spectator.com.au/2020/04/diary-211/

correcting the massive centralisation of power in Canberra and restoring the powers of the states."[44]

In the words of James Allan, "we want people who interpret the Constitution the way it was intended – to leave these big-ticket issues to the elected Parliament. It is the judges' interpretative views that matter, not their political druthers."

Clearly both Allan and Begg are calling for the appointment of originalist judges who will use the original meaning of the Constitution as a guide through which they approach cases. The benefits of this approach is that it preserves the scope of democratic decision making and constrains the judges ability to impose their own person views on decisions.

This allows political decisions to be worked out organically through the democratic process. In the long run it is far more likely to maintain social harmony than if decisions are suddenly imposed from above.

Originalism is far from the only judicial philosophy – and it's certainly not the dominant approach being followed on the High Court. But it is well known. So it is rather surprising that three eminent members of the legal establishment mistakenly assumed that constitutional conservatives were advocating for judges to be appointed according to their political (rather than judicial) views.

Perhaps it is the use of the term "capital-C conservative" which has confused them.

Labels should not matter. What is clearly being called for is judges who respect the sovereignty of the parliament and don't believe it is the role of the Court to effectively take major and contentious public policy decisions out of the hands of voters in a democracy.

It is Judicial activism – not Originalism – that politicises the courts

Ironically, for all the concern about the danger of politicising the courts, it is activist decisions like this Indigenous affairs case that polarise the community and create the dynamics for politicisation to occur.

Cases that confirm the existing understanding of the Constitution and leave policy decisions to democratically elected parliaments to resolve, by definition, are uncontroversial. It is the cases that fundamentally transform our system of government, take decisions out of the hands of the people, or suddenly introduce new "rights" that lead to public discontent and reduced trust in the judiciary. When this continually occurs politicisation is the inevitable result.

This debate around the appointment of judges that has suddenly flared up is a case in point. No doubt there were already plenty of people who opposed the direction of the High Court, but it was the shock decision to exempt members of Indigenous communities from the *Migration Act* that sparked the rush of calls for reform.

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[44] Chris Merritt, 'Judging the High Court's justices', *The Australian* (19 February 2020), https://www.theaustralian.com.au/inquirer/judging-the-high-courts-justices/news-story/6c819b096c60180d761d0ca9ab38b2eb

In fact, along with the existence of the US Bill of Rights, headline-grabbing activist cases are exactly what led to US judicial appointments becoming so politicised.

The growth of the conservative legal movement and the importance of judicial appointments in the political process only began to occur after a series of judgements from activist judges catapulted the issue of judicial appointments into the political debate. One of the biggest turning points was the case of *Roe v Wade*; [45] the decision that legalised abortion on the basis of privacy.

Putting the respective merits of the issue aside, it is clear that the decision in *Roe v Wade* was a shock to the American political system, as advocates on both sides turned their long-term attention to the Supreme Court. For example, it galvanised millions of pro-life voters to campaign for (and donate to) politicians who would appoint conservative judges. This is not to say that the conservative legal movement in the US is all, or even mostly about abortion. But it is unlikely the appointment process would have become so political if not for activist decisions that brought contentious policy issues into the judicial realm.

No one wants to see Australia emulate the kind of hyper-partisan battles that have come to characterise the Supreme Court nomination process in the US.

As we don't have a constitutional bill of rights there is far less scope for the Court to be dragged into highly contentious political debates. The lack of a senate confirmation process also removes one very public avenue for political grandstanding when it comes to the appointment of judges. But every time the High Court usurps the role of Parliament, changes the division of powers, or suddenly discovers a new right, we take a step towards a more politicised judicial system.

Conclusion

The High Court's decision in *Love v Commonwealth; Thoms v Commonwealth* is understandably viewed as a historic decision by many Indigenous Australians. But regardless of its symbolic importance, the High Court's decision should ring alarm bells for Australians concerned about our democratic system of government.

By exempting members of Indigenous communities from the *Migration Act* – regardless of whether or not they are Australian citizens – the High Court has created a racial division within the Constitution that voters may never have agreed to if given the opportunity at a referendum.

The decision is a warning about the risks of constitutional change – especially the proposal for an Indigenous voice to Parliament. It should also act as a wake-up call for the need to consider judicial philosophy of judges we appoint to the High Court. This is not just an issue of concern for constitutional conservatives, it is an issue that should concern all Australians who value our enviable constitutional democracy.

James Paterson is a Liberal Senator for Victoria.

[45] Roe v Wade 410 U.S. 113 (1973)