AVOIDING THE HINDMARSH ISLAND BRIDGE DISASTER: INTERPRETING THE RACE POWER

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I should never have allowed the gates of the town to be opened to people who assert that there are higher considerations than those of decency.

J M Coetzee, *Waiting for the Barbarians*

I INTRODUCTION

South Africa's Truth and Reconciliation Commission raised difficult and painful questions about the complicity of the courts with the Apartheid regime. After examining the Commission's hearings on the involvement of the courts, Dyzenhaus concluded that the dominance of the plain fact approach to interpretation by the courts 'greased the wheels of racial segregation and they allowed the security arm of government to suppress political opposition to that policy unhindered by judicial review'.[1] Racial issues are often troubling for courts. They raise uncomfortable questions about the very moral and legal foundations upon which a society is built. They also raise difficult issues about when and to what extent the courts should subject racial laws to the restraining hand of judicial review. These issues arose before the High Court in the Hindmarsh Island Bridge Case *Kartinyeri and Gollan v Commonwealth* ('*Kartinyeri*').[2]

In *Kartinyeri* the Court was for the first time required to directly deal with the meaning and scope of the race power under the Constitution — s 51(xxvi).[3] The Court was (not for the first time) directly confronted with the troubling issue of race. When required to decide what powers the Federal Government could

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1 David Dyzenhaus, *Hard Cases in Wicked Legal Systems: South African Law in the Perspective of Legal Philosophy* (1991) 214.

2 (1998) 195 CLR 337 ('*Kartinyeri*').

3 This has previously arisen as a secondary issue. See *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, ('*Koowarta*') 186 (Gibbs CJ), 209–10 (Stephen J); 242 (Murphy J); *The Commonwealth v Tasmania* (1983) 158 CLR 1 ('*Tasmanian Dam Case*'), 110 (Gibbs CJ); 203 (Murphy J); *Gerhardy v Brown* (1985) 159 CLR 70, 138, 273 (Deane J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 56 (Gaudron J); *Western Australia v Commonwealth* (1995) 183 CLR 373 ('*Native Title Act Case*'), 461; *Kruger v The Commonwealth* (1997) 71 ALJR 991, 1035.

exercise over racial groups under s 51(xxvi), the majority retreated into the plain fact and extreme textualist interpretation approaches. Their reasoning and approach has a haunting resonance with that of the Apartheid courts. The majority read the Constitutional text devoid of its social, historical and even Constitutional context. This allowed Gummow and Hayne JJ to conclude, for instance, that so long as a federal law discriminated on the grounds of race, it would be a valid enactment.[4] No issue of human decency or justice appeared relevant. They did, however, mention in passing the possible restraint of the rule of law, but offered no clear explanation of what this meant.[5]

The constitutional issue at stake in *Kartinyeri* was whether the *Hindmarsh Island Bridge Act 1997* (the '*Bridge Act*') was a valid exercise of constitutional power. The *Bridge Act* prevented the relevant Minister from making a declaration under the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (the '*Heritage Protection Act*') to preserve and protect any significant Aboriginal site that might be within the Hindmarsh bridge area. The Aboriginal applicants claimed that the non-issuance of a Ministerial declaration would allow the desecration of sites of Aboriginal significance during the building of a proposed bridge to the island. They also claimed that the *Bridge Act* was unconstitutional because it was contrary to s 51(xxvi). Under s 51(xxvi) the Federal Parliament has the power to make laws for the peace, order, and good government of the Commonwealth with respect to the 'people of any race for whom it is deemed necessary to make special laws'.

A central question in the case was the meaning and scope of s 51(xxvi). Brennan CJ and McHugh J retreated into textualism and the technical (mis)use of interpretation rules to avoid squarely facing that central question. Gummow and Hayne JJ used textualism to close their minds to any real inquiry into the history and context of the race power. This left their interpretation of the power dangerously unanchored. Such a textualist reading of so important a grant of power may well encourage courts in the future to walk away from their responsibility to review race laws to ensure they do not unduly trespass on the fundamental rights and interests of racial minorities. The 20th century, at least, is replete with examples, in Australia and overseas, of legislatures enacting laws leading to the inhumane abuse of racial groups.[6] Gummow and Hayne JJ ignored this history, insisting upon a textualist interpretation which finds such history to be irrelevant. In any event, as I have mentioned in an earlier article, the textualist claim that s 51(xxvi) is unambiguous (and it is therefore unnecessary to inquire into its context and history) is implausible because the meaning of the term 'race' itself is highly contested.[7]

4 *Kartinyeri* (1998) 195 CLR 337, 380.

5 Ibid 381.

6 Justin Malbon, 'The Race Power Under the Constitution: Altered meanings' (1999) 21 *Sydney Law Review* 80, 100.

7 Ibid 83–85.

This article, then, is critical of the textualist devices used by Brennan CJ and McHugh J to raise formalist rules to avoid an inquiry of substance into the meaning and scope of s 51(xxvi). It is also critical, as just mentioned, of the textualism of Gummow and Hayne JJ. In offering this critique, Part II of this article reminds us of the various interpretation methods available to a court. These are originalism (which is sometimes referred to as founding intention), extreme originalism, textualism (or literalism)[8], extreme textualism, and progressivism (or living force).[9]

Part III examines at some length Brennan CJ and McHugh J's judgment. They employed an array of technical and formalist arguments to subvert the focus on issues of substance, which is central to constitutional interpretation. This part is somewhat more laboured than I would have preferred because the arguments they put have a superficial appeal. They need, however, to be responded to in case their arguments are taken seriously. One suspects that their purpose for avoiding a substantive inquiry was because they felt that the *Kartinyeri* case did not offer a fact scenario appropriate for developing the jurisprudence for the constitutional power grant. Remember, this case involved considerable public controversy about Aboriginal claims that sacred sites existed in the bridge area, leading to the Federal Government arranging for two inquiries into the claims and the South Australian Government establishing a Royal Commission.[10] The case itself followed hard on the heels of the controversial decisions in *Mabo v Queensland [No 2]*[11] and *Wik Peoples v Queensland*[12] decisions, which led to considerable public controversy, and some State Premiers and the Deputy Prime Minister being highly critical of the High Court judges. In some cases the criticism of the judges was quite personal.[13]

Part IV examines the textualism of Gummow and Hayne JJ and contrasts this with the reasoning of Gaudron J and Kirby J. Gaudron J applied a mix of interpretation methods that allowed her to maintain fidelity to the text of s 51(xxvi) whilst also being alive to its history and social context. As a result she was able to find that Parliament has power to enact a special law regarding a racial group's racial differences or circumstances providing Parliament reasonably forms

8 According to Kirk, a close relative of textualism is legalism or 'interpretivism'. See Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 FLR 323, 235.

9 John Williams and John Bradsen, 'The Perils of Inclusion: The Constitution and the Race Power' (1997) 19 *Adelaide Law Review* 95, 97.

10 See the account of the background to the case given by Kirby J:*Kartinyeri* (1998) 195 CLR 337, 386–87.

11 (1992) 175 CLR 1 ('*Mabo [No 2]*').

12 (1996) 187 CLR 1 ('*Wik*').

13 See Gary D Meyers and Sonia Potter, 'Mabo — Through the Eyes of the Media — The Wik Decision' (Murdoch University School of Law, Indigenous Land, Rights, Governance and Environmental Management Project, 1999) 99. It is mentioned that the then Deputy Prime Minister, Mr Tim Fischer 'initiated his campaign against the High Court even before the Wik decision, accusing the judges of delaying their decision. Accusations were made of judicial activism'.

a political judgment that the law is necessary to deal with the group's differences or circumstances.[14] Kirby J applied interpretation methods that allowed him to explore the historical and social context of the provision. By doing so he was alive to the dangers inherent in a reading of s 51(xxvi) that enables Parliament to enact racial legislation with impunity.

This article approves of the way in which Kirby J placed s 51(xxvi) within its historical and social context. The problem with his judgment, however, is that it runs too freely from the text. Kirby J turns to the original intent behind the 1967 referendum which amended s 51(xxvi), and finds that the intention was to ensure that the Federal Government would enact laws for the benefit of Aborigines.[15] The difficulty with his conclusion, as correctly identified by Gaudron J, is that the text of s 51(xxvi) makes no mention of Aborigines — indeed the irony is that the previous specific mention of Aborigines was removed.[16] This suggests that the amendment is designed to provide the Federal Government with the same power to make laws for Aborigines as for any other race.[17] This in turn suggests that the intention evident in the 'yes' case for the 1967 referendum and the Parliamentary debates for the Bill proposing the referendum that the Commonwealth gain the power to make beneficial laws for Aborigines also applies to other non-Aboriginal'races'. The debates and the 'yes' case, however, referred only to Aborigines and were silent regarding other races. These points were ignored by Kirby J.

The conclusion drawn in this article is that the majority in *Kartinyeri* make a worrying retreat into textualism, leaving the jurisprudence of the race power in a dangerously vulnerable state. Textualism provides a path for judges to retreat from judicial review. It would be particularly concerning if the Court took that easy path where the majority of the population were intent, via the instrument of Parliament, upon inflicting unjust and arbitrary abuses upon the rights and interests of minorities. Whichever way the judges go, they cannot make their decisions free of moral considerations — although textualism allows them to pretend they can. An obligation ultimately lies upon them to judicially review challenged racial legislation under s 51(xxvi) to ensure it does not exceed the bounds of human decency.

There is a glimmer of light, ironically enough, amongst the dark textualism of Gummow and Hayne JJ. They offer in a couple of apparently innocuous

14 *Kartinyeri* (1998) 195 CLR 337, 365.

15 Ibid 406–08, 410 (Kirby J).

16 Ibid 361 (Gaudron J).

17 It might be argued that s 51(xxvi) applies to everyone, as we are all membersof a racial group. This would lead to the absurd result that the Federal Government could pass a law on any subject matter so long as it applied to a person of any race, even if the legislation made no racial distinctions, or had no relation to the issue of race. This argument was rejected by Gibbs CJ in *Koowarta* when he said '[i]t is true that in some contexts the word "any" can be understood as having the effect of "all", but it would be self-contradictory to say that a law which applies to the people of all races is a special law. It is not possible to construe par (xxvi) as if it read simply "The people of all races".' *Koowarta* (1982) 153 CLR 168, 187.

paragraphs the grounds for developing a robust jurisprudence capable of protecting the fundamental rights and interests of minorities. They said the Parliament could enact racial laws providing they were not in manifest abuse of their power to enact the laws. Mention of a manifest abuse test was earlier made in *Koowarta* and the *Native Title Act Case*, but left unexplained.[18] Gummow and Hayne JJ elaborated briefly in *Kartinyeri* that the test is based upon the common law presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[19] They also said that the Constitution assumes the rule of law as its basis.[20] They offered no further elaboration. Part IV of this article briefly explores the potential of their test, along with Gaudron J's elaboration of her understanding of the manifest abuse test, to offer a robust protection of the fundamental rights and interests of minorities against the unjust and arbitrary exercise of power. Part IV also sees scope for the further development of fundamental common law principles arising from Kirby J's view that the common law may have regard to international law principles of universal and basic human rights.[21] *Kartinyeri* thus acts as a cautionary tale regarding the use of textualism, but it also offers some hope for the protection of fundamental rights of racial minorities in Australia.

II INTERPRETATION METHODS AND CANONS

Constitutional interpretation involves reasoning processes that in many respects are the same as for statutory interpretation.[22] The Constitution is after all a statute.[23] There are however differences.[24] The Constitution, as Isaacs J observed, was 'made, not for a single occasion, but for the continued life and progress of the community'.[25] Additionally,

> many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should

18 *Koowarta* (1982) 153 CLR 186, 245, 261; *Native Title Act Case* (1995) 183 CLR 373, 460–61.

19 (1998) 195 CLR 337, 381.

20 Ibid.

21 Ibid 391.

22 In *Tasmania v Commonwealth* (1904) 1 CLR 329, 338 the Court said that the 'same rules of interpretation apply [to interpreting the Constitution] that apply to any other written document'.

23 See *McGinty v Western Australia* (1996) 186 CLR 140, 230 ('*McGinty*'), (McHugh J) where he said:

> [b]ut since the people have agreed to be governed by a constitution enacted by a British statute, it is surely right to conclude that its meaning must be determined by the ordinary techniques of statutory interpretation and by no other means.

24 *Victoria v Commonwealth* (1971) 122 CLR 353, 394 ('*Payroll Tax Case*'), (Windeyer J), who described the Constitution as 'a statute of a special kind'. See also Kirk, above n 8.

25 *Commonwealth v Kreglinger & Fernau Ltd and Bardsley* (1926) 37 CLR 393, 413.

> apply to whatever facts and circumstances succeeding generations thought they covered.[26]

Despite the differences between interpreting a statute and interpreting the Constitution, the Court applies interpretation methods common to both.

It is reasonably well accepted that the High Court applies three interpretation methods to interpreting the Constitution and other statutes: originalism (alternatively referred to as founding intention), textualism (or literalism) and progressivism (or living force).[27] At various stages in its history the Court has tended to prefer one method of constitutional interpretation to another. Between 1903 and *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*[28] it emphasised originalism, from 1920 until *Cole v Whitfield*[29] it emphasised textualism and from 1988 until relatively recently it has swung back to originalism, although there have been dissenters along the way.[30] Progressivism has crept in from time to time, notably in a number of High Court judgments during the 1990s.[31] In more recent times the Court has on occasion evoked the ghost of textualism. This is evident in *Kartinyeri,* of course, and in *Wakim.*[32] It is worth noting here that a judge usually does not confine himself or herself to a singular interpretation method during his or her career on the bench, and often does not do so in any particular judgment.[33] Two other interpretation methods can be added to the three generally accepted categories mentioned. They are extreme originalism and extreme textualism.

A summary of these various interpretation methods, and indicators for determining which method is being applied in a judgment, follows.

A *Originalism*

An originalist attempts to find the meaning of the text at the time of its enactment. There is some debate as to whether this requires finding the subjective intention of the drafter, or finding the meaning of the text as it could be objectively understood at the time of its enactment. The better view appears to be that the subjective state of mind of the drafter is irrelevant, and is probably not discernible anyway.[34]

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26 *Re Wakim; Ex parte Darvall* (1999) 198 CLR 511 ('*Wakim*'), 552 (McHugh J).

27 See Williams and Bradsen, above n 9, 97.

28 (1920) 28 CLR 129.

29 (1988) 165 CLR 360.

30 See Alexander Reilly, 'Reading the Race Power: A hermeneutic analysis' (1999) 23 *Melbourne University Law Review* 476, 478–79.

31 See below at page 52. See also Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A form of ancestor worship?' (2000) 24 *Melbourne University Law Review* 1.

32 (1999) 198 CLR 511.

33 See Williams and Bradsen, above n 9, 97 where they say that

> [i]n recent cases members of the High Court have invoked all three [interpretation] approaches. [ie originalism, textualism and progressivism] Thus it can be concluded that no approach has proved itself to be exclusive of another.

34 Ibid 97–98. See also *Wakim* (1999) 198 CLR 511, 551 (McHugh J) where he says:

Originalism has been criticised for providing too much scope for judges to choose selectively from the vast quantities of materials available enabling them to reach conclusions that reflect their personal values. Leventhal J castigated originalism as akin to entering a cocktail party and 'looking over a crowd and picking out your friends'.[35]

Indicators of a judge applying originalism include the judge referring to legislative or constitutional history, the Constitutional Debates, committee reports, second reading speeches and other extrinsic sources.[36] It can also be identified where a judge states he or she is attempting to discern the 'legislative purpose' of a statute to assist with finding the intended meaning of text.[37]

B *Extreme Originalism*

According to Sunstein there are two forms of originalism, hard (ie extremist) and soft (ie non-extremist):[38]

> Hard originalism, which is the more famous, is unacceptable. For the hard originalist, we are trying to do something like go back in a time machine and ask the Framers very specific questions about how we ought to resolve very particular problems. ... Soft originalism is a valuable project ... For the soft originalist it matters very much what history shows; but the soft originalist will take the Framers' understanding at a certain level of abstraction or generality. ... The origin of constitutional doctrine is not principally in the understandings of the founders, but rather in the rules developed by the Supreme Court over generations and generations.[39]

Sunstein describes Bork's views in his book *The Tempting of America* as hard originalist.[40] In his book Bork says:

> [a]ll that counts is how the words in the Constitution would have been understood at the time [of its drafting]. The original understanding is thus manifested in the words used and in secondary materials, such as debates at the

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> [t]he starting point for a principled interpretation of the Constitution is the search for the intention of its makers. That does not mean a search for their subjective beliefs, hopes or expectations. Constitutional interpretation is not a search for the mental states of those who made, or for that matter approved or enacted, the Constitution. The intention of its makers can only be deduced from the words that they used in the historical context in which they used them.

See also *Kartinyeri* (1998) 195 CLR 337, 399 (Kirby J).

35 See Patricia M Wald, 'Some Observations on the Use of Legislative History in the 1981 Supreme Court Term' (1983) *Iowa Law Review* 195, 214 (quoting Leventhal).

36 For a more complete list of sources that judges may refer to when interpreting Commonwealth statutes, refer to *Acts Interpretation Act 1901* (Cth) s 15AB.

37 See Richard J Pierce Jr, 'The Supreme Court's New Hypertextualism: An invitation to cacophony and incoherence in the administrative state' (1995) 95 *Columbia Law Review* 748, 750.

38 Cass R Sunstein, 'Five Theses on Originalism' in Symposium on Originalism, Democracy and the Constitution (1996) 19 *Harvard Journal of Law and Public Policy* 311, 312.

39 Ibid 312–14.

40 Ibid.

> conventions, public discussion, newspaper articles, dictionaries in use at the time, and the like.[41]

It appears that it is Bork's narrowing of interpretation down to discovering the meaning of constitutional words as they were understood at the time of drafting and ignoring the jurisprudence subsequently developed around those words that distinguishes him as an extreme (or hard) originalist.

Indicators of extreme originalism include a judge only referring to sources disclosing the meaning of words at the time they were enacted and refusing to take account of judicial opinions or other materials or opinions about the meaning of the text, particularly in the light of post-enactment experience and opinions.

C *Textualism*

A textualist seeks to find the ordinary and natural meaning of provisions as revealed by their words, or text. Textualists dislike referring to legislative history and extrinsic materials. According to Merrill, textualism

> tends to approach problems of statutory interpretation like a puzzle, the answer to which is found by developing the most persuasive account of all the public sources (dictionaries, other provisions of the statute, other statutes) that bear on ordinary meaning.[42]

Criticisms of textualism include that it offers a vehicle for the application of a judge's personal values in the guise of interpreting objective meaning. According to Merrill 'the textualist interpreter does not *find* the meaning of the statute so much as *construct* meaning'.[43] Scalia J has, with unintended irony, castigated originalism as enabling judges to pursue their own desires under the guise or delusion of pursuing unexpressed legislative intents, while at the same time arguing for the 'reasonable person' standard for judging the textual meaning of constitutional provisions.[44] As we well know, the intentions, beliefs and foresight of the fictitious reasonable person are plumbed by the judge — without calling witnesses or evidence of any kind. Textualism has also been criticised for not being able to live up to its claim of objectivism because it enables different judges to refer to different dictionaries, judicial opinions or interpretation canons to find a different 'plain meaning' to the same terms.[45] Thus, textualism can be readily manipulated to enable interpretations of text which are consistent with personally held judicial values.

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41 Robert H Bork, *The Tempting of America: The Political Seduction of the Law* (1990) 144.

42 Thomas W Merrill, 'Textualism and the Future of the *Chevron* Doctrine' (1994) 72 *Washington University Law Quarterly* 351, 354.

43 Ibid 372.

44 See Jane S Schacter, 'The Confounding Common Law Originalism in Recent Supreme Court Statutory Interpretation: implications for the legislative history debate' (1998) *Stanford Law Review* 1, 3.

45 Pierce, above n 37, 765.

Indicators of textualism include the judge referring to dictionary definitions, rules of grammar and interpretation canons to find the 'objective' meaning of words.[46] The use of dictionaries is not a decisive indicator, but if the judge emphasises the language of the provision and its textual construction together with the use of interpretation canons to discern textual meaning, these combined indicate a textualist approach. A textualist may also refer to other judicial opinion, and the usage of the term in question in a particular area of law.[47]

D *Extreme Textualism*

Extreme textualists adopt the same reasoning devices as the textualists, but will tend to dismiss any other interpretation method as being inappropriate. That is, they will tend to claim that textualism is the only appropriate method for discerning the meaning of legislation. Extreme textualists will also find linguistic precision where it does not exist and routinely attribute 'plain meaning' to statutory language that most observers would characterise as ambiguous or internally inconsistent.[48] As Pierce points out, once an extreme textualist has divined the 'plain meaning', he or she can ignore the legislature's intention that the term have a different meaning; that the plain meaning creates internal conflict with other provisions of the legislation or renders other provisions meaningless; that it will undermine agency efforts to further the legislative purpose as stated in the legislation; and the fact that agencies and the public relied on a contrary understanding of the term for decades.[49]

Scalia J argues that textualism is a doctrine of judicial restraint.[50] In fact the opposite is more likely to be the case. Merrill concludes, after making an empirical study of US Supreme Court decisions, that once a court grows comfortable with textualism — in which it becomes an autonomous interpreter that is not required to refer to extrinsic sources — 'its creativity in matters of statutory interpretation begins to expand apace, exemplified perhaps most clearly by the proliferating use of canons'.[51] Indeed, having fewer tools to work with, 'the textualist becomes more imaginative in resolving questions of statutory interpretation'.[52] And so rather than being a doctrine of restraint, textualism offers a means for greater judicial discretion for imposing judicially devised interpretative outcomes.

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46 Ibid 750.

47 Ibid 726.

48 Ibid 752.

49 Ibid 763.

50 The Honourable Antonin Scalia, 'Judicial Deference to Administrative Interpretation of Law' (1989) *Duke Law Journal* 511, 521.

51 Merrill, above n 42, 373.

52 Ibid.

E *Progressivism*

Progressivism requires interpreting the Constitution in a way that represents the will and intentions of contemporary Australians.[53] It requires taking 'full account of contemporary social and political circumstances and perceptions',[54] and incorporates evolutionary standards.[55] As examples of the application of this interpretation method, the High Court has found that although the founders would have intended s 80 of the Constitution (which requires trial by jury) to have meant male only juries, that meaning was inconsistent with the modern understanding.[56] The Court has also held that although the founders would have intended that adult suffrage only applied to adult men, it is now a term that must include adult women.[57]

The application of progressivism can be identified where a judge refers to contemporary standards as a measure of the meaning of a term. It includes taking judicial notice of current community standards and opinions.[58]

III BRENNAN CJ AND MCHUGH J'S APPLICATION OF AN INTERPRETATION CANON IN *KARTINYERI*

Brennan CJ and McHugh J's judgment appears first in *Kartinyeri*. They deployed a number of interpretation devices to avoid deciding the central issue, namely the meaning and purpose of the race power. Their essential task was to decide whether the *Bridge Act* was constitutionally valid. In essence this required them 'to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former'.[59] This involves a two

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53 *Theophanous v Herald & Weekly Times Ltd* (1993) 182 CLR 104 ('*Theophanous*') 173 (Deane J). However, see Haig Patapan's excellent critique of this approach and his questioning of the explicit and implicit claim by the Court that it is in a position to judge and give effect to shifting community values. Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 263–66, 267–68.

54 *Theophanous* (1993) 182 CLR 104, 174.

55 *Cheatle v R* (1993) 177 CLR 541. See generally Williams and Bradsen, above n 9, 102–05.

56 Ibid.

57 *McGinty* (1996) 186 CLR 140, 200–01 (Toohey J). See also McHugh J's rationale for progressivism in *Wakim* (1999) 198 CLR 511, 552:

> Indeed, many words and phrases of the Constitution are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered.

58 For a discussion on this see Patapan, above n 53, 263–71.

59 *United States v Butler* (1936) 297 US 1, 62 (Roberts J).

stepped process: first, identifying the scope of the constitutional provision which grants power; second, identifying the character of the challenged statute to decide whether its subject matter falls within the scope of the power grant.

Brennan CJ and McHugh J avoided the first step leaving a critical issue in an unnecessarily uncertain state. This omission was all the more significant as this was the first case before the court in which the challenged legislation relied solely on s 51(xxvi) for validity.[60] Consequently, they faltered in taking the second step. They ruled the *Bridge Act* valid on the basis of reasoning that relied on matters of form rather than substance. They claimed that the 'only effect of the *Bridge Act* is partially to repeal the Heritage Protection Act'.[61] This reduction of the Act to a single operation has resonance with the extreme textualist device of finding that challenged terms in a statute have a plain, unambiguous, singular and certain meaning. This enables the textualist to avoid inquiries into the history and statutory context of the terms. Similarly, finding the *Bridge Act* had a single operation allowed Brennan CJ and McHugh J to avoid examining the scope of s 51(xxvi) and avoid making a substantive inquiry into the rights, duties and privileges the Act affected.

A *A Strange Turn Of Logic: The Use And Abuse Of The Amending Rule*

Let us return to the first claim made in this part — that Brennan CJ and McHugh J avoided deciding the meaning and scope of s 51(xxvi). On this point they were quite explicit. They said it was unnecessary and misleading for them to determine the nature and scope of s 51(xxvi) because:

> Once it is accepted that s 51(xxvi) is the power that supports Pt II of the Heritage Protection Act, an examination of the nature of the power conferred by s 51(xxvi) for the purpose of determining the validity of the Bridge Act is, in our respectful opinion, not only unnecessary but misleading. It is misleading because such an examination must proceed on either of two false assumptions: first, that a power to make a law under s 51 does not extend to the repeal of the law and, second, that a law which does no more than repeal a law may not possess the same character as the law repealed. It is not possible, in our opinion, to state the nature of the power conferred by s 51(xxvi) with judicial authority in a case where such a statement can be made only on an assumption that is false.[62]

Ironically, the criticisms they made of the false assumptions themselves relied on the creation of false dichotomies. First, they suggested that a challenge to the *Bridge Act* must be based on the false assumption that a power to make a law under s 51 does not extend to the repeal of the law. It is possible, however, to accept that an Act that partially or wholly repeals another is unconstitutional

60 See above n 3.

61 *Kartinyeri* (1998) 195 CLR 337, 354.

62 Ibid 358. See also pp 352–53 where they say consideration of the operation and effect of the *Bridge Act* 'can be ascertained only by reference to the *Heritage Protection Act,* the operation of which it is expressed to affect'.

without accepting the proposition that the power to make a law does not include the power to repeal the law.[63] Putting that more positively, even if the power to make a law includes the power to repeal it, this does not mean that a law must be valid *merely because* it effects a partial or total repeal. There is no doubt that the provisions granting power in the Constitution to enact legislation impliedly include the power to repeal and amend the legislation. This implication derives from a common law interpretation rule, which can be conveniently called 'the amending rule'.

Brennan CJ and McHugh J pointed out that the rule has had a long life.[64] In the case of ordinary statutes it implies that the power to make subordinate legislation under an Act includes the power to amend or repeal the subordinate legislation. In the case of the Constitution, it implies that constitutional power grants include the Parliamentary power to amend or repeal legislation under the power grant. In the case of statutes, the common law rule has been given statutory effect by Interpretation legislation. The first legislation to give legislative effect to the rule was the English Interpretation Act 1889 ss 37 and 39. It seems that prior to the enactment the power to amend and repeal had to be implied by common law rule or be expressly granted by statute.[65] The English *Interpretation Act's* expression of the amending rule is replicated in section 33(3) the Commonwealth *Acts Interpretation Act 1901* (Cth).[66]

1 *The Amending Rule Should Not Limit Judicial Review*

The amending rule is a useful utility, otherwise every power grant would have to tediously include words to the effect that 'this power includes the power to amend, repeal or partially repeal any [subordinate] legislation under this [power

63 Ibid 356 where Brennan CJ and McHugh J say:

> [t]o the extent that a law repeals a valid law, the repealing law is supported by the head of power which supports the law repealed unless there be some constitutional limitation on the power to effect the repeal in question. Similarly, a law which amends a valid law by modifying its operation will be supported unless there be some constitutional limitation on the power to effect the amendment. Thus in *Air Caledonie International v The Commonwealth*, the attempt to amend the *Migration Act 1958* (Cth) by the *Migration Amendment Act 1987* (Cth) failed because the amendment purported to insert a taxing provision in the principal Act contrary to s 55 of the Constitution.

64 Ibid 355 where they refer to Sir Edward Coke's *Institutes of the Laws of England*, 36 (quoted from the 1797 edition) and *Blackstone's Commentaries* (9th ed, 1783) Bk 1, 160.

65 Samuel G G Edgar, *Craies on Statute Law* (7th ed, 1971) 296.

66 Section 33(3) states:

> [w]here an Act confers a power to make, grant or issue any instrument (including rules, regulations or by-laws) the power shall, unless the contrary intention appears, be constructed as including a power exercisable in the like manner and subject to the like conditions (if any) to repeal, rescind, revoke, amend, or vary any such instrument.

In Acts prior to 1890 which authorise the making of rules, regulations or by-laws, a power of rescission or variation must, it would seem, have been given expressly or by necessary implication in order to authorise any alteration of the rules etc.

grant/Act]'. But this useful rule should not be misused to avoid inquiries of substance regarding any issue of ultra vires or constitutionality. The amending rule is given only limited operation under the *Acts Interpretation Acts*, and arguably also has either an equally limited operation in a constitutional context, or an even more limited operation, given the emphasis on issues of substance rather than form. According to *Craies on Statute Law* the result of the amending rule

> is to permit revocation of many kinds of rules and by-law without reference to Parliament. But the revoking instrument and any substituted rules are as much subject to judicial examination as the original rules. [67]

Thus, the amending rule should not be invoked to limit judicial review of a repealing or amending Act. The amending or repealing Act should be reviewed in the same way as the principal Act. Putting the amending rule in a slightly different way, it should operate to deny a challenge to an Act's validity on the basis it is an amending or repealing Act and that the Constitution (or statute) makes no express mention of the power to amend or repeal the Act. The rule should therefore have a limited operation and should not inhibit any inquiry of substance into the nature of the rights, duties, powers and privileges which an amending or repealing Act changes, regulates or abolishes.

2 *Characterising The Amending Act*

The second false assumption Brennan CJ and McHugh J mentioned in the quote above is that a challenge to the *Bridge Act's* validity must be based on the assumption that a law which does no more than repeal a law may not possess the same character as the law repealed. Care needs to be taken with this statement. Remember first that the *Bridge Act* did not simply repeal the *Heritage Protection Act*, rather it effected a 'partial repeal'.[68] So it was not a simple case of an Act simply repealing a statute outright. It is wrong as a matter of logic to turn what I believe to be a correct statement, namely statement (A) that a law that partially repeals a principal Act *may* in some cases not have the same character as the principal Act; into statement (B) that statement (A) proceeds on the false assumption that a partially repealing law *cannot* have the same character as the principal Act.

Putting it another way, if I say that Betty, a child of blue eyed parents, does not have blue eyes, I am not proceeding on the false assumption that no children of blue eyed parents can have blue eyes. Certainly most partially repealing laws will have the same character as the principal Act they repeal, but not all will. It will take an inquiry into the substantive effect and operation of the principal Act after its partial repeal to find out whether or not it still retains a character that falls within the power grant. The inquiry would be into the rights, duties and privileges that the partially repealing law creates, changes, abolishes or regulates.

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67 Edgar, above n 65, 296.

68 *Kartinyeri* (1998) 195 CLR 337, 353 (Brennan CJ and McHugh J).

B *A Restricted Characterisation Of The Bridge Act*

Having avoided making a decision about the nature and scope of s 51(xxvi), Brennan CJ and McHugh J set about the second task, namely to determine the character of the *Bridge Act*. They began by restating the characterisation test,[69] which is neatly described by Mason CJ in *Cunliffe v The Commonwealth*:

> There is authority for the proposition that, for the purpose of determining whether a law can be described as one 'with respect to' a particular head of legislative power, the character of that law is to be determined by reference to its direct legal operation according to its terms. Thus, the character of the law is to be ascertained by reference to the nature of the rights, duties and privileges which it creates, changes, abolishes or regulates.[70] But this is not to deny the validity of a law which exhibits in its practical operation a substantial or sufficient connection with the relevant head of power.[71]

Brennan CJ and McHugh J characterised the *Bridge Act* as only having the effect of reducing the operation of the *Heritage Protection Act*.[72] This was insisted upon a number of times. At para 17 they said that as 'the Bridge Act has no effect or operation other than reducing the ambit of the Heritage Protection Act, s 51(xxvi) supports it', and at para 19 they added that the 'only effect of the Bridge Act is partially to exclude the operation of the Heritage Protection Act in relation to the Hindmarsh Bridge area'. Gummow and Hayne JJ did not, however, share their restrictive characterisation of the *Bridge Act*. Gummow and Hayne JJ found that the *Bridge Act* 'withdraws from the Minister the powers otherwise conferred by s 10 (and 12) of the Heritage Protection Act' and 'removes from the Minister the power to take any action in respect of applications' under the *Heritage Protection Act*.[73] It also 'changes what otherwise would be the continued operation of the Heritage Protection Act';[74] removes the plaintiffs' procedural rights;[75] 'curtails the operation of another law of the Commonwealth [ie the *Heritage Protection Act*], not the enjoyment of any substantive common law rights';[76] 'limits in a particular respect the declaration–making authority of the Minister under the Heritage Protection Act';[77] 'removes any privilege conferred by the Heritage Protection Act upon Aboriginals or Aboriginal groups who applied or might apply seeking such

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69 Ibid 353. See also 372 (Gummow and Hayne JJ).

70 *Bank of NSW v The Commonwealth* ('*Bank Nationalization Case*') (1948) 76 CLR 1, 187 (Latham CJ); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 7 (Kitto J), 16 (Taylor J); *Actors and Announcers Equity Association v Fontana Films Pty Ltd*(1982) 150 CLR 169, 184 (Gibbs CJ), 201–02 (Mason J).

71 (1994) 182 CLR 272, 294 (Mason CJ).

72 *Kartinyeri* (1998) 195 CLR 337, 369.Gaudron J appeared to agree with that characterisation by stating that the *Bridge Act* limited the field of operation of the *Heritage Protection Act*.

73 Ibid 375–76.

74 Ibid 376.

75 Ibid.

76 Ibid 376–77.

77 Ibid.

declaration in respect of areas or objects in the Hindmarsh Island bridge area or the pit area';[78] and 'imposes a disadvantage, of the nature identified above'.[79]

How, exactly, did Brennan CJ and McHugh J characterise the *Bridge Act* as being within power? In answer it should first be noted that their 'characterisation' of the Act was in fact no characterisation at all. They simply described the procedural operation of the *Bridge Act* — ie that it partially repealed the *Heritage Protection Act*. Second, it should be noted that they assumed, without giving any reasons, that the *Heritage Protection Act* was within power.[80] They then raised themselves on the shoulders of that assumption to claim that the partial repeal of the *Heritage Protection Act* must be within power. By doing this they avoided having to make any pronouncement on the scope of the race power. Third, they insisted that the *Bridge Act* had the effect of partially repealing, or *reducing*, the operation of the *Heritage Protection Act*.[81] They had to insist on this to avoid a claim that the *Bridge Act* was in fact *expanding* the operation of the *Heritage Protection Act*.

The significance of the final point can be illustrated this way. If, for example, the *Heritage Protection Act* allowed for the forced removal of Aboriginal people from certain sites, subject to compensation and appeal rights, and a subsequent Act repealed the provisions providing for compensation and appeal rights, then it is plausible that the character of the *Heritage Protection Act* would be changed. So if, for example, the Court ruled that s 51(xxvi) only permits laws that positively discriminate in favour of Aborigines,[82] then it would be necessary to decide whether the partial repeal results in a positively or negatively discriminatory law. So the expansionist/reductionist dichotomy is in fact meaningless unless we first know what the meaning and scope is of the race power. It is only then that we can decide whether the partially repealed Act is of a character that falls within the race power.

C *Conclusion*

The reasons why Brennan CJ and McHugh J went to such lengths to avoid an examination of the meaning and scope of s 51(xxvi) can only be speculated upon.[83] What they did, however, was to deploy a device, which has a resonance

78 Ibid.

79 Ibid 379.

80 Ibid 354.

81 Ibid.

82 Which Brennan J proposed was the situation in the *Tasmanian Dam Case* (1983) 158 CLR 1, 242. See also 273 (Deane J). I put the argument about s 51(xxvi) requiring laws that positively discriminate and the *Bridge Act* negatively discriminating, not because I necessarily agree with it, but to illustrate the problem with the expansion/reduction dichotomy regarding the validity of amending Acts.

83 They may have felt that the case did not offer a fact scenario for building the jurisprudence. There was a considerable amount of controversy surrounding the case, leading to a Royal Commission into the claims of the Ngarrindjeri people, of whom the applicants were members,

with extreme textualism. An extreme textualist will routinely deny that the text has any inherent ambiguity or inconsistency, so that the textualist is not faced with the task of referring to extrinsic material or historical and social context to resolve the ambiguity or inconsistency. The text is reduced to a singular 'plain meaning' to avoid contextual inquiries. Similarly, Brennan CJ and McHugh J reduced the *Bridge Act* to a singular, mechanistic role, ie to partially amend the *Heritage Protection Act*. By reducing the *Bridge Act* to this singular character, they then claimed that it was unnecessary to inquire into its impact upon the rights and interests of the applicants. Their fixation on form over substance brought them dangerously close to the morally void universe of narrow positivism, which the Australian courts have regularly visited for much of the 20th, and late 19th centuries.[84]

IV INTERPRETING THE MEANING AND SCOPE OF S 51(XXVI)

The other judgments in *Kartinyeri*, unlike Brennan CJ and McHugh J's judgment, did interpret the meaning and scope of the race power. Gummow and Hayne JJ took a textualist route, whilst Gaudron J placed emphasis on the fact that the words 'for whom it is deemed necessary to make special laws' in s 51(xxvi) limit the scope of Parliamentary power.[85] She reached her conclusions by applying textualist and originalist interpretation methods. Kirby J made originalist references to the intentions of the authors of the race power and the 1967 amendment to conclude that the provision only permits laws that benefit Aboriginal people. He also reinforced his conclusion by referring to a presumption that the Constitution was adopted and accepted by the people of Australia on the basis that it is not intended to violate fundamental human rights and human dignity.[86] This parallels Gummow and Hayne JJ's reference to the common law presumption that statutes do not intend to interfere with common law rights, freedoms and immunities, which is discussed further below.[87]

Each of the judgments will now be considered in turn.

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that the bridge area was a sacred site. The matter had come before the courts a number of times and a number of federal government initiated inquiries were also made into the matter. See *Kartinyeri* (1998) 195 CLR 337, 386–88 (Kirby J).

84 Justin Malbon, 'Natural and Positive Law Influences on the Law Affecting Australia's Indigenous People' (1997) 3 *Australian Journal of Legal History* 1, 25–38.

85 *Kartinyeri* (1998) 195 CLR 337, 363.

86 Ibid 417.

87 Ibid 381.

A *The Reasoning Of Gummow And Hayne JJ: A Retreat Into Textualism*

Gummow and Hayne JJ took a textualist approach bordering on the extreme textualist. They raised doubts about the need to consider the constitutional history of s 51(xxvi)[88] and emphasised that the text of s 51(xxvi) controls its meaning.[89] To the extent they considered any constitutional history, it was limited to the 1967 amendment, and even then they disputed the claim that the referendum was aimed at providing the Commonwealth the power to enact only beneficial laws for Aborigines. The referendum led to the alteration of s 51(xxvi) so as to remove the following words that are struck through from the provision: '[t]he people of any race ~~other than the aboriginal race of any State~~ for whom it is deemed necessary to make special laws'. Gummow and Hayne JJ stated that the referendum was about federalism and mentioned briefly that the Commonwealth did not pursue the option of repealing s 51(xxvi) altogether. They referred to the official 'yes' case for the 1967 referendum that was put to the electors by the Parliament[90] and concluded that it 'emphasised considerations of federalism' and did 'not speak of other limitations upon the nature of the special laws beyond confirming that they might apply to the people of the Aboriginal race "wherever they may live" rather than be limited to the Territories'.[91] They added that the amendment to the Constitution was proposed after learned advice that a complete repeal of s 51(xxvi) would be preferable to 'any amendment intended to extend to the Aboriginals "its possible benefits"'.[92]

Their conclusion only tells half the story. The document setting out the 'yes' case is not particularly lengthy, yet Gummow and Hayne JJ failed to mention its stated aim that the proposed amendment would remove the widely held belief that the unamended s 51(xxvi) discriminates in some ways against Aborigines.[93] Kirby J, on the other hand, makes a thorough examination of the history of the amendment and concludes that there was a clear desire by the Parliamentarians proposing the amendment to the electors to enable the Commonwealth to enact laws for the benefit of Aboriginal people.[94] Even a relatively limited examination

88 Ibid 382.

89 Ibid 381.

90 Commonwealth Electoral Office, 'Referendums to be held on Saturday, 27th May, 1967' (1967) Parliament was required under the *Referendum (Constitution Alteration) Act 1906* (Cth), s 6A(1) (since replaced by the *Referendum (Machinery Provisions) Act 1984* (Cth), ss 11(1) and (2)) to prepare a 'yes' case only there having been no opposition within the Parliament to the proposed alterations to the Constitution, it was necessary, in the procedures which followed, to prepare only the argument in favour of the proposed law to be distributed in pamphlet form to the electors.

See ibid 382 (Kirby J).

91 Ibid.

92 Ibid.

93 Commonwealth Electoral Office, 'Referendums to be held on Saturday, 27th May' (1967) 11.

94 Ibid 408 (Kirby J)

> the leaders of all of the major Australian political parties issued statements supporting the amendment to par (xxvi) and the repeal of s 127. The Prime Minister

of the history of the 1967 referendum reveals that it was about more than just federalism. It was also about improving the poor state in which many Aborigines were living as the result of decades of neglect and discrimination by State governments.

1 *Decontextualising The Words Of Section 51(xxvi)*

Gummow and Hayne JJ applied textualism with a rigour that allowed them to dice up the words and phrases of s 51(xxvi) and interpret each of them almost as if they were independent of each other. Recall the provision provides the Federal Parliament the power to make laws with respect to the 'people of any race for whom it is deemed necessary to make special laws'. Gummow and Hayne JJ claimed that the 'requirement that the Bridge Act be "special" [under s 51(xxvi)] does not relate to the matter of necessity'.[95] They relied on dicta from the *Native Title Act Case* for this proposition.[96] However, the context in which the Court made that statement in the *Native Title Act Case* made it clear that it was for Parliament, and not the courts, to deem it necessary to make a special law. Consequently in the *Native Title Act Case* emphasis was placed on the fact that 'the special quality of a law must be ascertained by reference to its differential operation upon the people of a particular race, not by reference to the circumstances which led the Parliament to deem it necessary to enact the law'.[97] The point of emphasis being made was that the Court did not understand s 51(xxvi) as evoking a 'judicial evaluation of the needs of the people of a race or of the threats or problems that confronted them in order to determine whether the law was, or could be deemed to be, "necessary"'.[98] That would obviously invite the Court to substitute its own political evaluation for that of Parliament's. The Court did allow that it may have some supervisory jurisdiction to examine the question of necessity against the possibility of a manifest abuse of the race power, but

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(Mr Holt), in his statement said that it was not acceptable to the Australian people that the national Parliament 'should not have power to make special laws for the people of the Aboriginal race, *where that is in their best interests*'. For the Federal Opposition, Mr Whitlam stated that the then provisions of the Constitution were 'discriminatory'. He pointed out the need to assist Aboriginal communities in the realms of housing, education and health, and stated that the Commonwealth must 'accept that responsibility on behalf of Aboriginals'. It was also vital, he argued, to remove the excuse 'for Australia's failure to adopt many international conventions affecting the welfare of Aborigines' For the Australian Country Party, its Deputy Leader, Mr Anthony, explained that the amendment to the Constitution 'would give the Commonwealth Government, for the first time, power to make special laws*for the benefit of* the Aboriginal people throughout Australia'. For the Australian Democratic Labor Party, Senator Gair titled his statement 'End Discrimination — Vote "Yes"' and explained that his Party had 'adopted the slogan "Vote Yes for Aboriginal Rights"'.

95 Ibid 379.

96 (1995) 183 CLR 373, 460–61 citing *Koowarta* (1982) 153 CLR 168, 186, 245, 261.

97 (1995) 183 CLR 373, 460–61.

98 Ibid 460.

decided not to further consider the possibility as it was not relevant to the matter before them.

Gummow and Hayne JJ effectively used the Court's concern in the *Native Title Case* about avoiding making political judgments to substantially narrow any scope for judicial review. They reasoned that so long as the law treats people differently on the basis of race it is ipso facto valid, Parliament's decision-making process regarding the enactment of the law being for the most part irrelevant for the purposes of judicial review. This point is underlined by Gummow and Hayne JJ's emphasis on the term 'special law' as granting power to enact racial laws, and not as offering grounds for challenging the validity of such legislation:

> The requirement of differential operation, spelled out from the use of the phrase 'special laws', is a criterion of validity not a cause of invalidity. It is 'of the essence of' a law supported by s 51(xxvi) 'that it discriminates between the people of the race for whom the special laws are made and other people.[99]

Thus, they claimed, s 51(xxvi) grants Parliament the power to enact special laws, that is racial laws. They are laws that treat people differently because of their race, and it does not matter whether that law is beneficial or otherwise. Presumably such laws as the racist laws of South Africa during apartheid, the Third Reich, the United States before the *Civil Rights Act* or all of the Australian States regarding Aborigines and Torres Strait Islanders would all fall within their description of special laws. Any concerns one may have about the frightening potential of this interpretation is dismissed by Gummow and Hayne JJ with the statement that:

> Extreme examples, given particularly the lessons of history (including that of this country), may be imagined. But such apprehensions cannot, in accordance with received doctrine, control what otherwise is the meaning to be given today to heads of federal legislative power.[100]

2 *The 'Manifest Abuse' Test*

Gummow and Hayne JJ did however offer one ground for judicial review, namely the manifest abuse test. But they left it far from clear as to how much of a restraint on Parliamentary power the test provides. They stated that the term 'deemed necessary' restrains Parliament from acting in 'manifest abuse' of its power of judgment to deem it necessary to enact the law.[101] This raises the question: in what circumstances would Parliament be acting in manifest abuse of its powers of judgment? In answer, they suggest that the manifest abuse test somehow relates to the common law's presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[102] The presumption may, however, be rebutted if the legislative intention to interfere with the rights is 'clearly manifested by unmistakable and unambiguous language'.[103] Second, Gummow

99 *Kartinyeri* (1998) 195 CLR 337, 380, quoting from *Koowarta* (1982) 153 CLR 168, 261.

100 Ibid.

101 Ibid 378.

102 Ibid 381.

103 Ibid.

and Hayne JJ reminded us that the Court can judicially review legislation on the basis of the *Marbury v Madison* doctrine.[104] This point turns on itself because there must first be some basis in the Constitution for judicial review. Finally, they quote Dixon J as saying that the Constitution assumes the rule of law as its basis.[105] They admitted that the implications of this have not been considered by the Court and provide no further enlightenment on the statement.

The upshot of this is that the manifest abuse test appears to rest on some vague and unarticulated notion of the rule of law. Kirby J believed it to be a weak test. He raised concerns about the 'inherent stability' of the test, stating that by 'the time a stage of "manifest abuse" and "outrage" is reached, courts have generally lost the capacity to influence or check such [racist] laws'.[106] It is possible, however, that Gummow and Hayne JJ's manifest abuse test is the harbinger of a test providing substantial protection of common law rights. There is insufficient space in this article to explore this possibility, and certainly Gummow and Hayne JJ offered no further enlightenment on their understanding of the scope and applicability of the test. However, to flag possibilities I will explore in a later article, their test does have profound potential to ensure the protection of the interests of racial minorities. As a starting point it can be noted that the Constitution is a statute — admittedly of a special kind — that was enacted by Westminster after the approval of the electors in the various Australian colonies in 1899–1900. Gummow and Hayne JJ's manifest abuse test incorporates the presumption that statutes do not intend to interfere with common law rights, freedoms and immunities.[107] As the Constitution is a statute, it follows that s 51(xxvi) should be read with the presumption that there is no intention to interfere with common law rights, unless the provision expressly, and unambiguously states otherwise. No such intention to interfere with common law rights is expressed in s 51(xxvi). Even if we refer to the Constitutional debates to divine the intentions of the founding fathers, we gain no clear indication of an intention to undermine common law rights, although admittedly the provision was included at a time when there was a strong belief in racial superiority.[108] In any event the intention behind the 1967 amendment was for a power that enabled laws to benefit Aborigines, and no mention was made of interfering with common law rights.[109] Despite the underlying intentions of the provision's authors, the intention to undermine common law rights must be clearly expressed in the words of the provision itself to rebut the presumption, and no such intention is expressed in the words of s 51(xxvi).[110]

The common law is organic and its principles regarding rights, freedoms and immunities are capable of continual development. It may well be capable of

104 Ibid.

105 Ibid.

106 Ibid 416.

107 Ibid 381.

108 Malbon, above n 6, 92–98.

109 *Kartinyeri* (1998) 195 CLR 337, 40–408, 410 (Kirby J).

110 *Coco v The Queen* (1994) 179 CLR 427, 437.

adopting and adapting international law developments regarding fundamental human rights. Brennan J stated in *Mabo [No 2]* that the

> common law does not necessarily conform with international law, but international law is a legitimate and important influence on the development of the common law, especially when international law declares the existence of universal human rights.[111]

In *Kartinyeri* Kirby J stated that the common law forbids violations of fundamental human rights and human dignity, and that in

> the contemporary context it is appropriate to measure the prohibition by having regard to international law as it expresses universal and basic rights. Where there is ambiguity in the common law or a statute, it is legitimate to have regard to international law.[112]

Further, and by way of added emphasis, Gummow and Hayne JJ add, regarding the manifest abuse test, that the Constitution is framed in accordance with the rule of law. There is a deal of debate about the extent and meaning of the rule of law, but it assumes as a minimum compliance with due process (as opposed to the arbitrary exercise of power) and equality of treatment before the law.[113] The common law tradition regarding the rule of law well precedes modern democracy to at least the 13th Century and Magna Carta,[114] and includes principles laid down in the Bill of Rights of 1689 regarding prohibitions against excessive bail and penalties, and cruel and unusual punishments.

As Gummow and Hayne JJ mentioned, the principle of *Marbury v Madison* places a duty on the courts to ensure the legislature complies with the Constitution. This does not mean that the Courts can substitute their political judgement for that of Parliament about what legislation ought to be enacted, but the Courts are obliged to ensure, to the extent that proposed legislation affects common law rights, that Parliament acts on a rational basis. Gaudron J confirmed this proposition in *Kartinyeri* when she said that

> a law which deals differently with the people of a particular race and which is not reasonably capable of being viewed as appropriate and adapted to a difference of the kind indicated has no rational basis and is, thus, a 'manifest abuse of the races power'.[115]

Therefore, on the basis of the elaboration of the manifest abuse test just outlined, legislation enacted under the race power must not interfere with common law rights, freedoms and immunities, and the rule of law. The common law is not stagnant, and is capable of developing along the lines of fundamental international

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111 (1992) 175 CLR 1.

112 *Kartinyeri (1998)* 195 CLR 337, 417.

113 See Patrick Parkinson, *Tradition and Change in Australian Law* (2nd ed, 2001) 96–98.

114 See David Clark, 'The Icon of Liberty: The status and role of *Magna Carta* in Australian and New Zealand Law' (2000) 24 *Melbourne University Law Review* 866. Clark mentions that the *Magna Carta* has been evoked in various cases regarding principles of sentencing, the right to trial according to law, prohibitions on arbitrary detention, the separation of powers, and the prohibition against cruel and unusual punishment. See part iv of his article.

115 *Kartinyeri* (1998) 195 CLR 337, 366.

human rights principles. And Parliament must ensure that any law that differentiates on the basis of race does so on some rational basis.

Again, it is a matter of speculation as to how effective Gummow and Hayne JJ intended their manifest abuse test to be. Their extreme textualism, however, builds their interpretation of s 51(xxvi) upon a highly unstable foundation. Textualism offers the illusion of stability. Because the text is unchanging it might be thought that the meaning of the text is unchanging. In reality, our understanding of text is socially and historically contingent. The term 'race', for example, has undergone tremendous transformation during the 20th century — a point ignored by Gummow and Hayne JJ.[116] In addition, as the textualist judge has fewer sources external to the text, such as extrinsic materials, to restrain his or her views about the meaning of the text, the judge has greater scope to impose judicially derived interpretive outcomes.

B *Gaudron J — A Minimalist Amendment*

Gaudron J applied a mix of non-extremist textualist, non-extremist originalist and progressivist approaches to interpreting s 51(xxvi). Her textualism led her to conclude that the provision does not simply apply for the benefit of Aboriginal people, as Kirby J concluded. She applied originalism to focus primarily on the intentions underlying the 1967 referendum, but concluded the intentions expressed at the time were subject to the explicit words of the text of s 51(xxvi). Here she noted the sharp disjuncture between the stated purpose behind the 1967 referendum and the words of s 51(xxvi). As Gaudron J noted, the provision makes no mention of Aborigines (in fact the mention of them was removed), nor does it say anything about a requirement that laws be non-detrimental.[117] So although the purpose of the legislature in proposing the amendment to the electorate for their approval at a referendum was to enable the Commonwealth to enact laws for the benefit of Aborigines, s 51(xxvi) does not make any mention of that requirement. In addition the words of the provision do not suggest that Parliament's power to make laws regarding people of the 'Aboriginal race' differs in any way from its power regarding other races. The Parliamentary and other debates in 1967 are silent on the issue of the intended scope of an amended s 51(xxvi) regarding non-Aboriginal racial groups. It seems that the matter was not given much, if any, consideration at the time.

An interpreter is therefore left with the plain words of s 51(xxvi), which support Gaudron J's conclusion that:

> The 1967 amendment was one that might fairly be described in today's terms as a 'minimalist amendment'. As a matter of language and syntax, it did no more than remove the then existing exception or limitation on Commonwealth power with respect to the people of the Aboriginal race. And unless something other than

116 See generally Malbon, above n 6.

117 *Kartinyeri* (1998) 195 CLR 337, 361.

> language and syntax is to be taken into account, it operated to place them in precisely the same constitutional position as the people of other races.[118]

And that position was established when the Constitution was written and enacted at the turn of the 19th and 20th centuries. There is little doubt that at least some of the Constitution's founders intended that the race power would enable the Federal Government to enact laws that members of affected racial groups would consider to be detrimental.[119] However, as Gaudron J found, the words 'for whom it is deemed necessary to make special laws' in s 51(xxvi) 'must be given some operation. And they can only operate to impose some limit on what would otherwise be the scope of s 51(xxvi)'.[120] As Gaudron J puts it:

> The criterion for the exercise of power under s 51(xxvi) is that it be deemed necessary — not expedient or appropriate — to make a law which provides differently for the people of a particular race or, if it is a law of general application, one which deals with something of 'special significance or importance to the people of [that] particular race'.[121] Clearly, it is for the Parliament to deem it necessary to make a law of that kind. To form a view as to that necessity, however, there must be some difference pertaining to the people of the race involved or their circumstances or, at least, some material upon which the Parliament might reasonably form a political judgment that there is a difference of that kind.[122]

Gaudron J added that two things follow from this criteria. The first is 'that s 51(xxvi) does not authorise special laws affecting rights and obligations in areas in which there is no relevant difference between the people of the race to whom the law is directed and the people of other races'.[123] Second, 'the law must be reasonably capable of being viewed as appropriate and adapted to the difference asserted'.[124] Using this test it is conceivable that the Federal Parliament would have had the power to enact the 'protectionist' legislation that was enacted by the States in the 19th century and for much of the 20th century if, at the time s 51(xxvi) was first enacted, it included the power over Aborigines as it does now. The protectionist legislation of the States confined many Aboriginal and Torres Strait Islander people to reserves, restricted their right to marry, led to the forced removal of their children and imposed numerous other restrictions on their fundamental human rights.[125] The widely held belief when the Constitution came into force was that some races were biologically and intellectually superior to others. Given the predominance of that belief, Parliament might have reasonably

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118 Ibid.

119 See Malbon, above n 6, 87–94.

120 *Kartinyeri* (1998) 195 CLR 337, 363.

121 *Native Title Act Case* (1995) 183 CLR 373, 461.

122 *Kartinyeri* (1998) 195 CLR 337, 365. See also 412, Kirby J said

> The test of necessity in par (xxvi) is a strong one. It is to be distinguished from advisability, expedience or advantage. Its presence in par (xxvi) indicates that a particular *need* might enliven the *necessity* to make a special law.

123 Ibid 366.

124 Ibid.

125 Malbon, above n 6, 102.

formed the political judgement earlier in the 20th century that the inferior Aboriginal races needed special legislation to 'protect' them.[126]

Experiences of the 20th century, as Kirby J pointed out, discredited the widely held belief in racial superiority. So, in the early part of the 20th century it was believed that Aborigines were racially inferior. The relevant difference between Aborigines and non-Aborigines was believed to be their biological and intellectual inferiority, which (if the Federal Government had the power over Aborigines) would have meant that protectionist legislation would be viewed as appropriate to the difference asserted. However, on Gaudron J's reasoning, the Federal Parliament presently has no power to enact protectionist legislation because belief in racial superiority is now discredited. The general belief now is that Aborigines, relative to the non-Aboriginal population, suffer poor health and education standards and high imprisonment rates because of a long history of systemic discrimination, and not because of any inherently inferior racial characteristics.[127] Thus, there is no relevant racial difference justifying protectionist or negatively discriminatory legislation.[128] There is, however, justification for legislation discriminating in favour of Aborigines to the extent that it overcomes the social disadvantages which have been created by the long history of systemic negative discrimination.

Gaudron J applied progressivism to interpreting s 51(xxvi) to the extent that she concluded that it had a temporal operation. She stated that the scope of s 51(xxvi)

> necessarily varies according to circumstances as they exist from time to time. In this respect the power conferred by par (xxvi) is not unlike the power conferred by s 51(vi) to legislate with respect to defence.[129] And as with the defence power, a law that is authorised by reference to circumstances existing at one time may lose its constitutional support if circumstances change.[130]

126 Ibid 87–89.

127 Ibid 108–09.

128 Ibid 110–12.

129 See with respect to the changing scope of the defence power: *Farey v Burvett* (1916) 21 CLR 433, 441–43 (Griffith CJ), 453–55 (Isaacs J); *Andrews v Howell* (1941) 65 CLR 255, 278 (Dixon J), 287(McTiernan J); *Adelaide Company of Jehovah's Witnesses Inc v The Commonwealth* (1943) 67 CLR 116, 161–63 (Williams J); *Victorian Chamber of Manufacturers v The Commonwealth Women's Employment Regulations* (1943) 67 CLR 347, 399–400 (Williams J); *Stenhouse v Coleman* (1944) 69 CLR 457, 471–72 (Dixon J); *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 195, 197, 199 (Dixon J), 207 (McTiernan J), 222–23, 227 (Williams J), 253–55 (Fullagar J), 273–74 (Kitto J); *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 596–97 (Gaudron J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 484 (Brennan and Toohey JJ).

130 *Kartinyeri* (1998) 195 CLR 337, 367.

C *Kirby J — Putting The Words In Social And Historical Context*

Kirby J applied both non-extremist originalism and progressivism, so as to allow him to contextualise the meaning and scope of s 51(xxvi).[131] He undertook an extensive analysis of the history regarding the adoption and amendment of the provision, and considered the intentions underlying the original drafting and the amendment. He concluded, particularly from the intentions underlying the 1967 amendment, that the provision was designed for the benefit of Aborigines. In applying progressivism, he referred to an interpretative principle which requires the Court, when faced with an ambiguous provision, to adopt a meaning that conforms to the principles of universal and fundamental rights rather than one that departs from those principles.[132] He suggested that these principles are contemporary in nature, and that in defining them it is appropriate to have regard to current international law principles to the extent they refer to universal and basic rights.[133] Kirby J's progressivism also led him to conclude that the requirement under s 51(xxvi) that laws be deemed 'necessary' and be 'special' sets a criterion of limitation that must be given meaning according to the understanding of the Constitution as read today.[134] The terms 'necessary' and 'special' are not to be understood as it might have been in 1901, he said, as such 'a static notion of constitutional interpretation completely misunderstands the function which is being performed'.[135]

Kirby J concluded from his originalist analysis of s 51(xxvi), that the provision does not permit laws that are detrimental to, and adversely discriminatory against, people of the Aboriginal race of Australia by reference to their race.[136] He relied heavily on the stated purpose of the 1967 amendment to draw that conclusion.[137] Kirby J's beneficial test is not, however, as robust as it may first appear. In whose opinion, for instance, does the law benefit the people affected by it? Presumably that judgement should be left to Parliament. The State Parliaments in the past enacted legislation that seriously undermined the most

131 See ibid 401–09 and 411 for his historical analysis.

132 Ibid 417.

133 Ibid.

134 Ibid 411.

135 Ibid 412.

136 Ibid 422.

137 It is interesting to note that Kirby J has disclaimed himself as an originalist. In an article 'Constitutional Interpretation and Original Intent: A form of ancestor worship?' (2000) 24 *Melbourne University Law Review* 1, 8 he writes that

> I want to add a few words as to why history and original intent provide poor guides for the task and why it is incumbent on us to construe the Constitution as a living document so that (as far as its words and structure permit) it serves effectively the governmental needs of contemporary Australians.

Yet Kirby J makes prolific use of history and reference to extrinsic material to identify the original intention of the founders when drafting the Constitution and the views of the Parliamentarians who enacted the legislation to put the 1967 referendum to the Australian electors.

basic and fundamental rights of indigenous people on the basis that it was for their protection. Parliament would no doubt have argued that the forced removal of Aboriginal children from their mothers was a beneficial law. The problem with the beneficial test is that the most draconian laws can be enacted with the (plausible) claim that they benefit the people they affect.

V CONCLUSION

Kartinyeri offers frightening potential if it is the harbinger for a narrow and extreme textualist reading of the race power. This may well allow judges to retreat from their responsibility to interpret the power in a way that gives effect to the entitlement of all people in Australia, regardless of their race, to the protection and the rule of law. The Constitution reflects the enduring ambitions of the Australian people, both at the time of federation and since that time, for a just and fair society. The Constitution was also enacted by the Parliament of Westminster in 1900 on the assumption that it entitles all people within Australia to the benefits and entitlements of the rule of law and the enjoyment of fundamental common law rights. The courts have the duty to ensure those enduring values of the people are not undermined. There are times when the immediate and temporary impulse of the people, via Parliament, is to inflict an arbitrary and unjust exercise of power upon a racial group. This impulse must, however, give way to the larger ambitions of the people for an inclusive and democratic society that respects the fundamental rights of all the people. The courts have the final responsibility for ensuring the enduring ambitions of the people are not undermined by temporary demands for the denigration of the fundamental rights and entitlements of a racial minority. And it is a failure of the duty for the courts to avoid judicial review by hiding behind a textualist wall.

Kartinyeri also offers the possibility for the development of a robust jurisprudence that offers the grounds for giving effect to the enduring ambitions of the people for a just and fair society. Such jurisprudence would make it less likely that the courts will in the future tolerate a recurrence of the wrongs the law has inflicted upon our indigenous people and other racial groups in the past. It will also lessen the chances of the courts greasing the wheels of racial segregation, as happened in South Africa.