CONSTITUTIONAL CHARACTERISATION: EMBEDDING VALUE JUDGEMENTS ABOUT THE RELATIONSHIP BETWEEN THE LEGISLATURE AND THE JUDICIARY

JAMES STELLIOS*

This article considers the process of characterising a Commonwealth law with respect to a federal head of power, organising the enquiry into three distinct steps of determining the essential character of a power, the definitional character of a power and the telescopic character of a power. The article then contends that this constitutional schema of characterisation disguises judicial value judgements about the proper scope of judicial review. The article concludes by reflecting on the application of this schema to the High Court's decisions in Spence v Queensland *(2019) 268 CLR 355 and* Love v Commonwealth *(2020) 375 ALR 597.*

CONTENTS

* Professor, ANU College of Law, Australian National University; Barrister, NSW Bar. An earlier version of this article was presented at a seminar hosted by the Melbourne Law School. I am very grateful for that opportunity and for the comments and feedback of many of the participants. My thanks also to Associate Professor Will Bateman and to the anonymous referees for their comments.

I Introduction

In Australian constitutional law, the expression 'characterisation' has been used to describe the process of determining whether a Commonwealth law is supported by a federal head of power. In *Grain Pool of Western Australia v Commonwealth* ('*Grain Pool*'),[1] the High Court considered whether provisions of the *Plant Variety Rights Act 1987* (Cth) and the *Plant Breeder's Rights Act 1994* (Cth) were supported by s 51(xviii) of the *Constitution*.[2] That power authorises the enactment of laws with respect to 'copyrights, patents of inventions and designs, and trade marks'.[3] On the question of characterisation, the joint judgment of Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ said:

> The general principles which are to be applied to determine whether a law is with respect to a head of legislative power such as s 51(xviii) are well settled. They include the following. First, the constitutional text is to be construed 'with all the generality which the words used admit'. Here the words used are 'patents of inventions'. This, by 1900, was 'a recognised category of legislation (as taxation, bankruptcy)', and when the validity of such legislation is in question the task is to consider whether it 'answers the description, and to disregard purpose or object'. Secondly, the character of the law in question must be determined by reference to the rights, powers, liabilities, duties and privileges which it creates. Thirdly, the practical as well as the legal operation of the law must be examined to determine if there is a sufficient connection between the law and the head of power. Fourthly, as Mason and Deane JJ explained in *Re F; Ex parte F*:
>
> 'In a case where a law fairly answers the description of being a law with respect to two subject matters, one of which is and the other of which is not a subject matter appearing in s 51, it will be valid notwithstanding that there is no independent connection between the two subject matters.'

[1] (2000) 202 CLR 479 ('*Grain Pool*').

[2] Ibid 489 [1], 490 [7] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[3] *Constitution* s 51(xviii).

> Finally, if a sufficient connection with the head of power does exist, the justice and wisdom of the law, and the degree to which the means it adopts are necessary or desirable, are matters of legislative choice.[4]

These statements of principle allude to various features of the characterisation process which are commonly reduced to three basic characterisation enquiries: first, the interpretation of the head of power; secondly, the determination of the character of the impugned statutory provision; and thirdly, the determination of a sufficient connection between the two.[5] Across these three enquiries, there are elements of both *constitutional* and *statutory* characterisation; only the former is the subject of this article.

This article has two main objectives. First, Part II will seek to explain that the *constitutional* characterisation enquiry can be organised into three distinct steps: what I call the *essential* character, the *definitional* character, and the *telescopic* character. Each step contributes to the reach of federal power. Secondly, Part III will elaborate on the proposition that this conceptual schema is not self-evident; instead, it shows the use of constitutional principles and rules to disguise value judgements about the relationship between the legislature and the judiciary. Some of that territory is well understood, but some of it is not, particularly choices made about the essential character of a power. Having developed these two main objectives, the article will turn in Part IV to reflect on the application of this schema through the lens of two recent High Court cases, *Spence v Queensland* ('*Spence*')[6] and *Love v Commonwealth* ('*Love*').[7]

II Constitutional Characterisation

Other than Professor Leslie Zines's sophisticated analysis of characterisation in chs 2–4 of *The High Court and the Constitution*,[8] there has been little written about the constitutional characterisation process.[9] The purpose of this Part is

[4] *Grain Pool* (n 1) 492 [16] (citations omitted), quoting with minor changes *Re F; Ex parte F* (1986) 161 CLR 376, 388 (Mason and Deane JJ). See also *New South Wales v Commonwealth* (2006) 229 CLR 1, 103–4 [142] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ) ('*Work Choices Case*').

[5] Nicholas Aroney et al, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 114.

[6] (2019) 268 CLR 355 ('*Spence*').

[7] (2020) 375 ALR 597 ('*Love*').

[8] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008). See also James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015).

[9] Notable exceptions are Aroney et al (n 5) ch 3 pt 3 and, in relation to the incidental power, Gary A Rumble, 'Section 51(xxxix) of the Constitution and the Federal Distribution of Power' (1982) 13(2) *Federal Law Review* 182.

to explore in more detail, and develop a schema of, constitutional characterisation principles. It will be explained that there are three distinct and sequential stages in that characterisation process. For convenience of taxonomical treatment, these steps are referred to as the essential character of a power, the definitional character of a power and the telescopic character of a power.

A *Essential Character*

The first step in the constitutional characterisation process is to classify a constitutional head of power into a category. Heads of power have been classified in different ways. At the highest level of generality, they have been characterised into two broad categories: *subject matter* and *purposive* powers.[10]

1 *Subject Matter Powers*

In relation to subject matter powers, there have been various attempts to further classify subjects into subcategories. It was recognised very early that the subjects of powers could be classified as 'natural' or 'artificial'. In *Attorney-General (NSW) ex rel Tooth & Co Ltd v Brewery Employés Union of NSW* ('*Union Label Case*'), the High Court considered whether the reference to 'trade marks' in s 51(xviii) supported Commonwealth legislation authorising the use of workers' marks.[11] A majority held that, in 1900, 'trade marks' was a special class of property involving a right of dominion,[12] and that workers' marks did not satisfy that conception.[13] Thus, the impugned workers' marks provisions were held invalid.[14] As Griffith CJ said, Parliament could not 'by calling something else by the name of "trade mark", create a new and different kind of industrial property'.[15]

In an enduring and influential dissent, Higgins J said that established 'principles of interpretation compel us to take into account the *nature* and *scope*' of the provision being interpreted.[16] His Honour contrasted the subject of trademarks with 'concrete, physical objects' like cattle; there was 'a vital distinction arising from the nature of the subject'.[17] In relation to physical objects, his

[10] For the distinction between purposive and subject matter or non-purposive powers: see, eg, *Leask v Commonwealth* (1996) 187 CLR 579, 591 (Brennan CJ), 600–3 (Dawson J) ('*Leask*').

[11] (1908) 6 CLR 469, 500 (Griffith CJ) ('*Union Label Case*').

[12] Ibid 503, 508, 512–13 (Griffith CJ), 524–6, 529 (Barton J), 531–2, 545 (O'Connor J).

[13] Ibid 518 (Griffith CJ), 526 (Barton J), 545 (O'Connor J).

[14] Ibid 518 (Griffith CJ), 530 (Barton J), 548 (O'Connor J).

[15] Ibid 513.

[16] Ibid 612 (emphasis added).

[17] Ibid 611.

Honour said, 'the boundaries of the class are fixed by external nature'.[18] By contrast, trademarks 'are artificial products of society, and dependent upon the will of society'.[19] His Honour continued:

> The class 'cattle' cannot well be extended by man; the class 'trade marks' can be extended. Power to make laws as to any class of rights involves a power to alter those rights, to define those rights, to limit those rights, to extend those rights, and to extend the class of those who may enjoy those rights. In the same clause of sec 51, power is given to make laws with respect to 'copyrights' (rights of multiplying copies of books, &c); with respect to 'patents' (rights to make or sell inventions); and with respect to 'trade marks' (rights to use marks for the purposes of trade). The power to make laws 'with respect to' these rights, involves a power to declare what shall be the subject of such rights.[20]

For his Honour, other subjects not fixed by nature included 'marriage', 'parental rights' and 'promissory notes'.[21]

There have been other attempts to further refine the classification of artificial subjects. As already indicated, in *Grain Pool*, 'patents of inventions' (also a subject within s 51(xviii)), along with 'taxation'[22] and 'bankruptcy', were characterised by the Court as 'recognised categor[ies] of legislation'.[23] In that case, the approach of Higgins J was endorsed by six members of the Court.[24] In *Commonwealth v Australian Capital Territory* ('*Marriage Equality Act Case*'), 'marriage' was described as referring 'to a status, reflective of a social institution, to which legal consequences attach and from which legal consequences follow'[25] — 'a recognised topic of juristic classification'.[26] The expression was wide enough, it was held, to include the union of same-sex couples.[27] Again,

[18] Ibid.

[19] Ibid.

[20] Ibid.

[21] Ibid 610.

[22] 'Taxation' has elsewhere been classified as a 'common governmental power or function': *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 209 (Stephen J) ('*Koowarta*').

[23] *Grain Pool* (n 1) 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), quoting with minor changes *Stenhouse v Coleman* (1944) 69 CLR 457, 471 (Dixon J).

[24] *Grain Pool* (n 1) 493–5 [19]–[20] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[25] (2013) 250 CLR 441, 456 [15] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Marriage Equality Act Case*').

[26] Ibid 458 [20], quoting with minor changes *A-G (Vic) v Commonwealth* (1962) 107 CLR 529, 578 (Windeyer J) ('*Marriage Act Case*').

[27] *Marriage Equality Act Case* (n 25) 463 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

Higgins J's reasoning from the *Union Label Case* was relied upon by a unanimous six-member Court.[28]

The importance of this essential characterisation step may have been somewhat obscured by the concurrent emphasis by Higgins J in the *Union Label Case* and the Court in *Grain Pool* and the *Marriage Equality Act Case* on reading the *Constitution* dynamically in recognition that it is an instrument of government intended to endure and that the 1900 usage of a term offers only 'the central type', not 'the circumference of the power'.[29] Such an interpretive mandate can be achieved in different ways. The point for present purposes is that the nature of the head of power, as an artificial subject, is an important conceptual means of achieving that flexible interpretive approach.[30]

Cutting across the physical–artificial distinction are other attempts at subject matter classification. Subject matters have also been characterised as *entities*, *activities*[31] or other *things*. *Entities* can be, on the one hand, *artificial* or *juristic* (eg corporations,[32] with their legal personality created endogenously to the law[33]) or, on the other hand, *natural* or *physical* (eg members of a race,[34] identifiable by features exogenous to the law).[35] *Activities* are more likely to be defined exogenously by social, business or commercial conduct, interactions or transactions. Examples include interstate and overseas trading activities,[36] banking,[37] astronomical and meteorological observations,[38] and, probably, the

[28] Ibid 458–9 [21]–[22].

[29] *Union Label Case* (n 11) 610 (Higgins J), quoted in *Grain Pool* (n 1) 493 [19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *Marriage Equality Act Case* (n 25) 458 [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[30] Michael Stokes, 'Meaning, Theory and the Interpretation of Constitutional Grants of Power' (2013) 39(2) *Monash University Law Review* 319, 322–3, 331–2.

[31] *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* (1982) 150 CLR 169, 207 (Mason J) ('*Fontana Films*'); *Koowarta* (n 22) 209 (Stephen J).

[32] See *Work Choices Case* (n 4) 85–6 [85], 104 [144], 117 [186] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Commonwealth v Tasmania* (1983) 158 CLR 1, 148–9 (Mason J) ('*Tasmanian Dam Case*'); *Fontana Films* (n 31) 216, 222 (Brennan J).

[33] Although the constitutional categories of 'trading', 'financial' or 'foreign' are discerned exogenously.

[34] *Koowarta* (n 22) 209 (Stephen J).

[35] I will return to the concept of an 'alien': see below Part IV(B).

[36] *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11–12 (Stephen J), 18–19 (Mason J) ('*Murphyores*').

[37] *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 333 (Dixon J), 392 (McTiernan J) ('*Bank Nationalisation Case*').

[38] *Koowarta* (n 22) 209 (Stephen J).

conduct or provision of postal, telegraphic, telephonic and other like services.[39] The subject of the currency power in s 51(xii) is a *thing*. That *thing* is likely to be the abstract and artificial conception of currency as 'a universal means of exchange, designated by a particular unit of account',[40] rather than the mere physical manifestation of it which would include the subjects of 'coinage' or 'legal tender'.[41] If not an *entity*, a lighthouse is another physical *thing* that constitutes the subject matter of s 51(vii).[42]

Thus, one way of characterising subject matter has been into *physical* and *artificial* categories, and one way to elaborate on 'artificial' subjects, or at least a class of them, is to see them as *endogenous* to the legal system. The subjects are themselves defined, at least in large part, by the law. By contrast, a natural or physical subject, like cattle or a lighthouse, exists *exogenously* to the legal system.[43]

2 *Purposive Powers*

Standing apart from subject matter powers are purposive powers. I will only mention these powers briefly as they are not the primary focus of this article. Most clearly, the defence power is purposive in character.[44] What is often referred to as the nationhood power was also identified by Brennan J in *Cunliffe v Commonwealth* ('*Cunliffe*') as purposive in character.[45]

By contrast, there are some subject matter powers that have purposive dimensions. While 'external affairs' is a subject matter that encompasses the subjects of treaties[46] and geographically external 'places, persons, matters or things',[47] the purpose of the implementing law is examined to determine

[39] *The Herald & Weekly Times Ltd v Commonwealth* (1966) 115 CLR 418, 432, 437 (Kitto J), 439–41 (Menzies J) ('*The Herald & Weekly Times*'). Although it is possible that the subject matter is the service 'systems' rather than the activity of conducting or providing a service: at 438 (Taylor J).

[40] *Leask* (n 10) 622 (Gummow J). See also at 595 (Brennan J).

[41] *Watson v Lee* (1979) 144 CLR 374, 398 (Stephen J).

[42] See *Cunliffe v Commonwealth* (1994) 182 CLR 272, 354 (Dawson J) ('*Cunliffe*'); *Leask* (n 10) 606 (Dawson J); *Koowarta* (n 22) 209 (Stephen J).

[43] I note the use of 'exogenous matters' by Edelman J in *Love* (n 7) 712 [457]. My usage is consistent with the way in which his Honour used that expression.

[44] *Constitution* s 51(vi). See, recently, *Private R v Cowen* (2020) 383 ALR 1, 11 [40] (Kiefel CJ, Bell and Keane JJ), 36 [129] (Nettle J).

[45] *Cunliffe* (n 42) 322, discussing *Davis v Commonwealth* (1988) 166 CLR 79 ('*Davis*').

[46] *Richardson v Forestry Commission* (1988) 164 CLR 261, 326 (Dawson J), quoted in *Victoria v Commonwealth* (1996) 187 CLR 416, 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ) ('*Industrial Relations Act Case*'). See also *Leask* (n 10) 604–5 (Dawson J).

[47] *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 632 (Dawson J), quoted in *Industrial Relations Act Case* (n 46) 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

whether some of those subject matters have been appropriately translated into domestic law.[48] Similarly, the conciliation and arbitration power identifies a subject and a purpose.[49] In *New South Wales v Commonwealth* ('*Work Choices Case*'), the High Court described the phrase 'conciliation and arbitration' as identifying 'a species of process or procedure embarked upon or engaged in with the objectives introduced by the word "for", namely … those "extending beyond the limits of any one State"'.[50] In that way, s 51(xxxv) marks out 'both end and means'.[51]

3 *Core versus Incidental*

Finally, in addition to these classifications, a distinction has been drawn traditionally between the core and implied incidental areas of subject matter powers.[52] In the characterisation process, if a law does not operate directly upon the subject matter of a power, then greater attention is given to the purpose of the law to determine its connection with the constitutional subject matter.[53] The impact of such a distinction was keenly felt in the context of s 51(i) of the *Constitution*. While the core of the power (ie the activity of interstate and overseas trade and commerce) was given an expansive operation, a more limited view of the power was embraced in the incidental area, where the High Court reinforced the delimitation of the activity at the heart of the power and took greater care to deny intrusions into intrastate trade and commerce.[54]

[48] *Industrial Relations Act Case* (n 46) 487 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[49] *Constitution* s 51(xxxv).

[50] *Work Choices Case* (n 4) 128 [222] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 26–7 (Mason CJ) ('*Nationwide News*').

[51] *Australian Boot Trade Employés' Federation v Whybrow & Co* (1910) 11 CLR 311, 338 (Isaacs J).

[52] Classic statements can be found in *Grannall v Marrickville Margarine Pty Ltd* (1955) 93 CLR 55, 77 (Dixon CJ, McTiernan, Webb and Kitto JJ); *Bank Nationalisation Case* (n 37) 354 (Dixon J). For a detailed analysis of the implied incidental power, see generally Stellios (n 8) ch 3. For a discussion of the difference between the implied incidental power and the express incidental power, see generally Rumble (n 9).

[53] See, eg, *Bank Nationalisation Case* (n 37) 354 (Dixon J).

[54] See, eg, *Wragg v New South Wales* (1953) 88 CLR 353, 386 (Dixon CJ):

> But even in the application of [the principle of incidental power] to the grant of legislative power made by s 51(i) the distinction which the *Constitution* makes between the two branches of trade and commerce must be maintained. Its existence makes impossible any operation of the incidental power which would obliterate the distinction.

The distinction was strained somewhat by the decision in *Actors and Announcers Equity Association of Australia v Fontana Films Pty Ltd* ('*Fontana Films*'), a case involving s 51(xx) of the *Constitution*.[55] The Court in that case upheld the validity of Commonwealth provisions that prohibited certain conduct undertaken with the intention of causing harm to the business of trading corporations.[56] The immediate legal operation of the law was not on the persons constituting the subject of the power; instead, the provisions prohibited the actions of others for the purpose of protecting the subjects of the power.[57] That is, the connection with the subject of power was illuminated by the law's *purpose*. Justice Mason recognised the characterisation dilemma:

> But when we speak of a law which protects the trading activities of a trading corporation our statement is not so specific. It may be understood as signifying a law which operates directly on the subject of the power. So understood the law is within power and valid. But it may be understood in a different sense so as to denote a law which, though it protects the trading activities of trading corporations, does so by a legal operation outside the subject matter of the power.[58]

Nonetheless, his Honour concluded that the impugned provision had a 'direct legal operation on the subject of the power'.[59]

The distinction was further tested in two cases, *Cunliffe* and *Leask v Commonwealth* ('*Leask*').[60] In *Cunliffe*, provisions of the *Migration Act 1958* (Cth) ('*Migration Act*') put in place a licensing system for migration agents.[61] The evident purpose of the provisions was to protect visa applicants, who were invariably aliens referred to in s 51(xix) of the *Constitution*, from incompetent and unscrupulous migration service providers.[62] An analogy to *Fontana Films* was clear, and there was little difficulty for the Court in reaching the conclusion that

As is well known, this led Murphy J to famously say that the Court's treatment of the incidental area of the trade and commerce power kept 'the pre-*Engineers* ghosts walking': *A-G (WA) ex rel Ansett Transport Industries (Operations) Pty Ltd v Australian National Airlines Commission* (1976) 138 CLR 492, 530.

55 *Fontana Films* (n 31) 180 (Gibbs CJ).

56 Ibid 189 (Gibbs CJ, Wilson J agreeing at 215), 211 (Mason J, Stephen J agreeing at 196, Aickin J agreeing at 215), 215 (Murphy J), 222–3 (Brennan J).

57 Ibid 195 (Stephen J).

58 Ibid 205.

59 Ibid 206. This view of the scope of the power was endorsed in the *Work Choices Case* (n 4) 121–2 [198] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

60 *Leask* (n 10).

61 *Cunliffe* (n 42) 367–70 (Toohey J).

62 Ibid 294 (Mason CJ), 313 (Brennan J), 333–4 (Deane J), 385 (Gaudron J), 394 (McHugh J).

the proscribed conduct was 'within the subject matter of the aliens power'.[63] In *Leask*, the challenge was to Commonwealth provisions requiring 'cash dealers' to report large cash transactions.[64] The Commonwealth relied on the heads of power in s 51(ii) (taxation) and s 51(xii) (currency).[65] Six judges considered that the Commonwealth provisions operated either 'directly on the physical transfer of currency from one person to another'[66] or were 'matters incidental to' the imposition of a duty to report currency transactions.[67]

These challenges provided the backdrop for a debate about the correctness of drawing the distinction between the core and the incidental area of a subject matter power and, further, the use of proportionality for characterisation in the incidental area. As characterised by Brennan J in *Cunliffe*, the plaintiffs had sought to exploit the distinction to introduce questions of proportionality into characterisation:

> The plaintiffs seek to establish a dichotomy between the core and incidental aspects of a power in order to obtain a foothold for the argument that proportionality is a criterion of validity. The proportionality which might advance their argument is proportionality between [the impugned provisions] and the aliens power.[68]

The plaintiffs' argument was met with varying responses. Chief Justice Mason in *Cunliffe* appeared to support a wider use of proportionality in the characterisation process, at least where the purpose of a law is protective of the subject matter:

> [T]he test of reasonable proportionality has an important role to play when the validity of a law hinges upon the proposition that it seeks to protect or enhance a subject matter or legitimate end within power. There is a need to ensure that

[63] Ibid 295 (Mason CJ). See also at 316 (Brennan J), 334 (Deane J), 358 (Dawson J), 374 (Toohey J), 387 (Gaudron J), 394–5 (McHugh J). One way to reach this conclusion was to say that 'characterization of a law is a matter of *substance*' and, therefore, the impugned provisions operated directly upon the rights of aliens: at 374 (Toohey J) (emphasis added).

[64] *Leask* (n 10) 587–8 (Brennan CJ).

[65] Ibid 590 (Brennan CJ).

[66] Ibid 595 (Brennan CJ). See also at 609–10 (Toohey J, Gaudron J agreeing at 616), 623 (Gummow J). Justice Toohey, Gaudron J and Kirby J also considered that the provisions were valid under the taxation power: at 612 (Toohey J, Gaudron J agreeing at 616), 637 (Kirby J).

[67] Ibid 607 (Dawson J, McHugh J agreeing at 617).

[68] *Cunliffe* (n 42) 320.

> such a law does not unnecessarily or disproportionately regulate matters beyond power under the guise of protecting or enhancing the legitimate end in view.[69]

However, there was resistance by other judges. Justice Brennan in *Cunliffe* took the view that the plaintiffs had raised 'a false dichotomy between the core and the incidental aspects of a legislative power. … [T]he core and incidental aspects of a power are not separated; the power is an entirety'.[70] In all cases, there must be a 'reasonable connexion' between the law and the subject matter of the power.[71] In some cases, the connexion might be revealed by looking to the purpose or object within the power,[72] and proportionality might be a 'helpful tool' to determine whether a sufficient connection exists between the law and the subject matter.[73] His Honour's objection, then, was to the use of proportionality as a separate test for validity within a rigid category of incidental power. The test was to be the same for the entirety of the power, although proportionality might provide some assistance in cases where the connection turned on the purpose of the law, rather than its legal operation.

By contrast, Dawson J in *Cunliffe* was less concerned with the conceptual distinction between the core and incidental areas,[74] and more troubled by the use of proportionality as a characterisation test for subject matter powers: 'Where the subject matter of a head of power involves no notion of purpose, the concept of reasonable proportionality offers … no assistance'.[75] However, his Honour's position was somewhat complicated by (i) his observations in *Cunliffe* that disproportionality of legislative means and end might operate in

[69] Ibid 297. Given that Mason CJ had concluded in *Fontana Films* (n 31) 208–9 and *Cunliffe* (n 42) 295 that a law protecting, respectively, trading corporations and aliens fell within the *core* area of the respective heads of power, this statement in *Cunliffe* (n 42) is cast in overly broad terms: if operating upon the subject matter of the power, questions of proportionality should not arise. However, what is important for present purposes is that his Honour accepted the conceptual distinction between the core area of the power and the incidental area, and that the characterisation process might involve an exercise in assessing proportionality between the law and its purpose. His Honour also made broad statements about the use of proportionality in *Nationwide News* (n 50) 29. However, it is clear that, in that case, they were made in the context of considering the validity of a law within the incidental area of a power: at 34.

[70] *Cunliffe* (n 42) 317–18.

[71] Ibid 319, quoting with minor changes *Burton v Honan* (1952) 86 CLR 169, 179 (Dixon CJ) ('*Burton*').

[72] *Cunliffe* (n 42) 319–20 (Brennan J).

[73] Ibid 321.

[74] His Honour also accepted the distinction between the core and incidental areas in *Nationwide News* (n 50) 85.

[75] *Cunliffe* (n 42) 351.

the *incidental* area of a subject matter power to identify laws that lacked a sufficient connection,[76] and (ii) his acceptance in *Leask* of what Brennan J had said in *Cunliffe* about there being one power, and that it is when one moves to the outer limits of a subject matter power that the purpose of the law becomes important for discerning the law's effect and operation.[77]

Other judges arranged themselves around the two central points: first, whether a subject matter power could be divided into its core and incidental areas[78] and, secondly, whether proportionality had any role to play in characterisation of subject matter powers.[79] While reconciling the various judgments across *Cunliffe* and *Leask* is no easy task, and might ultimately be reduced to semantics,[80] it seems that most of the judgments did not seek to displace the orthodox distinction between the core and the incidental areas of subject matter powers. Of course, Mason CJ clearly endorsed the distinction.[81] While Dawson J, Toohey J and Gummow J emphasised that a subject matter power is 'but one grant',[82] the purpose of doing so appeared to be directed to leaving little room for proportionality to operate as a freestanding test of validity for subject matter powers. Only Brennan J seemed to reject the distinction outright but, again, in the context of responding to the use of proportionality in characterisation.[83] The Court has since continued to eschew the use of proportionality

[76] Ibid 352, 355. See also *Nationwide News* (n 50) 87–8 (Dawson J).

[77] *Leask* (n 10) 602–3 (Dawson J), quoting *Cunliffe* (n 42) 318 (Brennan J). Rather than disrupting the established distinction between the core and the incidental areas of a subject matter power, it seems that Dawson J here placed emphasis on there being only one power in order to reject the use of proportionality as a test for validity, either at the core or in the incidental area of a subject matter power.

[78] In *Leask* (n 10), Gummow J emphasised that '[e]ach head of power is but one grant': at 624. In *Cunliffe* (n 42), Toohey J accepted the distinction between the core and incidental areas of power: at 373–4. His Honour also, however, emphasised 'that there is but a single grant': at 375. Justice Kirby in *Leask* (n 10) also accepted that 'there is but a single grant' of power: at 633.

[79] Justice McHugh in *Leask* (n 10) accepted that proportionality might be helpful in characterisation where 'the dominant subject matter of an impugned law is not itself a head of federal power': at 616. See also *Nationwide News* (n 50) 101 (McHugh J). By contrast, Gummow J in *Leask* (n 10) rejected the use of proportionality for characterisation under non-purposive powers: at 624. Justice Toohey was, in *Cunliffe* (n 42), receptive to the use of proportionality: at 376. In *Leask* (n 10), however, his Honour said that proportionality had 'no part to play' in the characterisation process in that case; it would draw the Court 'into areas of policy and … value judgments': at 613, 616 (Toohey J, Gaudron J agreeing at 616). By contrast, Kirby J in *Leask* (n 10) said that that proportionality 'may sometimes be helpful in the context of constitutional characterisation': at 635.

[80] Stellios (n 8) 62.

[81] *Cunliffe* (n 42) 296–7.

[82] *Leask* (n 10) 602 (Dawson J), 624 (Gummow J). See also *Cunliffe* (n 42) 375 (Toohey J).

[83] *Cunliffe* (n 42) 320.

when subject matter powers are concerned, but only in contexts involving the core areas of power,[84] so the position remains unclear.[85]

What this lengthy excursion reveals, for the purpose of this article, is that the core–incidental distinction has been an analytical tool used to shape the essential character of heads of power. Both its deployment, and opposition to its use, have significant consequences which will be taken up further below.

4 *Summary*

It seems reasonably clear that, analytically, the step of identifying a power's *essential* character precedes other constitutional characterisation steps. As will be explained further, how the *definitional* character and *telescopic* character are determined often turns upon the characterisation process undertaken at the essential characterisation stage.

B *Definitional Character*

Determining the definitional character of a head of power involves the familiar exercise of discerning the meaning of the constitutional text.[86] This is the focal point of much of the debate about constitutional interpretation.[87] I do not intend to enter that quagmire, except to emphasise that the step of constitutional interpretation is preceded by the essential characterisation of provisions, and

[84] *Theophanous v Commonwealth* (2006) 225 CLR 101, 128 [70] (Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S156/2013 v Minister for Immigration and Border Protection* (2014) 254 CLR 28, 42–5 [24]–[36] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) ('*Plaintiff S156*').

[85] That is not to deny that some of the criteria that are commonly applied in proportionality analysis might inform the means–end relationship in the characterisation context: see *McCloy v New South Wales* (2015) 257 CLR 178, 195 [3] (French CJ, Kiefel, Bell and Keane JJ).

[86] I have adopted the expression 'definitional character' at the risk of taxonomical confusion. The High Court often searches for the 'essential' features or characteristics of constitutional words or expressions when determining constitutional meaning. In the context of 'trial … by jury' in s 80 of the *Constitution*, see, eg, *Cheatle v The Queen* (1993) 177 CLR 541, 549 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). However, the expression 'essential character' is best reserved for identifying the very essence or nature of the power as described above. The *definitional* character of a power is a better fit for the exercise of determining the meaning of constitutional text.

[87] See, eg, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1; Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323; Nicholas Aroney, 'The High Court on Constitutional Law: The 2012 Term' (2013) 36(3) *University of New South Wales Law Journal* 863; Adrienne Stone, 'Judicial Reasoning' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 472.

that classification affects the posture to be taken when determining the definitional character.

In particular, characterisation of a subject as a recognised category of legislation or topic of juristic classification permits more leeway for a court to depart from the meaning that a subject commonly, technically or legally might have had in 1900. Central to such subjects is the recognition that they are endogenous to the legal system and, thus, it follows that Parliament has scope after 1900 to define the very subject of power. While a lighthouse is a physical subject, with features exogenous to the legal system and readily identifiable by empirical verification, recognised categories of legislation or topics of juristic classification are, at least in large part, artificial legal constructs. The artificiality of the subject matter permits the Parliament greater scope to define for itself the subject matter of the power than would be the case were the powers to refer to subjects exogenous to the legal system.

The judgment of Higgins J in the *Union Label Case* provides a useful example. The majority judges in that case took the view that the words 'trade marks' were to be taken as referring to the usage of those words that was recognised in 1900, including in case law and statutes, and had become the subject of international agreement.[88] The definitional elements had been fixed by 1900, and that conception did not include workers' marks.[89] While it was possible to give the words a wider meaning that would have embraced workers' rights (ie 'a mark used in connection with trade'),[90] the fact that the law interfered with matters of intrastate trade — a matter impliedly reserved to the states — contributed to the conclusion that the narrower meaning of the words be adopted.[91]

By contrast, Higgins J held that, even if the legal or popular usage of the expression 'trade marks' in 1900 was as a form of property in the way described by the majority (a position that his Honour rejected),[92] that did not prevent the Parliament from extending the types of rights that could come within the concept.[93] The subject of trademarks was endogenous to the legal system, and there was no warrant for confining that legal construct to common law and statutory conceptions of that subject in 1900.[94] As already indicated, his

[88] *Union Label Case* (n 11) 507–8, 512–13 (Griffith CJ), 526–9 (Barton J), 538–41 (O'Connor J).

[89] Ibid 518 (Griffith CJ), 530 (Barton J), 545 (O'Connor J).

[90] Ibid 501 (Griffith CJ).

[91] Ibid 502–4 (Griffith CJ), 532–3 (O'Connor J).

[92] Ibid 607–8.

[93] Ibid 610–11, 616.

[94] Ibid 610 (Higgins J).

Honour also identified other subjects as capable of change after 1900 by legislative definition:[95]

> Under the power to make laws with respect to 'marriage' I should say that the Parliament could prescribe what unions are to be regarded as marriages. Under the power to make laws with respect to 'parental rights', I should say that it could define what those rights are to be. Under the power to make laws with respect to 'promissory notes', I should say that it could increase the class of documents which in 1900 were known as promissory notes.[96]

The Court in the *Marriage Equality Act Case* applied that approach to the word 'marriage'.[97] If 'marriage', as a subject of power, were to have been characterised as 'a legal term of art' with a settled meaning at 1900,[98] the departure from that conception to include same-sex couples would have been difficult. Furthermore, if it had been characterised as referring to a religious institution — 'the monogamous marriage of Christianity'[99] — the subject matter would have been defined, in large part, exogenously to the legal system. However, as a topic of juristic classification, the subject was identified in the *Marriage Equality Act Case* as 'laws of a kind "generally considered, for comparative law and private international law, as being the subjects of a country's marriage laws"'.[100] It became a subject endogenous to the legal system. While same-sex marriages would have been difficult to square with the common law in 1900, or with the religious institution of marriage, as a topic of juristic classification it was within Parliament's power to define marriage to include such unions.[101]

Of course, as Higgins J recognised in the *Union Label Case*, there must be limits to what Parliament can do. His Honour addressed, in the following way, the argument that 'the powers of the Federal Parliament would be practically unlimited — that the Federal Parliament would only have to call a spade a "trade mark", and then legislate as to spades':[102]

95 Ibid 601–2.

96 Ibid 610.

97 *Marriage Equality Act Case* (n 25) 458–9 [20]–[21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

98 Ibid 454 [11].

99 *Marriage Act Case* (n 26) 577 (Windeyer J).

100 *Marriage Equality Act Case* (n 25) 459 [22] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Marriage Act Case* (n 26) 578 (Windeyer J).

101 *Marriage Equality Act Case* (n 25) 458–9 [21], 463 [38] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

102 *Union Label Case* (n 11) 614.

> This is a mistake. I gave an instance during the argument. Suppose that the Federal Parliament desire to arrogate to itself the control of wills — a subject which is clearly not entrusted to the Federal Parliament. Suppose that it define 'trade mark' as including a will, and enact that no will shall be valid unless registered as a trade mark. In such a case we should have no hesitation in treating such a law as invalid. It would be a sham. *It would not be a law with respect to trade marks at all. It would be a law as to wills, under cover of a law as to trade marks.* In such a case the Courts would have no difficulty in pronouncing that the Parliament had transgressed the boundary, had not applied itself to the exercise of its power at all.[103]

Justice Higgins's approach to uncovering such shams was to search for the 'substance of the Act'[104] — an approach resembling a statutory characterisation exercise of discerning the true character of the legislation. As will be explained below, as an approach for identifying the character of a law in the characterisation process, Higgins J's approach has not survived, and it is unclear how such shams would now be identified. Perhaps in recognition of this difficulty, the Court did not explore this limitation in either *Grain Pool* or the *Marriage Equality Act Case*.[105] Nonetheless, as will be seen below, there must be limits. If the limit is not to derive, as Higgins J considered, from the substance of the Act, then it must derive from the definitional character of the constitutional words.

In closing this section, it is enough for now to make two final points about the *definitional* character of a head of power. The first is that, once it is accepted that different powers have different essential classifications, constitutional meaning cannot, as a general proposition, be fixed at 1900, nor by reference to the state of the common law or the content of Imperial or colonial legislation prior to Federation. As is evident from the majority judgments in the *Union Label Case*, the posture of interpretation was to read the subject in a way that preserved to the states their reserved powers. The consequence of such an approach was to anchor the constitutional text to 1900 understandings to minimise expansive federal power. In dissent, Higgins J superimposed the antecedent step of essential characterisation in classifying trademarks as an artificial subject matter. While there may be limits to what Parliament can deem to be a trademark, it was given substantial leeway to determine what constituted the very subject matter of the power.

[103] Ibid 614–15 (emphasis in original).

[104] Ibid 615.

[105] In this respect, see the discussion of the *Marriage Equality Act Case* (n 25) in Aroney et al (n 5) 146–8.

Secondly, the High Court has not adopted an 'all-embracing theory of constitutional interpretation'.[106] Again, once it is accepted that the definitional character of text is preceded by an essential characterisation exercise, then an all-embracing theory of constitutional interpretation seems difficult to sustain, undermining attempts to identify a universal theory of originalism.[107] The definitional character of the text will depend in large part on the power's essential characterisation.

C *Telescopic Character*

Once the essential character and definitional character of constitutional powers are identified, the final stage of the characterisation process involves working out the scope of legislative power — in other words, how far can the power reach. This is what was referred to by the Court in *Grain Pool* as a search for a 'sufficient connection' between a law and a power.[108] As will be explained, this is a distinct stage in the constitutional characterisation process, the exercise of which turns critically on a power's anterior essential characterisation, and which embraces a range of characterisation rules.

1 *Subject Matter Powers*

Starting with subject matter powers, when characterising a law within the *core area* of a *subject matter power*, at least four related characterisation rules can be collected within what may be described as *dual characterisation*. To provide context for these characterisation rules, it is important to understand the interpretive methodology of the High Court prior to the decision in *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* ('*Engineers' Case*') and its impact on the scope of power.[109]

It is well known that the first three High Court judges considered that heads of legislative power had to be limited in their scope by reference to areas of

[106] *Marriage Equality Act Case* (n 25) 455 [14] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), citing *SGH Ltd v Federal Commissioner of Taxation* (2002) 210 CLR 51, 75 [41]–[42] (Gummow J).

[107] A staunch originalist might insist that the constitutional meaning of legal concepts must be fixed endogenously to the legal system that was in place at 1900. However, such an approach simply cannot stand alongside the essential characterisation approach adopted by Higgins J in the *Union Label Case* (n 11) 610–17 and endorsed by the Court in *Grain Pool* (n 1) 493–5 [19]–[20] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ), 514–15 [88]–[89] (Kirby J). Nor can it stand alongside the *Marriage Equality Act Case* (n 25) 458–9 [20]–[21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[108] *Grain Pool* (n 1) 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[109] (1920) 28 CLR 129 ('*Engineers' Case*').

regulation understood to be reserved to the states.[110] A useful example of this approach is *R v Barger*, where the High Court considered s 2 of the *Excise Tariff Act 1906* (Cth), which imposed excise duty on certain scheduled goods.[111] However, the excise was not to apply to goods manufactured under certain employment conditions.[112] The question for the Court was whether s 2 could be supported by the taxation power in s 51(ii) of the *Constitution*.[113] A majority of the Court considered that the 'primary meaning of "taxation" is raising money for the purposes of government by means of contributions from individual persons'.[114] However, consistently with the prevailing interpretive approach to heads of power, their Honours said that the 'regulation of the conditions of labour is a matter relating to the internal affairs of the States, and is therefore reserved to the States and denied to the Commonwealth'.[115] That

> led to the conclusion that the power of taxation, whatever it may include, was intended to be something entirely distinct from a power to directly regulate the domestic affairs of the States, which was denied to the Parliament.[116]

When faced with a binary choice of whether the power was 'vested either in the Parliament or in the State legislatures',[117] the majority examined the provision in search of its 'real',[118] 'substantial',[119] or 'true nature and character'.[120] While the majority expressly disapproved of resorting to the motives behind or indirect consequences of a law to determine its true character,[121] it is reasonably clear that such matters contributed to the conclusion that the 'substance'[122] of the legislation was not to impose an excise, but instead to regulate conditions of manufacture.[123]

Two points about the early characterisation approach should be emphasised. First, it was a direct consequence of the Court's approach to the reservation of

110 See generally Aroney et al (n 5) 115–36.

111 (1908) 6 CLR 41, 63 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ) ('*Barger*').

112 Ibid 64.

113 Ibid 66–8 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ), 82 (Isaacs J), 111 (Higgins J).

114 Ibid 68 (Griffith CJ for Griffith CJ, Barton and O'Connor JJ).

115 Ibid 69.

116 Ibid.

117 Ibid 73.

118 Ibid 74.

119 Ibid 77.

120 Ibid 73.

121 Ibid 67.

122 Ibid 75.

123 Ibid 77. See Stellios (n 8) 40.

state power. The Court was forced to characterise a law as exercisable *either* by the Commonwealth (within the express grant of power) *or* the states (within an impliedly reserved residue). It was natural and logical to adopt an approach that looked for a singular character.[124] Secondly, and most importantly for the characterisation schema suggested in this article, the limitation on Commonwealth power was not effected in the same way as the *definitional characterisation* approach, adopted in the *Union Label Case*, of reading constitutional words down so as not to intrude into areas traditionally regulated by the states.[125] It was not doubted that the impugned provision imposed 'taxation'; rather, the fact that the *true* character of the Commonwealth law intruded into a reserved area was a sufficient reason to confine the *telescopic* reach of the power.

The decision in the *Engineers' Case* made possible four related consequences for telescopic characterisation rules. First, it is now accepted that a law might have multiple characters, and that only one character need have a sufficient connection with a power.[126] Most clearly, it is enough that a law has a direct legal operation on the subject of power. If that is the case, then it is of no import that the law has a purpose, motive or consequence that gives it an additional character outside of power.[127] Consequently, the characterisation process does not involve a search for the law's true character.[128] As explained by Stephen J in an influential judgment in *Fontana Films*, '[b]ecause the powers granted by s 51 are not exclusive, but instead remain available … there is not … the … need to seek for one sole or dominant character of each law'.[129] As the majority said in the *Work Choices Case*, '[t]o describe a law as "really", "truly" or "properly" characterised as a law with respect to one subject matter, rather than another, bespeaks fundamental constitutional error'.[130]

[124] See *Fontana Films* (n 31) 190–2 (Stephen J). See also Aroney et al (n 5) 120, 137.

[125] See above nn 102–104 and accompanying text.

[126] *Fontana Films* (n 31) 190–2 (Stephen J), 202 (Mason J), 221–2 (Brennan J); *Tasmanian Dam Case* (n 32) 151 (Mason J), 270 (Deane J); *Cunliffe* (n 42) 334 (Deane J), 394 (McHugh J); *Leask* (n 10) 621–2 (Gummow J), 633 (Kirby J).

[127] *Plaintiff S156* (n 84) 43 [25] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ); *Murphyores* (n 36) 11–12 (Stephen J), 19–22 (Mason J); *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1, 13 (Kitto J), 15–16 (Taylor J), 18 (Menzies J), 19 (Windeyer J) ('*Fairfax*'); *Fontana Films* (n 31) 202–3 (Mason J); *The Herald & Weekly Times* (n 39) 433–4 (Kitto J).

[128] Although, at times, judgments have used the language of 'true' nature or character: see, eg, *Fairfax* (n 127) 5 (Barwick CJ), 7 (Kitto J), 18 (Menzies J), 19 (Windeyer J). For a detailed discussion of the shift from 'singular' to 'multiple' characterisation, see generally Aroney et al (n 5) 136–43; Stellios (n 8) 37–42.

[129] *Fontana Films* (n 31) 191.

[130] *Work Choices Case* (n 4) 72 [51] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ). See also at 84 [81] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

Secondly, provided the first rule is satisfied, the *Engineers' Case* dictates that a second characterisation that falls within an area traditionally occupied by the states is to have *no* constitutional significance. As the majority continued in the *Work Choices Case*, the first error

> is compounded if the conclusion which is reached about the one 'real' or 'true' or 'proper' character of a law proceeds from a premise which assumes, rather than demonstrates, a particular division of governmental or legislative power …[131]

Thirdly, a law may connect in different ways to different heads of power and, thus, can be supported by multiple, independent powers.[132] And, fourthly, unless a power is characterised as containing a 'positive prohibition or restriction', the *delimitation* of respective powers (whether subject matter or purposive powers) is not to constrain the reach of other powers,[133] reinforcing and amplifying the different ways that a law may connect with different heads of power.[134]

2 *Purposive Powers*

Having dealt with subject matter powers, a few brief comments may be made about the *telescopic* character of *purposive* powers. The defence power is the clearest example. It might have been characterised as a power with respect to the subject matter of the defence forces.[135] Instead, however, it is viewed as a power to pursue the *purpose* of the defence of the Commonwealth. Consequently, it has been held to support Commonwealth laws that are aimed at protecting the community from the threat of terrorist attack, even though the prevention of that risk was not through the use of military forces.[136]

As mentioned, while 'external affairs' has been said to refer to a subject matter, nonetheless it is accepted to have 'a purposive aspect'.[137] Strictly, if a treaty is a subject matter, then

> [i]t would be a tenable proposition that legislation purporting to implement a treaty does not operate upon the subject which is an aspect of external

[131] Ibid 72 [51].

[132] Ibid. For further analysis of the relationship of Commonwealth powers to each other, see Stellios (n 8) 31–6.

[133] *Work Choices Case* (n 4) 127 [221] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

[134] Ibid; *Tasmanian Dam Case* (n 32) 268–9 (Deane J).

[135] See the dissenting view of Gavan Duffy and Rich JJ in *Farey v Burvett* (1916) 21 CLR 433, 465–8.

[136] *Thomas v Mowbray* (2007) 233 CLR 307, 324–6 [7]–[9] (Gleeson CJ), 360 [136], 361 [139]–[140], 363 [146] (Gummow and Crennan JJ), 459–60 [444]–[445] (Hayne J), 504 [585]–[588], 506 [590] (Callinan J).

[137] *Cunliffe* (n 42) 322 (Brennan J).

> affairs unless the legislation complies with all the obligations assumed under the treaty.[138]

As Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ said in *Victoria v Commonwealth* ('*Industrial Relations Act Case*'), '[t]hat appears to have been the view taken by Evatt and McTiernan JJ in *R v Burgess; Ex parte Henry*'.[139] Yet, a 'purposive aspect' is introduced into the telescopic characterisation rules to permit the Parliament flexibility in the extent of implementation.

3 *Core versus Incidental Area*

As already mentioned, the High Court traditionally has also drawn, at least in relation to subject matter powers, a distinction between the core and incidental areas of a power. As already explained, some judges have emphasised that each power is but one grant. However, the distinction appears to remain an established part of the essential characterisation process.

Importantly, characterising a law as falling within the incidental area has important consequences for the telescopic reach of a power. Much of the territory has already been covered above. Whereas the core-area characterisation principles focus attention on the immediate legal and practical operation of a law on the subject matter of the power, in the incidental area of a power, the character of a law that is revealed from the law's purpose becomes constitutionally significant. The incidental-area characterisation principles permit the judiciary greater scope to evaluate the *reasonableness* of the Parliament's choice of legislative means to achieve the statutory purpose. And that scope is amplified if proportionality is applied to determine the reasonableness of that connection. This was the very reason why Toohey J in *Leask* rejected proportionality as a test in the characterisation process: it would draw the Court 'into areas of policy and … value judgments'.[140] Thus, whether a law's operation is identified in the *core* or the *incidental* area has significant implications for the role of the judiciary in exercising judicial review.

D *Summary*

This schema is not designed to be disruptive of existing approaches to constitutional characterisation. It merely elaborates upon, and organises, the conceptual steps undertaken in the characterisation process. That organisation results

[138] *Industrial Relations Act Case* (n 46) 488 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[139] Ibid, citing *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 688 (Evatt and McTiernan JJ).

[140] *Leask* (n 10) 616 (Toohey J).

in four main benefits. First, it carves out more clearly the step of essential characterisation, which is often overlooked or compressed into the other characterisation steps. Secondly, it identifies, more clearly, telescopic characterisation as a step in *constitutional* characterisation: the principles of telescopic characterisation define the law's 'constitutional character'.[141] Determining whether a law has a sufficient connection with a head of power is part and parcel of marking out the scope of that power. Thirdly, it shows that there may be important links between, respectively, the first and second steps, and the first and third steps. Fourthly, those connections help to explain why the same value judgements tend to shape characterisation principles across the entire constitutional characterisation exercise. It is to this final point that the article will now turn.

III Value Judgements in Constitutional Characterisation

In constructing this conceptual schema, I am not suggesting that it is self-evident or that it represents a natural order of constitutional law. To the contrary, my second claim in this article is that each step in the constitutional characterisation process can be seen as embodying a value judgement. In some cases, those constitutional values are made explicit; in others, however, they remain unarticulated assumptions disguised behind formal principles or rules. Most obviously, the constitutional value is one about federalism, and how widely federal power should be expanded at the expense of state power. This is not surprising given the characterisation context of discerning the scope of federal legislative power. However, as will be explained, at their core, the value judgements supporting constitutional characterisation principles and rules concern the appropriate constitutional relationship between the Parliament and the courts in conducting judicial review, whether the particular context raises federalism questions or the relationship between the individual and the state. They are constitutional principles and rules that allow judicial review to expand and contract as the Court would like. At one level, this is a trite observation; constitutional characterisation principles and rules after all are directed towards the scope of power of the Commonwealth Parliament. However, an appreciation of the values embedded in the legal technicalities allows us to understand the reasons why certain techniques are adopted by the High Court to resolve problems of federal political power.

That legal principles and rules are capable of masking values is not a novel proposition. After all, making that point was the core enterprise of the legal

[141] *Cunliffe* (n 42) 315 (Brennan J).

realism movement.[142] Furthermore, that value judgements are inherent in legal principles and rules of *characterisation* is well recognised in other fields of legal discourse. For instance, in the area of private international law, where legal disputes have connections to multiple jurisdictions and choices have to be made about which law is to apply, characterisation principles operate to classify legal claims into choice-of-law categories in order to apply a choice-of-law rule to connect a dispute to a legal area.[143] It has been recognised for a long time that each stage in that characterisation process involves a value judgement. Indeed, the experience in that context is that the formal characterisation rules are capable of manipulation to distort choice-of-law policy outcomes.[144] The functional role performed by legal characterisation principles has also been observed in the area of contract law.[145]

The High Court's early approach to constitutional characterisation was dominated by the reserve powers doctrine. Heads of power were interpreted openly and transparently to preserve to the states traditional areas of regulation, in a way that permeated each characterisation step and gave the judiciary significant scope to control and shape the federal system. The early characterisation principles had the effect of narrowing the scope of federal power.[146] The implementation of the current constitutional characterisation approach only became possible with the rejection in the *Engineers' Case* of the reserve powers doctrine. However, once that doctrine, with its clear functional purpose, was discarded, another constitutional value or set of values would have to take its

[142] Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 458. Indeed, the very point of this part of the present article is to respond to the challenge to analyse heads of power in functional terms: see at 491–2.

[143] For example, a tort claim, where the legal dispute has connections with two or more jurisdictions, is characterised into the tort category for choice-of-law purposes. The *substantive* law to be applied to resolve the dispute is determined by applying the *lex loci delicti* choice-of-law rule. By contrast, the forum's *procedural* law is to apply: see generally *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503. In that context, there are at least three stages in the characterisation process: first, applying the formal legal rules for classifying claims into categories; secondly, the formulation of the choice-of-law rule corresponding to that category; and, thirdly, the characterisation of a law as substantive or procedural.

[144] See, eg, Walter Wheeler Cook, '"Characterization" in the Conflict of Laws' (1941) 51(2) *Yale Law Journal* 191, 208–9; Robert Allen Sedler, 'Babcock v Jackson in Kentucky: Judicial Method and the Policy-Centered Conflict of Laws' (1967) 56(1) *Kentucky Law Journal* 27, 55–7; Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning' [2015] (5) *University of Illinois Law Review* 1847, 1883–4.

[145] See generally Pauline Bomball, 'Statutory Norms and Common Law Concepts in the Characterisation of Contracts for the Performance of Work' (2019) 42(2) *Melbourne University Law Review* 370.

[146] See Aroney et al (n 5) 120.

place. Otherwise, the characterisation process would become 'more intractable' if one were 'to rely purely on logical principles and canons of construction'.[147]

One of those 'logical' principles, Higgins J's approach in the *Union Label Case*, had already been suggested prior to the *Engineers' Case*. It was an analytical means to loosen the stranglehold that history and the framers' understandings had on constitutional interpretation. If the subject matter of power could be characterised as determinable, at least in part, by the legislature, then there necessarily would be an evolutionary dynamism to interpretation. The accompanying rationale for the principle was that the *Constitution* was intended to endure, and that mantra has often been used to justify expansive readings of federal power.[148]

But, why should the objective of an enduring constitutional instrument require that federal power be expanded? One answer that has been offered is that the centripetal force of the *Engineers' Case* reflected the 'growing realization that Australians were now one people and Australia one country and that national laws might meet national needs'.[149] Another answer is directed to the respective roles of the judiciary and the legislature to make judgements about the appropriate federal balance. Thus, in the *Engineers' Case*, the Court positioned responsible government, rather than judicial review, as the primary mechanism to control federal power and maintain federalism.[150] Justice Higgins's approach to essential characterisation in the *Union Label Case* can be viewed against that backdrop; it was a conceptual tool to shift federal power away from the judiciary to the legislative process. So too are the expansive definitional characterisation principles that favour broad readings of the subject matter of federal power and the telescopic characterisation principles that have emerged since the *Engineers' Case*.

In the space available, I will only elaborate further on the value judgements embedded in constitutional characterisation by reference to the *essential* characterisation distinction between the *core* and *incidental* areas of a subject matter power. That distinction operates to mark out the relationship between the judiciary and the legislature at multiple levels. First, once within the core of the power, the legislature has very wide compass to pursue purposes outside of power, and the bundle of telescopic characterisation rules that are packaged

147 Stellios (n 8) 24.

148 Ibid 26.

149 *Victoria v Commonwealth* (1971) 122 CLR 353, 396 (Windeyer J) ('*Payroll Tax Case*').

150 See Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 181–90; Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 146–8. See also *Tajjour v New South Wales* (2014) 254 CLR 508, 577 [140] (Gageler J).

under the label of *dual characterisation* are all directed to that end. The primary means for controlling the reach of federal power is placed within the system of responsible government. Secondly, the very reason for the existence of an incidental power is, as Toohey J recognised in *Cunliffe*, to give Parliament greater legislative power:

> The idea that something within that grant is incidental goes rather to the limits of the grant of power, emphasising that the power may have a wider operation than a literal reading of its words suggests …[151]

However, thirdly, differentiating the incidental from the core area also gives the Court a conceptual tool to retain greater supervisory jurisdiction over legislative choices about the allocation of federal power. While the cases on the core area of the power in s 51(i) have generally endorsed an expansive view,[152] as already mentioned, the cases in the incidental area of that power showed the Court's hesitation in embracing completely the full impact of the *Engineers' Case* for the regulation of the national economy.[153] But, when in the 1970s and 1980s the Commonwealth turned to rely on ss 51(xx) and (xxix) to move into areas traditionally regulated by the states, a majority of the Court was in favour of broad readings of those powers to legislate for the achievement of policy outcomes not obviously within federal power.[154] There was little suggestion that the core–incidental distinction would operate to hold back federal power.[155] For

[151] *Cunliffe* (n 42) 375.

[152] See, eg, *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 492, 500 (Rich J), 512–13 (Dixon J), 528–9 (Evatt J) ('*Huddart Parker*'); *R v Foster; Ex parte Eastern & Australian Steamship Co Ltd* (1959) 103 CLR 256, 276–8 (Dixon CJ, Fullagar J agreeing at 280, Kitto J agreeing at 280), 279–80 (McTiernan J), 311 (Windeyer J). Both of these cases upheld the regulation of the terms of conditions of persons employed in the activity of overseas trade and commerce. Section 51(i) has also been found to support legislation authorising a Commonwealth entity to engage in interstate air navigation: *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 57 (Latham CJ), 70–1 (Rich J), 75–7 (Starke J), 82–3 (Dixon J), 112 (Williams J). It also supports the regulation of exports for environmental purposes: *Murphyores* (n 36) 11–12 (Stephen J), 19–20 (Mason J).

[153] See above n 54.

[154] See, eg, *Fontana Films* (n 31) 189 (Gibbs CJ, Wilson J agreeing at 215), 211 (Mason J, Stephen J agreeing at 196, Aickin J agreeing at 215), 215 (Murphy J), 222–3 (Brennan J); *Tasmanian Dam Case* (n 32) 160 (Mason J), 183 (Murphy J), 249 (Brennan J), 268, 294–5 (Deane J); *Industrial Relations Act Case* (n 46) 485–9 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ).

[155] It is curious to note that the efforts of dissentients over this period to restrain federal power sought to rely, not on the core–incidental distinction, but on larger, more ambitious restrictions based upon a 'federal balance': *Tasmanian Dam Case* (n 32) 100 (Gibbs CJ), 304 (Dawson J); *Fontana Films* (n 31) 182 (Gibbs CJ). These efforts presented easy targets for attack: see, eg,

example, it has already been noted that, in *Fontana Films*, a law to protect the business of trading corporations from secondary boycotts was held to fall within the scope of s 51(xx) even though the law had a direct legal operation on persons other than constitutional corporations.[156]

Given that, by the end of the 1980s, questions of vertical federalism had been pushed steadily into the political process, it is not surprising that it took something transformative to bring the core–incidental distinction back into focus as a means of enhancing the Court's supervisory jurisdiction over legislative policymaking. That transformation was effected by the emergence of greater sensitivity to rights-protection during the closing years of the Mason Court, and resulted in the suggested use of proportionality as a test for characterisation in the incidental area. In *Davis v Commonwealth* ('*Davis*'), the Court struck down provisions of the *Australian Bicentennial Authority Act 1980* (Cth) that prohibited the use of certain expressions connected with the celebration of the bicentenary.[157] In the view of the majority, the nationhood power could not support a law which impacted disproportionately on the freedom of expression.[158] In *Nationwide News Pty Ltd v Wills* ('*Nationwide News*'), Mason CJ considered that *Davis* established two propositions:

> First, that, even if the purpose of a law is to achieve an end within power, it will not fall within the scope of what is incidental to the substantive power unless it is reasonably and appropriately adapted to the pursuit of an end within power, ie, unless it is capable of being considered to be *reasonably proportionate* to the pursuit of that end. Secondly, in determining whether that requirement of reasonable proportionality is satisfied, it is material to ascertain whether, and to what extent, the law goes beyond what is reasonably necessary or conceivably desirable for the achievement of the legitimate object sought to be attained and, in so doing, causes adverse consequences unrelated to the achievement of that object. *In particular, it is material to ascertain whether those adverse consequences result in any infringement of fundamental values traditionally protected by the common law, such as freedom of expression.*[159]

Industrial Relations Act Case (n 46) 485 (Brennan CJ, Toohey, Gaudron, McHugh and Gummow JJ); *Work Choices Case* (n 4) 73–4 [54], 104 [145], 120–1 [195]–[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

156 *Fontana Films* (n 31) 183, 185 (Gibbs CJ, Wilson J agreeing at 215), 195 (Stephen J), 201 (Mason J, Aickin J agreeing at 215).

157 *Davis* (n 45) 101 (Mason CJ, Deane and Gaudron JJ, Wilson and Dawson JJ agreeing at 101, Toohey J agreeing at 117), 117 (Brennan J).

158 Ibid 99–100 (Mason CJ, Deane and Gaudron JJ), 115–17 (Brennan J).

159 *Nationwide News* (n 50) 30–1 (emphasis added) (citations omitted).

The impugned provision in *Nationwide News* protected members of the Industrial Relations Commission from criticism calculated to bring the Commission into disrepute.[160] Two considerations were central to Mason CJ's conclusion that the impugned provision could not be supported by the incidental area of the conciliation and arbitration power in s 51(xxxv): first, that the degree of protection given to the Commission was in excess of that recognised at common law to protect the courts from criticism;[161] secondly, the impact of the impugned law on 'freedom of expression in relation to public affairs and freedom to criticize public institutions'.[162]

Justice Dawson reached the same conclusion that the impugned provision was not supported within the incidental area of s 51(xxxv).[163] However, his Honour rejected the use of proportionality as a characterisation test in the incidental area, and eschewed consideration of the impact of the law on the freedom of expression.[164] His Honour responded by employing the familiar statement that the 'justice, fairness, morality and propriety' of the law were matters for the Parliament.[165] The concept of proportionality is, his Honour said, 'of limited assistance where purposive powers are not involved'.[166] The 'danger in employing it', his Honour concluded, 'is that it invites the Court to act upon its view of the desirability of the impugned legislation rather than upon the connexion of the legislation with the subject matter of the legislative power'.[167]

Only two other members of the Court addressed the question. Although employing a test of proportionality to the incidental area of s 51(xxxv), Gaudron J considered that the impugned provision had a sufficient connection with the subject matter of the power.[168] By contrast, McHugh J held that the provision could not be supported within the incidental area, because of its impact on free speech, and accepted gross disproportionality as a measure of whether a law falls within the incidental area of a subject matter power.[169]

160 Ibid 24 (Mason CJ), discussing *Industrial Relations Act 1988* (Cth) s 299(1)(d)(ii), as enacted.

161 *Nationwide News* (n 50) 31.

162 Ibid 34.

163 Ibid 91.

164 Ibid 87–8.

165 Ibid 87, quoting *Burton* (n 71) 179 (Dixon CJ).

166 *Nationwide News* (n 50) 89.

167 Ibid.

168 Ibid 93–4.

169 Ibid 101–5.

Nationwide News precipitated the fractured views of the Court in *Cunliffe* and *Leask*, as canvassed above,[170] on the use of proportionality as a characterisation test, and the ongoing acceptance of the distinction between the core and incidental areas of a subject matter power. That distinction clearly provided the platform for the introduction of proportionality as a test of characterisation. What is also clear is that the deployment of the distinction, and opposition to its use, reflected value judgements about the relationship between the judiciary and the legislature — this time not in the context of the allocation of federal power, but the protection of fundamental freedoms.

To summarise, there is nothing groundbreaking in observing that value judgements are embedded in, and disguised by, constitutional principles. The purpose of Part III of this article was to expose the technical structure which permitted those value judgements to be expressed at the various stages of the constitutional characterisation process. At their core, they are directed to the relationship between the legislature and the judiciary, and the legitimate scope of judicial review, largely positioning responsible government as the primary driver of the characterisation principles, except where the Court has chosen to retain a heightened level of supervisory jurisdiction.

IV Recent Cases: Core State Functions and Aliens

The final part of this article will consider two recent High Court decisions to demonstrate the application of the constitutional characterisation schema developed in this article. In both cases, the essential characterisation exercise was crucial to the conclusions reached.

A *Core versus Incidental Areas of Subject Matter Powers: Protecting 'the Heartland of State Legislative Power'*

In *Spence*, the Court considered the validity of Commonwealth and Queensland legislation regulating the making of gifts to political parties.[171] The Queensland legislation *prohibited* property developers from making gifts to political parties that are registered under the *Electoral Act 1992* (Qld) and that endorse candidates for state and local government elections.[172] The Commonwealth provisions sought to *permit* the making of a political donation to political parties registered under the *Commonwealth Electoral Act 1918* (Cth) if the

[170] See above Part II(A)(3).

[171] *Spence* (n 6) 384–5 [1]–[4] (Kiefel CJ, Bell, Gageler and Keane JJ).

[172] Ibid 388 [16], discussing *Electoral Act 1992* (Qld) pt 11 div 8 sub-div 4 and *Local Government Electoral Act 2011* (Qld) pt 6 div 1A.

donation was '*required* to be, or *may* be', used to influence a vote at a federal election.[173] A donation would satisfy that condition if the donor explicitly required or allowed the gift to be used for that purpose, or the donor's gift was silent on the purposes to which the donation could be put.[174] The Commonwealth provisions did not apply to donations made explicitly, or marked separately by the recipient, for state electoral purposes.[175] Political parties can be, and are, registered under both legislative schemes. Thus, a donation that is silent as to its purpose could be spent by a political party for the purpose of a federal election. Equally, however, it could be spent by the political party for the purpose of a state election or another purpose unconnected with the federal election. Consequently, the federal provisions covered donations that might not be used for federal elections.

One of the many questions that arose in *Spence* for consideration was whether the Commonwealth provisions were within legislative power. The Commonwealth has power to regulate federal elections: the power being sourced in s 51(xxxvi) when combined with ss 10 and 31 of the *Constitution*.[176] While it might have been characterised as a purposive power,[177] the majority in *Spence* characterised the subject matter of a federal election

> *as a process* which has as its object the ascertainment of senators and members of the House of Representatives 'directly chosen by the people' within the meaning of ss 7 and 24 of the *Constitution*. An election is the process by which the people exercise that choice.[178]

Taking a broad view of that subject matter, 'nomination and grouping of candidates for election to the Senate or to the House of Representatives' was said by their Honours 'to form part of the electoral process' (that is, form part of the very subject matter of the power).[179]

[173] *Commonwealth Electoral Act 1918* (Cth) s 302CA(1) (emphasis added), as amended by *Electoral Legislation Amendment (Electoral Funding and Disclosure Reform) Act 2018* (Cth) sch 1 (collectively, '*Spence Commonwealth Provisions*').

[174] *Spence Commonwealth Provisions* (n 173) s 302CA(2).

[175] Ibid s 302CA(3).

[176] *Spence* (n 6) 400–1 [45] (Kiefel CJ, Bell, Gageler and Keane JJ). The majority did not address the scope of the express incidental power in s 51(xxxix): at 403 [53].

[177] Justice Dawson adopted this characterisation in *Langer v Commonwealth* (1996) 186 CLR 302, 324–5 ('*Langer*').

[178] *Spence* (n 6) 410 [71] (Kiefel CJ, Bell, Gageler and Keane JJ) (emphasis added). While Edelman J doubted that the power was purposive in character, his Honour identified the subject matter of the power differently 'as the conduct of persons with regard to *federal* elections': at 507–8 [344] (emphasis in original).

[179] Ibid 410 [71] (Kiefel CJ, Bell, Gageler and Keane JJ).

The majority had little difficulty finding a sufficient connection between the subject matter of the power and the provision to the extent that it permitted donations 'earmarked from the outset' to be used for the purpose of federal elections.[180] To the extent that the impugned provision operated 'to protect' such donations 'from any impediment arising from the operation of a State electoral law', it was within power.[181]

The constitutional difficulty arose in relation to the operation of the impugned provision in circumstances where donations were not earmarked for the purpose of federal elections; that is, where their use for that purpose was 'nothing more than a *bare possibility*'.[182] At this stage in the analysis, the majority returned to the distinction between the core and the incidental area of a power. Citing *Grain Pool*, the majority judgment set out the 'well settled' characterisation principles identified in the introduction to this article.[183] Their Honours noted that

> [t]he sufficiency of the connection of a Commonwealth law with the subject matter of a conferral of legislative power will appear without more if the law has a *direct* legal operation on the subject matter of the power.[184]

The majority referred[185] in support to *Huddart Parker Ltd v Commonwealth*,[186] *Murphyores Inc Pty Ltd v Commonwealth*[187] and the *Work Choices Case*.[188]

[180] Ibid 403–4 [55].

[181] Ibid. Chief Justice Kiefel, Bell, Gageler and Keane JJ said that the Parliament

> has power to secure … the fullest opportunity it thinks desirable to the people of the Commonwealth to elect their Parliamentary representatives unconfused by any other public duties required of them as citizens of a particular State …

at 403 [54], quoting *R v Licensing Court of Brisbane; Ex parte Daniell* (1920) 28 CLR 23, 31 (Isaacs J for Knox CJ, Isaacs, Gavan Duffy, Powers, Rich and Starke JJ). I will leave to one side the question of whether the impugned provision, to this extent, operated within the core of the power or within the incidental area. The majority later suggested that 'a law the purpose or object of which is protection of something that is encompassed within the subject matter' of power would operate within the incidental area: *Spence* (n 6) 407 [62] (Kiefel CJ, Bell, Gageler and Keane JJ). That conclusion, however, would not sit comfortably with the decision in *Fontana Films* (n 31) or *Cunliffe* (n 42).

[182] *Spence* (n 6) 404 [56] (Kiefel CJ, Bell, Gageler and Keane JJ) (emphasis added).

[183] Ibid 404–5 [57], citing *Grain Pool* (n 1) 492 [16] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[184] *Spence* (n 6) 405 [58] (emphasis added).

[185] Ibid.

[186] *Huddart Parker* (n 152) 515–16 (Dixon J, Rich J agreeing at 499).

[187] *Murphyores* (n 36) 20 (Mason J, Gibbs J agreeing at 9, Jacobs J agreeing at 26).

[188] *Work Choices Case* (n 4) 121–2 [198] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

However, their Honours emphasised, '[i]t must be understood … that these cases were concerned with laws that operated *directly on the subject matter* of a Commonwealth legislative power'.[189] The sufficiency of a connection is a matter of degree, and '[t]he more the legal operation of the law is removed from the subject matter of the power, the more questions of degree will become important'.[190] Citing Brennan CJ in *Cunliffe* and *Leask*, their Honours continued:

> Not inappropriate, although not always helpful, in examining those questions of degree is to frame the enquiry in terms of whether the operation of the law is in an area that is 'incidental' or penumbral or 'peripheral' to the subject matter of the power.[191]

But, while Brennan CJ (and, indeed, other judges in *Cunliffe* and *Leask*) sought to diminish the distinction between the core and the incidental area, the majority in *Spence* sought to reinforce it, folding what Brennan CJ had to say about the relevance of purpose in the characterisation process into a framework that differentiated between the core and incidental areas of a power:

> Determining whether a law is incidental to the subject matter of a power can be assisted by examining how the purpose of the law — what the law can be seen to be designed to achieve in fact — might relate the operation of the law to the subject matter of the power. … [A] law the purpose or object of which is protection of something that is encompassed within the subject matter of a conferral of legislative power may yet not be a law with respect to that subject matter because the law is insufficiently adapted to achieve that purpose, having regard to the breadth and intensity of the impact of the law on other matters.[192]

The classification of a provision as operating 'at the circumference of the subject'[193] opens the door for greater scrutiny of the connection between the provision's purpose and operation, with 'the slightness of the impact on the federal subject … shown most clearly by contrasting it with a much greater effect on matters outside the subject of power'.[194]

The majority then turned to consider two elements in that relational enquiry. First, the majority acknowledged the criticisms of Brennan CJ, Dawson J

189 *Spence* (n 6) 406 [58] (Kiefel CJ, Bell, Gageler and Keane JJ) (emphasis added).

190 Ibid 406 [59].

191 Ibid, citing *Cunliffe* (n 42) 317–22 (Brennan J), *Leask* (n 10) 591, 593–4 (Brennan CJ).

192 *Spence* (n 6) 406 [60], 407 [62] (Kiefel CJ, Bell, Gageler and Keane JJ) (emphasis added) (citations omitted).

193 Ibid 406 [60], quoting *Bank Nationalisation Case* (n 37) 354 (Dixon J).

194 *Spence* (n 6) 407 [62] (Kiefel CJ, Bell, Gageler and Keane JJ), quoting Stellios (n 8) 64.

and Toohey J in *Nationwide News*, *Cunliffe* and *Leask* of the use of proportionality analysis in this context.[195] However, the majority in *Spence* neither agreed nor disagreed with those criticisms. '[T]he point presently to be made', their Honours said, 'is that consideration of the purposes which the law is or is not appropriate and adapted to achieve may illuminate the required connection to the relevant head of power'.[196] Consequently, how precisely the relation between means and end in the incidental area of a power is to be approached was left undecided.

Secondly, their Honours turned to the areas outside power, the impact on which might be relevant to the sufficiency of connection. They referred to *Davis* and *Nationwide News* and, like Mason CJ in the latter, the majority in *Spence* appeared to accept that the impact on common law freedoms was relevant to the sufficiency of connection.[197] And, more relevantly to the circumstances in *Spence*, the majority turned to consider the impact of a Commonwealth law on the exercise of state power. Their Honours quoted Dixon CJ in *Australian Communist Party v Commonwealth* ('*Communist Party Case*')[198] and *Victoria v Commonwealth* ('*Second Uniform Tax Case*')[199] to the effect that matters 'within the province of the States' can only be reached by the Commonwealth Parliament if incidental to a matter within federal power.[200] In the latter case, Dixon CJ had considered that it was not incidental to the taxation power to prohibit a taxpayer paying state income tax until after the payment of federal income tax:

> This appears to me to go beyond any true conception of what is incidental to a legislative power and, under colour of recourse to the incidents of a power expressly granted, to attempt to advance or extend the substantive power actually granted to the Commonwealth until it reaches into the exercise of the constitutional powers of the States.[201]

195 *Spence* (n 6) 407 [63], citing *Nationwide News* (n 50) 87–9 (Dawson J), *Cunliffe* (n 42) 320 (Brennan J), 359 (Dawson J), *Leask* (n 10) 591, 593 (Brennan CJ), 599–605 (Dawson J), 614–15 (Toohey J).

196 *Spence* (n 6) 407 [63].

197 Ibid, citing *Davis* (n 45) 100 (Mason CJ, Deane and Gaudron JJ), *Nationwide News* (n 50) 33–4 (Mason CJ).

198 (1951) 83 CLR 1, 175 (Dixon J) ('*Communist Party Case*'), quoted in *Spence* (n 6) 408 [65].

199 (1957) 99 CLR 575, 614 (Dixon CJ) ('*Second Uniform Tax Case*'), quoted in *Spence* (n 6) 408–9 [67].

200 *Communist Party Case* (n 198) 175 (Dixon J), quoted in *Spence* (n 6) 408 [65].

201 *Second Uniform Tax Case* (n 199) 614. These comments by Dixon CJ had been referred to with approval by Gibbs CJ in *Gazzo v Comptroller of Stamps (Vic)* (1981) 149 CLR 227 ('*Gazzo*'), in

Two relevant consequences followed from this analysis for the validity of the impugned provision. First, the regulation of donations not earmarked for the *federal electoral process* (ie the subject matter of the power) could only be supported within the incidental area of that power. Secondly, the characterisation enquiry in the incidental area required consideration of the means (the operation) and end (the purpose) of the impugned provision. The purpose of the provision was to 'protect a source of funds which might, but need not, be deployed by a political entity in a federal electoral process'.[202] However, in the majority's view, there was 'disconformity' between that purpose and the breadth of the provision's operation which conferred an immunity from state laws otherwise limiting the funds that could be spent on activities with no connection to federal elections.[203] Of apparent importance was that the activities covered included those 'the regulation of which is within *the heartland of State legislative power*'.[204] Furthermore,

> [t]he contrast between the slightness of the impact of [the impugned provision] on the subject matter of the federal electoral process and its much greater impact on matters outside that subject matter point[ed] strongly to a purpose that [could not] be said to be incidental to that subject matter.[205]

support of the proposition that 'in considering whether a law is incidental to the subject matter of a Commonwealth power it is not always irrelevant that the effect of the law is to invade State power': at 240. A majority of the Court held invalid a Commonwealth law that exempted a maintenance agreement from attracting a duty or charge under state legislation: at 240 (Gibbs CJ), 245 (Stephen J), 280 (Aickin J). The statement by Gibbs CJ has been criticised. In *Fisher v Fisher* (1986) 161 CLR 438, Mason and Deane JJ considered the reasoning underlying the judgment to be 'fundamentally unsound': at 453. See also the critique in Stellios (n 8) 63, cited in *Spence* (n 6) 409 [69] (Kiefel CJ, Bell, Gageler and Keane JJ), 628 [136] (Nettle J), 686 [352] (Edelman J). Although recognising that critique, the majority in *Spence* (n 6) said that 'there is no reason to doubt the veracity of [Gibbs CJ's] observations': at 409 [69] (Kiefel CJ, Bell, Gageler and Keane JJ).

202 *Spence* (n 6) 412 [79] (Kiefel CJ, Bell, Gageler and Keane JJ).

203 Ibid 412–13 [80].

204 Ibid (emphasis added).

205 Ibid 413 [81].

The point of this analysis for the purposes of this article is to observe the essential characterisation adopted by the majority.[206] Of significance[207] is the characterisation of the power as having a *subject matter* that could then be sub-classified into its *core* and *incidental* parts. While judges in *Cunliffe* and *Leask* had reacted to the introduction of proportionality by emphasising that each head of power was 'but one grant', the majority in *Spence* returned to the traditional distinction to enlarge the Court's supervisory jurisdiction to make judgements about the vertical allocation of federal power. And importantly, the degree of connection between the incidental power and the impugned Commonwealth provision, in its operation on unearmarked donations, was assessed without regard (or, at least, sufficient regard) to the operation of the provision on earmarked donations that fell within power.

The dissenting judges did not carve up the power into rigid core and incidental areas and undertook what was closer to a characterisation exercise of the

[206] It is not the purpose of this article to evaluate and critique the majority's reasoning. However, two short points might be made. First, the connection to the subject matter of power turned on a future uncertainty — the *actual* spending of untied donations. The relational analysis in the incidental area might have been less about the comparative impact of the law inside and outside power, and more about the scope of power to cover the *possibility* of impact on the subject matter. That latter question was left unanswered in *Fontana Films* (n 31) 183 (Gibbs CJ), 208 (Mason J), discussed in Stellios (n 8) 67. Secondly, the majority's reasoning opened the door to criticisms that their Honours employed a pre-*Engineers' Case* approach to interpretation; that is, starting from the assumption that certain areas of regulation are within the powers of state Parliaments. The dissenting judges made comments to this effect: *Spence* (n 6) 435–6 [136] (Nettle J), 463 [221] (Gordon J), 511–12 [352] (Edelman J). While some passages may be read in that way, particularly the endorsement of Gibbs CJ's judgment in *Gazzo* (n 201), the better view is that the majority judges were alert to the '[p]re-*Engineers* ghosts': *Spence* (n 6) 387 [12] (Kiefel CJ, Bell, Gageler and Keane JJ); and that the potential impact on state power, and the reliance on Gibbs CJ in *Gazzo* (n 201), was limited to the kind of state powers that would be protected by principles of state immunity. That is, 'the heartland of State legislative power', as contemplated by their Honours, was intended to have narrow compass. That would be consistent with what the majority saw as the 'outworking of the conception of federalism that has prevailed since' the *Engineers' Case* (n 109) of '"a central government and a number of State governments separately organized" in which "power itself" forms no part of "the conception of a government"': *Spence* (n 6) 386 [6], quoting *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J). In this respect, see the suggestion made by Nettle J in *Spence* (n 6) 436 [137], although his Honour considered the distinction to be 'a fine one'.

[207] The classification of the federal elections power as a *subject matter* power, rather than a *purposive* power, probably had no significance in this case for the majority's conclusion: see *Spence* (n 6) 403 [53] (Kiefel CJ, Bell, Gageler and Keane JJ). If the power were purposive in character, there would be a need for the same evaluation of the means and end relationship, and there would have been no obstacle to their Honours considering the impact on matters outside power, including the 'heartland' power of regulating donations that might end up being used for the purposes of state elections.

power as 'but one grant'. Taking that approach, it was easier to bring the impugned provision within power, as the regulation of donations earmarked for federal election purposes contributed significantly to the conclusion that there was a sufficient connection with the subject matter of the power.[208] Certainly, it was important to that conclusion that the impugned provision ceased to operate when a donee had determined to apply unearmarked donations towards state elections.[209] However, it also seemed important that the power was not treated as differentiated into core and incidental areas. To the extent that unearmarked funds might have been deployed for another purpose, the dual characterisation principles saved the provision from invalidity.[210] In other words, the provision could simultaneously have the character of a law within power and the character of a law outside power. With the minimum connection with the subject matter established, 'the policy choice that the Commonwealth makes does not affect the question of validity'.[211] The dissenting judges' conclusion that unearmarked donations benefited from the dual characterisation principles would have been more difficult to reach if the impugned provision, in its operation on unearmarked donations, had to be justified on an independent basis within a more rigid incidental area of the power. While the incidental power was posited by the dissenting judges as a possible source of power if the law did not fall within the power's core area, it was not the primary focus of their Honours' analyses.[212]

In summary, the majority's deployment of essential characterisation principles was significant to the outcome. It was able simultaneously to endorse a broad scope to the power relating to federal elections *and* to retain closer judicial supervision as the subject of regulation moved to the periphery of that power. Such an outcome would not have been achievable if the power were characterised as purposive in nature (which would require *all* laws to be measured by the purpose of the power). And if the power were seen as 'but one grant', rather than divided into more rigid categories of core and incidental, there might have been more scope to bring the impugned provision within power. Indeed, to make the point crystal clear, the decision in *Fontana Films* suggests

[208] Ibid 438 [141] (Nettle J), 457–8 [203] (Gordon J). Justice Edelman's conclusion may have been assisted by accepting that the essential character of the power was a subject matter described 'as the conduct of persons with regard to *federal* elections': at 507–8 [344] (emphasis in original).

[209] Ibid 438–9 [142]–[143] (Nettle J), 460–1 [212]–[214], 462 [218] (Gordon J), 503–4 [333]–[335], 511–12 [352], 514 [357] (Edelman J).

[210] Ibid 439 [145] (Nettle J), 463 [219]–[221] (Gordon J), 516 [360] (Edelman J).

[211] Ibid 466–7 [231] (Gordon J).

[212] See ibid 463–4 [222]–[223] (Gordon J), 507–8 [344] (Edelman J).

that the law might have been seen as having an immediate operation on the subject matter of the power by protecting it from being undermined.[213] The majority's outcome was achieved by using essential characterisation tools, which then had direct consequences for the telescopic character of the power.

B *Characterisation of Subjects as Persons or Juristic Classifications: The Difficult Case of Aliens*

As outlined earlier in the article, some subject matters have been characterised as persons. The corporations covered by s 51(xx) are artificial persons. The people of any race covered by s 51(xxvi) are natural persons. These powers have been described as persons powers and, in each case, the search for the power's definitional character turns to the defining characteristics of those persons.[214]

In its reference to aliens, s 51(xix) has also been described as a persons power. In *Fontana Films*, Gibbs CJ said in reference to s 51(xx):

> In the first place, the power is conferred by reference to persons. Paragraph (xix), in so far as it refers to aliens, and par (xxvi) are the only other paragraphs of s 51 which confer power in that way.[215]

This essential character of the power was also identified by Brennan J in *Cunliffe*:

> The power to make laws with respect to aliens, unlike the majority of the powers conferred by s 51 of the Constitution, is not a power to make laws with respect to a function of government, a field of activity or a class of relationships: it is a power to make laws with respect to a class of persons.[216]

However, as Deane J said in the same case, the class of persons that s 51(xix) refers to is defined by a particular *status*.[217] Similarly, in *Shaw v Minister for Immigration and Multicultural Affairs*, Gleeson CJ, Gummow and Hayne JJ said:

> The power conferred by s 51(xix) supports legislation determining those to whom is attributed the *status* of alien; the Parliament may make laws which impose upon those having this status burdens, obligations and disqualifications

213 See above nn 55–59 and accompanying text.

214 See the accepted approaches of Mason J in *R v Federal Court of Australia; Ex parte The Western Australian National Football League (Inc)* (1979) 143 CLR 190, 233–4 and Deane J in the *Tasmanian Dam Case* (n 32) 273–4.

215 *Fontana Films* (n 31) 181, discussed in *Work Choices Case* (n 4) 110 [163] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

216 *Cunliffe* (n 42) 315.

217 Ibid 334.

> which the Parliament could not impose upon other persons. On the other hand, by a law with respect to naturalisation, the Parliament may remove that status, absolutely or upon conditions. In this way, citizenship may be seen as the obverse of the status of alienage.[218]

The identification of the relevant class of *persons* as possessing a *status* presents difficulties for identifying the essential character of the power. It is a characterisation exercise at the intersection of a 'natural' subject (a person) and an 'artificial' subject (a status). If the former, then the subject of the power, like members of a race, might be identifiable by reference to certain definitional characteristics. Some statements by High Court judges in the past have suggested such a characterisation by identifying 'allegiance' as a defining characteristic.[219] If the latter, then the subject might be determinable, like marriage, as a 'topic of juristic classification'.[220] If the former, the subject is determinable, at least in part, exogenously. If the latter, it is determinable endogenously. So, which is the essential character of s 51(xix)?

In *Love*, the question for the High Court was whether the *Migration Act* could be supported by the aliens power in its application to non-citizen persons of Aboriginal descent who were born outside Australia.[221] The plaintiffs had held visas which were cancelled pursuant to the *Migration Act*, the effect of which was to render the plaintiffs unlawful non-citizens and liable to removal from Australia.[222]

Across all the judgments, Gageler J was the clearest in identifying the essential character of the aliens power as the starting point for determining the power's definitional character. Commencing under the heading 'Nature of the aliens power',[223] his Honour said: 'The subject-matter comprises persons of a legal status — "aliens" — together with the process by which that legal status can be changed — "naturalisation".'[224] Consequently, the Commonwealth Parliament has the power under s 51(xix) 'to determine who is and who is not to

[218] (2003) 218 CLR 28, 35 [2] (emphasis added) (citations omitted) ('*Shaw*'). See also *Koroitamana v Commonwealth* (2006) 227 CLR 31, 38 [11] (Gleeson CJ and Heydon J); *Singh v Commonwealth* (2004) 222 CLR 322, 329 [4] (Gleeson CJ), 376 [128] (McHugh J), 383 [154] (Gummow, Hayne and Heydon JJ) ('*Singh*').

[219] *Singh* (n 218) 381 [144], 395 [190] (Gummow, Hayne and Heydon JJ).

[220] See *Marriage Equality Act Case* (n 25) 458 [20] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), quoting *Marriage Act Case* (n 26) 578 (Windeyer J).

[221] *Love* (n 7) 598 [1] (Kiefel CJ), 609 [51] (Bell J), 626 [112] (Gageler J), 632 [145]–[146] (Keane J), 652 [241]–[242] (Nettle J), 670 [294] (Gordon J), 689 [391] (Edelman J).

[222] Ibid 598 [2] (Kiefel CJ).

[223] Ibid 616 [83].

[224] Ibid.

have the legal status of alienage'.[225] Elaborating on the essential character of the power, his Honour continued:

> To the extent that s 51(xix) of the Constitution confers legislative power to determine the existence and consequences of a legal status, it resembles the legislative powers conferred by s 51(xvii) (with respect to 'bankruptcy'), s 51(xviii) (with respect to 'copyrights, patents … and trade marks') and s 51(xxi) (with respect to 'marriage'). Unlike the power conferred by s 51(vii) (with respect to 'lighthouses'), the example of which is often seized upon for the purpose of expounding constitutional principle, the subject-matter of none of those powers is a thing the existence of which falls to be ascertained as a constitutional fact independently of the application of positive law. Each refers instead to a 'recognized topic of juristic classification'. The topic of juristic classification to which each refers has an ineluctable fluidity in that the law on that topic was in a process of legislative development before and after 1900 and in that each is itself a source of legislative authority to modify or replace the pre-existing law on that topic. The subject-matter of none is expressed in terms that can be said to have an 'established and immutable legal meaning'. The scope of none can be 'ascertained by merely analytical and *a priori* reasoning from the abstract meaning of words'. Each takes its place within 'an instrument of government meant to endure and conferring powers expressed in general propositions wide enough to be capable of flexible application to changing circumstances'.[226]

Thus, his Honour aligned the essential character of the aliens power with the subjects of bankruptcy, copyrights, patents, trademarks, and marriage, all of which have been identified as recognised topics of juristic classification and defined, in very large part, endogenously to the legal system. It is an approach to the essential character of a power that can be traced from the *Marriage Equality Act Case* and *Grain Pool* back to Higgins J in the *Union Label Case* as an analytical device that severs constitutional meaning from the framers' assumptions and the legal meaning in 1900, and allows for a more dynamic interpretation over time. As a topic of juristic classification, it is unlike lighthouses or, it might be interpolated, the people of any race — subjects which are identifiable exogenously to the legal system.

The consequence of adopting that interpretation was that there was no 'constitutional fact' (or meaning) of alienage to be determined by the courts:

[225] Ibid 617 [84].

[226] Ibid 617–18 [86] (citations omitted), citing *Marriage Act Case* (n 26) 576, 578 (Windeyer J), *Marriage Equality Act Case* (n 25) 455 [14], [15], 458–9 [21] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), *Grain Pool* (n 1) 500–1 [40]–[41] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

> [T]he nature of the legislative power to determine who has and who does not have the legal status of alienage is wholly inconsistent with the notion that a person's status as an alien or non-alien falls to be determined independently of the exercise of the power as a question of constitutional fact. The status of a person as an alien or non-alien can (and where put in issue in appropriately constituted legal proceedings must) be judicially ascertained. But that status can be judicially ascertained only through the application of positive law, enactment of which inheres in the legislative power itself.[227]

In short, it is for Parliament to determine the status of alienage — it is not determinable exogenously to the legal system. Thus, earlier attempts to define 'alienage' as a constitutional fact by reference to the 'essential characteristic' of 'allegiance' to the sovereign were considered by Gageler J to be misguided.[228] Instead, the status of alienage is the obverse of membership (or citizenship) of the Australian body politic, and it is for the Parliament under s 51(xix) to set down the criteria to determine the respective classifications.[229] The consequence of Gageler J's approach is that status in this respect is binary — a person is either a citizen (ie a member of the Australian body politic) or a non-citizen (and thus an alien).

The plaintiffs in *Love* — of Indigenous descent but not Australian citizens — had argued that they fell within a classification of 'non-citizen non-aliens' — a classification that qualified the binary classification of citizens and aliens and, consequently, the means within the aliens power of delineating that binary classification.[230] The suggested classification of 'non-citizen non-aliens' was sourced, it was argued, in

> the common law's recognition of the continuing existence of self-determining indigenous societies maintaining a spiritual and cultural connection with land within Australia through observance of traditional laws and customs[231]

and such recognition by the common law was 'inconsistent with the treatment of members of those societies as strangers to that land or as foreigners to Australia'.[232] As persons who 'belong' to the land within the territory of the Commonwealth, it was argued that members of Indigenous communities (by virtue

[227] *Love* (n 7) 618 [88] (Gageler J).

[228] Ibid 618–19 [89].

[229] Ibid 619–22 [90]–[100].

[230] Ibid 626 [112], 630 [131]–[132] (Gageler J).

[231] Ibid 626 [117] (Gageler J).

[232] Ibid. This was characterised by Gageler J as the strongest basis upon which the argument could be put: at 627 [119].

of biological descent and mutual recognition of membership) must be taken to 'belong' to the political community of Australia and, thus, could not be aliens.[233]

Justice Gageler rejected the argument, but in terms that were predetermined by his Honour's choice of the essential character for the aliens power.[234] Membership of the political community of the Commonwealth is a topic distinct from the recognition and protection of the connection between Indigenous people and the land in the Commonwealth.[235] His Honour said that s 51(xix) was the means by which the Parliament defined the Australian political community; other powers, including s 51(xxvi), were the means for addressing the topic of connection to land.[236] How each of those topics is to be dealt with falls to be addressed through the political process.[237] Accordingly, his Honour concluded, the power in s 51(xix) to delineate aliens from citizens and, thus, to define the political community, could not be read as recognising, and being limited by, a third category of status beyond the reach of Parliament, whether that category be 'non-citizen non-aliens' or some other classification of 'constitutional citizens'.[238]

Yet, Higgins J in the *Union Label Case* had accepted that there were limits on Parliament's power to define the topic of juristic classification.[239] In the context of the aliens power, the point was made by Gibbs CJ in *Pochi v Macphee* ('*Pochi*') that

> [c]learly the Parliament cannot, simply by giving its own definition of 'alien', expand the power under s 51(xix) to include persons who could not possibly answer the description of 'aliens' in the ordinary understanding of the word.[240]

However, as was the case with the Court in the *Marriage Equality Act Case*, Gageler J in *Love* did not acknowledge any limits arising from the essential character of the power. While his Honour recognised that the power is not 'entirely unconstrained', the limits on the power were to be found, he said, elsewhere in the *Constitution*.[241] Exclusion from the body politic 'would need to be supported by "substantial reasons"', with his Honour citing cases about limits

233 Ibid 626–7 [117]–[118] (Gageler J).

234 Ibid 630 [131]–[132].

235 Ibid 629 [130].

236 Ibid.

237 Ibid.

238 Ibid 630 [132].

239 *Union Label Case* (n 11) 614–15.

240 (1982) 151 CLR 101, 109 ('*Pochi*').

241 *Love* (n 7) 622 [101].

implied from representative government.[242] Additionally, his Honour suggested that there might be a limit, deriving from the races power in s 51(xxvi), that might prevent Parliament from excluding people from the Australian community on racial grounds.[243] The point, for present purposes, is that any limit on the Parliament under s 51(xix) was seen to arise from an implied constitutional limit and not from any embedded limitation in the essential character of the power itself.[244]

While the other dissenting judges did not deal directly with the character of the power, it is reasonably clear that each judgment was consistent with Gageler J's approach to the essential character of the power. In separate judgments, Kiefel CJ and Keane J referred to s 51(xix) as the means by which Parliament determines 'the conditions upon which a non-citizen may become a citizen and … attribute[s] to any person who lacks the qualifications for citizenship the *status* of alien'.[245] Membership of the national body politic is not to be determined by physical or spiritual connections to land within the Commonwealth[246] or 'some supra-national or natural law'.[247] To recognise a category of 'non-citizen non-alien' would be to vest the authority of determining membership of the Australian political community in Indigenous communities,[248] thereby accepting a form of Indigenous sovereignty that was rejected in

[242] Ibid, citing *McGinty v Western Australia* (1996) 186 CLR 140, 166–7, 170 (Brennan CJ), *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 [7], 176–7 [12], 182 [23] (Gleeson CJ), 198–200 [83]–[86] (Gummow, Kirby and Crennan JJ), *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19–21 [23]–[26] (French CJ), 56–62 [150]–[168] (Gummow and Bell JJ), 118–21 [372]–[385] (Crennan J).

[243] *Love* (n 7) 622 [101], citing *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 365–6 [40] (Gaudron J). Justice Gageler suggested not only that s 51(xxvi) might contain a limitation preventing discrimination on racial grounds, but also that such a limitation would apply as a positive limit across other Commonwealth powers: *Love* (n 7) 622 [101], citing *Bourke v State Bank of New South Wales* (1990) 170 CLR 276, 289 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ). This would be a striking innovation in constitutional principle on s 51(xxvi).

[244] This is not the occasion for a developed critique of Gageler J's reasoning in this respect. However, if a limit cannot be grounded in one of the three constitutional characterisation steps discussed in this paper, it seems to leave in the Parliament's hands the exclusive authority to determine the reach of a federal head of power.

[245] *Love* (n 7) 599 [5] (Kiefel CJ) (emphasis added). Justice Keane made statements to a similar effect: at 636 [166], 639 [177]. However, and perhaps incompatibly with that approach, Keane J also accepted that foreign allegiance is the clearest characteristic that makes a person an alien: at 637 [170].

[246] Ibid 605 [31]–[33] (Kiefel CJ), 646 [213] (Keane J).

[247] Ibid 641 [193] (Keane J). See also at 608 [46] (Kiefel CJ).

[248] Ibid 604 [25] (Kiefel CJ), 642 [197] (Keane J). See also at 631 [137] (Gageler J).

Mabo v Queensland [No 2].[249] A limitation on that power had to be found elsewhere in the *Constitution*;[250] but, for their Honours, no such limitation could be discerned.[251]

The approach of the majority to the essential character of the power was very different. Each majority judge recognised the tension emerging from the existing authority on the aliens power: on the one hand, there has been an acceptance that Parliament can define the subject matter of the power — the status of alienage — at least to some extent; but, on the other hand, there has been a recognition that the expression 'alien' has a 'defining characteristic'.[252] This tension was inherent in what Gibbs CJ said in *Pochi*.[253] Echoing Gibbs CJ's words, Bell J accepted that the question was whether 'Aboriginal Australians *are persons* who cannot possibly answer the description of "aliens" *in the ordinary understanding of the word*'.[254]

Writing in separate judgments, Bell J and Gordon J responded to this question in broadly similar terms. The ordinary understanding of 'alien' did not include Aboriginal Australians.[255] As a group of persons, they are 'sui generis'.[256] Justice Bell said that, because of their 'distinctive connection' with their traditional lands,[257] Aboriginal Australians cannot belong to another place.[258] Similarly, Gordon J saw 'aliens' as a 'constitutional term'[259] that is 'anchored in the concept of "belong[ing] to another"',[260] conveying 'otherness', being an 'outsider', or 'foreignness'.[261] Aboriginal Australians, with their unique connection to their land and waters, cannot be 'aliens' in the constitutional sense of that word.[262]

[249] (1992) 175 CLR 1, 57–60, 63 (Brennan J, Mason CJ and McHugh J agreeing at 15), cited in *Love* (n 7) 604 [25] (Kiefel CJ).

[250] In *Love* (n 7), both the Chief Justice and Keane J acknowledged the point made by Gibbs CJ in *Pochi* (n 240), but neither judgment explored that potential limitation: at 600 [7] (Kiefel CJ), 636 [168], 637–8 [172] (Keane J).

[251] *Love* (n 7) 606–8 [39]–[48] (Kiefel CJ), 639–40 [178]–[182] (Keane J).

[252] Ibid 611 [60] (Bell J). See also at 650–1 [236], 653 [244] (Nettle J), 673–4 [310], 677 [326] (Gordon J), 703–4 [433] (Edelman J).

[253] *Pochi* (n 240) 109.

[254] *Love* (n 7) 609 [51] (emphasis added).

[255] Ibid 615 [74] (Bell J), 678 [333] (Gordon J).

[256] Ibid.

[257] Ibid 614 [73].

[258] Ibid 615 [74].

[259] Ibid 671 [300].

[260] Ibid 671 [301], quoting *Singh* (n 218) 395 [190] (Gummow, Hayne and Heydon JJ).

[261] *Love* (n 7) 670 [296].

[262] Ibid 681–2 [349], 685 [364], 687 [374] (Gordon J).

Justice Edelman reached similar conclusions, but through the lens of 'political community'.[263] His Honour identified the 'essential meaning of an alien' as 'a foreigner to a political community'.[264] At Federation,

> [t]he Aboriginal inhabitants of Australia had community, societies and ties to the land … that established them as belonging to Australia and therefore to its political community.[265]

Nothing since that time had changed that position. In particular, the statutory definition of citizenship could not operate as the exclusive determinant of the political community.[266] As his Honour put it, the 'antonym of an alien to the community of the body politic cannot be a "citizen"'; rather, it is a 'belonger'.[267] By mediating the composition of the political community through that *constitutional* conception of membership, his Honour was able to depart from the approach of the dissenting judges who saw the political community as one determined exclusively by the Parliament. Beyond statutory inclusion by citizenship, the political community is to be determined in part by 'fundamental norms of attachment to country',[268] including that of Aboriginal people who have 'powerful spiritual and cultural connections' with the territory of Australia.[269]

For Nettle J, once it was accepted in *Pochi* 'that the aliens power is not entirely untrammelled', then '*some* individuals' who are not citizens might not be aliens.[270] That was so in the case of persons who owe a permanent allegiance to the Crown in right of Australia and, thus, 'their classification as aliens lies beyond the ambit of the ordinary understanding of the word'.[271] His Honour continued:

> Whether a person's classification as an alien lies beyond the ambit of the ordinary understanding of that word has to depend on the person's possession of characteristics which so connect him or her to the sovereign as necessarily to give rise to reciprocal obligations of protection and allegiance.[272]

263 See, eg, ibid 689 [391].

264 Ibid 690 [393], 694–5 [404]. See also at 691 [395]–[396], 697 [410], 702–3 [429], 705 [437].

265 Ibid 690 [392].

266 Ibid 690–1 [394].

267 Ibid 691 [394]. See also at 694 [403], 705 [437].

268 Ibid 708 [445].

269 Ibid 710 [451].

270 Ibid 657 [252] (emphasis in original).

271 Ibid 657 [252].

272 Ibid 659 [260].

In Nettle J's view, immediately prior to Federation, the common law 'acknowledged the authority of elders and other persons to determine membership of an Aboriginal society'.[273] 'Permanent exclusion from the territory of Australia' would have been incompatible with that membership status.[274] It followed that, at common law, there was a 'unique obligation of protection owed by the Crown to [Aboriginal] societies and to each member in his or her capacity as such'.[275] Accordingly, resident members of Aboriginal societies could not be aliens 'in the ordinary sense of the word',[276] for the purposes of s 51(xix).[277]

This is not the occasion to attempt to harmonise the four majority judgments or synthesise them with the earlier cases on the aliens power. For the purposes of this article on constitutional characterisation, it is enough to make the following observations. First, the majority and dissenting judges adopted differing conceptions of the essential character of the power. The dissenting judgments, particularly that of Gageler J, saw the subject matter as a *topic of juristic classification* — the status of alienage — which can be determined exclusively by the legislature. By contrast, my preferred reading[278] of the majority judgments is that their Honours saw the subject matter as a category of *persons* — many of whom are given the legal status of non-citizen (and, thus, the constitutional status of alienage) by Parliament, but others who are vulnerable to that status by meeting a constitutional definition of alienage. On the approach of the dissent, alienage is exclusively determined endogenously to the legal system; on the majority approach, it is, in part, determined exogenously.[279]

Secondly, a recognition of these differing conceptions of the essential character of the aliens power largely renders sterile the debate about the application of the *Communist Party Case*.[280] If the dissent is correct about its classification of the subject matter, then it is largely for Parliament to determine membership

273 Ibid 664 [272].

274 Ibid.

275 Ibid.

276 Ibid 668 [284].

277 His Honour left open the possibility that Parliament might legislate to abrogate the common law obligation of protection of Aboriginal societies: ibid 668 [283].

278 An alternative view of the majority judgments, which is less clear on the reasons themselves, is that their Honours accepted that the power was concerned with legal status, but took seriously the proposition that the definitional character of the power placed limits on the essential character of the power.

279 An approach described by Gageler J as 'a constitutional cul-de-sac' that the Court had been down before: *Love* (n 7) 630 [132]. That was during the period between *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391 and *Shaw* (n 218).

280 *Love* (n 7) 618 [87]–[88] (Gageler J), 677–8 [329], 678 [331] (Gordon J). See also at 690–1 [394] (Edelman J).

of the political community. There is no constitutional fact to be determined by the Court. However, if the majority is correct, then it would be a contravention of the principle from the *Communist Party Case* for Parliament to be given unlimited power to define the subject matter of power. What is of greater moment is that the *juristic classification* approach leaves unaddressed the potential limits on Parliament's power and how they are to be identified. As already discussed, Higgins J in the *Union Label Case* recognised that there must be limits to what Parliament can do with a juristic classification.[281] Those potential limits were not addressed in *Grain Pool* or the *Marriage Equality Act Case*, and were left unaddressed in the *Love* dissenting judgments.[282] If the approach of characterising some subject matters as juristic classifications is to remain persuasive, further refinement of that approach is required.[283] Given that the Higgins J approach of searching for the substance of the law is no longer in favour at the telescopic characterisation stage, it would seem that the definitional character must provide the constraint on the essential character. What theory of interpretation would then apply at the definitional character stage would be very much up for grabs.[284]

Finally, to return to the central theme of this article, it is evident from the differing approaches in *Love* that the essential characterisation of the subject matter of power is central to its definitional character.

V Conclusion

The conclusions may be stated briefly. In Part II, the article sought to develop a schema for constitutional characterisation principles. While the schema is not disruptive of established statements of principle, it offers an analytical framework for approaching the characterisation exercise, offering a range of benefits to doctrinal clarity and coherence including the identification, in clear and separate terms, of the basic step of determining the *essential* character of the power. As explained in Part II, that step is pivotal to discerning the *definitional* character and *telescopic* character of a power. The schema also helps to explain the connections across the various stages in the constitutional characterisation exercise, as the various principles are shaped by the same underlying constitutional values. It also raises a real question about the universal adoption of

[281] See above nn 102–104 and accompanying text.

[282] The only judge to address the potential limits was Edelman J, who seemed to propose a solution of locating the correct level of generality of the definitional meaning: *Love* (n 7) 693 [401].

[283] See also Aroney et al (n 5) 146–8.

[284] For an analysis of how interpretive approaches might impose limits on these heads of power, see generally Stokes (n 30).

originalist methods of constitutional interpretation — a subject that might benefit from further enquiry.

Part III then sought to explain how characterisation principles and rules disguise choices about the scope of judicial review, dictating the relationship between the primary, democratic role of Parliament (through responsible government) and the supervisory jurisdiction of the courts to determine questions of federalism and the relationship between the individual and the state. An appreciation of this point allows us to understand the reasons why certain analytical techniques are adopted by the High Court to resolve questions of federal power, and opens the door to further research as to how the horizontal division of power can be obscured within the vertical division of power.

Part IV then reflected on two recent and important constitutional cases dealing with the Parliament's power to permit political donations and to remove non-citizen Indigenous people from Australia. In the former context, the essential characterisation distinction of *core–incidental* made a somewhat surprising reappearance to prevent the Commonwealth from regulating untied political donations on federalism grounds. In the latter, the competing characterisations of the aliens power, as identifying a *status* or a class of *persons*, appeared to be at the heart of the disagreement between the majority and dissenting judges. Such a disagreement might become important if the Court were to hear a challenge to provisions of the *Australian Citizenship Act 2007* (Cth) cancelling the Australian citizenship of certain citizens.[285]

[285] See *Australian Citizenship Act 2007* (Cth) pt 2 div 3.