Introduction

Let me begin by acknowledging the Yuggera and Turrbal peoples, who are the traditional owners of the lands where I live on the south side of Brisbane and where I’m speaking from today, as well as the Gadigal people on whose lands UNSW is built. I pay my respects to their families and elders, acknowledge that they never ceded their sovereignty or their territories, and recognise their ongoing struggles for truth and justice. And in fact it’s the very matters touched on in that acknowledgement of country – Aboriginal peoples’ unceded sovereignty and territory, their connections to community and country, and their struggles for truth and justice within a settler-colonial legal system forcibly imposed on their societies – it’s these matters that form the subject of Megan’s and my talk today.

We’ll be talking about the High Court’s decision in *Love v Commonwealth* and exploring its significance for the current debates over Indigenous constitutional recognition. I’ll begin by giving an overview of the case, before outlining the main strands of reasoning in the majority and minority judgments, including offering a critique of the role played by ‘race’ in the minority’s reasoning. After that, I’ll hand over to Megan, who’ll explore *Love v Commonwealth*’s importance for Indigenous constitutional recognition.

Let me give an overview of the facts and outcome in *Love*.

Overview

In late 2018, two Aboriginal men, Daniel Love and Brendan Thoms, were taken into immigration detention pending deportation from Australia. Daniel Love identifies as a member of the Kamilaroi people whose country is in north-western NSW. Brendan Thoms is a member of the Gunggari people whose country is in southern Queensland; and he’s also a recognised Gunggari native-title holder. Having been born outside Australia, neither Mr Love nor Mr Thoms was an Australian citizen, though both had lived in Australia since their early childhood. Under the *Migration Act*, their visas had been mandatorily cancelled on the basis that they had each been sentenced to terms of imprisonment of 12 months or more.

In special cases heard by the High Court in 2019, Mr Love and Mr Thoms sought to challenge their susceptibility to the *Migration Act*’s regime of detention and deportation on the grounds that they fell beyond the scope of the constitutional head of power on which the *Migration Act* relies. Aboriginal people, they argued, could not be considered to fall within the meaning of ‘alien’ under the Commonwealth Parliament’s power in s 51(xix) of the *Constitution* to make laws about aliens.

On 11 February 2020, in the case of *Love v Commonwealth*,¹ four members of the High Court – Justices Bell, Nettle, Gordon and Edelman – agreed with the plaintiffs. Chief Justice Kiefel and Justices Keane and Gageler dissented. An upshot of the decision is that the *Migration Act*’s provisions that rely on the aliens power – including those that resulted in Mr Love and Mr Thoms having their visas cancelled and being detained in immigration detention

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¹ [2020] HCA 3; (2020) 94 ALJR 198.
– cannot apply to Aboriginal people, even where they lack Australian citizenship. In this respect, the decision is a rejection by the High Court of what we might call Indigenous dispossession by deportation. Both Mr Love and Mr Thoms have launched claims for damages against the Commonwealth on the basis that they were falsely imprisoned in immigration detention.

The Judgments

The holding agreed to by all of the majority judges, as stated in Justice Bell’s judgment, is that ‘Aboriginal Australians (understood according to the tripartite test in Mabo (No 2)) are not within the reach of the “aliens” power conferred by s 51(xix) of the Constitution’.2

Central to the reasoning in each of the majority judgments was the unique connection between Aboriginal and Torres Strait Islander peoples and the territory of Australia. That connection was described by all of the majority judges as ‘spiritual’.3 Justices Gordon and Edelman also placed great emphasis on the remarkable depth of that connection going back tens of thousands of years.4 It’s a connection, said Justice Gordon, that had not been broken by the British acquisition of sovereignty over Indigenous lands, by federation or by any subsequent developments within the Australian constitutional order.5 On the contrary, as several judges made clear, it’s a connection that has been increasingly recognised in Australian law and society.6

The majority justices emphasised that this connection to land was an ongoing one recognised by the common law in Mabo (No 2), but that its legal implications could not be confined to the recognition of native title.7 Connection to country was the ‘deeper truth’, to quote Justice Gordon, recognised in Mabo, one that exceeded the narrower, property-based confines of native title rights and interests.8 Indigenous people’s connection to their lands and waters was fundamentally also a connection to the territory of the Australian polity, and this connection rendered them incapable of being ‘aliens’ within the meaning of s 51(xix).9

For Chief Justice Kiefel and Justices Gageler and Keane in the minority, Aboriginal people’s connection to country could not be used as a basis for interpreting the aliens power. All of the minority judges effectively accused those in the majority of exceeding the accepted bounds of the judicial function.10 The minority judges were unwilling to accept that the common law’s recognition of Indigenous connection to country had legal implications beyond native title, and rejected the use of that connection as a basis for constitutional interpretation or for grounding a constitutional connection to the Australian body politic.11 According to all of the minority judges, the effect of the majority’s argument was an impermissible recognition of Aboriginal sovereignty or something close to it, since it made alien status under the Constitution dependent on decisions made by Aboriginal groups about their own membership.12

Perhaps most controversially, the minority judges all represented the majority’s central holding – that Aboriginal people could not be considered constitutional aliens – as an improper reliance on ‘race’ to determine membership of the Australian political

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2 [81].
3 Bell [70]; Nettle [276], [278]; Gordon [290]; Edelman [391], [396], [450]–[451].
4 Gordon [336]; Edelman [391], [451]; see also Nettle [276].
5 Gordon [336]-[337], [342]-[346], [358]-[365].
6 Nettle [263]; Gordon [360]; Edelman [450].
7 Bell [70]-[71]; Nettle [276]-[278]; Gordon [339]-[441], [363]-[364]; Edelman [451].
8 Gordon [289], [340]; see also the references to this connection as a ‘fundamental truth’ in Edelman [451].
9 Bell [71]; Nettle [276]; Gordon [347]-[350]; Edelman [450].
10 Kiefel [8], [44], [46]; Gageler [133]-[134]; Keane [181].
11 Kiefel [30]-[31], [45]; Gageler [128]; Keane [194]-[195], [212]-[213].
12 Kiefel [25], [37]; Gageler [137]; Keane [197], [199]-[205]. For a response, see Gordon [351]-[357].
community.\textsuperscript{13} While none of those in the minority came outright and said it, there is an unmistakable sense from their judgments that they perceived in the majority’s reasoning an illegitimate act of racial discrimination against non-Indigenous people.

Much can be said in response to these claims about the majority’s supposedly impermissible reliance on ‘race’. And in fact, the majority judges made a range of responses that I won’t go into here.\textsuperscript{14}

But one matter overlooked by both the majority and minority judges in the discussion of race is that the apparently most troubling feature of race – its basis in biological descent – also plays a fundamental but entirely uncontroversial role in constituting and reproducing the Australian political community itself. One of the main criteria for acquiring Australian citizenship today, albeit a criterion insufficient by itself, is having a parent who is an Australian citizen or permanent resident.\textsuperscript{15} In other words, membership of the Australian political community is and has long been defined in significant part by biological descent, which is universally accepted as constitutionally valid.

I draw attention to this fact to make two points. First, using biological descent as the basis for differential legal treatment of people need not be seen as some invidious form of racial discrimination. As Australian citizenship law has long confirmed, biological descent can be a relevant characteristic for differentiating between different groups of people. The second point is that biological descent need not be seen as an irredeemably racial criterion. Rather, as in the case of citizenship, biological descent can be a criterion for establishing membership of an ongoing political community. I would suggest that Aboriginality, like Australian citizenship, is much better understood as involving membership of a discrete political community rather than membership of a race; and that for both Aboriginality and Australian citizenship, biological descent can be a legitimate criterion for membership of such a political community.

With that, I’ll hand over the Megan now to talk about the implications of Love for Indigenous constitutional recognition.

**********MEGAN**********

\textbf{Indigenous Constitutional Recognition in Love}  
One way of reading the High Court’s decision in Love is as a kind of judicially created constitutional recognition of Aboriginal and Torres Strait Islander peoples. Indeed, some of the majority judges seem to quite self-consciously deploy the language of recognition in their judgments. As Justice Gordon declared in a key passage: ‘Aboriginal Australians are not outsiders or foreigners – they are the descendants of the first peoples of this country, the original inhabitants, and they are recognised as such.’\textsuperscript{16} Some of the minority judges made pointed references to the public debate over Indigenous constitutional recognition in order to demonstrate that accepting the plaintiffs’ arguments would involve an untoward judicial intervention into a fundamentally political matter – effectively, it would entail the

\begin{footnotesize}
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\item[\textsuperscript{13} Kiefel [31], [44]; Gageler [133]; Keane [177], [181], [210].]
\item[\textsuperscript{14} Bell [73]; Nettle [274]; Gordon [370].]
\item[\textsuperscript{15} \textit{Australian Citizenship Act 2007} (Cth) ss 11A, 12(1)(a).]
\item[\textsuperscript{16} [355]. See also, eg, [398]. Justice Gordon also cites a recent article by former Chief Justice Murray Gleeson arguing in favour of Indigenous constitutional recognition: Murray Gleeson, ‘Recognition in Keeping with the Constitution’ (2019) 93 \textit{Australian Law Journal} 929, cited at [370].]  
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achievement of constitutional recognition by judicial fiat, without proper input from either Aboriginal and Torres Strait Islander peoples or the Australian people more generally.\textsuperscript{17}

But regardless of what you think about the propriety of the majority’s efforts at constitutional recognition, the constitutional recognition achieved by the High Court in \textit{Love} is troubling in another way. The troubling feature is that at least some of the majority judgments – notably those of Justices Nettle and Gordon – are wedded to notions of Aboriginality that, as in native title law, demand an unreasonable degree of continuity with so-called ‘traditional’ societies that predated colonisation. The harshness of that approach has been widely criticised in the native title context, since it takes manifestly inadequate account of Indigenous societal and cultural change, especially under the often-violent upheaval wrought by more than two centuries of colonisation. More perversely, it renders those Aboriginal and Torres Strait Islander people most impacted by the violence of British colonialism the least able to gain redress. As the basis for Indigenous constitutional recognition, this tradition-bound approach is therefore unduly exclusive, leaving many, perhaps most Aboriginal and Torres Strait Islander people unrecognised.

Aside from the worrying reliance of several majority judges on a tradition-bound Indigeneity as the basis for constitutional recognition, \textit{Love} also instantiates a form of constitutional recognition with quite limited constitutional effects. The upshot of the decision is to impose a negative constraint on one constitutional power that has, overall, minimal significance for Aboriginal and Torres Strait Islander peoples. True, it saves Indigenous people from the harshest effects of the aliens power: from dispossession by deportation. The importance of that protection, especially for the plaintiffs themselves, should not be downplayed. But nor should its wider constitutional significance be overstated.

To be sure, it’s possible that \textit{Love} will be only the opening gambit in a new jurisprudence that insists on interpreting constitutional provisions on the basis of Aboriginal and Torres Strait Islander peoples’ connection to country. But in the unlikely case that \textit{Love} ends up having constitutional ramifications beyond the scope of the aliens power, it’s very hard to see how judicial intervention alone could satisfy Indigenous demands for constitutional recognition. As the Uluru Statement makes clear, Aboriginal and Torres Strait Islander peoples are seeking collective control over all aspects of their lives through a constitutionally enshrined Voice to Parliament. The courts cannot create such an institution. Nor can the courts negotiate treaties, another constitutional demand in the Uluru Statement. These are only matters that can be resolved through concerted political action outside the courts.

\textsuperscript{17} Gageler [134]; Keane [178].