James Allan, 'Wokery and High Court 'Otherness''
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Wokery and High Court 'Otherness'

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ABSTRACT

In this article the author explains why he was spoilt for choice when asked by this review to write an article on the tendency towards wokery in today's Australian law schools, amongst the lawyerly caste more generally in this country, and across so many (and much) of our key institutions. Cancel culture limits on free speech, the emergence of a sort of 'Oppression Olympics' whereby self-declared victim groups compete to feel the most victimised, the wider rise of an illiberal identity politics, the list of potential topics goes on and on and are noted by the author. He then settles on illustrating the woke credentials of our High Court of Australia in the recent Love case. Indeed, the author concludes, depressingly, that this case was an instance of wokeness on steroids that emanated from our top court.

I FIRST CONSIDERATIONS

It is not often in today's legal academy that one is asked to write a paper on the theme of 'Wokeshevism: Critical Theories and the Tyrant Left'. Actually, nothing like it had ever happened to me before. Yes, yes, yes whole forests are daily felled to provide the paper to write

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law review articles on the many intellectual delights of the preening social justice brigades. With little effort one can find myriad articles that might easily be classed as detailing the travails of some self-declared "victim of oppression" group or other – and this despite the fact that life in today's West is plainly the best time (in material and life opportunity terms) for anyone, ever, to have been alive – a point doubly true for women and for minority groups in the West (as compared to minorities anywhere else on the planet, ever).[1]

Or one can find all the social justice type articles advocating judicial activism and 'living tree' constitutional interpretation avenues and approaches in order to cure the perceived lapses or failings of the democratically elected Parliament. Or one can also find that portion of the legal literature aimed at supercharging 'corporate social responsibility', for some like me this being a route to allow woke, *uber* progressive and virtue-signalling corporate managers and boards to ignore shareholders' concerns about better company performance and higher stock prices in favour of almost universally left-leaning political concerns, concerns that when I went through Canadian law school in the mid-1980s would have been considered far outside the legitimate and proper remit of CEOs, HR departments (then just 'personnel departments') and boards and probably a breach of the 'best interests of the owner-shareholders' duty or 'shareholder primacy' rule.

And those examples are just off the top of my head and without even venturing into the countless peer-reviewed law articles that touch on transgenderism, feminism, critical race theory, refugees, and anti-

[1] Matthew Ridley, *The Rational Optimist: How Prosperity Evolves* (Harper Perennial, 2010); Matthew Ridley, 'Cheer up!', *Readers Digest* (Web Article, 6 April 2020).

colonialism. Or that support further legislative changes that promote diversity concerns, that favour "hate speech" type inroads on free speech, that look a lot like the wailing and gnashing of teeth about the supposed rise of populism, or that amount to calls for the winding back of the presumption of innocence when it comes to certain disfavoured groups (the reader here being invited to fill in the blanks of today's most obvious disfavoured groups).

In that sort of academic world, the one in which Australia's legal academics today inhabit, the reader will quickly appreciate why the invitation to write an article for the theme of this special issue, 'Wokeshevism', came as such a surprise. And was so welcome. As I said, nothing like it had ever happened to me before; and it was difficult to get out of my head the thought of how delightful the eventual release of this special issue was going to be. I could imagine the pleasure of watching the *Guardian*-reading left-wing academics fulminating in rage. Possibly my getting married and seeing the birth of my first-born would score higher in the pleasurable stakes. But only possibly.

II THE PARADOX OF CHOICE

Of course, the invitation to prepare this article also brought with it the paradox of choice.[2] This is the problem that occurs when one has too much choice, too many choices, over great abundance and experiences a sort of cognitive overload, finding it difficult to make a decision. All sorts of possible topics for my paper ran through my head, amongst

[2] Barry Schwartz, *The Paradox of Choice: Why More is Less* (Harper Perennial, 2005); Daniel Kahneman, *Thinking Fast and Slow* (Farrar, Straus and Giroux, 2011).

them potential pieces on the woke, cancel-culture universities; or maybe I would write something on the 'Oppression Olympics', on how supposed victim groups in the world of identity politics seemingly form a sort of informal, "laid-down by no one" league table or ordinal ranking of "victimhood" – do transgender former males competing in women's sports win out against lesbian female athletes now unable to compete, or do they lose? Do radical Muslim terrorists rank higher up the victim hierarchy or do homosexuals who would fare rather badly should the ideology of the terrorists prevail? That, I thought, might work as a pretty good topic. It was certainly a catchy title.

Then again, the philosopher in me wondered if I should go big ticket and talk about why I thought wokeness was like a sort of new religion for the secular age. This would relate to a claim I had recently made in a chapter of the book *Forgotten Freedom No More: Protecting Religious Liberty in Australia*.[3] There, as an atheist myself, I had not only admitted the often over-looked good that the religious worldview inspires. I had also speculated about the need most people have to believe in something in transcendent terms, as of higher value, perhaps in almost timeless terms. Here is what I wrote:

> Here's another factor that gets little attention. In the absence of a Christian (or other mainstream religious) worldview, how many people are likely to be content or able to function at all with what looks to be a corollary of atheism, namely a fairly bleak picture of a meaningless world where a human 'is of no greater importance to the universe than that of an oyster' (to quote Mr Hume again)? Your Bertrand Russells and your David

[3] James Allan, 'A Humean Take on Religious Freedom' in Robert Forsyth and Peter Kurti (eds), *Forgotten Freedom No More: Protecting Religious Liberty in Australia* (Connor Court, 2020) 133.

> Humes, yes. But one suspects the vast preponderance of people who forswear the religious mindset with one hand will, with the other, have a deep need to welcome it back into their lives in some different guise. They might substitute worship of the planet, of Gaia, and instil that with some deeper significance – though truth be told, why some tiny dot of a planet in an obscure, far-flung galaxy in an ever-expanding universe should warrant that sort of souped-up, steroid-enhanced level of concern (absent a benevolent, theistic God) is not wholly clear. As a subset of that they might re-direct the religious impulse towards, say, lowering carbon dioxide emissions, again with a near religious impulse. Or they might infuse vegetarianism with this redirected spiritual vigour. The possibilities are many. And more than one commentator has suggested that most (perhaps almost all) non-believers will not actually jettison Christianity or Judaism or Islam for some bleak Bertrand Russell-like atheism, but rather for some version or other of these modern day types of Paganism. It won't exactly be a return to the Roman Republic before Christ; but there will be parallels – possibly including the tendency to live in the here and now, gratifying what you can as soon as you can. And if there be any truth in that, then the cost-benefit analysis of whether a widespread belief in a benevolent, theistic God be an overall plus or minus must include the consequences of that sort of redirected Paganistic zeal as well.[4]

As I said there, the possibilities of redirected religious zeal are many, and so maybe a big picture philosophical speculation on how a sort of woke, virtue-signalling fervour in favour of an ill-defined 'equity' and 'diversity' and general commitment to 'wokeness'– ramped up to whatever degree of transcendence the particular adherent prefers – has replaced traditional Christian beliefs might make a good article for

[4] Ibid 136-137.

this special issue. I was tempted.

I was also tempted by a variant of that sort of article. Maybe I might do a review article type piece on the book *Cynical Theories* by Helen Pluckrose and James Lindsay.[5] That book tries to explain the thinking behind a whole range of currently popular theories about race, colonialism, queerness, gender, disabilities, and the so on. If nothing else the book is quite eye-opening. The gist of the authors' claims is that all these theories are operating from a similar mindset or position, one heavily influenced by Michel Foucault and Jacques Derrida, and behind them perhaps Friedrich Nietzsche.

The basic premises of all these theories – the ones we might lump together under such headings as 'wokeness' or 'wokeshevism' – is that they all seem to assert that everything (not only gender but sex itself, race, even disability) is socially constructed. The nature-nurture divide or question becomes a one-horse race.[6] And the corollary of that is that everything is about, by, and for power. It is power all the way down that undergirds all these theories about race, colonialism, queerness, gender, disabilities, and so on. And from that bleak, austere starting position readers might think that no normative conclusions would follow. Wrong. In fact, these so-called cynical theories lying at the heart of cancel culture and of wokeness are heavily normative. Here it gets speculative but it seems, as far as one can tell, that the

[5] Helen Pluckrose and James Lindsay, *Cynical Theories: How Universities Made Everything About Race, Gender and Identity – And Why This Harms Everyone* (Swift Press, 2020).

[6] Which to my way of thinking means that for such adherents of these Cynical Theories, *inter alia*, that evolutionary thinking and theories about humans flowing from a general belief in evolution have to be rejected out of hand as does thinking about humans as in any way like animals. It is scientifically illiterate in other words, though such Cynical Theories may well be strong enough politically to silence and cow real life scientists.

normativity comes from a sort of deep-seated passion for equality. Or maybe, as an American friend suggested to me, it is more like a powerful resentment of anything that is less than perfect equality.[7] Or think of it this way. The core motivating principle of these theories, in basic terms, is that everything in society – absolutely everything – has been constructed to favour the powerful (or "privileged") over the weak (or "oppressed"). As a result, it all should be deconstructed or torn down. In terms of being founded on reductionist first principles these sort of theories put Marxism to shame. Moreover, no matter how charitable your reading might be, it is hard to see them as anything other than nihilistic theories. The classical liberal assumptions that most of us bring to the table – that individuals are real; that some aspects of human nature are hard-wired into us by millions of years of evolution; that race is sort of real in some half-baked sense, even if the classifications are scientific nonsense and pretty much arbitrary; that racism is a real, actual feature of the world that involves an intentional act or state of mind; and so on – all get thrown out the window if you adopt the worldview of these cynical theories. Everything, all of it, is socially constructed and about power we are to believe. As I said, I was tempted to do my invited article along those sort of lines as well.

III CONSTITUTIONALISING IDENTITY POLITICS

However, I resisted both those temptations and more besides. In the end, what with this being a law review and all and my not wanting to write a book-length diatribe, I opted to write on the wokeness of our top court in the case of *Love v Commonwealth of Australia*.[8] In fact,

[7] An unattainable goal, as even a minute's thought would confirm.

[8] [2020] HCA 3, (2020)n279 CLR 152 ('*Love*').

what follows is a revised, updated and tarted-up amalgam of a talk I gave in 2020[9] and of a blog post I wrote after that.[10] In the spirit of this special issue's theme, let me here give readers a trigger warning. The rest of this article is very critical of the High Court. If you are part of the lawyerly caste that dislikes stinging criticism of some of our top judges – that feels the judiciary should be above all but the most modest criticisms – then do not read any further. You will be triggered, traumatised and feel the judiciary has been traduced. Everyone else is welcome to proceed.

To start, let me make plain that in my view this *Love* case is one of the best examples of what is often characterised as judicial activism that you will ever come across.[11] Readers might also benefit from being reminded that of the four Justices in the *Love* majority, three were appointed by the Coalition – these three being, at the time of the *Love* decision, the then most recent three appointees to the High Court in fact. All three were appointed by the former Liberal Attorney-General George Brandis. All three were in the woke, judicial activist majority in *Love*.

Here's my quick summary of the *Love* case: It was a case on the question of deporting plaintiffs who were born outside Australia, who are foreign citizens and who have not been naturalised or made Australian citizens, but who claim to be Aborigines. In a 4-3 decision the case effectively constitutionalised identity politics. In a weird sort of way it elevated the common law – judge-made law

[9] Samuel Griffiths Society, 'Zoom Discussion with Prof James Allan (14 May2020)' (YouTube, 21 May 2020).

[10] James Allan, '"Otherness" and Identity Politics in Constitutional Law', *IACL-AIDC Blog* (Blog Post, 21 January 2021) <https://blog-iacl-aidc.org/cili/2021/1/26/otherness-and-identity-politics-in-constitutional-law>.

[11] I make that point again and again in my talk found at (n 9).

to be clear – above the Constitution itself. It introduced a race-based limit on the Parliament's power. It looked very much to be a clear case of outcome-oriented judging, meaning you start with the conclusion you want and then struggle to find rationales to get you there. Amusingly or depressingly, depending on your cast of mind, the *Love* case more or less ignored or abandoned the established heads of powers interpretive methods – the ones that to my mind have unfortunately been used by Australia's top court to deliver the most pro-centre federalism case law in the world.[12] Worse, it did so out of the blue in a case where no Australian State actually benefitted from that abandonment of established federalism orthodoxy. Given the tools with which the judges had to work – remember, Australia has no national bill of rights – this case was a stunning example of raw judicial activism. It no doubt temporarily brought the task of constitutional interpretation to the widespread attention of the voting public. And I would argue that the case directly influenced the next two judicial appointments to the High Court, such was the wider reaction to this case, including to its patent wokeness (the theme of this special issue).

In providing this survey of *Love* I could be forgiven for taking the reader through some of the key concepts that drove the thinking of the judges who were in the four-person majority. Here we would open up the constitutional law textbooks and delve into the meaning of such arcane legal concepts – and I am not making this up I assure

[12] For a full argument to that effect see James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has undermined Australian Federalism' (2008) 30(2) *Sydney Law Review* 245.

you – but concepts such as 'otherness';[13] or 'deeper truths';[14] or, when it comes to Australia, of a 'connection [that] is spiritual and metaphysical'[15] – all these "core legal precepts" and more then being combined together, as in some form of holistic alternative medicine brew, to claim that judge-made law now recognises 'that Indigenous peoples can and do possess certain rights and duties that are not possessed by, and *cannot be possessed by* non-Indigenous peoples of Australia.'[16] And that was just Justice Gordon.

Consider too Justice Nettle who talks of how 'different considerations apply ... to ... a person of Aboriginal descent'.[17] (Now of course one wonders why different considerations would apply in a liberal democracy committed to the rule of law and to formal equality, as opposed to one committed to the sort of identity politics poison that the British author Douglas Murray skewers in his book *The Madness of Crowds*.)[18] Still, different considerations for persons of Aboriginal descent apparently apply because that is what this judge says. If you are sceptical about that, Justice Nettle goes on to re-educate you by noting that the Commonwealth's claims to the contrary 'intuitively ... appear at odds with the growing recognition of Aboriginal peoples as "the original inhabitants of Australia"'[19] and of their 'essentially spiritual connection with "country"'.[20]

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[13] *Love* [2020] HCA 3; (2020) 270 CLR 152, 262 [296], 292 [333], 275 [343] (Gordon J). I will say that again, 'otherness', because in my 31 years of teaching law in universities around the world I have *never* encountered a case where a judge had decided a case where this notion of 'otherness' was a core part of the ratio.

[14] Ibid 260 [289], 274 [340] (Gordon J).

[15] Ibid 260-262 [290] (Gordon J).

[16] Ibid 279 [357] (Gordon J) (emphasis in original).

[17] Ibid 298 [262] (Nettle J).

[18] Douglas Murray, *The Madness of Crowds* (Bloomsbury Continuum, 2019).

[19] *Love* [2020] HCA 3; (2020) 270 CLR 152, 248-249 [263] (Nettle J).

[20] Ibid 256-257 [276] (Nettle J).

So our top judges, all unelected and assigned the job of *interpreting* our Constitution not *drafting* it, now appear to decide key constitutional law cases based on intuitions that provide them with some sort of ineffable expertise as far as discerning 'growing recognitions' is concerned – by whom we are not told. To be frank, I would have thought that if you were looking for the group of people least likely to have their fingers on the pulse of what the community does and does not recognise, you would be hard pressed to do better than choose a cocooned committee of ex-barrister top judges who are genuflected before day in and day out. But I defer to Justice Nettle here.

These top unelected judges, continues Justice Nettle, are also able to discern 'essential spiritual connections with "country"'. (And let me note too that Justice Nettle put 'country' in scare quotes. Not country, but "country". One wonders if that in itself is an indicia of membership in 'Club Woke'.) The key takeaway here, though, is that we have yet more crucial constitutional law concepts being thrown into the mix; we have now got 'essential spiritual connections with "country"' joining 'otherness' and 'deeper truths' as things that a committee of unelected ex-lawyers happen to have extra special expertise about, and which they are able to use to remove decision-making power away from the elected Parliament. By contrast, my personal view is that all issues related to identity ought to be left to the elected legislature, not to four of seven top judges, not least because that was the clear intention of those who framed and ratified our Constitution (though it is also the more democratic choice, and the one that excludes the judiciary from dealing in jiggery-pokery-wokery).

And yet there is more. Justice Edelman, in his judgment, talks of

'essential meaning[s]',[21] 'metaphysical construct[s]',[22] 'powerful personal attachment[s] to land'[23] and then, remarkably, says 'To treat differences as though they were alike is not equality. It is denial of community. Any tolerant view of community must recognise that community is based on difference.'[24]

I have no idea of what that actually means, but neither it, nor any of the other political ramblings, have anything to do with the judges' assigned task, which is to interpret a written constitution. Moreover, if you want to talk about formal equality of the sort that underlies the rule of law, then treating those claiming Aboriginal ancestry the same as you treat everyone else is not 'denial of community'. It is how any decent jurisdiction committed to liberal democracy acts – because of course Justice Edelman's political ramblings about community could justify any group getting special treatment. Does affording the Boers special treatment in the 1970s get a tick because you do not want to indulge in (and I quote) 'denial of that community' or because 'community is based on difference'? Let me blunt, all this Gordon/ Nettle/Edelman prattle is just about the worst sort of mumbo jumbo ever used in a constitutional law judgment. And believe me, there is some amazingly tough competition for the prize of worst judicial mumbo jumbo![25]

That, then, is an initial indication to readers of some of the lunatic,

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[21] *Love* [2020] HCA 3; (2020) 270 CLR 152, 287-289 [392]-[395], 290-294 [399]-[404], 298-299 [415], 301 [422], 303 [427], 308 [437], 320-321 [467] (Edelman J).

[22] Ibid 308 [438] (Edelman J).

[23] Ibid 312 [447] (Edelman J).

[24] Ibid 315 [453] (Edelman J).

[25] Just staying in Australia, see my 'The Three "R"s of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743.

post-modernist, steeped-in-identity-politics, blatantly activism-enhancing comments – let us use the terminology of this special issue and call it 'wallowing in wokeness' – of these three Australian High Court judges, all appointed by the right-of-centre Liberal Party I say again.

IV CONSTITUTIONAL (MIS)INTERPRETATION

To put those mumbo jumbo judicial comments in context, allow me briefly to provide a more orthodox account of the *Love* case. Let me do that even though in many ways the most important criticism of it is the one I have just taken you through in highly expedited fashion – namely, that supposed interpreters of our written constitution (one of the world's oldest and most successful) decided to trade in their jobs as interpreters of legal text for the far more invigorating job of identity politics professors. (My view is that if we must wallow in identity enhanced protections and wokery then it ought to be done by the branch that is accountable to the people, the elected legislature, where its practitioners are accountable to the people and can be voted out of their jobs.)

This more orthodox account forces us to delve into federalism judicial review of legislation. In my native Canada there is a two-list system of federalism and the approach to federalism interpretation is very different to that in Australia. In Canada the approach came out of the Privy Council in London in the 19th century; it is still orthodoxy today; and the test centres on what is known as a law's 'pith and substance'.[26]

[26] There is a good summary of the doctrine in *Reference re Firearms Act (Can)* [2000] 1 SCR 783.

You as a judge take a contested law and ask yourself what is that law's 'pith and substance'; what is its essential character; what does it in substance relate to. If you decide that some contested statute, in substance, relates to X (one of the heads of powers on one of the lists), but incidentally and less substantively touches on Y and Z (from the other heads of powers list), then the challenged law is *intra vires* the legislative competence of the X list, the one that contains head of power X.

Or put differently, Canada in effect has a two-step process: 1) What is the pith and substance of the impugned law? 2) Take that essential character, that pith and substance, and ask which head of power it most fully falls under. Does it fall under list one (s 91 in Canada, the powers of Ottawa) or list two (s 92, the Provinces' listed powers)?

Now compare that to Australia's approach to federalism judicial review of legislation, sometimes labelled (not least by my colleague Nicholas Aroney)[27] 'interpretive literalism'. How does it work in Australia,[28] which copied the US form of federalism and opted for a one-list system (so only the powers of the centre are listed and everything not listed goes to the States)? Well, you look at the s 51 heads of powers and read them 'as widely and liberally as the words used permit'.[29] And then you ask if the contested statute can fit under any of the s 51 heads of powers, read in this wide and liberal way. If

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[27] Nicholas Aroney, 'Reasonable disagreement, democracy, and the judicial safeguards of federalism' (2008) 27(1) *University of Queensland Law Journal* 129.

[28] To be clear I am talking about the post-1920 interpretive approach that flowed from the *Engineers Case*.

[29] That is the characterisation of my colleague Nicholas Aroney. But it is the clear effect of *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 and *New South Wales v Commonwealth (Work Choices)* (2006) 229 CLR 1, inter alia.

so, this is a matter for the Commonwealth. If not, it is for the States.

Now it is pretty obvious that the Australian approach to federalism judicial review is remarkably friendly to the centre. It is why Australia has what is probably the world's most pro-centre federalism jurisprudence.[30] I will skip over whether that is a good thing or a bad thing – most Australians in my 16 years' experience teaching law here clearly are centralists and think it a good thing; most Canadians and Americans (and Swiss and Germans, and me too) are not centralists and think it a bad thing. I do think it is fair to comment, though, that none of the framers or ratifiers of Australia's Constitution over 120 years ago would ever have imagined that Australian States would be the emasculated mendicants that they are today, thanks in large part to the High Court of Australia.

I bring up that bit of comparative federalism and the differing approaches to federalist interpretation because in theory the *Love* case was a federalism heads of power case. So one would assume the top judges here in Australia would be playing the interpretive literalism game. One would assume what we would see is something along the lines of the same-sex marriage case, *Commonwealth v Australian Capital Territory*,[31] where the 'marriage' head of power was read in a wide and liberal way so that it included marriages between persons of the same sex. Had it not done that in that same-sex marriage case, had it read the head of power more narrowly, or in line with the framers' intended meaning, then odds are the power would not have rested with the centre. It would have gone to the States, or in this case to the ACT. But that is not the *uber* pro-centre

[30] Allan and Aroney (n 12).

[31] [2013] HCA 55; (2013) 250 CLR 441.

Australian way. That is not our orthodox approach to federalism judicial review, like it or lump it.

Yet when we turn to *Love* we see the majority implicitly reject federalism heads of power orthodoxy with nary a mention. Worse, this *Love* decision is a completely bizarre case to break away from orthodoxy because no State or Territory gets to benefit from the limit on the centre's power. One would have expected the majority to look at the head of power in play, s 51(xix) 'aliens', and then read that in a broad, liberal, extremely-friendly-to-the-Commonwealth manner. As they always have done, which is why our States are mendicants and why we have the world's worst vertical fiscal imbalance, etcetera. Hence using anything remotely coming close to that orthodox approach to federalism judicial review and it looks like a sure thing that the Commonwealth legislation regulating deportation will stand and Mr Love and the other foreign citizens claiming to be Aborigines will be deported. As readers will know, however, that was not the result.

The majority's outcome is doubly unusual, weird almost, because with federalism judicial review – unlike with rights-related judicial review of the sort you see in Canada and the United States under a justiciable bill of rights – the judicial task is premised on the judges having to choose between two elected legislatures, central or State. Judges "doing federalism" act as umpires between two democratically elected legislatures.[32] If legislature X does not have the power to do what the statute is doing then legislature Y does. And vice versa.

But in the *Love* case we are talking about a statutory power to deport non-

[32] For my full argument to that effect, and a response to Adrienne Stone, see: James Allan, 'Not in for a Pound – In for a Penny? Must a Majoritarian Democrat Treat All Constitutional Judicial Review as Equally Egregious?' (2010) 21 *King's Law Journal* 233.

citizens. There was never any chance at all that if the Commonwealth could not deport Mr Love then one of the States could do it. No. In effect the High Court majority judges took this power away from all elected legislatures. They turned a heads of power federalism case into a sort of rights-related judicial review case – the sort of case you see under bills of rights where it is held that no elected body can do what the statute purports to do. And that is almost never the scenario with federalism judicial review, to say nothing of the fact that Australia is a country with no national bill of rights. Or put differently yet again, the implication in *Love* is that there is a sort of judicialised identity politics, bastardised race-based exception to s 51(xix) – some sort of judicially created limit on Parliament's sovereignty, some sort of constitutionally implied limit, that has nothing at all to do with federalism and no obvious connection to anything in the actual Constitution.

V FINAL CONSIDERATIONS

So, how did *Love* happen when on its face the case is a federalism judicial review case? How did the majority judges transmogrify it into a bastardised rights-related case that then afforded them – those same judges – the power to say no elected legislature could do this? How did this striking example of judicial activism happen? Well, it happened with a hefty dose of 'otherness', 'deeper truths', 'different considerations for persons of Aboriginal descent', the keen application of 'intuitions', discerning 'essential spiritual connections' and 'metaphysical constructs' – the list of dry, arcane constitutional concepts continuing on in that vein.

Put more bluntly, if that is even possible, it came because four of

our top judges (three of them appointed by a right-of-centre Liberal Coalition government, I repeat yet again with dismay) were infected by woke thinking. Even after being forced to sit in on one of the post-modernist grievance politics type classes now so common in Australia's universities no one (top judges included) has a glimmer, of a smidgen, of a hint, of an idea, of what 'otherness' is – or what 'otherness' means. Nor do any of us actually believe that our top unelected judges are able to discern 'essential spiritual connections'. Do they get special training on this once they are appointed to the High Court? Do they read up on Arthur Conan Doyle's essays on spiritualism? Does any reader honestly think that a committee of unelected ex-lawyers happens to have extra special expertise about any of this mumbo jumbo, enough to legitimately use it to invalidate a law passed by the democratically elected Parliament?

Or is this just an instance of wokeness on steroids having emanated from our top court? To ask is to answer, alas.