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The New Right and Aboriginal Rights in the High Court of Australia

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Abstract

In resolving disputes, the High Court of Australia sometimes has cause to expound upon the relationship between the Australian State and Aboriginal and Torres Strait Islander peoples. This article examines overblown and disingenuous New Right criticism directed towards the High Court in the aftermath of judgments deemed favourable to Indigenous Australians. It finds two themes recur in these attacks: that the High Court's decision is undemocratic, or that that the High Court has acted illegitimately. This article demonstrates that such claims are legally baseless. Drawing on quotes from major players in this debate, the article argues further that beneath this criticism lies a deeper angst over the sovereign foundations of Australia; an anxiety that reappears in arguments against contemporary calls for constitutional reform. As Australia nonetheless inches closer towards constitutional recognition of Aboriginal and Torres Strait Islander peoples, the ferocity of New Right censure suggests that the movement may fear that the Australian people do not share their same suspicions.

I INTRODUCTION

In the days, weeks and months immediately following the decision, New Right political and legal commentators attacked the High Court on several grounds. The decision was a stunning example of 'judicial activism'.[1] The majority had produced 'the most legally indefensible',[2] and 'most radical judgment in Australian history'.[3] Concerns were raised about how the judgment suggested the Court conceived of its role. If High Court justices sought to engage in the political sphere and 'invent … new

[1] James Woodford, 'Borbidge Steps Up Attack on High Court', *Sydney Morning Herald* (1 March 1997) 7; Innes Willox, 'Deputy PM Maintains Court Attack', *The Age* (28 April 1997) 4; Matt Coughlan, 'Dutton Furious with High Court Decision', *Canberra Times* (online, 20 February 2020) <https://www.canberratimes.com.au/story/6640195/dutton-furious-with-high-court-decision/>. For a longer history of the charge of 'judicial activism', see Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017).

[2] John Stone, 'Fifty Years of Unremitting Failure: Aboriginal Policy since the 1967 Referendum' (November 2017) *Quadrant* 64; James Woodford, 'Fischer Lashes High Court on Wik', *Sydney Morning Herald* (11 January 1997) 1.

[3] Morgan Begg, 'Left's Control of Higher Courts Under Threat', *The Australian* (10 March 2020); Morgan Begg, 'Activist Judges Misrepresent Mabo to Create Privileged Class', *The Australian* (13 February 2020).

law[s]',[4] it was clear they misunderstood their function. It was no wonder 'large parts of Australia' held the court 'in absolute and utter contempt'.[5]

The stakes were high. There was a real danger that the rule of law and democracy in Australia could be under threat.[6] Two solutions presented themselves; both extreme but apparently necessary. If the judges did not voluntarily resign their commission, Parliament should launch impeachment proceedings,[7] with the view of their removal from the bench on the ground of proved misbehaviour. They should be replaced by 'capital-C conservative' judges.[8] Alternatively, a referendum should be held to allow the people to have their say and overrule the politicians in robes.[9] If neither outcome was forthcoming, perhaps the country itself might breakup.[10]

New Right commentators were almost in unison. More in sorrow than in anger they wondered how the High Court could have fallen so far from the days of Chief Justice Sir Owen Dixon, when it was widely regarded as 'far and away the greatest appellate court in the English-speaking world'?[11] Together they lamented that the Court had 'abandoned the doctrine of strict constructionalism [sic] … in the dubious search for contemporary political relevance'.[12] The Court—and Australia itself—was at a crisis point. But what decision had motivated such strenuous criticism?

In fact, it was three decisions—with the first and third being almost thirty years apart—that bore the brunt of New Right opprobrium. Those decisions were *Mabo v Queensland (No 2)*,[13] *Wik Peoples v Queensland*,[14] and, most recently, *Love v Commonwealth* ('*Love*').[15] Although each of these cases raised distinct legal issues, all

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[4] Roderick Meagher, 'Address Launching *Upholding the Australian Constitution*, Volume 1' in *Upholding the Australian Constitution: Proceedings of the Inaugural Conference of The Samuel Griffith Society* (1994) Appendix 1.
[5] Woodford (n 1).
[6] Ben Mitchell, Paul Chamberlin and Greg Roberts, 'Taxpayers Must Fund Wik: Nats', *The Age* (8 February 1997) 7; Morgan Begg, 'Courting Calamity', (Winter, 2020) *IPA Review* <https://ipa.org.au/ipa-review-articles/courting-calamity>.
[7] Chris Merritt, 'Judging the Justices', *The Australian* (19 February 2020) 11.
[8] Nikki Savva, 'Fischer Seeks A More Conservative Court', *The Age* (5 March 1997) 6; Amanda Stoker, 'All's Fair in Love and War: The High Court's Decision in *Love & Thoms*' (Samuel Griffith Society, Online Speaker Series, 2020); James Allan, 'High Court of Wokeness', *The Spectator Australia* (21 February 2020) <https://www.spectator.com.au/2020/02/high-court-of-wokeness/>.
[9] Richard Court, 'Referendum on Mabo Decision Sought' (Media Statement, 10 July 1993). Peter Reith, a Liberal MP in the Commonwealth Parliament publicly supported Court's proposal: Tim Rowse, 'How We Got a Native Title Act' (1993) 65(4) *The Australian Quarterly* 110, 122; Stoker (n 8) 9; Maurice Newman, 'Masks Slip to Reveal the Ugly Face of the Future', *The Australian* (21 June 2017) 14.
[10] Murray Goot, 'The Wild West? Yes, No and Maybe' (1993) 65(4) *The Australian Quarterly* 194, 194; Mark Coultan and Mike Seccombe, 'Fischer's Mabo Outburst', *The Sydney Morning Herald* (1 June 1993) 1.
[11] SEK Hulme, 'The Wik Judgment' (1997) 8 *Upholding the Australian Constitution: Proceedings of the Eighth Conference of The Samuel Griffith Society* 130, 141. See further SEK Hulme, 'The Racial Discrimination Act 1975' (1997) 9 *Upholding the Australian Constitution: Proceedings of the Ninth Conference of The Samuel Griffith Society* 17, 17.
[12] Commonwealth, *Parliamentary Debates*, House of Representatives, 11 April 1986, 2128 (Allan Rocher).
[13] (1992) 175 CLR 1 ('*Mabo (No 2)*').
[14] (1996) 187 CLR 1 ('*Wik*').
[15] (2020) 94 ALJR 198 ('*Love*').

were fundamentally concerned with the relationship between the Australian State and Aboriginal and Torres Strait Islander peoples. The High Court's role in articulating that relationship in a way that recognised and respected the rights of Aboriginal and Torres Strait Islander peoples underlay the criticism that the Court received. Of course, these cases are not the only High Court decisions recognising and protecting the rights of Indigenous Australians that have attracted censure by the New Right. That list is far longer. Nonetheless, these three cases are central to understanding—and disarming—that opposition.

The New Right is a label attached to the conservative political movement that first emerged in the United States in the post-WWII period.[16] Influenced by Austrian political economist and philosopher Friedrich Hayek and United States economist Milton Friedman, the New Right sought to dislodge the post-war consensus and wind back former President Franklin D. Roosevelt's New Deal. Distinguishing itself from the 'Old Right' by a commitment to economic liberalism and a robust defence of the free-market, and from social democratic parties by an emphasis on traditional conservative policies of law and order and support for the family unit, the New Right advocated for a 'muscular conservativism'.[17] After several decades of growing strength, the movement burst to global prominence with the election of Margaret Thatcher as Prime Minister of the United Kingdom in 1979 and Ronald Reagan as President of the United States in 1980.

In Australia, the New Right surfaced in the late 1970s and solidified during the 1980s.[18] Drawing support from the right-wing of the Liberal and National parties, as well as mining and farming interests outside parliament, the movement rejected the Australian orthodoxy that had supported state intervention in the economy in favour of widespread deregulation. In opposition at the Commonwealth level for much of this early period,[19] the Australian New Right imported the language and tactics of the American movement. Proponents claimed that a cadre of 'self-interested educated elites' were supporting the 'unreasonable gains' of economically and socially marginalised groups made at the expense of 'mainstream' Australians.[20] Multiculturalism and the notion of reconciliation with Indigenous Australians were seen as particularly 'troubling', 'not only because of the threats they posed to social cohesion but because of their expense (as 'rent seekers') in an economy that suffered from a lack of competitiveness and was hit by the end of the decade with recession'.[21]

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[16] See generally Jerome Himmelstein, *To the Right: The Transformation of American Conservativism* (University of California Press, 1990); Joseph Lowndes, *From the New Deal to the New Right* (Yale University Press, 2008).
[17] Bruce Schulman, 'Comment: The Empire Strikes Back—Conservative Responses to Progressive Social Movements in the 1970s' (2008) 43(4) *Journal of Contemporary History* 695, 699.
[18] Dominic Kelly, *Political Troglodytes and Economic Lunatics: The Hard Right in Australia* (La Trobe University Press, 2018) ch 1.
[19] Indeed, as Elizabeth Humphrys demonstrates, in Australia the labour movement and the Australian Labor Party were central actors in the deregulation of the labour market: Elizabeth Humphrys, *How Labour Built Neoliberalism: Australia's Accord, the Labour Movement and the Neoliberal Project* (Haymarket, 2019).
[20] Mark Davis and Nick Sharman, '"Strange Times": Anti-Elite Discourse, the Bicentenary, and the *IPA Review*' (2015) 48(2) *Communication, Politics and Culture* 78, 78–81.
[21] Josev (n 1) 127.

Under the prime ministership of John Howard, the New Right became the dominant force within modern Australian conservativism.[22]

The New Right is generally distinct from but may overlap with 'constitutional conservatives'. In debate over whether and how to recognise Aboriginal and Torres Strait Islander peoples in the *Constitution*, a group of legal scholars calling themselves constitutional conservatives have argued against reform that would empower the judiciary, such as through the insertion of a clause prohibiting racial discrimination.[23] For constitutional conservatives, such a clause would undermine parliamentary supremacy and invite inappropriate judicial activism.[24] The New Right also opposes a racial non-discrimination clause, but its concerns are broader. Not worried about judicial activism per se, the focus of New Right criticism is outcome oriented. New Right critics may frame their censure as complaints over the most appropriate approach to constitutional interpretation, but as we will see, their real concern appears to be the fact that the High Court has ruled in a way that protects the rights of Indigenous Australians at the expense of 'mainstream' Australians.

The paper is divided into three substantive sections. Part II outlines the three cases that form the background to this study. In Part III, I discuss the criticism directed towards the court in the aftermath of each judgment. This is organised thematically to illustrate that the same arguments reappear in repackaged form. As this study reveals, two key themes recur in New Right commentary. First, that the High Court's decision is somehow undemocratic, either because it has prioritised the interests of Indigenous Australians over non-Indigenous Australians or because the judges have acted as politicians. Second, that the High Court has acted illegitimately by rewriting Australia's history or by seeking to impute moral responsibility on contemporary Australians for the 'supposed' sins of our ancestors. In either case, New Right criticism fixed on the Court misrepresents the law in rhetorically inflammatory ways that help to fuel their larger political narrative.

In Part IV, I demonstrate that these same themes are often used to dismiss contemporary calls for broader constitutional reform.[25] Drawing on quotes from major players in the debate, I argue that these attacks appear to be motivated by an anxiety over Australia's claim to sovereignty. At root in the New Right's opposition to Aboriginal rights in the High Court is a recognition (unconscious or otherwise) that

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[22] Kelly (n 18) 16; Judith Brett, *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* (Cambridge University Press, 2003); John Howard, 'Address at the Launch of the Publication "The Conservative"' (Parliament House, Canberra, 8 September 2005) <https://pmtranscripts.pmc.gov.au/release/transcript-21912>.

[23] See, eg, Greg Craven, 'The Con-Cons' Constitutional Conundrum', *The Australian* (19 February 2014) 12.

[24] Shireen Morris, 'Undemocratic, Uncertain and Politically Unviable? An Analysis of and Response to Objections to a Proposed Racial Non-Discrimination Clause as Part of Constitutional Reforms for Indigenous Recognition' (2014) 40(2) *Monash University Law Review* 488, 495.

[25] Jeremy Patrick, 'A Survey of Arguments against the Constitutional Recognition of Indigenous Australian Peoples' in Simon Young, Jennifer Nielsen and Jeremy Patrick (eds), *Constitutional Recognition of First Peoples in Australia: Theories and Comparative Perspectives* (Federation Press, 2016) 143.

the sovereign pillars of Australia are both 'morally suspect'[26] and 'legally shaky'.[27] As Australia inches closer towards constitutional reform, the legal baselessness and political ferocity of New Right criticism suggests that perhaps the movement understands that the Australian people do not share their same anxieties.

II THREE KEY CASES

A *Land:* Mabo (No 2) *and* Wik

Unlike the situation in the United States, Canada or Aotearoa New Zealand, there is no history of treaty-making in Australia and no larger record of treating Aboriginal and Torres Strait Islander communities as sovereign entities exercising an inherent right to govern themselves according to their own law and custom.[28] Instead, the colonists largely ignored the legal claims of Aboriginal and Torres Strait Islander peoples. The supposed legal basis for this path was confirmed by the Privy Council in 1889. In *Cooper v Stuart*, the Privy Council declared that at the time of the British acquisition of sovereignty, the continent was 'a tract of territory practically unoccupied, without settled inhabitants or settled law'.[29] On this basis, Australian law developed on the fiction that Aboriginal and Torres Strait Islander peoples' did not possess any pre-colonial legal interests in land.

Aboriginal and Torres Strait Islander peoples long contested this position in both formal and informal ways, but it was not until 1971 that an Australian court considered this question. In *Milirrpum v Nabalco Pty Ltd*,[30] the Yolngu people of Yirrkala asserted that they held a communal native title over their lands, and that their legal rights had not been extinguished by Australian law. Justice Blackburn of the Supreme Court of the Northern Territory acknowledged that the Yolngu people possessed 'a subtle and elaborate system [of laws] highly adapted to the country in which the people led their lives'.[31] Nonetheless, his Honour felt bound to follow the precedent in *Cooper v Stuart*, holding that common law Aboriginal title 'had [never] formed part of the law of any part of Australia'.[32] The decision was not appealed to the High Court.

[26] Patrick Macklem, 'Indigenous Recognition in International Law: Theoretical Observations' (2008) 30(1) *Michigan Journal of International Law* 177, 179.
[27] Mick Dodson, 'Sovereignty' (2002) 4 *Balayi: Law, Culture and Colonialism* 13, 18.
[28] *Love* (n 15) 223 [102] (Gageler J); Harry Hobbs and George Williams, 'The Noongar Settlement: Australia's First Treaty' (2018) 40(1) *Sydney Law Review* 1, 22–24.
[29] (1889) 14 App Cas 286, 292. For discussion see Eddie Synot and Roshan de Silva-Wijeyeratne, '*Cooper v Stuart* (1889) 14 App Cas 286' in Nicole Watson and Heather Douglas (eds), *Indigenous Legal Judgments: Bringing Indigenous Voices into Judicial Decision-Making* (Routledge, 2021).
[30] (1971) 17 FLR 141.
[31] Ibid 267.
[32] Ibid 245.

The failure of the common law to recognise Aboriginal and Torres Strait Islander peoples land rights was ameliorated to some extent by statute.[33] Beginning in 1966, several individual settlements were reached between Indigenous peoples and the Commonwealth, or various states.[34] Although some of these settlements delivered expansive rights, many were 'much more limited in scope'.[35] In any event, absent a legally enforceable right to land, these settlements remained essentially ad hoc, limited in utility for other communities, and predicated on a supportive political environment. Indeed, Western Australia, Tasmania and the ACT failed to make any agreement during this period, and Prime Minister Bob Hawke's promise of a national land rights regime was defeated by concerted political opposition.[36]

Australian law continued to operate on the view that upon the British Crown's acquisition of sovereignty in 1788, no Indigenous law, customs, or rights, including interests in land, survived. In *Mabo (No 2)*, the High Court was asked directly for the first time whether this was correct. A majority found that British acquisition did not necessarily extinguish Indigenous peoples' existing rights and interests. Instead, the majority held that the Australian common law recognises native title,[37] a form of Indigenous land tenure that 'has its origin in the traditional laws acknowledged and the customs observed by the [relevant] indigenous people'.[38] Nonetheless, the Court explained that the acquisition of British sovereignty meant that native title could be extinguished by a valid exercise of legislative or executive power inconsistent with the continued right to enjoy native title. Notwithstanding this significant limitation, the decision sparked immediate alarm among certain members of the community.

The Court's decision left several questions over the scope and nature of native title uncertain. Seeking to clarify these issues, facilitate claims and regulate the process of dealing with future activities that may affect native title, the Parliament enacted the *Native Title Act 1993* (Cth) ('*NTA*'). Significantly, a number of provisions of the *NTA* were drafted 'based on obiter dicta' comments from the judgments in *Mabo (No 2)*.[39] One critical presumption was reflected in the preamble to the Act, which read in part: 'the High Court has…held that native title is extinguished by valid government acts that are inconsistent with the continued existence of native title rights and interests,

[33] See Harry Hobbs, 'Locating the Logic of Transitional Justice in Liberal Democracies: Native Title in Australia' (2016) 39(2) *UNSW Law Journal* 512, 535–536.
[34] *Aboriginal Lands Trust Act 1966* (SA); *Aboriginal Lands Act 1970* (Vic); *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth); *Anangu Pitjantjatjara Yankunytjatjara Land Rights Act 1981* (SA); *Aboriginal Land Rights Act 1983* (NSW); *Maralinga Tjarutja Land Rights Act 1984* (SA); *Aboriginal Land Act 1991* (Qld); *Torres Strait Islander Land Act 1991* (Qld).
[35] Maureen Tehan, 'A Hope Disillusioned, an Opportunity Lost? Reflections on Common Law Native Title and Ten Years of the *Native Title Act*' (2003) 27(2) *Melbourne University Law Review* 523, 530.
[36] See generally Quentin Beresford, *Rob Riley: An Aboriginal Leader's Quest for Justice* (Aboriginal Studies Press, 2006) 166-196.
[37] *Mabo (No 2)* (n 13) 76 (Brennan J, Mason CJ and McHugh J agreeing at 15), 119 (Deane and Gaudron JJ), 216 (Toohey J).
[38] *Fejo v Northern Territory* (1998) 195 CLR 96, 128 [46] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).
[39] Simeon Beckett, 'The Impact of *Wik* on Pastoralists and Miners' (1997) 20(2) *UNSW Law Journal* 502, 502.

such as the grant of freehold or of leasehold estates'. In *Wik*, a majority of the Court rejected this assumption.

The case concerned a claim by the Wik peoples and the Thayorre people to native title over certain areas of land in Queensland subject to two leases. The majority held that because pastoral leases do not automatically grant exclusive possession to the leaseholder, they do not necessarily extinguish native title. Rather, it is important to consider the nature of and rights conferred by a particular lease, and then consider the nature and content of the native title rights and interests.[40] Although confirming that native title can coexist with other legal interests in land, the Court held that where native title rights are in conflict or inconsistent with pastoral interests, the rights of pastoralists would prevail.

Despite this qualification, *Wik* was greeted with considerable angst among pastoralists, the mining industry and conservative politicians—some of whom sought to inflame the issue. The National Farmers Federation declared that 'the decision has just about ended Aboriginal reconciliation',[41] while Prime Minister John Howard paraded a map of Australia on national television putatively showing 78 per cent of the continent 'under threat' of native title claims.[42] Alarmed that the Court had changed the rules twice in four years, members of the New Right charged that the 'suburban backyard' might soon be vulnerable.[43] These and other statements were legally baseless,[44] but they were not directed to lawyers; they were made to the broader non-Indigenous Australian community and their representatives in Parliament. They were effective; in 1998 the Parliament passed amendments to the *NTA* designed to 'fix the Wik mess'[45] by delivering 'bucket loads of extinguishment'.[46]

B *Community:* Love

Love was not concerned with the question of land and native title, but community and identity. The case highlights how the same fundamental tension resulting from the disconnect between the legal account of Australia's constitutional development and the factual reality of Aboriginal and Torres Strait Islander peoples' continuing exercise of sovereignty can manifest in various ways.[47] The question before the Court was

[40] *Wik* (n 14) 132–133 (Toohey J); 155, 167 (Gaudron J); 168 (Gummow J); 238 (Kirby J).
[41] Asa Wahlquist, 'Cultivating Fear', *The Weekend Australian* (25 October 1997) 23.
[42] Ravi de Costa, 'Reconciliation as Abdication' (2002) 37(4) *Australian Journal of Social Issues* 397, 399; Jillian Kramer, '(Re)mapping Terra Nullius: Hindmarsh, Wik and Native Title Legislation in Australia' (2016) 29 *International Journal for the Semiotics of Law* 191, 192.
[43] Interview with Prime Minister John Howard (Kerry O'Brien, 7:30 Report, 1 December 1997) <https://pmtranscripts.pmc.gov.au/release/transcript-10554>; Victoria, *Parliamentary Debates*, Legislative Assembly, 20 July 1993, 3 (Jeff Kennett, Premier).
[44] Tehan (n 35); Philip Hunter, 'Judicial Activism? The High Court and the *Wik* Decision' (1997) 4(2) *Indigenous Law Bulletin* 6.
[45] Janine Macdonald, 'In a Blink, Bill is Passed', *The Age* (4 July 1998) 36.
[46] Interview with Deputy Prime Minister Tim Fischer (John Highfield, ABC Radio National, 4 September 1997); *Native Title Amendment Act 1998* (Cth).
[47] Cheryl Saunders, 'The Constitutional Status of Indigenous Australians', *Verfassungsblog* (Blog post, 28 February 2020) <https://verfassungsblog.de/the-constitutional-status-of-indigenous-australians/>.

whether two Aboriginal people who were not citizens of Australia could be deported under the *Migration Act 1958* (Cth) ('*Migration Act*') as 'aliens'.

Daniel Love and Brendan Thoms were both born outside Australia and neither holds Australian citizenship. Love was born in Papua New Guinea (PNG) in 1979 to an Australian citizen father and PNG citizen mother.[48] At birth, he became a citizen of PNG.[49] Love identifies as and is recognised by at least one elder as a Kamilaroi man. Thoms was born in New Zealand in 1988 to an Australian citizen mother and a New Zealand citizen father. Thoms automatically became a citizen of New Zealand at birth. Thoms identifies and is recognised by other members as a member of the Gunggari people. The Federal Court has recognised Gunggari native title and Thoms himself is a native title holder.[50] Both men were convicted of separate offences and sentenced to a period of imprisonment of 12 months or more. As a result, both men had their visas cancelled by a delegate of the Minister for Home Affairs in accordance with s 501(3A) of the *Migration Act*. Both men challenged the cancellation of their visas on the basis that they were not aliens for the purpose of s 51(xix) of the *Constitution* and could therefore not be deported under the Act.

A majority of the Court accepted their submission. Four Justices held that Aboriginal Australians, understood according to the three-part test in *Mabo (No 2*), 'are not within the reach of the "aliens" power conferred by s 51(xix) of the Constitution'.[51] The majority confirmed that while the Commonwealth Parliament's authority to legislate with respect to aliens is broad, Parliament cannot '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'.[52] For three of the four justices in the majority, Aboriginal and Torres Strait Islander peoples long-standing and deep connection to country means that they cannot be said not to belong to the Australian community, even if they do not hold statutory citizenship.[53] Justice Nettle characterised this in a slightly different way. His Honour held that common law recognition of Aboriginal societies 'as the source and sanctuary of traditional laws and customs' means that the Crown owes an obligation to protect those societies, who 'eo ipso owe permanent allegiance' to the Crown in right of Australia.[54]

Notwithstanding this central finding, however, a division within the majority over the appropriate legal test for Aboriginality resulted in different orders for each plaintiff. As a native title holder, all four justices in the majority accepted that Thoms satisfied the standard. In the case of Love, however, Nettle J could not be certain that he met

[48] Facts drawn from Daniel Love and Brendan Thoms, 'Special Case Submission of the Plaintiffs', Submission in *Love v Commonwealth; Thoms v Commonwealth*, B43/2018, 2 April 2019, 2-3, [9] –[[15].
[49] See *Constitution of the Independent State of Papua New Guinea 1975*, s 66(1).
[50] *Kearns v Queensland* [2013] FCA 651; *Foster v Queensland* [2014] FCA 1318.
[51] *Love* (n 15) 218 [81] (Bell J).
[52] *Pochi v Macphee* (1982) 151 CLR 101, 109 (Gibbs CJ), cited in *Love* (n 15) 212 [50] (Bell J), 243 [236] (Nettle J), 260-261 [310]–[311] (Gordon J), 273-274 [395] (Edelman J).
[53] *Love* (n 15) 217 [74] (Bell J), 256 [284] (Nettle J), 258 [296] (Gordon J), 274 [398] (Edelman J).
[54] Ibid 253 [272], 255 [279] (Nettle J).

the requirements in *Mabo (No 2)*.[55] Consequently, Love's status was sent before a lower court for determination.[56] Complexities arising from the decision are being worked out in the Federal Court.[57]

The immediate effect of the decision in *Love* prevented the government's intended deportation of Daniel Love and Brendan Thoms. It also precludes the government from deporting other Aboriginal non-citizens under the *Migration Act*. Reflecting the decision's challenge to the government's policy of deporting non-citizens convicted of serious offences, several members of the government were 'furious' with the result,[58] and announced plans to seek legal advice to allow them to continue to deport Aboriginal non-citizens under a different head of power.[59] The decision also attracted significant censure from members of the New Right outside government. That criticism almost proved effective. In 2021, the Coalition government petitioned the High Court to overturn its decision.[60] Following a change of government at the 2022 federal election, however, the case was withdrawn.[61] Members of the New Right expressed their vocal dismay, attacking the government for its 'disgraceful decision'.[62]

III Reaction and Response

Cases that touch upon the relationship between Aboriginal and Torres Strait Islander peoples and the Australian State attract attention because their impact extends beyond the specific parties in dispute. These cases implicate foundational narratives of Australian identity. *Mabo (No 2)* and *Wik* did not only upset settled property law in Australia, but for many non-Indigenous Australians these two cases challenged their conception of the country and its/their history.[63] This is because land plays a symbolic role in the mythology of nation-building, particularly for settler-colonial states. Aboriginal and Torres Strait Islander claims to land can disturb this mythology, inviting extreme reaction.

The same is true for cases like *Love*. Disputes over citizenship, alienage and deportation focus attention on questions of membership and belonging, of 'exclusion

[55] Ibid 257 [287]–[288] (Nettle J).
[56] Ibid 209 [24] (Kiefel CJ), 229 [141] (Gageler J), 236 [187] (Keane J), 257 [287] (Nettle J).
[57] See, eg, *Helmbright v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs (No 2)* [2021] FCA 647.
[58] Coughlan (n 1).
[59] Elias Visontay, 'Peter Dutton says High Court Indigenous "Status" Call May Face Legislation Fight', *The Australian* (13 February 2020).
[60] *Montgomery v Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs* (High Court of Australia, S173/2021, commenced 29 November 2021).
[61] Ibid. The case was discontinued 28 July 2022.
[62] James Allan, 'Love Labor's Voice', *The Spectator Australia* (Web Page, 6 August 2022) <https://www.spectator.com.au/2022/08/love-labors-voice/>. See also Amanda Stoker, 'Ditched High Court Appeal Against Indigenous Deportation Laws Sets a Dangerous Precedent for Foreign Criminals', *Sky News* (Web Page, 1 August 2022) <https://www.skynews.com.au/opinion/ditched-high-court-appeal-against-indigenous-deportation-laws-sets-a-dangerous-precedent-for-foreign-criminals/news-story/a2dfc1e8218b0b1128419a8af48bb8c0>.
[63] Bain Attwood, 'Mabo, Australia and the End of History' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 100.

and inclusion'.[64] These issues pose both moral and normative difficulties. Concentrating deliberation on the drawing of boundaries between people and across groups, they challenge communities to reflect on what it means to belong. Articulating clear legal principles that can be applied to the diversity of human experience will always be challenging, but it is especially challenging for settler states like Australia, whose very existence as a nation is intimately tied with the dispossession of the Aboriginal and Torres Strait Islander peoples who have occupied the land for at least 60,000 years. Can settler colonial states built on the exclusion of First Peoples perpetuate that exclusion by prohibiting access to country and kin on the basis that they do not 'belong'?

In 1996, historian Andrew Markus catalogued five distinct themes of conservative opposition to *Mabo (No 2)*. Markus identified anxieties over the harmful consequences to the nation that would follow the decision; a 'realistic' account of history that saw conflict and colonisation as inevitable; a belief that Aboriginal people were not disadvantaged but were in fact privileged; a view that the Court had 'betrayed the demands of their high position'; and a 'critical' (and frankly offensive) view of 'Aboriginal culture and civilisation'.[65] In this part, I extend and reconceptualise Markus' typology for a legal audience. I demonstrate how the New Right's antagonism towards High Court decisions that protect and promote the rights of Aboriginal and Torres Strait Islander peoples fall within two broad themes: either that the judgment is undemocratic or that it is otherwise illegitimate.

A *Undemocratic*

The Australian Constitution did not only ignore the existence and continuing vitality of Aboriginal and Torres Strait Islander communities. It also imposed a 'strongly democratic and popular framework' of governance, 'predicated on the absence of … minorities within the polity'.[66] The gradual removal of discriminatory legislation and practices over many years has secured democratic goals, but it has not changed that underlying structure. More than simply complicating efforts to secure the rights and interests of Indigenous Australians, this constitutional structure has encouraged the development of a legal and political culture that favours a strict conception of formal equality.[67] Under this account legislation, executive policy, and judicial decisions that empower Aboriginal and Torres Strait Islander peoples as collective political units, rather than merely as Australian citizens, can attract criticism as violative of democratic principles.

[64] Kim Rubenstein, 'Citizenship and the Centenary—Inclusion and Exclusion in 20th Century Australia' (2000) 24(3) *Melbourne University Law Review* 576, 580.
[65] Andrew Markus, 'Between Mabo and a Hard Place: Race and the Contradictions of Conservativism' in Bain Attwood (ed), *In the Age of Mabo: History, Aborigines and Australia* (Allen & Unwin, 1996) 88, 89–92.
[66] Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143, 156.
[67] Harry Hobbs, *Indigenous Aspirations and Structural Reform in Australia* (Hart Publishing, 2021) Ch 2.

1 Denial of Formal Equality

A prominent thread that runs through much criticism on these cases is the idea that the High Court has ruled in a way that favours one group of people (Indigenous Australians) over another (non-Indigenous Australians). Concerns along these lines were frequently aired in response to *Mabo (No 2)* and *Wik*. In recognising a species of rights to land that could only be held by Aboriginal and Torres Strait Islander peoples—in circumstances where that community also met a stringent continuity test—these decisions were 'seen as privileging Indigenous peoples to the detriment of everyone else, which was completely unacceptable in a democracy that prizes equality before the law'.[68]

Virulent criticism was a feature of papers delivered to the conservative legal association, the Samuel Griffith society. Founded in May 1992, the Society sought to promote federalism, restore the authority of Parliament, and protect the institutions of Australia's constitutional democracy.[69] Many members may have been alarmed at their prescience; almost immediately after its formation, the High Court delivered its judgment in *Mabo (No 2)*. In overturning 'two centuries of settled Australian property law',[70] the decision sparked instant criticism—some of which focused on the apparent diminishment of the rights of non-Indigenous peoples. For instance, in July 1993, at the Society's second annual conference, President of the Western Australia Liberal Party, Bill Hassell, noted succinctly: 'Mabo creates privilege – legal privilege based on race'.[71] A few years later at the June 1996 conference, native title lawyer John Forbes repeated this claim, arguing that *Mabo (No 2)* has inequitably allowed Indigenous Australians access 'to choice portions' of the country.[72] In 1998, barrister and former Dean of Melbourne Law School, Colin Howard reiterated these claims, arguing that the High Court had created 'a racist law' that discriminated against non-Indigenous Australians.[73]

Similar complaints were raised following *Wik*. In October 1997, frequent contributor to the Samuel Griffith Society and member of the Victorian Bar, SEK Hulme, grieved for the 'poor pastoralists':

> After a generation of having land filched by governments, they are told that that cannot be done to Murray Islanders…. In the cause of preventing discrimination, the Court

[68] Kelly (n 18) 144.
[69] The Samuel Griffith Society, 'About Us', *The Samuel Griffith Society* (Web Page) <https://www.samuelgriffith.org/>. On the links between the Samuel Griffith Society and the New Right in Australia see Kelly (n 18) Ch 4.
[70] John Stone, 'Strains of the Third World', *Australian Financial Review* (Web Page, 5 August 1993) <https://www.afr.com/politics/strains-of-the-third-world-19930805-k5kjk>.
[71] Bill Hassell, 'Mabo and Federalism: The Prospect of an Indigenous Peoples' Treaty' (1993) 2 *Upholding the Australian Constitution: Proceedings of the Second Conference of The Samuel Griffith Society* 34, 36.
[72] John Forbes, 'Amending the Native Title Act' (1997) 8 *Upholding the Australian Constitution: Proceedings of the Eighth Conference of The Samuel Griffith Society* 104, 105.
[73] Colin Howard, 'The People of No Race' in *Upholding the Australian Constitution: Proceedings of the Tenth Conference of The Samuel Griffith Society* (Brisbane, 7-9 August 1998) 88, 92.

> gave to the single race that had native title in the Murray Islands a position no ordinary Australian has.[74]

For Hulme, the High Court had enacted a form of reverse discrimination.[75] Such accusations became relatively common at the Society's annual events. At the same conference, Forbes claimed that the Howard government's proposed amendments to the *NTA* would grant Indigenous Australians greater rights than 'members of other races'.[76] The United Nations Committee on the Elimination of Racial Discrimination evidently disagreed. Concerned that the situation facing Aboriginal and Torres Strait Islander peoples in the country was 'clearly deteriorating', the Committee cited Australia under its Urgent Actions Procedures and Early Warning Measures[77]—the first western nation subject to this process.[78] The Committee ultimately found that the government's Ten Point Plan was inconsistent with Australia's international human rights obligations.[79]

Many of those critical of the decisions in *Mabo (No 2)* and *Wik*, focused their attention on the potential for dangerous and radical consequences. Writing in 1994, legal scholar LJM Cooray considered that the judgment 'has created a platform for further unjust legislation drafted by the Commonwealth government and enacted by parliament'.[80] Cooray went further, considering that recognition and vindication of native title would ultimately result in a situation 'analogous' to apartheid, as small groups of Indigenous Australians would assert native title over 'vast mining and economic resources'. Cooray explained:

> The beneficiaries in Australia will be a tiny minority, and the deprived will constitute the vast majority of the people. In South Africa under apartheid, the beneficiaries were a tiny minority and the deprived constituted the vast majority.[81]

Cooray's inflammatory comparison to apartheid reveals the heightened anxiety among a certain group of legal scholars and political commentators in the years following the High Court's recognition of native title. Amongst this group was an inability to conceive of decisions touching upon the rights of Aboriginal and Torres Strait Islander peoples in anything other than a zero-sum game. Queensland Premier Rob Borbidge articulated this anxiety in the aftermath of *Wik*, contending that 'You

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[74] Hulme, 'The Racial Discrimination Act 1975' (n 11) 22.
[75] Ibid 25–26.
[76] John Forbes, 'The Prime Minister's Ten Point Plan' in *Upholding the Australian Constitution: Proceedings of the Ninth Conference of The Samuel Griffith Society* (Perth, 24-26 October 1997) 30, 30.
[77] Committee on the Elimination of Racial Discrimination, *Summary Record of the 1287th Meeting*, UN Doc CERD/C/SR.1287 (14 August 1998) 7 [32]; Committee on the Elimination of Racial Discrimination, *Decision 1 (53) concerning Australia*, UN Doc CERD/C/53/Misc.17/Rev.2 (14 August 1998).
[78] Ravi de Costa, *A Higher Authority: Indigenous Transnationalism and Australia* (UNSW Press, 2006) 160.
[79] Committee on the Elimination of Racial Discrimination, *Decision 2 (54) concerning Australia*, UN Doc CERD/C/54/Misc.40/Rev.2 (18 March 1999) [6].
[80] LJM Cooray, 'The High Court in Mabo: Legalist or L'égotiste' in Murray Goot and Tim Rowse (eds), *Make a Better Offer: The Politics of Mabo* (Pluto Press, 1994) 82, 95.
[81] Ibid 93.

don't create a spirit of reconciliation by taking pastoralists' land off them by the judicial theft of property'.[82]

The decision in *Love* has also faced criticism for supposedly privileging Indigenous people over non-Indigenous people, revealing that this limited (and limiting) view continues to hold some purchase. New Right opposition has been fierce. The majority judgment is 'ethno-nationalism frocked up as progress',[83] it has 'fundamentally challeng[ed] the idea that all Australians are equal',[84] and enshrined 'racism' in Australian law.[85] For Queensland Liberal National Senator Amanda Stoker, the decision divides 'those who reside in Australia along racial lines'.[86] Similar comments were made by Stoker's colleagues, including Attorney-General Christian Porter, who declared that the High Court had created 'an entirely new category of people'.[87]

This type of opposition shares a focus on a notion of formal equality that disclaims any attempt to divide the Australian community along lines of 'race'. One of the major challenges for Indigenous claims in Australian public law is the persistence of race. Without a legal foundation of treating Aboriginal and Torres Strait Islander peoples as distinct sovereign communities, Australian law has generally engaged with Indigenous Australians through this concept.[88] This was not a natural or inexorable choice, but a consequence of the particular articulation of legislative power in the *Constitution*. Owing to the language of s 51(xxvi), race is 'a constitutional term',[89] and legal accounts of Indigenous identity in Australia thus necessarily implicate matters of race.[90]

However, Indigenous claims need not be understood solely along racial lines. The significance of the majority judgments in *Love* is in the fact that each is predicated on

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[82] 'Angry Borbidge Warns PM of Lawyers' Banquet', *The Courier Mail* (23 April 1997) 4.
[83] Caroline Di Russo, 'Love and Thoms: This Isn't Closing the Gap, But Entrenching Our Differences', *The Spectator Australia* (Web Page, 14 February 2020) <https://www.spectator.com.au/2020/02/love-and-thoms-this-isnt-closing-the-gap-but-entrenching-our-differences/>.
[84] Begg (n 3).
[85] Jack Weatherall, 'How the High Court has Endorsed Identity Politics in Love and Thomas' [sic], *The Spectator Australia* (Web Page, 12 February 2020) <https://www.spectator.com.au/2020/02/how-the-high-court-has-endorsed-identity-politics-in-love-and-thomas/>.
[86] Stoker (n 8) 8.
[87] Paul Karp and Calla Wahlquist, 'Coalition Seeks to Sidestep High Court Ruling the Aboriginal Non-Citizens Can't be Deported', *Guardian Australia* (Web Page, 12 February 2020) <https://www.theguardian.com/australia-news/2020/feb/12/coalition-seeks-to-sidestep-high-court-ruling-that-aboriginal-non-citizens-cant-be-deported>. See also James Paterson, 'The High Court *Love* Decision' (Samuel Griffith Society, Online Speaker Series, 2020).
[88] Kirsty Gover, 'From the Heart: The Indigenous Challenge to Australian Public Law' in Jason Varuhas and Shona Wilson Stark (eds), *The Frontiers of Public Law* (Hart, 2020) 205, 219–220. See also Eddie Synot, 'The Rightful Place of First Nations: Love & Thoms', *AusPubLaw* (Web Page, 6 March 2020) <https://auspublaw.org/2020/03/the-rightful-place-of-first-nations-love-thoms/>.
[89] *Love* (n 15) 270 [370] (Gordon J), discussing Murray Gleeson, 'Recognition in Keeping with the Constitution' (2019) 93(11) *Australian Law Journal* 929.
[90] *Gerhardy v Brown* (1985) 159 CLR 70, 118 (Brennan J). See also 84 (Gibbs CJ), 100–103 (Mason J), 107 (Murphy J), 145 (Deane J), 161 (Dawson J). Note that the *Native Title Act 1993* (Cth) is also supported by the race power: *Western Australia v Commonwealth* ('*Native Title Act Case*') (1995) 183 CLR 373.

what Gordon J describes as the 'deeper truth' of *Mabo (No 2)*.[91] That is, the metaphysical connection Aboriginal and Torres Strait Islander peoples have to the Australian community and to the lands and waters of the Australian continent generally, as a result of their status as First Peoples; a connection that predates colonial settlement by 60,000 years. Indeed, the majority judgments, particularly those of Gordon J and Edelman J, find constitutional significance in the sui generis nature of Aboriginal and Torres Strait Islander peoples' connection to country. As Gordon J explains, 'Aboriginal Australians have a unique connection to this country; it is not just ancestry or place of birth or even both. It is a connection with the land or waters under Indigenous laws and customs which is recognised under Australian law'.[92] Justice Edelman found likewise, holding that underlying the particular connection to traditional land, recognised as 'native title', 'is the general spiritual and cultural connection that Aboriginal people have had with the land of Australia for tens of thousands of years'.[93]

Of course, this is not to suggest that *Love*, nor the earlier decisions in *Mabo (No 2)* and *Wik*, are entirely free from the notion of 'race'. The language of s 51(xxvi) prevents a more holistic conceptualisation based on Indigeneity. That constitutional head of power has enabled significant legislative reform to promote the interests of Indigenous peoples, but it remains a conceptually conflicted basis for the protection of Indigenous rights.[94] It forces Aboriginal and Torres Strait Islander peoples claims through the prism of race, a lens that, owing to painful histories of discrimination, is treated with suspicion within liberal democratic states. Nonetheless, as Edelman J explained in *Love*, to hold that equality requires the denial of difference

> [M]isunderstands the concept of equality before the law. To treat differences as though they were alike is not equality. It is a denial of community. Any tolerant view of community must recognise that community is based upon difference.[95]

Indeed, it is not a denial of equality to recognise Indigenous difference. New Right condemnation on this basis may be designed for political effect but it is legally and philosophically misplaced.

2 *Judicial role*

Criticism that the High Court has engaged in some form of undemocratic behaviour is not always articulated in such incendiary language. Rather than accuse the Court of reverse discrimination or of otherwise favouring the interests of Aboriginal and Torres Strait Islander peoples over non-Indigenous Australians, many New Right

[91] *Love* (n 15) 257 [289] (Gordon J). See also Shireen Morris, '*Love* in the High Court: Implications for Indigenous Constitutional Recognition' (2021) 49(3) *Federal Law Review* 410, 418–424.
[92] *Love* (n 15) 271 [373] (Gordon J).
[93] Ibid 288 [451] (Edelman J).
[94] Kirsty Gover, 'Indigenous-State Relationships and the Paradoxical Effects of Antidiscrimination Law: Lessons from the Australian High Court in *Maloney v The Queen*' in Jennifer Hendry et al (eds), *Indigenous Justice: New Tools, Approaches, and Spaces* (Palgrave, 2018) 27.
[95] *Love* (n 15) 288 [453] (Edelman J).

political commentators frame their responses in the language of the appropriate function of the judiciary in a parliamentary democracy. Reasonable people can disagree about the methodology or approach taken by the Court or individual Justices.[96] There is no one correct approach to constitutional interpretation or one right way for a Judge to exercise their functions. However, New Right criticism differs from good faith critique of the judicial role. The ferocity of New Right claims suggests their real concern lies with the outcome of High Court decisions.[97]

In her exploration of the rise of the label of 'judicial activism' in Australia, Josev locates its emergence as a political slogan in the wake of *Mabo (No 2)*. Josev explains that the term became a central part 'of the Australian New Right's strategy of arguing that minority interests had captured the attention of government in the Keating era at the expense of mainstream concerns and aspirations'.[98] This decision, along with the latter judgment in *Wik*, prompted a flurry of concern that the judiciary had also been captured — and in doing so had usurped the role of Parliament. Once again, the annual conferences of the Samuel Griffith Society were central in propagating this view. In a speech to the 1993 annual meeting, former Queensland Liberal politician, and retired Supreme Court Justice Peter Connolly, refused to recognise *Mabo (No 2)* as a judicial decision, choosing instead to refer to the case as 'the legislation of 3 June 1992'.[99] This was popular among New Right legal commentators. In 1994, Cooray wrote that while the judgment is 'in law a judicial decision', 'in substance it is more akin to an Act of Parliament', explaining that is why he calls it 'the *Mabo* Edict'.[100] In 1997, John Forbes also described the decision as 'judicial legislation', that ran 'contrary to the separation of powers which the High Court otherwise enforces'.[101] Drawing on this theme, Forbes characterised *Wik* as 'retrospective legislation' 'passed by the thinnest of majorities'.[102]

The doctrine of *stare decisis* serves to preserve consistency and stability in the law.[103] It requires lower courts follow the decision of courts above them in the judicial hierarchy. However, as an apex court, there is no obligation on the High Court to follow decisions of lower courts or its own prior decisions. The Court has identified a list of factors necessary to justify departing from an earlier decision,[104] but appears to

[96] For a comprehensive overview (and refutation) of good faith criticism along these lines in the context of Indigenous constitutional recognition see Morris (n 24).
[97] Michael Kirby, 'Judicial Activism: Power without Responsibility? No, Appropriate Activism Conforming to Duty' (2006) 30(2) *Melbourne University Review* 576, 578.
[98] Josev (n 1) 195.
[99] Peter Connolly, 'Should Courts Determine Social Policy?' in *Upholding the Australian Constitution: Proceedings of the Second Conference of The Samuel Griffith Society* (Melbourne, 30 July – 1 August 1993) 47, 50.
[100] Cooray (n 80) 83.
[101] Forbes, 'Amending the Native Title Act' (n 72) 104.
[102] Ibid 116.
[103] See Jeremy Waldron, 'Stare Decisis and the Rule of Law: A Layered Approach' (2012) 111(1) *Michigan Law Review* 1; Daniel Farber, 'The Rule of Law and the Law of Precedents' (2006) 90 *Minnesota Law Review* 1173.
[104] *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 56–8 (Gibbs CJ); *John v Federal Commissioner of Taxation* (1989) 166 CLR 417, 438.

favour a more holistic evaluation.[105] This can include consideration of whether a change in the law may be 'necessary to maintain a better connection with more fundamental doctrines and principles'.[106] Although these considerations have been developed following the decision in *Mabo (No 2)*, their tenor is identifiable in Brennan J's judgment. In departing from 'the fiction by which the rights and interests of indigenous inhabitants in land were treated as non-existent', his Honour forcefully explained that 'the common law should neither be nor be seen to be frozen in an age of racial discrimination'.[107]

New Right legal commentators acknowledged that the Court may depart from precedent but argued that the leap was too extreme. For Connolly, the judgment constituted 'a naked assumption of power by a body quite unfitted to make the political and social decisions which are involved'.[108] Hard right provocateur Ray Evans accused the Court of throwing Australian property law 'into disarray',[109] while journalist Padraic McGuinness considered the judgment a 'coup d'état'.[110] Other critics were even less forgiving. In an extraordinarily vituperative attack, Cooray claimed that High Court Justices had demonstrated 'unbounded intellectual arrogance'[111] and engaged in 'the rape of the common law and the Constitution',[112] because the Court had 'ignored' the 'line of cases' that 'clearly laid down that customary native land title (assuming that it existed) was extinguished upon the acquisition by the Crown of a colony'.[113] Of course, the Court did not ignore these cases, but overruled them. As Brennan J held, 'whatever the justification advanced in earlier days for refusing to recognise the rights and interests in land of the indigenous inhabitants of settled colonies, an unjust and discriminatory doctrine of that kind can no longer be accepted'.[114]

In a parliamentary democracy the judiciary should not stray beyond their appropriate boundaries and traverse into the political domain. Yet, there are no bright lines; the precise location of those boundaries will shift according to the critic.[115] However, the intensity of the attacks levied on the Court by members of the New Right detracted from more temperate contemporaneous criticism. In 1993, for example, Peter Costello gave voice to conservative concerns over judicial activism in more measured language. In an interview with the *Herald Sun*, Costello noted:

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[105] *Wurridjal v Commonwealth* (2009) 237 CLR 309, 352 (French CJ).
[106] *Imbree v McNeilly* (2008) 236 CLR 510, 526.
[107] *Mabo (No 2)* (n 13) 41–42.
[108] Connolly (n 99) 50.
[109] Ray Evans, 'Reflections on the Aboriginal Crisis' in *Upholding the Australian Constitution: Proceedings of the Seventh Conference of The Samuel Griffith Society* (Adelaide, 7-9 June 1996) 95, 98.
[110] Padraic McGuinness, 'High Court's Coup d'etat', *The Australian* (2 September 1992) 11.
[111] Cooray (n 80) 88–89.
[112] Ibid 95.
[113] Ibid 83. See also Peter Connolly, 'Right According to Law' in *Upholding the Australian Constitution: Proceedings of the Inaugural Conference of The Samuel Griffith Society* (Melbourne, 24-26 July 1992) 11, 13.
[114] *Mabo (No 2)* (n 13) 42.
[115] Robert French, 'Judicial Activists—Mythical Monsters?' (2008) 12 *Southern Cross University Law Review* 59, 73.

> Once upon a time, Parliament made the law and the courts interpreted it. But all that has changed…You've got unelected, and maybe unrepresentative, people making the rules that we all have to live under. And if you don't like what they doing, you can't vote them out.[116]

Costello's critique is overstated. Judges may not be directly democratically accountable for their decisions, but constitutional, institutional, and professional checks provide a measure of indirect democratic accountability.[117] Judges are also routinely asked to 'make' law in all manner of cases,[118] and it is only on constitutional matters that Parliament cannot overrule the courts. Nonetheless, the criticism speaks to an ongoing debate over the appropriate role of the judiciary. New Right criticism of *Mabo (No 2)* and *Wik* did not seem to leave room for reasonable disagreement in that debate. Rather, reaction was characterised by wild accusations that the Court had 'de-robed themselves',[119] or that the Court had revealed its 'ambition to become a sort of supreme legislature' or 'a third parliament'.[120] Such accusations suggest that the real source of complaint was the outcome of the decision rather than judicial methodology.

Similar complaints have been levied against *Love*.[121] In the immediate wake of the decision, Chris Merritt, the legal affairs editor for *The Australian*, boldly declared the judgment 'an illegitimate exercise of judicial power that ignores the separation of powers and endangers the community's confidence in the High Court as the trusted guardian of the Constitution'.[122] Gideon Rozner, the Director of Policy at the Institute of Public Affairs agreed, declaring that the majority judgments resembled something authored by 'Dennis Denuto from *The Castle*'; they were 'extremely wacky and poorly written. They seem to invoke what you could almost call voodoo jurisprudence'.[123] This criticism makes little sense as a comment on the methodology of the Court. After all, the Court engaged in orthodox processes of constitutional interpretation. Merritt and Rozner's criticism are more clearly understood as politically inspired censures on the substantive outcome of the decision.

One of the more caustic attacks on the judgment came from James Allan, a legal scholar at the University of Queensland. In a blog post that expands upon a

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[116] Markus (n 65) 91. See also Greg Craven, 'Reflection on Judicial Activism: More Sorrow than in Anger' (1997) 9 *Upholding the Australian Constitution: Proceedings of the Ninth Conference of The Samuel Griffith Society* 103, 111.
[117] Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of the Government of Australia* (University of Queensland Press, 1987) 256–8.
[118] Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 563–4.
[119] Hugh Morgan, 'The Australian Constitution: A Living Document' in *Upholding the Australian Constitution: Proceedings of the Inaugural Conference of The Samuel Griffith Society* (Melbourne, 24–26 July 1992) 17, 24.
[120] Richard Evans, 'The Blainey View: Geoffrey Blainey Ponders *Mabo*, the High Court and Democracy' (1995) 96 *Law Institute Journal* 203, 203.
[121] See, eg, Johnny Sakr and Augusto Zimmermann, 'Judicial Activism and Constitutional (Mis)Interpretation: A Critical Appraisal' (2021) 40(1) *University of Queensland Law Journal* 119, 137–139.
[122] Merritt (n 7).
[123] Gideon Rozner in Chris Berg and Scott Hargreaves, *Looking Forward Episode 50: The High Court and Third Class Australians* (Institute for Public Affairs, 12 February 2020) <https://ipa.org.au/ipa-tv/the-looking-forward-podcast/looking-forward-episode-50-the-high-court-and-third-class-australians>.

presentation given to the Samuel Griffith Society, Allan describes the decision as 'unorthodox', replete with 'political ramblings', and 'just about the worst sort of mumbo jumbo ever used in a constitutional law judgment'.[124] Accusing the majority of a 'stunning example of judicial activism', Allan asserts that the judges 'start[ed] with the conclusion [they] want[ed] and then struggle[d] to find rationales to get [them] there'.[125] Those rationales are not persuasive for Allan but constitute nothing more than some sort of 'holistic alternative medicine brew' that constitutionalises 'identity politics'.[126]

At times, Allan moves beyond the caustic. In dismissing the notion that Aboriginal and Torres Strait Islander peoples' connection with the Australian continent should have any legal significance, Allan wonders aloud why – if the majority judgments are predicated on protecting a distinct community – it could not equally justify 'affording the Boers special treatment in the 1970s'.[127] It is not clear if Allan really believes that legal and political efforts to protect and promote the rights of Indigenous Australians are the same as Apartheid — recognised in international law as a crime against humanity.[128] It is more likely that this remark is a deliberately provocative comment aimed at eliciting offence. In any event, it suggests that Allan's criticism may well have less to do with the methods of constitutional interpretation adopted by the majority than with the outcome of the decision itself.

B Illegitimate

The second major theme behind New Right reaction to High Court decisions that protect and promote the rights of Aboriginal and Torres Strait Islander peoples is the notion that these judgments are somehow illegitimate. As Tanya Josev and Dominic Kelly have expertly documented, in the case of *Mabo (No 2)* focus primarily centred on the notion that a group of elites were attempting to 'rewrite Australian history'.[129] Hard right conservative commentators thus sought to position themselves as defenders of the 'true' Australian history. Closely related to this impulse is the view that irrespective of what happened, the Australian people today bear no responsibility – moral or legal – for invasion and colonisation. Anxiety over 'the black armband view'[130] of Australian history and the role that 'professional purveyors of guilt'[131] have in teaching Australians to 'apologise for pride in their culture, traditions,

[124] James Allan, '"Otherness" and Identity Politics in Constitutional Law', *International Association of Constitutional Law* (Blog Post, 21 January 2021) <https://blog-iacl-aidc.org/cili/2021/1/26/otherness-and-identity-politics-in-constitutional-law>. See also James Allan, 'Zoom Discussion with Professor James Allan', *Samuel Griffith Society* (Video, 14 May 2020) <https://www.youtube.com/watch?v=Sl6AsFH2WQ8>.
[125] Allan, '"Otherness" and Identity Politics in Constitutional Law' (n 124). A charge that Allan has made before: see, eg, James Allan, 'The Three "Rs" of Recent Australian Judicial Activism: Roach, Rowe and (No)'Riginalism' (2012) 36(2) *Melbourne University Law Review* 743.
[126] Allan, '"Otherness" and Identity Politics in Constitutional Law' (n 124).
[127] Ibid.
[128] *International Convention on the Suppression and Punishment of the Crime of Apartheid* (opened for signature 30 November 1973) 1015 UNTS 243 (entered into force 18 July 1976).
[129] Josev (n 1). See further Kelly (n 22) Ch 4.
[130] Geoffrey Blainey, 'Drawing Up A Balance Sheet Of Our History', *Quadrant* (July 1993) 10.
[131] John Howard, *Future Directions* (Liberal Party of Australia, December 1988) 7.

institutions and history'[132] predate these decisions,[133] but *Mabo (No 2)* and *Wik* sparked further conflagration. Significantly, though less frequently articulated today, the political motivation underlying this position remains present, inflecting contemporary debate on constitutional reform.

1 Rewriting History

For many generations, historical scholarship in Australia excluded Indigenous peoples. While this active 'cult of forgetfulness' was slowly broken down in the second half of the twentieth century,[134] deeper narratives continued to position non-Indigenous Australians at the centre of the historical stage.[135] This larger picture meant that although historians had begun to incorporate 'the black experience into their image of the national past'[136] the wider Australian community was further behind. In *Mabo (No 2)* the High Court drew on contemporary historical scholarship on early contact history that centred the experiences of Aboriginal peoples to explain and justify its decision. This approach was perceived by some members of the New Right as an effort at rewriting Australian history. As these commentators declared, implicit in this exercise was the 'conscious rejection of Australia's [true] history'[137] the 'revolutionary repudiation of the Australian past',[138] and the position that the nation itself was somehow undermined.[139]

Several detractors focused on the scholarship employed by members of the Court. As Geoffrey Partington notes, although the justices acknowledged the research of 'many scholars', 'Henry Reynolds is mentioned most often' and 'several important passages of their judgment are virtual paraphrases' of Reynolds' study on native title, *The Law of the Land*.[140] Historians supportive of the decision in *Mabo (No 2)* have criticised Reynolds' historical methodology. Bain Attwood, for example, has characterised *The Law of the Land* as 'a work of juridical history rather than a work of academic history',[141] because it reconstructs the past in a manner that makes it accessible to the law and 'applicable to the case at issue'.[142] Indeed, as critical analyses of Mabo have

[132] Ibid.
[133] Stuart Macintyre and Anna Clark, *The History Wars* (Melbourne University Press, 2004); Mark McKenna, 'Different Perspectives on Black Armband History' (Parliament of Australia, Information and Research Services, Research Paper No. 5, 10 November 1997) 3–7.
[134] WEH Stanner, *The Dreaming and Other Essays* (Black Inc., 2009) 138, 156.
[135] Robyn Moore, 'Who is Australian? National Belonging and Exclusion in Australian History Textbooks' (2021) 9(1) *Review of Education* 55.
[136] Henry Reynolds, *The Breaking of the Great Australian Silence: Aborigines in Australian Historiography 1955–1983* (Institute of Commonwealth Studies, 1984) 19.
[137] Geoffrey Partington, 'The Aetiology of Mabo' in *Upholding the Australian Constitution: Proceedings of the Fourth Conference of The Samuel Griffith Society* (Brisbane, 29–31 July 1994) 19.
[138] Ibid 29.
[139] Attwood (n 63) 104.
[140] Geoffrey Partington, 'Henry Reynolds and the *Mabo* Judgment' (1996) 30 *Australia & World Affairs* 23.
[141] Bain Attwood, '*The Law of the Land* or the Law of the Land? History, Law and Narrative in a Settler Society' (2004) 2 *History Compass* 1, 2.
[142] Ibid, citing Andrew Sharp, 'History and Sovereignty: A Case of Juridical History in New Zealand/Aotearoa' in Michael Peters (ed), *Cultural Politics and the University in Aotearoa/New Zealand* (Dunmore Press, 1997) 160.

explained, the 'rejected' doctrine of terra nullius in *Mabo (No 2)* was never justified as the legal basis to dispossess Aboriginal and Torres Strait Islander peoples,[143] and was irrelevant to the question at issue.[144] Nonetheless, drawing on Reynold's invocation and articulation of this concept allowed the Court to develop a narrative to explain why dispossession occurred.[145]

Historians and lawyers look to the past for specific reasons.[146] Historical scholarship seeks to uncover the truth in full awareness that it is multifaceted, indeterminate and experienced and understood in differing ways; for this reason, '[h]istorical truth is hardly ever more than a descriptive hypothesis'.[147] In contrast, courts must make a definitive determination on legal rights, and in doing so a court 'creates truth',[148] or at least, 'legal truth'.[149] Drawing on 'juridical history' to support their judgments does not weaken the majority Justices' legal reasoning. *Mabo (No 2)* is consistent with and draws on international precedent that confirm the existence of native title. In creating a narrative, however, the use of this scholarship can help the Australian public comprehended the decision.

Reynolds became a target of conservative assault for this reason. New Right detractors recognised that Reynolds' 'morally charged'[150] scholarship could help explain and justify the High Court decision among and within the Australian community. Geoffrey Blainey, for instance, argued that the sources chosen by the majority judgments were based on 'prejudice and misguided research'.[151] Columnist Padraic McGuinness agreed, contending that the judgments were built on the work of 'propogandist historians desperately rewriting the past in order to gain control of the present',[152] while Colin Howard was dumbstruck by 'the truly remarkable version of our national history that [the majority judgments] propounded'.[153] More recently, Michael Connor has argued that because he could not find a reference to 'terra nullius'

[143] Andrew Fitzmaurice, 'The Genealogy of Terra Nullius' (2007) 38 *Australian Historical Studies* 1.
[144] David Ritter, 'The "Rejection of Terra Nullius" in Mabo: A Critical Analysis' (1996) 18 *Sydney Law Review* 5.
[145] Ibid 33; Bain Attwood, 'Unsettling Pasts: Reconciliation and History in Settler Australia' (2005) 8 *Postcolonial Studies* 243, 250.
[146] See generally Anne Carter, 'The Definition and Discovery of Facts in Native Title: The Historian's Contribution' (2008) 36 *Federal Law Review* 299.
[147] Alessandro Portelli, 'Oral Testimony, the Law and the Making of History: The "April 7" Murder Trial' (1985) 20 *History Workshop Journal* 5, 31.
[148] Ibid.
[149] Ibid. See further Helen Irving, 'Constitutional Interpretation, the High Court, and the Discipline of History' (2013) 41 *Federal Law Review* 95, 102.
[150] Bain Attwood and Tom Griffiths, 'Frontier, Race, Nation' in Bain Attwood and Tom Griffiths (eds), *Frontier, Race, Nation: Henry Reynolds and Australian History* (Australian Scholarly Publishing, 2009) 1, 29.
[151] Geoffrey Blainey, 'Land Rights for All', *The Age* (10 November 1993). See also Geoffrey Partington, 'Thoughts on Terra Nullius' in *Upholding the Australian Constitution: Proceedings of the Nineteenth Conference of The Samuel Griffith Society* (Melbourne, 2007) 96.
[152] Padraic McGuiness, 'High Court's Role Now Irrevocably Politicised', *The Weekend Australian* (13–14 November 1993) 2.
[153] Colin Howard, 'The People of No Race', in *Upholding the Australian Constitution: Proceedings of the Tenth Conference of The Samuel Griffith Society* (Brisbane, 7–9 August 1998) 88, 92.

in eighteenth century colonial records, *Mabo (No 2)* is unsound.[154] Such a position is self-evidently absurd. Even if the legal concept of *terra nullius* was not used to justify colonisation at that time, the colonial policies that dismissed the rights of Aboriginal and Torres Strait Islander peoples can be accurately characterised for contemporary audiences as *terra nullius*.

Closely connected to these complaints is the view that the historical revisionism of the Court in *Mabo (No 2)* and *Wik* undermined the legitimacy of histories focused on British settlement and nation-building. For example, Hugh Morgan complained that according to the Court, 'the free, prosperous and dynamic nation that our forebears built here…and which we have inherited, is irremediably tainted by the unlawfulness and immorality of settlement'.[155] Blainey, whose language became more florid after *Wik*, accused the Court of being a 'black armband tribunal'.[156] Other critics went on the counterattack. Most infamously, Keith Windschuttle published a series of articles and books accusing Reynolds and other scholars of Aboriginal history of 'misrepresentation, deceit and outright fabrication',[157] contending that these historians have greatly exaggerated the violence between Aboriginal people and colonists. For Windschuttle, stories of violence, dispossession and other abuses are a 'left-wing myth, whose purpose is to defame…the nation'.[158] A comprehensive review of Windschuttle's own methodology and historical accuracy recognises that 'the number of elementary errors' in his work should 'exclude it from serious historical debate'. Nevertheless, the 'political and cultural impact' of his work will remain 'given the appeal of its claim to be upholding truth in the face of politically motivated intellectuals who are setting us all up for an unwarranted guilt trip'.[159]

Love has not attracted the same degree of criticism of rewriting Australian history because the nature of the questions before the Court did not require it to draw upon Indigenous history. Nonetheless, the majority judgments have been censured for threatening government policy and thereby similarly illegitimately undermining the nation and its security. In a speech to the Samuel Griffith Society, Senator Stoker announced that the decision 'creates a loophole in the government's policy of deporting non-citizens who've been convicted of serious crimes allowing dangerous non-citizens to avoid deportation if they can show Aboriginality'.[160] Stoker continued, arguing that because Indigeneity rests in part on acceptance by an Aboriginal or Torres Strait Islander community, 'the decision outsources control over immigration

[154] Michael Connor, *The Invention of Terra Nullius: Historical and Legal Fictions on the Foundation of Australia* (Macleay Press, 2005).
[155] Hugh Morgan, 'A Day to Remember' (Address to the Victorian Returned Services League, 30 June 1993). Cited in Attwood (n 63) 104.
[156] Geoffrey Blainey, 'Black Future', *The Bulletin* (8 April 1997) 22.
[157] See, eg, Keith Windschuttle, 'The Fabrication of Aboriginal History' (2003) *The Sydney Papers* 21, 22; Keith Windschuttle, *The Fabrication of Aboriginal History: Volume One: Van Diemen's Land 1803–1847* (Macleay Press, 2004).
[158] Robert Manne, 'Keith Windschuttle', *The Monthly* (February 2010) 8, 10.
[159] James Boyce, 'Fantasy Island' in Robert Manne (ed), *Whitewash: On Keith Windschuttle's Fabrication of Aboriginal History* (Black Inc., 2003) 17, 17–18.
[160] Stoker (n 8) 6.

and security policy from the legislature to Aboriginal societies'.[161] Of particular alarm to many of the New Right is the idea that non-citizens might make spurious claims to Indigeneity to destabilise government policy and undermine the country's security.[162] Di Russo envisages prospective deportees 'furiously fossick[ing] through their family tree to locate an indigenous ancestor so as to evade deportation',[163] while Jonathan Sakr and Augusto Zimmerman contend that Australia's migration law is now subjected to 'the arbitrary proclamation of Aboriginality'.[164] Once again, such claims are legally overstated. Whether or not it is appropriate, the final power to adjudicate whether a person is Indigenous for the purposes of Australian law rests with Australian courts.[165] Appreciating this fact reveals that New Right criticism fixed on the Court may be clothed in legal argument, but much of it is political in nature, and should be understood as such.

2 *Moral responsibility*

Accusations that the Court has acted illegitimately sometimes move beyond the complaint that elites are seeking to re-write Australian history; they can also encompass the notion that High Court justices are imposing their own morality on ordinary Australians.[166] This feeling was prominent in reactions to *Mabo (No 2)*, where many critics rallied against what they saw as an illegitimate attempt to impart feelings of guilt or responsibility on contemporary Australians for invasion and dispossession.

The 'unusually emotive'[167] language of the judgments was a particular focus,[168] as if the judges could not help but reveal their biases. The majority judgments are indeed explicit: 'judged by any civilized standard', Indigenous dispossession 'is unjust',[169] and 'unacceptable in our society'.[170] Invasion, colonisation and dispossession constitutes 'the darkest aspect of the history of this nation',[171] and has left a 'national legacy of unutterable shame'.[172] As Jeremy Webber has noted, the majority's emphasis on coming to terms with the past goes well beyond mere formal acknowledgment, delving into a 'jurisprudence of regret'.[173] Of course, courts must be careful to limit

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[161] Ibid.
[162] See, eg, Frank Chung, 'High Court Ruling on Indigenous Deportation "Will Lead to Racial Division and Strife"', *News.com.au* (Web Page, 12 February 2020) <https://www.news.com.au/national/courts-law/high-court-ruling-on-indigenous-deportation-will-lead-to-racial-division-and-strife/news-story/4e03589cbdbfef9f455a753b44b2d725>.
[163] Di Russo (n 83).
[164] Sakr and Zimmerman (n 121) 138.
[165] Robert French, 'Aboriginal Identity—the Legal Dimension' (2011) 15(1) *Australian Indigenous Law Review* 18, 19; *Shaw v Wolf* (1998) 83 FCR 113, 137.
[166] See Morgan (n 119) 24.
[167] *Mabo (No 2)* (n 13) 120 (Deane and Gaudron JJ).
[168] Similar criticism has been levelled at the majority judgments in *Love; Thoms* (n 15): see John P. Bryson, 'Citizens, Aliens, Race and the High Court' (April 2020) *Quadrant* 52.
[169] *Mabo (No 2)* (n 13) 29 (Brennan J), 90 (Deane and Gaudron JJ).
[170] Ibid 40 (Brennan J), 182 (Toohey J).
[171] Ibid 109 (Deane and Gaudron JJ).
[172] Ibid 104 (Deane and Gaudron JJ).
[173] Jeremy Webber, 'The Jurisprudence of Regret: The Search for Standards of Justice in *Mabo*' (1995) 17(1) *Sydney Law Review* 5, 10.

'philosophical digression' but moral reflection is a valid and valuable tool in common law reasoning.[174] Members of the New Right were less charitable. Former Nationals Senator John Stone labelled it 'a fit of self-indulgent personal remorse',[175] while Colin Howard found its character 'extraordinary'.[176] Howard's colleague at the Victorian Bar, SEK Hulme, likened it to the medieval Christian church holding Jews responsible for the crucifixion of Jesus.[177]

Some critics sought to dismiss any notion of responsibility by seeking to draw up a 'balance sheet' to assess the merits and demerits of colonisation and invasion.[178] It was clear what side would end up in the black—and what side the red. Describing the recognition of native title as a 'windfall', Forbes criticised the fact that there was 'no set-off for the billions spent on Aboriginal welfare since the 1970s, or for the Land Acquisition Fund, or for anything which Europeans brought to Australia'.[179] Similarly, Peter Connolly wondered whether 'the billion-odd dollars currently being given to the Aboriginal population each year' more than met any loss for the 'change in their circumstances'.[180] French-Tunisian essayist Albert Memmi once noted that a coloniser's identity 'is essentially that of a usurper' and 'colonisers are constantly concerned with trying to legitimate their usurpation'.[181] These vulgar statements reveal the perceptiveness of Memmi's insight.

Others sought to construct a wall between 'the past' and 'contemporary' relations to weaken Indigenous Australians legal, political, and moral claims for restitution in the present. Tim Fischer, the leader of the National Party, declared that the 'horrors of the past were not caused by this generation of Australians'.[182] Similarly, in a paper delivered after the judgment but which did not refer to *Mabo (No 2)*, former Chief Justice of the High Court, Sir Harry Gibbs warned against any plan to negotiate a treaty or treaties with Indigenous communities. Gibbs explained, 'it does not follow that a generation which was in no way responsible for the crimes or the blunders of the past should be so racked with guilt that we should imperil our sovereignty and place the very existence of our nation at risk'.[183] Howard also sought to minimise the contemporary consequences of colonisation by asserting that 'everyone associated with [the conquest of Australia] has long since died'.[184] Howard wondered further

[174] Ibid 6, 27–28.
[175] Stone (n 70).
[176] Colin Howard, 'The People of No Race' in *Upholding the Australian Constitution: Proceedings of the Tenth Conference of The Samuel Griffith Society* (Brisbane, 7–9 August 1998) 88, 92.
[177] SEK Hulme. 'The High Court in Mabo' in *Upholding the Australian Constitution: Proceedings of the Second Conference of The Samuel Griffith Society* (Melbourne, 30 July – 1 August 1993) 60, 76.
[178] Geoffrey Blainey, 'Drawing Up a Balance Sheet of Our History' (1993) *Quadrant* 37; Hulme (n 177) 76.
[179] Forbes (n 76) 30.
[180] Connolly (n 99) 51.
[181] Albert Memmi, *The Colonizer and the Colonized*, tr Howard Greenfeld (Orion Press, 1965) 52 [trans of *Portrait du Colonisé Précédé du Portrait du Colonisateur* (Buchet-Chastel, 1957)].
[182] Coultan and Seccombe (n 10).
[183] Harry Gibbs, 'Re-writing the Constitution' in *Upholding the Australian Constitution: Proceedings of the Inaugural Conference of The Samuel Griffith Society* (Melbourne, 24–26 July 1992) 5, 6.
[184] Colin Howard, 'The Consequences of the Mabo Case' (1993) 46(1) *IPA Review* 21, 22.

what the problem was in any event; after all, conquest 'has only recently attracted moral criticism from anyone but the losers'.[185]

The urge to delimit injustices in this way is a political tactic. If colonisation is 'historic', and colonisation 'long past', then such harms are either a thing of the past or may have been superseded by additional and alternative pressing demands for justice.[186] In these circumstances, meaningful restitution or reparations may no longer be either necessary or desirable; reconciliation becomes 'about forgiveness and moving on',[187] not rights, redress, and reform. Indigenous Australians reject this limited understanding. Colonisation may have commenced over two hundred years ago, but its consequences persist underneath its 'changing operational modalities'.[188] As the Royal Commission into Aboriginal Deaths in Custody noted in 1991:

> '[S]o much of the Aboriginal people's current circumstances, and the patterns of interactions between Aboriginal and non-Aboriginal society, are a direct consequence of their experience of colonialism and, indeed, of the recent past.'[189]

In this sense, the initial injustice may be historic, but wrongdoing is not 'an historical artefact'.[190] It continues to exist today in the 'very structure' of the relationship between Indigenous and non-Indigenous peoples,[191] grounding a contemporary and prospective claim for justice.

In pushing back against the Court, critics were keenly aware of their larger political motivations. While Howard criticised the majority judgments for dispensing with ordinary legal reasoning in favour of teaching 'an ill-considered lesson in atonement for supposedly inherited guilt',[192] his primary concern was that the passage of the *NTA* might encourage the Court to 'arrive at further decisions of a comparably radical nature'.[193] Likewise, Fischer declared that 'You cannot right every wrong by Mabo and you should not attempt to'.[194] The concern that the Court's decision might lead to future (undesirable) political and legal reform has reappeared in commentary on *Love*. Liberal Senator James Paterson has warned that the judgment 'perfectly illustrates the warnings constitutional conservatives' have 'about the legal risks' of constitutional

[185] Ibid.
[186] Jeremy Waldron, 'Superseding Historic Injustice' (1992) 103 *Ethics* 4.
[187] Rosemary Nagy, 'Truth, Reconciliation and Settler Denial: Specifying the Canada—South Africa Analogy' (2012) 13 *Human Rights Review* 349, 360.
[188] Patrick Wolfe, 'Nation and MiscegeNation: Discursive Continuity in the Post-Mabo Era' (1994) 36 *Social Analysis* 93, 96.
[189] Royal Commission into Aboriginal Deaths in Custody, *National Report* (1991) vol 2, 1.
[190] Adrian Little and Mark McMillan, 'Invisibility and the Politics of Reconciliation in Australia: Keeping Conflict in View' (2017) 16 *Ethnopolitics* 519, 530.
[191] Jeremy Webber, 'Forms of Transitional Justice' in Melissa Williams, Rosemary Nagy and Jon Elster (eds) *Transitional Justice* (New York University Press, 2012) 98, 114–115.
[192] Colin Howard, 'The High Court' in *Upholding the Australian Constitution: Proceedings of the Fourth Conference of The Samuel Griffith Society* (Brisbane, 29–31 July 1994) 48, 53.
[193] Ibid.
[194] Attwood (n 63) 107.

recognition.[195] Morgan Begg has likewise argued that '[t]o approve constitutional recognition would be an endorsement of the High Court's dangerous decision and empower future courts to make similar decisions'.[196]

IV SOVEREIGN ANXIETIES

The New Right articulate their disapproval to the outcome of these cases in a particular language. As we have seen, concerns that the majority justices misunderstood or overstepped the appropriate boundaries of the judicial role are often made. Also familiar are complaints that the result breaches a strict account of formal equality by favouring one group of Australians over another, or by seeking to impute moral responsibility for events that were tragic but inevitable. Despite their prominence, however, it is not always clear that these objections sit at the heart of this criticism. Indeed, in many cases, what appears to motivate opposition is a more fundamental concern over the existence of the Australian nation; a concern that engaging seriously with invasion and dispossession might have fundamental consequences for this continent.

At times these anxieties are paraded in full view. In the aftermath of *Mabo (No 2)*, for example, Hugh Morgan explained that the Court's 'naïve adventurism' had put Australia's 'territorial integrity…under threat'.[197] The decision, according to Morgan, 'carried the seed of the territorial dismemberment of the Australian continent and the end of the Australian nation as we've known it'.[198] Others also caught up in the 'Mabo madness'[199] used no less inflammatory rhetoric. Bill Hassell spoke in conspiratorial tones, perceiving the decision as 'but a small part of a wider agenda, which certainly includes a separate, sovereign, Aboriginal state within Australia capable of conducting international affairs'.[200] Legal scholar LJM Cooray warned against the apparent consequences of recognising native title, contending that doing so could 'lead to a demand (even a realisation of that demand) for independent areas of territory by the Aborigines'.[201]

Historian Geoffrey Blainey agreed. In June 1993 he surmised:

> we could well end up with two permanent systems of land tenures and the genesis of two systems of government…Aboriginal lands form almost a continuous corridor from the Arafura Sea to the Southern Ocean, with only tiny breaks in the continuity. One Aboriginal block of land is about as large as Portugal, another as large as the Netherlands. …One large Aboriginal area has the rainfall and general capacity to support a nation of many millions at East Asian standards. …The average Aborigine

[195] Paterson (n 87) 4.
[196] Begg (n 6).
[197] Paul Chamberlin, 'Mining Chief Lashes Mabo', *Sydney Morning Herald* (1 July 1993) 2.
[198] Josev (n 1) 131; Markus (n 65) 90. See further Morgan (n 119) 17.
[199] Markus (n 65) 93.
[200] Hassell (n 71) 43.
[201] Cooray (n 80) 93.

> has about 12 times as much land as the average non-Aborigine. …To extend land rights is also to weaken…the real sovereignty and unity of the Australian people.[202]

Here, Blainey draws on a kernel of truth – the development of two systems of land tenure – before revealing his real political concern: the disintegration of Australia. A few months later he reiterated his position, declaring that the decision could 'cut the nation in half and eventually turn Australia into two separate nations'.[203]

Similar concerns have followed *Wik* and *Love*. Most recently, members of the New Right have erroneously asserted that in *Love* the High Court has launched 'a direct assault on the sovereignty of the Crown',[204] by recognising 'a parallel system of law that sits outside Australian sovereignty'.[205] These statements draw on comments of the minority judgments in *Love* which suggest that the decision comes 'perilously close' to recognising a form of Indigenous sovereignty.[206] However, the New Right is, once again, legally incorrect. The majority in *Love* is clear that their judgments do not stretch so far.[207]

Inaccuracy is a feature not a bug. These statements are not designed to accurately explain the reasoning of the Court but to inflame anxiety and apprehension within the broader Australian community. They are designed to create a false sense of outrage about the consequences of recognising Indigenous rights.

It is critical to appreciate this fact because the New Right has adopted the same strategy in dismissing calls for constitutional recognition. It is for this reason that Windschuttle boldly asserts that the 'ultimate objective' behind recognition is 'the establishment of a politically separate race of people'.[208] It is for this reason that former Nationals Senator John Stone choose to begin a speech in 2017 with 'a welcome to country—a welcome to *our* country. So let me begin by acknowledging the traditional owners of this land: King George III and his heirs and assigns'.[209] Less inflammatory but no less inaccurate, members of the Coalition government repeatedly mischaracterised the proposed constitutional First Nations Voice as a 'third chamber of Parliament', implying that it would threaten Australia's existing constitutional

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[202] Geoffrey Blainey, 'Australia – Two Peoples, Two Nations?', *The Age*, 12 June 1993, 2.
[203] Geoffrey Blainey, 'Pieces of the *Mabo* Jigsaw', *The Age*, 23 October 1993, 2. See further Geoffrey Blainey, 'Mabo, Wik: A Victory for Racial Discrimination: Professor Blainey', *News Weekly* (17 May 1997) 12, 14: 'Australia's future as a legitimate nation and even as one nation is in doubt'.
[204] Begg (n 6).
[205] Gideon Rozner in Berg and Hargreaves (n 123).
[206] *Love* (n 15) 227 [125] (Gageler J).
[207] See below nn 215. For discussion see Synot (n 88).
[208] Keith Windschuttle, 'The Break-Up of Australia: Part I: The Hidden Agenda of Aboriginal Sovereignty', *Quadrant* (November 2016) 9, 16. This is an extract of: Keith Windschuttle, *The Break-up of Australia: The Real Agenda Behind Aboriginal Reconciliation* (Quadrant Books, 2016). See further 'Constitutional Recognition: The Breakup of Australia?', *Counterpoint*, (ABC Radio National, 7 November 2016) <https://www.abc.net.au/radionational/programs/counterpoint/constitutional-recognition:-the-breakup-of-australia/7986364>.
[209] Stone (n 2) (emphasis in original).

architecture.[210] Prominent political actors have also campaigned against a treaty, contending that it would undermine Australian sovereignty. Former Prime Ministers John Howard and Tony Abbott, for instance, have argued respectively that 'a nation…does not make a treaty with itself'[211] and that 'a treaty is something that two nations make with each other'.[212]

These sovereign anxieties are misguided for the High Court has always been clear on two points. First, it will not and cannot hear a challenge to the British acquisition of sovereignty over the continent.[213] Second, Australian law does not recognise a sovereignty adverse to the Crown because the assertion of sovereignty by the British Crown 'necessarily entailed…that there could thereafter be no parallel law-making system'.[214] In *Love*, the Court again confirmed this position.[215] As Gordon J explained, 'recognition of Indigenous peoples as a part of the "people of Australia" is directly contrary to accepting any notion of Indigenous sovereignty persisting after the assertion of sovereignty by the British Crown'.[216] Equally, neither a First Nations Voice nor treaty would threaten Australian sovereignty. As former Chief Justice of the High Court Robert French has explained, a treaty need:

> 'not involve any compromise of sovereignty. Such an agreement could acknowledge the traditional law and custom of indigenous communities across Australia, their historical relationship with their country, their prior occupancy of the continent and the fact that there are those who have maintained and asserted their traditional rights to the present time. This is a cultural reality which can be accepted without compromising, symbolically or otherwise, Australia's identity as a nation. And if that traditional relationship should be asserted by some in terms of sovereignty, it would be sovereignty under traditional law and custom. It may have meaning in that universe of discourse.'[217]

If Australian sovereignty is not under threat, then why do these and similar cases receive such venomous reaction? Two reasons can be proffered.

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[210] While Barnaby Joyce has apologised for mischaracterising the Voice, Scott Morrison and Peter Dutton have not: Amy Remeikis, 'Barnaby Joyce "Apologies" for Calling Indigenous Voice a Third Chamber of Parliament', *Guardian Australia* (18 July 2019) <https://www.theguardian.com/australia-news/2019/jul/18/barnaby-joyce-apologises-for-calling-indigenous-voice-a-third-chamber-of-parliament>.

[211] Interview with the Prime Minister of Australia John Howard (John Laws, 29 May 2000) <https://pmtranscripts.pmc.gov.au/release/transcript-22788 >.

[212] Tom McIlroy, 'Tony Abbott and John Howard Warn Against A Treaty With Indigenous Australians', *Sydney Morning Herald* (8 September 2016).

[213] *New South Wales v Commonwealth* (1975) 135 CLR 337, 388 (Gibbs CJ).

[214] *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422, 444 [44] (Gleeson CJ, Gummow and Hayne JJ).

[215] *Love* (n 15) 209 [25] (Kiefel CJ); 223 [102] (Gageler J); 237 [199] (Keane J); 250 [264] (Nettle J); 268 [356] (Gordon J).

[216] Ibid 268 [356] (Gordon J). Expressions of Indigenous sovereignty are more nuanced than that articulated by the High Court and the New Right: *Uluru Statement from the Heart* (26 May 2017); Hobbs (n 67) 57–75; Morris (n 91) 424–428; Dylan Lino, *Constitutional Recognition: First Peoples and the Australian State* (Federation Press, 2018) ch 7.

[217] Robert French, 'Native Title – A Constitutional Shift?' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent* (Federation Press, 2009) 126, 144–145.

First, in his 1980 Boyer Lecture, Bernard Smith described the dispossession of Aboriginal and Torres Strait Islander peoples as the 'locked cupboard of our history'.[218] The criticism of High Court decisions perceived as favourable to Indigenous Australians explored in this paper suggests that for the New Right, much of the focus in the four decades since has been on trying to keep that cupboard locked.

Lambasted as undemocratic and illegitimate, these complaints imply not only an anxiety over the moral and legal foundations of Australia but also a fretfulness over the 'devastating consequences'[219] that would follow from engaging seriously with Aboriginal and Torres Strait Islander peoples' claims.[220] These cases 'challenge[] our sense of history, [and] our national sense of self';[221] these cases force us to look inside that locked cupboard. The concern of the New Right is that if we do look inside, we will have little option but to engage in meaningful structural reform. We will have little choice but to deal with the 'unfinished business'[222] of the Australian Constitution.

Recognising that these are political attacks points to a second motivation. Perhaps equally important for the New Right is the fear that the Australian people might support meaningful reform. In the Uluru Statement from the Heart, Aboriginal and Torres Strait Islander peoples outlined a model of structural reform that will meet their aspirations in a manner consistent with Australia's system of governance. That reform consists of a constitutionally entrenched First Nations Voice to advise the Parliament and government on issues that affect Indigenous Australians, and a Makarrata Commission to supervise a process of treaty-making and truth telling.

The federal government has dismissed calls for a constitutional Voice and continues to reject the idea of a Makarrata Commission.[223] However, survey data reveals that the Australian people support the Uluru Statement. A comprehensive review of polling has found that support for a constitutionally entrenched First Nations Voice is 'remarkably high', with most polls since 2017 indicating that 70 – 75 per cent of committed voters support the Voice.[224] Similarly, analysis of public submissions made

[218] Bernard Smith, *The Spectre of Truganini* (ABC, 1980) 10.
[219] Markus (n 65) 89.
[220] Webber (n 173) 15.
[221] Brian Keon-Cohen, '*Wik*: Confusing Myth and Reality' (1997) 20(2) *UNSW Law Journal* 517, 518. See also Attwood (n 63) 100.
[222] Patrick Dodson, 'Beyond the Mourning Gate: Dealing with Unfinished Business' in Robert Tokinson (ed), *The Wentworth Lectures: Honouring Fifty Years of Australian Indigenous Studies* (Aboriginal Studies Press, 2015) 192.
[223] The government has since initiated a co-design process to develop the Voice but does not support constitutional enshrinement. For more information, see, Tom Calma and Marcia Langton, *Indigenous Voice Co-Design Process: Final Report to the Australian Government* (National Indigenous Australians Agency, 2021).
[224] Francis Markham and Will Sanders, 'Support for a Constitutionally Enshrined First Nations Voice to Parliament: Evidence from Opinion Research Since 2017' (Centre for Aboriginal Economic Policy Research, Working Paper No. 138/2020).

to the government's Indigenous Voice Co-Design process reveals 'overwhelming public support for constitutional enshrinement'.[225]

The legal baselessness and ferociousness of their criticism suggests that the New Right may recognise its political vulnerability. After all, even while the previous federal government ignored the Uluru Statement's call for a constitutionally entrenched First Nations Voice, several states and territories began to engage in treaty-making processes.[226] Although in their early stages and subject to their own challenges, these processes reveal that a larger constituency supports a re-evaluation of the relationship between Aboriginal and Torres Strait Islander peoples and the state. The community response to the Uluru Statement suggests that even if the previous government was not, the Australian people may be willing to seek to come to terms with the foundation of this country.

V CONCLUSION

This article has examined the offensive and disingenuous criticism of the New Right in response to High Court decisions perceived as favourable to Aboriginal and Torres Strait Islander peoples. It has done so by considering responses to *Mabo (No 2)*, *Wik* and *Love*. Although separated by almost thirty years, reaction to these three cases is markedly similar—for the New Right, these decisions are undemocratic and illegitimate. In making these claims, the New Right misrepresents the law to make a political point. Recognising these are political rather than legal claims is important, for similar tactics are used to counter contemporary calls for constitutional recognition of Indigenous Australians.

New Right criticism may come in various forms, but it appears to be motivated by a larger anxiety. Former Nationals Senator John Stone gave voice to this underlying fear when he described the Uluru Statement from the Heart as threatening 'the very sovereignty of the Australian nation'.[227] Such claims are inaccurate: the Uluru Statement calls for Aboriginal and Torres Strait Islander peoples 'ancient sovereignty [to] shine through as a fuller expression of Australia's nationhood'.[228] Nonetheless, they may point to a political weakness. As support for the Uluru Statement and a constitutionally enshrined First Nations Voice grows, the intensity of New Right criticism suggests the movement is facing its greatest fear: that the Australian people support reform.

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[225] Gabrielle Appleby, Emma Buxton-Namisnyk and Dani Larkin, *Indigenous Voice Co-Design Process: An Expert Analysis of the NIAA Public Consultations* (29 June 2021) 13.
[226] George Williams and Harry Hobbs, *Treaty* (Federation Press, 2nd ed, 2020) Ch 8.
[227] Stone (n 2).
[228] Uluru Statement (n 216).