LEAVE THOSE BLUE-EYED BABIES ALONE: RHETORICAL LIMITATIONS ON PARLIAMENTARY SOVEREIGNTY*

by

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One of the abiding justifications of our Academy is that it affords a forum for academic lawyers, practising lawyers and judges to come together to share the insights of each group in relation to the work of the others, hopefully to the advantage of the development of Australian law. As it happens, the work of the judges tends to attract more regular, and closer, scrutiny than the work of either of the other two groups. And while it is, no doubt, understandable that this should be so, it is not always comfortable for the judges. One is reminded of the observation of John Colet, the great humanist and friend of St Thomas More, that although we cannot hope to know much about the nature of God, we can be sure that the Deity prefers to be loved rather than surveyed. I can say from long observation that some judges also feel that way.

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I thought, therefore, that it might be timely to give some attention to an aspect of the administration of justice which concerns the work of our advocates and the lawyers who assist them in their endeavours before the courts almost as much as it concerns the work of the judges themselves.

Albert Venn Dicey, in his *Introduction to the Study of the Law of the Constitution*[1], famous for (among other things) its discussion of Parliamentary sovereignty, said of Leslie Stephen's *Science of Ethics*, that Stephen's chapter on "Law and Custom" "contains one of the best statements to be met with of the limits placed by the nature of things on the theoretical omnipotence of sovereign legislatures". Stephen had said[2]:

> "Lawyers are apt to speak as though the legislature were omnipotent, as they do not require to go beyond its decisions. It is, of course, omnipotent in the sense that it can make whatever laws it pleases, inasmuch as a law means any rule which has been made by the legislature. But from the scientific point of view, the power of the legislature is of course strictly limited. It is limited, so to speak, both from within and from without; from within, because the legislature is the product of a certain social condition, and

[1] Dicey, *Introduction to the Study of the Law of the Constitution*, 8th ed (1915) at 78-79.
[2] Stephen, *Science of Ethics*, (1882) at 143.

> determined by whatever determines the society; and from without, because the power of imposing laws is dependent upon the instinct of subordination, which is itself limited. If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it."

Of course, Australian lawyers are regularly required to go "beyond" the decisions of our legislature because it is constitutionally the province of the judiciary to say what the law is; and that means saying what the fundamental law, the law of the *Constitution*, requires of our legislatures. In this regard, we follow the lead of the Supreme Court of the United States in *Marbury v Madison*[3] – and of that case I will say something more in due course. But for the moment, while acknowledging that in the Australian context the Diceyan understanding of Parliamentary sovereignty is necessarily qualified by constitutional limitations of text and structure, I draw attention to two aspects of Stephen's statement, and Dicey's approval of it: first, it is idle to suggest that a monstrous law is, because it is monstrous, not a valid law; and secondly, the elected representatives in the Parliament that made such a law, and the people who elected them, must be taken

[3] (1803) 5 US 137.

to tolerate such a state of affairs only because they are all, electors and elected representatives, monsters.

The broad point being made by both Stephen and Dicey was that, in a discussion of the nature of Parliamentary sovereignty, there is little to be gained by testing the limits of Parliament's legitimate power by postulating a state of affairs in which an entire polity has gone mad except for its lawyers and judges. One does not need to have an unduly romantic view of the merits of democracy as a system of government to be disturbed by the notion of lawyers' exempting themselves from an assumption that they are willing to make about the incapacity for self-government of their fellow citizens. And that is so especially in the absence of a clear demonstration of the source, and a comprehensive statement of the content, of the qualification of parliamentary sovereignty that vests in the lawyers and the judges responsibility for supervising and controlling the assumed tendency of their fellow citizens to folly or atrocity.

Nevertheless, since early in the life of the federation, rhetorical arguments invoking extreme examples, such as the peril of Stephen's blue-eyed babies, have been persistently deployed in argument in our courts with a view to persuading our judges to impose limits upon the legislative power of Parliament by reference to

considerations that do not appear in the constitutional text, which cannot be seen to be implied as a matter of necessity from the text or structure of the *Constitution*[4], and which have eluded clear and comprehensive articulation. In this latter regard, this style of argument has much in common with the notion apparent in much earlier writing about the relationship between sovereign power and the common law: that there are some things that, as a matter of natural law or perhaps some deep-rooted or ancient common law limitation on legislative power, are not permitted. This notion was never fully articulated but it is at least as old as Sir Edward Coke's view that of the institutions by which we are governed, in the end, the common law, by which we mean the lawyers and judges who articulate it, knows best.

The rhetorical device of the extreme example has been deployed, not so much to challenge the validity of an obviously vicious law on the basis that it is itself obviously vicious, but to challenge the validity of a law that may plausibly be portrayed as the edge of a "slippery slope", such that Parliament must be checked in its slide into folly or depravity. In such cases, the appeal is to a judicial apprehension that the majority of the people, or their elected representatives in Parliament, may be emboldened by the taste of power, unconstrained by

[4] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

considerations of decency or common sense apparent to lawyers and judges, to make a law that is truly monstrous. A recent example of this kind of appeal can be found in *Garlett v Western Australia*,[5] where Counsel argued that Western Australian legislation which allowed the State to apply for a restriction order in relation to a person convicted of a "serious offence" was invalid insofar as robbery was included as a serious offence on the basis that if that law were valid, the legislature might be emboldened to designate a failure to wear a helmet while riding a bicycle as a "serious offence" for the purpose of the legislation.

Enthusiasm for this Cassandra-like style of argument seems to come and go over the years, even though the Parliaments elected by our fellow citizens have, quite conspicuously, managed to remain innocent of the blood of blue-eyed babies, and even though the High Court in its judgments has, from time to time, explicitly discouraged the invocation of the peril to blue-eyed babies or their rhetorical equivalents as reason to narrow the legitimate scope of legislative power[6]. Of course, these rhetorical strategies would not be used if advocates did not think that they might work on the judges at whom they are directed; and we can see that judges, on occasion, encourage that thinking, even though, on the whole, judges deprecate it.

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[5] [2022] HCA 30 at [87].
[6] See eg, *Kartinyeri v The Commonwealth* (1998) 195 CLR 337 at 380 [871]; *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 43 [32]; *Singh v The Commonwealth* (2004) 222 CLR 322 at 384 [155].

Fardon

My first professional encounter with the blue-eyed babies outside of Dicey's work occurred in 2004 when I appeared as Solicitor-General for the State of Queensland in *Fardon v Attorney-General (Qld)*[7]. At issue before the High Court in that case was the validity of Queensland's *Dangerous Prisoners (Sexual Offenders) Act 2003*, a law that provided for the indefinite detention of prisoners who had been convicted of sexual offences and who had thereafter been shown to pose an ongoing and unacceptable risk of harm to the community if released without supervision. This legislation was a relatively novel response to a social problem that was causing grave disquiet within the community.

The legislation aroused the objection that preventative detention of an offender beyond his or her proper sentence was unknown to the common law. Of course, the great sages of the common law never faced this social problem. One reason for that was that, in their time, serious sexual offenders who were convicted and sentenced would be unlikely ever to be released back into the community. The protective or

[7] [2004] HCATrans 39 at 81-83.

preventive purpose of the criminal law was vindicated by the death penalty or by "perpetual confinement, slavery or exile"[8].

At the hearing of argument in the High Court, Mr Michael Sexton SC, the Solicitor-General for the State of New South Wales, had risen to his feet to make submissions as an intervenor in support of the validity of the Act. He had not finished his first sentence when the following exchange took place:

> "GUMMOW J: What if the person was not a genuine threat to the community?
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> McHUGH J: Why do you confine it to that? Why can they not detain blue-eyed babies?
>
> MR SEXTON: I thought the blue-eyed babies would emerge this afternoon, your Honour.
>
> KIRBY J: Or an enemy of the people.
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> GUMMOW J: Or elderly barristers."

[8] *Garlett v The State of Western Australia* [2022] HCA 30 at [50]-[51].

If Mr Sexton had thought that he might safely indulge in mildly humorous banter, or perhaps that his soft words might suffice to turn away wrath, he was sadly mistaken. Justice Kirby was implacable:

> "KIRBY J: These are not purely theoretical questions, Mr Solicitor. In our history, we had legislation against Communists. It is not inconceivable there might be legislation against terrorists, very loosely and generally defined, so we have to look at this very seriously. It is not a joke, as far as I am concerned.
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> MR SEXTON: No, it is not, your Honour. Those questions at the State level can probably be answered "yes", in our submission, but they are far removed from this case or any of the cases that have been before the Court in recent times.
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> KIRBY J: Yes, but if you have to look at a particular case – I do not want to say this – Immanuel Kant taught it in philosophy and this Court has to do it every time it deals with a constitutional problem. You have to ask what happens if this becomes the general rule."

This was a bravura piece of rhetoric on the part of Kirby J. The question challenged Counsel to deny the significance of Immanuel Kant's ethical views for

the resolution of the issue before the Court. While there was something to be said for the view that, as a matter of constitutional law, Kant's ethical philosophy was, on even the most expansive view, too remote from the constitutional text to shed light on its meaning, it would have seemed, in the context of the debate which Kirby J had framed, distinctly churlish and mean-spirited on the part of Mr Sexton to have said so. The rhetorical power of this intervention by Kirby J lay in the invitation to challenge the high-minded assumption that Kant's ethical views were significant, an invitation made without condescending to particularise either the legal basis for the assumption or the relevant content of those views.

Kirby J went on to dissent in the result.

Section 51(xx) of the *Constitution*

The deployment of the extreme example to delegitimise a democratic choice featured early in the history of the federation in a case about the Commonwealth Parliament's power under s 51(xx) of the *Constitution* to make laws with respect to foreign trading or financial corporations.

Huddart, Parker & Co Pty Ltd v Moorehead[9], decided in 1909, involved a challenge to the validity of ss 5(1)(a) and 8(1) of the *Australian Industries Preservation Act 1906* (Cth), which prohibited "[a]ny foreign corporation, or trading or financial corporation formed within the Commonwealth" from engaging in anti-competitive behaviour within the Commonwealth, such as restraint of trade or creating or attempting to create a monopoly. Huddart, Parker & Co, a company formed under the laws of Victoria, had been suspected of committing offences under those provisions and was called upon to answer certain questions. The company refused and was consequently fined. It argued that the law was beyond the bounds of legislative power conferred by s 51(xx) of the *Constitution*.

The High Court, with Isaacs J dissenting, upheld the company's challenge. Of the majority, Higgins J said[10]:

> "If the argument for the Crown is right, the results are certainly extraordinary, big with confusion. If it is right, the Federal Parliament is in a position to frame a new system of libel laws applicable to newspapers owned by corporations, while the State law of libel would have to remain applicable to newspapers owned by individuals. If it is right, the Federal

[9] (1909) 8 CLR 330.
[10] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 409-410. See also *New South Wales v Commonwealth* (2006) 229 CLR 1 at 116 [183].

> Parliament is competent to enact licensing Acts, creating a new scheme of administration and of offences applicable only to hotels belonging to corporations. If it is right, the Federal Parliament may enact that no foreign or trading or financial corporation shall pay its employés less than 10s per day, or charge more than 6 per cent interest, whereas other corporations and persons would be free from such restrictions. If it is right, the Federal Parliament can enact that no officer of a corporation shall be an Atheist or a Baptist, or that all must be teetotallers. If it is right, the Federal Parliament can repeal the *Statute of Frauds* for contracts of a corporation, or may make some new *Statute of Limitations* applicable only to corporations. Taking the analogous power to make laws with regard to lighthouses, if the respondent's argument is right, the Federal Parliament can license a lighthouse for the sale of beer and spirits, or may establish schools in lighthouses with distinctive doctrinal teaching, although the licensing laws and the education laws are, for ordinary purposes, left to the State legislatures."

Having said all that, Higgins J acknowledged that "these arguments from inconvenience are not conclusive"[11]. And yet, his Honour concluded, with the

[11] *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330 at 410.

other members of the majority, that ss 5 and 8 of the Act were invalid, reading down s 51(xx) so that it authorised only laws relating to corporations "as such".

With all respect to Higgins J, it is very difficult to accept that the examples referred to by him played no part in persuading him to his conclusion. In the *Concrete Pipes Case*[12] and the *WorkChoices Case*[13] the High Court overruled the decision in *Huddart, Parker*, rejecting the approach of Higgins J as inconsistent with the decision in the *Engineers' Case*[14] to which Higgins J himself subscribed.

Section 51(xxxv) of the *Constitution*

The *Engineers' Case* concerned the Commonwealth's power under s 51(xxxv) of the *Constitution* to make a law binding on the States with respect to conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limit of one State.

[12] *Strickland v Rocla Concrete Pipes Pty Ltd* ("*Concrete Pipes Case*") (1971) 124 CLR 468.
[13] *New South Wales v The Commonwealth* ("*WorkChoices Case*") (2006) 229 CLR 1.
[14] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("*Engineers' Case*").

The decision is familiar to all as one of the most important in the history of the federation. I mention it because it contains an early and authoritative statement deprecating the rhetoric of the extreme example.

The plurality (Knox CJ, Isaacs, Rich and Starke JJ) said of the argument that a restrictive view of the language of the grant of power was necessary to prevent its abuse[15]:

> "It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them .... the extravagant use of the granted powers in the actual working of the *Constitution* is a matter to be guarded against by the constituencies and not by the Courts."

Their Honours went on to make the point that fidelity to the constitutional establishment of representative government was inconsistent with the anti-democratic assumption on which the argument was based[16]:

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[15] *Engineers' Case* (1920) 28 CLR 129 at 151.
[16] *Engineers' Case* (1920) 28 CLR 129 at 151-152.

> "When the people of Australia, to use the words of the *Constitution* itself, 'united in a Federal Commonwealth,' they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done."

WorkChoices

The *WorkChoices Case* involved consideration of the relationship between the corporations power in s 51(xx) and the conciliation and arbitration power in s 51(xxxv) of the *Constitution*, in the context of a challenge to a comprehensive regime of industrial relations law enacted by the Howard government. That regime – contained in the *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) – had replaced the regime previously dependent on s 51(xxxv) with a regime which was, in large part, an exercise of the power under s 51(xx).

Extreme examples were deployed in argument to emphasise that to permit s 51(xx) to be used in this way would allow the federal Parliament to legislate on virtually

any subject matter and disrupt the federal balance. In the course of argument, it was said for New South Wales that a limit must be placed on s 51(xx) because[17]:

> "[t]he idea that the corporations power authorises any law directed to the identified class of person would enable the Commonwealth to legislate comprehensively in relation to such persons on a range of subjects including employment regulation, defamation, negligence, contracts, succession, trusts and criminal responsibility. Such control would depend on the arbitrary criterion of whether one of the persons involved had assumed corporate identity."

That argument resonated with the dissentients, as we shall see, but there was nothing "arbitrary", about the fact that it was the ubiquity of the corporation as the vehicle of choice for the conduct of business that shifted the balance of power within the Australian federation from the States to the Commonwealth in favour of a national economy. It was this historical fact, rather than an unduly expansive view of s 51(xx), that allowed the Commonwealth Parliament to impose national standards in industrial relations and consumer affairs. At federation, the power of the Commonwealth Parliament under s 51(xx) of the *Constitution* to make laws

[17] *WorkChoices Case* (2006) 229 CLR 1 at 11.

with respect to, relevantly, trading corporations was of relatively little practical account; but by the time of the High Court's decisions in the *Concrete Pipes Case* and later, in the *WorkChoices Case*, the exercise by the Commonwealth Parliament of this power was, as a matter of practical reality, determinative of standards of conduct in industrial relations and consumer rights in Australia. Rejection of the argument put for New South Wales did not mean that the true meaning of s 51(xx) had changed since federation, much less that the change in its effect was in any way "arbitrary". It was simply that the proliferation of corporations as the vehicle of choice for trade and commerce meant that the practical significance of the Commonwealth's power over the nation's economy had grown to be vastly greater than the founders could ever have imagined.

A majority of the Court (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ, Callinan and Kirby JJ dissenting) again deprecated the use of "extreme examples and distorting possibilities" to limit the scope of the corporations power, such as those that influenced Higgins J in *Huddart, Parker*[18]. Their Honours said[19]:

> "In part, reference to such consequences seeks to present possible *social* consequences that it is said could flow if further legislation is enacted,

[18] *WorkChoices Case* (2006) 229 CLR 1 at 117 [187].
[19] *WorkChoices Case* (2006) 229 CLR 1 at 117 [188].

> and which it is said are to be seen as absurd or inconvenient, as a reason to confine the reach of the legislative power. Section 51(xx), like other powers, should not be given a meaning narrowed by an apprehension of extreme examples and distorting possibilities of its application to future laws."

On the other hand, Kirby J was persuaded by the argument, which "dr[e]w to notice the extremely large potential of the Commonwealth's submissions, if accepted, to exclude State law from operation in areas that for more than a century they have occupied in a hitherto creative interaction with federal law"[20]. Kirby J said[21]:

> "In my view, the use of s 51(xx) exhibited in the Amending Act carries with it, if valid, a very large risk of destabilising the federal character of the *Australian Constitution* ...
>
> In effect, the risk to which I refer is presented by a shift in constitutional realities from the present mixed federal arrangements to a kind of optional or 'opportunistic' federalism in which the federal Parliament may

[20] *WorkChoices Case* (2006) 229 CLR 1 at 223 [537].
[21] *WorkChoices Case* (2006) 229 CLR 1 at 224-225 [541]-[543]. See also 225 [544]-[545].

> enact laws in almost every sphere of what has hitherto been a State field of lawmaking".

Callinan J was similarly persuaded. Referring to the examples given by Higgins J in *Huddart, Parker* discussed earlier, Callinan J said[22]:

> "And here we are today, confronted with one of the very claims, I would say, excess, of power that his Honour feared.
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> The potential reach of the corporations power, if it is as extensive as the majority would have it, is enormous. The extent to which corporations and their activities pervade the life of the community can be gleaned from the numbers quoted in the explanatory memorandum and to which the joint judgment refers. The reach of the corporations power, as validated by the majority, has the capacity to obliterate powers of the State hitherto unquestioned. This Act is an Act of unconstitutional spoliation."

This is heroic rhetoric; all the more heroic for being contrary to the authority of the *Concrete Pipes Case* and to the principle in the *Engineers Case*.

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[22] *WorkChoices Case* (2006) 229 CLR 1 at 332 [793]-[794].

Section 92 of the *Constitution*

Gerner v Victoria[23] involved a challenge to s 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic) and Lockdown Directions made pursuant to that section which restricted the movement of people within Victoria from time to time. Mr Gerner was the owner of a restaurant business, which he alleged suffered significant loss of revenue by reason of the Lockdown Directions. The challenge to the validity of the laws was based on the contention that they fell foul of a guarantee of freedom of movement said to be implicit in the *Constitution*. That freedom of movement was contended, in part, to be implied as an aspect of s 92 of the *Constitution*, which states that "trade, commerce, and intercourse among the States ... shall be absolutely free."

In argument, Counsel for Mr Gerner placed "heavy emphasis ... upon the unappealing prospect that State Parliaments, unconstrained by a limit upon legislative power of the kind urged by the plaintiffs, might divide the people of the Commonwealth by creating 'enclaves' that prevent people knowing each other"[24].

[23] (2020) 270 CLR 412.
[24] *Gerner v Victoria* (2020) 270 CLR 412 at 423-424 [18].

The Court (Kiefel CJ, Gageler, Keane, Gordon and Edelman JJ) rejected this argument[25]. Their Honours, adhering to the approach in the *Engineers' Case*, said:

> "[T]he *Engineers' Case* stands in the way of the plaintiffs' argument. To point to the possibility that legislative power may be misused is distinctly not to demonstrate a sufficient reason to deny its existence[26]. The interpretation of the *Constitution* is not to be approached with a jaundiced view of the integrity or wisdom or practical competence of the representatives chosen by the people[27]."

Section 51(xix) of the *Constitution*

In recent times, the rhetoric of the extreme example has been deployed most frequently to attempt to limit the power of the Federal Parliament to make laws relating to the conferral or loss of citizenship under s 51(xix) of the *Constitution*.

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[25] *Gerner v Victoria* (2020) 270 CLR 412 at 424 [18].
[26] *Engineers' Case* (1920) 28 CLR 129 at 151-152; *Kruger v The Commonwealth* (1997) 190 CLR 1 at 36; *WorkChoices Case* (2006) 229 CLR 1 at 117-118 [188].
[27] *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106 at 136; See also *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 at 43-44.

The blue-eyed babies put in an appearance in the course of argument in the immigration case of *Re Patterson; Ex parte Taylor*[28]. That was a case about the extent of the power conferred on Parliament by s 51(xix) to make laws with respect to "immigration and aliens".

In the course of argument about whether the Parliament could treat as an alien a British subject not born in Australia who had lived in Australia for a long time, but who had not applied for Australian citizenship, the following exchange took place:

> "KIRBY J: Why does not the example of hundreds of thousands, if it be that, certainly many thousands, of people who have lived their lives peacefully, honourably and lawfully in this country – take the present prosecutor's mother, living quietly in a country town, suddenly she finds she is an alien. If she leaves and goes overseas, she can be denied re-entry to this country, though in every way she has become associated with this country and its people. That gets close, in my view, to blue-eyed babies; I have to tell you.
>
> GUMMOW J: Well, she has not become associated in every way because she has not taken out citizenship.

[28] [2000] HCATrans 737 at pp 161-163.

MR BENNETT: That is one aspect of the answer. The other aspect is - - -

KIRBY J: Yes, but citizenship is a creature of statute. I have to keep reminding this debate about that. We are talking here about something which Parliament has just created; it is not something which is in the *Constitution*.

MR BENNETT: Unless one has a blue-eyed baby principle, the answer is that is a matter for the Parliament, and it is a matter for the Parliament to determine which people, having some relevant connection with the concept of alien – to put it neutrally – are to be aliens."

Mr Bennett KC was one of the most eminent barristers of his generation. Raising the peril in which blue-eyed babies find themselves at the hands of Australian Parliaments was possibly not the most prudent response to this line of questioning. The exchange continued:

"KIRBY J: The only thing I would say is that many of the people who have been made aliens probably did begin life as blue-eyed babies. I mean, that is the reality taken [sic] this group.

MR BENNETT: Yes. I used the phrase "blue-eyed baby", of course, as a convenient phrase. It is more accurate to refer to it as the peace, order and good government principle, and whether that limits or does not limit - - -

> KIRBY J: No, that is a separate issue. That is a formula in the *Constitution*. The blue-eyed baby is something outside and above and at the foundation of the *Constitution*."

The *Constitution* itself is silent on the matter of citizenship. That is because the people of the Commonwealth of Australia to whom the *Constitution* does refer were, at federation, subjects of the British Crown, and it was as subjects of the British Crown that their status as members of the people of the Commonwealth was then established. But even at federation not all subjects of the British Crown were people of the Commonwealth. It was not to be supposed that any of the teeming millions who were subjects of the Imperial Crown were, ipso facto, people of the Commonwealth. It was s 51(xix) that authorised the Parliament of the Commonwealth to determine that question.

At federation, while not all British subjects were Australians, all Australians were British subjects. Today, membership of the Australian body politic is not, and cannot be, established by a relationship with an empire that has disappeared. Citizenship may be a statutory rather than a constitutional concept, but it is all that we have to establish the legal status of membership of the people of the

Commonwealth unless that function is a matter for the Court. In *Pochi v Macphee*, Gibbs CJ said[29]:

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

What was said by Gibbs CJ in *Pochi* cannot be understood as anointing the Court as the authority to determine membership of the Australian body politic on the basis of its own inquiries in each case as to the extent to which an individual has been "absorbed" into the Australian body politic. That notion was clearly inconsistent with the decision in *Pochi* in which an argument based on absorption into the community was rejected, not as a matter of evidence and fact but as a matter of principle.

In *Chetcuti v The Commonwealth*[30], the High Court held, by majority, that s 51(xix) allows the Parliament to determine, through citizenship legislation, membership of the Australian body politic subject to the *Pochi* limit. At Federation, the law as to alienage was not settled, and the status of British subjects

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[29] (1982) 151 CLR 101 at 109.
[30] (2021) 95 ALJR 704 at 710 [12]; 392 ALR 371 at 374.

was, prima facie, a sufficient connection between the Australian body politic and individual Australians. As a result of Australia's evolution as a nation, independent of its imperial roots, determination of the status of membership of the Australian body politic now falls to be determined by ourselves alone. The power of determination is necessarily exercisable by the Parliament.

The rhetorical power of a blue-eyed babies style of argument found expression in oral argument in *Alexander v Minister for Home Affairs*[31], where in response to the Solicitor-General for the Commonwealth's submission that "alien" does not have an essential meaning, Edelman J responded[32]:

> "Just to conclude on that, the range of available meanings will include, for example, persons who hold dual citizenship, or persons who have only one parent who is a citizen, or persons who are not born in Australia, so that it - the range of possible people who could be aliens under section 51(xix) is substantially more than half of the Australian population."

[31] (2022) 96 ALJR 560; 401 ALR 438.
[32] *Alexander v Minister for Home Affairs* [2022] HCATrans 11 at lines 4352-4356.

His Honour also referred to the decision in *Re Canavan*[33], where one of the statistics given was that more than 46 per cent of the population have either dual citizenship or would be dual citizens under the laws of another State[34].

The rhetorical power of this consideration resonates strongly in the reasons of Edelman J in *Alexander*[35]:

> "The application of the essential meaning of 'alien' that was urged by the defendants has the likely consequence that potentially half of the permanent population of Australia are aliens, being dual (or more) citizens, being born overseas, or having at least one parent who does not hold Australian citizenship. Almost by definition, something must have gone wrong in the application by this Court of the meaning of the *Constitution* for it to be concluded that the Commonwealth Parliament has power to legislate on the premise that potentially half of the people of the Commonwealth of Australia are foreigners to the political community of the Commonwealth of Australia."

His Honour went on later to say[36]:

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[33] (2017) 263 CLR 284.
[34] *Alexander v Minister for Home Affairs* [2022] HCATrans 11 at lines 4373-4377.
[35] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 600 [182]; 401 ALR 438 at 483.

> "If [what was said in *Chetcuti*] were true, then s 51(xix) would confer an unconstrained power on the Parliament to choose its own criteria for citizenship and thereby determine who is an alien and attach consequences to that alienage. Applied to other powers, this reasoning would mean that the Parliament could make laws to divest the assets of Croesus among his creditors on the basis that Parliament determined for itself the meaning of bankruptcy, irrespective of the essential features inherent in the constitutional meaning of bankruptcy. The Parliament could 'define "trade mark" as including a will, and enact that no will shall be valid unless registered as a trade mark'[37], contrary to 'universal agreement in the laws of every part of the British Empire' at the time of Federation concerning 'certain essentials founded in the origin and very nature of a trade mark'[38]."

In the course of argument in *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Montgomery*[39] Senior Counsel for Mr Montgomery attacked the majority view in *Chetcuti* on the basis that on that view, the Commonwealth could pass a law saying that everyone who has dual

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[36] *Alexander v Minister for Home Affairs* (2022) 96 ALJR 560 at 603 [197]; 401 ALR 438 at 487.
[37] *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 614.
[38] *Attorney-General for NSW v Brewery Employes Union of NSW* (1908) 6 CLR 469 at 535, 540.
[39] [2022] HCATrans 52 at lines 5025-5030.

citizenship is an alien and will be deported so as to get "rid of 47 percent of the population".

Once again, one may acknowledge the force of the rhetoric conjuring up the appalling prospect of a Parliament dividing the nation against itself. It is a powerful distraction from mundane reality. That reality is that the person affected by the law in question was not born in Australia and is a citizen of another country who had not troubled to take the undemanding steps voluntarily taken as a matter of course by millions over the years to become Australian citizens.

The "deep" common law as the fundamental constraint

An appeal to the notion of a "deep-seated" common law constraint on legislative power featured prominently in argument in *Durham Holdings Pty Ltd v New South Wales*[40], with the blue-eyed babies making a special guest appearance.

In *Durham Holdings*, certain coal deposits vested in the plaintiff were vested in the Crown in right of the State of New South Wales by s 5 of the *Coal Acquisition Act 1981* (NSW). Pursuant to s 6 of the Act, the Governor made statutory instruments

[40] (2001) 205 CLR 399.

providing for compensation payments to coal owners affected by the vesting. The instruments were varied by amendment which reduced the compensation payable to the plaintiff to about $20 million. It was argued for the plaintiff by Mr DF Jackson KC, the leader of the Australian Bar, that[41]:

> "The exercise of legislative power is limited by the inviolability of fundamental legal rights .... There is a common law constitutional limitation that denies the legislature the power to make a law providing for the acquisition of property without full compensation."

Mr Jackson KC, while disclaiming the "entire arbitrariness" of the example of the "blue-eyed babies", called in aid a different example of legislation by which "all children born with a particular skin pigmentation, which made them prone to skin cancer, and thus hospitalisation costs were to be dealt with in a particular way, whether it be made to live in particular places or perhaps even to be disposed of, and, your Honours, surely the Court ... would take the view that such a law was ultra vires"[42].

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[41] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 401.
[42] *Durham Holdings Pty Ltd v New South Wales* [2000] HCATrans 512 at lines 360-370.

McHugh J then asked: "But why?" And to that question there was, if I might say with unfeigned respect, no answer.

That was so because this kind of rhetorical device is not a tool of legal analysis but rather an appeal to an intuition that some things are not permitted and that it is for the courts to draw the line because the community's chosen representatives cannot be trusted to do so.

Durham Holdings is particularly useful for the purposes of tonight's discussion because it was a case where the blue-eyed babies met Sir Edward Coke.

In the course of argument[43], Mr Bennett KC SG, appearing for the Attorney-General of the Commonwealth, intervening, made reference to the suggestion by Lord Cooke of Thorndon in *Fraser v State Services Commission*[44]:

> "some common law rights may go so deep that even Parliament cannot be accepted by the courts to have destroyed them."

[43] *Durham Holdings Pty Ltd v New South Wales* [2000] HCATrans 512 at pp 32-33.
[44] [1984] 1 NZLR 116 at 121.

That prompted Gummow J to respond:

> "It seems to be some natural law right here which is fundamentally undemocratic."

To which Mr Bennett KC replied:

> "Yes, your Honour, it is all the articles by academics about blue-eyed babies."

Mr Bennett KC cited *Union Steamship Co of Australia Pty Ltd v King*[45] among other cases in support of his argument that under the principle of parliamentary supremacy, there is no scope for the curtailment of legislative power by reference to the common law. He submitted that the identification of fundamental common law rights is inherently problematic and would replace parliamentary supremacy with judicial supremacy[46].

The plurality in *Durham Holdings* (Gaudron, McHugh, Gummow and Hayne JJ, with whom Callinan J agreed generally) rejected the plaintiff's attempt to introduce

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[45] (1988) 166 CLR 1 at 10.
[46] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 404.

into the constitutional text, in this case s 2(2) of the *Australia Act*, a limitation not found there and which was not "implicit in the federal structure within which State Parliaments legislate"[47]. Kirby J too was not prepared to accept that the answer to extreme laws "masquerading as a State law" lies "in assertions by judges that the common law authorises them to ignore an otherwise valid law of a State"[48].

The notion that the common law, in some way so profound that it defies precise articulation, exercises supervisory control over the legislature is most famously associated with Sir Edward Coke and his judgment in *Dr Bonham's Case*[49]. Famously, Coke wrote[50]:

> "[I]n many cases, the common law will … controul Acts of Parliament, and sometimes adjudge them to be utterly void: for when an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will controul it, and adjudge such Act to be void."

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[47] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 410 [14].
[48] *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 431-432 [75].
[49] *Dr Bonham's Case* (1610) 8 Co Rep 113b [77 ER 646].
[50] *Dr Bonham's Case* (1610) 8 Co Rep 113b at 118a [77 ER 646 at 652].

Coke's views had roots in the natural law thinking he was sometimes disposed to reject: the idea that the exposition of the law was a matter for learned men, steeped in tradition, and for them only. That thinking was at odds with the radical Protestant view that individuals can find their way to the truth for themselves without the mediation of a priestly caste.

While Coke spoke of the "common law" as an abstraction, the practical reality, well understood by his contemporaries, was that he was promoting the supremacy of the judges over the King in Parliament. Coke, when he spoke as a judge, championed the supremacy of the common law as an essentially continuous body of law derived from Anglo-Saxon custom and reflecting natural law as Coke saw it. In this telling, the authority of the common law pre-dated the Norman Conquest and the legal authority of the King and the King in Parliament. Coke's position was polemical and political. As a legal historian, Coke's scholarship was seriously (and possibly even deliberately) deficient. In supporting the view that the position and power of the King were themselves creatures of the common law, Coke was supporting the claim of the judges, of whom he was the leader, to the lion's share of sovereign power.

The historical reality as a matter of "facts on the ground" was that the English judiciary and their legal authority were the creatures of Henry II and that the judges were, from the first moments of the common law's self-consciousness, directly dependent on the King in whose name they dispensed justice throughout the realm. The judges discussed their cases directly with the King. As Ralph Turner noted[51], the judges at the time of the Angevin Kings often marked their cases "loquendum cum rege", that is, "to be discussed with the King". And as noted by Edward Rubin, the research of Pollock and Maitland amply demonstrated that, as a matter of history, it is to Henry II and his justiciars that we must look for the creation of the common law as a body of rules administered throughout the realm[52]. In this, the better view of the historical development of the common law, the King, and the sovereign power initially embodied in the King, and later the King in Parliament, was the true fountain of justice.

It is easier to intuit a fundamental limitation upon sovereign legislative power in terms of a negative proposition whereby some things are not permitted. The spectre of majoritarian oppression exercises distinctly less claim on the imagination when the question is not whether Socrates should be exiled for despising the gods and corrupting the youth, but whether he and his aristocratic friends should be voted a

[51] Turner, *The English Judiciary in the Age of Glanvill and Bracton*, (1985) at 159.
[52] Rubin, "Seduction, Integration and Conceptual Frameworks: The Influence of Legal Scholarship on Judges", (2010) 29 *University of Queensland Law Journal* 101 at 106-107.

pension for their services to the city. The moral claim of the majority who pay the taxes from which the pension is to be met confers moral authority to decide how much, to whom, and for what, they are prepared to pay. Coke, of course, did not have to address the problem that it is more difficult to intuit a minimum set of positive standards, such as levels of education, health care, pension rights and so forth. When one does address this question, it becomes even more apparent that the problems of identifying the legal source, and articulating the content of these supposed fundamental constraints, negative or positive, cannot be resolved by the recruitment of the blue-eyed babies or other extreme examples of what Parliaments would never dream of doing in order to win an argument that they may not do something else.

There are strong echoes of Coke's view in the observations of Lord Steyn in *R (Jackson) v Attorney General*[53] to the effect that while the supremacy of Parliament is the basal principle of the United Kingdom's constitution, the principle is itself a construct of the common law created by the judges who might, in some circumstances, create qualifications to the principle. But portentous references to what the judges *might* do, do not explain the source and content of the limits on the

[53] [2006] 1 AC 262. See also, Dixon, "The Common Law as an Ultimate Constitutional Foundation", (1957) 31 *Australian Law Journal* 240.

sovereignty of the representative institutions of government enforceable by the judiciary.

The English civil wars of the 17th century established, in the most emphatic way, the claim of the Parliament to be the sole institution of government with final authority to say what the law should be as distinct from what it is in any particular case; but shortly after the founding of the United States, the great judgment of Marshall CJ in *Marbury v Madison*[54] established that the Supreme Court of the United States could invalidate Acts of Congress held by the judges to be inconsistent with the *Constitution*. In this regard, Coke's observations in *Dr Bonham's Case* might be said to have foreshadowed the strong form of judicial review established by *Marbury v Madison*; but to the disappointment of those who would claim Coke as the originator of judicial review of legislation, it is noteworthy that *Dr Bonham's Case* was not even mentioned in the celebrated judgment of Marshall CJ.

Centuries before *Dr Bonham's Case*, and, indeed, well before Magna Carta was imposed on John Lackland by his barons, it was obvious to all in the kleptocracy that was Norman Britain that a written instrument was the irreducible minimum of

[54] (1803) 5 US 137.

prudence required in dealing with the King and his barons. The proliferation of rights-creating instruments such as deeds and wills and charters disposing of lands or creating towns or monasteries or other charitable institutions required interpretation in the course of their enforcement. And that task became – naturally one might say – part of the ordinary and unremarkable business of the courts established by Henry II and his successors.

John Marshall's decision in *Marbury v Madison* was founded squarely on the eminently practical appreciation that interpreting written documents is simply what judges do and what they had always done within the common law tradition. Constitutional adjudication is an exercise in interpreting the effect of the *Constitution* as a written instrument; and that exercise is of a piece with the work which characterises the work of judges in interpreting deeds and wills.

Marshall's insight, that "it is emphatically the province and duty of the judicial department to say what the law is"[55], reflected the practical experience of practising lawyers that declaring what the law is, is a characteristic function of judges in the common law tradition. This practical and institutional approach informed by the separation of powers effected by the US *Constitution* is, of course,

[55] *Marbury v Madison* (1803) 5 US 137 at 177.

very different from the doctrinaire approach of Coke in *Dr Bonham's Case*, pursuant to which there is something outside and beyond and at the foundation of the *Constitution*.

Blackstone was in no doubt about where the truth lay. He said, "So long ... as the English constitution lasts, we may venture to affirm, that the power of parliament is absolute and without control" [56]. In particular, Blackstone said that judges were not "at liberty to reject" even unreasonable laws "for that were to set the judicial power above that of the legislature, which would be subversive of all government"[57].

Conclusion

What is required by way of the particular content of equality before the law, parliamentary democracy and fairness in the administration of the law, cannot be known "a priori". And inquiry into what is required is not advanced by the rhetorical devices we have been discussing.

[56] Blackstone, *Commentaries on the Laws of England*, 14th ed (1803), bk 1, ch 2 at 162.
[57] Blackstone, *Commentaries on the Laws of England*, 14th ed (1803), bk 1 at 91.

The development of our constitutional law would not suffer if we were to eschew altogether the rhetoric of the extreme and distorting example and the obscurantist appeal to a notion of a deep common law. The laws that are targeted by this rhetoric are never about actually killing blue-eyed babies, but are about disadvantage to a particular class of interests. The power of their appeal depends upon the extent to which those interests are perceived by the judge. The truth, so perceived, is intuited as axiomatic, and is, therefore, unexamined. Rhetoric, however powerful, is not legal principle. The blue-eyed babies should be left in peace. As Stephen and Dicey knew, if our fellow citizens are mad monsters, there is no legal principle that gives any reason to think that the lawyers and judges can cure that illness.