MEANING, THEORY AND THE INTERPRETATION OF CONSTITUTIONAL GRANTS OF POWER

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The High Court has often interpreted grants of power by determining the essential meaning of the terms in which the grants are formulated. This approach appears to have the advantage of certainty and objectivity. However, it may make interpretation too rigid. Grants of power have certain inherent features which push the Court towards a more flexible approach in which it exercises a choice to bring a new phenomenon within power by the way in which it baptises or names it. The article considers the extent to which two philosophical theories of meaning, criterialism and semantic realism, can reconcile this baptising approach with an essential meaning approach to interpretation. It concludes that both theories are limited in the extent to which they allow terms to extend to matters not in the contemplation of their users so that neither is capable of introducing the type of flexibility into the essential meaning approach which may be needed to reconcile it with the baptising of new phenomena so as to bring them within power.

I INTRODUCTION

Constitutional interpretation involves a paradox. On the one hand, the reason for adopting a rigid constitution and judicial review is to ensure that some basic constitutional principles are protected from change through normal political processes. On the other hand, some constitutional flexibility is desirable. Without it constitutions can become anachronistic and out of step with current social, economic and political developments. The courts, especially the High Court as the final interpreter of the *Constitution*, are charged with the unenviable responsibility of balancing the competing demands of rigidity and flexibility. They seek to perform this balancing act within the constraints imposed by the fact that that they are courts charged with interpreting and applying the *Constitution* as a legal document according to legal principles of interpretation.

There have been many proposed solutions to the problem of balancing rigidity and flexibility, but none is so widely accepted or so obviously successful in achieving an appropriate balance that it could be described as the Holy Grail of interpretation. Some, such as originalism, which argues that the *Constitution*

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should be given its original intended meaning, tend towards rigidity. Some of its supporters, recognising this, have sought to introduce degrees of flexibility by means of various moderating devices, such as ignoring the application intentions of the drafters[1] or allowing the Court some discretion to depart from the original meaning of the text where it is consistent with the original idea[2] or with the original intentions[3] behind the *Constitution*.

Other proposed solutions, such as non-originalism, tend towards flexibility. According to non-originalism, the text should be interpreted according to today's understanding of its meaning and free of all constraints imposed by its original meaning. It permits any sensible interpretation which is consistent with the dictionary meaning of the words, the grammar of the sentence in which the words are found and the overall constitutional context. Choosing between sensible interpretations requires a value judgment. This is necessarily the case because adopting the current essential meaning of a term may reduce the text to nonsense. For example, s 92 of the *Constitution* guarantees the freedom of interstate intercourse. If the current, essential meaning of intercourse were limited to sexual intercourse, it would be ridiculous for a non-originalist to interpret s 92 as a guarantee of free love or sexual licence between the States. To ensure a rational choice, non-originalists tend to adopt a standard for evaluating possible interpretations. For example, the non-originalist Justice Kirby has adopted the standard of good government for this purpose, arguing that the Court should look for the interpretation which 'achieves the purposes of good government which the *Constitution* was designed to promote and secure'.[4] According to its critics, this approach is so flexible that it gives the judges a free hand in rewriting the *Constitution*.[5]

The interpretation of grants of power has its own special problems which give rise to difficulties in balancing rigidity and flexibility. Grants of power tend to be defined in a few general terms such as marriage or defence or trade and commerce among the States. The words of each grant must be interpreted in relative isolation because there is little context to provide assistance in determining their meaning. To overcome the lack of context, the High Court has often seen its role in interpreting grants of power as determining the essential meaning or connotation

1 Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1, 30–1.

2 Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 358–9.

3 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 1, 33–4; Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677, 709.

4 Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship' (2000) 24 *Melbourne University Law Review* 1, 14.

5 James Allan and Michael Kirby, 'A Public Conversation on Constitutionalism and the Judiciary between Professor James Allan and the Hon Michael Kirby AC CMG' (2009) 33 *Melbourne University Law Review* 1032, 1037–9, 1041–2.

of the terms in which the grants are formulated.[6] The search for essential meaning or connotation assumes that words, especially descriptive terms, have a meaning or referent which does not change much regardless of context and that the meaning or referent of a descriptive term gives a list of properties which all objects falling with the scope of the term possess. For example, the meaning or connotation of the word 'chair' gives a list of properties which all chairs possess and enables us to identify all possible examples of the word chair. That may be contrasted with the denotation of the term, which is the set of all *actual* things the term describes at a particular point in time.

There are good reasons why the High Court attempts to determine the essential meaning of the words in which grants of power are formulated. Firstly, if we can identify the essential meanings of the words in which grants of power are expressed, we can identify the essential features of the classes of phenomena to which the grants refer. The more we can identify the essential features shared by a class, the more justifiable our classification will be. Secondly, a theory of classification based on the idea that concepts and hence constitutional terms have fixed essential meanings supports the view that the *Constitution*'s meaning is fixed and that it is possible for the Court to interpret and apply it in accordance with that meaning.[7] Thirdly, many of the issues which the Court must consider are socially and politically divisive. The Court continually seeks for neutral ways of deciding these issues in order to defuse the controversy which would surround their actions if they were seen to take sides on the social and political issues involved. This is particularly the case where the Court is asked to decide whether new social and political forms fall within the old categories which the *Constitution* creates. For example, the Court may soon have to consider whether the Commonwealth's power over marriage extends to same sex relationships. It would greatly increase the chances of the decision being accepted if the Court were able to argue convincingly that same sex relationships do possess or do not possess all the essential features of a marriage.

Almost all the advantages of attempting to discover the essential meaning of the terms of a grant relate to the degree of certainty and objectivity which such an approach promises to bring to interpretation. Hence it appeals to those who favour rigidity over flexibility. One would rarely expect a non-originalist to appeal to the essential meaning of terms as a guide to interpretation. Although the meaning of the words of the *Constitution* is important to non-originalists in that current

6 The High Court has adopted this approach in cases as far apart in time as *A-G (NSW) v Brewery Employes Union of New South Wales* (1908) 6 CLR 469, 521–2 (Barton J), 535 (O'Connor J), 560 (Isaacs J), 605–6 (Higgins J) ('*Union Label Case*'); *Singh v Commonwealth* (2004) 222 CLR 322, 349–51 [54]–[58] (McHugh J), 384–6 [155]–[162], 395–7 [190]–[195] (Gummow, Hayne and Heydon JJ); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 496–7 [24]–[26] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Grain Pool Case*'). Evans provides a more comprehensive list of cases in which essentialist reasoning has been used: Simon Evans, 'The Meaning of Constitutional Terms: Essential Features, Family Resemblance and Theory-Based Approaches' (2006) 29(3) *University of New South Wales Law Journal* 207, 210 nn 19–28.

7 Evans, above n 6, 214, makes a similar point about the general appeal of essentialism to judges given their role.

meaning provides one of the few constraints on their approach to interpretation,[8] they see meaning as an indicator of the range of choice which the text permits the interpreter rather than as a guarantor of objectivity and certainty. Because they favour setting the text free from original meanings and intentions, they are committed to choosing the most appropriate of possible interpretations rather than the interpretation which is most consistent with the essential meaning of the text at any point in time, whether that point in time is now or in the past.[9]

The advantages of certainty and objectivity which appear to be the major attractions of a search for the essential meaning of the terms used in grants of power may make interpretation too rigid. Grants of power have certain inherent features which push the Court towards a more flexible approach to interpretation than that which the search for essential meaning appears to permit. Many of the grants give power over legal and social institutions such as marriage, copyright and bankruptcy. The ordinary meaning of these terms is at least in part derived from their legal meaning which is in turn in part dependent upon the bundle of legal rights, duties and practices associated with the term from time to time. For example, the legal meaning of the term 'copyright' is at least in part derived from the bundle of legal rights, duties and practices associated with copyright at a particular point in time and hence may change as the law changes.[10] To the extent that the constitutional definition of copyright reflects, at least in part, the legal meaning, legislation which makes changes to the basic features of copyright and hence changes its legal meaning may need to change the constitutional definition of copyright in order to be valid. That leaves the Court with a dilemma: either allow the Parliament some power to redefine the scope of its powers or impose strict limits on Parliament's ability to make basic changes to matters over which it has been given power.[11]

The other major problem which pushes the Court towards flexibility in the interpretation of grants of power over legal and social institutions is that such institutions tend to evolve, often rapidly. As a result, there may come a time when an institution may have changed to such an extent that it has little in common with the institution as it was in 1901, apart from the name. At that point, it is not clear that the power extends to it. For example, if marriage, copyright or bankruptcy has changed radically since 1901, they may have become different institutions and as a result fall outside the relevant powers. If this conclusion is accepted, large numbers of Commonwealth powers may become redundant.[12]

The Court has adopted a number of approaches to the interpretation of grants of power in order to deal with these problems. One is to adopt an avowedly non-

8 Allan and Kirby, above n 5, 1035.

9 See text accompanying above n 4.

10 Michael Stokes, 'The Interpretation of Legal Terms Used in the Definition of Commonwealth Powers' (2007) 35 *Federal Law Review* 239, 241.

11 Ibid 241–8.

12 Michael Stokes, 'Originalism and the Interpretation of Constitutional Grants of Power' (Working Paper, Faculty of Law, University of Tasmania, 2013). Copies of this paper are available from the author.

originalist approach.[13] Others include adhering at least in name to the view that the role of the Court is to determine the essential meaning of the terms of a grant while adopting such a broad, abstract interpretation of those terms that it gives the Court sufficient flexibility to enable it to adopt an essentially non-originalist approach.[14] For example, in the recent *Commonwealth v Australian Capital Territory* ('*Same Sex Marriage Case*'), the Court adopted a very abstract interpretation of the term 'marriage' in section 51(xxi):

> Rather, 'marriage' is to be understood in s 51(xxi) of the *Constitution* as referring to a consensual union formed between natural persons in accordance with legally prescribed requirements which is not only a union the law recognises as intended to endure and be terminable only in accordance with law but also a union to which the law accords a status affecting and defining mutual rights and obligations.[15]

Despite resort to these approaches, the search for the essential meaning of constitutional terms has always been and remains a common approach to interpretation.[16]

The Court's search for the essential meanings of terms is problematic. Many philosophers doubt that words have essential meanings[17] or argue, that if they do, the meaning cannot be separated from the context in which the word is used.[18] Even if we can separate meaning from context to some extent, context is clearly relevant to determining how a word is used, especially if the word has multiple meanings. For example, the *Constitution* gives the Commonwealth power over marriage.[19] Marriage was used in 1900 both to refer to the legal conception of marriage as the union of one man and one woman for life to the exclusion of all others, and to refer to other unions between men and women, such as polygamous unions. Normally, the context would assist in determining which of these meanings was intended. However, that context is often lacking in the *Constitution* because of the bald terms in which grants of power are phrased, throwing the Court back on the search for essential meaning.[20]

Not only do philosophers doubt that words have essential meanings, but legal commentators have been critical of the way in which the Court has used the concept of essential meaning and the related connotation/denotation distinction

13 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 552–3 [44] (McHugh J); *Re Governor, Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 355–6 [87]–[88] (Kirby J).

14 Stokes, 'Originalism', above n 12.

15 [2013] HCA 55 (12 December 2013) [33] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

16 For examples, see above n 6.

17 For a simple account of the problems of essential meaning, see Evans, above n 6, 214–16.

18 Quine, for example, suggests that the meaning of words cannot be separated from the context in which the words are used, so that the meaning will vary from context to context: see Raffaella De Rosa and Ernest Lepore, 'Quine's Meaning Holisms' in Roger Gibson (ed), *The Cambridge Companion to Quine* (Cambridge University Press, 2004).

19 *Constitution* s 51(xxi).

20 Not all context is lacking. For example, context provided by the intentions of the drafters is not reduced by the bald terms used. This may explain some of the appeal of intentionalism in constitutional interpretation.

as aids to constitutional interpretation. Zines has argued that the distinctions between essential attributes and incidents and between connotation and denotation do not resolve but merely restate the issue with respect to the meaning of a term, and he suggests that the answers given 'sometimes descend to mere dogmatism'.[21] Goldsworthy has suggested that in its use of essential meaning and the connotation/denotation distinction the Court has often said one thing (that constitutional terms have fixed meanings) while doing another: giving a term a meaning which it did not originally have, where it seems appropriate to do so.[22]

This article does not consider whether scepticism of essential meanings or the criticism of the Court's use of essential meanings is justified. Instead, it considers the extent to which two philosophical theories of meaning, criterialism, which provides the philosophical basis for the Court's approach to essential meaning and for the connotation/denotation distinction, and the rival theory of semantic realism, can introduce flexibility into an essential meaning approach to the interpretation of grants of power. For a long time the Court has used the distinction between the connotation, or essential meaning of a term, and its denotation, or the set of all *actual* things to which the term refers at a particular point in time, to justify extending a grant of power to new phenomena on the grounds that the denotation of a term may change without any change to the connotation.[23] As a result, there has been some discussion of the usefulness of the distinction[24] and at least one originalist has endorsed it as a method of introducing some flexibility into constitutional interpretation.[25]

Recently, some commentators have suggested that another theory of meaning which the Court has not used, semantic realism, has the potential to provide solutions to some of the problems of legal interpretation.[26] Emerton, a supporter of the application of semantic realism to the problems of legal interpretation, has shown how it can be used to provide a degree of flexibility in the interpretation of one constitutional concept, that of 'chosen by the people' in ss 7 and 24 of

21 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 26–7. See also Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25 *Adelaide Law Review* 3, 9–10.

22 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 1, 40–4.

23 Examples include *R v Commonwealth Conciliation and Arbitration Commission; Ex parte Association of Professional Engineers* (1959) 107 CLR 208, 267 (Windeyer J) ('*Professional Engineers' Association*'); *Lansell v Lansell* (1964) 110 CLR 353, 366 (Taylor J), 370 (Windeyer J); *King v Jones* (1972) 128 CLR 221, 239 (Barwick CJ), 265 (Gibbs J); *McGinty v Western Australia* (1996) 186 CLR 140, 200–1 (Toohey J); *Eastman v The Queen* (2000) 203 CLR 1, 41–5 [134]–[144] (McHugh J); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 427–30 [110]–[117], 435–6 [132] (McHugh J); *Singh v Commonwealth* (2004) 222 CLR 322, 333–4 [14] (Gleeson CJ), 434–4 [37]–[38], 350–1 [57] (McHugh J); *XYZ v Commonwealth* (2006) 227 CLR 532, 564 [90], 567 [99] (Kirby J), 585 [157] (Callinan and Heydon JJ).

24 See, eg, Zines, *The High Court and the Constitution*, above n 21, 25–32; Zines, 'Dead Hands or Living Tree?', above n 21, 8–11; Evans, above n 6, 208–14; Christopher Birch, 'Mill, Frege and the High Court: The Connotation/Denotation Distinction in Constitutional Interpretation' (2003) 23 *Australian Bar Review* 296; *Re Wakim; Ex Parte McNally* (1999) 198 CLR 511, 551–3 [42]–[44] (McHugh J).

25 Goldsworthy, 'Originalism in Constitutional Interpretation', above n 1, 31–2, 40–4.

26 Nicos Stavropoulos, *Objectivity in Law* (Clarendon Press, 1996); David O Brink 'Legal Theory, Legal Interpretation, and Judicial Review' (1988) 17 *Philosophy & Public Affairs* 105.

the *Constitution*.[27] It may be that it can be used to introduce flexibility into the interpretation of a wide range of constitutional terms.

Both the connotation/denotation distinction and semantic realism have one thing in common which opens up the possibility that they can be used to introduce flexibility into constitutional interpretation. Both suggest that the users of a term may not always be aware of its true meaning or of all the matters which fall within its scope, thus allowing the term to refer to matters not contemplated by its original users and providing some support for the view that the meaning of terms in grants of power may extend to matters outside the contemplation of the framers in 1900. The article considers the two theories to determine the extent to which they support the view that users of a term may not always be aware of its true scope or of its complete extension. It concludes that both theories are limited in the extent to which they allow terms to extend to matters not in the contemplation of their users so that neither is capable of introducing the type of flexibility which may be needed to deal with the problems inherent in the interpretation of grants of power outlined above.

Part II of the article looks at the philosophical theories of criterialism and semantic realism. Part III considers the extent to which general terms are flexible and examines what often happens when we extend the scope of a general term to new phenomena or new situations. It concludes that in most cases, we have a choice to extend the term, to use a different term or to invent a new term. When we have a choice, a naming or baptism — that is, a decision to apply an existing or new term to the new phenomenon — takes place. Part IV examines examples in the interpretation of grants of power in which the Court has openly made a choice and has baptised a new phenomenon to bring that phenomenon within the terms of a grant of power and suggests why this has not happened often. Part V examines theories of meaning, concluding that they have limited potential for demonstrating that baptism is not needed to bring a new phenomenon within the scope of a general term. As a result, they do not introduce much flexibility into the interpretation of terms with a fixed meaning. As noted above, any potential for flexibility largely depends upon a theory's being able to distinguish between the usage of a term at the date of its adoption and its meaning at that time. Part V(A) examines the connotation/denotation distinction, concluding that because it is closely associated with criterialism, a conventional theory of language, it is unable draw a clear distinction between usage and meaning. Hence, it is unable to introduce much flexibility into interpretation. Part V(B) considers a related distinction, the concept/conception distinction, concluding that for similar reasons it also does not introduce much flexibility into interpretation. Part V(C) argues that semantic realism, because it claims that terms have a meaning which is determined by the real nature of the kinds to which they refer, rather than by linguistic usage or conventions, has greater potential for distinguishing between usage and meaning and introducing flexibility into interpretation. However,

27 Patrick Emerton, 'Political Freedoms and Entitlements in the *Australian Constitution* — An Example of Referential Intentions Yielding Unintended Legal Consequences' (2010) 38 *Federal Law Review* 169.

because it accepts that terms have fixed meanings, it may not introduce enough flexibility to solve the interpretive problems set out above.

II THEORIES OF MEANING — CRITERIALISM AND SEMANTIC REALISM

Both criterialism and semantic realism accept that general terms do have essential meanings and that to fully understand the essential meaning of a term, we need to understand the nature of the phenomenon to which the term refers. However, they differ in the way they explain the relationship between the term and the nature of the phenomenon to which the term refers.

According to the criterialist model of how concepts and general terms work, the meaning of a concept gives us a list of properties which we can use to identify all objects which fall within the scope of the concept, such that a 'property [is] essential to an object … [to which a concept refers] if it is true of that object in any case where it would have existed'.[28] For example, a property is an essential property of a chair if it is a property of all chairs which have existed and could exist.

Semantic realists deny that descriptive terms operate by giving language users a list of essential properties which all objects falling within the scope of the term must possess. Instead, they argue that descriptive terms are used in two ways. First, descriptive terms are used to baptise an object by devising a term to stand for it or by bringing it within the scope of an existing term.[29] Second, descriptive terms are used in the way that others use the term, that is to refer to objects of the kind to which, by established practice, the term refers. Users of the term may have little or no understanding of the properties of the object to which the term refers and do not need to be able to list them. There may be experts in the community able to give a full or partial account of the properties of the object. But this need not be the case. There may be objects which have been baptised of which we know almost nothing except that they exist. According to semantic realism, 'mastery of the use of an expression falls short of knowing what it really means. Indeed, a linguistic community may use an expression for millennia without finding out what it really means and without realizing that they do not know what it really means'.[30] For example, people used the term 'water' for thousands of years without realising that it really meant a molecule composed of two atoms of hydrogen and one atom of oxygen.

The semantic realist does not deny that objects falling within the scope of a general term must share some essential features. However, they deny that language users necessarily use these essential features to determine what objects fall within the

28 Saul A Kripke, *Naming and Necessity* (Basil Blackwell, revised ed, 1980) 48.

29 When talking of social and political kinds, baptism can be a complex process: see Emerton, above n 27, 180–3.

30 Dennis M Patterson, 'Dworkin on the Semantics of Legal and Political Concepts' (2006) 26 *Oxford Journal of Legal Studies* 545, 551. Patterson mentions some of the problems and paradoxes to which this theory gives rise: at 549–52.

scope of a general term. As noted above, the essential features which objects of the same kind have in common may not be known or may be hidden from language users. Instead, users apply general terms to objects because they are of the same kind. Objects which are perceived as being of the same kind will, of course, appear to have similar properties or be similar to accepted paradigm examples which everyone accepts as examples of the kind. If they were not, we would have little reason for concluding that they were of the same kind. But the list of properties which they are seen to share is tentative and always subject to revision in the light of new evidence. The list operates as a checklist to aid in identifying the kind to which a term refers rather than as a list of essential properties which all objects properly falling within the scope of the term must share.[31]

In criterialist theories of meaning, a change in the list of properties which an object must have to fall within a general term equates to a change in the essential meaning of the term. That is not the case in semantic realist theories because the term is used to refer to a kind rather than to identify an object by the properties which it possesses. As we gain more knowledge of the hidden features of the kind, we will be able to define the boundaries of the kind more accurately. We may be forced to concede that our previous usage of a term which refers to a kind was mistaken because it was based on a lack of knowledge of the real features of the kind.

The different approaches of the two theories to the role the properties of an object play in determining whether the object falls within the scope of a general term are indicative of a deeper difference. Criterialism gives priority to the role of thought in language and meaning. Thought creates the world in that our conceptual structures impose meaning on what would otherwise be a jumble of unintelligible sense perceptions. Being able to categorise objects under general terms according to their properties plays a key role in organising the jumble. Criterialism argues that language is conventional in that language speakers share lists of properties or criteria which they agree phenomena must have to fall within the scope of a general term. These lists of criteria are constructs of thought and do not necessarily correspond with the real nature of the phenomena which they are used to classify.[32]

On the other hand, the semantic realist argues that the world is intelligible in itself in that we are aware of kinds of objects in an immediate and direct way. Descriptive terms are used to refer to these kinds of objects. We may develop lists of the properties which objects possess as an aid to identification, but they are not crucial to our being able to identify and talk about the object. Hence the lists are tentative and may change as our understanding of the object increases.

Semantic realist theories are seen as most appropriate in understanding the general terms we use to describe natural phenomena. Natural phenomena often have deep molecular and genetic structures which could be seen as determining the meaning of natural kind terms and which may not be known or understood by

31 Hilary Putnam, 'Dreaming and Depth Grammar' in Roger J Butler (ed), *Analytical Philosophy* (Blackwell, 1962) 211, 219–20.

32 Stavropoulos, above n 26, 2–3; Brink, above n 26, 112.

users of the terms. Although some supporters of semantic realism argue that the theory is of universal application, others argue that it is limited to terms describing the natural world and that terms used to describe artefacts and other aspects of the social world are better explained by criterialism or similar theories.[33]

III THE FLEXIBILITY OF GENERAL TERMS AND EXTENSION BY BAPTISM

A *Classificatory Terms*

Some general terms have meanings which extend beyond their applications at any point in time to include examples of the phenomena which were unknown at that time and which differ in important respects from the known examples. These are terms which are used to classify new and unfamiliar phenomena into existing categories. They are important in helping people cope with change. For example, when Europeans first arrived in Australia, they were assisted in coping with the new and strange environment by being able to classify new fauna and flora within existing descriptive, general terms. Although they saw many new and strange birds, they were able to classify them as birds because they had the basic features of birds. The sense of strangeness and shock would have been far greater if they had found creatures which fell completely outside any of the general terms they used.

The purpose of general terms such as 'bird' is to enable us to classify a large number of different varieties of phenomena, which share features in common, under the one term. It was always assumed, before new varieties of bird were found, that the term 'bird' referred to creatures with the essential properties of a bird which were not known to exist as well as to those which were known to exist. In other words, linguistic conventions about the application of the term 'bird', like the application of most terms used to classify diverse phenomena, give it an inbuilt capacity for extension allowing the term to apply to new and unfamiliar varieties of phenomena as long as those phenomena have all of the essential features required to fall within the term. With terms of this nature, we may reasonably conclude that the meaning of the word is not determined by the way it is used at any particular time so that we can separate the set of its possible meanings from the set of its actual uses.

In my opinion the existence of classificatory terms such as 'bird' does not enable us to develop a general theory of how constitutional terms accommodate change. Firstly, not all descriptive terms are of this nature, some being used to refer to one

33 Supporters of the view that semantic realism can be used to analyse the meaning of artefactual terms and legal and social terms include Hilary Putnam, 'Mind, Language and Reality: Philosophical Papers' (Cambridge University Press, 1975) vol 2, 242; Stavropoulos, above n 26, 2–3; Brink, above n 26, 112; Sally Haslanger, 'What Are We Talking About? The Semantics and Politics of Social Kinds' (2005) 20(4) *Hypatia* 10, 16–19; Hilary Kornblith, 'How to Refer to Artifacts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) ch 8, 139. Those who think that semantic realism does not apply to artefacts and other social kinds include Stephen P Schwartz, 'Introduction' in Stephen P Schwartz (ed), *Naming, Necessity, and Natural Kinds* (Cornell University Press, 1977) 13, 38–41; Amie L Thomasson, 'Artifacts and Human Concepts' in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 52.

phenomenon or to a small class of phenomena rather than to a broad category of phenomena. Secondly, sometimes we are faced with genuinely new phenomena which cannot be fitted within our existing conceptual framework without changing that framework. For example, the echidna and platypus were only fitted into the existing classification systems for animals by changing the essential meaning of the term 'mammal' to include animals which lay eggs.

B *Descriptive Terms not Used to Classify Different Types of Phenomena and Extension by Baptism*

Not all descriptive terms are used to classify different varieties of a broad class, such as bird, but refer to one phenomenon. For example, the descriptive term 'phone' was originally used to refer to a type of technology, the landline phone, which enabled people to speak to each other by means of an electric current transported by a wire. When mobile phones were invented, people had to decide whether the term 'phone' referred to mobile phones as well as landline phones.

The decision could not be made by looking for the meaning of the term 'phone', as that was understood when phones were first invented and deciding whether that meaning included mobile phones as well as landline phones. 'Phone' at the time of the phone's invention was a term which referred to one phenomenon, the landline phone, rather than a term which was used to classify different varieties of phenomena which possessed a number of common characteristics. To argue that mobile phones were phones because they had the essential features of phones could be seen as arbitrary because mobiles have some of the basic features of landline phones but not others. They can be used in the same way — to enable people to talk to each other at a distance — but use different technology, microwave radio, rather than a landline. The fact that mobile phones have some of the features of landline phones may be seen as justifying or ruling out describing them as phones depending on which features we choose to emphasise.

Mobile phones probably came to be called phones by what is called 'baptism and transmission'.[34] A person, perhaps the inventor or a marketing guru, 'baptised' the mobile phone by using that term to refer to the new invention, or a consensus developed that the mobile was indeed a phone and that name for the mobile phone was transmitted from one person to another.[35] It could have been different in that the person who named the mobile phone may have chosen to emphasise the similarities with broadcasting rather than with the phone and called it a personal radio, enabling users to broadcast to friends.

The persons who 'baptised' the mobile phone may have been influenced by the similarities between it and landline phones. Those similarities no doubt encouraged others to accept that mobile phones were phones. But that fact does not entail that the mobile phone was a phone because it fell within the meaning of the term 'phone'. The term 'phone' differs from a term such as 'bird' because

34 Kornblith, above n 33, 140.

35 Emerton, above n 27, 180–2, discusses the way in which a consensus may emerge as to the extension of a word to a new instance.

it was originally used to refer to one phenomenon, a landline phone, rather than to classify related phenomena such as all the species of birds. If the first English speaker to see a wattlebird had denied that it was a bird, we would have doubted whether that person understood the term 'bird'. No 'baptism' of the wattlebird as a bird was needed because it had all the features necessary to classify it as a type of bird. But we would not have thought it odd if the person who named the mobile phone had refused to call it a phone because the term 'phone', unlike the term 'bird', is not used to classify related types of phenomena but to refer to one or a small number of phenomena.

It would have been reasonable for the person who 'baptised' the mobile phone not to have called it a phone because the decision to call it a phone involves a change to the meaning or referent of the term 'phone'. When new discoveries or inventions have major similarities to phenomena with which we are familiar, we may be tempted to modify an existing concept to accommodate the new phenomenon. But we have a choice to do so or to develop a new concept. The decision to modify an existing concept may be self-conscious and the result of public deliberation, as was the decision to redefine the term 'planet' so as to exclude Pluto and other large bodies found further from the Sun. More often, it is likely to be the result of evolutionary changes in common usage in the face of unfamiliar objects. However the process occurs, it is different in kind from extending a term to include new types of phenomena which possess those features necessary to fall within the term. It differs because it involves a change to the list of features which an object must possess to fall within the scope of the concept. For example, the decision to call a mobile phone a phone entails the decision that landline technology is not an essential feature of a phone.

Even if the above analysis of the way in which the term 'phone' was extended to include the mobile phone is wrong, it does not weaken the general point. That point is that often we do not have terms for new institutions and technology. We may decide to extend an existing term to the new phenomenon but that decision involves a choice and hence is a baptism of the new phenomenon. We should not lose sight of the fact that it is a baptism simply because the new phenomenon has some features which are similar to existing phenomena and as a result we decide to extend the term for the existing phenomena to the new phenomenon.

IV THE INTERPRETATION OF GRANTS OF POWER AND THE 'BAPTISM' OF NEW PHENOMENA AS FALLING WITHIN AN EXISTING GRANT OF POWER

The classic case of the High Court's extending a grant of power to include new developments not known at federation is *R v Brislan; Ex parte Williams*.[36] In that case, the High Court held that radio broadcasting had enough of the features conveyed by the terms 'telegraphic, telephonic or like services' to come

36 (1935) 54 CLR 262 ('*Brislan*').

within the Commonwealth power to make laws with respect to such services in s 51(v). Accordingly, although radio broadcasting had not been invented when the *Constitution* was adopted, it fell within the terms in which the power was expressed and hence within the scope of the power.

In my opinion, the decision was a baptism, a deliberate decision to extend the term 'like services' to radio, because of the similarities between radio and telegraphic and telephonic services, rather than recognition that radio was a like service because it had all of the essential features of postal, telegraphic, and telephonic services. Accordingly, Dixon J's dissent on the grounds that radio differs from postal, telegraphic and telephonic services in that it enables contact with a wide audience rather than with a particular person or place does not seem eccentric and does not show that he did not understand the meaning of terms such as postal, telegraphic and telephonic services.[37]

The baptism of radio as a 'like service' in *Brislan* was easy to justify because, as Latham CJ pointed out, the addition of the words 'like services' reveals an express intention to extend the legislative power beyond postal, telegraphic, and telephonic services.[38] That entails that a like 'service' need not have all of the essential properties of postal, telegraphic and telephonic services but need only be relevantly similar, inviting the Court to baptise other services as 'like services'. In other words, the power authorised its own extension by baptism to new phenomena unknown at federation.[39]

Baptisms of new phenomena under other powers are not so easily justified because other powers do not authorise their own extension. For example the decision in the *Grain Pool Case*[40] that plant breeders' rights legislation fell within s 51(xviii), the power with respect to patents and other types of intellectual property, is better seen as a decision to baptise the plant breeders' rights legislation as a type of patents law because it was similar in many relevant ways to that law than as a decision that the legislation had all of the essential properties of a patents law. One of the arguments the Court used to justify the decision recognised that fact. The Court argued that there is an inherent flexibility or dynamism in the grants of power to the Commonwealth which enables them to extend to new phenomena which were not known at federation.[41]

The argument adopted Higgins J's metaphor in the *Union Label Case* of the central case and the circumference of the power,[42] under which the 1900 understanding of the extension of the grant of power forms the central case, but not the circumference of the power.[43] Although suggestive, the metaphor does not

37 Ibid 292–4.

38 Ibid 277–8.

39 This point was suggested to me by Professor Jeffrey Goldsworthy of Monash University.

40 (2000) 202 CLR 479.

41 Ibid 493–6 [18]–[23] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

42 (1908) 6 CLR 469, 610.

43 *Grain Pool Case* (2000) 202 CLR 479, 493–4 [19] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

stipulate a method for determining a power's circumference. The Court adopted the metaphor in association with the decision in *Brislan*, discussed above, stating:

> What is of immediate significance for present purposes is the reference in *Nintendo* by their Honours to *R v Brislan; Ex parte Williams* and *Jones v Commonwealth [No 2]*. Those authorities dealt with the inherent scope for expansion of the application of the power with respect to postal, telegraphic, telephonic 'and other like services' in s 51(v) of the *Constitution*. This serves to emphasise a point of significance in the present case. Later developments in scientific methods for the provision of telegraphic and telephonic services were contemplated by s 51(v). Likewise, it would be expected that what might answer the description of an invention for the purpose of s 51(xviii) would change to reflect developments in technology.[44]

The quote assumes that s 51(xviii) may extend to new developments in the same way as s 51(v), although it does not contain an express invitation to extend the power to 'like' phenomena. I have argued above that in *Brislan*, s 51(v) authorised the Court to identify 'like' services by looking for relevant similarities rather than the essential properties of telephonic and telegraphic services. The assumption that s 51(xviii) contains a similar authorisation permitting the Court to consider relevant similarities rather than essential properties when determining whether new intellectual property rights legislation falls within s 51(xviii) offers an explanation of how the Court might determine the circumference of a power in practice. However, it appears to involve an extension of the grant by baptising the new phenomena as falling within its terms on the basis that they are relevantly similar to the central type rather than a demonstration that the new phenomena fall within the essential meaning of the terms of the grant.

The Court has been reluctant to extend grants of power by baptising new phenomena or by looking for relevant similarities in cases where the proposed extension is to accommodate social, political or legal changes rather than economic change. It is not clear why this has been the case, unless it is motivated by ideas similar to those which led Windeyer J to argue that '[l]aw is to be accommodated to changing facts' and 'not to be changed as language changes'.[45] Technological change appears to be an obvious case of changing facts, while social, political, legal and economic change may seem to be closer to changes in language. However, it is not clear that Windeyer J's distinction is defensible when applied to constitutional interpretation. In normal speech, we extend the meaning of words to new phenomena in response to changes in facts of all types, including changes in society, the law and politics as well as changes in technology. Whatever the reason, in determining whether grants of power extend to new social, political and legal phenomena, the Court has been less likely to extend powers by reference to relevant similarities than to resort to ideas such as the connotation/denotation distinction to argue that grants extend to phenomena

44 Ibid 493 [18] (citations omitted) (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

45 *Professional Engineers' Association* (1959) 107 CLR 208, 267.

not known in 1901 without any change in their essential meaning. The problems associated with the reliance on essential meaning are considered in the next part.

V THEORIES OF MEANING, FLEXIBILITY AND CHANGE

A *The Connotation/Denotation Distinction*

As noted above, the Court often views the interpretation of grants of power as requiring a determination of the essential meaning of the words in which the grant is formulated.[46] The approach is based on the view that the meaning of a concept gives us a list of the properties which every example of the object to which the concept refers must possess. Hence the essential meaning of the terms of a grant of power will list the properties which an item must have to fall within the terms of the grant. The Court tends to use the term 'connotation' to refer to the essential meaning of a word or phrase. We can use the connotation to identify the intension of a term, that is, the set of all *possible* things the term could describe given its definition. Extension or denotation refers to the set of all *actual* things the term describes at a particular point in time.

The connotation/denotation distinction as used by the Court claims that the denotation of general terms may extend to include objects and phenomena which were unknown when the term was adopted without any change to the connotation or essential meaning of the term, that is, to the list of properties which every example of the object to which the term refers must have to fall within the concept. The Court has used the connotation/denotation distinction to explain how a constitutional term, including the terms of a grant of power, could come to refer to ideas, objects or phenomena which had not existed or had not been discovered, or which were not understood as falling within the terms of the grant when the *Constitution* was drafted.[47]

According to this theory, a grant of power can extend to phenomena unknown at federation or to legislation changing some of the characteristics of an institution over which the Commonwealth has power if the connotation or essential meaning of the terms of the grant is not changed, whereas its denotation, the set of all *actual* things the word or phrase describes at a particular point in time, is changed. If a new phenomenon had all of the essential features of a subject over which the Commonwealth had legislative power, if it fell within the set of all *possible* things the subject could describe given its definition, it was within power even if it did not exist or had not been discovered at federation when the term was adopted. If it lacked any of the essential features, it fell outside the set and hence fell outside power. Legislation modifying a social or legal institution to which a grant of power refers will be within power if the modified institution has all the essential features of the institution to which the grant of power refers, thus falling within

46 See the cases listed in above n 6 and in Evans, above n 6, 210 nn 19–28.

47 See above n 23.

the set of all possible things to which the power refers. The doctrine, on its face, does not claim that the *Constitution* changes in meaning, but that the denotation of its terms may incorporate unforeseen developments without any change in meaning.

There are aspects of the distinction's use in constitutional interpretation which are problematic. Firstly, the idea that the denotation of a term may extend to new and unknown phenomena is most applicable when applied to general classificatory terms such as bird, which, as pointed out above,[48] are used to classify a large number of different varieties of phenomena, which share features in common, under the one term. These terms have an inbuilt capacity for extension allowing the term to apply to new and unfamiliar varieties of phenomena as long as those phenomena have all of the essential features required to fall within the term. With terms of this nature, we may reasonably conclude that the meaning of the word is not determined by the way it is used at any particular time because we can separate the set of its possible uses, determined by its connotation, from the set of its actual uses, that is its denotation.

It is not obvious that most terms used in grants of power are general classificatory terms like 'bird', rather than terms like 'phone' which apply to one phenomenon or to a small class of phenomena and which can only be extended by baptism.[49] Many of the terms used in s 51, such as copyright, patents of invention, trade marks, bills of exchange, promissory notes and bankruptcy, appear to be of the latter type. Because the set of their possible uses does not extend much beyond the set of their actual uses, it is difficult to extend such terms to new phenomena without changing their essential meaning so as to add to the set of their possible uses.[50] That is to extend their connotation as well as their denotation.

Secondly, the distinction cannot be used to explain cases, which, to use Higgins J's metaphor, fall within the circumference rather than the central type of a grant of power. As argued above, these are cases in which the Court has extended a power to include a new phenomenon because of its similarities with phenomena which fall within power.[51] In these cases, the Court does not consider whether the new phenomenon has all the essential characteristics needed to fall within the connotation of the term, but whether it is relevantly similar to the central case. Hence, these cases do not meet the requirements of the connotation/denotation distinction.

Instead, the distinction is used to extend the central type by showing that phenomena which were not known or contemplated at federation fall within the central type rather than the circumference of the power. It is used to achieve this result by showing that the meaning of the terms of grants extends beyond the way in which those terms were used at federation. There are two ways in which the denotation of the terms of a grant of power might extend to phenomena

48 See Part III(A).
49 See Part III(B).
50 Ibid.
51 See Part IV.

not in existence at the time of federation, one uncontroversial and the other controversial. Take a term such as marriage. The denotation of 'marriage' in the marriage power clearly includes all future marriages with the same essential features as marriage was understood to have in 1900. That is uncontroversial because the set of actual marriages at a given time clearly falls within the set of possible marriages without any need to extend the scope of the latter set. If this were not the case, the meaning of a term such as marriage would change every time a new marriage came into existence. That is absurd.

But this is not the way in which the High Court needs to use denotation as an aid to flexible interpretation. The Court needs to use it to argue that the denotation of a term such as marriage may extend to include marriages with features which differ in important respects from marriages in existence at federation without any change to the connotation of marriage. Legislative redefinitions of marriage, to include marriages with important new features, such as same sex relationships, which differ significantly from the marriages known at federation, can only fall within the denotation of marriage without a change to the connotation if the denotation can extend to examples of marriage which differ significantly from those known at federation. Such an extension depends on the view that the meaning of a term describing a social institution or practice may not be completely reflected in the way the word is used from time to time.

The way in which the High Court needs to use the connotation/denotation distinction is difficult to reconcile with criterialism, the theory of meaning with which the connotation/denotation distinction is normally associated. In criterialism, the meaning of general terms is determined by the list of essential properties which phenomena must have to fall within the term.[52] The list of essential properties or connotation of the term enables us to identify its denotation, that is, the set of actual phenomena which fall within the scope of the term.[53]

Standard criterialism is a conventionalist theory of language, in which words have agreed meanings. Hence the list of essential properties which a thing must have to fall within a descriptive term is an agreed list.[54] Such a theory limits the extent to which users of a term can be unaware of the full extension of the term or mistaken in their use of it. It is more difficult to argue that the users of a term are unaware of its extension or mistaken as to its meaning if language is conventional because, if language is conventional, the meaning of a term is determined by what the language users agree that the term means. Individual speakers may be mistaken in their use of a term because they have failed to learn the conventions governing that term's use. But if the meaning of the term is determined by what language users agree the term means, that cannot be true of a whole community of users. A community of users of a term may mistakenly believe that a phenomenon does or does not possess all of the essential properties required to come within the scope of the term. But that is the only kind of mistake they can make. In particular, they

52 See text accompanying above n 28.

53 See text accompanying above nn 47–9.

54 See text accompanying above nn 31–2.

cannot be wrong as to the list of properties which a phenomenon must have to come within the scope of a general term.

As a result, criterialism has little capacity to argue that language users are unaware of the full extension of a term or mistaken in their use of it. Thus from a criterialist perspective it is unlikely that the meaning of a term extends much beyond the way in which it is used at a particular time. If the meaning of a term is an agreed meaning, that agreement is likely to be evidenced by common usage, making it difficult to argue that the meaning of the term extends beyond the way in which it is used. Even if the rules of logic or evidence require an extension to the meaning of a term, that may not justify extending the term beyond its agreed meaning. There is no reason why language conventions or shared meanings must respect either logic or evidence.

Criterialist theories do not entail that general terms have no capacity to expand to include new phenomena. If the new phenomena have all of the essential properties of the phenomena to which the term extends, they will fall within the term, but not otherwise. Hence a term has greater capacity to extend to new phenomena if the essential properties required for a phenomenon to fall within the term are few and general rather than many and detailed. As a result, criterialism encourages a process of interpreting powers abstractly to cope with change.[55] As criterialism views language as a shared means of structuring the sense impressions which the mind receives, it does not see words as referring to reality in a direct unmediated way. Hence the nature of the objects to which words refer does not present a barrier to this process of abstraction, making it easier.[56]

B *The Concept/Conception Distinction*

The concept/conception distinction as originally elaborated by Gallie[57] and as used by Ronald Dworkin[58] referred to a feature of concepts which are used to appraise or evaluate, rather than to refer or describe.[59] Gallie argued that it is impossible to understand many terms used to evaluate or appraise without understanding that they are essentially contested, that is, that there are competing conceptions of the concept and that there is no conclusive way of resolving the contest between the competing conceptions. For the most part, Dworkin adopted this analysis, although he disagreed with Gallie on the issue of whether there could be right answers to some issues which had to be resolved by reference to essentially contested values.[60]

55 This tendency is discussed in Stokes, 'Originalism', above n 12.

56 This point was suggested to me by Dr Patrick Emerton of Monash University.

57 W B Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167.

58 Ronald Dworkin, *Taking Rights Seriously* (Duckworth, 1977) 103.

59 For an analysis of the differences between evaluative and descriptive terms and their importance in constitutional interpretation, see Michael Stokes, 'Contested Concepts, General Terms and Constitutional Evolution' (2007) 29 *Sydney Law Review* 683.

60 Dworkin, *Taking Rights Seriously*, above n 58, 134–6; R M Dworkin, 'No Right Answer?' in P M S Hacker and J Raz (eds), *Law, Morality and Society: Essays in Honour of H L A Hart* (Clarendon Press, 1977) 58.

However, the High Court has tended to ignore the distinction between descriptive and evaluative terms and has used the concept/conception distinction in its analysis of the descriptive terms used to define constitutional grants of power.[61] Used in this way, it has many similarities with the connotation/denotation distinction. Concept may be equated with connotation and refers to the essential meaning of the term, while conception may be equated with denotation and refers to each member of the set of all *actual* things the term describes at a particular point in time. Hence, a term may extend to new conceptions as long as there is no change to the essential concept. Used as a synonym for connotation/denotation in this way, it makes clear what I have pointed out is implicit in the other distinction; it is dependent upon showing that the meaning of the term being interpreted extends beyond its application at the time it was adopted to new conceptions of the phenomena to which it refers, not just to new examples of those phenomena.

There is another way in which the distinction could be used when applied to descriptive terms, a use which is closer to that of Dworkin and Gallie. The social institutions to which some grants of power refer are themselves contested. Marriage is an example. Hence the distinction could be used to refer to the competing conceptions of marriage current in the community, these falling within power if they have a sufficient relationship to the constitutional concept. On this view, the concept provides a paradigm or central case and new conceptions fall within power if they are sufficiently analogous to that central case. This type of relationship between the terms of a grant of power and new conceptions or understandings of the phenomena to which the power refers is similar to the explanation of Higgins J's metaphor of the central type and the circumference of the power discussed above.[62] It also has some similarities to semantic realism.

C *Semantic Realism*

Although semantic realism has rarely been used by the Court to show how grants of power can extend to new phenomena, the idea that a term may extend beyond the way in which it is used at a particular time is more compatible with semantic realism than with criterialism. A key element in semantic realism is the idea that the meaning of terms may be determined by the deep structure of the phenomena to which they refer — a deep structure which may not be obvious to users because of lack of knowledge or other reasons. On this view, as noted above, 'mastery of the use of an expression falls short of knowing what it really means. Indeed, a linguistic community may use an expression for millennia without finding out what it really means and without realizing that they do not know what it really means'.[63]

61 *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 552 [43] (McHugh J); *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 237–9 [307]–[309] (McHugh J).

62 See text accompanying above nn 42–5.

63 Patterson, above n 30, 551. Patterson mentions some of the problems and paradoxes to which this theory gives rise: at 549–55.

Because semantic realism separates mastery of the use of a term from knowing what the term really means, it separates meaning from the way in which a term is used at any particular time. Hence it may provide support for the idea that terms used in defining grants of power may extend beyond the way in which the term would have been understood in 1901 to include new phenomena and even some redefinition of the scope of a grant.

Semantic realism appears most applicable to natural kind terms, that is, terms which are used for objects found in nature, such as water and animals.[64] Where a legal decision turns on the meaning of natural kind terms, and the decision limits the meaning to the way the term was used at a particular time rather than applying it to all members of the natural kind, semantic realism provides compelling arguments that the decision is wrong.

Dred Scott v Sandford[65] is a case in point. In *Dred Scott*, Taney CJ held that in the language of the late 18th century, the word 'men' did not include people of African origin.[66] Therefore, the statement in the *Declaration of Independence* that all men are created equal did not extend to African-Americans. If Taney CJ's understanding of the language use of the men who drafted and adopted the *Declaration of Independence* was right, we can argue from a semantic realist perspective that those who drafted and ratified the *Declaration* did not understand the meaning of the word 'men' because, as a matter of fact, Africans are men. The intention to use the word 'men' to exclude Africans does not change the meaning of the word 'men', which depends on matters of fact, such as sharing the same genome, but is merely evidence of the drafters' mistake.

Whether this argument succeeds depends upon the intended referential chain of the drafters and ratifiers of the *Declaration*.[67] It is likely that their intended referential chain was either to the natural kind 'natural or biological man' considered outside society, or to the social kind 'civic man', that is man as a member of a political community. If it was 'civic man', then for all the reasons Taney CJ referred to in his judgment, African-Americans were not civic men in the late 18th century and could properly be said to fall outside the term 'men' as used in the *Declaration*. If African-Americans fell outside the terms of the *Declaration* when it was drafted, then in the absence of any change to the *Declaration* or to the *United States Constitution*, on ordinary principles of statutory interpretation they remained outside the scope of the term 'men'.

However, an analysis of the *Declaration* strongly suggests that the intended referential chain was to the natural kind, natural or biological man. The relevant passage reads:

> We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights,

64 See text accompanying above n 33.

65 60 US 393 (1857) ('*Dred Scott*').

66 Ibid 410.

67 For an analysis of the importance of the intended referential chain to interpretation, see Emerton, above n 27, 185–202.

> that among these are Life, Liberty and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men, deriving their just powers from the consent of the governed. That whenever any Form of Government becomes destructive of these ends, it is the Right of the People to alter or to abolish it, and to institute new Government, laying its foundation on such principles and organizing its powers in such form, as to them shall seem most likely to effect their Safety and Happiness.

The reference to all men being created equal and endowed with inalienable rights suggests that the intended referential chain of the *Declaration* is to man considered outside and apart from society, that is to natural or biological men before they become civic men. This interpretation is supported by the argument that natural men are entitled to form government to secure their natural rights and to dissolve their government if it becomes destructive of those rights. If the *Declaration* is referring to the kind 'natural or biological man', then, regardless of the opinions and intentions of the drafters of the *Declaration,* the term 'man' in the *Declaration* extends to African-Americans because they fall within that kind. They fall within the natural kind 'man' because they share a similar deep structure, a common genome, with all other humans. That fact brings them within the natural kind 'biological man' whether or not the drafters of the *Declaration* knew that they fell within that kind or intended to refer to them.

If the intended referential chain in *Dred Scott* was to the natural kind 'biological man', the decision of Taney CJ was wrong on one of two grounds. First, he may simply have misinterpreted the *Declaration of Independence*, by assuming that the referential chain of the term 'men' was to the social kind 'civic man' rather than the natural kind 'biological man'. If that assumption had been correct, the evidence of the systematic exclusion of African-Americans from civic life in the 18th century to which he referred would have been relevant. Second, he may have interpreted the *Declaration* correctly as referring to biological man but, from the perspective of semantic realism, have made the mistake of assuming that the beliefs and intentions of the drafters were relevant to determining the meaning of the term 'biological man'.

The semantic realist analysis of natural kind terms provides a powerful argument that these terms at least may extend beyond the way in which they were used or intended to be used at a particular time. As the *Dredd Scott* example illustrates, the argument can be used to show that natural kind terms in legal documents have a meaning which is not determined by the way in which the words were used at the time or by the intentions and understandings of the drafters of the document as to the phenomena to which the terms referred.

There is more controversy about whether semantic realism can extend to terms such as legal terms because legal terms may be nothing more than creations of the human mind without any natural equivalent. If they are creations of the human mind and nothing more, it is difficult to argue that they have a deep structure of which the creators, or experts in the field can be unaware.[68] These objections

68 Stavropoulos deals with such objections in detail: Stavropoulos, above n 26, ch 4.

are beyond the scope of this paper, which accepts that it is at the least arguable that semantic realism can extend beyond natural kinds to other descriptive terms including moral and legal terms. As Brink writes:

> Interpretive disputes occur in the law primarily over the interpretation of the law's use of general terms, and Kripke and Putnam have defended these semantic claims for the semantics of general terms, such as natural kind terms. 'Fair' and 'cruel' are natural kind terms just as much as 'toxic' is; they are general terms which refer to properties, and they 'do explanatory work' or 'pull their weight' in certain kinds of thinking, reasoning and theorizing. 'Cruel' and 'fair' denote moral kinds, as 'toxic' denotes a chemical kind.[69]

If semantic realism does extend to legal terms, it provides stronger support than does criterialism for the idea that the meaning of words, including constitutional terms, may extend beyond the way in which they were intended to be used to include new phenomena of which the users were unaware. Brink argues that semantic realism differs from criterialism in a number of important ways. First, semantic realism separates the meaning of words from people's beliefs about the extension of those words:

> meaning is not to be identified with, and reference is not determined by, the descriptions which people associate with, or their beliefs about the extension of, their words.[70]

As a result, the intention of the framers and ratifiers of the *Constitution* is not important in determining the meaning of constitutional terms because their meaning is determined by the way the world is, not by anyone's beliefs about the nature of the world or their intentions when they used a word. Brink argues that 'this semantic theory gives us reason to discount the semantic importance of framers' intent in interpreting statutes and constitutional provisions'.[71] He adds that

> [m]any people think that when interpreting the meaning of important constitutional provisions containing moral or political language, such as the First, Fifth, Sixth, Eight, Ninth, Tenth, and Fourteenth Amendments, we must pay close attention to what the framers of those provisions intended in enacting them (their specific intentions) and that their intentions place constraints upon constitutional interpretation independently of the plausibility of the framers' moral and political beliefs. … [T]his would be an important semantic constraint only if the traditional [criterialist] semantic theory were true. In that case, the framers' beliefs about the provisions would fix the original meaning and reference of those provisions. … But, as we have seen, we should reject the traditional semantic theory. The meaning and reference of our terms is given by the way the world is — in

69 Brink, above n 26, 120–1. See also Haslanger, above n 33, 17–18; Stavropoulos, above n 26, chs 1–2.

70 Brink, above n 26, 121.

71 Ibid.

> the case of the moral and political terms found in many constitutional provisions, by certain kinds of social and political factors. We discover the meaning of these constitutional amendments, therefore, by relying on substantive moral and political theory and argument.[72]

Finally, as the above quotes suggest, Brink argues that the meaning of legal and constitutional terms is determined by theoretical arguments about the real nature of the referents rather than on the speakers' beliefs about their nature:

> Determination of the meaning and reference of legal standards will often require reliance on theoretical considerations about the real nature of the referents of language in the law, considerations which may well outstrip conventional wisdom on the subject.[73]

By separating the meaning of constitutional terms from the intentions of the framers, by allowing that their meaning may extend to examples beyond the knowledge and understanding of the framers, and by tying meaning to theory, semantic realism provides new ways of defending the claim that the terms of grants of power may extend to phenomena not in existence at federation without emptying those grants of most of their meaning. However, given the extent to which legal and social institutions can evolve, a semantic realist approach may not allow sufficient flexibility to ensure that grants of power extend to radically changed institutions.

Grants of power typically give power over social institutions rather than natural phenomena, so a semantic realist analysis of their meaning is likely to be in terms of social kinds rather than natural kinds. The similarities between natural and social kinds may suggest that social kinds have a greater capacity for expansion beyond the ways that they are used at any particular time than is actually the case. Often, the referent of a natural kind may be identified by one key characteristic despite the fact that it has myriad properties. In the case of water, it is its molecular structure, H_2O. In the case of the biological kind, human being, it is a shared genome. Regardless of apparent differences from the examples with which we are familiar, a substance is water if it has the molecular structure H_2O, and an organism is human if it possesses the human genome.

The fact that membership of a natural kind may depend upon possession of one key characteristic increases the likelihood that the term used to refer to the kind will extend well beyond any understanding of its scope at any particular time. This is especially the case if the characteristic is, as in *Dred Scott*, hidden rather than obvious. Hence, the meaning of natural kind terms in a document such as a constitution may extend well beyond the way in which the framers intended to use the terms.

72 Ibid 123. See also Emerton, above n 27, 178–9, 185–8; Stavropoulos, above n 26, 48–51. Intentions are important in determining the referential chain to which a word was intended to refer: Emerton, above n 27, 178–84.

73 Brink, above n 26, 121. See also Stavropoulos, above n 26, 46–51; Emerton, above n 27, 181–4.

If social and legal kinds can be identified by one or a few key characteristics, especially characteristics which may not be obvious to the lay person, they may extend well beyond the way in which they are used at any particular time. However, social kinds such as marriage differ from natural kinds in that they probably do not possess one or a few key identifying characteristics of the sort which are commonly used to identify the members of a natural kind. We could select a couple of features of marriage which almost everyone would recognise as important, such as the fact that marriages are voluntary and intended to be for life, and argue that they are the key features which all members of the kind 'marriage' must share, whereas other important features, such as the fact that historically marriages have been between persons of the opposite sex and have been intended to exclude other similar relationships are merely common features of many marriages and do not go to define membership in the kind marriage.

Such an approach may be arbitrary. There is a theoretical justification for singling out the molecular structure H_2O as the defining characteristic of the substance to which the term water refers. That structure is common to all examples of water and explains all properties of water. Similarly, possession of the human genome is common to all humans and plays a part in explaining the properties and capacities of every member of the kind 'human'. Arguably, there is no feature of a social kind such as marriage which is common to all examples of the kind and which can explain the other properties of the kind in the way that the molecular structure of water can be used to derive the other properties of water. Therefore there may be no theoretical justification for singling out one or a couple of features common to a social kind such as marriage and arguing that they rather than other common features are the essential features which define membership in the kind or give us the paradigm case.

To the extent that membership of a social kind cannot be explained in this way, it may depend on possession of a larger number of features, the lack of any of which may deprive an example of membership of the kind. If that is the case, social kinds may change relatively quickly and even disappear from the social landscape as the features which define membership in the kind change or disappear. As a result, terms referring to social kinds may lose their referents relatively quickly, making it less likely that constitutional terms referring to social and legal institutions extend to changed social and legal conditions.[74] To avoid this conclusion, the Court may be tempted to argue that the key characteristics possessed by all members of a social kind are few in number and general in content, thus abstracting from the meaning of the term.[75]

74 The above argument based on the differences between social and natural kinds was suggested to me by Dr Dale Smith of Monash University.

75 The definition of marriage adopted in the recent *Same Sex Marriage Case* [2013] HCA 55 (12 December 2013) [33], quoted above in the text accompanying n 15, is a good example of the tendency to arbitrary abstraction. The definition adopts the view that marriage must be 'formed … in accordance with legally prescribed requirements' suggesting that de facto relationships can never fall within the marriage power. But no attempt is made to justify the view that formation in accordance with legally prescribed requirements is essential to marriage for the purposes of the marriage power, whereas monogamy and heterosexuality are not.

Consider the example of marriage and divorce. Marriage and divorce have changed radically since 1900 and at some point may have changed so radically as to be a different institution going under the same name.[76] In answering the question whether the institution as it exists today falls within power, as the *Dred Scott* example considered above shows, the semantic realist must first determine the kind to which the term in the grant refers. In the case of marriage, there are a number of choices, depending on whether the *Constitution* uses the term 'marriage' to refer to the social institution, the legal institution, a combination of the two, sociological/anthropological analyses of marriage, or an ideal of marriage. To which of these kinds the term refers depends upon the referential intentions of the framers and ratifiers of the *Constitution*. That would need to be determined by historical enquiry. Where a grant refers to a power defined in more strictly legal terms, such as copyright, there are not so many possible referents of the terms of the grant.

Once the social or legal institution to which a term refers has been determined, it is necessary to determine whether the institution as it exists today falls within the terms of the grant. That does not depend on its name but on whether it is still an institution of the same kind as that to which the grant refers. As has been noted above, for the semantic realist this is determined by substantive theoretical argument about the nature of the phenomenon to which the grant refers, rather than by analysis of how the word was used in 1900. Assuming for the sake of argument that the referent of marriage for the purposes of the marriage power is the socio/legal institution of marriage as it existed in 1900, there would need to be an exercise in social and legal history to determine the social and legal role of marriage in 1900. That would define the kind 'marriage' for the purposes of the marriage power. The social and legal role of marriage today would have to be compared with it in order to determine whether marriage as understood today falls within that kind. Once the referent of the term has been identified, facts about the intentions of the drafters or the way in which the word was used in 1900 become irrelevant to the enquiry. Instead, the enquiry is into the nature of the social phenomena over which the terms of the grant give power.[77]

To sum up, from a semantic realist perspective, if the referent of marriage for the purposes of the marriage power is the socio/legal conception of marriage extant in 1900, that conception would define the kind 'marriage' for the purposes of the power. Because the framers and the ratifiers of the *Constitution* may not have acted on an accurate conception of the nature of the phenomenon in question, the power may extend to types of relationship which they would not have recognised as being marriages. To that extent it allows the power to extend to new types of marriage not known or recognised as marriages in 1900. But it does not allow the power to extend to new types of marriage which fall outside the kind marriage extant in 1900.

76 Some of the radical social and legal changes in the nature of marriage and their implications for the interpretation of the marriage power are considered in Stokes, 'Originalism', above n 12.

77 Emerton, above n 27, 183–90.

Although a semantic realist perspective is consistent with allowing the terms of a grant of power to extend to some phenomena unknown to the framers of the *Constitution*, it only provides a limited degree of flexibility to constitutional terms. If the words of the *Constitution* are to have a settled meaning which it is the Court's role to apply, the kind to which a power refers must also be relatively fixed. So the kind to which the power over marriage refers is marriage as it was in 1900, not marriage as it is today. Hence the question for the interpreter is whether marriage today falls within that kind. Even if the power extends beyond the central kind or type as Higgins J suggested in the *Union Label Case*,[78] the kind provides the central case and there must be limits to the extent to which Parliament may depart from that kind. Semantic realism, if correct, only enables us to identify the kind to which a term in a grant of power refers and does not tell us when the Court may extend the scope of a grant of power beyond that kind.

As a result, even on a semantic realist analysis, when the Court extends a power beyond the central kind to a new phenomenon, it is exercising a choice to extend the power on the basis of the new phenomenon's similarities with the central case and hence is baptising the new phenomenon.[79] Limiting Commonwealth powers to kinds fixed in 1900 limits Parliament's power to deal with social change, including deliberate legislative change. As noted above, social change may result in a new institution of the same name replacing the one existing in 1900. Some major change in legal and social institutions is deliberate and Parliament may decide that it is in the public interest to change the paradigm in an area. For example, the *Family Law Act 1975* (Cth) changed the paradigm of divorce inherited from 1900 by allowing divorce without proof of any matrimonial offence or major breach of the marriage contract. As a result it could be said to have changed the nature of marriage from a relationship lasting for life to one which can be terminated at any time by the choice of one party.

The example shows that even if the boundaries of powers are interpreted generously, some deliberate legislative change is likely to be so fundamental that it falls outside the boundaries of the power as determined in 1900. For example, it is probably beyond the scope of the marriage power to define marriage as including cohabitation for a period of six months or more. Hence, although semantic realism allows powers to extend to new phenomena unknown to the framers with greater flexibility than does criterialism, it may not allow sufficient extension to authorise radical reform of a legal or social institution over which the Commonwealth was given power or to prevent some powers losing their referents and being rendered nugatory. To enable grants of power to apply to radically changed institutions, the semantic realist theory of meaning may have to be combined with a non-originalist approach to interpretation, allowing the substitution of a current kind for that which prevailed in 1900.

78 (1908) 6 CLR 469, 601–2.

79 See text accompanying above nn 36–45 for an analysis of bringing new cases within the circumference of the power. See Emerton, above n 27, 181–3 for some complexities in determining whether new cases fall within a social kind concept and the element of choice which may be involved.

VI CONCLUSION

Theories of constitutional interpretation, which favour rigidity over flexibility have appealed to the idea that words have fixed, essential meanings in order to give certainty and objectivity to the interpretation of the bald terms of grants of legislative power. But this approach may lead to too little flexibility for two reasons. First, if the Court is unable to extend grants of power, there comes a point at which legal and social institutions to which the grants of power refer may have changed so much that they fall outside the scope of Commonwealth power. At that point, the grants of power can only be used in a reactionary way, to re-establish the institutions as they used to be. Second, if grants of power are limited to their meaning as at 1900, the power of the Commonwealth Parliament to make radical changes to legal and social institutions over which it has been given power will be greatly reduced because radical changes to an institution may entail that it ceases to be the institution over which the Commonwealth was given power.

In an attempt to reconcile flexibility with the idea that words have fixed essential meanings, the Court has used ideas taken from the philosophy of language, such as connotation and denotation, to define and justify the extent to which Commonwealth power may extend to new situations not envisaged by the framers. By using these ideas, it has sought to show that when it finds that a grant of power extends to phenomena not envisaged in 1900, it is doing no more than determining and applying the meaning of the text of the grants of power and it is not exercising a power to change the meaning of that text.

This article has argued that philosophical theories of essential meaning do not support the Court's attempt to combine a flexible approach to the interpretation of grants of power with the idea that terms of such grants have essential fixed meanings. A flexible approach to the interpretation of grants, as the Court has occasionally recognised, involves the choice to extend the meaning of the terms of the grant to include a new phenomenon by baptising the phenomenon as an example of the referent of the term. To that extent, it is inconsistent with the idea that constitutional terms have fixed meanings. There is nothing in philosophical theories of essential meaning which supports the conclusion that general terms typically can extend to new phenomena without a deliberate decision to baptise the phenomena as falling within the scope of the term.

In making this argument, this article has considered the extent to which the two dominant theories that terms have essential meanings, criterialism and semantic realism, support the idea that a term may extend to include phenomena which were not known to the drafters of the *Constitution* or which the drafters did not consider fell within the scope of the term. It has concluded that of the two theories, semantic realism allows greater scope for the possibility that words may extend to include phenomena which the users of the word did not understand as falling within their scope.

The Court's approach in this area has been confined to using the connotation/denotation distinction. The Court has argued that the denotation of a word

may change so as to extend it to phenomena which were unknown at federation without any change to the connotation or essential meaning of the term. This article has examined that use of the distinction and concluded that it is difficult to justify. The connotation/denotation distinction is part of a theory of language, criterialism, which sees meaning as conventional and based on the intentions of the user, limiting the possibility that grants of power can extend to institutions and situations not intended by the framers of the *Constitution*. Any claim that words can extend to include phenomena which were not known to the users of the words is difficult to reconcile with a conventional theory of language because at bottom it is a claim that the users of a word did not fully understand its meaning. If the meaning of a term is determined by usage or convention, it is difficult to argue that users do not fully understand the meaning of the terms they use.

Semantic realism offers greater scope for extending grants of powers to new situations outside the knowledge and intentions of the framers. According to this theory, words refer to objects in the world. Those objects may have deep structures hidden from the users of the words referring to those objects, so that people may use a word for long periods without a complete understanding of the nature of its referent. The speakers' intentions as to the object to which they are referring are important in determining the word's referent, but because the speakers may not understand the true nature of that object, their intentions about the scope of the application of the word are irrelevant. Thus, if a constitutional term includes within its referents phenomena which the framers would have excluded, the framers' intentions are irrelevant. However, there are limits to the flexibility which semantic realism permits as it is committed to the idea that although the user of a word may not fully understand its meaning, the word does have a fixed meaning.

Semantic realism does not allow a sufficient extension of Commonwealth powers to cover all possible changes, whether imposed by legislation or the result of social evolution, in the institutions to which the powers refer. That should not surprise us because the problem on which this article focuses is inherent in the idea that words have meanings which are fixed at the date on which they are used. If that idea is applied to the interpretation of the *Constitution*, it leads to the conclusion that the *Constitution* has a meaning which is largely fixed at the date of adoption.

The idea that the *Constitution* has a fixed meaning makes it difficult to interpret constitutional grants of power in a way which allows them to accommodate social change. The powers granted in the *Constitution* refer in many cases to social and legal institutions. The form of these institutions is not fixed, but is continually changing in line with changing needs and expectations. Parliament may decide that it is in the public interest to make changes to these institutions. At some point it is reasonable to assume that the institutions to which grants of power refer will change so radically that they cease to exist. They may be replaced by new, different institutions which may continue to have the same name or they may have no successors. At this point, the grants of power, if interpreted with a fixed meaning, lose their referents. They may be used to re-establish the referent by recreating the institution to which the power refers. However, this limits the scope

of the power to reactionary rather than progressive uses and creates perverse incentives for the Commonwealth to re-establish and retain old institutions which no longer serve society well. As all theories of meaning must concede that a document has a relatively fixed meaning, it is not surprising that no theory of meaning allows the meaning of terms in constitutional grants of power to be extended to the extent necessary to avoid the problems.