

# *The High Court's Conception of Discrimination: Origins, Applications, and Implications*

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## *Abstract*

In constitutional settings, the High Court has grown attached to a particular conception of discrimination that is notable for its abstractedness and purported universality. This article explores that conception, tracing its evolution and its permeation of the Court's constitutional jurisprudence. It argues that this 'universal' conception of discrimination, while it does mandate certain limited content, cannot provide guidance upon some of the most significant questions confronting judges when shaping constitutional non-discrimination rules.

## *1. Introduction*

Any regular reader of the Australian High Court's decisions over recent years is likely to have discerned the patterns now marking the Court's approach to questions of discrimination. In constitutional settings, particularly, the Court has grown attached to a particular conception of discrimination that is notable for its high level of generality and purported universality. This article explores that conception, tracing its evolution and its permeation in the Court's constitutional jurisprudence. In practical terms, the analysis and ideas presented will hopefully prove useful to litigants raising discrimination arguments, whether in a constitutional or statutory context. In more abstract terms, this article's contribution is to highlight the importance of context, not just in understanding what discrimination is but also in the design of rules and tests through which discrimination is identified. When the importance of context is appreciated, the High Court's recent efforts to harmonise and synthesise its overall approach to discrimination seem misguided.

The article is organised as follows. Section 2 identifies the various places in the Australian Constitution<sup>1</sup> where the concept of discrimination, or its analogues,

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<sup>1</sup> *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 9.

appears. It then traces the evolution of the Court's current conception of discrimination — the 'universal' conception of discrimination, as I will call it — and explores its use in various constitutional and other settings. I give detailed treatment to the recent and illuminating decision of the High Court in *Permanent Trustee Australia Ltd v Commissioner of State Revenue*.<sup>2</sup> Section 3 explores the limited content of the Court's universal conception of discrimination. I assert that this conception, in favouring a particular set of doctrinal techniques, generates two features within constitutional non-discrimination rules.<sup>3</sup> First, it eschews an exclusive focus upon legal form and so rejects absolute constructions of rules. Second, it favours one kind of balancing test over other alternatives. These techniques, while not amounting themselves to substantive content — in the sense of a commitment to a particular theory of just distribution — do have an important part to play in the determination of substantive outcomes when non-discrimination rules are applied. I locate these elements in the Court's reasoning in key discrimination cases and indicate the ways in which this limited content may need further refinement or qualification.

In Section 4 I argue that the Court's universal conception of discrimination, in view of its limited content, cannot provide guidance upon some of the most significant questions confronting judges when shaping constitutional non-discrimination rules. Accordingly, it cannot function as a comprehensive touchstone. The conception is, perhaps necessarily, silent on key questions that attend all constitutional discrimination analysis, even while resolution of these questions will likely turn on factors particular to individual rules. Here, I examine the conception's unhelpfulness, first, in isolating the purpose or rationale underlying constitutional non-discrimination rules and, second, in establishing the proper degree of deference to be paid to Parliament's judgements.

## **2. 'Discrimination' in the Constitution and the Formulation of a Universal Conception**

### **A. Locating the Non-discrimination Rules in the Constitution**

The *Australian Constitution* contains several non-discrimination rules. Some of these are framed expressly in the text of individual provisions, while others are understood to be implicit.

There are only three provisions expressly invoking the language of discrimination. Section 51(ii) empowers the Commonwealth Parliament to make laws with respect to 'taxation; but so as not to discriminate between States or parts of States'. The decided cases concerning section 51(ii), none of which are recent, confine the limitation narrowly.<sup>4</sup> Section 102 permits the Commonwealth to

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2 *Permanent Trustee Australia Ltd v Commissioner of State Revenue* (2004) 220 CLR 388 ('*Permanent Trustee*').

3 I will use the term 'non-discrimination rules' as a general descriptor for prohibitions contained in constitutional or statutory provisions as well as those sourced in implied principles.

'forbid, as to railways, any preference or discrimination by any State ... [where] undue and unreasonable'.<sup>5</sup> The final explicit mention of discrimination occurs in section 117, a provision of greater contemporary relevance and interest. Section 117 provides:

A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State.

Until relatively recently, section 117 had only a limited operation.<sup>6</sup> In *Street v Queensland Bar Association*, which will be returned to later, the High Court revived section 117 by adopting a substantive understanding of the prohibited discrimination.<sup>7</sup>

The Constitution contains other provisions that do not employ the term 'discriminate' or 'discrimination' but nevertheless seem concerned with the concept of discrimination or some variant. Two seldom considered provisions require the Commonwealth to observe a principle of uniformity in dispensing benefits and burdens.<sup>8</sup> The High Court has looked more carefully at the concept of 'preference' appearing in section 99, which provides:

The Commonwealth shall not, by any law or regulation of trade, commerce, or revenue, give preference to one State or any part thereof over another State or any part thereof.

The Court's recent reformulation of its understanding of section 99 will be explored in Section 2(C) below.

At least two other constitutional provisions not self-evidently concerned with discrimination have, nonetheless, been interpreted in ways that draw upon that idea. Section 92's insistence upon 'absolutely free' trade and commerce has, since *Cole v Whitfield*, been understood as a prohibition upon 'discriminatory burdens

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4 Discrimination must be evident on the face of a law: *Cameron v Deputy Federal Commissioner of Taxation* (1923) 32 CLR 68. See also Leslie Zines & Geoffrey Lindell, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21 *Federal Law Review* 136.

5 High Court discussion of this provision is virtually non-existent. The one substantial treatment was, moreover, in obiter: *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327 at 354–5 (Latham CJ).

6 The discrimination needed to be evident on the face of a law and the concept of 'residence' was understood narrowly: *Davies and Jones v Western Australia* (1904) 2 CLR 29; *Henry v Boehm* (1973) 128 CLR 482.

7 *Street v Queensland Bar Association* (1989) 168 CLR 461 ('*Street*').

8 Section 51(iii) relates to the conferral of bounties and section 88 the imposition of customs duties. Section 51(iii) has received brief mention in a few, mostly early, cases. See, for example, *The King v Barger, The Commonwealth v McKay (Barger's Case)* (1908) 6 CLR 41 at 70 (Griffith CJ, Barton & O'Connor JJ); *Deputy Federal Commissioner of Taxation v WR Moran Pty Ltd* (1939) 61 CLR 735 at 760–1, 764 (Latham CJ), 770 (Starke J) and 788–9 (Evatt J); (1940) 63 CLR 338 at 347–8 (PC). For a more recent and even more brief mention, see: *Seamen's Union of Australia v Utah Development Co.* (1978) 144 CLR 120 at 133 (Gibbs J) and 141 (Stephen J).

of a protectionist kind'.<sup>9</sup> The section 51(xxvi) conferral of power to make laws with respect to 'the people of any race for whom it is deemed necessary to make special laws' has also been found to implicate the notion of discrimination, although important aspects of this understanding remain unsettled.<sup>10</sup>

Finally, the High Court has developed various doctrines by inference from the *Constitution's* supposed structural imperatives. Of these, two of the longest standing and most important implicate the notion of discrimination. The doctrine of State immunity had until recently given a central role to the idea of discrimination — where a Commonwealth law was found to 'discriminate' against one or more States, by singling it or them out for a burden, this would render the law *prima facie* invalid.<sup>11</sup> Also seeming to implicate the notion of discrimination is the doctrine of the separation of judicial power, inferred from the structure of the Constitution and, in particular, from the manner in which judicial power is created and conferred in Chapter III.<sup>12</sup> From this general principle, the Court has spun off several more specific implications addressing discrete aspects. One such specific principle that has been advanced by some judges is a requirement of 'equal justice'.<sup>13</sup> While not yet accepted by a majority in any single case, and having encountered some initial hostility,<sup>14</sup> the germ of this equal justice implication has nevertheless been kept alive for well over a decade.<sup>15</sup>

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9 *Cole v Whitfield* (1988) 165 CLR 360 ('*Cole*'). Discrimination is thus one of the elements that must be present before a law will be found to infringe section 92.

10 In particular, divisions have emerged on the Court over whether that provision confers a positive power to single out particular groups for adverse treatment or rather must be used only to benefit the groups singled out: *Kartinyeri v Commonwealth* (1998) 195 CLR 337 ('*Kartinyeri*').

11 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 at 79 (Dixon J); *Commonwealth v Tasmania (Tasmanian Dam Case)* 159 CLR 1 at 128–9 (Mason J); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 199 at 206 (Gibbs CJ), 217 and 220 (Mason J) ('*Queensland Electricity Commission*'); *Re Australian Education Union; ex parte Victoria* (1994) 184 CLR 188 at 227 (Mason CJ, Brennan, Deane, Toohey, Gaudron & McHugh JJ). While a majority of the Court has since denied that discrimination constitutes a free-standing basis for invalidity, it is a concept that might yet retain some relevance, albeit lessened, within the State immunity doctrine: *Austin v Commonwealth* (2003) 215 CLR 185 ('*Austin*'). See also Amelia Simpson, 'State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design' (2004) 32 *University of Western Australia Law Review* 44 at 50–9.

12 Leslie Zines, *The High Court and the Constitution* (4<sup>th</sup> ed, 1997) at 169–70, 212–18.

13 This has centred on the notion that judicial power must be exercised in a non-discriminatory fashion, with discrimination being understood in a procedural rather than substantive sense. *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 (Deane & Toohey JJ) and 502–3 (Gaudron J); *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 at 107 (Gaudron J); *Kruger v Commonwealth* (1997) 190 CLR 1 ('*Kruger*') at 112 (Gaudron J); *Cameron v The Queen* (2002) 209 CLR 339 at 352–3 (McHugh J).

14 *Leeth v Commonwealth* (1992) 174 CLR 455 at 467–71 (Mason CJ, Dawson & McHugh JJ).

15 See Michael McHugh, 'Does Chapter III of the Constitution Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 1; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205.

## B. *The Articulation of a Universal Conception of Discrimination*

### (i) *Foundations*

The High Court's movement towards a generalised, universalised statement describing the essential idea of discrimination seemed to gain momentum with Gaudron J's appointment in 1987.<sup>16</sup> Justice Gaudron's judgments and extra-curial writings attest to her particular interest in, and extensive knowledge of, equality and discrimination theory.<sup>17</sup>

Justice Gaudron's judgment in *Street v Queensland Bar Association* provided what has since become a leading statement of the meaning of discrimination within Australian law.<sup>18</sup> There, Gaudron J grounded her understanding of discrimination in twentieth century international human rights jurisprudence and its progeny in the form of the individual rights-protective, constitutional and statutory non-discrimination rules that have taken root in national legal systems.<sup>19</sup> These rules, she noted, have 'shaped our understanding of what is involved in discrimination' and, in particular, have brought recognition that treating differently situated persons identically can amount to discrimination.<sup>20</sup> Citing decisions of both international and national courts,<sup>21</sup> Gaudron J distilled two core elements of the legal understanding of discrimination. Discrimination, she found, consists in treatment that is not 'appropriate' to a real or 'relevant difference'.<sup>22</sup> The question of appropriateness, she said, could be approached via the 'appropriate and adapted' test employed in constitutional characterisation. That test holds that a law's connection to a purposive head of legislative power is made out if it is 'reasonably

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16 Some isolated, preliminary attempts predate Gaudron J's arrival, however. See, for example, *Gerhardy v Brown* (1985) 159 CLR 70 at 127–131 (Brennan J); *Queensland Electricity Commission* (1985) 159 CLR 192 at 240 (Brennan J).

17 *Street* (1989) 168 CLR 461 at 566–73 (Gaudron J); *Kartinyeri* (1998) 195 CLR 337 at 365–8 (Gaudron J); Mary Gaudron, 'Equality Before the Law with Particular Reference to Aborigines' (1993) 1 *The Judicial Review* 81; Mary Gaudron, 'In the Eye of the Law; the Jurisprudence of Equality', Mitchell Oration 1990, Adelaide, 24 August 1990; Jenny Morgan, 'Equality and Discrimination: Understanding Context' (2004) 15 *Public Law Review* 314.

18 *Street* (1989) 168 CLR 461.

19 *Street* (1989) 168 CLR 461 at 571–3. In articulating her preferred conception of discrimination, Gaudron J relied upon the reasoning of the International Court of Justice in the *South West Africa Cases (Second Phase)* [1966] ICJR 6 at 305–6 (Tanaka J) and the European Court of Justice in *Re Electric Refrigerators* (1963) 2 CMLR 289 at 312. She also invoked the decisions of national courts in India, Canada, and the United States: *State of West Bengal v Anwar Ali* (1952) 39 AIR(SC) 75 at 93 (SR Das J); *Griggs v Duke Power Co* 401 US 421 (1971); *Ontario Human Rights v Simpson-Sears Ltd* (1985) 2 SCR 536.

20 *Street* (1989) 168 CLR 461 at 571.

21 *Street* (1989) 168 CLR 461 at 571–3. Key among these references are the cases noted above n19. Justice Gaudron also referred to decisions of the United States Supreme Court interpreting the 'privileges and immunities' clause of the *US Constitution*: *Toomer v Witsell* 334 US 385 (1948) at 396; *Supreme Court of New Hampshire v Piper* 470 US 274 (1985) at 284. These cases, while interpreting a constitutional provision of much longer standing, nevertheless took a similar approach and Gaudron J found them helpful for that reason.

22 *Street* (1989) 168 CLR 461 at 571.

capable of being seen as appropriate and adapted to that purpose.<sup>23</sup> Justice Gaudron's judgment also emphasised the importance of identifying an appropriate comparator when applying non-discrimination rules.<sup>24</sup>

This foundation was consolidated soon after in *Castlemaine Tooheys Ltd v South Australia*.<sup>25</sup> A passage from Gaudron and McHugh JJ's judgment has since been invoked routinely as the definitive articulation of discrimination's essence. There they explained the 'general features of a discriminatory law':<sup>26</sup>

A law is discriminatory if it operates by reference to a distinction which some overriding law decrees to be irrelevant or by reference to a distinction which is in fact irrelevant to the object to be attained; a law is discriminatory if, although it operates by reference to a relevant distinction, the different treatment thereby assigned is not appropriate and adapted to the difference or differences which support that distinction. A law is also discriminatory if, although there is a relevant difference, it proceeds as though there is no such difference, or, in other words, if it treats equally things that are unequal — unless, perhaps, there is no practical basis for differentiation.

The passage was prefaced by an acknowledgment that statutory anti-discrimination rules may modify or depart from this universalised formulation. However, even those variegated statutory rules were seen as particular expressions of the idea of discrimination as expressed above.

It is no coincidence that these leading expressions of a universal conception of discrimination emerged in the context of constitutional interpretation. Both judgments acknowledge that the constitutional setting lends itself to the purest expression of the essential idea of discrimination. While non-discrimination rules abound in other legal fields, those are generally formulated with much greater particularity than is the conception of discrimination posited by Gaudron J in *Street*<sup>27</sup> and by Gaudron and McHugh JJ in *Castlemaine Tooheys*.<sup>28</sup> Statutory non-discrimination rules, especially, are usually particularised in great detail.<sup>29</sup> In the constitutional context, by contrast, non-discrimination rules are characterised by brevity — some are entirely dependent upon implication. Thus, while the

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23 *Street* (1989) 168 CLR 461 at 573. It is worth noting that Gaudron J's treatment of discrimination, in her judgments and extra-curially, never invoked the more robust concept of proportionality that is central to European non-discrimination and equality jurisprudence. Rather, she was careful to describe the relevant means-ends issue in the more limited, and thus deferential, language of what is 'reasonably capable of being seen as appropriate and adapted' to an acceptable end. This is consistent with Gaudron J's emphasis in other constitutional settings on 'proportionality' as simply a test for smoking out improper purposes: for example, *Nationwide News Pty Limited v Wills* (1992) 177 CLR 1 at 93; *Kruger* (1997) 190 CLR 1 at 102–3.

24 *Street* (1989) 168 CLR 461 at 566–7.

25 *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436 ('*Castlemaine Tooheys*').

26 *Castlemaine Tooheys* (1990) 169 CLR 436 at 478.

27 *Street* (1989) 168 CLR 461.

28 *Castlemaine Tooheys* (1990) 169 CLR 436.

29 On this statutory particularity, see: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 408–10 (McHugh J); *I W v City of Perth* (1997) 191 CLR 1 at 12, 14–15 (Brennan CJ & McHugh J) ('*I W v City of Perth*').

conception of discrimination outlined above was not confined to the constitutional context it was, and is, taken to have particular significance there given the less confined nature of the interpretative task. Subsequent judgments have continued to promote a universal conception of discrimination that transcends the constitutional context and yet has particular purchase there. This article adopts the shorthand term 'universal conception' to describe this articulation of discrimination's essence as framed in *Street* and *Castlemaine Tooheys* and reiterated and refined subsequently.<sup>30</sup>

(ii) *Constitutional Applications*

In the years since these foundations were laid, the universal conception's momentum has continued to build. It has been deployed in cases concerned with common law doctrine and statutory interpretation, but its particular resonance within constitutional jurisprudence has been emphasised. The remainder of this sub-section charts the consolidation and refinement of the universal conception in key cases, demonstrating its strengthening hold within, and beyond, the Court's constitutional jurisprudence.

While the universal conception of discrimination emerged in the context of express constitutional limitations, judgments in subsequent cases gave it a wider purchase within the High Court's constitutional jurisprudence. One such extension occurred in *Kartinyeri*, where the conception was invoked in exploring the meaning and scope of the section 51(xxvi) 'races power'.<sup>31</sup> One of the questions raised was whether this power supports laws singling out a particular race for detrimental treatment — in other words, whether it can effect discrimination. Justice Gaudron considered the races power to contain an implicit non-discrimination rule, insisting that such a limitation necessarily attended any express conferral of a power to make laws singling out particular racial groups. For her, the core features of the universal conception of discrimination marked the power's outer limits — only laws representing appropriate responses to relevant differences among races could properly be described as 'special laws' 'deemed necessary' for 'the people of any race' in keeping with section 51(xxvi)'s terms.<sup>32</sup>

The universal conception has also been invoked in expunging non-conforming understandings of discrimination from the Court's constitutional jurisprudence. *Austin* involved application of the doctrine of State immunity.<sup>33</sup> In addressing the State immunity question, three of the *Austin* judgments reviewed the adequacy of

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30 *Street* (1989) 168 CLR 461; *Castlemaine Tooheys* (1990) 169 CLR 436. This is my term, rather than one found in the existing literature. I settled on this because it best reflects the apparent judicial intention to deploy this single conception across the whole spectrum of constitutional settings in which discrimination is an issue.

31 *Kartinyeri* (1998) 195 CLR 337.

32 *Kartinyeri* (1998) 195 CLR 337 at 365–8. Justices Gummow and Hayne also attempted to relate the race power to the universal conception of discrimination. They concluded, however, that the race power was fundamentally different from other constitutional contexts in which the concept of discrimination arose. In the former context, differentiation among races operated as 'a criterion of validity not a cause of invalidity': *Kartinyeri* (1998) 195 CLR 337 at 380.

the then-prevailing ‘wo-limbed’ formulation of that doctrine, under which ‘discrimination’ had been regarded as a free-standing basis on which States could assert immunity from Commonwealth laws.<sup>34</sup> The joint judgment of Gaudron, Gummow and Hayne JJ criticised the two-limbed formulation as a misapplication of the concept of ‘discrimination’. The true nature of discrimination, they said, was as described in the universal conception.<sup>35</sup>

The essence of the notion of discrimination is said to lie in the unequal treatment of equals or the equal treatment of those who are not equals, where the differential treatment and unequal outcome is not the product of a distinction which is appropriate and adapted to the attainment of a proper objective.

Justices Gaudron, Gummow and Hayne went on to insist that the language of discrimination could not sensibly be employed in contexts where key elements described in the universal conception were absent.<sup>36</sup> The element lacking in the State immunity discrimination doctrine was the identification of an appropriate comparator and performance of the requisite comparison.<sup>37</sup>

This negative deployment in *Austin*<sup>38</sup> contrasts with the positive invocation of the universal conception in *Mulholland v Australian Electoral Commission*.<sup>39</sup> That case also concerned implied limitations on Commonwealth power, specifically those arising from the constitutional commitment to representative government.<sup>40</sup> The appellant contended that provisions of the *Commonwealth Electoral Act* 1918 (Cth) offended the express constitutional requirement that

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33 *Austin* (2003) 215 CLR 185. The issue was the validity of special Commonwealth taxation arrangements applying only to State judges, which aimed to equalise the judges’ tax burden as against that of other high income earners. The plaintiff, a State judge, argued that these arrangements discriminated against States as employers and also interfered impermissibly with State constitutional autonomy, by effectively forcing States to alter the way in which State judges were remunerated.

34 *Austin* (2003) 215 CLR 185. The non-discrimination principle, concerned with the ‘placing on States of special burdens or disabilities’, was thus one ‘limb’ of the doctrine. The other regarded States as immune from Commonwealth laws operating to ‘destroy or curtail the continued existence of the States or their capacity to function as governments’: *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192 at 217.

35 *Austin* (2003) 215 CLR 185 at 247.

36 *Austin* (2003) 215 CLR 185 at 247.

37 *Austin* (2003) 215 CLR 185 at 247. I have elsewhere argued that this view of first limb discrimination analysis is questionable: Amelia Simpson, ‘State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design’ (2004) 32 *University of Western Australia Law Review* 44 at 59–61.

38 *Austin* (2003) 215 CLR 185.

39 *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 (‘*Mulholland*’).

40 An office-holder in a minor political party challenged the constitutionality of provisions of the *Commonwealth Electoral Act* 1918 (Cth) which, if valid, threatened the party with deregistration. These provisions made it a condition of continuing registration that a party have 500 members: *Commonwealth Electoral Act* 1918 (Cth), ss 123(1)(a)(ii), 137(1)(b). The Act also required that, for purposes of calculating this membership, a political party could not count any person already named by another party in its qualifying 500 count of members: s 126(2A).



parliamentarians be 'directly chosen by the people'.<sup>41</sup> He argued that this requirement incorporated an implicit prohibition upon discrimination in federal electoral processes.

Two of the judgments in *Mulholland* unpacked this idea by reference to the universal conception of discrimination. Justices Gummow and Hayne, and Heydon J writing separately, were non-committal as to the suggested constitutional protection against discrimination in electoral matters. Nevertheless, they said, even if such a constitutional limitation existed, the particular electoral laws challenged by the appellant were appropriate and adapted to a relevant difference among political parties. Accordingly, and by reference to the universal conception of discrimination, these electoral laws escaped characterisation as discriminatory.<sup>42</sup>

Most recently the universal conception has been brought to section 99 of the Constitution. The relevant case, *Permanent Trustee*, is examined in Section 2(C) and at later points.<sup>43</sup>

### (iii) *Statutory and Common Law Applications*

Recent years have seen repeated reference to, and reinforcement of, the universal conception of discrimination in High Court decisions concerned with common law principles and statutory interpretation. Particularly striking are comments made by Gummow J in *I W v City of Perth*, a case concerned with the interpretation and application of a statutory non-discrimination rule.<sup>44</sup> Justice Gummow turned to the universal conception, drawn from the constitutional setting, to highlight the failings of the statutory formulation. Having commended the 'constitutional concept' of discrimination articulated in *Castlemaine Tooheys* for its succinctness and clarity, Gummow J despaired that that formulation had been 'eschewed by legislatures' in favour of statutory formulations 'both complex and obscure and productive of further disputation.'<sup>45</sup>

If the statutory rule at issue in *I W v City of Perth*<sup>46</sup> seemed unnecessarily elaborate and esoteric, the rule considered in *Cameron v The Queen* posed almost the opposite problem.<sup>47</sup> The appellant complained of the improper application of a statutory sentencing discretion, asserting that the trial judge inadequately credited his guilty plea. While the validity of the discretion *per se* was not challenged, the Court did consider the question of whether and when such discretions might amount to discrimination against persons *not* pleading guilty. As the non-discrimination rule was only alluded to in the statute,<sup>48</sup> the majority joint

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41 *Australian Constitution* ss 7, 24.

42 *Mulholland* (2004) 220 CLR 181 at 234 (Gummow & Hayne JJ) and 302–3 (Heydon J).

43 *Permanent Trustee* (2004) 220 CLR 388.

44 *I W v City of Perth* (1997) 191 CLR 1.

45 *I W v City of Perth* (1997) 191 CLR 1 at 37. I have set out the relevant statutory provision above at n29.

46 *I W v City of Perth* (1997) 191 CLR 1.

47 *Cameron v The Queen* (2002) 209 CLR 339.

48 The *Sentencing Act* 1995 (WA), s 7(2)(a) provides that '[a]n offence is not aggravated by the fact that ... the offender pleaded not guilty to it'.

judgment of Gaudron, Gummow and Callinan JJ turned to the universal conception of discrimination to flesh that requirement out. Building upon Gaudron and McHugh JJ's formulation in *Castlemaine Tooheys*, they reasoned:<sup>49</sup>

One aspect of the legal notion of discrimination “lies in the unequal treatment of equals”. The “equals” here are those required to plead guilty or not guilty; they stand as equals before the criminal law and processes of Western Australia. But is the differential treatment of such persons and the unequal outcome with respect to sentence the product of a distinction which is appropriate and adapted to the attainment of a proper objective, here the facilitation of the course of justice by the willingness of the accused to plead in a particular fashion? The answer ... is in the affirmative.

The universal conception was invoked in similar fashion in *Bayside City Council v Telstra Corporation Limited*, where another statutory non-discrimination rule required fleshing out.<sup>50</sup> The Court was asked to determine whether local taxes levied upon telecommunications cabling were discriminatory, where other comparable uses of public land were not similarly levied. The Commonwealth law provided simply that a State or Territory law has no effect where it ‘discriminates’ against one or more telecommunications carriers.<sup>51</sup> The statute was silent on what would count as discrimination and so required the Court to draw upon sources of meaning external to the Act.<sup>52</sup> The majority joint judgment turned to the universal conception, restating it in terms that did not shy away from the significant indeterminacy at its heart:<sup>53</sup>

Discrimination is a concept that arises for consideration in a variety of constitutional and legislative contexts. It involves a comparison, and, where a certain kind of differential treatment is put forward as the basis of a claim of discrimination, it may require an examination of the relevance, appropriateness, or permissibility of some distinction by reference to which such treatment occurs, or by reference to which it is sought to be explained or justified. In the selection of comparable cases, and in forming a view as to the relevance, appropriateness, or permissibility of a distinction, a judgment may be influenced strongly by the particular context in which the issue arises. Questions of degree may be involved.

The majority concluded that there was indeed ‘discrimination’ in what the universal conception revealed to be the relevant sense.<sup>54</sup> While this result is perhaps unremarkable, *Bayside City Council* nevertheless stands out for its embrace of indeterminacy as a feature of the universal conception and for its very matter-of-fact assimilation of constitutional and statutory contexts. This has met

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49 *Cameron v The Queen* (2002) 209 CLR 339 at 343–4.

50 *Bayside City Council v Telstra Corporation Limited* (2004) 216 CLR 595 (*‘Bayside City Council’*).

51 *Telecommunications Act* 1997 (Cth), Sch 3, cl 44(1)(a).

52 This was acknowledged by the trial judge, as McHugh J noted: *Bayside City Council* (2004) 216 CLR 595 at 638.

53 *Bayside City Council* (2004) 216 CLR 595 at 629–30.

54 *Bayside City Council* (2004) 216 CLR 595 at 630–2.

with some resistance, the most recent expressions of which we will encounter in Section 2(C).<sup>55</sup> Nevertheless, the five member joint judgment in *Bayside City Council* further entrenched the universal conception within the Court's jurisprudence, casting a wide net for it in the process.

### C. *The Universal Conception Taken to Section 99 — Permanent Trustee*<sup>56</sup>

The most recent significant development in the High Court's constitutional discrimination jurisprudence has been the universal conception's rollout in the new terrain of section 99 of the *Constitution*. This provides a useful context for exploring issues and implications thrown up by the universal conception of discrimination. Section 99 forbids the Commonwealth to 'give preference' among the States in matters of trade, commerce, or revenue. The provision had not been before the Court in several decades, although commentators had long suggested that it was ripe for review given intervening developments.<sup>57</sup> That opportunity came in *Permanent Trustee*.<sup>58</sup>

The claimed 'preference' at issue in *Permanent Trustee* was the application of differential tax rates to taxpayers in different States under the *Commonwealth Places (Mirror Taxes) Act* 1998 (Cth) ('the *Mirror Taxes Act*'). This legislation subjected Commonwealth land within States, over which the Commonwealth has 'exclusive' lawmaking power,<sup>59</sup> to equivalent types and rates of taxation as applied elsewhere in those States pursuant to State law.

The suggested constitutional problem lay in the significant disparities in the applicable tax rates from State to State. The appellant contended that the Commonwealth's legislation, in 'picking up' and applying different tax rates depending upon the State in which a Commonwealth place is located, exhibited a 'preference' as between States. The Commonwealth statute made transactions concerning Commonwealth places in Victoria significantly more costly to taxpayers than would be identical transactions concerning Commonwealth places in New South Wales.<sup>60</sup> The respondent Commissioner submitted that the Act imposes a uniform rule, that is, taxation of Commonwealth places at the same rate as surrounding non-Commonwealth places, with different outcomes reflecting a variable controlled by the States. Given that control, he argued, resulting differences could not readily be construed as 'preferences'.

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55 See for example, *I W v City of Perth* (1997) 191 CLR 1 at 12–14 (Brennan CJ & McHugh J); *Purvis v New South Wales* (2003) 217 CLR 92 ('*Purvis*') at 125 (McHugh & Kirby JJ); *Bayside City Council* (2004) 216 CLR 595 at 637–8 (McHugh J).

56 *Permanent Trustee* (2004) 220 CLR 388.

57 For example, Leslie Zines & Geoffrey Lindell, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21 *Federal Law Review* 136.

58 *Permanent Trustee* (2004) CLR 388.

59 Section 52(i) of the Constitution gives the Commonwealth Parliament 'exclusive power to make laws for ... all places acquired by the Commonwealth for public purposes'. The *Mirror Taxes Act* was conceived in response to earlier decisions of the High Court, holding that State laws of general application, including those imposing stamp duties, could not apply to Commonwealth places located within the State: *Allders International Pty Ltd v Commissioner of State Revenue (Vic)* (1996) 186 CLR 630; *Worthing v Rowell and Muston Pty Ltd* (1970) 123 CLR 89.

The majority joint judgment of Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ found that the *Mirror Taxes Act* did not infringe section 99.<sup>61</sup> They began by commenting on the distinctive nature of the characterisation task presented by section 99:<sup>62</sup>

[T]he critical phrase in s 99, “give preference ... over”, expresses, as Dixon J put it in *Elliott v The Commonwealth*, “a conception necessarily indefinite”. As a consequence, in a given case, much will depend upon the level of abstraction at which debate enters upon the particular issue.

They thus acknowledged the considerable room for debate about appropriate baselines — or assessments of who is relevantly ‘like’ whom — wherever constitutional rules invoke comparative concepts such as equality, discrimination, uniformity and preference. Hence, they observed, not all distinctions or differentiations framed by reference to geographic location will give ‘preference’. At this point they explicitly assimilated section 99 to the universal conception of discrimination. Casting the concept of ‘preference’ as a variant upon the legal notion of ‘discrimination’, the majority invoked the universal conception as formulated by Gaudron J in *Street* and by Gaudron, Gummow and Hayne JJ in *Austin*.<sup>63</sup>

The majority straddles two distinct paths to reach its conclusion that the *Mirror Taxes Act* does not infringe section 99. These are (1) an assessment that the law does in fact treat like cases alike and so dispenses equal treatment, and (2) an assessment that the law, although treating like cases differently and thus dispensing unequal treatment, represents an appropriate pursuit of a proper objective such that the difference in treatment is justified. I will refer to these two lines of reasoning as the ‘characterisation’ and ‘justification’ approaches, respectively.

In places, the majority’s reasoning suggests the characterisation approach. In particular, they observe:<sup>64</sup>

The scheme of the *Mirror Taxes Act* is to treat as relevantly of the same character the whole of the geographic area of each State, including those portions which are Commonwealth places; the taxation laws applying in the Commonwealth places are assimilated with those laws in the surrounding State.

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60 The transaction at issue in *Permanent Trustee* was the signing of a Development Agreement for the building of a hotel at Tullamarine Airport in Melbourne, a Commonwealth place. The Agreement was assessed to stamp duty under the *Mirror Taxes Act* in the sum of \$762,583.20. The Court was informed that a relevantly identical agreement pertaining to a Commonwealth place located in New South Wales would have been assessed to \$254,265.20 in duty. In other States the duty assessed would have exceeded \$2 million.

61 *Permanent Trustee* (2004) 220 CLR 388 at 423–5.

62 *Permanent Trustee* (2004) 220 CLR 388 at 423 (citations omitted).

63 *Permanent Trustee* (2004) 220 CLR 388 at 423–4.

64 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.

This seems implicitly to acknowledge that the baseline chosen by the Commonwealth Parliament was appropriate in the circumstances and so defensible. The majority does advert to the obvious alternative baseline — that is, a view of Commonwealth places within a State as being most relevantly ‘like’ other Commonwealth places in other States.<sup>65</sup> Yet the majority evidently accepted the Commonwealth’s characterisation of relevant likeness.

Other passages in the joint judgment are more suggestive of the ‘justification’ route to its conclusion. Recall that this involves an initial concession that similarly situated subjects have been treated differently, but a subsequent assessment that the different treatment is justified. This approach is evident in the majority’s insistence that: ‘[t]he differential treatment and unequal outcome that is involved here is the product of distinctions that are appropriate and adapted to a proper objective.’<sup>66</sup> Additionally, they observe:<sup>67</sup>

Even if all Commonwealth places, whatever their State location, are to be considered as relevantly “equal”, their differential treatment to assimilate them in this way is a proper objective in the sense of the authorities.

The majority’s resort to both characterisation-based and justification-based reasoning need not reflect indecision. In embracing the universal conception of discrimination, the majority has subscribed to the realisation that a single law, seen from different vantage points, may appear to dispense both equal treatment and unequal treatment. On this footing, it may indeed be prudent for judges to reason in a way that acknowledges both competing characterisations as viable. Ultimately, within the universal conception’s framework, their reasoning will turn on an assessment of reasonableness whichever analysis is pursued.

While the majority also considered other constitutional issues, the dissents of McHugh and Kirby JJ focused on section 99. Justice McHugh had earlier cautioned against a single conception of discrimination conflating constitutional and statutory settings.<sup>68</sup> In *Permanent Trustee* he built a case against the central implications of unleashing the universal conception within section 99. He said constitutional text, structure, and history, together with earlier decided cases, showed that the prohibition on Commonwealth preferences should not be governed by principles and tests originating in contemporary, rights-protective, non-discrimination statute law.<sup>69</sup> That the *Mirror Taxes Act* offended section 99 seemed, for McHugh J, certain when the provision is interpreted in light of its federal rationale of ensuring State neutrality. That purpose was simply incompatible with an interpretation that viewed section 99 as yielding to worthy

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65 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.

66 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.

67 *Permanent Trustee* (2004) 220 CLR 388 at 424–5 at 425.

68 *Waters v Public Transport Corporation*, (1991) 173 CLR 349 at 408–10 (McHugh J); *IW v City of Perth* (1997) 191 CLR 1 at 12, 14 (Brennan CJ & McHugh J); *Purvis* (1993) 217 CLR 92 at 125 (McHugh & Kirby JJ); *Bayside City Council* (2004) 216 CLR 595 at 637–8 (McHugh J).

69 *Permanent Trustee* (2004) 220 CLR 388 at 447–8 (McHugh J).

Commonwealth policy objectives. For McHugh J, constitutional text, structure, history and precedent all pointed to an absolute prohibition upon giving preference, at least where preference is evident on the face of a Commonwealth law.<sup>70</sup>

Justice Kirby's reasoning on section 99 was similar.<sup>71</sup> He saw no reason for assimilating the concept of 'preference' to that of 'discrimination' and, accordingly, no reason to subsume section 99 into the Court's jurisprudence on discrimination.<sup>72</sup> Justice Kirby also agreed with McHugh J that the section 99 prohibition must be understood as absolute, rather than as ceding in the face of compelling policy. This followed from section 99's status as an express constitutional prohibition, around which 'arguments of convenience melt away.'<sup>73</sup> Accordingly, he thought the merits of the Commonwealth policy irrelevant to the question of whether section 99 invalidated the *Mirror Taxes Act*.<sup>74</sup> Justice Kirby's conclusions are particularly striking in light of his often professed progressivist interpretative sensibilities.<sup>75</sup> In *Permanent Trustee*, Kirby J considered that section 99's text, history, and federal structural purpose were conclusive, rendering alternative interpretations drawn from contemporary discrimination jurisprudence simply unviable.<sup>76</sup>

Fundamental to both dissenting judgments is their understanding of the characterisation task required by section 99. Neither acknowledges the possibility of alternative, plausible baselines for comparison in deciding on the taxation position of Commonwealth places. Rather, both insist that the *Mirror Taxes Act* treats States relevantly 'differently' — applying different rules to Commonwealth places depending on the State in which they are located.<sup>77</sup> To attribute such determinacy to the concept of giving preference is of course to assume that some legislative differentiations are objectively identifiable as 'preferences'.

*Permanent Trustee* marks a significant moment for the universal conception of discrimination — cementing it as a central theme of the present Court's

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70 *Permanent Trustee* (2004) 220 CLR 388 at 427–8, 446–8 (McHugh J).

71 He differed, though, on some matters of detail, for instance in insisting that the preference worked by the *Mirror Taxes Act* lay in the differential disbursement of funds to the States, rather than in the initial imposition of tax liability: *Permanent Trustee* (2004) 220 CLR 388 at 466 (Kirby J).

72 *Permanent Trustee* (2004) 220 CLR 388 at 462, 465.

73 *Permanent Trustee* (2004) 220 CLR 388 at 462–3.

74 *Permanent Trustee* (2004) 220 CLR 388 at 462, 466–7.

75 For example, *Kartinyeri* (1998) 195 CLR 337 at 400–1; *Abebe v Commonwealth* (1999) 197 CLR 510 at 581; *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 522–5; *Eastman v The Queen* (2000) 203 CLR 1 at 79–82; *Cheng v The Queen* (2000) 203 CLR 248 at 321–2.

76 Kirby J stated that the majority's approach 'offends [constitutional] text and history': *Permanent Trustee* (2004) 220 CLR 388 at 468.

77 We might infer from both dissenting judgments that the dissenters' view of the appropriate baseline for comparison was influenced by consideration of the presumed intent of the Constitution's framers and ratifiers: *Permanent Trustee* (2004) 220 CLR 388 at 447–8 (McHugh J) and 467, 468 (Kirby J).

jurisprudence. Further, it confirms the conception's potential to spearhead change within other federal structural provisions of the Constitution.<sup>78</sup> The dissents are also significant, in asking whether this extension of the universal conception is appropriate and raising arguments that might be used to resist such extensions. These themes reappear below in Sections 3 and 4, where I explore the implications of the universal conception's rise as a touchstone.

### ***3. The Minimal Content of the Universal Conception***

Much of the analysis later in this article will focus on important features of non-discrimination rules that cannot be determined by reference to the universal conception of discrimination. Yet those areas of indeterminacy do not mean that the universal conception is entirely empty. In this section I will assert that the conception does indeed have some minimal content, involving an apparent commitment to at least two things: first, the combination of a flexible view of 'alikehood' and a focus on impugned laws' substantive effects means rules will not be understood as absolutes; second, a particular methodology of balancing competing values and interests is favoured. This content, I will argue, works to confine the range of interpretations that might be placed upon a non-discrimination rule where the Court elects to bring that rule under the umbrella of its universal conception. Taking each feature in turn, I will locate them in the Court's decisions and explore their implications.

#### ***A. The Focus on Substance and Rejection of Absolutism***

Earlier in this article I noted that the universal conception of discrimination appears to regard a certain kind of indeterminacy as an inherent feature of non-discrimination rules. This recognition of indeterminacy follows from the fact that the universal conception favours a flexible view of 'alikehood' in the construction of specific rules along with a substance-focused approach to their application. These preferences, in turn, dictate the rejection of any construction of non-discrimination rules that would enable those rules to operate as absolutes. In this subsection I will explore the foundations of these components of the universal conception and explore their significance in the context of *Permanent Trustee*.<sup>79</sup>

The universal conception's attention to substance over form is a feature that manifests at the stage of applying constitutional non-discrimination rules. It simply involves a refusal to conceptualise discrimination exclusively by reference to considerations of legal form. Where a non-discrimination rule is substance-focused, discrimination may be discerned not just in the language in which an impugned law is expressed but also in the way that the law operates in practice. In other words, discrimination may be established by reference to the consequences that an impugned law has for legal subjects. The universal conception of discrimination, as is evident in the standard formulations collected above in

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<sup>78</sup> See for example, *Australian Constitution*, ss 51(ii), 92.

<sup>79</sup> *Permanent Trustee* (2004) 220 CLR 388.

Subsection 2(B), mandates a view of discrimination that takes the concept beyond an exclusive focus on legal form. This commitment to substance is not confined to the discrimination context; rather, it has become deeply ingrained in the High Court's contemporary approach to all constitutional limitations.<sup>80</sup>

A quite separate distinction, relevant to interpreting rules, is that between fixed and flexible views about alikeness.<sup>81</sup> Where a fixed view of alikeness features in the interpretation of a particular non-discrimination rule, certain people or things are predetermined to be 'alike', either in one specific context or more generally, with the rule mandating that they receive the same treatment. So, for example, to take a fixed view of alikeness in the context of sex discrimination typically means viewing men and women as fundamentally 'alike' and forbidding their different treatment in settings such as employment, education, and so on. This may be contrasted with a non-discrimination rule that adopts a flexible view of alikeness. Flexibility about alikeness here translates into an acceptance that people and things are simultaneously alike and unlike by different measures. Discrimination, on this view, becomes a question of the reasonableness of particular classifications in their context. So, a flexible view of alikeness within a prohibition on sex discrimination would deem some instances of different treatment permissible — for example, giving women preference in promotion within the public service — where it is responsive to relevant differences between men and women, such as female under-representation in senior public office.

While these two distinctions do not track one another completely, it does seem that only three of a possible four permutations will be viable. A non-discrimination rule taking a fixed view of alikeness is clearly compatible with a form-based test — most early non-discrimination rules followed this pattern.<sup>82</sup> These days, however, non-discrimination rules incorporating a fixed view of alikeness will often be implemented via a substance-focused approach. For instance, a rule declaring that women and men are relevantly 'alike', and must receive the same treatment, could be transgressed by a law differentiating on some basis other than sex — perhaps height, or ability to work full-time hours — if the practical effect was that women and men received different treatment. The third and seemingly

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80 See for example, *North Eastern Dairy Co Ltd v Dairy Industry Authority of NSW* (1975) 134 CLR 559 at 606–7; *Hematite Petroleum Pty Ltd v Victoria* (1983) 151 CLR 599 at 630; *Gosford Meats Pty Ltd v New South Wales* (1985) 155 CLR 368 at 383–4; *Cole* (1988) 165 CLR 360 at 401; *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399 at 447–51.

81 Sometimes this essential distinction is explained in terms of formal and substantive conceptions of discrimination — with a formal conception of non-discrimination being one that regards all people as fundamentally alike and deserving of the same treatment, such that all distinctions referable to innate personal characteristics are discriminatory, and a substantive conception being one that focuses upon unreasonable or subordinating distinctions while permitting those deemed 'benign'. See for example, Glenn Patmore, 'Moving Towards a Substantive Conception of the Anti-Discrimination Principle: *Waters v Public Transport Corporation of Victoria* Reconsidered' (1999) 23 *Melbourne University Law Review* 121 at 126–7. I have avoided this terminology in this article in an effort to keep the likeness distinction separate from the distinction between form- and substance-focused approaches to rule application.

82 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 6; Sandra Fredman, *Discrimination Law* (2002) at 31–2, 44.



non-viable permutation is the pairing of a flexible view of alikeness with a form-based test. With no fixed view as to who is relevantly like whom under a given non-discrimination rule, it is difficult to imagine how the terms of an impugned law could be conclusive of discrimination. The fourth, and viable, permutation is the pairing of a flexible view of alikeness with a substance-focused test for discrimination. It is this pairing that seems to underpin the High Court's universal conception of discrimination.

In mandating a flexible view of alikeness and a substance-focused approach to rule application, the universal conception introduces significant indeterminacy to non-discrimination rules. The position on alikeness assumes particular importance, here. Recall that the universal conception, as framed, views discrimination as a failure to acknowledge *relevant* similarities and differences among subjects, thereby acknowledging the potential for different perceptions of similarity and difference. Here lies the acknowledgement that the universal conception necessarily implicates judicial assessments of reasonableness, of which more will be said in Section 4, below. As was explained in Section 2(C), the assessment of reasonableness may take the form of reviewing the baseline for comparison upon which an impugned law proceeds. Alternately, it may manifest as a review of the appropriateness of the means adopted to pursue a chosen policy goal.

So understood, the universal conception necessarily brings with it a rejection of any understandings of non-discrimination rules that would have them operate as absolutes.<sup>83</sup> The nature and feasibility of absolute rules within the law has long been a source of disagreement among judges and legal scholars.<sup>84</sup> Without wishing to wade into that debate, this article will rely on two fairly orthodox understandings of how a constitutional limitation could be said to operate as an 'absolute': first, where its application turns on determinate, objective criteria rather than the application of discretion or judgment; second, when it is not defeasible, that is, cannot be explicitly traded off against competing social goals. So understood, absolute rules require a degree of determinacy that cannot, in the context of any given non-discrimination rule, be reconciled with an overarching

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83 The insight that comparison-based constitutional rules — such as those dealing with discrimination, preference, and uniformity — invite assessments of reasonableness is not a new one. The United States Supreme Court had accepted this, in relation to constitutional uniformity and preference clauses, before the drafting of the *Australian Constitution* was completed. The American position may have informed Quick and Garran's assessment — made in 1901 and in relation to section 99 — that considerations of reasonableness will inevitably intrude in the application of constitutional rules premised on comparison: John Quick & Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 878.

84 Some of this debate has been conducted in terms of a contest between 'rules' and 'standards': see, for example, Kathleen Sullivan, 'The Supreme Court, 1991 Term — Foreword: The Justices of Rules and Standards' (1992) 106 *Harvard Law Review* 22; Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175. One of the contexts where the viability of absolutism has been debated most thoroughly is that of the American First Amendment jurisprudence on free speech: see, for example, Alexander Meiklejohn, 'The First Amendment is an Absolute' (1961) *Supreme Court Review* 245.

commitment to the universal conception of discrimination. The latter, in insisting that non-discrimination rules must be concerned only with *inappropriate* distinctions among people and things, introduces a criterion that is necessarily dependant upon judicial assessments of reasonableness. Moreover, it seems inherent in this that the constitutional interest in non-discrimination can, in at least some cases, be traded away.

This view of non-discrimination rules as indeterminate, and thus heavily reliant upon judicial discretion, has gained widespread acceptance in recent times.<sup>85</sup> However, the extent of this dependence will always be influenced by the choices of lawmakers and judges in drafting and interpreting particular rules, in deciding which aspects of the discrimination question are fixed and which are left open or fluid. For instance, where a non-discrimination rule is built around a fixed view of likeness — for example, men and women are alike and equal — one significant opening for judicial assessments of reasonableness is closed off. That constriction is magnified where a non-discrimination rule is applied by means of a strictly form-based test, that is, discrimination cannot be identified unless a law treats, say, men and women differently on its face.

To some minds, what is left after judicial discretion is squeezed out of a non-discrimination rule — a rigid, narrowly applicable rule that is easy to evade — may seem even less palatable than the initial problem of indeterminacy. Yet there is always room for disagreement about which of these sets of evils is the lesser. The judgments in *Permanent Trustee* seem to evidence just such disagreement about the parameters of section 99, even while very little of it is laid open. The majority joint judgment, in turning to the universal conception of discrimination to inform its interpretation of section 99, embraces a flexible view of likeness that brings with it the need for assessments of reasonableness. Those assessments are openly declared, even while the accompanying reasons are unhelpfully brief. The dissenting judgments of McHugh J and Kirby J instead favour a fixed view of likeness, under which States are necessarily alike and must receive the same treatment. Moreover, while paying lip service to a substance-based test, both seem focused on legal form. They fix upon the *discrimen* employed in the *Mirror Taxes Act* and do not engage with the possibility that, in substance, the Act *does* dispense the same treatment to each State. The combined effect of these two positions is to bring section 99 much closer to an absolute operation.

The minority judgments do advance some reasons for favouring this absolute view of section 99, including textual pointers in the Constitution, the supposed intentions of the framers and ratifiers, and also the purpose attributable to section 99.<sup>86</sup> Scholarly commentary has suggested another policy reason for confining

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85 Much of the philosophical debate has been conducted in the alternative language of 'equality' rules. See, in particular: Peter Westen, 'The Empty Idea of Equality' (1982) 95 *Harvard Law Review* 537, compare Kent Greenawalt, 'How Empty is the Idea of Equality' (1983) 83 *Columbia Law Review* 1167.

86 *Permanent Trustee* (2004) 220 CLR 388 at 427–8, 446–8 (McHugh) and 462–3, 468 (Kirby J).

section 99 to a narrow and largely determinate operation — the desirability of a broad Commonwealth discretion to tailor economic incentives and financial assistance as it sees fit.<sup>87</sup>

Thus, the invocation of the universal conception of discrimination, and the consequent focus on substance and rejection of an absolute construction, was not a foregone conclusion in *Permanent Trustee*.<sup>88</sup> Reasonable arguments might be made for giving section 99 a more determinate, absolute operation. Moreover, section 99's explicit concern with 'preference', rather than 'discrimination', offered ready textual grounds for sidestepping the universal conception and its attendant features. Yet the majority joint judgment in *Permanent Trustee* ignored these possibilities.<sup>89</sup> The features bestowed upon the section 99 rule by way of the universal conception were presented as inevitable, rather than chosen.

### ***B. The Choice of Balancing Modality***

A further feature of non-discrimination rules that is seemingly mandated by the universal conception of discrimination is a specific kind of balancing analysis that I will call 'holistic' balancing. The leading formulations of the universal conception, as outlined in Section 2(B) above, do not explicitly specify a preferred method by which the balancing of competing policy objectives is to be undertaken within constitutional discrimination analysis. Nevertheless, these formulations do in their terms imply a preference as between the two main alternative balancing modalities articulated by the High Court in its constitutional jurisprudence — being a two-stage defeasibility model and a holistic balancing model. In this subsection I will explain these two alternatives and the preference for the holistic model that is evident in the universal conception.

I will then argue that important areas of the Court's constitutional non-discrimination jurisprudence have yet to be brought into line with this preference, meaning that these areas must currently stand outside the conception's purview. Further, it may be that these outlier doctrines are best left unassimilated. In that case, the Court would need either to accept the non-universality of its current conception of discrimination or reformulate it to accommodate alternative balancing approaches. Either way, there are good reasons to retain both tests as available alternatives. In particular, the defeasibility approach seems well suited to the analysis of instances of direct discrimination, while the holistic approach appears preferable when analysing indirect discrimination.

The universal conception, in understanding discrimination analysis to turn on assessments of reasonableness, invites some process of balancing a constitutional interest in non-discrimination against competing policy objectives and interests.

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87 See Zines & Lindell, above n4. As Leslie Zines once put it, a narrow, legalistic construction of section 99, as reflected in the Court's early decisions, would likely make it 'easier by careful drafting for the Commonwealth to avoid' the limitation: David Hamby & John Goldring, *Australian Lawyers and Social Change* (1976) at 94.

88 *Permanent Trustee* (2004) 220 CLR 388.

89 *Permanent Trustee* (2004) 220 CLR 388.

However, the leading formulations of the conception do not dictate explicitly a particular approach to undertaking that balancing. Two main alternatives seem to suggest themselves, based on existing approaches to applying constitutional limitations and other non-discrimination rules. Essentially, the choice seems to be either to build balancing into the definition of discrimination or, instead, to make balancing part of a supervening inquiry in which acknowledged instances of discrimination may be redeemed by reference to other competing considerations.

The High Court has experimented with each of these two distinct approaches to balancing analysis. While this is discernible in the application of constitutional non-discrimination rules, it becomes clearer on surveying the Court's wider constitutional jurisprudence. The clearest and most consistent instance of balancing being styled as a supervening inquiry appears in the context of the implied freedom of political communication. In *Lange v Australian Broadcasting Corporation*, the Court structured that freedom as a two-stage inquiry, a structure that has been endorsed and adhered to in subsequent decisions.<sup>90</sup> First, the Court looks for prima facie violation of the freedom, asking whether the law 'effectively burden[s] freedom of communication about government or political matters'.<sup>91</sup> Where the answer to that question is yes, the second stage of the test is engaged. The inquiry there is essentially whether the identified infringement can be justified, in that the relevant law is 'reasonably appropriate and adapted to serve a legitimate end'.<sup>92</sup>

This two-stage form of balancing analysis is, then, an approach premised on the rule's defeasibility — its susceptibility to explicit override where other interests seem to outweigh it.<sup>93</sup> What is distinctive here is the explicitness of the potential override. The analysis acknowledges first that the protected interest — for instance, free political communication — has been impeded before asking the distinct, and supervening, question of whether that impediment might be tolerated in furtherance of other goals. In other words, balancing analysis ensues only where there is an initial conclusion that the constitutionally protected interest has indeed been encroached upon.

The alternative form of analysis is the holistic approach to balancing. Under this integrated methodology, questions of potential policy justification are not so clearly and deliberately isolated. Rather, they tend to be treated as one component of the overall question of whether some action or law infringes a constitutional limitation. Non-discrimination rules, in particular, map out in a distinctive way within the framework of this holistic balancing approach. There, in essence, the presence of a compelling policy justification for differentiating between legal subjects simply undoes the very allegation of discrimination. Discrimination is

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90 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567 ('*Lange*'). The formulation was refined slightly in *Coleman v Power* (2004) 220 CLR 1 at 50–1 (McHugh J), 77–8 (Gummow & Hayne JJ) and 82 (Kirby J), although not in a way that is material here.

91 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567.

92 *Lange v Australian Broadcasting Commission* (1997) 189 CLR 520 at 567.

93 Amelia Simpson, 'Grounding the High Court's Modern Section 92 Jurisprudence: the Case for Improper Purpose as the Touchstone' (2005) 33 *Federal Law Review* 445 at 473.

conceived of as the vice of differentiating *without* adequate justification. The two distinct and sequential questions that characterise a defeasibility analysis, such as the *Lange* test, merge into one, or at least become blurred.<sup>94</sup> This tends to work a subtle, but important, shift in emphasis — it downplays the fact of harm or disadvantage and focuses most attention on the fairness and good sense of the policy responsible for the distinction. Proponents of a holistic balancing approach in the discrimination context are usually quite particular about the point at which the label ‘discrimination’ attaches to an impugned act or law. On the holistic approach, if the differentiation complained of strikes judges as being rational and appropriate in pursuit of some legitimate goal, that differentiation simply does not qualify — not even provisionally — as ‘discrimination’.<sup>95</sup>

The universal conception of discrimination has consistently been expressed in terms that reflect a preference for the holistic approach to balancing. Specifically, the standard formulations describe in neutral terms — as ‘differential treatment’, giving rise to ‘unequal outcome’ — the disadvantage said to give rise to discrimination. None of the Court’s recent articulations of the concept of discrimination in constitutional settings, discussed in Section 2(B) above, have departed from this formula or adverted to the possibility of a more structured approach to the task of balancing. Rather, the general formulations, and the ensuing applications of particular constitutional limitations, have carefully avoided any provisional findings of ‘discrimination’ which supervening balancing analysis might then displace.<sup>96</sup> It seems, then, that when the universal conception of discrimination is wheeled out as the starting point for constitutional non-discrimination analysis, a holistic approach to balancing will follow predictably in its path.

This piggybacking of the holistic balancing approach occurred most recently in *Permanent Trustee*.<sup>97</sup> Recall that, there, the joint judgment found an acceptable policy explanation underpinning the differential treatment in the *Mirror Taxes Act* and hence found that the Act did not ‘give preference’, where that term was taken to signify discrimination.<sup>98</sup> While the analysis is unhelpfully brief, it is clear that the identification and evaluation of a policy rationale went to the very existence of a discriminatory preference, rather than being structured as a supervening inquiry.<sup>99</sup> Hence, the disadvantage complained of was consistently labelled ‘differential treatment and [an] unequal outcome’, by virtue of its being ‘the

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94 Sandra Fredman, *Discrimination Law* (2002) at 118.

95 See for example, European Convention on Human Rights Draft Protocol 12, Explanatory Report, paras 18–19; *Andrews v Law Society of British Columbia* (1986) 27 DLR (4<sup>th</sup>) 600 at 603–610 (McLachlin JA); *Street* (1989) 168 CLR 461 at 570–1 (Gaudron J).

96 See for example, *Austin* (2003) 215 CLR 185 at 247 (Gaudron, Gummow & Hayne JJ); *Mulholland* (2004) 220 CLR 181 at 234 (Gummow & Hayne JJ), 302–3 (Heydon J); *Permanent Trustee* (2004) 220 CLR 388 at 424–5, 425 (Gleeson CJ, Gummow, Hayne, Callinan & Heydon JJ).

97 *Permanent Trustee* (2004) 220 CLR 388.

98 The joint judgment offered this analysis in addition to a characterisation-based explanation, under which questions of reasonableness and balancing ostensibly did not arise: see above at Section 2(C), notes 59–62 and accompanying text.

product of distinctions that are appropriate and adapted to a proper objective.<sup>99</sup> While the section 99 rule could equally, in principle, have accommodated the alternative defeasibility-based model of balancing, this possibility was not raised.

The centrality of a holistic balancing model to the universal conception of discrimination can be traced to the latter's genesis. As explained in Section 2(B) above, the Court has, when articulating the universal conception, acknowledged repeatedly the particular formative influence of Gaudron J's judgment in *Street*.<sup>101</sup> The universal conception's having congealed around these reasons means that views expressed by Gaudron J in the specific context of section 117 — including a preference for a holistic approach to balancing — have been accorded wider significance, effectively migrating to new discrimination settings.

Significantly, though, Gaudron J's preference for a holistic balancing approach to discrimination problems was not favoured by a majority of the Court in *Street's Case* itself. Even while the Court in *Street* reached unanimous agreement on key aspects of section 117's interpretation, seven separate judgments were delivered articulating seven distinct views. Most fundamentally, differences emerged concerning how any balancing analysis should proceed under the reinvigorated and substantively focused section 117. Most members of the Court seemed to envisage a defeasibility-based approach, whereby the determination of discrimination would be made ahead of any consideration of possible justifications, such as might be mounted by reference to State sovereignty or citizenship.<sup>102</sup> Only Gaudron J, and perhaps also Deane J, saw the preferable approach as being to treat the issues holistically, conceptualising discrimination as something that only occurs or exists in the absence of acceptable justification.<sup>103</sup> For Gaudron J this approach followed from the very meaning of the term discrimination which, she said, in its legal sense 'signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained.'<sup>104</sup> This apparent disagreement as to the appropriate balancing approach in the section 117 context has not been resolved in later cases, where the distinction has either been papered over or ignored altogether.<sup>105</sup> Nevertheless, we might expect that the current High Court would favour the Gaudron view, especially given the universal conception's particular connection with Gaudron J's reasons in *Street*.<sup>106</sup>

99 *Permanent Trustee* (2004) 220 CLR 388 at 424–5 and 425 (Gleeson CJ, Gummow, Hayne, Callinan, & Heydon JJ).

100 *Permanent Trustee* (2004) 220 CLR 388 at 424–5 and 425 (Gleeson CJ, Gummow, Hayne, Callinan, & Heydon JJ).

101 *Street* (1989) 168 CLR 461. Similar reverence is sometimes shown for the joint reasons of Gaudron and McHugh JJ in *Castlemaine Tooheys* (1990) 169 CLR 436.

102 *Street* (1989) 168 CLR 461 at 492–3 (Mason CJ), 512–14 (Brennan J), 548 (Dawson J), 559–60 (Toohey J) and 583–4 (McHugh J).

103 *Street* (1989) 168 CLR 461 at 528–9 (Deane J) and 571–3 (Gaudron J).

104 *Street* (1989) 168 CLR 461 at 570–1.

105 *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463 at 485 (Dawson & Toohey JJ); *Sweedman v Transport Accident Commission* (2006) 224 ALR 625 at 637–639 (Gleeson CJ, Gummow, Kirby & Hayne JJ), 658 (Callinan J) and 664 (Heydon J).

By contrast, the Court's approach to section 92, another of the Constitution's non-discrimination rules, might not be so easily brought into line with the standard preference for a holistic balancing approach, and thus into line with the overarching jurisprudence developing around the universal conception. The leading cases applying the section 92 prohibition on discriminatory protectionism are unequivocal in preferring a defeasibility approach to balancing. In particular, the five member joint judgment in *Castlemaine Tooheys* insisted that the usual case, involving review of facially neutral laws, should proceed via a two-stage test.<sup>107</sup> The first stage involves assessing whether the impugned law is discriminatory and protectionist in its object or effect. If it is, the second stage of the test allows that acknowledged discrimination to be redeemed if it is found to be 'incidental and not disproportionate' to the pursuit of non-protectionist policy goals.<sup>108</sup> The High Court's most recent section 92 decision, *APLA Limited v Legal Services Commissioner (NSW)*, seems to confirm this kind of analytical structure as governing both limbs of the section 92 prohibition — that is, interferences with interstate 'intercourse' as well as trade and commerce.<sup>109</sup>

The separate joint reasons of Gaudron and McHugh JJ in *Castlemaine Tooheys* preferred a holistic approach to the balancing question.<sup>110</sup> However, commentators have since doubted whether a holistic approach carries any real advantage in the section 92 context.<sup>111</sup> In particular, structured forms of balancing analysis under that provision have a long history, having emerged decades before the modern approach to section 92 was settled in *Cole v Whitfield*.<sup>112</sup> Many of those pre-*Cole* authorities might be more readily tapped as a source of guidance if the Court were to retain a two-stage, defeasibility-based approach to analysing section 92 problems.<sup>113</sup>

Aside from these context-specific reasons weighing against a holistic approach to balancing for section 92, more general arguments might be made for retaining the option of a two-stage, defeasibility-based balancing approach in other constitutional settings. In particular, two-stage reasoning may seem appealing in cases involving so-called 'direct' discrimination — that is, disadvantage flowing

106 In the section 117 context, moreover, there is no significant body of pre-existing case law to be factored into this choice.

107 *Castlemaine Tooheys* (1990) 169 CLR 436 at 473–4.

108 *Castlemaine Tooheys* (1990) 169 CLR 436 at 473.

109 *APLA Limited v Legal Services Commissioner (NSW)* (2005) 224 CLR 322 ('*APLA*') at 353 (Gleeson CJ & Heydon J), 393 (Gummow J), 460 and 463 (Hayne J).

110 *Castlemaine Tooheys* (1990) 169 CLR 436 at 478–80.

111 Zines, above n12 at 143; Michael Coper, 'Section 92 of the Australian Constitution since *Cole v Whitfield*', in Hoong Phun Lee & George Winterton (eds), *Australian Constitutional Perspectives* (1992).

112 See for example, Zines, above n12 at Ch 7; Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (1983).

113 Even while *APLA* was not an ideal case in which to revisit the trade and commerce limb of section 92 — the obvious absence of protectionism meant that the need for balancing analysis was avoided — it is significant nonetheless that none of the judgments attempted to recast section 92 through the lens of the universal conception of discrimination. It may simply be that *Cole v Whitfield*'s success in bringing clarity to a previously confused and disordered area of the High Court's jurisprudence has left the Court reluctant to tinker with its fundamentals.

from an explicit difference in treatment referable to a ‘ground’ which the law recognises as suspect.<sup>114</sup> Even where constitutional non-discrimination rules are interpreted as extending to instances of indirect discrimination, there will still be cases in which they need to be applied to laws drawing a seemingly prohibited distinction on their face. Such a situation might arise, for instance, under section 117 where a State law explicitly reserved some benefit or privilege — such as welfare benefits or rights of democratic participation — for State residents.<sup>115</sup> In the section 99 context, *Permanent Trustee* could easily have been viewed as a problem of direct discrimination, had the Court chosen to characterise the *Mirror Taxes Act* as applying different rules to different States. Significantly, in such cases, where it is determined that a law treats subjects differently on a prohibited basis, any attempt to salvage the law becomes, essentially, an exercise in justification.<sup>116</sup> In these instances the analysis will likely fit neatly into the two-stage, defeasibility-based balancing model.

Applying constitutional non-discrimination rules by reference to a two-stage balancing model, in suitable cases, would be consistent with the approach taken in Australian statutory anti-discrimination law. Australian statutory prohibitions, whether relating to direct or indirect discrimination, are typically structured so as to isolate and treat as distinct inquiries both the question of whether different treatment is ‘reasonable’ and also the availability of other defences such as ‘unjustifiable hardship’ or ‘special measures’.<sup>117</sup> In some matters, statute law goes so far as explicitly to attach the label ‘discrimination’ to differential treatment that may nevertheless be found excusable.<sup>118</sup> The High Court accepts and observes these statutory demands for analytical separation when applying these rules.<sup>119</sup> As a source of guidance, this body of case law might be tapped and channelled more readily into constitutional contexts if the latter remained amenable to such structured forms of analysis.

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114 See for example, Fredman, above n94 at 93–4; Mary Gaudron, ‘In the Eye of the Law; the Jurisprudence of Equality’, Mitchell Oration 1990, Adelaide, 24 August 1990. Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) at 44–5.

115 Some of these possibilities are discussed in *Street* (1989) 168 CLR 461 at 492 (Mason CJ), 546 (Dawson J), 572 (Gaudron J) and 583–4 (McHugh J).

116 The alternative manoeuvre is, of course, to resolve the case at the level of characterisation, by finding that the categories the law draws do not equate with the proscribed distinction. On one view, this is what the joint judgment in *Permanent Trustee* did in reviewing the *Mirror Taxes Act*. See above, Section 2(C).

117 See for example, *Racial Discrimination Act* 1975 (Cth) ss 8(1), 9(1A)(a); *Sex Discrimination Act* 1984 (Cth) ss 5(2), 7B(1), 7C, 7D; *Disability Discrimination Act* 1992 (Cth) ss 6(b), 11.

118 See for example, *Disability Discrimination Act* 1992 (Cth) ss 11, 15(4), 16(3), 17(2). These are among the provisions of that Act that adopt the concept of ‘unjustifiable hardship’ as a basis for finding that demonstrated discrimination is not unlawful. The Act’s approach, of tolerating some instances of acknowledged discrimination, is discussed in *X v Commonwealth* (1999) 200 CLR 177. See also *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 355, 357, 362 (Mason CJ & Gaudron J), discussing the *Equal Opportunity Act* 1984 (Vic) s 29(2).

119 See, most recently: *New South Wales v Amery* (2006) 80 ALJR 753 at 756 (Gleeson CJ), 764 (Gummow, Hayne & Crennan JJ), 795 (Kirby J), 768, 789 (Callinan J) and 789 (Heydon J). See also *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 378–9 (Brennan J), 394–6 (Dawson & Toohy JJ). But compare the holistic approach preferred by Mason CJ and Gaudron J: *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 362–3.



Similarly, the High Court's utilising a defeasibility-based balancing approach might, in relation to some constitutional non-discrimination rules, enhance the comparability of potentially helpful constitutional material from other jurisdictions. In particular, useful guidance might be found in the United States Supreme Court's approach to the provisions and doctrines on which relevant Australian constitutional provisions were partly modelled.<sup>120</sup>

In contrast, some constitutional discrimination problems may possess features that leave them more suited to a holistic approach to balancing. In particular, rules that are significantly open-ended — whether due to their textual expression or to judicial interpretation — may lend themselves to the holistic approach, particularly where applied to problems cast as instances of indirect discrimination. The interpretation given to section 99 in *Permanent Trustee*, for instance, which contemplates the provision's application to facially neutral laws, leaves it with a potentially very wide ambit.<sup>121</sup> If the High Court were to apply its two-stage defeasibility-based approach to an open-ended rule like section 99, the first stage would likely amount to little more than an inquiry into whether a Commonwealth law had the *effect* of advantaging some States over others in trade, commerce or revenue. Countless laws would seemingly satisfy a preliminary inquiry of that kind. Yet judges understandably might balk at declaring many facially neutral laws that generate differential outcomes to be instances of *prima facie* 'discrimination', which must then be justified by reference to other, overriding, values or policy goals. It is, accordingly, unlikely that the Court would contemplate across-the-board adoption of its two-stage defeasibility-based balancing modality as a means of bringing symmetry to its treatment of discrimination issues.

That the universal conception of discrimination, as presently framed, seems to mandate a holistic approach to balancing suggests that it may actually fall somewhat short of universality in its reach and relevance. Some constitutional non-discrimination rules — most notably sections 92 and 117 — have yet to be recast by reference to the universal conception and in terms of holistic balancing, despite recent opportunities for the High Court to do so. In fact, at least some instances of discrimination analysis under these provisions — and indeed under other provisions — may actually be better suited to the more structured, defeasibility-based approach to balancing. If the Court really does see value in a conception of discrimination common to all constitutional contexts, it should move away from formulations that indicate a preference for holistic balancing. If it is not prepared to make that change in emphasis, it should perhaps retreat from the idea of universality and acknowledge that its favoured conception governs only a subset of the discrimination questions that can arise under the Constitution.

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120 When the High Court overhauled its approach to sections 92 and 117 — in *Castlemaine and Street* — close attention was paid to the United States Supreme Court's jurisprudence on the Negative Commerce clause and the Article IV Privileges and Immunities clause.

121 The only side-constraint operating to confine the provision's reach is its textual restriction to laws dealing with trade, commerce and revenue. Thus it has a much wider potential ambit than other rules bearing more restrictive side-constraints, such as section 92 with its confinement to protectionist discrimination: *Cole* (1988) 165 CLR 360 at 394, 407; *APLA* (2005) 224 CLR 322.

#### 4. *The Ongoing Need to Particularise Non-Discrimination Rules*

I explained in Section 2 that the universal conception of discrimination is treated as a meaningful touchstone, capable of doing real work in establishing the parameters and features of particular constitutional rules. In Section 3, I identified two respects in which the conception does seem to contribute some limited content to interpretations of particular rules. In this section I will argue that the universal conception nevertheless cannot serve as a complete touchstone in its own right, that is, it cannot provide the Court with all of the guidance necessary to settle the contours of specific non-discrimination rules. This is not to say that the Court, when invoking the conception, is oblivious to the particular issues and choices that specific discrimination contexts throw up. Rather, it seems options are considered and ramifications are pondered largely out of sight, with the universal conception serving as a kind of smoke screen behind which the necessary choices can be made.<sup>122</sup> The chosen contours are often implicitly attributed to the universal conception, even where it does not actually dictate them.

This practice of inadequate disclosure creates a significant tension in the Court's approach to constitutional non-discrimination rules. Having accepted the essential indeterminacy of these rules, and thus the need for assessments of reasonableness and value judgements, the Court has created principles that cannot be self-executing. Instead, the universal conception of discrimination invites — indeed requires — the exercise of significant judicial discretion on sensitive and controversial issues. Yet the Court's practice over recent years, when invoking the universal conception, has been to avoid a full and candid airing of reasons for preferring one position over other alternatives.<sup>123</sup> Countervailing pressures — likely the standard concerns about judicial legitimacy and institutional competence — appear to have won out. This tension, between the in-principle demands of an indeterminate standard, on the one hand, and wider efforts to downplay judicial discretion, on the other, is evident in the majority joint judgment in *Permanent Trustee*.<sup>124</sup>

The tendency to overlay the universal conception as a source of guidance in the interpretation of particular rules is a product of this tension. For a majority of the Court, acknowledging the policy considerations and values that have

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122 This is much the same criticism as was levelled at the High Court's use of formulaic touchstones in earlier times. See for example, Philip Phillips, 'Trade, Commerce and Intercourse Part I: Commonwealth Legislative Powers' in Rae Else-Mitchell (ed), *Essays on the Australian Constitution* (1952) at 210, 227.

123 This occurs at the level of interpreting rules, as well as at the application stage, and is consistent with the current Court's widely remarked upon reluctance to engage openly with non-legal policy arguments and values. See for example, Murray Gleeson, *The Rule of Law and the Constitution*, (2000) at 85, 97–99; Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* at 241, 241–2.

124 *Permanent Trustee* (2004) 220 CLR 388.

influenced the sculpting of particular non-discrimination rules in distinct directions evidently seems unwise, or at least unnecessary. Instead, the universal conception is pushed well beyond its natural limits as a source of guidance, and given credit for doctrinal contours that must in reality spring from other considerations. So, even while the universal conception, as formulated, seems to invite judges to take responsibility for the substantive evaluation of impugned laws, much of the detail involved in that evaluation has remained unarticulated, as though it follows self-evidently from invocation of the conception itself.

In this section I will explore two facets of the particularity that the Court must, and does, bring to individual constitutional non-discrimination rules. The first is the need to ascertain the purpose or rationale underpinning particular non-discrimination rules, in order fully to elaborate each rule's parameters. The second is the need to decide upon an appropriate level of deference to be paid to lawmakers' assessments of reasonableness, both as to the selection of baselines for comparison and the identification of policy-based justifications for different treatment. While these are really intertwined inquiries, teasing them out separately provides a clearer picture of the universal conception's limitations as a touchstone. My discussion here aims to highlight two things: first, both inquiries necessarily arise wherever the universal conception of discrimination is taken as a starting point; and, second, neither can be settled by reference to the conception alone.

#### ***A. Isolating a Rule's Purpose or Rationale***

In settling the contours of any non-discrimination rule it is important to isolate the purpose or 'mischief' — that is, the perceived problem or danger — to which that rule is directed. Judges and scholars have long known that the idea of discrimination is infuriatingly elusive without the discipline and direction that comes with a purposive vantage point.<sup>125</sup> Even where this sense of a rule's purpose remains unarticulated,<sup>126</sup> it is a consideration that will be informing and shaping, if silently, the interpretation and application of that rule. The universal conception of discrimination, precisely because it is expressed in such general terms, is of little real assistance in isolating this crucial component.

Even while the universal conception does not itself provide a means of identifying the rationale animating specific non-discrimination rules, it does seem at least to acknowledge the importance of purposive considerations. As I explained in Section 2, the universal conception harnesses the notion of 'proper', and thus by implication improper, objectives. The range of proper legislative objectives is framed by the Constitution — especially, but not exclusively, by the non-

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125 See for example, *Elliott v Commonwealth* (1936) 54 CLR 657 at 682 (Dixon J); Gaudron, above n14; Justice Ian Binnie, 'Equality Rights in Canada: Judicial Usurpation or Missed Opportunities?', in Grant Huscroft and Paul Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) at 101; Hugh Collins, 'Discrimination, Equality and Social Inclusion' (2003) 66 *Modern Law Review* 16.

126 As may happen particularly where it is disputed: Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) at 35–61; Richard Fallon Jr, 'Foreword: Implementing the Constitution' (1997) 110 *Harvard Law Review* 54 at 101–2.

discrimination rule at issue. The delimitation of proper objectives requires judges to consider the relevant constitutional rule's intended, or appropriate, ambit and this in turn seems to depend upon some conception of what it is that the rule aims to achieve. Simply incanting a highly generalised and abstracted notion of discrimination throws no light on what kinds of legislative objectives will count as 'proper' under the shadow of a particular constitutional non-discrimination rule. Rather, the Court must turn to additional factors and considerations, in order to discover a rule's rationale, before constructing an appropriate working definition of 'proper' purposes and proceed to consider the validity of an impugned law. The universal conception of discrimination can serve as nothing more than a placeholder here.

What, then, are these factors and considerations into which the Court might be delving in isolating a rationale, and settling attendant contours, for particular constitutional non-discrimination rules? While the Gleeson Court eschews the rigidity of abstract theories of constitutional interpretation in favour of a more 'flexible' approach,<sup>127</sup> this eclecticism has nevertheless seen it drawing upon the traditional, familiar, reference points — the Constitution's text, structure, and history, as well as progressivist arguments and policy considerations.<sup>128</sup> These considerations and sources may, of course, be approached directly. They may also be approached indirectly by recourse to the reasoning in earlier cases which themselves took account of the relevant considerations and sources. Importantly, though, bare invocations of earlier authority will usually be an impoverished way of tapping relevant interpretative arguments and considerations, given that no two cases are entirely alike. Equally, no two constitutional provisions will throw up exactly the same set of textual, historical and policy considerations. This means that authorities generated in the context of one constitutional provision will be, at best, incomplete reference points as the Court approaches some other provision or doctrine. This caution has particular resonance for non-discrimination rules, with each being directed to its own distinct configuration of objectives and intended beneficiaries.<sup>129</sup>

The Court's willingness to use the universal conception as a placeholder for open consideration of a non-discrimination rule's underlying rationale and appropriate contours is evident in *Permanent Trustee*.<sup>130</sup> Resolution of that case

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127 Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234 at 246. See also: *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51 at 75 (Gummow J); Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989–2004', The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Sydney, 26 November 2004: [http://www.hcourt.gov.au/speeches/mchughj/mchughj\\_26nov04.html](http://www.hcourt.gov.au/speeches/mchughj/mchughj_26nov04.html) accessed 12 April 2007.

128 Selway, *ibid*; Susan Kenny, 'The High Court on Constitutional Law: the 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210.

129 For instance, contrast the Court's insistence in *Street* (1989) 168 CLR 461 (for example, at 486 (Mason CJ) and 502–3 (Brennan J)) that s 117 of the Constitution protects the rights of individuals, with its position in *Cole* (1988) 165 CLR 360 that individuals only benefited incidentally and secondarily.

130 *Permanent Trustee* (2004) 220 CLR 388.

required some sense of the rationale undergirding the section 99 limitation, to comprehend precisely what it means for the Commonwealth to 'give preference'. Yet, having identified the legislative objective underlying the *Mirror Taxes Act*, the majority states simply that '[t]he differential treatment and unequal outcome that is involved here is the product of distinctions that are appropriate and adapted to a proper objective.'<sup>131</sup> Missing is any account of precisely what it was about the policy underlying the *Mirror Taxes Act* that qualified it as 'a proper objective in the sense of the authorities' — in other words, why and by what measure it was 'proper'.<sup>132</sup> The relevant standard, and the reasons for its selection, went unarticulated. That absence is only underlined by the joint judgment's refusal to engage with the accounts of section 99's purpose presented in the dissenting judgments.<sup>133</sup>

Had the majority resolved to explain its view on 'proper objectives', it would have confronted a choice among competing views as to section 99's rationale. One dimension of this choice concerns the provision's beneficiaries. As earlier explained, the dissenters emphasised the *Mirror Taxes Act*'s potential impact upon individual taxpayers in different States. The majority, however, seemed content to assume that section 99's intended beneficiaries were the States considered as polities. These respective positions conduce to quite different views of 'proper', or improper, legislative objectives. A Commonwealth law might, as in the case of the *Mirror Taxes Act*, be well received by all State governments and yet create disparities that burden some individuals unfairly.

There is a further sense in which some advertence to section 99's rationale was inevitable in settling the rule's contours. An important, but largely submerged, theme running through the *Permanent Trustee* judgments is the potential to take either a form-based or a substance-based approach in applying section 99 — it could be understood either as a rigid and largely symbolic rule prohibiting only those laws taking geography as their *discrimen*, or as a more flexible standard turning upon assessments of reasonableness.<sup>134</sup> Electing between these constructions would require an assessment of the relative importance, here, of federal symbolism as against substantive State neutrality. It would also require some reflection upon the appropriateness of substantial judicial discretion in this context.<sup>135</sup> The purpose or rationale attributed to section 99 would factor significantly in each of these assessments.

To summarise, the purpose or rationale attributed to an individual non-discrimination rule is significant in shaping its contours and, moreover, it cannot be discovered in the universal conception of discrimination.

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131 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.

132 *Permanent Trustee* (2004) 220 CLR 388 at 424.

133 *Permanent Trustee* (2004) 220 CLR 388 at 423; though compare at 447 (McHugh J).

134 See discussion in Section 3(A).

135 This is discussed further in Section 4(B), below.

### B. *Deciding on the Appropriate Level of Deference*

Where non-discrimination rules are understood as indeterminate — and requiring judicial assessments of reasonableness — judges must decide what degree of deference they will pay to lawmakers' judgment. As the High Court's universal conception of discrimination concedes and accommodates indeterminacy, it necessarily poses the deference question. However, it is formulated at such a high level of generality that it offers the Court little guidance on how much deference should be paid in particular contexts. External considerations must be consulted — considerations likely to differ, in nature and potency, from one constitutional setting to another. This subsection considers how much attention the deference question has received in constitutional cases invoking the universal conception. Essentially, the Court has wavered in its preparedness to acknowledge the deference issue as a free-standing one requiring fresh consideration in each new setting. Most recently, in *Permanent Trustee*, no effort was made to disentangle the deference issue from the universal conception, leaving the false impression that the latter somehow determines the former.<sup>136</sup>

Given the diverse collection of constitutional non-discrimination rules identified in Section 2, it seems likely that each rule — perhaps each individual case — would throw up a different configuration of interests, concerns, and issues bearing upon the question of how much deference is appropriate. This may include considerations of comparative institutional advantage, the number of distinct interests in play, and the contestability of implicated values.<sup>137</sup> For instance, constitutional non-discrimination rules accorded an individual rights protective function — section 117 and perhaps the section 92 intercourse limb — present considerations not seen when dealing with rules focused on federal relations alone. Similarly, non-discrimination rules directed to economic and fiscal relations present issues distinct from those raised by rules protecting the integrity of institutions — such as the implied limits on discrimination associated with the separation of judicial power or representative government.<sup>138</sup> For this reason alone we might expect the Court to revisit the question of deference, and recalibrate its position, in each new context to which the universal conception of discrimination is transplanted. Yet it has received surprisingly little direct attention in the case law. Despite a promising start in Gaudron J's judgment in *Street*,<sup>139</sup> the deference question has more recently been neglected and its free-standing nature obscured behind ritual incantations of the universal conception.

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136 *Permanent Trustee* (2004) 220 CLR 388.

137 See for example, Neil Komesar, *Imperfect Alternatives: Choosing Institutions in Law, Economics and Public Policy* (1994) at Ch 2; Lawrence Sager, 'Fair Measure: The Legal Status of Underenforced Constitutional Norms' (1978) 91 *Harvard Law Review* 1212 at 1217–8. For a recent and comprehensive discussion of these and other considerations in an Australian setting, see: Jeremy Kirk, 'Rights, Review and Reasons for Restraint' (2001) 23 *Sydney Law Review* 19.

138 See discussion in Section 2(A)–(B).

139 *Street* (1989) 168 CLR 461.

In *Street*, Gaudron J addresses the deference question directly, albeit briefly, proposing an approach specific to section 117. She begins by noting:<sup>140</sup>

The question whether different treatment assigned by reason of a relevant difference is appropriate to that difference is one which ... cannot be answered by the dictation of 'specific legislative choices to the State'.

Justice Gaudron goes on to propose that, in the section 117 context, a suitable touchstone for appropriateness would be a modified version of a standard High Court characterisation touchstone. The relevant question would be 'whether the different treatment is reasonably capable of being seen as appropriate and adapted to a relevant difference.'<sup>141</sup>

There are two other notable features of Gaudron J's approach to deference in *Street*.<sup>142</sup> First, her allusions to it are confined to her discussion of assessments of 'appropriateness' — her separate discussion of the prior touchstone of 'relevant difference' does not allude to questions of deference, even while they would seem equally relevant there. Second, Gaudron J does not link her position on deference to her conception of discrimination. Even while her treatment of the deference issue is brief and indirect, it is kept analytically separate from the formulation of the legal notion of discrimination. That realisation — that the appropriate level of deference is in no sense dictated by the universal conception — has been pushed into the shadows in more recent cases.

Of the recent constitutional cases invoking the universal conception only one — *Mulholland* — adverts to the deference issue.<sup>143</sup> The appellant complained that aspects of Commonwealth electoral regulation were discriminatory. He identified an implicit non-discrimination rule within the constitutional demand that representatives be 'directly chosen' by the people — infringed, he argued, by a requirement that political parties have at least 500 members to qualify for statutory entitlements such as party identification beside candidates on ballot papers. Most judgments discussed the appropriate degree of deference only as a general backdrop to the reasoning across all issues in the case. Only Heydon J directed reflections about deference to the discrimination issue in particular. He referred to the standard of review adopted by Gaudron J in *Street* — the deferential 'reasonably capable of being seen as appropriate' standard.<sup>144</sup> Although noting that Gaudron J proposed that standard in the context of section 117, Heydon J suggests its use in reviewing legislation said to discriminate contrary to other

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140 *Street* (1989) 168 CLR 461 at 573.

141 *Street* (1989) 168 CLR 461 at 574; Bradley Selway, 'The Rise and Rise of the Reasonable Proportionality Test in Public Law' (1996) 7 *Public Law Review* 212 at 216–7; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1 at 59; Zines, above n12 at 421.

142 *Street* (1989) 168 CLR 461.

143 *Mulholland* (2004) 220 CLR 181. Hayne J's judgment in *APLA* (2005) 224 CLR 322 at 460–463 contains some interesting and important reflections on deference in the section 92 context. However, the universal conception of discrimination was not invoked and discussed in that case.

144 *Mulholland* (2004) 220 CLR 181 at 302–3.

constitutional limitations.<sup>145</sup> Importantly, he accepts that the deference issue also arises when viewing discrimination problems from the characterisation vantage point — suggesting that the baseline for comparison adopted in a statute will be acceptable when not ‘irrational’.<sup>146</sup>

The main problem with Heydon J’s treatment is that he does not offer any reasons in explanation of his stance. In endorsing the deferential posture suggested by Gaudron J in *Street*, Heydon J does not explore why that standard, developed for section 117, would be appropriate in the context of a different constitutional non-discrimination rule. To see the sorts of reasons he might have envisaged, we must look to other judgments. For those judges counselling substantial deference to Parliament’s judgment across the board, a number of considerations seemed to support this stance. All attached significance to the *Constitution’s* explicit conferral of broad discretionary power upon the Parliament to establish and adjust the electoral system’s contours.<sup>147</sup> Some adverted to the inevitability of disagreement about electoral arrangements and their fairness, conceding Parliament’s comparative advantage in assessing possible alternatives.<sup>148</sup> Some foreshadowed heightened scrutiny or vigilance — that is, less deference — in certain circumstances. For Gummow and Hayne JJ, this would be appropriate in cases where incumbents manipulated that advantage to entrench themselves in power.<sup>149</sup> Justice Kirby suggested similar stringency in cases where laws singled out ‘unpopular minorities’.<sup>150</sup>

*Mulholland* thus provides some indication of what factors might, in a particular setting, demonstrate deference to legislative assessments of what is reasonable. Yet the Court, when rolling out its universal conception of discrimination in a new setting, remains reluctant to explore the deference question openly. This is evident on returning to *Permanent Trustee*, where the issue of deference went unmentioned.<sup>151</sup> The dissenters had a legitimate reason for ignoring the issue; in denying that section 99’s application turns on an assessment of reasonableness in the first place, they left no opening for a showing of deference.<sup>152</sup> The majority, however, needed to take a position; in bringing the universal conception of discrimination to bear, they join ensured that section 99’s application would turn on an assessment of the reasonableness of impugned distinctions. Yet the majority said only that, in the case of the *Mirror Taxes Act*, ‘[t]he differential treatment and unequal outcome ... is the product of distinctions that are appropriate and adapted to a proper objective.’<sup>153</sup> They might mean here that the scheme was obviously reasonable, such that possible gradations of deference were unimportant. Yet the

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145 *Mulholland* (2004) 220 CLR 181 at 302–3.

146 *Mulholland* (2004) 220 CLR 181 at 302.

147 *Mulholland* (2004) 220 CLR 181 at 192, 194–5 (Gleeson CJ), 207, 214, 217 (McHugh J), 233, 236–7 (Gummow & Hayne JJ), 253–5 (Kirby J) and 296–7 (Callinan J).

148 *Mulholland* (2004) 220 CLR 181 at 192, 197 (Gleeson CJ), 239–40 (Gummow & Hayne JJ).

149 *Mulholland* (2004) 220 CLR 181 at 237–8.

150 *Mulholland* (2004) 220 CLR 181 at 264.

151 *Permanent Trustee* (2004) 220 CLR 388.

152 *Permanent Trustee* (2004) 220 CLR 388 at 447, 448 (McHugh J) and 461–2 (Kirby J).

153 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.



vigorous dissents suggest the scheme's reasonableness was not self-evident. Accordingly, the deference issue should have been pivotal in *Permanent Trustee*.<sup>154</sup>

As no reasons accompanied the majority's assertion that the scheme was reasonable, it is impossible to ascertain how searching an assessment was undertaken in arriving at that conclusion. It would be helpful to know, for instance, whether the States' acquiescence in the Mirror Tax scheme furnished a distinct reason for deferential review in this particular case; or, alternatively, whether the judges perceived a broader justification for deference, perhaps rooted in the Court's perceived institutional limits in evaluating economic and fiscal policy initiatives. As there is no judicial or wider social consensus on these matters, the Court's position cannot simply be assumed or intuited. Accordingly, it needs to explain its approach to reviewing legislative assessments of reasonableness and deciding how much deference to extend.<sup>155</sup>

## 5. Conclusion

This article set out to illuminate the particular conception of discrimination that has come to dominate the High Court's approach to constitutional discrimination issues. I have explained two key ways in which this 'universal conception' contributes limited content to the non-discrimination rules brought under its purview, in the mandating of particular approaches to applying those rules. I have also outlined why the conception cannot serve as a complete point of reference, there being important doctrinal details on which it is silent. This article will hopefully assist litigants to frame effective arguments around constitutional non-discrimination rules. In particular, it should help to clarify when the universal conception will present an obstacle to particular lines of argument and, equally importantly, at what point its guidance will run out. While this kind of clarification should ideally be coming from the Court, its current approach has tended instead to occlude the agitation of the real policy questions arising in specific contexts.

The broader point is simply that context is important.<sup>156</sup> The shift from formal to substantive approaches to equality and discrimination confirms this. But context is also important in doctrinal design, to ensure that the underlying purposes of specific non-discrimination rules will be isolated and secured and that the most appropriate institutions are tasked with making the necessary value judgments. In light of this we should be sceptical about judicial efforts to harmonise non-discrimination rules within, and beyond, the Constitution.

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154 *Permanent Trustee* (2004) 220 CLR 388 at 424–5.

155 This expectation is simply a function of the general rule of law requirement that courts explain their reasons, wherever those reasons cannot be readily inferred from the context or from general social understandings, etc. See for example, Lon Fuller, *The Morality of Law* (1964) at 49–51.

156 In that sense, this article's project has much in common with one already undertaken by Fredrick Schauer in a First Amendment context: Fredrick Schauer, 'Principles, Institutions and the First Amendment' (1998) 112 *Harvard Law Review* 84.

