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# The Text through Time

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**The Text through Time**

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# The Text through Time

Jack Tsen-Ta Lee\*

The text of a written constitution or bill of rights is prone to 'drift' or 'slippage' in the meanings of terms. Even if such meanings have not altered over time, because of changes in attitudes and values there may be disagreement with the text's framers as to the scenarios that are covered or not covered by terms. This article submits that the distinction between the connotation and denotation of a term that has been applied in Australian jurisprudence is useful for determining the meaning of the text through time. The connotation of a term is the generally unchanging bundle of attributes that is central to the term's meaning. A term's connotation determines the scope of its denotation – the collection of things or scenarios to which the term refers. The denotation will be wider (that is, the term's essential meaning will apply to more things or scenarios) when the term expresses abstract concepts. Unlike connotation, denotation can expand or shrink over time.

WHEN THE TEXT of a constitution or bill of rights is laid down by its framers, they naturally assume that the words and phrases they use will be understood by the interpreters of the text in the manner the framers themselves understand them. This is more likely to be true at the point of the text's enactment and within the next few years, even decades. However, as time passes, 'drift' or 'slippage' in meaning<sup>1</sup> may occur. A word that had a certain meaning in the past may come to be used in new situations. Section 51(xxi) of the Australian Constitution empowers the Commonwealth Parliament to 'make laws for the peace, order, and good government of the Commonwealth with respect to... marriage'. In *Re Wakim, ex parte McNally*,<sup>2</sup> Justice Michael McHugh recognized that when the Constitution came into force in 1901, the word *marriage* bore the meaning ascribed to it in 1866 by Lord Penzance in *Hyde v Hyde*<sup>3</sup> – 'the voluntary union for life of one man and one woman, to the exclusion of all others'.<sup>4</sup> This remains the classic definition of marriage at common law. However, McHugh J noted *obiter dicta* that if the meaning of the word was construed at that level of abstraction today, 'it would deny the Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably

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<sup>1</sup> Christopher Birch, 'The Connotation–Denotation Distinction in Constitutional Interpretation' (2003) 5 J App Prac & Process 445, 458.

<sup>2</sup> (1999) 198 CLR 511 (HC, Aust).

<sup>3</sup> (1866) LR 1 P & D 130.

<sup>4</sup> *Ibid* 133.

“marriage” now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others’.<sup>5</sup> It may be asked whether the courts should recognize such semantic shifts.

Another possibility is that the linguistic meaning of a term may not have altered, but because of changes in attitudes and values there may be disagreement with the text’s framers as to the scenarios that are covered or not covered by the term. The Eighth Amendment to the United States Constitution prohibits, among other things, the infliction of ‘cruel and unusual punishments’. In 1791, when the Amendment came into force, subjecting juveniles who had committed heinous crimes to the death penalty was regarded as neither cruel nor unusual. Were the views of the Amendment’s framers regarding the application of the term binding on the Supreme Court in 2005? In *Roper v Simmons*<sup>6</sup> a majority of the Court thought not.

In the first situation detailed above, the linguistic meaning of a term has undergone some change over time, giving rise to the issue of whether a judge should apply this new meaning to the term. The pertinent issue in the second situation is whether a court is bound to accept the applicative rather than linguistic meaning given to a term by the framers. This article proposes an approach that may be taken by judges in such circumstances. The matters are considered in the context of written constitutions, though some of the conclusions may be applied to ordinary legislation as well. At the outset, Part I of the article examines whether a statutory term should simply be accorded its modern meaning, regardless of how it might have been understood at the time of framing. It is submitted that this is an unsatisfactory approach to interpretation. Part II goes on to consider the distinction, well established in Australian jurisprudence, between the connotation and denotation of a term. Despite some academic and judicial criticism, I argue that the distinction accords with how statutes should generally be interpreted, and remains a useful technique for dealing with the text through time.

## I. SEMANTIC OPPORTUNISM

The framers of a constitution or a bill of rights are powerless to prevent semantic shifts – changes over time in meanings – in the terms they have chosen to express their intention in. Where this has occurred, in theory the legislature may amend the law in an attempt to ensure that its understanding of the text is duly conveyed to the judiciary. The legislature may not, however, always be at liberty to so act. It may be unable to garner sufficient support from legislators to have the amending statute passed, or it may be politically inexpedient to propose such changes. It may have more pressing matters to deal with on its legislative agenda, with the consequence that the statute remains unchanged for some years. Where the constitutional or bill of rights text remains unchanged in the face of a slippage in meaning, the judiciary

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<sup>5</sup> *Re Wakim* (n 2) 553, [45]. The *OED Online*, the Internet version of the venerable *Oxford English Dictionary*, defines marriage as ‘[t]he condition of being a husband or wife; the relation between persons married to each other; matrimony’, and attests this with quotations dating back to the 14th century. However, it adds in a recent note: ‘The term is now sometimes used with reference to long-term relationships between partners of the same sex’. See ‘marriage, *n.*’, *OED Online* (OUP, Oxford September 2008 draft revision) <<http://dictionary.oed.com/cgi/entry/00302422>> (accessed 25 October 2008).

<sup>6</sup> 543 US 551 (2005).

must decide whether, and if so how, the slippage should be taken into account in the interpretation of the text.

One possible approach is for courts to ignore the original meaning of the word or phrase that has undergone a semantic shift, and simply interpret it according to its present meaning. This is essentially what has been termed the ‘contemporary literalism’ approach,<sup>7</sup> one proponent of which is former Justice Michael Kirby of the High Court of Australia. He has taken the view that the text of the Australian Constitution, once enacted into law, ‘took upon itself its own existence and character as a constitutional charter’,<sup>8</sup> and hence has been ‘set free from the “intentions” of its draftsmen’ and must be read ‘by contemporary Australians... with the eyes of their generation expecting it to fulfil (so far as the words and structure permit) the rapidly changing needs of their times’.<sup>9</sup> The result is that a judge is not required to give effect to the original meaning of the term in question, so long as the new meaning he gives the term comports with current usage.

This may be a highly convenient way of dealing with semantic shifts. However, it should be questioned whether, without some supporting evidence, it is reasonable to assume the framers of a text intend that the phraseology they have employed be construed in this way. A writer generally uses words in order to express certain meanings and, he hopes, to achieve certain purposes. It is improbable that he intends for his words to have whatever meaning they happen to have at the time in the future when they are read and interpreted. Richard Ekins terms such an approach ‘semantic opportunism’ as it would authorize courts to ‘frustrate Parliament’s judgment, as communicated in the intended meaning of the statutory language, whenever there is another semantically available meaning which is compatible with the judges’ own moral views’.<sup>10</sup> He continues:

Communication proceeds not on the basis simply of sentence meanings alone but by listeners, or readers, building theories as to what the communicator intended the words to mean. Conventions of language are of course an important factor in determining meaning, as they outline the available scope of possible intended meanings that a speaker who is familiar with the conventions might wish to use. But interpretation and communication do not stop there. We do not simply choose the most convenient semantically possible sentence meaning. If we are required to obey the person, or institution, that is communicating then we have to ascertain what they meant to say, not what particular semantic meaning we would like their words to bear.<sup>11</sup>

Semantic opportunism would cause the meaning of terms to be entirely fortuitous; readers would be able to ascribe to terms meanings not envisaged by writers if it turned out that the terms had altered in sense. For a court to do so would be tantamount to it introducing a principle unsupported by the text.<sup>12</sup> Michael

<sup>7</sup> Jeffrey Goldsworthy, ‘Interpreting the Constitution in its Second Century’ (2000) 24 *Melb U L Rev* 677, 687

<sup>8</sup> *Re Wakim* (n 2) 599–600, [186] (Kirby J, dissenting).

<sup>9</sup> *Re Colina, ex parte Torney* (1999) 200 CLR 386, 423, [96]. See also *Eastman v R* (2000) 203 CLR 1, 80, [242].

<sup>10</sup> Richard Ekins, ‘A Critique of Radical Approaches to Rights Consistent Statutory Interpretation’ [2003] *EHRLR* 641, 648.

<sup>11</sup> *Ibid* 648–649. See also Lawrence B Solum, ‘Semantic Originalism’ (Illinois Public Law and Legal Theory Research Papers Series No 07-24, 22 November 2008) <<http://papers.ssrn.com/abstract=1120244>> (accessed 27 August 2009) 3–4.

<sup>12</sup> Michael McConnell, ‘The Role of Democratic Politics in Transforming Moral Convictions into Law’ (1989) 98 *Yale LJ* 1501, 1528, cited in Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Fed L Rev* 1, 38.

McConnell has said, ‘The only difference between the unintended meaning and the extratextual principle is verbal happenstance.’<sup>13</sup>

## II. THE CONNOTATION–DENOTATION DISTINCTION

If semantic opportunism is to be rejected, it is necessary to consider whether there exists a more palatable manner to deal with shifts in linguistic meaning and scenarios over time. It is contended that the distinction, well established in Australian jurisprudence, that is drawn between the ‘connotation’ and ‘denotation’ of a term is of assistance here. These concepts were drawn from the writings of John Stuart Mill,<sup>14</sup> who regarded the connotation of a term as the information that a term conveys, which consists of a bundle of attributes,<sup>15</sup> and the term’s denotation as the things that the term is the name of.<sup>16</sup> In Jeffrey Goldsworthy’s words, a term’s connotation is the criteria that define the term, while its denotation is made up of all the things in the world to which the term refers.<sup>17</sup>

### A. CONNOTATION

Case law establishes that while the denotation of a term may enlarge as new things falling within the connotation come into existence or become known, the connotation itself remains constant from the time the text was enacted (referred to here as the time of framing).<sup>18</sup> This is arguably justified by the presumption that legislators generally intend to convey a certain essential meaning through the words they choose, and do not desire the words to simply bear whatever meaning they happen to have or can possibly have at the time when they fall to be interpreted. The conclusion would be otherwise if there is cogent textual and secondary evidence that Parliament had in fact intended to empower the court to disregard the meaning a term had when it was first enacted, but in the absence of such evidence is submitted the presumption is reasonable. In a common law jurisdiction, written laws serve to introduce a degree

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<sup>13</sup> McConnell, *ibid.*

<sup>14</sup> John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (9th edn Longmans, London 1875) 31–42; see *Street v Queensland Bar Association* (1989) 168 CLR 461, 537 (Dawson J).

<sup>15</sup> Birch (n 1) 455.

<sup>16</sup> Christopher R Green, ‘Originalism and the Sense–Reference Distinction’ (2006) 50 St Louis U LJ 555, 565.

<sup>17</sup> Goldsworthy, ‘Originalism’ (n 12) 31–32. See also Reed Dickerson, *The Interpretation and Application of Statutes* (Little, Brown, Boston, Mass 1975) 128 (“The connotations of words define their meanings, whereas their denotations consist merely of specific instances falling within those meanings.”), cited in Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd edn Butterworths, Toronto 1994) 142; and *Eastman v R* (2000) 203 CLR 1, 45, [142], in which McHugh J, quoting Leslie Zines, *The High Court and the Constitution* (4th edn Butterworths, Sydney 1997) 17, explained that the connotation of a term refers to ‘those qualities and only those qualities that a thing must have in order to come within the term’, while the denotation consists of ‘those objects or classes that have all the requisite qualities’.

<sup>18</sup> *Re Wakim* (n 2) 551–552, [42], citing *R v Commonwealth Conciliation and Arbitration Commission, ex parte Association of Professional Engineers, Australia* (1959) 107 CLR 208 (HC, Aust) 267 (*Professional Engineers Case*); *Eastman* (n 9) 43, [137]. See also the Australian High Court decisions *King v Jones* (1972) 128 CLR 221, 229; *Cheatle v R* (1993) 177 CLR 541; *Sue v Hill* (1999) 199 CLR 462. See also Goldsworthy, *ibid* 31; Jeffrey Goldsworthy, ‘Australia: Devotion to Legalism’ in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (OUP, Oxford 2006) 106 and 122.

of rigidity into its jurisprudence. The final appellate court is empowered to overrule the judgments of lower courts, and usually regards itself as entitled to depart from its own previous decisions in appropriate cases.<sup>19</sup> The court may quite easily reconsider and modify common law principles, but it has restricted discretion as regards legal principles contained in statutes. It may, to a limited extent, interpret statutory provisions differently from previous judgments, but it cannot ignore the text entirely. Thus, major changes to the statute can only be effected by the legislature. This is a *fortiori* true of constitutions and bills of rights contained within them, since written laws as these are often amendable only if more onerous procedures are followed. For instance, a constitutional amendment bill may need to achieve a special majority of legislators' votes or be approved at a national referendum to be passed. This implies that the court should regard the linguistic meaning of a statutory text as the one it had at the time it was adopted by legislators and enacted into law. To hold otherwise would essentially be disregarding the words chosen by the legislature.<sup>20</sup> Justice David Brewer of the US Supreme Court noted in *South Carolina v United States*:<sup>21</sup>

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.<sup>22</sup>

Another reason for regarding the connotation of a statutory term as fixed at the time of framing has to do with the nature of legislation as a tool for communication across time. By enacting a statute, the legislature is attempting to convey legal rules it has laid down to present and future generations of persons who may be affected by them. In order for this communication to be effective, it follows that the terms used by the legislature in the statute must be understood to have the linguistic meaning that they had at the time of enactment. If the terms could be construed with changed meanings, this would distort the sense of what the

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<sup>19</sup> See, for instance, the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (UK) and the Practice Statement (Judicial Precedent) [1994] 2 SLR 689 (Singapore). Lower courts are normally bound by the rules of *stare decisis* to apply the decisions of higher courts in the same judicial hierarchy: see, for example, *Cassell & Co Ltd v Broome* [1972] AC 1027 (HL); *Favelle Mort Ltd v Murray* (1976) 133 CLR 580 (HC, Aust); *Jusri bin Mohamed Hussain v Public Prosecutor* [1996] 3 SLR 551 (HC, Singapore).

<sup>20</sup> Compare Solum (n 11) 3: 'Why is constitutional meaning fixed, the time of origination? One common answer to this question focuses on the fact that the constitution is *written* and the notion that the function of a writing is to fix meaning through time.'

<sup>21</sup> 199 US 437 (1905).

<sup>22</sup> *Ibid* 448, cited in *Brewery Employés' Union Attorney-General (NSW) v Brewery Employés' Union of New South Wales* (1908) 6 CLR 469 (HC, Aust) 534. See also Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton University Press, Princeton, NJ 2004) 105–106: 'With a constitution, as with a contract, we look to the meaning established, the time of formation and for the same reason: If either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or "locks in" a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself. Writtenness ceases to perform that function if meaning can be changed in the absence of an equally written modification or amendment.'

legislature was attempting to get across.<sup>23</sup> Thus it was said in *Attorney-General (NSW) v Brewery Employés' Union of New South Wales* that when assessing the scope of the legislative powers of the Commonwealth of Australia Parliament, 'it is to the meaning in 1900 that we must look, for the plain reason that the Constitution previously framed in Australia became law in that year, and the framers cannot, of course, have had in their minds meanings which had not then come into existence'.<sup>24</sup> And Windeyer J commented in *R v Commonwealth Conciliation and Arbitration Commission, ex parte Association of Professional Engineers, Australia*: 'Law is to be accommodated to changing facts. It is not to be changed as language changes.'<sup>25</sup>

There is, however, an exception to the basic rule: a court may legitimately determine that the connotation of a term has 'changed' if fresh information shows that certain existing attributes of the term should never have been regarded as part of the connotation; or that the existing attributes do not fully delineate the term and that additional, new attributes must be included. This point is considered below.<sup>26</sup>

## B. DENOTATION

Disagreement exists over whether the denotation of a term changes over time. Christopher Birch, for instance, maintains that 'Mill's concept simply does not permit the denotation of a general name to change while the connotation remains the same'.<sup>27</sup> On the other hand, Goldsworthy says it is 'undeniable that the denotation of a constitutional term can change',<sup>28</sup> a position also taken by the Australian courts.<sup>29</sup> The opposing opinions may be one of the reasons why in *Eastman v R Kirby J* called the connotation–denotation distinction 'disputable' and said that he contested it.<sup>30</sup>

The disagreement appears to stem from differing understandings of what is meant by the denotation of a term. As indicated above, Birch takes the view that both the connotation and denotation of the term are fixed and unchanging at the time when the term is enacted into law. Taking his cue from Mill, he appears to regard denotation as a *description of the class* of all things to which the term can possibly refer. The scope of the class is determined by the attributes of the term, that is, the term's connotation. For example, he notes that the word *person*, if used in its general sense in a 1900 text, may denote the class of all beings belonging to the species

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<sup>23</sup> Solum (n 11) 66: 'Fixation explains how reliable communication across time is possible. Absent fixation, communication becomes impossible in cases in which the conventional semantic meanings of utterance types happen to change.'

<sup>24</sup> *Brewery Employés' Union* (n 22) 521; see also *ibid* 501: 'The meaning of the terms used in that instrument [the Australian Constitution] must be ascertained by their signification in 1900.'

<sup>25</sup> *Professional Engineers Case* (n 18) 267.

<sup>26</sup> See Pt II.C.1, below.

<sup>27</sup> Birch (n 1) 453.

<sup>28</sup> Goldsworthy, 'Originalism' (n 12) 31.

<sup>29</sup> See the cases mentioned in n 18 above, and compare *Brewery Employés Union* (n 22) 501 (Griffith CJ): 'The meaning of the terms used in that instrument [the Constitution] must be ascertained by their signification in 1900. ... On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject matters. So long as those new developments relate to the same subject matter the powers of the Parliament will continue to extend to them. For instance, I cannot doubt that the powers of the legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a like kind, although in detail they may be very different from posts and telegraphs and telephones as known in the nineteenth century.'

<sup>30</sup> *Eastman* (n 17) 80–81, [244].



*Homo sapiens*, whether they existed in the past, present or future.<sup>31</sup> In his eyes, the denotation of the word *person* is the label 'all beings belonging to the species *Homo sapiens*'. Therefore, whether one is interpreting the meaning of *person* in 1900 or in the present, the denotation of the word is constant as the description of the class of things answering to the name 'person' does not change.

Conversely, those who regard a term's denotation to be capable of changing over time equate denotation with the *class of things that comprise it*, and not the description of the class itself. Under this view, the denotation widens when things possessing the bundle of attributes that make up the term's connotation come into existence, even if they did not when the text was enacted and were not contemplated by the text's framers. Similarly, the denotation shrinks if it is discovered that things which were believed to be within the class should not longer be so regarded because they lack one or more of the attributes of the class.<sup>32</sup> An example given by McHugh J involves the term *internal carriage* in section 92 of the Australian Constitution. He said that the connotation of the term is any method of inland transport; it is submitted that the corresponding denotation is a group of related elements which are the various means of transportation used within Australia's borders. In 1900, when the Constitution came into force, the term's denotation included transport by horse-drawn carriages and trains, but today it also includes the carriage of goods within Australia by aeroplane.<sup>33</sup> The denotation can therefore be said to have widened, in that the number of elements in the group or class has increased.

Seen thus, there is no significant difference in principle between the opposing views of denotation. Provided semantic opportunism is rejected, there is consensus that the connotation of a term generally does not change over time, but that things having the attributes that form the connotation can come into or go out of existence. The disagreement over denotation arises from some persons focusing on the description of the class of things in question, and others on the class of things itself. While a Millian purist would probably find fault with the way the word *denotation* has been used by the Australian courts, since this is a well established usage it will be employed in the rest of this article.

Unlike a term's connotation, its denotation is not fixed at the time of framing. The potential scenarios falling within the scope of a constitutional term can change over time, depending on whether they possess the essential attributes of the term. It is contended that there are insufficient grounds for the view that a term's denotation must always be confined to that which existed at the time of framing or to scenarios that the framers foresaw, since constitutions and bills of rights are intended to set down fundamental principles of law that are assumed to endure for extended periods.<sup>34</sup> For instance, arguing a term such as *forced labour*<sup>35</sup> can only refer to

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<sup>31</sup> Birch (n 1) 452–453.

<sup>32</sup> For authority that a denotation can contract as well as expand, see *Australian National Airways Ltd v The Commonwealth* (1945) 71 CLR 29 (HC, Aust) 81; *Professional Engineers Case* (n 25) 267; *Lansell v Lansell* (1964) 110 CLR 353 (HC, Aust) 366; *R v Federal Court of Australia, ex parte WA National Football League* (1979) 143 CLR 190 (HC, Aust) 233–234; *Street* (n 14) 532–538; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 (HC, Aust) 197; and *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 (HC, Aust) 645–646, cited in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 (HC, Aust) 341.

<sup>33</sup> *Eastman* (n 17) 45, [143].

<sup>34</sup> Compare *Marbury v Madison* 5 US (1 Cranch) 137 (SC, US) 176 (1803), where Chief Justice John Marshall said that the exercise of the people's 'original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness... is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so

types of forced labour known to the framers is also illogical as it goes against the open-ended nature of the term.<sup>36</sup> In her dissenting judgment in *Canada (Attorney General) v Mossop*,<sup>37</sup> Justice Claire L'Heureux-Dubé said that even if Parliament had in mind a specific idea of the scope of a particular term in the Canadian Human Rights Act,<sup>38</sup>

in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task.<sup>39</sup>

As we will see later, whether the denotation of a term is narrow or wide depends on the level of abstraction of the concept that the term embodies.<sup>40</sup>

According to McHugh J, the connotation–denotation concept is now regarded by philosophers as outdated.<sup>41</sup> However, Christopher Green has pointed out that McHugh J relied on Professor Leslie Zines' statement in *The High Court and the Constitution* (4th ed, 1997) that 'the court has drawn a now outdated philosophical distinction between connotation and denotation',<sup>42</sup> but that Zines did not elaborate on why he felt the distinction was outdated nor cited any sources.<sup>43</sup> It is submitted that the connotation–denotation distinction continues to be relevant, at least for the purposes of statutory interpretation. A word or phrase naturally lends itself to a conceptual division between its 'meaning' (connotation) and 'applications' (denotation) in various contexts.<sup>44</sup> We might say, for example, that the meaning or connotation of the word *religion* is the belief in a supernatural Being, Thing or Principle and the acceptance of canons of conduct to give effect to that belief.<sup>45</sup> The applications or denotation of the word would be the things or scenarios that are signified by the connotation, in this case, faiths such as Buddhism, Christianity and Islam. Dawson J noted in *Street v Queensland Bar Association*:

[T]he attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them. ... [T]he principle which lies behind it... has never been doubted. It is that the limits within which a constitutional prescription operates

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established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent.'

<sup>35</sup> Singapore Constitution, Art 10(2): 'All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes.'

<sup>36</sup> The conclusion may be different if the word or phrase is a term of art: see nn 67–72 and the accompanying text, below.

<sup>37</sup> [1993] 1 SCR 554 (SC, Can).

<sup>38</sup> SC 1976–77, c 33, as amended by SC 1980–81–82–83, c 143.

<sup>39</sup> *Mossop* (n 37) 621, [110].

<sup>40</sup> See Pt II.C.2, below.

<sup>41</sup> *Re Wakim* (n 2) 552, [43].

<sup>42</sup> Zines, *The High Court and the Constitution* (n 17) 17: see Green (n 16) 578.

<sup>43</sup> Green, *ibid*.

<sup>44</sup> See Alexander Reilly, 'Reading the Race Power: A Hermeneutic Analysis' (1999) 23 *Melb U L Rev* 476, 482, for the use of the terms *meaning* and *applications* to explain the connotation–denotation distinction.

<sup>45</sup> *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 154 CLR 120 (HC, Aust) 137 (Mason ACJ and Brennan J).

do not change, however much changing circumstances may allow it to be applied to new situations.<sup>46</sup>

### C. APPLYING A CONNOTATION–DENOTATION ANALYSIS

#### 1. *Establishing Connotation*

In applying a connotation–denotation analysis to determine whether a term should be given a dynamic interpretation, the first step is to establish the connotation of the term in question. Following Mills’ understanding of connotation, the task at hand is to identify the bundle of attributes constituting the term’s meaning. It is necessary to discern attributes that are central to the meaning of the term, and to put aside those that are not. To try and capture this idea, Australian judges have used a multiplicity of phrases, speaking about identifying a term’s ‘really essential characteristics’,<sup>47</sup> ‘fundamental conception’,<sup>48</sup> ‘essential particulars’,<sup>49</sup> ‘essential differentia’,<sup>50</sup> ‘essential feature’<sup>51</sup> and ‘essential meaning’.<sup>52</sup> This issue is significant because the selection of an attribute as part of the term’s connotation has a profound impact on the scope of the denotation. For instance, the term *adult person* in section 41 of the Australian Constitution could mean either ‘person of or over 21 years of age’ or ‘person recognized by law as of mature age’. If the court determines that being at least 21 years of age is an attribute of an adult person within the meaning of section 41, then people aged between 18 and 21 years will not be regarded as such, even if the general age of majority has been lowered by ordinary legislation from 21 to 18 years.<sup>53</sup>

The task of identifying the ‘essential characteristics’ of a term has a somewhat metaphysical air to it. The remarks of Justice Antonin Scalia of the United States Supreme Court in *PGA Tour, Inc v Martin*<sup>54</sup> may be noted; he said that ‘to say something is “essential” is ordinarily to say it is necessary to the achievement of a certain object’.<sup>55</sup> And in the *Brewery Employés’ Union* case, Justice Isaac Alfred Isaacs explained:

To ascertain the really essential characteristics... it is necessary to distinguish what is merely occasional, though frequent, and to strip the expression of everything that is not absolutely fundamental. If we find some attribute universally attaching to the idea

<sup>46</sup> *Street* (n 14) 537–538.

<sup>47</sup> *Brewery Employés Union* (n 22) 560 (Isaacs J), and 535 (O’Connor J): ‘[T]he true line of inquiry is first to ascertain what were the essential characteristics of a “trade mark” in Australia, the time when the Constitution was passed, disregarding all conditions, qualifications, and attributes, which were not of its very nature and essence...’. See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 (HC, Aust) 528, [123] (‘really essential characteristics’); *Re Patterson, ex parte Taylor* (2001) 207 CLR 391 (HC, Aust) 495, [312] (‘essential characteristics’); and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 (HC, Aust) 61, [94] (‘essential character’).

<sup>48</sup> *Ibid* 577.

<sup>49</sup> *Ibid* 581 (Isaacs J, dissenting), citing *People v Fisher* 50 Hun 552, 3 NY Supp 786 (1889).

<sup>50</sup> *Brewery Employés Union* (n 22) 606.

<sup>51</sup> *Cheatle* (n 18) 560, cited in *McGinty v Western Australia* (1996) 186 CLR 140, 200–201 (Toohey J).

<sup>52</sup> *McGinty, ibid* 221 (Gaudron J).

<sup>53</sup> Which is what the Australian High Court decided in *King v Jones* (n 29): see Goldsworthy, ‘Originalism’ (n 12) 32.

<sup>54</sup> 532 US 661 (2001).

<sup>55</sup> *Ibid* 700.

in all circumstances, that attribute is probably indispensable; but if any feature, however usual its presence may be, is not invariably existent, ... it cannot, I apprehend, be asserted that the fundamental concept includes the variable feature.<sup>56</sup>

Beyond these statements, it is probably futile to try and lay down rigid guidelines for determining when the attributes or characteristics of a term are essential to its meaning. Nevertheless, it is to be borne in mind that the court's broad task at hand is to establish the ordinary public meaning that the term would have had when the constitution became law.

This will involve considering the natural and ordinary meaning of the term in context, which in turn necessitates looking at the legislative purpose of the provision that the term appears in. The court should adopt a connotation that best promotes this purpose.<sup>57</sup> It has been suggested by Ruth Sullivan that when a question of interpreting the Canadian Charter of Rights and Freedoms arises, courts in that jurisdiction do not regard the original purpose of the Charter as binding. Instead, it is said that they 'construct a purpose that is appropriate, having regard to the current social and ideological climate as well as the historical evolution of the Charter', thus enabling a 'progressive approach' to be adopted towards Charter interpretation.<sup>58</sup> In support of this, reliance was placed on comments by Justice Antonio Lamer in *Reference re Section 94(2) of the Motor Vehicle Act, RSBC 1979, c 288*<sup>59</sup> relating to interpreting the Charter by reference to comments made by officers of the Executive. He said that 'in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs'.<sup>60</sup> It is submitted that as a reminder that judges should not interpret constitutional terms too narrowly, the Supreme Court's holding is laudable and consistent with the presumption that constitutions and bills of rights should be interpreted generously.<sup>61</sup> It is quite another thing, though, to read it as providing justification for a court to ignore the original legislative purpose of a statutory provision and to formulate a new purpose as the basis for interpreting terms in the provision. As was pointed out in *R v Big M Drug Mart Ltd*,<sup>62</sup> legislative purpose 'is a function of the intent of those who drafted and enacted the legislation at the time, and not of any shifting variable'.<sup>63</sup> Although this was said with reference to an ordinary statute and not the Canadian Charter, there is no reason why the logic should not equally apply to a constitutional

<sup>56</sup> *Brewery Employés' Union* (n 22) 560 (Isaacs J, dissenting).

<sup>57</sup> Goldsworthy, 'Originalism' (n 12) 32, citing Leslie Zines, 'Characterisation of Commonwealth Laws' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co Ltd, North Ryde, NSW 1992) 33, 40, 41–42. Geraldine Chin, 'Technological Change and the Australian Constitution' (2000) 24 *Melb U L Rev* 609, 640, argues that the purpose of a statutory provision should be used to determine the essential meaning of a term *in place of* the connotation–denotation distinction. It is submitted that an undesirable consequence of this approach is that a court may be tempted to ignore the ordinary public meaning of a term at the time the statute came into force in order to fulfil the purpose of the provision that it appears within.

<sup>58</sup> Sullivan, *Driedger on the Construction of Statutes* (3rd edn) (n 17) 48–49. The point no longer seems to appear in the 5th edition of the work, *Sullivan on the Construction of Statutes* (5th edn LexisNexis Canada, Markham, Ont 2008).

<sup>59</sup> [1985] 2 SCR 486 (SC, Can).

<sup>60</sup> *Ibid* 509, [53].

<sup>61</sup> See, for example, *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 (PC on appeal from Singapore) 670, [1979–1980] SLR(R) 710, 721, [23], citing *Minister of Home Affairs v Fisher* [1980] AC 319 (PC on appeal from Bermuda) 328.

<sup>62</sup> [1985] 1 SCR 295 (SC, Can).

<sup>63</sup> *Ibid* 335, [91].

document. Moreover, a provision's purpose is an integral part of the context which should be considered when interpreting the provision. It is to be discerned in the first place from the text itself, and secondarily from other sources such as legislative debates. If the court were to accept fresh explanations of a provision's purposes from the executive branch, this would provide a novel and unorthodox avenue for the interpretation of the provision to be manipulated without the matter being debated by the legislature. It is contended that the latter is the appropriate method for the legislature to imbue an existing provision with a new purpose. If Parliament has had occasion to reconsider a provision and there is cogent evidence that it has decided to retain it unchanged for fresh purposes, this ought to be taken into account by the court. However, absent such a scenario, even though constitutional provisions should be interpreted liberally since they are intended to remain relevant in changing times and circumstances, this is no warrant for a court to ignore the original legislative purpose and construct a largely fictitious one.

In addition, the constitutional text may in fact stipulate the meaning of the term in question (no doubt to the great relief of judges),<sup>64</sup> or there may be implications to be drawn from the text.<sup>65</sup> Where a word or phrase is a term of art, it may be necessary to give it the technical meaning that it has gained at common law.<sup>66</sup> Such a meaning was given by a majority of the High Court of Australia in the *Brewery Employés' Union* case<sup>67</sup> to the term *trade marks* in section 51(xviii) of the Australian Constitution, which authorizes the Parliament 'to make laws for the peace, order, and good government of the Commonwealth with respect to... [c]opyrights, patents of inventions and designs, and trade marks'. The majority examined in detail how the term was understood in legislation and court decisions and by the commercial community at the time the Constitution came into force. In the later decision of *Sue v Hill*,<sup>68</sup> one of the issues was whether in 1999 the United Kingdom was a 'foreign power' for the purposes of section 44(i) of the Australian Constitution, which provides that any person who 'is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ... shall be incapable of being chosen or of sitting as a senator', though it was certainly not regarded as such at the time the Constitution was framed. Justice Mary Gaudron identified the first question arising as whether the term *foreign power* 'bears its ordinary meaning or is used in some special sense which forever excludes the United Kingdom'.<sup>69</sup> She went on to find that it was not used in a special sense as the Constitution was a foundational document clearly intended to serve the Australian people well into the future. Furthermore, 'foreign power' was an abstract concept apt to describe different nation states at different times according to their circumstances.<sup>70</sup> Therefore, since the relationship between Australia and the United Kingdom had evolved over time, at the present it was appropriate to regard the United Kingdom as a foreign power. This is a reminder of the lesson taught by *R v Therens*:<sup>71</sup> where fundamental liberties would be abridged, one must be wary of assigning to a constitutional expression the technical meaning accorded by the courts to a term appearing in ordinary legislation (or, by extension, a term defined at common law). As Gaudron J noted in *Sue v Hill*,

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<sup>64</sup> Solum (n 11) 56.

<sup>65</sup> *Ibid* 57.

<sup>66</sup> *Ibid* 55.

<sup>67</sup> *Brewery Employés' Union* (n 22).

<sup>68</sup> (1999) 199 CLR 462 (HC, Aust).

<sup>69</sup> *Ibid* 524, [161].

<sup>70</sup> *Ibid* 524–525, [162].

<sup>71</sup> [1985] 1 SCR 613 (SC, Can).

since a constitution is intended to retain relevance over the *longue durée*, it may not have been the intention of the framers to restrict the potential extent of the document in this manner.<sup>72</sup>

The legislature is not entitled to alter the meaning of a constitutional term by way of ordinary legislation enacted after the time of framing either. It was held in *Brewery Employés' Union* that the Parliament of the Australian Commonwealth was not entitled to enlarge its legislative powers 'by calling a matter with which it is not competent to deal by the name of something else which is within its competence'.<sup>73</sup> It could not, therefore, purport to treat workers' trade marks defined in the Trade Marks Act 1905 (Cth)<sup>74</sup> as 'trade marks' within the meaning of section 51(xviii) of the Constitution, which authorizes the Parliament 'to make laws for the peace, order, and good government of the Commonwealth with respect to... [c]opyrights, patents of inventions and designs, and trade marks'. Permitting a legislature to redefine constitutional terms through ordinary legislation, unless expressly provided for by the constitution itself, amounts to a circumvention of the statutory procedure established for amending a written constitution. Of course, the executive and legislature both have a duty of interpreting the constitution when carrying out their functions, and the courts are entitled to take such interpretations into account. However, the views of the political branches on this matter are not conclusive. Ultimately it is the courts' responsibility alone to authoritatively determine the meaning of terms.

Considering a term's applicative meaning may also assist in the ascertainment of its essential characteristics, to the extent that it is possible to discern possible applications of the term that the constitution's framers had in mind. This is to be distinguished from the practice, said to have been adopted by some courts, of developing the connotation of a term from familiar examples (that is, the elements of the denotation) known at the time when the matter is brought before the court.<sup>75</sup> As a result, the essential meaning of the term is distorted, possibly to achieve a desired result.<sup>76</sup> The practice creates a bootstrapping problem – a term's denotation is determined by its connotation, which is fixed at the time the constitution was enacted into law. However, the connotation would constantly change if modern scenarios are used to determine its essential characteristics. Arguably, the problem can be avoided if modern examples are judiciously considered to see only what light they shed on the essential meaning of the term as it was understood at the time of framing.

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<sup>72</sup> Cf the comments of Kirby J in *Shaw* (n 47) 59–60, [89]: '[T]he task of this Court is to give meaning to the constitutional word "aliens" not for some other purpose but solely for the purpose of defining the operation of the fundamental law of the Australian nation and people.' Thus, in his Honour's view, the term *aliens* appeared in the Australian Constitution in a different context from the concept of alienage as expressed in old English common law cases from the times of the Stuart kings (*Calvin's Case* (1608) 7 Co Rep 1a, 77 ER 377) or the Hanoverian succession (*In re Stepney Election Petition, Isaacson v Durant* (1886) 17 QBD 54, 59–60), and in United States cases immediately after the American Revolutionary War (*Re Patterson* (n 47) 482, [274], and the US cases referred to therein).

<sup>73</sup> *Brewery Employés' Union* (n 22) 501. See also *Pochi v Macphee* (1982) 151 CLR 101 (HC, Aust) 109 (Gibbs CJ): 'the Parliament cannot, simply by giving its own definition of "alien", expand the power under s 51(xix) [of the Australian Constitution] to include persons who could not possibly answer the description of "aliens" in the ordinary understanding of the word'.

<sup>74</sup> No 20 of 1905.

<sup>75</sup> Chin (n 57) 632, citing Zines, *The High Court and the Constitution* (n 17) 19; and P[atrick] H[arding] Lane, *Lane's Commentary on the Australian Constitution* (2nd edn LBC Information Services, North Ryde, NSW 1997) 911–912.

<sup>76</sup> Chin, *ibid* 633–634.

Although connotation is supposed to remain unchanged, some judges have stated that the framers of the constitution or earlier judges may not have correctly or fully appreciated the import of the text. In *Re Wakim*, McHugh J noted that

the meanings that we now place on the Constitution may not entirely coincide with the meanings placed on it by those who drafted, approved or enacted that document. ... Experience derived from the events that have occurred since its enactment may enable us to see more in the combination of particular words, phrases or clauses or in the document as a whole than would have occurred to those who participated in the making of the Constitution.<sup>77</sup>

The point is fairly taken, since it is unreasonable to assume that the framers and prior interpreters of the text are infallible.<sup>78</sup> McHugh J's view also provides a possible justification for Kirby J's remarks in *Grain Pool of Western Australia v Commonwealth* that 'the Court's search has become one for the contemporary meaning of constitutional words, rather than for the meaning which those words held in 1900. ... What constitute such "really essential characteristics" may grow and expand, or may contract over time',<sup>79</sup> which otherwise express his preference for semantic opportunism. However, accepting that courts have the power to redefine connotations from time to time is an acknowledgement that judges exercise significant discretion in this regard. It is submitted this should not be regarded as undesirable as it is simply a feature of Westminster constitutional systems. Judges must not act like amanuenses of the political branches in deciding difficult cases; they are expected, and guaranteed independence, to exercise personal discernment. By conducting themselves in this manner, they fulfil their role in the constitutional dialogue that takes place between the judiciary and the political branches of government.

Admittedly, the task of establishing the essential characteristics, and thus the connotation, of a term will sometimes be less than straightforward.<sup>80</sup> Despite the court's best efforts, there may be insufficient information for it to determine with certainty the attributes by which the framers of the text intended the term's

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<sup>77</sup> *Re Wakim* (n 2) 553, [46], citing *Victoria v The Commonwealth* (1971) 122 CLR 353, 396 and *Theophanous* (n 32) 197. See also *McGinty* (n 51) 221 (Gaudron J) ('The words... are to be approached on the basis that, although their essential meaning is unchanged, "their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge"', citing *James v The Commonwealth* (1936) 55 CLR 1, 43); *Eastman* (n 17) 46, [147] (McHugh J) ('[T]he present generation may see that the provisions of the Constitution have a meaning that escaped the actual understandings or intentions of the founders or other persons in 1900').

<sup>78</sup> Goldsworthy notes that unexpected developments can change the understanding of what a word means, revealing that a characteristic previously associated with it was never really essential. He cites the example of the discovery of black swans, which showed that swans need not be white: see Goldsworthy, 'Australia: Devotion to Legalism' (n 18) 151.

<sup>79</sup> *Grain Pool* (n 47) 525, [117], and 530, [129] (footnote omitted). See also Kirby J's opinion in *Re Patterson* (n 47) 495, [311]: 'It is entirely consonant with my approach to the interpretation of the Constitution to accept that the meaning of constitutional words vary over time. That meaning is to be ascertained by reference to the essential characteristics of the concept signified by the words, not by searching, as such, for how the framers in 1900 would have read them or intended them to operate.'

<sup>80</sup> Goldsworthy, for instance, has taken the view that the connotation–denotation distinction 'can be very difficult, and perhaps in some cases impossible, to apply': Goldsworthy, 'Originalism' (n 12) 32. See also Goldsworthy, 'Australia: Devotion to Legalism' (n 18) 151, citing Zines, 'Characterisation of Commonwealth Laws' (n 57) 35: '[W]hen a word enacted in 1900 must be applied, many decades later, to circumstances not envisaged by the framers, it is often difficult if not impossible to know what criteria they themselves – if they had envisaged those circumstances – would have regarded as essential for its correct application.'

connotation to be constituted. In this case, it is submitted that the court should apply the presumption in favour of generosity and articulate a reasonable connotation that maximizes rights. In addition, it should bear in mind the need for pragmatism and avoid a result that is excessively inconvenient or unworkable.

## 2. *Determining Denotation*

The connotation of a term determines its denotation. Having identified the attributes and thus the essential meaning of the term, the court's task is then to determine whether a particular scenario raised by a dispute falls within the essential meaning. In this respect, the ambit or scope of a term's denotation depends on the extent to which the term embodies abstract concepts. Where a term has a broad connotation and expresses one or more concepts at a high level of abstraction, it will have a wider denotation. This makes it more likely that a scenario at hand will come within the denotation of the term. The word *religion* referred to previously is a prime example of such a term. On the other hand, a term narrow in meaning will have a similarly restricted denotation. It may even be the case that the denotation of the term contains only a single scenario.

It might be argued that denotation, like connotation, is fixed at the time when the term in question is enacted into law. Taking this view would mean, for example, that the denotation of the phrase *cruel and unusual punishment* in the Eighth Amendment to the United States Constitution is limited to those forms of punishment regarded as cruel and unusual when the Amendment came into force in 1791. It is submitted the correctness of the statement depends on the ambit of the term's connotation. A term with a narrow meaning may indeed have a denotation limited to scenarios existing at the time of enactment, and no others. On the other hand, such a conclusion is unwarranted if the framers of the text have chosen to use a term bearing a wide connotation without qualification. In *Re Wakim*, McHugh J noted that many words and phrases of the Australian Constitution 'are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered'.<sup>81</sup>

Ronald Dworkin's distinction between 'conceptions' and 'concepts' is similar. He says that the members of a community may give instructions or set standards by laying down, say, a particular conception of fairness – that is, by explaining what fairness entails in certain cases, or by specifying some explicit theory of how fairness is to be determined.<sup>82</sup> This is akin to Parliament having employed a statutory term with a narrow connotation, with the result that only a limited number of scenarios existing at the time of framing constitute its denotation. On the other hand, the members of a community may simply direct persons to act fairly. In this case, they

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<sup>81</sup> *Re Wakim* (n 2) 552, [44]. See also Sullivan, *Sullivan on the Construction of Statutes* (5th edn) (n 58) 502–503: 'A text that is written in general or abstract language invites an organic approach... In so far as an "organic" approach consists of adapting legislation to evolving conceptions of society and its basic values, it is a normal and appropriate part of interpretation. Courts are bound to respect the meaning of words used by the legislature, but given the plastic character of language, especially the general language typically found in human rights codes, this constraint does not prevent the courts from taking a flexible and adaptive approach.'

<sup>82</sup> Ronald Dworkin, 'Constitutional Cases' in *Taking Rights Seriously* (Harvard University Press, Cambridge, Mass 1977) 136.



are appealing to a concept of fairness and conferring on those they are instructing the responsibility of developing and applying their own conception of fairness as controversial cases arise.<sup>83</sup> Again, this is comparable to Parliament using a term with a broad connotation, a vague term bearing an abstract essential meaning. It is reasonable for the courts to take this as an indication that they must decide for themselves the scope of the term's denotation, which is not to be regarded as frozen as at the time of framing.

An example of how the court may find a connotation–denotation analysis useful when deciding if a statutory term is applicable to a novel scenario is provided by *Fitzpatrick v Sterling Housing Association*, though the analysis was not expressly adverted to.<sup>84</sup> The plaintiff had lived with the protected tenant of a flat in what the House of Lords found to be a stable and permanent homosexual relationship. One of the issues that arose was whether the plaintiff could take over the tenancy of the flat from his partner after the latter's death as 'a member of the original tenant's family', pursuant to paragraph 3(1) of Schedule 1 of the Rent Act 1977.<sup>85</sup> Lord Slynn of Hadley noted that the tenancy succession provision had first appeared in the Increase of Rent and Mortgage Interest (Restrictions) Act 1920.<sup>86</sup> Essentially conducting a connotation–denotation analysis, his Lordship therefore stated that the questions to ask were what the characteristics of the term *family* in the 1920 Act (which was not a term of art) were, and whether two same-sex partners could satisfy those characteristics.<sup>87</sup> To identify the characteristics of the term, it was necessary to determine the purpose sought to be achieved by Parliament through the legislation.<sup>88</sup> Lord Nicholls of Birkenhead cited *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* to similar effect:<sup>89</sup>

A statute must necessarily be interpreted having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed at that state of affairs. When circumstances change, a court has to consider whether they fall within the parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an extension is made.

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<sup>83</sup> *Ibid.*

<sup>84</sup> [2001] 1 AC 27 (HL). See also *Attorney-General v Edison Telephone Company of London (Limited)* (1880–1881) LR 6 QBD 244 (Ex D) (telephone falling within the definition of *telegraph* in the Telegraph Act 1869 (32 & 33 Vict, c 73) even though the device had not been invented, the time the Act came into force); *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327 (HC, Aust) (reference in legislation to powers of council to provide 'gas' included supply of liquefied petroleum gas, even though only coal gas available at time when legislation enacted; Barwick CJ at 331: 'I can see no reason why, whilst the connotation of the word "gas" will be fixed, its denotation cannot change with changing technologies.'). cited in D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (4th edn Butterworths, Sydney 1996) 92–93, [4.8]; *R v Ireland* [1997] QB 114 (CA) (appellant who caused psychological harm to women victims by making repeated telephone calls to them and remaining silent when they answered committed 'assault' within meaning of Offences against the Person Act 1861 (24 & 25 Vict, c 100) s 47); and *Victor Chandler International v Customs and Excise Commissioners* [2000] 1 WLR 1296 (CA) (s 9(1)(b) of Betting and Gaming Duties Act 1981 (c 63), which prohibits issuing, circulation or distribution in the United Kingdom of any advertisement or other document inviting the making of bets, breached if Gibraltar company broadcasts betting odds on teletext in the UK by direct electronic transmission from terminal in Gibraltar).

<sup>85</sup> 1977 c 42 (UK).

<sup>86</sup> 10 & 11 Geo V, c 17: see *Fitzpatrick* (n 84) 40.

<sup>87</sup> *Fitzpatrick*, *ibid* 35.

<sup>88</sup> *Ibid* 38.

<sup>89</sup> [1981] AC 800 (HL) 822 (Lord Wilberforce).

How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it was expressed.<sup>90</sup>

Lord Slynn held that the intention in 1920 had not just been for a protected tenant's legal wife but also other members of the family unit occupying the property on the death of the tenant to succeed to the tenancy. In his view, a transient superficial relationship or mere cohabitation by friends for convenience did not amount to a family;<sup>91</sup> the hallmarks of the relationship were a degree of mutual interdependence, sharing of lives, caring and love, and commitment and support.<sup>92</sup> Lord Nicholls spoke of the sharing of lives together in a single family unit living in one house;<sup>93</sup> while Lord Clyde referred to bonds of love and affection, not of a casual or transitory nature but in relationships which were permanent or at least intended to be so.<sup>94</sup> Here, the judges were establishing the attributes of the term which determined its connotation. A majority of the House went on to find that the plaintiff should be regarded as a member of the tenant's family for the purposes of the Act – the relationship between the plaintiff and the tenant thus fell within the denotation of the term *family* in the Act.

In *Fitzpatrick*, Lord Slynn said that another way of approaching the matter was to ask whether the meaning of the term *family* needed to be updated so as to be capable of including persons who today would be regarded as being a member of another's family, whatever the term might have meant in 1920.<sup>95</sup> However, he eventually did not rely on this approach. Instead of regarding the meaning of the word *family* as having changed, he was of the opinion it was better to say that the situations capable of falling within the words had changed.<sup>96</sup> It is submitted that this view is correct. The 'updating construction' approach appears to derive from Francis Bennion, who has stated that there is a common law presumption that Parliament intends the court to apply to an ongoing Act<sup>97</sup> 'a construction that continuously updates its wording to allow for changes since the Act was initially framed'.<sup>98</sup> Bennion views the presumption as reflecting the principle that an ongoing Act is to

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<sup>90</sup> *Fitzpatrick* (n 84) 45.

<sup>91</sup> *Ibid* 40.

<sup>92</sup> *Ibid* 38.

<sup>93</sup> *Ibid* 44.

<sup>94</sup> *Ibid* 51. Lord Clyde added that as a result of the personal attachment, other characteristics followed, such as a readiness to support each other emotionally and financially, to care for and look after the other in times of need, and to provide a companionship in which mutual interests and activities could be shared and enjoyed together. He noted it would be difficult to establish such a bond unless the couple were living together in the same house, and if there was not an active sexual relationship between them or, least the potentiality of such a relationship. While the existence of children were not a necessary element, if the couple had or were caring for children whom they regard as their own this made the family designation more immediately obvious: *ibid*.

<sup>95</sup> *Ibid* 35.

<sup>96</sup> *Ibid* 39. Lord Clyde, too, expressed the view that what had changed was not the essential meaning of the word *family*, but the precise personal associations to which the concept might now be applied: *ibid* 50.

<sup>97</sup> According to Bennion, an ongoing Act is an Act intended to develop in meaning with developing circumstances, and is to be distinguished from a fixed-time Act which is intended to be of unchanging effect: F[rancis] A[lan] R[oscoe] Bennion, *Statutory Interpretation: A Code* (5th edn LexisNexis, London 2008) 889–890, s 288.

<sup>98</sup> *Ibid* 890, s 288. Bennion was expressly cited in *R v Westminster City Council, ex parte A* (1997) 9 Admin LR 504, 509; in *Fitzpatrick* (n 84) 35 and 50; and in *Victor Chandler* (n 84) 1303, paras 27–28, and 1305–1306, [35].

be taken to be ‘always speaking’:<sup>99</sup> ‘[I]n its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law.’<sup>100</sup> The careful wording of Bennion’s explanation deserves to be noted, and preferred to looser formulations such as that proposed by D C Pearce and R S Geddes in the Australian context: ‘[W]ords in an Act are to be interpreted in accordance with their current meaning’.<sup>101</sup> Inasmuch as it may be argued that an updating construction implies the essential meaning of a statutory term changes over time, it is submitted that this is erroneous. Construing the presumption in favour of an updating construction in this manner would promote semantic opportunism, which we have already rejected.

A court may also be confronted by a situation where semantic drift has occurred – the modern meaning of a term is no longer the same as that when it was enacted. This modern meaning can be detected by having regard to, among other things, the term’s present semantic meaning in the context of the legislation it appears in, judicial notice and, where appropriate, the testimony of witnesses. In line with the general principle that a term’s connotation does not change, the court is bound to give effect to the original meaning. This is akin to Bennion’s ‘box principle’, which he explains as follows:

An Act uses a term T1. The meaning of T1 at the date when the Act is passed indicates that it comprises A, B, C and D. (In other words, T1 is like a box containing those four elements and no others.) By the time the instant case is heard, the meaning of T1 has changed. Now the box contains A, B, E and F, and nothing else. However, another term T2 is now in use. The box which is T2 contains, at the date of the instant case, the elements A, B, C and D (and no others). For the purposes of that case, the Act is to be read as if instead of T1 it used the term T2. (If there was in fact no new term T2, it would be necessary to use instead a form of words which embraced A, B, C and D, and nothing else.)<sup>102</sup>

The box principle is entirely in line with the connotation–denotation analysis. The elements A, B, C and D in Bennion’s exposition are equivalent to the attributes comprising a term’s connotation, which are regarded as fixed. On the other hand, Pearce and Geddes suggest a different test: ‘Would the legislature have intended to include the activity or thing in the expression if it had known about it?’<sup>103</sup> With respect, it is submitted that this test is unacceptably speculative. Basically, it requires a counterfactual intention to be imputed to the legislature. The connotation–denotation analysis, reflected in Bennion’s box principle, is to be favoured.

Applying this analysis to the example concerning the interpretation of section 51(xxi) of the Australian Constitution raised by McHugh J in *Re Wakim*,<sup>104</sup> if the connotation of the term *marriage* at the time of framing was a voluntary union for life of one man and one woman to the exclusion of all others, this remains unchanged. Hence, these are the essential attributes of the term that will decide its denotation. Even if at the time the issue comes up for decision the word *marriage*

<sup>99</sup> Citing Lord Thring, *Practical Legislation* (John Murray, London 1902) 83: see Bennion, *ibid* 891, s 288.

<sup>100</sup> Bennion, *ibid* 890, s 288.

<sup>101</sup> Pearce and Geddes (n 84) 91, [4.6].

<sup>102</sup> Bennion (n 97) 907, s 288.

<sup>103</sup> Pearce and Geddes (n 84) 94, [4.9].

<sup>104</sup> See nn 2–5 and the accompanying text, above.

has gained a wider meaning in the community, it is submitted that it would be incorrect for the court to depart from the original understanding of the term.<sup>105</sup>

### III. CONCLUSION

In Australian jurisprudence, the connotation of a statutory term is the unchanging bundle of attributes that constitutes its meaning, while its denotation is the collection of things or scenarios to which the term refers. There are compelling reasons why the connotation of a constitutional term should be regarded as fixed as at the time of framing rather than changing. Arguably, when a legislature enacts a statute, its central intent is to create binding legal rules and communicate them to present and future generations of administrators, lawmakers and judges, and the public at large. Thus, barring specific textual and secondary evidence to the contrary, it is unlikely that the framers of a constitution intended to confer on the courts the discretion to completely ignore the message they were trying to convey. If the courts did act in this manner, they would be practising ‘semantic opportunism’. Constitutional terms would be subject to reinterpretation only if their linguistic meanings happened to have altered over time. This would make the interpretive process highly fortuitous.

On the other hand, the presumption should be that the denotation or applicative meaning of terms and provisions is not frozen as at the time of framing. The potential scope of application of a term depends on whether it embodies abstract concepts or not. If it does not, there is a possibility that the term may indeed apply only to scenarios existing or foreseen at the time of framing. The converse is true when the legislature has chosen to express itself in vague terms and has neither attempted to define them nor indicated their scope. There is every reason to suppose that framers intended to leave it to the court to determine how such terms and provisions should be applied on a case-by-case basis, particularly in view of the fact that constitutions and bills of rights lay down fundamental principles that are supposed to persist for extended periods.

Applying a connotation–denotation analysis is a practical way to determine how a term should be interpreted in the light of a semantic shift in the meaning of the term, or changed circumstances. Ascertaining connotation entails discerning the attributes that are central to the term’s meaning. This is by no means always a straightforward task, and it is probably unrealistic to try and articulate rigid rules for determining whether a particular attribute is an essential characteristic of a term. It should be appreciated that the task of identifying the connotation of a term is basically the ascertainment of the ordinary public meaning that the term bore when the constitution was framed. However, where there is a lack of convincing evidence indicating what the framers regarded as the essential meaning of the term, the court

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<sup>105</sup> Interpreting the term *marriage* in this way would not necessarily mean that the Australian Commonwealth Parliament has no power to legislate to, say, authorize same-sex unions. By s 51(xxi) of the Australian Constitution, the Parliament is empowered to ‘make laws... *with respect to...* marriage’ [emphasis added]. Arguably, a law authorizing same-sex unions is a law ‘with respect to’ the traditional understanding of marriage because it confers on such unions a status comparable to that of marriage. In *Re Wakim* (n 2) 554, [47], McHugh J said that ‘the indeterminate nature of the words “with respect to”... may result in subjects now falling within the scope of the Commonwealth power although most people in 1901 would have denied that the Commonwealth had power in respect of such subjects’. Thus, because the legal profession now had connections with almost every aspect of trade and commerce, taxation, trading and financial corporations, banking, insurance, copyrights, patents, bankruptcy, insolvency and matrimonial causes, the Commonwealth Parliament might have regulatory powers over the profession that would have been regarded as unthinkable in 1901: *ibid.*

should apply a presumption of generosity and articulate a connotation that maximizes rights while trying to avoid impractical results.

The connotation of a term determines the scope of its denotation – the denotation will be wider (that is, more things or scenarios will come within the term's meaning) when the term expresses abstract concepts. This is line with the view that a moderately originalist approach to the interpretation of constitutions and bills of rights should not require courts to always read the legislative text as it was understood at the time of its enactment. Depending on the language of the text, it may be appropriate for a dynamic interpretation to be adopted.

The method of interpretation proposed here might be criticized for focusing on the technicalities of how meaning should be attributed to the words and phrases used in the text, rather than encouraging the taking of a broad-brush approach. It is submitted that we must not overlook the fact that constitutions and bills of rights are statutes, and must generally be treated as such except where their special nature requires otherwise. The method mandates fidelity to the ordinary public meaning of the text at the time of framing. In any case, it is evident that the interpretive method discussed also reposes significant discretion in judges to determine the meaning of constitutional terms. For instance, fresh knowledge or factual scenarios coming to the court's attention since the text was framed may justify a judge in holding that the prior formulation of a term's connotation is inaccurate and should be revised, even though connotation is understood to be constant and unchanging. Furthermore, courts have much leeway in deciding how vague terms appearing in the text should be applied. This should not cause dismay, for it is submitted that this is precisely the responsibility that is envisaged for judges, at least in Westminster-style systems, with written constitutions and bills of rights.

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