Conceptions of democracy and the administrative state in the shaping of Australian judicial review of administrative action

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Conceptions of democracy and the administrative state in the shaping of Australian judicial review of administrative action

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In recent decades Australian judicial review of administrative action has been characterised as having taken a different shape to review in countries with a similar common law heritage. One explanation given for this difference is an attachment to what has been called 'formalism' or 'legalism' in Australian judicial doctrine. This thesis argues that instead, the source of the difference lies in the different normative institutional values of the Australian system of law and government.

This thesis is divided into two parts. Part I sketches the contemporary framework of judicial review of administrative action in Australia. It looks at three defining features of it, the constitutional separation of judicial power, the distinction between merits and legality and the concept of jurisdictional error. This part of the thesis draws out the ways in which these features can be recognised as the product of a notion of judicial power which is responsive to institutional context.

Part II of the thesis turns to a consideration of the normative values that have shaped conceptions of institutional power in Australia. This part of the thesis argues that, owing to the period in which the Australian Constitution was adopted, and certain aspects of Australian history, the Australian conception of government is characterised by what can be termed 'new liberalism' or 'progressivism', giving what can be recognised as a 'functionalist' character to Australian public law. A key tenet of new liberalism was that freedom was to be achieved through the state. A further tenet was that the people should be 'self-governing'. Both ideas can be distinguished from the classical conception of liberalism at the centre of the traditional Diceyan conception of constitutionalism. This thesis argues that the presence of these ideas in the decades before and after Federation can be regarded as having helped to shape a concept of judicial power, which operates to prevent arbitrary state action and protect the overall health of the constitutional system itself, but otherwise leave questions of public policy or morality for resolution by the people themselves through the political process.

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1.
INTRODUCTION

> Laws should be so appropriate to the people for whom they are made that it is very unlikely that the laws of one nation can suit another.
>
> Montesquieu[1]

1.1 AIM OF THIS THESIS

The aim of this thesis can be stated simply: to enquire into why it is that, despite its common law heritage, the doctrine of judicial review of administrative action in Australia has taken a somewhat different shape and tone to that of other nations with similar systems of government.[2] Although the reasons for this might be thought to be obvious, the orthodox analysis of Australian doctrine sometimes proceeds from certain assumptions, which themselves will be challenged in this thesis.

My work on this thesis began with a question about the nature and scope of the unreasonableness ground of judicial review in Australia. Typically, at least until the decision of the High Court in *Minister for Immigration and Citizenship v Li* ('*Li*'),[3] the ground in Australia was thought to have been aligned to the closely confined ground of review derived from the case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*.[4] In this case, Lord Green MR had famously said that for an administrative decision to be so unreasonable that it took a decision-maker outside the lawful scope of their discretion it had to be 'so unreasonable that no reasonable authority could ever have come to it.'[5]

In comparable common law countries, courts had moved beyond this restrictive approach to the unreasonableness ground.[6] The perception that Australian courts had not done so has contributed to the observations of scholars such as Michael Taggart and Dean Knight

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1 Montesquieu, *The Spirt of the Laws* tr Anne Cohler, Basia Carolyn Miller, Harold Samuel Stone (eds) (Cambridge University Press, 1989) 8.

2 For instance, England, Canada and New Zealand. For a recent comparative study of judicial review in these nations see Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018). This is not a comparative thesis; however, it draws upon English doctrine and debates where necessary.

3 ('*Li*') (2013) 249 CLR 332.

4 [1948] 1 KB 223.

5 Ibid 234.

6 For the English approach see chapter 6 at 6.3.3.

that Australia had become a kind of outlier in terms of its doctrine of judicial review of administrative action.[7] The reason typically given for the different Australian approach to judicial review is its written or 'rigid' Constitution, or rather certain features of it.[8] These include the absence of a bill of rights or other formal rights instrument at the national level,[9] and also the stricter separation of judicial power that is required by Ch III of the Constitution.[10]

Li, however, appeared to adjust the unreasonableness ground of judicial review of administrative action. For instance, in a joint judgment, Hayne, Kiefel and Bell JJ said that '*Wednesbury* is not the starting point for the standard of unreasonableness, nor should it be considered the end point.'[11] They went on to explain that decision-making could acquire the quality of unreasonableness, in the legal sense, in a range of ways, including where it lacked 'an evident and intelligible justification.'[12]

This decision seemed, at the time, to raise a number of questions. Both the joint judgment and the judgment of French CJ contained obiter references to a lack of proportionality as a possible indicium of unreasonableness,[13] a word which until then had usually been avoided in Australian judicial review of administrative action.[14] Even leaving this to one side, the apparent unshackling of the unreasonableness ground from the restrictive *Wednesbury* formulation appeared to indicate a more open embrace of substantive review than had previously been seen in Australian judicial review of administrative action.

Did this mean that review in Australia was about to shake off its apparent pre-occupation with formalist distinctions between legality and merits and jurisdictional and non-jurisdictional error that had earned it the label of 'exceptionalist' from Michael Taggart?[15] Was this the High Court signalling a new preparedness to embrace doctrinal

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7 Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1; and Knight (n 2) see, eg, at 37-39.

8 See, eg, Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 229-230; Cheryl Saunders, 'Constitution as Catalyst: Different Paths Within Australasian Administrative Law' (2010) 10 *New Zealand Journal of Public International Law* 143, 153; and Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (2017) 106. Cf Taggart (n 7) 27-28.

9 Taggart (n 7) 1 and Saunders (n 8) 153-145.

10 See, eg, Saunders (n 8) 154 and Selway (n 8) 234.

11 *Li* (n 3) 364.

12 Ibid 367. This judgment is discussed in depth in chapter 6 at 6.4.1.

13 Ibid 352 (French CJ); 366 (Hayne, Kiefel and Bell JJ).

14 See, eg, *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ).

15 Taggart (n 7).

developments from elsewhere in the common law world that had been eschewed until now? If so, how could this fit within the parameters of review set down by Brennan J in *Attorney General v Quin* ('*Quin*'),[16] where he had said that the merits of a matter were a 'forbidden field' for a court.[17]

Justice Brennan's judgment in *Quin* has been identified as the beginning of the recognition of the influence of the Australian Constitution on the shape and scope of the principles of judicial review of administrative action in Australia.[18] In an article published following *Li*, Leighton McDonald asked how, after 'the untethering of unreasonableness review from the very strict "standard" in *Wednesbury*', could review for unreasonableness 'be accommodated within the constitutional context of judicial review in Australia and, more particularly, the limited nature of review associated with the concept of jurisdictional error—the organising concept for the courts' constitutionally entrenched review function.'[19] Ultimately, however, while *Li* did revise the unreasonableness ground, and, as explained in chapter 6, brought it into line with the contemporary approach to jurisdictional error, it did not radically alter its scope.

This meant that the question of why it was that judicial review of administrative action in Australia remained distinctive when compared to review elsewhere remained to be answered. Engagement with this primary question led into a series of further questions about some of the key assumptions that are made about review of administrative action in Australia. Is the Australian Constitution really the 'conversation-stopper'[20] in this regard, after all?

While to some extent the constitutional features described above most likely have played a role in shaping the Australian approach, they are not wholly satisfying answers to the question of why review in Australia has taken a 'different path'.[21] In terms of the absence of human rights protections, for instance, there has been a debate in England about whether the proportionality standard can be applied in cases that do not touch upon a

16 (1990) 170 CLR 1.
17 Ibid 38.
18 See, eg, Stephen Gageler, The Constitutional Dimension' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge, 2014) 165, 175.
19 Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 PLR 119, 120.
20 Taggart (n 7) 11.
21 Ibid 1.

right.[22] Further, within the frame of the Ch III separation of powers doctrine, it is the institutional role of the courts to say what the 'law' is. This leaves scope for courts to develop the doctrine of judicial review of administrative action in ways that set new parameters of lawful decision-making.

Taggart considered that what really prevented Australian courts from doing this was their innate conservativism.[23] Yet, again, this is not an entirely satisfying explanation as to why Australian courts have not followed the doctrinal development of, for instance, the English courts. Australian courts have shown themselves capable of innovation and creativity, including in the public law context. It seems difficult to either defend or refute the claim that Australian judges are more conservative than their counterparts elsewhere in the common law world.

A further charge levelled at Australian courts is that they were overly formalist in their approach to public law.[24] This gives rise to the question of what is meant by the term 'formalist'. This is something considered in chapter 2. Since the emergence of the realist movement in the United States in the early decades of the 20th century, the term has acquired a 'pejorative' quality.[25] Typically, it is applied to mean that judges or courts are seeking to obscure the values that they are drawing upon behind an ostensibly objective 'judicial method'.[26] 'Formalism', however, is a word that can have many meanings attributed to it. Taggart appeared to be using it to mean that Australian judges deployed formalist techniques as 'fig-leaves',[27] in a manner designed to obscure the values that lie beneath them, and so mask the power being wielded by courts.

Judicial review of administrative action in Australia does place heavy emphasis on form. Most immediately apparent is its focus on statutory form. One part of the claim that review in Australia is formalist is that the approach taken privileges statutory interpretation over common law principle, especially as Australian doctrine has tended to frame judicial review's grounds as implied statutory requirements. Further, jurisdictional

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22 See chapter 6 at 6.3.3.

23 Taggart (n 7) 7.

24 Ibid; Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 15, 23-25.

25 Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 510.

26 See, eg, Sir Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate and Other Papers*, collected by Woinarski (The Law Book Company, 1965) 152 and chapter 2 at 2.9.

27 Taggart (n 7) 28.

error is a central concept in Australian judicial review of administrative action. Except in the relatively rare circumstance that the decision under review involved an exercise of non-statutory power, the conclusion of whether a jurisdictional error has been made is reached through a process of statutory interpretation. However, the principles of statutory interpretation are, for the most part, creations of the common law. These principles are informed by the values of the common law itself.

There is another relevant set of considerations, which arise in connection with the approach taken by the High Court to constitutional interpretation. In the sphere of review of legislative action, it has been accepted by the High Court that it cannot invalidate laws made by the Commonwealth Parliament unless it applies principles drawn from the text and structure of the Australian Constitution. This approach, which again can be recognised as focused on form rather than free-standing common law values, has been described as legalism. It is sometimes equated with formalism.[28] Like formalism, legalism has also been critiqued as an interpretive approach that seeks to obscure the values being drawn upon by the High Court.[29]

However, I argue that another possible interpretation that can be given to this focus on form is that it is a method that is itself informed by certain other values, which are connected to the High Court's own understanding of its role within the Australian constitutional system. This method is in turn informed by ideas or values regarding the roles of the other institutions of government, the legislature and the executive. In *Quin*, Brennan J said that courts undertaking review of administrative action must be sure to remember that they are 'but one of three co-ordinate branches of government.'[30] This statement has been overlooked in comparison with others he made in the same judgment. The argument here is that it is in fact crucial to understanding the approach of the High Court to review of both legislative and administrative action.

This thesis takes the word 'co-ordinate', as used by Brennan J in *Quin*, to mean that the branches of the Australian national government each form one component of a whole, being the national government of Australia established by the Constitution. Each branch of government has its own role to play in the government of the nation, and the

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28 Ibid 7.
29 Ibid 28.
30 *Quin* (1990) 170 CLR 1, 37.

'government of the nation' is a common objective or purpose shared by each branch. In this sense, each branch of government can be regarded a 'co-ordinate' or 'equal' element in the constitutional system.[31] This, however, should not be taken as intended to mean that an orthodox understanding of parliamentary sovereignty, in which the common law of the courts must give way to the clearly expressed intentions of the legislature, is not applicable in this paradigm. The way in which the High Court exercises the judicial power of the Commonwealth is necessarily conditioned by the way in which the roles of the other two branches of government are understood, and traditional notions of parliamentary sovereignty are one aspect of the Court's understanding of the role of the legislature.

On this reading, the focus on form and textual meaning is one way of ensuring that the judiciary stays within a sphere of power that is considered legitimate, at the same time leaving space for the other branches of government to perform their own legitimate roles. Legal texts themselves are not interpreted in a void. Common law principles inform the meaning that is ascribed to them. It has been accepted that the common law cannot rise above the Constitution.[32] At this point, however, the interpretation of statutes intersects with the interpretation of the Constitution. Why has its 'text and structure' been interpreted to mean some things but not others? This too is a consequence of certain values.

The boundaries of judicial and executive power are not clear cut. The decision of whether or not a jurisdictional error has been made involves the consideration of not only the limits of the decision-maker's power, but also the limits of the power of the court itself. A conclusion of jurisdictional error is informed not only by common law standards of fairness and rationality, but by the judiciary's understanding of its own function in relation to that of the executive. My suggestion is that any difference in Australia, for instance the preference for interpretivism, and the maintenance of the distinction between jurisdictional and non-jurisdictional errors of law, is related to the ways in which the roles of the legislature and the executive are also understood. The source of this most likely

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31 See, eg, *Oxford English Dictionary* (online at 10 February 2020) 'co-ordinate' (A adj, def 3).

32 See, eg, *Theophanous v Herald & Weekly Times* (1994) 182 CLR 104, 126 (Mason CJ, Toohey and Gaudron JJ) and 141, 153 (Brennan J).

lies in the social, political and historical influences on the concept of government and the state in Australia.

Recent work by Rosalind Dixon and others has attempted to engage with the values that might legitimately be drawn upon by the High Court in constitutional interpretation.[33] As Nicholas Aroney has observed '[p]rinciples and values have a legitimate role to play in constitutional interpretation, but only as they are grounded in and disciplined and illuminated by the Constitution's text, structure and history.'[34] This thesis seeks to situate the High Court's interpretive approach to questions of constitutional and administrative law against the background of the history and political culture of Australia. As chapters 5 and 6 explain, certain features of this have been influential in shaping the ways in which the roles of Australian institutions of government have been understood. The term 'values' is used throughout this thesis to capture these ideas. It is not the purpose here to suggest that the institutional values identified amount to rules or standards that 'control' interpretive choice, but rather that they comprise part of the normative context that functions to 'inform' such choices.[35]

1.2 OVERVIEW OF THESIS

The argument of this thesis is organised in two parts. Part I, 'Sketching the Framework', provides an overview of the modern contours of judicial review of administrative action in Australia. It discusses three of the defining features of judicial review of administrative action, being the constitutional separation of judicial power, the legality/merits distinction and the conception of jurisdictional error. These chapters seek to challenge some assumptions about this contemporary framework of review in Australia. The key argument is that it is not characterised by formalism or conservativism, but rather an institutional approach to judicial power that has meant that its role has been shaped so as to take account of the role and functions of the other institutions of national Australian government.

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33 See Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, 2018).

34 Nicholas Aroney, 'The Justification of Judicial Review: Text, Structure, History and Principle' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, 2018) 27, 30.

35 This draws upon the explanation of the way in which values inform interpretation given by Gabrielle Appleby and Brendan Lim in 'Democratic Experimentalism' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, 2018) 221, 241-242.

Part II, 'Mapping the Influences', considers what might be some of the values that inhere in the Australian system of government that could be said to play a role in the way in which the role and functions of its institutions are understood. This argument is recognisably institutional, or 'process' based. As chapter 5 notes,[36] for them to be of any real assistance, legal process or institutional approaches require an appreciation of the wider values that can be associated with notions of the role and functions of institutions.

Part II argues that the true source of any distinctiveness in judicial review of administrative action lies in the values derived from the historical, social and political order in Australia. These values include a positive conception of the democracy and the role of the state in improving the lives of its citizens. These two influences, which may be associated with what has been called the 'functionalist style' in public law, have shaped notions of institutional power, including that of the judiciary.

PART I: SKETCHING THE FRAMEWORK

Chapter 2—formalism as judicial self-restraint: The constitutional separation of judicial power

This chapter considers the role of the constitutional separation of judicial power in the shaping of judicial review of administrative action. There is a view that this doctrine is a contributing factor to the perceived formalism of Australian judicial review of administrative action. While the separation of judicial power has been implied from the text, the text itself does not seem to require this implication. It can be inferred from this that the separation of powers is itself informed by a set of values regarding the nature and extent of judicial power, and the way it interacts with the other branches of government. In this chapter I contend that the longstanding approach to judicial review of legislative action can be recognised as informed by these same values, which in turn, are also at work in review of administrative action.

Chapter 3—Merits and Legality

In *Quin*, Brennan J stated that role of the courts in undertaking judicial review of administrative action was to assess its legality, leaving its merits to the administrative decision-maker. This statement has come to be regarded as setting out the scope of

[36] See at 5.3.2.

judicial review in Australia. This chapter considers the *Quin* judgment in the context of its time, which was a period in which arguments for common law constitutionalism were gaining support.

Justice Brennan was also influential in framing judicial review's standards as requirements implied from the statutes that empower decision-makers, rather than free-standing common law principles. Will Bateman and Leighton McDonald have described this as the 'statutory approach' to judicial review.[37] They contend that the rise of this approach has been motivated by a desire on the part of the courts to minimise concerns over the democratic legitimacy of judicial review.[38]

In this chapter I argue instead that the Brennan approach has become the ascendant one because it embodies values more in keeping with the Australian Constitution. The *Quin* judgment expressly takes account of the fact that in Australia, each branch of government, including the executive, is regarded as having its own legitimate sphere of power. The Constitution established all three branches at the same time. The power of the judiciary is subject to its limits, in much the same way as are the powers of the other two branches of government. The Brennan approach to review of administrative action can be recognised as consonant with the longstanding concept of judicial power described in chapter 2. This means that the concept of the 'merits' is not residual, but rather informed by the judiciary's understanding of its own function in relation to that of the executive.

The principles of review have indeed been characterised as matters of implied legislative intention. However, like most other principles of statutory interpretation, they remain common law or judicial creations. The statutory or interpretive approach should not be perceived as a barrier to the development of new common law principle to restrain executive action. The common law has long proven adaptable in this regard. Much like the legalism described in chapter 2, the interpretive approach instead gives a frame to the limits of judicial power. It is, further, an approach that has been adapted specifically to the Australian context, in which legislation is the primary source of most executive power.

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[37] Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law (2017) 45(3) *Federal Law Review* 153.

[38] Ibid.

Chapter 4—The Power and Limits of Interpretivism

Drawing on the material set out in the previous two chapters, this chapter considers the specific issue of the High Court's approach to legislative attempts to oust or limit the power of the courts to undertake review of administrative action. Although its own review jurisdiction is protected by s 75(v) of the Constitution, the High Court has long opted to apply an interpretive approach to attempts to oust or limit review, rather than simply ruling that they are invalid. This approach has affirmed the 'centrality' of jurisdictional error.[39]

The conclusion that a jurisdictional error has been made involves the consideration of not only the limits of the decision-maker's power, but also the limits of the power of the court itself. The boundaries of judicial and executive power are not clear cut. A conclusion of jurisdictional error is informed not only by common law standards of fairness and rationality, but by the judiciary's understanding of its own function in relation to that of the executive. The suggestion here is that any difference in Australia, for instance the preference for interpretivism, and the maintenance of the distinction between jurisdictional and non-jurisdictional errors of law, is related to the particular ways in which the roles of the legislature and the executive are also understood. The source of this most likely lies in the social, political and historical influences on the concept of government and the state in Australia. Part II maps what some of these influences are.

PART II: MAPPING THE INFLUENCES

Chapter 5—Trust in the people

The notion that the power of the judiciary must be understood by reference to the ways in which it 'co-ordinates' with the other branches of government is a recognisably institutional or 'process' based one. However, to have an account of the way in which institutional power is conceived in a system of government, it is necessary to identify values connected with the aims and purposes of the institutions in that system. This chapter looks to the social and political influences that might be said to have had a seminal force on the way in which the role and character of the Australian institutions of government have been understood. In turn these influences might be thought to have

[39] James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77.

played a role in shaping the conception that the judiciary has of its own power to control the other branches of government, and in turn, on the development and scope of principle.

This chapter sets out some of the features of social history and politics that influenced the conception of democracy that is inherent within the Australian Constitution. It first gives a brief historical background which illustrates the way in which ideas considered radically democratic elsewhere came to be mainstream in Australia. It then suggests that a set of ideas that might be called progressivism, or 'new liberalism' held sway in Australian politics in the decades before and after Federation. Although many ideas can be associated with progressivism, an important feature of its Australian manifestation was a belief in the transformative power of government. Many prominent Australian politicians and lawyers of this period believed that liberty came through the support of the state. Liberalism in Australia must be understood through this lens.

This chapter then draws upon the work of Martin Loughlin regarding the functionalist style in public law.[40] This was a style that he associated with new liberalism. Although it cannot be neatly defined, functionalism is characterised by faith in democracy, legislation and had at its core a positive rather than a negative idea of state or administrative power. Functionalists were suspicious of the obstructive potential of the rule of law. This chapter relies upon Loughlin's contention that Dicey should be considered to have had a normative perception of law to show that Australian public law should be considered to have functionalist rather than Diceyan overtones.

This contention has the potential to be of considerable utility in explaining the development of Australian public law principle. For instance, the new liberal belief in the transformative power of the state seems to have influenced a different conception of the relationship between individuals and the state than the one that is discernible in Dicey's theory of the Constitution. The final part of this chapter attempts to sketch some of the ways in which functionalist influences can be recognised as at work in the conception of judicial power that has been mapped over the previous three chapters.

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[40] See, eg, Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) ('*Public Law*') 59-61 and 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361.

Chapter 6—A positive conception of the administrative state

The same social and political influences that have shaped notions of democracy and the role of the legislature have also contributed to a specific conception of the executive. In the traditional Diceyan conception of government, discretion is treated as suspect as it is potentially arbitrary and therefore contrary to the rule of law. The only way executive power could be controlled was by the ordinary courts. This is what Carol Harlow and Richard Rawlings have described as a 'red light' view.[41]

However, the ideologies that influenced the establishment of an expansive franchise, as well as a highly refined electoral process, also perceived that the best way to achieve the objectives of government was through legislation. Legislation requires administration, and naturally leads to administrative discretion. The administrative state has never been truly regarded with suspicion in Australia. As argued in chapter 3, part of the reason for the view of Brennan J regarding the scope of judicial review becoming so influential is that it accords with pre-existing notions regarding the legitimate role of the executive.

This chapter draws upon the example of the unreasonableness ground to explain the way that this trust in the state has been given expression in the scope of the unreasonableness ground judicial review of administrative action. The unreasonableness ground provides a useful example because, as noted, the more restrictive Australian approach to it is one reason why review in Australia has been perceived as 'exceptionalist'. Further, its inherently substantive quality means that it often stands as a 'symbol' of a wider set of beliefs about the purpose and role of judicial review of administrative action.

This chapter also builds upon the arguments of chapters 3 and 4. Taking the functionalist influences on Australian public law into account, it becomes possible to recognise that features of judicial review of administrative action that have been called exceptional are not so much formalist as functionalist. It is possible to identify, for instance, that the modern Australian concept of jurisdictional error can be understood as an instrument for what Hart and Sacks called 'reasoned elaboration'.[42] It is a mechanism that allows courts to undertake the complex task of assessing the processes of the other institutions of

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41 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 22.

42 Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) (prepared for publication from the 1958 Tentative Edition by William N Eskridge Jr and Phillip P Frickey) 146-150. See chapter 5 at 5.3.2.

government to come to a conclusion as to whether an alleged error has resulted in an invalid administrative action.

Further, in the functionalist style, legislation, as the representation of the democratic will, was considered superior to the common law.[43] By particular reference to the unreasonableness ground, this chapter builds the case that the statutory approach described in chapter 3 can be understood as shaped by functionalist influences. It further explains the way in which the interpretive approach explained in chapter 4 can nevertheless be developed by courts in a way that advances and protects common law values, albeit in a way that is tailored by these functionalist influences.

Chapter 7—Conclusion

In the concluding chapter of the thesis I draw together the arguments that are made in each of the preceding chapters. This thesis seeks to explain the Australian approach to judicial review of administrative action by reference to wider Australian attitudes to government and the state. Although the Australian approach has been subject to critique for its perceived 'formalism', these critiques proceed from what can be understood as a 'liberal normativist'[44] perspective. Functionalism may be something of a spent force elsewhere, but this concluding chapter seeks to defend the functionalist features of judicial review in Australia.

While it can be accepted that there are certain limits to the functionalist Australian approach, it also has many strengths. In a period in which some of the basic tenets of liberal democracy itself are under challenge, it is possible see the benefits in a system of public law which places its faith in notions of the common good and situates the primary source of power and responsibility with the people themselves. The judicial restraint practised by Australian courts serves to underline the point that ultimately there are limits to what the 'law' itself can achieve. Politics, the way it is in turn practised, the level of engagement citizens have with their system of government and the faith they have in their institutions are all things that underpin the way in which a constitutional system operates.

This last point gives rise to why functionalism is still a relevant and useful concept in public law. For systems of government to function well, attention must be paid to the

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43 Loughlin, *Public Law* (n 40) 60.
44 Ibid 209-210.

things that occur outside the interaction of the courts with the other branches of government. Electoral law is one example of this. As chapter 5 explains, while Australia has a majoritarian system of government, its electoral law and practices help to ensure that this system functions moderately. While electoral law does not necessarily of itself have a constitutional character, an orderly, fair and impartially administered electoral system is a key feature of a properly functioning constitution. There are many other such examples. Chapter 7 suggests that one advantage of the functionalist style is that it can help to shift focus towards these other aspects of a system of government, something that is necessary in a period in which faith in institutions and even democracy itself has been in decline in Australia and elsewhere.

PART I:
SKETCHING THE FRAMEWORK

2.

THE CONSTITUTIONAL SEPARATION OF JUDICIAL POWER: FORMALISM AS JUDICIAL SELF-RESTRAINT

> I take it as an incontrovertible axiom that responsible government is to be the keystone of this federal arch.
>
> Isaac Isaacs[1]

2.1 INTRODUCTION

This chapter considers the constitutional doctrine of the separation of judicial power in Australia. This doctrine is often perceived to be a defining force in Australian judicial review of administrative action.[2] Because the separation of judicial power is often perceived as 'rigid'[3] and 'formalist',[4] this has contributed to the understanding that formalism is an essential characteristic of review in Australia.[5] However, while the constitutional doctrine of the separation of powers is often characterised in this way, it is also replete with many exceptions, and is responsive to context.[6] While such exceptions are often interpreted as evidence that the formalist doctrine is cumbersome, and lacking in transparency, they could instead be regarded as a signal of its flexibility, and that it is capable of responding as circumstance requires. This does not mean that it is simply applied in an unprincipled fashion. Rather it seems possible to recognise that the application of the doctrine is in fact informed by certain values that are key to understanding judicial review of legislative and also administrative action in Australia.

This chapter sets out the general theory of separation of powers and the specifically Australian constitutional doctrine of the separation of judicial power. The key point to

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1 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 169.

2 See, eg, Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*'), 24 (McHugh and Gummow JJ).

3 Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 5.

4 For example, see Peter Gerangelos, 'Interpretational methodology in separation of powers jurisprudence: the formalist/functionalist debate' (2005) 8 *Constitutional Law and Policy Review* 1, 2-3.

5 See Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 46.

6 See, eg, the discussion in James Stellios, *Zines's The High Court and the Constitution* (The Federation Press, 6th ed, 2015) at 245-252, which demonstrates the factors that courts might have regard to in determining the contours of judicial power.

understand about the doctrine for the purposes of the argument here is that it did not *have* to be implied from the text and structure of the Constitution. That it was can be viewed as indicative of a particular understanding of the nature of judicial power.

The separation of judicial power has grown in significance in review of administrative action in recent decades. This chapter briefly traces how this development transpired. The influence of the separation of judicial power is one of the reasons why review in Australia has come to be seen as 'exceptionalist'.[7] This chapter describes the case that has been made regarding the exceptionalist character of review in Australia. This is often attributed to what is understood to be a peculiarly Australian attachment to judicial formalism, as reflected by, amongst other things, the separation of judicial power and the more definite distinction between the legality and the merits which is often associated with the former.

This chapter then sets out a challenge to the idea that review in Australia is rigid and 'formalist', at least in the 'pejorative'[8] way that term is often understood. This chapter engages with the core critique of formalism, which is that it masks the substantive values that are being drawn upon in judging. While there are no doubt examples of cases where an overly rigid technical approach to review has been applied, it will be suggested that the values being drawn upon by the High Court in shaping the concept of judicial power are usually not obscured by its interpretive approach. Australian review of administrative action can be recognised as influenced by similar underlying values to review elsewhere, such as fairness and rationality. To the extent that review in Australia is different, the source of the difference can be found in another set of values. These are the values of the constitutional or political system itself, and they inform the way in which the functions of each institutions of government, including the courts, are understood.

Federal judicial power has a particular conception in Australia. Its preserve is finding and enforcing the limits of the law. Questions of policy wisdom, merit, or even of its substantive justice, to the extent that these can be distinguished from those of law, are left for others. While contemporary rights-based or 'common law' constitutionalism holds that this to some extent is an abrogation of judicial functions, constitutional systems must be understood as a whole. The judiciary is 'but one of three co-ordinate branches of

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7 See, eg, Taggart (n 3).

8 Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 510.

government'.[9] The role and relative health of the other institutions of government must not be overlooked. Focus on the judiciary alone cannot properly illuminate how well a 'political' or 'abstract ideal' like the rule of law is protected in any given constitutional system.[10]

This chapter introduces the argument that this conception of judicial power has been influenced by certain systemic values. One is the distinctively majoritarian character of Australian democracy. Another is a culture which expects the government not only to provide services, but to do so in a relatively utilitarian manner, that is, pragmatically, and efficiently. In other words, it is a culture with a broadly positive conception of the administrative state. Each of these influences has shaped Australian notions of the roles of the legislature and the executive. Federal judicial power, insofar as it relates to public law matters, can only properly be understood as a mechanism that has been adapted to co-ordinate with these other institutions and the way their roles or functions have been conceived. Part II of this thesis explores these institutional values and their possible influences in more depth.

The approach to interpretation and to the doctrinal development of the general law in Australia that is most often called 'legalism' can be recognised as a mode of review that is informed by this specific conception of the role of the federal judicial power. Although it is often equated with 'formalism', and although both terms are difficult to satisfactorily define, it actually does not share very many of the characteristics of the brand of formalism that was repudiated in the twentieth century. Rather, it can be more closely identified with what Frederick Schauer argued was a system that placed emphasis on rules as a way of subordinating the individual value preference of the judge to those which might be regarded as wider values of the system.[11] The argument that this is how Australian legalism is best understood is made by reference to two of its key influences, the decision of the majority of the High Court in *Amalgamated Society of Engineers' v Adelaide Steamship Co Ltd* ('*Engineers' Case*'),[12] and its best known proponent, the long-serving High Court Justice and Chief Justice, Sir Owen Dixon.[13] Finally, it is suggested

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9 *Attorney General (NSW) v Quin* (1990) 170 CLR 1, 37 (Brennan J).

10 See Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017) chapter 11.

11 Schauer (n 8) 543-544.

12 ('*Engineers' Case*') (1920) 28 CLR 129.

13 The critique as to whether Dixon's legalism went beyond rhetoric is addressed below at 2.9.

here that the separation of powers doctrine, which is also closely associated with Dixon, can be understood as an expression of the particular concept of judicial power that legalism itself represents.

This chapter is organised as follows. Part 2.2 provides some general background to separation of powers theory. Part 2.3 briefly describes the separation of powers in the English Constitution. In 2.4, the evolution of the Australian constitutional separation of powers doctrine, as well as some long-standing critiques of it, are set out. Part 2.5 explains how the constitutional separation of judicial power came to be seen as influential on judicial review of administrative action. Part 2.6 explores the consequences of this new constitutional paradigm. Part 2.7 engages with ways in which the concept of formalism has been defined and suggests that one way of regarding a preference for rules and form in adjudication is as an expression of judicial restraint. Part 2.8 argues that the High Court's traditionally 'legalist' approach to interpretation is better understood as a response to certain values that are key to the Australian system of constitutional government, rather than an attempt to 'cloak' or obscure the potency of judicial power. Part 2.9 seeks to support this claim by reference to the approach and possible motivations of the leading proponent of 'legalism': Dixon.

2.2 SEPARATION OF POWERS THEORY

One of the most ancient[14] and commonly accepted ideas in public law is that the powers of each branch of government must be kept separate, enabling each to function as a check on the others, thereby preventing tyranny. This theory requires modern government to be comprised of three main institutions, each with its own functions, namely, legislative, executive and judicial. It 'evolved slowly over many centuries', with much of the thinking being initially inspired by the tumultuous political upheavals of seventeenth century England.[15] The 'name most associated' with the modern doctrine is that of Charles de Secondat, Baron de Montesquieu.[16] Writing in the mid-eighteenth century, he described

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[14] The theory is commonly traced to Aristotle. See, eg, M J C Vile, *Constitutionalism and the Separation of Powers* (2nd ed, Oxford University Press, 1967) 24-26; Wolfgang Friedmann, *Principles of Australian Administrative Law* (Melbourne University Press, 1950); and Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 177.

[15] Vile (n 14) 21.

[16] Ibid 76; however, see Martin Loughlin, *Political Jurisprudence* (Oxford University Press, 2017) 79-81, where he writes that 'by the mid-eighteenth century, the idea that government needed to differentiate between governing tasks was well understood.' For Loughlin, the true significance of Montesquieu's work lies in its contribution to what he describes as 'political jurisprudence'. He

a model of tripartite government where each of the three branches had its own function. He contributed considerably to thinking about the role of the judiciary within this model,[17] for instance stating that it was necessary for the judicial power of the state to be kept distinct from its legislative and executive powers, since:

> If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined with the executive the judge could have the force of an oppressor.[18]

Later constitution-makers, including the founders of the United States Constitution, were greatly influenced by the work of Montesquieu.[19] James Madison wrote in *The Federalist No. 47* that Montesquieu was the 'oracle' on the subject of the way in which 'the preservation of liberty requires that the three great departments of power should be separate and distinct.'[20] Separating and dividing the institutions of government and their functions was regarded as a basic constitutional mechanism for not only safeguarding against tyranny, but also for preventing corruption and ensuring accountability. The enhancement of institutional accountability is not the only underlying rationale for the separation of powers. Conceptions of the separation of powers that are more towards the functionalist end of the spectrum accept that institutions have different competencies, and for the purposes of good government should exercise those functions which are most appropriately suited to these competencies.[21]

However, outside the realm of theory, a '[c]omplete segregation of institutions', where each exercises its functions in isolation from the others, 'is impracticable.'[22] Sometimes efficiency requires overlap. There are also fine distinctions between the nature of the

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considered that it is necessary 'to move beyond' the liberal reading typically given to Montesquieu, that he was concerned to 'indicate the law's importance in curtailing political power' and recognise that Montesquieu's 'true purpose was to demonstrate that, in order to *generate* political power, the political must be framed by the legal.'

17 See, eg, Vile (n 14) 88-90.

18 Montesquieu, *The Spirt of the Laws* tr Anne Cohler, Basia Carolyn Miller, Harold Samuel Stone (eds) (Cambridge University Press, 1989) 157.

19 James Madison, The Federalist No. 47 in Alexander Hamilton, James Madison and John Jay *The Federations Papers* (Oxford University Press, 2008) 239; Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart, 2nd ed, 2015) 11, 13; and Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 4; cf Vile (n 14) 121.

20 Madison (n 19) 239.

21 See below at 2.8.2 for a discussion of legal process theories. Functionalism is considered at length in chapter 5.

22 Saunders (n 19) 4.

many powers and functions of government and questions about how they are best distributed. As a result, there are 'immense difficulties involved' in trying to draw lines and allocate them to one branch of government or another.[23]

2.3 SEPARATION OF POWERS IN THE BRITISH CONSTITUTION

Montesquieu based his ideal model of government on the English Constitution, but as he himself was aware, there was no separation of powers in England.[24] According to Martin Loughlin, in any case, '[m]any scholars have shown that Montesquieu's so-called doctrine of separation of powers entails no strict separation, but merely a blending or balancing of governmental powers.'[25] Loughlin considered that Montesquieu's 'true purpose was to demonstrate that, in order to *generate* political power, the political must be framed by the legal.'[26] This reading is in keeping with Loughlin's own wider arguments about the relationship between law and politics, which are considered in more depth in chapter 5.

Leaving to one side the question of whether or not the reading typically given to Montesquieu is the correct one, the English system of government by a Monarch-in-council, answerable to a parliament, which evolved into the modern Westminster system, means that the legislature and the executive are closely blended. As a result, by contrast with the system of government of the United States, there is no attempt to separate the powers of the executive and the legislature in England. There is, however, a tradition of judicial independence reaching back through centuries of British history, 'cemented' by the *Act of Settlement 1701* and protected 'as a result of subsequent law and as a result of convention.'[27] Yet, despite Lord Diplock's well-known statement that 'it cannot be too strongly emphasised that the British constitution, though largely unwritten, is firmly based upon the separation of powers',[28] others have been more circumspect about whether this is really the case.[29]

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23 Gerangelos (n 4) 11.
24 Vile (n 14) 85.
25 Loughlin (n 16) 81.
26 Ibid.
27 Roger Masterton, *The Separation of Powers in the Contemporary Constitution: Judicial Competence and Independence in the United Kingdom* (Cambridge University Press, 2011) 27.
28 *Duport Steels Ltd v Sirs* [1980] 1 WLR 142, 157.
29 Owen Hood Phillips, 'A Constitutional Myth: Separation of Powers' (1977) 93 *Law Quarterly Review* 11, 12-13; Sir Ivor Jennings, *The Law and the Constitution* (University of London Press, 5th ed, 1967)

In *The Law of the Constitution*, Dicey makes only passing reference to the concept of the separation of powers, in the context of his critique of *droit administratif*, the French system of administrative law. He considered that 'separation of powers' in France, which he traced to Montesquieu, meant 'something different from what we mean in England by the 'independence of judges', or the like expressions.'[30] He considered that it meant that while judges could not be removed by the executive, 'the government and its officials ought (whilst acting officially) to be independent of and to a great extent free from the jurisdiction of the ordinary Courts.'[31] Officials were answerable to administrative tribunals, under a separate scheme of 'administrative' law, something Dicey said was 'hardly intelligible' to English lawyers.[32] The French practice was entirely contrary to Dicey's description of the operation of the rule of law in England.[33]

While independence of the judiciary in England has long been subject to certain safeguards such as security of tenure,[34] in other ways there has traditionally been no institutional 'separation' of judges from the other branches of government. For example, until the establishment of the Supreme Court in 2009, the highest court of the United Kingdom was formally a committee of the House of Lords, comprised of judges who were also members of the legislature. Although steps have been taken to further insulate judges from political processes,[35] the tradition of judicial independence is of a different character to the Australian federal separation of judicial power.

Judges operating under an unwritten constitution are in a different position. The power of English judges has more indeterminate boundaries. This might mean that aspects of judicial power are potentially less secure in some ways, but it also leaves more scope for the judiciary to articulate its own role. By contrast, in Australia, at the federal level, the powers of each branch of government, including the judiciary, are conferred, but also limited, by the Australian Constitution. Chapter III of the Australian Constitution sets

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239-241, also appendix I, for example at 294; Masterton (n 27) for instance, chapter 1, where an overview is given of the separation of powers in the context of the English Constitution.

30 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution: Oxford Volume Edition of Dicey* (vol 1) J W F Allison (ed) (Oxford University Press, 2013) 104.

31 Ibid.

32 Ibid 106.

33 Dicey's denial of the existence of administrative discretion in England and its lasting impact on administrative law is considered in chapter 6 at 6.2.1.

34 Masterton (n 27) 27-28.

35 See, eg, Masterton (n 27) chapter 8, for an account of the effect of the *Constitutional Reform Act 2005* (UK) in terms of the establishment of the Supreme Court.

out the powers of the federal judiciary.[36] The way in which Ch III has been interpreted by the High Court, and what this means for the nature of judicial power in Australia is considered in the next section of this chapter.

2.4 THE SEPARATION OF POWERS IN AUSTRALIA

The Australian political and constitutional system is a hybrid of American federalism and British parliamentary government. By comparison with the founders of the United States Constitution, the drafters of the Australian Constitution had the benefit of another century of development and refinement not only of the English system of government, but also in political philosophy. By the time of the Australasian Federal Conventions of the 1890s, the British system of responsible and cabinet government, which had been too nascent for the drafters of the United States Constitution to draw upon, had been described in the widely read work of Walter Bagehot[37] and was well understood and replicated in the colonial parliaments.[38] Although the Constitution itself is largely silent on these points, there was never any doubt that the Commonwealth Parliament, despite its (uniquely for the time)[39] democratically elected upper chamber, was intended to function Westminster-style. In this way the framers of the Australian Constitution 'created [a] British heart in an otherwise American federal body.'[40] This difference is not only structural, but also substantive.

The inclusion of parliamentary government in the constitutional arrangements of the Commonwealth means that there is no strict separation of power between the executive and the legislature in Australia. As accepted by the High Court in *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan*,[41] despite providing a tripartite institutional framework of government, the Constitution does not prohibit the Commonwealth Parliament from delegating the power to make regulations, said to be

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36 As discussed further at 2.4.1, Ch III creates an integrated federal judiciary, which has consequences for state judges as well.

37 Walter Bagehot, *The English Constitution* (Kegan, Paul, Trench, Trübner & Co, 6th ed, 1891) (initially published in a serialised form between 1865-1867).

38 This was something raised explicitly at the Adelaide Convention in 1897. Josiah Symon, of South Australia, read from works by John Fiske and James Bryce to make the point that responsible or Cabinet government had not been made a feature of the United States Constitution simply because it had not yet fully emerged as one of the British Constitution. See *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 25 March 1897, 134-135.

39 See chapter 5 at 5.2.2(b).

40 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 172.

41 ('*Dignan*') (1931) 46 CLR 73.

'legislative' in character, to the executive. This was in part because the incorporation of the British traditions of government into Australia's constitutional arrangements made an insistence upon the separation of legislative and executive power unfeasible.[42] In a lecture given in 1935, Dixon J explained that the Court's decision not to enforce a separation of powers between the legislature and the executive could be explained by 'mere judicial incredulity'.[43] He added that this was because 'it seemed unbelievable that the executive should be forbidden to carry on the practice of legislation by regulation.'[44] It was not practical to expect legislative schemes to be effectively administered without being underpinned by detailed regulation.[45]

2.4.1 Separation of federal judicial power

Unlike the English position, however, Australia has a 'formal' separation of judicial power, derived from its Constitution. There are two 'limbs' to the separation of powers doctrine. The first was more or less established in the *Wheat Case*[46] in which a majority of the High Court found that the Act passed by the Commonwealth Parliament in 1912 to establish the Interstate Commission was invalid. This was on the basis that the Act gave the Commission the power to issue injunctions, and this was considered to be a judicial power. The Commission was not established under Ch III of the Constitution, which provides for the federal judiciary, but rather Ch IV, which covers finance and trade within the Commonwealth. The principle that only bodies meeting the description of courts could exercise the judicial power of the Commonwealth was affirmed several years later in *Waterside Workers' Federation of Australia v J W Alexander Ltd*.[47]

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42 Ibid 101-102 (Dixon J), also cf Evatt J at 114-120 who was even less prepared to accept that the tripartite structure really required the separation of the powers of any arms of government, including the judiciary. See also *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556 ('*Lowenstein*'), 565 (Latham CJ) where the Chief Justice observed 'it cannot be said that there is involved in the Constitution a strict doctrine of separation of powers. There are many features of the Constitution, either obvious upon the face of the Constitution or elucidated by judicial decisions, which show that such a principle cannot be accepted.' See also *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*') (1956) 94 CLR 254, 275 and 280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

43 Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 606.

44 Ibid.

45 See, eg, the later decision in *Boilermakers' Case* (n 42) 280 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), where this point is also made.

46 *New South Wales v Commonwealth* (1915) 20 CLR 54.

47 (1918) 25 CLR 434.

The second limb was not confirmed by a majority of the Court until almost three decades later, in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*').[48] This case concerned the powers of the Commonwealth Court of Conciliation and Arbitration. In a nation where much political conflict was generated by industrial disputes, that court was an important institution.[49] Section 51(xxxv) of the Constitution, now rendered virtually obsolete,[50] gives the Commonwealth power over 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State.' When an industrial dispute with the requisite national character arose, the Commonwealth Court of Conciliation and Arbitration had the power, in accordance with the *Commonwealth Conciliation and Arbitration Act 1904* (Cth), to both arbitrate the dispute and make an award to bring about its end. It also had a range of other ancillary enforcement powers.

As Fiona Wheeler has explained, the *Boilermakers* challenge 'was part of an ongoing campaign by the union movement against the Arbitration Court's use of its penal powers.' Members of the Boilermakers' Society had been involved in strike action with members of the Federated Ironworkers Association at a shipyard in Sydney.[51] An employers group complained to the Court of Conciliation and Arbitration, which ordered the unions to end their action. When this order was not complied with, the Court made a further order, fining the Boilermakers' Society for the involvement of its members in the strike.[52] Both orders of the Court were challenged by the Boilermakers' Society in the High Court on the basis that 'they could be made only in the exercise of the judicial power of the Commonwealth' and that the Constitution did not empower the federal parliament to establish a tribunal that possessed both arbitral and judicial power.[53]

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48 *Boilermakers' Case* (n 42).

49 Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 164-166.

50 In 2005 the Commonwealth Government passed near-comprehensive industrial relations legislation, which relied on its corporations power in s 51(xx). A challenge to this legislation led by New South Wales and joined by all states was unsuccessful (see *New South Wales v Commonwealth* ('*WorkChoices Case*') (2006) 229 CLR 1). Following the 2007 federal election, at which there was a change of government, all states except Western Australia referred most of their industrial relations powers to the Commonwealth.

51 Wheeler (n 49) 164.

52 Ibid; see also *Boilermakers' Case* (n 42) 266 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), where the facts are set out.

53 *Boilermakers' Case* (n 42) 266-267 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

The majority, led by Dixon J,[54] upheld the arguments of the union, stating that only bodies meeting the description of a court can exercise the judicial power of the Commonwealth[55] and confirmed what had until then been more speculative—that federal courts can only exercise judicial power.[56] Arbitral powers were found to be non-judicial powers, and this meant that powers to make industrial awards and make judicial orders about industrial disputes could not be combined in the same federal body.[57] Questions as to what other functions might not be sufficiently judicial to be conferred on Ch III courts were left to be determined later on a case-by-case basis.[58] The Privy Council affirmed the decision in *Attorney General (Cth) v The Queen*.[59]

This principle only exists at Commonwealth level,[60] with the position in the states traditionally being considered closer to that of England.[61] Nevertheless, a line of doctrine commencing with *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')[62] holds that state courts exercising federal jurisdiction cannot be vested with functions that would undermine their 'institutional integrity' as courts.[63] In the *Kable* decision itself, the separate judgments comprising the majority relied upon slightly different reasoning to invalidate an Act of the New South Wales Parliament which sought to ensure that Mr Kable,[64] who had been convicted of manslaughter, remained in prison beyond the term of

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54 See George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421, 433.

55 *Boilermakers' Case* (n 42) 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

56 Ibid 277-278.

57 Ibid 288-289.

58 Ibid 280.

59 (1957) 95 CLR 529.

60 See, for example, *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

61 For example, in several ways the position of judges in the states is, largely for historical reasons, perhaps closer to that of British judges. An example is the convention of Chief Justices of State Supreme Courts serving as state lieutenant-governors, who perform the role of state governors when governors themselves are unavailable. Matthew Stubbs has argued that this practice is unconstitutional in accordance with Ch III principles—see 'The constitutional validity of State Chief Justices acting as Govenor' (2014) 25 *Public Law Review* 197. However, cf Rebecca Ananian-Welsh, and George Williams, 'Judges in Vice-Regal Roles' (2015) 43 *Federal Law Review* 119, 142-145, where it is suggested that while it is possible these appointments might be considered incompatible with judicial power according to the test set out in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 ('*Wilson*'), at 17, by Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ, it is unlikely (although not impossible) that the High Court would find the practice invalid, given the 'historical foundations of the practice' and the fact that it otherwise remains 'in keeping with constitutional values and principles.'

62 ('*Kable*') (1996) 189 CLR 51.

63 See, eg, *South Australia v Totani* (2010) 242 CLR 1, 47-48 (French CJ).

64 Mr Kable was the only person the legislation applied to. Section 3(1) of the *Community Protection Act 1994* (NSW) provided that the object of the Act was 'to protect the community by providing for

his sentence. However, they each referred, albeit sometimes in different language, to the idea that certain functions might not be compatible with judicial power.[65] Each judgment also accepted that one way to ascertain this was by reference to whether the performance of particular functions by a court could have the effect of impairing 'public confidence' in the judiciary.[66]

In subsequent decisions involving challenges to state legislation made along *Kable* lines, the High Court retreated from the 'public confidence' criterion.[67] The reasoning from the separate *Kable* judgments was distilled into a principle that state parliaments cannot confer a function on a state court that exercises federal jurisdiction that 'substantially impairs its institutional integrity' and would be 'incompatible with [the state court's] role as a repository of federal jurisdiction'.[68] In *Forge v Australian Securities Investment Commission,*[69] Gleeson CJ said that the terms of Ch III of the Constitution required 'that State Supreme Courts must continue to answer the description of "courts"' and this meant that they had to 'satisfy minimum requirements of independence and impartiality.'[70] This was a 'stable principle, founded on the text of the *Constitution*.'[71]

This set the scene for the separate, but related, development, in *Kirk v Industrial Court of New South Wales* ('*Kirk*').[72] In *Kirk*, the High Court found that another 'defining characteristic' of State Supreme Courts protected by Ch III was their capacity to issue the writ of certiorari.[73] This meant that the Australian Constitution impliedly safeguarded the supervisory jurisdiction of state Supreme Courts in a similar way as it expressly

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the preventive detention (by order of the Supreme Court made on the application of the Director of Public Prosecutions) of Gregory Wayne Kable.'

65 See *Kable* (n 62) 98, where Toohey J indicated his view that the Act was 'inconsistent with traditional judicial process'; 103, where Gaudron J said that the Constitution did not permit 'different grades or qualities of justice' and that State courts could not be given 'powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth'; 116-117 where McHugh J referred to the need for state courts being, and appearing to be, independent from the executive government of the state; and 134 where Gummow J referred to the way in which the relevant legislation impaired 'the appearance of institutional impartiality'.

66 See *Kable* (n 62) 98 (Toohey J); 107 (Gaudron J); 116-119 (McHugh J); 133 (Gummow J).

67 See Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 8-9.

68 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 591 (Gleeson CJ).

69 (2006) 238 CLR 45.

70 Ibid, 67.

71 Ibid.

72 ('*Kirk*') (2010) 239 CLR 531; see Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641, 649, 655.

73 *Kirk* (n 72), 566.

protected that of the High Court in s 75(v).[74] The effect of these decisions has been to cast a similar 'constitutional net' over judicial review of administrative action conducted by state courts.[75]

Following the decision in *Kirk*, the then Chief Justice of New South Wales, James Spigelman, reflected that '[i]n substance, the High Court has equated State administrative law, in this respect, with the position under s 75(v) of the Constitution,' adding that '[t]he gravitational force has done its work.'[76] The 'gravitational force' in this sense is the one created by Australia's single common law, presided over by the High Court, which has both original jurisdiction in certain federal matters, as well as general appellate jurisdiction.[77] This position may be contrasted with that of the United States, where in accordance with the line of cases following *Erie Railroad Co v Tompkins*,[78] federal courts follow the common law principles set down by the relevant state courts. One consequence of the single common law approach, combined with the development of the principles derived from *Kable* and *Kirk*, is that the institutional features of state supreme courts have become increasingly aligned with those of federal courts.[79] James Stellios, for instance, has observed that there has been a 'convergence in institutional design' of state and federal courts.[80] This of has significance for the framing of supervisory jurisdiction of state Supreme Courts, in particular in relation to its scope.[81]

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74 This decision is considered in more detail in chapter 4 at 4.3.1.

75 Stephen Gageler, The Constitutional Dimension' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge, 2014) 165, 173; see Matthew Groves 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399, for an extended discussion of this. See also the 2018 decision in *Burns v Corbett* (2018) 92 ALJR 423, where it was held by a majority of the High Court, as a matter of implication from the text and structure of the Constitution, that State Parliaments could not confer Ch III jurisdiction (in this case the capacity to resolve disputes between residents of different states) upon administrative tribunals – see at [2] (Kiefel CJ, Bell and Keane JJ) and [67]-[69] (Gageler J).

76 James Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 77.

77 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563 (The Court) and Sir Owen Dixon, 'Sources of Legal Authority' in *Jesting Pilate and Other Papers*, collected by S Woinarski (The Law Book Company, 1965) 198, 198-199. See also Groves (n 75) 411; James Stellios, 'The Centralisation of Judicial Power Within the Australian Federal System' (2014) 42 *Federal Law Review* 357, 383 where it is suggested that, particularly since the abolition of avenues of appeal to the Privy Council, '[t]he elevation of the High Court to the apex of the Australian judicial systems, in fact, taken on a centralising life of its own'; and Stephen McLeish, 'The nationalisation of the State court system' (2013) 24 *Public Law Review* 252, 264 where it is argued that the notion of an '"integrated judicial system in Australia"' was also behind the 'convergence' of principles regarding the institutional features of federal and state courts.

78 304 US 64 (1938).

79 See, eg, McLeish (n 77), and Stellios n (77).

80 Stellios (n 77) 371.

81 See, eg, Groves (n 75) 399.

2.4.2 The need for there to be a 'matter' to give rise to the original jurisdiction of the High Court

The *Boilermakers* doctrine is not the only way in which the High Court has articulated a conception of judicial power as distinct from the power of the other branches of government. In the 1921 decision of *Re Judiciary and Navigation Acts* ('*Re Judiciary*'),[82] a majority comprised of Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ, with Higgins J the only dissentient, held that a provision in the *Judiciary Act 1903* (Cth) giving the Court the power to give an advisory opinion as to the constitutional validity of legislation was itself invalid. According to the majority, the sections in Ch III of the Constitution 'were clearly intended as a delimitation of the whole original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.'[83]

Section 76 of the Constitution, which dealt with the relevant original jurisdiction of the Court, was prefaced with the requirement that there be a 'matter.'[84] In a definition that has stood ever since, the majority said that for there to be a 'matter' within the meaning of s 76, there must be 'some immediate right, duty or liability to be established by the determination of the Court.'[85] There was nothing in Ch III 'to lend colour to the view that Parliament can confer power or jurisdiction to determine abstract questions of law without the right or duty of any body or person being involved.'[86]

As the above account has shown, it took several decades for the second limb of *Boilermakers*, that courts can only exercise judicial power, to be firmly established. However, *Re Judiciary* hints at this limit.[87] The definition attached to the concept of federal judicial power by the majority in this case is a relatively narrow one, that keeps it fairly closely within the confines of a traditional notion of what courts are expected to do. A different view could have been taken. Justice Higgins, in dissent, was prepared to accept that s 76 did not limit the power of the Commonwealth Parliament to confer the

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82 ('*Re Judiciary*') (1921) 29 CLR 257.
83 Ibid 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
84 Likewise, so is the other provision which deals with the High Court's original jurisdiction, s 75(v).
85 *Re Judiciary* (n 82) 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
86 Ibid 267 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).
87 Indeed, James Stellios has written that this decision effectively established the second limb of the *Boilermakers* principles. See 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113, 117. In his view, if 'jurisdiction cannot be given to a court unless there is an immediate right' this necessarily excludes the conferral of non-judicial power.

necessary jurisdiction on the High Court, and also that the word 'matter' was not so limited as in the view taken by the majority.[88]

The *Re Judiciary* definition of 'matter' can therefore be recognised as operating together with, as well as informing the scope of, the second limb of *Boilermakers* as a constraint on the power of the federal judiciary. This serves to give the concept of the 'judicial power' of the Commonwealth a particular shape, although it eludes precise definition.[89] As the result in *Boilermakers* meant that arbitral powers had to be placed within a separate body, this established a pattern of the vesting of functions deemed not to be 'judicial' in other bodies. This pattern was later reflected by the formation of the Administrative Appeals Tribunal (AAT) to review the 'merits' of administrative decisions.[90] Given the discussion of 'legalism' later in this chapter, it is worth noting that the challenge to the validity of the offending provision of the *Judiciary Act* that was at the centre of *Re Judiciary* was brought by the counsel for the State of Victoria, Owen Dixon.

2.4.3 The critique of the *Boilermakers* principles

The outcome of the *Boilermakers' Case* was by no means a foregone conclusion. The actual text of the Constitution 'clearly permits, on ordinary rules of interpretation, a number of approaches' to the question of whether the Constitution requires the separation of the powers of the branches of government.[91] Jeffrey Goldsworthy said that the inference that the Constitution requires the separation of judicial power 'is debateable,

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88 *Re Judiciary* (n 82) 271-272.

89 See, eg, the discussion of the difficulty 'in attempting to formulate a comprehensive definition of judicial power' in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 182 CLR 245, 267-269 (Deane, Dawson, Gaudron and McHugh JJ).

90 See below at 2.5.1 and chapter 3 at 3.2.2 for further on the establishment of the AAT. A further example is the creation of the Federal Magistrates Court (now the Federal Circuit Court) following the decision of the High Court in *Brandy* (n 89). In this decision, the Court found that provisions in the *Racial Discrimination Act 1975* (Cth) conferring certain powers on the Human Rights and Equal Opportunity Commission were invalid since they purported to vest judicial power in an executive body – see 259-264 (Mason CJ, Brennan and Toohey JJ) and 269-271 (Deane, Dawson, Gaudron and McHugh JJ). See also Department of Parliamentary Services (Cth) *Bills Digest* (No 59 of 1999-2000, 9 September 1999), which explains that one purpose of the Federal Magistrates Bill, which established the Federal Magistrates Court, was to address issues raised by the *Brandy* decision. Following the invalidation of the determination aspects of the previous complaint-handling regime, the Federal Court had been given jurisdiction to deal with complaints that could not be resolved through conciliation. The Federal Magistrates Court was to help ease the workload of the Federal Court in its human rights jurisdiction, amongst others.

91 Stellios (n 6) 220; see also George Winterton, *Parliament, The Executive and the Governor General* (Melbourne University Press, 1983) 62, where he observed that the second limb of *Boilermakers* 'is not mandated by the language of chapter III, and can only be 'implied' therefrom if it is assumed to be necessary for judicial independence.'

since the Convention Debates offer little evidence that the framers had any such intention', although he does note that 'they clearly wanted to protect the independence of the judiciary.'[92] Geoffrey Sawer observed that, had the case been decided 'at any time between about 1920 and 1940', it most likely would have gone other way in the High Court and the Privy Council.[93] In *Dignan*, Evatt J had, in obiter, expressed doubt that the Constitution prevented courts from exercising powers that could be considered non-judicial.[94] Justice Evatt's approach was the majority view at the time,[95] however by the 1950s he and the other adherents to this position were gone from the Court, and the by-now Chief Justice Dixon was able to persuade a majority to accept his own long-held position.[96]

Yet, many were not persuaded by the outcome of the case or the majority's reasoning, and it has attracted criticism almost since it was handed down.[97] The ruling in the case created practical problems, the most immediate one being that the Court of Conciliation and Arbitration had to be divided into two bodies exercising separate functions.[98] It also raised questions about the kinds of functions judges could perform outside the range of their normal duties.[99] A key difficulty that has been identified with the *Boilermakers* doctrine is, in the words of Evatt J from *Dignan*, counselling against the entrenchment of such a principle, that 'it is not possible to predicate of all lawful Commonwealth action

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92 Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 128.

93 Sawer (n 14) 178-179, although note he also considered that if it had 'been decided in the first fifteen years of federation it would almost certainly have been answered by the High Court in the same way'.

94 *Dignan* (n 41) 116, cf 98 (Dixon J).

95 See, eg, *Lowenstein* (n 42), 566-567 (Latham CJ); 576 (Starke J); although cf the dissent of Dixon and, interestingly, Evatt JJ at 585-588, who found that the Federal Court of Bankruptcy had invalidly been given non-judicial powers such that it had been given 'the duties of prosecutor and judge' (588). However, their dissent seems to embody something closer to a *Kable*-style incompatibility principle rather than the formal separation principle ultimately established by *Boilermakers*.

96 Wheeler (n 49) 164.

97 Sawer (n 14), the various responses to his article set out at 188-196 and more recently Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 1 *Canberra Bulletin of Public Administration* 1, 6; Gabrielle Appleby, 'Imperfection and Inconvenience: Boilermakers' and the Separation of Judicial Power in Australia' (2012) 31 *University of Queensland Law Journal* 265, 269-273.

98 Sawer (n 14) 188.

99 For example, in 1940, as part of a desperate bid to avert hostilities, Sir John Latham had taken leave from his post as Chief Justice to be sent to Tokyo to lead Australia's first diplomatic mission to Japan. Later, in 1942, Sir Owen Dixon also took leave from his judicial duties so he could go to Washington as Australia's Ambassador to the United States. While, given the size and sophistication of Australia's contemporary diplomatic corps it is very difficult to imagine senior judges taking up such posts today, *Boilermakers* was decided in a very different time where it was possible that such necessities might once again arise. Sawer (n 14) 180-183 for a discussion of the possible consequences of its ruling for the practice of federal judges taking up 'extra-curricular' executive posts.

that it must be an exercise either of legislative, or judicial or executive functions.' As he noted, the functions of each arm of government are not 'mutually exclusive in character'.[100] While some actions might readily be characterised as either 'legislative' or 'judicial', it can be very hard to draw distinctions between other actions of government in order to place them in one of these categories.[101] Peter Gerangelos has described the exercise of attempting to do so as 'vexed, multi-faceted and intricate.'[102] It is well-known that judicial power 'is not susceptible of precise definition.'[103]

The province of executive power is also very difficult to define. Ivor Jennings observed that '[n]obody has seriously sought to define an administrative function, except by a process of exclusion.'[104] Even taking the function in question in the *Boilermakers' Case* itself as an example, there is no obvious reason why 'arbitration' *had* to be considered a non-judicial function.[105] This means that the drawing of distinctions is likely being driven by policy considerations, which are often unacknowledged.

Some critics of the *Boilermakers* doctrine have suggested that rather than attempting to employ the 'formalist' method of insisting that there is a rigid separation between judicial power on the one hand and legislative or executive power on the other, it would be better to employ what they describe as a 'functionalist' approach.[106] In such an approach the question to be considered is not whether a particular function or power can be categorised as either judicial or non-judicial in a binary fashion, but rather whether a function can be considered to be 'incompatible' in some way with the core functions of a court. In the latter approach, courts can exercise certain non-judicial powers, so long as they do not compromise the exercise of judicial power in some way, for instance by undermining the public's confidence in the judiciary.[107] Justice Williams had proposed such an

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100 *Dignan* (n 41) 115.

101 A good example can be found in *Roche Products Pty Ltd v National Drugs and Poisons Schedule Committee* (2007) 163 FCR 451, in which Roche Products sought to challenge a decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*'), however Branson J found that it was a legislative decision, and not of administrative character, as required by s 3(1) to give rise to the Federal Court's review jurisdiction under the of the *ADJR Act*.

102 Gerangelos (n 4) 1.

103 Mason (n 97) 6.

104 Jennings (n 29) 239-240, 293.

105 Sawer (n 14) 180.

106 Such a proposal is explored by Mason (n 97) 5-6; Gerangelos (n 4) 1; Stellios (n 87) 117, 129; and Appleby (n 97) 280. See also Rebecca Welsh, who has proposed an approach that draws upon elements of both formalism and functionalism to distinguish judicial power—'A Path to Purposive Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash Law Review* 67, 95-103.

107 Mason (n 97) 5-6, although cf Stellios (n 87) 131-132.

'incompatibility' or functional approach in his dissenting judgment in the *Boilermakers* case,[108] but the Privy Council had rejected it as 'vague and unsatisfactory' and as not supported by the text of the Constitution.[109]

For a while it seemed as though there might be a retreat from the *Boilermakers* position. In *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation*,[110] Barwick CJ was critical of '[t]he principal conclusion of the *Boilermakers' Case*', stating that it was:

> [U]nnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit.[111]

While he raised the possibility of a 'departure' from it, it was not necessary to consider the question in the matter before the High Court. A second opportunity for the reconsideration of the second limb of the principle arose two years later and was again not taken by the Court.[112] Writing a few years later, George Winterton considered that the 'eventual overruling of *Boilermakers* appears to be only a question of time.'[113]

In the decades since, however, it has 'been unquestioned'[114] and both limbs of the doctrine 'are now firmly entrenched, by precedent and by institutional practices and doctrines to which the precedents have given rise.'[115] The *Kable* doctrine[116] and the possibilities of drawing implied freedoms from Ch III that it presents have helped to breathe new life into the separation of judicial power.[117] Not only this, according to Wheeler, the High Court has 'limited the effect of *Boilermakers* by adopting a pragmatic and flexible

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108 (1956) 94 CLR 254, 313-314. This approach allowed him to conclude that award-making had 'close analogy with ordinary curial proceedings' – see 317.
109 (1957) 95 CLR 529, 542-543 (Viscount Simonds for the Court).
110 (1974) 130 CLR 87.
111 Ibid 90.
112 *R v Joske; Ex parte Shop Distributive and Allied Employees' Association* (1976) 135 CLR 195, 201 (Barwick CJ), 202 (Gibbs and Jacobs JJ), 211 (Stephen J), 222 (Mason and Murphy JJ).
113 Winterton (n 91) 63.
114 Stellios (n 6) 219.
115 Saunders (n 19) 13.
116 *Kable* (n 62).
117 Wheeler (n 49) 172-173.

approach to identifying judicial and non-judicial functions.'[118] Although a *Kable*-style incompatibility approach has not been adopted in the application of the *Boilermakers* principles, the conclusion of Wheeler suggests that in practical terms, the outcomes are similar to what they might be had such a test been adopted in any case. It is worth keeping this in mind when encountering arguments about how distinctions can be drawn between legality and merits, and jurisdictional and non-jurisdictional errors. This 'pragmatic' approach to the drawing of distinctions can help provide clues as to what values the High Court has sought to protect through the maintenance of the doctrine of the separation of powers.

Writing in 2004, Wheeler noted that 'it is important not to overstate the contemporary significance of *Boilermakers*' and that '[t]he more important restraint on the institutional allocation of governmental power remains the first limb of the separation doctrine—the long-standing requirement that federal judicial power must be exercised by courts alone.'[119] There was 'little pressure in terms of public policy to expand the responsibilities of courts beyond judicial functions.'[120] Yet, at the same time that the effect of the second limb was fading as a constitutional issue, it was increasingly being recognised as relevant to the nature and scope of federal judicial review of administrative action. Before turning to a discussion of how this state of affairs arose, it is worth noting that a limited view of judicial power was actually adopted by the High Court long before the *Boilermakers* decision.

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[118] Ibid 171; see also Fiona Wheeler, 'The Separation of Judicial Power and Progressive Interpretation' in H P Lee and Peter Gerangelos (eds) *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (The Federation Press, 2009) 222, 227-230. See further the development of the 'chameleon doctrine'—see *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, 18 (Aickin J); *Precision Data Holdings v Wills* (1991) 173 CLR 167, 189 (The Court); Wheeler (n 118) 226-227; and Appleby (n 97) 272-273. See also the *persona designata* doctrine, which would also appear to be driven by the recognition of what Gabrielle Appleby described as the 'practical need to allow the conferral of *some* non-judicial functions on judges.' See Appleby (n 97) 271 and also, for example, *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348 and *Wilson* (n 61) 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

[119] Fiona Wheeler (n 49) 173.

[120] Ibid. Although this statement must now be read in light of attempts to confer various powers on judges in the context of anti-terror and organised crime legislation. See, eg, Paul Fairall and Wendy Lacey, 'Preventative Detention and Control Orders Under Federal Law: The Case for a Bill of Rights' (2007) 31 *Melbourne University Law Review* 1072 and Rebecca Ananian-Welsh and George Williams, 'The New Terrorists: The Normalisation and Spread of Anti-Terror Laws in Australia' (2014) 38 *Melbourne University Law Review* 362. See also the subsequent work of Wheeler (n 118) 230-244.

2.5 CHAPTER III SEPARATION OF JUDICIAL POWER AND THE LIMITS OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

Like the separation of powers theory, judicial review of administrative action has deep antecedents. In Australia, its common law principles formed part of the legal heritage received from Great Britain. The Australian Constitution, in effect since 1901, contains express reference to three of the remedies developed to restrain official action over a long period of time at common law: mandamus, prohibition and injunction.[121] Although judicial review of the actions of officers of the Commonwealth has therefore been available since its foundation, for much of the twentieth century, the original jurisdiction of the High Court to review the actions of the executive was invoked relatively infrequently.[122]

The first Australian administrative law text, *Principles of Administrative Law*, written in 1950 by Wolfgang Friedmann, does not refer to this provision of the Constitution until the third from last page, and then does so only in relation to the supervision of tribunals.[123] Since the text predated the *Boilermakers* case, it also, obviously, did not refer to its doctrine. Rather, the discussion it contains of this principle was in general terms, drew upon the British constitution and noted that the separation of powers doctrine 'must be regarded as a general principle of political theory rather than as a strict constitutional principle capable of exact definition.'[124] A leading judicial review text written much later, after the comprehensive administrative law reforms of the 1970s, only refers to the *Boilermakers* case in the context of the possible limits the first limb of the doctrine might place on privative clauses.[125] This was a point later made by the joint judgment in *Plaintiff S157/2002 v Commonwealth*,[126] where it was observed that 'Parliament cannot

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121 *Australian Constitution*, s 75(v).

122 For more than half of the first century of Federation the provision was invoked sparingly, most often in industrial relations matters. From the late 1970s onwards it began to be used with increasing frequency against a wider range of 'officers of the Commonwealth.' See 4.2.1 for a discussion of the Commonwealth Parliament's attempts to restrict judicial review in migration and refugee matters in the 1990s, leaving, at one point, s 75(v) as the only avenue of review for some decisions.

123 Friedmann (n 14) 110.

124 Ibid 23 and chapter 3 generally.

125 Harry Whitmore and Mark Aronson, *Review of Administrative Action* (Law Book Company, 1978) 497.

126 ('*Plaintiff S157/2002*') (2003) 211 CLR 476.

confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction.[127]

However, by the turn of the new century, the Constitution had come to be seen as a major influence on the shape and nature of judicial review of administrative action.[128] It is now relatively common for accounts of Australian administrative law, and in particular, judicial review of administrative action, to begin with a discussion of the specific relevant features of the Constitution, including the separation of judicial power.[129] This shift took place in two main stages occurring almost twenty years apart. Like most changes that happen in public law, both are connected to wider shifts in government and political culture that were also taking place at the time. The first was in response to a perceived need to modernise and improve the access and engagement citizens had with the Commonwealth administrative state. The second is best understood as an attempt by the judiciary to first place limits upon its own power to scrutinise executive action, and then later to safeguard the same in the face of legislative attempts to oust it.[130] While these steps were taken under domestic pressures, they can also be perceived as the articulation of a response by Australian courts, in particular the High Court, to developments elsewhere, something considered in more depth in the next chapter.

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127 Ibid 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). This case is considered further at 4.2.3.

128 See, eg, Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303; Susan Kneebone, 'What is the Basis of Judicial Review?' (2001) 12 *Public Law Review* 95; Selway (n 2); Cheryl Saunders, 'Constitution as Catalyst: Different Paths Within Australasian Administrative Law' (2010) 10 *New Zealand Journal of Public International Law* 143; Spigelman (n 76) 77; Groves (n 75); Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism* (Hart, 2017) chapter 2; and Debra Mortimer, 'The Constitutionalization of Administrative Law' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 696.

129 See, eg, Matthew Groves and H P Lee, 'Australian administrative law: The constitutional and legal matrix' in Matthew Groves and H P Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 1, in particular 6-11; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (5th ed, LexisNexis Butterworths, 2019) chapter 5; Michael Head, *Administrative Law: Context and Critique* (4th ed, The Federation Press, 2017) 46-48, 50. This focus can be contrasted with leading English texts in which the concept of the separation of powers is referred to in a more abstracted fashion, see, eg, H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014) 317.

130 Chapter 3 describes Brennan J's articulation of the limits of judicial review in Australia, while chapter 4 engages with the High Court's response to legislative attempts to oust review. More broadly, Carol Harlow and Richard Rawlings have described legislative and executive responses to judicial review decisions as 'striking back'—see ''Striking Back' and 'Clamping Down': An Alternative Perspective on Judicial Review' in John Bell, Mark Elliott, Jason NE Varuhas and Phillip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016) 301.

2.5.1 First stage: the establishment of a system of 'merits review'

The first step towards the acknowledgment of the role of the separation of powers doctrine in shaping administrative law came with the publication of the report of the Commonwealth Administrative Review, or 'Kerr', Committee in 1971.[131] By the late 1950s, prominent Australian lawyers had begun advocating for the creation of a new federal Ch III court to help relieve some of the burden of the High Court's original jurisdiction.[132] The Gorton Government had established this Committee in 1968 with the task of seeking ways of improving access to administrative justice in Australia. The Committee was chaired by John Kerr, then a judge of the Commonwealth Industrial Court and the Supreme Courts of ACT and the Northern Territory, and included then Commonwealth Solicitor-General Sir Anthony Mason, his successor in that post, Robert Ellicott, and Professor Harry Whitmore. Although the Committee was given relatively narrow terms of reference,[133] the report it tabled in Parliament in 1971 recommended sweeping and innovative administrative law reforms.

Amongst these was that there should be 'a general system of appeals established on a much broader base than present.'[134] Judicial review of administrative action, which was in any case difficult for most people to access, only allowed for review of decisions on the basis of whether they were lawful or not. However, most of the time when a person was 'aggrieved' by an administrative decision, they would feel that it was 'wrong on the facts or the merits of the matter', rather than with regard to its lawfulness.[135] Appeal to an institution capable of reviewing the 'merits' of decisions was therefore required.

In the view of the Committee, several factors, including the complex nature of judicial review,[136] and the greater suitability of a tribunal process for the review of the great mass of administrative decisions,[137] but also separation of judicial power required by Ch III of the Constitution, militated against such a broadly-based appeals power being given to a

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131 *Report of the Commonwealth Administrative Review Committee* (Canberra, 1971) ('*Kerr Committee Report*'); see Peter Cane, 'Merits Review and Judicial Review—The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 213.

132 See Michael Black, 'The Federal Court of Australia: The First 30 years—A survey on the occasion of two anniversaries' (2007) 31 *Melbourne University Law Review* 1017, 1019-1020.

133 *Kerr Committee Report* (n 131) 1, where the terms of reference and the Committee's approach to them are set out.

134 Ibid 67.

135 Ibid 9.

136 Ibid.

137 Ibid 29.

superior court. The Committee considered that, owing to the constitutional restriction on the exercise of non-judicial power by Ch III courts:

> Where the decision of the administrative authority involves non-justiciable issues, a comprehensive review of that decision cannot be committed to the courts. It is of paramount importance to recognise that the vast majority of administrative decisions involve the exercise of a discretion by reference to criteria which do not give rise to a justiciable issue. It follows that, for constitutional reasons there can be no review by a court of the merits of these decisions.[138]

The concern of the Committee was with courts possibly being invited to adjudicate 'non-justiciable' issues.[139] Instead the Committee recommended the establishment of a 'general Administrative Review Tribunal'.[140] Such a Tribunal could undertake merits review of the exercise of administrative discretion, and thereby complement the role of courts, which supervise the legality of action. In 1975, the Commonwealth Parliament passed legislation, which established the AAT in line with the recommendations of the Committee.[141]

In a 'bold departure from the pre-existing law'[142] the role of the AAT was 'to review decisions made in the exercise of powers conferred' by the Act under which the particular decision is made, provided that the Act itself gave the AAT jurisdiction to do so.[143] What this means is that, in undertaking a review of a decision, the AAT can exercise 'all the powers and discretions that are conferred by any relevant enactment upon the person who made the subject decision.'[144] If the AAT determines upon its own examination of the material before it that the decision that has been made is not the 'correct or preferable'[145] one, it is able to set the decision aside and either make a new one in substitution or remit it for reconsideration.[146] In this way, the AAT is said, in a phrase that has become a

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138 Ibid 24.

139 How this may be understood as contributing to the meaning of 'the merits' is further considered in chapter 3 at 3.2.3.

140 *Kerr Committee Report* (n 131) 86.

141 *Administrative Appeals Tribunal Act 1975* (Cth).

142 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 297 (Kirby J).

143 *Administrative Appeals Tribunal Act 1975* (Cth) s 25(1)(a).

144 Ibid s 43(1); see also, for example, *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal (No 2)* (1981) 3 ALD 88, 91 (Davies J).

145 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

146 *Administrative Appeals Tribunal Act 1975* (Cth) s 43(1)(c)(i) and (ii).

shorthand description of what 'merits review' is, to 'stand in the shoes of the original decision-maker'.[147] In reviewing decisions, the AAT is not 'at large', but is 'subject to the same general constraints as the original decision-maker.'[148] Jurisdiction to review administrative decision-making is conferred upon the AAT by some 400 Commonwealth statutes.[149] Attempts to reduce or remove the capacity of the AAT to scrutinise decisions are made by governments from time to time,[150] meaning that its place in the accountability network must be guarded and not taken for granted. Nevertheless, it plays an important and central role in the Australian system of administrative law.[151]

The establishment of such a comprehensive system of merits review meant that the courts were left with functional responsibility for judicial review. Shortly after the AAT was established, the *Administrative Decisions (Judicial Review) Act* (Cth) ('ADJR Act') was enacted.[152] The ADJR Act gave the newly established Federal Court jurisdiction to review administrative decisions and conduct. It aimed to simplify the processes of judicial review and make it more accessible too. Although the similarity of tribunal review to judicial review has been pointed out,[153] these separate systems of merits and judicial review gave a new relevance to the notion of the constitutional separation of judicial power in review of administrative action.

2.5.2 Second stage: the judiciary's articulation of its own role

Stephen Gageler, as he then was, observed that until the 1990s, judicial review of administrative action had been a 'crudely bottom up affair', comprised of a set of common law principles with no organisational theory.[154] The shift from this situation to one in

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147 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 324-325 (Kiefel J), referring to the statement of Smithers J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 46, where his Honour said 'in reviewing a decision the Tribunal is considered as being in the shoes of the person whose decision is in question.' See also at 299 (Kirby J) and more recently *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629, [51] (Bell, Gageler, Gordon and Edelman JJ).

148 *Frugtniet v Australian Securities and Investments Commission* (2019) 93 ALJR 629, [14] (Kiefel CJ, Keane and Nettle JJ).

149 See Administrative Appeals Tribunal, *Annual Report 2018-19* (Report 2019) 10.

150 There are many examples. See Australian Citizenship Amendment (Strengthening the Requirements for Australian Citizenship and Other Measures) Bill 2017 (Cth) for a recent, albeit unsuccessful one.

151 See, for instance, chapter 3 at 3.2.2 and chapter 6 at 6.5.4.

152 This was also prompted by the recommendations of the Kerr Committee—see *Kerr Committee Report* (n 131) 76-80.

153 This is discussed in chapter 3 at 3.2.1.

154 Gageler (n 128) 303.

which it has now been described as having an 'overarching constitutional justification'[155] is often said to have begun with the judgment of Brennan J in *Attorney General v Quin* ('*Quin*').[156] In this judgment, Brennan J sought to set out the parameters of the supervisory jurisdiction by reference to the very nature of judicial power itself. Drawing upon the United States Supreme Court decision in *Marbury v Madison*[157] he said 'it is, emphatically, the province and duty of the judicial department to say what the law is' but that '[t]he duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.' To this he added that it was not the task of the court to 'simply cure administrative injustice or error' and that '[t]he merits of administrative action, to the extent they can be distinguished from the legality, are for the repository of the relevant power, and, subject to political control, for the repository alone.'[158] Justice Brennan's stricture acknowledging a distinction between merits and legality is considered further in chapter 3.

Justice Brennan's statement was later quoted by a majority of the High Court with approval,[159] and has since been referred to by courts many times as setting out the limits of judicial power to review administrative action.[160] Although at no point did Brennan J refer to the *Boilermakers* principles or even the Constitution itself,[161] this has since been taken to be an affirmation that the Ch III separation of judicial power places limits on the supervisory jurisdiction of courts in Australia.[162] This can be partly attributed to Brennan

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155 Gageler (n 75) 175.

156 *Quin* (n 9); see, eg, Gageler (n 128) 307 and (n 75) 165, 170, 175; Margaret Allars, 'Executive Versus Judiciary Revisited' in Anthony Connelly and Daniel Stewart (eds) *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (The Federation Press, 2015) 49, 49-60, although Will Bateman and Leighton McDonald consider the 'cleaving of the limits of the legal norms of administrative law to constitutional considerations' began with the earlier judgment of Brennan J in *FAI Insurances v Winneke* (1982) 151 CLR 342, see Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' in (2017) 45(3) *Federal Law Review* 153, 166.[156] Their view regarding this is discussed further in chapter 3.

157 5 US 137 (1803).

158 *Quin* (n 9), 35-36.

159 *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ).

160 For example, *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135, 152-153 (Gleeson CJ. Gummow, Kirby and Hayne JJ); *Minister for Immigration and Citizenship v SZJSS* (2010) 240 CLR 164, 174 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Plaintiff M70/2011 v Minister for Immigration and Citizenship* (2011) 244 CLR 144, 157-158 (French CJ) (citing *Wu Shan Liang*).

161 Something once pointed out by Matthew Groves, who noted how 'striking' this was; see (n 75) 402.

162 Groves and Lee (n 129) 10.

J's invocation of *Marbury v Madison*.[163] The case, in which the United States Supreme Court asserted its power to undertake judicial review, was influential upon the decision of the framers of the Australian Constitution to include s 75(v) in Ch III, so as to place beyond doubt the question of whether the High Court would have original jurisdiction to restrain officers of the Commonwealth.[164] The pronouncement of Marshall CJ also sits comfortably with the *Boilermakers* doctrine. In the United States, however, the statement of Marshall CJ is generally 'confined' to constitutional law, and not extended into review of administrative action.[165]

The *Marbury* principle had been cited from time to time by the High Court in support of explanations of the role of a constitutional court.[166] However, prior to *Quin*, it had not been used to explain the role of the court in the supervision of uses of administrative, as opposed to legislative, power. In *Quin*, before setting out the most well-known passages of his judgment, Brennan J referred to the statement of Gibbs J in *Victoria v Commonwealth and Hayden*,[167] that the 'duty' placed upon the courts by the *Marbury* principle applied to adjudication of constitutional challenges to executive action.[168] To this, Brennan J added 'but the duty extends to judicial review of administrative action alleged to go beyond the power conferred by statute or by the prerogative or alleged to be otherwise in disconformity with the law.'[169]

Gageler said this 'adoption' of the principle to review of administrative action meant that:

> [T]he judicial review of legislative action and the judicial review of administrative action are ultimately attributed to a common source. That source, although it can be legitimately labelled "the rule of law", is more precisely identified as the constitutional separation of judicial power from legislative and executive power. Within a constitutional system which

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163 *Quin* (n 9) 35.

164 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875 (Edmund Barton). See also *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*'), 363 (Dixon J); J A La Nauze, *The Making of The Australian Constitution* (Melbourne University Press, 1972) 233-234; and Justin Gleeson and Robert Yezerski, 'The Separation of Powers and the Unity of the Common Law' in Justin Gleeson, James Watson and Ruth Higgins (eds) *Historical Foundations of Australian Law* (vol 1) (The Federation Press, 2013) 297, 317-318.

165 Mark Aronson, 'Between Form and Substance: Minimising Judicial Scrutiny of Executive Action' (2017) 45 *Federal Law Review* 519, 520.

166 For example, by Fullagar J in *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262-263.

167 (1975) 134 CLR 338.

168 Ibid 380.

169 *Quin* (n 9) 35.

> establishes and secures such a separation of powers, it is the province and duty of the judicial power to declare and enforce the law that constrains and limits the powers of the other branches of government.[170]

The crux of this, however, was that the derivation of the power to undertake review of administrative action from a source common with the jurisdiction to review legislative action meant that the former also had a 'common limitation.' This was that 'declaring and enforcing the law is not only exclusively the function of judicial power' but was also its 'sole function', hence the need to stay out of 'the merits' of administrative decision making.[171] It is possible to see from this account the way in which the legality/merits distinction referred to by Brennan J in *Quin* became entangled with the reciprocal limbs of the Ch III separation of judicial power. It should also be recalled that the notion of judicial power itself remains the narrowly drawn one associated with the reasoning in *Re Judiciary*.

Gageler has described Brennan J's *Quin* judgment as an archetype of 'top down reasoning.' In it, Brennan J took the 'constitutional conception of the nature of judicial power' and from it 'derived a single principle which then informs the scope and content of judicial review.'[172] This was the beginning of a new approach, in which the formerly 'piecemeal common law conception of Australian administrative law' moved towards one with a 'constitutional net' settled over it.[173] The judgment laid the foundations for the 'seemingly singular and elegant constitutional scheme'[174] that was later constructed by the High Court in the landmark cases of *Plaintiff S157/2002 v Commonwealth*[175] and *Kirk v Industrial Court of New South Wales*.[176] Within the confines of this 'net', 'the conceptual justification for review' at both Commonwealth and state levels 'is no more and no less than the rule of law itself.'[177]

Previously courts might have avoided 'the merits' out of a desire to maintain a distinction between the supervisory jurisdiction and de novo appeal. However, in the contemporary

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170 Gageler (n 128) 309.
171 Ibid; see also Sir Anthony Mason, 'Judicial Review: A View From Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 331-332.
172 Gageler (n 128) 307.
173 Gageler (n 75) 165.
174 Ibid 175.
175 *Plaintiff S157/2002* (n 126).
176 *Kirk* (n 72).
177 Gageler (n 75) 175.

context, merits review amounts to something that is constitutionally impermissible for a court to do, as it entails the assumption of executive functions and therefore is a breach of the separation of powers doctrine.[178] This seems to presuppose a number of things, one of them being that it is somehow possible to draw clear distinctions between the merits and the legality of a decision without recourse to other, external, considerations despite the fact that it is well-known that there are no 'bright lines'[179] here. This close association between the norms of judicial review of administrative action and formal rather than informal constitutional principle 'has become integral to dogma associated with 'Australian exceptionalism' in judicial review.'[180] Yet when explained in this way, some nuances are missing.

Perhaps the most important nuance that seems to get left out of some contemporary accounts of judicial review of administrative action in Australia, judicial review involves the application of what remain, essentially,[181] judge-made standards to the assessment of the legality of administrative action. Even as the shift towards the better recognition of the influence of the Constitution on judicial review of administrative action has taken place, this standard setting role of the courts has not been displaced. To locate the true source of what Taggart described as exceptionalism, it is necessary to look to the wider normative influences at play.

The apparent 'convergence' of constitutional and administrative law has not occurred only in Australia.[182] This means that 'constitutional tradition' has become a factor in shaping the role of the courts in judicial review of administrative action.[183] What are the

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178 See, eg, the statement of McHugh and Gummow JJ in *Lam* (n 2) at 25 that it was actually 'an aspect of the rule of law under the Constitution' that judicial power did not extend 'to the performance of the legislative function of translating policy into statutory form or the executive function of administration.'[178] Courts can be given powers that are similar to merits review powers by Parliament. See, eg, the *Tax Administration Act 1953* (Cth), s 14V, which gives '[a] person aggrieved' by an order from the Tax Commissioner in accordance with Part IVA of the Act that they should not leave Australia in circumstances where they owe a tax liability the right to appeal to the Federal Court (or the Supreme Court of a State or Territory).

179 See, eg, Stephen Gageler, 'The legitimate scope of judicial review' (2001) 21 *Australian Bar Review* 279, 279-280.

180 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(3) *Federal Law Review* 153, 166.

181 Leaving to one side, for the purposes of this discussion, the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

182 See, eg, Dame Sian Elias, 'The Unity of Public Law?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 15, 15-16.

183 Ibid 15.

features of the Australian constitutional tradition that have influenced the different shape of judicial review of administrative action in Australia? While it is typically conceived of as a 'formalist' doctrine, the constitutional separation of powers, and the 'formalism' or 'legalism' thought to underpin it, are useful starting points for a consideration of what some of the wider normative influences on the Australian constitutional tradition might be.

2.6 CONSEQUENCES OF THE NEW CONSTITUTIONAL PARADIGM: AUSTRALIAN 'EXCEPTIONALISM'?

Several consequences for the scope of judicial review of administrative action have been said to flow from the Constitution, in particular the separation of powers doctrine. Some have helped to preserve or reinforce the power of the courts. For example, it was noted by the joint judgment in *Plaintiff S157/2002 v Commonwealth*,[184] that 'a privative clause cannot operate so as to allow a non-judicial tribunal or other non-judicial decision-making authority to exercise the judicial power of the Commonwealth' or in other words allow such a body to 'determine conclusively the limits of its own jurisdiction.'[185] This aided a finding that the Commonwealth Parliament could not pass legislation that ousted review of administrative action that had been taken in such a way as to amount to a jurisdictional error.[186]

However, the constitutional separation of powers doctrine is said to be one reason why judicial review of administrative action in Australia has not followed developments that have taken place in other, comparable, nations.[187] For instance, the separation of federal judicial power is referred to as one reason why Australia has maintained a distinction between jurisdictional and non-jurisdictional error, while elsewhere it has been abandoned.[188] Likewise, it is also one reason given as to why the distinction between merits and legality is considered somehow more restrictive in Australia.[189] It is also

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184 *Plaintiff S157/2002* (n 126).
185 Ibid 505 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
186 Ibid 506.
187 See for instance, Saunders (n 128) 154.
188 Selway (n 2) 234, later cited with approval by *Lam* (n 2) 25 (McHugh and Gummow JJ); Saunders (n 128) 154; cf Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (ed) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 395, 409 and Lisa Burton Crawford and Janina Boughey, 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18, 22; see chapter 4 at 4.3.
189 Saunders (n 128) 154.

thought to influence the way in which certain common law developments in judicial review have been rejected in Australia, for example the application of a proportionality standard to executive action,[190] the provision of substantive protection to legitimate expectations,[191] and the development of the concept of judicial deference.[192] Owing to the stance Australian courts have taken on these doctrinal matters, it has become common for judicial review in Australia to be characterised as different to approaches in legal systems that are often thought to otherwise be comparable, for example that of England.

Australian review is often characterised as 'formalist'.[193] This is how Taggart described it in his provocative[194] but enduring article on what he described as Australian 'exceptionalism'.[195] Taggart noted that the Constitution was 'generally construed' as requiring a 'much stricter separation of powers' than even those of the United States or Canada. While this made the High Court's power to undertake constitutional review very strong, it came at the cost of 'considerable restraint' in administrative law, meaning that courts were limited 'to enforcing the 'law'', with a 'sharp divide' between the law and the merits that 'the courts say they cannot and will not cross.'[196] However, he rejected the view that the Australian Constitution might be the reason for this, writing that it was not the 'conversation-stopper' Australian lawyers considered it to be. He added:

> Simply citing the 'memorable words' in the venerable US Supreme Court decision of *Marbury v Madison*—that '[i]t is, emphatically, the province and duty of the judicial department to say what the law is'—is too simplistic. Like so much Australian constitutional talk it is actually grounded in a more

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190 In *Bruce v Cole* (1998) 45 NSWLR 163 at 185 Spigelman CJ observed that '[t]he concept of proportionality is plainly more susceptible of permitting a court to trammel on the merits of a decision than Wednesbury unreasonableness.' See also Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 374-375 and 378-382 for an assessment of the Australian position on this after *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 and *McCloy v New South Wales* (2015) 257 CLR 178.

191 *Lam* (n 2) 23-25 (McHugh and Gummow JJ).

192 See, eg, Janina Boughey, 'Re-Evaluating the Doctrine of Deference in Administrative Law' (2017) 45 *Federal Law Review* 597, 597.

193 See, eg, Taggart (n 3) 7; Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 15, 17; Knight (n 5) 19, 37.

194 See Mark Aronson, 'Process, Quality and Variable Standards: Responding to an Agent Provocateur' in David Dyzenahus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 6.

195 Taggart (n 3).

196 Ibid 4-5.

> universal common law constitutionalism, which owes much to the writings of A V Dicey.[197]

Rather than being derived from the Constitution, he considered this narrower approach to review of administrative action was the result of one of the other 'distinguishing features of the Australian public law landscape', which was what 'Jeffrey Goldsworthy has summed up as a devotion to legalism, which those outside Australia might better recognise as formalism.'[198]

Taggart noted that Australia had not embraced proportionality[199] or substantive legitimate expectations,[200] but he considered that these features of Australian judicial review of administrative action were not those that made it an outlier. Courts elsewhere had yet to fully embrace proportionality without rights, or the English doctrine of substantive fairness,[201] so roundly rejected by McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*.[202] For Taggart though, Australian formalism had failed to address the changing nature of the administrative state in cases like *Griffith University v Tang*,[203] and *NEAT Domestic Product v Australian Wheat Board*,[204] in which the definition of what comprised administrative action for the purposes of the applicability of judicial scrutiny had been narrowly drawn.[205] He considered that in both cases, the High Court had failed to 'see through the institutional form to the reality of the situation.'[206] Taggart's point that principle in Australia has in some ways not kept pace with changes such as the increase in the outsourcing of government functions is perhaps a valid one. However, Australian courts may not be free to follow developments in common law principle of other nations in the way Taggart argued, at least while also maintaining consistency with underlying Australian doctrine and values. Australian courts may instead seek alternative ways of developing principle that is both capable of confronting these challenges and in keeping with Australian traditions.[207]

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197 Ibid 11, references omitted.
198 Ibid 7.
199 Ibid 24.
200 Ibid 26.
201 Ibid 25-26.
202 *Lam* (n 2) 21-25 (McHugh and Gummow JJ).
203 (2005) 221 CLR 99.
204 (2003) 216 CLR 277.
205 Taggart (n 3) 22, 22-24.
206 Ibid 22.
207 For example, there is a need for Australian administrative law to better grapple with the accountability problems posed by trends in outsourcing of government functions. It is possible that, as has historically

In Taggart's view, by adhering to the approach he described, Australian judicial review of administrative action was 'not speaking the new international language of judicial review'.[208] Writing at around the same time, Thomas Poole applied a similar critique in which he characterised the modern approach to judicial review in Australia as 'the devil' in comparison with the 'deep blue sea' of the English approach.[209] Like Taggart, he considered that, 'after the perceived excesses of the Mason court', Australian courts had rejected 'the international discourse of rights' and retreated into 'the apparent safe-haven of old-fashioned Dixonian legalism.'[210] Like Taggart, he considered this 'reversion to formalism after a period of anti-formalism at home and during an anti-formalist era abroad' was to 'deliberately court isolation.'[211]

More recently Dean Knight has similarly categorised judicial review in Australia in a like way, observing that Australia's 'strong embrace of abstract formalism' is 'a tradition worn almost as a badge of honour.'[212] In his taxonomy of contemporary modes of review, Knight described review in Australia as continuing to 'echo the abstract formalism that was once replete—but has since dissipated in English administrative law.'[213] Knight presented Australian administrative law jurisprudence as lagging behind that of comparable, but more progressive nations. Australia, on this view, is not only 'exceptionalist', it has been left in the past. In support of this conclusion, Knight referred to similar issues to those raised by Taggart and Poole. For instance, he points to the 'strong commitment to the legality-merits dichotomy.'[214] Knight suggested that the 'centrality of jurisdictional error'[215] in Australia demonstrated one of the hallmarks of what he described as a 'scope of review' approach, one that used to prevail in England. A key characteristic of this was the 'classification of decisions and errors into different

proven to be the case in Australia, non-judicial solutions might present more effective systemic mechanisms than judicial review. Any attempt to develop judicial doctrine would need to accommodate certain constitutional limitations on judicial review going beyond the separation of powers doctrine. For a discussion of this issue see Janina Boughey and Greg Weeks, 'Officers of the Commonwealth in the Private Sector: Can the High Court Review Outsourced Exercises of Power?' (2013) 36 *University of New South Wales Law Journal* 316.

208 Taggart (n 3) 9.
209 Poole (n 193) 17.
210 Ibid.
211 Ibid 33.
212 Knight (n 5) 254.
213 Ibid 37.
214 Ibid 43; see also Taggart (n 3) 27-28.
215 Knight (n 5) 39; see also Spigelman (n 76).

categories: some reviewable, others not.'[216] Chapter 4 addresses this latter aspect of Knight's characterisation more specifically.[217]

2.7 DEFINING FORMALISM

The picture of review in Australia painted by Taggart, Poole and Knight has, to some extent, become the defining one. However, it is worth considering how accurate it really is. One of the dangers of accepting this critique is that it has the potential to become self-reinforcing, both inside and outside of the courts. This is because it potentially obscures the wider forces at play in Australian judicial review, meaning in turn that any opportunities they might offer for the further development of principle will also be obscured. A conception of review as motivated by arid formalism could simply result in this very thing. A starting point for the exploration of these issues is to consider whether review in Australia really warrants its 'formalist' tag. To do so it is first necessary to attempt an inquiry into what is meant by 'formalism'. Formalism is a term that defies neat definition. It can be attributed with more than one meaning and should therefore be used with care.

2.7.1 What we talk about when we talk about formalism

Martin Loughlin has said formalism 'is rooted in the view that law is a self-contained body of rules which operates by means of a distinctive system of conceptual thought.'[218] In his 'Australian Exceptionalism' article, Taggart defined it as follows:

> Formalism is a catch-all term: a 'shorthand for a number of different ideas' including a highly technical approach to problems; the employment of formal, conceptual and logical analysis, often related to literalism and sometimes originalism; a belief that law is an inductive science of principles drawn from the cases, rather than the application of broad overarching principles to particular disputes, and in extreme forms a denial of judicial law-making.[219]

The term formalist is often used pejoratively, even if the precise nature of the failing that is being criticised is not always readily apparent.[220] As H L A Hart observed, '[c]uriously

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216 Ibid 36.
217 See at 4.3.
218 Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 22.
219 Taggart (n 3) 7.
220 Schauer (n 8) 510.

enough, the literature which is full of the denunciation of these vices' never really made what they were 'clear in concrete terms'.[221] Echoing this, Frederick Schauer later wrote that while there was 'scant agreement on what it is for decisions in law, or perspectives on law, to be formalistic' except to the extent that 'whatever formalism is, it is not good.'[222]

To understand why the term formalism is often used pejoratively, some context is useful. In the early twentieth century, scholars, particularly in the United States,[223] grew increasingly critical of the traditional mode of interpretation of courts, which became understood to be 'formalism', or what John Hart Ely described as 'clause bound interpretivism'.[224] There were several strands of this response to formalism, variably described as realism, pragmatism and functionalism. To a certain extent they all shade into each other and are therefore hard to distinguish. The terms also have different meanings for different scholars and in different contexts. These movements can, however, be viewed as attempts to formulate ways for the law to better respond to a range of modern developments, such as the emergence of the regulatory state and the growth in legislation that brought it about.[225]

In 1935, Felix Cohen, one of the leading proponents of realism, declaimed that 'the age of the classical jurists is over.'[226] Cohen argued that courts tended to ignore 'practical questions of value or of positive fact' instead 'taking refuge in "legal problems" which can always be answered by manipulating legal concepts in certain approved ways.'[227] In this model, the rules of law 'are not descriptions of empirical social facts (such as customs of men or the customs of judges) nor yet statements of moral ideas, but are rather theorems in an independent system.' He described this conception of law as 'the science of transcendental nonsense.'[228] Cohen thought that in the future, students of the law would

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221 H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 610.

222 Schauer (n 8) 509-510.

223 See, eg, Roscoe Pound, 'Mechanical Jurisprudence' (1908) 9 *Columbia Law Review* 605, 614-615 although see Brian Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010) chapter 3, where it is argued the jurisprudence of the time was not as rigid as Pound contended.

224 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) 11.

225 Tamanaha (n 223) 94.

226 Felix Cohen, 'Trancendental Nonsense and the Functional Approach' (1935) 35 *Columbia Law Review* 809, 833.

227 Ibid.

228 Ibid.

need to have an appreciation for 'the human motivations and social prejudices of the judges, the stretching and shrinking of precedents in every washing ... and the fact of legislation', as well as be versed in what he termed 'social policy'.[229] Law did not, as it was 'traditionally conceived', exist in a vacuum where there were 'no temporal processes, no cause and effect, no past and no future.' Rather, '[l]egal systems, principles, rules, institutions, concepts and decisions can be understood only as functions of human behaviour.'[230]

Much of the realist reaction was elicited by decisions of the United States Supreme Court, such as *Lochner v New York* ('*Lochner*'),[231] in which an attempt by the state of New York to regulate the working conditions of bakery employees was held to contravene freedom of contract rights that the Court considered were protected by the Fourteenth Amendment.[232] By the interwar years, the realist movement was flourishing in the United States and criticism of the formalism of the United States Supreme Court 'reached fever-pitch' during the 1930s, when several aspects of Roosevelt's New Deal were frustrated by decisions of the Court.[233] In 1937 this caused the President to contemplate increasing the number of judges on the Court, or requiring them to retire by a certain age, the threat of which may have helped to break the deadlock between the administration and the Court.[234]

2.7.2 The realist conundrum

In spite of these critiques, it has proven difficult to formulate a better theory of adjudication.[235] This is particularly true in the domain of public law, where problems of institutional legitimacy can arise for courts if they stray too far outside what might typically be considered a judicial approach to the matters that come before them. The main flaw of realism, or what Ely referred to as 'non-interpretivism',[236] was that while it

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229 Ibid 833-834.
230 Ibid 844-845.
231 198 US 45 (1905).
232 See Pound (n 223) 615-616 for a realist critique of *Lochner*.
233 Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (Federation Press, 2017) 22.
234 Ibid.
235 As Keven Booker and Arthur Glass have observed, '[a]ll the basic approaches—originialism, intentionalism, interpretivism, non-interpretivism and so on—will have great difficulty in delimiting the appropriate interpretive context.' See 'The *Engineers Case*' in H P Lee and George Winterton (eds) *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 34, 44.
236 Ely (n 224) 1.

demanded that judges be more open about the values that they were drawing upon in adjudication, it seemed incapable of giving a satisfactory answer to the problem of which values are appropriate for application in public law matters.[237] This was something of which many realists or functionalists themselves were aware. This problem caused some early proponents of realism, for example, Roscoe Pound, to distance themselves from some of its central contentions after a period.[238]

Cohen wrote that '[l]egal criticism is empty without objective description of the causes and consequences of legal decisions' and that '[l]egal description is blind without the guiding light of a theory of values.'[239] This was also the later conclusion of Pound, who, in rejecting the claim of some realists that the law could be reduced 'to a science analogous to mathematical physics' said that while statistics might have some value in showing 'how justice is administered' they were also being expected to show how it must be, thereby dispensing with 'the question of how it ought to be'. This latter question turned 'ultimately on a theory of values' and was 'the hardest one in jurisprudence.'[240]

2.7.3 Formalism as judicial self-restraint

In Schauer's view '[a]t the heart of the word "formalism," in many of its numerous uses, lies the concept of decision-making according to *rule*.'[241] Prima facie, in the context of a legal system, he could see nothing wrong with that. It is indeed quite difficult to see how else the law can be applied in an orderly, consistent and transparent fashion except by adherence to rules in some form. Of course, to avoid absurdity, decision-makers must have a measure of discretion as to how rules should be applied to the case at hand.[242] How limits are to be drawn by courts around this area of discretion itself can be recognised as Pound's much harder, values-based question.

For Schauer, the crux of the objection to the style of reasoning perceived as 'formalist' lay in its tendency to present what were essentially choices about meaning, which were

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237 Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455, 458.
238 Loughlin (n 218) 130; see, eg, Roscoe Pound, 'The Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697.
239 Cohen (n 226) 849.
240 Pound (n 238) 703.
241 Schauer (n 8) 510.
242 Ibid 525.

motived by values, as inexorable conclusions.[243] As he acknowledged, this accorded with Hart's notion that formalism 'derives from the denial of choice in the penumbra of meaning, where applying the term in question is optional.'[244] Schauer took the decision in *Lochner* as his example. He argued it was not a problematic decision because it was too narrow, a common critique of reasoning described as formalist, but rather because it was 'excessively broad.' For Schauer, the decision was rightly condemned:

> … as formalistic not because it involves a choice, but because it attempts to describe this choice as compulsion. What strikes us clearly as a political or social or moral or economic choice is described in *Lochner* as definitionally incorporated within the *meaning* of a broad term. Thus, choice is masked by the language of linguistic inexorability.[245]

However, Schauer suggested that there was some utility in a version of 'formalism' that was 'a way of describing the process of taking rules seriously'.[246] A system characterised by rules might bend towards what he described as 'conservative, in the non-political sense', but this had the advantage of encouraging stability and predictability.[247] Further, rules often functioned to limit the choice of decision-makers, and while this tended to be framed in the negative, sometimes this was in fact a valuable restriction upon their capacity to prioritise their 'own sense of the good' where this might 'diverge from that of the system they serve.'[248] Therefore, while 'it is clearly true that rules get in the way', it did not necessarily always follow that this was 'a bad thing'.[249] Formalism was only ever 'superficially about rigidity and absurdity.' At its heart, it was 'about power and its allocation'. For Schauer, '[t]o be formalistic as a decisionmaker is to say that something is not my concern, no matter how compelling it may seem.'[250] This is not to say that Schauer did not note that there may be times when this might be akin to the avoidance of responsibility, however he said:

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243 Ibid 511-512.
244 Ibid 514, citing H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 608-612.
245 Ibid 514, 538.
246 Ibid 537.
247 Ibid 542.
248 Ibid 543.
249 Ibid.
250 Ibid.

> Part of what formalism is about is its inculcation of the view that sometimes it is appropriate for decisionmakers to recognize their lack of jurisdiction and defer even when they think their own judgment is best.[251]

On this reading then, it is possible recognise that formalism can be an expression of an acknowledgment of the limits of judicial power.

In a contemporary setting, no one denies that legal reasoning is influenced by a whole range of value considerations. Indeed, Brian Tamanaha goes as far as to suggest that 'for more than a century many prominent judges, law professors, and lawyers have many times said precisely the opposite—emphasising the openness of law to social influences, social changes and social needs' as well as 'the inevitability that judges must occasionally make choices.'[252] This is no less true in Australia than it is elsewhere. If review in Australia appears 'formalist', it is worth asking whether this formalism is itself the product of a particular set of values.

2.8 AUSTRALIAN 'LEGALISM' AS THE EXPRESSION OF A CULTURE OF JUDICIAL SELF-RESTRAINT

As Taggart noted, the tendency in Australia is to refer to the High Court's interpretative style as 'legalism'.[253] While Taggart equated this with formalism, examples of *Lochner*-style reasoning are relatively rare in Australian public law jurisprudence.[254] Criticisms of the High Court's reasoning often proceed from a different basis to those directed at the style of jurisprudence that provoked the realist reaction, for instance that it has given insufficient regard to certain values, out of preference for rules or form, or seeks to mask the political power that it wields behind impartial-seeming doctrine.

In his response to Taggart's 'exceptionalism article', Mark Aronson wrote that 'it is no more difficult to detect an Australian judgment's underlying value preferences than it is to decode the preferences of judgments from elsewhere.'[255] In his view, in the context of Australian judicial review of administrative action, 'the charge of formalism' really

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[251] Ibid 543-544.
[252] Tamanaha (n 223) 181.
[253] See, eg, Taggart (n 3) 7 and Goldsworthy (n 92).
[254] Although see Brian Galligan, *The Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (Queensland University Press, 1987) eg, 26-30, regarding the obstacle that the Constitution itself traditionally presented to the nation reform agenda of the Labor Party. See 2.9.1 for further on the problems this presented for the Chifley Government in particular.
[255] Aronson (n 194) 23.

means that 'Australia's judicial review grounds should be more directly normative or principles-based.'[256] Judicial review of administrative action in Australia is guided by normative principles. Similar to courts elsewhere, Australian courts seek to safeguard procedural fairness, the rational and reasonable exercise of discretion and the rights of individuals. It is possible that in some cases, the limits the Australian judiciary has drawn around its own power to apply the law so as to protect these values are more narrowly set than those drawn elsewhere. However, to simply describe review of administrative action in Australia as formalist, owing to innate conservativism, is to overlook other forces at work upon it. This is not to deny that conservativism is a factor in shaping the role of courts in judicial review of administrative action, but it cannot be regarded as the sole explanation for any differences between doctrine in Australia, and, for example, England.

The next chapter explains the way in which the influential judgment of Brennan J in *Attorney General (NSW) v Quin,*[257] serves to illustrate some of the other influences.[258] These are a commitment to a distinctively democratic form of government as well as an acceptance that administrative discretion is a legitimate feature of the state, and not something inherently suspect. The latter idea encompasses an appreciation of the fact that judicial review is not the only way of holding the executive to account, and that sometimes other accountability mechanisms are more appropriate.[259] Each of these influences contributes to a conception of judicial power that is independent, and powerful within its own boundaries, even if those boundaries are somewhat more narrowly drawn than they might be elsewhere. This section of this chapter will examine the way in which the High Court's traditional mode of interpretation, often called 'legalism', can be viewed as a response to these underlying normative influences. In this sense, the High Court's interpretative approach can be regarded as closely linked with the constitutional doctrine of the separation of judicial power, as it too can be recognised as both a product of this interpretative approach and the same wider influences.

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256 Ibid 23-24.
257 *Quin* (n 9).
258 See at 3.6.
259 See below at 2.8.2 and also chapter 5 at 5.3.2.

2.8.1 'Strict and complete legalism' in constitutional review

The Australian Constitution was itself a statute of the British Parliament. Like most other statutes, it is a practical document,[260] with provisions devoted to explaining, in relatively unadorned language, the powers of each institution of government, and those of the federal government in relation to the states. It 'does not include grand declarations of national values or aspirations.'[261] As such it lends itself to a style of interpretation that focuses primarily on form, which is one way of understanding the approach known as 'legalism'.[262]

Legalism is often said to have its basis in the High Court's landmark 1920 decision in the *Engineers' Case*.[263] Prior to this case, there had been a split within the Court regarding the most appropriate way to interpret the Constitution. In its first two decades, there was a view that that it could be interpreted by reference to free-standing doctrines, particularly with respect to the appropriate division of powers across the federal system, that arguably had no basis in its actual text.[264] However, the majority in the *Engineers' Case* insisted that the 'one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it' and then its words will 'shine with [their] own light' or speak for themselves.[265]

This is usually taken to mean that the text was not to be read as subordinate to principles found outside the text itself, such as doctrines of 'political necessity' or 'reserved powers'. Justice McHugh once observed that the significance of this was that the majority had essentially rejected 'the use of external political principles or policies to interpret the Constitution, and thereby committed the Court to the strict legalism of which Sir Owen Dixon became the leading proponent.'[266] Taggart wrote that the 'towering presence of

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260 Chapter 5 discusses some of the political ideas in Australia at the time of Federation that influenced the drafting of the document in a deliberately pragmatic way—see at 5.2.

261 Goldsworthy (n 92) 109.

262 See for instance Sir Anthony Mason, 'The Role of a Constitutional Court: A comparison of the Australian and United States experience' (1986) 16 *Federal Law Review* 1, 24.

263 *Engineers' Case* (n 12).

264 See, eg, Goldsworthy (n 92) 116-118 for a discussion of pre-*Engineers* doctrine.

265 *Engineers' Case* (n 12) 152 (Knox CJ, Isaacs, Rich and Starke JJ). The judgment states '. . . and then *lucet ipsa per se*.' The translations of this phrase in the text above are from Keven Booker and Arthur Glass, 'What makes the *Engineers Case* a classic?' in Michael Coper and George Williams (eds) *How Many Cheers for* Engineers*?* (The Federation Press, 1997) 45, 48.

266 *Eastman v The Queen* (2000) 203 CLR 1, 47.

Sir Owen Dixon has cast a longer shadow over the Australian judiciary than any other jurist', and that his influence was one reason why Australian courts had clung on to 'legalism' for so long.[267] While it is true that Dixon was the best-known proponent of this style,[268] some guidance as to why it has been dominant for so long in Australia can be found in a closer examination of the *Engineers' Case* itself.

2.8.2 The *Engineers' Case* – legalism as a mode of interpretation that takes account of the specific role of the judiciary in the Australian Constitution

The majority judgment in the *Engineers' Case* contains several passages referring to the place of responsible government in the Australian Constitution. It was this feature of the Constitution that the majority drew upon to reject the use of decisions of the United States Supreme Court in the interpretation of the Constitution, stating:

> [I]t is plain that, in view of the two features of common and indivisible sovereignty and responsible government, no more profound error could made than to endeavour to find our way through our own Constitution by the borrowed light of the decisions, and sometimes the dicta that American institutions and circumstances have drawn from the distinguished tribunals of that country.[269]

This passage precedes a section of the judgment where some standard English principles of statutory and constitutional interpretation are set out, which concludes with the famous line that '[t]he one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it is made'.[270]

This use of the notion of 'responsible government' to reject doctrines that had been applied in the context of interpreting the similarly federal United States Constitution has been the subject of criticism. Keven Booker and Arthur Glass once described the arguments for distinguishing the United States authorities, including the reliance on responsible government, as 'dubious'.[271] In recent work characterising Australian judicial review as paradigmatic of what he defines as 'democratic legalism', Theunis

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267 Taggart (n 3) 8.
268 There is a long-standing critique that while Dixon was a proponent of legalism he was not a practitioner of it – however see discussion at 2.9.
269 *Engineers' Case* (n 12) 148 (Knox CJ, Isaacs, Rich and Starke JJ).
270 Ibid 152.
271 Booker and Glass (n 235) 41.

Roux observed that 'this entire section of the main judgment, Australian constitutional scholars now agree, amounted to rhetorical overreaching if not plain irrationality.'[272] He suggested that this focus on the English approach to interpretation was to 'fixate on just one part of the Australian Constitution's heritage and moreover a part that was not even relevant to the case.'[273]

While the application of this reasoning to the case at hand might be questionable, the invocation of the notion of responsible government by the High Court can be regarded as the recognition of the central role this plays in the Australian Constitution. As Stellios has observed:

> While there has been much expression of puzzlement as to the relevance of responsible government to the issues of the interpretation of legislative powers and intergovernmental relations it is generally accepted that the Court was referring to the ultimate control of government by the electorate.[274]

At this point it becomes important where emphasis is placed. There are two potential ways of viewing the impetus for the interpretative approach called 'legalism', which is said to have its foundation in the *Engineers' Case*.

In one, legalism is what Brian Galligan once described as a 'cloak' used by the High Court to shield its 'political work'.[275] Beneath this cloak, Galligan thought that 'the Court has been able to perform a high profile but delicate political function without becoming embroiled in political controversy.'[276] This perspective was later reiterated by Haig Patapan, who said that '[u]ntil very recently the High Court regarded itself, and was generally considered to be, solely a legal institution.'[277] Patapan also attributed this to the Court's 'legalism', noting that '[t]he politics of the High Court appeared unpolitical because legislation was impugned indirectly: the validity of laws was raised in the context of specific cases rather than as matters of general principle, and only when the Court was apprised of a matter' meaning that 'the limits of judicial power obscured the political

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272 Theunis Roux, *The Politico-Legal Dynamics of Judicial Review: A Comparative Analysis* (Cambridge University Press, 2018) 97.
273 Ibid 97.
274 Stellios (n 6) 548.
275 Galligan (n 254) 252.
276 Ibid.
277 Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000) 3.

nature of the Court's decisions.'[278] This appears to be the view that Roux finds persuasive, since he too characterises 'democratic legalism' as a mode of review that 'depends upon the judiciary's observance of the reasoning methods that have come to be associated with the ideal of law's autonomy from politics.'[279] What this formulation has in common with that of Galligan, and, to an extent, Patapan, is that seen in this light, 'legalism' is an approach to review that attempts to preserve its democratic legitimacy.

An alternative perspective that may be adopted is that this mode of interpretation does not seek to deny or obscure the political role of the courts or attempt to maintain the (frankly unsustainable) claim that law can be separated from politics, or that political considerations play a role in judging. Rather, what it seeks to do is acknowledge the institutional or functional limits of courts, and to recognise, and leave space for, the role of what might be called 'politics' in the Australian constitutional system. Within this framework, the Court remains the 'guardian' of the Constitution, meaning that it is able to be more proactive where this is required for the general health of the constitutional system itself.[280] This reading was given to the *Engineers' Case* by Stephen Gageler some years prior to his appointment to the High Court.[281] For several reasons this latter view is the preferable one.

For Gageler, the meaning of the passages in *Engineers* that had proven so cryptic for some others was clear. He read the reference to responsible government and its influence on the way the Court should approach its role as 'recognising the existence of political constraints within the Constitution and as enjoining the judiciary to assume a substantially lower profile in the resolution of political disputes.'[282] In constructing this thesis, Gageler drew upon the distinctly different origin stories of the respective constitutions of Australia and the United States, and the influence of social and political circumstances on

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278 Ibid.

279 Roux (n 272) 78-79.

280 For this reason, the view of Windeyer J of the *Engineers Case*, that it was partly a response to a growing recognition of the need for the national government to have powers, as expressed in *Victoria v Commonwealth* ('*Payroll Tax Case*') (1971) 122 CLR 353, 395-396 can be regarded as in keeping with the alterative perspective. Some support for this is found in Henry Burmester, 'Justice Windeyer and the Constitution' (1987) 17 *Federal Law Review* 65, for instance at 66, where Burmester noted that Windeyer J's method offered an alternative to the narrow positivism of some of his predecessors, but also from the rights-protecting approaches of Murphy and Deane JJ, instead providing 'a satisfactory approach to the function of judicial review having regard to the democratic notions underlying the Australian constitutional system.'

281 See Gageler (n 40). See also Stephen Gageler, 'Beyond the Text: A Vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138.

282 Gageler (n 40) 184.

constitutional design. The founders of the United States Constitution feared not only state but majoritarian tyranny.[283] In the words of Gageler, this led them to design a constitution in which 'government was to be removed from the people and once removed it was to be divided within itself.'[284]

As chapter 5 describes, the political culture in Australia in the 1890s could not have been further removed from that prevailing in America at the time the United States Constitution was drafted. As Gageler says, in Australia, there was 'no fear of government; much less fear of government by the people.'[285] The Australian Constitution was created instead against a background of faith in government and progressive democracy, one of 'trusting in the political process'.[286] As explained in chapter 5, Australia's institutions of government are distinctively democratic, as, traditionally at least, has been its political culture. The Australian understanding of the British institution of responsible government must be considered in light of these traditions, which are somewhat different to those of England itself.

Although judicial review was also something taken for granted as necessary in a federation by the drafters of the Australian Constitution, not much thought seems to be given as to how a court with such powers would interact with the notion of responsible government.[287] For Gageler, the true significance of the *Engineers' Case* is that it can be read as recognising 'that the political process should be given primacy in the Australian Constitution', including in relation to resolving disputes about the boundaries of federal and state power.[288] This requires the acknowledgment that 'the central conception of responsible government' is that the political process itself can act 'as a mechanism of constitutional restraint.'[289]

The most curious thing about the 'puzzlement' caused by the majority judgment in the *Engineers' Case* would seem to be that these conclusions are clear from its face. Consider

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283 The ideals regarding government and democracy that existed before and after Federation are discussed in chapters 5 and 6.
284 Gageler (n 40) 167.
285 Ibid.
286 Ibid 181. See further chapter 5 at 5.2.
287 Ibid 174.
288 Ibid 184.
289 Ibid.

the following paragraph, taken from what Roux suggests is the possibly 'irrational' part of the judgment:

> When the people of Australia, to use the words of the Constitution itself, 'united in a Federal Commonwealth,' they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. *No protection of this Court in such a case is necessary or proper*.[290]

To return to Schauer's claim that formalism can function as a mechanism for encouraging the subversion of the individual value preference of a judge to wider or overarching systemic ones, it is possible to discern from this passage some of the overarching systemic constitutional values of Australia. The *Engineers' Case* did not so much lay the foundations of legalism as set out the guideposts for an approach to judicial review that would be characterised by an appropriate level of restraint for a constitutional court in a polity that was expressly designed to be a majoritarian democracy.[291]

This, at least, is the view of Gageler, who wrote that the majority judgment does not stand as a call for 'legalism', but rather for a mode of interpretation that recognises the primacy of the role of the political process 'as a mechanism of constitutional constraint,' with judicial review playing a 'subsidiary role.'[292] This is what was meant by the references to responsible government within the judgment, and '[s]o interpreted, the case supports the ascendency of one form of constitutionalism over another.'[293] As Gageler noted, the judgment recognised the Constitution as both 'a legal, but also a political document', referring to it as 'the political compact' of the Australian people.[294]

Gageler revisited this thesis in a speech given some time after his initial paper was published. In this paper, Gageler noted that he 'continued to adhere broadly' to the 'vision of the structure and function of the Constitution' that he had set out in it.[295] In his view,

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290 *Engineers' Case* (n 12), 151-152 (Knox CJ, Isaacs, Rich and Starke JJ) (*emphasis added*).
291 See chapter 5, in particular at 5.2.2(b).
292 Gageler (n 40), 184.
293 Ibid.
294 Ibid, quoting *Engineers' Case* (n 12), 142 (Knox CJ, Isaacs, Rich and Starke JJ).
295 Gageler (n 281) 144-145.

it was only by having regard to this, in particular the central role given to responsible government within it, that it was it possible to discern a 'coherent conceptual explanation' for 'modern constitutional doctrine' and its 'apparent contradictions.'[296] The Australian Federation 'was conceived not as a means of dividing and constraining government but as empowering self-government by the people of Australia',[297] the institutions of Australian government are responsible and answerable to the Australian people, and '[t]hose people, through the exercise of political power, ought at least for the most part be well able to look after themselves.'[298] He asked:

> [W]hy is it not appropriate to see the Constitution as creating a political system whose ordinary constitutional working will be through the political process and to see the role of the judicial power within that political system as akin to that of a referee whose extraordinary constitutional responsibility is for the game itself rather than a linesman whose only responsibility is to call in or out?[299]

This second paper by Gageler makes the influence on his thinking of the American legal process theorists more explicit.[300] The legal process school derived from the work of the Harvard scholars Henry Hart and Albert Sacks.[301] Legal process theory contained a recognition that the various institutions of government each had a role to play in the 'settlement of social questions'.[302] Within this theory, the 'role of law in the broadest sense is to set, monitor and enforce the procedural arrangements determining who does what.'[303] It is the role of the courts to have a detailed understanding of the roles of other institutions within the system, and to adapt jurisprudence accordingly.[304] It is perhaps unsurprising that this approach has some attraction in the Australian context, for reasons expanded upon in chapter 5.

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296 Ibid 139-140.
297 Ibid 145.
298 Ibid 147.
299 Ibid 152.
300 See for instance his references to Herbert Weschler and John Hart Ely, ibid 150-151.
301 Hart and Sacks taught at Harvard for several decades, beginning in the 1930s. The work of Hart and Sacks was mostly contained in teaching materials, which were widely known in the United States, but not published until 1994, although they had prepared a 'tentative edition' for publication in 1958—see Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) (prepared for publication from the 1958 Tentative Edition by William N Eskridge Jr and Phillip P Frickey).
302 Ibid 5.
303 David Kennedy, 'Henry M Hart Jr., and Albert M Sacks' in David Kennedy and William W Fisher III (eds) *The Canon of American Legal Thought* (Princeton University Press, 2006) 243, 245.
304 They called this 'the principle of institutional settlement'. See Hart and Sacks (n 301) 4. See chapter 5 at 5.3.2.

The institution of responsible government lies at the heart of the Australian Constitution. It has played a role in shaping other constitutional doctrine in addition to that derived from the *Engineers Case*. For example, the influence of the concepts connected with responsible government is one explanation for the ruling in *Dignan*, referred to above at 2.4, that a separation of Commonwealth legislative and executive power would be impractical. More recently, the concept of responsible government has been drawn upon for the development of principles for the control of Commonwealth spending.[305] This constitutional notion of responsible government must, however, be understood in the context of the system of Australian government as a whole.

The arguments of Gageler support the notion that the real impulse shaping judicial review is not a desire to mask the true political power of the High Court, but rather the recognition that the nature and character of Australia's constitutional arrangements requires judicial power to be tailored in such a way as to leave room for the political process to resolve many issues. As explained in chapter 5, the Australian system of government is very, perhaps even distinctively, democratic. The national government was designed to be majoritarian in way that was, at the time, unparalleled in either the English or American systems that predated it. Recognition of this makes it possible to more readily accept that while Australian constitutionalism is usually said to be an amalgam of political and legal constitutionalism, it is really the former that is ascendant in Australia.[306]

2.9 LOOKING AGAIN AT THE APPROACH OF CHIEF JUSTICE DIXON

'Strict and complete legalism' is, as noted by Taggart, synonymous with Sir Owen Dixon.[307] Although in his 1987 article Gageler observed that his reading of the *Engineers' Case* was at odds with the legalism of Dixon,[308] it is worth considering whether Dixon's own approach proceeded from an understanding of judicial power that is not all that far removed from the one that has been contended for here. As well as being

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[305] See, eg, *Williams v Commonwealth* (2012) 248 CLR 156, where the notions of federalism and responsible government were both drawn upon, for eg at 204-206 (French CJ); 351-352 (Crennan J); and 369-370 (Kiefel J). See Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253, 256 for an analysis of this approach.

[306] Gageler (n 40) 184; see also Lisa Burton Crawford and Geoffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 355, 364-367.

[307] Taggart (n 3) 8.

[308] See, eg, Gageler (n 40) 189.

the best-known proponent of legalism, Dixon perhaps also made the most significant contribution towards the adoption of the second limb of *Boilermakers*, first as an advocate in *Re Judiciary* and then as the Chief Justice of the High Court at the time the *Boilermakers' Case* was decided. While both legalism as a mode of interpretation and the separation of powers doctrine itself are often equated with formalism, both could alternatively be perceived to arise from what Schauer termed judicial 'modesty'.

2.9.1 Legalism, 'public confidence' and the separation of judicial power

The legalism of Dixon is most often thought to have been driven by a desire to preserve public confidence in the courts. On the occasion of his swearing in as Chief Justice of the High Court in 1952, Dixon said, by reference to the High Court's role as the arbiter of disputes between the Commonwealth and the States, that:

> … close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts. It may be that the court is thought to be excessively legalistic. I should be sorry to think that it is anything else. There is no safe guide to judicial decisions in great conflicts other than a strict and complete legalism.[309]

This position was later endorsed as the most appropriate approach for the High Court by subsequent Chief Justices, including Sir Garfield Barwick[310] and Murray Gleeson,[311] although not Sir Anthony Mason.[312]

Once again, the prevailing narrative about this speech seems to be that what Dixon described as legalism, with its potential to obscure the policy considerations driving judicial choice, was thought to be important for the democratic legitimacy of the courts. The remarks in his swearing-in speech are often taken to mean that Dixon considered that what he referred to as 'close adherence to legal reasoning' was the best way to safeguard the legitimacy of the High Court's power.[313] As noted, Galligan contended that legalism

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309 Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv.
310 *Attorney-General (Cth); Ex rel McKinlay* (1975) 135 CLR 1, 17.
311 See Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 85.
312 Mason (n 262) 5
313 See Leslie Zines, *The High Court and the Constitution* (The Federation Press, 5th ed, 2008) 597; Sir Anthony Mason, 'Mike Taggart and Australian Exceptionalism' in David Dyzenhaus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Bloomsbury, 2009) 179, 180; William MC Gummow, 'Law and the Use of History' in Justin T Gleeson and Ruth C A Higgins (eds) *Constituting Law: Legal Argument and Social Values* (The Federation Press, 2011) 61, 74.

was a 'political strategy' aimed at disguising the true political power of the undemocratic institution of judicial review,[314] and that Dixon 'undoubtedly appreciated its strategic implications.'[315]

Sir Anthony Mason suggested that a central motivating concern of the Dixon-led majority in *Boilermakers* was Dixon's perception of the need to preserve respect for the courts as an institution. It was this concern that influenced the stance he took on the need to quarantine judicial power.[316] Winterton also thought that this seemed to be the policy consideration driving *Boilermakers*, but he was sceptical of the validity of such a concern. This was because he thought it appeared to be 'based on the unfounded assumption that judges will be subject to political influence if they venture beyond purely *judicial* activities', a concern he thought was belied by the acceptance by judges of extra-judicial non-judicial activities.[317] However, the apprehension seems to be less about the influence that might be brought to bear on judges, and more that public confidence in the judiciary would be put at risk.

As another former Justice of the High Court, William Gummow, has pointed out, the reference by Dixon to 'strict and complete legalism' is 'apt to be misunderstood for want of historical perception.'[318] The context in which this statement was made must be recalled. The speech was given in the shadow of the Cold War, at the close of two decades of social and political turmoil in Australia, which had commenced with the Great Depression and encompassed the Second World War, during which Australia came under threat of invasion. The High Court had played an active and visible role in this period, making a series of controversial decisions that allowed the shifting of the balance of financial power away from the states,[319] struck down some of the more ambitious elements of the Chifley Government's post-war social reconstruction program,[320] and at a time of hysteria over communism, both global and domestic, invalidated the Menzies

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314 Galligan (n 254) 38-39.
315 Ibid 40.
316 Mason (n 313) 180. Chief Justice Dixon 'is generally thought to be the architect of the majority decision'. See also Mason (n 262) 4.
317 Winterton (n 91) 62.
318 Gummow (n 313) 74-75; see also Galligan (n 254) 41.
319 *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case'*).
320 For example, *AG (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237 ('*First Pharmaceutical Benefits Case*'); *Bank Nationalisation Case* (n 164); and *British Medical Association v Commonwealth* (1949) 79 CLR 201 ('*Second Pharmaceutical Benefits Case'*). See Galligan (n 254) chapter 4, where an account is given of the way in which the High Court invalidated key aspects of the reform program of the Curtin/Chifley Governments throughout the 1940s.

Government's attempt to criminalise the Australian Communist Party.[321] As Gummow noted, 'Dixon was not suggesting, as has sometimes been asserted that, the court should be blind to the world around it', but rather 'at one level, perhaps, was [seeking] to mollify resentment in the other branches of government at recent decisions which would today be stigmatised as "judicial activism".'[322]

The need to ensure continued 'public confidence' in courts is also something that seems to have been a motivating concern of Brennan J,[323] whose contribution to contemporary Australian administrative law is discussed further in chapter 3. An important consideration here is that it is not just that public confidence in the courts that is at stake, but in the constitutional and political system as a whole. Writing extra-judicially, Brennan put it this way:

> Public confidence in the whole legal system would be impaired if judicial activism outstrips the consensus of the community and becomes what Lord Devlin castigated as 'judicial dynamism'.[324]

This would not seem to be a concern with the need to disguise the true power of courts, but rather to ensure that they perform their role in such a way as to maintain appropriate limits upon it. The next chapter returns to this theme in the context of the contemporary framing of judicial review of administrative action primarily as a matter of statutory interpretation.[325]

Dixon, like his predecessor on the High Court, Sir Isaac Isaacs, the likely author of the *Engineers* majority,[326] was well aware that the Constitution was 'a political instrument.'[327] As one of the three primary institutions of the federal government, the court plays an unavoidable role in national politics. The material question is not whether or not the Court affects political power, but how it elects to do so. The *Boilermakers*

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321 *Australian Communist Party Case v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case'*).
322 Gummow (n 313) 75; see also Gageler (n 281) 143-144.
323 See Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1987) 18,18 and also 22. Cf J A G Griffith, who described this (when it was cited by Sir John Laws) as 'populist gobbledegook' in 'The Brave New World of Sir John Laws' (2000) 63 *Modern Law Review* 159, 174. Laws' quoting of Brennan, when Brennan's arguments are read in full, seems to sit somewhat at odds with his own expansionary approach in any case.
324 Brennan (n 323) 22.
325 See at 3.5 and 3.6.
326 Booker and Glass (n 235) 34.
327 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J).

decision was made in the wider context of industrial law, once the scene of some of the greatest social, legal and federal battles in Australia. In his swearing-in speech, Dixon had appeared to flag some disquiet that there was 'confusion in the public mind' about judicial power and the power wielded by 'industrial tribunals'.[328] The fear was that being vested with Commonwealth arbitral power 'would plunge the federal courts into the turbulent and controversial world of industrial relations.'[329]

One possible explanation for the characterisation of arbitral functions as non-judicial is that arbitration could require the consideration of broad policy considerations, such as the state of the economy, and the cost of living. Not only this, arbitration did not involve disputes between individuals about rights. The awards that resulted from this process affected entire industries and large numbers of workers across the nation. Such questions are instantly recognisable as being amongst those that are more typically thought of as matters best left to the executive sphere, since they give rise to questions that are possibly not likely to be well resolved by the application of 'the judicial method'.[330]

Rather than viewing 'legalism' as an approach designed to mask the true nature of judicial power, and to obscure the policy choices being made, it is possible Dixon himself regarded it is as technique that was tailored to ensuring that the High Court fulfilled a role that was appropriate for a constitutional court within the framework of the Constitution. Viewed in this light, it is less about preserving 'public confidence' in the legitimacy of review as it is about providing a mechanism for the recognition of the limits of the judicial role, and ensuring respect for the scope of the powers of the other branches of government.

It can perhaps be regarded a 'safe guide' for the High Court in its role as 'referee', or in other words as counselling the appropriate level of judicial self-restraint in service of the overarching values of the constitutional system itself. To the extent that it can be regarded as formalist, it is not of a kind that denies or obscures the role of values in judging, but rather to limit the range of values which might be drawn upon. This is a view taken by Keven Booker and Arthur Glass, who suggested that while the *Engineers* approach to interpretation 'does not forbid the move to context, it does try to structure and guide the

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328 Dixon (n 309) xvi.
329 Mason (n 313) 180; see also Gummow (n 313) 74.
330 Sir Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate and Other Papers*, collected by Woinarski (The Law Book Company, 1965) 152.

use of this material.'[331] It is a view that would also seem to be in keeping with that held by another former Justice of the High Court, Sir Victor Windeyer, who observed that:

> … in the interpretation of an instrument of government, adherence to rule has not meant the kind of legal positivism or literalism that shackles meaning to a binding and unyielding mass of precedent. Legalism there demands rather that kind of consistency that is the product of the application of constant principle to contemporary needs in developing circumstances.'[332]

2.9.2 Dixonian legalism as a response to realism

Even accounting for differences between the court in certain eras and between individual judges, it has never been strictly true that the High Court decided cases without reference to standards or values. It has long been recognised by Australian judges that formal legal reasoning cannot provide the answers to every question presented to a court. As Goldsworthy observed, the judges of the High Court have 'never claimed to be able to resolve constitutional uncertainties simply by consulting a dictionary' and that 'they were always willing to take into account considerations of history, purpose and policy', although he noted that 'they did so within a relatively narrow compass.'[333] Likewise Leslie Zines observed that it has often been the case that the same judges who have underscored the need for legalism 'did not regard that method of approach as denying resort to broad social and political values they perceived in the Constitution.'[334] High Court judges 'have not generally denied the existence of judicial choice.'[335] It is doubtful whether they could be said to have ever ascribed to what is sometimes called the 'declaratory theory', or the idea that common law already existed and was simply 'a body of rules waiting always to be declared and applied.'[336]

Mason once described Dixon's conception of the 'judicial method' as 'an analytical approach to legal questions featuring abstract logical reasoning based on the text of the

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331 Booker and Glass (n 235) 44.
332 Sir Victor Windeyer, 'Learning the Law' (1961) 35 *Australian Law Journal* 102, 108.
333 Goldsworthy (n 92) 154.
334 Zines (n 313) 610.
335 Goldsworthy (n 92) 153.
336 See *Skelton v Collins* (1966) 115 CLR 94, 134, where Windeyer J said that to 'suppose that [Australia's inherited common law] was a body of rules waiting always to be declared and applied may be for some people satisfying as an abstract theory. But it is simply not true in fact.' This is referred to by Anthony Mason as the 'demise of the declaratory theory' in Australia, see Sir Anthony Mason, 'Legislative and judicial law-making: Can we locate an identifiable boundary?' in Geoffrey Lindell (ed) *The Mason Papers* (Federation Press, 2007) 59, 62.

relevant law, to the exclusion of social, political and economic considerations' which were still operating in the background.[337] This is reminiscent of the attempt to present jurisprudence as a kind of stand-alone science of which Cohen and others were so critical. However, Sawer observed that 'even in the case of Dixon himself, it is not difficult to indicate issues whose decision demanded a broadly political set of assumptions.'[338] Writing 50 years ago, he added that 'it is a commonplace modern juristic analysis that no system of law can contain within itself all the materials by which every case that arises can be decided, no matter how brilliant the legal logicians of the relevant court.'[339] The question here though is whether or not Dixon actually intended legalism to mean an approach that obscured judicial value judgments, or whether it can be regarded as a call to judges to have care regarding which ones they applied.

Much in the way that Brennan J's *Quin* judgment can be read as a response to trends emerging in judicial review of administrative action elsewhere,[340] it is possible to recognise external influences on the concept of legalism as propounded by Dixon. As Tanya Josev has pointed out, Dixon was aware of the debates occurring in United States jurisprudence and in academic legal thought during his time on the High Court.[341] Josev suggested that his address entitled 'Concerning Judicial Method',[342] given at Yale in 1955, which she calls 'the high-water mark in the exposition of legalism', can be regarded as an attempt to engage in dialogue with the realist scholars of that University.[343]

It is this address that Mason drew upon in formulating the outline of legalism that he gave.[344] However, Josev noted that in it, Dixon 'explicitly gave consideration to the realist and behaviourist developments in legal thinking' and attempted to accommodate 'legalism within this new intellectual climate.'[345] Dixon alluded to the great flaw of the

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337 Mason (n 336) 61.

338 Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 58.

339 Ibid. See also Galligan (n 254) 39 where he says that '[o]ne has only to read Dixon's opinions to see that he was not in fact a strict and complete legalist.'

340 See chapter 3 at 3.6.

341 Josev (n 233) 96, where she refers to his correspondence with senior figures in the judiciary and the academy on both sides of the Atlantic. See also Dixon's tribute to Felix Frankfurter, published while he was the Chief Justice of the High Court—'Mr Justice Frankfurter: A Tribute from Australia' (1957) 67 *Yale Law Journal* 179.

342 Dixon (n 330).

343 Josev (n 233) 98-102; see also John Gava, 'Law Reviews: Good for Judges, Bad for Law Schools?' (2002) 26 *Melbourne Law Review* 560, 566-567.

344 Mason (n 336) 61, fn 6.

345 Josev (n 233) 98.

realist critique, which is that it proposed no adequate alternative to a conception of law as science with its own internal rules of logic. He stated:

> … it is a safe generalisation that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly, no doubt, but still as having acquired.[346]

To the passage quoted above, Dixon added that it was 'open to the realist to attack the validity of such an assumption' but it would be 'unreal' for a realist 'to deny its existence.'[347] He acknowledged that the law as applied by judges would respond to changes over time as 'accepted principles' were 'applied to new cases' or that courts could 'reason from the more fundamental of settled principles to new conclusions or to decide that a category is not closed against unforeseen instance.'[348] However, it was 'an entirely different thing for a judge who is discontented with a result held to flow from a long-accepted legal principle, deliberately to abandon the principle in the name of justice or social necessity or social convenience.'[349] As Josev observed, it is possible to see in this a concession from Dixon 'that the judiciary as a subject of study was very open to the realist critique', but that this was for others to engage in, not judges.[350] She considered that the Yale address was an attempt by Dixon to show 'that adherence to his brand of legalism was not stultifying; nor did it preclude a progressive approach to the law as sought by the realists.'[351]

2.9.3 The endurance of 'legalism'

For a period coinciding with the chief justiceships of Mason and Brennan, from the mid-1980s until the late 1990s, some considered that legalism had been put to rest.[352] This

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346 Dixon (n 330) 157-158.
347 Ibid 158.
348 Ibid 158.
349 Ibid 158.
350 Josev (n 233) 99; See also John Gava, who has written that '[f]or Dixon judging is a practice, not the application of a theory'—'Dixonian Strict Legalism, *Wilson v Darling Island Stevedoring* and Contracting in the Real World' (2010) 30 *Oxford Journal of Legal Studies* 519, 523; see also John Gava, 'Sir Owen Dixon, Strict Legalism and *McRae v Commonwealth Disposals Commission*' (2009) 9 *Oxford University Commonwealth Law Journal* 141, 141.
351 Josev (n 233) 100.
352 See, eg, Patapan (n 277) 5.

was a period of creativity in High Court judgments unseen for some time, as reflected in decisions that recognised native title,[353] the implied freedom of political communication,[354] and of the importance of taking international law into account in domestic decision-making.[355] Undoubtedly influenced by trends elsewhere, including in the United Kingdom, where courts were increasingly having regard to European jurisprudence, some commentators, including a small number of sitting judges, began to explore the idea that courts could create a bill of rights by implying from the Constitution that the intention of the Australian people in adopting it was that the powers of Parliament were presumed not to 'extend to invasion of fundamental common law liberties'.[356] This never became a majority view.[357]

Speaking in the mid-1980s, prior to his appointment as Chief Justice, Mason had observed the resistance in Australia to constitutional change by the method set out in s 128 of the Constitution.[358] He expressed the view that legalism had fostered conservativism, and said 'it is impossible to interpret any instrument, let alone a constitution, divorced from values.'[359] He suggested that it was the role of a constitutional court to use its powers to ensure that the Constitution remained relevant, meaning it was necessary for courts interpreting constitutions to 'take account of community values', so that the constitutions themselves continued to be relevant.[360] He thought that 'policy oriented interpretation' would mean that the values being drawn upon by judges would be exposed 'for debate', meaning it 'would enhance the open-character of the judicial decision-making process and promote legal reasoning that is more comprehensive and persuasive to society as a whole.'[361]

Josev documented the unprecedented backlash experienced by the High Court subsequent to the innovations of the Mason era.[362] Gabrielle Appleby and Andrew Lynch have said that what occurred following the 1996 election of the Howard Government 'was the most

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353 *Mabo v Queensland (No2)* (1992) 175 CLR 1; *Wik Peoples v Queensland* (1996) 187 CLR 1.
354 *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
355 *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273.
356 See, eg, John Toohey, 'A Government of Laws, and Not of Men' (1993) 4 *Public Law Review* 158, 170.
357 This is discussed in more depth in chapter 3 at 3.4.2.
358 Mason (n 262) 1-2.
359 Ibid 5.
360 Ibid.
361 Ibid 28.
362 Josev (n 233) chapters 4 and 5.

pronounced institutional pushback in Australia's judicial history.'[363] However, they considered that it 'proved, ultimately, unsuccessful', adding that 'Mason's jurisprudential interpretative legacy would survive.'[364] As they observe, as Chief Justice, Mason had been able to attract a majority of the Court to embrace the clear set of 'progress-minded' values he had 'conceived to reflect the changing context in which Australia found itself.'[365]

It is sometimes suggested that in the face of the criticism the Court was subjected to in the late 1990s and early 2000s that it retreated back into legalism.[366] However the actual picture is much more nuanced than this.[367] It is possible that some have overstated the changes that were wrought by the jurisprudence of the Court in the Mason period. Zines, for instance, considered that, rather than representing the embrace of 'a new hermeneutical principle of sociological jurisprudence', as Patapan contended,[368] the Mason era was better characterised as a reaction against rigidity that had crept in to some aspects of the High Court's constitutional and other jurisprudence.[369] Zines did note, however, that by the late 1990s, the 'rhetoric' of 'strict and complete legalism' had returned.[370]

In a lecture delivered as the centenary of Federation approached, the recently appointed Gleeson CJ endorsed the position taken by Dixon. Chief Justice Gleeson characterised the function of the Court as one of the interpretation of a 'basic law' that is a 'written legal document.'[371] He said that the Court was the 'ultimate interpreter and Guardian of the Constitution' and 'the members of the Court are expected to approach their task' of ruling on the validity of legislation, 'by the application of what Sir Owen Dixon described as "a strict and complete legalism."'[372] He offered an institutional and democratic

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363 Gabrielle Appleby and Andrew Lynch, 'Sir Anthony Mason: Towering over the High Court of Australia', in Rehan Abeyratne and Iddo Porat (ed), *Towering Judges: Judges Who Made an Impact on the Trajectory and Development of Constitutional Law* (Cambridge University Press, forthcoming 2020) 9.
364 Ibid.
365 Ibid 14.
366 See, eg, Poole (n 193) 17.
367 Josev (n 233) 173.
368 Patapan (n 277) 179.
369 Zines (n 313) 610-611.
370 Ibid 606; see also Haig Patapan, 'The High Court in Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241.
371 See Gleeson (n 311) 85.
372 Ibid.

justification for this expectation that legalism will be the objective of the Court, stating that the 'framers were conscious of the power they were giving the High Court as the ultimate interpreter of the Constitution' and that 'the responsibility of ruling on the validity of laws enacted by democratically elected parliamentarians is thus cast upon a group of unelected lawyers' who 'should be uninfluenced by public or political opinion.'[373] Judicial review of legislation was to be a 'last resort' and the judiciary 'the body which resolved disputes about the powers of the other branches of government'.[374]

This 'rhetoric' of legalism should not be confused with the pursuit of a jurisprudence that is a parched, value-free zone. The Court did not abandon the innovations of the Mason era. Many of the values that Mason CJ sought to advance remained influential as first Gleeson and then French succeeded him as Chief Justice. The Court continued to develop protections based along fair process and responsible and representative government lines.[375] The Court also developed new lines of doctrine. During the period in which Gleeson was Chief Justice the High Court implied certain protections for voting entitlements from the text and structure of the Constitution.[376] Following the appointment of French CJ, the Court began to develop doctrine in connection with the Commonwealth's spending powers, and its executive power in s 61 of the Constitution.[377] Some of these decisions, for instance those connected with protections for voting, were criticised by some scholars as 'activist',[378] although as Josev noted, they did not attract the level of public criticism that those of the Mason era had.[379]

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373 Ibid.

374 Ibid 84.

375 Appleby and Lynch (n 363) 14.

376 *Roach v Electoral Commissioner* (2007) 233 CLR 162; see also the subsequent decision of *Rowe v Electoral Commissioner* (2010) 243 CLR 1; see chapter 5 at 5.2.2(b).

377 *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156; and *Williams v Commonwealth [No 2]* (2014) 252 CLR 416.

378 See, eg, James Allan, 'The Three 'Rs' of Recent Australian Judicial Activism: *Roach*, *Rowe* and (no) 'Riginalism'' (2012) 36 *Melbourne University Law Review* 743; and Anne Twomey, '*Rowe v Electoral Commissioner—Evolution or Creationism?'* (2012) 31 *University of Queensland Law Journal* 181, who did not apply the term 'activist' but considered the approach to interpretation applied in both cases to be a 'radical' one.

379 Josev (n 233) 197-198. According to Josev, the only decision to really attract this label from the media in more recent years was that of *Plaintiff M70/2011 v Minister for Immigration and Citizenship [Malaysian Declaration Case]* (2011) 244 CLR 144, which involved review of administrative rather than legislative action. The interpretation given by the High Court to the relevant provision in the *Migration Act 1958* (Cth) prevented the Commonwealth government from pursing a policy of transferring people who had sought refugee protections from Australia to Malaysia.

As has been argued throughout this chapter, it is necessary to look beyond the 'rhetoric' of legalism in any case, to find the values informing the High Court's approach to interpretation. A number of other concepts are captured in the passages from Gleeson's lecture quoted above. One is the concept of a court with a vital, although limited role. The institutional competency of the court is to resolve disputes about the meaning of the law. Wider questions of policy, to the extent it is possible to distinguish them from questions of law, are to be left to the other, more politically accountable branches of government. This concept of institutional limits which is a more satisfactory explanation for the endurance of the interpretative approach that is referred to as legalism than simply attributing it to conservativism alone.

Seen through this prism, the long-standing approach of 'legalism' can be recognised as a doctrine of judicial self-restraint. As chapter 5 contends, the values-based protections that first emerged in the Mason era have been shaped into principles that guard the *constitution system* rather than individual rights per se.[380] The legacy of the Mason era is perhaps the confirmation of the role of the Court as the guardian of the Constitution. One aspect of this role is to articulate and defend the values of the Australian constitutional system. Where the protection of the system itself is required, the Court can be more proactive.[381] It is this need to act only within the framework of the system that confines the range of values that the Court may legitimately draw upon.

The stricture of Dixon that judges should strive to put aside their personal values can be read as a rejoinder to them that they are not politicians. However, this is not a denial that values condition judgments, or that courts play a political role, but instead an attempt to encourage an awareness amongst judges of where the limits of their own power might lie. Judicial power in Australia must be understood as 'coterminous' with the powers of the other branches of government.[382] It is the unique role of the High Court to be the ultimate adjudicator of where the boundaries of the powers of each branch lie, but the Court has defined this role in such a way as to leave space for the legitimate functions of the other branches.

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380 See at 5.4.

381 The High Court has a history of this, as illustrated *Communist Party Case* (n 321). The *Engineers Case* (n 12) is also in this category, taking the view expressed by Windeyer J in the *Payroll Tax Case* (n 280).

382 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell (G. Partridge & Co), 1901) 205.

2.10 CONCLUSION

Australia's different approach to judicial review of administrative action has been attributed to a deep attachment to what is often recognised as formalism. This different approach became more apparent following what is sometimes called the 'constitutionalisation'[383] of administrative law that has taken place in Australia.[384] The Australian Constitution, and in particular, the doctrine of the separation of judicial power that has been implied from it is usually identified as the 'catalyst'[385] for the different path taken by review in Australia. This chapter has sought to delve into what might be the underlying influences on the interpretative choices of the High Court in implying this doctrine from the Constitution in the first place, and also, since the *Engineers' Case* in 1920, adhering for the most part to a style of constitutional interpretation known as legalism.

From this approach to constitutional interpretation can be gleaned a series of ideas that are of use in attempting to understand the normative considerations that are being drawn upon by courts when determining the legality of administrative action, the most prominent amongst them being that this role is limited by the relationship of the judiciary as an institution of Australian government to the other institutions of Australian government. The next chapter explores the way in which the highly influential judgment of Brennan J in *Quin*[386] can be read as an acknowledgment not only of this, but also of what Gageler described as the primacy of political constitutionalism in the Australian constitutional compact.

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383 See, eg, Mortimer (n 128).

384 See, eg, Dame Sian Elias, 'The Unity of Public Law?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 15, 26-27.

385 Saunders (n 128).

386 *Quin* (n 9).

3.
MERITS AND LEGALITY

> Indeed, if one thing is clear in Australian administrative law, it is that judicial review does not entail review on the merits.
>
> Sir Anthony Mason[1]

3.1 INTRODUCTION

One of the most elementary principles of judicial review of administrative action is that it does not amount to review on the 'merits'. Judicial review is not the same as an appeal. The 'merits' of a decision are the part of it which can only be determined by the original decision-maker, or a body given the power to reconsider a decision on its 'merits'. Although the concept of the merits is often invoked, it is almost never defined. This is because it is extremely difficult to do so. Sir Anthony Mason once described the term as having the quality of 'blancmange'.[2] Part of the reason why it is so difficult to identify the 'merits' is because the exercise is similar to attempting to distinguish between executive and judicial power. As noted in the previous chapter, the lines between the two are not always clear.[3] Despite this, the 'merits' are the 'forbidden field' that Brennan J cautioned that the courts must never enter in a judgment that has come to be known as setting out the boundaries of judicial review in Australia.[4] How, though, are these limits really decided, if it is not actually possible to define the 'merits' comprehensively?

The previous chapter sketched the particular conception of the appropriate boundaries of the judicial method in Australia. It suggested that this notion of judicial power can only be understood by reference to the Australian conceptions of the other two branches of government. These conceptions are themselves informed by the constitutional framework of Australia, but also wider ideas regarding the role of the national government, democracy and the administrative state. These wider ideas are explored in chapters 5 and 6. Following on from the previous chapter, this chapter examines the

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1 'The Kerr Report of 1971: Its Continuing Significance' (Inaugural Whitmore Lecture, delivered at Council of Australasian Tribunals NSW Chapter Annual General Meeting, 19 September 2007) 5.

2 Sir Anthony Mason, 'Judicial Review: A View From Constitutional and Other Perspectives' (2000) 28 *Federal Law Review* 331, 333.

3 See at 2.4.3.

4 *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, 38.

judgment of Brennan J in *Attorney-General (NSW) v Quin* (*'Quin'*)[5] and the contemporary 'normative structure'[6] of judicial review of administrative action in Australia.

Justice Brennan set out his views on the purpose and scope of judicial review across a series of judgments, which culminated in *Quin*. As set out in chapter 2, *Quin* is regarded as marking the beginning of the recognition of the influence of the Australian Constitution on the scope of judicial review of administrative action in Australia.[7] Will Bateman and Leighton McDonald,[8] and separately Margaret Allars,[9] and Stephen Gageler,[10] have written that, following *Quin*, Australian judicial review of administrative action entered a new normative phase or 'paradigm'.[11]

One feature of this is Brennan J's extension, in *Quin*, of the rule in *Marbury v Madison*,[12] that it is the province of courts alone to say what the law is, to review of administrative, not simply legislative, action.[13] Justice Brennan's statement that the merits are for the initial decision-maker 'alone' has, as explained in chapter 2, become tied up with the constitutional concept of the separation of judicial power.[14] 'Merits review' has become associated conceptually with executive power, and in line with the *Boilermakers* principles, this is something that courts are unable to do.

A further feature of this new normative paradigm is a shift in the way questions about the legality of executive action are approached. Bateman and McDonald have defined this shift as one away from an approach where stand-alone grounds of review were said to be drawn from the common law and applied by courts as standards of administrative conduct, towards one where what the standard of decision making required in a given circumstance is determined from the subject matter, scope and purpose of the legislation

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5 Ibid.
6 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law (2017) 45(3) *Federal Law Review* 153.
7 See at 2.5.2.
8 Bateman and McDonald (n 6).
9 Margaret Allars, 'Executive Versus Judiciary Revisited' in Anthony Connelly and Daniel Stewart (eds) *Public Law in the Age of Statutes: Essays in Honour of Dennis Pearce* (The Federation Press, 2015) 49, 50.
10 Stephen Gageler, The Constitutional Dimension' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge, 2014) 165, 170.
11 Ibid 175.
12 5 US 137 (1803).
13 See *Quin* (n 4), 35-36 (Brennan J).
14 See at 2.5.2.

under which the decision was made.[15] This has been accompanied by a shift away from an approach characterised by the application of 'specific labels' towards one of 'looser principles'.[16] This in turn is closely associated with the move towards the concept of 'jurisdictional error' becoming a unifying one in Australian judicial review of administrative action, something considered at length in chapter 4. These developments have occurred in the context of a further apparent shift in the language of foundation principles of statutory interpretation more generally, which has seen legislative intention described openly as 'a fiction'.[17]

Again, this move towards framing the grounds of review as interpretive principles can be traced to the judgments of Brennan J.[18] The embrace of Brennan J's vision of administrative law is characterised by certain ambiguities. It has been read as encouraging a return to legalism, but does it really mean that judicial review of administrative action in Australia now makes less of a contribution to standards of administrative government, as Bateman and McDonald contend?[19] To a certain extent, framing review as a matter of implied legislative intent changes or resolves very little. The rules of statutory interpretation are, for the most part, common law creations. They are flexible and, historically at least, have proven capable of development in response to the changing nature of the administrative state itself. The questions of why Brennan J sought to frame review in this way, and why this approach prevailed, yield no ready answer. This chapter contends that, read against debates about the scope of judicial review that were occurring at the time, Brennan J's approach represents the articulation of a mode of review that is better suited to the Australian constitutional context.

This chapter engages with the arguments of Bateman and McDonald. It accepts their view that the language of review has undergone a change. However, as an alternative to their perspective that this change occurred as a result of fears over the 'democratic legitimacy' of review,[20] it suggests that this framing of review can be regarded as more

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15 Bateman and McDonald (n 6).

16 Mark Aronson, 'The Growth of Substantive Review: The Changes, their Causes and their Consequences' in John Bell, Mark Elliott, Jason N E Varuhas and Phillip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016) 113, 137-139.

17 *Lacey v Attorney General (Qld)* (2011) 242 CLR 573 ('*Lacey*'), 592 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

18 Stephen Gageler, 'The Underpinnings of Judicial Review: Common Law or Constitution?' (2000) 28 *Federal Law Review* 303, 305; Bateman and McDonald (n 6) 164.

19 Bateman and McDonald (n 6) 176-179.

20 Ibid 154.

in keeping with the concept of judicial power sketched in the previous chapter. Chapter 2 explained that the approach to judicial method embodied by the key constitutional cases of *Amalgamated Society of Engineers' v Adelaide Steamship Co Ltd* ('*Engineers' Case*')[21] and *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*')[22] had the effect of limiting the range of values that could be drawn upon by federal courts when performing their judicial functions. The approach set out by Brennan J across several decisions, culminating in *Quin*, can be regarded as having a similar effect on the doctrine of review of administrative action.

In his article on Australian exceptionalism, Taggart was critical of the way in which the boundaries of the 'merits' were drawn in Australia.[23] He characterised the refusal of Australian courts to adopt more substantive grounds of review because this would lead to merits review as motivated by a desire 'to keep the fig-leaf in place for fear of frightening those who do not know better.'[24] This was despite the fact that 'as insiders know, room remains for the values and preferences of individual judges to play a part in the identification, application and evolution of administrative law principles and techniques.[25] In keeping with the argument set out in chapter 2, the suggestion here is that the preference for form in Australia is not a 'fig-leaf'. Rather, it is a guidepost. Like the *Engineers* approach to legislative review, the *Quin* approach to administrative review should not be read to mean that values have no role in review. It does, however, seek to limit the range of values that can be drawn upon. This is in service of other normative values that inhere in the Australian system of law and government, regarding the respective roles of the three main institutions established by the Constitution.

The role of the courts in judicial review of administrative action in Australia is to determine the limits of 'the law'. To accept this is not to ignore that the concept of 'the law', like the concept of administrative discretion, is not clear cut. The fact that the boundaries of institutional power are not easily drawn does not make the need for them redundant. To some extent, normative values are aspirational and unavoidably so.

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21 ('*Engineers' Case*') (1920) 28 CLR 129.
22 ('*Boilermakers' Case*') (1956) 94 CLR 254.
23 Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 13, 27-28. For further on the differences in relation to the distinction in Australia see Dame Sian Elias, 'The Unity of Public Law?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 15, 25-26.
24 Taggart (n 23) 14.
25 Ibid 28.

Chapters 5 and 6 seek to provide some explanation of the wider institutional values of the Australian system that help to explain the range of standards that are regarded as legitimately judicial, and how the limits of judicial power are understood within the framework that the Constitution provides for Australian government.

This chapter is organised as follows. Part 3.2 considers the concept of the 'merits', how it is defined, and the role played by the Administrative Appeals Tribunal or 'AAT' in shaping it in Australia. Part 3.3 sets out some background to the key case of *Quin*. Part 3.4 places *Quin* in the context of the debates over common law constitutionalism that were emerging at the time. Part 3.5 engages with the contention of Bateman and McDonald that, owing to the embrace of the jurisprudence of Brennan J, the 'normative structure' of review has shifted from what they describe as a 'grounds approach' to a 'statutory approach'. This part suggests that Brennan J's *Quin* judgment can be considered as in part a response to trends that were emerging in English scholarship and jurisprudence in the context of the ultra vires debate. Finally, part 3.6 contends that *Quin* should be read not as entrenching a formalist approach to judicial review of administrative action, but rather one that is in keeping with the understanding of judicial power described in chapter 2.

3.2 WHAT ARE THE MERITS AND HOW DO WE DECIDE?

3.2.1 Dividing lines

Supervisory courts cannot undertake merits review. In Australia, this is often framed as a consequence of the formal separation of judicial power required by Ch III of the Constitution. As the previous chapter set out, this was one of the explanations given by the Kerr Committee for their recommendation that a system of tribunals be established to deal with merits review of federal administrative decisions.[26] While the separation of powers doctrine might be considered 'exceptionalist', judicial review of the merits does not occur in any comparable nation. There are, however, different degrees of ease with openly substantive review elsewhere.[27] Drawing the line between legality and merits remains no easy task even where this is the case, and it can be hard to find agreement on how it should be done. The difficulty is multi-faceted. On the one hand, as outlined in

[26] *Report of the Commonwealth Administrative Review Committee* (Canberra, 1971) ('*Kerr Committee Report'*) 22.
[27] Aronson (n 16) 112.

the previous chapter, there is the problem of identifying which functions can be designated as 'administrative'. On the other, there is the not unrelated problem of identifying which issues might be unsuitable for judicial determination.

Peter Cane once observed that 'there is no analytically clear distinction between the legality of administrative decisions and their "merits"' and that 'the distinction between legality and merits does not set a clear boundary around judicial review.'[28] Some have questioned the worth of even trying to draw a distinction between merits and legality at all. Mark Aronson, Matthew Groves and Greg Weeks have noted Lord Sumption's preference for avoiding the expression altogether 'because it has never been sufficiently clear what kind of inquiries a 'merits review' embraces.'[29] Aronson, Groves and Weeks said of this that:

> With such a contingent definition of the merits, it is little wonder that some commentators have urged judges to abandon its generality, and to engage in judicial review simply on 'generally accepted' views of what constitutes good and honest government.[30]

Yet, as they point out, there are good arguments against the courts taking on the role of setting standards of good management that are better developed within the public service itself.[31] There are also good arguments against courts intervening in the policy of elected governments. Nevertheless, the courts play an important role in ensuring that administrators stay within the legal confines of their power. The difficulty lies in the indeterminate nature of the concepts of 'law', the 'merits' and the boundaries between judicial and executive power.

The distinction between legality and merits is expressed in several ways. Sometimes it is characterised as a distinction between law and fact or law and policy or process and substance, with questions of a procedural nature being considered more suitable for judicial review, while substantive matters generally are not. However, the difficulty with drawing such distinctions is that it is almost always necessary to make exceptions to them.

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28 Peter Cane, 'Merits Review and Judicial Review—The AAT as Trojan Horse' (2000) 28 *Federal Law Review* 213, 221.

29 *R (Lord Carlile) v Secretary of State for the Home Department* [2015] AC 945, 969, cited by Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 181.

30 Aronson, Groves and Weeks (n 29) 181.

31 Ibid.

In some cases, deciding the fundamental question, which is whether an administrator has acted within the scope of their power,[32] may require an assessment of matters of fact or substance. For reasons of institutional legitimacy, however, lines must be drawn somewhere. It is this need to draw such lines that has given rise to theories of deference and restraint.[33]

Another way of viewing the merits is that they occupy the sphere in which action may be taken by an administrative officer that will not result in invalidity. Where the power in question is sourced in a statute, identifying the limits of valid action is an exercise in statutory interpretation. Parliament rarely ever expressly addresses the subject of whether or not a certain action will result in invalidity, although it will sometimes provide that certain breaches of statutes or the general law will not result in invalidity.[34] The domain of the merits, or the area in which action will not result in invalidity is attributed to parliamentary intention, but is determined by the courts.[35]

This exercise of statutory interpretation is performed by reference to the distinctions referred to above. However, distinctions between law and fact or process and substance can only provide some guidance. The rest must come from wider values as well as a pragmatic sense of the appropriate function of not only the decision-maker but also the court in the context of a particular case. These institutional or functional values will be influenced by the wider ones of the constitutional and political system itself. Where and how the lines between merits and legality are drawn depends on a range of factors, some of them related to constitutional and broader legal culture. This means, depending upon other norms or features of a political and legal system, these lines might conceivably fall in different places. Wider conceptions of the nature of judicial power and the role of

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[32] Aronson has called this the 'grand role' of judicial review – 'to enforce the legal limits of and preconditions to the exercise of administrative power' – see (n 16) 128.

[33] See, eg, Matthew Lewans, *Administrative Law and Judicial Deference* (Hart, 2016); and Jeff King, *Judging Social Rights* (Cambridge University Press, 2012) 117-118. For an Australian perspective see Janina Boughey, 'Re-Evaluating the Doctrine of Deference in Administrative Law' (2017) 45 *Federal Law Review* 597.

[34] Aronson (n 16) 124. One example of such a clause is s 501G(4) of the *Migration Act 1958 (Cth)*, which provides that a 'failure to comply with this section in relation to a decision does not affect the validity of the decision.' Such provisions are sometimes referred to as 'no-invalidity' clauses. For further see, eg, Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81.

[35] See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 ('*Project Blue Sky*'), 390 (McHugh, Gummow, Kirby and Hayne JJ), where it was said that the 'better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an at done in breach of the provision should be invalid.'

courts in securing administrative accountability must surely play a role in determining where they fall.

3.2.2 The role played by the administrative law reforms of the 1970s in shaping the Australian conception of the 'merits'

The previous chapter outlined the case that has been made by some scholars for the claim that judicial review of administrative action in Australia is exceptionalist. One of the defining features of review in Australia is said to be its emphasis on the distinction between merits and legality.[36] Brennan J's 'frequently repeated' statement from *Quin* is often cited as the basis for this emphasis.[37] However, the source of the Australian difference on this point runs somewhat deeper, and much like the acknowledgment of the role played by the constitutional separation of judicial power in relation to review of administrative action, an account of the contemporary Australian approach to the legality/merits dichotomy is perhaps best begun by reference to the recommendations of the profoundly influential Kerr Committee report.[38] Chapter 2 set out some background to the establishment of the Kerr Committee, and described its role in bringing the constitutional separation of judicial power to the fore in judicial review of administrative action. This chapter will now consider the way in which the establishment of a system of merits review has influenced the Australian concept of the 'merits'.

In a statement worth reflecting on, the Committee said at the outset of its report:

> We have found that is neither correct nor practicable to examine in isolation judicial review in the traditional sense; it must be seen and examined in the total context of review of administrative decisions. The adequacy of any system of judicial review can be assessed and judged only in the light of such other provision for administrative review as does, or should, exist at the same time. Further, it must be kept in mind that a question of importance which can arise in relation to some functions is whether they are better suited to judicial or non-judicial review.[39]

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36 See, eg, Taggart (n 23) 28 and more recently Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018), 43.
37 Knight (n 36) 43.
38 *Kerr Committee Report* (n 26).
39 Ibid 2.

Certain pragmatic attitudes, still recognisable in Australia's system of administrative law, are displayed within this passage. These include a recognition that judicial review is only one part of the overall accountability picture, and that while it performs a profoundly important function in keeping the executive within the boundaries of the law, for a variety of reasons it may not always be the best way of securing administrative accountability. These attitudes can be perceived as having a 'green light' or 'functionalist' character, something considered at length in chapter 5.[40]

A further observation made by the Kerr Committee was that '[a] person aggrieved by a decision of a Commonwealth official or tribunal will generally feel that the decision was wrong on the facts or the merits of the matter.'[41] As outlined in the previous chapter, the Committee took the view that, for various reasons, including the constitutional separation of judicial power, it would not be appropriate to give federal courts a general administrative review jurisdiction.[42] It would instead be more suitable to give what they described as 'merits review' powers to a specially created 'general Administrative Review Tribunal'.[43] In accordance with the recommendations of the Committee, the Commonwealth government subsequently established the Administrative Appeals Tribunal (AAT). The AAT has statutory powers to review, upon the application of a person affected by a decision and decide what is the 'correct or preferable'[44] decision in the circumstances. The Tribunal can exercise 'all the powers and discretions that are conferred by any enactment upon the person who made the subject decision.'[45]

Owing to the constitutional considerations that influenced the Kerr Committee to recommend that the jurisdiction of superior courts not be expanded, unlike in a comparable jurisdiction such as England, the AAT and other Commonwealth tribunals are treated as being a part of the executive branch, rather than the judicial one.[46] Peter Cane has argued that the functions of the AAT were for all intents and purposes,

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40 See 5.3 for functionalism and green light theory. Chapter 6 considers the ways in which these attitudes have helped to shape the doctrine of judicial review of administrative action—see at 6.5.4.

41 *Kerr Committee Report* (n 26) 9.

42 Ibid 24.

43 Ibid 86.

44 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 46 FLR 409, 419 (Bowen CJ and Deane J).

45 *Administrative Appeals Tribunal Act 1975* (Cth), s 43; *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* (No 2) (1981) 3 ALD 88.

46 Robin Creyke, 'Tribunals and Merits Review' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge, 2014) 393, 395.

judicial—that 'merits review can plausibly be described as judicial review in disguise.'[47] He acknowledged that his argument was 'provocative', but contended that the AAT 'looks and acts more like a court with lay members than a tribunal with judicial and legal members.'[48] If one takes the stance that the separation of powers doctrine is a formalist construct, this view can perhaps be accepted. The Kerr Committee itself expressed frustration at what it perceived to be the hurdle of the *Boilermakers' Case*, which required the drawing of 'artificial rather than functional' distinctions between judicial and administrative roles that were 'productive of considerable practical problems.'[49]

Tribunals and courts share certain features, meaning that sometimes the distinctions drawn between them can appear artificial.[50] This impression is perhaps reinforced by the recognition of what is sometimes referred to as the 'chameleon doctrine', which holds that functions can be classified as administrative or judicial according to the manner of their exercise.[51] These kinds of difficulties have prompted some to argue that the branches of government should be reimagined, with executive accountability bodies reconceived as comprising a 'fourth arm' of government.[52]

However, as the previous chapter set out, it is possible to recognise that there are deeper values at work behind not only the *Boilermakers* principles, but also the High Court's traditionally 'legalist' jurisprudence more generally. Once this is done, it is possible to see that the differences between the judicial review conducted by courts and the merits review carried out by the AAT and other federal tribunals are indeed functional. Taking this perspective, it becomes less significant that the lines between merits and legality or even fact and law are sometimes hard, perhaps even sometimes impossible, to draw. If, though, the reasons why such lines ought still to be drawn are considered, it is easier to recognise that the lines themselves are not artificial.

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47 Cane (n 28) 225.
48 Ibid 215.
49 *Kerr Committee Report* (n 26) 22.
50 See Cane (n 28) and Creyke (n 46) 399-400.
51 See chapter 2, (n 118).
52 James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 274; John McMillan, 'Re-Thinking the Separation of Powers' (2010) 38 *Federal Law Review* 423, 440-441; cf Stephen Gageler, 'Three is Plenty' in Matthew Groves and Greg Weeks (ed) *Administrative Redress In and Out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (The Federation Press, 2019) 12.

Even though the AAT's rulings have, for practical reasons, become precedent-like, they are not binding in the way those of a court would be.[53] Section 45 of the *Administrative Appeals Tribunal Act* (1975) (Cth) recognises this, providing that questions of law may be referred by the AAT to the Federal Court where needed. Like other executive decision-makers, tribunal members can make findings about the law, but however influential these are, or should be, for administrative decision-makers they are not final determinations of principle in the way they would be if made by a court.[54] Justices Brennan and Deane drew this distinction, noting that 'administrative opinion' did not have the 'foundation' of stare decisis.[55] As a consequence, a 'court could not decline to perform its function' of 'expounding and applying Parliament's intention as the court sees it' in order to 'follow an administrative opinion or practice.'[56] This is the basis of the Australian reluctance around the notion of 'deference', even though, as the next chapter explains, the concept of jurisdictional error functions pragmatically so as to allow the making of errors of law that are not jurisdictional.[57]

Ultimately, although it may seem blurry and at times inconvenient, the distinction between tribunals and courts remains important for the same reasons that all hard-to-draw lines are in administrative law, which include institutional integrity and pragmatism. The line between tribunals and courts is much like the one between merits and legality itself. Although the functions and powers of the AAT appear quasi-judicial, ultimately its approach and purposes are different. Merits review, as conducted by tribunals like the AAT, is a further external layer of quality control for executive decision making. In theory at least, there are many benefits to a system that provides a second look at administrative decisions from a body that has formal and fair procedures, but is not a court.[58] However, appreciating that there might be a functional difference between merits

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53 Creyke (n 46) 414.

54 See, eg, Cane (n 28) 237.

55 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 31.

56 Ibid.

57 See, eg, *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135 ('*Enfield*'), 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ) and Boughey (n 33) 604-605. See also chapter 4 at 4.3.

58 Although given reports about the contemporary culture in government, including allegations of tribunal 'stacking', questions must be asked about whether the system is being allowed to function in a manner that contributes in the best possible way to better executive accountability – see, eg, Narelle Bedford, **'**AAT: Importance, Independence and Appointments' on AUSPUBLAW (10 April 2019) <https://auspublaw.org/2019/04/aat-importance,-independence-and-appointments/>.

and judicial review still does not answer the question of how courts themselves define the field of the 'merits'.

3.2.3 Justiciable questions

The Kerr Committee did not think it was appropriate for federal courts to have merits review powers. This was due to the *Boilermakers* doctrine,[59] which the Kerr Committee said meant that 'courts may only be entrusted with those functions in the field of administrative review which are strictly judicial (in the sense that they involve the exercise of the judicial power of the Commonwealth) or are incidental to those functions.'[60] The *Boilermakers* doctrine also meant that 'administrative bodies cannot be entrusted with judicial functions.'[61] As noted, however, the Committee acknowledged that where a question involved 'the rights of subjects', the drawing of a distinction between merits and legality was 'artificial'.[62] They observed that the difficulties were exacerbated by the fact that the judicial and administrative functions were themselves very hard to define.[63] This was, after all, the era in which the eventual demise of the *Boilermakers* doctrine was considered to be a likely event.[64]

The way in which the Committee resolved for itself the question of which decisions would be unsuitable for review by courts was by reference to the notion of 'justiciability.'[65] Despite the Committee's acknowledgment of the difficulties associated with defining judicial power, its discussion of the kinds of matters that might be thought non-justiciable helps to demonstrate the influence of the particular conception of judicial power described in chapter 2.[66] For example, when considering the nature of judicial power, the Committee quoted Griffith CJ's definition of it from the early High Court decision of *Huddart Parker & Co Pty Limited v Moorehead*,[67] where he said that it was concerned with the determination of controversies about rights.[68] This understanding of the scope

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59 As derived from the *Boilermakers' Case* (n 22), see chapter 2 at 2.4.1.
60 *Kerr Committee Report* (n 26) 22.
61 Ibid.
62 Ibid.
63 Ibid.
64 See chapter 2 at 2.4.3.
65 *Kerr Committee Report* (n 26) 23.
66 (1921) 29 CLR 257.
67 (1908) 8 CLR 330.
68 Ibid 357.

and role of judicial power was crucial to the way in which the Committee defined the related concept of justiciability.

The Committee said that for a matter to be justiciable, it had to involve 'an issue that could be resolved by the application of legal principles or standards.'[69] Judicial power could not extend to the review of matters that required 'reference to industrial or social considerations.' Thus, for a discretion to be considered judicial, or capable of being exercised by a court, it had to proceed 'upon grounds that are defined or definable, ascertained or ascertainable, involving the application of prescribed standards.'[70] According to this threshold, it was the view of the Committee that a 'vast majority' of administrative decisions gave rise to matters, and '[w]here the decision of the administrative authority involves non-justiciable issues, a comprehensive review of that decision cannot be committed to the courts.' Where decisions gave rise to issues that were justiciable, the courts could review them, but such review had to be 'confined to the application of legal standards.'[71]

Cane wrote that the understanding of what justiciability entails has moved on from that of the Kerr Committee, observing that the term now tends to mean 'something closer to the American "political questions principle'" in that it applies to issues that 'are politically so contentious that it is prudent for courts to steer clear and leave them to the politicians.'[72] While this is the clearest way to understand the concept, it is also imbued with other practical considerations, such as whether important principles like cabinet secrecy would prohibit an applicant from gathering enough information to be able to make a case for the judicial review of a decision.[73] However, Cane's views regarding the outdated nature of the Committee's definition of justiciability are based on his reading of the report's relevant passages. He wrote that the Committee had 'defined non-justiciability in terms of *lack of decision-making criteria*.'[74] He considered that it was now unlikely that the 'vast majority' of administrative decisions would be considered non-justiciable in this sense, as most administrative decisions are made in accordance

69 *Kerr Committee Report* (n 26) 23.
70 Ibid 24.
71 Ibid.
72 Cane (n 28) 216.
73 See, eg, *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274, 302 (Wilcox J).
74 Cane (n 28) 233, emphasis added.

with executive rules or guidelines of some kind, although he conceded that not every decision was suitable for judicial review.[75]

Yet, the Committee's definition of justiciability appears to be something much closer to 'questions that are suitable for adjudication by a body that is understood to be a court'. This essentially remains the definition of justiciability. As chapter 2 set out, it is also something that has particular meaning in Australia. Policy and rule-making was a feature of the administrative state at the time of the Kerr Committee, even if decision-making systems were not then as complex as they are now. There is a vast difference between executive rule making, whether it be enforceable (as in the form of statutory instruments) or not, and the exercise of judicial power.

The point being made by the Committee was that federal courts can only exercise judicial power, and, hard as it is to define, the shape that it generally takes at its core is that it 'proceeds upon grounds that are defined or definable, ascertained or ascertainable' and involves 'the application of prescribed standards'.[76] There are clear parallels between the Kerr Committee's proposal for a tribunal to undertake review that courts could not, and the separation of the 'non-judicial' features of industrial arbitration from the federal industrial court. This hints at the rationale for the *Boilermakers* principles that was set out in the previous chapter.[77]

The boundaries between judicial and executive power are not exact. There are always going to be matters that arise in what French CJ and Bell J once described as 'the borderlands'[78] or Gleeson CJ, extra-judicially, the 'twilight'[79] area existing between the two forms of power. This blurred line between executive and judicial power finds some expression in the notion of 'chameleon' powers.[80]

However, the formal doctrine of separation of judicial power in Australia and the definitions of judicial power that have grown up around it, not to mention the values that these could be said to reflect, mean that the corresponding definition of the executive

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75 Ibid 216.
76 *Kerr Committee Report* (n 26) 24.
77 See 2.9.1.
78 *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 53. Although note that this was in the context of the distinction between judicial and legislative power.
79 Murray Gleeson, 'Judicial Legitimacy' (2000) 20 *Australian Bar Review* 4, 11.
80 See n 51.

zone, or the field of the merits, is not entirely residual in Australia. The executive has its own sphere of power and competence. As this chapter will later set out, this is something that the Brennan approach to review of administrative action appears to comprehend.

3.2.4 Is the field of the merits shrinking?

It has been suggested that the scope of the merits has been shrinking, as the power of the courts to review administrative action expands. Aronson, Groves and Weeks have said that, '[f]unctionally speaking, the merits used to be only those issues which administrators could get wrong, and it did not matter whether they got them spectacularly wrong or by an accidental hair's breadth.'[81] As Aronson has separately written, it used to be the case that the only ground that went to the substance of a decision was *Wednesbury* unreasonableness. However, 'substantive review', where courts 'ask how well [an administrator has] performed their tasks' instead of only checking whether they have acted beyond the 'four corners' of power 'has expanded significantly.'[82]

In the United Kingdom, although not in other comparable nations,[83] procedural fairness has been extended to protect individuals from decision-making that is substantively unfair,[84] although it has proven difficult to develop a principled approach to the circumstances in which courts can intervene on this basis.[85] Courts elsewhere have also increased the breadth of the ground of unreasonableness and in the United Kingdom the question of whether it should be replaced altogether by proportionality is something that has been under consideration for a long time.[86] Even in Australia there has been an apparent shift towards a greater acceptance of a measure of substantive review.[87] This shift has encompassed an ostensible relaxation not only of the stringency of the unreasonableness grounds, but also those connected to when something can be considered a jurisdictional fact, for instance.

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81 Aronson, Groves and Weeks (n 29) 179.

82 Aronson (n 16) 113.

83 Janina Boughey, 'Proportionality and Legitimate Expectations' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart, 2017) 121, 127

84 *R v North and East Devon Health Authority; ex parte Coghlan* [2001] 3 QB 213.

85 Jason N E Varuhas, 'In Search of Doctrine: Mapping the Law of Legitimate Expectations' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart, 2017) 18.

86 See chapter 6 at 6.3.3 for a discussion of this.

87 Aronson (n 16) 119, referring to *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*') as a turning point; see also Janina Boughey*, Human Rights and Judicial Review in Australia and Canada: The Newest Despotism* (Hart, 2017) chapter 6. See chapter 6 of this thesis at 6.4.1 and 6.4.2 for an explanation of the contemporary approach to the unreasonableness ground in Australia.

Robin Creyke has assessed the claim that there is a growing overlap between merits and judicial review, owing to developments in judicial review which have permitted review of more substantive aspects of administrative decision-making, such as fact-finding. However, after a review of relevant judicial review cases, Creyke found that the Federal Court had exercised such powers sparingly.[88] While pragmatism has forced the acknowledgment that sometimes to assess legality courts must consider some substantive aspects of administrative decisions, the culture of judicial self-restraint that was described in chapter 2 tends to prevail.[89] Chapter 6 suggests that, although *Minister for Immigration and Citizenship v Li* ('*Li*')[90] did somewhat re-frame the unreasonableness ground in Australia, it did not do so in a way that profoundly reshaped the role of the court. Sometimes enforcing the law might require the checking of the way facts are found, for instance where this is relevant to working out whether a power or discretion has been exercised in a way that keeps it within jurisdiction. While checking fact-finding or reasonableness is not an entirely procedural exercise, this does not make it merits review. This is especially true where the courts have maintained that it is their role to enforce the law, and the concept of 'the law' is itself relatively confined.

Creyke's analysis supports the view that, in Australia at least, the scope of the merits is not really shrinking. The language of judicial review of administrative action is certainly changing, but this kind of change is itself a constant feature of review, something readily appreciated if a longer-term view is taken of the matter. The values or wider influences that inform interpretive choice are more significant than the way that the lines that are drawn are themselves described. The 'merits' covers the area that belongs to the executive, not the courts. However, while it is possible to see that certain understandings of executive power inform doctrine and the drawing of boundaries,[91] a clearer account of the legitimate domain of executive power is lacking. Most focus on review of administrative action is on the limits of the power of the courts, rather than on the development of an account of the kinds of decisions that are best made by the executive.

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88 Robin Creyke, 'Judicial Review and Merits Review: Are the Boundaries Being Eroded?' (2017) 45 *Federal Law Review* 627, 631 in relation to the Federal Court's powers to review findings of fact made by the AAT in limited circumstances under s 44(7) of the *Administrative Appeals Tribunal Act 1975* (Cth), 632 in relation to the jurisdictional facts, 646-648 regarding the application of the unreasonableness ground in the wake of *Li* (n 87), and 651 in conclusion.

89 Ibid, eg, at 639, in relation to recent apparent expansions of the scope of a 'question of law' in Federal Court authority, and the ways in which these have been subsequently applied, and also 651.

90 *Li* (n 87).

91 This is considered in chapter 6.

This can be recognised as yet another facet of the 'Diceyan dialectic' identified by Lewans.[92]

It is not the purpose here to define the legitimate scope of the merits. Rather, the aim is to establish that a key element of review of administrative action in Australia is the recognition that the executive has a rightful and necessary role in government, and that this recognition has played a role in shaping doctrine.[93] This theme will be returned to in chapter 6. The remainder of this chapter considers the way in which the approach of Brennan J, which has become so influential, can be seen to encompass this idea.

3.3 QUIN AND THE SETTING OF THE BOUNDARIES OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

The previous chapter examined the effect of the constitutional separation of judicial power doctrine on judicial review of administrative action. It touched upon the role played by the influential judgment of Brennan J in *Attorney General (NSW) v Quin*[94] in the recognition of this doctrine as a defining feature of Australian review of administrative action. The judgment has had a similar effect on the way in which the legality/merits distinction functions in Australia. This is in part because the distinction itself is hard to distinguish conceptually from the formal separation of powers, but it is also owing to Brennan J's direct reference to the merits in the most quoted section of his judgment.

To understand the importance and influence of *Quin*, it is helpful to consider it against the context of its facts and the wider debates about judicial review that were taking place at the time it was decided. Michael Taggart associated the use of *Marbury v Madison* by Brennan J in *Quin* with 'a more universal common law constitutionalism'.[95] As Bateman and McDonald have said it is '[t]his cleaving of the limits of the legal norms of administrative law to constitutional considerations' in this passage of *Quin* that, above all else 'has become integral' to what they describe as 'the dogma associated with 'Australian exceptionalism''.[96] Yet, read in the context of its time, it can be recognised that Brennan J was making a particular choice to frame judicial review in a certain way, partly in

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92 See Matthew Lewans, 'Re-Thinking the Diceyan Dialectic' (2008) 78 *University of Toronto Law Review* 75 and also (n 33) 15.
93 This is a recognisably process-driven contention—see, eg, chapter 2 at 2.8.2 and chapter 5 at 5.3.2.
94 *Quin* (n 4) from 25.
95 Taggart (n 23) 11.
96 Bateman and McDonald (n 6) 166.

response to the rapid expansion of its scope during the 1980s, but also in response to trends in public law theory that were urging this expansion to continue.

Quin can be considered a landmark administrative law judgment, but one that can sometimes seem to be constructed on shifting sands. The approach taken by Brennan J appeared to foreclose on review in Australia taking certain paths that had been taken elsewhere, towards more substantive review. From time to time certain developments, for instance the decision in *Li*, are thought not to accord with the approach in *Quin*.[97] However, if the arguments set out here are accepted, it is possible to see that *Quin* does not necessarily prohibit some forms of more substantive review, and it should also not be regarded as inhibiting the development of new principles of judicial review of administrative action. One reason for any confusion about the decision in *Quin* is that the reading that has been typically given to it is one that attributes it with entrenching formalist distinctions between legality and merits, placing Australian judicial review within certain confinements.[98]

However, if regard is had to the concept set out in the previous chapter, of formalism, or 'legalism', as a mode of judicial self-restraint, and *Quin* is read in the context of its time, it is possible to recognise certain things. One is that what it really embraces is not rigid formalism, but rather a certain conception of the judicial power of the Commonwealth and how this power relates to that of the other institutions of Australian government. In this way, the decision is in keeping with the reading given to Dixonian legalism in chapter 2. Neither *Quin*, nor the other judgments of Brennan J referred to in this chapter, seek to deny that values are at work in judicial review. In fact, many values about the exercise of judicial power in the supervision of executive are clearly visible at work in the jurisprudence of Brennan J.

The Brennan approach clearly, however, aims to limit *which* values can be applied. Its influence can therefore be likened to the effect of the *Engineers'*[99] and *Boilermakers'*[100] cases in the wider constitutional context. On this view, it is possible to recognise that the likely reason why Brennan J's approach became the prevailing one is because it is more

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97 See, eg, Leighton McDonald, 'Rethinking Unreasonableness Review' (2014) 25 *Public Law Review* 119, 134.
98 Knight (n 36) 43.
99 *Engineers' Case* (n 21).
100 *Boilermakers' Case* (n 22).

in keeping with the deeper traditions regarding the nature of federal judicial power within the framework of the Australian Constitution. Some further context regarding the *Quin* decision is provided before these arguments are set out in more depth.

3.3.1 *Quin* in the context of its facts

Quin involved the case of a former stipendiary magistrate who was not reappointed to the Local Court of NSW, when it replaced the Court of Petty Sessions with the commencement of the *Local Courts Act 1982* in January 1985. Following a protracted review process concerning the most appropriate appointment procedure for the members of the new Local Court, including a reference to the New South Wales Law Reform Commission,[101] the New South Wales Government had ultimately reappointed all stipendiary magistrates except Mr Quin and four of his colleagues, due to complaints that had been made about their conduct.

In its report to the Attorney-General, the Law Reform Commission had noted its receipt of submissions expressing doubt regarding the capacity of some magistrates to continue in office.[102] As a result, it recommended that the stipendiary magistrates should not be automatically reappointed,[103] but that a process it described as 'phased selection' should be put in place. This would entail the submission of applications by the magistrates to an appropriately comprised committee. The Law Reform Commission expressly noted that '[i]t is desirable that stipendiary magistrates should have an opportunity to respond to any doubts a selection committee may have about their suitability for appointment as magistrates.'[104]

The government followed some of the Commission's recommendations, for example, it established a selection committee, but the process it put in place did not give the magistrates who were not appointed to the Local Court an opportunity to respond to the specific allegations that had been made against them, which had influenced the decision not to appoint them to the Local Court.[105] In December 1984, Mr Wran, who was at that

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[101] See New South Wales Law Reform Commission, *The Magistracy: Interim Report—First Appointments as Magistrates Under the Local Courts Act 1982* Report 38 (1983).
[102] Ibid [4.20]-[4.25].
[103] Ibid [4.30].
[104] Ibid [4.51].
[105] See the facts as set out by Priestley JA in *Macrae v Attorney General* (1987) 9 NSWLR 268 ('*Macrae*'), 287-301, in particular 296 and 299.

stage both the Premier and the Attorney-General, announced that a recommendation had been made to the Governor that all bar five of the stipendiary magistrates should be appointed to the Local Court.[106]

The five magistrates who had not been appointed initiated judicial review proceedings, seeking a declaration that they had been denied natural justice. At first instance, the Supreme Court dismissed their application,[107] but the Court of Appeal reversed this decision in *Macrae v Attorney General*.[108] In separate judgments, Kirby P, Mahoney and Priestley JJA each found that the magistrates had not been given an opportunity to respond to adverse claims about their performance, meaning that there had been a denial of procedural fairness.[109] The Court of Appeal issued a declaration that the decision of the Attorney-General not to appoint the magistrates was void.[110]

The New South Wales Government's application for special leave to appeal to the High Court was refused in 1988.[111] At the state election the next month, the Labor government was swept from office, but the magistrates had yet to be appointed. In line with a policy adopted by the previous government after the Court of Appeal decision, the new Attorney-General announced that the five magistrates would be treated no differently to other applicants for positions on the bench of the Local Court, but that they would be given the opportunity to respond to claims made against them as a part of the application process.[112] Three of the former magistrates once again applied to the Supreme Court, but by the time the matter was heard, Mr Quin was the only remaining applicant.[113] The action was removed to the Court of Appeal, where a majority, comprised of Kirby P and Hope JA gave the declaration sought, which was that the Attorney-General consider Mr Quin's original 1983 application according to law.[114]

In dissent, Mahoney JA, who had in *Macrae* agreed that there had been a denial of procedural fairness, said that the submissions made this time on behalf of the plaintiff had

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106 Ibid 301 (Priestley JA).
107 See ibid 302 (Priestley JA).
108 Ibid.
109 Ibid 283 (Kirby P); 285-286 (Mahoney JA); 304-308 (Priestley JA).
110 Ibid 283 (Kirby P); 287 (Mahoney JA); 309 (Priestley JA).
111 See *Quin* (n 4) 12 (Mason CJ).
112 Ibid 50-51, where Dawson J quotes from the statement made by the new Attorney General for New South Wales.
113 Ibid 3.
114 *Quin v Attorney-General (NSW)* (1988) 16 ALD 550, 554 (Kirby P); 557 (Hope JA).

crossed into the realm of substantive expectation, noting that 'the suggestion was, if there be no entitlement to appointment, there is at least the entitlement to prior consideration.'[115] He could not accept this argument, taking the view that there was nothing in the *Macrae* decision that stood for the proposition that Mr Quin had 'an entitlement or legitimate expectation' that he 'would be preferred to a person who, notwithstanding the other matters for consideration, would be better qualified for appointment.'[116] The Attorney-General was granted leave to appeal to the High Court.

By a majority of 3:2, the High Court held that the Attorney-General was not required to consider Mr Quin's original 1983 application but was free to follow the current appointment policy. The split between the Court seems to have been driven by the fact that the majority took into account the wider institutional context of the decision. By contrast, the judges in the minority were more prepared to treat Mr Quin's claim as a straightforward procedural fairness case.[117]

The developing principles of procedural fairness, then recently articulated in *Kioa v West* ('*Kioa*'),[118] required that a person be told adverse information about them that might have bearing on an administrative decision that related to them, and be given a chance to respond to such information.[119] Taken on their face, the facts of *Quin* suggest that this was a situation in which these principles might be said to apply. Mr Quin and the other affected magistrates had not been given an opportunity to respond to the complaints that had been made about their conduct before the decision not to reappoint them was made. For this reason,[120] a majority of the Court of Appeal, as well as Deane and Toohey JJ in the High Court, found in favour of Mr Quin and were prepared to uphold the declaration issued by the Court of Appeal.[121]

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115 Ibid 562.

116 Ibid.

117 Toohey J stated that '[t]o treat the decision of the Court of Appeal as involving an intrusion by the courts into the powers of the Executive and as a threat to the notion of the separation of powers is to give the appeal a scope which it does not purport to have.' He later added that the litigation had to 'be determined within the parameters set by the parties' and it was not 'an answer to point to the limitations fairly imposed on the power of the courts to review administrative action' as the 'issue for resolution is a narrower one'. See *Quin* (n 4) 65-66.

118 ('*Kioa*') (1985) 159 CLR 550.

119 Ibid 582 (Mason J); 602 (Wilson J); 628 (Brennan J); 634 (Deane J).

120 Kirby P was also concerned about the possible effects this decision could have on the public perception of judicial independence – see *Macrae* (n 105) 271.

121 See *Quin* (n 4) 45 (Deane J); 66-69 (Toohey J).

However, the majority of the High Court looked to the wider circumstances, which directly gave rise to the issue of the power of the courts to intervene on a question of executive power as sensitive as the appointment of judicial officers. Chief Justice Mason was generally more supportive of the notion of legitimate expectations than Brennan J.[122] In his judgment in *Quin*, however, Mason CJ concentrated on the change of policy by the Attorney-General, which he accepted had been made because the Attorney 'considered that the new policy would better serve the interests of the administration of justice by securing the appointment as magistrates of those persons who were best qualified and willing to serve.'[123] After having regard to the relevant legislation, Mason CJ noted that Parliament had left to 'the Attorney-General and Cabinet to decide what procedures, if any, should be applied in selecting and recommending magistrates for appointment.' He also remarked that for the Attorney-General to be 'at liberty' to determine how judicial officers were to be appointed was in line with traditional approaches.[124]

Approaching the matter from this angle meant that Mason CJ was 'unable to perceive how a representation made or an impression created by the Executive can preclude the Crown or the Executive from adopting a new policy and acting in accordance with such a policy.'[125] The primary issue at stake for Mason CJ was not the procedural fairness that was denied to Mr Quin as an individual, but the wider one about the need for the executive to be free to make policy decisions regarding the processes to be used to appoint judicial officers. The references to tradition in his judgment are telling.[126] Pursuant to tradition, judges are appointed through the Cabinet process, even where, as was the case here, the appointment is governed by legislation.[127] Executive freedom on this point comes with the corollary that the judges must then be treated as independent, and are usually, rightly, hard to remove.

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122 Mason CJ was part of the majority in *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273, which held that Australia's ratification of the United Nations Convention on the Rights of the Child gave rise to a legitimate expectation that in making a decision whether or not to cancel the applicant's visa the Minister would act in accordance with the Convention. See at 291-292. See also Sir Anthony Mason, 'Judicial Review: The Contribution of Sir Gerard Brennan' in Robin Creyke and Patrick Keyzer (eds) *The Brennan Legacy: Blowing the Winds of Legal Orthodoxy* (The Federation Press, 2002) 38, 51 and 'Procedural fairness: Its development and continuing role of legitimate expectation' (2005) 12 *Australian Journal of Administrative Law* 103, 106-107.

123 *Quin* (n 4) 16.

124 Ibid 16.

125 Ibid 17.

126 Ibid 18-19.

127 Ibid 18.

Justice Brennan's approach also had regard to the wider institutional questions at stake. He too was of the view that it was 'not the function of a court to direct or to affect the selection of judicial officers', which was one which 'by constitutional convention if not by constitutional law belongs to the Executive Government.'[128] In the best-known passage of his judgment he quoted Marshall CJ's well-known words from *Marbury v Madison*, that '[I]t is, emphatically, the province and duty of the judicial department to say what the law is.'[129] To this he added:

> The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power. If, in so doing, the court avoids administrative injustice or error, so be it; but the court has no jurisdiction simply to cure administrative injustice or error. The merits of administrative action, to the extent that they can be distinguished from the legality, are for the repository of the relevant power, and, subject to political control, for the repository alone.[130]

The third judge in the majority, Dawson J, referred to similar institutional concerns. Mr Quin had been removed from office by a legislative, not an administrative act. The relevant statute 'clearly contemplated that not all the former stipendiary magistrates would be appointed as magistrates pursuant to its terms.'[131] Further, he considered that 'what the respondent seeks would exceed the bounds of procedural fairness and would intrude upon the policy which was otherwise left entirely to those entrusted with the responsibility of determining who is to be appointed a magistrate under the *Local Courts Act*.'[132] This was because the order that the respondent sought would, in effect, 'prevent the Attorney-General from pursuing the change in policy which he has made for the selection of magistrates.'[133] It was not appropriate, in the view of Dawson J, that the principles of fairness be capable of binding ministerial discretion as to policy in this way, although he drew a distinction between a change of policy and 'the selective application of an existing policy in an individual case.'[134]

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128 Ibid 33.
129 Ibid 35 citing (1803) 1 Cranch 137, 177 [5 US 87, 111].
130 Ibid 35-36.
131 Ibid 58.
132 Ibid 60.
133 Ibid 60.
134 Ibid.

The background to the case shows that what was at stake was a contest between the actions of the highest ranks of the executive in pursuit of government policy considered to be beneficial to the people of New South Wales on the one side and the interests of an individual on the other. The state government was seeking to modernise and professionalise its magistracy. Although the High Court appeared to split over the thorny issue of legitimate expectations, the underlying issue driving the split can be recognised as a functional one. The factual context of the case clearly gave rise to the question of institutional legitimacy which was thrown up by the rapid expansion in the power of the courts to scrutinise decisions for procedural fairness.

The passage from Brennan J's judgment quoted above is well-known. This passage has been cited many times since by courts in support of the limited role played by courts in scrutinising executive action.[135] Knight noted that the 'remarks of Brennan J in *Quin* are frequently repeated' in Australian judgments.[136] In his view, this emphasis on the distinction between the legality and the merits of action has 'had the effect of significantly quelling the development of other substantive grounds of review of the kind seen in other Anglo-Commonwealth jurisdictions.'[137] Yet the text surrounding this passage of Brennan J's judgment is also highly illuminating, as it is possible to glean from it a better understanding of the claims Brennan J was making and draw some conclusions regarding what might have been his purpose in making them. Before setting out these aspects in Brennan J's judgment in more detail, it is helpful to provide some further context for the debates regarding judicial review of administrative action that were emerging at the time.

3.4 PLACING QUIN IN THE CONTEXT OF ITS TIME: COMMON LAW CONSTITUTIONALISM AND THE ULTRA VIRES DEBATE

The 1980s had seen a blossoming of judicial review principles, not only in Australia but in comparable jurisdictions, as old rules on matters such as standing, review of non-statutory executive power and even the application of grounds like procedural fairness were modernised and simplified. In Australia, the commencement of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act*') and the establishment of the

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135 For example, *Minister for Immigration and Ethnic Affairs v Wu Shan Liang* (1996) 185 CLR 259, 272 (Brennan CJ, Toohey, McHugh and Gummow JJ) and *Enfield* (n 57), 152-153 (Gleeson CJ. Gummow, Kirby and Hayne JJ).

136 Knight (n 36) 43.

137 Ibid.

Federal Court helped to make review more accessible to more people. It is fair to say that the power of the courts to supervise a wide range of executive actions had never been greater, and it has been observed that, ultimately, this caused some disquiet in the executive branch.[138]

3.4.1 The ultra vires debate and the rise of common law constitutionalism

At the same time, arguments for an even further degree of judicial intervention in the control of government action were being made. In the 1980s, judges and scholars, primarily in England, began to question the very constitutional foundations of judicial review.[139] A debate emerged, which centred around whether the role of the courts was restricted to finding and enforcing the limits on power that had been set by Parliament, or whether the principles of judicial review stood alone from statute, as creations of the common law. This debate, much like the one about the application of proportionality,[140] was encouraged, although not begun, by the decision of the House of Lords in *Council of Civil Service Unions v Minister for the Civil Service* (‘*GCHQ Case’*).[141] At issue in the *GCHQ Case* was the question whether non-statutory exercises of administrative power could attract judicial review. The answer given by the majority was that they could.[142]

This appeared to raise the question of whether the principles of judicial review, for instance that administrative action must be rational and procedurally fair, could continue to be attributed to parliamentary intention, as they traditionally had been.[143] This was because if the principles were capable of application by courts where the relevant exercise of power had not been pursuant to statute they must be derived from the common law itself. Dawn Oliver described the norm that conditions on the exercise of power such as reasonableness or fairness were to be implied as matters of legislative intent by the Courts as the ‘second limb of the ultra vires rule’, with the first being that decision-makers must

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138 Dennis Pearce, ‘Executive Versus Judiciary’ (1991) 2 *Public Law Review* 179; John McMillan, ‘Judicial Restraint and Activism in Administrative Law’ (2002) 30 *Federal Law Review* 335.

139 For example Dawn Oliver ‘Is the Ultra Vires Rule the Basis of Judicial Review?’ [1987] *Public Law* 543; Christopher Forsyth, ‘Of Fig Leaves and Fairy Tales: The Ultra Vires Doctrine, the Sovereignty of Parliament and Judicial Review’ (1996) 55 *Cambridge Law Journal* 122.

140 See chapter 6 at 6.3.3.

141 (‘*GCHQ Case*’) [1985] AC 374.

142 Ibid 400 (Lord Fraser), 407 (Lord Scarman), 409 (Lord Diplock), 417 (Lord Roskill). For other reasons, related to the justiciability of the decision, this was of no avail to the applicants—see 400-403 (Lord Fraser), 404, 406-407 (Lord Scarman), 412-413 (Lord Diplock), 423 (Lord Roskill), 423 (Lord Brightman).

143 See, eg, Oliver (n 139) 544.

also comply with the express statutory limits upon their power.[144] The debate regarding the source of these principles is often referred to as the 'ultra vires' debate.[145]

The debate was driven by changing attitudes to the relationship between the courts and the other branches of government.[146] In an influential article, Oliver posed the question whether, instead of being about the control of '*powers*, or *vires*', it could be said that judicial review was now primarily concerned with 'the protections of individuals'.[147] As faith in the British Parliament and executive government fell, greater trust began to be placed in the courts.[148] At its heart this debate, like the still-ongoing one about proportionality, in the context of administrative law,[149] is about the nature and scope of the power of the judiciary to supervise the other branches of government, and both debates can be seen as part of an even more fundamental one about the very character of English constitutionalism itself. Even as recently as the 1970s the House of Lords had affirmed the principle of parliamentary sovereignty.[150] However, by the 1980s, scholars like T R S Allan and Paul Craig began to assert that the common law placed limits on the sovereignty of Parliament.[151]

In response, other scholars began defending the concept of political constitutionalism.[152] Perhaps the most famous defence of political constitutionalism is J A G Griffith's Chorley

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144 Ibid 544.

145 Many of the key contributions to this debate are collected in Christopher Forsyth (ed) *Judicial Review & The Constitution* (Hart, 2000).

146 See chapter 5 at 5.3.3(c) and chapter 6 at 6.2 for further reference to this wider context.

147 Oliver (n 139).

148 See, eg, Lord Hailsham, 'Elective Dictatorship', Richard Dimbleby Lecture, broadcast by the BBC on 14 October 1976, published in *The Listener* (London, England), Thursday, October 21, 1976; see also Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 217-220; Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 45.

149 Also encouraged by the *GCHQ Case* (n 141), in particular the judgment of Lord Diplock, at 410, where he hinted that grounds of review could be further developed to adopt the principle of proportionality. See, eg, Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel Nor Dangerous' in Jeffrey Jowell and Dawn Oliver (eds) *New Directions in Judicial Review* (Stevens & Sons, 1988) 51, 68 and Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368. For an overview of the English debate regarding proportionality, see chapter 6 at 6.3.3.

150 See *British Railway Board v Pickin* [1974] AC 765, 782 (Lord Reid).

151 T R S Allan, 'The Limits of Parliamentary Sovereignty' [1985] *Public Law* 614, 625-629; Paul Craig, 'Sovereignty of the United Kingdom Parliament after *Factortame*' (1991) 11 *Yearbook of European Law* 221, 255.

152 See, eg, Adam Tomkins, 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 158; Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007); Graham Gee and Grégoire Webber, 'What is a Political Constitution?' (2010) 30 *Oxford Journal of Legal Studies* 273; and Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010), for example at chapter 2.

Lecture, 'The Political Constitution'.[153] However, recently Martin Loughlin has argued that this particular lecture can really only properly be understood if it was situated 'in an appropriate historical and political context'[154] as being informed by the now largely abandoned functionalist style in public law,[155] which is considered in depth in chapter 5.[156] Loughlin considered that contemporary proponents of political constitutionalism had failed to properly recognise this, leading to 'an entirely fruitless debate' about the respective merits of legal versus political constitutionalism.[157]

3.4.2 Common law constitutionalism in Australia

Aronson, Groves and Weeks have noted that in Australia, it is 'possible to put aside the finer detail of the English debates, simply because so much of it turns on the interrelationship between the three branches of government under an unwritten constitution.'[158] In Dicey's theory the Constitution is comprised of two key pillars, which he called the supremacy of Parliament and the 'the rule or supremacy of law.[159] The rule of law is shaped by the 'ordinary courts'. This leaves room for debate regarding whether and how parliamentary sovereignty should give way to the 'supremacy of law'. Many arguments in favour of 'common law constitutionalism' proceed from the perspective that it is the task of the courts to defend aspects of social morality and 'fundamental values' from erosion by legislation.[160] It is, therefore, entirely plausible to assert that common

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153 See (1979) 42 *Modern Law Review* 1.

154 Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 *King's Law Journal* 5, 10.

155 Ibid 11. See also Thomas Poole, 'Tilting at Windmills? Truth and Illusion in 'The Political Constitution' (2007) 70 *Modern Law Review* 250, 250, where he noted that the lecture 'reads like the last salvo of an intellectual movement that knows itself to be in terminal decline.'

156 See at 5.3.

157 Loughlin (n 154) 12. Loughlin further contended that modern political constitutionalists were seeking a return to what he described as 'conservative normativism', see 18-19. Loughlin's description of conservative normativism is set out in chapter 5 at 5.3.3.

158 Aronson, Groves and Weeks (n 29) 133.

159 A V Dicey *Lectures Introductory to the Study of the Law of the Constitution: Oxford Volume Edition of Dicey* (vol 1) J W F Allison (ed) (Oxford University Press, 2013) 95. See chapter 5 at 5.3.3(a) on the way in which Dicey's notion of parliamentary supremacy should be read in light of his concept of the rule of law.

160 See, eg, Allan (n 151) 625, a perspective subsequently expanded upon in Allan's other scholarship, for example in *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001) and *The Sovereignty of Law: Freedom, Constitution and Common Law* (Oxford University Press, 2013). See also Sir John Laws, 'Law and Democracy' [1995] *Public Law* 72, 84-88 and 'The Good Constitution' (2012) 71 *Cambridge Law Journal* 567.

law constitutionalism is reconcilable with Diceyan theory.[161] Dicey himself considered the English Constitution to be 'judge-made'.[162]

To use the phrase of Mark Tushnet, 'British constitutional law has been developed by the courts in a way not readily distinguishable from the way in which they develop the common law.' Tushnet contrasts this with the US position, in that 'US constitutional law has always been grounded in a canonical text, 'interpreted' by the courts.'[163] The same is true of the Australian position.[164] This puts things on a fundamentally different footing. As the previous chapter demonstrated, while values play a role in interpretation, the text places a framework around the way in which such values can be used.

While the Australian system of government is more closely influenced by English traditions than those of the United States, where there is a written document, any inquiry about the source and scope of the powers of the respective institutions must take it as the starting point. Chapters 5 and 6 argue that, although the influence of English traditions upon Australian constitutionalism is strong, these traditions, as well as certain conceptions about the roles of institutions, have been significantly adapted to the specific circumstances of Australian government. The Australian conception of judicial power must be understood in light of this. For instance, it seems that one reason why common law constitutionalist theories of review seem at odds with Australian notions of judicial power is owing to some of the political ideas that have influenced the design and interpretation of the Australian Constitution, set out in chapter 5.[165]

However, at around the time *Quin* was decided, some in Australia were suggesting that the Constitution could be interpreted as giving the High Court authority to protect rights and liberties found in the common law, rather than in a constitutional text.[166] The text of

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161 See, eg, Tom R Hickman, 'In Defence of the Legal Constitution' (2005) 55 *University of Toronto Law Journal* 981, 987-988.

162 Dicey (n 159) 116.

163 Mark Tushnet, 'Foundations of Public Law: A View from the US' in Michael A Wilkinson and Michael W Dowdle (eds) *Questioning the Foundations of Public Law* (Hart, 2018) 209, 209-210.

164 Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action—The Search Continues' (2002) 30 *Federal Law Review* 217, 237.

165 See at 5.2.

166 This actually began almost two decades earlier, when Murphy J made some statements to the effect that certain rights and freedoms were required for '[t]he proper operation of the system of representative government' – See, eg, *Ansett Transport Industries (Operations) Pty Limited v Commonwealth* (1977) 139 CLR 55, 88 (in obiter) and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-582. Justice Murphy's remarks in these judgments foreshadow the implied freedom of political communication, although the rights and freedoms he sought to imply were less explicitly anchored in the text and structure of the Constitution (see Winterton, below, at 129). Justice Murphy

the Constitution is fairly sparse[167] and could potentially lend itself to multiple interpretations. As the previous chapter described, this was also the period in which, under the leadership of Sir Anthony Mason as Chief Justice, the High Court moved into a period of relative creativity in constitutional interpretation.[168] Nevertheless, proponents of this more expansive approach to interpretation only ever comprised a minority of the Court.

In *Union Steamship Co of Australia Pty Ltd v King* ('*Union Steamship*')[169] a unanimous judgment of all seven members of the High Court referred to the possibility of there being 'some restraints' on legislative power that could be found 'by reference to rights deeply rooted in our democratic system of government and the common law.'[170] This statement was made in the context of an unsuccessful challenge to the validity of an enactment of the New South Wales Parliament on the basis that it was not a law for the 'peace, welfare and good government' of the state, in line with s 5 of the *Constitution Act 1902* (NSW). There had previously been some split opinion in the New South Wales Court of Appeal to the effect that this phrase amounted to 'words of limitation' on the legislative power of the New South Wales Parliament.[171] The unanimous judgment in *Union Steamship* settled this question, ruling that this phase did not 'confer jurisdiction on the courts of a State jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure peace, order and good government'.[172]

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also sought to imply other rights and freedoms, including freedom from discrimination on the basis of gender (see *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 267), from 'slavery or serfdom' (see *McGraw-Hinds (Australia) Pty Ltd v Smith* (1979) 144 CLR 633, 670, which he derived from 'the nature of Australian society' as being free and democratic) and from 'cruel and unusual punishment' (see *Sillery v R* (1981) 180 CLR 353, 362). Initially Murphy J was alone in this, but by the early 1990s this approach attracted some support from Toohey and Deane JJ – see *Leeth v Commonwealth* (1992) 174 CLR 455 ('*Leeth*'), 485-490, 492. See also John Toohey, 'A Government of Laws, and Not of Men' (1993) 4 *Public Law Review* 158, and for an overview see Leslie Zines, 'A Judicially Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166 and George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds) *Interpreting Constitutions: Theories, Principles and Institutions* (The Federation Press, 1996) 121.

167 Susan Kenny, 'Evolution' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 119, 123.

168 See at 2.9.3.

169 ('*Union Steamship*') (1988) 166 CLR 1.

170 Ibid 10.

171 See *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382, 384-385 (Street CJ), 421-422 (Priestley JA) cf 406 (Kirby P) and 413 (Mahoney JA). The fifth member of the Court, Glass JA, reserved his position on the issue – see at 407.

172 *Union Steamship* (n 169) 10.

However the reference made by the Court to potential common law limits appeared to leave other prospects open.

One of the most notable proponents of the idea that certain rights could be implied from the Australian Constitution was Justice John Toohey. In *Leeth v Commonwealth*,[173] Toohey and Deane JJ found that a provision of the *Commonwealth Prisoners Act 1967* (Cth) relating to the setting of non-parole periods for Commonwealth offences by State or Territory courts was invalid as it infringed a 'doctrine of legal equality', which they implied from the Constitution.[174] In extra-curial writing, Toohey argued that the courts could create a bill of rights by implying from the Constitution that the intention of the Australian people in adopting it was that the powers of Parliament were presumed not to 'extend to invasion of fundamental common law liberties'.[175] Although Toohey was putting forward an approach to the interpretation of the text of the Australian Constitution, the contours of this were close to the positions taken by common law constitutionalists in the English debate.

Such arguments ultimately did not attract widespread support in Australia.[176] As noted in chapter 2, however, the Mason/Brennan era did result in new protections for fair process and Australia's system of representative and responsible government being implied from the text and structure of the Constitution.[177] However, as chapter 5 explains, these have been shaped into systemic rather than individual protections.[178]

Justice Brennan was obviously aware of these wider debates regarding the ultra vires rule and constitutionalism, and this awareness is discernible in his contribution to Australian doctrine on judicial review of administrative action. This argument will be developed in more depth in a later section of this chapter. First, by way of providing further context to what was said by Brennan J in *Quin*, what is sometimes referred to as the Australian version of the 'ultra vires' debate will be outlined.

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173 *Leeth* (n 166).
174 Ibid, see at 485-487 and 491-493.
175 Toohey (n 166) 170.
176 See, eg, Winterton (n 166) and Zines (n 166), especially at 180-184.
177 See at 2.9.3.
178 See at 5.4.2.

3.5 THE DEBATE IN AUSTRALIA—COMMON LAW PRINCIPLE OR STATUTORY INTENTION

The contemporary approach to judicial review of administrative action holds that by close interpretation of the whole statute in context, it is possible to ascertain the 'subject matter, scope and purpose' of a particular power or duty, and use this to assist in determining whether a decision-maker has failed to take a relevant consideration into account[179], denied procedural fairness,[180] acted unreasonably,[181] or in some other way fallen into jurisdictional error.[182] Unless it says otherwise in clear language, Parliament is taken to have intended that a statutory power will be exercised reasonably and in accordance with the principles of procedural fairness. As described in the next chapter, this interpretive approach has become unified under the banner of 'jurisdictional error'.[183] The next section of this chapter charts the rise of what Bateman and McDonald have referred to as the 'statutory approach' to judicial review.

3.5.1 The rise of the 'statutory approach'

Bateman and McDonald suggest there has been a shift away from what they describe as a 'grounds approach' to judicial review, towards a 'statutory approach'.[184] They say that in the grounds approach, there was more focus on the 'identification and articulation of 'grounds of review'', whereas in the latter, now ascendant approach, the emphasis of courts is on statutory interpretation.[185] They pinpoint the beginning of a shift away from the grounds approach not only to a series of judgments delivered by Brennan J, of which *Quin* is one.[186] They noted that Brennan J first articulated the statutory approach in *FAI Insurances v Winneke*,[187] where he stated that 'the common law attributes to the legislature an intention that the principles of natural justice be applied.'[188] Bateman and McDonald contrast this with the approach taken by other members of the High Court in

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179 *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24, 39-40 (Mason J).
180 *Kioa* (n 118) 611 (Brennan J).
181 *Li* (n 87) 366 (Hayne, Kiefel and Bell JJ), 371 (Gageler J).
182 See, eg, *Project Blue Sky* (n 35) 390-391 (McHugh, Gummow, Kirby and Hayne JJ) and *Commissioner of Taxation v Futuris* (2008) 237 CLR 146 ('*Futuris*'), 155-156 (Gummow, Hayne, Heydon and Crennan JJ).
183 See chapter 4 at 4.3.
184 Bateman and McDonald (n 6) 153.
185 Ibid.
186 Ibid 164.
187 ('*Winneke*') (1982) 151 CLR 342.
188 Bateman and McDonald (n 6) 164-165 citing *Winneke* (n 187) 409.

this case, who they say 'spoke through the authority of history in describing natural justice as a common law duty.'[189]

The principal example of the difference between Brennan J and other members of the High Court on this point is, however, drawn from *Kioa v West*,[190] where a split between Mason CJ and Brennan J on the question of whether the duty to provide natural justice was sourced from the common law or from statute as a presumption of parliamentary intent was more sharply evident. Although both agreed there had been a denial of natural justice in the case, Brennan J reiterated the position he had taken in *Winneke*, stating again that whether or not a court had jurisdiction to review a decision on the ground of natural justice depended 'upon the legislature's intention that observance of the principles of natural justice is a condition of the valid exercise of the power.'[191] He further said:

> There is no free-standing common law right to be accorded natural justice by the repository of a statutory power. There is no right to be accorded natural justice which exists independently of statute and which, in the event of a contravention, can be invoked to invalidate executive action taken in due exercise of a statutory power.[192]

In the same case, Mason J took what he would later describe as the 'competing view'[193] that 'the law has now developed to a point where it may be accepted that there is a common law duty to act fairly, in the sense of according procedural fairness' when making an administrative decision which affected 'rights, interests and legitimate expectations', which was 'subject only to the clear manifestation of a contrary statutory intention.'[194]

This divergence of views has sometimes been characterised as a local version of the ultra vires debate.[195] While at first Brennan J seemed to be alone in insisting that the principles of natural justice were matters of parliamentary intent, after he succeeded Sir Anthony Mason as Chief Justice, his approach became the ascendant one, confirmed by later

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189 Ibid 164.
190 *Kioa* (n 118).
191 *Winneke* (n 187) 609.
192 Ibid 610.
193 Mason (n 122) 46.
194 *Kioa* (n 118) 584.
195 Aronson, Groves and Weeks (n 29) 413, where it is stated that the difference that emerged between Justices Mason and Brennan 'was not unlike a miniature reproduction of the wider English debate about the foundations of judicial review itself'. See also Gageler (n 18) 303; Susan Kneebone, 'What is the Basis of Judicial Review? (2001) 12 *Public Law Review* 95; and Selway (n 164) 226-229.

decisions.[196] The concept of 'jurisdictional error' has become a unifying thread in Australian judicial review of administrative action. Reaching the conclusion of whether an error is jurisdictional or not is framed as a matter of determining 'whether it was a purpose of the legislation that an act done in breach of the provision should be invalid.'[197] Put simply, it is an exercise in statutory interpretation.

3.5.2 Consequences of the embrace of the statutory approach

It has generally been agreed that nothing much, in real terms, turns upon the matter of whether the grounds of review are treated as standalone common law duties or attributed to parliamentary intention. In an extra-judicial paper, Sir Gerard Brennan himself once acknowledged that 'in most cases it may be of little practical importance whether the grounds of judicial review are derived from the implied intention of Parliament or from an autonomous common law rule.'[198] In *Plaintiff S10/2012 v Minister for Citizenship* ('*Plaintiff S10*'),[199] a majority of the High Court observed:

> [O]ne may state that 'the common law' usually will imply, as a matter of statutory interpretation, a condition that a power conferred by statute upon the executive branch be exercised with procedural fairness to those whose interests may be adversely affected by the exercise of that power. If the matter be understood in that way, a debate whether procedural fairness is to be identified as a common law duty or as an implication from statute proceeds upon a false dichotomy and is unproductive.[200]

By reference to this and other High Court statements also made in the context of the duty of procedural fairness,[201] Aronson, Groves and Weeks observed that the Court has 'made it clear that there is little reason to conceive the foundations of natural justice as a crude

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196 See, eg, *Plaintiff S10/2012 v Minister for Immigration and Citizenship* (2012) 246 CLR 636 ('*Plaintiff S10*'), 666 (Gummow, Hayne, Crennan and Bell JJ), citing *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Aala*'), 100-100 (Gaudron and Gummow JJ), in turn drawing upon authority including that of Brennan J in *Kioa* (n 118) 615.

197 See *Project Blue Sky* (n 35) 390-391 (McHugh, Gummow, Kirby and Hayne JJ) and *Futuris* (n 182) 155-156 (Gummow, Hayne, Heydon and Crennan JJ).

198 Gerard Brennan, 'The Purpose and Scope of Judicial Review' in Michael Taggart (ed) *Judicial Review of Administrative Action in the 1980s: Problems and Prospects* (Oxford University Press, 1987) 18, 27.

199 *Plaintiff S10* (n 196).

200 Ibid 666 (Gummow, Hayne, Crennan and Bell JJ).

201 See *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, 258-259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ) and *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 352 (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

choice between the common law and legislative intention.'[202] Since, either way, Parliament remains capable of altering or removing the requirements of natural justice, 'their source is of little practical significance.'[203]

However, for Bateman and McDonald, the change in the language of review of administrative action that they perceived actually represented a fundamental 'shift in the basic structure of its justification.'[204] They suggested that administrative law has two core 'legitimacy' problems, 'administrative legitimacy' and 'democratic legitimacy'.[205] In defining 'administrative legitimacy', they said that the administrative state is too far removed from democratic controls, and that the 'anachronistic' claim that ministerial responsibility plays a role is 'hollow'.[206] This means it is important that courts fulfil a role in making sure that the administrative state behaves in conformity with the rule of law. As they put it, the grounds of review 'mark out general legal principles with which administrators must comply to act lawfully.'[207] Since it was necessary for an applicant to establish a ground of review for a remedy, in the form of one of the writs, to issue, 'that ground for review established a norm with which the decision-maker must comply to inoculate any decision from judicial review.'[208] As a consequence, the grounds approach 'has the potential to bring administrative government into closer conformity with identified rule of law requirements.'[209]

Bateman and McDonald described the 'democratic legitimacy' problem as arising from concerns connected with the counter-majoritarian potential of judicial review.[210] While they acknowledged that it would be 'overly simplistic' to regard the move towards the statutory approach 'as the product of any single driver' it was in their view 'clear that each step of its development was geared towards providing some form of buffer against the increasing pressures on the judiciary to limit its role as the scrutineer of government decision-making.'[211] Given this, they suggested that the statutory approach is

202 Aronson, Groves and Weeks (n 29) 415.
203 Ibid.
204 Bateman and McDonald (n 6) 154.
205 Ibid 175.
206 Ibid.
207 Ibid 153.
208 Ibid 159.
209 Ibid 177.
210 Ibid 173.
211 Ibid 172.

'administrative law *in extremis*'.[212] It is an approach which is adapted towards securing the continued legitimacy of judicial review of administrative action, by limiting it to policing the limits of powers conferred by Parliament.[213] However, they say that the narrow and technical focus of this approach means that, while it is by no means values-neutral, it is less able to contribute to standards of good administration as the grounds approach.[214]

As chapter 2 acknowledged, it is true that throughout the 1990s, the High Court came under an extraordinary level of political and media pressure regarding a series of so-called 'activist' judgments.[215] Some of these were native title decisions, for example the Court's finding in *Wik Peoples v Queensland*[216] that certain kinds of pastoral leases had not extinguished native title over the lands subject to them. Tanya Josev has suggested that the 'emergence of claims of "judicial activism" were not simply a *reaction* to the Court's work, but part of a broader dispute within the "culture wars" playing out in the Australian political arena' during this period.[217]

This already heightened atmosphere provided the setting for a series of clashes between Parliament and the courts over the scope of judicial review of administrative decisions made in the migration context.[218] This is a controversial area of administrative law in other countries too,[219] but owing to a combination of factors, including its colonial history, isolated geography, as well as the White Australia Policy and its legacy,[220] migration and refugee policies have long proven particularly contentious in Australia. The controversy over the role of the High Court in the review of decisions made under

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212 Ibid.
213 Ibid 176.
214 Ibid 178-179.
215 Tanya Josev, *The Campaign Against the Courts: A History of the Judicial Activism Debate* (The Federation Press, 2017) chapters 4 and 5.
216 (1996) 187 CLR 1.
217 Josev (n 215) 118.
218 See, eg, McMillan (n 138).
219 See Richard Rawlings, 'Review, Revenge, Retreat' (2005) 68 *Modern Law Review* 378.
220 One of the first pieces of legislation passed by the Commonwealth Parliament was the *Immigration Restriction Act 1901* (Cth), which underpinned an immigration policy favouring migration from Europe, particularly the United Kingdom. Writing in 1930, the historian Keith Hancock described the White Australia Policy as 'the indispensable condition of every other Australian policy'—see *Australia* Ernest Benn, 1930) 77. For an overview of the White Australia Policy and its influence on Australian public law, see Gabrielle, Alexander Reilly and Laura Grenfell *Australian Public Law* (Oxford University Press, 3rd ed, 2019) 66-69.

the *Migration Act 1958* (Cth) reached its height nearly two decades ago.[221] Many of the most significant steps toward the modern approach to judicial review of administrative action have been taken by the High Court in cases involving migration law[222] and many of these, such as the landmark decision in *Plaintiff S157/2002 v Commonwealth*[223] show the Court seeking to navigate legislative attempts to limit judicial scrutiny of decision-making.[224]

It is true to say, as Bateman and McDonald do, that sometimes the statutory approach can lead to results that may seem 'fabricated', as courts strain the boundaries of meaning to achieve results that better 'protect individual rights and interests.'[225] It is also true to say, as they also do, that there has been a change in the way that the principles of judicial review are framed. This has also been accompanied by certain High Court judgments expressing what appeared to be scepticism about traditional notions of 'parliamentary intention' itself.[226] It is hard to offer a comprehensive and compelling explanation for these shifts. It is also possible to overstate the overall effects of this change in the language of review. Bateman and McDonald's views on the way in which this approach came to be dominant, and on the capacity of the courts to contribute to the standards of administrative conduct are worthy of some further consideration.

There are two main difficulties with the conclusions they reach. The first is that, given the willingness of the High Court, in particular, to deploy interpretivism or the 'statutory approach' in such a way as to frustrate what might seem to be the apparent intentions of Parliament in some cases, it is hard to accept that the approach itself is aimed at quelling any counter majoritarian doubts about judicial review. The second relates to the issue of whether and to what extent courts really can contribute to the somewhat imprecise and

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221 See Mark Aronson, 'Process, Quality and Variable Standards: Responding to an *Agent Provocateur'* in David Dyzenahus, Murray Hunt and Grant Huscroft (eds) *A Simple Common Lawyer: Essays in Honour of Michael Taggart* (Hart Publishing, 2009) 5, 25 where the debate's 'prolonged and depressingly acrimonious' nature is sketched. See also McMillan (n 138).

222 See Stephen Gageler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92, where the stages of these developments are set out.

223 (2003) 211 CLR 476.

224 See, eg, chapter 4 at 4.2.1.

225 Bateman and McDonald (n 6) 179.

226 See, eg, *Lacey* (n 17) 591-592, (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See further Richard Ekins and Jeffrey Goldsworthy, 'The Reality and Indispensability of Legislative Intentions' (2014) 36 *Sydney Law Review* 39; Stephen Gageler, 'Legislative Intention' (2015) 41 *Monash University Law Review* 1; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017) 114-115; and Robert French, 'The Principle of Legality and Legislative Intention' (2019) 40 *Statute Law Review* 40.

subjective concept of 'good administration', beyond enforcing the boundaries of the law as they find them. There are functional limitations on the capacity of the courts to contribute to good administrative practices. As the discussion of the Kerr Committee's findings above at section 3.2.2 of this chapter shows, the Committee was not only motivated to recommend a new system of administrative law owing to the constitutional separation of powers, but also out of a sense that courts might not always be the most effective agents of administrative justice.[227] Going beyond this, there are also doubts as to the capacity of judicial review to influence bureaucratic behaviour.[228]

This gives rise to a bigger question, and that is whether it is really the role of the courts to perform such a task, or whether it might be more effectively done in other ways. The belief that this is primarily the role of the courts can be recognised as a 'normativist' or 'red light' one, as explained further in chapters 5 and 6.[229] These chapters suggest that certain values about government and the role of the state that are discernible within the Australian constitutional framework perhaps do not readily accord with this belief. The remaining part of this chapter sets out the claim that one reading that can be given to Brennan J's approach to judicial review is that it is one that accords with these systemic values, which is one possible explanation as to why it ultimately became the preferred approach.

3.6 RE-FRAMING THE 'DEBATE' IN AUSTRALIA

The notion that the modern 'statutory approach' to review has been motivated by a desire on the part of the judiciary to subdue fears about the counter majoritarian potential of judicial review of administrative action is familiar. This is because it echoes a wider narrative about the High Court's public law jurisprudence, which is that, after a period of relative creativity during the Mason era, the Court retreated back into legalism in response to the controversy that had been generated by some of its decisions.[230] It is also in keeping

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227 See also chapter 2 at 2.5.1. The way this notion in turn may have shaped principles of review is considered further in chapter 6, see 6.5.4.

228 See, eg, Simon Halliday, 'The influence of judicial review on bureaucratic decision-making' [2000] *Public Law* 110.

229 See, eg, chapter 5 at 5.3.3(c) and chapter 6 at 6.2.1.

230 See, eg, Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241, in particular at 253 but cf Josev (n 215) 173, where Josev noted that '[i]f the Mason and Brennan Courts' native title and implied rights jurisprudence attracted the brunt of the criticism under the activist label, then it cannot be argued that the Gleeson Court 'reversed' that jurisprudence in order to avoid criticism.'

with another view, of longer standing, referred to in chapter 2, that the Court's traditional interpretive approach, described as legalism, is in part the result of a desire to 'cloak' the true power of the Court, and the 'political' nature of its role.[231]

Chapter 2 expressed a preference for a different view, which is that legalism is an interpretive approach characterised by what might be called judicial self-restraint or even 'modesty'. It has been crafted in such a way as to take account of the role of the judiciary in the Australian Constitution, insofar as it relates to the roles of the other institutions of government.[232] Following the Mason era at least, this does not mean the Court cannot or should not have open regard to values, but the range of values that can be drawn upon is shaped by this overarching idea of the role of judicial power in the system of government established by the Constitution. This chapter suggests that likewise, an alternative, and similar, narrative regarding the apparent reworking of the principles of judicial review of administrative action is available.

Taking a perspective that is both wider and longer-term, it is possible to perceive the pattern that has emerged in review of administrative action since the 1990s as in keeping with a notion of judicial power that has been shaped in particular ways by certain normative considerations. These include a conception of democracy that must be seen as informing the nature of legislative power, as well as an acceptance of the legitimate role of the administrative state.[233] The latter is something that can be seen to lie at the heart of the pragmatic acknowledgement threaded through the constitutional doctrine of the separation of powers and affirmed by the recommendations of the Kerr Committee, that, despite their fundamentally important constitutional role, courts are not the only, or even always the best way, of holding administrative power to account.

Even where political accountability is deficient, there are other mechanisms available, including ombudsmen, integrity commissions, auditors-general and, of course, tribunals such as the AAT. These other mechanisms to a certain extent blend political and legal methods of holding the executive to account in a targeted way.[234] There are limits to what

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231 See at 2.8.2.

232 See at 2.8.2 and 2.9.

233 These ideas are developed in chapters 5 and 6 respectively.

234 Over the past three decades, beginning with NSW in 1988, and as recently as the ACT in 2019, corruption oversight bodies have been established in every state and territory, although the Commonwealth is yet to establish its own. Each body has a different combination of powers and procedures, but the NSW Independent Commission Against Corruption, for eg, is required by its

the principles of public law can achieve.[235] It is not the role of the courts to expand their jurisdiction where Parliament has not provided such measures.[236] The focus of courts in Australia is on the formal law, its scope and its meaning, because, in accordance with the Australian constitutional compact, this is the role of the judiciary alone.

Bateman and McDonald suggested that the move towards the statutory approach was partly a response to fears about the counter majoritarian potential of judicial review of administrative action. The High Court did find itself subject to political pressure in the late 1990s and early 2000s.[237] However, as explained in chapter 4, the move away from the grounds approach can also be understood as the harnessing of the interpretive method in such a way as to render the ouster of review by Parliament more difficult. Framing the standards of rationality and fairness expected from the administrative state as neat common law grounds left them vulnerable to statutory exclusion from review. If they are instead embraced as principles of statutory interpretation, they are in fact, as chapter 4 will suggest, more flexible.[238] In leaving more room for the judiciary to continue to develop the law of review in response to legislation in this way, this approach seems less concerned with what Bateman and McDonald call the democratic legitimacy of review, particularly when combined with changes in the language around the concept of parliamentary intention. In fact, viewed in this light, it could be seen to have proceeded from almost the opposite motivation.

Seen in this way, the statutory approach is not administrative law *in extremis*, but can rather be read as simply the shaping of its principles by the High Court so that they continue to conform with this normative framework, and the institutional values it contains, at the same time ensuring that they are flexible enough to be able to respond to changing circumstances, including, as discussed in the next chapter, legislative attempts to oust review. It must be remembered that the principles of statutory interpretation, applied by the judiciary to find the intention of parliament, are for the most part, creations

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founding legislation to play a role in educating the NSW public service regarding corruption prevention—see *Independent Commission Against Corruption Act 1988* (NSW), s 13(d)-(k).

235 See Kenneth Hayne, 'On Royal Commissions' (Speech, Centre for Comparative Constitutional Law Conference, Melbourne Law School, 23 July 2019) 8-9. <http://alumni.online.unimelb.edu.au/s/1182/images/editor_documents/MLS/cccs/on_royal_commissions__-_the_hon_k_m_hayne.pdf?sessionid=515621e2-1abd-4495-a4de-ba003a6f86b1&cc=1>

236 See *Quin* (n 4) 37, which is quoted and considered in chapter 6 at 6.5.4.

237 Josev (n 215), in particular chapter 5, for an account of this period.

238 See at 4.4.

of the common law themselves. Indeed, the English ultra vires debate ultimately reached an impasse on this exact point.[239] Even if review is framed as a matter of statutory interpretation, it is impossible to escape the role of the common law in the development of principle.[240]

This alternative perspective also re-frames what was understood as the local version of the ultra vires debate as being about the recognition of these material differences between judicial review in Australia and England. As noted, the ultra vires debate was, at its heart, about the source and nature of judicial power in the English Constitution. Taking this as the starting point, it becomes possible to recognise that the Brennan approach became the preferred one not because it masked or obscured the true power of the courts, but rather because it articulates a role for the courts in supervising executive action that is resonant with a longer-term understanding of the nature of judicial power in Australia and its relationship with the Parliament and the executive. Australian courts cannot follow principle developed elsewhere that is not consonant with conceptions of the role and functions of all three institutions.

3.6.1 Locating the alternative narrative in *Kioa* and *Quin*

In setting out this alternative account it is useful to look more closely at what Brennan J said not only in *Quin*, but also in the earlier decision of *Kioa*. To properly understand the account Brennan J gives of judicial power in these cases, it is necessary to look beyond the phrases, especially those from *Quin*, that have been to some extent reduced to slogans. When this is done, a number of interrelated themes can be discerned from the relevant passages of Brennan J's judgments. The recognition of these themes, and their placement in the wider Australian legal, political and institutional context helps to illuminate the extent of the contribution that Brennan J made in these judgments towards the articulation of the role of the courts in judicial review of administrative action within the particular framework of the Australian Constitution.

As noted, Bateman and McDonald trace the shift towards what they call the 'legislative intention' approach to a series of judgments given by Brennan J, commencing with his

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239 See, eg, Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 129.

240 Ibid.

judgment in *FAI Insurances v Winneke*.[241] At issue in this case was the question whether the exercise of statutory power by a state Governor could give rise to a duty of procedural fairness. A majority of the High Court found that it could. Although he concurred with the majority, Brennan J was alone in framing the requirements of natural justice as a matter of statutory intention.[242]

The next step occurred in *Kioa*, which is where Bateman and McDonald say that the 'fusion of constitutional principle and administrative law doctrine' initially took place.[243] In support of this they quoted a passage from *Kioa*, where Brennan J observed that while parliamentary supremacy required courts to ensure that the executive remained within the boundaries of statutory power, the courts had 'no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.'[244] Bateman and McDonald say that these passages of Brennan J's judgment allude to Ch III considerations, since in them he 'linked the nature of courts' judicial review powers with the idea of the separation of judicial functions from the representative and responsible government.'[245] Justice Brennan's subsequent judgment in *Quin* thus represented the further refinement of this position, producing 'what would become the accepted modelling of the relationship between the constitutional separation of judicial power and Australian administrative law.'[246]

It is true that Brennan J's view of the role of the judiciary in the supervision of administrative action is every bit as discernible from his judgment in *Kioa* as it is from that of *Quin*.[247] Reading this judgment today, it is hard to escape the conclusion that, much in the same way that his judgment in *Re Drake and Minister for Immigration and Ethnic Affairs (No 2)*[248] can be seen as a lasting instruction as to how the AAT should conduct merits review, the approach he described in *Kioa* should perhaps be recognised

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241 *Winneke* (n 187). See Bateman and McDonald (n 6) 163.
242 Ibid 407-410 (Brennan J). While a majority of the High Court, with only Murphy J in dissent, found that the requirements of natural justice applied to the decision under challenge, only Brennan J entered into a discussion of the source of the requirements.
243 Bateman and McDonald (n 6) 165.
244 Ibid 166 citing *Kioa* (n 118) 611.
245 Ibid.
246 Ibid 166.
247 See *Kioa* (n 118) from 609 throughout.
248 (1979) 2 ALD 634.

as having performed a similar function in judicial review.[249] However, while in *Quin* Brennan J did express concern with the need for courts to stay within appropriate boundaries or risk putting their own legitimacy at stake,[250] his vision of the judicial role is somewhat more textured than this.

Foreshadowing what he was later to say in *Quin*, in *Kioa*, he stated:

> The distinction between the method and merits is sometimes elusive. The merits are for the repository of the power alone, and a repository of power is not held to be in breach of the principles of natural justice merely because he has come to a decision which, to the eyes of the court, appears unjust.[251]

He went on to add:

> Unless the courts rigidly limit their examination of the observance of the principles of natural justice to the procedures adopted by the repository of power, the courts trespass into a field of decision-making for which their own procedures are ill-suited.[252]

He later echoed this in *Quin*, stating that while it was the role of the court to say what the law was:

> In giving its answer, the court needs to remember that the judicature is but one of three co-ordinate branches of government, and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual.[253]

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249 See for instance Matthew Groves, 'Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart 2017) 319, 324, where he noted 'the often neglected point that Brennan J exercised as much influence on the evolution of merits review in his role as the first president of the AAT as he did on judicial review in his role as a Justice of the High Court.'

250 *Quin* (n 4) 38.

251 *Kioa* (n 118) 622.

252 Ibid 623.

253 *Quin* (n 4) 37. Note the similarity between this statement and the judgment of Fullagar J in *Australian Communist Party v Commonwealth* (1951) 183 CLR 1, 262-263. Like Brennan J in *Quin*, Fullagar J referred to the principle in *Marbury v Madison*, noting that it was 'axiomatic' in the Australian system. He noted, however, that it was 'modified in varying degree in various cases (but never excluded) by the respect which the judicial organ must accord to the opinions of the legislative and executive organs.'

This contemplation of the proper role of the courts in relation to the other branches of government, continues over several paragraphs of Brennan J's judgment in *Quin*. It included the following passage:

> The courts—above all other institutions of government—have a duty to uphold and apply the law which recognizes the autonomy of three branches of government within their respective spheres of competence and which recognizes the legal effectiveness of the due exercise of power by the Executive Government and other repositories of administrative power. The law of judicial review cannot conflict with the recognition of the legal effectiveness of the due exercise of power by the other branches of government.[254]

Several ideas about the nature and scope of judicial power are evident from these passages. Read in context, Brennan J's statements about judicial review not being concerned with the 'merits'[255] or the furtherance of 'administrative justice'[256] can be seen as concerned with leaving space for the other branches of government to perform their own legitimate functions. If his statement about the need for the courts to stay out of the merits is understood in this way, it becomes possible to recognise that the 'merits' is not really a residual notion. Rather, the judicial concept of the 'merits', in other words, the area of power that does not belong to them, is understood by reference to concepts about the 'spheres of competence' of the other branches of government.

Deciding controversies about rights is a core element of judicial power. However, in these passages, Brennan J acknowledges that in the context of judicial review of administrative action, what are frequently involved are not straightforward balancing exercises of the rights of one individual against those of another.[257] Often the cases that arise for resolution in the public law setting involve questions that for many possible reasons are not suitable for judicial adjudication. As Gummow J put this in a decision of the Full Court of the Federal Court handed down just months before *Quin*, 'the question where the balance lies between competing public and private interests in the exercise of

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254 *Quin* (n 4) 38.
255 Ibid 36.
256 Ibid 36, 37.
257 See, eg, T T Arvind and Lindsay Stirton, 'The Curious Origins of Judicial Review' (2017) 133 *Law Quarterly Review* 91, 114-116, where they grapple with the nature of the interests involved and the claims at stake, and note the limitations of modern principle in addressing the problems raised.

a statutory discretion goes to the merits of the case, and is thus one for the decision-maker not the courts to resolve.'[258]

Seen in this light it can be recognised that Australian review of administrative action is not defined by formalism as much as by a preparedness on the part of the courts to recognise not only their own functional limitations, but also the legitimate role of the other branches of government. This view is supported by the judgment of McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* ('*Lam*'),[259] where they noted that 'the existence of a basic law' in Australia required courts to have regard to their own limitations by reference to the powers of the other institutions of government.[260] This includes recognition that, owing to their own particular functions, the legislature and, where power has been conferred upon it by the legislature, the executive, might be better positioned to strike a balance between the interests of individuals and those of the collective.

The role articulated for courts by Brennan J is in this way reminiscent of something observed by Andrew Inglis Clark, one of the key participants in the 1890s convention debates, who provided one of the two draft Constitutions which were prepared for the first convention in 1891.[261] Shortly after Federation, Clark wrote that:

> The jurisdiction conferred by the Parliament of the Commonwealth upon any federal court must be within the limits of the judicial power of the Commonwealth, and these are coterminous with the legislative and the executive powers conferred by the Constitution upon the Parliament of the Commonwealth and upon the Crown.[262]

This recalls what Brennan J said in *Quin*, set out above, about the necessity of the judiciary keeping in mind it is 'but one of three co-ordinate branches of government' when it was ruling on the scope of executive power.[263]

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258 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193, 221.
259 ('*Lam*') (2003) 214 CLR 1.
260 Ibid 24-25.
261 The other was provided by Charles Kingston, see J A La Nauze, *The Making of The Australian Constitution* (Melbourne University Press, 1972) 24.
262 Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell (G. Partridge & Co), 1901) 205.
263 *Quin* (n 4) 37.

In this sense the judgments of Brennan J in *Quin* and *Kioa* go beyond just recognising the role of the Australian Constitution in shaping judicial review of administrative action. Rather, they can be viewed as embracing the set of institutional values through which the text and structure of the Constitution is interpreted. The justification for the Australian approach to judicial review of administrative action can be found in the ways in which the role and functions of its other institutions of government are also understood, and the way in which the power of the judiciary is regarded as 'coterminous' with these. Chapters 5 and 6 give an account of the way certain political ideas about government have been influential on the way in which the roles of the other institutions of government have been framed in Australia.

3.6.2 The judgments of Justice Brennan as a response to the ultra vires debate

The passages from *Kioa* and *Quin* set out here can be read as a rejection of arguments that were being made around the time these cases were decided regarding the role of the courts in judicial review of administrative action. They reflect a concern with courts remaining within the boundaries of their own institutional capabilities. In this way, Brennan J's statements in both judgments can be recognised as the staking of a position on the appropriate constitutional, and institutional, role of courts in review of administrative action in response to these emerging trends. The somewhat extraordinary facts of *Quin* provided him with the opportunity to do so in a way that expanded upon what he had already said in *Kioa*.

In both judgments, Brennan J directly referred to what the English called the ultra vires question. In *Kioa*, he raised the decision in the *GCHQ Case* and noted that while it might be the case that where the source of a power was not a statute, '[i]t may be that the common law determines not only the scope of the prerogative but the procedure by which it is exercised.' However, where the power was derived from statute, the courts had 'no jurisdiction to declare a purported exercise of statutory power invalid for failure to comply with procedural requirements other than those expressly or impliedly prescribed by statute.'[264] In *Quin* he reprised this theme, noting that '[j]udicial review provides no

[264] *Kioa* (n 118) 611.

remedies to protect interests, falling short of enforceable rights, which are apt to be affected by the *lawful* exercise of executive or administrative power.'[265]

This seems to be the crux of why Brennan J's approach has ultimately been the preferred one in Australia. As Brennan J went on to emphasise in *Quin* '[t]he essential warrant for judicial intervention is the declaration and enforcing of the law affecting the extent and exercise of power: that is the characteristic duty of the judicature as the third branch of government.'[266] For Brennan J the scope of judicial power to carry out review of administrative action had to be defined by 'the extent of power and the legality of its exercise' rather than 'the protection of individual interests.'[267] Although Brennan J does not cite Oliver's 1987 article in *Quin*,[268] this resembles a rejoinder to the proposition that she posed in its opening paragraph, that judicial review had 'moved on from the *ultra vires* rule to a concern for the protection of individuals.'[269]

This rejection of the view that the common law contained principles that were somehow capable of defeating statutory intention is tied up with the recognition of the role of the Australian Constitution in review of administrative action.[270] The High Court, and the other Australian federal courts, find themselves on a different footing to the English courts. To return to Tushnet, these English debates must be regarded as specific to the circumstances of an unwritten constitution, in which the foundational principles are derived from the common law itself.[271] In such a context, it is possible to debate the historical evolution of the roles of the various institutions of government, and the sources of certain powers that they have. As noted, the various positions taken in the ultra vires debate are often influenced by an understanding of other facets of English constitutional development, and a position on the particular role and powers of Parliament and the courts.

Those on the common law side of the English debate for this reason consider that the attribution of the principles of review to parliamentary intention is a 'fig-leaf', a fiction

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265 *Quin* (n 4) 35 (emphasis added).
266 Ibid 35.
267 Ibid 36.
268 He does, however, cite an earlier article by Jack Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 *Oxford Journal of Legal Studies* 22, which referred to the emerging challenge to ultra vires.
269 Oliver (n 139) 543.
270 See in particular Selway (n 164) on this point.
271 Tushnet (n 163) 209-210.

necessary to preserve constitutional niceties.[272] That the notion that the principles of review could be attributed to parliamentary intention was a fiction seems to be something that is accepted by both sides of the debate. In his defence of the ultra vires doctrine, for instance, Christopher Forsyth noted that '[n]o one is so innocent as to suppose that judicial creativity does not form the grounds of judicial review.'[273] This means that to a certain extent the debate was about whether the fig-leaf is needed or not. For instance, as Paul Craig once explained, '[t]he ultra vires principle is based on the assumption that judicial review is legitimated on the ground that the courts are applying the intent of the legislature.'[274] This meant that '[t]he ultra vires principle … provided both the basis for judicial intervention and established its limits.'[275] For Craig, it was a problematic fiction that cloaked what the courts were really doing, including where they were applying principles that had no apparent relation to anything that could have been intended by Parliament.[276] For Christopher Forsyth, however, arguments that the 'fig-leaf' could be dispensed with failed to appreciate 'the subtlety of the constitutional order in which myth but not deceit plays so important a role and where form and function are often different.'[277]

Taggart's critique of certain aspects of Australian judicial review of administrative action was partly motivated by what he perceived as a desire on the part of Australian courts to preserve the fig-leaf.[278] However, this interpretation does not account for the ways in which the Australian conception of judicial power is different from the English one. Where there is a written constitution that defines the roles of each institution of government, there is less need for such fig-leaves. The Constitution expressly gives the High Court jurisdiction to hear applications relating to the control of executive power.[279] To the extent that the intention or interpretive approach in Australia proceeds from a fiction, it is one of a different kind, because ultimately the source of the power of the federal courts to restrain the actions of 'officers of the Commonwealth' is clear.

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272 Laws (n 160) 79.
273 Forsyth (n 139)136.
274 Paul Craig, 'Ultra Vires and Judicial Review' (1998) 57 *Cambridge Law Journal* 63, 64.
275 Ibid 65.
276 See, eg, ibid 67.
277 Forsyth (n 139) 136.
278 Taggart (n 23) 14.
279 *Australian Constitution*, s 73 and s 75.

In Australia, the debate is less about the source of judicial power to review executive action, and more about its scope. This raises the question of why Brennan J thought it was necessary to continue to frame the principles of review as matters of parliamentary intention. One possible answer is that owing to both the formal Constitution and the historical development of the Australian state, the sources of executive powers here are much more likely to be located in a statute or some other enforceable instrument. However, in England, it is less unusual to find non-statutory administrative power, which is one of the driving forces of the ultra vires debate.[280] In Australia, the statement that 'all power of government is limited by law'[281] can, more often than not, be taken to mean formal law, and ultimately the Constitution. This is the most obvious reason for the heavy emphasis on text and interpretive principle.[282] This theme is taken up in the next chapter.

However, another possible answer lies in the same institutional values that have encouraged focus on 'text and structure' in the sphere of constitutional review. As chapter 2 suggested, the High Court's traditionally legalist approach should not be understood as formalist, at least insofar as this term is applied to mean that it seeks to obscure the values being drawn upon by courts. Rather, it seeks to limit the range of values that can be drawn upon. Anchoring review of administrative action in statutory text has a similar effect. As Brennan J explained in the passages quoted above, it requires the courts to focus on the limits of power, including their own. The role of the court in judicial review of administrative action to ensure that administrative power is not exceeded.

Unlike in the English constitutional system, where there is scope for debating what Dicey meant by the rule of law, and how the courts were supposed to protect it, the Constitution is the source of the High Court's power to review executive action. It is likewise the source of the power of the legislature. Unless the text and structure of the Constitution provide a reason for finding legislative action invalid, there is no justification for courts to do so. By extension, where legislation is validly made, courts cannot use the supervisory jurisdiction to frustrate the intentions underpinning it by reference to the

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[280] See, eg, Oliver (n 139) 545, where she noted that '[a] considerable part of the activity of central government is carried on under *de facto* or common law powers.'

[281] *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 24 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

[282] On this point see Paul Finn, 'Public Trusts and Fiduciary Relations' in Charles Sampford, Ken Coghill and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012) 32, 35. See chapter 6 at 6.5.3 where it is argued that interpretivism is a method that has been adapted for the prevalence of legislation in Australia.

moral notions that scholars like Allan consider are embodied in the 'rule of law'.[283] In the system of co-ordinate branches established by the Constitution, this would not be a legitimate use of judicial power.

Linking the principles of review to parliamentary intention is one way of acknowledging that judicially developed principle cannot rise above statutory text. Attribution of the principles to parliamentary intention may be 'unnecessary',[284] but in a system where the political process provides the ultimate and 'ordinary'[285] means of control it functions as a guidepost for courts as to the limits of their own power.

This should not be read as a denial that the common law, and the values it contains, play a role in conditioning the exercise of administrative power. Given the indeterminacy of the scope of 'the law' and the 'merits', there remains room for the judicial development of principle. It needs to be noted that this does not mean that judges 'find', but rather make, the law. Lord Reid once put this colourfully, observing that '[t]hose with a taste for fairytales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour' just waiting to be found by judges upon their appointments to courts.[286] As he added 'we do not believe in fairy tales any more.'[287] That nobody believes in this particular 'fairy tale' is no less true in Australia than in any other common law country.[288] This extends to the development of interpretive principle just as much as any other aspect of the common law.

As Lord Reid further noted, the question is not whether or not it is the role of judges to make law, but rather 'how do they approach their task and how should they approach it.'[289] It is submitted that the answer to this lies in conceptions of institutions. Such an institutional or process-focused response requires consideration of how the role and functions of each institution are conceived in a system of government.[290] Developing an

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283 See at 3.4.1 and 3.4.2.

284 French (n 226) 41.

285 See, eg, *Engineers' Case* (n 21), 151-152 (Knox CJ, Isaacs, Rich and Starke JJ) and Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 Federal Law Review 162, 188. See also chapter 2 at 2.8.2.

286 Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of the Society of Public Teachers of Law* 22, 22.

287 Ibid.

288 On this point, see, eg, Sir Anthony Mason, 'The Judge as Law-maker' (1996) 3 *James Cook University Law Review* 1, 1 where he draws upon Lord Reid's speech and adds '[n]othing is to be gained by spending time on what is obvious to everyone.'

289 Reid (n 286).

290 For reference to legal process theory see chapter 2 at 2.8.2 and chapter 5 at 5.3.2.

account of these requires some reference to what might be identified as the values that have shaped such conceptions.

Chapter 5 explains the way in which the national government of Australia was expressly designed to be an 'effective instrument of the popular will.'[291] Chapter 6 suggests that the administrative state has long been perceived in Australia not as a threat to liberty but an instrument for the benefit of society. Taking both ideas into account, it does not seem in the slightest way 'fictional' to suggest that Parliament intends public power to administered in a way that is reasonable and procedurally fair, unless it provides otherwise. Writing extra-curially, Allsop CJ has said that '[a]n organised political system with a foundation of the sovereignty of the governed provides the constitutional framework in which to view power as reciprocal, consensual and as serving the people.'[292] At the same time, both ideas also plausibly require the judiciary to exercise self-restraint in the way it uses 'the law' to condition power. The recognition by the courts of the legitimate roles of the other branches of government minimises, although it does not eliminate, the potential for the interpretive approach to be stretched beyond the boundaries of plausibility.

3.6.3 The Brennan approach and substantive review

As an extension of what has been argued above, it is worth considering the Brennan approach on the specific question of legitimate expectations. Although the idea that the statutory approach is administrative law *in extremis* is not in keeping with the alternative narrative that has been set out here, this is not to say that concerns with the legitimacy of judicial review have not been a feature of the change that has occurred. That Brennan J was thinking about these matters can also be seen not only from his judgments,[293] but also from his extra-curial writing in the 1980s, in which he had noted that the latter half of the twentieth century had seen an expansion of judicial review of administrative action. He considered that it was 'reasonable to surmise' that this turn of events 'coincides with public sentiment, the sentiment of Parliament and the sentiment of at least some sections of the executive.' However, he identified that '[t]he problem is to determine how far

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[291] Gageler (n 285) 171.
[292] James Allsop, 'Values in Public Law' in Neil Williams (ed) *Key Issues in Public Law* (The Federation Press, 2018) 9, 13.
[293] See, eg, *Quin* (n 4), 38.

judicial intervention should go.'[294] He further said '[i]t seems an elementary proposition that the function of the Courts is not to assume the powers conferred by Parliament on administrative agencies', adding that there was 'no shortage of judicial activists, urging the Courts on to do so.'[295]

Brennan was aware that influential judges and commentators, for instance Lords Denning and Cooke, were arguing that the review should not be limited to simply procedural fairness, but should extend to substantive fairness as well.[296] In *Quin*, he acknowledged that the merits were subject to 'political' rather than judicial 'control'.[297] Writing after his retirement as Chief Justice he said '[i]n a free society under the rule of law, some mechanism is needed to review the exercise of power' and that '[i]n a democracy, that mechanism is part political, part legal.'[298] Although he considered that Lord Hailsham's charge that modern legislatures had become so dominated by their executives that government now resembled 'an elective dictatorship' was 'close to the mark',[299] he appeared to accept that in the absence of parliament or the constitution giving more power to the courts to protect the rights of individuals, courts could not claim it for themselves, beyond the application of the common law in the ordinary way.

This did not mean that he saw no role for the common law, or for the setting of standards of administrative conduct by the judiciary. His judgments in *Quin* and *Kioa* both demonstrate that he was concerned with how the right balance between intervention and restraint ought to be struck. The passages in *Kioa* dealing with the universality of the requirement of natural justice are telling in this regard.[300] Much has been written on the concept of 'legitimate expectation', both in the context of review in Australia and more widely.[301] In Australia, it is well-known that initially there was some division in the High Court over the concept, and that ultimately it was Brennan J's view that the notion did

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294 Brennan (n 198) 21.
295 Ibid.
296 Ibid 29
297 *Quin* (n 4) 36.
298 Gerard Brennan, 'The Review of Commonwealth Administrative Power: Some Current Issues' in Robin Creyke and Patrick Keyzer (eds) *The Brennan Legacy: Blowing the winds of legal orthodoxy* (The Federation Press, 2002) 9, 9.
299 Sir Gerard Brennan, 'The Parliament, The Executive and The Courts: Roles and Immunities' (1997) 9 *Bond Law Review* 136, 142.
300 *Kioa* (n 118) see from 610-619 in particular.
301 See, eg, the contributions to Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart, 2017).

not add anything to the law of procedural fairness that prevailed.[302] Discussions of the decline of 'legitimate expectations' in Australia tend to focus on the clear rejection of any form of substantive procedural fairness expressed in *Lam* on the basis that it was too close to merits review.[303] However, Brennan J's explanation of natural justice as a duty that attaches to nearly all exercises of administrative power, unless Parliament uses very clear language to exclude it, demonstrates a clear appreciation of the role of the judiciary in defining the content of such a duty, through the application of the principles of interpretation.

Brennan J's rejection of the notion that courts had a role in protecting an individual's 'legitimate expectations' was bound up with his eschewal of the view that procedural fairness was a right, or something pertaining to an individual, in preference for one that it was a duty that applied nearly all the time (unless there were good practical reasons why it should not).[304] Another way, then, of viewing this formulation of procedural fairness is that it is a standard that was generally expected of administrative decision-making, unless Parliament says otherwise in painstakingly clear terms. As Aronson, Groves and Weeks have noted, following the High Court's ultimate endorsement of Brennan J's position:

> [A] shift from legitimate expectations to an overall view of the fairness of a process means that fairness is not focussed on what was promised or expected, but on what should have been provided. This lens is clearly a better one through which to view fairness.[305]

There is an important policy consideration underlying this approach. In *Quin*, Brennan J observed 'if the courts were permitted to review the merits of administrative action whenever interested parties were prepared to risk the costs of litigation, the exercise of administrative power might be skewed in favour of the rich, the powerful, or the simply litigious.'[306] This stance on procedural fairness reflects what could be seen as a wider

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302 See *Lam* (n 259) 27-28 (McHugh and Gummow JJ).

303 See ibid, 9-10 (Gleeson CJ); 23-25 (McHugh and Gummow JJ); 48 (Callinan J). See, eg, Greg Weeks, 'Holding Government to its Word: Legitimate Expectations and Estoppels in Administrative Law' in Matthew Groves (ed) *Modern Administrative Law in Australia: Principles and Practice* (Cambridge University Press, 2014) 224, 244 and Boughey (n 87) 128.

304 See, eg, *Kioa* (n 118) 617.

305 Aronson, Groves and Weeks (n 29) 427.

306 *Quin* (n 4) 37.

trend in Australian public law, discussed in chapter 5, towards protecting systemic values instead of individual rights.[307]

It is useful at this point to consider what Aronson, Groves and Weeks have said regarding the statement from *Plaintiff S10*, quoted above. While expressing agreement that debating whether the requirement of procedural fairness has a basis in the common law or in legislation is 'unproductive', they noted:

> *Plaintiff S10* needs to be taken a step further, although that may have been implicit in any event. The 'principles and presumptions of statutory construction' to which it refers have lives beyond the context of statutory interpretation; so far as they relate to public law, they are principles which can be deployed to civilise the administrative exercise of some forms of government power, whether they be taken pursuant to statute or otherwise.[308]

As they go on to state, '[v]ery few statutes give so much as a hint that their powers and duties are to be exercised in good faith and only in pursuit of the statute's objectives or purposes'[309] later adding '[i]n short, it is relatively unusual to see a judicial review court doing only what the statute has told it to do when confronted with an administrative violation of a statutory command.'[310] Given this, it seems that the interpretive approach should be regarded as contributing to standards of administrative conduct, albeit in the limited way that courts are able to, through the application of the law, which they continue to develop.

3.7 CONCLUSION

The interpretivist 'statutory approach' has become the preferred one in Australia because it is more in keeping with a system in which there is a 'basic law' and where most executive power is sourced in statute or in other formal instruments. The written Constitution is the source of the High Court's jurisdiction, and therefore the source of the limits of that jurisdiction as well. Yet, this is only a partial answer to the nature and scope of the power of the courts to undertake review of executive action. The notion of judicial

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307 As in the context of the implied freedom of political communication, where the High Court has repeatedly emphasised that what is protected is not a personal right. See, eg, *Unions NSW v State of New South Wales* (2013) 252 CLR 530, 554 (French CJ, Hayne, Crennan, Kiefel and Bell JJ).

308 Aronson, Groves and Weeks (n 29) 130.

309 Ibid.

310 Ibid 132.

power is influenced by other considerations, some of which are explored in chapters 5 and 6. At its core, the meaning of judicial power in Australia has been fixed for a long time. It involves the resolution of controversies about rights, duties and obligations through the application of discoverable legal principle.

However, none of this means that there is no room within the approach for the principles of review to continue to adapt to changing circumstances in the same fashion that common law principles always have. The Constitution establishes the High Court and expressly gives it the power to restrain the actions of 'officers of the Commonwealth' through the issue of certain remedies. The understanding of the content of these remedies and the principles surrounding their issue has changed markedly in the almost 120 years of the Constitution's existence. To use the phrase of Hayne J in *Re Refugee Review Tribunal; Ex parte Aala*,[311] 'the Constitution did not intend to freeze at 1900 the development of the common law regarding the issue of any of the prerogative writs'.[312]

To suggest that the approach embodied by *Quin* is not capable of development in ways that respond to circumstance is a misreading of it. While it is not particularly amenable to the style of review that has been advocated by common law constitutionalists since the 1980s, it still is not one that embraces the sort of restrictive formalism that prevents the courts from intervening where possible in order to ensure that executive *process* at least is held accountable, even while trying to avoid the field of *policy* as much as possible, accepting that there are no clear distinctions between the two. The evolution of the concept of jurisdictional error, considered in the next chapter, demonstrates the flexibility of the interpretive approach.

311 *Aala* (n 196).
312 Ibid, 143; see also 141.

4.

THE POWER AND LIMITS OF INTERPRETIVISM

> The idea that there are degrees of error ... is not always easy to grasp.
>
> Gleeson CJ[1]

> All language requires necessary implications.
>
> Edelman J[2]

4.1 INTRODUCTION

Chapter 3 suggested that the approach to review of administrative action embraced by Brennan J in *Attorney General v Quin*[3] was one that was in keeping with the conception of judicial power described in chapter 2. One feature of this is the framing of the principles of review as matters of statutory intention. This approach is closely associated with the central concept of Australian review of administrative action: jurisdictional error. This is because the conclusion that a jurisdictional error has been made is usually reached through a process of statutory interpretation.

This maintenance of a distinction between jurisdictional and non-jurisdictional error is one of the features of review of administrative action in Australia that is said to typify its 'exceptionalism'.[4] However, when the modern approach to jurisdictional error is considered in context, it is possible to recognise that it is not rigid or inflexible in the way that it is sometimes presented.[5] Once again, the modern approach to jurisdictional error can be regarded as the ongoing adjustment of doctrine to contemporary circumstances in a way that remains faithful to certain deeper systemic constitutional and institutional values. These values can be considered the main source of any difference in the

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1 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157/2002*'), 485 (Gleeson CJ).

2 *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1 ('*Graham*'), 36 (Edelman J).

3 ('*Quin*') (1970) 170 CLR 1.

4 See, eg, Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 9; Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 37-39; Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (ed) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 395, 395.

5 See, eg, Knight (n 4) 33.

Australian approach to judicial review of administrative action. Chapters 5 and 6 provide an explanation as to why it may be that review takes a different shape in Australia.

This chapter explores this interpretive method in more depth, by particular reference to the High Court's approach to legislative attempts to oust or limit judicial review. It is not a coincidence that two seminal privative clause cases, *Plaintiff S157/2002 v Commonwealth* ('*Plaintiff S157/2002*')[6] and *Kirk v Industrial Court (New South Wales)* ('*Kirk*')[7] have also been steps along the path to the present situation in which jurisdictional error has become a key principle of judicial review. Faced with legislative attempts to oust or limit judicial review, the High Court has long preferred an interpretive solution, one that seeks to reconcile or read down provisions encapsulating such attempts, rather than finding them outright invalid as infringing s 75(v) of the Constitution. This in some ways affords the Court greater flexibility in terms of protecting not only its own jurisdiction, but also that of other Ch III and state courts, which did not, until recently at least, have the same constitutional protection that it has. This approach also secured the central place of the concept of jurisdictional error.

Reaching the conclusion that a jurisdictional error has been made is said to be a matter of determining whether Parliament intended that the error should lead to invalidity.[8] The question of whether a jurisdictional error has been made is really a question as to the nature and extent of the power that Parliament intended *this* decision-maker to have, in *these* circumstances. The High Court has indicated repeatedly that answering this question is an exercise in statutory interpretation, which requires a pragmatic 'examination of the text, context and purpose'[9] of any relevant legislation. Determinations of whether errors are indeed jurisdictional and have thus given rise to invalidity are context dependent and therefore flexible.

Meaning can rarely derive from the face of statutory text alone. Giving meaning to text requires reference to interpretive principles. These principles themselves are

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6 *Plaintiff S157/2002* (n 1).

7 ('*Kirk*') (2010) 239 CLR 531.

8 *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355, 390-391 (McHugh, Gummow, Kirby and Hayne JJ); *Commissioner of Taxation v Futuris* (2008) 237 CLR 146, 156-157 (Gummow, Hayne, Heydon and Crennan JJ).

9 *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* (2018) 264 CLR 1 ('*Probuild Constructions*'), 14-15 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

predominantly judge-made, and informed by a range of values.[10] These include principles found in the general law such as fairness and reasonableness, but also, importantly, normative values relating to the role and functions of institutions themselves. The remarks of Brennan J in *Quin*, and the subsequent framing of judicial review's grounds as matters of statutory implication, should not be understood as meaning that the application of statutory power was not to be conditioned by values located in the common law. Rather, as suggested by chapter 3, in the context of rapidly developing principle, the framing of judicial review in this way is a reminder to courts to be aware of their own functional limits. In this way, the institutional context acknowledged by *Quin* acts as a frame within which common law values and standards of lawful decision-making are applied by courts.[11] This, as always, is a question of balance, and the jurisdictional error approach provides a useful mechanism through which courts can engage in this weighing exercise.

This chapter is organised as follows. Part 4.2 sets out the background to the jurisdiction conferred on the High Court by s 75(v) of the Australian Constitution. As this part explains, legislative attempts to oust review contributed to the development of the concept of jurisdictional error. Part 4.3 explains the extension to state Supreme Courts of the protection the concept provides for judicial power in the case of *Kirk.* This part also sets out what was said in *Kirk*, and the way in which this decision consolidated the modern approach to jurisdictional error. Part 4.4 turns to consider the notion of what was referred to in *Plaintiff S157/2002* as an 'entrenched minimum provision of judicial review.'[12] The way in which this concept was approached in the 2017 decision in *Graham v Minister for Immigration and Border Protection* ('*Graham*')[13] is illustrative of the way in which the role of judicial power within the framework of the Australian Constitution has been conceived. As noted, chapters 5 and 6 will explore certain historical, political and social influences which may have played a role in shaping institutional values in Australia. The material in this chapter supports a theme returned to in chapter 6, which is that the

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10 On this point see, eg, James Allsop, 'Values in Public Law' in Neil Williams (ed) *Key Issues in Public Law* (The Federation Press, 2018) 9, 10.

11 John Basten, 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed) *Key Issues in Judicial Review* (The Federation Press, 2014) 35, 37-38.

12 *Plaintiff S157/2002* (n 1) 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

13 *Graham* (n 2).

approach to judicial review of administrative action embodied in the concept of jurisdictional error is one that has been shaped by these influences.

4.2 SECTION 75(V) OF THE AUSTRALIAN CONSTITUTION

Section 75(v) of the Australian Constitution provides that the High Court has original jurisdiction in matters 'in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.' The reasons why these three remedies in particular were included, and not others, most obviously certiorari, have been the subject of scholarly discussion and debate.[14] The section was included in the Constitution at the suggestion of Andrew Inglis Clark, who wanted to avoid the problem faced by the Supreme Court of the United States in *Marbury v Madison*,[15] that it did not have original jurisdiction to issue the writ of mandamus to restrain executive action.[16] During the Convention Debates of 1898, Edmund Barton said in reference to the section that its purpose was to enable the High Court to 'exercise its function of protecting the subject against any violation of the Constitution, or any law made under the Constitution.'[17] As the joint judgment in *Plaintiff S157/2002* observed, '[t]here was no precise equivalent to s 75(v) in either of the Constitutions of the United States of America or Canada.'[18]

Further, s 75(v) of the Constitution must be read in conjunction with s 75(iii), which provides that the High Court has original jurisdiction in matters 'in which the Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'. Section 75(v) has been said to 'supplement' s 75(iii),[19] but the extent to which this is the case is not entirely settled.[20] It is generally thought, for instance, that, s 75(iii) is a source of jurisdiction to grant the writ of certiorari, which is not named in s 75(v).[21] However, Lisa Burton has cast doubt upon whether the assumptions that matters brought

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14 William Gummow, 'The Scope of Section 75(v) of the *Constitution*: Why Injunction but no Certiorari?' (2014) 42 *Federal Law Review* 241; Lisa Burton, 'Why these three? The Significance of the Selection of Remedies in Section 75(v) of the *Australian Constitution*' (2014) 42 *Federal Law Review* 253.

15 ('*Marbury*') 5 US 137 (1803).

16 See chapter 2 at n 164.

17 *Official Record of the Debates of the Australasian Federal Convention,* (Melbourne), 4 March 1898, vol 2, 1884-1885 as cited by *Plaintiff S157/2002* (n 1) 483 (Gleeson CJ).

18 *Plaintiff S157/2002* (n 1) 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

19 *Commonwealth v Mewett* (1997) 191 CLR 471, 547.

20 See, eg, *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 ('*Richard Walter*'), 179 (Mason CJ).

21 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (LawBook Co, 6th ed, 2017) 56. Also see, eg, *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82 ('*Aala*'), 139 (Hayne J).

under s 75(v) could also be brought under s 75(iii), and also that certiorari is available under s 75(iii).[22] It has nevertheless been accepted that, while s 75(v) does not refer to certiorari, the conferral of jurisdiction to grant the writs of mandamus and prohibition 'implies ancillary or incidental authority' to also grant certiorari where this writ is necessary.[23]

Regardless of the position taken on the relationship between ss 75(iii) and 75(v), the High Court's jurisdiction to hear matters in which the remedies referred to in s 75(v) are sought has therefore always been clearly entrenched. As Mark Aronson, Matthew Groves and Greg Weeks have said, the 'High Court's capacity to strike down unconstitutional legislation or Commonwealth action lacking either statutory or constitutional authority cannot be questioned or diminished.'[24] The same was not true of the jurisdiction of state Supreme Courts until the decision of the High Court in *Kirk,*[25] where the capacity of the state Supreme Courts to issue the writ of certiorari was said to be 'a defining characteristic of those courts' and could not therefore be excluded by state parliaments.[26] However, there is a distinction between a grant of jurisdiction to issue remedies and the substantive principles of law that attach to the issue of those remedies.[27] For this reason, it is difficult to define precisely what is entrenched by s 75(v), which 'is patently a conferral of jurisdiction *only*',[28] and 'not a source of substantive rights'.[29]

Aronson, Groves and Weeks have observed that when faced with privative clauses or attempts to oust their review jurisdiction, courts generally respond 'with a mixture of

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22 Burton (n 14) 270 and 275.

23 *Aala* (n 21) 90-91 (Gaudron and Gummow JJ).

24 Aronson, Groves and Weeks (n 21) 1065. Interestingly, the Constitution is not as explicit about the High Court's capacity to strike down *legislative* action. That the Court does have this power is an implication derived from the Constitution. However, in a well-known statement from *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262, Fullagar J observed 'in our system the principle of *Marbury v Madison* is accepted as axiomatic' (references omitted). It is an implication that 'has never been doubted'—see Lisa Burton Crawford and Geoffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 355, 363-364. See further Nicholas Aroney, 'The Justification of Judicial Review: Text, Structure, History and Principle' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, 2018) 27.

25 *Kirk* (n 7).

26 Ibid 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

27 See *Aala* (n 21) 139 (Hayne J) and also Jeremy Kirk, 'The entrenched minimum provision of judicial review' (2004) 12 *Australian Journal of Administrative Law* 64, 66.

28 Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017), 50.

29 *Richard Walter* (n 20) 178 (Mason CJ).

incredulity, hostility and thinly disguised disobedience.'[30] Despite the protections afforded by s 75(v), the Court has long preferred an interpretive approach to privative clauses that is somewhat similar to the one set out by the House of Lords in *Anisminic v Foreign Compensation Commission* ('*Anisminic*'),[31] rather than simply ruling, even when faced with extremely provocative statutory provisions, that attempts to limit or remove its jurisdiction are invalid. Given the formal protection afforded to the Court's jurisdiction by s 75(v), Aronson, Groves and Weeks say it was somewhat 'remarkable' that the High Court has, more than once, 'rejected direct constitutional challenges for violation of s 75(v), preferring an interpretive solution to a constitutional problem.'[32]

Yet the High Court's preference for interpretive approaches extends beyond its s 75(v) jurisprudence. As Gabrielle Appleby and John Williams have observed at around the same period that *Plaintiff S157* and then *Kirk* were decided, the High Court was employing an interpretive approach in other areas of constitutional review.[33] They consider that, in the context of the doctrine derived from *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'),[34] the Court was also at this time preferring to apply an interpretive approach to statutes in such a way as to find them consistent with constitutional principle.[35] Before considering this pattern further at 4.2.4, this chapter will first provide some context as to the way in which legislative attempts to oust judicial review of administrative action encouraged the development of the modern doctrine of jurisdictional error.

4.2.1 Legislative attempts to oust review, and their consequences

Partly for the reasons set out in chapter 2,[36] s 75(v) is often a starting point for a discussion of Australian administrative law, but this was not always the case.[37] However, it is not

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30 Aronson, Groves and Weeks (n 21) 1054.

31 [1969] 2 AC 147; see Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' (2017) 45(3) *Federal Law Review* 153, fn 88.

32 Aronson, Groves and Weeks (n 21) 1068.

33 Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1.

34 (1996) 189 CLR 51.

35 Appleby and Williams (n 33) 9.

36 See at 2.5.

37 The first Australian administrative law text, written in 1950 by Wolfgang Friedmann, does not refer to this provision of the Constitution until the third from last page, and then only in the context of the High Court's jurisdiction to supervise the administrative tribunals which were the predecessors of the Administrative Appeals Tribunal, see *Principles of Australian Administrative Law* (Melbourne University Press, 1950) 110.

only the move towards a clearer articulation of the influence of the Constitution on the principles and scope of judicial review of administrative action which has led to the greater focus on s 75(v). It is also a consequence of legislative attempts to restrict judicial review. When the *Administrative Decisions (Judicial Review) Act 1977* (Cth) ('*ADJR Act'*) was initially enacted, it stated that its terms applied to decisions 'of an administrative character' that were made 'under an enactment.'[38] There were few exceptions to this in the initial text of the Act.

Prior to the commencement of the Act, the then government asked the Administrative Review Council to consult with agencies and prepare a report regarding which decisions should not be amenable to review under the Act.[39] Before it commenced, the ADJR Act was amended to include two schedules. Schedule 1 listed decisions to which the ADJR Act did not apply, while Sch 2 listed those to which s 13 of the Act, which provided for the request of reasons for decisions, did not apply.[40] Initially the decisions covered by Sch 1 were those that might be expected to be excluded from the reach of judicial review under the Act, either because they were not likely to be justiciable in any case, such as those of security agencies, or they were decisions connected to prosecutorial or public service employment matters, which traditionally fall somewhat outside the scope of 'administrative' justice and attract their own forms of oversight.

Over time, Parliament has amended Sch 1 many times to prevent review of certain other kinds of decisions. This has perhaps been done most visibly, and controversially, in the context of migration decisions. Even a cursory glance at the Commonwealth Law Reports shows that the major battleground for attempts to restrict review in Australia was once the field of industrial relations law.[41] However, as noted in chapter 3, over the last 30 years, here, as in other comparable countries,[42] applications for review of migration and refugee decisions have become one of the main sources of judicial review cases, and the main point of contention between courts and the other branches of government regarding

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38 *ADJR Act 1977*, s 3.

39 Commonwealth, *Parliamentary Debates*, House of Representatives, Thursday 21 August 1980, 635, Ian Viner.

40 See *Administrative Decisions (Judicial Review) Amendment Act 1980* (Cth).

41 Aronson, Groves and Weeks (n 21) 1056.

42 See Richard Rawlings, 'Review, Revenge, Retreat' (2005) 68 *Modern Law Review* 378 and Aronson, Groves and Weeks (n 21) 1056.

the scope of judicial power.[43] As Stephen Gageler has documented, from the time of its commencement, 'administrative law litigation on the subject of migration law ... proceeded almost exclusively under the ADJR Act.'[44] However, the Federal Court's jurisdiction to review migration matters using the ADJR Act was removed by amendments made to the *Migration Act 1958* (Cth) ('*Migration Act*') in 1992.[45] From that point on, statutory rights of review could only be accessed under the terms of the latter Act, and these were further and further limited by successive amendments.

One result of these attempts to restrict review was that, for a period during the late 1990s the High Court effectively became 'a trial court for the determination of procedural fairness and *Wednesbury* reasonableness cases' as challenges involving these grounds could not be taken to the Federal Court and had to be filed in the original jurisdiction of the High Court.[46] These circumstances contributed directly to the rise of 'jurisdictional error' in Australian judicial review of administrative action, as the High Court began to develop the concept in ways that diminished the power of the limitations upon review in the *Migration Act*.[47]

Shades of the approach that the High Court would ultimately take towards these attempts to restrict review could be seen in *Minister for Immigration and Multicultural Affairs v Eshetu* ('*Eshetu*').[48] In this case, writing alone, Gummow J had said that the attempt in Pt 8 of the *Migration Act* to oust review on the ground of *Wednesbury* unreasonableness,[49] in other words that a 'decision involved an exercise of power that was so unreasonable that no reasonable person could have exercised the power',[50] did not prevent review in the circumstances of the case. In reaching this conclusion, Gummow J drew a distinction between decisions made in the exercise of a statutory discretion, to which *Wednesbury* unreasonableness applied, and those made in accordance with a provision that treated the

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43 Stephen Gageler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92, 92; Cheryl Saunders, 'Plaintiff S157/2002: A case-study in common law constitutionalism' (2005) 12 *Australian Journal of Administrative Law* 115, 119; see also John McMillan, 'Judicial Restraint and Activism in Administrative Law' (2002) 30 *Federal Law Review* 335.

44 Gageler (n 43) 95.

45 See *Migration Reform Act 1992* (Cth); see Gageler (n 43) 98.

46 Gageler (n 43) 99.

47 Ibid 100.

48 ('*Eshetu*') (1999) 197 CLR 611.

49 As derived from *Associated Provincial Picture Houses Limited v Wednesbury Corporation* [1948] 1 KB 223, 234 (Lord Greene MR). See chapter 6 at 6.3.2.

50 *Migration Act 1958* (Cth) s 476(2)(d), as repealed by sch 1 of the *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth).

state of satisfaction required to be reached by a decision-maker prior to making a decision as a jurisdictional fact.[51]

In the view of Gummow J, the relevant provision in this case fell into the second category, and therefore could be challenged on the basis that it was illogical, a ground of review that had not been ousted.[52] This line of jurisprudence was later further developed in the joint judgment of McHugh and Gummow JJ in *Minister for Immigration and Multicultural Affairs; Ex parte S20/2002*.[53] In both cases this was to no avail for the applicants, given that illogicality, to the extent that it can be viewed as a separate ground,[54] is at least as difficult to make out as *Wednesbury* unreasonableness.[55]

The judgment of Gummow J in *Eshetu* gave some indication of the approach that would ultimately be the undoing of the attempt by Parliament to prevent the Federal Court from reviewing migration and refugee decisions. A further indication came in *Re Refugee Review Tribunal; Ex parte Aala* ('*Aala*').[56] In this case, the applicant commenced proceedings in the High Court's s 75(v) jurisdiction seeking, among other remedies, the writ of prohibition, on the basis that the decision to find against his refugee claim had been tainted by a denial of natural justice which amounted to a jurisdictional error.[57] While natural justice had been a ground of review in 1901, it could not, according to the (very semantic) submissions put on behalf of the Commonwealth, have been

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51 *Eshetu* (n 48) 650-651.

52 Ibid 650.

53 (2003) 198 ALR 59.

54 The Gummow view, that states of satisfaction might be jurisdictional facts, to which a standard of irrationality or illogicality could be applied, was accepted by a majority of the High Court in *Minister for Immigration and Citizenship v SZMDS* (2010) 240 CLR 611 ('*SZMDS*'), 624-625 (Gummow ACJ and Kiefel J), 643-644 (Crennan and Bell JJ). However, it is possible that one result of *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 has been to re-amalgamate them into one standard that applies to either discretion or fact-finding, see Aronson, Groves and Weeks (n 21) 371, and Therese Baw, 'Illogicality, Irrationality and Unreasonableness in Judicial Review' in Neil Williams (ed) *Key Issues in Judicial Review* (The Federation Press, 2014) 66, 76.

55 Although there was no agreement as to the relevant test between the two joint judgments in *SZMDS*, Gummow ACJ and Kiefel J, who took what was ultimately the minority view that the decision in that case had been illogical, noted that an 'affirmative answer' to the question of whether a decision was illogical should not be 'lightly given', see 625, and Crennan and Bell JJ considered the test was essentially akin to that of *Wednesbury* itself, see 647-648.

56 *Aala* (n 21).

57 Ibid 90-91 (Gaudron and Gummow JJ).

characterised as a jurisdictional error.[58] A majority of the High Court rejected this line of argument.[59]

Stephen Gageler has suggested that the effect of *Aala* was to 'firmly entrench jurisdictional error as the sole basis on which what were now the constitutional writs of prohibition and mandamus might issue.'[60] He also noted that at the same time, 'the scope of jurisdictional error was beginning to assume a protean, almost organic, nature', one that 'was to prove to be a highly flexible concept' as it turned on limitations upon power implied from statute, which 'were fairly readily to be found.'[61] These observations were prescient, as will be shown at section 4.3.

4.2.2 The *Hickman* principles

While *Plaintiff S157/2002*[62] was a landmark case, the method applied by the High Court in this decision can be recognised as in keeping with its traditional approach of declining to read privative clauses literally. Prior to the decision in *Plaintiff S157/2002*, the approach generally applied to such clauses was that set down by Dixon J in the 1945 decision of *R v Hickman; Ex parte Fox and Clinton*.[63] Faced with a clause seeking to oust judicial review of decisions of Local Reference Boards, which had the 'power to settle any local matter likely to affect the amicable relations of employers and employees in the coal mining industry'[64], Dixon J had said that privative clauses were not to be 'interpreted as meaning to set at large the courts or other judicial bodies to whose decision they relate.'[65]

Rather, the meaning of such clauses was that a decision to which they applied would not be invalid because it did not comply with a procedural or other requirement set out in the governing statute 'provided always' that three stipulations were met.[66] These were that the decision was a 'bona fide attempt' to exercise power, that it related to 'the subject-

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58 Ibid 85-87.
59 Ibid, see, eg, 109 (Gaudron and Gummow JJ), 135 (Kirby J), 143 (Hayne J). Gleeson CJ agreed with Gaudron and Gummow JJ, see 89.
60 Gageler (n 43) 100.
61 Ibid 101.
62 *Plaintiff S157/2002* (n 1).
63 ('*Hickman*') (1945) 70 CLR 598.
64 *National Security (Coal Mining Industry Employment) Regulations*, reg 14(1)(a) (primary Act, the *Defence (Transitional Provisions) Act 1946* (Cth), repealed by the *Statute Stocktake Act 1999* (Cth)).
65 *Hickman* (n 63) 615.
66 Ibid.

matter of the legislation' and that it was 'reasonably capable of reference to the power given to the body.'[67] In accordance with this reading, the effect of a privative clause was to make it more difficult for a decision-maker to make an unlawful decision, or act outside the scope of their jurisdiction, rather than to actually oust the supervisory jurisdiction of superior courts. These requirements became known as the '*Hickman* principle' or 'provisos'.[68]

Applied in this case, the decision of the Local Reference Board that a transport company and its lorry drivers were engaged in the 'coal mining industry' was beyond its power to make.[69] The submissions made to the Court were that the company transported a range of goods other than coal, and was engaged in the transport industry, not the coal mining industry.[70] Justice Dixon stated that it was 'plain' that the relevant regulations were not intended to give the Local Reference Board 'any power whatever to determine the ambit of the expression "coal mining industry"', which was a question that went to the limits of its own jurisdiction.[71] Justice Dixon noted that to confer such power on the Local Reference Board would be unconstitutional, as the power to determine jurisdictional limits was a judicial function.[72]

Prior to *Kirk*,[73] the High Court's long-term preference for an interpretive approach was generally thought to have been motivated by a desire to extend the same protections to the supervisory jurisdiction of state courts as was enjoyed by the High Court.[74] There is no doubt force in this assertion, especially given that in his influential judgment in *R v Hickman; Ex parte Fox v Clinton*[75] Dixon J was clear to note that the principles he

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67 Ibid.

68 See, eg, *Richard Walter* (n 20) 193-194 (Brennan J); and *Plaintiff S157/2002* (n 1) 512 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

69 *Hickman* (n 63) 618 (Dixon J). The other members of the Court similarly reached the conclusion that the decision of the Local Reference Board had been beyond its jurisdiction—see 609 (Latham CJ), 610 (Rich J), 612 (Starke J) and 621 (McTiernan J).

70 See, eg, the submissions of A R Taylor K C for the prosecutors, *Hickman* (n 63) 602-603.

71 *Hickman* (n 63) 618.

72 Ibid.

73 *Kirk* (n 7).

74 Aronson, Groves and Weeks (n 21) 1055; see also *Plaintiff S157/2002* (n 1) 487 (Gleeson CJ); Saunders (n 43) 122; and Will Bateman, 'The *Constitution* and the Substantive Principles of Judicial Review: The Full Scope of the Entrenched Minimum Provision of Judicial Review' (2011) 39 *Federal Law Review*, 465, 477.

75 *Hickman* (n 63).

outlined for the interpretation of privative clauses applied '[b]oth under Commonwealth law and in jurisdictions where there is a unitary constitution.'[76]

4.2.3 *Plaintiff S157/2002 v Commonwealth*

The Commonwealth Parliament's efforts to prevent judicial review of decisions made under the *Migration Act* culminated with amendments to the Act in 2001, which included a privative clause in the form of a new s 474.[77] This provision still appears in the *Migration Act* in materially the same terms. It provides, in the language of s 3 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (ADJR Act), that decisions 'of an administrative character' made under the Act, or under regulations made under the Act, are 'final and conclusive' and 'must not be challenged, appealed against, reviewed, quashed or called into question in any court' and also are not 'subject to prohibition, mandamus, injunction, declaration or certiorari in any court on any account.'[78]

In *Plaintiff S157/2002*,[79] the applicant argued that s 474 of the *Migration Act 1958* (Cth) was invalid. Despite being, seemingly, on its face, in conflict with s 75(v) of the Constitution, the High Court found that, properly construed, the provision was not invalid. During argument in the case, the Commonwealth proceeded on the basis that the provision could not oust the High Court's s 75(v) jurisdiction.[80] However, the Commonwealth submitted that the effect of s 474 was not to oust jurisdiction, but rather that the provision 'enlarge[d] the powers of decision-makers so that their decisions are valid so long as they comply with the three *Hickman* provisos.'[81] In response, the High Court did not overrule *Hickman*, as urged by the plaintiff,[82] but instead laid out a more direct path to an essentially similar result.[83]

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76 Ibid; see also *Plaintiff S157/2002* (n 1) 483 where Gleeson CJ noted that '[m]any of the considerations relevant' to the interpretation of privative clauses are 'common to both' State or federal jurisdiction.

77 See *Migration Legislation Amendment (Judicial Review) Act 2001* (Cth), sch 1, cl 7.

78 *Migration Act 1958* (Cth), s 474(1)(a), (b) and (c).

79 *Plaintiff S157/2002* (n 1).

80 Ibid 498, [53] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

81 Ibid 502, [62] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

82 See arguments put on behalf of the plaintiff at ibid 478.

83 Although cf Crawford (n 28) 108-112, where it is argued that the approach taken in *Plaintiff S157/2002* was 'more closely anchored in the text of the Constitution', took 'a far more defensive stance against the use of privative clauses in federal legislation' and shifted the emphasis from the effect of clauses on the jurisdiction of the executive to their effect on that of the Court itself.

In a joint judgment, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said that the Commonwealth's arguments were based on a misconception of the relevant case law.[84] Justice Dixon had not meant that privative clauses were to be interpreted in isolation from the rest of the Act in which they appeared. Rather, the '*Hickman* provisos' were designed to aid construction of clauses that needed to be reconciled with the other terms of the Act. Section 474 had to be construed in context. There were 'two basic rules of construction' which could be applied to the task of interpreting privative clauses. The first rule, derived from *Hickman* itself, was 'if there is an opposition between the Constitution and any such provision, it should be resolved by adopting [an] interpretation [consistent with the Constitution if] that is fairly open.'[85] The second rule applied generally to privative clauses, and this was that they were to be strictly construed.[86]

They added that, even leaving s 75(v) to one side, there were other 'constitutional requirements that are necessary to be borne in mind' in the construction of a privative clause.[87] These included, in line with the constitutional separation of powers principles, that it was beyond the competency of the Commonwealth Parliament to confer upon a decision-maker the capacity to determine the limits of their own jurisdiction.[88] This was in line with what had been said by Dixon J in *Hickman*. To be read consistently with the Constitution, therefore, s 474 could not have been intended to oust the power of the courts to review decisions for jurisdictional error.[89] Properly construed, the phrase 'decisions made under this Act' in s 474, had to mean 'decisions which involve neither a failure to exercise jurisdiction nor an excess of the jurisdiction conferred by the Act' and its effect was actually 'to require an examination of limitations and restraints found in the Act.'[90]

In separate reasons, Gleeson CJ similarly found that s 474 was valid, while also reducing it to almost no effect. However, he took a different approach.[91] Chief Justice Gleeson said of s 75(v) that it 'secures a basic element of the rule of law', as it ensured that '[t]he

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84 *Plaintiff S157/2002* (n 1) 502-504, [64]-[68] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
85 Ibid 504, [71], paraphrasing *Hickman* (n 63) 616 (Dixon J).
86 Ibid 505, [72].
87 Ibid 505, [73].
88 Ibid 505-506, [75]. See also Gleeson CJ at 484, [9].
89 Ibid 506, [76].
90 Ibid 505, [73].
91 One that Stephen Gageler once described as '[t]he most satisfactory justification for the result in *Plaintiff S157/2002*'—see (n 43) 103.

jurisdiction of the Court to require officers of the Commonwealth to act within the law cannot be taken away by Parliament.'[92] He added:

> Within the limits of its legislative capacity, which are themselves set by the Constitution, Parliament may enact the law to which officers of the Commonwealth must conform ... Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.[93]

While Parliament could not remove the Court's jurisdiction to protect 'the subject against any violation of the Constitution, or of any law made under the Constitution', the Constitution also gave Parliament powers, and 'subject to certain limitations', this enabled 'Parliament to determine the content of the law to be enforced by the Court.'[94]

Chief Justice Gleeson noted that there was a 'potential inconsistency' inherent in legislation containing a clause such as s 474, which was that Acts usually contain provisions that purport to confer limited jurisdiction upon decision-makers, which are 'difficult to reconcile with a provision that states there is no legal sanction for excess jurisdiction.'[95] He drew on authority prior to *Hickman* on the meaning of privative clauses in the English and Australian decisions, which indicated that they could not protect a decision affected by 'a manifest defect in jurisdiction in the tribunal that made it, or manifest fraud in the party procuring it.'[96] In his view, Dixon J's *Hickman* judgment was an attempt to reconcile the contradiction presented by a privative clause with the provisions of the Act conferring limited jurisdiction.[97] Chief Justice Gleeson considered that once the task before the court was identified as 'one of statutory construction', this meant that 'all relevant principles of statutory construction' of which *Hickman* was just one, were 'engaged'.[98]

He rejected the Plaintiff's argument that s 474 should be read literally on the basis that it was out of line with the High Court's previous s 75(v) jurisprudence.[99] However, he then

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92 *Plaintiff S157/2002* (n 1) 482, [5] (Gleeson CJ).
93 Ibid 482-483, [5].
94 Ibid 483, [6].
95 Ibid 484, [10].
96 Ibid 485, [12], quoting *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442.
97 Ibid 487, [17].
98 Ibid 491, [26].
99 Ibid 489, [22].

applied the wider interpretive approach he attributed to Dixon J, which drew upon the general principles of statutory construction, to an almost equally devastating effect upon it.[100] He referred to the principle of legality, stating that 'unmistakable and unambiguous language' is required to manifest a parliamentary intention to abrogate fundamental rights or freedoms.[101] Chief Justice Gleeson stated that 'privative clauses are construed "by reference to a presumption that the legislature does not intend to deprive the citizen of access to the courts"' unless this intention can be clearly discerned from the relevant statute.[102] He further observed that 'the Australian Constitution is framed upon the assumption of the rule of law.'[103]

All of this together meant that the words of s 474 were not clear enough to evince the parliamentary intention to provide that 'decisions of the Tribunal, although reached by an unfair procedure, are valid and binding.'[104] This approach casts the natural justice ground as having the same status as the common law principles protected by the principle of legality.[105] Clear words are required to oust it. Given the flexible nature of what procedural fairness might require in a given circumstance, this is not always an easy task for drafters to achieve.[106]

4.2.4 Why has an interpretive approach been preferred?

This last point sheds some light on why an interpretive approach to the s 75(v) jurisdiction has been preferred by the High Court. Stephen Gageler once noted that the 'practical consequence' of *Plaintiff S157/2002* was to restore much of the Federal Court's jurisdiction.[107] In an early comment on *Plaintiff S157/2002*, Jeremy Kirk considered that

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100 Ibid 492-494, [29]-[36].
101 Ibid 493, [30]
102 Ibid.
103 Ibid 493, [31].
104 Ibid 494, [37].
105 This was not the first time the High Court had indicated that clear words must be used to oust the requirements of procedural fairness. See, eg, *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ) and *Re Minister for Immigration and Multicultural Affairs; Ex parte Epeabaka* (2001) 206 CLR 128 (Gleeson CJ, McHugh, Gummow and Hayne JJ), 138-139. See also the subsequent case of *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, at 259 (French CJ, Gummow, Hayne, Crennan and Kiefel JJ), where the principle that clear words were required was linked with the 'presumption that it is highly improbably that Parliament would overthrow fundamental principles or depart from the general system of law without expressing its intention with irresistible clearness', otherwise described as the principle of legality. See Matthew Groves, 'Exclusion of the Rules of Natural Justice' (2013) 39 *Monash University Law Review* 285, 290.
106 For a discussion of this, see Groves (n 105).
107 Gageler (n 43) 103; Leighton McDonald, 'The entrenched minimum provision of judicial review and the rule of law' (2010) 21 *Public Law Review* 14, 17.

the interpretive approach taken by Dixon J in *Hickman* represented a 'wrong turning in Australian law.'[108] In his view, '[t]he privative clause in question [in *Hickman*] was directly inconsistent with a provision of the *Constitution'* meaning it was invalid, and '[f]ealty to the *Constitution* should have required that conclusion, as it should with all such clauses.'[109]

Hanging over legislative resort to these measures is always what Richard Rawlings once described in the English context as the 'nuclear option': the Court finding privative clauses invalid.[110] The 'nuclear option' is more significant in the context of the United Kingdom, where there is no equivalent of s 75(v) and where resort to it 'would strike at the foundations of the uncodified Constitution'.[111] In the recent decision of *R (Privacy International) v Investigatory Powers Tribunal*,[112] which directly raised the issue of the constitutional validity of an ouster clause, the majority, led by Lord Carnwath, preferred to read the provision down.[113] In a strong dissent, Lord Wilson described the approach taken by Lord Carnwath as 'too strained',[114] but a majority of the court found it to be preferable to the alternative of confronting the constitutional question more squarely.

Unlike the UK Supreme Court, which would need to locate the source of any capacity on its part to invalidate a statutory provision ousting judicial review in the common law, the High Court's jurisdiction to review administrative action has express constitutional protection. However, read literally, s 75(v) only provides a measure of protection, and only to the High Court. Certain considerations of judicial policy can help to explain why the Court, even when faced with a provision such as s 474, did not just simply rule that it was invalid. These go beyond Dixon J's concern with the need for an approach that would reduce the impact of state privative clauses on the capacity of state courts to exercise supervisory jurisdiction.

Writing of statutory attempts to exclude judicial review, Aronson, Groves and Weeks have said that 'the duty to supervise the exercise of public power consists of a myriad of

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108 Kirk (n 27) 71.
109 Ibid 65.
110 Rawlings (n 42) and Aronson, Groves and Weeks (n 21) 1069 where it is said that the 'constitutional threat' is 'ever-present, but rarely needed'; and Saunders (n 43) 121.
111 Saunders (n 43) 117.
112 ('*Privacy International*') [2019] 2 WLR 1219.
113 *Regulation of Investigatory Powers Act 2000* (UK), s 67(8).
114 *Privacy International* (n 112) [228].

rules', but also 'as importantly, of an essentially political assessment of the complex relationships between the courts, the Executive, the legislature and the public.'[115] Aronson once also observed, '[s]ome people think that *Plaintiff S157*'s joint judgment was fuzzy because it was written by a committee, or perhaps because its authors were typically hyper-cautious.'[116] He thought, however, that 'the fuzziness was intentional, and that fuzziness is proving to be a good strategy' since the Commonwealth had apparently stopped trying to refine s 474 of the *Migration Act*.[117] Again, there are parallels here with the High Court's wider approach to defining the limits of judicial power more generally. By reference to the *Kable* line of cases, French CJ once said that they did not 'constitute a codification of the limits of State legislative power with respect to State courts', adding that '[f]or legislators this may require a prudential approach to the enactment of laws directing courts on how judicial power is to be exercised'.[118]

If privative clauses were held to be invalid where, read literally at least, their terms appear to violate s 75(v), this would seemingly leave the respective spheres of the Commonwealth Parliament and the High Court fairly clear-cut. Parliament could, for example, use clear words to remove features that are traditionally considered part of the supervisory jurisdiction that are not covered by the terms of s 75(v), with an obvious answer being the power to issue the writ of certiorari. The interpretive approach makes such attempts less straight-forward.

The approach of the Court in *Plaintiff S157/2002* has been identified by Cheryl Saunders as a deployment of a form of common law constitutionalism.[119] The approach set down by the joint judgment in *Plaintiff S157/2002* is one that draws upon common law principles, although, as Saunders explained, 'the prospect of formal constitutional invalidity loomed in the background should common law principles fail.'[120] Against the background of the 'constitutionalisation' of review,[121] and the shift to the text-based 'statutory approach',[122] it might seem discordant that the Court would choose to locate

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115 Aronson, Groves and Weeks (n 21) 1053.
116 Mark Aronson, 'Commentary on "The entrenched minimum provision of judicial review and the rule of law"' (2010) 21 *Public Law Review* 35, 38.
117 Ibid.
118 *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*'), 47.
119 Saunders (n 43) 121-122.
120 Ibid 121.
121 See chapter 2 at 2.5.
122 See chapter 3 at 3.5.

the limits of parliamentary power to oust review *outside* of the constitutional text in this way. However, this only serves to highlight the wider argument here, that text – constitutional and otherwise – is given meaning by reference to other considerations, including its context.

Before turning to a consideration of this latter point in the context of the concept of jurisdictional error, it should be pointed out that an interpretive approach to the constitutional concept of judicial power has been preferred in other areas as well. As noted above at 4.2, Appleby and Williams have observed that for a time following the initial *Kable* decision, when confronted with a challenge to legislation based on the principles derived from it, the High Court tended to prefer an interpretive approach, in which it opted to interpret the legislation in a way that avoided constitutional invalidity.[123] One example of such a case is *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*.[124]

This decision involved a challenge to an Act of the Parliament of Western Australia which established a scheme which gave the Commissioner of Police the power to make an order that fortifications could be removed from certain premises.[125] This legislation was designed to give police additional powers to confront organised crime associated with various motorcycle clubs, often known more colloquially as 'bikie gangs'. The legislation contained a provision that allowed for judicial review of the Commissioner's decision by the Supreme Court of Western Australia. This provision was challenged on the basis that the limits it set on this review amounted to 'an impermissible form of control over the exercise by the Supreme Court of its jurisdiction.'[126]

The Commissioner's power in s 72 of the *Corruption and Crime Commission Act 2003* (WA) was conditioned on the Commissioner having a 'reasonable belief' that certain circumstances existed before issuing the fortification removal notice. Section 76(5) provided that the Court could consider whether or not the Commissioner had such a reasonable belief when they issued the notice. The challenged provision, s 76(2), allowed the Commissioner to identify information relevant to the proceedings that 'might prejudice the operations' of the police. Once identified this information was 'for the

123 Appleby and Williams (n 33) 9.
124 ('*Gypsy Jokers*') (2008) 234 CLR 532; see Appleby and Williams (n 33) 9.
125 *Corruption and Crime Commission Act 2003* (WA), s 72.
126 *Gypsy Jokers* (n 124) 553 (Gummow, Hayne, Heydon and Kiefel JJ).

court's use only' and was 'not to be disclosed to any other person, whether or not a party to the proceedings'.

By a 6:1 majority,[127] the High Court found that this provision was not inconsistent with the *Kable* principle. In a joint judgment, Gummow, Hayne, Heydon and Kiefel JJ said that the function conferred on the Supreme Court of Western Australia by s 76 was clearly a judicial one. The limitation in s 76(2) did not prevent the court from engaging in the task of assessing whether or not the Commissioner had the requisite reasonable belief. The Supreme Court itself was not denied access to the information.

As a result, their Honours took the view that the provision could not be interpreted to amount to an executive constraint on the exercise of judicial power that meant that its exercise was not independent.[128] They considered that the impugned provision had the effect of displacing potential claims of public interest immunity. Given the subject matter of the legislation, it could be expected that such applications would be made, in the absence of the provision.[129] As Gleeson CJ observed in his separate judgment, if room had been left for claims of public interest immunity to be made, which was likely given the particular context of legislation, and these claims were successful, 'the practical consequence' would have been to make it 'impossible for the Court to exercise the review function contemplated by s 76(1)', because it would lack information relevant to the Commissioner's belief.[130]

In a few, but not many, subsequent decisions, the High Court has used the *Kable* principle to assert limits to state legislative power.[131] However, the interpretive approach applied in *Gypsy Jokers* is nevertheless instructive as to the way in which a notion of the core content of Ch III judicial power has been constructed by the High Court. The notion of the core content of judicial power is itself relevant to any consideration of what the extent of the 'minimum provision of judicial review', said by the joint judgment in *Plaintiff S157* to be entrenched by the Constitution,[132] might be. This is because both concepts require

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127 With Kirby J in dissent.
128 *Gypsy Jokers* (n 24) 559 (Gummow, Hayne, Heydon and Kiefel JJ); see also 551 (Gleeson CJ).
129 Ibid 556-557 (Gummow, Hayne, Heydon and Kiefel JJ). See also 550-551 (Gleeson CJ).
130 Ibid.
131 See, eg, *International Finance Trust Company Limited v New South Wales Crime Commission* (2009) 240 CLR 319; and *Totani* (n 118).
132 *Plaintiff S157/2002* (n 1) 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

the identification of certain characteristics that are central to the constitutional notion of judicial power. This question is returned to at Part 4.4 of this chapter.

4.3 INTERPRETIVISM AND THE 'CENTRALITY OF JURISDICTIONAL ERROR'[133]

Stephen Gageler observed that one consequence of *Plaintiff S157/2002*, so far as it related to migration decisions, was that it made a 'radical difference' to the landscape of judicial review as 'the ADJR Act had been swept away in favour of review under s 39B of the *Judiciary Act*' which replicates the High Court's s 75(v) jurisdiction in the Federal Court, and also that review in this jurisdiction 'had become review for jurisdictional error alone.'[134] *Plaintiff S157/2002* can therefore be seen as a major step along the path to the 'statutory approach' to judicial review now ascendant in Australia.[135] Another key step occurred in a case also involving a statutory restriction on review, albeit this time in a state rather than federal context, that of *Kirk*.[136]

While Dean Knight characterised *Craig v South Australia* ('*Craig*')[137] as 'the emblematic case entrenching [the] dominant role' of jurisdictional error, this mantle perhaps more rightly falls to *Kirk*.[138] *Craig* is the case in which the High Court declined to follow the House of Lords decision of *In re Racal Communications Limited*.[139] In *Racal*, Lord Diplock had stated that '[t]he break-through made by *Anisminic* was that, insofar as concerned administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not, was for practical purposes abolished.'[140] In *Craig*, the High Court said that the 'distinction has not . . . been discarded

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133 See James Spigelman, 'The centrality of jurisdictional error' (2010) 21 *Public Law Review* 77.
134 Gageler (n 43) 103.
135 Bateman and McDonald (n 31) 171; see chapter 3 at 3.5.
136 *Kirk* (n 7).
137 ('*Craig*') (1995) 184 CLR 163.
138 Knight (n 4) 39.
139 [1981] AC 374.
140 *In re Racal* [1981] AC 374, 383. This statement was later taken up by the English Divisional Court in *R v Greater Manchester Coroner; Ex parte Tal* [1985] QB 67, 81-83 (Robert Goff LJ for the Court), where it was said that '[s]ince *Anisminic* the requirement that an error of law within the jurisdiction must appear on the face of the record is now obsolete.' The principle that Lord Diplock had derived from *Anisminic* was said in *Greater Manchester Coroner* to apply to both administrative tribunals and inferior courts. The Court in *Greater Manchester Coroner* explicitly rejected the reasoning of the earlier decision in *R v Surrey Coroner; Ex parte Campbell* [1982] QB 661, 675 (Watkins LJ for the Court).

in this country.'[141]

In *Craig*, the High Court set out a list of the kinds of errors that could be considered jurisdictional in nature, although this did not purport to be exhaustive.[142] Knight draws upon this list to support his claim that *Craig* is the 'emblematic' case entrenching the central role of the concept of jurisdictional error,[143] a notion that he associated with rigid categories and rules that determine whether or not errors are reviewable.[144] However, it is important to acknowledge that the position stated in *Craig* was just one key step of several towards what was said by the High Court in *Kirk* about the function of the concept of jurisdictional error.

Kirk is perhaps best known for its extension of the position arrived at in *Plaintiff S157/2002* to state Supreme Courts, holding, in essence, that their jurisdiction to conduct review for jurisdictional error could not be ousted by a privative clause.[145] However, this is far from the only significance of *Kirk*. The position taken by the majority in this case ultimately secured the 'pivotal role'[146] of the concept of jurisdictional error, which now 'commands the whole field of common law judicial review in Australia.'[147] As will be explained in the next section, it also underscored what Gageler described as the 'protean' nature of the concept.[148]

4.3.1 *Kirk v Industrial Court*

This case involved the decision of the Industrial Court of New South Wales that Mr Kirk and his company were liable for certain offences under the relevant workplace health and safety legislation in connection with the accidental death of an employee on a farm owned by the company. Section 179(1) of the *Industrial Relations Act 1996* (NSW) provided that a decision of the Industrial Court was 'final and may not be appealed against,

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141 *Craig* (n 137) 179 (Brennan, Deane, Toohey, Gaudron and McHugh JJ). Although note that decision at issue in *Craig* was one made by a court, and not an administrative tribunal, and the Court observed that 'Lord Reid's comments [from *Anisminic*] should not be accepted as an authoritative statement of what constitutes jurisdictional error by an inferior court for the purposes of certiorari.'

142 *Craig* (n 137) 177-178 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

143 Knight (n 4) 40-41.

144 Ibid 64-65 and 245.

145 *Kirk* (n 7) 566 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

146 Lisa Burton Crawford, 'Who Decides the Validity of Executive Action? No-Invalidity Clauses and the Separation of Powers' (2017) 24 *Australian Journal of Administrative Law* 81, 81.

147 Mark Aronson, 'Jurisdictional Error and Beyond' in Matthew Groves (ed) *Modern Administrative Law in Australia: Concepts and Context* (Cambridge, 2014) 248, 250.

148 Gageler (n 43) 101.

reviewed, quashed or called into question by any court or tribunal.' The High Court held that it was a 'defining characteristic' of the Supreme Court of New South Wales at the time of Federation that it had the power to issue the writ of certiorari to quash decisions affected by jurisdictional errors. Chapter III of the Australian Constitution required the continued existence of 'a body fitting the description "the Supreme Court of a State."[149] As this was the case, in order to ensure that the Supreme Court continued to meet this description, this power to grant relief where a jurisdictional error had occurred could not be taken away by the State legislature.[150]

In reaching the conclusion that the Industrial Court had made jurisdictional errors in finding the offences proven against Mr Kirk, in a joint judgment, six members of the High Court quoted Louis Jaffe, who had written that the concept of 'jurisdiction', used in the context of determining limits upon power 'is almost entirely functional: it is used to validate review when review is felt to be necessary.'[151] In Jaffe's description, this concept was not drawn upon arbitrarily, but by reference to how legislative grants of power actually work.[152] Jaffe was seeking to explain that while the word jurisdiction 'suggests an absolute and almost a priori measure of power', it was a mistake to view its use to denote the limits of power in such a way.[153] Rather, he said, it had to be 'understood that the word "jurisdiction" is not a metaphysical absolute but simply expresses the gravity of the error.'[154]

After setting out these passages from the work of Jaffe, the majority in *Kirk* turned to consider what had been said by the whole Court in *Craig*, and quoted the following passage:

> If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its

149 *Kirk* (n 7) 580 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
150 Ibid 566 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
151 Ibid 570 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963.
152 Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 962.
153 Ibid 963.
154 Ibid.

> authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it.[155]

To this the majority in *Kirk* added 'it is important to recognise that the reasoning in *Craig* that has just been summarised is not to be seen as providing a rigid taxonomy of jurisdictional error.'[156] The examples given by the High Court in *Craig* were 'just that—examples', and 'not to be taken as marking the boundaries of the relevant field'.[157] Earlier in their reasons, the majority noted that 'it is neither necessary, nor possible, to attempt to mark the metes and bounds of jurisdictional error.'[158] As in *Craig*, the High Court refused to take the step of stating that all errors of law are jurisdictional errors.[159]

4.3.2 The modern concept of jurisdictional error

The maintenance of this distinction between jurisdictional and non-jurisdictional errors of law is one feature of Australian review of administrative action that is considered to be 'exceptional'.[160] For instance, Knight thought that review in Australia typified what he categorised as a 'scope of review schema'.[161] He described this style of review to be focussed on formal categories, and contended that it was an approach to review that was once dominant in England, and still continued to prevail in Australia, as evidenced by the continued distinction between jurisdictional and non-jurisdictional errors.[162]

However, this kind of critique tends to overlook not only what has really been said by the High Court in jurisdictional error cases, but also its broader context. Far from entrenching rigid rules or categories of error that must be established for a remedy to issue, the effect of a line of cases leading up to and since *Kirk* has been to place a highly flexible concept at the heart of Australian administrative law.[163] As the previous chapter discussed, the grounds of review tend now to function as standards of lawful administrative conduct that are read as implied into statutes, unless they contain clear language indicating otherwise. The distinction between jurisdictional and non-jurisdictional errors performs the role of

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155 *Kirk* (n 7) 570 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), quoting *Craig v South Australia* (1995) 184 CLR 163, 179.
156 Ibid 574 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
157 Ibid.
158 Ibid 573 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
159 Ibid 571 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
160 See, eg, Taggart (n 4) 8-9; Knight (n 4) 39; and Boughey and Crawford (n 4) 395.
161 Knight (n 4) 37.
162 Ibid see, eg, 39 and 245.
163 See John Basten, 'Jurisdictional error after Kirk: Has it a future?' (2012) 23 *Public Law Review* 94, 95.

marking the boundary of the power of the courts to undertake review, and the limits on the power of the administrative officer under review. As Aronson once observed, writing even prior to *Kirk*, the phrase 'jurisdictional error' has become 'both a conclusory term and a point of departure.'[164]

The concept encompasses the notion that sometimes the nature of a decision-maker's discretion is such that they have the power to go wrong, even where they have potentially made an error of law. As Jaffe argued, the notion of jurisdiction, used in this fashion, is not rigid, but context dependent. This is something confirmed once again by the 2018 decision of *Hossain v Minister for Immigration and Border Protection* ('*Hossain*').[165]

4.3.3 *Hossain* and the confirmation of the functional nature of jurisdictional error

This case concerned a decision to refuse the appellant's partner visa. The visa had been refused on the basis that the appellant's application for it had not been made within 28 days of the expiration of his student visa, and the appellant had an outstanding debt to the Commonwealth that he had not made an arrangement to pay. The Administrative Appeals Tribunal ('AAT') affirmed the decision. The decision of the AAT was then appealed to the Federal Circuit Court. In the Federal Circuit Court, the Minister conceded that an error of law had been made by the AAT in connection with the application of out of time criterion. However, the Minister argued that this was not a jurisdictional error.[166]

The Federal Circuit Court and, on appeal, the Full Court of the Federal Court found that, contrary to the submission of the Minister, the error had been of a jurisdictional kind. Whereas the Federal Circuit Court concluded that this meant that the whole decision was invalid,[167] the Full Federal Court, by majority, said that while the error in relation to this one criterion was jurisdictional, it did not deprive the AAT of its jurisdiction as to the other aspects of the decision.[168] The High Court dismissed the appeal of Mr Hossain,

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164 Mark Aronson, 'Jurisdictional error without the tears' in Matthew Groves and H P Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 330, 330; see also Mark Aronson (n 147) 252, 259.

165 ('*Hossain*') (2018) 264 CLR 123.

166 *Hossain v Minister for Immigration and Border Protection* [2016] FCCA 1729 (11 July 2016), [13] (Judge Street).

167 Ibid [20]-[22] (Judge Street).

168 *Minister for Immigration and Border Protection v Hossain* (2017) 252 FCR 31 ('*Minister for Immigration v Hossain*'), 39-40, where Flick and Farrell JJ said that 'the consequences of jurisdictional error are not susceptible to an invariable conclusion that a decision is rendered a nullity.' Their

however, it did not agree with the approach taken by the Full Court of the Federal Court, finding instead that while an error of law had been made, it had been an error within jurisdiction.

In a joint judgment, Kiefel CJ, Gageler and Keane JJ reprised and elaborated upon what had been said by the majority in *Kirk*. Once again, their Honours referred to Jaffe, expanding further upon his work. They noted that the comments quoted in *Kirk* had been made in response to Frankfurter J's statement that the word 'jurisdiction' was 'a verbal coat of too many colors'.[169] Paraphrasing, their Honours said that Jaffe had 'characterised criticism of the language of jurisdiction as "barrenly semantic"' in that it failed 'to face the question why a court denominates some questions as jurisdictional and others as not.'[170] They went on to explain that:

> The answer he proffered was that the language of jurisdiction is a traditional expression of the function of a court, acting within the limits of its own jurisdiction where no statutory mode of review existed, of ensuring that the repository of statutory power did not strain the statutory limits of that power.[171]

The joint judgment then emphasised the functional nature of the concept of jurisdictional error, and once again set out the same sections of Jaffe's article that had been quoted by the majority in *Kirk*.[172]

The joint judgment further explained, in keeping with the suggestion of Jaffe in the passage quoted above, that the concept of 'jurisdiction' is something that courts resort to where there are no statutory rights of appeal. Their Honours noted that if the ADJR Act had 'been enacted to cover judicial review of statutory decision-making more comprehensively, the terminology of jurisdiction and jurisdictional error in its application to administrative action may well had fallen into desuetude in Australia', as indeed it did

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Honours went on to find that in this context, where the Minister could only make a decision to either grant or not grant the visa, but could make this decision by reference to more than one criteria, the 'jurisdictional error which may vitiate the fact-finding process in respect to one criteria stands separate and apart from the fact finding process in respect to the other.' Cf the dissenting judgment of Mortimer J, who considered that the correct approach was to first 'accept an error of this kind is jurisdictional' and next to consider whether the court should use its discretion to grant relief – see 49, 56-57.

169 *United States v LA Tucker Truck Lines Inc* 344 US 33, 39 (1952) as cited by *Hossain* (n 165) 130 (Kiefel CJ, Gageler and Keane JJ).

170 *Hossain* (n 165) 130-131 (Kiefel CJ, Gageler and Keane JJ), quoting Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 962-963.

171 Ibid.

172 Ibid 131-132 (Kiefel CJ, Gageler and Keane JJ).

for a period, during the 1980s.[173] Since the s 75(v) jurisdiction of the High Court had to be relied upon to scrutinise certain decisions, the distinction between jurisdictional and non-jurisdictional errors could 'not be avoided.'[174] The fact that this statement differed somewhat from that of McHugh and Gummow JJ in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* ('*Lam*')[175] was acknowledged by a footnote.[176] In *Lam* McHugh and Gummow JJ had linked the need to maintain the distinction with the constitutional doctrine of the separation of powers.[177]

Both prior to and since the decision in *Hossain*, Janina Boughey and Lisa Burton Crawford have argued that the explanations generally given as to why the Constitution required the maintenance of the concept of jurisdictional error, including that of the separation of powers, do not provide an adequate rationale for the need to maintain the distinction between jurisdictional and non-jurisdictional error.[178] For instance, they reject the notion that s 75(v) requires the maintenance of the distinction as 'obviously flawed.'[179] They do not agree with the claim that the particular combination of remedies the provision contains means it was intended to be limited to jurisdictional errors.[180] Likewise, they say that s 75(v) is only one source of federal jurisdiction to review administrative action, whereas, as explained at 4.2.2, jurisdictional error is now a central concept in judicial review generally, both in and *out* of the federal sphere.[181]

Boughey and Crawford also regard the claim that retention of the distinction between jurisdictional and non-jurisdictional error is necessary because of the Constitutional separation of powers doctrine as 'not convincing.'[182] They consider that what they term

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173 Ibid 132 (Kiefel CJ, Gageler and Keane JJ).
174 Ibid.
175 ('*Lam*') (2003) 214 CLR 1.
176 *Hossain* (n 165) fn 20 (Kiefel CJ, Gageler and Keane JJ).
177 *Lam* (n 175) 24-25. See also Bradley Selway, 'The Principle Behind Common Law Judicial Review of Administrative Action – The Search Continues' (2002) 30 *Federal Law Review* 217, 234 and Cheryl Saunders, 'Constitution as Catalyst: Different Paths Within Australasian Administrative Law' (2010) 10 *New Zealand Journal of Public International Law* 143, 154.
178 Janina Boughey and Lisa Burton Crawford, 'Reconsidering *R(on the application of Cart) v Upper Tribunal* and the Rationale for Jurisdictional Error' [2017] *Public Law* 592, 596-57; (n 4) 407-413; and 'The Centrality of Jurisdictional Error: Rationale and Consequences' (2019) 30 *Public Law Review* 18, 22.
179 Boughey and Crawford, 'Rationale for Jurisdictional Error' (n 178) 596; see also (n 4) 406-408 and (2019) 22.
180 This explanation was given by Callinan J in *Plaintiff S157/2002* (2003) 211 CLR 476, 525. See Boughey and Crawford 'Rationale for Jurisdictional Error' (n 178) 596 and (n 4) 407.
181 Boughey and Crawford 'Rationale for Jurisdictional Error' (n 178) 596 and (n 4) 407.
182 Boughey and Crawford (n 4) 409; see also 'Rationale for Jurisdictional Error' (n 178) 597.

the 'separation of powers rationale'[183] conflates 'the distinction between jurisdictional errors of law with another: the distinction between *legal* and *non-legal* errors.'[184] They noted that, owing to the constitutional separation of judicial power, Ch III merits review can involve what amounts to non-judicial power, but that in any case, the distinction is concerned with errors of *law*, whether they be jurisdictional or not.[185]

In their view the distinction is best regarded as 'a method for recognising the power of a supreme parliament to confer limited authority on administrative bodies, and to define the scope of that authority.'[186] This is because it acknowledges Parliament's capacity to place limits on power that do not necessarily have to be complied with for the exercise of power to be valid.[187] They say: '[s]imply put, the distinction between jurisdictional and non-jurisdictional errors of law is a device for distinguishing between what Parliament has authorised and what Parliament has not.'[188] Further, they have contended that '[t]he only compelling explanation for the distinction is that it reflects the scope of legislative power to define the limits of executive power.'[189]

This is a persuasive view, but it does not seem to have enough regard to the part performed by the courts themselves in determining such limits. As chapter 3 argued, even within the 'statutory approach', the courts, as well as the legislature, play a role in giving content to the concepts of 'the merits' and 'the law'. The courts also play a role in giving content to the concept of validity itself. Statutory text alone will usually not be enough to inform a conclusion as to whether an error of law should lead to invalidity. Courts determine this by reference to a range of considerations, including context. This is not to suggest that Boughey and Crawford do not acknowledge this role of the courts.[190] However, for this reason, while parliamentary supremacy is an important component of the rationale for the maintenance of a distinction between jurisdictional and non-jurisdictional error,

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183 Boughey and Crawford (n 4) 408.
184 Boughey and Crawford 'Rationale for Jurisdictional Error' (n 178) 597; see also (n 4) 409-410.
185 Boughey and Crawford (n 4) 409-410.
186 Boughey and Crawford 'Rationale for Jurisdictional Error' (n 178) 593; see also (n 4) 396 and The Centrality of Jurisdictional Error (n 178) 19.
187 Boughey and Crawford (n 4) 414.
188 Ibid 413.
189 Boughey and Crawford 'The Centrality of Jurisdictional Error' (n 178) 22; see also Crawford (n 28) 131, where it is stated that the Australian constitutional system 'is not one in which the courts are subordinate to the legislature' and that both the legislature and the courts are 'equally powerful…within their relative sphere of constitutional competence.'
190 See, eg, Boughey and Crawford (n 4) 415.

the other explanations that have also been provided for it are also illuminating, even if none provide a full account of why it is needed.

For instance, the explanation given in this chapter of the way in which the approach to the supervisory jurisdiction has, since *Hickman*, been crafted to extend the protections for the High Court's jurisdiction that can be gleaned from s 75(v) to other courts, including state courts, illustrates the way in which principles developed in the context of s 75(v) have a unifying effect on doctrine more broadly.[191] Bearing this in mind, a better way of framing a 's 75(v) rationale' is not by reference to remedies referred to in the provision, but the pragmatic one given in *Hossain*. For long as it becomes required from time to time to resort to the original jurisdiction of the High Court, the concept of a distinction between jurisdictional and non-jurisdictional error remains necessary, because it is the vehicle for the interpretive approach.

As Boughey and Crawford acknowledge, Parliament has the power to use clear terms to exclude review along the lines of unreasonableness or procedural fairness.[192] However, even within a framework that recognises parliamentary supremacy, the courts are still able to continue to develop the principles of statutory interpretation in ways that protect and enhance the values of the common law, including those connected to standards of administrative decision-making. Jurisdictional error is the flexible concept that allows courts to do so. The distinction between jurisdictional and non-jurisdictional errors of law also embodies the pragmatic acknowledgment on the part of the courts that the legislature is competent to allow decision-makers to make non-jurisdictional errors of law.[193]

As Jaffe explained, '[t]ypically a grant of power is focused, is made explicit at some points and blurred at others.'[194] He added that while legislation conferring administrative power is often specific 'in terms of persons, objects, means of implementation', the actual 'standards for the exercise of power are apt to be vague and general.'[195] This is in keeping

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191 See, eg, chapter 2 at 2.4.1 regarding the ways in which the constitutional conception of judicial power has influenced the notion of judicial power more broadly.
192 See, eg, Boughey and Crawford (n 4) 414-415.
193 See, eg, the reasoning of the majority in *Probuild Constructions* (n 9) 15-21 (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).
194 Jaffe (n 152) 961.
195 Ibid 962.

with the observation of Aronson that '[n]o drafting can predict all the issues that will arise in a regulatory scheme, nor should it try.'[196]

As Aronson further stated, owing to the very nature of statutory interpretation, what constitutes a jurisdictional error can vary given the surrounding context, adding:

> Complaints that 'jurisdictional error' provides too little guidance are therefore misguided. They boil down to complaints that statutory interpretation can be an imprecise art. Of course it is, in any country, and in administrative law as in any other field of law. Administrative law deals with the administrative state—a huge and multifaceted creature. Statutory interpretation cannot just be about statutory text. Courts have an unavoidable role in filling gaps …[197]

One of the principal acknowledgments made by the majority in *Kirk* is the very frank one that it is simply not possible to have a neat check list of the kinds of reviewable errors that might be made by administrative decision-makers. The vast nature of the contemporary administrative state means that countless decisions are being made in a multitude of different circumstances every day, by decision-makers with very different functions and degrees of authority.

On this reading the best justification for the maintenance of the distinction is simply the one given by Jaffe—it is a necessary instrument for the navigation of the wide ocean of situations that can be thrown up by the interaction of the regulatory state with the lives of citizens. However, it is also not possible to clearly define the boundaries of the powers of each institution of government. In this way the distinction is also an instrument that enables the court to find these boundaries in a given set of circumstances.

4.3.4 Reaching the conclusion that an error has been jurisdictional

This last point is important for understanding how the 'mechanism' of judicial review functions, or how the conclusion that an error is jurisdictional is reached. The interpretive process involves reference to many considerations. These include, for instance what the legislation says and all of the relevant circumstances of the decision, including the identity

[196] Aronson (n 147) 270.
[197] Ibid 274-275.

of the decision-maker and the nature of the interests affected by it, and the values of the general law that it touches upon.[198]

As Gummow and Crennan JJ observed in *Thomas v Mowbray*,[199] '[i]t is a commonplace that statutes are to be construed having regard to their subject, scope and purpose.'[200] Statutory *context* is important. This is something emphasised by Kiefel CJ and Keane J in *R v A2*,[201] where they noted:

> Consideration of the context for the provision is undertaken at the first stage of the process of construction. Context is to be understood in its widest sense. It includes surrounding statutory provisions, what may be drawn from other aspects of the statute and the statute as a whole. It extends to the mischief which it may be seen that the statute is intended to remedy.[202]

As the passage following this statement go on to make clear, by 'mischief', Kiefel and Keane CJ meant the policy intent that underpins the statute. While this context does not override the plain meaning of text, the search for meaning requires regard to be had to the purpose of legislative schemes.[203]

As acknowledged by Allsop CJ in *Minister for Immigration and Border Protection v Stretton*,[204] later quoted with approval by Gageler J in *Minister for Immigration and Border Protection v SZVFW* ('*SZVFW*'),[205] also relevant to the interpretive process are 'the fundamental values that attend the proper exercise of power', found in the common law.[206] However this gives rise to several questions. What precisely are these values, what do they require of decision-makers, and what are the limits of the court's own powers in applying them as conditions on statutorily conferred discretions?

The way these values are developed and applied by the courts must be understood as influenced by other considerations, sometimes less explicit. These are values connected

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198 Mark Aronson, 'Should We Have a Variable Error of Law Standard?' in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Michael Taggart's Rainbow* (Hart, 2015) 241, 256; and Basten (n 11) 47.
199 (2007) 233 CLR 307.
200 Ibid 348.
201 (2019) 93 ALJR 1106.
202 Ibid [33].
203 Ibid [33]-[44].
204 (2016) 237 FCR 1.
205 (2018) 92 ALJR 713, [59].
206 *Stretton* (2016) 237 FCR 1, 5; on this point see also Basten (n 11) 37-38 and Allsop (n 10) 9.

with the way in which the roles and functions of each institution of government, the legislature, the executive and the courts, is understood. These values play a role in the way in which courts draw lines around the concept of 'jurisdiction'. As Aronson has said, '[i]t is often the case that a body has done what its Act allowed, even though a court might have done it differently.'[207] The limits of the court's own power to interfere with an otherwise lawful decision are an ever-present consideration, and, as chapter 3 suggested, this is one explanation for the framing of the principles of review as statutory implications.

While cases like *Minister for Immigration and Citizenship v Li*, *SZVFW* and *Hossain* have perhaps made this clearer, the basic shape of this approach was established by *Kirk*. Jurisdictional error is an inherently functional concept. The variable nature of the scrutiny that can be applied through the mechanism of jurisdictional error has been described by Aronson.[208] It is made to be adapted to the specific circumstances of a case, including the purpose and context of statutory power. A cynic might suggest that the distinction is simply applied at will by courts. What stops this from being the case, though, is the framework of institutional factors that courts are operating within.

This much seems to have been acknowledged by the joint judgment in *Hossain*:

> The common law principles which inform the construction of statutes conferring decision-making authority reflect longstanding qualitative judgments about the appropriate limits of an exercise of administrative power to which a legislature can be taken to adhere in defining the bounds of such authority as it chooses to confer on a repository in the absence of affirmative indication of a legislative intention to the contrary. Those common law principles are not derived by logic alone and cannot be treated as abstractions disconnected from the subject matter to which they are applied. They are not so delicate or refined in their operation that sight is lost of the fact that '[d]ecision-making is a function of the real world'.[209]

With regard to the specific issue raised by the circumstances of the *Hossain* case, the High Court rejected the stance taken by the majority of the Full Federal Court, that it was possible to make a jurisdictional error that did not invalidate the whole decision.[210] They

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[207] Aronson (n 147) 251.
[208] Aronson (n 198) 255.
[209] *Hossain* (n 165) 134.
[210] *Minister for Immigration v Hossain* (n 168) 38-39 (Flick and Farrell JJ).

preferred to characterise the error of law made by the AAT with regard to the out of time criterion as non-jurisdictional. To reach this conclusion, Kiefel CJ, Gageler and Keane JJ said that where a statute sets out a condition that must be complied with in the course of a decision-making process, 'it is not to be interpreted as denying legal force and effect to every decision that might be made in breach of the condition.'[211]

Rather, '[t]he statute is ordinarily interpreted as incorporating a threshold of materiality in the event of non-compliance.'[212] It was likely that this 'threshold would not ordinarily be met' in circumstances where a failure to comply with a condition had 'made no difference to the decision that was made in the circumstances in which that decision was made.'[213] To an extent, this attempt at adding some texture to the concept of jurisdictional error would not appear to add anything new to it. It is well-known that at the heart of the concept of an error leading to invalidity, or a jurisdictional error, lies the acknowledgment that 'there are degrees of error'.[214] The High Court has also long accepted, for example, that a breach of procedural fairness will require what Gleeson CJ described in *Lam*[215] as something amounting to 'practical injustice' to have occurred.[216]

In a separate judgment,[217] Edelman J agreed with the conclusion that jurisdictional error requires an element of materiality.[218] However, he qualified this by noting that '[t]here may be unusual circumstances where an error is so fundamental that it will be material whether or not a person is deprived of the possibility of a successful outcome.'[219] Such circumstances could be where there was an 'extreme case of denial of procedural fairness' that touched upon 'respect for the dignity of the individual.'[220]

In the subsequent case of *Minister for Immigration and Border Protection v SZMTA*,[221] the 'materiality' criterion was again applied by Bell, Gageler and Keane JJ.[222] However in this case Nettle J, writing with Gordon J who had not been a member of the *Hossain*

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211 *Hossain* (n 165) 134.
212 Ibid.
213 Ibid 134-135.
214 *Plaintiff S157/2002* (n 1), 485 (Gleeson CJ).
215 (2003) 214 CLR 1; see also *Minister for Immigration and Border Protection v WZARH* (2015) 256 CLR 326, 341 (Gageler and Gordon JJ).
216 *Lam* (n 175) 14.
217 With which Nettle J expressed agreement—see *Hossain* (n 165) 137.
218 Ibid 146.
219 Ibid 147.
220 Ibid 147-148.
221 ('*SZMTA*') (2019) 264 CLR 421.
222 Ibid see, eg, 452-453.

bench, expressed more disquiet with this approach. They noted that it introduced a further element of uncertainty.[223] In their view, those making decisions, and those affected by them 'are entitled to expect that decisions will be valid and enforceable under and according to the statute and not under a statute subject to some margin of error or principle of construction described as "materiality".'[224] They considered that employment of this criterion imposed an onus on the applicant to show that the failure to comply with the terms of the statute gave the alleged error the requisite 'materiality', and this shifting of 'the onus of proof would fundamentally change the nature of judicial review' itself because the task for the court 'would become a form of merits review.'[225]

It is possible to recognise that there are circumstances where the concept of materiality has some utility. The *Hossain* position that it is better to regard an error of law that does not change the outcome of a decision as non-jurisdictional seems preferable to a situation where the error is cast as jurisdictional but not leading to the ultimate invalidity of a decision. However, the remarks of Nettle and Gordon JJ tend to show that, as with so many questions that arise in review of administrative action, the utility of the concept is a question of degree. This tends to demonstrate a central dilemma; it is necessary for courts to set out explicit principles to guide applicants, respondents and other courts, yet it is almost impossible to state rules with any real generality.

Predictability in this sphere seems to require a better sense of the institutional values that also form a part of the calculus of jurisdictional error. Chapter 6 returns to this theme and expands upon the use of the interpretive approach in what is contended is an institutional framework with a positive conception of the administrative state. The next section of this chapter considers the way in which institutional values also play a role in shaping the limits of the power of the legislature to limit review altogether.

4.4 THE 'ENTRENCHED MINIMUM PROVISION' OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

In obiter towards the end of their joint judgment in *Plaintiff S157*, Gaudron, McHugh, Gummow, Kirby and Hayne JJ said that s 75(v) 'introduces into the Constitution of the

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223 Ibid 458, 459.
224 Ibid 458.
225 Ibid 459-460.

Commonwealth an entrenched minimum provision of judicial review.'[226] They explained that the provision was a 'means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.'[227] The purpose of granting the High Court this jurisdiction was 'to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action is lawful and within jurisdiction.'[228] Where there was a written constitution, like that of Australia, 'there must be an authoritative decision-maker' to resolve disputes about power, and 'the ultimate decision-maker in all matters where there is a contest, is this Court.'[229]

There has been much discussion of what this 'entrenched minimum provision of review' really encompasses.[230] Section 75(v) only states that the High Court can grant the remedies of injunction, prohibition and mandamus against officers of the Commonwealth. It says nothing about protecting the principles of common law that give rise to the issue of these remedies. It also does not prevent the grant of wide discretionary powers to executive officers, or the framing by Parliament of statutory provisions in ways that seek to prevent executive action from being invalid.

4.4.1 The utility of theories of the rule of law in locating the extent of the entrenched minimum provision of judicial review

Like the role of the court in undertaking judicial review of administrative action in general, the notion of the entrenched minimum provision has been linked with the notion of the rule of law. In *Plaintiff S157/2002*, for instance, Gleeson CJ referred to the well-known statement of Dixon J from *Australian Communist Party v Commonwealth* ('*Communist Party Case*')[231] that the Constitution 'is an instrument framed in accordance with many traditional conceptions' amongst which 'it may be fairly said that the rule of law forms an assumption.'[232] He then quoted the following passage from the judgment of Brennan J in *Church of Scientology Inc v Woodward*:[233]

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226 *Plaintiff S157/2002* (n 1) 513.
227 Ibid.
228 Ibid.
229 Ibid.
230 See, eg; Kirk (n 27); McDonald (n 107); Bateman (n 74); and Crawford (n 146).
231 *Communist Party Case* (n 24).
232 Ibid 193; *Plaintiff S157/2002* (n 1) 492.
233 (1982) 154 CLR 25.

> Judicial review is neither more nor less than the enforcement of the rule of law over executive action; it is the means by which executive action is prevented from exceeding the powers and functions assigned to the executive by law and the interests of the individual are protected accordingly.[234]

The joint judgment also referred to the concept, noting that the presence of s 75(v) in the Constitution represented 'a textual reinforcement for what Dixon J said about the significance of the rule of law for the Constitution'.[235]

Some scholars have attempted to use concepts of the rule of law to give content to the entrenched minimum provision. Jeremy Kirk, for instance, argued that s 75(v) could be read as giving effect to what Dicey called the principle of legality, or the idea that 'governments must act according to law.'[236] He considered that this principle offered 'a foundation for regarding certain grounds of review as being entrenched.'[237] While Kirk argued that certain grounds could be regarded as entrenched, his explanation of how this would operate in practice still relied upon statutory drafting techniques. He conceded, for instance, that it was open to Parliament for the most part to set the terms of lawful decision making.[238] Applying Kirk's concept of the rule of law, not much, if anything, would be constitutionally entrenched.

The central difficulty with invoking the idea of the rule of law to explain the extent of judicial power is that identified by Edelman J in *Graham*, where he stated '[w]hich of the different versions of the "contested concept" of the "rule of law", whether thick or thin, is the basis for the implied constraint?'[239] The phrase 'the rule of law' can be attributed with many possible meanings, some narrow, some expansive. As Martin Loughlin has written 'the ubiquity of the expression 'the rule of law' is matched only by the multiplicity of its meanings.'[240] Judith Shklar once observed that '[i]t would not be difficult to show'

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234 Ibid 70, quoted by *Plaintiff S157/2002* (n 1) 492.
235 *Plaintiff S157/2002* (n 1) 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).
236 Kirk (n 27) 69.
237 Ibid 70.
238 Ibid.
239 *Graham* (n 2) 48-49, quoting Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137.
240 Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 313.

that the phrase 'has become meaningless thanks to ideological abuse and general over-use.'[241]

In Australia, it is usually thought to have a meaning towards the narrower end of the spectrum, one that captures the principle that the government must stay within the confines of formal law, but does not extend to the protection of fundamental individual rights in the manner that some theorists, for example T R S Allan, argue that it must.[242] In an extended analysis, Lisa Burton Crawford suggested that, in Australia, the phrase does not mean that 'the courts have inherent authority to enforce all those limitations on executive power that are necessary to ensure a morally legitimate system of government, regardless of what Parliament provides' in the manner contended by T R S Allan.[243] Rather, whatever meaning and content it has are 'firmly anchored in the text and structure of the Constitution.'[244] Crawford argued that a core feature of the constitutional arrangements of Australia is that:

> [T]he Constitution constituted the Australian legal order and conferred the three branches of the Federal Government with their respective powers. No branch of government can exercise a power greater than the Constitution confers—'a stream cannot rise higher than its source'.[245]

The 'stream/source maxim' was something that she considered reflected the 'particular nature of the Australian Constitution, and the powers that it confers',[246] or indeed captures 'the fundamental nature of the Australian legal order.'[247] Unlike the state parliaments (with the exception of entrenched provisions), and the English Parliament that they were modelled upon, the Australian Parliament cannot change its own Constitution.

The powers of all branches of the Commonwealth government are limited by the Constitution, which is, as Richard Bellamy has noted, procedural in that '[i]t merely describes the machinery of federal decision-making, outlining the processes to be used

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241 Judith Shklar, 'Political Theory and the Rule of Law' in Allan Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, 1.

242 See, eg, T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law*, chapter 8, where Allan contends that the 'absence of explicit guarantees of due process and the equal protection of the laws in the Commonwealth constitution' was 'immaterial', if it could be said, as he contended 'these principles are inherent in a constitution founded on the rule of law', 250.

243 Crawford (n 28) 133.

244 Ibid.

245 Ibid 162.

246 Ibid.

247 Crawford (n 146) 93.

and the competences of the different levels of government'.[248] The power to alter this situation is left in the hands of the people by s 128. As Crawford further pointed out, in this framework, the common law developed by the High Court must also 'be subordinate to the Constitution.'[249] As explained in chapter 3, theories of common law constitutionalism have not gained much traction in Australia, after a brief period of currency in the early 1990s.[250]

However, the Constitution is a fairly sparse document.[251] To a degree, this is the nature of written constitutions. As Loughlin has said, 'despite their textuality, constitutions are replete with gaps, silences and abeyances.'[252] Certain matters were left out of the Australian Constitution, for various reasons.[253] Some were considered to go without saying, based on understandings of government at the time it was written. A clear example of this is the provisions dealing with the executive, which 'left much to informed understanding.'[254] Others were deliberately left open because of a need to compromise or because the framers understood the need to leave room for the nation they were creating to be able to grow without too much restraint.[255] These gaps cannot be necessarily regarded as oversights, but, as Loughlin pointed out, might be the result of 'a set of implicit agreements to collude in keeping fundamental questions of political authority in a state of irresolution.'[256] These silences can be understood as 'functional': things are left out of constitutions out of necessity.[257]

As Edelman J pointed out in *Graham,* '[a]ll language requires necessary implications.'[258] It is crucial to understand, however, that when it comes to a constitution, 'objective

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248 Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007), 173. See also Susan Kenny, 'Evolution' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 119, 123.

249 Crawford (n 28) 166.

250 See chapter 2 at 2.9.3, and chapter 3 at 3.4.2.

251 Kenny (n 248) 123.

252 Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 50. See also see also Kenny (n 248) 123-124.

253 See, eg, chapter 5 at 5.2.2.

254 Kenny (n 248) 123.

255 See, eg, ibid 127.

256 Michael Foley, *The Silence of Constitutions: Gaps, 'Abeyances' and Political Temperament in the Maintenance of Government* (Routledge, 1989), xi, as cited by Loughlin (n 253) 50.

257 Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *International Journal of Constitutional Law* 922, 926.

258 *Graham* (n 2) 36**.**

interpretation cannot exist.'[259] Like any legal text, the Australian Constitution requires interpretation not only of what it says, but also of what it does not say, and this is done by reference to convention, precedent and common law tradition, but also, tacitly if not always explicitly, by reference to judicial understandings of Australia's history and the nation's social and political culture, including the way in which the role and functions of other two branches of government are understood within this framework. This point is relevant to understanding why constitutional 'silences' are interpreted or given expression in certain ways by the High Court.

As much as the High Court's own powers are limited by the Constitution, the Court itself has nevertheless had an immeasurable influence on the way in which the Constitution is read and understood. The 'textual indeterminacy' of the Constitution has meant that there is certain scope for 'constitutional evolution.'[260] As discussed in chapter 2, the separation of powers doctrine itself is an implication from the text and structure of the Constitution, one that was called into question in the 1970s.[261] In recent decades the Court has contributed new key understandings of the constitution through developments of jurisprudence regarding implications from the text, for example the implied freedom of political communication.[262]

However, the High Court has for the most part resisted what Bellamy called the 'standing temptation to read rights' into the mostly procedural constitution and 'employ them for the judicial review of legislation.'[263] The fact that such a temptation is thought to exist suggests that, to the extent that it has conceived of its own role as limited in the way Crawford described, indicates that it is responding not only to the formal requirements of the Constitution, but factors in addition to them. These factors are hard to define. The elements of Australian constitutionalism are open to debate. Chapters 5 and 6 set out some factors that might help contribute to a better understanding of the way in which judicial power to undertake review of administrative action has taken the shape it has in Australia.

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259 Loughlin (n 257) 926.
260 Kenny (n 248) 125.
261 See at 2.4.3.
262 See *Australian Capital Television Pty Ltd v The Commonwealth* (1992) 177 CLR 106.
263 Bellamy (n 248) 173; see also chapter 3 at 3.4.2.

4.4.2 Institutional approaches to the entrenched minimum provision

This last point helps to explain why the more satisfactory attempts to explain the entrenched minimum provision of review are those drawing upon institutional understandings of the role of the courts with respect to Parliament, rather than drawing upon theories external to the framework of the Constitution. Section 75(v) gives the High Court jurisdiction to issue specific writs, but the principles that attach to the issue of such writs have always derived from the common law. This remains the case whether they are attributed to 'parliamentary intention' or not.

In attempting to answer the question of where the boundaries of legislative power to limit review lie, Crawford draws upon 'an extension of the "stream/source" doctrine from the constitutional to the administrative context'.[264] Crawford said that the power of the legislature is necessarily constrained by the fact that the interpretation of the scope of statutory power is an 'exclusively judicial role'.[265] So called "no invalidity" clauses, or provisions that state that certain forms of action cannot be invalid, then, 'should not be treated as conclusively determining the validity of executive action.'[266] Allowing the legislature to make conclusive statements as to jurisdiction would be tantamount to enabling a 'usurpation of the judicial power of the Commonwealth.'[267] The task of deciding the limits of executive power falls to 'Ch III courts—and not the federal Parliament' because making binding declarations as to the legal consequences of an action is a judicial function.[268]

Will Bateman has also argued that any limitations on Parliament's power to limit access to review must come from 'the *Constitution's* text and structure.'[269] In terms of what these limitations might be, Bateman argued that the key was the concept of jurisdictional error, which formed 'the basis of the constitutional entrenchment of judicial review.' This was because:

> To hold that the *Constitution* entrenches a jurisdiction to review for jurisdictional error while, simultaneously, holding that Parliament may confer

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264 Crawford (n 146) 93; see also Crawford (n 28) 162.
265 Crawford (n 146) 90-93.
266 Ibid 95.
267 Ibid.
268 Ibid 98.
269 Bateman (n 74) 489-490.

> a power that is devoid of jurisdictional limitations, is to empty the constitutional conception of jurisdictional error of all content and privileges form over substance. Thus, the *Constitution* prevents a federal or State parliament from creating a statutory power that is not conditioned by jurisdictional limitations sufficient to render the power 'limited' or 'controlled'.[270]

The 'functional' method he proposed for determining when a breach of this principle had occurred entailed 'ascertaining the functions performed by [the relevant constitutional concept] and, then, seeing which attributes are essential to the performance of that function.'[271] The benefits of such an approach in his view were that 'it explicitly recognises and structures the values that underlie Ch III and provides a principled framework for their application.'[272]

In the context of s 75(v), a functional approach required the ascertainment of 'the functions performed by the constitutionally entrenched jurisdiction to review for jurisdictional error.' For Bateman, a key function of s 75(v) was 'to prevent unlimited or uncontrolled jurisdiction with the judiciary at the apex of any claim of legality: avoiding islands of power immune from judicial restraint.' Another way of putting this was to 'adopt 'non-arbitrariness' as the relevant limitation.'[273] In accordance with this, the relevant consideration was whether a decision-maker was completely unconstrained in the exercise of power.[274] This fits with an earlier observation made by Leighton McDonald that one way of ensuring that power is not arbitrary is to subject its use to other forms of scrutiny.[275] The notion that while Parliament is relatively free to set the limits of administrative power, but cannot remove the capacity of the High Court to at least check that these limits have been complied with was something subsequently confirmed by *Graham v Minister for Immigration and Border Protection* (*'Graham*').[276]

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[270] Ibid.
[271] Ibid 502, citing James Stellios 'The High Court's Recent Encounters with Section 80 Jury Trials' (2005) 29 *Criminal Law Journal* 139, 149.
[272] Ibid.
[273] Ibid 503.
[274] Ibid.
[275] McDonald (n 107) 29-30; see also Bateman (n 74) 504.
[276] *Graham* (n 2).

4.4.3 'All power of government is limited by law'[277]—*Graham* and the entrenched minimum provision of judicial review

Graham involved decisions of the Minister for Immigration and Border Protection to cancel the visas of Aaron Graham and Mehaka Te Puia. Both Graham and Te Puia were believed to have associations with the Rebels, an 'outlaw motorcycle gang.' The Government began cancelling the visas of people who were believed to be associated with such gangs following the passage of the *Migration Amendment (Character and General Visa Cancellation) Act 2014* (Cth), which expanded the Minister's powers to do so on character grounds.

The decisions pertaining to Graham and Te Puia were purportedly made in accordance with s 501(3) of the *Migration Act* (Cth). Section 501(3)(c) provides that the Minister may cancel a visa in circumstances where 'the Minister reasonably suspects that the person does not pass the character test' and s 501(3)(d) provides that this can be done where 'the Minister is satisfied that the refusal or cancellation is in the national interest.' Section 501(6)(a) provides that a person will not pass the character test where 'the person has a substantial criminal record (as defined by subsection (7)). This is defined in s 501(7)(c) as having been 'sentenced to a term of imprisonment of 12 months or more.'

Relevantly, s 501(6)(b), which was amended by the 2014 Act, further provides that a person does not pass the character test where:

> the minister reasonably suspects:
>
> (i) that the person has been or is a member of a group or organisation, or has had or has an association with a group, organisation or person; and
>
> (ii) that the group, organisation or person has been or is involved in criminal conduct ...

Section 503A of the Act deals with information supplied to the Minister by law enforcement or intelligence agencies. Section 503A(2)(c) states that where certain sensitive information is communicated to the Minister or his delegates 'the Minister or officer must not be required to divulge or communicate the information to a court, a tribunal, a parliament or parliamentary committee or any other body or person'. In the

[277] Ibid.

statements of reasons given by the Minister in the cases of both men, the Minister made it clear that his decision to revoke their visas had taken into account undisclosed information.[278]

(a) Rejection of 'essential function' arguments

Graham and Te Puia challenged the validity of ss 501(3) and 503A(2). The arguments put on behalf of Graham regarding validity drew on a *Kable*[279] and *Kirk*[280]-style functionalist approach in that it was argued that Ch III considerations placed restrictions on the power of Parliament to limit, by legislation, the access of courts to information that should have been admissible. The plaintiffs contended that it was 'an essential function of courts to find facts relevant to the determination of the rights in issue' and that s 503A(2) prevented them doing this and as such was 'an interference with their function.'[281] The majority, comprised of Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ, did not agree with this argument, noting that it had 'long been accepted that laws may regulate the method or burden of proving facts.'[282] It was within the competency of Parliament to 'alter the onus of proof or standards of proof', or 'modify or abrogate, common law principles such as those governing the discretionary exclusion of evidence' or 'legislate so as to affect the availability of privileges, such as legal professional privilege.'[283]

The plaintiff argued that the line between when such regulation was permissible and when it was not could be ascertained from the common law. The relevant principles to have reference to, according to the plaintiff, were those connected with determinations of public interest immunity. According to the plaintiff, it was 'the duty of the court to balance the competing public interests, not the privilege of the executive.'[284] However, the majority accepted the submission of the Attorney-General on this point, which was that 'there is no constitutional principle which requires the courts to be the arbiter of that question', while noting, however, that '[w]hether the Constitution permits legislation to deny a court exercising jurisdiction to see the evidence upon which a decision was based

278 *Graham* (n 2) 21 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).
279 (1996) 189 CLR 51.
280 *Kirk* (n 7).
281 *Graham* (n 2) 22.
282 Ibid.
283 Ibid.
284 Ibid 23.

is another matter.'[285] The majority also considered that the plaintiffs' arguments, based on *Kable* that the institutional integrity of a court was 'substantially impaired' by the impugned provision, were 'not compelling.'[286]

(b) Section 75(v) and the role of judicial power

Instead, however, the majority found that the provision was invalid insofar as it impaired the capacity of the Court to exercise its s 75(v) jurisdiction. In doing so it is clear that the majority was motivated by a desire to prevent the exercise of power in an arbitrary or uncontrolled manner. As a starting point, they stated, 'all power of government is limited by law', adding:

> Within the limits of its jurisdiction where regularly invoked, the function of the judicial branch of government is to declare and enforce the law that limits its own power and the power of the other branches of government through the application of the judicial process and through the grant, where appropriate, of judicial remedies.[287]

This was a 'constitutional precept' with deep roots.[288] The majority said that by the time the Australian Constitution was framed, it had come to be associated with the decision of the United States Supreme Court in *Marbury v Madison*,[289] and since then, it has come to be associated with the High Court's own decision in *Australian Communist Party v Commonwealth*.[290] They highlighted two quotes from judgments in this case, one being that of Dixon J that the rule of law was an 'assumption' of the Australian Constitution,[291] the other being that of Fullagar J that the *Marbury* principle was 'axiomatic' in the Australian system.[292] The majority then quoted the statement of Dixon J from *Hickman* that it was not possible for Parliament:

> [T]o impose limits upon the quasi-judicial authority of a body which it sets up with the intention that any excess of that authority means invalidity, and yet,

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285 Ibid.
286 Ibid 24.
287 Ibid.
288 Ibid.
289 *Marbury* (n 15).
290 *Communist Party Case* (n 24).
291 Ibid 193.
292 Ibid 262-3.

> at the same time, to deprive this Court of authority to restrain the invalid action of the court or body by prohibition.[293]

The majority re-stated what had been said by Gleeson CJ in *Plaintiff S157/2002*, that Parliament 'may create, and define, the duty or the power or jurisdiction and determine the content of the law to be obeyed.'[294] What it could not do, however, was deprive the High Court 'of its constitutional jurisdiction to enforce the law so enacted.'[295]

After noting the relative freedom of Parliament, outside the other confines of the Constitution such as the heads of Commonwealth power in s 51, the majority said that the question of whether a law transgressed this limitation was 'one of substance, and therefore of degree.' Its answer required:

> ... an examination not only of the legal operation of the law but also of the practical impact of the law on the ability of a court, through the application of judicial process, to discern and declare whether or not the conditions of and constraints on the lawful exercise of the power conferred on an officer have been observed in a particular case.[296]

Applying these principles to the cases at hand, the majority said that the 'legal operation' of s 503A(2)(c) was to prevent the Minister from being required to divulge to a court the kind of information referred to in s 503A(1).

The 'practical impact' of this was to prevent the Federal Court and the High Court being able to access the information which was relevant to the exercise of the power of the Minister to make the decisions that were under review.[297] This meant that the provision operated 'in practice to shield the purported exercise of power from judicial scrutiny.' The power to cancel visas on character grounds required the Minister to 'reasonably suspect' or be 'satisfied' of certain matters. The majority pointed out that the 'suspicion' or 'satisfaction' of the Minister 'must each be formed by the Minister reasonably and on a correct understanding of the law. Although one of the things that the Minister had to

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293 *Hickman* (n 63) 616, cited by *Graham* (n 2) 25.
294 *Plaintiff S157/2002* (n 1) 483, quoted by *Graham* (2017) 263 CLR 1, 25-26.
295 Ibid, quoted by *Graham* (2017) 263 CLR 1, 25-26, see also 27 at [48].
296 *Graham* (n 2) 27.
297 Ibid 28.

be satisfied of was that the cancellation decision was in the 'national interest', even this 'broad and evaluative' condition was 'not unbounded.'[298]

Without the information which the Minister clearly had had regard to in forming the requisite states of mind to make the decisions regarding both the plaintiff and the applicant, the Court was unable to assess the reasonableness of the decision. To the extent that s 503A(2)(c) prevented the Minister from being required to divulge the relevant information to the High Court and the Federal Court, the provision amounted 'to a substantial curtailment of the capacity of a court exercising jurisdiction under or derived from s 75(v) of the Constitution to discern and declare whether or not the legal limits of powers conferred on the Minister by the Act have been observed.'[299]

There is a symmetry with the outcome in the *Gypsy Jokers* case here. As noted at 4.2.4, the relevant provision in that case was found to be valid because, rather than obstructing the court's review function, it supported it. This was because, although the provision allowed the Police Minister to restrict an applicant's access to certain information, it did not prevent the court from viewing it. *Graham* reinforces the point that the court must at least be able to have the capacity to assess the legality of action, even where discretions are relatively unconfined, because this avoids the spectre of non-judicial bodies determining the limits of their own jurisdiction.

This point is key to understanding the constitutional conception of judicial power.[300] It is the task of the judiciary to ensure that the actions of the other branches of government are not arbitrary but authorised by a legitimate source of power. This can be recognised as a unifying thread in much of the High Court's public law jurisprudence, from the reasons of Fullagar J in the *Communist Party Case* to those of Brennan J in *Quin*. It can also be regarded as in keeping with the concept touched upon in chapter 2,[301] and returned to in chapter 5,[302] of the High Court as a 'referee', responsible for health of the system itself. [303] However, is part of the role of a referee to be aware of when not to intervene.

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298 Ibid 29-30.

299 Ibid 32.

300 It also, once again, helps to show the way in which standards of judicial power have a 'national' character. See chapter 2 at 2.4.1 where the way in which concepts of federal judicial power have influenced concepts of state judicial power is discussed.

301 See at 2.8.2.

302 See at 5.4.2.

303 Stephen Gageler, 'Beyond the Text: A Vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152.

As the previous two chapters have explained, the concept of judicial power is subject to certain limits when it comes to defining the content of the law itself. To understand the source of these limits, it is necessary to look beyond constitutional text and structure, which does not sufficiently account for them.

4.5 CONCLUSION

As the discussion of this chapter shows, it is a key constitutional principle in Australia that a 'stream' of power must have a traceable 'source'. More than this, the approach of the High Court to legislative attempts to restrict both its own supervisory jurisdiction, and that of other superior courts, has demonstrated considerable ingenuity and prudence in making the necessarily 'political' assessments regarding the relationships between the institutions of government and the wider public. However, there remain large questions about the deeper normative considerations driving its interpretive choices. Reliance upon constitutional or statutory text and structure can only advance matters so far.

The previous chapter outlined the contemporary approach to review of administrative action, which locates the source of the principles of judicial review in the intention of parliament and explored the possible basis for this judicial choice to frame them in this way. It is an error to regard this contemporary approach as either a denial of the judicial role in making these principles of interpretation or as an approach that is overly rigid and lacking in any capacity to adapt and change over time. Courts have long proven themselves capable of adapting the principles of statutory intention as needed to meet changing requirements.

This was something explicitly noted by Hayne J in *Aala*,[304] where he observed, in relation to s 75(v) that 'the Constitution is silent about the circumstances in which the writs' it refers to 'may issue.' The Constitution only entrenched 'the jurisdiction of this Court when the writs are sought, rather than any particular ground for the issue of the writs.'[305] This, though, gave rise to a 'tension', because the rules governing the boundaries of lawful power were the product of the common law and capable of change over time. As Hayne J noted, this tension was particularly apparent in privative clause cases. While Parliament was able to 'lawfully prescribe the kind of duty to which an officer of the

[304] *Aala* (n 21).
[305] Ibid 142.

Commonwealth is subject and may lawfully prescribe the way in which that duty shall be performed', Parliament could not 'withdraw from this Court the jurisdiction which it has to ensure that power given to an officer of the Commonwealth is not exceeded.'[306] It is possible to see that between the constitutional entrenchment of jurisdiction to hear cases in which the writs are sought and the common law principles that attach to the issue of the writs named in s 75(v) there lies a kind of 'borderland'.[307] The way the High Court has sought to navigate this borderland is through an interpretive approach.

This is not something that the approach of Brennan J, set out in chapter 3, sought to deny. As Brennan J put it in *Attorney General (NSW) v Quin* ('*Quin*'),[308] 'the modern development and expansion of the law of judicial review of administrative' has been 'achieved by an increasingly sophisticated exposition of implied limitations on the extent or exercise of statutory power'.[309] This approach does not end what Edelman J referred to in *Probuild Constructions (Aust) Pty Ltd v Shade Systems Pty Ltd* [310] as a centuries-old 'power struggle' between courts and Parliaments (or statutory drafters).[311] Rather, this endures, but perhaps it should not always be considered a 'power struggle'. As suggested in chapter 3, the branches of the Australian government are regarded as 'co-ordinate' with each other. This notion is discernible as one underpinning of the interpretive approach to the issue of what exactly is entrenched by s 75(v) of the Constitution.

Jurisdictional error is the highly adaptable concept that lies at the heart of the interpretive approach. The purpose of the concept is that it is capable of responding to the specific circumstances of a decision. However, it might be possible to better understand and articulate the boundaries of executive power and the law, as well as predict where they might be drawn in specific cases, with a clearer understanding of the underlying values or normative influences driving judicial choices regarding the framing of the intention of parliament. Part II considers certain historical, social and political features of Australian government which should be recognised as having had an influence on shaping the values

306 Ibid.
307 This term was used by French CJ and Bell J in *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 49, when discussing the division between legislative and judicial power in the context of the implied freedom of political communication.
308 *Quin* (n 3); see chapter 3 at 3.6.
309 Ibid 36. See chapter 6 at 6.5.3 where it is argued that this interpretive approach, which is more in keeping with wider institutional values, can nevertheless be developed to protect standards of administrative decision-making.
310 *Probuild Constructions* (n 9).
311 Ibid 33.

being drawn upon in defining the role and function of judicial power within the Australian constitutional system.

PART II:
MAPPING THE INFLUENCES

5.

TRUST IN THE PEOPLE

'a democracy if there ever was one'

Sir Owen Dixon[1]

5.1 INTRODUCTION

The preceding chapters have described the Australian conception of judicial power and outlined how this has in turn influenced and shaped the principles of judicial review of administrative action. The best-known statement of the role and function of judicial review of administrative action in Australia comes from the judgment of Brennan J in *Attorney General (NSW) v Quin*.[2] In this, Brennan J underscored the importance of the judiciary remaining aware that it is 'but one of the three co-ordinate branches of government.'[3]

The judicial restraint that characterises the High Court's public law jurisprudence is often attributed to conservativism.[4] While its sources are most likely manifold, it seems that the way in which the powers of each branch of government have been envisioned as 'coterminous'[5] within the framework of the Australian Constitution is a key contributing factor. This contention has an affinity with legal process and institutional theories.[6] However, a key critique of such theories is that it is not possible to have a value-neutral concept of institutions. In this chapter, and the one that follows, it is argued that if the role of the judiciary is to be comprehended by reference to the way it 'co-ordinates' with the other branches of government, it is necessary to begin the work of producing a clearer picture of the way in which the roles of the other two institutions are also understood within the framework of Australian national government.

For reasons not only connected to constitutions, but also history and culture, there are liable to be different approaches or understandings of the roles of the legislature and the

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1 'Two Constitutions Compared' in *Jesting Pilate and Other Papers*, collected by S Woinarski (The Law Book Company, 1965) 100, 102.
2 ('*Quin*') (1990) 170 CLR 1.
3 Ibid 37.
4 See, eg, chapter 2 at 2.8.
5 Andrew Inglis Clark, Andrew Inglis Clark, *Studies in Australian Constitutional Law* (Charles F Maxwell (G. Partridge & Co), 1901) 205.
6 Legal process theory was touched upon in chapter 2 at 2.8.2 and below at 5.3.2.

executive in different nations. Even where there is a written constitution, such as in Australia or the United States, it is accepted that the text is accompanied by many 'unwritten rules'.[7] These rules can sometimes take the form of constitutional conventions, although as Gabrielle Appleby has noted, there are also principles that have been implied from the text of the Constitution.[8] However, there are other norms, that might not warrant definition as 'rules', but nevertheless play an influential role in shaping the concept of judicial power. There are likely to be many such norms, for instance those connected to cultural and societal attitudes, which serve to influence the way in which the roles of institutions, including courts, are perceived. The focus of this chapter, and the next, however, is on what the emphasis on form in judicial review in Australia might tell us about the institutional norms that exist in Australia.

To properly appreciate the ways in which the approach of Australian courts to judicial review of administrative action is distinct from the ways in which this task is approached by courts in other, comparable, nations, it is necessary to look beyond notions of judicial power itself, and to conceptions of the role and function of the other branches of government. This chapter and the one that follows suggest that one possible source of the different Australian approach to the exercise of judicial power in the public law context lies in the political ideals that were in the ascendancy at the time the Constitution was founded and have most likely continued to influence the way government is perceived in Australia.

The focus in this chapter is on the particular conception of democracy in Australia, which appears to have been influenced by 'new liberalism' or 'progressivism'. This conception of democracy underpins the Australian constitutional framework and helps to inform thinking about the role of Parliament, and in turn, the relationship between the legislature and the other branches of government. In the words of Edmund Barton, the Australian Constitution was deliberately and expressly designed to 'to enlarge the powers of self-government of the people of Australia.'[9] Observing Australia's political institutions in the early 1920s, James Bryce remarked that, of all the modern democracies he had studied, Australia was the one 'which has travelled farthest and fastest along the road

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7 See Gabrielle Appleby, 'Unwritten Rules' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 209, 209, 211-212.

8 Ibid 207.

9 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 17 (Edmund Barton).

which leads to the unlimited rule of the multitude.'[10] For reasons of history, and the ideologies that were in the ascendancy at the time of Federation, Australia's institutions of government have a majoritarian character that distinguishes them from those of the other English-speaking democracies with which it is most commonly compared.

This chapter suggests that this constitutional, institutional and political architecture has had an effect on the way in which the High Court has conceived and articulated its own role in the Australian system of government. As already outlined in chapter 2, one influence on the High Court's 'legalist' approach to interpretation is the particular view that the Court has of its own institutional limits and role within the constitutional framework, something that has informed the development of the separation of powers doctrine.

The Court has long recognised that the concept of responsible government is at the heart of the Constitution.[11] While this is well known, what seems to have received less attention are the ideas that might imbue this concept and how these in turn influence the scope of judicial power. It seems to be equated with a derivation of English political constitutionalism in the form that is often associated with the theory of A V Dicey. However, the social and political history of Australia would suggest that the notion of responsible government in Australia is possibly somewhat different, because the way it is understood has been influenced by Australian conceptions of democracy, which have long placed considerable faith in majoritarianism. The Constitution was designed to 'enlarge the powers of self-government', which means that for the most part its silences were deliberate, and, intended to be filled by the people themselves.

This is what is meant in chapter 2 by the claim that the approach to interpretation by the High Court has been crafted so as to leave space for 'politics'.[12] In this way, this conception of democracy in turn influences conceptions of legislative power, and the power of the High Court to restrain the other branches of government. It is for the Court to determine and enforce the limits of power within the terms of the Constitution. Other

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10 James Bryce, *Modern Democracies* (The Macmillan Company, 1921) vol 2, 166.

11 See, eg, *Amalgamated Society of Engineers' v Adelaide Steamship Co Ltd* (*Engineers' Case*) (1920) 28 CLR 129, 147. See chapter 2 at 2.8.2.

12 See at 2.8.2.

matters are to be resolved by the people themselves, through the 'ordinary constitutional means' of the political process.[13]

Chapter 6 suggests that the historical reliance upon government in Australia perhaps led to an attitude of what could be seen as greater trust in the administrative state itself, and more comfort with the distinctly un-Diceyan and pragmatic idea that administrative discretion does not always have to be controlled by courts, and, is perhaps better rendered accountable in other ways. Seen in this light, it is possible to accept that judicial preference for form over free standing or indistinct values is itself an expression of a commitment to another set of values. To borrow from, and reverse, the phrasing of Frederick Schauer, this can be recognised as the prioritisation by Australian judges of the values 'of the *system* in which they serve' over what may be their '*own* sense of the good.'[14]

Rather than being formalist, it can perhaps be better understood as a 'functionalist' approach to judicial review of both legislative and administrative action. Like other labels, functionalism is a term that has more than one application. This chapter draws upon the concept as used by Martin Loughlin, to describe a tradition in public law thought that was vibrant in throughout much of the 20th century but was in retreat by the 1980s.[15] Features of this tradition included faith in the capacity of the state to improve society, and a belief that true liberty is achieved *through* the state.[16] As the discussion of judicial review set out in the preceding chapters has already suggested, this concept has a certain resonance in Australia. It must be noted that this thesis does not purport to be historical, sociological, or comparative in nature. This chapter and the next must be read subject to these qualifications.

This chapter is organised as follows. Part 5.2 sets out the historical and political underpinnings of the concept of democracy in Australia. This section has two parts, the first looking at social and political culture in the decades around Federation, with a particular focus on the progressivism that was evident in the period. The second looks at constitutional design and interpretation. Part 5.3 uses the work of Martin Loughlin to

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13 Stephen Gageler, 'Beyond the Text: A Vision of the structure and function of the Constitution' (2009) 32 *Australian Bar Review* 138, quoting *Engineers Case* (n 11) 151 (Isaacs J).

14 Frederick Schauer 'Formalism' (1988) 97 *Yale Law Journal* 509, 543.

15 See, eg, Martin Loughlin, 'The Political Constitution Revisited' (2019) 30 *King's Law Journal* 5, 18.

16 Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 60.

explain the functionalist style in public law. This style is resonant with the dominant progressive influences described in part 5.2. Part 5.4 provides a sketch of the ways in which judicial review in Australia can be recognised as having a functionalist character. This discussion leads into chapter 6, which examines attitudes towards the role of the administrative state by reference to the unreasonableness ground in judicial review of administrative action.

5.2 THE POLITICAL AND HISTORICAL UNDERPINNINGS OF THE CONCEPT OF DEMOCRACY IN AUSTRALIA

There are several key studies of the history of the making of the Australian Constitution, which touch upon the politics and thinking of the decades before Federation.[17] These studies have acknowledged the pioneering nature of Australian democracy, something which is well-understood in Australian public law scholarship.[18] However, one thing that has received less attention is the way in which the political thinking and values that influenced this embrace of democratic institutions might in turn have conditioned the way in which the High Court has developed the concept of its own judicial power.

While there has been some engagement with this question, it has tended to focus on the ways in which progressive ideas might have influenced individual High Court judges.[19] However, the argument here is different, and consists of two main parts. The first is that, while different High Court judges have held different personal values and political beliefs, the common thread that unites the jurisprudence of the High Court across the decades since Federation is a notion that the role of the Court, in matters touching upon the control of legislative and executive power at least, is not to be the guardian of public morals or political opinion, but rather to support the proper working of the institutions of

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17 See, eg J A La Nauze, *The Making of The Australian Constitution* (Melbourne University Press, 1972); W G McMinn, *A Constitutional History of Australia* (Oxford University Press, 1979); Helen Irving, *To Constitute A Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999); and Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009).

18 See, eg, McMinn (n 17) 62-64; Irving (n 17) 60; and Aroney (n 17) 206, 135, 206-207.

19 See, eg, Ian Holloway, 'Natural Justice and the High Court of Australia: A study in Common Law Constitutionalism' (PhD Thesis, Australian National University, 1999), which examined the specific topic of natural justice, and the possible influence of progressivism and functionalism on natural justice. See in particular 65-73 and 91-95, where progressivism in Australia and its possible influence on the natural justice jurisprudence of Higgins and Isaacs JJ is discussed; See also Peter Bayne, 'Mr Justice Evatt's Theory of Administrative Law: Adjusting State Regulation to the Liberal Theory of the Individual State' (1991) 1 *Law in Context* 1.

government.[20] The second part of the argument is that the way in which the role and functions of these institutions is understood has been influenced by the 'progressive' or 'new liberal' ideas that had currency in the decades before and after Federation.

In 1921, James Bryce suggested that the concept of democracy in Australia was unique amongst those that he had studied, describing it as 'free from all external influences and little trammelled by intellectual influences descending from the past.'[21] Hugh Collins wrote in 1985 that the Australian political landscape appears 'novel' to English or American observers in that 'everything looks at once much the same and yet quite different.'[22] He attributed the difference to what he described as the 'essentially Benthamite' character of 'the mental universe of Australian politics.[23] One way in which Collins thought Australia's political culture was distinctive from, for example, those of the United States and the United Kingdom, in a way that could be considered 'Benthamite', is that it is that the Australian institutions of government are recognisably majoritarian in ways that are different from those of either nation.

This section of this chapter explores the possible reasons for this difference. It first contemplates the social and political culture of Australia in the decades around Federation. This section draws particularly on recent work of the political scientist and historian, Judith Brett,[24] and the historian, Marilyn Lake,[25] which helps to support the claim that progressivism was an important influence on the Australian conception of democracy. It then turns to consider the ways in which these progressive attitudes can be recognised in the text, and the silences, of the Constitution itself.

5.2.1 Social and political culture

The Australian Constitution was a product of its time. It was a much more 'modern' constitution than that of the United States, which was imbued with the natural rights ideals of the enlightenment period in which it was drafted, which had also helped to inspire the

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20 See chapter 2 at 2.8.2 and 2.9.3.
21 Bryce (n 10) 166.
22 Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147, 147.
23 Ibid 148.
24 Judith Brett, *From Secret Ballot to Democracy Sausage: How Australia Got Compulsory Voting'* (Text, 2019)
25 Marilyn Lake, *Progressive New World: How Settler Colonialism and Transpacific Exchange Shaped American Reform* (Harvard University Press, 2019).

French Revolution.[26] Individual liberty was key amongst them, as was a desire to constrain tyranny.[27] However, the Australian Constitution was written following a further century of economic, social and theoretical development. The Industrial Revolution and its aftermath wrought profound change in England and other industrialised nations. As Brett has observed, while 'John Locke was the foundational thinker for the United States, for Australia it was the philosopher and political reformer Jeremy Bentham.'[28] Brett noted that Bentham considered that 'without government and law, there are no rights', and he 'held a much more expansive view of the possibilities of government action than did America's founding fathers.'[29]

This is reminiscent of Collins' description of Australia as a distinctively 'Benthamite society'.[30] In his view, the aspects of Bentham's thought that were crucial to understanding the political culture of Australia were 'his utilitarianism, his legalism and his positivism.'[31] However, Helen Irving has said, alternatively, that it was Bentham's intellectual successor, J S Mill, 'for whom utilitarianism was a framework for democracy and human development', who was more influential on the development of Australia's constitutional and political system.[32] It is not the purpose here to seek to either prove or disprove Collins' claim that Australia can only be understood if it is regarded as a 'Benthamite society.'[33] However, the philosophies of key 19th Century figures like Bentham and Mill are likely to have been just as influential on the prevailing understanding of law and government in the decades before and after Federation as that of A V Dicey. As much as Dicey was an admirer of both figures, he sought to emphasise the classically liberal elements of their thinking, and did not agree with the way in which,

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26 Although in different ways and with different consequences. See, eg, Hannah Arendt, *On Revolution* (Faber, 2016) 141-148, and Martin Loughlin, *The Idea of Public Law* (Oxford University Press, 2003) 108-111.

27 See, eg, James Madison, The Federalist No. 51, in Alexander Hamilton, James Madison and John Jay, *The Federations Papers* (Oxford University Press, 2008) 256, where he described the need to not only divide the powers of government, but also the need for measures to prevent majoritarian tyranny; see also, eg, Martin Loughlin, *Foundations of Public Law* (Oxford University Press, 2010) 283-285; Mark Tushnet, *The Constitution of the United States of America: A Contextual Analysis* (Hart, 2nd ed, 2015) 13-15.

28 Brett (n 24) 2.

29 Ibid 2-3.

30 Collins (n 22) 147.

31 Ibid 148.

32 Irving (n 17) 215.

33 Collins (n 22) 148.

by the end of the nineteenth century, their work had been increasingly been drawn upon to support 'collectivist' reforms.[34]

Liberalism in Australia in the periods before and after Federation had a somewhat different character to this. The next section of this chapter describes the way in which certain historical circumstances led to Australia becoming a 'laboratory' for democracy. This leads into a discussion of progressivism in Australian politics in the decades around Federation.

(a) Early influences

James Bryce was a contemporary of Dicey at Oxford. His earlier work, *The American Commonwealth*[35] had greatly influenced the framers of the Australian Constitution.[36] He suggested in *Modern Democracies*, published in 1921, that the concept of democracy in Australia was somewhat unique. He considered that the features of the Commonwealth government were 'highly democratic', listing them as follows:

> Universal suffrage at elections for both Houses of Legislature.
>
> One-member districts equal, broadly speaking in population.
>
> Triennial elections.
>
> No plural voting.
>
> Payment of members.
>
> No [legislative] veto by the Executive.
>
> Complete dependence of the Executive upon the larger House of the Legislature.
>
> Scarcely any restrictions on legislative power (other than those which safeguard State rights).

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34 See, eg, Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 364 and Matthew Lewans, *Administrative Law and Judicial Deference* (Hart, 2016) 32-35.

35 (Macmillan, 2nd ed, 1889).

36 La Nauze (n 17) 18-19; Aroney (n 17) 78-79, 87; and Stephen Gageler, 'James Bryce and the *Australian Constitution*' (2015) 43 *Federal Law Review* 178.

Prompt and easy means of altering the Constitution.[37]

It should be noted that suffrage was not universal. There were no property qualifications on voting in federal elections, and both men and women over the age of 21 were able to vote. However, the *Commonwealth Franchise Act 1902* (Cth) explicitly denied voting rights to First Peoples as well those who had migrated to Australia from Asia, Africa or the Pacific Islands.[38]

Bryce noted that the features he had listed, with the exception of democratic upper chambers, all existed at the state level as well. With the exception of the last-named feature, which has not been borne out by experience,[39] each of these things is now taken for granted to some extent, however at the time, they were the stated goals of advocates of what was viewed to be a 'radical'[40] kind of democracy. That they were all united together in Australia prompted Bryce to comment that '[o]ne can hardly imagine a representative system of government in and through which the masses can more swiftly and completely exert their sovereignty.'[41] Bryce assessed the 'Australian schemes of government' as more democratic than those of either Canada or the United States.[42] They were certainly more so than England, where property requirements had only just been removed from male franchise at the time Bryce was writing, and would remain in place for women until 1928.[43]

In making the case that Australia is a Benthamite society, Hugh Collins drew upon the influence of Chartism in pre-Federation Australia.[44] Chartism was a movement in England in the 1830s and 1840s which was driven by the new working class that had been created by the Industrial Revolution. Chartists sought to protest their exclusion from

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37 Bryce (n 10) 178.

38 Section 4, which was entitled 'disqualifications', provided that '[n]o aboriginal native of Australia Asia Africa or the Islands of the Pacific except New Zealand shall be entitled to have his name placed on an Electoral Roll unless so entitled under section forty-one of the Constitution.'

39 It has proven difficult to achieve the double majority required by the process set out in s 128 of the Australian Constitution. Of the 44 referendums that have been held, only 8 have been successful, with the last vote in favour of constitutional change occurring in 1977—see George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010, 88.

40 Bryce (n 10) 179; see also McMinn (n 17) 62.

41 Bryce (n 10) 178.

42 Ibid 179.

43 They were removed by the *Representation of the People (Equal Franchise) Act 1928*, 18 & 19 Geo 5, c 12. Women over the age of 30 who owned property, or who had husbands who did, had already been granted the vote by the *Representation of the People Act 1918*, 8 Geo 5, c 4.

44 Collins (n 22) 150; see also Gabrielle Appleby, Alexander Reilly and Laura Grenfell, *Australian Public Law* (Oxford University Press, 3rd ed, 2019) 49.

political power, and the demands of the 'Charter' from which they derived their name included manhood suffrage, secret ballots, regular elections and the removal of the requirement that members of Parliament own property.[45] The resemblance between the demands of the Chartists and the list of features noted by Bryce is instantly recognisable. Some followers of Chartism were transported to Australia,[46] while others, such as the influential Premier of New South Wales, Sir Henry Parkes, migrated.[47]

By the 1850s, Parkes and others were advocating for manhood suffrage.[48] Collins referred to the historian Keith Hancock as having noted that by contrast with England where such reforms took much longer to achieve, 'practically the whole political programme of the Chartists' had been realised '[w]ithin ten years of the discovery of gold' in Australia.[49] The degree to which this was true varied from one colony to another. The South Australian Constitution, for example, was particularly radical, even incorporating manhood suffrage for the lower house, and an elected upper chamber, albeit with property restrictions on the franchise for this.[50]

According to the historian John Hirst, while Parkes and those who shared his views were active in Sydney in attempting to achieve the aims of the Chartists,[51] the drastic expansion of the male franchise that had occurred in the 1850s in New South Wales had been somewhat of an accident.[52] The British Parliament had been persuaded, in part by fears of former convicts becoming the dominant political group in New South Wales, to set the rate of rent a man needed to pay to be able to vote at a lower rate, to enable more recently arrived free settlers, who were less financially established, to vote. In doing so they failed

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45 John Hirst, *Australia's Democracy: A Short History* (Allen & Unwin, 2002) 34.

46 Marian Sawer, 'Pacemakers for the World?' in Marian Sawer (ed) *Elections: Full, Free & Fair* (The Federation Press, 2001) 1, 1-2; Paul A Pickering, 'A wider field in new country: Chartism in colonial Australia' in Marian Sawer (ed) *Elections: Full, Free & Fair* (The Federation Press, 2001) 28, 34; Hirst (n 44) 35.

47 Sawer (n 46) 1-2; Hirst (n 45) 37; see also Sir Thomas Bavin, *Sir Henry Parkes: His Life and Work* (Angus & Robertson, 1941) 3-4, where Parkes' membership of the Birmingham Political Union, which Bavin described as an 'alliance of all classes' in support of the Reform Bill of 1832. For a more extended account of Chartists and their influence in Australia see Pickering (n 46) 28.

48 See Bavin (n 47) where it is noted that Parkes' 'first public speech' in New South Wales was 'made at a demonstration in favour of universal suffrage in 1849.'

49 Sir Keith Hancock, *Australia* (Ernest Benn Ltd, 1930) 71, cited by Collins (n 22) 150-151.

50 *Constitution Act 1856* (SA), ss 6 and 16; see Appleby, Reilly and Grenfell (n 44) 52, where it is noted that the South Australian Constitution 'was the most democratic constitution of its time' and 'reflected many of the goals of the Chartist Movement.' See also Sawer (n 46) 2, where it is noted that in Victoria, 4 out of the 6 demands of the Charter had been met by the 1850s.

51 John Hirst, *The Strange Birth of Australian Democracy* (Allen & Unwin, 1988) 19-20.

52 Ibid 24-20.

to understand the cost of living in Sydney. By setting the rate so low, almost every householder in Sydney was able to vote. Inflation caused by the gold rush continued the expansion of the franchise. As Hirst presents it, this meant that by the end of the decade, support for 'manhood suffrage' was 'no longer a radical position—it could be depicted as a mere tidying up operation'.[53] In Hirst's depiction, reforms that in England had to be hard won came about long before Federation, mostly by circumstance rather than agitation.

By the 1890s in Australia, there were no longer property restrictions on the franchise in South Australia, Victoria and New South Wales.[54] Property qualifications were abolished in Western Australia and Tasmania in the 1890s, and last of all in Queensland in 1905.[55] In South Australia, the vote was granted to women in 1894, an achievement 'beyond the ambition of the Chartism'.[56] This meant that by the time of Federation, majoritarianism was not a fearful spectre. Instead, Australia was a long way down the path towards it. More so, what Brett, in her recent work on the embrace of democracy in Australia, has called a 'penchant for uniform bureaucratic solutions' was already on display when it came to the organisation and staging of elections.[57]

Brett gives an account of the continuing importance of democracy to Australians, detailing the attachment to compulsory voting, and the way in which election days have become 'Saturday festivals of democracy'.[58] Brett shows that these cultural attitudes towards democracy are crucially underpinned by these 'bureaucratic solutions', many of which were devised in the decades before Federation, and later refined by the independent institutions set up by the Commonwealth government to administer elections.[59] This account of certain continuities in attitudes towards democracy helps support the argument in this chapter that faith in majoritarianism has been an influence on the political culture of Australia, and by extension, its judicial culture as well. It further helps to introduce a concept that is explored in the next chapter, of another 'faith', in the use of legislation

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53 Ibid 101.

54 See McMinn (n 17) 62. McMinn documents that this was achieved in South Australia, Victoria and New South Wales by the end of the 1850s.

55 Ibid.

56 Ibid 63; see also Brett (n 24) 40-41.

57 Brett (n 24) 37.

58 Ibid 164.

59 See also Graham Orr, *The Law of Politics: Elections, Parties and Money in Australia* (The Federation Press, 2010) 4, who noted that 'Electoral legislation in Australia is exceedingly detailed, to the point of being overwrought.' See further at 7-8; and see Sawer (n 46) 15-18.

and administration to achieve the objectives of government. This second faith can be regarded as related to the first, since, as Loughlin explains, for functionalists 'legislation, as the embodiment of the democratic will, is the highest form of law.'[60]

The secret ballot, another important step towards democracy,[61] was one such 'bureaucratic solution'. As Brett explained, the adoption of the secret ballot was crucial in ensuring elections were not only fair, but orderly.[62] While it is sometimes mistakenly suggested that the secret ballot was an Australian innovation, what was actually pioneered was a new means of staging it.[63] In other places where it had been employed, voters arrived with their own ballots, often given to them by the candidates themselves, already filled in. However, the method first adopted in Victoria in 1855 used an approach that had been proposed by Bentham, in which all 'materials needed to vote would be supplied' to the voter upon arrival at the polling place, and 'the government would bear the cost.'[64] Before this was implemented, the further innovation of the private voting booth was added to the scheme, and according to Brett, the combined effect of the provision of ballot papers and voting booths 'made secret voting a workable reality.'[65]

The fine-tuning of electoral systems continued beyond this. In the 1850s, South Australia created salaried government official positions for the management of electoral rolls and also for a returning officer, which Brett regards as 'the first permanent electoral administration in the world'[66], and also the 'first step' in a 'proud history of non-partisan electoral administration'.[67] Again, these reforms were inspired by the work of Bentham.[68] Then, in Queensland in the 1890s, something close to the contemporary system of preferential voting used for federal elections was adopted.[69] These and other innovations

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60 Loughlin (n 16) 60; see also Loughlin (n 34) 401.
61 See McMinn (n 17) 63.
62 Brett (n 24) 24-25.
63 Ibid; Lake (n 25) 5.
64 Brett (n 24) 22. The initiative was proposed by Henry Chapman, a member of the Victorian Legislative Council who had been influenced by the work of Bentham and Mill—see 20-21. Chapman was a friend and correspondent of J S Mill – see Sawer (n 46) 8, 18
65 Brett (n 24) 22.
66 Ibid 37.
67 Ibid 35; see also Orr (n 59) 9-10.
68 Brett (n 24) 36-37.
69 Ibid 32; see also 29-31 for an account of Catherine Spence's long-time advocacy of the single transferable voting system devised by Thomas Hare, the basis for the Australian system of voting, which is neither first past the post nor simply proportional, and also Lake (n 25) 78-79 for reference to her advocacy for the concept in the United States. See further Benjamin Reilly, 'Preferential voting and its political consequences' in Marian Sawer (ed) *Elections: Full, Free & Fair* (The Federation

were drawn upon after Federation, as the Commonwealth Government took steps to establish an independent Commonwealth electoral administration, create a comprehensive electoral roll, and then ensure that voting, eventually made compulsory in 1924, was as easy to access as possible, including by allowing for Saturday and absentee voting.[70] Regular refinements, to ensure that it continues to function efficiently and fairly, remain a feature of the electoral system.[71]

As Brett correctly observed, while this kind of electoral detail can seem an 'arcane and specialist' area, the flexible and highly refined Australian electoral system sheds light on attitudes to democracy in Australia.[72] Australia's electoral system remains distinctive for its integrity, efficiency and fairness.[73] The unusual combination of mandatory and preferential voting[74] continues to be an important factor in Australia's democratic stability.[75] In Brett's view, the care taken by various politicians and bureaucrats in the creation of this system is the source of the 'political stability' Australia has 'enjoyed for more than a century.'[76] More than this though, as Brett's account shows, many of the key elements that make this system function so well were on their way to being established

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Press, 2001) 78, 82-85 for an account of the refinement of the system and Sawer (n 46) 22, for reference to the view that this is a particularly democratic method of recording votes.

70 These initiatives are detailed by Brett (n 24) chapters 6-13 in particular. For further on initiatives to ensure that, as voting is compulsory, it should also be easy, see Lisa Hill 'A Great Leveller: Compulsory Voting' in Marian Sawer (ed) *Elections: Full, Free & Fair* (The Federation Press, 2001) 129, 131. For Saturday voting, see 136.

71 As Marian Sawer has noted, an important development was the establishment of the Joint Standing Committee on Electoral Matters (JSCEM) in 1983 (initially under another name). The JSCEM conducts regular, public, inquiries into the conduct of federal elections, and as Sawer noted, is an 'extremely important forum for obtaining bipartisan support for technical improvements in electoral administration.' See (n 46) 15.

72 Brett (n 24) 10.

73 There are many examples of ways in which voting is easier in Australia than it is elsewhere, of which Saturday voting is just one The United States has failings in its electoral system significant enough to cause the Democracy Intelligence Unit to classify it amongst the world's 'flawed democracies'—see (n 401). Brett gives examples of features that distinguish the Australian system. One is that, since the first federal election, provision has been made for absentee voting in Australia. In the United Kingdom, however, voters must vote at the polling place closest to their registered address. Elections are held on Tuesdays, so voters must be able to get home from work in time to vote. As Brett observed, such rules advantage certain groups and this 'tilts the electoral system back to the propertied'—see (n 24) 81-83, and also Hill (n 70).

74 The combination of both preferential *and* compulsory voting is itself unusual. See Joan Rydon, 'Compulsory and preferential: The distinctive features of Australian voting methods' (1968) 6 *Journal of Commonwealth and Comparative Politics* 183 and more recently Keith Dowding 'Australian exceptionalism reconsidered' (2017) 52 *Australian Journal of Political Science* 165, 175-176.

75 See, eg, Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy? The Role and Structure of Policy' in Mark A Graber, Sandford Levinson and Mark Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 395, 396, 416; see also Benjamin Reilly, 'Preferential voting and its political consequences' in Marian Sawer (ed) *Elections: Full, Free & Fair* (The Federation Press, 2001) 78, 78-79, 91, 94.

76 Brett (n 24) 10.

prior to Federation. These were the foundations of the 'radical' democracy that Bryce observed two decades later. Majoritarianism concerned Dicey[77] and the authors of the *Federalist Papers*.[78] For the most part this was not the case in Australia in 1901, where utilitarian ideas had already been drawn upon to design an electoral machinery capable of blunting its potential risks.

When the present-day electoral system of Australia is compared with that of the United Kingdom or the United States, it is possible to recognise that the commitment to democracy has different contours in Australia. The most prominent example[79] is compulsory voting, pioneered in Queensland and introduced at the Commonwealth level at the 1925 election after a fairly steep decline in participation rates at the 1922 election, later extended to all federal and state government elections in Australia.[80] The concept of being compelled to vote would likely be 'anathema' to 'American-style liberalism', yet in Australia suggestions that compulsory voting requirements might be removed tend to be met with fierce opposition from the electorate.[81] Brett argues that that this 'embrace of compulsory voting tells us a great deal about the way our history has shaped our political culture.'[82] The historian Benjamin Jones has suggested that this attachment to compulsory voting signifies an Australian adherence to 'the civic republican ideal of

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77 See, eg A V Dicey, *Lectures on the Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 2nd ed, 1920 (reprint of 1914 edition)), lxiv, where he drew links between expansions in suffrage and what he considered to be the undue influence of 'socialists'. See also at 57-59.

78 Indeed, such a view was key to the federalist position. See, eg, James Madison, The Federalist No. 10, in Alexander Hamilton, James Madison and John Jay, *The Federations Papers* (Oxford University Press, 2008) and Tushnet (n 27) 13-15.

79 For others, see (n 73). By comparison the United Kingdom retains a non-compulsory, first past the post, system. A proposal to change to a preferential system was rejected at a referendum staged in 2011, after members of both major parties campaigned against it—see, eg, John Curtice, 'Politicians, voters and democracy: The 2011 UK referendum on the Alternative Vote' (2013) 32 *Electoral Studies* 215, 219-221. This system means that governments are usually elected with the support of less than 50 percent of those electors who voted. The last time a government was elected with more than 50 percent of the vote was in 1931. See Lukas Audickas, Richard Cracknell and Phillip Loft, 'UK Election Statistics: 1918-2019: A Century of Elections' (Briefing Paper No CBP7529, House of Commons Library, Parliament of the United Kingdom, 18 July 2019) 7, 12.

80 Brett (n 24) 137. Brett noted that this was achieved in most states for lower house election by the 1940s, but it took until 1985 for South Australia to adopt compulsory voting for Legislative Council elections; see also Anne Twomey, 'Compulsory Voting in a Representative Democracy: Choice, Compulsion and the Maximisation of Participation in Australian Elections' (2013) 13 *Oxford University Commonwealth Law Journal* 283, 285-287.

81 See Benjamin T Jones, 'Elections: Aren't They All The Same?' in Benjamin T Jones, Frank Bongiorno and John Uhr (eds) *Elections Matter: Ten Federal Elections that Shaped Australia* (Monash University Publishing, 2018) xi, xi-xii. Its introduction also met with little opposition – see Rydon (n 74) 184; Brett (n 24) 134-137; and Twomey (n 80) 287. The constitutional validity of compulsory voting was upheld in *Judd v McKeon* (1926) 38 CLR 380.

82 Brett (n 24) 3.

communitarianism', which he defines as 'an ancient intellectual tradition that values the common good of the community over individual good, and even individual rights.'[83]

(b) Influence of progressivism in Australia around the time of Federation

By the late nineteenth century, liberalism had taken a progressive turn, and the laissez-faire notions that had until then been prevalent were being challenged.[84] The state had begun to be more widely perceived as having a role in the advancement of society, and the foundations of what would become the welfare state later in the twentieth century were already being laid.[85] As George Wood put it in the foreword to an essay written by H V Evatt whilst still a student at the University of Sydney, '[t]he state must become the instrument, not the tyranny of person, of caste, of superstition, but of the common will of the people.'[86] According to Loughlin, '[a]t its core . . . new liberalism stood in opposition to the social atomism of classical liberalism' and it held 'that 'real' freedom could not be realized without collective action on a significant scale.'[87]

Progressivism is a movement that sought to bring about these objectives.[88] It tends to be associated with the United States.[89] However, it also 'strongly influenced Australian intellectuals, politicians and public administrators between the 1890s and the 1920s', although the term itself was used less in Australia.[90] Political ideas which can be gathered under the rubric of 'progressivism' were the driving force behind Australia and New Zealand being 'once rightly regarded as the most 'advanced' social laboratories in the world.'[91] The historian Graeme Davison noted that '[s]upport for progressive ideas was strongest among the professional middle classes', who he said held 'a belief in a more extensive use of state power.'[92] He further said that '[m]any of its ideals found expression

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83 Jones (n 81) xii.

84 See, eg, Loughlin (n 34) 361.

85 See, eg, Stuart Macintyre, 'Liberalism' in Graeme Davison, John Hirst and Stuart McIntyre (eds) *The Oxford Companion to Australian History* (Oxford University Press, rev ed, 2001) 391, 392.

86 G A Wood, 'Foreword' in H V Evatt, *Liberalism in Australia: An Historical Sketch of Australian Politics down to the year 1915* (Law Book Co, 1918).

87 Loughlin (n 34) 361.

88 Although in this the Australian variant should perhaps be distinguished from that of the United States, where there was more unease amongst progressives with 'legislation and public control' – see Arthur S Link and Richard L McCormick, *Progressivism* (Harlan Davidson, 1983) 22.

89 For an account of the movement in the United States, see ibid.

90 Graeme Davison, 'Progressivism' in Graeme Davison, John Hirst and Stuart McIntyre (eds) *The Oxford Companion to Australian History* (Oxford University Press, rev ed, 2001) 535.

91 Russel Ward, 'Translators Foreword' in Albert Métin, *Socialism Without Doctrine* tr Russel Ward (Alternative Publishing Co-operative, 1977) 4; see also Irving (n 17) 43.

92 Davison (n 90) 535.

through the Deakinite wing of the Liberal Party.'[93] Alfred Deakin was a prominent Victorian politician, progressive liberal,[94] and key advocate for Federation.[95] He became the second Prime Minister of Australia, and went on to serve two further terms.[96] His influence during the early years of Federation was such that H V Evatt wrote that even when he was 'without a majority behind him, he was the unacknowledged leader of the House.'[97]

Marilyn Lake has recently shown that many tenets of liberal progressivism were incubated in Australia, but also that these ideas were inextricably linked with the ideas and attitudes of settler colonialism.[98] Lake noted that progressives regarded themselves as '"pioneers" of labor reforms, women's rights and children's services.'[99] At the same time, 'progressivism rested on the division of the world into advanced and backward peoples',[100] and that the 'project of progressive reform was imbued with settler colonialism's '"regime of race," which informed the ascendant politics of "whiteness."'[101] Australia's pathbreaking democratic and social reforms are bound up with this history of racism. Lake described 'political equality' and 'racial exclusion' as 'twin ideals'.[102] The historian Stuart Macintyre wrote that the progressive liberalism of figures like Deakin sought to both 'nurture a particular kind of social solidarity' while also 'safeguard[ing] the racial purity of the nation by the racially restrictive White Australia policy'.[103] Brett set out the debate in the Commonwealth Parliament regarding the Franchise Bill of 1902, in which some of the leading progressives, like H B Higgins,

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93 Ibid.

94 Michael Roe, *Nine Australian Progressives: Vitalism in Bourgeois Social Thought 1890-1960* (University of Queensland Press, 1984) 18; J A La Nauze, *Alfred Deakin: A Biography* (Angus & Robertson, 1979) 105-107; and Judith Brett, *The Enigmatic Mr Deakin* (Text, 2018), for example at 211-212.

95 See J A La Nauze (n 94) 157; McMinn (n 17) 108, Michael Roe (n 94) 18; Stuart Macintyre, 'Alfred Deakin' in Graeme Davison, John Hirst and Stuart McIntyre (eds) *The Oxford Companion to Australian History* (Oxford University Press, rev ed, 2001) 176, 176; and Brett (n 94) 102-103, 201-204, chapter 5.

96 From September 1903-April 1904, July 1905-November 1908 and June 1909-April 2010.

97 H V Evatt, *Liberalism in Australia: An Historical Sketch of Australian Politics down to the year 1915* (Law Book Co, 1918) 66.

98 Lake (n 25).

99 Ibid 18.

100 Ibid 68.

101 Ibid 5.

102 Ibid 12.

103 Macintyre (n 95) 177.

gave the right to vote in federal elections to women, while at the same time denying it to Indigenous peoples.[104]

Lake's primary concern is the way in which progressivism interacted with settler colonialism not only in Australia, but also in New Zealand and the United States. Lake argues that there was considerable trans-Pacific sharing of progressive and settler-colonialist ideas. As a part of this, she documents the correspondence between influential political and legal figures in both Australia and the United States. For this reason, her work provides a useful account of the contact between those involved not only in the drafting of the Australian Constitution, but also in its interpretation in the first decades of Federation, and prominent figures in the realist and pragmatic movements in the United States.

In Australia, as Lake demonstrates, what was known as new liberalism or 'progressivism' had a currency that it lacked elsewhere, other than perhaps New Zealand. Politics in Australia had a different character.[105] Macintyre has written that liberalism in 19th century Australia 'was not a dissident but a dominant creed.'[106] The way in which Chartist reforms were achieved quickly in Australia has been outlined above. Coupled with this democratic mindset was a positive view of the role of the state in organising society. The thinking of the time was reflected in what constitutional historian Helen Irving refers to as 'a new Utopian genre [of fiction] in which social experimentation through legislation creates an ideal society.'[107] Evatt put the relationship between democracy and new liberalism as follows:

> Liberalism has grown to see that democracy is founded not merely on the private interest of the individual, but also on the function of the individual as a member of the community; and so the common good is based on the common will.[108]

Lake gives an account of the reflections of Harvard academic, Josiah Royce, who travelled to Melbourne and Sydney in the late 1880s and spent time with Deakin. From

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104 Brett (n 24) chapter 5.

105 There is much literature on this, but see, eg, Judith Brett, *Australian Liberals and the Moral Middle Class: From Alfred Deakin to John Howard* (Cambridge University Press, 2003) 1-7; Irving (n 17) chapter 2; and Macintyre (n 85) 391.

106 Macintyre (n 85) 391.

107 Irving (n 17) 38.

108 Evatt (n 97) 74.

Deakin he formed the impression that while the early leaders of America had feared 'the despotism of European tyrants' and had so 'emphasized individual liberty', a different approach was being taken in Australia. In Royce's view, 'Australian leaders focused on building "some new social tie" that would bind people together.'[109] His biographer, J A La Nauze, said of Deakin that he believed that '[t]here must be positive protection for members of society for whom an abstract equality of opportunity did not in fact secure equal opportunities of living.'[110] There was a sense amongst the leading politicians of the era that government was not to be feared but could and should be harnessed in service of the welfare and betterment of society.

This is not to suggest that within this paradigm, there were not differences of opinion over every kind of matter.[111] For example, Lake records that influential Australian lawyers and politicians like H B Higgins and Andrew Inglis Clark engaged in '[v]igorous debates over constitutional law and labor reform' with American counterparts such as Oliver Wendell Holmes Jr, Felix Frankfurter, Louis Brandeis and Roscoe Pound.[112] Some in Australia, such as Clark, were admirers of the United States Constitution, including the rights protections that it contained, and the power that the Supreme Court had assumed within it.[113] He wrote approvingly of it 'that while it places the ultimate source of all political authority in the whole body of the citizens, yet [it] erects effectual barriers against all attempts to establish democratic despotism.'[114] His contemporary Higgins took a different view. Lake says of him that he was 'strongly committed to the potential of the law as an instrument for social and political reform.'[115] He regarded the federalist features of the draft Australian Constitution as counter-majoritarian, fearing, in the words of Lake, that the 'constitution would thwart the national will—the will of the people—erecting a barrier of reform for all time.'[116]

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109 Lake (n 25) 46, quoting Josiah Royce, 'Impressions of Australia' *Scribner's* 9, no 1 (January 1891) 85.
110 LaNauze (n 94) 106.
111 Link and McCormick note that progressives in the United States 'were a varied and contradictory lot', and the same is no doubt true of those in Australia—see (n 88) 2.
112 See Lake (n 25) 68.
113 Ibid 108, 113-114; see also John Williams, '"With Eyes Open"': Andrew Inglis Clark and our Republican Tradition' (1995) 23 *Federal Law Review* 150, 154-155, 157-158 where he discusses Clark's belief in 'natural rights' and the ideals that flowed from this.
114 Clark (n 5) 387.
115 Lake (n 25) 117.
116 Ibid 119.

Higgins and Clark engaged in a public debate through the exchange of newspaper articles on the question of states' rights.[117] Yet Lake regards them both to have been progressives. Clark corresponded with Holmes, a pioneer of realism, and shared Holmes' view that '[t]he law was not a "dead letter"…but a "living force", responsive to society's changing needs.'[118] However, by the start of the twentieth century, progressives in the United States, such as Holmes himself, had begun to perceive that both the Constitution and the courts 'were serious obstacles to reform.'[119]

This is where the progressivism of someone like Higgins diverged from that of Clark. The constitutional historian John Williams observed of Clark that, while he 'believed in an expanded and representative electoral system, he nevertheless was aware of the dangers of the "majority of the hour".'[120] He believed that institutions should empower the people, but 'he proposed institutional arrangements consistent with natural rights doctrine—primarily institutional checks and balances.'[121] Clark also proposed that certain rights protections, modelled on some found in the United States Constitution, be included in the Australian Constitution, something considered in more depth in the next section of this chapter.

Higgins, on the other hand, was a more radical democrat,[122] deeply sceptical of 'judge-made law',[123] who expressed the beliefs that the judicial function was 'to interpret and apply the law, not make it or change it' and that in a democracy social progression and improvement should be left 'to the action of public opinion, inspired by public needs and

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117 Ibid 117-120.

118 Lake (n 25) 120, quoting Clark, *Studies in Australian Constitutional Law* 20-21; see also Williams (n 113) 161-162, for Clark's friendship with Holmes.

119 Lake (n 25) 122.

120 Williams (n 113) 158.

121 Ibid 158.

122 Yet he still opposed granting Indigenous peoples citizenship rights. See Brett (n 24) 63-64 for some commentary about this. For the evolution of Higgins' radical politics more generally, see John Rickard, *H B Higgins, The Rebel as Judge* (Allen & Unwin, 1984), chapter 4.

123 This is a recognisably Benthamite attitude. Bentham had a 'profound dissatisfaction with the common law', which he perceived as 'corrupt, unknowable, incomplete and arbitrary'. This motivated his pursuit of the 'codification' of law – see Phillip Schofield, 'Jeremy Bentham: Legislator of the World' (1998) 51 *Current Legal Problems* 115, 122. For an example of Bentham's views on the comparative merits of common and statute law, see 'Papers relative to Codification and Public Instruction: including correspondence with the Russian Emperor and divers constituted authorities in the American United States: Supplement, No V' in Phillip Schofield and Johnathan Harris (eds) *The Collected Works of Jeremy Bentham – 'Legislator of the World': Writings on Codification, Law and Education* (Clarendon Press, 1998) 113, 145.

speaking through its appropriate organs of Congress and polling-booth.'[124] Clark's affinity with Holmes, who famously dissented in *Lochner v New York* ('*Lochner*'),[125] meant that he had a 'similar appreciation of the wider social and economic reality associated with legal reasoning',[126] something Higgins also shared.[127]

Although not a member of the Labor Party, Higgins was sympathetic to many of its causes, and interested in industrial reform. He had been influential in ensuring that the unique conciliation and arbitration power was written into the Australian Constitution.[128] He is perhaps still best known in Australia for his authorship of the 1907 *Harvester* decision[129] while President of the Court of Conciliation and Arbitration, in which he specified the requirements of a living wage.[130]

This ground-breaking decision created considerable interest in the United States, and Higgins forged a close correspondence with Felix Frankfurter, who shared similar beliefs.[131] The political strength of the labour movement in Australia combined with the fact that key non-aligned figures like Higgins and Deakin[132] were supportive of many of its aims led to the early establishment of a system of industrial relations in which the state played a much more dominant role than elsewhere.[133] This belief that the state had a role

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124 Lake (n 25) 123, quoting H B Higgins,' The Rigid Constitution' (1905) 20 *Political Science Quarterly* 203, 211; see also Rickard (n 122) 94-95.

125 ('*Lochner*') (1905) 198 US 45; see (n 135).

126 John Williams, 'Battery Point Revisited: Andrew Inglis Clark's *Studies in Australian Constitutional Law*' in Richard Ely, Marcus Howard and James Warden (eds) *A Living Force: Andrew Inglis Clark and the Ideal of the Commonwealth* (Centre For Tasmanian Historical Studies, The University of Tasmania, 2001) 355, 363.

127 According to Lake, during the hearing of the *Harvester* case (see n 129), Higgins himself interviewed the wives of workers to assess the sum they required to meet the cost of living, thus pioneering 'a form of sociological jurisprudence that anticipated the famous Brandeis brief' that was put before the Supreme Court of the United States in *Muller v Oregon* 208 US 412 (1908), see Lake (n 25) 126.

128 See *Australian Constitution,* s 51(xxxv); see, eg, Rickard (n 122); 86-87; Aroney (n 17) 281-282; and Lake (n 25) 125.

129 *Ex parte H V McKay* (1907) 2 CAR 1.

130 Asked to determine the meaning of the phrase 'fair and reasonable' wages in accordance with s 2(d) of the *Excise Tariff Act 1906* (Cth), Higgins J said it meant the standard appropriate for meeting 'the normal needs of the average employee regarded as a human being living in a civilized community'—see ibid 3.

131 Lake (n 25) 128-135. See also Sir Owen Dixon, 'Mr Justice Frankfurter: A Tribute from Australia' (1957) 67 *Yale Law Journal* 179, 180.

132 See, eg, Brett (n 105) 20-27, where an account is given of the way in which for the first decade following Federation, Deakin's Liberals found more natural allies on most questions of policy, including this one, in the Labor Party than in the avowedly 'anti-socialist' conservatives. It was only the Labor Party's insistence on strict enforcement of party lines through the requirement that members take 'the pledge' that ultimately caused the Liberals to form a coalition with the conservatives owing to their objections to the pledge on the basis it interfered with free will and individual conscience.

133 See, eg, Bryce (n 10) 173; see also Evatt (n 97) 56, for a similar claim.

in the mediation of industrial disputes and the setting of wages and conditions of workers illustrates clearly that the dominant political ideologies of the time were not those of laissez faire liberalism. The inclusion of s 51(xxxv) in the Constitution can perhaps be contrasted with the decision of the United States Supreme Court in *Lochner*,[134] where a majority invalidated state legislation setting conditions for bakery workers on the basis that it contravened the freedom of contract that they considered was protected by the Fourteenth Amendment.[135]

What reflection on the political ideologies of key figures in the Federal movement like Higgins, Deakin and Clark, and the reforms they prioritised, helps to show is that in Australia in the decades before and after Federation it was the ideas and attitudes of new liberalism or progressivism that were in the ascendancy. This is not to say that there were not those with conservative views, or even different ideas amongst progressives themselves regarding the desirability of majoritarianism and the intervention of the state in society and the lives of citizens. However, the politics of Australia in the period were characterised by attitudes that were open to the concept that the power of the state could be harnessed to the popular will. This progressive strain had a lasting influence on liberalism in Australia.[136]

5.2.2 Constitutional design and interpretation

While recent work has attempted to challenge it,[137] the perception that the Australian Constitution is not imbued with 'values' has been a prevailing one. This largely seems to be because it contains no soaring language seeking to define the aspirations of the

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134 *Lochner* (n 125).

135 Ibid 541-546 (Peckham J). In his dissenting judgment, at 547, Holmes J stated that the Constitution did not protect the economic theories that might only be shared by sections of the population, including laissez faire.

136 Stuart Macintyre suggested, for instance, that the Deakinite style of progressive liberalism remained influential in Australian politics until Robert Menzies establishment of the modern Liberal Party in 1944 'reasserted a more conservative liberalism' – see (n 85) 392. See also his separate entry in the same. 'Socialism' 600, 600, where he noted that 'state socialism has been the dominant tradition in Australia', although it has tended to be what Albert Métin called, in 1901, 'socialisme sans doctrines' – see Albert Métin, *Socialism Without Doctrine* tr Russell Ward (Alternative Publishing Co-operative, 1977) and also Evatt (n 97) 56, 62, for reference to the 'Labour' Party's 'glorification of practical measures and practical reforms.'

137 See, eg, Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and aspirations in the Australian Constitution' *International Journal of Constitutional Law* 14 (2016) 60; Rosalind Dixon (ed) *Australian Constitutional Values* (Hart, 2018); and Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 143.

nation.[138] For instance, Chief Justice of Australia, Robert French, while he was still a judge of the Federal Court, stated:

> To read the Australian Constitution is not to experience a significant sense of moral uplift. It sets out no ringing declaration of shared values nor statement of fundamental human rights and freedoms protected by it. There is no historical catharsis, no revolutionary big bang from which our nationhood emerged and expanded.[139]

Similarly, Finn wrote that in Australia there had been no revolution as in the United States and '[n]o clash of grand theories.'[140] Instead, there had been '[j]ust evolution, and apparently prosaic evolution at that.'[141] This echoes a sentiment that was perhaps present at Federation. As historian Mark McKenna has noted, on 1 January 1901, the *Adelaide Advertiser* said that Federation had been 'a process of evolution, not revolution'.[142]

The document itself is a statute, and as such is plainly written and pragmatic. This situation alone is enough to go some way towards explaining the characteristically 'formalist' or legalist way that it has been interpreted by the High Court.[143] The document was also the product of many compromises struck over the course of the decade during which it was debated and refined. One tactic employed to reach such compromise was to leave matters out of the Constitution itself, to be resolved by the national Parliament at a future date.[144]

Even the brief snapshot of the political landscape of Australia at the time of Federation given here is enough to suggest that it was a markedly different one to that inhabited by A V Dicey and his English contemporaries, which will be outlined in more detail both

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138 Irving (n 17) 58.

139 Robert French, 'The Constitution and the People' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds) *Reflections on the Australian Constitution* (The Federation Press, 2003) 60, 60.

140 Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed) *Essays on Law and Government – Volume I: Principles and Values* (The Law Book Company Limited, 1995) 1, 1.

141 Ibid.

142 Mark McKenna, 'The history anxiety' in Alison Bashford and Stuart McIntyre (eds) *The Cambridge History of Australia* (vol 2) (Cambridge University Press, 2013) 561, 564.

143 See chapter 2 at 2.8.

144 The thorny issue of interstate trade policy is one example—see, eg Gabrielle J Appleby and John M Williams, 'A tale of two clerks: When are appropriations appropriate in the Senate' (2009) *Public Law Review* 194, 195. Another was the question of votes for women—see Lisa Burton Crawford and Geoffrey Goldsworthy, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds) *The Oxford Handbook of The Australian Constitution* (Oxford University Press, 2018) 355, 366. Electoral matters were in general left to Parliament to determine—see, eg, *McGinty v Western Australia* (1996) 186 CLR 140 ('*McGinty*'), 269, 275-278 (Gummow J).

later in this chapter and in the next. In England, attitudes that were mainstream in Australia were still considered radical or dissident, as the discussion of the functionalist style later in this chapter illustrates.[145] While the text of the Constitution itself is fairly sparse, certain things, such as the matters that were left out, and the way it has been interpreted over a long period of time, help to demonstrate that it does reflect certain ideals and values that could be considered to be inspired by the progressivism or 'new liberalism' of the period in which it was written.[146] These values are slanted towards preferencing the system or the collective, based upon the notion that freedom is not so much needed from government, but comes through its orderly provision *by* government. This is perhaps why they have proven elusive to identify and define, because they are somewhat misaligned with those of the variations of 'normativism' which Loughlin argues have always been dominant in constitutionalism.[147]

(a) Rights protection

The Australian circumstance of having an entrenched written constitution that does not contain a Bill of Rights is rare from a modern comparative perspective.[148] As is well-known, the drafters of the Australian Constitution did consider including additional rights protections in the text of the Constitution. For instance, one proposal, attributed to Clark,[149] was that a clause drafted along similar lines to the equal protection clause that was added to the United States Constitution following the Civil War be included.[150] These attempts to include specific rights protections were, for the most part, unsuccessful.

As the debates frequently make clear, amongst the primary concerns of many present was that Parliament should be able to preserve the tenets of 'White Australia' through the enactment of discriminatory citizenship and other legislation. As Lake observed, '[t]he

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145 See, eg, Macintyre (n 85) 391.

146 See, eg, Patrick Keane, 'In Celebration of the Constitution' (Speech, National Archives Commission, 12 June 2008) 3 <http://www.austlii.edu.au/au/ journals/QldJSchol/2008/64.pdf>.

147 See below at 5.3.3(a).

148 According to Tamas Gyorfi, his survey of the data compiled by the Comparative Constitutions Project found only one other nation with such a constitution, which is Brunei. See *Against the New Constitutionalism* (Edward Elgar Publishing, 2016) 15, n 45.

149 The proposal was put at the Convention by Sir Edward Braddon, see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 665, however it is thought to have been drafted by Clark. See La Nauze (n 17) 68, where he noted that a similar clause contained in the earlier 1891 draft Bill 'may be confidently assigned to Clark'. See also Williams (n 113) 175; and George Williams and David Hume, *Human Rights Under the Australian Constitution* (Oxford University Press, 2013) 65.

150 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 665 (Sir Edward Braddon).

inauguration of the Commonwealth in Australia in 1901 was framed by the "White Australia Policy."'[151] The debate about the equal protection clause was no different. It is clear from the contributions made to this debate, including by prominent liberal delegates such as Isaacs, that one concern with such a clause was that it would prevent the states from maintaining or enacting laws that were racially discriminatory.[152] John Williams has observed that 'the *Debates* reveal that the rejection of Clark's amendment had more to do with issues of race and discrimination than any other.'[153]

Patrick Emerton has noted that the debate on the equal protection clause contained an 'assumption of the deep unities of interest upon which the democratic provisions of the Constitution seem to have been assumed to rest'.[154] The 'strongly democratic and popular framework' of the Australian Constitution, with its absence of rights protections for minorities 'was predicated on the absence of such minorities within the polity.'[155] As both Lake and Helen Irving describe, this false idea was deeply bound up with the bigoted attitudes of the period about race and civilisation, and the impulses that drove the 'White Australia Policy'.[156]

There were other sources of resistance to the proposed rights protections. The drafters of the Constitution were aware that the instrument they were at work upon must stand the test of time by leaving space in its terms to accommodate future changes and developments.[157] As Lake noted, by the 1890s 'the tension between reverence for the American Constitution as a sacred text and the conception of law as instrument of political and social change was increasingly evident on both sides of the Pacific.'[158] Progressive notions regarding the likelihood of continued social development are discernible in the desire to keep the constitutional text sparse.[159]

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151 Lake (n 25) 65; see also Irving (n 17) 100.

152 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 666 (Sir John Forrest), 669 (Isaac Isaacs), 687 (Henry Higgins), (Isaac Isaacs); see also Williams (n 113) 177-178.

153 and John Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42 *Australian Journal of Politics and History* 10, 18.

154 Emerton (n 137) 155.

155 Ibid 156.

156 Irving (n 17) chapters 7-9; Lake (n 25), see, eg, 14, 65-69.

157 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 15 April 1897, 701-702 (Alfred Deakin), where, on the subject of whether or not to specify a number of members of Parliament in the Constitution he stated that in circumstances where '[w]e cannot possibly forsee the future … why lay down an iron rule'.

158 Lake (n 25) 114.

159 Keane (n 146) 3.

It has been observed that the drafters of the Australian Constitution, believing as they did in the institutions of English government, took the view that 'the protection of citizens' rights were best left to Parliament and the common law.'[160] This is sometimes presented as a belief 'grounded on a fallacy'.[161] Not only were the rights of many not protected in this system, space was deliberately left to allow the rights of some in the community to be removed at the will of Parliament.[162] It is, however, worth considering whether the prevailing liberal progressivism, with its belief in the transformative power of government and in the instrumental nature of law in fact imbued Australian institutions, while modelled on British ones, with a somewhat different character.

Liberal progressivism perceived government as the provider of social order and benefits. The best way to achieve reform, change and social 'progress', was through legislation. Lake wrote that '[f]or Australian progressives, it was legislative enactment, not simply the espousal of "social ethics" that was necessary to secure social justice.'[163] As noted, it was already the view of Holmes and others that the United States Constitution often stood in the way of important and necessary social reforms. Prior to his appointment to the High Court, Patrick Keane stated that 'the first thing to note about the Australian Constitution is that it was deliberately crafted to embody an ideal of responsible government and representative democracy in which each citizen participates equally with all others.'[164] Keane suggested that in opting to leave out a Bill of Rights, the Framers took 'a gamble on the political wisdom of future generations', seeking not to 'fetter' the future 'by the supposed wisdom of the past.'[165]

Emerton considered that the Convention debates of the 1890s 'reveal that the drafters of the Australian Constitution saw its *popular*, *democratic* character as fundamental.'[166] More than this, they drew the link between this democratic character of the polity and the

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160 Sir Anthony Mason, 'The Constitution in Retrospect and Prospect' in Robert French, Jeffrey Lindell and Cheryl Saunders (ed) *Reflections on the Australian Constitution* (The Federation Press, 2003) 7, 9.

161 Williams and Hume (n 149) 52.

162 Ibid 52.

163 Lake (n 25) 19.

164 Keane (n 146) 3; see also 2 where he quoted the statement of William Harrison Moore that the 'great underlying principle' of the Constitution was that the rights of individuals were 'secured by ensuring, as far as possible, to each a share, and an equal share, in political power', *The Constitution of the Commonwealth of Australia* (1st ed, 1902). This statement was also quoted by Mason CJ in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 ('*Australian Capital Television*'), 136.

165 Keane (n 146) 3.

166 Emerton (n 137) 152; see also Crawford and Goldsworthy (n 144) 368.

expectation on the part of the people that their representatives in the national parliament would '*do things*' that they wanted.[167] This perception meant that there was a belief that 'it would be wrong to allow conservative elements to block that', although he rightly stops short of suggesting that this wholly explains 'their rejection of a bill or rights.'[168] There is nevertheless an intriguing question here regarding whether these ideals contributed to a particular conception of the state, of the relationship of individuals to it, and, in turn, the role of the judiciary to adjudicate these matters.

(b) Directly chosen by the people

As Isaacs said at the 1897 Convention in Adelaide, the Constitution was intended to be 'the embodiment of permanent political principles under which this nation can live and grow'.[169] On the first day of the Adelaide Convention, the overarching purpose of federation was stated by Edmund Barton to be 'to enlarge the powers of self-government of the people of Australia.'[170] As Nicholas Aroney has observed, this latter sentiment is 'strikingly democratic.'[171] Some delegates to the Convention were worried that responsible government required one chamber of Parliament to be dominant, possibly muting the capacity of the proposed Senate to protect the interests of the smaller states.[172] In response to such concerns, Isaacs said that it was 'an incontrovertible axiom that responsible government was to be the keystone of this federal arch.'[173] He then set out the link between this concept and that of self-government, by referring to Barton's statement on the first day, and exhorting those present:

> …to consider in every instance and say, "If I am loyal to the sentiment expressed in these opening words, let me test the proposal before the light. Is

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167 Emerton (n 137) 152.

168 Ibid.

169 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 170 (Isaac Isaacs).

170 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 17 (Edmund Barton).

171 Aroney (n 17) 207.

172 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 27-30 (Sir Richard Baker). Such concerns had been debated at the second Convention in 1891, prompting one West Australian delegate to state that 'either responsible government will kill federation, or federation in form in which we shall, I hope, be prepared to accept, will kill responsible government.' See *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 12 March 1891, 280 (John Winthrop Hackett). See also Williams (n 113) 170-171, where he sketches Clark's opposition to responsible government, in preferment for a model more similar to that of the United States, in which the executive branch was separate.

173 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 169 (Isaac Isaacs).

> it or is it not an increase of self-government to abolish what is known as the Cabinet system. Is it or is it not an increase of self-government to adopt the referendum?" and so with every proposition made around the Chamber. I believe these words will afford an excellent touchstone to the propositions we have heard asserted and controverted.[174]

The Convention Debates of the 1890s are steeped in this kind of acknowledgment that the constitution under contemplation was to be a democratic one. The epithet of the 'most democratic constitution in the world' is applied to it throughout the debates. For example, the progressive South Australian delegate Charles Kingston proclaimed it 'the most democratic federal constitution that has ever been presented to the acceptance of a free and enlightened country.'[175]

The conservative delegate, Sir Richard Baker, noted in his closing remarks on the final day of the 1898 Convention that for some in the community, the Australian Constitution was 'far too democratic' adding that 'in no Constitution which has yet existed in the world have there been two Houses of Legislature in which property has no representation at all.'[176] This raises the elected character of the Senate, the members of which were, like those of the House of Representatives, to be 'directly chosen by the people'. This position can be contrasted with the initial design of the United States Senate, in which senators were selected by state legislatures.[177] This method of indirect election was included in the draft constitution of 1891, but this proposal met with resistance and was removed from later drafts.[178]

In the bicameral parliaments of the former Australian colonies, Governors appointed the members of upper chambers, a practice which continued in some States well into the post-

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174 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 26 March 1897, 170 (Isaac Isaacs). As Aroney noted, in *Australian Capital Television* (n 164) McHugh J seemed to accept that Deakin's reference to 'self-government' had a democratic meaning; see at 228-229. This view is supported by this speech given by Isaacs quoted here, and see also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 70-171. However, Aroney further noted that the phrase appeared to have different meanings for other participants in the convention debates, and that perhaps 'the prevailing understanding was that [Deakin's] recital was about local self-government, not national sovereignty'—see (n 17) 207.

175 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 15 September 1897, 579 (Charles Kingston).

176 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 17 March 1898, 2482 (Sir Richard Baker).

177 This process was altered by the Seventeenth Amendment, which was ratified in 1913—see Tushnet (n 27) 5, 237.

178 See Brett (n 24) 47.

war period.[179] In comparable former British colonies, there was a similar state of affairs. The Legislative Council of New Zealand remained an appointed chamber until its abolition in 1950.[180] Members of the Senate of Canada are still appointed by the Governor General on advice rather than elected.[181] Until reforms made in 1999, the House of Lords was comprised, in part, of several hundred hereditary peers.[182]

This elected character of the Senate presented particular problems regarding the respective powers of the Houses in relation to each other.[183] At the 1897 Convention, John Quick, in contending for the need for provisions catering for potential deadlocks between the Houses of Parliament, observed that, in creating an upper chamber which would have the same group of electors as the House of Representatives, the Constitution would establish 'a senate the like of which will not be found in any constitution that is in existence, or has ever been in existence in the world.'[184] Looking upon it in 1921, Bryce commented that the Senate was 'not a conservative force, being elected in the same suffrage as is the Assembly, and by a method which gives greater power to an organised popular majority.'[185] The fact that, unlike almost every other second chamber at the time, the Senate was designed to be popularly elected is something taken entirely for granted in Australia, where the focus of any discussion on the design of this chamber tends to be on its failure to operate as a 'states' house' in the manner intended at Federation.

Despite the fact that Senators were to be chosen by popular election, the chamber nevertheless has other counter-majoritarian features. One of the compromises required to encourage the smaller colonies to join the Federation was to allow them equal

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179 The Legislative Council of New South Wales, for example, was not popularly elected until 1978, following the passage of the *Constitution and Parliamentary Electorates and Elections (Amendment Act) 1978* (NSW). South Australia, on the other hand, had an elected upper house since the beginning of responsible government 1856. However, despite having had manhood suffrage since that time, property qualifications continued to apply to the franchise for the Legislative Council until 1973—see (n 50).

180 See, eg, the *Legislative Council Act 1891* (NZ) s 2. The Council was abolished by the *Legislative Council Abolition Act 1950* (NZ).

181 *Constitution Act 1867* (Imp) 30 & 31 Vict, c 3, s 24.

182 *House of Lords Act 1999* (UK). The Act significantly reduced the number of members of the House. As a compromise, around 90 hereditary peers were allowed to remain in the House on an interim basis, until further reforms could be agreed.

183 Compromises that were reached regarding the respective powers of each chamber, including appropriations powers, were influenced by the experiences of conflicts between the Houses of the colonial Parliaments—see Appleby and Williams (n 144) 201.

184 Official Record of the Debates of the Australasian Federal Convention, Sydney, 15 September 1897, 552 (Dr John Quick).

185 Bryce (n 10) 179.

representation in the Senate, despite considerable disparities in state populations, which continue to the present day. Aroney identifies this issue as one of the main areas of division at the constitutional conventions.[186] The more politically radical members of the Convention, including Higgins and Isaacs, were opposed to equal representation owing to its anti-democratic character.[187] However, concession on this matter 'was a prerequisite to the consent of the smaller colonies',[188] causing Higgins to ultimately campaign against the Constitution he had helped to draft on the basis that it was not properly democratic.[189]

While it is clear that the Constitution was drafted amidst a certain level of democratic fervour, and while it helped to establish a system of representative government that Bryce considered to be without precedent or close example, the actual text of the Constitution is sparse on the nature and character of matters such as responsible government, and how the democracy was to function, for example who was to be eligible to vote. This was deliberate, likely for several reasons. One was a desire to allow space for the continued development of the political system. At the 1891 Convention, Sir Samuel Griffith observed that 'the genius of the English people has shown itself for the last 200 years to be capable of moulding the constitution, so as to suit the exigencies of the times.' Since it was not possible to tell 'what the exigencies of the future might be', Griffith said, 'we should not make our constitution so rigid as to insist upon any particular form of government', at least insofar as 'the relationship between the executive and parliament' was concerned.[190]

Sections 7 and 24 of the Constitution provide that the members of the Senate and the House of Representatives respectively 'shall be directly chosen by the people of the

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186 Aroney (n 17) 188.

187 See eg ibid 196, 219-220; Irving (n 17) 147 (on the labour movement's opposition to equal representation); and Rickard (n 122) 93-94. See also Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (Cambridge University Press, 1995) 81-83, where he wrote that leading progressives in the federalist movement including Higgins, Deakin and Isaacs argued at the 1897-98 Convention that 'the states were fully protected by the federal division of powers and by State Governments' and that 'the Senate would not function as a States' house', adding that '[t]hese strong views of the leading Australian founders rejecting the notion of the Senate as a States' house have not received the attention which they deserve.'

188 Aroney (n 17).

189 See Helen Irving, 'Original Intent? The 1927 Royal Commission on the Constitution and the Framers' Evidence' in (2001) 8 *The New Federalist* 84, 86; Appleby and Williams (n 144) 200; and Lake (n 25) 117-118.

190 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 18 March 1891 467 (Sir Samuel Griffith).

Commonwealth.' No provision was made as to who 'the people' were to be. The relevant provisions of Ch I of the Constitution preserve the requirements that applied in the states at the time of Federation, until the Commonwealth Parliament itself provided otherwise. By contrast with the Constitution of the United States, it does not leave federal electoral matters to the states, instead requiring a national franchise.[191]

The view of the High Court has typically been that this leaves Parliament relatively free to determine many aspects of electoral law, in line with the view that this, like many other matters, should be left to the 'people' themselves to determine. As Gummow J observed in *McGinty v Western Australia* ('*McGinty*'),[192] the fact that many questions regarding electoral matters were left to Parliament to decide reflects 'the notion that representative government is a dynamic rather than static institution'.[193] However, the fact that the Constitution is 'pervaded' by 'the principle of responsible government' has been used to either draw or suggest certain limits upon Parliament's powers to define the electorate in certain respects.[194]

In *Attorney-General (Cth); Ex rel McKinlay* ('*McKinlay*'),[195] for instance, a majority of judges considered that the Constitution neither guaranteed universal adult suffrage nor required that electorates contain equal numbers of voters.[196] McTiernan and Jacobs JJ, however, were prepared to accept that by the time this case was decided in 1975, the choice 'by the people of the Commonwealth' referred to in s 24 of the Constitution possibly did require universal suffrage.[197] In *McGinty* Brennan CJ made obiter remarks to similar effect.[198] The majority in *McGinty* confirmed that it was not possible to imply a requirement that electorates contain equal numbers of voters from the Constitution.[199]

In the subsequent case of *Roach v Electoral Commissioner* ('*Roach*'),[200] Gummow, Kirby and Crennan JJ drew upon the work of historians Hirst and W G McMinn to raise the point that, whilst not universal, the franchise was comparatively wide in Australia at

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191 *Australian Constitution,* ss 8, 9, 10, 29, 30 and 31. See also Brett (n 24) 48.
192 *McGinty* (n 144).
193 Ibid 280.
194 *Engineers' Case* (n 11) 146 (Knox CJ, Isaacs, Rich and Starke JJ).
195 ('*McKinlay*') (1975) 135 CLR 1.
196 Ibid 25 (Barwick CJ); 62 (Mason J); 36-37 (McTiernan and Jacobs JJ); 45 (Gibbs J, on the equal numbers of votes question); 55 (Stephen J); Cf the dissent of Murphy J at 72, 75
197 Ibid 36; see also Stephen J at 57.
198 *McGinty* (n 144) 167.
199 Ibid 175-176 (Brennan CJ), 183, 188-189 (Dawson J), 243-244 (McHugh J), 284-285 (Gummow J).
200 ('*Roach*') (2007) 233 CLR 162.

Federation.[201] They referred to 'the particular Australian experience with the expansion of the franchise in the nineteenth century, well in advance of that in the United Kingdom' and suggested that '[v]oting in elections for the Parliament lies at the very heart of the system of government for which the *Constitution* provides.'[202] This meant that any prohibitions on certain groups of people from voting had to be 'reasonably appropriate and adapted to serve an end which is consistent or compatible with observance of the relevant constitutional constraint upon legislative power.'[203] Justices Gummow, Kirby and Crennan found that amendments made in 2006 to the *Electoral Act 1918* (Cth) that disentitled people serving time in prison from voting, regardless of the length of their sentence were invalid, because they went 'beyond what is reasonably appropriate and adapted.'[204] Prior to these amendments, prisoners serving sentences of three years or more were unable to vote whilst in prison. These earlier restrictions were considered valid.[205]

Like the other key protection derived from the system of representative and responsible government provided for by the Constitution, the freedom of political communication,[206] this protection of the franchise was framed as a matter of preserving the constitutional system itself, rather than the rights of individuals. In *Roach* Gleeson CJ expressed his support for what had been said by McTiernan and Jacobs JJ in *McKinlay*, adding that ss 7 and 24 amounted in this respect to 'a constitutional protection of the right to vote.'[207] However, in his reasons, he similarly located the source of the right in the system of representative government, to which 'the franchise is critical'.[208] Exclusion of a group of people from the franchise without a 'substantial' reason, 'would not be consistent with choice by the people.'[209]

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201 Ibid 194-195, n 105.
202 Ibid 198.
203 Ibid 199.
204 Ibid 201-202 (Gummow, Kirby and Crennan JJ); see also Gleeson CJ, 182, who also found the provisions invalid, but on the basis that by failing to identify prisoners who had committed serious crimes the 2006 amendments had broken 'the rational connection necessary to reconcile disenfranchisement with the constitutional imperative of choice by the people.'
205 Ibid 179 (Gleeson GJ) 204 (Gummow, Kirby and Crennan JJ).
206 See, eg, *Australian Capital Television* (n 164); *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 302; *McCloy v New South Wales* (2015) 257 CLR 178; and *Clubb v Edwards* (2019) 93 ALJR 448.
207 *Roach* (n 200) 174.
208 Ibid.
209 Ibid.

The High Court has derived these protections for voting rights from the text and structure of the Constitution.[210] While it contains few express protections for individual rights, it has always been read as establishing a liberal and free democracy. Certain things necessary for a healthy civil society, such as this measure of protection for voting rights, as well as the implied freedom of political communication, have thus been gleaned from its spartan provisions. The decision in *Roach* in particular may be contrasted with the position in the United Kingdom, where a ban on prisoners serving terms of one year or more from voting has remained in place despite a 2005 ruling from the European Court of Human Rights that it was unlawful.[211]

This tendency to shape principles as systemic rather than individual protections can also be discerned in judicial review of administrative action.[212] This matter will be further considered by reference to the tenets of the 'functionalist style' later in this chapter. At this point it is useful to set out an explanation of what this style is said to encapsulate.

5.3 FUNCTIONALISM AND GREEN LIGHT THEORY

As is the case with many labels, the term 'functionalism' has more than one possible meaning. In Australian public law it is usually used to mean an approach to review of either legislative or administrative action that takes account of the functions of institutions or decision-makers in making determinations about validity.[213] However, functionalism

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[210] See the subsequent case of *Rowe v Electoral Commissioner* (2010) 243 CLR 1, which further developed these principles.

[211] See *Hirst v United Kingdom (No 2)* (2006) 42 EHRR 41. The ruling of the European Court of Human Rights (ECHR) in *Hirst* caused political controversy in the United Kingdom, where it was met with resistance from successive governments. The United Kingdom intervened in the subsequent case of *Scoppola v Italy (No 3)* (2013) 56 EHRR 19, seeking to have the ECHR change its position however, the Court declined to do so—see at 681 (although it ruled that the ban imposed by Italy on prisoners sentenced to between 5 years and life imprisonment did not breach the European Convention on Human Rights). See Ed Bates, 'Analysing the Prisoner Voting Saga and the British Challenge to Strasbourg' (2014) 14 *Human Rights Law Review* 503 for a discussion of these judgments and the British Government's refusal to comply with the rulings of the ECHR in relation to this issue In 2018, the United Kingdom Government agreed to make certain administrative changes to the ban on prisoner voting, however it did not make any legislative changes to the *Representation of the People Act 1983* (UK), meaning the ban on prisoners voting while in custody remains in place in s 3 of the Act (the changes allow prisoners released on temporary licence to vote, but do not allow a person to vote while they are in custody). See Elizabeth Adams, 'Prisoners' Voting Rights: Case Closed?' on UK Constitutional Law Blog (30th Jan. 2019) <https://ukconstitutionallaw.org>.

[212] See chapter 3 at 3.6.3.

[213] See, eg, Peter Gerangelos, 'Interpretational methodology in separation of powers jurisprudence: the formalist/functionalist debate' (2005) 8 *Constitutional Law and Policy Review* 1; James Stellios, 'Reconceiving the separation of judicial power' (2011) 22 *Public Law Review* 113; Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43 *Federal Law Review* 455 and Dixon (n 137) 3.

has also been given a wider meaning, and been used to describe an alternative tradition in public law, one that shares features with what Carol Harlow and Richard Rawlings termed 'green light theory.'[214] This is a tradition which is more accepting of administrative discretion and the administrative state, and also does not necessarily consider that courts are the only institution suitable to hold the state and its various actors to account. Aronson, Groves and Weeks have stated, the functionalist tradition was concerned with how to 'acknowledge the validity of positive as well as negative freedoms.'[215]

The scholarship of Loughlin on functionalism is useful for thinking about Australian public law values because it helps to illuminate certain things that seem to have been obscured from debates about it. These things could perhaps be attributed to the influence of progressivism. Australian constitutionalism is sometimes characterised as Diceyan.[216] However, while A V Dicey's work was undoubtedly very influential upon the design of the Australian Constitution,[217] Loughlin's work helps to show that in many ways the Constitution as it was initially drafted and as it has been interpreted since Federation embodies a form of constitutionalism that differs from Diceyan theory in certain ways, which will be set out later in this chapter.

Loughlin initially framed what he termed the 'functionalist style in public law' as a response to what he called the 'conservative normativism' which he saw embodied by the work of A V Dicey.[218] Dicey was suspicious of administrative law, considering the use of discretion arbitrary and contrary to his conception of the individual liberty and the rule of law.[219] However, even by the time he was writing, the British Parliament was using legislation to confer discretion on administrators more and more frequently, for purposes that once would not have been imagined.

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214 Carol Harlow and Richard Rawlings, *Law and Administration* (Weidenfeld and Nicolson, 1984) chapter 2.

215 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6th ed, 2017) 7.

216 See, eg, Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 11.

217 See, eg, Aroney (n 17) 71-73, 92-96.

218 Loughlin, (n 16) in particular chapter 7 and (n 34).

219 See, eg, A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution: Oxford Volume Edition of Dicey* (vol 1) J W F Allison (ed) (Oxford University Press, 2013) 97-98.

This is in turn useful for thinking about the way in which the power of the courts to undertake judicial review of administrative action has been conceived in Australia, which helps to explain how and why it is different to review in England, for example, in a way that is more satisfactory than simply attributing it either to Australia's conservativism, or its written constitution stripped. This is not to suggest that the written or 'rigid' nature of the Australian Constitution is not a feature of this difference, but rather to expand upon the point made in chapter 2 regarding why certain interpretations of the document have been preferred over others that were also open.

5.3.1 An overview of the 'functionalist style'

Many agree that the dominance of the views of Dicey resulted in a concept of administrative law that is ill-equipped to deal with the contemporary administrative state,[220] or in other words the modern conception of government as the provider of services and benefits to the community. A particular feature of this is that, as Matthew Lewans has identified, public law theory treats the state primarily as a threat to individual liberty, and does not take proper account of its provision of what he, drawing on the work of Isiah Berlin, calls 'positive liberty'.[221] It should be noted that Berlin himself was sceptical of the notion of positive liberty.[222] Even after several decades of neo-liberalism, most continue to accept that the state has a role in regulating and organising society, although there is less consensus about where and when intervention is appropriate.

Functionalist thinking, in accordance with the meaning Loughlin ascribes to it, encompasses the following concepts, among others:

1. Since the start of the twentieth century, the administrative state is a legitimate aspect of government. Its legitimacy means that matters such as administrative efficiency are legitimate concerns for courts to have regard to in determining the content of legality. Another way of putting this is that deference to administrators is appropriate in some circumstances.

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220 See, eg, H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1, 4; Matthew Lewans, 'Rethinking the Diceyan Dialectic' (2008) 58 *University of Toronto Law Journal* 75; and Lewans (n 34) 14.

221 Lewans (n 220) 78; and (n 34) 28-31.

222 See Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed) *Liberty* (Oxford University Press, 2002) 166, 216; see also Lewans (n 34) 29-30.

2. Law is perceived as instrumental, and legislation is a legitimate mechanism for the regulation of society. Like administrative discretion, legislation need not be mistrusted, but rather 'as an embodiment of the democratic will' and therefore 'the highest form of law.'[223]

3. While judges must draw upon values in adjudication, it is important that judges, as far as possible, do not have reference to their own personal values to obstruct the social gains sought through administration.

These concepts are also to some extent captured by what Carol Harlow and Richard Rawlings once described as the 'green light' approach to public law.[224] In their description, green light theories embrace a model of the state in which 'the use of executive power to provide services for the benefit of the community seemed entirely legitimate.' For green light theorists, 'the function of the courts checking executive action was a questionable activity.'[225] They contrasted this with the more familiar English public law tradition of Dicey and Lord Hewart,[226] in which the courts were relied upon to protect the liberty of the individual against unwarranted state intrusion.[227]

5.3.2 Functionalism and legal process theory

While it can be seen to fit on the 'green light' end of the spectrum, functionalism is nevertheless an awkward word.[228] Like formalism, it is difficult to define, and can mean different things to different people. In Australia, Rosalind Dixon has written that functionalism is 'by definition a theory of how certain choices or institutions can 'serve' particular functions.'[229] According to Dixon, functionalism involves two key commitments. Firstly, it encompasses 'a focus on a range of substantive legal goals or values in resolving areas of formal legal indeterminacy'.[230] Secondly, it includes 'a focus

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223 Loughlin (n 16) 60.
224 This was set out in detail in the first edition of their book, see Harlow and Rawlings (n 214) chapter 2.
225 Ibid 35.
226 In *The New Despotism* (Ernest Benn, 1945) initially published in 1929, Lord Hewart argued that the bureaucracy was growing at an alarming rate, and presented a threat to liberty and the rule of law.
227 Harlow and Rawlings (n 214) 35.
228 Loughlin has recently written against use of the red light/green light imagery to represent competing schools of thought. He stated it was used as a teaching technique by Harlow and Rawlings, and 'is incapable of providing a robust theoretical foundation of British public law'. See Loughlin (n 15) 19; cf Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 48, where they acknowledge that a consistent 'overarching theory of the administrative state' is not their aim.
229 Dixon (n 213) 459.
230 Ibid.

on the potential consequences of various legal choices for the realisation of these goals.'[231] In the constitutional law context, the concept of functionalism was initially developed as an answer to the legitimacy problem posed by realism.[232] Proponents of a functional approach to constitutional interpretation argued that reference to policy considerations and values by courts should not be 'purely open ended'.[233] Rather, interpretation should be guided by reference to 'those values that can be traced to broader textual and structural provisions of the *Constitution*.'[234]

It is possible to see here some shades of the arguments put forward by Stephen Gageler,[235] which are touched upon in chapter 2,[236] who himself was drawing upon American scholarship, including that of Ely.[237] Ely was critical of judges assuming the role of 'philosopher kings' who overturned majority will in accordance with their own values.[238] He argued that rather than being 'an enduring but evolving statement of general values', as it is sometimes depicted, the text of the United States Constitution in fact left 'the selection and accommodation of substantive values almost entirely to the political process.'[239] The document itself was more concerned with process, including with 'ensuring broad participation in the processes and distributions of government.'[240] For Ely, this meant that the United States Supreme Court was justified if it gave 'special scrutiny', or was more interventionist, where a majority was acting to exclude a minority from participation in democratic processes in some way.[241] Gageler suggested a similar approach could be taken in the Australian context.[242] Dixon observed that this is just one kind of functionalist approach, one she described as 'process-based'.[243]

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231 Ibid.
232 Ibid 460; see also Dixon (n 137) 9.
233 Dixon (n 213) 460.
234 Ibid; see also Dixon (n 137) 9, where Dixon says that functionalism's 'explicit commitment to legal form' meant that it required 'any reliance by a court on 'values'-based argument should first depend on serious engagement with the text, history and structure of a constitution, as well as prior precedent.'
235 Gageler (n 174); Gageler (n 13).
236 See chapter 2 at 2.8.2.
237 John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980).
238 Ibid 24.
239 Ibid 87.
240 Ibid.
241 Ibid see, eg, 75-77.
242 Gageler (n 174) 197-198.
243 Dixon (n 213) 480.

The scholarship of Ely was influenced by the legal process theory scholarship of Henry Hart and Albert Sacks.[244] The process theory was developed in the context of the post-World War Two, New Deal-era in the United States.[245] Part of its context was therefore the need to adapt an understanding of law to the 'marked expansion of federal legislative and regulatory authority' that had occurred in this period.[246]

As chapter 2 noted, the legal process theory of Hart and Sacks held that society was governed by a complex web of procedures.[247] Within this web, was the 'central idea of law' which they said was 'an idea that can be described as *the principle of institutional settlement*.'[248] This principle required courts to have 'a perceptive understanding' of the nature of an institution and its procedures when deciding whether to follow or overrule precedent.[249] This principle was to operate 'not merely as a principle of necessity, but as a principle of justice.'[250] The role of law was to improve processes to ensure that institutional decisions advanced 'the purposes of society.'[251] For Hart and Sacks, law was 'a doing of something, a purposive activity, a continuous striving to solve the problems of social living.'[252]

One focus of Hart and Sacks was on the institutional features of courts, as they tried to capture the kind of reasoning that could be considered specific to them.[253] For instance, another key principle described by Hart and Sacks was what they called the principle of reasoned elaboration.[254] This required courts, in resolving disputes about meaning, to first identify the policy or principle underlying 'every rule and standard', and then resolve any

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244 See William N Eskridge Jr and Phillip P Frickey, 'An Historical and Critical Introduction to *The Legal Process*' in Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) (prepared for publication from the 1958 Tentative Edition by William N Eskridge Jr and Phillip P Frickey) li, cxviii.

245 David Kennedy, 'Henry M Hart Jr., and Albert M Sacks' in David Kennedy and William W Fisher III (eds) *The Canon of American Legal Thought* (Princeton University Press, 2006) 243, 244.

246 Ibid.

247 Henry M Hart and Albert M Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (Foundation Press, 1994) (prepared for publication from the 1958 Tentative Edition by William N Eskridge Jr and Phillip P Frickey) 3-4.

248 Ibid 4.

249 Ibid 5.

250 Ibid 6.

251 Ibid.

252 See ibid 148.

253 Kennedy (n 245) 247.

254 See Hart and Sacks (n 247) 146-150.

uncertainty about meaning 'not only so as to avoid irrational consequences in application, but so as to further the purpose so attributed.'[255]

As Dixon suggested, there is some appeal in process or institutional theories in Australia given that the Constitution is a recognisably process focussed or 'procedural' one.[256] In addition to Dixon and Gageler, Grant Hoole and Gabrielle Appleby have explored the potential insights that might be derived from process theory in the design of integrity bodies.[257] However, as Hart and Sacks themselves acknowledged, the 'institutions which can be devised for the settlement of social questions vary endlessly', meaning that 'variations between each type of procedure are endless' and so 'are the variations in the relationship between each type of procedure and the system as a whole.'[258] This meant that '[a]t least in its combination of procedures … every society's system is more or less distinctive and in some respects unique.'[259]

This raises the question of how process theory is given content. Not only is it necessary to appreciate the role and functions of institutions in a system of government, other wider political and philosophical concepts relevant to the way these institutions are constructed must be identified. These will often be place specific as well. It is simply not possible to have a concept of institutional settlement without an attendant understanding of the values that can be associated with each institution.[260]

A key criticism of the process school is that it lacks an account of underpinning values.[261] For instance, Loughlin's critique of Ely's theory is that it attempts 'to do the impossible', which is 'to clearly distinguish between process and substance.'[262] The very notion of 'representative democracy on which he relies needs to be defended substantively—that is on the basis of certain fundamental values of the type he seeks to avoid.'[263] Others, such

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255 Ibid 148.

256 See, eg, Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 173.

257 See Grant Hoole and Gabrielle Appleby, 'Integrity of Purpose: A Legal Process Approach to Designing A Federal Anti-Corruption Commission' (2017) 38 *Adelaide Law Review* 398.

258 See Hart and Sacks (n 247) 5-6.

259 Ibid 6.

260 Appleby, Reilly and Grenfell (n 44) 6.

261 Ibid.

262 Loughlin (n 27) 363; see also Mark Tushnet, 'Darkness on the Edge of Town: The Contributions of John Hart Ely to Constitutional Theory' (1980) 89 *Yale Law Journal* 1037, 1045 and Laurence Tribe, 'The Puzzling Persistence of Process-Based Constitutional Theories' (1980) 89 *Yale Law Journal* 1063, 1064.

263 Loughlin (n 27) 363.

as Laurence Tribe advanced similar critiques. Tribe wrote that '[t]he process theme by itself determines almost nothing unless its presuppositions are specified and its content supplemented by a full theory of substantive rights and values.'[264] Appreciation of this is one motivation behind Rosalind Dixon's inquiry into what might be considered to be the values underlying what she considers to be the functionalist (or process) nature of the Australian Constitution.[265] An understanding of these values is crucial, since, as Jeff King has observed, '[p]eople can and seemingly do agree much' on many notions bound up in what he described as 'institutionalism' while at the same time 'disagreeing about the role of courts in public law adjudication.'[266]

The way in which democracy itself is thought about is capable of being informed by different values. This chapter has argued that in Australia, the concept is imbued with the sense that government represents the people and exists to do things for them. This sense has been underpinned by a sophisticated electoral machinery, out of an understanding that this is something upon which the 'legitimacy of governments rests'.[267] This is a recognisably functionalist, used in the Loughlin sense, attitude. For this reason, a clearer understanding of the influences of what he described as the functionalist style in Australia can, in turn, help to identify the kinds of institutional values that are, or could be, legitimately drawn upon by courts in drawing the limits of the powers of the other branches of government.

For this reason, the focus of the next section of this chapter is on the term as used by Loughlin. Loughlin's overriding contention is that public law can be understood as 'simply a sophisticated form of political discourse' and 'that controversies within the subject are simply extended political disputes.'[268] He has continued to explore this idea for over two decades. In his most recent work he has advanced the concept of 'political jurisprudence', a school of jurisprudence that 'claims that law is to be understood as an aspect of human experience called "the political"'.[269] It is not the purpose of this chapter to critically engage with this project. The aim here is far more modest in that it merely seeks to draw upon aspects of Loughlin's scholarship to help highlight certain features of

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264 Tribe (n 262) 1064.
265 Dixon (n 137) 10.
266 Jeff King, 'Institutional Approaches to Judicial Restraint' (2008) 28 *Oxford Journal of Legal Studies* 409, 430.
267 Orr (n 59) 1.
268 Loughlin (n 16) 4.
269 Martin Loughlin, *Political Jurisprudence* (Oxford University Press, 2017) 1.

the Australian constitutional system, and some of the ideas which might be seen to underpin it.

5.3.3 Normativism and functionalism

Loughlin's claim about public law being 'a distinctive form of political practice'[270] is useful for thinking about the ways in which review in Australia might be different, because it helps to show that at least some of the criticism of Australian judicial review of administrative action as formalist can be viewed as proceeding from a particular standpoint about the role of courts in a constitutional system. While often such differences are characterised as theoretical, for instance as being about the difference between political and legal constitutionalism, Loughlin suggested that, fundamentally, they are about the taking of different political positions.

Loughlin thought there was failure amongst public lawyers to properly appreciate their own lack of 'consensus about the basic contours of their discipline.'[271] For him, to understand the subject, it was first necessary 'to examine the conceptual structures which dominate the public law landscape.'[272] In *Public Law and Political Theory*, he argued that there were 'two basic styles of thinking' in public law, which he called 'normativism' and 'functionalism.' A proper understanding of the differences between each style, which were 'founded on differences concerning fundamental questions about the nature of human beings, their societies and their governments' could help to clarify some of the bigger questions in public law.[273]

Loughlin's 'sketch' of 'normativism' was that this style was:

> … rooted in a belief in the ideal of the separation of powers and in the need to subordinate government to law. This style highlights law's adjudicative and control functions and therefore its rule orientation and its conceptual nature. Normativism essentially reflects an ideal of the autonomy of law.[274]

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270 Loughlin (n 27) 32.
271 Loughlin (n 16) 58.
272 Ibid.
273 Ibid 59-60.
274 Ibid 60.

In his more recent work, he has said that normativism is characterised by the belief 'that law has an intrinsic moral quality', which led to the conversion of 'legal interpretation into a type of moral reasoning', and that:

> Rather than explaining the often messy practices of actual regimes, normativist analysis constructs an idealized representation of constitutional order and then promotes that idealized model through a particular scheme of interpretation.[275]

Loughlin used functionalism as a contrast to this style. His conception of functionalism:

> … views law as part of the apparatus of government. Its focus is upon law's regulatory and facilitative functions and therefore is orientated to aims and objectives and adopts an instrumentalist social policy approach. Functionalism reflects an ideal of progressive evolutionary change.[276]

In Loughlin's account of these styles, the former is associated with a largely liberal world view, one with an emphasis on the need to secure the freedom of the individual from interference by government,[277] while the latter can be aligned with one that views the state not with suspicion for its illiberal tendencies, but with an expectation that it will play a role in the progression of society as a whole.[278] This does not necessarily mean that functionalism can be equated with socialism, as 'there is no one theory of socialism to which the main adherents to a functionalist style would subscribe.'[279] It was influenced by the 'new liberalism', which by the start of the twentieth century had begun to overshadow classical liberalism. The tenets of this included a belief that 'humans were intrinsically social creatures and that 'real' freedom could not be realized without collective action on a significant scale.'[280] The functionalist style 'tends to be built on an organicist conception of society, generally embraces a positive conception of liberty, and looks upon democracy as an achievement of great moral as well as evolutionary importance.'[281]

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275 Loughlin (n 269) 4.
276 Loughlin (n 16) 60.
277 Ibid 63.
278 Loughlin (n 34) 361
279 Loughlin (n 16) 105.
280 Loughlin (n 34) 361.
281 Loughlin (n 16) 134.

(a) Diceyan 'normativism' as the dominant tradition in public law

However, Loughlin explained that the 'dominant tradition' in public law remained 'conservative normativism', and the main proponent of it was A V Dicey.[282] The key strands of Dicey's theory of the constitution were parliamentary supremacy and the rule of law.[283] For Loughlin, the normative aspects to this become apparent when Dicey's theory is placed in the context of Dicey's values.[284] It is necessary to understand that Dicey's idealised description of the Constitution was influenced by a 'particular outlook or political ideology.'[285]

For instance, while Dicey was a proponent of parliamentary supremacy, he was mistrustful of what he saw as the 'collectivism' that he perceived to be growing in the latter part of the 19th century.[286] In his introduction to the second edition of *Lectures on the Relationship Between Law and Public Opinion in England During the Nineteenth Century*, first published in 1914, he said that the 'main current of legislative opinion from the beginning of the twentieth century has run vehemently towards collectivism.'[287] In these lectures, he warned of the dangers of 'the growth of legislation tending towards socialism.'[288] He considered that such 'socialistic legislation' was in part inspired by what he called the 'trial of socialistic experiments in the English colonies, such as the Australian Commonwealth'.[289] Loughlin noted that he viewed these moves towards mass participation and the modern administrative state 'as threatening to the idea of the British constitution which he had sought to formulate.'[290]

Sir Ivor Jennings wrote of Dicey, '[a] public lawyer, like the philosopher, is the child of his age.'[291] Jennings characterised the political views of Dicey as being in accord with those of the last of the Whigs, of which he was one, at one time having held political

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282 Ibid 139-140; and Loughlin (n 27) 443.
283 See, eg, Dicey (n 219) 95, where Dicey stated that the two features that 'have at all times since the Norman Conquest characterised the political institutions of England' were the supremacy of the 'central government', and later Parliament, and 'the rule or supremacy of law.'
284 Loughlin (n 16) 141.
285 Ibid; see also Harlow and Rawlings (n 214) 19.
286 Dicey (n 77) lectures VII and VIII; and Loughlin (n 16) 142-144.
287 Dicey (n 77) xxiii, liii.
288 Ibid 258.
289 Ibid lxv.
290 Loughlin, (n 16) 154, 156; see also Loughlin (n 27) 316, fn 15.
291 Ivor Jennings, 'In Praise of Dicey' (1935) 13 *Public Administration* 123, 124.

aspirations himself.[292] These were those of a classic or conservative liberal, economically *laissez-faire* and opposed to the further expansion of the franchise.[293] Although Jennings acknowledged that as a scholar Dicey 'did his best to exclude his subjective notions' from his work, they nevertheless 'peeped out' through the constitutional principles he described.[294] For Jennings, then, Dicey's denial of the existence of administrative law is not a sort of benign mistake, as it is sometimes interpreted as from the distance of more than a century after he was writing. Rather, it was inseparable from the political views he held regarding individual liberty and the mode of its best preservation, which was by civil courts through the application of the common law.[295]

As Jennings pointed out '[p]arliamentary government does not, of course, necessarily mean democratic government.'[296] Dicey harboured the kind of scepticism of majoritarian democracy that was not uncommon in nineteenth century English politics, when '[t]o say that a man was a democrat was to say that he was a Radical.'[297] Dicey had said that '[d]emocracy in England has shown a singular tolerance, not to say admiration, for the kind of social inequalities involved in the existence of the Crown and of an hereditary and titled peerage.'[298] He added that 'democracy tempered by snobbishness' could even be seen as 'beneficial' to 'the easy working of modern English constitutionalism.'[299]

Put in this light, Dicey's version of parliamentary sovereignty cannot be seen as a means of better facilitating majoritarianism. As a classical liberal, he was concerned with individual freedom, and the potential threats posed to this by the state. Loughlin contended that for Dicey, the institution of Parliament did not resemble the democratic or majoritarian one that it later came to be understood to be, nor did he necessarily mean the same thing by the rule of law as his work is commonly interpreted.[300]

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[292] Jennings wrote that 'Dicey lived and died a Whig' – see Sir Ivor Jennings, *The Law and the Constitution* (The University of London Press, 5th ed, 1959) 310.

[293] See, eg Jennings (n 291) 125; see also Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986), 201 and Lewans (n 220) 78.

[294] Jennings (n 291) 125-128.

[295] Ibid 130-131.

[296] Ibid 124.

[297] Ibid.

[298] Dicey (n 77) 57. Compare this with the 'egalitarianism' which John Hirst observed as emerging in Australia in the 1880s and 1890s—see 'Egalitarianism' (1986) 5 *Australian Cultural History* 12, 24-29.

[299] Ibid.

[300] Loughlin (n 16) 148-153.

Judith Shklar argued that the phrase 'rule of law' 'originally had two quite distinct meanings.'[301] This first was that 'it referred to an entire way of life'.[302] This model could be 'attributed to Aristotle, who presented the Rule of Law as nothing less than the rule of reason.'[303] The second meaning or model could be attributed to Montesquieu, and this was a theory of limited government.[304] Shklar considered that Dicey's theory was 'the most influential restatement of the rule of law since the 18th century.'[305]

For Loughlin, the critical question was whether Dicey's theory was an expression of the first or the second model described by Shklar.[306] While he conceded that there was a focus on institutional form in Dicey's theory that gave it some affinity with Montesquieu's model, he believed that in essence it was closer to the ancient concept.[307] This was because Shklar had observed that in this paradigm, 'the single most important condition for the rule of law is the *character* of those who engage in legal judgments', who were, for the most part, 'middle-class moderates'.[308] As Loughlin put it, these middle-class moderates who preside over the law and tend to its values 'are able to persuade others to practise self-restraint and maintain a legal order which best fits the ethical structure of the polity.'[309]

For Loughlin, this is also 'precisely how Dicey viewed Parliament and expected it to act.'[310] Underpinning Dicey's theory is the assumption that the members of Parliament and the judiciary were drawn from the same class of people.[311] Dicey further shared the view of Coke, Hale and Blackstone, whose work he drew upon, that Parliament was, in effect, 'the highest and greatest court over which none other can have jurisdiction in the Kingdom.'[312] Dicey's idea of Parliament, then, was 'permeated with the cultural values

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301 Judith Shklar, 'Political Theory and the Rule of Law' in Allan C Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell, 1987) 1, 1.
302 Ibid.
303 Ibid 1.
304 Ibid 2.
305 Ibid 5.
306 Loughlin (n 16) 150.
307 Ibid 151.
308 Shklar (n 301) 3; Loughlin (n 16) 152
309 Loughlin (n 16) 152; and Loughlin (n 27) 316-317.
310 Loughlin (n 16) 152.
311 Support for this is found in Dicey (n 77) 58-59, where Dicey noted that '[d]emocracy in England has to a great extent inherited the traditions of aristocratic government, of which it is heir' adding that 'no man dreams of maintaining that the government and the administration, are not subject to the legal control and interference of the judges.'
312 Loughlin (n 16) 152, quoting Sir Matthew Hale, citing Dicey *Law of the Constitution*, 40.

of the ancient conception of the rule of law.'[313] Viewed in this light it becomes apparent that, contrary to the modern perception, there is no discord between the notions of Parliamentary supremacy and the rule of law in Diceyan theory: Dicey considered that 'on a true appreciation of the constitution, the principles should be viewed as being complementary.'[314]

This further reveals that his conception of law was normative.[315] For this reason, Loughlin concluded that he was not really a positivist in the modern meaning of the term.[316] Hence, Loughlin is able to categorise the dominant tradition in English public law, which has been so heavily influenced by Dicey, as a normativist one.[317] In this he differs from many others, including Harlow and Rawlings, who considered that the prevailing English tradition was positivist.[318]

As is well known, Dicey formulated this idea of the constitution at a time of great social and political change, including the increased use of legislation and the establishment of many administrative bodies to regulate all kinds of aspects of life.[319] These movements in the late nineteenth century were the beginnings of the modern welfare state. Loughlin observed that Dicey did not address these changes, instead formulating a concept of the rule of law that 'seemed incompatible with the extensive use of government powers' and through this he 'attempted to stem the tide of government growth in a collectivist direction', an effort that was 'as effective as Canute's.'[320]

However, the suspicion of wide democracy and expansive administrative power expressed by Dicey in *The Law of the Constitution* has never really gone away. Loughlin cited Lord Hewart's 1929 book *The New Despotism* as one example,[321] and Lord Hailsham's 'elective dictatorship' claim can be regarded as another.[322] More than this, though, it is possible to regard many strains of common law constitutionalism as having

313 Ibid 152.
314 Ibid 151-152.
315 Ibid 142.
316 Ibid 153.
317 Ibid 152.
318 Harlow and Rawlings (n 214) 4.
319 Loughlin (n 16) 159-160.
320 Ibid 160.
321 Ibid 164.
322 Lord Hailsham, 'Elective Dictatorship', Richard Dimbleby Lecture, broadcast by the BBC on 14 October 1976, published in *The Listener* (London, England) Thursday, October 21, 1976; see also Martin Loughlin (n 16) 212-213.

distinctively anti-democratic features, that are in keeping with the 'ancient' tradition of the rule of law identified by Shklar and Loughlin. It can be readily seen that this is not so far removed from the idea that certain groups within society are more capable than the rest, acting collectively, of determining how best to resolve certain questions, or even that such questions are better resolved by 'philosopher kings' rather than (properly) representative legislatures.

(b) Functionalism as a reaction to the dominant tradition

For Loughlin, then, functionalism is how he described the reaction against this dominant tradition.[323] It was 'a practical, reformist approach, offering solutions to a variety of legal challenges facing modern government and spanning the range from institutional reforms to alternative modes of interpretation and methods of legal reasoning.'[324] It was 'directly tied' to the 'political movement encompassed under the broad heads of new liberalism, social democracy and progressivism', and central to it was a belief that 'the institutions and practices of public law can and should be used for the purpose of promoting human improvement.'[325]

One aim of functionalists, several of whom came from the London School of Economics, was to demonstrate that Dicey had been wrong about there being no administrative law in Britain.[326] Another objective, held by scholars such as Ivor Jennings, was to 're-orientate the focus of public law away from Dicey's concern with individual rights and towards an examination of the powers and functions of public authorities.'[327] Scholars like Harold Laski were concerned with finding more effective mechanisms than courts for constraining executive discretion.[328]

Like the realists, some functionalists sought scientific and empirical methods of demonstrating their arguments.[329] Again, like the realists, functionalists sought to 'examine critically the reasoning processes of courts and to expose the value assumptions

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323 Loughlin (n 27) 443.
324 Loughlin (n 34) 363.
325 Ibid.
326 Loughlin (n 16) 166.
327 Ibid 167-168.
328 See, eg, Harold Laski, 'The Growth of Administrative Discretion' (1923) 1 *Journal of Public Administration* 92.
329 Loughlin (n 16) 168; see, eg, Felix Cohen, 'The Problems of a Functional Jurisprudence' (1937) 1 *Modern Law Review* 5.

on which they rest.'[330] Functionalists like John Griffith were sceptical of judicial intervention, which they regarded as obstructive.[331] Loughlin suggested that a key feature of functionalism was the 'rejection of such shibboleths as the 'rule of law' or the 'separation of powers' because they regarded them as being 'invariably invoked to disguise (often reactionary) value positions'.[332]

(c) Functionalism as a spent force

As noted, Loughlin's distinction between normativists and functionalists has some overlap with what Carol Harlow and Richard Rawlings call 'red and green light theories'.[333] Traditionally, red light theorists resemble the former in that they typically viewed administrative law primarily 'as an instrument for the *control* of power and protection of individual liberty',[334] and courts were the main institution they relied upon to exercise this control.[335] Green light theorists, on the other hand, are identifiable with the latter. They define green light theory as seeing 'in administrative law a vehicle for political progress' and as welcoming 'the "administrative state".'[336]

Harlow and Rawlings initially set these categorisations out in the first edition of their book, *Law and Administration*. However, in the third edition, published 25 years later, Harlow and Rawlings observed that as times changed and 'politics with them', former green lighters appeared to move towards positions regarding the need for judicial control of the executive that once would have been the province of red lighters.[337] On this point, Aronson, Groves and Weeks have said that 'today's liberal left places great faith in the protective power of human rights Charters, and typically takes a court-centred view of such instruments.'[338] However, they also noted that such things are never fixed in time. Politics are constantly changing, and views on public law and what is desired from it will continue to change along with it.[339]

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330 Ibid 172.
331 See, eg, J A G Griffith, 'The Political Constitution' (1979) 42 *Modern Law Review* 1, 14.
332 Loughlin (n 34) 400-401.
333 Harlow and Rawlings (n 228) chapter 1.
334 Ibid 32, also 23.
335 Ibid 39.
336 Ibid 32.
337 Ibid 45.
338 Aronson, Groves and Weeks (n 215) 8.
339 Ibid.

Loughlin also described a similar development in public law thought, observing that, following the advent of economic rationalism in the 1980s, functionalists could 'now see more clearly how public institutions can be made to work for private interests and that the activities of a virtuous citizenry may not be sufficient in the face of private power'.[340] He considered that an impasse had been reached in public law, as formerly functionalist thinkers embraced positions closer to what Loughlin described as 'liberal normativism' out of a desire to constrain the use of government for ends they did not support.[341] Functionalism, which had only ever 'maintained its life as a dissenting tradition',[342] had become a spent force.[343]

For Loughlin, functionalism had been 'a product of the opening up of a new age founded on growing interdependencies based on an urban, industrial society'; its 'contemporary difficulties' appeared to him to 'emanate from the crisis of political order in a post-industrial society'.[344] This is prescient as it was written over twenty-five years ago, and yet describes a contemporary problem in public law. He wrote of the deleterious effect that the decline of government social spending had on democracy itself and the shift away from a class understanding of politics and towards an issues based one, leading to the breakdown of former coalitions[345] and a decline of faith in the political system.[346]

He concluded that the dominant normativist tradition could not contend with contemporary political realities, because its 'conception of the individual, state and the law' still essentially drew upon nineteenth century thinking, and had not contended with the fact that the relationships between the individual and the state were now very different from what they had been.[347] It was necessary for a revitalisation of functionalism to enable the development 'of a style of public law thought that 'is able to reflect more adequately the relationships between law and society.'[348] This theory needed to 'recognize the normativity of the law; that is the fact of the ought.'[349] However, it must

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340 Loughlin (n 16) 220.
341 Ibid 209-210, and also 217-221, where he discusses the work of Patrick McAuslan, who he says was both the actual successor of Griffith at the London School of Economics as well as somewhat of an intellectual successor. See also Loughlin (n 15) 11.
342 Loughlin (n 16) 181.
343 See Loughlin (n 15) 18.
344 Loughlin (n 16) 220-221.
345 Ibid 227-228.
346 Ibid 231.
347 Ibid 243.
348 Ibid.
349 Ibid.

also 'be able to assimilate the positivity of law' since 'law is a human creation which seeks to perform certain social functions.'[350] Given this, 'it must be clearly recognised that the law is capable of being altered, and the primary means of doing so is through the process of legislation.'[351]

5.4 THE INFLUENCE OF 'FUNCTIONALISM' ON JUDICIAL REVIEW OF ADMINISTRATIVE ACTION IN AUSTRALIA

It is possible to immediately recognise the resonance between the 'progressive' ideals that were flourishing in Australia at the time of Federation, and what Loughlin identifies as the key tenets of the functionalist style. It seems safe to suggest that the 'functionalist' style of thinking has influenced the conceptions of the key institutions of Australian government, and the way in which their 'coterminous' or 'co-ordinate' boundaries have been drawn. It further seems safe to suggest that the critique of Australian judicial review as 'formalist',[352] or Knight's more recent one that it 'performed poorly when judged in rule of law terms',[353] drawing on Lon Fuller's definition of the rule of law,[354] proceed from the perspective of liberal normativism.

While functionalism might be a 'spent force', if many of its tenets, such as a positive, rather than a negative, conception of the state and its role in the lives of individuals, are in fact a part of the constitutional framework of Australia, a 'normativist' lens seems misapplied. However, to identify the ways in which the style that Loughlin described as functionalist has influenced the Australian outlook on government and judicial power with a degree of specificity would likely require a larger and differently designed project than the one encompassed by this chapter. What follows are some more general observations on the ways in which one ideal of new liberalism in Australia, a vision of a legislature that would 'enlarge the powers of self-government of the people',[355] can be recognised as influential. The final part of this chapter considers the way in which trust

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350 Ibid 243-244.

351 Ibid.

352 Taggart (n 216) 7; Thomas Poole, 'Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights' in Linda Pearson, Carol Harlow and Michael Taggart (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Hart, 2008) 15, 17; Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 19, 37.

353 Knight (n 352) 254.

354 See Lon L Fuller, *The Morality of Law* (Yale University Press, 1969).

355 *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 17 (Edmund Barton).

in the state itself has contributed to both judicial review doctrine and wider conceptions of administrative law.

5.4.1 Functionalism and 'legalism'

Chapter 2 argued that while the High Court's approach to review of legislative and administrative action has been called formalist, it should be distinguished from a style of interpretation that sought to cloak or obscure the values it draws upon. It was suggested that it was better to view it as influenced by a particular conception of judicial power, one that is informed by the values of the Australian constitutional system, including certain notions regarding the powers of the judiciary with respect to the other branches of government. The foundation of this approach to interpretation is said to be the *Engineers' Case*.[356]

The intention here is not to suggest that the Court has consistently applied the same values, or that every judge has shared a similar outlook as to what these might be. This is not the case.[357] Rather, as noted above, the institutional or process-based nature of the claim being made requires an attempt to identify the values that give content to our understanding of the roles of each institution. The progressive notions about democracy and the positive possibilities of the state that have been sketched here provide the frame for the jurisprudence of the High Court on public law questions. Within this frame there is room for judicial disagreement. Importantly, there is also room for values to change over time. As also noted, one reason for leaving so many matters out of the Constitution was to leave room for the political system of Australia to be able to respond to changing social circumstances, something that the progressives were well-versed in and open towards. They did not want to bind the future to the past.

The *Engineers' Case* acknowledged the central role of 'responsible government' in the Australian Constitution. Stephen Gageler, as he then was, argued that the majority judgment can be read as 'enjoining the judiciary to assume a substantially lower profile in the resolution of political disputes.'[358] The concept of 'responsible government'

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356 *Engineers' Case* (n 11).

357 There are many examples of differences of judicial opinion about fundamental matters. See, eg, chapter 3 at 3.4.2. where the approach of Toohey and Deane JJ to implying common law rights protections from the Constitution is set out. As noted there, these views did not attract a majority of the High Court.

358 Gageler (n 174) 184. See chapter 2 at 2.8.2.

embraced by the *Engineers* majority is recognisably similar to that of 'self-government' defended by Isaacs at the 1897 Convention.[359] It is for the people themselves to decide how they are governed, through the 'ordinary constitutional means'.[360]

At issue in that case was the specific question of the powers of the Commonwealth government respective to those of the states. The point made by the *Engineers* majority is essentially that while it was the role of the Court to find the limits of the powers of the Commonwealth as set out by the Constitution, beyond that it was for 'the people' of the Commonwealth and the states, who are, in effect, the same 'people', to determine whether the Commonwealth had accumulated too much power, and make their views known through the 'ordinary constitutional process.'[361] In the much later case of *Nationwide News Pty Ltd v Wills*,[362] Brennan J put this another way, stating '[t]he courts are concerned with the extent of legislative power but not with the wisdom or expedience of its exercise.'[363] These matters are for the legislature, but really 'the people'.

In *McKinlay*, Barwick CJ endorsed what Sir Owen Dixon had said in his swearing-in speech about there being 'no safer guide to judicial decisions in great conflicts than a strict and complete legalism.'[364] In a later passage in which he described what he thought to be the distinctions between the constitutions of Australia and the United States he said that 'the Australian Constitution is built upon confidence in a system of parliamentary government with ministerial responsibility.'[365] In the context of the United States Constitution, 'restriction on legislative power is sought and readily implied', but 'where confidence in the Parliament prevails, express words are regarded as necessary to warrant a limitation of otherwise plenary powers.'[366] This meant in turn that 'discretions in parliament are more readily accepted in the construction of the Australian Constitution.'[367]

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359 See above at 5.2.2(b).
360 *Engineers' Case* (n 11) 151 (Knox CJ, Isaacs, Rich and Starke JJ).
361 Ibid 151-152 (Knox CJ, Isaacs, Rich and Starke JJ); Gageler (n 174) 188. See chapter 2 at See also chapter 2 at 2.8.2. and chapter 3 at 3.6.2.
362 ('*Nationwide News*') (1992) 177 CLR 1.
363 Ibid 44.
364 *McKinlay* (n 195) 17.
365 Ibid 24.
366 Ibid.
367 Ibid.

While these kinds of statements are typically interpreted as embodying a form of Diceyan political constitutionalism, the normativism that Loughlin identified at the heart of Dicey's theory means that they are really describing a system that stands apart from it. This would seem to be in some way owing to the greater trust that was placed in 'the people' in the Australian constitutional compact. While no doubt modelled on the Parliament of Westminster, the way in which the powers of the Commonwealth Parliament, and the Commonwealth judiciary, have been perceived must be understood through the filter of the new liberalism or progressivism of the Federation period. This had placed its faith in 'the people' rather than in abstract natural rights. It also had faith in what Loughlin, when speaking about the beliefs of J A G Griffith, called 'a Comtean belief in continuing social progress.'[368] This in turn must be understood against the background of the realist mistrust of the potential for constitutions and the courts to impede such progress.[369]

While Australians were debating the merits of compulsory voting,[370] Dicey was still stating his opposition to female suffrage, and also proportional representation, on the basis that it carried the idea of representation 'much too far'.[371] The role played by the absence of a Bill of Rights in the Australian Constitution has been given considerable attention in terms of the framing of Commonwealth judicial power.[372] Far less attention seems to have been given to the way in which the trust in the people, that could be considered to be exemplified by compulsory voting,[373] as well as the mechanisms that have been developed and refined over a long period of time to facilitate participation in elections, have perhaps also been profoundly influential.

Oversight of this is one possible explanation why the reading that has consistently been given to the preference for interpretivism is that it is an attempt to preserve the 'democratic legitimacy' of review.[374] If the constitutional system is instead regarded to have placed its primary trust in a self-governing people, or in other words, in majoritarian

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368 Loughlin (n 15) 14.
369 See, eg, chapter 2 at 2.7.1.
370 See Brett's account (n 24). Arguments in favour of it had initially been made as long ago as the 1860s—see 94. The Fisher Government made voter enrolment compulsory in 1911 (105-109). See also (n 81) and Twomey (n 80) 285-287.
371 See Dicey (n 219) 453-461.
372 There are many examples in both doctrine and scholarly literature but see, eg, *Nationwide News* (n 362) 43 (Brennan J).
373 See, eg, Brett (n 24) 136.
374 See for example chapter 2 at 2.8.2 and chapter 3 at 3.5.2.

democracy, it becomes easier to accept the alternative explanation that legalism is the result of deliberate and appropriate judicial self-restraint. It is not that the High Court is trying to obscure its real power or the inherently political effects of its role, or the political considerations it must itself have regard to. Rather, it is that the Court is making a genuine attempt to recognise the limits of judicial power in a system that is predicated on the development of political solutions.

This should not be regarded as a denial that the boundaries between the law and 'politics' are porous. However, the fact that it is sometimes hard to draw lines, and the acknowledgment that there are indeed even areas of overlap between the powers of all branches of government does not mean it is facile to attempt to have a working definition of judicial power, such as the one set out in chapter 2. Recognising that responsible government implies, or has been interpreted as implying, trust in the people, or in other words their participation in the political process to resolve certain questions provides another guide to locating the boundaries of judicial power.

5.4.2 Positive conceptions of the state

Amongst the 'ten basic elements of belief' that Loughlin considered to have shaped the functionalist style, were that 'the basic function of public law must be to maintain a healthy body politic: to promote social solidarity', that 'lawyers should not get too bound up in the promotion of form (concepts) over substance (ends)' and that 'rights are to be treated as claims that are recognized and enforced only insofar as their recognition promotes the common good.'[375] The next chapter considers the direct influence of a positive conception of the state on the doctrine of judicial review of administrative action in more detail. There is a range of other ways in which this positive conception of the state might be regarded as influential.

Chapter 3 touched upon the fact that there was, briefly, some support for the notion that the Constitution could be read as protecting certain fundamental or common law rights.[376] Such arguments have, for the most part, been resisted. They often proceed from certain conceptions of the rule of law. Lisa Burton Crawford argued that, 'however it is conceived, the rule of law is unsuited to judicial enforcement, at least within the

[375] Loughlin (n 34) 362-363.
[376] See at 3.4.2.

Australian constitutional framework.'[377] In her view, 'the Australian constitutional order is best captured' by the statement of Fullagar J in *Australian Communist Party v Commonwealth* ('*Communist Party Case*')[378] that 'a stream cannot rise higher than its source'.[379] On this reading, Commonwealth legislative and executive power cannot exceed the formal limits found in either the Constitution or validly enacted statute.[380] It is both 'no less, but no more' the role of the judiciary to ensure that this is so.[381]

This is a persuasive explanation. Yet text is often capable of more than one meaning, and some High Court judges, Murphy, Deane and Toohey JJ, for example, have been prepared to take the court beyond this more narrowly conceived judicial role.[382] Richard Bellamy said there was a 'standing temptation to read rights' into a mostly procedural constitution and 'employ them for the judicial review of legislation' which had for the most part been resisted by the High Court.[383]

There have been certain matters implied from the Constitution that now form key aspects of doctrine in Australia that are arguably not required by its text or structure alone. One, as noted in chapter 2, is the separation of judicial power, and the protections for the independence of state courts that were later derived from this in the line of cases beginning with *Kable v Director of Public Prosecutions (NSW)* ('*Kable*').[384] The other is the implied freedom of political communication. While the legitimacy of these implications has been questioned,[385] they remain doctrinally entrenched. So why is it considered legitimate for the High Court of Australia to have made these implications but to have otherwise resisted implications of individual rights? The obvious answer is that arguably, the text and structure of the Constitution, read as a whole, supports these

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377 Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017) 197.
378 (1951) 83 CLR 1.
379 Crawford (n 377), quoting *Communist Party Case* (1951) 83 CLR 1, 258. See chapter 4 at 4.4.1.
380 Ibid 201.
381 Ibid.
382 See chapter 3 at 3.4.2 for the views expressed, both curially and extra-curially, by Toohey JJ on the implication of rights protections from the Constitution. For reference some of the relevant judgments of Murphy J, see chapter 3 at (n 166).
383 Bellamy (n 256) 173.
384 (1996) 189 CLR 51; see at 2.4.2.
385 On questions raised about the separation of judicial power, see chapter 2 at 2.4.2. On the implied freedom of political communications see, eg, *McGinty* (n 144) 183, where Dawson J, who dissented in *Australian Capital Television* (n 164) continued to express his scepticism regarding the implication, and also Jeffrey Goldsworthy, 'Devotion to Legalism' in Jeffrey Goldsworthy (ed) *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2007) 106, 147-149.

implications but not others. However, this still does not explain the value judgments involved in such a conclusion.

Rosalind Dixon and Gabrielle Appleby have explained the way in which the *Kable* protections 'have explicitly and repeatedly been framed as *structural* guarantees, with any rights-benefits being incidental and narrow.'[386] Likewise, they noted that with regard to the implied freedom of political communication and the protections for the franchise recognised in *Roach*[387] the High Court has emphasized 'that the relevant implications are to be seen as *limitations* on power, rather than as the source of individual rights.'[388] In a recent speech, Keane J has described the way in which an appeal to institutional values rather than personal rights was influential on shaping the doctrine of the implied freedom of political communication.[389]

In seeking to explain this tendency, Dixon and Appleby suggested that one potential source of it could be a 'John Hart Ely-style 'process-based' theory of judicial review.'[390] The difficulty they perceive with this explanation is, though, that this should have meant that the High Court was 'willing to recognise at least some form of implied right to equality or implied protection for 'discrete and insular' minorities' in the political process.'[391] It is worth considering, however, whether these aspects of Ely's process theory are derived from the specific institutional circumstances of the United States. As noted at 5.3.2, process theories, of necessity, have their own normative content. The processes sought to be protected by the High Court are likely to be informed by the values of the Australian system or 'process', and as explained in this chapter, the Australian Constitution can be regarded as underpinned by a conception of democracy that is different from that of the United States.

If the Constitution is regarded as the product of 'new liberal' ideals, another possible explanation is that both implied limitations on legislative power can be regarded as

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386 Rosalind Dixon and Gabrielle Appleby, 'Constitutional Implications in Australia: Explaining the Structure—Rights Dualism' in Rosalind Dixon and Adrienne Stone (eds) *The Invisible Constitution in Comparative Perspective* (Cambridge University Press, 2018) 343, 350.

387 *Roach* (n 200).

388 Dixon and Appleby (n 386) 355.

389 Patrick Keane, 'Silencing the Sovereign People' (Speech, Spigelman Public Law Oration, Sydney, 30 October 2019) 7-9 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/keanej/JKeane30Oct2019.pdf>

390 Dixon and Appleby (n 386) 373.

391 Ibid 373-373 quoting John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) on footnote 4 in *United States v Carolene Products Co*, 304 US 144 (1938).

protecting the constitutional system itself, rather than the rights of individuals. This explanation takes account the kind of 'functionalist' influences described by Loughlin, for instance the desirability of public law supporting a 'healthy body politic', and the prioritisation of the common good over individual rights. This explanation as to why the text of the Australian Constitution bears some implications but not others provides a potentially rich seam of analysis that cannot be given justice here. It can be recognised as having resonance with Gageler's 'referee' metaphor for the High Court.[392] Doctrinal development will have legitimacy where it plays some role in contributing to the health of the constitutional system as a whole, but less so where it appears to be entering the 'political' space that is supposed to be reserved to the legislature as the representatives of popular will.

5.4.3 Sir Owen Dixon and Australian 'conservative normativism'

One of the intriguing things about Australian progressives is that they were clearly, as Lake shows, in contact with prominent leaders in the American realist movement, like Holmes Jr and Frankfurter.[393] The work of Lake would tend to suggest that they shared similar views regarding the role of the law in society. While Higgins was sceptical of judge-made law, as a judge of the Industrial Court he employed a realist method, which lent itself naturally to the matters that fell to be resolved in that jurisdiction.[394]

It is therefore interesting that industrial disputes became something that were regarded as needing to be quarantined from judicial power. Chapter 2 described the ways in which the separation of judicial power can be closely connected with the outlook of Sir Owen Dixon in particular. His swearing-in speech contains this intriguing passage:

> Lawyers are often criticized because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the foundations and the framework steady. Those who believe in a planned society should perceive that the rule of law administered by the courts offers a reconciliation of ordered liberty with planned control. Those who, on the contrary, believe that society is best served by giving rein to the competitive exertion of the energies of everyone in his calling or pursuit must also see that

[392] Gageler (n 13) 145. See chapter 2 at 2.8.2; see also Martin Loughlin, 'The Silences of Constitutions' (2018) 16 *International Journal of Constitutional Law* 922, 928-932, where he discusses differences between constitutions perceived as 'political' frameworks and those perceived as 'legal frameworks'.
[393] See above at 5.2.1(b).
[394] See (n 127).

> the courts must preserve the rights of each from the encroachment of others. Between these two views there are gradations in which the court must serve the like function.[395]

Although Dixon CJ is referring here to a political divide that seems archaic now, given that fears over Australia becoming communist have long faded, it is possible to imagine the divide he is referring to framed in more contemporary ways, meaning that the statement retains its relevance.

Functionalists regarded the separation of powers as obstructive to reform, but there would seem to be good arguments that the separation of powers doctrine does not work that way in Australia. There is a further question here then about Dixon's rationale. In line with functionalist thinking, he could be considered a proponent of conservative normativism. Yet the Australian iteration of the separation of judicial power seems to be a necessary element in a constitution which places so much faith in the popular control of the political institutions of government.[396] Such a system requires a 'referee',[397] and this is the point being made in the passage above. Complete impartiality is not possible to achieve, but through the insistence on a particular 'judicial method' it is possible to foster a culture of restraint that helps to ensure that the values applied by courts in review of legislative and executive action tend, at least often enough, to be those of the system of government itself, ensuring that, for the most part, the referee's role remains legitimate.

5.5 CONCLUSION

Although many aspects of Dicey's theory of the constitution have been called into question, as Loughlin observed 'the fact of the matter is that Dicey's arguments lived on as the predominant ideology of twentieth-century constitutional lawyers.'[398] In the English context, those arguing for a greater role to be played by the courts in the control of the legislature and the executive are considered to be at odds with the Diceyan idea of parliamentary sovereignty. The work of Loughlin demonstrates that there is, however, a common thread in that, much like the position of 'liberal normativists', Dicey himself had little faith in majoritarianism. Although he theorised about the sovereignty of parliament,

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395 Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xv.

396 See chapter 2 at 2.9 for the argument that Dixon's legalism was underpinned by certain ideas regarding the role of the institutions established by the Constitution.

397 Gageler (n 13) 152. See also chapter 2 at 2.8.2 and 2.9.1.

398 Loughlin (n 34) 366.

he had a limited concept of democracy, and as discussed at more length in the next chapter, considered that administrative discretion was arbitrary and contrary to his other key constitutional principle, the rule of law.

However, this chapter has sought to suggest that some key elements of Australian constitutionalism, in particular the conception it contains of the people and their relationship to the government, or in other words the notion of majoritarian democracy that is central to it, were informed by what is variably described as new liberalism, progressivism or functionalism. This means that at its core, while Australian constitutionalism is usually described as a blend of legal and political constitutionalism,[399] neither description adequately captures its character. These progressive or functionalist influences have likely contributed to the underlying normative values that have been drawn upon to give shape to the concept of judicial power in Australia.

For this reason, critiques proceeding from a liberal normativist perspective perhaps may not have the capacity to yield much insight into the way in which the role and function of the judiciary is conceived in Australia. An example of such a critique is Knight's suggestion that judicial review of administrative action in Australia falls short of securing some of the rule of law values identified by Lon Fuller.[400] While it is true that some of these values are not well protected within the Australian system of law and government, it is necessary to look beyond the role of the courts alone to properly comment on the extent to which this is or is not the case. To properly assess these matters, it is essential to consider the system of government as a whole, and the general health of the civil society over which it presides.

Something that has been touched upon in the preceding chapters is the notion of the ascendancy of 'liberal legalist' constitutionalism over the past few decades. Discernible in this form of constitutionalism is a lack of trust in or suspicion about majoritarian government, and a related distaste for politics. The objective of this kind of constitutionalism is, in a sense, to control the institutions most responsive to majoritarianism (legislatures) with those perceived to be less readily swayed its demands (courts). Fear of majoritarianism is nothing new. However, it is worth thinking about

[399] See, eg, Crawford and Goldsworthy (n 144) 364-367.
[400] Knight (n 352) 254.

whether this lack of trust in 'the people' has been harmful to the health of democracy more generally.

Implicit in the critique of Australian judicial review of administrative action as 'formalist' is the notion that it does not do enough to protect the rights and interests of individuals. Yet in spite of this, Australia is often ranked highly compared with other nations on measures such as protection of civil liberties.[401] This suggests that there is a wider inquiry to be made, one that takes account of what nurtures the protection of these kinds of rights, if it is not necessarily courts.[402] This is a multi-faceted issue that cannot be properly addressed here. However, the apparent trust in 'the people' that lies at the heart of Australia's constitutional arrangements is something that merits further attention when trying to understand the way in which scope and limits of judicial power to undertake review of administrative action have been defined in Australia.

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401 For example, the Democracy Index, compiled by the Economist Intelligence Unit, ranked the health of Australian democracy at number 9 in the world, below New Zealand and Canada, which were 4 and 6 respectively, but above the United Kingdom (14) and the United States (25). New Zealand and Australia both scored 10.00 for the protection of civil liberties. See Democracy Index 2018: Me too? Political participation, protest and democracy (2019) 36 <https://www.eiu.com/topic/democracy-index>. See also Gyorfi (n 148) 152, where several nations that he assessed as having limited or weak judicial review are compared on these and a range of other measures.

402 There is a considerable body of literature which addresses the question of whether courts are in fact the most appropriate body to decide certain kinds of questions, which might be better resolved in the political sphere—see, eg, Paul Yowell, *Constitutional Rights and Constitutional Design* (Hart, 2018), in particular chapter 5 the institutional capacities of legislatures and courts to carry out certain functions are compared; Gyorfi (148); Ran Hirschl, *Towards Juristocracy: The Origins and Consequences* (Harvard University Press, 2007); and Jeremy Waldron, 'The Core of the Case Against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

6.

A POSITIVE CONCEPTION OF THE ADMINISTRATIVE STATE

> 'The mutual claims of the State and of its citizens must be claims clearly justifiable by reference to a common good which includes the goods of all.'
>
> Harold Laski[1]

> 'all power of government is limited by law.'
>
> Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ[2]

6.1 INTRODUCTION

As chapter 3 argued, the approach to judicial review articulated by Brennan J in *Attorney General v Quin* ('*Quin*')[3] is one that provides a guide for the taking account of the legitimate roles of both the legislature and the executive within the framework of the Australian Constitution. The powers of the three main branches of government must be understood by the way in which they 'co-ordinate' or interrelate with each other. The nature and scope of these powers is informed by the Australian Constitution, the drafting and interpretation of which has been influenced by the notions of government and democracy sketched in chapter 5. This chapter considers attitudes to administrative power within this framework, and their corresponding influence on principle in judicial review of administrative action.

Jurisdictional error is now a central concept in review of administrative action in Australia. Chapter 4 suggested that the conclusion that a jurisdictional error has been made is reached after a consideration of the limits of an administrative power in the context in which it was exercised. A key contention of that chapter was that when courts are engaging in this exercise, statutory language is the starting point for the analysis, but that this language is interpreted by reference to a set of values. These values are derived from the general law; however, the stipulations of Brennan J in *Quin* provide a framework for their application.[4] The concept of judicial power, which has been described

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1 *A Grammar of Politics* (Allen & Unwin, 5th ed, 1967) 96.
2 *Graham v Minister for Immigration and Border Protection* ('*Graham*') (2017) 263 CLR 1, 24.
3 ('*Quin*') (1990) 170 CLR 1.
4 See, eg, John Basten 'Judicial Review of Executive Action: Tiers of Scrutiny or Tears of Frustration?' in Neil Williams (ed) *Key Issues in Judicial Review* (The Federation Press, 2014) 35.

throughout the preceding chapters, is one element of this framework. However, just as chapter 3 suggested that the concept of 'the merits' is not residual, the notion of judicial power is itself shaped by conceptions of executive power. Values relating to the very nature and function of administrative power itself form a part of the context within which statutory language is interpreted, and the principles of review are shaped.

These values, though, are generally not referred to explicitly by courts, making them hard to define with specificity. As a starting point for attempting to understand what they might be and explain their force, this chapter seeks to build upon the argument of chapter 5 by suggesting that political conceptions of the role of the administrative state have been different from the one found in Dicey's theory of the constitution since even before Federation in Australia. As chapter 5 outlined, Dicey viewed the increasing use of legislation to achieve 'collective' aims with scepticism.[5] Dicey also viewed the exercise of administrative power unfavourably.[6] Administrative power required the exercise of discretion, which he regarded as potentially arbitrary.[7]

By contrast with this, for the functionalist style of public law, 'rights emanate from the state.'[8] As noted, in the functionalist style, legislation was considered to be the supreme form of law as it was the embodiment of democratic will.[9] Legislation and regulation could be harnessed to address what were considered to be the great social problems of the late 19th and early 20th centuries.[10] The Australian Constitution is itself a statute of the British Parliament.[11] Regulatory schemes require a bureaucracy to administer them. Underpinning these views was the historical fact that the state had long been interventionist in Australia. There was an acceptance, perhaps even an expectation, that government would play a key role in the ordering of society through regulation of all

5 See 5.3.3(a).
6 Ibid.
7 A V Dicey, *Lectures Introductory to the Study of the Law of the Constitution: Oxford Volume Edition of Dicey* (vol 1) J W F Allison (ed) (Oxford University Press, 2013) 97-98.
8 Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 60.
9 Ibid; see chapter 5 at 5.3.1.
10 See also James Bryce, 'The Methods and Conditions of Legislation in Our Time' (1908) 3 *Columbia Law Review* 157, 161.
11 Although it was endorsed by a popular vote prior to this, and its terms were guarded by its drafters against amendment by the British Government—see Helen Irving, *To Constitute a Nation* (Cambridge University Press, 1999) 204-207.

kinds.[12] This is a recognisably positive conception of administrative power, in which true liberty is achieved through the beneficial intervention of the state.[13]

The Constitution was intended to establish a national government. This would require an administrative state. Section 61 of the Constitution states that the executive power of the Commonwealth 'extends to the execution and maintenance of this Constitution, and of the laws of Commonwealth.' The precise scope of this power is subject to much debate.[14] The concern in this chapter is not so much with the specific question of the breadth of s 61. Rather it is with the separate, although related, idea of the ways in which executive power has been treated by the judiciary as having its own legitimate sphere.

It is perhaps owing to these influences that judicial review in Australia does not seem to be perceived entirely in what might be described as 'red light' terms,[15] but rather displays what were referred to in the previous chapter as 'functionalist' tendencies. These extend to an acceptance that other methods of control, including those situated in the executive itself, as well as those that come from the political sphere, are more suitable for some kinds of questions. This does not mean, however, that the courts do not play an important role in controlling the administrative state. This task is just not viewed to be theirs exclusively, or even predominately. In some ways this pragmatic acceptance that control might be more effectively provided in certain circumstances by statutory tribunals or

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12 See, eg, John Wanna and Patrick Weller, 'Traditions of Australian Governance' (2003) 81 *Public Administration* 63, 65-71.

13 See chapter 5 at 5.3.1.

14 There is extensive literature on this, but see, eg, George Winterton, *The Parliament, The Executive and the Governor-General: A Constitutional Analysis* (Melbourne University Press, 1983), in particular at chapter 2 and 3; George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421; Anne Twomey, 'Pushing the Boundaries of Executive Power—*Pape*, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313; Peter Gerangelos, 'The Executive Power of the Commonwealth of Australia: Section 61 of the Commonwealth Constitution, "Nationhood" and the Future of the Prerogative'' (2012) 12 *Oxford University Commonwealth Law Journal* 97; Gabrielle Appleby and Stephen McDonald, 'Looking at the Executive Power through the High Court's New Spectacles' (2013) 35 *Sydney Law Review* 253; Peter Gerangelos, 'Reflections on the Executive Power of the Commonwealth: Recent Developments, Interpretational Methodology and Constitutional Symmetry' 37 *University of Queensland Law Journal* 191; and Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' (2018) 43 *University of Western Australia Law Review* 103. On the issue of the powers of the Governor-General as the Australian Head of State, see Anne Twomey, *The Veiled Sceptre: Reserve Powers of Heads of State in Westminster Systems* (Cambridge University Press, 2018).

15 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd ed, 2009) 4.

corruption oversight bodies may have contributed to the insistence that it is role of the courts to say what the law is.[16]

As chapter 4 observed, although there is a focus on text in Australian judicial review, the principles of statutory interpretation remain, for the most part, judge-made.[17] Courts in Australia have not followed developments in English principle regarding, for example, substantive legitimate expectations.[18] As discussed in chapter 2, Michael Taggart and Dean Knight have attributed this to the 'formalism' or conservativism inherent in the judicial review doctrine of Australia.[19] However, as chapter 2 argued, an approach that focuses on text and interpretive method can also be a way of ensuring that the values of the system itself are privileged over those of individual judges. Review of administrative action in Australia is framed by a constitutional notion of judicial power that has been influenced by the political ideas described in chapter 5.

This means that, unless the text and structure of the Constitution provides a reason for finding otherwise, conferrals of legislative power will be treated as valid. It follows that Parliament can empower Ministers to make decisions that may not meet certain standards that the general law might otherwise apply, such as reasonableness.[20] The interpretive approach described by chapter 4 can be employed to condition the exercise of power in certain ways, but not where the statutory intention is clear. Dean Knight perceived that this approach falls short on certain rule of law measures.[21] However, within the Australian constitutional framework, the rule of law cannot be used to frustrate the clear intention of Parliament.[22] This is not the role of the High Court when understood as 'co-ordinate' with the other two branches of government. The interpretive approach can,

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16 See *Quin* (n 3) 17, 35 and 37 Brennan J; *Corporation of the City of Enfield v Development Assessment Corporation* (2000) 199 CLR 135, 153 (Gleeson CJ, Gummow, Kirby and Hayne JJ); see Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 13 for a critique of this approach.

17 Some principles are codified in interpretation Acts, for instance the *Acts Interpretation Act 1901* (Cth). Where applications for review are made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth), ss 5 and 6 contain a list of the available grounds, however these grounds themselves have typically been applied by reference to the general law.

18 For example, cf *R v North and East Devon Health Authority; ex parte Coghlan* [2001] 3 QB 213 with *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 ('*Lam*'), 21-23 (McHugh and Gummow JJ).

19 See chapter 2 at 2.6.

20 An example is s 501 of the *Migration Act 1958* (Cth), see below at 6.5.2.

21 Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018) 254.

22 See, eg, Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (The Federation Press, 2017) 163-169; see also chapter 4 at 4.4.1 and chapter 5 at 5.4.2.

however, be used to demand stringent decision-making processes, as this is in keeping with the way the role of the judiciary has been shaped in Australia.

One reason why the unreasonableness ground provides a useful illustration for the arguments in this chapter is its inherently subjective quality. Because it is difficult to construct an objective idea of what 'reasonable' might constitute in a particular set of circumstances, theories of the scope of the ground tend to be informed by standpoints on other matters, in particular more general perceptions about the nature of the judicial function.[23] Debates about unreasonableness or proportionality can be regarded as proxies for deeper ones about constitutionalism. Further, unreasonableness is a kind of 'meta-ground'. Other grounds of review, such as having regard to an irrelevant consideration, failure to take a relevant consideration into account, no evidence and even procedural fairness can all also be described as instances of unreasonableness. For these reasons, examining the way in which courts approach the unreasonableness ground can be illustrative of wider values about the role of courts in judicial review of administrative action.

In keeping with the argument of chapter 2, this chapter suggests that one explanation for the more restrictive approach to unreasonableness in Australia is that, within the constitutional framework that has been described throughout the preceding chapters, there is an acceptance that where Parliament has given a task to a decision-maker, it is not for the court to adjudicate on the morality or wisdom of the way in which this task is performed. It can only assess legality, leaving questions that touch upon the pursuit of wider, collective, aims of regulatory schemes to the executive branch, which is ultimately more accountable through the political process.[24]

This chapter is organised as follows. Part 6.2 sets out Dicey's well-known suspicion of administrative power and the lasting influence it has had on administrative law. It then sets out the ways in which this suspicion can be considered to be relatively absent in Australia, owing to the history of interventionist government and the progressive ideas described in chapter 5. Part 6.3 provides an overview of the reasonableness rule in the control of administrative discretion and sets out the drift away from the traditional

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[23] See Michael Taggart, 'Proportionality, Deference, Wednesbury' [2008] *New Zealand Law Review* 423, 425.

[24] See, eg, chapter 3 at 3.6.1.

Wednesbury rule that has occurred in English jurisprudence. Part 6.4 sets out the contemporary Australian approach to unreasonableness review. Part 6.5 explains the ways in which this approach to unreasonableness in review of administrative action can be considered to be the product of functionalist influences.

6.2 EXECUTIVE DISCRETION AND THE ADMINISTRATIVE STATE IN AUSTRALIA

The term 'administrative state' is used here to refer to the agencies and institutions of government which comprise the executive branch. In a Westminster system, such as Australia, this term can also encompass decision-makers at the highest level, who are also members of Parliament. This is because the Ministers who comprise Cabinet are also often responsible for many day-to-day administrative decisions.

Throughout the 19th century, under the influence of theorists like J S Mill, it began to be perceived that the state had a role in improving the lives of citizens.[25] By the 20th century, as Michael Taggart once put it:

> … it was taken for granted in many countries that it was the duty of the state to care for its citizens 'from cradle to grave': to provide education, pensions, medical services, and public utilities, and to hold out a safety net for the less fortunate so they had food, shelter, and the other necessities of life.[26]

As Taggart went on to describe, the latter decades of the century saw something of a retreat from this, as under the influence of neoliberal economic theories, it began to be accepted once again that many matters should be left to market forces.[27] This led to 'privatisation', deregulation, and the 'contracting out' of government services to the private sector.[28] This shift was far-reaching,[29] and Australia was not immune.[30] Despite this, the administrative state still has considerable reach.

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25 See, eg, Loughlin (n 8) 116.

26 Michael Taggart, 'The Nature and Functions of the State' in Mark Tushnet and Peter Cane (eds) *The Oxford Handbook of Legal Studies* (Oxford University Press, 2005) 101, 101.

27 Ibid 102-104; For a British perspective, see Harlow and Rawlings (n 15) 56-59.

28 Taggart (n 26) 101.

29 The literature on this is extensive but see ibid 101.

30 Again, the literature is extensive, but for a recent overview see John Quiggin, 'The diffusion of public private partnerships: a world systems analysis' (2019) 16 *Globalizations* 838, and for a general critical perspective on the influence of neoliberalism in Australian policy making see Damien Cahill and Phillip Toner, 'Introduction' in Damien Cahill and Phillip Toner *Wrong Way: How Privatisation & Economic Reform Backfired* (LaTrobe University Press, 2018) 1.

The sheer size and scope of the administrative state and the tasks which it is called upon to perform require the existence of a bureaucracy,[31] staffed by officials, who need scope to exercise discretion.[32] Although rules to guide the exercise of discretion can be set down in instruments with the force of law, such as legislation and regulations, for all kinds of practical reasons connected with the dynamic nature of executive power, and its multitude of aims and ends, these cannot be wholly prescriptive with respect to how the decisions of government are to be made. Kenneth Culp Davis wrote that discretion is and always has been a necessary feature of government, and '[n]o government has ever been a government of laws and not of men in the sense of eliminating all discretionary power.'[33] The elimination of discretion is, according to Denis Galligan, 'an impossible dream'.[34] Despite the need for it, however, there has long been a suspicion of it in constitutionalism, something that has often been attributed to the work of A V Dicey.[35]

The previous chapter described the influence of progressive ideas in Australian politics in the late 19th and early 20th centuries. This section of this chapter expands upon the ideas contained in that chapter. It suggests that, owing to its history and the point in time at which its Constitution was made, the 20th century idea of the state as a provider has always been influential on the way in which the role and functions of the executive branch of government have been perceived. It first sets out Dicey's attitudes towards the concept of administrative discretion, and the long-standing critique of this.

6.2.1 Dicey's suspicion of executive discretion

In his work on the English Constitution, Dicey expressed considerable scepticism regarding administrative discretion, suggesting that 'wherever there is discretion, there is room for arbitrariness.'[36] He portrayed executive discretion, in the phrase of H W Arthurs as 'the antithesis of law.'[37] As Galligan noted, 'Dicey may not have meant discretion as a synonym for arbitrariness, but he certainly suggested that where there is discretion, there

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31 Harlow and Rawlings (n 15) 52.
32 Denis Galligan, *Discretionary Powers: A Legal Study of Official Discretion* (Clarendon Press, 1986) 72-84.
33 Kenneth Culp Davis, *Discretionary Justice: A Preliminary Inquiry* (Louisiana State University Press, 1969) 17.
34 Galligan (n 32) 1.
35 See, eg, H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1.
36 Dicey (n 7) 98.
37 Arthurs (n 35) 22.

is a high risk of arbitrariness.'[38] The critique of Dicey's denial that discretion was a feature of English political and constitutional system is of long-standing.[39] Writing in 1935, Ivor Jennings described it as an 'absurd proposition'.[40] Nevertheless, this denial has remained influential in several ways.[41] For instance, as Matthew Lewans observed, 'Dicey's idea of the rule of law was meant to provide a bulwark against parliamentary action.'[42] This means that 'Diceyan constitutionalism appears to pivot on an insoluble dialectic between parliamentary sovereignty and the rule of law.'[43]

Dicey's description of the constitution and the place of the 'rule of law' within it is well-known. He perceived that the 'central character' of the French system of administrative law, which he described as the *droit administratif*, was that it 'was a body of law intended to preserve the privileges of the state.'[44] This state of affairs was 'fundamentally inconsistent with what Englishmen regard as the due supremacy of the ordinary law of the land.'[45] For Dicey, 'the essential characteristic' of the English Constitution was 'the absence of arbitrary power on the part of the Crown.'[46] This was the product of a centuries-long struggle to curb the power of the monarchy in England. It was the basis of his 'idea of legal equality', which meant 'the universal subjection of all classes to one law administered by the ordinary Courts'.[47] This meant that 'every official, from the Prime Minister down to a constable or a collector of taxes is under the same legal responsibility for every act done without legal justification as any other citizen.'[48]

This is an important constitutional principle in Australia too, something considered in chapter 4.[49] As a majority of the High Court, comprised of Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ, observed in *Graham v Minister for Immigration and Border*

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38 Galligan (n 32) 143.
39 See, for example, Ivor Jennings, *The Law and the Constitution* (The University of London Press, 5th ed, 1959) 310.
40 Ivor Jennings, 'In Praise of Dicey' (1935) 13 *Public Administration* 123, 131.
41 Arthurs (n 35); Loughlin (n 8) 139-140; Matthew Lewans, 'Re-Thinking the Diceyan Dialectic' (2008) 78 *University of Toronto Law Review* 75.
42 Matthew Lewans, *Administrative Law and Judicial Deference* (Hart, 2016) 31; see chapter 5 at 5.3.3(a) for a discussion of Diceyan 'normativism'.
43 Ibid 15.
44 Dicey (n 7) 238.
45 Ibid 236.
46 Ibid 98.
47 Ibid 100.
48 Ibid.
49 See at 4.4.1.

Protection[50] 'all power of government is limited by law.'[51] However, while this is straightforward, complexity arises in attempting to give content to 'the law'. This is where the political assumptions that contextualise Dicey's theory become important. Chapter 5 has already described Dicey's adherence to a form of classical liberalism, and his mistrust of the 'collectivism' he saw growing around him as the 20th century began.[52]

Jennings wrote of Dicey that 'he seemed to think that the British Constitution was concerned almost entirely with the *rights of individuals*', adding that '[h]e was imagining a constitution dominated by the doctrine of *laissez-faire*.'[53] This caused him to conceive of 'the function of government' narrowly, as being concerned only with the protection of 'the individual against internal and external aggression.'[54] Crucially, for the argument here, Jennings said of Dicey that:

> The Constitution was for him an instrument for protecting the fundamental rights of the citizen, and not an instrument for enabling the community to provide services for the benefit of its citizens.[55]

Lewans, drawing upon the work of Isaiah Berlin, considered that Dicey was operating from 'the notion of negative liberty'.[56] In this conception, state power represented a threat to individual rights and liberties. This was because, as Denis Galligan explained, Dicey was focussed on state power in 'those areas of traditional personal liberties concerning arrest, search, seizure, forfeiture, and detention', about which the common law 'had developed a system of clear and comprehensive principles.'[57]

Jennings said that Dicey was an individualist who was not 'concerned with the relations between poverty and disease on the one hand, and the new industrial system on the other.'[58] According to Jennings, Dicey treated 'social reform' as the politics of 'Radicals'.[59] He was unable to see the merits of the *droit administratif*, meaning that he 'rejected the opportunity of initiating a vigorous and effective system of administrative

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50 (2017) 263 CLR 1.
51 *Graham* (n 2) 24.
52 See at 5.3.3(a).
53 Jennings (n 39) 55.
54 Ibid.
55 Jennings (n 40) 132.
56 Lewans (n 42) 15, citing Isiah Berlin, 'Two Concepts of Liberty' in Isaiah Berlin, *Four Essays on Liberty* (Oxford University Press, 1969) 118.
57 Galligan (n 32) 201.
58 Jennings (n 39) 311.
59 Ibid 31.

law.'[60] Jennings perceived that by ignoring the role of administrative authority, Dicey portrayed 'collectivism' itself as 'unconstitutional.'[61] Such a conception of the state was already out of date even by the first edition of Dicey's text.[62] Jennings wrote scathingly that if 'the rule of law' was taken to mean that:

> … the State only has the functions of carrying out external relations and maintaining order, it is not true. If it means that the State ought to exercise these functions only, it is a rule of policy for Whigs (if there are any left).[63]

The spirit of Dicey's age was perhaps better captured by Bryce, who observed that '[w]e live in critical times, when the best way of averting hasty or even revolutionary changes is to be found in the speedy application of remedial measures.'[64] He suggested that allowing the people to express their will through legislation would 'help that will to express itself with prudence, temperance and wisdom', and posed the question '[w]hat is legislation but an effort of the people to promote their common welfare?'[65]

It was Dicey's 'political ideology that led him to preclude administrative authority', something that Lewans thought 'should be cause for concern amongst constitutional theorists, because it skews our understanding of how to resolve questions of legal authority between different legal institutions or officials.'[66] Despite this, the context is often overlooked. Lewans wrote that 'even today there is a persistent tendency to divorce Dicey's constitutional theory from its controversial political foundations', and that there is a propensity amongst public law scholars to 'venerate Dicey's *description* of the constitution, while ignoring the *normative* political foundation Dicey laid for it in his other writings.'[67]

As Chapter 5 contended, this context is important. When it is taken into account, it is possible to see, as Martin Loughlin argued, that there is not really an 'insoluble dialectic' between the concepts of parliamentary sovereignty and the rule of law in Dicey's theory.

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60 Galligan (n 32) 202.
61 Jennings (n 40) 132.
62 Jennings (n 39) 55; see also Paul Craig, *UK, EU and Global Administrative Law: Foundations and Challenges* (Cambridge University Press, 2015) 65-95 for an overview of administrative power in England from the 15th to 19th centuries.
63 Ibid 311.
64 Bryce (n 10) 171.
65 Ibid.
66 Lewans (n 42) 38; see also Ivor Jennings, 'Courts and Administrative Law—The Experience of English Housing Legislation' (1936) 49 *Harvard Law Review* 426, 430.
67 Lewans (n 42) 39.

Dicey believed in a form of limited democracy, which, for him, made it unlikely that Parliament would pass laws that the courts did not want to enforce. He did not appear to properly comprehend, initially at least, the situation that was already happening around him, in which a widening franchise would bring about the passage of legislation which did interfere with individual liberties such as the freedom of contract, but in ways that were thought to be for the good of all.[68]

As H W Arthurs wrote, 'in debates over the relationship of the courts to the administration, the Rule of Law remains the rallying cry for those who favour judicial intervention.'[69] Expecting the control of the state to be entirely the prerogative of courts is an expression of what Loughlin called 'conservative normativism',[70] with the later variant being 'liberal normativism',[71] and also akin to what Carol Harlow and Richard Rawlings have described as 'red light theory'.[72] The normativist conception of law at the heart of Dicey's theory means that, while he said that Parliament was sovereign, it remained the important constitutional role of the 'ordinary courts' to 'interfere' with administration if need be.[73]

Like most nations with systems of government derived from England, Australian administrative law is much influenced by Diceyan ideas. At the same time, as the previous chapter described, the Australian Constitution was established under the influence of a set of ideas about government that were nearly the opposite of those of Dicey. Before turning to a consideration of how this might have had an influence on the principles of administrative law, the next section of this chapter sketches the different conception of administrative power in Australia.

6.2.2 A constitutionalism that is not entirely Diceyan

As can be gleaned from the account given here, the role and form of the English government in the 18th and early 19th centuries were quite different to the modern conception. The state was perceived as having more limited functions, or to use the phrase of Wolfgang Friedmann, it was thought of as a 'glorified policeman, but otherwise

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68 See chapter 5 at 5.3.3(a).
69 Arthurs (n 35) 4.
70 Loughlin (n 8) 139-140.
71 Ibid 212.
72 Harlow and Rawlings (n 15) 3.
73 See chapter 5 at 5.3.3(a) and also chapter 3 at 3.4.2.

a disinterested spectator'.[74] However, since its colonisation by the British, this has never been an entirely apt descriptor of the state in Australia. Paul Finn observed that the systems of government set up in the Australian colonies were, of necessity, 'markedly different in structure and responsibilities from that of Britain.'[75] Keith Dowding later wrote that 'Australia is marked out by its colonial heritage.'[76] The 'close colonial relationship' with Britain helped to create the 'hallmarks' of its 'bureaucratic state' in which the 'role of the state was conceived of as safeguarding the welfare of the people as a whole, directed by wise public servants and sound legal processes.'[77] The state established by the British in Australia therefore had, from its very beginnings, a different character to the one idealised by Dicey.

The social and economic forces at work in the United Kingdom and pre-Federation Australia were very different from each other, leading to the establishment in the latter of distinctive administrative arrangements. These in turn had the effect of placing 'the relationship between the citizen and the state on somewhat different footings in the two countries.'[78] In Australia, the requirements of colonial government helped to foster an 'enduring attitude which looked to the central governments for the satisfaction of needs.'[79] The political scientists John Wanna and Patrick Weller have noted that '[g]overnment officials believed in the use of state guarantees and collective resources (taxes, public borrowing and regulation) to induce and shape the early development of the Australian self-governing entities.'[80]

According to Finn, the kinds of functions assigned to local authorities in colonial New South Wales were in the United Kingdom either performed by central government or statutory boards, with the result that citizens were in 'a closer relationship with the government.' For Finn, this influenced what he called 'a revolution in the law', in the form of legislation adopted across the colonies to provide for the modification of the doctrine of crown immunity to allow citizens to bring civil claims against the

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74 Wolfgang Friedmann, 'The Planned State and the Rule of Law: Part I' (1948) 22 *Australian Law Journal* 162, 163.
75 Paul Finn, *Law and Government in Colonial Australia* (Oxford University Press, 1987) 5.
76 Keith Dowding, 'Australian exceptionalism reconsidered' (2017) 52 *Australian Journal of Political Science* 165, 169.
77 Ibid.
78 Finn (n 75) 3.
79 Ibid.
80 Wanna and Weller (n 12) 66.

government.[81] Further, colonial governments performed 'activities that were without counterpart in Britain or which were conducted by local government, private enterprise or private and charitable organisations.'[82]

Finn noted that this style of government prompted mid-twentieth century economists to ascribe the labels of 'colonial' or 'state socialism' to it, which, he added, was somewhat paradoxical given that at least in part the high levels of state involvement were aimed at fostering the development of private capital.[83] He further noted on this point that '[w]hatever its explanation, practical necessity, pragmatism, and then some humanitarian concern triumphed over theory and ideology.'[84] This provision of infrastructure and fostering of industry seemingly more out of necessity than ideology continued after Federation. It was observed by James Bryce, who noted in *Modern Democracies* that 'State ownership of the railways' in Australia should not be ascribed to 'any Collectivist views'.[85] Rather, a general lack of capital or private wealth to undertake such a project had meant that '[t]he States assumed the duty.'[86]

This history of reliance upon government to provide all manner of services, including things that were provided by private enterprise elsewhere, created a relatively comprehensive regulatory state prior to Federation. As Hugh Collins observed 'the state that was delivered to Australia's colonial democrats was a stronger, more intrusive, legitimately interventionist instrument than Victoria's Britain.'[87] This history then coalesced with the influence of liberal progressivism outlined in chapter 5, which regarded government as a means for achieving 'social progress', as defined by reference to the cultural values of the era.[88]

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81 Finn (n 75) 3 and further at chapter 6.

82 Ibid 3.

83 Ibid; see also, eg, W K Hancock, *Australia* (Ernest Benn, 1930) 73; Stuart Macintyre, 'State socialism' in Graeme Davison, John Hirst and Stuart McIntyre (eds) *The Oxford Companion to Australian History* (Oxford University Press, rev ed, 2001) 613, 613-641; and Wanna and Weller (n 12) 66. See chapter 5 (n 136) for reference to the notion of Australian 'socialism sans doctrine'.

84 Finn (n 75) 3.

85 James Bryce, *Modern Democracies* (The Macmillan Company, 1921) vol 2, 233.

86 Ibid; see also Friedmann (n 74) 163, where he noted that the state had assumed responsibility for the railways in Australia because 'owing to the character of the land and the distribution of the population' their operation 'could never be a profit-making enterprise'.

87 Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114(1) *Daedalus* 147, 151; see also Wanna and Weller (n 12) 66.

88 See chapter 5 at 5.2.1.

As noted in chapter 5, it was the view of Collins that the institutions and political outlook of Australia were heavily influenced by the prevailing ideology of the latter half of the 19th Century, a form of Benthamite utilitarianism that he considered has held sway in Australia ever since.[89] Alan Davies would much later observe the Australian 'characteristic talent for bureaucracy'.[90] John Wanna and Patrick Weller described Australian administrators as, historically, 'utilitarian and pragmatic'.[91]

Legislation is the primary means by which utilitarian[92] and democratic objectives are achieved. By the late 19th century, the growing perception of a more expansive role for the state meant that legislation was being used much more frequently in England as well.[93] The Constitution was itself a statute of the British Parliament.[94] The Constitution contains a list of the subjects with regard to which the Commonwealth Parliament is competent to legislate.[95] The debates over which powers should be included in this list are themselves illustrative of the perception of the role of the state in general at the time.[96] Legislation represents the expression of the popular will.[97] It was, and still is, first developed and then administered by government departments.[98]

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89 Collins (n 87). See at 5.2.

90 A F Davies, *Australian Democracy: An Introduction to the Political System* (Longmans, Green and Co, 2nd ed, 1964) 4.

91 See also Wanna and Weller (n 12) 67.

92 The need for codification of the law was central to Bentham's philosophy; see, eg, Phillip Schofield, 'Jeremy Bentham: Legislator of the World' (1998) 51 *Current Legal Problems* 115, 119.

93 See, eg, Bryce (n 10). This was something that Dicey had viewed with concern—see chapter 5 at 5.3.3(a).

94 See (n 11)

95 *Australian Constitution*, s 51.

96 As Helen Irving wrote, '[t]he powers found in s 51 represent what was thought in the 1890s as proper for national, rather than local, legislation'—see *To Constitute A Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, 1999) 91. The fact that these included 'invalid and old-age pensions' (s 51(xxiii)) and 'conciliation and arbitration for the prevention and settlement of industrial disputes extending beyond the limits of any one State' (s 51(xxxv)) is illustrative of interventionist notions of state. As Irving noted, limited as these powers may have been, they were nevertheless 'extremely progressive for their time'—see 169. For reference to the convention debates over the inclusion of these provisions, see Irving at 95-96. For discussion as to why it might be that the Commonwealth was not given more comprehensive social and industrial powers, see Irving 93-94 and J A La Nauze, *The Making of The Australian Constitution* (Melbourne University Press, 1972) 282-286.

97 See, eg, passage from Bryce (n 10), quoted at 6.2.1.

98 See, eg, ibid 163, where a description of the drafting process in England at the time is given. Bryce observed that '[w]hen it comes to the actual introduction of a measure, the work of preparation is done by an administrative department of the government and the drafting by the government draftsman.' This meant, in his view, that 'both a considerable measure of practical knowledge of the subject and a high level of professional competence for giving legal form to what is meant to be enacted are secured.'

This legislation was underpinned by a large amount of delegated legislation.[99] In a practice that has become more pronounced over time, much of the detail of many regulatory schemes is to be found in lengthy and detailed regulations or other statutory instruments.[100] Delegated legislation also deals with matters of policy substance.[101] The sheer volume of such regulatory material raises questions regarding the capacity of Parliament, and in turn, the public, to scrutinise the executive's use of these powers.[102] However, the practical necessity of delegated legislation has long been recognised in Australia, as the High Court's decision in *Victorian Stevedoring and General Contracting Company Pty Ltd v Dignan*[103] demonstrated.[104]

The establishment of the Senate Standing Committee on Regulations and Ordinances in 1932[105] further serves to illustrate the pragmatic acceptance not only of the need for the executive to perform this kind of role, but also of the need for the practice of delegation of legislative power to have some oversight going beyond that provided by the courts. Writing in 1948, Friedmann said that '[t]he necessity of delegating rule-making on the largest scale to administrative authorities is as much a basic fact of modern industrial society as the assumption by the state of certain obligations of social welfare.'[106] This acceptance of such a great degree of delegation of legislative power to the executive further illustrates that, even given the commitment to democracy outlined in chapter 5, there is what could be recognised as a functionalist preference for bureaucratic expertise.

All of this provides a basis for thinking that, by Federation, and certainly in the decades afterwards, it was already accepted that an expansive administrative state was an

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99 See, eg, Mark Aronson, 'Subordinate legislation: lively scrutiny or politics in seclusion' (2011) 26 *Australian Parliamentary Review* 4, 6, who observed after studying the legislation passed by the New South Wales Parliament in 1908, that there was 'a great deal of subordinate legislation.'

100 Ibid 7-8.

101 Ibid 7, 11; see also Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary scrutiny of delegated legislation* (Report, 3 June 2019) 6.

102 See, eg, Aronson (n 99) 11; and Gabrielle Appleby and Joanna Howe, 'Scrutinising parliament's scrutiny of delegated legislative power' (2015) 15 *Oxford University Commonwealth Law Journal* 3, 4.

103 (1931) 46 CLR 73.

104 See chapter 2 at 2.4; see also, eg Aronson (n 99) 9; Appleby and Howe (n 102) 4-5; and Gabrielle Appleby, 'Challenging the Orthodoxy: Giving the Court a Role in Scrutiny of Delegated Legislation' (2016) 69 *Parliamentary Affairs* 269, 273.

105 See Senate Standing Committee (n 101) 15; and Appleby (n 104) 274-275, who noted the early establishment of such a parliamentary committee made Australia at that point 'a world leader in parliamentary scrutiny of delegated legislation.'

106 Friedmann (n 74) 166.

inevitable feature of government.[107] Rather than something to be feared, it was something to be put to work in service of the needs of the people of the nation. This is a recognisably positive conception of the state.[108] This position can be contrasted with the suspicion of administrative power, specifically administrative discretion, which characterised Dicey's theory of the constitution. Dicey himself regarded Australia as a laboratory for the collectivist reforms that caused him to begin to have some doubts about his own theory of parliamentary supremacy.[109]

Australia's written constitution, which established all three main institutions of government at the same time, also helped to place things at the national level on a different footing at the very beginning. Harlow and Rawlings noted that when the 'green light' or functionalist theorist Harold Laski described the judiciary 'as a branch of government' in early twentieth century England this was regarded as 'heretical'.[110] There has never been any doubt that the federal judiciary, established by Ch III of the Constitution, is a branch of the national government.

More than this, the executive has a place within the Constitution that, while influenced by other constitutional models, gives it a character of its own. Justice Gageler once observed, regarding the framers of the Constitution, that:

> Nowhere was their careful appropriation and adaptation of constitutional precedent to local circumstances more apparent than in their framing of what is described in Ch II of the *Constitution* as "The Executive Government" and of its relationship with what are described in Chs I and III of the *Constitution* as "The Parliament" and "The Judicature".[111]

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[107] In the context of the United States, Jerry L Mashaw has argued similarly, that '[f]rom the earliest days of the Republic' there was acceptance that an administrative state would be necessary to achieve the aims of government, meaning that the apparent 'hole in the Constitution' with respect to executive administration was 'filled in over time by legislation, administrative practice, and judicial precedent'—see *Creating the Administrative Constitution: The Lost One Hundred Years of American Administrative Law* (Yale University Press. 2012) 5, 29-30, 286.

[108] See, for instance, Isaiah Berlin, 'Two Concepts of Liberty' in Henry Hardy (ed) *Liberty* (Oxford University Press, 2002) 166, 177-178 and Lewans (n 42) 28-31. See chapter 5 at 5.3.1.

[109] A V Dicey, *The Relation Between Law and Public Opinion in England During the Nineteenth Century* (Macmillan, 2nd ed, 1914, reprinted 1920) lxv.

[110] Harlow and Rawlings (n 15) 3.

[111] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 91.

Justice Gageler went on to note the ways in which the 'Executive Government' was expressly 'subordinated to the Parliament' as well as the powers given to the Federal judiciary in the Constitution to restrain the executive from exceeding its own power.[112]

These remarks were made in his judgment in *Plaintiff M68/2015 v Minister for Immigration and Border Protection* ('*Plaintiff M68*').[113] The specific issue in that case was the nature and extent of the Commonwealth's general executive power in s 61 of the Constitution. However, they are illustrative of the point being made here, that the Australian Constitution, read against the background of Australia's political culture, can be considered to have itself influenced a certain conception of executive power.[114]

Gageler J noted that although s 61 stated that the executive power of the Commonwealth was 'to be vested in the monarch and exercisable by the Governor-General', it 'was always to involve broad powers of administration, including in relation to the delivery of government services.'[115] Once again discernible in this is a 'modern' idea of government. Further, the exercise of executive power 'is and was always to be susceptible of control by Commonwealth statute.'[116]

There is a considerable body of literature on the nature and scope of the executive power contained in s 61.[117] The argument sought to be made here is slightly different. It relates to how the role of the executive and the administrative state over which it presides is understood and perceived. Debates over the nature and extent of the 'nationhood' power, said to be encompassed by s 61, will be relevant to such an understanding, although these questions are beyond the immediate scope of this thesis. Chapter 4 made the point that the conclusion that a jurisdictional error has been made involves a process of statutory interpretation which is done by reference not only to common law values but also values that are connected to how the role and functions of each institution, the judiciary *and* the executive, are understood. These values play a part in informing the way in which courts fill gaps and silences in legislation.

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112 Ibid 92-96.
113 Ibid.
114 See also *Lam* (n 18) 24-25 (McHugh and Gummow JJ), where they noted that the existence of a 'basic law', with three branches of government, provided a 'frame of reference' that was different to that of England; see chapter 3 at 3.6.1.
115 Ibid 96.
116 Ibid.
117 See (n 14).

Beyond the simple statement contained in s 61,[118] the Constitution does not seek to define executive power. It is nevertheless possible to infer that it has certain characteristics from the features that it does contain, as referred to by Gageler J in the passages that have been set out here. Much in the way the Constitution was designed to facilitate self-government, the concept of executive power comprised within it was intended to both achieve the objectives of the Commonwealth Parliament while being answerable to it, and to the people themselves, through the principles of responsible government. The High Court was given express jurisdiction in Ch III to restrain the executive from exceeding its powers, including by the application of the general law, meaning that any vestiges of common law doctrines of crown immunity did not apply to Commonwealth executive action.[119]

The point is that the Commonwealth's executive power was designed to play a role in the creation and administration of a national government, which was in turn expressly designed to be answerable to the people.[120] Further, the power of the High Court to restrain this action comes from the Constitution itself, although its application has always been informed by reference to the principles of the supervisory jurisdiction, developed over long periods of time at common law. Within this framework, the important role of the courts is to ensure that the executive stays within the boundaries of 'the law'. As Brennan J acknowledged in *Quin*, it is the task of the courts to say what the law is.[121] However, the court must perform this role in such a way as not to undermine or interfere with the primary accountability mechanism of the Constitution.

The explanation often given for the limits on judicial power is the constitutional separation of powers doctrine. However, this concept is itself informed by a concept of Commonwealth executive power—'the judicature is but one of three co-ordinate branches'.[122] Crucially, as acknowledged by Brennan J in *Quin*, 'the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual.'[123] Read in the context of the discussion set out both here and in chapter 5, this can be recognised as an inherently functionalist

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118 Quoted above at 6.1.
119 See, eg, *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 94 (Gageler J).
120 See, eg, chapter 5 at 5.2.2(b).
121 *Quin* (n 3) 37.
122 Ibid.
123 Ibid.

statement[124] of the role of the courts in judicial review of administrative action. Is it the case then, that the principles of judicial review of administrative action in Australia could be better understood as the product of functionalist, rather than normative influences? This question is considered later in this chapter by reference to the unreasonableness ground. It is first necessary to set out some background regarding the framing of the unreasonableness principle, first in the English jurisprudence, and then in Australia.

6.3 THE UNREASONABLENESS GROUND AND THE CONTROL OF ADMINISTRATIVE DISCRETION

Reasonableness is a core concept in many areas of law, and one of the most complex. This is no less true of administrative law than it is of other fields. Central to the difficulty with the concept is the inherent slipperiness of the term 'reasonable' itself. What does it mean to 'be reasonable' and who gets to decide? Countless words have been written in contemplation of these questions. The notion of reasonableness has a subjective quality that makes the unreasonableness ground a contested one in judicial review of administrative action.

6.3.1 The role of rationality and reasonableness in the control of discretion

As the experience of common law systems around the world has demonstrated, when it comes to the matter of the power of the courts to ensure that administrative action is reasonable or rational, it is very difficult to craft an acceptable standard that can be applied from case to case. Part of the problem relates to the indeterminate nature of many of the concepts in play here. Part of it is connected to difficulties with terminology. For instance, even just generally speaking, while the two terms are often used interchangeably, reasonableness can be distinguished from rationality. 'Reasonableness' has what can be described as a moral dimension, in that to be considered reasonable, a decision must be 'both rational and moral.'[125] Irrationality is sometimes referred to as

[124] On this point see Basten (n 4) 38.

[125] Giovanni Sartor, 'A Sufficientist Approach to Reasonableness in Legal Decision-Making and Judicial Review' in Giorgio Bongiovanni, Giovanni Sartor and Chiara Valentini (eds) *Reasonableness and Law* (2009, Springer) 17, 17. See also Galligan (n 32) 145.

just 'one facet of unreasonableness.'[126] As French CJ said in *Minister for Immigration and Citizenship v Li* ('*Li*'), 'not every rational decision is reasonable.'[127]

However, sometimes rationality can be defined as requiring an element of reasonableness. For example, Denis Galligan formulated the rule that discretionary power must be used rationally as follows:

> The general principle that discretionary decisions should be made according to rational reasons means: (a) that there be findings of primary facts made on good evidence, and (b) that decisions about the facts be made for reasons which serve the purposes of the statute in an intelligible and reasonable manner.[128]

Geoff Airo-Farulla has argued that 'rationality' should, in the administrative law context, 'be seen as an umbrella term, encompassing many specific requirements of good decision-making.'[129] Reasonableness, on the other hand, required 'consistency with accepted moral values and common sense, and paying due regard to the interests of others', where such a requirement had not already been met by 'the more specific doctrines such as procedural fairness, relevant considerations and reasonable proportionality.'[130] These definitional questions add to the complexity of attempting to formulate a ground of review.

Regardless of how these terms are defined, however, there is an even more fundamental question to be considered, which is whether and to what extent it is the role of the judiciary to decide such questions. Unreasonableness has an undeniably subjective character. The current edition of *De Smith's Judicial Review* stated, for instance, that '[i]n practice, many of the decisions held unreasonable are so held because they offend the values of the rule of law.'[131] The authors added '[t]he concept of "unreasonableness", or "irrationality" in itself imputes the arbitrariness that Dicey considered was the antithesis of the rule of

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126 Lord Woolf, Jeffrey Jowell, Catherine Donnelly and Ivan Hare, *De Smith's Judicial Review* (Sweet & Maxwell, 8th ed, 2018) 604.

127 *Minister for Immigration and Citizenship v Li* (2013) 249 CLR 332 ('*Li*'), 352. See also Geoff Airo-Farulla, 'Reasonableness, rationality and proportionality' in Matthew Groves and H P Lee (eds) *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) 215.

128 Galligan (n 32) 266.

129 Geoff Airo-Farulla, 'Rationality and Judicial Review of Administrative Action' (2000) 24 *Melbourne University Law Review* 543, 573.

130 Ibid 574.

131 Woolf, Jowell, Donnelly and Hare (n 126) 619.

law.'[132] Yet, as chapter 4 acknowledged, the rule of law is itself a contested notion.[133] For functionalists, it was perceived as a principle designed to frustrate reformist objectives.[134] The scepticism of Jennings on this point has been set out above.[135]

The view that the unreasonableness ground should have a wider scope is closely related to the view that courts should be more interventionist in judicial review of administrative action. This can be recognised as a view that the judiciary should have more normative control over what 'reasonable' means in an administrative setting. The next section of this chapter explores the way in which wider conceptions of the respective roles and functions of the executive and the judiciary inform the standpoints taken by various judges and scholars on the scope and application of the unreasonableness ground. To do this, it draws upon aspects of the English debate over *Wednesbury* unreasonableness, which are also relevant for the analysis of unreasonableness review in Australia at 6.4.

6.3.2 The *Wednesbury* rule

It has long been a requirement of the law that discretionary power be exercised reasonably. In the 1891 House of Lords decision of *Sharp v Wakefield*,[136] Lord Halsbury, drawing upon much earlier authority himself,[137] said:

> ... "discretion" means when it is said that something is to be done within the discretion of the authorities that that something is to be done according to the rules of reason and justice, not according to private opinion; according to law and not humour. It is to be, not arbitrary, vague and fanciful, but legal and regular. And it must be exercised within the limit, to which an honest man competent to the discharge of his office ought to confine himself.[138]

However, a requirement that discretion be exercised reasonably does not tell us what 'reasonable' means. In administrative law, the standard of 'reasonableness' was, for a long time, typically associated with the judgment of Lord Greene in the seminal case of *Associated Provincial Picture Houses Limited v Wednesbury Corporation*,[139] where he

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132 Ibid.
133 See chapter 4 at 4.4.1.
134 See, eg, Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 400-401.
135 See at 6.2.1.
136 ('*Sharp*') [1891] AC 173.
137 For example *Rooke's Case* (1598) 5 Rep 100a, cited by [1891] AC 173, 179.
138 *Sharp* (n 136) 179, references omitted.
139 ('*Wednesbury*') [1948] 1 KB 223.

said that when a public authority had acted within the 'four corners' of its powers, a court could not intervene.[140] He went on to note, though, that the law required a public authority to exercise its discretion reasonably.[141] In terms of what that meant as a question of law, he said that a court could not intervene simply because it disagreed with the approach taken by the authority, or itself would have come to a different view in the circumstances. Rather, to attract sanction from a reviewing court, the decision made had to be 'so unreasonable that no reasonable authority could ever have come to it.'[142]

6.3.3 Going out of style? The drift away from the *Wednesbury* rule

In England, the now 'unloved'[143] *Wednesbury* rule has been 'under sustained attack for several decades'.[144] This attack has been multi-pronged. For example, it has been said that the *Wednesbury* standard, 'literally interpreted', was perceived to 'almost never give a claimant any protection.'[145] It has also been perceived to be lacking in transparency, as the 'vagueness' of the *Wednesbury* test could allow judges to cloak 'their social and economic preferences more easily.'[146] Described in this way the rule appears to be the very embodiment of the style of formalism that gave the word the pejorative character noted by Frederick Schauer.[147]

It is difficult to pinpoint the beginning of this shift. It was related to the growing influence of European jurisprudence upon the English common law[148] but also to the rise of human rights and common law constitutionalist discourse that has occurred since the 1970s. Even more deeply, it is also a reflection of the profound uncertainty about the constitutional order of the United Kingdom that emerged in the late 20th century.[149] One

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140 Ibid 228.
141 Ibid 229.
142 Ibid 234.
143 Taggart (n 23) 426.
144 Paul Daly, 'Wednesbury's reason and structure' [2011] *Public Law* 238, 238.
145 Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th ed, 2016) 633.
146 Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: Substantive Principles of Administrative Law' [1987] *Public Law* 368, 381.
147 Frederick Schauer, 'Formalism' (1988) 97 *Yale Law Journal* 509, 510. See chapter 2 at 2.7.1.
148 Woolf, Jowell, Donnelly and Hare (n 126) 9.
149 This uncertainty has reached a new high point following the 2016 'Brexit' referendum. There is an extensive literature on this, encompassing the debates over common law and political constitutionalism, but Mark Tushnet has put the situation succinctly with regard to what motivated Martin Loughlin's inquiry in *Foundations of Public Law* (Oxford University Press) see Mark Tushnet, 'Foundations of Public Law: A View from the US' in Michael A Wilkinson and Michael W Dowdle (eds) *Questioning the Foundations of Public Law* (Hart, 2018) 209, 213, and Loughlin's response, 'Excavating the *Foundations*' in the same volume at 255, 256.

portent that change was underway can be seen in the influential judgment of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* (the '*GCHQ Case'*).[150]

Lord Diplock said that judicial review had reached a stage of development where its grounds could be 'conveniently' classified under 'three heads', which he described as "illegality", "irrationality" and "procedural impropriety."[151] He equated "irrationality" with *Wednesbury* unreasonableness.[152] He said though, that the fact that the existing grounds could be grouped under these heads of review did not mean that there was no room for further development of the common law of judicial review. Specifically, he raised the prospect that English courts might in future adopt the principle of proportionality, then already recognised in the administrative law of some European countries.[153]

Proportionality used in this sense refers to the analytical approach applied by courts seeking to determining whether a 'constitutionally permissible' balance has been struck between a protected right and a limitation that has been placed upon that right by a legislature.[154] It was initially developed by courts in Germany in the period following the Second World War, but has since been adapted to the jurisprudence of many other nations, including Australia, but so far only in the context of the freedom of political communication implied from the Constitution.[155]

Although there are debates about the best way to formulate the approach, in the context of English administrative law it has been said that the court must ask in regard to an impugned measure:

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150 [1985] AC 374. See Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (LawBook Co, 6th ed, 2017) 377, where the authors note that a proportionality approach was 'unthinkable' until this decision.

151 Ibid 410.

152 Ibid.

153 Ibid.

154 See, eg, Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012) 3 and also Jeffrey Jowell and Anthony Lester, 'Proportionality: Neither Novel Nor Dangerous' in Jeffrey Jowell and Dawn Oliver (eds) *New Directions in Judicial Review* (Stevens & Sons, 1988) 51.

155 See *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 (French CJ, Kiefel, Bell and Keane JJ) although there are members of the High Court who have remained sceptical regarding this approach to the adjudication of whether the implied right has been infringed, see *Brown v Tasmania* (2017) 261 CLR 328, 376-77 (Gageler J), 476-479 (Gordon J), and *Clubb v Edwards* (2019) 93 ALJR 448 [159] (Gageler J), [390]-[404] (Gordon J).

> (i) whether its objective is sufficiently important to justify the limitation of a fundamental right; (ii) whether it is rationally connected to the objective; (iii) whether a less intrusive measure could have been used; and (iv) whether, having regard to these matters and to the severity of the consequences, a fair balance has been struck between the rights of the individual and the interests of the community.[156]

Writing only a couple of years after the *GCHQ Case*, Jeffrey Jowell and Anthony Lester argued, in what have been described as 'seminal—and at that time radical contributions',[157] that there was a need for courts to recognise and apply substantive principles in judicial review of administrative action.[158] Rather than 'encouraging judges to interfere in the merits of official decisions' as feared, they took the view that this would instead inspire reflection upon the 'proper role of the courts' in the context of the growing body of common law on the control of administrative action.[159]

Jowell and Lester considered that, were the legitimacy of substantive review to be recognised, at least in some circumstances, the *Wednesbury* test would not, on its own, continue to be a satisfactory principle. This was principally for three reasons. The first was that it did not require an explanation of why an action determined to be unreasonable was indeed unreasonable. The second was that, in attempting to constrain substantive review, the *Wednesbury* test was so stringent as to be nearly impossible to make out. It only applied where an officer had 'behaved absurdly'. The third reason was that the tautologous nature of the test meant that it was confusing.[160] Jowell and Lester suggested

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156 *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700, 771 (Lord Sumption JSC with the agreement of Baroness Hale, Lord Kerr and Lord Clarke JJSC), 804 (Lord Reed JSC) and 814 (Lord Neuberger PSC). See Aronson, Groves and Weeks (n 150) 378 for reference to the 'large number' of English cases attempting to address exactly what is required by the proportionality test, and also to the face that its 'basic structure' seems to have been settled by *Bank Mellat*. For a more general formulation, see Barak (n 154) 3. In Australia the application of structured proportionality has been much narrower, limited to constitutional cases where the implied freedom of political communication has been invoked. For the framing of proportionality in this context see *McCloy v New South Wales* (2015) 257 CLR 178, 194-195 (French CJ, Kiefel, Bell and Keane JJ), which was further clarified in *Brown v Tasmania* (2017) 261 CLR 328, 363-364 (Kiefel CJ, Bell and Keane JJ). This test entails asking whether a law is 'suitable, necessary and adequate in its balance.'

157 Mark Elliott and Hanna Wilberg, 'Modern Extensions of Substantive Review: A Survey of Themes in Taggart's Work and in the Wider Literature' in Mark Elliott and Hanna Wilberg (eds) *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart, 2015) 19, 31.

158 Jowell and Lester (n 146) 368.

159 Ibid 368-369.

160 Ibid 372.

several alternative grounds of substantive review be considered instead, one being proportionality.[161]

In a subsequent paper, Jowell and Lester expanded on their endorsement of proportionality, suggesting that, unlike the opaque *Wednesbury* rule, the structured proportionality approach would 'greatly strengthen the coherence of our developing system of administrative law.'[162] Jowell and Lester considered that the structured proportionality approach was no more susceptible to slipping into merits review than *Wednesbury*, and it had the advantage of requiring judges to state the principled reasons for their decision more clearly.[163]

Jowell later clarified his argument, suggesting that rather than being replaced entirely, *Wednesbury* unreasonableness still had a role, but 'in the interests of integrity and accountability the standard of unreasonableness should where possible be clarified by more precise categories, criteria and principles to guide and govern all official decisions.'[164] However, he and Lester had been in the vanguard of a long, and still ongoing,[165] debate about whether the *Wednesbury* standard should be replaced with one that asks whether a decision was proportionate in the circumstances.

The present doctrinal position is that proportionality is the standard to be applied in cases where a protected human right is invoked. The English jurisprudence has been influenced by that of the European Court of Human Rights.[166] Even prior to the introduction of the

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161 Ibid; see also Jowell and Lester (n 154) 68.

162 Ibid 51.

163 Jowell and Lester (n 146) 381 and also (n 154) 51, 68.

164 Jeffrey Jowell, 'Proportionality and Unreasonableness: Neither Merger nor Takeover' in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Michael Taggart's Rainbow* (Hart, 2015) 42, 43, 58-59.

165 For the ongoing nature of the debate, See, eg, *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355 and Craig (n 145) 633. As for the debate itself, there are many contributions, but see Taggart (n 23); Paul Craig, 'Proportionality, Rationality and Review' [2010] *New Zealand Law Review* 265; Tom Hickman, 'Problems for Proportionality' [2010] *New Zealand Law Review* 303; Sir Phillip Sales, 'Rationality, Proportionality and the Development of the Law' (2013) 129 *Law Quarterly Review* 223; and Jason N E Varuhas, 'Against Unification' in Hanna Wilberg and Mark Elliott (eds) *The Scope and Intensity of Substantive Review: Traversing Michael Taggart'* (Hart, 2015) 91.

166 In *Smith and Grady v United Kingdom* (1999) 29 EHRR 493, 542-543, the European Court of Human Rights (ECHR) held that, even where it had been adjusted to take into account the effect of a measure on human rights, the rationality standard was too high to allow proper assessment of complaints under Article 8 of the *Convention for the Protection of Human Rights and Fundamental Freedoms*. Following the commencement of the *Human Rights Act 1998* (UK), the House of Lords held that given this, the appropriate standard of review to be applied in human rights cases was proportionality, in keeping with the jurisprudence of the ECHR—see *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, 545-546 (Lord Bingham) and 546-548 (Lord Steyn).

Human Rights Act 1998 (UK) it had been accepted that in cases where a fundamental right was affected, stricter scrutiny could be applied by the court.[167] However, despite the criticism to which the *Wednesbury* rule has been subject for over three decades, the Supreme Court of the United Kingdom has still not accepted that proportionality is a stand-alone common law ground in cases where a protected right is not involved,[168] although some judges have expressed openness to it becoming one.[169]

The debate regarding proportionality can be regarded as part of the wider one about common law constitutionalism.[170] It is unsurprising therefore that where participants stand on the question of proportionality often correlates with the positions they take on this overarching debate.[171] These debates were, of course, partially motivated by a loss of faith in the capacity of other institutions to control executive power. From at least the 1970s, some have urged that greater judicial intervention was needed to fill the gaps left by executive control of parliament, or what Lord Hailsham famously described as 'elective dictatorship.'[172]

Loughlin suggested that the economic rationalist policies adopted by governments in the latter decades of the 20th century helped to cause a 'crisis in public law thought', as theorists, including those who had previously been inclined towards the functionalist style, began to lose faith in democratic institutions.[173] It is possible to recognise many global economic, social and political trends that have contributed to circumstances in which, for an increasing number of public lawyers, the courts were perceived as the better institution to control administrative action.[174] This in turn has influenced calls for more substantive grounds of review.

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167 *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514, 531 (Lord Bridge); Woolf, Jowell, Donnelly and Hare (n 126) 646-648 and Paul Craig, 'Judicial review and anxious scrutiny: foundations, evolution and application' [2015] *Public Law* 60, 60.

168 Woolf, Jowell, Donnelly and Hare (n 126) 648.

169 See Aronson, Groves and Weeks (n 150) 378, where they noted that this seems to be implied by Lord Carnwath, with whom Lords Neuberger, Mance, Wilson and Sumption agreed, in *R (Youssef) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1457, 1485-1486.

170 See chapter 3 at 3.4.1.

171 The clearest example of this can be found by comparing the content of two key English administrative law texts, Craig (n 145), and William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 11th ed, 2014). See Taggart (n 23), for a summary of the debate, where he draws out the differences between some of these 'fellow travellers' from 470-477.

172 Lord Hailsham, 'Elective Dictatorship', Richard Dimbleby Lecture, broadcast by the BBC on 14 October 1976, published in *The Listener* (London, England), Thursday, October 21, 1976.

173 Loughlin (n 8) 231.

174 See, eg, 5.3.3(c) and also the circumstances referred to by Taggart n (26).

Some of this has general application to courts outside the United Kingdom. Doubts have similarly been raised in Australia regarding the capacity of Parliament to properly scrutinise the executive.[175] As noted above, the effect of neoliberal ideas on the function of the state has been experienced in other developed democracies.[176] Yet, much like the ultra vires debate discussed in chapter 3, at their heart, many of these debates are specific to the United Kingdom, where a series of circumstances, including its relationship with Europe, have precipitated the asking of profound questions about the very foundations of its constitutional order.[177]

It is often apparent that those contending for a more expansive judicial role are motivated by the perception that it is necessary to fill what would otherwise be gaps in the oversight of the state. For instance, Paul Craig argued that it was 'not coherent to maintain that rationality review should be confined to its traditional narrow meaning, and pretend that it is any form of meaningful control over administrative decision-making that will avail claimants.'[178] Implicit in this is the idea that it is the role of the courts to have this kind of control.

Courts in the United Kingdom now make decisions that once would have seemed beyond the scope of the judicial role. It is possible that this has had some effect on the way in which agencies are made accountable. In the area of healthcare expenditure, for example, Daniel Wang has suggested that 'rigorous judicial scrutiny of rationing decisions' has 'driven the NHS to be more explicit about the reasons and procedures leading to the denial of treatment'.[179] There remains, however, a legitimate question about whether courts are, functionally, the appropriate institution to be influencing executive decision-making in an area of administration such as the public healthcare budget. More than this though, it can be recognised that these kinds of debates are entirely framed by what Lewans called

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175 See, eg Sir Gerard Brennan, 'The Parliament, The Executive and The Courts: Roles and Immunities' (1997) 9 *Bond Law Review* 136, and chapter 3 at 3.6.3.

176 See at 6.2.

177 Exemplified by the recent decision of the Supreme Court in *R (Miller) v Prime Minister (No 2)* [2019] 3 WLR 589 and the circumstances surrounding it.

178 Craig (n 165) 276.

179 Daniel Wei L Wang, 'From Wednesbury Unreasonableness to Accountability for Reasonableness' (2017) 76 *Cambridge Law Journal* 642, 652-653.

the 'Diceyan dialectic'.[180] There is limited scope within them for the notion that the administrative state has its own role and function.[181]

This context, which is quite different to the Australian one, must be kept in mind. The next section of this chapter will set out the modern Australian approach to the unreasonableness ground. It will be seen that the approach to the ground is in keeping with the one taken by courts to the overarching concept of jurisdictional error, as described by chapter 4.

6.4 UNREASONABLENESS IN AUSTRALIAN JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

In the context of judicial review of administrative action in Australia, reasonableness was, for a time at least, understood to mean *Wednesbury* unreasonableness.[182] The *Administrative Decisions (Judicial Review) Act 1979* (Cth), for instance, provided that one ground upon which an administrative decision could be challenged was where it was 'an exercise of a power that is so unreasonable that no reasonable person could have so exercised the power.'[183] As Brennan J said in *Quin*, the application of this ground was 'extremely confined',[184] so much so that it had never actually been applied 'in terms' by the High Court.[185]

The fact that Australian judges had apparently persisted in adhering to the rule while elsewhere it had become somewhat of a by-word for overly restrictive approaches to judicial review, describe, for instance, as an 'emblem of the classic model of administrative law',[186] has been characterised as symptomatic of many things. These include judicial reticence around human rights, and the apparent retreat into a kind of legalism or formalism now regarded as out of step with review elsewhere.[187] The notion that review in Australia resembles what is sometimes called the 'classic model' of judicial

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180 Lewans (n 42) 72.
181 Ibid 72-73.
182 See, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth), s 5(2)(g); *Minister for Aboriginal Affairs v Peko-Wallsend* (1986) 162 CLR 24, 41 (Mason J); *Quin* (n 3) 36 (Brennan J).
183 Section 5(2)(g).
184 *Quin* (n 3) 37.
185 During the argument in *Li* (n 127) the Commonwealth Solicitor-General conceded in response to a question from Hayne J that the High Court had never applied *Wednesbury* 'in terms', see at 336.
186 Taggart (n 23) 429.
187 Thomas Poole, 'The Devil and the Deep Blue Sea' in Linda Pearson, Carol Harlow, Michael Taggart and Elizabeth Fisher (eds) *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Bloomsbury, 2008) 15, 23, 28; Taggart (n 16) 11-14; Knight (n 21) 254.

review, symbolised by *Wednesbury* unreasonableness, is closely associated with the idea that review in Australia is 'formalist'.[188] Dean Knight, for instance, stated that the 'old-fashioned (highly deferential and residual) *Wednesbury* formulation of unreasonableness dominates Australian jurisprudence' and that the 'courts have generally resisted moves elsewhere to fashion variable forms of unreasonableness.'[189] Knight considered that these were markers of what he described as a 'scope of review schema' that was characterised by 'legal formalism'.[190]

It is worth considering whether the notion of 'fashion' has much to contribute to the understanding of legal principle. In any case, in line with the argument made in chapter 2, it is important to be clear regarding what is meant by formalism in this context. If the word is used to mean a focus on text, it can be recognised that this is indeed a primary trait of judicial review of administrative action in Australia. However, it does not seem to be the case that this is an approach aimed at masking the values being drawn upon by courts in the application of the ground. It is also true that the application of the ground remains characterised by restraint. Yet, viewed against the wider normative considerations that have been sketched in this chapter and the previous one, this restraint seems to be based on more than simply conservativism. The next section of this chapter gives an account of the contemporary approach of Australian courts to the unreasonableness ground. This is useful for the discussion that subsequently follows of the ways in which this approach might be understood as the product of functionalist influences.

6.4.1 The 'watershed'[191] of *Li*

In the 2013 decision of *Li*, five members of the High Court held that the decision of the Migration Review Tribunal (MRT) to not allow the applicant a further extension of time to gather the information needed to support her visa application was unreasonable. In a joint judgment Hayne, Kiefel and Bell JJ said that 'the *Wednesbury* rule was 'not the starting point for the standard of reasonableness, nor should it be considered the end point.'[192] They went on to add that a decision did not have to be 'irrational, if not bizarre'

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188 See chapter 2 at 2.6.
189 Knight (n 21) 44.
190 Ibid 33.
191 *Rowley v Chief of Army* (2017) 255 FCR 176, 197 (Perry J).
192 *Li* (n 127) 364.

to be unreasonable, and on a correct reading of Lord Greene's judgment this was not what he had intended in any case. Rather, what he had said in *Wednesbury* 'may more sensibly be taken to recognise that an inference of unreasonableness may in some cases be objectively drawn even where a particular error in reasoning cannot be identified.'[193]

The decision in *Li* initially caused some conjecture that it might be a signal of a preparedness on the part of the High Court to move away from its perceived strict, traditional approach to unreasonableness, and towards one in which it might even apply a proportionality analysis.[194] This was in part because both the joint judgment and, separately, French CJ, made obiter references to the point that where a decision seemed disproportionate this might be an indication that it was unreasonable.[195] However, attempts to argue along proportionality lines in the context of judicial review of administrative action have not met with success so far.[196]

Nevertheless, *Li* can most certainly be read as key judgment, one that can be viewed as a part of a wider trend in Australian judicial review. As observed by Mark Aronson, Matthew Groves and Greg Weeks, *Li* acknowledged that 'the unreasonableness ground of review does not always set an immutably high standard.'[197] However, the decision also helps to demonstrate the way in which the grounds of review have been framed as implied terms in statutes and harnessed in service to the flexible, overarching and functional concept of jurisdictional error.[198]

As foreshadowed in chapter 3 and further explored in chapter 4, over at least the past two decades a move away from statements of judicial review's grounds as rule-like principles has been underway. Instead, review is framed as an exercise in finding the express and implied boundaries of power through an interpretive exercise. While the concept of jurisdictional error tends to be perceived as rigid and formalist,[199] it has, as Stephen

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193 Ibid.

194 See, eg, Leighton McDonald, 'Rethinking unreasonableness review' (2014) 25 *Public Law Review* 119, and Janina Boughey, 'The Reasonableness of Proportionality in the Australian Administrative Law Context' (2015) 43 *Federal Law Review* 59.

195 *Li* (n 127) 352 (French CJ), 366 (Hayne, Kiefel and Bell JJ).

196 In *Stretton v Minister for Immigration and Border Protection* (2015) 231 FCR 36, Logan J did find that the Minister's decision was unreasonable in the sense that it could be said he had '[taken] a sledgehammer to crack a nut', see 57-58. However, this was overturned on appeal—see (n 232).

197 Aronson, Groves and Weeks (n 150) 191-192.

198 See chapter 4 at 4.3.

199 See, eg, Knight (n 21) 33.

Gageler once noted, taken on 'a protean, almost organic nature'.[200] *Li* can therefore be perceived as in keeping with the earlier developments in cases like *Kirk v Industrial Court*,[201] as set out in chapter 4, which laid the foundation for it.[202]

While there were differences between each of the three judgments as to how the standard of reasonableness is to be framed in *Li*, there were some common threads. For instance, each judgment drew on similar authorities to demonstrate that the requirements of reasonableness and rationality are wider and older than the *Wednesbury* rule.[203] Further, in line with the trend in Australian review of administrative action considered in chapter 3, each of the judgments in *Li* said that reasonableness is treated as a requirement to be implied into the exercise of every statutory discretion.

For example, French CJ said that 'every statutory discretion, however broad, is constrained by law.'[204] Even where the discretion conferred was to arrive at a particular conclusion or 'view', that view 'must be reached by a process of reasoning.'[205] By reference to authority such as *Quin*,[206] *Kruger v Commonwealth*,[207] and *Minister for Immigration and Multicultural Affairs v Eshetu*,[208] Hayne, Kiefel and Bell JJ likewise said that it was a long-standing presumption of law that the 'legislature is taken to intend that a discretionary power, statutorily conferred, will be exercised reasonably.'[209]

Justice Gageler said that an implication that a discretion must be exercised reasonably is 'no different' to the requirement that the state of satisfaction that forms a precondition to the exercise of a discretionary power must be reasonably formed.[210] In each case, these implications were:

> [A] manifestation of the general and deeply rooted common law principle of construction that such decision-making authority as is conferred by statute

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200 Stephen Gageler, 'Impact of migration law on the development of Australian administrative law' (2010) 17 *Australian Journal of Administrative Law* 92, 101.
201 (2010) 239 CLR 531.
202 See chapter 4 at 4.3.
203 See, eg, *Li* (n 127) (French CJ), 362-363 (Hayne, Kiefel and Bell JJ), 370-371 (Gageler J).
204 Ibid 348.
205 Ibid.
206 *Quin* (n 3).
207 (1997) 190 CLR 1.
208 (1999) 197 CLR 611.
209 *Li* (n 127) 362.
210 Ibid 370.

> must be exercised according to law and to *reason* within limits set by the subject matter, scope and purposes of the statute.[211]

This 'implied condition' extended beyond the matter of why a decision was made, into how it was made. Like the 'closely linked' ground of procedural fairness, reasonableness is a 'default position' and it cannot be 'implied as a condition of validity if inconsistent with the terms in which a power of duty is conferred or imposed of if otherwise inconsistent with nature or statutory context of that power or duty.'[212]

In a manner that again reflects what was argued in chapter 4 regarding jurisdictional error, each of the three separate judgments in *Li* appeared to accept that, no matter how the standard of unreasonableness is framed, its application is always contextual. For example, French CJ referred to the statement of Mason J in *FAI Insurances v Winneke*,[213] which drew upon what Kitto J had said in *R v Anderson; Ex Parte Ipec-Air Pty Limited*,[214] that 'the extent of ... discretionary power is to be ascertained by reference to the scope and purpose of the statutory enactment.'[215] Although statutes typically leave decision-makers 'an area of decisional freedom' within which 'reasonable minds may reach different conclusions about the correct or preferable decision', this did not mean this 'freedom' could be 'construed as attracting a legislative sanction to be arbitrary or capricious, or to abandon common sense.'[216]

Justices Hayne, Kiefel and Bell referred to authority from Dixon CJ to make a similar point. Chief Justice Dixon had said in *Klein v Domus Pty Ltd*[217] that where discretions were 'ill-defined' it was 'necessary to look to the subject matter, scope and purpose of the statute conferring the discretionary power and its real object.'[218] They added to this that was 'necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.'[219]

In terms of guidance as to the wider considerations that might be relevant, the joint judgment stated that decisions could be unreasonable where, for instance, as Mason J had

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211 Ibid 370-371.
212 Ibid 371.
213 (1982) 151 CLR 342.
214 (1965) 113 CLR 177.
215 (1982) 151 CLR 342, 368, cited by *Li* (n 127) 349.
216 *Li* (n 127) 351.
217 (1963) 109 CLR 467.
218 *Li* (n 127) 363-364.
219 Ibid 364.

observed in *Minister for Aboriginal Affairs v Peko-Wallsend,*[220] the decision maker had not given 'adequate weight to a relevant factor of great importance'.[221] Further, an 'obviously disproportionate response is one path by which a conclusion of unreasonableness might be reached.'[222] Decisive in the *Li* case, however, was the fact that the MRT had not satisfactorily explained why it had 'abruptly' decided in all the circumstances not to afford Ms Li more time to provide the accurate skills assessment she needed to fulfil the requirements.[223]

Drawing on Dixon J's judgment in *House v The King*,[224] the joint judgment noted that it had been said there that 'an appellate court may infer that in some way there has been a failure to properly exercise the discretion "if upon the facts [the result is unreasonable or plainly unjust."'[225] Even where, as in the case of Ms Li, some reasons had been provided by the decision-maker, 'it may nevertheless not be possible for a court to comprehend how the decision was arrived at.'[226] Unreasonableness 'is a conclusion which may be applied to a decision which lacks an evident and intelligible justification.'[227] Since inadequate reasons had been given in the case of Ms Li, it was not possible for the court to identify precisely what kind of error had occurred, but it was possible to infer from the outcome that there had been one. This enabled a conclusion that the discretion had been exercised unreasonably, contrary to the implied intention of parliament.[228]

In reaching his own conclusion that the MRT had acted unreasonably, Gageler J applied the *Wednesbury* standard. Justice Gageler's preference for the *Wednesbury* formulation seems to have been motivated by the deference mechanism structured into the test, or at least such an inference can be drawn from the other authority he quoted.[229] Yet, the reasons he gave for his decision also admit a similar flexibility. The requirements of the

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220 (1986) 162 CLR 24.
221 (1986) 162 CLR 24, quoted at *Li* (n 127) 366.
222 *Li* (n 127) 366.
223 Ibid 369.
224 (1936) 55 CLR 499.
225 *Li* (n 127) 367, quoting (1936) 55 CLR 499, 505.
226 Ibid.
227 Ibid.
228 Ibid 369.
229 Ibid at 376, for instance, where he quoted a passage from the judgment of Dixon CJ in *Klein v Domus* (1963) 109 CLR 467, 473, which noted that, where Parliament had conferred a statutory discretion, it was necessary for a reviewing court to have regard to the fact that Parliament intended this discretion to be exercised by the body it had been given to. See also his later judgment in *Minister for Immigration and Border Protection v SZVFW* (2018) 92 ALJR 713 ('*SZVFW*') [51]-[52], which would seem to confirm this. On *Wednesbury* as a 'symbol' of restraint, see also Varuhas (n 165) 105-106.

Wednesbury standard are themselves contextual as they implicitly require consideration of the nature of the decision-making power and the circumstances it has been applied in. For Gageler J a relevant consideration to his finding that this decision reached the high threshold of unreasonableness in this case was that the decision-maker was an administrative tribunal.[230] This aspect of his judgment is considered further at 6.5.2.

6.4.2 Reasonableness after *Li*

Even considering the open acknowledgment of the contextual nature of unreasonableness that has occurred since *Li*, it is hard to imagine Australian courts abandoning their characteristic restraint in the application of the ground. Reasonableness in Australia remains fairly restricted. In *Minister for Immigration and Border Protection v SZVFW* ('*SZVFW'*),[231] Kiefel CJ said that while *Wednesbury* may not be the only test for unreasonableness, it nevertheless highlighted the necessary stringency of the ground, adding:

> And that is because the courts will not lightly interfere with the exercise of a statutory power involving an area of discretion. The question is where that area lies.[232]

The flexible nature of the unreasonableness principle has been emphasised in subsequent decisions. In a decision of the Full Federal Court, *Minister for Immigration and Border Protection v Stretton* ('*Stretton*'),[233] Allsop CJ said:

> The proper elucidation and explanation of the concepts of jurisdictional error and legal unreasonableness does not depend on definitional formulae or on one verbal description rather than another.[234]

In the explanation of legal unreasonableness that he gave in his judgment in this case Allsop CJ set out the various ways in which this ground had been explained in many cases over a number of decades.[235] He said that that '[a]ny criticism that these explanations are circular and vague is to be met by attending to the terms, scope and policy of the statute and the values drawn from the statute and the common law that fall to be considered in

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230 *Li* (n 127) 377.
231 *SZVFW* (n 229) (Gageler J); [137] (Edelman J).
232 Ibid [11].
233 ('*Stretton*') (2016) 237 FCR.
234 Ibid 3.
235 Ibid 4.

assessing the decision.'[236] He took the view that there were 'fundamental values that attend the proper exercise of power', and these included 'a rejection of unfairness, of unreasonableness and of arbitrariness; equality and the humanity and dignity of the individual.'[237] The question of the weight to be afforded to any relevant values is to be answered by reference to the relevant statute.[238]

Chief Justice Allsop noted that a decision can 'lack quality' in several ways, including by 'sufficiently lacking rational foundation, or an evident and intelligible justification, or in being plainly unjust, arbitrary, capricious or lacking common sense having regard to the terms, scope and purpose of the statutory source of the power.'[239] These descriptions were not 'exhaustive or definitional', and the 'relationship between the conclusion or outcome and the reasoning process revealed by reasons to reach it is one that should not be rigidly set.'[240] These passages were later endorsed in *SZVFW*,[241] where the flexible and contextual nature of reasonableness was once again emphasised.[242]

Given the way the unreasonableness principle has now been expressed, it seems likely that there is now no longer a need for the separate ground of irrationality that was developed in the wake of *Eshetu*.[243] As Aronson, Groves and Weeks have observed, it is now the case that:

> … rationality is a standard which varies according to contextual factors such as the statutory demands, the decision-maker's procedural and resource constraints and (we submit) the gravity of the issues at stake.[244]

While reasonableness, like the other principles of review such as procedural fairness, is the 'default position'[245] that impliedly attaches to every statutory discretion, this does not mean that unreasonableness is a condition that *only* attaches to an exercise of statutory power.[246] As this latter idea suggests, the notion of legal reasonableness, whilst an

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236 Ibid 5.
237 Ibid.
238 Ibid.
239 Ibid 5-6.
240 Ibid 6.
241 *SZVFW* (n 229) [59] (Gageler J); [137] (Edelman J).
242 Ibid [59] Gageler J; [81]-[84] Nettle and Gordon JJ); [133], [153] Edelman J.
243 See chapter 4 at 4.2.1.
244 Aronson, Groves and Weeks (n 150) 296.
245 *Li* (n 127) 362, (Gageler J).
246 See, eg, *Jabbour v Secretary, Department of Home Affairs* [2019] FCA 452 (3 April 2019) [91]-[100] (Robertson J).

implied condition on the exercise of statutory power (unless Parliament says otherwise), has some content that stands apart from statutes themselves and is drawn from the common law. As chapter 4 established, even an interpretive approach is informed by judicial or 'common law' principles and values.[247] Application of judicial review's more qualitative grounds has an unavoidably subjective element. The crucial question is, then, where do the limits of the court's own power to apply such values come from?[248]

As has been argued throughout, the answer to this must lie in overarching normative values, those of the constitutional system itself, regarding the scope of the power of the judiciary to supervise the power of the other branches of government. This surely must be what was meant by Gageler J in *SZVFW*, where he said '[w]hatever room might remain for argument about the most appropriate expression of the standard of legal reasonableness' the actual 'nature of reasonableness should be taken to be settled by the explanation of it in *Quin*.'[249] Likewise in *Stretton*, Allsop CJ acknowledged that the whole interpretive exercise he described was framed by a particular conception of judicial power, noting '[t]he content of the concept of legal unreasonableness is derived in significant part from the necessarily limited task of judicial review'.[250] While *Li* has 'changed things',[251] it said nothing to alter these deeper values. The remaining section of this chapter seeks to explain some of the ways in which the positive conception of administrative, and for that matter, legislative, power that is a feature of the Australian constitutional system may have played a role in shaping the unreasonableness principle.

6.5 UNREASONABLENESS IN A FUNCTIONALIST PARADIGM

Chapter 5 suggested that one reason for the restraint shown by Australian courts towards certain questions is the influence of what can be recognised as functionalist thinking on the conception of judicial power in Australia. That chapter concluded by suggesting that this is one reason why the High Court has been able to develop constitutional principle in ways that protect and enhance the functioning of *institutions*, but not so much *individual* rights.[252] There is a similar pattern in review of administrative action, which tends to

247 See at 4.3.
248 See, eg, Basten (n 4) 37.
249 *SZVFW* (n 229) [53].
250 *Stretton* (n 233) 5 (Allsop CJ).
251 Aronson, Groves and Weeks (n 150) 375.
252 See at 5.4.

focus on insisting on fair and accountable decision-making processes, rather than outcomes.

This is not to suggest that there is a clear line between decision-making process and substance, which there is not.[253] Rather, it is to draw together some themes that have been reoccurring throughout earlier chapters. For instance, chapter 3 observed the way in which the concept of legitimate expectations has been eschewed in favour of a general requirement of procedural fairness that applies to every exercise of power unless Parliament uses clear enough language to exclude it.[254] The same is now true of unreasonableness. Chapter 4 noted the way in which the minimum provision of judicial power has been shaped around the need to avoid arbitrariness.[255] Parliament is free to confer expansive discretion, but this cannot be entirely free from all scrutiny: 'all power of government is limited by law.'[256]

It is the institutional role of courts to give content to the concept of 'law'. Where what Loughlin described as 'normativism', of either the conservative or liberal variant,[257] prevails, courts can apply concepts of law that have more substantive or moral qualities. However, this is not the case where the main influences have a functionalist character. The application of the principles of review in Australia is framed by the notion, captured by Brennan J's judgment in *Quin*, that the courts must remain aware of their own functional limits.[258] In a constitutional framework where there is considerable faith in majoritarianism, as well as a positive conception of administrative power, it is conceivable that the scope of the power of the courts to control the 'reasonableness' of action is narrower.

Jeffrey Pojanowski has recently referred to the reduction, in '[c]lassical legal thought', of public law 'to two principles associated with two institutions: the rule of law upheld by ordinary courts and supreme legislation promulgated by political accountable officials'.[259] This is reminiscent of Lewans' 'Diceyan dialectic'. Yet, as Pojanowski puts

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253 See, eg, Alan Robertson, 'Is Judicial Review Qualitative?' in John Bell, Mark Elliott, Jason N E Varuhas and Phillip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016) 243.

254 See at 3.6.3.

255 See at 4.4.

256 *Graham* (n 2) 24 (Kiefel CJ, Bell, Gageler, Keane, Nettle and Gordon JJ).

257 See chapter 5 at 5.3.3.

258 *Quin* (n 3) 37; chapter 3 at 3.6.1.

259 Jeffrey Pojanowski, 'Neoclassical Administrative Law' (2019) 133 *Harvard Law Review* 1, 52.

it, 'there the administrative state is.'[260] For Pojanowski, 'so much argument in administrative law revolves around reconciling the contemporary regulatory state with this classical definition, separation and assignment of political powers.'[261]

The focus here has generally been on Diceyan influences on English public law, given the particular common law heritage of Australia. The position in the United States, where the very constitutional legality of administrative power itself is sometimes called into question,[262] has not been considered. Pojanowski's account of 'neoclassical administrative law' is an attempt to explain how administrative power can be accommodated within the framework of the United States Constitution. What of Australia though, where the administrative state has 'been' since the adoption of the Constitution? Surely it is to be expected that the new liberal or progressive view of government that has been set out has left its stamp on conceptions of how such power should best be rendered accountable.

It is submitted that functionalist influences can be recognised at work on the shape of principles of judicial review of administrative action in several ways. Most obviously, the central concept of 'jurisdictional error' is inherently, and expressly, functional.[263] The development of what Will Bateman and Leighton McDonald described as the 'statutory approach',[264] with jurisdictional error at its core, may be perceived as the fashioning of the principles of judicial review of administrative action in such a way so as to accommodate the need for supervisory courts to navigate the complex web of administrative functions while at the same time maintaining appropriate levels of judicial oversight *and* restraint. To draw upon the work of Hart and Sacks, as set out in chapter 5, jurisdictional error is analogous with the principle of reasoned elaboration. It is a method for the taking into account by courts of the complexities of the whole 'legal process' in reaching the conclusion that there has been an error of law of such a nature that it has rendered an administrative decision invalid.[265]

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260 Ibid.
261 Ibid 52-53.
262 See, eg, Philip Hamburger, *Is Administrative Law Unlawful?* (University of Chicago Press, 2015); cf Mashaw (n 107).
263 See chapter 4 at 4.3.
264 Will Bateman and Leighton McDonald, 'The Normative Structure of Australian Administrative Law' in (2017) 45(3) *Federal Law Review* 153, 153. See chapter 3 at 3.5.1.
265 See at 5.3.2.

As chapter 5 further noted, institutional and process-style approaches require the identification of the values that are associated with institutions so their real functioning can be revealed.[266] To be reached in a principled way, the conclusion that there has been a jurisdictional error must be informed by conceptions of the 'co-ordinate'[267] roles of the institutions of government.[268] This is where the notion that there is a positive conception the state within the Australian system of government can potentially be illuminating.

Embodied in the idea that 'the authority of the judicature does not derive from a superior capacity to balance the interests of the community against the interests of an individual'[269] is a fundamentally different conception of judicial *and administrative* power, as well as of the relationship between the individual and the state than that captured by Dicey. It is one that clearly perceives that it is acceptable for the state to pursue collectivist aims, free from judicial obstruction, although not judicial oversight. Within this conception of judicial power, it is still possible to deploy the interpretive method in ways that have regard to the consequences of the exercise of state power for individual interests and rights. However, it is not the role of the judiciary to protect rights or a more substantive concept of the 'rule of law' in ways that might frustrate the objectives of the executive, and the Parliament to which the executive is accountable through the principles of responsible government.

The preference for interpretive rather than free-standing principles can also be regarded as an expression of a functionalist approach. This is because interpretivism allows courts to exercise judicial power in ways that condition administrative conduct while using principles of construction to guide the boundaries of the court's own power. It is an approach to judicial power that has been adapted to a system in which legislation is the most important form of law. The narrower ambit of the more substantive judicial review grounds, unreasonableness and fairness, can be understood as the product of functionalist influences. Finally, the acceptance that executive oversight is not the sole province of the courts, and can be performed by other institutions, including most obviously Parliament, but also administrative tribunals and other bodies, is clearly functionalist. This section of this chapter explores these examples in more depth.

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266 Ibid.
267 *Quin* (n 3) 37 (Brennan J); see chapter 3 at 3.6.1.
268 See chapter 4 at 4.3.4.
269 *Quin* (n 3).

6.5.1 The connection between the scope of the unreasonableness principle and its role in the constraint of discretion

The English debates regarding the reasonableness principle have been described above at 6.3.3. The differences between the application of the unreasonableness ground in Australia and other comparable jurisdictions have become more apparent since moves have been made elsewhere towards more openly substantive forms of review. In his article on 'Australian Exceptionalism', Taggart commented on the way in which 'the common law emanating from . . . Australia, the UK, New Zealand and Canada—has 'persuasive' authority in the other countries.'[270] As noted in chapter 2, Taggart did not consider that the standard explanation as to why Australian principle had diverged from that of elsewhere, namely the separation of judicial power required by the Australian Constitution, was particularly convincing.[271]

Taggart thought that 'conservativism' and 'formalism' were the primary reasons for the preference of Australian courts not to follow certain doctrinal developments.[272] More recently Knight has come to a similar conclusion. In his view, '[o]nly Australia continues the abstract formalism of old.'[273] To this he added that the development in principle elsewhere had occurred as a response to certain wider influences, noting that the 'growth of the modern administrative state and the proliferation in the way in which public power is exercised have required more nuanced and sophisticated judicial supervision.'[274] There had been a recognition that '[b]lunt tools are no longer fit for purpose.'[275]

One difficulty inherent in attempting to compare the approaches of courts in different systems of government is that even where there is, to some extent, a shared common heritage, there will still be often be vastly different approaches to many questions owing to local conditions and assumptions. Such conditions and assumptions are very hard to describe and quantify. Writing in the context of political science, Dowding engaged with the idea of whether Australia could be considered 'exceptional' on any of the measures it

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270 Taggart (n 16) 2.
271 Ibid 27-28.
272 Ibid 6-8; see chapter 2 at 2.6.
273 Knight (n 21) 245.
274 Ibid 246.
275 Ibid.

is sometimes claimed that it is.[276] He noted the central problem with such a question, which is that at 'the highest level of generality—no country is unique', while '[a]t the highest level of granular description' they all were.[277] This meant if claims of exceptionalism are to be attempted, it is necessary that they are made 'at an appropriate level of granularity.'[278]

A second point worth considering here was made by Taggart himself. It is a point about the need to be aware of the way language and labels are used. In the context of the debate over whether proportionality should replace *Wednesbury* unreasonableness, he wrote 'words like *Wednesbury* unreasonableness, anxious scrutiny, reasonableness, proportionality, and deference operate as symbols and their symbolism and significance is a product of time, place, and perspective.'[279] As chapter 4 explained, jurisdictional error in Australia can no longer be understood to be analogous with the rigid classification of errors approach that Knight thought to have characterised 'the early editions of de Smith's textbook'.[280] Far from being a 'blunt instrument', the modern Australian concept of jurisdictional error is a subtle one that has been developed to enable courts in the balancing exercise required to find the respective limits of legislative, administrative *and* judicial power.[281]

As the preceding chapters have maintained, the key difference in the Australian approach to judicial review of administrative action lies in the normative considerations being drawn upon in review. To perceive this, it is necessary to look behind judicial language or rhetoric and towards its wider context. Part of this wider context is the way in which the role of each institution of government is understood in a given constitutional system. In thinking about the way in which principles of review are formulated, it is necessary to think about how they are expected to function in a particular system. What is the specific contribution to accountability that is being asked of courts? The answer to this question has to be situation dependent.

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276 Dowding (n 76) 165, where he said that Australia had been claimed to be 'exceptional' 'in myriad ways from geography to biota, from history to culture, from economics to politics'.
277 Ibid 167.
278 Ibid.
279 Taggart (n 23) 425.
280 Knight (n 21) see 33-37.
281 See chapter 4 at 4.3.

Taggart once argued that while proportionality was the appropriate standard where a human right was at stake, in other administrative law matters, which he labelled 'public wrongs', the more fitting standard was *Wednesbury* unreasonableness.[282] He gave a range of reasons for this, including that the more restricted standard was a 'bulwark against unduly privileging individualism under the cloak of proportionality at the expense of effective government',[283] which was a central anxiety of much functionalist scholarship.[284] This contention of Taggart's has been referred to as his 'bifurcation thesis'.[285] It has now formed the impetus for a new debate, regarding 'taxonomy' in public law. This debate is focused on the question of whether the principles of judicial review of human rights matters should be regarded as a body of law that is separate to traditional judicial review, which concerned only with the limits of administrative power.[286]

Jason Varuhas, who has endorsed Taggart's bifurcation thesis, takes the view that human rights principles should be treated as a separate body of law.[287] Paul Craig, on the other hand, takes the view that '[c]ommon law judicial review will … naturally entail consideration of the individual and the public interest', meaning it is not 'tenable' to classify traditional review as concerned with public power, with rights infringement being subject to an entirely different set of principles.[288] Both perspectives have persuasive elements.

Once again, the lack of a national formal rights protecting instrument can make this seem like yet another debate with little relevance in the Australian context. However, Varuhas' descriptions of the traditional common law approach to the supervisory jurisdiction are illustrative for thinking about the Australian context. Varuhas noted that traditionally, 'the primary power of decision has been bestowed by Parliament on the executive decision-maker' and that '[i]f courts exercised a primary jurisdiction they would supplant

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282 Taggart (n 23) 477-480.
283 Ibid 478.
284 See, eg, Jennings (n 66) 454.
285 Craig (n 165) 265
286 See Varuhas (n 165) and also Jason Varuhas 'Taxonomy and Public Law' in Mark Elliott, Jason Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 39, and see, in response, Paul Craig, 'Taxonomy and Public Law: A Response' [2019] *Public Law* 281.
287 See Varuhas (n 165) 91; and Varuhas (n 287), in particular at 73-76.
288 Craig (n 286) 286.

the role of the executive decision-maker and contravene Parliament's sovereign will.'[289] Further, it would not only 'be contrary to Parliament's will' if courts were to do this, but 'if they intervene too readily [the courts] may end up impeding the exercise of public power in pursuit of the common good or distorting such exercises of power.'[290] Even leaving questions of institutional competency to one side, there is a risk here, identified by Pojanowski, that by being overly interventionist, courts can actually blur rather than strengthen accountability.[291]

Within this traditional approach depicted by Varuhas, *Wednesbury* is 'a safety net, only to be resorted to if specific grounds fail.'[292] This is the reason for its high threshold; the *Wednesbury* standard is supposed to stand 'as a totem of non-intervention.'[293] The decision was given by Parliament to a body other than the court to make, and it is for that 'decision-maker to determine what lies in the interests of the public.'[294]

Craig takes issue with Varuhas' framing of judicial review as being predominantly 'concerned with regulation of power in the public interest to ensure that the goals contained in … legislation are properly effectuated'.[295] For Craig, a distinction between the supervisory jurisdiction as 'public-regarding', while the placing of limits on the power of the government to interfere with rights and liberties is the preserve of the human rights jurisdiction, is not borne out by the history of judicial review.[296] As he puts it, the 'common law judges who created judicial review would never have accepted the fulfilment of the regulatory mandate.'[297] This perspective is part of Craig's wider thesis that proportionality has long been a part of the English law of judicial review.[298]

The distance between Varuhas and Craig is an illustration of Loughlin's point that 'there is little consensus amongst public lawyers about the basic contours of their discipline', except 'amongst those who share the same theoretical framework.'[299] Craig's position is

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289 Varuhas (n 286) 69.
290 Ibid.
291 Pojanowski (n 259) 52, where he noted that 'by abstaining from the administrative common law that seeks to smooth the operation of the administrative state, the courts would make the consequences of the other branches' choices clearer.'
292 Varuhas (n 165) 106; see also Taggart (n 23) 425.
293 Varuhas (n 165) 105-106.
294 Ibid 106.
295 Craig (n 286) 290.
296 Ibid.
297 Ibid.
298 Ibid; see also Craig (n 62) 36-41.
299 Loughlin (n 8) 58.

recognisably normativist.[300] As pointed out in chapter 3, it is open to English scholars to contend for such positions in the context of the Diceyan constitution.[301] However, the Varuhas position seems closer to a post-administrative state functionalist approach, at least insofar as he is concerned to keep the principles of human rights law distinct from those of general public law.[302] For this reason, his description of the unreasonableness ground as a 'safety net' is the more applicable one in the Australian context.[303] The section below shows the way in which the interpretive approach described in chapter 4 can be used by courts to ensure that decision-making meets certain judicially imposed standards. However, these standards tend to fix on process, rather than substance. In an approach that accepts that other branches of government have their own legitimate spheres of power, there is less justification for expecting courts to control the actual *reasonableness* of action.

A further illustration that the Australian approach can be regarded as influenced by functionalist thinking comes from the work of Lewans, who considered that the *Wednesbury* standard was overly deferential.[304] He compared the decisions of the House of Lords in the cases of *Liversidge v Anderson* (*'Liversidge*')[305] and *Roberts v Hopwood* (*'Roberts*').[306] In *Liversidge*, the House of Lords had said it had no power to review a decision to detain a person made in the exercise of discretion conferred upon the Secretary of State under a certain wartime regulation, in part because it was unable to assess the way in which the 'personal' reasonable belief of the Secretary of State had been arrived at.[307] Lewans said that this was an example of overly submissive review, in which the rule of law was perceived to be 'a relatively flimsy constraint'.[308] He placed *Wednesbury* in the same category of cases.[309]

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300 See for instance chapter 3 at 3.4.1 for reference to Craig's views on parliamentary sovereignty. Although see Craig's own position on normativism and functionalism, expressed in Craig (n 62) 103-111.

301 See 3.4.2.

302 See Varuhas (n 286) 61-62, where he defines his approach as functionalist, in the sense that it is a method that sorts 'fields of doctrine according to function.'

303 See, eg, Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) 367.

304 Lewans (n 42) 49, 53-54.

305 ('*Liversidge*') [1942] AC 206.

306 ('*Roberts*') [1925] AC 578; see Lewans (n 42) 49-58.

307 *Liversidge* (n 305) 220-221, 224-225 (Viscount Maughan); 257 (Lord Macmillan) 269-270 (Lord Wright); and 278-282 (Lord Romer).

308 Lewans (n 42) 53.

309 Ibid.

Lewans contrasted these decisions with the one taken in *Roberts*, in which the House of Lords found that a decision of the Poplar Borough Council to significantly increase the wages of its male employees and pay equal wages to its female employees had been invalid, essentially on the ground that it was irrational or unreasonable.[310] For Lewans, this was an example of 'correctness review', which:

> … holds that even though administrative officials have been empowered by Parliament to implement legislation, their decisions must comport with common law principles and values whose content is determined exclusively by the judiciary. The underlying assumption is that since judges are the guardians of the rule of law, they are entitled to intervene whenever an administrative decision deviates from judicial interpretation of what the law requires.[311]

Once again this is a recognisably 'normativist' approach to review. The functionalist scholar Harold Laski was critical of *Roberts*.[312] He wrote that what the decision of the House of Lords amounted to was 'the view that whenever expenditure lies at the discretion of an elected body, the District Auditor must test its exercise in terms of his own criteria of "reasonableness."'[313] Likewise, Friedmann called *Roberts* a 'deplorable decision', and said it was one 'for which there is no parallel in Australian practice', which he considered was more likely to follow the subsequent decision in *Wednesbury*, that he regarded as corrective of the law.[314]

In earlier work, Friedmann had said that if 'decisions like *Liversidge v Anderson* come dangerously close to a legitimation of administrative absolutism, a decision like *Roberts v Hopwood* oversteps the limits of judicial neutrality.'[315] Friedmann's proposed solution

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310 The administrative decision challenged was that of an auditor who had been appointed by the Local Government Board to audit the expenditure of metropolitan borough councils. The auditor had used powers given to them under the *Local Government Act 1888* (51 & 52 Vict. c.41) which allowed them to disallow items of account that were made contrary to law. The auditor had disallowed the Council's decision to pay its employees in this manner, and the House of Lords agreed with him that it had been made contrary to law. See *Roberts* (n 306) 584-585 (Lord Buckmaster) for an explanation of the facts of the case. As to views taken by the House of Lords regarding the Council's decision, see 590 (Lord Buckmaster), 595, 600 (Lord Atkinson), 609-610 (Lord Sumner), 612 (Lord Wrenbury), 618 (Lord Carson).

311 Lewans (n 42) 54.

312 Harold Laski, 'Judicial Review of Social Policy in England: A Study of Roberts v Hopwood *et al*' (1926) 39 *Harvard Law Review* 832.

313 Ibid 842.

314 Wolfgang Friedmann, *Principles of Administrative Law* (Melbourne University Press, 1950) 38-42, although note he was referring to the specific context of review of the making of delegated legislation.

315 Wolfgang Friedmann, 'The Planned State and the Rule of Law: Part II' (1948) 22 *Australian Law Journal* 207, 212.

to this problem was to implement administrative controls beyond judicial review.[316] This is a recognisably functionalist position. However, it is worth noting that the paradigm case of *Liversidge* also has no ready comparator in Australia.

In *R v Connell; Ex parte Hetton Bellbird Collieries Ltd* ('*R v Connell*'),[317] decided only a couple of years after *Liversidge*, Latham CJ took a contrary position, holding that, even where a power required a decision-maker to be satisfied of certain matters, it was possible for the court to check whether the decision evidenced a correct understanding of the extent of their powers on the part of the decision-maker.[318] In support of what he said in *R v Connell*, Latham CJ cited an earlier decision of himself and McTiernan J in *Reid v Sinderberry*,[319] which had concerned the power of the Governor-General, no less, to make regulations under the wartime National Security Act that appeared to him necessary for certain purposes related to defence. Chief Justice Latham and McTiernan J had said that such a regulation could 'not be held to be valid if it was shown that the Governor-General could not reasonably be of the opinion that the regulation was necessary or expedient for such purposes.'[320]

Where there is a 'basic law',[321] all power of government is limited by that law, including that of the Governor-General. Of course, the principle of justiciability might be the source of practical limits on the power of the courts to review some exercises of power.[322] As chapter 4 argued, the High Court is likely to insist upon its jurisdiction to at least be able to check that power has been exercised within the confines of the law. However, the concept of executive legitimacy that has been described in this chapter has consequences for what is meant by 'the law'. The power of the judiciary is also conditioned by the 'basic law'.[323]

The contention that courts should apply more expansive approaches to the unreasonableness ground is in the end hard to separate from one that the court's view of the reasonableness of the situation is the one that ought to prevail. With respect to the

316 See, eg, ibid 212-213.
317 (1944) 69 CLR 407, 432.
318 Ibid 430.
319 Also known as the ('*Man Power Case*') (1944) 68 CLR 504.
320 Ibid 512.
321 *Lam* (n 18) 24 (McHugh and Gummow JJ).
322 See, eg, *Church of Scientology v Woodward* (1982) 154 CLR 25, 72-74 (Brennan J); and *Minister for Arts, Heritage and Environment v Peko-Wallsend* (1987) 15 FCR 274, 301-302 Wilcox J).
323 *Lam* (n 18) 24 (McHugh and Gummow JJ).

Roberts case, Laski drew, from the judgment of Lord Sumner, the conclusion that his Lordship regarded 'all policy with which he is in political disagreement as necessarily "unreasonable."'[324] This is the risk unless, as Brennan J made clear in *Quin*, the application of the ground is kept 'extremely confined.'[325] The level of comfort with a correctness standard such as the one described by Lewans will depend upon other perspectives on the way in which judicial power relate or interacts with the powers of the other branches of government. This is, in effect, what Hart and Sacks described as the 'principle of institutional settlement'.[326]

6.5.2 Context of the decision – identity of the decision-maker

The function and identity of the decision-maker are clearly matters of context that are considered when a court is weighing a decision of whether an exercise of power has been unreasonable. For example, it seems likely that a different standard of decision-making will be expected from administrative tribunals than of administrative officials, because, although they are not courts, their decision-making processes and the standards of fairness expected from them are court-like. In *Li*, Gageler J quoted from the judgment of Brennan J in *Norbis v Norbis*,[327] where his Honour had said that there was a difference between judicial review of a judicial discretion rather than an administrative discretion, though it was not one of 'principle'.[328]

Justice Brennan had said that, where the decision in question had been made by a court, a reviewing court was comparatively familiar 'with judicial discretions and the usual confines of a judicial discretion', meaning that it was 'more sensitive to an unreasonable exercise of discretion and more confident of its ability to detect error in its exercise.' However, it was 'harder to be satisfied that an administrative body has acted unreasonably, particularly when the administrative discretion is wide in its scope or is affected by policies of which the court has no experience.'[329] For Gageler J, 'there was no such practical difficulty' where, as in *Li*, the decision maker was an administrative

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[324] Laski (n 312) 842; see also Jack Beatson, 'The Scope of Judicial Review for Error of Law' (1984) 4 *Oxford Journal of Legal Studies* 22, 27-28 on this point.
[325] *Quin* (n 3) 36.
[326] Henry M Hart and Albert Sacks, *The Legal Process: Basic Problems in the Making and Application of Law: Basic Problems in the Making and Application of Law* (The Foundation Press, 1994) 4-6.
[327] (1986) 161 CLR 513.
[328] *Norbis* (1986) 161 CLR 513, 540.
[329] Ibid 540-541.

tribunal and the decision in question was the refusal of an adjournment. Such a decision 'will rarely, if ever, be affected by policies of which the court has no experience.'[330] There are recent examples of Tribunal decisions being more closely scrutinised in other ways as well.[331]

However, in cases where the decision-maker is a Minister with a broad conferral of administrative discretion, particularly one framed in terms that it is to be exercised in the 'public' or 'national' interest, unreasonableness is a much harder ground to make out. There are many cases illustrating this, for example those relating to the power given to the Minister for Immigration and Border Protection in s 501 of the *Migration Act 1958* (Cth) to revoke a person's visa on character grounds.[332] This power can only be exercised by the Minister personally.[333]

Where a person does not pass the character test because they have a criminal record that meets the definition of 'substantial' in the Act (which includes where they have been 'sentenced to a term of imprisonment of 12 months or more'), the Minister 'must' refuse or revoke their visa.[334] This provision clearly contemplates unreasonable outcomes, in the sense that it can lead to the revocation of the visas of people who have lived in Australia for most of their lives but who have not taken citizenship and been sentenced for any one of the wide range of offences that can result in imprisonment for 12 months or more. This does not mean that the reasonableness standard does not apply to such decisions, but its application is limited to matters of process.

6.5.3 Using interpretivism to protect standards

Taggart and Knight attributed the refusal of Australian courts to follow English courts down more substantive paths to 'formalism'.[335] However, given the different institutional and political settings that have been set out here, it is hard to see how this can be done

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330 *Li* (n 127) 377.

331 See, eg, *BIL17 v Minister for Immigration and Border Protection* [2019] FCAFC 6 (31 January 2019), where the Full Federal Court held, unanimously, that the Administrative Appeals Tribunal had not undertaken the review required of it in reviewing a decision of the Minister's delegate to refuse a protection visa under the *Migration Act 1958* (Cth) by failing to have regard to country information considered to be relevant by the Court.

332 *Stretton* (n 233) is an example of such a case, see above at 6.4.2.

333 *Migration Act 1958* (Cth) s 501(4).

334 Ibid ss 501(3A)(a)(i), 501(7)(c).

335 *Hands v Minister for Immigration and Border Protection* [2018] FCA 662 (11 May 2018) [20], (Griffiths J).

legitimately. As long as legislation falls within one of the Commonwealth heads of power and does not otherwise exceed limits derived from the text and structure of the Constitution, it will be valid. The ramifications of this for review of administrative action are that Parliament can confer discretionary power on administrators that allows them to make decisions that are 'harsh or even "cruel"'.[336] There is limited scope for courts to deploy substantive principles such as unreasonableness where an administrative decision-maker has been given this type of discretion.

This can have results that are far from acceptable to a liberal normativist perspective. A clear example can be found in the case of Mr Justin Hands, which involved the Minister's power in s 501 of the *Migration Act 1958* (Cth). Mr Hands came to Australia with his parents at the age of 3 in 1974. He believed he was an Australian citizen, and the evidence before the Assistant Minister of Immigration and Border Protection was that he was an accepted member of the Aboriginal community in the area he had lived in since the age of 12. He had adult children in Australia and a partner of 13 years, who had 5 grandsons that Mr Hands helped to care for. In 2016 he was convicted of domestic violence offences in the Bateman's Bay Local Court. Owing to this, Mr Hands' visa was cancelled on the basis that he had failed to pass the character test set out in the *Migration Act 1958* (Cth). Following the making of representations on behalf of Mr Hands, the Assistant Minister for Immigration and Border Protection declined to revoke the cancellation of Mr Hands' visa. This decision was challenged on several grounds, including unreasonableness.[337]

At first instance, Griffiths J observed that '[s]ome, perhaps many, people will view the Assistant Minister's … decision in Mr Hands' circumstances as harsh, but I accept the Assistant Minister's contention that his decision was not unreasonable in the legal sense.'[338] The nature of the relevant decision-making power was such that Griffiths J accepted that '[i]f the decision be viewed as harsh or even "cruel"… it is within the Assistant Minister's "area of decisional freedom" and is not arbitrary or capricious.'[339] This is an application of the *Li* approach to unreasonableness. While the court can have regard to 'the gravity of the issues at stake',[340] even where the consequences of the decision for an individual are as grave as these, the court cannot remake the decision in

[336] Ibid [42].
[337] Ibid [20].
[338] Ibid [42].
[339] Ibid.
[340] Aronson, Groves and Weeks (n 150) 296.

accordance with its own standards where the statute has empowered the Minister or their delegate to give weight to other considerations.

However, it is generally accepted that it falls to the courts to make sure that decisions have been made according to certain procedural standards. In *Quin*, Brennan J referred to the 'increasingly sophisticated exposition of implied limitations on the extent or the exercise of statutory power', which were nevertheless 'not calculated to secure judicial scrutiny of the merits of a particular case.'[341] The appeal in Mr Hands' case, *Hands v Minister for Immigration v Border Protection*,[342] provides an illustration of how this approach can function. Mr Hands was successful on appeal to the Full Court of the Federal Court, however, not on the ground of unreasonableness, which was not pressed on appeal.[343]

Instead, Allsop CJ, with the agreement of Markovic and Steward JJ, reviewed the statement of reasons that had been given by the Assistant Minister, and found that there was no evidence for certain key findings of fact that were included within it, which amounted to a jurisdictional error.[344] Typically, the scope for making errors of law in the finding of fact is also relatively confined.[345] As noted above, the language of s 501 clearly provides that visas may be revoked where the strict character test is not met. However, Allsop CJ prefaced his decision by noting the 'important questions about Executive power' that are raised by these s 501 cases.[346] Amongst these were 'the human consequences removal from Australia can bring about.'[347] It was necessary for '[p]ublic power' to not only 'conform to the requirements of its statutory source' but also 'the limitations required by legality.'[348] Where the stakes for a person were so severe, and the consequences so 'devastating' as they are under s 501, 'legality' demanded that they be confronted.[349]

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341 *Quin* (n 3) 36.
342 ('*Hands*') (2018) 364 ALR 423.
343 Ibid [37] (Allsop CJ).
344 Ibid [2], [32]-[33], [44]-[47] (Allsop CJ), [54] (Markovic J) and [55] (Steward J).
345 See, for instance, Aronson, Groves and Weeks (n 150) 255.
346 *Hands* (n 342) [3].
347 Ibid.
348 Ibid.
349 Ibid.

This decision is an example of the way in which the interpretive approach can be used to protect and enhance standards, as well as 'prod'[350] Parliament and the executive to have regard for them. Presented with a statutory provision that confers relatively unconfined discretion, the exercise of which can have the profoundest of consequences for the person subject to it, the Full Court resorted to enforcing 'legality' by applying a stricter than usual standard to the decision-making process itself. This was achieved by focusing on the decision-making process, and thus sidestepping the substantive reasonableness of the decision.

While Taggart may have said of this that it means only that the 'fig leaf' is being kept 'in place',[351] this is an approach observably more in keeping with the institutional values that have been described here. It does not calibrate the standard of review based on the rights of the individual affected by the decision or the court's own view of what a reasonable decision would have been. Instead, it demands that decision-makers have proper regard to what are, in the context of this particular power, the grave costs of their decisions, and ensure that their decision-making procedures and standards are appropriately rigorous.

One might further be tempted to suggest that this level of intervention does not fit within the functionalist paradigm that has been described here. However, given the nature of this particular legislative provision, it in fact seems in keeping with the contention made in chapter two, that it is the role of the courts to enhance processes of the system.[352] This is less about protecting the rights of just one individual against the excesses of the state, because it is also recognisably for the benefit of everyone who has a share or stake in the system. As Allsop CJ has written, extra-curially, in 'a free democracy', those subject to exercises of power:

> … should be entitled to expect that the lawful exercise of power involves attributes or characteristics that recognise and reinforce human dignity and decency, and that reflect the high trust that society has placed in those with

[350] See, eg, Appleby (n 104) 273, who uses this term in arguing that courts have a role in 'prodding parliamentary oversight of executive power through the creation of both substantive and procedural limits' on the delegation of legislative power to the executive.
[351] Taggart (n 16) 14.
[352] See at 2.8.2 and also chapter 5 at 5.3.2.

> public power to exercise it lawfully and *for the common good* [emphasis added].[353]

The acknowledgement of the 'co-ordinate' role of institutions does not require supine, *Liversidge*-style deference. Rather, it requires the tailoring of the judicial role in ways that show only appropriate restraint. As explained above, for functionalism, legislation, as the expression of the popular will, was superior to the common law. The decision in *Hands* is an example of the use of the interpretive approach in such a way as to condition the use of power validly conferred by legislation. Rather than subjugate legislatively conferred discretion to the common law, this attaches interpretive, judicially created, principles to its exercise. These principles are largely related to rationality. It does not substitute the courts view of what would have been a reasonable decision in the circumstances, but it does demand that the decision-maker adequately justify their decision.

Proportionality in review of administrative action (as opposed to constitutional action) is something that has been for the most part avoided by Australian courts.[354] As Janina Boughey has pointed out, the most obvious reason for the Australian position on proportionality is the absence of constitutional or statutory protection of rights at the federal level and in most states and territories.[355] Taggart noted that no country had as yet moved to a position where proportionality was applied without rights. When it came to proportionality and unreasonableness, 'Australian judicial review is in the mainstream here.' There was no 'exceptionalism' in this aspect of Australian judicial review of administrative action.[356]

Taggart did think, however, that it was exceptional of Australian courts not to develop variable intensity unreasonableness review.[357] As explained above, this is a kind of interim unreasonableness standard that had been developed by English courts for application in cases touching upon rights prior to the implementation of the *Human Rights*

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353 James Allsop, 'Values in Public Law' in Neil Williams (ed) *Key Issues in Public Law* (The Federation Press, 2018) 9, 13.

354 See, eg, *Bruce v Cole* (1998) 45 NSWLR 163, 185 (Spigelman CJ); however, cf the earlier decision of *Fares Rural Meat and Livestock Co Pty Ltd v Australian Meat and Live-stock Corporation* (1990) 96 ALR 153, 166 (Gummow J).

355 Boughey (n 194) 69. See also Aronson, Groves and Weeks (n 150) 381.

356 Taggart (n 16) 26.

357 Ibid 12.

Act 1998 (UK).[358] Taggart thought that the refusal of Australian courts to do this was bound up with fears that it would 'trespass' on the merits of decision-making and the general Australian 'reluctance about rights talk.'[359] He rejected the distinction between 'law and discretion' that he perceived this approach rested upon, and contended that all that was needed for a variable intensity standard was 'a well-established 'culture of justification.''[360]

The phrase 'culture of justification' is derived from the work of Etienne Mureinik.[361] He was attempting to grapple with the question of how the law could respond in circumstances where legislative and judicial authority had been profoundly abused.[362] As Varuhas has observed, where 'decisions and empowering legislation emanate from wicked, utterly illegitimate institutions or where a jurisdiction is transitioning out of such a regime', it might be possible to accept that courts should assume a certain normative role in seeking to rebalance the constitutional system.[363] However, it was important to consider the ways in which institutions already functioned when making arguments about the appropriate role of courts.[364] These observations are in keeping with the wider argument here that it is important that institutions and their processes are understood in context.

Taggart suggested that Australia's culture of justification came from the statutory requirements that decision-makers give reasons,[365] although he was critical of the High Court's refusal to develop a common law requirement that this be done in *Public Service Board v Osmond*.[366] Australia's culture of justification goes beyond such requirements, although it is far from perfect. Leaving this point to one side, it may be seen from decisions like *Li* and *Hands* that courts are prepared to make stringent demands of any reasons that are given. These cases also tend to show that Australian courts have also arrived at their own variable standard of review, although it has been shaped in

358 See above at 6.3.3.
359 Taggart (n 16) 12-13.
360 Ibid 14.
361 Etienne Mureinik, 'A Bridge to Where? Introducing the Interim Bill of Rights' (1994) 10 *South African Journal on Human Rights* 31.
362 Ibid.
363 Varuhas (n 165) 125-126, on this point.
364 Ibid 125.
365 Taggart (n 16) 14.
366 (1986) 159 CLR 656; see ibid.

accordance with existing doctrine and is anchored in interpretive rather than free-standing common law principle.[367]

A final point that should be noted is that this preference for using statutory interpretation to shape standards of administrative conduct is a pattern in Australian law and scholarship. A further example comes from the work of Paul Finn. From the early 1990s, Finn wrote a series of papers in which he explored the concept of developing equitable principles in ways that could better control the exercise of public power.[368] Finn was, at least in part, responding to the widescale corruption scandals then plaguing Australian politics.[369] He raised the possibility that the equitable concept of a fiduciary trust held unexplored potential in the public law context, and that officials could be held personally accountable to the public via this mechanism.[370] While others elsewhere, for example Evan Fox-Decent,[371] have attempted to develop this concept, Finn ultimately stepped away somewhat from his view that the principles of equity and trusts could be used in this way.[372]

This was partly because he concluded that 'we now live in an age of statutes and not the common law.'[373] More than this, was what he described as a 'peculiarly Australian phenomenon', which was that '[u]nlike in the other common law countries, the balance between statute and common law has always heavily favoured statute.'[374] This meant that the 'rules of statutory interpretation', including the grounds of judicial review, were

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367 See Mark Aronson, 'The Growth of Substantive Review: The Changes, their Causes and their Consequences' in John Bell, Mark Elliott, Jason NE Varuhas and Phillip Murray (eds) *Public Law Adjudication in Common Law Systems: Process and Substance* (Hart, 2016) 113, 128, who has observed that *Li* signalled a move towards a middle ground between what Poole described as 'Australia's incrementalist, rule-bound approach' and 'England's broad standard, normativist' one—see Poole (n 187) 15.

368 See, eg, Paul Finn, 'Integrity in Government' (1992) 3 *Public Law Review* 243; 'The Forgotten Trust: The People and the State' in Malcolm Cope (ed) *Equity: Issues and Trends* (The Federation Press, 1995) 131; 'A Sovereign People, A Public Trust' in Paul Finn (ed) *Essays on Law and Government – Volume I: Principles and Values* (The Law Book Company Limited, 1995) 1.

369 See Finn 'The Forgotten Trust' (n 368) 134 and Paul Finn, 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224, 227. Scandals included state government corruption in Queensland and Western Australia, leading respectively to the inquiry known as the Fitzgerald Inquiry, and the Royal Commission known as the 'W A Inc' Royal Commission. See also See also Stephen Gageler, 'The Equitable Duty of Loyalty in Public Office' in Tim Bonyhady (ed) *Finn's Law: An Australian Justice* (The Federation Press, 2016) 126, 129, fn 17.

370 See, eg, Finn, 'A Sovereign People, A Public Trust' (n 368).

371 See Evan Fox-Decent, *Sovereignty's Promise: The State as Fiduciary* (Oxford University Press, 2011).

372 See Paul Finn, 'Public Trusts and Fiduciary Relations' in Charles Sampford, Ken Coghill and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012) 32, 35-36 and 'Public Trusts, Public Fiduciaries' (2010) 38 *Federal Law Review* 335; see also Gageler (n 369) 134-135.

373 Finn, 'Public Trusts, Public Fiduciaries' (n 372) 350.

374 Finn, 'Public Trusts and Fiduciary Relations' (n 372) 35.

the 'appropriate modern vehicles' through which 'the discharge of public functions' should be regulated 'in light of the interests and values that the common law considers should be acknowledged and protected.'[375]

It was in the principles of statutory interpretation that Australian courts possessed the 'tools to achieve what has been elsewhere achieved in the common law world by direct resort to the notions of trusteeship and fiduciary responsibility.'[376] Further, 'these tools are ones which are consistent with our legal history and methodology.'[377] Finn still considered that the idea of state power being held on the public trust remained an important 'metaphor'.[378] In a system with a positive conception of the state, the position could not be otherwise. Finn's conclusions about the use of the principles of interpretation accord with what has been set out not only here, but in chapters 3 and 4 regarding the interpretive method. This is the approach most in keeping with practice and values here owing to what have been described in this chapter and the previous one as functionalist influences on the way in which the role of the judiciary with respect to other institutions has been perceived.

6.5.4 The role of merits review in holding discretion to account and shaping judicial principle

One final example of the functionalist structure of administrative law in Australia is the very non-Diceyan acceptance that there are institutions other than courts that are able to oversee the exercise of administrative discretion. Sometimes, for a range of reasons, including those connected to administrative efficiency and access to justice, but also the need to preserve judicial legitimacy, such institutions are more appropriate than courts to perform this role. One example of such an institution is the Administrative Appeals Tribunal or 'AAT', which has been described by Robin Creyke as 'a premier administrative law institution' which provides 'effective guidance to agencies on more than 400 pieces of legislation which now allocate jurisdiction to the Tribunal.'[379]

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375 Finn, 'Public Trusts, Public Fiduciaries' (n 372) 350.
376 Paul Finn, 'Public Trusts and Fiduciary Relations' (n 372) 39.
377 Ibid.
378 Ibid.
379 Robin Creyke, 'Administrative Justice—Towards Integrity in Government' (2007) 31 *Melbourne University Law Review* 705, 728.

Although it is a quasi-judicial body, owing to the Australian understanding of the separation of powers, it cannot be regarded as a court.[380] Matthew Groves has observed that:

> … Brennan J exercised as much influence on the evolution of merits review in his role as the first president of the AAT as he did on judicial review of administrative action in his role as a Justice of the High Court. In these different roles, he sketched broad principles on the doctrinal basis and functional nature of different avenues of review. His Honour's position on each was surely informed by his experience on the other.[381]

The AAT has become such a fundamental part of the system of administrative law in Australia that the influence of its role on the principles of judicial review of administrative action is perhaps overlooked. As Groves pointed out, it has a 'unique' power to undertake merits review.[382] The AAT is able to exercise 'all the powers and discretions that are conferred by any enactment upon the person who made the subject decision.'[383] The way this is sometimes described is that the AAT can 'stand in the shoes of the original decision-maker'.[384]

Since 'what cannot be done in judicial review typically can be done in merits review, and vice versa', there is less need for the courts to apply more substantive grounds of review.[385] Justice Brennan himself made this exact point in *Quin*, where he observed:

> The absence of adequate machinery, such as an Administrative Appeals Tribunal, to review the merits of administrative acts and decisions may be lamented in the jurisdictions where the legislature has failed to provide it, but the default cannot be made good by expanding the functions of the courts.[386]

The AAT does not have jurisdiction over every administrative decision, but it does over many of the areas of policy in which individuals have the most day to day contact with

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380 See chapter 2 at 2.5.1 and chapter 3 at 3.2.2.

381 Matthew Groves, 'Legitimate Expectations in Australia: Overtaken by Formalism and Pragmatism' in Matthew Groves and Greg Weeks (eds) *Legitimate Expectations in the Common Law World* (Hart 2017) 319, 324.

382 Ibid.

383 *Re Control Investments Pty Ltd and Australian Broadcasting Tribunal* (No 2) (1981) 3 ALD 88.

384 *Shi v Migration Agents Registration Authority* (2008) 235 CLR 286, 324 (Kiefel J), referencing the statement of Smithers J in *Minister for Immigration and Ethnic Affairs v Pochi* (1980) 44 FLR 41, 46, where his Honour said 'in reviewing a decision the Tribunal is considered as being in the shoes of the person whose decision is in question.'

385 Groves (n 381) 324-5.

386 *Quin* (n 3) 37.

the state.[387] Many matters that reach the judicial review stage have already been considered by tribunals, meaning that often judicial review functions as a second look at the initial administrative decision.

Groves was referring specifically to the possible impact of the AAT on the shape that procedural fairness has taken in Australia, but the observation applies equally to the reasonableness and rationality grounds.[388] In his study of discretion, Galligan noted that the creation of bodies like the AAT was an attempt to bring administrative discretion within the framework of what he called its 'legal regulation'.[389] The AAT plays a role in constraining discretion, and one feature of this is surely that it makes a contribution to ensuring the rationality and reasonableness of executive decisions, meaning that fewer cases involving these grounds reach the courts. However, since it is not a court, the AAT is able to condition discretion by reference to a range of factors that courts cannot have regard to. This means it can assess the reasonableness of decision-making in a general and not simply a legal sense.

The point being made here about the influence of the AAT in the shaping of the principles of judicial review is more than a trite one. Dame Sian Elias has observed, speaking about review in other common law countries, '[p]erhaps we have loaded too much into the supervisory jurisdiction which could be better addressed in a distinct (but supervised) administrative justice system.'[390] Although there might be a range of questions that arise in connection with how well the AAT is currently able to provide administrative justice,[391] the creative vision behind it is well-captured by this description.[392] This is yet a further reason why debates that rage elsewhere about the scope of the unreasonableness ground and review in general can seem very distant in Australia.

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387 The most common kinds of decisions that the AAT reviews include those made in the areas of child support, Commonwealth worker's compensation, migration and refugee visa and 'visa-related' decisions, veteran's entitlements, social security and taxation – see Administrative Appeals Tribunal, *Annual Report 2018-19* (Report 2019) 10.

388 That the existence of the AAT might have had an influence on 'scope and method of judicial review' in Australia is something that has been touched upon by Dame Sian Elias—see 'The Unity of Public Law?' in Mark Elliott, Jason N E Varuhas and Shona Wilson Stark (eds) *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart, 2018) 15, 19.

389 Galligan (n 32) 211.

390 Elias (n 388) 35.

391 See, eg, Creyke (n 379) 728-729 on issues caused by underfunding. Further, there have been controversies regarding lack of impartiality in the appointment of tribunal members – see, eg, Narelle Bedford, **'**AAT: Importance, Independence and Appointments' on AUSPUBLAW (10 April 2019) <https://auspublaw.org/2019/04/aat-importance,-independence-and-appointments/>.

392 See chapter 2 at 2.5.1 and chapter 3 at 3.2.2 for the rationale underpinning the creation of the AAT.

6.6 CONCLUSION

This chapter has considered the contemporary Australian approach to unreasonableness. It has suggested that the standard of unreasonableness that has emerged after *Li* can be recognised as in keeping with the approach to the grounds of review and jurisdictional error that was described in chapters 2 and 3 respectively. However, owing to the inherently subjective quality of the notion of 'reasonableness', perspectives on the scope of the unreasonableness standard in judicial review are closely connected to perspectives on the actual scope of judicial review itself, and the role of courts in supervising the executive branch of government. For this reason, this chapter has drawn upon the contemporary framing of the standard both in Australia and England in an attempt to explore the ways in which judicial review of administrative action in Australia can be considered to have been influenced by certain conceptions of the role of the state, and the relationship of the individual to it that seem to be apparent in Australian public law jurisprudence.

The contention has been that these conceptions have been influenced by the way in which the role of government has been perceived in Australia. The new liberal or progressive ideas that are a part of the fabric of Australia's history of government has imbued this perception with a character that is recognisably functionalist. Once this is recognised, it is possible to see that the interpretive approach to judicial review that has been described in this thesis is one that has been adapted to these influences. While there is undoubtedly a focus on form, this is not the result of rigidity or *formalism*. Rather, it can be perceived as the tailoring of the principles of review to certain systemic values. For instance, as chapter 5 noted, democratic values are deeply embedded in Australia's political culture. Legislation, as the representation of popular will, is the primary mode of law. The principles of judicial review have been crafted to reflect a set of values that are connected with ideas associated with the administrative state as something that is to be harnessed in service to this popular will, in a way that is for the benefit of people.

None of this means, however, that courts are simply 'finding' meaning. Rather, like courts elsewhere, they are developing principles. If these principles take a different shape to the principles of review elsewhere in the common law world, it is owing to these other, 'functionalist' values that have been described in these last two chapters.

7.
CONCLUSION

Ours is a distinctive constitutional system and in a variety of respects.

Paul Finn[1]

7.1 INTRODUCTION

In chapter 1 the aim of this thesis was stated to be to enquire into why the doctrine of judicial review of administrative action had, despite its common law heritage, taken a different shape and tone in Australia than other comparable nations, such as England. To answer this question, it was necessary to look beyond the standard explanations that have been given, for instance the separation of judicial power required by chapter III of the Constitution, the lack of formal human rights protections at the national level and a perceived attachment to formalism.

Part I of this thesis described the contemporary framework for judicial review of administrative action. Each of the first three chapters engaged with one of the key elements of review of administrative action in Australia that have been pointed to as evidence of its exceptionalism: the constitutional separation of judicial power, the supposedly stricter legality/merits distinction, and the central concept of jurisdictional error. The picture that emerged from Part I was that the principles of review of administrative action have been tailored to take account of the fact that the judiciary is, as Brennan J said in *Attorney-General v Quin* ('*Quin*'), 'but one of three co-ordinate branches of government.'[2]

This is a recognisably institutional or process-based approach to judicial review of administrative action. As chapter 4 explained, the contemporary interpretive approach to review, which has the concept of jurisdictional error at its core, is informed not only by common law values, but also those connected with the way in which the role and functions of the institutions of government, including the executive, which encompasses a wide array of different decision-making bodies, is understood. The application of the values of the common law takes place within this institutional

1 'Public Trust and Public Accountability' (1994) 3 *Griffith Law Review* 224, 226.
2 ('*Quin*') (1990) 170 CLR 1, 37.

framework, which informs the judiciary's understanding of where the boundaries of its own powers lie.

It is therefore important to develop a picture of the institutional values that help to shape this understanding. Part II of this thesis maps some of the values that can be considered to underpin attitudes towards the roles of the institutions of government in Australia. Much of the focus in the literature of judicial review of administrative action in Australia has been on the way in which the role of the judiciary is defined. The contribution that Part II of this thesis makes to this literature is to draw out the ways in which the conceptions of the powers of the other institutions affects the drawing of boundaries around judicial power.

7.2 A FUNCTIONALIST CONCEPTION OF GOVERNMENT

The source and limits of the powers of each institution of national government is the Australian Constitution. Like any text, the Constitution must be interpreted. Words are rarely given purely literal meaning. Interpretation does not take place in a vacuum. This means that the meaning given to the Constitution, including any implications drawn from its text and structure, of which the separation of judicial power principle is one, are themselves influenced by certain normative values. Chapter 2 argued that one possible explanation for the traditionally 'legalist' approach to constitutional interpretation applied by the High Court, with its focus on constitutional text and structure, could be regarded as itself the product of a certain set of values.

In this way it can be recognised that it is not only these constitutional principles, but the ideas and values that they can be said to instantiate, that are influential on the way in which the federal judiciary has framed its own power to act as a check on the powers of the other branches of government. It is not sufficient, then, to suggest that review of administrative action has been shaped simply by the constitutional separation of judicial power, since this is only a partial explanation. It is also necessary to have regard to the values that might be said to have influenced the development of the constitutional doctrine of the separation of judicial power itself.

This conclusion led into a series of additional questions connected to what these values are and how they might be identified. A constitution is intended to be the foundation of a system of government. When thinking about the values that are drawn upon in

interpreting a constitution, a useful starting point is any notions about the very nature of and purpose of government that might be seen to have influenced its very design. Part II of the thesis explored what these might be.

As chapters 5 and 6 suggest, owing to Australia's own history, as well as the particular point in time that its Constitution was established, a set of distinctive ideas can be recognised as at work not only upon the design, but also, crucially, the interpretation of the Constitution. The word interpretation, as used here, encompasses the way in which the judiciary has interpreted the nature and scope of its own power. While the focus of this thesis has been on review of administrative action, it has been necessary to draw upon the constitutional conception of judicial power more broadly. This is because the influences that have shaped this are directly relevant to the way in which the power to undertake review of administrative action has been understood.

Chapters 5 and 6 further suggest that certain systemic values can be discerned as influential on the public law jurisprudence of the High Court. These are values that do not regard the individual as inherently under threat from the government, with only the courts able to provide the necessary protection. Rather, what can be regarded as a more sophisticated, or modern conception of government and the state is at work. This is one that perceives the benefits of what was once called 'collectivism'. In this conception, a wide administrative state is not regarded with suspicion *per se*. Rather, the possible benefits it provides are perceived. As Loughlin put it, '[t]he normativist believes that rights precede the state whereas for the functionalist rights emanate from the state.'[3]

Once it is accepted that these ideas have been influential upon the Australian conception of government, they can in turn be recognised as having explanatory power in relation to the doctrine of judicial review of both legislative and administrative action. As chapter 5 observed, this conception of government is one possible explanation as to why implications from the text and structure of the Constitution have tended to take the form of principles that are aimed at protecting and enhancing the constitutional system itself, rather than individual rights. The separation of powers doctrine, which aims to safeguard judicial integrity, is itself one such system-

[3] Martin Loughlin, *Public Law and Political Theory* (Clarendon Press, 1992) 60.

enhancing principle. Within a functionalist paradigm, one goal of public law is the maintenance of a healthy body politic.

Again, once the influence of these ideas is accepted, they have explanatory power in the context of judicial review of administrative action. For instance, the judgment of Brennan J in *Quin* has often been cited as establishing the constitutional limits on the scope of judicial review in Australia. Most of the focus upon what Brennan J said there has been on the section of the judgment addressed to the legality/merits distinction. However, chapter 3 argued that other passages of his judgment are crucial for understanding Brennan J's vision of judicial review of administrative action. For instance, Brennan J noted that courts must recall that they are part of a system of 'co-ordinate' branches of government, and that their 'authority' is not 'derived from a superior capacity to balance the interests of the community against the interests of an individual.'[4]

As chapter 3 noted, this is an institutional approach to review of administrative action. Yet, read in the context of what was set out in chapter 5, it is also possible to recognise that it is an approach very much in keeping with the functionalist style in public law. Contained within this recognition that sometimes the judiciary is not the best institution to adjudicate on the interests of the individual is a positive conception of the role of the state.

Further, as chapter 6 explained, for the functionalist, legislation, as the representation of the popular will, is the 'primary',[5] or 'highest form of law.'[6] Just this point alone is illuminating in the Australian context. As chapter 3 noted, by contrast with England, for example, most executive power is sourced in legislation. Chapter 6 referred to Paul Finn's description of the 'peculiarly Australian phenomenon', in which, '[u]nlike in the other common law countries, the balance between statute and common law has always heavily favoured statute.'[7] This preference to rely upon legislation, and

4 *Quin* (n 2) 37.
5 Martin Loughlin, 'The Functionalist Style in Public Law' (2005) 55 *University of Toronto Law Journal* 361, 401.
6 Loughlin (n 3) 60.
7 Paul Finn, 'Public Trusts and Fiduciary Relations' in Charles Sampford, Ken Coghill and Tim Smith (eds) *Fiduciary Duty and the Atmospheric Trust* (Routledge, 2012) 32, 35.

delegated legislation, in support of the 'talent for bureaucracy'[8] provides a clear impetus for the interpretive approach described in chapters 3, 4 and 6. Viewed through a functionalist lens, it is possible to see further explanations for it. As chapter 6 makes clear, the interpretive approach can be used to condition the exercise of statutory power in ways that set standards for process, even if at the same time it means that grounds like unreasonableness are narrowly drawn.

The impulse or justification for this is the same as in the sphere of constitutional interpretation. In a system where majoritarian democracy is such a key feature, it is not the role of the courts to draw upon substantive rule of law values to frustrate or obstruct majoritarian will. However, demanding that decision-making processes be fair, and decisions be explained and supported by evidence is a legitimate exercise of judicial power where it is accepted that it is the role of the judiciary to guard the health of the body politic.

7.3 CHALLENGES AND OPPORTUNITIES FOR THE FUNCTIONALIST PARADIGM

While Taggart and Knight considered that formalism clung on in Australia when it had receded elsewhere, it really seems that what has clung on in Australia is functionalism. Elsewhere, as chapter 5 noted, this is a spent force.[9] It has continued to be influential, if overlooked, in Australia, because, if the claims in chapter 5 are accepted, its assumptions and values were built into the very foundations of Australia's system of government.

The approach to judicial review of administrative action in Australia has been explained by reference to functionalist influences. However, owing to the limitations of this project, a comprehensive account of the history and effect of these influences has not been attempted. Further, this project has not engaged fully with the question of how the recognition of these influences might be of use in future doctrinal development.

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8 A F Davies, *Australian Democracy: An Introduction to the Political System* (Longmans, Green and Co, 2nd ed, 1964) 4.

9 See chapter 5 at 5.3.3(c).

What has been said here touches upon some large questions regarding the character of liberalism itself in Australia, and what this might mean for the way in which the relationship between the individual and the state is understood. Does the historical conception described in chapter 5 still hold true for instance? If not, how might the potential future impacts of any changes that have occurred in more recent decades with regard to certain fundamental assumptions be assessed?

I have suggested that the lens of liberal normativism might not be the best one to apply to Australian public law, but this is, to some extent, as far as the analysis has been taken. During a period in which liberal or normativist constitutionalism has been in the ascendency around the world, there is a question as to how the functionalist values of the Australian system can be better identified and either strengthened or modified as need be. While functionalism and the progressivism or new liberalism that it was a product of can be seen to have some explanatory force for the shape of doctrine in Australia, this tells us little about where to go next.

This thesis has suggested that the Australian approach to judicial review can be explained by having regard to the social and political context that has been set out. In this final section of my conclusion, I also defend the approach taken by Australian courts to their task of keeping the actions of the other branches of government within the bounds of power. This defence, is, however, qualified. While there is much to commend about the Australian system of public law and administrative justice, there are many contemporary challenges for it.

Some of these are the result of the deleterious effects of ruthless budget cutting and privatisation. In a functionalist system, the acceptance that courts are not always the best institution for the control of the state is supported by an assumption that this will be done in other ways. The recommendations of the Kerr Committee are recognisably functionalist in this regard, as they proposed not only the establishment of the Administrative Appeals Tribunal ('AAT'), but also a body that became the Administrative Review Council, to monitor the efficacy of the new administrative law scheme. The fate of this body demonstrates how vulnerable oversight bodies that fall under the ultimate control of the executive really are. The funding for this body was

summarily abolished by the Abbott Government in 2015,[10] although the legislation establishing it remains in effect,[11] leaving a large gap in the oversight of the functioning of the system of administrative justice. It is this style of executive-led disregard for administrative accountability, amongst other public goods, which encouraged the turn towards liberal normativism elsewhere in the world.

This gives rise to the point that some of the hazards faced by the Australian system are not only a problem domestically but have a global character. All around the world at the moment '[c]onstitutional democracies and constitutional democracy appear to be in trouble.'[12] There are many reasons for this. The Global Financial Crisis has had a destabilising effect on the liberal economic order that has prevailed in recent decades. Technology, too, is disrupting not only economics, but the way that information is disseminated and consumed.[13]

Australia is not immune from these global influences. The decline in faith in the institutions of government that has occurred elsewhere in the world has been felt sharply in Australia. According to the Australian Electoral Commission, nearly 92 percent of eligible voters participated in the May 2019 federal election.[14] Owing to compulsory voting, this participation rate is, by world standards, very high. However, while on this measure political engagement remains strong, there are reasons to believe that Australians are dissatisfied with their political system. A research partnership between the Museum of Australian Democracy and the Institute for Governance and Policy Analysis at the University of Canberra has identified a steep and rapid decline in the level of public satisfaction with the functioning of Australian

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10 Australian Government, *Budget 2015-16: Budget Measures* (Budget Paper No 2, May 2015) 65.

11 See *Administrative Appeals Tribunal Act 1975* (Cth), pt V.

12 Mark A Graber, Sanford Levinson, and Mark Tushnet, 'Constitutional Democracy in Crisis? Introduction' in Mark A Graber, Sanford Levinson, and Mark Tushnet (eds) *Constitutional Democracy in Crisis* (Oxford University Press, 2018) 1, 1.

13 There are many recent accounts of what has given rise to this state of affairs, but see for example Yascha Mounk, *The People vs. Democracy: Why Our Freedom Is In Danger & How To Save It* (Harvard University Press, 2018), chapter 4, which addresses social media, and chapter 5, which discusses economic stagnation.

14 Tom Rogers, Electoral Commissioner, '2019 turnout at federal election exceeds 2016 event' (Media Release, Australian Electoral Commission, 13 June 2019) <https://www.aec.gov.au/media/media-releases/2019/06-13a.htm>. As the media release noted, enrolment was at a record 96.8 of eligible Australians, meaning that the overall rate of turnout was higher than the previous federal election in 2016.

democracy since 2007.[15] This research, however, found a telling split in attitudes towards the democratic values and 'infrastructure' of Australia, which retained the faith of those surveyed, and its democratic politics, which has not.[16]

Rosalind Dixon and Anika Gauja have observed the negative effects of the rise of populist politics in Australia.[17] They say that while Australia's uniquely robust electoral system means that populist parties can be contained on one hand, on the other this does not prevent the mainstream parties from adopting modified versions of illiberal populism to pursue crucial second-preference votes.[18] The *Trust and Democracy in Australia* report reveals other urgent concerns. These were related to political donations and perceived influence, integrity of politicians, and the political alienation of those with lower incomes.[19]

A theme that can be perceived within the institutional values described in chapters 5 and 6 is that, to a certain extent, they rely upon a notion that there is a 'common good'. In an age of individual rights, in which many perceive that 'a government of laws, not men'[20] is a desirable objective, the tendency of the High Court to eschew 'rights-talk'[21] in favour of principles that tend towards the protection of the system of government itself, such as the implied freedom of political communication, is regarded as evidence of constitutional inadequacy. However, perhaps it is time to re-evaluate some existing critiques of the Australian Constitution and the doctrine that has grown up around it.

Principles of public law cannot entirely address democratic deficits. Constitutionalism must recognise that there are limits to what 'law' can achieve. Even where law is of use, it is less likely to be of the constitutional kind. It might take the shape of better regulation for electoral financing, for example. Measures are needed to restore the

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15 Gerry Stoker, Mark Evans and Max Halupka, *Trust and Democracy in Australia: Democratic decline and renewal* (Democracy 2025, Report No 1, December 2018).

16 Ibid 39-40.

17 Rosalind Dixon and Anika Gauja, 'Australia's Non-Populist Democracy? The Role and Structure of Policy' in Mark A Graber, Sandford Levinson and Mark Tushnet (eds) *Constitutional Democracy in Crisis?* (Oxford University Press, 2018) 395.

18 Ibid at 417-419 for example.

19 Stoker, Evans and Halupka (n 15) see, eg at 22, 25 and 40-42.

20 See, eg, Allan C Hutchinson and Patrick Monahan, 'Introduction' in Allan C Hutchinson and Patrick Monahan (eds) *The Rule of Law: Ideal or Ideology* (Carswell, 1987) ix, ix.

21 Michael Taggart, ''Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1, 12-13.

faith of citizens in politics, particularly if the policy challenges of contemporary life such as the rise of artificial intelligence, inequality and climate change are to be met.

Although functionalism is a 'defunct' style in public law, there are many lessons in it for contemporary public lawyers. Functionalism recognised the transformative power of politics. The purpose of law in the functionalist style is to facilitate and direct politics, not sideline or suppress it. Law in this sense means law that is not necessarily found in the Constitution itself, but which can be considered to support its overall functioning, for instance electoral law, and law providing for integrity bodies.

It is possible to perceive that there is merit in a conception of government that places faith and responsibility in the people and has a belief in government for the 'common good'. Prior to his appointment to the High Court, Patrick Keane once observed of the Australian system of government:

> … our constitutional arrangements mean that we must, as a community, recognise our problems and accept that solving them is the responsibility of all of us because we can't look to pronouncements from on high to solve our political differences. And that is all to the good because, as citizens, we are all called to work to remedy political injustices. Since Aristotle, citizenship worthy of the name has involved no less: it encompasses both individual privilege and civic responsibility.[22]

Ultimately, in a parliamentary system, the executive is responsible to Parliament, not the courts. While there is a line of opinion from Lord Hewart to Lord Hailsham that is sceptical of the ability of Parliament to hold the executive to account,[23] a question arises regarding whether a greater degree of judicial intervention is the best response to this. There are two reasons why it might not be that are worth considering. The first is the question regarding whether courts really are equipped with the institutional capacity to properly grapple with many policy questions. The second is whether by intervening as 'moderating trustees', courts are actually making it harder for the

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22 Patrick Keane, 'In Celebration of the Constitution' (Speech, National Archives Commission, 12 June 2008) 10 <http://www.austlii.edu.au/au/journals/QldJSchol/ 2008/64.pdf>.

23 Lord Hewart, *The New Despotism* (Ernest Benn, 1945), initially published in 1929; Lord Hailsham, 'Elective Dictatorship', Richard Dimbleby Lecture, broadcast by the BBC on 14 October 1976, published in *The Listener* (London, England), Thursday, October 21, 1976.

executive to be held properly to account, by blurring lines of responsibility that would otherwise be clear.[24]

The remarks of Keane, quoted above, help to illuminate a third reason why judicial intervention is not always preferable. Where faith has been placed in politics, citizens themselves play an important role in the health of the system. It is not the role of the court to prevent the legislature or the executive from achieving its aims; rather it is the role of the citizens themselves to organise politically and ensure that government acts for the collective good. This means that differences between citizens themselves are better resolved through politics. It is, however, the role of the court to ensure that power is *accountable*, and its exercise *accounted for*.

Modern liberal constitutionalism regards this approach as problematic, and potentially dangerous. Such fears are not baseless. None of this seeks to deny the difficulties that can arise where majorities deprive minorities of rights. Yet courts alone are not enough to keep systems of government functioning effectively. A constitutional system is like an ecosystem. Beneath the most visible institutions of the judiciary, the legislature and the executive can be found a substructure or foundation comprised of many other interrelated parts. If the health of these is not maintained, this will have an impact on the capacity of the whole system to operate. It is important that the gaze of public lawyers is shifted away from the emphasis on courts that liberal normativism tends to encourage, and towards the state other parts of the ecosystem, and what might be done about them.

[24] This is something recently suggested in the United States context by Jeffrey A Pojanowski, see 'Neoclassical Administrative Law' (2019) 133 *Harvard Law Review* 1, 52; cf the recent decision of the United Kingdom Supreme Court in *R (Miller) v Prime Minister (No 2)* [2019] 3 WLR 589.

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