# Rights Review in the High Court and the Cultural Limits of Judicial Power

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# RIGHTS REVIEW IN THE HIGH COURT AND THE CULTURAL LIMITS OF JUDICIAL POWER

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## ABSTRACT

How are we to explain the High Court's reluctance to move into stronger forms of rights protection, as evinced by the disparity between its federalism and rights-based judicial review practices? It has been suggested that the federal and 'rights' provisions of the *Constitution* are equally indeterminate, calling into question the notion that the legal materials themselves compel a preference for one or another type of review. And the Court's record of rendering politically consequential decisions in its federalism jurisdiction suggests that political-institutional constraints may not preclude it from expanding its rights review powers. This article contends that the disparity in the Court's review practices can be explained only by way of a theory of judicial politics that is sensitive to notions of cultural as well as political constraint. It traces the historical emergence of an Australian politico-legal culture, before examining its role in restraining the further protection of constitutional rights.

## I INTRODUCTION

The High Court of Australia has generally been reluctant to constrain the power of government on the basis of individual rights. The *Constitution* contains only a few 'express guarantees' roughly analogous to traditional civil and political rights to begin with, and for the most part the Court has construed them narrowly.[1] When it was called on to determine the practical scope of the s 80 requirement that trials for federal offences 'on indictment' be by jury, the Court preferred a strictly literal construction

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1 This tendency has attracted a great deal of criticism: see, eg, George Williams, *Human Rights under the Australian Constitution* (Oxford University Press, 2002) 96–128; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 569–78; Hilary Charlesworth, 'The High Court and Human Rights' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (LexisNexis Butterworths, 2004) 356, 358–61. For a defence of the Court's record in relation to these provisions, see, eg, Keven Booker and Arthur Glass, 'The Express Rights Provisions: Form and Substance (or Opportunities Taken and Not Taken?)' in H P Lee and Peter Gerangelos, *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 155.

that ceded unfettered discretion to Parliament as to whether a particular offence would or would not be deemed indictable.[2] Elsewhere it cast s 41 — which seemed on its face to protect the entitlement of those eligible to vote in state elections to also vote in federal ones — as a transitional provision and dead letter, on the basis of a contested evaluation of the framers' intent.[3] It wasn't until 1989, with the Court's relatively expansive treatment of s 117 in *Street v Queensland Bar Association*,[4] that an express constitutional guarantee was successfully invoked to limit the power of government for the first time. In other words, where two or more plausible readings of a given guarantee have been available, the Court has tended to endorse whichever was most deferential to the political branches.

Exceptions to this trend have emerged from time to time, but they have been limited in scope. Foremost among these was the brief flowering of implied rights under the Mason Court during the 1980s and 1990s. Its break with settled modes of judicial reasoning seemed to signal a decisive shift in Australian jurisprudence (in line with similar jurisprudential developments initiated by constitutional courts throughout the common law world), and a move into stronger and more elevated forms of rights protection.[5] But even this proved temporary: the Mason Court

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2 *R v Archdall and Roskruge; Ex parte Carrigan* (1928) 41 CLR 128, 136 (Knox CJ, Isaacs, Gavan Duffy and Powers JJ), 139–40 (Higgins J); *Kingswell v The Queen* (1985) 159 CLR 264, 276 (Gibbs CJ, Wilson and Dawson JJ), 282 (Mason J). Section 80 has consequently been described as a 'mere procedural provision': *Spratt v Hermes* (1965) 114 CLR 226, 244 (Barwick CJ). An alternative interpretation is that the words 'on indictment' connote the relative seriousness of the offence, and thereby establish an independent standard for the enlivenment of the provision that substantively burdens the legislative power of the federal government. Justices Dixon and Evatt advocated forcefully for this approach to s 80 in their joint dissent in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 580–4, as did Deane J in *Kingswell v The Queen* (1985) 159 CLR 264, 298–310. More recently, James Stellios has offered a third reading of s 80 as a mechanism for facilitating the exercise of Commonwealth judicial power throughout the federal system: James Stellios, 'The Constitutional Jury — "A Bulwark of Liberty"?' (2005) 27 *Sydney Law Review* 113, 133–9. Convincing as this account may be, its significance for an historical analysis of judicial choice is limited by the fact that it was not directly contemplated by the Court.

3 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254, 276–80 (Brennan, Deane and Dawson JJ). Their Honours argued that s 41 was only meant to protect the federal voting rights of those so entitled *at Federation* on the statutory establishment of federal franchise. Keven Booker and Arthur Glass have defended this restrictive approach as a necessary concession to the practical need to ensure uniform federal franchise: Booker and Glass, above n 1, 159–60. However, as Anne Twomey has pointed out, non-uniformity was a logical consequence of the initial operation of s 41, as only South Australia and Western Australia had extended the vote to women by 1901 (a fact specifically discussed in the Convention debates): Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125, 138–41. Twomey also argues that this narrow interpretation destroys a vital link between state and federal franchises created through the interaction of s 41 with ss 24 and 25: at 141–3.

4 (1989) 168 CLR 461.

5 See Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).

'revolution' was largely arrested after a series of conservative judicial appointments,[6] and most subsequent attempts to develop a more expansive implied rights jurisprudence have been unsuccessful.[7]

In stark contrast to this permissiveness in its individual rights decisions, the Court has a long record of holding powerful political and economic interests to account in its federalism jurisdiction.[8] How are we to make sense of this disparity? Assuming for the moment that the relevant limits on rights-based judicial review cannot be attributed to the constitutional text alone,[9] we might suppose that they originate in a generalised political-institutional resistance to an expansion of judicial power. Indeed, as Martin Shapiro has pointed out, rights review presents the most substantial difficulties of this kind to courts operating in developed liberal democracies, relative to other types of review in their purest forms:

> rights review has the greatest anti-majoritarian dimension. In separation of powers review, the court places itself between two contenders both of whom claim majority backing. In federalism review both state and central government also claim majority support, albeit of different majorities. Rights review, almost by definition, pits legislative majorities representing electoral majorities against some interest that has lost in the majoritarian legislative arena.[10]

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6 Jason L Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) ch 7; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Haig Patapan, 'High Court Review 2002: The Least Dangerous Branch' (2003) 38 *Australian Journal of Political Science* 299. A recent exception to this has been the Court's defence of voting rights by way of the principle of representative government: *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

7 See, eg, the rejection of an implied freedoms of association and movement in *Kruger v Commonwealth* (1997) 190 CLR 1. For a discussion of that aspect of the case, see Williams, above n 1, 194–6. See also Katharine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 39 *Australian Journal of Political Science* 331; Katharine Gelber, 'High Court Review 2004: Limits on the Judicial Protection of Rights' (2005) 40 *Australian Journal of Political Science* 307.

8 See Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987).

9 An argument to which I will return in Part II(A) of this article.

10 Martin Shapiro, 'Judicial Review in Developed Democracies' (2003) 10(4) *Democratization* 7, 18. Of course, in practice, the distinction between structure and rights is not always so clear-cut. Structural questions might and often do implicate individual freedoms, and structural review can take on a rights 'flavour' where those freedoms are taken into interpretive consideration. An example of the latter can be found in the High Court's occasional use of proportionality when determining whether a purported exercise of implied incidental Commonwealth power is sufficiently connected to a relevant head of power: see, eg, *Commonwealth v Tasmania* (1983) 158 CLR 1, 260 (Deane J) ('*Tasmanian Dam Case*'); *Nationwide News Pty Ltd v Willis* (1992) 177 CLR 1, 30–1 (Mason CJ); *Cunliffe v Commonwealth* (1994) 182 CLR 272, 296–8 (Mason CJ), 321 (Brennan J); *Leask v Commonwealth* (1996) 187 CLR 579, 593–4 (Brennan CJ), 614–15 (Toohey J). In a formal sense, the boundary between structure and rights is probably haziest where structural implications take on a functional equivalence with rights (eg, the implied freedom of political communication, which is commonly referred to in rights terms despite its structural pedigree): Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of

But even this anti-majoritarian difficulty cannot adequately explain why the High Court has eschewed a fuller expansion of its rights review powers. Tracing the historical evolution of the United States Supreme Court's rights jurisprudence, Shapiro goes on to suggest that constitutional courts in developed democracies will tend to build legitimacy for their review practices through less controversial forms of structural and rights-based review, before capitalising on the gains made in those areas to transition into more politically consequential modes of rights protection.[11] It is precisely this leveraging of the political capital accumulated in the structural sphere that the High Court has failed to effect.

My central argument here is that understanding the High Court's reticence to move in strong-form rights review is possible only if we employ a theory of judicial politics that is sensitive to notions of political and *cultural* constraint. I begin in Part II by examining the nature of constraints on judicial review. In Part III, I very briefly trace the emergence of a distinctive politico-legal culture in Australia, which I contend has its roots in conceptions of the rule of law developed under colonialism, linking the past to the present through received ideas about judicial propriety and doctrinal constraint. Finally, in Part IV, I demonstrate how the High Court's attempts to accommodate its review practices to this politico-legal culture reinforced political opposition to its more creative (and perhaps realistic) approaches to constitutional interpretation, effectively undercutting its capacity to further expand its review powers.

## II THREE FORMS OF CONSTRAINT

### A Doctrinal constraint

The extent to which any system of legal rules and norms is logically capable of constraining judicial choice has been a central question in legal philosophy for some time, and one that I need not engage with directly for the purposes of my argument here. It is sufficient to note that the alleged failure of doctrine in this regard has constituted a substantial limb of democracy-based objections to rights review.[12] The high level of generality at which constitutional rights typically operate implicates judges in evaluative forms of reasoning, which, it is supposed, are morally incompatible with a liberal-democratic commitment to participatory politics.[13] As Adrienne Stone has pointed out, these criticisms can be directed equally to review in

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Structural Judicial Review' (2008) 28 *Oxford Journal of Legal Studies* 1, 12. The relevant distinction for current purposes is the position in which a particular exercise of review places a court in relation to the political branches; what matters is that it 'looks' like rights review from an institutional standpoint.

11 Stone, 'Judicial Review Without Rights', above n 10, 11–13, 19–25. Implicit in this is the assumption that 'legitimacy' can be understood, at least roughly, as a form of social capital, which is capable of being accumulated and 'spent': see Theunis Roux, *The Politics of Principle: The First South African Constitutional Court, 1995–2005* (Cambridge University Press, 2013) ch 2. The concept of legal legitimacy is elaborated upon further in the text accompanying nn 20–21 below.

12 Jeremy Waldron, *Law and Disagreement* (Clarendon Press, 1999); Jeremy Waldron, 'The Core of the Case against Judicial Review' (2006) 115 *Yale Law Journal* 1346.

13 Waldron, *Law and Disagreement*, above n 12, ch 11; Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Mebourne University Press, 1992) 151, 167–70.

the structural sphere.[14] The structural provisions of a constitution will tend to be similarly vague for several reasons, among them the difficulty of defining distinct areas of legislative competence, and the prospective nature of the document itself. A court that is called upon to determine the practical scope of a government's power to legislate with respect to 'external affairs',[15] for instance, must resort to evaluative judgments — such as weighing the relative merits of centralisation and decentralisation within a federal system[16] — that are functionally equivalent to those involved in the context of a rights claim.[17]

These issues have so far framed the terms of a debate, between Stone and those critical of her conclusions, over the moral justifiability of structural review within a liberal-democratic political order.[18] What has been neglected is that Stone's analysis, if correct, seriously undermines any notion that the relative determinacy of the *Constitution*'s federalism and rights provisions alone can explain the High Court's differential approach to structural and rights-based review.[19] This point becomes clearer if we think of legal rules and norms as establishing boundaries around the range of legally plausible solutions available in relation to a given problem, transgression of which will result in a loss in legal legitimacy.[20] Doctrinal limits chafe when some other factor compels a judge to test them. In those legal systems in which there is a strong judicial attachment to the ideal of adjudication according to law, transgression is most likely to be prompted by countervailing constraints,[21] such as

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14 Stone, 'Judicial Review without Rights', above n 10. There are exceptions to this, but they are limited. They include provisions framed in relatively specific and therefore uncontroversial terms (eg, the one-third requirement for a quorum in the lower house of the Australian Parliament under *Constitution* s 38), and constitutional guarantees against discrimination between the constituent polities within a federation, which secure their political participation and thus the basic conditions for the existence of the federation itself: Adrienne Stone, 'Democratic Objections to Structural Judicial Review and the Judicial Role in Constitutional Law' (2010) 60 *University of Toronto Law Journal* 109, 124–5, 128–30 ('Democratic Objections').

15 *Constitution* s 51(xxix).

16 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, 229 (Mason J); *Tasmanian Dam Case* (1983) 158 CLR 1.

17 Stone, 'Judicial Review without Rights', above n 10, 15–17.

18 For criticisms of Stone's analysis, see Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism' (2008) 27 *University of Queensland Law Journal* 129; Jeffrey Goldsworthy, 'Structural Judicial Review and the Objection from Democracy' (2010) 60 *University of Toronto Law Journal* 137. For Stone's response to her critics, see Stone, 'Democratic Objections', above n 14.

19 Stone herself does touch briefly on this as being a consequence of her argument, but only in the prescriptive sense of providing ammunition to those advocating for the constitutional protection of rights: Stone, 'Democratic Objections', above n 14, 130.

20 See Richard H Fallon, Jr, 'Legitimacy and the Constitution' (2005) 118 *Harvard Law Review* 1787, 1817–20. The diminishment of a court's store of legal legitimacy can, in turn, act to intensify the political constraints operating against it: see Roux, *The Politics of Principle*, above n 11, ch 2. The nature of political constraints is explored further in Part II(B) of this article.

21 Judges might also be motivated to transgress the limits of legitimate legal argument as a means to actualise their own policy preferences. However, it is important to note that this is not a necessary corollary to a constraint-based conception of legal doctrine, as it is in

those emanating from the political-institutional arrangements of the system itself, as will be discussed further below. For now, the relevant question becomes: If rights review *is* no more costly than structural review in terms of lost legal legitimacy, why has the High Court not moved into strong-form rights review? Any (perceived) legitimacy costs associated with doing so must have their basis elsewhere. In other words, we must move beyond the notion of doctrinal constraint in order to explain the Court's review practices.

### B Political constraint

It follows that any purely doctrinal account of judicial review will tend to obscure its political contingency. When Fullagar J declared that in Australia 'the principle of *Marbury v Madison*[22] is accepted as axiomatic',[23] he elided the fact that the Marshall Court's judgment was not axiomatic even in the United States, or only in a narrowly jurocentric sense.[24] A court may assert that it is competent to exercise judicial review, but that assertion is meaningful only to the extent that other powerful political actors acquiesce to it.[25] Those actors may instead choose to ignore or defy the court's decisions;[26] they may seek to dilute the relative influence of some of its members by

behavioural or attitudinal models of judicial decision-making: see, eg, Jeffrey A Segal and Harold J Spaeth, *The Supreme Court and the Attitudinal Model* (Cambridge University Press, 1993). Called on to respond to a particular legal problem, a judge can be motivated by a genuine desire to give effect to the most authentic possible expression of an existing body of doctrine, while at the same time being limited by that doctrine (as commonly occurs when several equally plausible solutions present themselves). That the interaction between doctrinal constraints and judicial preference formation is somewhat more complex than suggested by behavioural modelling is a key insight in the historical-institutionalist school's reaction against such simplified accounts: see, eg, Keith E Whittington, 'Once More unto the Breach: PostBehavioralist Approaches to Judicial Politics' (2000) 25 *Law & Social Inquiry* 601; Cornell W Clayton and Howard Gillman (eds), *Supreme Court Decision-Making: New Institutionalist Approaches* (University of Chicago Press, 1999).

22 5 US (1 Cranch) 137 (1803) ('*Marbury*').

23 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262.

24 That of providing *a* basis in precedent for the Supreme Court's power to declare laws unconstitutional during adjudication: Mark A Graber, 'Establishing Judicial Review: *Marbury* and the Judicial Act of 1789' (2003) 38 *Tulsa Law Review* 609, 626. Its significance even in this regard is questionable, as it was more than 80 years before the Supreme Court first acknowledged the decision as providing a discrete precedential basis for its review powers in *Mugler v Kansas*, 123 US 623 (1887). As Graber wryly puts it, the fact that *Marbury* established judicial review 'was a well kept secret throughout the nineteenth century': at 627. He suggests instead that the *Judiciary Act of 1789*, 1 Stat 73 played a much greater role in its establishment.

25 Keith E Whittington, *Political Foundations of Judicial Supremacy: The Presidency, the Supreme Court, and Constitutional Leadership in US History* (Princeton University Press, 2007) 9.

26 Perhaps the best-known 20th-century example of this was Orval Faubus' mobilisation of the National Guard, during his tenure as governor of Arkansas, to prevent the desegregation of Little Rock public schools mandated by *Brown v Board of Education*, 347 US 483 (1954). Faubus' denial of the Supreme Court's authority to bind state governments precipitated a national crisis, prompting the Court to assert judicial supremacy in *Cooper v Aaron*, 358 US 1 (1958), For an account, see Daniel A Farber, 'The Supreme Court and the Rule of Law: *Cooper v Aaron* Revisited' [1982] *University of Illinois Law Review* 387. But defiance of the Court's early decisions by the states was relatively widespread. For example, its orders in

expanding the bench, and appointing to it judges who are more sympathetic to their political agendas;[27] they may pressure individual judges, directly or indirectly, to reach certain conclusions; in the most extreme circumstances, they may seek to remove particular judges from office,[28] or dissolve the court entirely. A court's review jurisprudence is as much a product of its particular approach to negotiating such threats to its institutional independence as of the legal substance of its decisions.[29] Any holistic account of judicial review therefore must attend to the political circumstances within which it emerges and is exercised.

Historically, the United States Supreme Court's strategy has been to build legitimacy for its openly consequentialist interpretive methods by favouring dominant political and economic interests, in both the structural and rights spheres. Only later did it exploit these gains to move into more elevated forms of review.[30] *Marbury* is itself an exemplar of this approach. Having lost control of the executive and the legislature to Thomas Jefferson's Democratic-Republican Party in the 1800 elections, the Federalists pushed legislation through the lame-duck 6th Congress that enabled

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both *New Jersey v Wilson*, 11 US (7 Cranch) 164 (1812) (concerning the withdrawal of a tax exemption over certain Indian lands) and *Martin v Hunters' Lessee*, 14 US (1 Wheat) 304 (1816) (concerning the Supreme Court's authority to review decisions of state courts) were simply disregarded by the governments of New Jersey and Virginia, respectively: Barry Friedman, *The Will of the People: How Public Opinion Has Influenced the Supreme Court and Shaped the Meaning of the Constitution* (Farrar, Straus and Giroux, 2009) 84. The issue was foregrounded in *Worcester v Georgia*, 31 US (1 Pet) 1 (1831), part of a series of conflicts over Georgia's efforts to remove the peoples of the Cherokee Nation to the west in order to facilitate its own expansionary ambitions. Naturally, Georgia denied the Supreme Court's authority, refusing even to participate in the litigation. Informally, President Andrew Jackson — who both favoured Native American removal, and endorsed a vision of federalism in which the coordinate departments remained independent from one another — sided with Georgia; that is, until the issue of the Court's authority (and, indirectly, of Cherokee sovereignty) became implicated in questions over Jackson's ability to enforce a tariff levied over South Carolina: Friedman, above n 26, 88–104.

27 The quintessential example is Franklin Roosevelt's abortive 'court-packing plan', a legislative package, initiated in response to the Hughes Court's hostility to his New Deal agenda, that would have allowed him to appoint up to six judges to the Court for every incumbent member over 70 years and six months who refused to retire. For an account, see Friedman, above n 26, ch 7.

28 This occurred in Malaysia in 1988, when three judges of the Supreme Court, including the Lord President, were removed by a tribunal convened by the country's Prime Minister, Mahathir Mohamad: see Mark Gillen and Ted L McDorman, 'The Removal of the Three Judges of the Supreme Court of Malaysia' (1991) 25 *University of British Columbia Law Review* 171. More to the point, judicial removal also took place in colonial South Australia and Van Diemen's Land: see Part III(A) of this article.

29 See Theunis Roux, 'Principle and Pragmatism on the Constitutional Court of South Africa' (2009) 7 *International Journal of Constitutional Law* 106, 109–12; Roux, *The Politics of Principle*, above n 11, ch 2.

30 Shapiro, above n 10, 11–13. In this light, *Marbury*'s apparent precedential significance is seen to be more a product of historical revisionism than something intrinsic to the case itself. As Graber argues, '[t]he better claim is that important late nineteenth and twentieth century cases cited *Marbury* when seeking to establish strong precedential foundations for modern review practice': Graber, 'Establishing Judicial Review', above n 24, 628.

outgoing president John Adams to appoint 16 new circuit judges and 42 new justices of the peace, all loyal Federalists (the so-called 'Midnight Judges'). Although most of these commissions were delivered before Adams' term expired, some were not. On taking office, Jefferson quickly saw that the enabling legislation was repealed, and ordered James Madison, his Secretary of State, to withhold the remaining commissions. William Marbury, a Midnight appointee, petitioned the Supreme Court to issue a *mandamus* compelling Madison to deliver his commission. The Marshall Court was placed in a difficult position. For one thing, the range of legally plausible solutions available to it was limited. Marbury had been validly appointed, and was entitled to his commission.[31] Moreover, it was within the Court's legal power to compel Madison to deliver it.[32] But the Court was also politically constrained: it could not have issued such an order and hoped to see it followed, and a refusal to do so by Madison would have done serious harm to its credibility.[33] So, instead, Marshall CJ sidestepped the issue altogether — and asserted the power of judicial review — by holding the legislation conferring jurisdiction upon the Court in respect of the matter unconstitutional.[34] By exercising judicial review in a politically inconsequential manner, he both 'defused [the] crisis and preserved political support for judicial power',[35] setting the standard for more than a century of Supreme Court review practice.[36]

The High Court has generally taken the inverse approach to negotiating such difficulties. Rather than avoiding direct confrontation with the executive and legislative branches, the Court openly engaged them from a relatively early stage, legitimating its politically consequential role through close adherence to the language of doctrinal constraint — 'a strict and complete legalism'[37] — when describing its own interpretive methods.[38] Thus insulated from political attack, it used its powers of structural review to obstruct the Chifley Labor Government's post-war reconstruction

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31 *Marbury*, 5 US (1 Cranch) 137, 167–70 (1803).

32 Ibid 170.

33 For a detailed account of the political circumstances surrounding the decision, see Friedman, above n 26, ch 2.

34 *Marbury*, 5 US (1 Cranch) 137, 174–8 (1803).

35 Mark A Graber, 'The Problematic Establishment of Judicial Review' in Howard Gillman and Cornell Clayton (eds), *The Supreme Court in American Politics: New Institutionalist Interpretations* (University of Kansas Press, 1999) 28, 36.

36 See, eg, Mark A Graber, 'The Nonmajoritarian Difficulty: Legislative Deference to the Judiciary' (1993) 7 *Studies in American Political Development* 35; Mark A Graber, 'The Passive-Aggressive Virtues: *Cohens v Virginia* and the Problematic Establishment of Judicial Power' (1995) 12 *Constitutional Commentary* 67; Mark A Graber, 'Federalist or Friends of Adams: The Marshall Court and Party Politics' (1998) 12 *Studies in American Political Development* 229; Mark A Graber, 'Establishing Judicial Review? *Schooner Peggy* and the Early Marshall Court' (1998) 51 *Political Research Quarterly* 221; Mark A Graber, 'Naked Land Transfers and American Constitutional Development' (2000) 53 *Vanderbilt Law Review* 71.

37 Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (Severin Woinarski ed, Law Book, 1965) 245, 247. The Court's strict commitment to legalism is generally traced to its decision in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ('*Engineers*' *Case*').

38 Galligan, *Politics of the High Court*, above n 8.

program,[39] which was to include national ownership of essential services such as airlines[40] and banking,[41] as well as a comprehensive system of social service provision;[42] and then to strike down legislation banning the Australian Communist Party,[43] which had been enacted as 'a key plank of the Menzies [Liberal] government's successful election platform'.[44]

Given the High Court's clear and long-standing willingness to invalidate important legislation enacted by both major parties, the obvious question once again is: What has prevented it from moving into strong-form rights review? We have already seen that rights review is no less compatible with the Court's commitment to strict legalism than structural review.[45] It might instead be supposed that rights review is somehow less politically viable. Indeed, as Shapiro has argued:

> any federalism is a kind of cartel in which members join because they perceive that if they all follow the same cartel rules they will all benefit more than if there were no cartel. It is in the nature of cartels, however, that if one member disobeys the rules while others obey, the disobedient member will benefit more than it would if it obeyed. Thus in order to work over time cartels require a strong disciplinary mechanism that can spot disobedience by individual members and bring them back into line.[46]

A court that intervenes to restrain a government purporting to act in excess of its constitutionally conferred power is therefore likely to enjoy the political support of the other members. But the High Court's decision in *Re Wakim; Ex parte McNally*[47] signalled its capacity and willingness to engage in a different kind of federalism review. In that case, the Court overturned a scheme, established by the mutual consent of the Commonwealth and each of the states, that enabled the cross-vesting of jurisdiction between state and federal superior courts. It did so on the basis of a negative implication, identified through a highly technical reading of ch III in its textual context.[48] In previous decisions, the Court had shown itself to be capable of reviewing key government initiatives — and in the *Communist Party Case*, ideologically charged ones — without jeopardising its institutional independence. But in *Wakim*, it

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39 Ibid ch 4.

40 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

41 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 ('*Bank Nationalisation Case*').

42 *A-G (Vic); Ex rel Dale v Commonwealth* (1945) 71 CLR 237; *British Medical Association v Commonwealth* (1949) 79 CLR 201.

43 *Communist Party Case* (1951) 83 CLR 1.

44 Galligan, *Politics of the High Court*, above n 8, 43. See also: at 203–7. At the same time, the influence of McCarthyism over public life in the United States only intensified, more or less unchallenged by the conservative and politically vulnerable Vinson Supreme Court: see Robert M Lichtman, *The Supreme Court and McCarthy-Era Repression: One Hundred Decisions* (University of Illinois Press, 2012).

45 See Part II(A) of this article.

46 Shapiro, above n 10, 8.

47 (1999) 198 CLR 511 ('*Wakim*'). See also *Byrnes v The Queen* (1999) 199 CLR 1; *Bond v The Queen* (2000) 201 CLR 213; *R v Hughes* (2000) 202 CLR 535.

48 This is a statement about the nature of the Court's interpretive approach, not the soundness of its reasoning. For a detailed and excoriating critique of the substance of the *Wakim* judgment, see Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 186.

did this on the back of a private-party-initiated constitutional challenge, in the absence of any disagreement between the Commonwealth and the states over the extent of their legislative powers.

Federalism review of this type is manifestly different to that contemplated in Shapiro's cartel-based account, or by Sir Owen Dixon when he described a strict adherence to legalism as 'the only way to maintain the confidence of all parties in federal conflicts'.[49] From an institutional standpoint, it is indistinguishable from rights review. Both are strongly anti-majoritarian (in *Wakim*, to the extent of pitting the Court against legislative majorities at both the national and state levels), and involve courts 'seeking to stop the government from doing what it wants to do rather than choosing which part of government must give way to the other'.[50] Alongside the Court's long history of successful federalism review, *Wakim* calls into question the notion that its aversion to developing a rights-based jurisprudence could be grounded in perceived resistance to its rendering politically consequential decisions in the face of contrary democratic consensus. While this does not mean that the Court could now move into strong-form rights review without political repercussions, it does suggest that those political constraints must themselves be grounded elsewhere.

### C Cultural constraint

In order to approach an explanation of the High Court's position on rights review, we must employ an understanding of judicial review that is sensitive to notions of doctrinal, political *and* cultural constraint, as well as the connections between them. I will substantiate this claim first by tracing the historical emergence and entrenchment of judicial review and the politico-legal culture through which it has been legitimated,[51] and then by examining the role of that culture in preventing the Court from moving into more elevated rights review.[52]

Before proceeding, it is necessary to clarify what I mean here by 'politico-legal culture', and how the constraints flowing from it relate to those already considered. As used here, the term refers to something closely aligned with Martin Chanock's description of legal culture as

> a set of assumptions, a way of doing things, a repertoire of language, of legal forms and institutional practices. As with all aspects of a culture, it changes in response to new situations, but it also reproduces itself; its new responses fit into its existing forms. … A legal culture … embodies a narrative, encompassing both past and future, which gives meaning to thought and actions.[53]

A politico-legal culture similarly comprises a set of embedded discourses about the nature of law and its place within a broader political system. These discourses contextualise and strive to give continuity to often divergent and contradictory principles and institutional arrangements. Culture is produced by the circumstances of politics, but also productive of them, constituting the discursive field within which

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49 Dixon, above n 37, 247.
50 Shapiro, above n 10, 18.
51 See Part III of this article.
52 See Part IV of this article.
53 Martin Chanock, *The Making of South African Legal Culture 1902–1936: Fear, Favour and Prejudice* (Cambridge University Press, 2001) 23.

political conflict is played out. In other words, it both reflects *and* structures social understandings of the appropriateness of particular modes of legal reasoning, and of the proper scope of judicial power.[54]

Culture thus conceived operates to constrain a court's powers of judicial review in at least two important ways. First, it acts as the medium through which doctrinal and political constraints give substance to a community's expectations of law and the judicial role. Because culture works to accommodate disparate legal and political facts, these expectations may be inconsistent. This form of cultural constraint will express itself indirectly as external resistance to a court's activities, which is to say as political constraint. Second, culture constrains judicial review more directly by acting as a medium through which these shared meanings are internalised by judges themselves.[55] Cultural and doctrinal constraint inform one another through this dynamic: a judge's particular understanding of the law will necessarily influence her interpretation of a particular legal rule of principle. Both modes of cultural constraint are also affected by the embeddedness of politico-legal culture, which links political and legal facts through *time* as well as 'space'. Cultural understandings of law may, and by definition often will, persist beyond the circumstances within which they first emerged.[56] In other words, culture may continue to act as a particular constraint long after legal doctrine and politics have ceased to.

## III A BRIEF GENEALOGY OF AUSTRALIAN POLITICO-LEGAL CULTURE[57]

### A Colonial rule of law and the cultural foundations of structural review

It has been said that '[t]he establishment of judicial review in Australia was accompanied by none of the travail which marked its reception in the United States'.[58] This is simply not true. In fact, the courts' earliest review decisions were highly contentious, and the practice emerged only through a process of intense political struggle over the nature of Australian constitutionalism and the appropriate role of the judiciary in relation to the legislative and executive branches. What is distinctive about this emergence is that it took place prior to Federation, when colonial courts were called upon to assess the validity of local legislation in relation to superior British laws. This context had a determining influence on both the nature of those review practices and on the politico-legal culture within which they were legitimated.

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54 See P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987).

55 See, eg, Michel Foucault, *Discipline and Punish: The Birth of the Prison* (Alan Sheridan trans, Vintage Books, 1995).

56 This feature of culture, or some aspect of it, is present in accounts of law as a traditional or customary practice: see, eg, Martin Krygier, 'Law as Tradition' (1986) 5 *Law and Philosophy* 237; Jeremy Webber, 'The Grammar of Customary Law' (2009) 54 *McGill Law Journal* 579.

57 A truly comprehensive account of the emergence and shape of Australian politico-legal culture is, of course, not feasible given the constraints of the format. What follows amounts instead to a rough genealogical sketch, one that, it is hoped, will suffice to illustrate the essential features of that culture as they relate to the question at hand.

58 Sanford H Kadish, 'Judicial Review in the High Court and the United States Supreme Court' (1959) 2 *Melbourne University Law Review* 4, 8.

Early colonial review was exercised on uncertain legal foundations. Although colonial governments plainly derived their legislative powers from Imperial law and were limited as such, the role of local courts in enforcing those structural limits was ambiguous. Judicial review throughout this period was justified largely on the basis of the rule of law,[59] while the courts 'slipped comfortably into the well worn language of *ultra vires* and the doctrine of repugnancy' familiar to them from the British common law tradition.[60] In the absence of a written constitution, the rule of law 'provided a standard … by which to judge the performance of those possessing governmental and judicial authority',[61] and, by extension, a discursive framework within which the courts could develop and legitimate an analogous set of review practices.

I say a 'discursive framework' because while the rule of law did provide a standard for assessing the validity of legislative and administrative action, it was a highly flexible one. Although the term became more closely associated, at least in British and Australian legal culture,[62] with the narrowly formal Diceyan conception[63] from the late 19th century onwards, its meaning was far less settled before then. As John McLaren has shown, conservatives and radicals frequently invoked the 'rule of law' throughout the early Australian colonial period to justify quite distinct political claims.[64] Both groups conceived of it as a *constitutional* principle first and foremost, in the sense of systematising and limiting the exercise of power by the state. But where for those on the right the term connoted a narrower ordering, anticipating Dicey, within which the legitimacy of government action depended largely upon the observance of some prescribed set of formal procedural requirements, to those on the left it was a considerably more expansive concept, encompassing the idea that the law ought to secure individual liberty against arbitrariness, and overlapping with a broader set of common law rights.

The significance of this must be read against the uneven and incremental reception of English law by the Australian colonies. Contrary to the simplified Blackstonian

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59 See John McLaren, 'The Judicial Office … Bowing to No Power but the Supremacy of the Law: Judges and the Rule of Law in Colonial Australia and Canada, 1788–1840' (2003) 7 *Australian Journal of Legal History* 177; Ian Holloway, 'Sir Francis Forbes and the Earliest Australian Public Law Cases' (2004) 22 *Law and History Review* 209; Ian Holloway, Simon Bronitt and John Williams, 'Rhetoric, Reason, and the Rule of Law in Early Colonial New South Wales' in Hamar Foster, Benjamin L Berger and A R Buck (eds), *The Grand Experiment: Law and Legal Culture in British Settler Societies* (UBC Press, 2008) 78.

60 James A Thomson, *Judicial Review in Australia: The Courts and the Constitution* (SJD Thesis, Harvard University, 1979) 21.

61 McLaren, above n 59, 178.

62 See, eg, Geoffrey de Q Walker, *The Rule of Law: Foundation of Constitutional Democracy* (Melbourne University Press, 1988) 144; David Kinley, 'Constitutional Brokerage in Australia: Constitutions and the Doctrines of Parliamentary Supremacy and the Rule of Law' (1994) 22 *Federal Law Review* 194.

63 A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, first published 1885, 10th ed, 1959) 187–203. For a useful typology distinguishing formal conceptions of the rule of law (such as Dicey's) from more substantive ones, see Paul P Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467.

64 McLaren, above n 59, 178–80.

account, transfer did not take place automatically on 'settlement'.[65] As Ian Holloway argues:

> the truth is not that the substance of English law was received in 1788. We know that much of it simply was not. But what *did* happen — in 1824, not 1788 — was the creation of a court with all of the authority of the English common law courts. This did not mean that the substantive law in New South Wales would be the same as in England, for it never has been, but that the legal *dynamic* would be the same. To put it another way, Australia did not receive English law, but it received — and this serves as the foundation stone of today's Australian constitutionalism — English *legal culture*.[66]

A significant aspect of this inherited culture was a certain formalist orientation, expressed in part through the common law's prioritisation of questions of procedural justice.[67] But within that, courts enjoyed considerable room to move. Debates over the content of the rule of law were live, and 'where the courts stood [in relation to them] … influenced the political culture in various jurisdictions and how narrowly or broadly the rule of law was construed within them'.[68] Holloway has demonstrated, for example, that the personality of Sir Francis Forbes — who bridged both political positions through an instrumental understanding of the rule of law — had a strong determining influence on the emergence of an early strand of constitutionalism in New South Wales during his tenure as its first Chief Justice.[69] In practical terms, this meant that early forms of proto-structural judicial review emerged within the colonies and became entrenched alongside the broader politico-legal culture through which they drew their legitimacy. Moreover, the political circumstances of this emergence had a lasting impact on both culture and practice.

The most sustained and controversial period of colonial judicial review took place in South Australia between 1859 and 1868. As well as being an important constitutional milestone in its own right, the episode is illustrative of the constitutional politics and cultural attitudes of the time. The conferral of self-government on the colonies in the mid-1850s called a number of difficult constitutional issues to the surface, the foremost being how to reconcile the principle of responsible government with the continued subordination of colonial legislatures to the Imperial laws that constituted them.[70] This tension manifested as political conflict between those legislatures and the colonial courts over the question of judicial review. Over the course of a decade, the Supreme Court of South Australia, led primarily by Justice Benjamin Boothby, aggressively

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65 Not even in the limited sense suggested by Blackstone, in which as much of the law as is applicable to the circumstances of the colonies at that time is received: Sir William Blackstone, *Commentaries on the Laws of England* (Legal Classics Library, first published 1765–69, 1983 ed) vol 1, 104–5. In the Australian context, see Victor Windeyer, 'A Birthright and Inheritance: The Establishment of the Rule of Law in Australia' (1962) 1 *University of Tasmania Law Review* 635. Cf H V Evatt, 'The Legal Foundations of New South Wales' (1938) 11 *Australian Law Journal* 409, 415–21; Alex C Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1.

66 Holloway, above n 59, 211 (emphasis in original). See also Holloway, Bronitt and Williams, above n 59.

67 Holloway, Bronitt and Williams, above n 59, 84. See also, generally, Atiyah and Summers, above n 54.

68 McLaren, above n 59, 178.

69 Holloway, above n 59.

70 Alex C Castles, *An Australian Legal History* (Law Book, 1982) 400 ff.

asserted its powers of review by striking down a series of enactments of the South Australian Parliament as ultra vires or otherwise repugnant to British law.[71] Several key pieces of legislation were among those impugned, including the *Real Property Act 1858* (SA)[72] (which established the Torrens system of land registration), and a statute constituting an appellate court for the colony.[73] At one point it was even intimated that the Parliament itself might not have been validly constituted,[74] although the opportunity to review that particular piece of legislation never presented itself.

As far as Justice Boothby was concerned, the Court's review function flowed directly from 'its power and duty to construe all Acts of Parliament, whether Imperial or Colonial'.[75] But received assumptions about the sovereignty of Parliament were pervasive and influential.[76] Many assumed that responsible government implied an institutional hierarchy equivalent to that in Britain: colonial legislatures were thought to be supreme within their circumscribed provinces, and the courts subordinate to them; to the extent that constitutional limits did exist, it was not for the courts to decide if and when they had been transgressed.[77] Disagreement over these questions was not limited to South Australia: versions of the debate had been seen before, in New South Wales[78] and Van Diemen's Land,[79] and in the latter case had resulted in the removal of one judge of the Supreme Court, and the subsequent censure of Lieutenant Governor Sir William Denison by the Colonial Office. But even by those standards, the tenor in South Australia was unusually heightened, and political tensions ultimately escalated into a genuine constitutional crisis. Parliament would repeatedly enact laws only for Boothby to strike them down, on grounds that were 'often elusively slight'.[80] The political community became 'sharply divided into pro- and anti-Boothbyites'.[81] As Alex Castles recounts, '[a] ministry collapsed on the

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71 Thomson, above n 60, 46–60; Castles, 'The Reception and Status of English Law in Australia', above n 65, 23–8.

72 South Australia, *Hutchinson v Leeworthy*, Parl Paper No 142 (1864) 19–21 (Boothby J), 21–2 (Gwynne J) (decided on 28 May 1860), cited in Thomson, above n 60, 47. See also Douglas Pike, 'Introduction of the Real Property Act in South Australia' (1960) 1 *Adelaide Law Review* 169, 184–5.

73 South Australia, *Payne v Dench*, Parl Paper No 100 (1863) 1–3 (Gwynne J), 3–5 (Boothby J) (decided on 16 April 1861), cited in Thomson, above n 60, 48.

74 As Boothby said, 'I think it is very doubtful whether the Crown had power to assent to the Constitution Act without the consent of the Imperial Parliament. If the question was raised, I have little doubt that … [it] would be found to be not worth the paper it is printed on': *Lloyd v Kelly*, *South Australian Register* (Adelaide), 10 August 1860, 3, quoted in Thomson, above n 60, 48.

75 South Australia, *Letter dated August 12, 1861 from William Hinde to the Chief Secretary*, Parl Paper No 143 (1864), quoted in Thomson, above n 60, 49.

76 See Dixon, above n 37, 50–1.

77 Thomson, above n 60, 51.

78 Ibid 23–33.

79 Ibid 34–45.

80 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (Federation Press, 5th ed, 2010) 120.

81 Pike, above n 72, 187.

Boothby issue … [while a]nother was formed … to finalise consideration of a motion to achieve the judge's removal from the bench'.[82]

The effect of the crisis was to lay bare the complex of incipient constitutional practices, and to ossify them as concrete legal rules. The British Parliament, compelled by this point to intervene,[83] passed the *Colonial Laws Validity Act 1865* (Imp), which confirmed the presumptive validity of local laws.[84] But while the Act limited the *scope* of the courts' powers of review, it affirmed the practice more generally by preserving it in respect of those Imperial statutes made directly applicable to the colonies by express paramountcy.[85] This compromise mirrored a shift in debates over the Boothby affair within South Australia. While critics of the Supreme Court had begun by attacking the legitimacy of judicial review per se, they eventually came to focus their condemnation on the capricious manner in which Boothby had exercised it. In doing so, they tacitly conceded to a view that had increasingly gained traction: that review itself was a legitimate judicial function.[86]

But this was a very particular type of review. First of all, it was unequivocally limited to the structural sphere; gone, for now at least, was any final recourse to the kind of deep common law rights that had been championed by Forbes.[87] It was also highly deferential, as the courts were expected to find invalidity only where British Parliament had unambiguously intended to legislate for the colonies. Perhaps most significantly of all, colonial review was functionally indistinguishable from other forms of statutory interpretation, giving rise to a highly legalistic mode of review. So while the legislative backing afforded by the *Colonial Laws Validity Act* conferred legitimacy on the colonial courts' practice of structural review, creating a space within which they could perform the function free of political interference, it also established strictly circumscribed limits for that practice. In this way, (structural) judicial review and cultural expectations about the appropriate judicial role were entrenched together.

### B Federalism and Judicial Supremacy in the Context of Responsible Government

Expectations established during the colonial period gave rise to assumptions relied upon in drafting the *Constitution*. Whereas the path to federation in the United States was marked by a profound political and philosophical break with British colonial authority, the Australian colonies were motivated to it in the 1890s by the pursuit of more pragmatic reformist ends; specifically, a shared sense of the economic and political benefits of collective action.[88] They otherwise sought, where possible, to preserve the continuity of existing institutions and political conventions (Consistent

82 Castles, above n 70, 408.
83 Ibid 407–8.
84 And which, it should be added, Justice Boothby proceeded to construe as narrowly as possible: Thomson, above n 60, 59 n 511.
85 *Colonial Laws Validity Act 1865* (Imp) ss 2, 3.
86 Thomson, above n 60, 48–60.
87 Holloway, above n 59, 218.
88 See J A La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) ch 1.

with the utilitarianism that dominated British political thought at the time,[89] they were deeply distrustful of abstract rights for their perceived destabilising potential[90]). As a result, the *Constitution* itself reflects an uneasy commitment to two divergent and often contradictory constitutional traditions: responsible government, inherited from the British; and federalism, borrowed from the United States.[91]

The impact of received cultural assumptions was particularly apparent in the drafting of the judiciary clauses. It was clear to the framers that the effective operation of government within the federal system would depend upon there being an efficient mechanism for resolving federal boundary disputes.[92] They followed the example set in the United States by conceding this role to a politically independent constitutional court, wielding strong powers of judicial review.[93] But their understandings of American federalism were profoundly influenced by the work of James Bryce.[94] Bryce's interest in foreign legal systems was genuine, and he was an astute observer of their institutional peculiarities. But his views were also shaped by the strain of scientism that dominated late 19th-century comparative political thought, and his own Anglophilic faith in the superiority of English political values. Both conspired in his portrayal of American institutions as essentially English ones that had been adapted to a different set of circumstances, divorced entirely from the political philosophy, republicanism in particular, that had animated them.[95] While he expressed admiration for the Supreme Court's role in maintaining the *United States Constitution* through interpretation,[96] he also described judicial review — in terms that would have appealed to a group of lawyers familiar with the practice of proto-structural review by

89 See Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 115(1) *Dædalus* 147.

90 Goldsworthy, 'The Constitutional Protection of Rights in Australia', above n 13, 152–4.

91 See J R Mallory, 'Politics by Other Means: The Courts and the Westminster Model in Australia' (1979) 17 *Journal of Commonwealth & Comparative Politics* 3; Elaine Thompson, 'A Washminster Republic' in George Winterton (ed), *We, the People: Australian Republican Government* (Allen & Unwin, 1994) 97. This structural tension has been cited as the cause of the 1975 constitutional crisis: Colin Howard and Cheryl Saunders, 'The Blocking of the Budget and Dismissal of the Government' in Gareth Evans (ed), *Labor and the Constitution 1972–1975: Essays and Commentaries on the Constitutional Controversies of the Whitlam Years in Australian Government* (Heinemann, 1977) 251.

92 As Galligan points out, judicial review was 'a dominant theme' at the Constitutional Convention, one 'that constantly recurred throughout the debate on the judiciary clauses': Galligan, *Politics of the High Court*, above n 8, 56. Indeed, Josiah Symon famously referred to the High Court as 'the keystone to the federal arch': *Official Record of the Debates of the National Australasian Convention*, Adelaide, 20 April 1897, 950.

93 Galligan, *Politics of the High Court*, above n 8, 48–63.

94 James Bryce, *The American Commonwealth* (Macmillan, 1889). On Bryce's influence on the Convention participants, see, eg, La Nauze, above n 88, 18–19, 85, 273; Galligan, *Politics of the High Court*, above n 8, 44–5; Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (Cambridge University Press, rev ed, 1999) 122.

95 See John F S Wright, 'Anglicizing the United States Constitution: James Bryce's Contribution to Australian Federalism' (2001) 31 *Publius: The Journal of Federalism* 107; Graham Maddox, 'James Bryce: Englishness and Federalism in America and Australia' (2004) 34 *Publius: The Journal of Federalism* 53.

96 See, eg, Bryce, above n 94, vol 1, 374–5.

Australian colonial courts — as involving the mechanical comparison of legislation with the constitutional text.[97]

Of course, judicial review under federalism would differ from that under colonial self-government in at least one important respect: unlike the colonial courts, the High Court would enjoy judicial supremacy, the power to authoritatively determine constitutional meaning.[98] It is unclear to what extent the framers appreciated the political implications of introducing this element into the existing system of responsible government.[99] However, the consequences were manifest. Australia has since been caught between 'competing constitutionalisms',[100] each embodying a distinct conception of the appropriate source of limitations on government power. As Stephen Gageler puts it:

> It is the difference between government separated from the people and limited by law and an internal separation of powers, and government emanating from the people and limited by a need to appeal constantly to the support of a broadly based electorate drawn from the people it governs.[101]

The difficulty for the High Court is that it is constantly subject to contradictory demands flowing from each tradition. Under responsible government, the people, in their capacity as an electorate, restrain government excess through their representatives in the legislature; the free exercise of their will is a political virtue, and as we have seen,[102] the courts are expected to defer to them. Federalism, by contrast, is premised upon the fragmentation of that will — its anti-majoritarian streak is no accident; it was established in the United States for fear of popular tyranny as much as governmental[103] — and the courts are required to take an active (political) hand in policing its boundaries.

These tensions were almost certainly exacerbated by the retention of Privy Council appeals as late as 1986. While the High Court has always held final authority with regard to constitutional matters, the supervision of the Privy Council in other spheres ensured that British legal norms and interpretive methods predominated. Their influence was ubiquitous, even when they were not directly reinforced through the operation of *stare decisis*, thanks in large part to a generalised obeisance to the decisions

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97 Ibid vol 1, ch 23.

98 For a discussion on the nature of judicial supremacy and its relationship to judicial review, see Whittington, *Political Foundations of Judicial Supremacy*, above n 25, 5–10.

99 Gageler suggests that the framers expected amendment to be the primary mechanism by which the *Constitution* would adapt to changing circumstances, which was obviously not borne out in practice: Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 174. While Craven identifies elements of interpretive progressivism (interpretation in light of contemporary standards and needs, as distinct from originalism) among the Convention participants, he concludes that 'any suggestion to the effect that strong progressivism was a dominant, or even significant, position among the Founders amounts to a gross exaggeration': Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87, 128.

100 Gageler, above n 99, 164–74.

101 Ibid 170.

102 See Part III(A) of this article.

103 Gageler, above n 99, 164–5.

of British higher courts.[104] It is surely significant that these norms grew out of, and thus reflected the values of, a legal system to which the functioning of a court under the conditions of federalism was an entirely foreign. From its inception, the High Court was called upon to play an institutional role that was, in at least one important respect, at odds with the politico-legal culture within which it had been created and through which it drew its legitimacy.

### C The (re-)emergence of legalism

In its earliest federalism decisions, the High Court sought to give effect to a 'coordinate' vision of the federal system, with the Commonwealth and state governments sovereign within the respective spheres of legislative competence assigned or reserved to them by the *Constitution*.[105] It actively prevented encroachment by each government in the others' affairs, first by finding that state government officials were impliedly immune from burdens placed upon them by Commonwealth laws and vice versa,[106] and second by construing Commonwealth lawmaking power narrowly where to do otherwise would mean intruding upon areas that had traditionally been the exclusive province of the states.[107]

Although this purposive approach to constitutional interpretation was quite antithetical to the strict textualism that had characterised late colonial review, it was consistent with the approach favoured by the United States Supreme Court at the time.[108] It is also worth noting that the original members of the High Court were themselves senior statesmen — all three had participated in the Constitutional Conventions and been otherwise involved in public life in some capacity, and Sir

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104 Pierce, above n 6, 227–30. This contention is based on the views (given anonymously) of Australian appellate judges and senior legal practitioners interviewed by Pierce in the course of his research. As one High Court justice remarked, '[T]here was an attitude of mind on the part of Australian judges that although they weren't strictly bound by … decisions of English courts … because the Privy Council was constituted by judges who sat in the House of Lords there was a natural tendency … to follow a House of Lords decision': at 228. Similarly, another claimed that 'the Brits never understood federation — just didn't understand what was involved in it. They simply had no conception of the quite different role of the judiciary in a federation': at 229. A barrister who had appeared often before the Court reflected on the cross-jurisdictional pervasiveness of the English courts' influence:

> The Privy Council had no experience in constitutional law in any sense comparable to the way you have it in the U.S. or Australia. That I think does have an effect on the modes of reasoning because if you have to decide constitutional cases, there are so many factors you take into account. Sometimes very few of them have much to do with legal reasoning in any traditional sense: at 229.

In fact, Pierce himself cites the final abolition of Privy Council appeals as a key precipitant for the Mason Court's 'transformation' of the High Court's place in the Australian legal system: at 224–37.

105 Zines, above n 1, 1–9.

106 *D'Emden v Pedder* (1904) 1 CLR 91; *Deakin v Webb* (1904) 1 CLR 585; *Federated Amalgamated Government Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488.

107 *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; *A-G (NSW) v Brewery Employees Union of New South Wales* (1908) 6 CLR 469.

108 *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819); *Collector v Day*, 78 US (11 Wall) 113 (1870); *United States v E C Knight Co*, 156 US 1 (1895).

Edmund Barton had been Prime Minister before resigning to take up a justiceship — which may have contributed to their willingness to employ broad discretion in the exercise of their judicial functions.[109] And while the object of preserving the integrity of the constituent federal units as discrete political entities implicated the Court in modes of reasoning alien to the extant politico-legal culture, it may have held some familiarity from an institutional perspective, given the judiciary's obligation to respect the independence of the colonies under responsible government.[110]

Regardless, the High Court's choice of approach quickly brought it into conflict with the ascendant Labor Party, which at the time was stridently opposed to federalism for its anti-majoritarian aspect, but had formed too late to be much involved in the process of constitutional drafting.[111] Between 1908 and 1912, the Griffith Court stymied key Labor-favoured initiatives in industrial relations[112] and the regulation of restrictive trade practices.[113] Labor heavily criticised the Court's decisions, and pushed for constitutional reform, albeit unsuccessfully.[114] By openly advocating parliamentary over judicial supremacy, Labor laid bare the structural contradictions intrinsic to the 'Washminster' system, leaving the Court exposed in the process. If it was to play the institutional role that had been assigned to it, the Court needed to provide some reassurance that it was not simply usurping political choices that belonged more properly with the democratic process, that its decisions reflected something other than the aggregate policy preferences of the justices themselves. This need was particularly acute given Australia's strong historical and cultural attachment to the principle of responsible government. The Court was left vulnerable, as Galligan says, 'because its method of interpreting the constitution … was palpably insufficient for striking down important government legislation'.[115]

The High Court's solution was to reaffirm its commitment to fulfilling its constitutionally conferred role through purely apolitical interpretive methods. This change in approach was itself made possible by a shift towards the appointment of professional lawyers to the bench rather than former politicians, strategically initiated by Labor in the wake of its confrontation with the Griffith Court.[116] As a majority of the reconstituted Court asserted in the *Engineers' Case*:

> The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally and 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, then *lucet ipsa per se*.[117]

This meant the rejection of principles arrived at by way of *political* inferences 'necessitated' through an understanding of the *Constitution* as embodying some

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109 Galligan, *Politics of the High Court*, above n 8, 79–80; Patapan, *Judging Democracy*, above n 5, 11–12.

110 See Part III(A) of this article.

111 Galligan, *Politics of the High Court*, above n 8, 26–30, 85.

112 *R v Barger* (1908) 6 CLR 41.

113 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *Colonial Sugar Refining Co Ltd v A-G (Cth)* (1912) 15 CLR 182; *Adelaide Steamship Co Ltd v The King* (1912) 15 CLR 65.

114 Galligan, *Politics of the High Court*, above n 8, 85–91.

115 Ibid 91.

116 Ibid 91–4, 97.

117 *Engineers' Case* (1920) 28 CLR 129, 152 (Knox CJ, Isaacs, Rich and Starke JJ).

underlying institutional vision of the federal system, including the implied immunity and reserved state powers doctrines. Sir Owen Dixon later described the Court's 'sole function' as being 'to interpret a constitutional description of power or restraint upon power and say whether a given measure falls on one side of a line consequently drawn or on the other'.[118] Legalism therefore comprises two propositions: the acknowledged predominance of the judiciary in the *Constitution*, necessitated by its position within the federal structure; and the assumption that the *Constitution* establishes substantive limits on government power that are discernible by reference to its text, structure, and the context of its drafting.[119] Underpinning this is a Diceyan distinction between the legal and the political;[120] the possibility of locating the limits of government power in the *Constitution* through strictly legalistic methods legitimates the Court's role in enforcing them, as the judiciary is specially qualified to decide legal questions.

But the new approach also brought the Court more squarely into line with traditional expectations of judicial restraint. As Jeffrey Goldsworthy points out, the interpretive principles laid down in *Engineers*' were not intrinsically novel. Rather, it was the Court's 'insistence that they had not previously been strictly applied' that distinguished the judgment.[121] At its core, legalism posits a continuity between the general legal role of the judiciary and the practice of interpreting and applying the *Constitution*, the meaning of which is to be 'ascertained in accordance with ordinary rules of construction'.[122] Implicit in the Court's open commitment to traditional legal modes of reasoning, then, was an assertion that its role as federal umpire was compatible with the 'proper' judicial function, as understood in the context of the prevailing politico-legal culture.

## IV CULTURE AS A CONSTRAINT ON RIGHTS-BASED REVIEW

Despite what successive justices of the High Court have said about the nature of their interpretive methods, the critiques of rights-based and structural review canvassed in Part II(A) of this article strongly suggest the impossibility of complete doctrinal constraint, as an historical fact if not a logical one. It follows then that

> legalism is incapable of fulfilling its own agenda: … a neutrally based *a priori* approach to constitutional line drawing is in its own terms impossible and … the High Court's acknowledged readiness to depart from old doctrine where it considers it misconceived or inappropriate means that the choice between any number of reasonable alternative positions assumes an air of arbitrariness.[123]

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118 Dixon, above n 37, 247.
119 Gageler, above n 99, 175–6.
120 Patapan, *Judging Democracy*, above n 5, 14–15.
121 Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 121.
122 *Engineers*' *Case* (1920) 28 CLR 129, 150 (Knox CJ, Isaacs, Rich and Starke JJ). The Court's insistence that such a continuity could be sustained was all the more significant for the predominance of British interpretive norms in the context of its general legal role, as discussed in the text accompanying n 104.
123 Gageler, above n 99, 178.

The Court's strict historical attachment to the language of doctrinal constraint is more intelligible as 'a vital expression of [its] politics'.[124] From this perspective, legalism amounts (or amounted) to a public statement of the Court's deference to the principle of parliamentary supremacy, and a rejection of the distrust of popular and governmental excess underpinning the fragmentation of political power in American federalism.[125] Galligan has described legalism as a deliberate rhetorical strategy,[126] and Goldsworthy in particular has objected strenuously to this characterisation, arguing that Galligan offers little in the way of evidence to substantiate it.[127] But whether this professed self-limitation is a direct response to external political constraints, real or perceived, or the judiciary's internalisation of a particular view as to its appropriate role is in a certain sense irrelevant; both streams flow from the same source, and trace convergent paths. Ultimately, the motivations of judges may be inscrutable. But they are also beside the point. What matters is that there is a cost associated with the High Court's stance: by maintaining that a purely legalistic approach to constitutional interpretation is possible, the Court obscures those doctrinal choices that it is inevitably required to make, which have consequences that it does not,— or more importantly *cannot,*– acknowledge.

This last point warrants further scrutiny. Legalism may be a 'noble lie' insofar as it has allowed the High Court to successfully perform certain constitutionally allotted functions,[128] but it is also one that has contributed significantly to the calcification of a deeply formalist politico-legal culture that is hostile to judicial choices of the kind necessitated by those same functions. Whereas structural review has had the benefit of historical entrenchment alongside legalism as a culturally legitimated practice,[129] rights-based review has not. This has had the effect of undercutting the Court's capacity or inclination to move into more elevated and openly political forms of rights review.

The cultural contingency of political constraints on the High Court's review practices becomes readily apparent through a comparison of its rights decisions with its federalism ones. In the *Tasmanian Dam Case*, the Court resorted to extra-constitutional considerations of political expediency in construing the scope of the external affairs power, openly prioritising Australia's participation in international affairs over any countervailing need to preserve the autonomy of the states.[130]

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124 Andrew Lynch, 'The High Court — Legitimacy and Change: Review Essay: Haig Patapan, Judging Democracy — The New Politics of the High Court of Australia' (2001) 29 *Federal Law Review* 295, 298.

125 Gageler, above n 99, 181–90.

126 Galligan, *Politics of the High Court*, above n 8, 38–41.

127 Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18 *Federal Law Review* 27, 32–6. Galligan, for his part, argues that Goldsworthy has mischaracterised his argument, and Goldsworthy in turn argues that Galligan has ignored the thrust of his criticisms: Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40; Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50.

128 Galligan, *Politics of the High Court*, above n 8, 41.

129 See Part III of this article.

130 *Tasmanian Dam Case* (1983) 158 CLR 1, 129 (Mason J), 169–70 (Murphy J), 221 (Brennan J), 262 (Deane J). Chief Justice Gibbs, in dissent, proffered the alternative view, arguing that:

Although criticised at the time,[131] the decision was subsequently confirmed,[132] and has had a lasting impact on the federal balance. By contrast, the Court's recognition and initial consolidation of native title,[133] grounded in an adaptation of existing common law principles in response to contemporary notions of justice and international human rights standards,[134] was subject to a sustained and vitriolic political backlash.[135] A common refrain was that the Mason and Brennan Courts had engaged in unrestrained 'judicial activism',[136] and subsequent decisions have tended to narrow the scope of the doctrine.[137] The implied freedom of political communication cases have followed a similar trajectory. In *Nationwide News Pty Ltd v Wills*[138] and *Australian Capital Television v Commonwealth*,[139] the Mason Court articulated a free-standing principle of representative government, identified as being implicit in the provisions of the *Constitution* establishing the Commonwealth Parliament and allowing for constitutional amendment by referendum,[140] which in turn necessitated some degree of protection for political communication. As in the context of native title, the decisions were publicly criticised,[141] and the Court eventually retreated to a much more conservative interpretation of the implied freedom in *Lange v Australian Broadcasting Corporation*,[142] one purportedly derived from the 'text and structure' of the *Constitution* alone.

These cases suggest that it is precisely when the High Court moves beyond the language of strict legalism that it is likely to face the most pronounced political resistance to its decisions. Of course, denying doctrinal choices does not negate their

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> The division of powers between the Commonwealth and the States, which the Constitution effects, could be quite meaningless if the federal government could, by entering into treaties with foreign governments on matters of domestic concern, enlarge the legislative powers of the Parliament so that they embraced literally all fields of activity: at 100.

131 For an account of the political climate within which the decision was laid down, see Galligan, *Politics of the High Court*, above n 8, 240–8.

132 *Richardson v Forestry Commission* (1988) 164 CLR 261; *Victoria v Commonwealth* (1996) 187 CLR 416.

133 *Mabo v Queensland [No 2]* (1992) 175 CLR 1 ('*Mabo*'); *Wik Peoples v Queensland* (1996) 187 CLR 1.

134 See especially *Mabo* (1992) 175 CLR 1, 29, 38–42 (Brennan J).

135 See Pierce, above n 6, 261–7. For a highly lucid account of the native title cases in their political context and from the Court's perspective, see Patapan, *Judging Democracy*, above n 5, ch 5.

136 For contrasting extra-curial discussions by High Court judges of this often-disparaged but ill-defined phenomenon, see Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2001) 10 *Otago Law Review* 493; Justice Michael Kirby, '"Judicial Activism"? A Riposte to the Counter-Reformation' (2005) 11 *Otago Law Review* 1.

137 See, eg, *Western Australia v Ward* (2002) 213 CLR 1; *Wilson v Anderson* (2002) 213 CLR 401; *Members of the Yorta Yorta Aboriginal Community v Victoria* (2002) 214 CLR 422. See also Sean Brennan, 'Native Title in the High Court of Australia a Decade after *Mabo*' (2003) 14 *Public Law Review* 209.

138 (1992) 177 CLR 1.

139 (1992) 177 CLR 106.

140 *Constitution* ss 7, 24, 128.

141 See Patapan, *Judging Democracy*, above n 5, 51–61.

142 (1997) 189 CLR 520.

existence; they are merely obscured. As Stone has pointed out, for instance, a strictly textualist account of the implied freedom of political communication leaves gaps — most obviously in determining an appropriate standard of review — which by their very nature can only be filled in by reference to considerations extrinsic to the *Constitution*'s text and structure.[143] The greater the Court's commitment to the rhetoric of doctrinal constraint, the more likely it becomes that such choices will be justified by recourse to vaguely defined notions of 'community values'[144] (which, as Haig Patapan notes, provide little in the way of meaningful guidance[145]) or left unacknowledged altogether.

If adopting an overtly rights-protective posture exposes the Court to a heightened risk of political reprisal, it is hardly surprising that it might instead seek to vindicate rights indirectly. Its use of the principle of legality, according to which it will construe a statute consistently with 'fundamental' common law rights unless Parliament evinces an unambiguous intention to the contrary, is one example (albeit a maximally deferential one).[146] The Court has been less deferential by far in its recent revival and radical expansion of the 'institutional integrity' principle originally elaborated in *Kable v Director of Public Prosecutions (NSW)*,[147] culminating in its entrenchment of the

143 Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842.

144 See, eg, Chief Justice Murray Gleeson, *The Boyer Lectures 2000: The Rule of Law and the Constitution* (ABC Books, 2000) 98, 134.

145 Patapan, *Judging Democracy*, above n 5, 24–7.

146 See, eg, *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 518 (Mason CJ, Wilson and Dawson JJ), 523 (Brennan J); *Bropho v Western Australia* (1990) 171 CLR 1, 17–18 (Mason CJ, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Coco v The Queen* (1994) 179 CLR 427, 436 (Mason CJ, Brennan, Gaudron and McHugh JJ). Writing extra-curially, Chief Justice Robert French has recently suggested that the principle of legality 'can be regarded as "constitutional" in character even if the rights and freedoms which it protects are not': Chief Justice Robert French, 'Protecting Human Rights without a Bill of Rights' (Speech delivered at John Marshall Law School, Chicago, 26 January 2010) 30 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf>. In the 2008 McPherson Lectures, Chief Justice James Spigelman cast the interpretive presumptions coming within the scope of this principle as equivalent to a 'common law bill of rights': Chief Justice James Spigelman, 'The Common Law Bill of Rights' (Speech delivered at the McPherson Lectures, University of Queensland, Brisbane, 10 March 2008) <http://www.lawlink.nsw.gov.au/lawlink/supreme_court/ll_sc.nsf/vwFiles/spigelman100308.pdf/$file/spigelman100308.pdf>. For a detailed discussion of the principle of legality as an avenue for the protection of rights, see Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449.

147 (1996) 189 CLR 51 ('*Kable*'). *Kable* established that ch III places substantive limits on the powers and functions that states are legislatively competent to vest in state courts. These limitations were justified variously on the grounds that certain functions are incompatible with state courts' status as potential repositories of federal judicial power, or would otherwise undermine their institutional integrity or public confidence in the judicial system more generally: at 94, 98 (Toohey J), 103, 107–8 (Gaudron J), 116, 118, 121 (McHugh J), 133–4, 135 (Gummow J). The principle was rationalised in *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 as 'one which hinges upon maintenance of the

supervisory jurisdiction of state supreme courts in relation to jurisdictional error in *Kirk v Industrial Court of New South Wales*.[148] The significance of *Kirk* in affirming due process rights at the state level is comparable, at least in a formal sense, to that of *Plaintiff S157/2002 v Commonwealth*[149] at the federal level.[150] That a rights outcome such as this should arrive on the back of the Court's repulsion of an attempt to oust judicial authority over a structural question is telling; so too that, like *Wakim*, the decision turned on the operation of ch III. If *Wakim* signalled the Court's willingness to take a confrontational and anti-majoritarian role in that context, then *Kirk* goes a long way towards confirming it.

That the High Court could hand down a decision such as that in *Wakim* without compromising its institutional security would seem to indicate that it had reached the 'tipping point', contemplated by Shapiro and seen in the United States, beyond which it would be capable of moving into strong-form rights review. What that case and the others canvassed here show is that constraints on its ability to do so must be based in something other than the doctrinal or political-institutional characteristics of rights review itself. That 'something' is the perception, maintained at the level of politico-legal culture, that rights review is qualitatively different to or less legitimate than federalism review. Ironically then, it is the Court's own efforts to secure its institutional legitimacy, by tying it to the 'public rhetoric of technical legalism',[151] that have prevented it from leveraging that legitimacy into an expansion of its own review powers. The result seems to be a kind of vicious circle: in order to shore up its legalist credentials, the Court must more and more vehemently deny the choices that routinely confront it, and by doing so deepen the cultural distaste for its constitutionally mandated role.

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defining characteristics of a "court", or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court': at 76 (Gummow, Hayne and Crennan JJ). It has since been further developed and applied: see, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319; *Totani v South Australia* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181. For detailed discussions, see Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411, 433–41; Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227.

148 (2010) 239 CLR 531, 566–7 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) ('*Kirk*').

149 (2003) 211 CLR 476 ('*S157*').

150 Wendy Lacey, '*Kirk v Industrial Court of New South Wales*: Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641, 642. For an analogous discussion of the practical effect of *S157* on due process rights, see Caron Beaton-Wells, 'Judicial Review of Migration Decisions: Life after *S157*' (2005) 33 *Federal Law Review* 141. See also Nicholas Gouliaditis, 'Critique and Comment — Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870.

151 Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 184, 200.