NATIONHOOD POWER AND JUDICIAL REVIEW: A BRIDGE TOO FAR?

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Following the Williams v Commonwealth decision, the scope of the nationhood power has acquired a renewed importance as an area where the Commonwealth Executive can exercise its non-prerogative capacities without prior legislative authority. This article takes the position that subject to principled exceptions, the scope of nationhood power is a non-justiciable question to be resolved by the political process. The principled exceptions relate to when the exercise of nationhood power would contravene constitutional prohibitions or infringe fundamental common law rights. In these instances, courts determine the constitutionality of the exercise of nationhood power by the Commonwealth Executive. This article analyses this proposition through consideration of appropriate sources of Australian constitutional law including constitutional text; judicial authority; extrinsic materials; and comparisons with overseas jurisprudence; particularly the 'political questions' doctrine of the US Supreme Court. It concludes by providing a practical application of this hybrid non-justiciability framework.

Section 61 of the Commonwealth Constitution ('Constitution') vests Commonwealth executive power in the Queen which is exercisable by the Governor-General on Commonwealth Ministers' advice.[1] While this provision identifies executive power's parameters,[2] s 61 importantly does not define executive power.[3] This juxtaposition engenders an inherent textual ambiguity which inevitably gives rise to an intriguing and vexed question: what activities fall within the scope of Commonwealth executive power?

In response, one illuminating framework posits that executive power's scope consists of two components: breadth and depth. Breadth signifies the limits of executive power derived from the Constitution's federal structure. Depth refers to the Commonwealth Executive's ('Executive') common law powers; it signifies executive power's limits derived from the separation of

[1] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558. This article is not concerned with the reserve powers of the Governor-General.

[2] *Commonwealth v Colonial Combing, Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 437 (Isaacs J).

[3] *Davis v Commonwealth* (1988) 166 CLR 79, 92–3 (Mason CJ, Deane and Gaudron JJ).

powers underlying the Constitution. Assessing the constitutional validity of Executive acts under this framework involves two steps: *first*, is the Executive entering into subject matters within its competence ('breadth question')? *Second*, if so, does the Executive have a common law power to undertake the impugned activity ('depth question')?[4]

In considering the depth question, common law powers are further bifurcated into Crown prerogatives and non-prerogative capacities.[5] Crown prerogatives are those unique powers and rights which inhere in the Sovereign alone. Non-prerogative capacities refer to capacities the Executive shares with other juristic persons.

Before *Williams v Commonwealth* the 'common assumption' was that the Executive could validly exercise its common law powers in fields within the Commonwealth's constitutional areas of responsibility. These areas of responsibility include subject matters of Commonwealth legislative competence and the inherent authority derived from the Executive's character and status as Australia's national government ('nationhood power').[6]

Williams held that the exercise of the Executive's non-prerogative capacities to contract or spend in fields of Commonwealth legislative competence requires valid Commonwealth legislative authority.[7] No prior statutory authority is necessary however where the capacities to contract or spend are exercised pursuant to nationhood power.[8] This apparent antithesis raises a critical and fundamental question: under what circumstances can the

[4] *Williams v Commonwealth* (2012) 288 ALR 410, 510 [368] (Heydon J); George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 29–30.

[5] *Davis v Commonwealth* (1988) 166 CLR 79, 108–9 (Brennan J); *Williams v Commonwealth* (2012) 288 ALR 410, 539 [488] (Crennan J). See generally Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 349. But see Margit Cohn, 'Judicial Review of Non–Statutory Executive Powers after Bancoult: A Unified Anxious Model' [2009] *Public Law* 260, 264 (criticising this distinction).

[6] *Williams v Commonwealth* (2012) 288 ALR 410, 484–5 [254]–[256] (Hayne J). See generally *Williams v Commonwealth* (2012) 288 ALR 410, 503–15 [346]–[385] (Heydon J).

[7] *Williams v Commonwealth* (2012) 288 ALR 410, 442 [83] (French CJ), 453–4 [134]–[137] (Gummow and Bell JJ), 550–1 [544] (Crennan J). Crown prerogatives can be exercised without prior statutory authority.

[8] See *Williams v Commonwealth* (2012) 288 ALR 410, 417 [22] (French CJ), 455–6 [143]–[146] (Gummow and Bell JJ), 480–1 [240] (Hayne J), 520 [402] (Heydon J), 542 [503] (Crennan J), 559–60 [583] (Kiefel J) (recognising that nationhood power is part of Commonwealth executive power where it extends further than protection of the body politic from sedition and subversion). This is consistent with Mason J's decision in *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397. It appears nationhood power falls within s 61's 'maintenance of the Constitution' limb — *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 406 (Jacobs J); *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

Executive exercise its non-prerogative capacities pursuant to nationhood power?

In response, this article articulates, critically analyses and defends this general proposition: the circumstances in which the Executive can exercise its non-prerogative capacities pursuant to nationhood power ('exercises of nationhood power') is a non-justiciable question to be resolved by the political process.

General propositions invariably entail exceptions. In this context, there are two important exceptions: courts can declare exercises of nationhood power unconstitutional where they contravene constitutional prohibitions or disproportionately infringe fundamental common law rights.

Part I draws on originalist, textual and structural arguments to articulate and justify an unusual conclusion: the conundrum of nationhood power's scope — subject to constitutional prohibitions — involves inherently political issues not amenable to judicial resolution. Indeed, this conundrum is appropriately and better resolved through the political process.

Part II addresses the obvious response that courts would abdicate their fundamental duty of determining the law if nationhood power's scope — subject to constitutional prohibitions — was non-justiciable. In particular, it critiques the proposition that judicial review is axiomatic in Australian constitutional law. Critically, it will be shown that the Constitution is, from textualist, structuralist and originalist perspectives, premised on the political process determining whether Executive actions are unconstitutional. Judicial review and the political process therefore operate concurrently as accountability mechanisms for unconstitutional Executive acts. Where the constitutional validity of exercises of nationhood power are in issue, the political process is the appropriate accountability mechanism because of its' superior normative constitutional and democratic legitimacy.

Part III articulates and defends an important qualification to that proposition: courts take precedence where fundamental common law rights are infringed. In essence, judges determine whether exercises of nationhood power disproportionately infringe fundamental common law rights. Disproportionate exercises of nationhood power are constitutionally prohibited as an aspect of the rule of law, a fundamental assumption underlying the Constitution.[9]

[9]Constitutional assumptions stand outside of the instrument — *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ). Consequently, constitutional assumptions

Part IV illustrates practical applications of this hybrid-justiciability framework and critically analyses its implications for Australia's federal system. This article concludes with an exposition and evaluation of this framework.

PART I: NATIONHOOD A NON-JUSTICIABLE EXECUTIVE POWER

Advancing and defending a novel proposition — that subject to constitutional prohibitions on Commonwealth powers, nationhood power's scope is a non-justiciable political question — is this Part's objective.

A *Purpose Of Nationhood Power*

When the Constitution commenced operation on 1 Jan 1901, its overriding purpose was to establish a federal body politic. Resolutions expressed at the 1890 Australasian Federation Conference stated the colonies' best interests would be 'promoted by an early union under the Crown'.[10]The 1897 preamble to preliminary resolutions in the National Australasian Convention declared Federation's purpose 'to enlarge the powers of self-government of the people of Australia'.[11] Importantly, in referendums held in each colony, electors approved the Constitution with the preamble expressly recording their agreement 'to unite in one indissoluble Federal Commonwealth'. Accordingly, Australian nationalism was a 'key motivating spirit behind both the popular support for federation and the aspirations of many of the framers'.[12] From this perspective, Federation was a mechanism for 'moving to a higher and more beneficial plane the powers of self-government of those [Australian] people'.[13] As the formation of the national body politic required — if not legally then at least politically — the colonies' consent,[14] the Constitution's federal aspects were the essential pre-requisites to establishing a national body politic with powers of self-

inform our understandings of the Constitution without necessarily being derived from its text and structure.

[10]Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 145.

[11]*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 228 (McHugh J).

[12]Helen Irving, 'The Constitution of a Federation Commonwealth: the Making and Meaning of the Australian Constitution: Nicholas Aroney' [2011] *Public Law* 462, 465.

[13]Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 146.

[14]Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 42.

government.[15]

From an originalist perspective, the Constitution conferred on the Commonwealth powers that were sufficient and appropriate to its status as the national polity of a united people.[16] A pre-eminent example is Edmund Barton's statement: 'we all admit that we are constituting a free people; we all admit that we cannot withhold from that people every attribute of power which is necessary to the consummation of the purpose for which they are constituted'.[17] The division of powers, as in any federal structure, is essentially 'pragmatic … to be determined by … practicalities of the matter'.[18] Indeed, the Constitution's allocation of powers between the Commonwealth and States reflected 1901 practicalities. Powers necessary for, and appropriate to, the Commonwealth can change because of Australia's continuous national growth and progression. This phenomenon inevitably requires reassessments of where power should reside within the Constitution's federal structure. These reassessments are inherently political, not judicial, questions[19] as the framers and voters knew, and as the text and operation of ss 51(xxxvii) and 128 demonstrate. These reassessments also underlie nationhood power's scope as illustrated in *Pape v Federal Commissioner of Taxation*:

> Section 61 is an important element of a written constitution for the government of an independent nation. While history and the common law inform its content, *it is not a locked display in a constitutional museum ... It has to be capable of serving the proper purposes of the national government.* [20]

Nationhood power's scope, therefore, raises issues of an inherently political nature. Consequently, a foundational question is engendered: is nationhood power's scope justiciable? A preponderance of empirical, normative and legal

[15]But see Gabrielle Appleby, Nicholas Aroney and Thomas John, 'Australian Federalism: Past, Present and Future Sense' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 1, 1–2.

[16]See *Lamshed v Lake* (1958) 99 CLR 132, 142 (Dixon CJ); C J G Sampford, 'Responsible Government and the Logic of Federalism' [1990] *Public Law* 90, 94.

[17]*Official Report of the National Australasian Convention Debates,* Sydney, 8 September 1897, 201.

[18]Antonin Scalia, 'The Two Faces of Federalism' (1982) 6 *Harvard Law Journal and Public Policy* 19, 20 (discussing the US Constitution).

[19]See also Jesse H Choper, 'The Scope of National Power vis–à–vis the States: The Dispensability of Judicial Review' (1977) 86 *Yale Law Journal* 1552, 1556.

[20](2009) 238 CLR 1, 60 [127] (French CJ) (emphasis added). For criticism of nationhood power, see George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 40–4.

considerations entail a negative response.

B *Justiciability*

Justiciability, as a legal concept, has eluded definition. Even so, its underlying rationale is clear: to confine judicial power to resolve issues not properly assignable to the political process.[21] The political process is not susceptible to precise or concrete definition. This article takes the position that the political process incorporates: the electoral process; mechanisms that hold the political branches of government accountable for their actions; and mechanisms which allows the electorate to determine where power ought to reside within the federal structure, most notably referendums under s 128 of the Constitution.

Non-justiciable issues are controversies concerning operations of political branches that cannot be resolved through the exercise of judicial power.[22] The underlying, though not exclusive,[23] concern is the judiciary's capacity to deal with the subject matter[24] — is the issue amenable to judicial resolution?[25] Although justiciability has two strands,[26] primary and secondary, this article is concerned with primary justiciability.

1 *Primary justiciability*

(a) *Political Questions Doctrine*

Primary justiciability arises where subject matters are not appropriate or fit for judicial adjudication. The High Court has not had occasion to discuss comprehensively this concept of justiciability. Nevertheless, indicia of primary justiciability can be found in the US Supreme Court's 'political questions' doctrine[27] outlined in *Baker v Carr*.[28]

[21] Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 784, 788.
[22] *Brodie v Singleton Shire Council* (2001) 206 CLR 512, 555 [92] (Gaudron, McHugh and Gummow JJ).
[23] See *Likiardopolous v the Queen* (2012) 291 ALR 1, 11 [37] (Gummow, Hayne, Crennan, Kiefel and Bell JJ).
[24] Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 788.
[25] *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 692 (Kirby J); *Stewart v Ronalds* (2009) 76 NSWLR 99, 112 [42] (Allsop P). See *Likiardopolous v the Queen* (2012) 291 ALR 1, 3 [2] (French CJ).
[26] Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 788.
[27] Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 788–9. See also Geoffrey Lindell, 'Justiciability' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001)

This doctrine's relevance in Australia is uncertain.[29] Even so, at least two reasons support its Australian application. *First*, judicial review is considered axiomatic in Australia.[30] One reason for this is *Marbury v Madison*.[31] *Marbury* explicitly recognised that certain subject matters could be beyond judicial competence because of the political nature of those issues.[32] Indeed, this important contribution of Marshall CJ is pronounced in the context of increasing acceptance among US legal historians that judicial review predated *Marbury*.[33] If *Marbury* is axiomatic in Australia, this political questions qualification should also be axiomatic.

Secondly, the *Baker* doctrine is a function of the separation of powers.[34] The Constitution effects, like the US Constitution, a strict separation of powers between courts and political branches.[35] The underlying premise of this US doctrine has equal application in Australia.

(b) *Political Questions are Outside the Constitutional Concept of 'Matter'*

The scope of executive power could be a 'matter' within federal jurisdiction because executive power is sourced in the Constitution.[36] Nevertheless, a matter subsumes a 'justiciable controversy'.[37] Where there is no justiciable controversy, there is no 'matter.'

391, 391. For criticisms of this doctrine, see generally Louis Henkin, 'Is There a Political Question Doctrine?' (1976) 85 *Yale Law Journal* 597.

[28] *Baker v Carr* 369 US 186 (1962) ('*Baker*'). In *Baker,* qualified voters of certain counties in Tennessee brought a civil action alleging that an apportionment statute violated the Fourteenth Amendment. The respondent argued that the case did not involve a justiciable issue. The court held that this was a justiciable issue. In the process, the court articulated the political questions doctrine; a doctrine used to determine whether issues raised in cases are justiciable controversies. The term 'political questions doctrine' will be used interchangeably with the '*Baker* doctrine'.

[29] *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 692 (Kirby J); *Re Ditfort; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 370–1 (Gummow J); *Gamogab v Akiba* (2007) 159 FCR 578, 587 [33] (Kiefel J). But see *Victoria v Commonwealth* (1975) 134 CLR 81, 135 (McTiernan J) (applying the political questions doctrine in dissent).

[30] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262–3 (Fullagar J).

[31] 5 US (1 Cranch) 137 (1803) ('*Marbury*'). See generally Robert Lowry Clinton, *Marbury v. Madison and Judicial Review* (University Press of Kansas, 1989).

[32] Rachel Barkow, 'More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237, 241, 250.

[33] Aziz Huq, 'When was Judicial Self–Restraint?' (2012) 100 *California Law Review* 579, 583.

[34] *Baker v Carr* 369 US 186, 217 (1962). But see Geoffrey Lindell, 'Judicial Review of International Affairs' in Brian R Opeskin and Donald B Rothwell (eds), *International Law and Australian Federalism* (Melbourne University Press, 1997) 160, 164–5.

[35] *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

[36] *Ruddock v Vadarlis [No 2]* (2001) 115 FCR 229, 242 [30]–[31] (Black CJ and French J).

[37] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 [139] (Gummow and Hayne JJ).

Critically, courts determine the anterior question of whether an issue is non-justiciable.[38] In this context, courts would conclude issues are non-justiciable controversies where the *Baker* doctrine is applicable. Consequently, there would be no federal jurisdiction 'matter.'

2 *Political Questions Doctrine: A Functional Approach*

The *Baker* doctrine has two strands: textual and prudential.[39] This bifurcation, however, tends to obscure that this doctrine is concerned with situations where courts cannot enforce constitutional limitations on the powers and functions of political branches.[40] Where this doctrine applies, political branches are constitutionally required to make judgments about constitutional limitations on their powers and functions.[41] The political process assesses the correctness of those judgments.[42]

A critical question is therefore engendered: when are constitutional limitations on the powers and functions of political branches subject only to enforcement by the political process? The answer involves substantive criteria: when courts are not competent to decide or when leaving an issue to the political branches promises a reliable, perhaps superior, resolution.[43] These criteria illustrate a functional approach to the political questions doctrine. This approach may be characterised as follows: which process, judicial or political, is best suited to resolve a particular issue?[44] Under this functional approach, courts conclude that where a *Baker* indicium applies, the political process is best suited to resolve a particular issue.

Since *Baker*, the US Supreme Court has shown little enthusiasm for the

[38] *South Australia v Victoria* (1911) 12 CLR 667, 721 (Isaacs J). See generally Amy Preston-Samson, 'Navigating Muddy Waters: Does the High Court have a Role in Adjudicating Interstate River Disputes' (2012) 29 *Environmental Planning and Law Journal* 373, 376 nn 20.

[39] Rachel Barkow, 'More Supreme than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237, 243.

[40] Jonathan Siegel, 'A Theory of Justiciability' (2007) 86 *Texas Law Review* 73, 113.

[41] Jesse H Choper, 'Introduction' in Nada Mourtada–Sabbah and Bruce E Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, 2007) 1, 10.

[42] See Rachel Barkow, 'More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237, 327–9.

[43] Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1457, 1463. See also Fritz W Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 *Yale Law Journal* 517, 566.

[44] Sir Anthony Mason, 'A Bill of Rights in Australia?' (1989) 5 *Australian Bar Review* 79, 82–3 (discussing political questions generally).

doctrine's prudential aspects[45] — *Nixon v United States* made no reference to prudential strands.[46] The plurality in *Vieth v Jubelirer* reaffirmed the doctrine's textual and prudential aspects but stated the doctrine's indicia were 'probably listed in descending order of both importance and certainty'. No doubt exists concerning textual aspects' validity[47]— demonstrable textual commitment of an issue to a co-ordinate political branch[48] or a lack of judicially discoverable and manageable standards ('lack of judicial standards'). Since the former is inapplicable in the context of implied powers, this article focuses on a lack of judicial standards indicium.[49]

3 *Lack of Judicial Standards*

(a) *Guiding Principle*

The *Baker* doctrine assumes that a standard can be devised.[50] Judicial standards invariably have a 'penumbra of uncertainty ... the deciding authority will have room to manoeuvre – an area of choice and of discretion; an area where some aspect of policy will inevitably intrude'.[51] Devising a principled basis for determining a lack of judicial standards is difficult because courts 'frequently apply vague and indeterminate criteria which involve imprecise conclusions, moral judgments, evaluative assessments and discretionary considerations'.[52]

Even so, there is a guiding principle: whether a judicial standard is desirable and sufficiently principled to guide courts and constrain judges from implementing their ideological beliefs in ad hoc, unreasoned ways.[53] For

[45] See generally Rachel Barkow, 'More Supreme Than Court? The Fall of the Political Question Doctrine and the Rise of Judicial Supremacy' (2002) 102 *Columbia Law Review* 237, 270–2; Jesse H Choper, 'Introduction' in Nada Mourtada–Sabbah and Bruce E Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, 2007) 1, 1–2.

[46] 506 US 224, 228–9 (1993) ('*Nixon*').

[47] 541 US 267, 277-8 (2004) (Scalia J with Rehnquist CJ, O' Connor and Thomas JJ concurring).

[48] For provisions in the Commonwelth Constitution which could be textually committed to political branches, see Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 180, 184.

[49] See also Sir Anthony Mason, 'The High Court as Gatekeeper' (2000) 24 *Melbourne University Law Review* 784, 796 (indicating that primary justiciability should be confined to textual aspects of the *Baker* doctrine).

[50] Fritz W Scharpf, 'Judicial Review and the Political Question: A Functional Analysis' (1966) 75 *Yale Law Journal* 517, 566.

[51] Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 252 quoted in *Thomas v Mowbray* (2007) 233 CLR 307, 351 [91] (Gummow and Crennan JJ).

[52] *A-G (Cth) v Breckler* (1999) 197 CLR 83, 126 [83] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[53] Jesse H Choper, 'The Political Question Doctrine: Suggested Criteria' (2005) 54 *Duke Law Journal* 1457, 1470.

example, to determine whether an industrial agreement or practice is contrary to 'public interest' raises 'indefinite considerations of policy' that 'prevents their providing objectively determinable criteria'.[54] Applying this standard involves adjudicative bodies deciding on 'idiosyncratic conceptions and modes of thought'.[55]

Policy considerations may intrude in the common law's development and statutory interpretation,[56] and constitutional interpretation.[57] Concern arises however when policy considerations are of a kind that they are more appropriately addressed by the political process because of judicial process constraints.[58] That this functional consideration underlies a conclusion of a lack of judicial standards is exemplified in *Gilligan v Morgan*.[59]

The respondents in *Gilligan* requested injunctive relief that required judicial evaluation of the appropriateness of the National Guard's 'training, weaponry and orders'. Judicial standards were sought for 'training, kind of weapons … scope and kind of orders to control the actions of the National Guard'. The US Supreme Court held the constitutional provision vesting in Congress the power to organise, arm, and discipline the National Guard was non-justiciable. Critically, courts lacked competence to deal with the 'complex subtle, and professional decisions as to the composition, training, equipping, and control of a military force'.[60] Judicial process constraints — namely, lack of judicial expertise — explain the lack of judicial standards to assess the appropriateness of the training of reserve military forces. Additionally, the political considerations involved in political gerrymandering litigation influenced the plurality's decision in *Vieth* that there was a lack of judicial

[54] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 400–1 (Windeyer J).

[55] *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 376–7 (Kitto J) (holding that the tribunal was not exercising Commonwealth judicial power when applying this standard). But see *Thomas v Mowbray* (2007) 233 CLR 307, 350–1 [88]–[91] (Gummow and Crennan JJ) (stating the vantage point from which the issues were presented is significant).

[56] *Thomas v Mowbray* (2007) 233 CLR 307, 348 [80]–[81] (Gummow and Crennan JJ).

[57] Sir Anthony Mason, 'A Bill of Rights for Australia?' (1989) 5 *Australian Bar Review* 79, 81.

[58] *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 551 [5] (Gleeson CJ); *Momcilovic v the Queen* (2011) 280 ALR 221, 338 [404] (Heydon J). See also *R v Davidson* (1954) 90 CLR 353, 381–2 (Kitto J); *Thomas v Mowbray* (2007) 233 CLR 307, 464 [463] (Hayne J). See *Likiardopolous v the Queen* [2012] 291 ALR 1, 3 [2] (French CJ).

[59] 413 US 1 (1973) ('*Gilligan*').

[60] 413 US 1, 5-6, 10 (1973). See also *Vieth v Jubelirer* 541 US 267, 303 (2004) (Scalia J, Rehnquist CJ and O'Connor and Thomas JJ concurring).

standards.[61]

(b) *Lack of Judicial Standards: Australian Decisions*

That a lack of judicial standards means an issue is insusceptible to judicial determination is also evident in Australian judicial decisions, albeit in statutory contexts.[62]

Gerhardy v Brown[63] involved a s 109 inconsistency challenge between the *Pitjantjatjara Land Rights Act 1981* (SA) ('State Act') and the *Racial Discrimination Act 1975* (Cth) ('RDA Act'). The State Act vested title to a large tract of land in a body corporate comprising all Pitjantjajaras ('body corporate') and some other groups of Aboriginal people. The Act gave the Pitjantjajaras unrestricted rights of access to the land. The Act prohibited any non-Pitjantjajara person from entering into the land without permission of the body corporate. The issue was whether the State Act discriminated against non-Pitjantjajara people contrary to the RDA Act thereby giving rise to a s 109 inconsistency.

The court held there was no s 109 inconsistency because of s 8 of the RDA Act. Section 8 provides the RDA Act does not apply if a legislative or executive measure constitutes a 'special measure'. The court held the State Act, which conferred a benefit to one racial group over others to address prior disadvantage suffered by that group, constituted a special measure.

Brennan J provided the indicia for what constitutes a special measure. For Brennan J, whether a racial group needed protections to ensure their advancement towards racial equality involved a political assessment. He referred to the political questions doctrine as a possible jurisprudential foundation for his conclusion that this political assessment was insusceptible to judicial review for a lack of 'legal criteria'. His judgment suggests that a lack of judicial standards indicates issues are inappropriate for judicial determination.[64]

[61] See 541 US 267, 299 (2004) (Scalia J, Rehnquist CJ, O'Connor and Thomas JJ). Five justices in *Vieth* maintained there was still a judicial standard, although there was no concurrence as to that standard. Moreover, this is not the position in Australia — *A-G (Cth) ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 61 (Mason J); *McGinty v Western Australia* (1996) 186 CLR 140, 286 (Gummow J).

[62] See generally Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (Law Book Co, 1992) 180, 201–15.

[63] (1985) 159 CLR 70

[64] (1985) 159 CLR 70, 133, 137–9 (Brennan J). See also *Gamogab v Akiba* (2007) 159 FCR 578, 586-7 [31] (Kiefel J) (suggesting issues arising out of international relations may be non-justiciable because

However, his Honour did state that courts have a role in determining whether the political assessment could be 'reasonably made'. This is inconsistent with the 'political questions' doctrine. This observation must be however be appreciated from the vantage point that judicial review of legislative and executive acts is considered axiomatic in Australian constitutional jurisprudence.

Moreover, the role of courts in this context is limited to determining whether 'the political judgment is one that a reasonable legislature could not have made'.[65] This engenders the following: what 'legal criteria' can be used to make this assessment? The legal criterion is not readily apparent. In this context of whether an act constitutes a 'special measure', it is not enough that other legislative and executive bodies might have pursued different courses of action to a common problem. It is an essential feature of a federal structure is that legislative and executive bodies within the federal structure may adopt different measures to address a particular issue. Inevitably, courts would have to make evaluative judgments about what legislative and executive bodies can and can not do. This brings into play concerns about judicial competence arising from constraints of the judicial process. Courts are in no superior position to political branches to determine whether a legislative or executive act is needed to ensure a racial group's advancement to equality. This article argues that these issues of judicial competence means that there is a 'lack of legal criteria' to determine whether legislative or executive acts constitutes a special measure. Accordingly, this issue involves a political assessment to be left to the political process.

Judicial decisions support the proposition that a lack of judicial standards arises from inherent constraints of the judicial process. *Thomas v Mowbray*[66]held valid Div 104 of *Criminal Code 1995* (Cth) that empowered courts to issue control orders when satisfied of two conditions: the order would substantially assist in preventing a terrorist act; and the order's stipulations were reasonably necessary for protecting the public from a terrorist act.

The majority held that it was not antithetical to Ch III that judges determine whether a particular measure was reasonably necessary for

there is no judicial standard for determination of those issues without referring to the political questions doctrine as a jurisprudential foundation).

[65]*Aurukun Shire Council v CEO Office of Liquor Gaming and Racing in the Department of Treasury* (2012) 1 Qd R 1, 91 [211] (Keane JA).

[66](2007) 233 CLR 307.

protecting the public from a terrorist act. Hayne J dissented (as well as Kirby J) holding that 'for the purpose of protecting the public from a terrorist act' was an indeterminate criterion for the exercise of judicial power.[67]

In essence, courts discharging this statutory function were hampered by judicial process constraints.[68] *First*, political branches had superior expertise in matters concerning public protection from security threats. Courts were ill-equipped to determine what steps were needed for public protection in the context of national security issues. From this vantage point, there is a qualitative difference between the role of courts under the impugned legislation and circumstances — referred to by majority justices — where courts have previously determined what is needed for the protection of the public.[69] *Secondly*, courts cannot readily access information available to the Executive to determine what is needed for public protection. The desirability of keeping information secret from courts is not readily evident in other situations where courts are required to make orders to protect members of the public. *Thirdly*, the evaluative judgments undertaken by intelligence services were not of a kind that courts ordinarily performed. To argue, as the majority justices did, that courts acting judicially would develop guiding principles on a case–by–case basis[70] does not refute concerns that under this legislation judges would make judgments according to idiosyncratic notions of justice.[71]

Consequently, certain controversies are not readily amenable to judicial resolution because courts are hampered by constraints of the judicial process; constraints which do not affect the political branches. This underlying functional consideration applies equally in statutory and constitutional contexts.

4 *Mason J's AAP Test: No Judicial Standard*

Importantly, from judicial review perspectives, Mason J devised a standard for ascertaining nationhood power's scope: power to 'engage in enterprises and

[67] *Thomas v Mowbray* (2007) 233 CLR 307, 468 [475].
[68] *Thomas v Mowbray* (2007) 233 CLR 307, 476-9, [508]-[510], [516] (Hayne J).
[69] See generally *Thomas v Mowbray* (2007) 233 CLR 307, 334 [28] (Gleeson CJ). See also *Thomas v Mowbray* (2007) 233 CLR 307, 355 [109]-[110] (Gummow and Crennan JJ), 507 [595] (Callinan J), 526 [651] (Heydon J agreeing).
[70] *Thomas v Mowbray* (2007) 233 CLR 307, 351 [92] (Gummow and Crennan JJ), 526 [651] (Heydon J).
[71] See also *Thomas v Mowbray* (2007) 233 CLR 307, 418–9 [322] (Kirby J). See also the discussion in *Vieth v Jubelirer* 541 US 267, 278–82 (Scalia J, Rehnquist CJ and O'Connor and Thomas JJ concurring) (concerning courts inability for 18 years to discern a judicial standard for political gerrymandering cases).

activities peculiarly adapted to a government of a nation and which cannot otherwise be carried on for the [nation's] benefit'.[72] The inherent vagueness of this standard is illustrated by considering its parameters: (i) it is insufficient that the Executive considers a subject matter to be of national interest and concern;[73] (ii) it is insufficient that programs can be conveniently formulated and administered by the national government; and (iii) nationhood power cannot operate to radically alter the Commonwealth's areas of constitutional responsibility.[74]

The first and second parameters raise several questions. *First*, how can courts distinguish between programs concerning a subject matter of national concern from programs consistent with purposes of the national government? *Secondly*, how can courts distinguish between enterprises conveniently formulated and administered by the national government from enterprises that cannot otherwise be carried out for the nation's benefit? Mason J's standard provides no clear guiding principle to answer these questions.

Indeed, the lack of a clear guiding principle to these questions means opinions will differ about whether an activity meets this standard.[75] Critically, opinions will differ because they are based on individual judges' policy, political and personal preferences.[76] This conclusion can be empirically demonstrated.

Judicial authority exists for nationhood power encompassing exploration;[77] establishment of CSIRO to undertake scientific research;[78] expenditure on inquiries, investigation and advocacy concerning public health matters;[79] matters so complex and scale of action so large that national co-ordination is required;[80] agreements between Commonwealth and States on matters of joint

[72] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397. That standard has subsequently been approved by the High Court. See, for example, *R v Hughes* (2000) 202 CLR 535, 554–555 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[73] *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 88 [228] (Gummow, Crennan and Bell JJ).

[74] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 398 (Mason J). The third parameter is discussed in section 6.

[75] See *Williams v Commonwealth* (2012) 288 ALR 410, 468 [196] (Hayne J).

[76] See also George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 28.

[77] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 362 (Barwick CJ), 413 (Jacobs J).

[78] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J), 413 (Jacobs J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 50 [95] (French CJ).

[79] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 397 (Mason J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 50 [95] (French CJ). See also *A-G (Vict.) v Commonwealth* (1945) 71 CLR 237, 257 (Latham CJ); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 419 (Murphy J).

[80] *Commonwealth v Tasmania* (1983) 158 CLR 1, 109 (Gibbs CJ) (assuming this to be the test).

interest;[81] Commonwealth funding for truly national endeavours in science, literature, arts and sporting endeavours;[82] Bicentennial commemoration;[83] national emergencies arising from war, natural disasters or a large-scale economic crisis;[84] and short-term fiscal stimulus payments to address a global financial crisis affecting the nation.[85] However, nationhood power does not encompass regulation of the national economy;[86] establishment of regional councils pursuant to a national social welfare scheme;[87] protection or conservation of Australia's cultural and natural heritage;[88] or funding to support chaplaincy services in State schools under agreements between the Executive and chaplaincy service providers.[89]

These examples raise numerous questions. Why is scientific research supported by nationhood power when States can and do fund similar research? Why is there a distinction between funding intellectual endeavours and funding chaplaincy services to improve the health of persons pursuing intellectual endeavours? How do courts determine whether a particular enterprise is of such a scale and complexity that national co-ordination and planning is required so as to substitute their judgment for that of political branches? Why are national initiatives in literature, arts, sporting endeavours supported by nationhood power whereas a national social welfare scheme is not? How do courts determine if an emergency is national rather than local or intra-State? Moreover, what institutional competence do courts have to substitute their judgment for that of political branches as to what constitutes a national

[81] *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J); *R v Hughes* (2000) 202 CLR 535, 554–5 [38] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

[82] *Commonwealth v Tasmania* (1983) 158 CLR 1, 253 (Deane J); *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J). See also *A-G (Vict.) v Commonwealth* (1945) 71 CLR 237, 254 (Latham CJ); *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 419 (Murphy J).

[83] *Davis v Commonwealth* (1988) 166 CLR 79.

[84] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 89 [233] (Gummow, Crennan and Bell JJ). *Contra Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 122–3 [348]–[354] (Hayne and Kiefel JJ), 193 [551]–[552] (Heydon J).

[85] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63–64 [133] (French CJ).

[86] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 362 (Barwick CJ); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63 [133] (French CJ), 192 [547], [549] (Heydon J).

[87] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 363 (Barwick CJ), 401 (Mason J). *Contra Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 413 (Jacobs J).

[88] *Commonwealth v Tasmania* (1983) 158 CLR 1, 323 (Dawson J). *Contra Commonwealth v Tasmania* (1983) 158 CLR 1, 253 (Deane J).

[89] *Williams v Commonwealth* (2012) 288 ALR 410, 442 [83] (French CJ), 455–7 [143]–[149] (Gummow and Bell JJ), 542 [503]–[504] (Crennan J), 560–2 [586]–[594] (Kiefel J).

emergency?[90] Why are intergovernmental agreements in matters of joint interest supported by nationhood power whereas agreements between the Commonwealth Executive and third parties with State acquiescence[91] are not? What is the substantive and principled distinction between truly national endeavours and matters of national concern or interest? Why can the Commonwealth take short-term preventive measures to avoid a deep national recession but cannot implement programs to facilitate national growth and prosperity? Why is Australia's development as an independent, sovereign nation relevant whereas Australia's national development as an integrated economic market in a globalised world irrelevant?

These questions, and the lack of clear non-subjective answers, demonstrate Mason J's standard for nationhood power masks overtly 'political questions unsuited to judicial determination.'[92] This standard exemplifies a formula carrying 'a distancing effect enabling judges to present [their decisions] as objective rulings'.[93]

The current test for determining the scope of nationhood power does not involve a judicially discoverable and manageable standard. Further, in any event, the nature of that power is such that no such standard can be developed to determine nationhood power's scope.

5 *Policy Considerations Render Nationhood Power's Scope Non-Justiciable*

(a) *Underlying Principle of Nationhood Power*

Nationhood power is a judicial implication which confers power on the national polity because of the nation's growth and progression. The nation's growth and progression has two aspects.

First is the Commonwealth's progression from colonial dominion status within the British Empire to an independent, sovereign nation.[94] Pursuant to

[90] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 122–3 [352]–[353] (Hayne and Kiefel JJ), 193 [552] (Heydon J).
[91] See generally *Williams v Commonwealth* (2012) 288 ALR 410, 495–6 [308] (Heydon J).
[92] George Winterton, 'The Relationship between Commonwealth Legislative and Executive Power' (2004) 25 *Adelaide Law Review* 21, 28. See also Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 417.
[93] Margit Cohn, 'Form, Formula and Constitutional Ethos: The Political Question/Justiciability Doctrine in Three Common Law Systems' (2011) 59 *American Journal of Comparative Law* 675, 676.
[94] *New South Wales v Commonwealth* (1975) 135 CLR 337, 373 (Barwick CJ). See generally Leslie Zines, 'The Growth of Australian Nationhood and its Effect on the Powers of the Commonwealth' in Leslie Zines (ed), *Commentaries on the Australian Constitution* (Butterworths, 1977) 1.

this evolution, the national polity acquired: inherent power of self-protection;[95] competency to celebrate the Bicentenary;[96] and arguably power, previously exercisable only by Imperial Parliament, concerning matters pertaining to the Sovereign — for example, Royal Succession.[97]

Second, and critically, is the change in relative capacities of national and State polities.[98] For instance, the Executive could respond to an uncertain large-scale financial crisis under nationhood power because of its superior fiscal capacities and administrative resources. [99] Accordingly, what underlies nationhood power's scope is empowerment of the national polity to undertake activities contemporary society 'with its various interrelated needs, requires … to meet those needs'[100] despite the express 1901 distribution of powers.

(b) *Nationhood Power Only Extends Executive Power's Breadth*

Ruddock v Vadarlis held the Executive could prevent entry of non-citizens because of its constitutional status as the Executive of a national polity of a sovereign nation. Interestingly, this executive power fell within subject matters of Commonwealth legislative competence.[101] *Ruddock* is reconcilable with *Williams* only if the Executive can exercise, without statutory authority, its non-prerogative capacities in subject matters of legislative competence that are central to the Commonwealth's national polity status. It is unclear why the nation's growth and progression would transmogrify certain subject matters of Commonwealth legislative competence to this privileged status. Indeed, this article rejects the proposition that the Commonwealth's character and status

[95]See *Burns v Ransley* (1949) 79 CLR 101, 110 (Latham CJ). However, the power of self–protection is now recognised as a prerogative following *Burmah Oil Co (Burma Trading) v Lord Advocate* [1965] AC 75. See generally Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 333.

[96]See *Davis v Commonwealth* (1988) 166 CLR 79, 92–5 (Mason CJ, Deane and Gaudron JJ), 104 (Wilson and Dawson JJ), 109–115 (Brennan J).

[97]Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 435. But see Anne Twomey, 'Changing the Rules of Succession to the Throne' [2011] *Public Law* 378.

[98]See also Gabrielle Appleby, Nicholas Aroney and Thomas John, 'Australian Federalism: Past, Present and Future Sense' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 1, 7.

[99]*Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 63–4 [133] (French CJ), 91–2 [241]–[242] (Gummow, Crennan and Bell JJ); *Williams v Commonwealth* (2012) 288 ALR 410, 456 [146] (Gummow and Bell JJ). No judge in *Pape* held the fiscal stimulus package *in its entirety* could be supported by a Commonwealth legislative head of power.

[100]*Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 412 (Jacobs J). See also *Davis v Commonwealth* (1988) 166 CLR 79, 110 (Brennan J).

[101]See generally (2001) 110 FCR 491, 542 [192]-[193] (French J), 514 [95] (Beaumont J agreeing).

has a constitutional function other than extending executive power's breadth beyond spheres of Commonwealth legislative competence.[102]

(c) *Interaction Between Nationhood Power and S 96*

The High Court has interpreted s 96 of the Constitution to enable Commonwealth Parliament, subject to limited exceptions, to impose any condition on financial grants to States.[103] The existence of s 96 confirms there is a 'very large area of activity which lies outside … executive power ... which may become the subject of conditions attached to [s 96] grants'.[104]

Through s 96 the Commonwealth can achieve objectives appropriate for the national government.[105] One reading of nationhood power, judicially endorsed, is empowerment of the Executive to implement programs unachievable using s 96. Gummow and Bell JJ in *Williams* held the fiscal stimulus package in *Pape* 'necessitated the use of the federal taxation administration system rather than adoption of a mechanism supported by s 96'.[106] The availability of s 96 grants to fund the school chaplaincy program was critical to the rejection of nationhood power's application in *Williams*.[107]

Two points can be articulated in response. *First*, to read down nationhood power because s 96 indicates activities lie outside executive power is incongruous — nationhood power is part of Commonwealth executive power. *Secondly*, the scope of nationhood power is assessed by considering the 'legal and practical capacity of the States' to undertake the activity.[108] This approach

[102] See also Cheryl Saunders, *The Australian Constitution: A Contextual Analysis* (Hart Publishing Pty Ltd, 2011) 179–80; Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 323–4, 330.

[103] *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140, 170 [46] (French CJ, Gummow and Crennan JJ), 206 [174] (Heydon J) (Commonwealth cannot bypass the requirement to acquire property on just terms using s 96 grants).

[104] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 398 (Mason J).

[105] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 178–9 [513], 180 [517] (Heydon J); *Williams v Commonwealth* (2012) 288 ALR 410, 456–7 [146]–[148] (Gummow and Bell JJ), 481–3 [243]–[248] (Hayne J), 542 [502]–[503] (Crennan J), 562 [593] (Kiefel J).

[106] *Williams v Commonwealth* (2012) 288 ALR 410, 456 [146]. *Cf Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 178–9 [513], 180 [517] (Heydon J) (in dissent holding s 96 could have been employed).

[107] *Williams v Commonwealth* (2012) 288 ALR 410, 456–7 [146]–[148] (Gummow and Bell JJ), 542 [502]–[503] (Crennan J), 562 [593] (Kiefel J).

[108] *Williams v Commonwealth* (2012) 288 ALR 410, 456 [146] (Gummow and Bell JJ). See also *Williams v Commonwealth* (2012) 288 ALR 410, 542 [503] (Crennan J), 561–2 [591]–[594] (Kiefel J).

'keeps the pre–*Engineers* ghosts walking'.[109] Rather, nationhood power's scope involves this assessment: whether the Commonwealth Executive or State Executives should undertake activities in light of this phenomenon — changes in relative capacities of Commonwealth and State polities arising from the nation's growth and progression.

Under this approach, s 96 does not circumscribe nationhood power's scope. An initial concern might be that this interpretation of nationhood power's scope would render s 96 otiose.[110] That, however, overlooks several considerations. *First*, s 96's function is to alleviate doubt about Commonwealth Parliament's power to attach conditions to State grants.[111] That the Executive relies on nationhood power, instead of s 96, does not detract from s 96's function — Parliament can still provide conditional grants to States. Moreover, Commonwealth legislation delegates to the Executive power to impose conditions. Whether s 96 is utilised, instead of nationhood power, is an issue about which the Executive is accountable to the political process. *Secondly*, nationhood power cannot bypass s 96 by compelling States to exercise their constitutional powers. *Thirdly*, States have considerable expertise in delivering services. Indeed, this role is one of their fundamental political and constitutional responsibilities.[112] The Commonwealth incurs significant opportunity costs in terms of speed, efficiency and resources in administering programs independently of States. Necessarily, this is very important in the Executive's decision to act under nationhood power or s 96. *Fourthly*, there could be adverse political ramifications if the Commonwealth ignores co-operative federalism. History indicates that in issues of national importance Commonwealth governments do attempt to compromise with States to avoid politically charged accusations of bypassing States.[113] *Fifthly*, the

[109]*A-G (WA) ex rel Ansett Transport v Australian National Airlines Commission* (1976) 138 CLR 492, 530 (Murphy J) (making this statement in the context of dismissing an argument that a supposed distinction between interstate and intra–state trade and commerce limited the scope of s 51(i)).).

[110]*Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 199 [569] (Heydon J); *Williams v Commonwealth* (2012) 288 ALR 410, 562 [593] (Kiefel J). See also *Williams v Commonwealth* (2012) 288 ALR 410, 481 [243] (Hayne J).

[111]*Victoria v Commonwealth and Hayden* (1975) 134 CLR 373, 395 (Mason J).

[112]Bradley Selway, 'Mr Egan, The Legislative Council and Responsible Government' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (Federation Press, 2000) 35, 63.

[113]For example, the Commonwealth's Government refusal to follow the Australian Government Productivity Commission's primary recommendation that the Commonwealth Government should be the sole financier of the National Disability Insurance Scheme; reduce special purpose payments to States; and seek States to reduce the collection of revenue earmarked for disability support services. See Productivity Commission, 'Disability Care and Support: Productivity Commission Inquiry

Commonwealth's capacity to deliver programs through s 96 is inevitably dependent on States' political and economic willingness to co-operate. The Commonwealth Parliament and Executive's use of s 96 could be constrained, for example, by States' intractability derived from political, ideological or financial reasons unrelated to the program's beneficial purpose.[114]

Whatever view is taken of these considerations several propositions remain important.

Nationhood power's scope involves an assessment as to whether the Commonwealth, or State Executives exclusively, should undertake a particular activity. This assessment arises because of changes in relative capacities of national and state polities arising from the nation's growth and progression. Obviously, this is a political assessment involving indeterminate, conflicting policy considerations. Courts are no more inherently capable of correct judgment than political branches.[115] Constraints of the judicial process — basing decisions on material that complies with evidentiary and procedural rules; the formulation of issues for judicial determination by parties; resolution of those issues by application of legal principles to facts that are proven, agreed or capable of being judicially noticed; lack of expertise other than legal knowledge and experience[116]— means that courts are ill-equipped to determine which polity within the federal structure should control or undertake particular activities. Consequently, there is no judicially discoverable and manageable standard for the resolution of nationhood power's scope.

6 *Justiciable Limitations on Nationhood Power's Scope*

Courts can and should determine whether exercises of Commonwealth power contravene express or implied constitutional prohibitions. The distinction between a government of limited and unlimited powers would be abolished if such limitations on the central polity's powers were left to the majoritarian

Report — Overview and Recommendations' (Report No 54, Australian Government Productivity Commission, 2011) 85–6.

[114]One cannot ignore the hostile relationship between the Commonwealth and States when the Whitlam government implemented the Australian Assistance Plan the subject of *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338.

[115]See also Jesse H Choper, 'The Scope of National Power vis–à–vis the States: The Dispensability of Judicial Review' (1977) 86 *Yale Law Journal* 1552, 1555.

[116]*A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542, 551 [5] (Gleeson CJ); *Momcilovic v the Queen* (2011) 280 ALR 221, 338 [404] (Heydon J).

political process.[117] The critical issue, however, is what 'limitations' curtail the national polity's powers.

In this context, an important qualification has been judicially imposed on nationhood power:

> the exigencies of national government cannot be invoked to set aside the distribution of powers between the Commonwealth and States.[118]

This limitation is traceable to Dixon J's statement that the basal consideration behind nationhood power's scope is the federal distribution of powers and functions.[119] This basal consideration informs numerous judicial statements concerning nationhood power's scope. [120]

Despite Sir Owen Dixon's judicial stature, several obvious criticisms protrude.

First, nationhood power is an implied power necessary for the national polity. An implied power 'inheres in the instrument and as such forms part of the instrument'.[121] Nationhood power accordingly forms part of the federal distribution of powers. If a freedom of political communication is not 'some lesser or secondary form of principle' because it is 'rooted in implication rather than in the express text of the Constitution'[122], it follows nationhood power is not a lesser or secondary power because it is implied rather than express. Therefore, the issue is not what scope of nationhood power is appropriate to a central government in a federation that distributes legislative powers (where the national polity has express legislative powers). [123] Rather, the issue is what scope of nationhood power is appropriate given limits on Commonwealth powers imposed by the Constitution's federal structure.

Secondly, the Constitution's federal structure does not delineate State

[117] *Marbury v Madison* 5 US (1 Cranch) 137, 176 (1803).
[118] (2009) 238 CLR 1, 60 [127] (French CJ).
[119] *A-G (Vict.) v Commonwealth* (1945) 71 CLR 237, 271–2.
[120] *Victoria v Commonwealth and Hayden* (1975) 134 CLR 338, 398 (Mason J) (nationhood power cannot effect a radical transformation in what has hitherto been thought to be the Commonwealth's area of responsibility under the Constitution); *Davis v Commonwealth* (1988) 166 CLR 79, 93–4 (Mason CJ, Deane and Gaudron JJ) (nationhood power is ordinarily clearest where there is no real competition with State executive or legislative competence); *Davis v Commonwealth* (1988) 166 CLR 79, 111 (Brennan J) 111 (nationhood power invites consideration of sufficiency of States' powers to undertake the enterprise).
[121] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ); *Carr v Western Australia* (2007) 232 CLR 138, 145 [12] (Gleeson CJ); *Bennett v Commonwealth* (2007) 231 CLR 91, 136 [130] (Kirby J).
[122] *Monis v the Queen* [2013] HCA 4, [104] (Hayne J).
[123] *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 535, 560 (Mason J).

powers. Rather, as a general proposition, it confers powers on the Commonwealth, leaving States with an 'undefined residue'.[124] The federal structure therefore does not *a priori* restrict any power, whether express or implied, conferred on the Commonwealth.[125] This proposition gains added prominence if the Commonwealth and States are neither separate nor independent but merely emanations of one Australian Crown.[126]

Thirdly, the nationhood power's parameters are essentially defined by reference to a federalist proposition: there are State areas of responsibility into which the Commonwealth cannot intrude. Originally (1903–1919), the High Court read down Commonwealth legislative power by reference to traditional areas of State responsibility. However, this 'reserve powers' doctrine was substantively and definitively rejected in *Engineers*.[127] Critical to judicial rejection of that doctrine was the emergence of Australian national unity and growth as a nation.[128] To restrict nationhood power by notions of State areas of responsibility is to risk reviving pre–*Engineers* doctrines.

Fourthly, as a general proposition, the judiciary is, at least as a matter of precedent, bound to 'recognise the development of the Nation and to apply established principles to the new positions which the Nation in its progress from time to time assumes'.[129] Accordingly, courts ought to recognise that the relative capacities of the national and state polities to undertake activities change with the nation's growth and progression. It is therefore incongruous to limit nationhood power by notions of State areas of responsibility — national and regional areas of responsibilities change with the nation's growth and progression.[130]

[124] *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 440 (Dawson, Toohey and Gaudron JJ).

[125] See *New South Wales v Commonwealth* (2006) 229 CLR 1, 120 [194]–[195] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); Stephen Gageler, 'The Federal Balance' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27, 37.

[126] *Worthing v Rowell & Muston Pty Ltd* (1970) 123 CLR 89, 97 (Barwick CJ); Bradley Selway, 'Horizontal and Vertical Assumptions within the Commonwealth Constitution' (2001) 12 *Public Law Review* 113, 124. But see *Sue v Hill* (1999) 199 CLR 462, 498–502 [84]–[91] (Gleeson CJ, Gummow and Hayne JJ).

[127] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

[128] Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 242–3. But see Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers' Case*' (2009) 37 *Federal Law Review* 363.

[129] *Commonwealth v Colonial Combing Spinning and Weaving Co Ltd* (1922) 31 CLR 421, 438 (Isaacs J); *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 85 [219] (Gummow, Crennan and Bell JJ).

[130] *Victoria v Commonwealth* (1971) 122 CLR 353, 395–6 (Windeyer J).

Fifthly, to assert nationhood power raises considerations of 'real competition' between Commonwealth power and State power is based on an important premise — expansion of nationhood power results in a correlative reduction in State power.[131] The Constitution does not provide substantive rules or procedural mechanisms to resolve inconsistency between exercises of Commonwealth and State executive powers.[132] The Commonwealth's comparative superiority[133] should entail that where conflict exists, the Commonwealth prevails.[134] In any event, this conflict can be obviated through Commonwealth Parliament's legislative supremacy over State executive power under s 61 combined with s 51(xxxix) supplemented by s 109 of the Constitution.[135] Consequently, that exercises of Commonwealth executive power may weaken or destroy State activity is constitutionally authorised.

An important proposition can be deduced from the above considerations: the only federal structural limitation,[136] which applies to all Commonwealth powers, is that nationhood power cannot interfere with a State's capacity to function as a government.[137] Necessarily, this limitation, along with other express and implied constitutional limitations, is justiciable.

C *Conclusion*

Courts are ill-equipped to deal with the indeterminate and conflicting policy considerations involved in determining where power ought to reside within the federal structure to cater for contemporary society's needs. Under a functional

[131] See Alfred Deakin, 'Channel of Communication with Imperial Government: Position of Consuls: Executive Power of Commonwealth' in P Brazil and B Mitchell (eds), *Opinions of Attorneys–General of the Commonwealth of Australia 1901–14* (Australian Government Publishing Service, 1981) vol 1, 129, 132 quoted in *Williams v Commonwealth* (2012) 288 ALR 410, 412 [1] (French CJ).

[132] *Williams v Commonwealth* (2012) 288 ALR 410, 517 [392] (Heydon J).

[133] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 85 [222] (Gummow, Crennan and Bell JJ).

[134] Alfred Deakin, 'Whether Coextensive with Legislative Power: When is State Executive Power Displaced: Whether Commonwealth has Power by Executive Act to Permit Landing of Foreign Troops or Crews' in P Brazil and B Mitchell (eds), *Opinions of Attorneys–General of the Commonwealth of Australia 1901–14* (Australian Government Publishing Service, 1981) vol 1, 358, 360.

[135] *Williams v Commonwealth* (2012) 288 ALR 410, 517 [393] (Heydon J); George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 47.

[136] *Commonwealth v Tasmania* (1983) 158 CLR 1, 128–9 (Mason J); Stephen Gageler, 'The Federal Balance' in Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012) 27, 37-8; Bradley Selway, 'Horizontal and Vertical Assumptions within the Commonwealth Constitution' (2001) 12 *Public Law Review* 113, 124.

[137] Generally referred to as the *Melbourne Corporation* principle: *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 as reformulated in *Austin v Commonwealth* (2003) 215 CLR 185.

approach to the US political questions doctrine — equally applicable in the Australian constitutional context — this Part has demonstrated that judicial process constraints means there is no judicially discoverable and manageable standard to assess nationhood power's scope. Consequently, nationhood power's scope is non-justiciable[138] unless exercises of nationhood power contravene constitutional prohibitions. Apart from express and implied constitutional prohibitions applying generally on Commonwealth powers, this Part demonstrated that the only federal structural constitutional prohibition is the *Melbourne Corporation* principle.

Part II: Judicial Review Is Not Absolute

Usually the response to non-justiciability is that courts would abdicate their fundamental duty to determine the constitutionality of executive actions. This Part responds by articulating and defending a simple proposition: judicial review is not absolute. Through the constitutionally entrenched principles of responsible and representative government, the Constitution establishes another accountability mechanism operating alongside judicial review: the political process. In this context, democratic, normative and pragmatic reasons are articulated for a crucial proposition — the political process is, subject to constitutional prohibitions, the appropriate accountability mechanism for nationhood power's scope.

A *Responsible Government: Expanded Notion*

Through ss 62 and 64, responsible government pervades, and is central to, the Constitution.[139] Responsible government's characteristics are based on a combination of law, convention, political practice and public opinion.[140] Although amorphous, responsible government has core conventions: Sovereigns must appoint Ministers holding confidence of Parliament's lower

[138]To the extent *Boland v Hughes* (1988) 83 ALR 673 is inconsistent with this position, this article argues that s 128 is a non-justiciable question. For general support of this proposition, see especially, James Crawford, 'Amendment of the Constitution' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (Melbourne University Press, 1992) 177, 183–7.

[139] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

[140] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 403 [17] (Gleeson CJ); *Egan v Chadwick* (1999) 46 NSWLR 563, 568 [18] (Spigelman CJ). See also *Egan v Willis* (1998) 195 CLR 424, 451 [41] (Gaudron, Gummow and Hayne JJ).

house and must also, subject to reserve powers, act on ministerial advice;[141] the Executive must resign (or advise lower house dissolution) upon losing such confidence.[142]

1 *Individual and Collective Ministerial Responsibility*

The conventional understanding is that responsible government encompasses 'the means by which Parliament brings the Executive to account' because 'the Executive's primary responsibility in its prosecution of government is owed to Parliament'.[143] Incorporated are two notions.[144] First is individual ministerial responsibility, Ministers are responsible to legislative chambers for administering their departments and answerable for departmental officers' actions.[145] Second is collective ministerial responsibility. Cabinet Ministers are collectively answerable to Parliament for government administration and decisions. Responsible government contemplates that executive powers are exercised according to ministerial directions and policies.[146]

Individual ministerial responsibility has, however, eroded with entrenchment of the party political system in Australia's parliamentary system.[147] The Executive generally controls parliamentary mechanisms that enable effective scrutiny of individual Ministers.[148] Ministers are generally not 'vicariously liable … for the "sins" of … [their] subordinates'.[149] Moreover, individual ministerial responsibility is premised upon a structure and operation

[141]The most notable exception is the dismissal of the Whitlam Government in the 1975 constitutional crisis.

[142] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 461–2 [213] (Gummow and Hayne JJ); George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229, 244–5.

[143]*Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ).

[144]*Egan v Chadwick* (1999) 46 NSWLR 563, 571 [39] (Spigelman CJ) and authorities cited therein.

[145]Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 82, 85.

[146]*Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 87 (Murphy J).

[147]Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 75, 93–4; Matthew Groves 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 83, 86.

[148]Matthew Groves, 'Judicial Review and Ministerial Responsibility' in Matthew Groves (ed), *Law and Government in Australia* (Federation Press, 2005) 83, 86 discussing *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 464 [220] (Gummow and Hayne JJ).

[149]Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 75, 79. [**Original:** … vicariously liable … for the "sins" of … his subordinates'…].

of government that does not necessarily reflect reality.[150]

Accordingly, responsible government's critical feature is collective ministerial responsibility.[151] Collective ministerial responsibility is premised on the government resigning if Cabinet Ministers no longer maintain the lower house's confidence.[152] Since Federation, the strengthening party system has significantly curtailed the practical operation of collective ministerial responsibility.[153] Consequently, Parliament is 'seen to be the de facto agent or facilitator of executive power, rather than a bulwark against it'.[154] This conundrum raises an important issue: what ought to be responsible government's content in contemporary Australia's party-dominated parliamentary system?

2 *Responsible Government and Political Accountability*

(a) *Responsible Government in 2012*

Responsible government's underlying premise is holding the Executive politically accountable for its actions.[155] Political accountability encompasses two notions.[156] *First*, the Executive is subject to parliamentary scrutiny for its actions. *Secondly*, Parliament's lower house passes a no-confidence motion[157] or rejects a critical piece of legislation[158] and the Executive must resign or advise the Governor-General to dissolve the lower house.

As illustrated above, this second notion of political accountability has become illusory in Australia's party–dominated parliamentary system.

[150]Simon Evans, 'Continuity and Flexibility: Executive Power in Australia' in Paul Craig and Adam Tomkins (eds), *The Executive and Public Law* (Oxford University Press, 2006) 89, 108–12.

[151]Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 75, 79; Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1 *Australia Bar Review* 233, 237. But see *Williams v Commonwealth* (2012) 288 ALR 410, 454 [136] (Gummow and Bell JJ).

[152] *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 461–2 [213] (Gummow and Hayne JJ); George Winterton, *Parliament, The Executive and the Governor-General* (Melbourne University Press, 1983) 79–81.

[153]Sir Gerard Brennan, 'Courts, Democracy and the Law' (1991) 65 *Australian Law Journal* 32, 34–5.

[154]John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 163. [**Original:** … seen to be the de facto agents or facilitators of executive power, rather than bulwarks against it …].

[155]*Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ); *Re Patterson; Ex parte Taylor* (2001) 207 CLR 391, 463–4 [217] (Gummow and Hayne JJ).

[156]See *Egan v Willis* (1998) 195 CLR 424, 455 [45] (Gaudron, Gummow and Hayne JJ).

[157]George Winterton, 'Tasmania's Hung Parliament, 1989' [1992] *Public Law* 423, 442–3.

[158]George Winterton, '1975: The Dismissal of the Whitlam Government' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 229, 244.

Responsible government is nevertheless a fluid concept[159]— it evolves to ensure political accountability of the Executive. Political accountability, in light of Australia's parliamentary system, is no longer primarily a function of Parliament.[160] Rather, responsible government involves 'a government … responsive to public opinion and answerable to the electorate'. Interpreted in this 'general and flexible sense', responsible government incorporates mechanisms, other than judicial review, exposing Executive actions to public scrutiny and sanctions.[161]

To ascribe responsible government this meaning is not inconsistent with requirements for its content to be implied from the Constitution's text and structure. *First*, judicial authority suggests Ministers of the State are 'necessarily accountable to "the people" referred to in ss 7 and 24'.[162] *Secondly*, through s 64 — a provision 'made with a view to the Cabinet system'[163] — it is evident the Constitution is premised on Parliament monitoring and scrutinising the Executive.[164] It is 'within the spirit of the instrument'[165] that responsible government's content evolves to ensure the Executive is subject to effective scrutiny and sanctions.

Nor does this meaning of responsible government require constitutional entrenchment, and therefore judicial enforcement, of all mechanisms exposing the Executive to public scrutiny and sanctions. Responsible government incorporates 'practical constitutional understandings not reducible to written law'.[166] It is a general description of Australian constitutional arrangements

[159]Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1 *Australia Bar Review* 233, 233. See also *Williams v Commonwealth* (2012) 288 ALR 410, 545 [516] (Crennan J); *Re Patterson; Ex parte Taylor* (2000) 207 CLR 391, 402 [14] (Gleeson CJ).

[160]David Kinley, 'Governmental Accountability in Australia and the United Kingdom: A Conceptual Analysis of the Role of Non–Parliamentary Institutions and Devices' (1995) 18 *University of New South Wales Law Journal* 409, 409–11, 425–6.

[161]*Williams v Commonwealth* (2012) 288 ALR 410, 545 [515]-[516] (Crennan J). See also Michael Barker, 'Accountability to the Public: Travelling Beyond the Myth' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 228, 244–58; Harry Evans, 'Parliament and Extra–Parliamentary Accountability Institutions' (1999) 58 *Australian Journal of Public Administration* 87, 88.

[162] *Monis v the Queen* [2013] HCA 4, [102] (Hayne J).

[163]*Re Patterson; Ex parte Taylor* (2000) 207 CLR 391, 462 [214] (Gummow and Hayne JJ).

[164]*Re Patterson; Ex parte Taylor* (2000) 207 CLR 391, 464 [220] (Gummow and Hayne JJ); *Williams v Commonwealth* (2012) 288 ALR 410, 454 [136] (Gummow and Bell JJ).

[165]Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 249.

[166]*Williams v A-G (NSW)* (1913) 16 CLR 404, 457 (Isaacs J). But see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

which operates according to its general tenor.[167]

(b) *Responsible Government and Representative Government*

Responsible government, particularly in this general and flexible sense, is 'representative government writ large'.[168] Central to the constitutionally prescribed system of representative government is the electorate's capacity to access 'relevant information about the functioning of government in Australia and … policies of political parties and candidates'.[169] An implied freedom of political communication limits Commonwealth legislative and executive power's interference with political communications essential to representative government. Although not a personal right, the implied freedom may serve to ensure juristic persons communicate freely on matters protected by that freedom.[170] Australian electors are accordingly able to form 'political judgments required for … exercise of their constitutional functions'.[171]

B *Implications*

1 *Political Process As A Check On Commonwealth Executive*

Responsible government is a system of government 'constrained by the political process and not by an internal division of functions'.[172] Consequently, under the system of responsible government articulated above, Australian electors have a constitutional function of holding the Commonwealth Executive to account for its actions. This constitutional function is discharged principally via electoral processes.[173]

Responsible government restrains the Executive from exceeding its constitutional powers in two senses. *First*, the Executive is less likely to act when it considers that political institutions will inform the public — through

[167] *Egan v Willis* (1998) 195 CLR 424, 501 [152] (Kirby J); Geoffrey Lindell, 'Responsible Government' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 75, 82, 85–6. But see Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 340–1.

[168] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 188.

[169] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 560.

[170] *Wotton v Queensland* (2012) 285 ALR 1, 22 [80] (Kiefel J).

[171] *Nationwide News Pty Ltd v Wills (*1992) 177 CLR 1, 50–1 (Brennan J). See *Monis v the Queen* [2013] HCA 3, [352] (Crennan, Kiefel and Bell JJ).

[172] Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 188.

[173] See *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138–9 (Mason CJ), 230–1 (McHugh J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 46–7 (Brennan J), 70–72 (Deane and Toohey JJ).

communications subject of the implied freedom — that the Executive is exceeding their constitutional powers. *Secondly*, the electorate sanctions the Executive when voters decide the Executive has exceeded their constitutional powers. In this latter sense, the political process acts as 'a mechanism of constitutional constraint … in relation to issues of federalism'.[174]

2 *Criticisms Of The Political Process*

Three criticisms are usually raised concerning the political process acting as an accountability mechanism via elections.[175] *First*, it is invariably impractical for individual citizens or groups to articulate their constitutional grievances to the wider electorate. *Secondly*, electoral processes never focus on one discrete issue. Voters can only vote against a plethora of policies. Electors may wish to elect a government while declaring particular activities beyond its constitutional competence.[176]*Thirdly*, the majoritarian political process may choose candidates precisely because they wish to circumvent constitutional limitations on government power. Each criticism is addressed separately.

(a) *Judicial Review Only Appropriate in Certain Circumstances*

Individuals or groups may not be capable of influencing the political process. Judicial review is therefore appropriate. However, this proposition must, as a matter of constitutional law, be subject to a qualification discussed in Part III: individuals or groups can only seek judicial review if their fundamental common law rights are infringed. Where their concern is solely with the location of power within the federal structure, this matter is appropriately left to the political process. The Constitution was not designed to diffuse power 'to secure liberty'.[177] Consequently, the critical premise behind the US Supreme Court adjudicating individual's separation–of–powers claims — that individual rights are affected depending on the location of government power[178]— does not apply in the Australian constitutional landscape.

[174]Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 164.
[175]Jonathan Siegel, 'Political Question and Political Remedies' in Nada Mourtada–Sabbah and Bruce E Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, 2007) 243, 259–62.
[176]John Toohey, 'A Government of Laws, and Not of Men?' (1993) 4 *Public Law Review* 158, 173.
[177]Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review (1987) 17 *Federal Law Review* 162, 165–6, 171.
[178]*United States v Munoz–Flores* 495 US 385, 394 (1990).

(b) *Section 128 Addresses Inherent Defects in Electoral Processes*

The assessment of the political process as to whether nationhood power supports particular policies ('nationhood policies') involves rejection or acceptance of all Executive policies in elections. Where there is acceptance of the plethora of policies, it can be accepted that the electorate supports nationhood policies.

Where the electorate rejects government policies collectively, it will generally be unclear whether the electorate rejected nationhood power as a source of constitutional authority for particular policies.[179] The following scenarios can eventuate as a result.

First, the Executive may reinstate nationhood policies for the electorate's reassessment. The electorate may endorse or reject the new package of policies, including nationhood policies. That the electorate endorses nationhood policies previously rejected merely illustrates a distinguishing feature of the political process as an accountability mechanism — its malleability. *Second*, the Executive could pursue the same policy objective but change the policy's implementation and methodology. In a constitutional dialogue between the Executive and electorate, the Executive changes nationhood policies' implementation and methodology until the electorate accepts those policies.

The majority of Commonwealth electors may hold the Executive has power to undertake an activity when a majority of electors in a majority of States hold a contrary view. The Constitution has nevertheless provided the appropriate political check: the Senate. The framers devised the Constitution assuming the Senate would represent State interests.[180] That the Senate may not discharge this function because of the strengthening party–dominated parliamentary system does not require a corresponding increase in judicial power.[181] Senators who do not discharge their constitutional responsibilities are accountable to their State electorates in Commonwealth elections.

Where nationhood policies are rejected as part of a plethora of policies, uncertainties concerning constitutional validity of nationhood policies can be addressed through s 128 referendums. The Executive can, due to ordinarily having lower house support, initiate a referendum for constitutional

[179]See generally Jonathan R Siegel, 'Political Questions and Political Remedies' in Nada Mourtada–Sabbah and Bruce E Cain (eds), *The Political Question Doctrine and the Supreme Court of the United States* (Lexington Books, 2007) 243, 260.

[180]*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 135 (Mason CJ).

[181]But see Sir Gerard Brennan, 'Courts, Law and Democracy' (1991) 65 *Australian Law Journal* 32, 35.

amendment to authorise nationhood policies. If the electorate accepts the referendum, it has demonstrated its support for nationhood policies. If the referendum is rejected, s 128 reaffirms the electoral assessment of the political process.

Consequently, through s 128, the Constitution addresses the inherent defect of the electoral process determining whether policies are supported by nationhood power. That the requirements are more stringent to obtain s 128 amendments is explicable by reference to the malleability of the electoral process as an accountability mechanism. Leaving the validity of policies to the electoral process is inherently uncertain. In contrast, judicially interpreted constitutional provisions arising from s 128 referendums provide a reliable and enduring source of Commonwealth power to implement policies.

(c) *No A Priori Constitutional Limitation To Contravene*

There is no *a priori* limitation on nationhood power that the majoritarian political process seeks to violate because the extent of any limitations is itself determined by the political process.

3 *Judicial Review Is Not Absolute*

Judicial review and responsible government act as accountability mechanisms for unconstitutional Executive acts. Accordingly, judicial review and responsible government act concurrently to hold political branches to account for exceeding their constitutional powers.[182] Inevitably, this engenders a subsequent question: how do they operate concurrently in this context?

4 *Political Process: Appropriate Accountability Mechanism In This Context*

(a) *Political Process: Greater Democratic Legitimacy*

The political process has greater democratic legitimacy than judicial review. Democracy means government by the people. Implicit is majority rule.[183] Indeed, representative majoritarian democracy is people governing indirectly through elected representatives.[184]

A decision of the electorate has greater democratic legitimacy than that of

[182]Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138, 152.
[183]*Reference Re Secession of Quebec* [1998] 2 SCR 217, 253 [63].
[184]*McGinty v Western Australia* (1996) 186 CLR 140, 201 (Toohey J); Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 44.

tenured and appointed judges.[185] This is particularly when the judicial process cannot provide objective non-political answers to whether executive or legislative acts transgress constitutional limits.[186]

(b) *Electorate: The Appropriate Body for Determining Nationhood Power's Scope*

The Commonwealth and States are artificial, albeit essential, entities in Australia's federal structure. People, in the basic sense, constitute individual States. In aggregate, people of individual States and Territories constitute the Commonwealth.[187] Consequently, 'it is the *same people* and the *same Crown* who constitute the Commonwealth and the States'. The electorate acting as 'one political capacity' is,[188] compared to courts, better able to determine where executive power should lie within the Constitution's federal structure to cater for contemporary society's needs.

That a system of representative government exists in the Commonwealth Constitution and State Constitutions[189] cements this proposition. Under this system, Commonwealth Ministers exercise government power on behalf of the Australian people.[190] By parity of reasoning, the system of representative government in State Constitutions means State Ministers exercise government power on behalf of people of their State.[191] Because the Commonwealth and States derive power from these people, via these Constitutions, voters — collectively at Commonwealth elections supplemented by s 128 referendums — should determine where power to undertake an activity ought to reside within the Constitution's federal structure.[192]

(c) *Consistency with Operation of Political Questions Doctrine*

[185]Jeremy Kirk, 'Constitutional Implications from Representative Democracy' (1995) 23 *Federal Law Review* 37, 72–3.
[186]Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) *Federal Law Review* 162, 189.
[187]*Leeth v Commonwealth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ).
[188]Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 187 (emphasis in original).
[189]Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 40–2.
[190]*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 71 (Deane and Toohey JJ).
[191]*Egan v Chadwick* (1999) 46 NSWLR 563, 591–2 [132]–[134] (Priestley JA).
[192]*Contra* Jeffrey Goldsworthy, 'Structural Judicial Review and Objection from Democracy' (2010) 60 *University of Toronto Law Journal* 137, 139–40.

In holding Congress's power to manage the National Guard was non-justiciable in *Gilligan*, the US Supreme Court stated ultimate responsibility for managing the National Guard resided in political branches 'periodically subject to electoral accountability'.[193] Consequently, the political questions doctrine's application presumes political branches will be held to account by the political process.

C *Conclusion*

Via evolutionary central constitutional principles of responsible and representative government, the political process operates concurrently with judicial review as accountability mechanisms for unconstitutional exercises of executive power. In this context, the political process is constitutionally and democratically superior to judicial review in assessing whether the Executive has lawfully exercised its non-prerogative capacities under nationhood power.

Part III: Qualification to Non-Justiciability

Several assumptions pervade constitutional law. A prominent example is that the rule of law underlies the Constitution.[194] Judicial review is the enforcement of the rule of law over executive action. That is, the executive is prevented from exceeding their legal and constitutional powers. Individual freedoms, liberties and interests are therefore protected.[195] It would be destructive of 'any meaningful commitment to the rule of law' to maintain that nationhood power is non-justiciable because courts are required to make political decisions.[196]

In response, this Part articulates a crucial proposition: it is not antithetical to the rule of law that nationhood power's scope can and should be determined by the political process. This proposition is subject to one qualification: nationhood power is justiciable where fundamental common law rights are infringed. Courts determine whether there is such an infringement and if that infringement is disproportionate. In the absence of a common law equivalent of

[193] 413 US 1, 10 (1973).
[194] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J). The Constitution depends on this assumption for its efficacy, see *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 351–2 [30] (Gleeson CJ and Heydon J); *South Australia v Totani* (2010) 242 CLR 1, 62–3 [131] (Gummow J), 156 [423] (Crennan and Bell JJ); *Momcilovic v the Queen* (2011) 280 ALR 221, 390 [593] (Crennan and Kiefel JJ).
[195] *Church of Scientology Inc v Woodward* (1980) 154 CLR 25, 70 (Brennan J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 [31] (Gleeson CJ).
[196] Duncan Kerr, 'The High Court and the Executive: Emerging Challenges to the Doctrine of Responsible Government and the Rule of Law' (2009) 28 *University of Tasmania Law Review* 145, 176.

parliamentary supremacy for the Executive, the effect of a judicial finding of disproportionate exercises of nationhood power is that the Executive has acted unconstitutionally.

A *Rule Of Law*

Rule of law is a concept that continues to defy definition. The primary debate is between advocates of formal and substantive rule of law conceptions. The former concerns: how the law was enacted; clarity of ensuring norm; and temporal dimensions. The latter accepts these formal aspects but also requires substantive individual rights to be legally recognised and enforced.[197] Both conceptions are subject to criticisms. It is doubtful whether a theory that strikes a balance between these alternative conceptions will gain universal acceptance.[198]

This debate, however, obscures a crucial point. The purpose of the rule of law is to curtail arbitrariness of government power.[199] Indeed, formal and substantive rule of law conceptions institutionalise mechanisms to prevent arbitrary government power. The overarching issue is therefore clear: what mechanisms in the legal or constitutional system ensure government power is exercised non-arbitrarily? This issue focuses attention on what is 'arbitrary'; a concept that is 'complex and insufficiently theorized'.[200]

Arbitrariness is informed by adherence to particular rule of law conceptions.[201] Under formal and substantive rule of law conceptions, exercises of government power must find their source in a legal rule. In a constitutional system, all government action must comply with the Constitution.[202]

The rule of law also includes authoritative determination of the law. In this context, a fundamental questions arises: who can and should authoritatively

[197]Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467, 467-9, 476–8.
[198]T R S Allan, *Law, Liberty and Justice* (Oxford: Clarendon Press, 1993) 21.
[199]*Reference Re Secession of Quebec* [1998] 2 SCR 217, 257 [70]; Lord Bingham, 'Rule of Law' (2007) 66 *Cambridge Law Journal* 67, 72; Duncan Kerr, 'The High Court and the Executive: Emerging Challenges to the Doctrine of Responsible Government and the Rule of Law' (2009) 28 *University of Tasmania Law Review* 145, 151.
[200]Martin Krygier, 'Rule of Law' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 233, 241.
[201]Paul Craig, 'Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework' [1997] *Public Law* 467, 470–1.
[202]*Reference Re Secession of Quebec* [1998] 2 SCR 217, 258 [71]-[72]; Murray Gleeson, 'Courts and the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 178, 182.

determine whether Executive activities are supported by nationhood power? The conventional view in Australia is that the court's power of final and authoritative interpretation is an element of the rule of law. Nevertheless, vesting final power of interpretation in non-judicial bodies is not necessarily destructive of the rule of law. Where power of authoritative interpretation of the law is vested in any body, conformity with the rule of law depends on the power's scope, body's character, and how and when the body exercises its power.[203]

This article earlier demonstrated that voters are the appropriate body, via elections supplemented by s 128, to determine where power ought to reside within the federal structure. The appropriateness of electors determining nationhood power's scope and the frequency and manner of the political process exercising this power of authoritative interpretation inevitably leads to this conclusion: it is not antithetical to the rule of law to leave authoritative adjudication of nationhood power's scope — subject to constitutional prohibitions — to the political process.[204] One qualification attaches to this general position.

B *Intersection: Common Law Rights And Rule Of Law*

The Constitution assumes the common law's existence. The common law is the foundation of Australia's legal system and it provides for the fundamental principle of parliamentary supremacy.[205] This principle is qualified in Australia by the existence of the Constitution — for example, Commonwealth legislation must be supported by a Commonwealth legislative power.[206] The common law also recognises rights. Common law rights refer to an evolving and indeterminate category of enforceable rights; residual rights or immunities and privileges; and principles underlying a particular field of law.[207] The common

[203]Sir Anthony Mason, 'The Rule of Law in the Shadow of the Giant: The Hong Kong Experience' (2011) 33 *Sydney Law Review* 623, 624-5.

[204]See also Richard Bellamy, *Political Constitutionalism: A Republican Defence of the Constitutionality of Democracy* (Cambridge University Press, 2007) 83. But see *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, 323 [61] (Lord Nolan) (stating that electoral accountability is insufficient to give effect to the rule of law).

[205]Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31 *Australian Law Journal* 240, 240-2.

[206]*Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 414 (Priestley JA); Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 1.

[207]Chief Justice John Doyle, 'Common Law Rights and Democratic Rights' in P D Finn (ed), *Essays on Law and Government* (Law Book Co, 1995), vol 1, 144, 148.

law reconciles the recognition of rights and this qualified parliamentary supremacy through a principle of statutory construction: Parliament does not intend to abrogate fundamental common law rights without clear legislative intent ('*Coco* principle').[208]

In this context, three points are crucial. *First*, fundamental common law rights are those rights 'recognised by the courts'.[209] *Secondly*, the *Coco* principle is a principle of statutory construction — it does not operate as a substantive constraint on legislative power.[210] *Thirdly*, and critically, the *Coco* principle is an aspect of the rule of law.[211]

This raises the critical antecedent question: how is the *Coco* principle an aspect of the rule of law? There are three different answers. *First*, Parliament cannot infringe fundamental common law rights unless it expresses its clear intention. Therefore, Parliament is forced to take responsibility for its decisions. *Secondly*, Parliament will be held accountable, through the political process, for infringing fundamental common law rights. This accountability forms a practical constraint on legislative power.[212]

Thirdly, fundamental common law rights are protected through courts interpreting legislation to minimise infringements where alternative constructions are open.[213] Formal and substantive rule of law conceptions are accordingly evident in the *Coco* principle's operation: the legislature is practically restrained from infringing rights because laws must be enacted in a certain form[214] and courts interpret statutes to minimise infringement of rights.

This principle, however, does not apply to nationhood power — a non-statutory source of executive power. Nevertheless, if the common law can affect exercises of Commonwealth legislative power as an aspect of the rule of law, *a fortiori* the common law can affect exercises of nationhood power. It is

[208]See *Coco v The Queen* (1994) 179 CLR 427, 436–7 (Mason CJ, Brennan, Gaudron, McHugh JJ).
[209]*Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 671 [182] (Crennan, Kiefel and Bell JJ). See generally *Momcilovic v the Queen* (2011) 280 ALR 221, 351 [444] (Heydon J) (listing rights).
[210] *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 43 (Brennan J).
[211] *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329 [21] (Gleeson CJ); *Australian Crime Commission v Stoddart* (2011) 282 ALR 620, 671 [182] (Crennan, Kiefel and Bell JJ); *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625, 635 [30] (French CJ, Crennan and Kiefel JJ).
[212]David Dyzenhaus, 'The Justice of the Common Law: Judges, Democracy and the Limits of the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 21, 39, 43.
[213]See *Australian Education Union v General Manager of Fair Work Australia* (2012) 286 ALR 625, 635–6 [30]–[32] (French CJ, Crennan and Kiefel JJ).
[214]Suri Ratnapala and Jonathan Crowe, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2012) 382–3.

anomalous for the common law to affect legislative power, but not executive power, in a constitutional system where Parliament is supreme over the Executive.[215]

Two further important reasons sustain this conclusion. *First*, constitutional struggles in the United Kingdom predating Australian Federation involved continuous development of statutory executive power at the expense of non-statutory prerogative power.[216] Those prerogatives that remain were left to the Crown by UK Parliament.[217] No principle unites these prerogatives. However, those prerogatives that concern emergencies, self-protection and keeping peace within the realm inhere in the Crown by virtue of necessity.[218] Those prerogatives enable the UK Executive to interfere with common law rights.[219] Unless prerogative powers' purpose necessarily entails infringement of fundamental common law rights, the UK Executive cannot infringe these rights without statutory authority.[220]

Consequently, it would be an historical and, perhaps textual, anomaly if the Commonwealth Executive could infringe fundamental common law rights because of its constitutional status as Australia's national government.[221] Indeed, the proposition that the Executive cannot infringe common law rights unless authorised by statute or prerogative power is practically manifested in the following limitations on executive power: the Executive cannot unilaterally tax persons; create offences; dispense with any law's operation;[222] or detain citizens without judicial adjudication of criminal guilt subject to limited exceptions.[223]

Secondly, history illustrates that democratic institutions have been rendered asunder usually at the behest of persons controlling executive offices

[215]See *Re Residential Tenancies Tribunal (NSW); Ex parte Defence Housing Authority* (1997) 190 CLR 410, 446 (Dawson, Toohey and Gaudron JJ).

[216]Sir Maurice Byers, 'The Australian Constitution and Responsible Government' (1985) 1 *Australia Bar Review* 233, 234. See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 229–35.

[217]*Burmah Oil Company Ltd v Lord Advocate* [1965] AC 75, 100 (Lord Reid).

[218]Sebastian Payne, 'The Royal Prerogative' in Maurice Sunkin and Sebastian Payne (eds), *The Nature of the Crown* (Oxford University Press, 1999) 77, 90–94, 109.

[219]See generally Anne Twomey, 'Pushing the Boundaries of Executive Power — Pape, the Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313, 325–6.

[220]See the discussion in B V Harris, 'Government "Third Source" Action and Common Law Constitutionalism' (2010) 126 *Law Quarterly Review* 373, 377–83.

[221]See *Ruddock v Vadarlis* (2001) 110 FCR 491, 501 [30]–[32] (Black CJ); Leslie Zines, 'The Inherent Executive Power of the Commonwealth' (2005) 16 *Public Law Review* 279, 281. *Contra Ruddock v Vadarlis* (2001) 110 FCR 491, 543–4 [193]–[197] (French J), 514 [95] (Beaumont J agreeing).

[222]*Williams v Commonwealth* (2012) 288 ALR 410, 454 [135] (Gummow and Bell JJ).

[223]*Chu Kheng Lim v Minister for Immigration & Ethnic Affairs* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ).

and power.[224] Potential for abuse of Executive power should not be understated.

C *Rule Of Law In Nationhood Power's Context*

The above engenders a critical question: how does the common law affect exercises of nationhood power as an aspect of the rule of law?

1 *Proportionality In Context Of The Non-Statutory Exercise Of Nationhood Power*

(a) *The Proportionality Exercise*

In this context, the Executive would be pursuing objectives consistent with the purposes of national government when it infringes common law rights. Conflict between competing interests is resolved by applying the proportionality principle[225] which has roots in the rule of law.[226]

The proportionality principle requires the Commonwealth Executive to pursue a legitimate end. Legitimate ends are any purpose not constitutionally prohibited.[227] Courts do not assess whether the end is consistent with the purposes of national government. This question is a non-justiciable issue for the political process to determine.

The proportionality test, in this context, has three justiciable steps: suitability, necessity, and proportionality.[228] Suitability looks to whether the probable effectiveness of the Executive's measures. Courts then assess whether the measure is necessary. A measure is not necessary if there are other practicable, available means that involve less infringement on common law rights. This conclusion is reached only if the alternative means are obvious and compelling.[229]

[224] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187 (Dixon J).
[225] See Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 4-5.
[226] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 [457] (Kiefel J); *Momcilovic v The Queen* (2011) 280 ALR 221, 381 [556] (Crennan and Kiefel JJ).
[227] Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 718, 723. But see Dieter Grimm, 'Proportionality in Canadian and German Constitutional Jurisprudence' (2007) 57 *University of Toronto Law Journal* 383, 387 (indicating that while German jurisprudence says legitimate ends are those not constitutionally prohibited, Canadian jurisprudence says an objective of sufficient importance is required).
[228] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140–1 [460]-[463] (Kiefel J). See also Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 6-8. See *Monis v the Queen* [2013] HCA 4, [144] (Hayne J).
[229] *Monis v the Queen* [2013] HCA 4, [347] (Crennan, Kiefel and Bell JJ).

Finally, a balancing exercise (otherwise known as strict proportionality) is undertaken – courts assess the social importance of Executive acts' contribution to legitimate ends against the social importance of avoiding Executive acts' limitation of infringed rights.[230] This balancing exercise could be considered as raising inherently political considerations appropriately left to the political process.[231] This is a legitimate concern. Nevertheless, courts should undertake this exercise as a corollary of their determination of fundamental common law rights' existence. It would be anomalous for courts to determine the existence of rights only to leave the political branches to determine how those rights can be infringed. Moreover, given courts require alternative means to be obvious and compelling to say a measure is not necessary, courts are likely to take a conservative position in relation to strict proportionality.

(b) *Consequences of Disproportionate Exercises of Nationhood Power*

The common law 'supplies principles for … [the Constitution's] interpretation and operation'.[232] Since the proportionality principle has roots in the rule of law, disproportionate infringements of fundamental common law rights are arbitrary.[233] In the absence of an equivalent of the common law principle of parliamentary supremacy for the Executive,[234] the common law's operation on nationhood power, as an aspect of the rule of law, is that disproportionate exercises of nationhood power are constitutionally invalid.[235]

2 *Proportionality in Context of Legislation Enacted Pursuant to s 51(xxxix)*

[230] Aharon Barak, 'Proportionality (2)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 738, 745.

[231] Bernhard Schlink, 'Proportionality (1)' in Michel Rosenfeld and András Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press, 2012) 718, 734–5.

[232] *South Australia v Totani* (2010) 242 CLR 1, 20 [1] (French CJ) citing Sir Owen Dixon, 'Marshall and the Australian Constitution' (1955) 29 *Australian Law Journal* 420, 424–5. [**Original:** … supplies principles for its interpretation and operation …]. See also *Condon v Pompano Pty Ltd* [2013] HCA 7, [2]-[3] (French CJ).

[233] *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 140 [457] (Kiefel J); *Roach v Electoral Commissioner* (2007) 233 CLR 162, 199 [85] (Gummow, Kirby and Crennan JJ).

[234] See generally *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] 1 AC 453, 482 [35] (Lord Hoffman).

[235] But see Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 249 citing *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 126 (Mason CJ, Toohey and Gaudron JJ) (arguing that Sir Owen Dixon's statement concerning the common law's operation was not suggesting that the common law was superior or inferior to the Constitution but setting the scene in which the Constitution operates). This caution should be considered in the context in which it was articulated. These situations were whether the common law of defamation circumscribes the constitutional implied freedom of political communication and whether rights can be implied from the Constitution. These situations are, of course, distinguishable.

Section 51(xxxix) provides Parliament with legislative power to enact laws incidental to the execution of constitutional powers vested in the Executive. Whether a law is incidental to nationhood power is a justiciable issue. At this juncture, a critical question emerges: does the rule of law require legislation incidental to execution of nationhood power to satisfy a proportionality test?

This article enunciates an affirmative answer. *First,* judicial authority supports this affirmative conclusion. *Davis v Commonwealth* involved legislative provisions that created offences for using prescribed symbols or expressions in connection with certain lawful activities without the Bicentenary Authority's consent. These provisions were beyond s 51(xxxix) because of a disproportionate infringement of a fundamental common law right: freedom of expression.[236]

Secondly, judicial authority rejecting proportionality in the characterisation process does not apply in this context. For example, *Leask v Commonwealth* held proportionality has no role in the characterisation process for non-purposive Commonwealth legislative powers. However, *Leask* does not reject the further proposition: proportionality has a role in purposive powers including s 51(xxxix).[237] Indeed, the *Pape* plurality implicitly applied a proportionality test when they held the impugned legislation — which created a duty on the Executive to make payments to eligible recipients and an obligation on recipients to restore overpayments — was supported by s 51(xxxix). This proportionality test was rendered relatively easier absent significant infringements of recipients' common law rights.[238]

Thirdly, it may be difficult, in principle, to embrace that proportionality only applies to some heads of legislative power.[239] In this context, however, there is a normative justification. Section 51(xxxix) gives effect to the execution of non-statutory executive power. Executive power is qualitatively different to

[236] *Davis v Commonwealth* (1988) 166 CLR 79, 100 (Mason CJ, Deane and Gaudron JJ). See generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 32–3.

[237] *Leask v Commonwealth* (1996) 187 CLR 579, 605–6 (Dawson J), 616 (Gaudron J), 617 (McHugh J agreeing with Dawson J), 624 (Gummow J) ('*Leask*'). But see *Leask v Commonwealth* (1996) 187 CLR 579, 593 (Brennan CJ); *Contra Leask v Commonwealth* (1996) 187 CLR 579, 614 (Toohey J). See generally Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 39–41.

[238] *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 92 [243]–[245] (Gummow, Crennan and Bell JJ)..

[239] *Leask v Commonwealth* (1996) 187 CLR 579, 635 (Kirby J); Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1, 39.

legislative power.[240] The express incidental power cannot transmogrify executive power to a status equivalent to legislative power.[241] That is, the express incidental power does not enable Commonwealth Parliament to achieve what the Executive cannot achieve under nationhood power.

Davis supports this proposition. Brennan J stated freedom of expression could 'hardly be an incidental casualty of an activity undertaken by the Executive Government to advance a nation which boasts of its freedom'. The impugned provisions were beyond s 51(xxxix) because they purported 'to control the commemoration in a manner which is beyond … executive power'.[242]

D *Conclusion*

This Part articulated and sought to defend several propositions: the common law affects the exercise of nationhood power as an aspect of the rule of law; nationhood power cannot constitutionally infringe common law rights unless that infringement is proportionate to legitimate ends; this assessment — subject to whether the end is consistent with the purposes of national government — is justiciable.

Part IV: Implicaitons and Application

The proposition that, subject to violation of constitutional prohibitions and infringement of fundamental common law rights, nationhood power's scope is non-justiciable engenders a traditional response: nationhood power will undermine the Constitution's federal structure. This Part critically analyses and addresses this response.

To do so, this Part adduces several reasons why, in this context, adoption of this hybrid justiciability framework will not undermine Australia's federal structure. In particular, this Part will demonstrate strategic, constitutional and rule of law reasons why the Commonwealth Executive and Parliament will pursue its policy objectives through enactment of legislation supported by other sources of Commonwealth power. This Part will conclude by illustrating practical applications of this hybrid non-justiciability framework.

[240] *Williams v Commonwealth* (2012) 288 ALR 410, 419 [27] (French CJ), 454 [135] (Gummow and Bell JJ).
[241] See *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 92 [244] (Gummow, Crennan and Bell JJ).
[242] *Davis v Commonwealth* (1988) 166 CLR 79, 116.

A *Implications*

Would the Commonwealth Executive's reliance on nationhood power and Commonwealth Parliament's enactment of s 51(xxxix) legislation curtail or destroy Australia's federal structure? A negative answer is justified for several reasons.

First, there is inherent uncertainty associated with reliance on nationhood power given the vagaries of the political process. Conversely, there are practical incentives to meet government policy objectives through drafting and enacting legislation pursuant to expert advice on s 51 powers' scope — whether based on judicial precedent of those powers' scope or based on an application of established general principles of constitutional interpretation. Of course, there is no certainty in constitutional law. However, to enact legislation pursuant to expert constitutional advice provides greater certainty as to its validity than to leave it to the determination of the political process.

There are also ancillary benefits associated with judicial validation of Commonwealth legislation's validity, particularly where political controversy surrounds the legislation's validity and substantive merits.[243] A compelling example of the benefits associated with judicial validation of legislation is *National Federation of Independent Business v Sebelius.*[244] The validity of *Patient Protection and Affordable Care Act 2010* which President Barack Obama initiated and persuaded Congress to enact despite fierce opposition was upheld by a narrow majority. Before this ruling, serious questions were raised about the validity of the legislative scheme; particularly the scheme's requirement for persons to purchase health insurance in order to avoid a compulsory payment to government. The Supreme Court removed this uncertainty by upholding the Obama administration's signature domestic achievement. The Democratic Party campaigned on the platform that the Obama administration took concrete and *constitutional* steps to provide universal healthcare.

Secondly, legislation receiving judicial endorsement of constitutional validity may enable Commonwealth Parliaments to regulate fields and activities potentially not constitutionally feasible if the Executive relies on nationhood power. For example, assume the Executive relied exclusively on nationhood power to support *Workplace Relations Amendment (Work Choices) Act 2005* (Cth) ('Workchoices'). Also assume the High Court held Commonwealth

[243]See Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Yale University Press, 2nd ed, 1986) 29–31.
[244]567 US 1 (2012).

legislation did not disproportionately infringe common law rights. As history illustrates, despite the High Court's endorsement of that legislation's constitutional validity, the political process, including the 2007 Commonwealth election and a new government and Parliament, rejected Workchoices. While there are numerous variables affecting an electoral result, the Howard government's reforms of the industrial relations system was a prominent electoral issue. It is plausible to surmise that Workchoices played a part in the electoral defeat of the Howard government. Undoubtedly, the same impact that Workchoices had on the electorate's decision would have occurred if, as a matter of constitutional law, the question of Workchoices' validity had been non-justiciable.

The court's broad interpretation of s 51(xx), however, has arguably provided capacity for the Commonwealth to intrude into fields traditionally within State areas of responsibility despite electoral and parliamentary rejection of Workchoices.[245] This hypothetical example illustrates at least one conclusion: it cannot be categorically asserted the Commonwealth would rely exclusively on nationhood power and s 51(xxxix) to justify and implement all its actions. This is particularly when the Commonwealth desires to implement programs resisted by States — States' capacities to influence and shape these political process outcomes should not be understated.

Thirdly, where legislation is supported under s 51, Commonwealth Parliament can create rights and impose duties. Conversely, nationhood power and s 51(xxxix) does not give the Commonwealth Executive and Parliament similar capacity to create rights and impose duties.[246] Indeed, Commonwealth Parliament's capacity under ss 61 and 51(xxxix) to regulate conduct and activities is 'likely to be answered conservatively'.[247] Punitive or coercive measures may be necessary to ensure efficacy of government schemes. Unlike other sources of legislative power, nationhood power and s 51 (xxxix) are unlikely to support such measures.

Consequently, the Commonwealth Executive and Parliament have strategic, constitutional and rule of law reasons for using other sources of

[245]See Productivity Commission, 'Gambling' (Report No 50, Australian Government Productivity Commission, 2010) 19.4 (suggesting that corporations power could support regulation of gambling industry).
[246]*Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 92 [244] (Gummow, Crennan and Bell JJ). *Cf Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 120–1 [342] (Hayne and Kiefel JJ) (giving a much wider scope to express incidental power).
[247]*Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1, 24 [10] (French CJ).

Commonwealth power to achieve Commonwealth policies, objectives and programmes. If the Commonwealth Executive and Parliament cannot rely on s 51 powers to achieve an end — in a non-punitive manner — reliance on nationhood power is consistent with the very purpose of this executive power.

B *Practical Application: Non-Justiciability Framework*

1 *Williams*

Assuming no s 51 power supported National School Chaplaincy Program (NSCP), the political process would determine whether funding school chaplaincy services is a matter consistent with purposes of the national government or exclusively a State issue. The common law has not recognised a right to secular education. Even if the High Court held this right did exist, NCSP would not have involved a disproportionate infringement of that right — use of chaplaincy services was voluntary. If, however, the NSCP compelled students to use chaplaincy services, there are compelling reasons for concluding that requiring persons to use those services — thereby infringing a common law right to take or not take a course of action[248]— would be a disproportionate means of supporting school chaplaincy services.

2 *HIH Claims Support Ltd v Insurance Australia Ltd*[249]

It appears Gummow and Bell JJ in *Williams* considered nationhood power would not support the scheme in *HIH Claims* because it could be funded by s 96 grants.[250]

HIH Claims involved the Commonwealth establishing a scheme, managed and administered by a trustee, to assist those insures affected by the insolvency of insurance companies in the HIH Group. The Commonwealth, under appropriation legislation, provided $640 million to provide financial assistance. Under a non-justiciability approach, if this scheme's constitutional validity were challenged and the Commonwealth relied on nationhood power, the political process would decide whether the scheme was consistent with the purposes of the national government. The scheme does, in some respects, affect common law rights. For instance, the scheme's trustee has power to 'undertake investigations' into applications for assistance. Since this power appears

[248] *Gifford v Strang Patrick Stevedoring Pty Ltd* (2003) 214 CLR 269, 284 [36] (McHugh J); *Lehman Bros Holdings Inc v City of Swan* (2010) 240 CLR 509, 531 [66] (Heydon J).
[249] (2011) 244 CLR 72 (*'HIH Claims'*).
[250] (2012) 288 ALR 410, 456 [146] nn 249.

necessary for the integrity of the scheme, infringement of common law rights arising from exercises of this power would satisfy the proportionality test.

Moreover, applicants assign rights under the insurance policy and forgo rights to recover money in the insurer's liquidation. Consequently, the issue would be: are these infringements proportionate to achieving the legitimate end of financial assistance for insures affected by HIH Group's collapse? Given that those insured would receive at least 90 per cent of the amount they would have been paid by the insolvent insurer, it is likely courts would consider this infringement of common law rights to be proportionate to the legitimate end. [251]

Hence, the scheme would arguably not involve a disproportionate infringement of common law rights. Therefore, under this framework, the constitutionality validity of the scheme would be left to the political process.

Conclusion

Nationhood power's underlying premise is that powers appropriate to the national polity may change with the nation's growth and progression. Consequently, nationhood power's scope involves assessing which polity within the federal structure should undertake particular activities in contemporary society notwithstanding the recognised distribution of powers of 1901. This assessment is a political, not judicial, question.

Judicial process constraints make courts ill-equipped to deal with the indeterminate policy considerations involved in assessing which polity within the federal structure is appropriately equipped to undertake particular activities. Indeed, judicial assessments of what activities are supported under nationhood power illustrate a tendency for judges to invoke their personal beliefs about where power ought to reside within the federal structure. This is an inappropriate basis upon which to resolve critical issues about the operation of that structure. This is particularly so when the political process, a constitutional mechanism for policing unconstitutional Executive acts, is more appropriately equipped to determine where power should reside within the federal structure so as to meet the needs of contemporary society.

Consequently, nationhood power's scope — subject to constitutional prohibitions — is a non-justiciable question to be resolved through the political process. An important qualification has also been suggested and supported —

[251](2011) 244 CLR 72, 79–82 [6]–[9], [15]-[16] (Gummow ACJ, Hayne, Crennan and Kiefel JJ).

courts have a role when nationhood power infringes common law rights of persons. This qualification flows from two premises. *First*, the common law, as determined by courts, is a vital component of the Constitution's foundation. *Secondly*, the common law's operation affects exercises of government power as an aspect of a fundamental assumption underlying the Constitution: the rule of law. Disproportionate infringements of fundamental common law rights by the Commonwealth Executive and Parliament acting pursuant to s 51(xxxix) are unconstitutional because there is no common law equivalent of parliamentary supremacy that applies to the Executive.

Importantly, this constitutional law hybrid–justiciability framework is not destructive of Australia's federal structure because constitutional, strategic and rule of law reasons ensure the Commonwealth relies on other sources of legislative power. Where the Commonwealth Executive cannot, via Commonwealth Parliament, utilise these other sources of power, this is consistent with nationhood power's purpose: to enable the Commonwealth Executive to undertake activities to cater for the needs of contemporary society.

Of course, this framework may seem, especially on first impression, unpalatable.

However, this critical premise of this article is that judicial process constraints make courts an inappropriate body for determining where executive power should reside within the federal structure. Consequently, this framework engenders two options: courts can reject nationhood power's existence or leave this power's scope to the political process.

There are strong reasons to suggest nationhood power is an unnecessary constitutional implication. The Constitution provides mechanisms — ss 51(xxxvii), 96, 128 and prerogatives adapted to new situations — to enable the Executive to carry out activities as required by contemporary society. If, however, nationhood power's existence is judicially promulgated and endorsed, this article advocates a viable conclusion that this hybrid–justiciability framework is the most pragmatically, democratically and constitutionally legitimate method of determining what activities are supported by nationhood power.

THE GOOD, THE BAD AND THE UNHEALTHY: AN ASSESSMENT OF AUSTRALIA'S COMPLIANCE WITH THE INTERNATIONAL RIGHT TO HEALTH

MARIETTE BRENNAN*

The understanding of the international right to health has flourished with the content of the right being detailed in Article 12 of the ICESCR. Despite the wide spread adoption of the ICESCR, few countries look to international standards when making domestic health care decisions. This paper seeks to explore how Australia's health care programs comply with the international right to health, despite successive Commonwealth governments making little attempt to comply with the international standards.

I INTRODUCTION

It seems as though the health care system and both the Commonwealth and State government[1] choices regarding it are rarely far from the headlines. The

*Mariette Brennan, PhD is an assistant professor at Lakehead University's faculty of law. She would like to thank Profs. Joan Gilmour, Aaron Dhir and Roxanne Mykitiuk for feedback on various sections of the paper. Additionally, the author would like to thank the law faculty at Bond University for its assistance.

[1] Historically health rights in the Australian constitution have been the subject of political compromises. Danuta Mendelson. 'Devaluation of a Constitutional Guarantee: The History of Section 51 (xxiiiA) of the Commonwealth Constitution' (1999) 23 Melb. U. L. Rev. 308; see also James A. Gillespie, *The Price of Health: Australian Governments and Medical Politics 1910-1960* (Cambridge University Press, 1991). At Federation, the States retained powers that were in their jurisdiction, unless the power was granted to the Commonwealth. In 1901, the only power that was assigned to the Commonwealth government, in terms of health, was found under section 51 ix (powers over quarantine); the residual powers over health remained with the States. Mendelson, *infra,* 311. The *Constitution* was subsequently amended to grant the Commonwealth government further powers in relation to health. Section 51 now states:

> . ..make laws for the peace, order, and good government of the Commonwealth with respect to 'xxiiiA) the provision of maternity allowances, widows' pensions, child endowment, unemployment, pharmaceutical, sickness and hospital benefits, medical and dental services (but not so as to authorize any form of civil conscription), benefits to students and family allowances.

See *Pharmaceuticals Benefits Case* (1945) 71 CLR 237 and *Federal Council of the British Medical Association in Australia and Others v The Commonwealth and Others (Pharmaceutical Benefits Case 2)* (1949) 70 CLR 201. Despite this expanded power, State governments also retained jurisdiction in the area of health; therefore the healthcare system relies on cooperation between the two levels of government. See Genevieve Howse, 'Managing Emerging Infectious Diseases: Is a Federal System an