ON JUDICIAL RASCALS AND SELF-APPOINTED MONARCHS: THE RISE OF JUDICIAL POWER IN AUSTRALIA[1]

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I INTRODUCTION

Do we live in an age of judicial hegemony? It is a commonplace observation that there has been a rise in judicial power around the globe. Aharon Barak, former President of the Supreme Court of Israel, once said that 'nothing falls beyond the purview of judicial review; the world is filled with law; anything and everything is justiciable'.[2] Scholars have described this phenomenon as a 'judicialisation of politics': a growing intrusion of the judiciary into realms once the preserve of the executive and legislative and a corresponding transfer of power to the courts.[3] Policy decisions that were once the exclusive preserve of democratic institutions are now ultimately resolved by judges, often in the guise of determinations about rights. This judicialisation has expanded to include matters of the utmost political significance that define whole polities.[4] No less than the identity of the United States President was determined in 2000 by the Supreme Court.[5] Further, legalistic methods of analysis are rapidly colonising routine decision-making within parliamentary committees and administrative agencies.

This article examines the extent to which there has been a rise in judicial power in Australia. Has the control and influence of Australian courts increased relative to the power exercised by the legislative and executive branches? Do courts routinely have the final say on contested policy questions? Has there been a 'judicialisation of politics' in Australia? Such questions invite both comparative and historical evaluations. To what extent have Australian courts participated in the worldwide rise in judicial power? To what extent are Australian courts more powerful than they were, say, 50 years ago?

These questions are relevant to several central concerns of contemporary public law. One is the proper role of the courts and their ability to perform their central rule of law function. Traditionally, judicial independence has been thought to rely on an

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1 These epithets have been adapted from Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2004) 10 *Otago Law Review* 493, 507 ('Judicial rascals are not to be thrown out. Political rascals can be') and Michael Kirby, 'Attacks on Judges: A Universal Phenomenon' (1998) 72 *Australian Law Journal* 599, 601 (referring to a criticism of the High Court as a 'pathetic … self-appointed [group of] Kings and Queens').

2 Linda White et al (eds.), *The Comparative Turn in Canadian Political Science* (UBC Press, 2008) 89.

3 Ran Hirschl, 'The Judicialization of Politics' in Robert E Goodlin (ed.), *The Oxford Handbook of Political Science* (Oxford University Press, 2009).

4 Ran Hirschl, 'The Judicialization of Mega-Politics and the Rise of Political Courts' (2008) 11 *Annual Review of Political Science* 93.

5 *Bush v Gore*, 531 US 98 (2000).

apolitical judiciary. While the 'fairy tale' that judges do not make law may have long been exploded,[6] there remain standards against which judicial reasoning can be assessed,[7] which gives rise to questions of whether the courts have overstepped the mark. In particular, does the courts' entry into partisan decision-making call into question their legitimacy more generally? Another issue is the 'central obsession' of American public law theory, the counter-majoritarian difficulty — the concern that unelected judges have power to overturn the decisions of democratically elected institutions.[8] The more the courts extend into the policy realm, the more acute this dilemma becomes. And another concerns the desire to ensure that contemporary democratic regimes properly protect human rights, and the extent to which this should be the province of the courts or the democratic branches.[9]

In this article we argue that there has been a modest rise of judicial power in Australia. This rise in power is attributable to the development by the High Court of a handful of important constitutional doctrines which involve an incursion into democratic decision-making, and there has been a significant expansion of the grounds on which executive action can be held unlawful. Apart from this, however, in few areas of policy or political decision-making can it be said that the High Court has the final say. Even in many of the High Court's most ambitious and controversial moments, the political branches retain substantial latitude in implementing their policies.

If this is so, it raises a deeper question. Why has Australia largely resisted a powerful and sweeping trend that has characterised most other comparable countries? We argue that while several factors are at play, the prime reason for this is the absence of a national bill of rights, both statutory and constitutional. Australia is very nearly unique in the world in this respect. Bills of rights give litigants an opportunity to involve courts in the review of administrative and legislative decisions in virtually any field of policy-making. When bills of rights are constitutional, they also give the courts a final say over the balance to be struck between competing rights and public goods. Bills of rights transfer very significant decision-making power to the courts. If the judges make use of these powers, they become accustomed to playing a much more overt policy-making role and this mindset has a tendency to tip over into the exercise by courts of their adjudicative functions more generally, particularly in constitutionally or politically significant cases. The resulting judicialisation of politics extends beyond 'ordinary' rights jurisprudence into the determination of what Ran Hirschl has called 'the most pertinent and polemical political controversies a democratic polity can contemplate'.[10] Against these trends, judicial and political culture in Australia have

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

7 Jeffrey Goldsworthy, 'Realism About the High Court' (1988) 18 *Federal Law Review* 27.

8 Ilya Somin, 'Political Ignorance and the Countermajoritarian Difficulty: A New Perspective on the "Central Obsession" of Constitutional Theory' (2004) 89 *Iowa Law Review* 1287.

9 See, eg, Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds.), *Protecting Human Rights: Institutions and Instruments* (Oxford University Press, 2003).

10 Hirschl, above n 3, 254. Hirschl offers as examples of such controversies the outcome of US and Mexican presidential elections, the war in Chechnya, the Pervez Musharraf-led military coup d'état in Pakistan, Germany's place in the EU, restorative justice dilemmas in post-authoritarian Latin America, post-Communist Europe, or post-apartheid South Africa, the secular nature of Turkey's political system, Israel's fundamental definition as a 'Jewish and Democratic State', and the political future of Quebec and the Canadian federation.

been relatively resistant to the courts playing a more overt policy-making role. The courts have tended to preserve a firm distinction between law and politics, leaving the policy merits of a particular law for the legislature to determine, and in administrative law they have maintained that their role is to adjudicate on the legality of a decision, with the merits being a matter for the decision maker. A robust political culture dominated by a disciplined party system, which is not slow to criticise the courts where they step outside their perceived legitimate role, reinforces this judicial 'reticence'.

II THE RISE OF JUDICIAL POWER WORLDWIDE

There is a well-developed comparative literature documenting a worldwide expansion of the role of the courts. This expansion of judicial power is often treated as synonymous with a kind of 'juristocracy',[11] namely an increasing intrusion of judicial and legalistic decision-making into the political realm. Two features of this judicialisation of politics have been identified. The first is the increasing determination by courts and judges of decisions and policies that were previously within the province of the other government branches, the legislature and the executive.[12] When judges come to have the final say on policies, the political branches find it difficult or impossible to overrule their determinations. A second feature is the increasing adoption of judicial-like decision-making methods outside the courts, especially through the adoption of legalistic rules and methods of reasoning by administrative decision-makers and parliamentary committees, the former in response to the threat of judicial review,[13] the latter sometimes as a result of legislative requirements.[14] When either or both of these kinds of judicialisation exist in a jurisdiction, there can be said to be a rise in judicial power. They are, however, distinct trends that need to be assessed independently of each other.

Dramatic and controversial examples abound from around the globe. The United States Supreme Court held in 2015 that the Fourteenth Amendment to the United States Constitution requires States to license marriages between two people of the same sex and to recognize marriages between two people of the same sex which were lawfully performed out of State.[15] In 1973 the Indian Supreme Court ruled that not even a formal constitutional amendment could legally abrogate from certain fundamental elements of the 'basic structure' of the Constitution.[16] In 1995 the Hungarian Constitutional Court struck down as unconstitutional various elements of

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11 Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2004).

12 Torbjörn Vallinder, 'When the Courts go Marching In', in C Neal Tate and Torbjörn Vallinder (eds.), *The Global Expansion of Judicial Power* (New York University Press, 1995), 13; C Neal Tate, 'Why the Expansion of Judicial Power?', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, 28.

13 Ibid.

14 Eg, *Human Rights (Parliamentary Scrutiny) Act 2011* (Cth); *Charter of Human Rights and Responsibilities Act 2006* (Vic); *Legislative Standards Act 1992* (Qld).

15 *Obergefell v Hodges*, 576 US ___ (2015).

16 *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461, discussed in Nicholas Aroney, 'Fundamental Law and Constitutional Rights in India and Australia' (2003) 29 *Indian Socio-Legal Journal* 89.

the austerity measures introduced by the Hungarian government designed to ward off bankruptcy.[17] The South Korean Constitutional Court in 2004 overturned the impeachment of President Roh Moo Hyun by the National Assembly and reinstated him to office.[18] In 2001 the Fijian Court of Appeal held that the 1997 Constitution[19] remained in force notwithstanding its purported overthrow by the Commander of Fiji's Military Forces.[20] It has been argued that the judges of the Turkish Constitutional Court have become 'co-legislators', overturning constitutional amendments for substantive reasons under the guise of enforcing the principle of secularism.[21]

Various reasons for the judicialisation of politics have been proposed. One scholar has suggested that a separation of powers, a 'politics of rights', interest group litigation, ineffective majoritarian institutions and wilful delegation by governments are all conditions which may facilitate a rise in judicial power.[22] Other institutional features are also significant, such as who has standing to bring constitutional cases, and whether non-parties are permitted to make submissions as *amicus curiae*. However, the most common explanation for the global increase of judicial power is the prevalence of rights instruments which have been adopted by many countries. While the extent of the increase of judicial power is debated, it is typically acknowledged that the introduction of constitutional bills of rights and statutory human rights enactments has increased the power of the judiciary.[23] In the absence of such rights instruments, the scope for judicial review is much more limited, being based primarily on matters of procedure and legality.[24]

III IDENTIFYING THE RISE IN JUDICIAL POWER

How is a rise in judicial power to be identified, explained and assessed? The comparative literature generally focusses on the balance of power exercised by the legislature, the executive and the judiciary respectively, and assesses the extent to which there has been an increase in judicial power at the expense of the power

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17 Herman Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press, 2000) 92-3.

18 Youngjae Lee, 'Law, Politics, and Impeachment: The Impeachment of Roh Moo-hyun from a Comparative Constitutional Perspective' (2005) 53 *American Journal of Comparative Law* 403.

19 *Constitution Amendment Act 1997* (Fiji Islands).

20 *Republic of Fiji v Prasad* (Unreported, Fiji Court of Appeal, Casey J (Presiding), Barker, Kapi, Ward and Handley JJA, 1 March 2001). The decree was the *Interim Military Government Decree No 1, Fiji Constitution Revocation Decree 2000*. For analysis see Anne Twomey, 'The Fijian Coup Cases — the Constitution, Reserve Powers and the Doctrine of Necessity' (2009) 83(5) *Australian Law Journal* 319.

21 Abdurrahman Saygil, 'What is Behind the Headscarf Ruling of the Turkish Constitutional Court?' (2010) 11 *Turkish Studies* 127, 136.

22 Tate, 'Why the Expansion of Judicial Power?', above n 12, 28–32.

23 Eg Frederick Vaughan, 'Judicial politics in Canada: patterns and trends', in Paul Howe and Peter H Russell (eds.), *Judicial Power and Canadian Democracy* (McGill-Queen's University Press, 2001), 15, 23; Erin F Delaney, 'Judiciary Rising: Constitutional Change in the United Kingdom' (2014) 108 *Northwestern University Law Review* 543. James Allan has also argued this point on numerous occasions: see, eg, James Allan, 'Turning Clark Kent into Superman: The New Zealand Bill of Rights Act 1990' (2000) 9 *Otago Law Review* 613.

24 Hirschl, above n 3, 263.

exercised by the non-judicial branches.[25] According to this approach, the mere fact that more cases are brought before the courts, or that courts overturn more government decisions or legislation than previously, is not necessarily indicative of a rise in judicial power; it could be that these are merely an inevitable consequence of an increasing number of governmental decisions being made. The relative increase in the power of courts is what matters, not an increase in the power exercised by all three branches of government taken as a whole.

In our view, an increase in judicial power can also occur through an overall increase in the power of government, in which the judiciary partakes, but without a corresponding diminution of the powers exercised by the non-judicial branches. In Australia, as in many other countries, there has been a sustained growth in the quantity and complexity of primary and secondary legislation over many decades,[26] accompanied by a marked, but less sustained, long term growth in the size of government relative to the private sector.[27] Alongside these trends has been a corresponding growth in the functions and powers exercised by tribunals and courts — deliberately conferred upon them by legislation. There is no doubt that there has been a very significant rise of judicial power in this sense in Australia. Legislation is frequently enacted conferring new powers on courts and tribunals. Some notorious examples include the powers conferred in the fight against organised crime and international terrorism, such as control orders, declarations against criminal organisations and anti-fortification orders.[28] But the trend is more widespread than high profile examples such as these.[29] In our view, these developments raise significant concerns not only for their potential interference with individual civil and political rights,[30] but also for the incursion of state institutions and legalistic modes of regulation into fields occupied by institutions of civil society,[31] juridifying and bureaucratising them in a manner that can hinder their ability to contribute to the common good.[32]

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25 Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12.

26 Chris Berg, 'Policy without Parliament: The Growth of Regulation in Australia' (2007) 19(3) *IPA Backgrounder* 1, 4.

27 Julie Novak, 'Economic Consequences of the Size of Government in Australia' (PhD Thesis, RMIT University, 2013).

28 The many examples include the *Fortification Removal Act 2013* (Vic) s 11; *Criminal Organisations Control Act 2012* (Vic) ss 19, 43.

29 This article is not the place to try to catalogue these powers. Their existence and growth is a notorious fact.

30 See, eg, Andrew Lynch, Nicola McGarrity and George Williams (eds.), *Counter-Terrorism and Beyond: The Culture of Law and Justice After 9/11* (Routledge, 2010); George Williams and Svetlana Tyulkina, 'Preventative Detention Orders in Australia' (2015) 38 *University of New South Wales Law Journal* 738; Nicola McGarrity, Lisa Burton and George Williams, 'The Extraordinary Questioning and Detention Powers of the Australian Security Intelligence Organisation' (2012) *Melbourne University Law Review* 415.

31 Robert Nisbet, *The Quest for Community: A Study in the Ethics of Order and Freedom* (ISI Books, 2010), ch 5.

32 See, eg, Matthew Turnour, *Beyond Charity: Outlines of a Jurisprudence for Civil Society* (PhD Thesis, Queensland University of Technology, 2009); Nicholas Aroney and Matthew Turnour, 'Charities Are the New Constitutional Law Frontier' (2017) 41 *Melbourne University Law Review* (forthcoming).

While we think that state displacement of roles formerly played by the 'intermediate' institutions of civil society is a serious problem, we do not consider further in this article the rise of judicial and governmental power in this general sense. Rather, in line with the comparative literature, we consider the rise in judicial power in Australia in terms of the balance between the branches of government and the extent to which there has been a transfer of power from the other branches to the courts. In our view, the primary way that an increase in judicial power has the potential to occur in Australia is through unrestrained and expansive approaches to constitutional interpretation and the interpretation of statutes that are accorded a quasi-constitutional status, such as statutory charters of rights. Novel advances in the common law effected by the judiciary may be overturned by legislation, and unwelcome interpretations of legislation can also be 'corrected' by subsequent legislation, but this does not apply to constitutions and politically unamendable statutes. For this reason, we focus on constitutional and quasi-constitutional jurisprudence in this sense.

Measuring a relative rise in judicial power is not a simple exercise. Two scholars recently wrote that 'there is no consensus on the concept or the measure of judicial power'.[33] In a recent paper, Stephen Gardbaum has proposed that the best measure of judicial power is not simply the number, frequency or proportion of cases in which courts use the power of judicial review to strike down legislation or administrative action, but a more rounded assessment of how consequential court decisions are in terms of affecting the outcomes of important constitutional and political issues and their impact on political and social life.[34] Gardbaum argues that the consequential power of the courts is a function of three broad factors: (1) formal legal rules and powers, (2) legal and judicial practice, and (3) the immediate political and electoral context.[35] Prime among the formal legal factors, Gardbaum says, is the existence of a justiciable written constitution, or a bill of rights with constitutional status. At this most basic level, Australia has a written constitution, but unlike many other countries, does not have a constitutional bill of rights, let alone a statutory one. According to Gardbaum, these factors are highly significant, but they are not the whole story. It is also relevant to consider the exact terms and scope of the constitution as well as the extent of the powers and jurisdiction available to the courts.[36] Of the particular measures that Gardbaum discusses, it is especially relevant to observe that the provisions of the Australian Constitution are largely restricted in their scope to defining the institutions of the Commonwealth and conferring powers upon them.[37] The Australian Constitution is not deliberately 'transformative'; it does not seek to bring about fundamental social or political change, except in the sense that its central purpose was to unite six Australian self-governing colonies into a federal

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[33] Daniel M Brinks and Abby Blass, 'Rethinking Judicial Empowerment: The New Foundations of Constitutional Justice' (2017) 15 *International Journal of Constitutional Law* 296, 321.

[34] Stephen Gardbaum, 'What Makes for More or Less Powerful Constitutional Courts?' (Paper presented at the International Society of Public Law Annual Conference, Copenhagen, 2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3050169##> 5.

[35] Ibid 8.

[36] Ibid 10-12.

[37] Nicholas Aroney, Peter Gerangelos, James Stellios and Sarah Murray, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) 42-44, 101-104, 202-204, 282-7.

commonwealth.[38] In relation to the High Court in particular, it is relevant to note that the judicial power of the Commonwealth is constitutionally vested in the High Court, other federal courts and State courts exercising federal jurisdiction[39] and that the power of judicial review, although not expressly stated, has always been understood to be intrinsic to the Constitution's design and purpose.[40] The High Court has jurisdiction to issue various constitutional writs and make binding declarations of invalidity, but it does not issue advisory opinions.[41] Unlike some constitutional courts, the High Court does not have authority to rule on constitutional amendments,[42] but it may be practically difficult for political actors to secure constitutional amendments in order to reverse court decisions.[43] Individuals and politicians can initiate constitutional proceedings before the courts, but the rules of locus standi in Australia are stricter than in other countries.[44] Judges are appointed by governments, no legislative approval for their appointment is required and no judges are popularly elected in Australia; federal judges have tenure to age 70 and are therefore institutionally independent.

As Gardbaum argues, however, constitutional formalities are not the whole story. It is also important to consider legal and judicial practice.[45] Courts may have substantial powers, but whether they actually exercise those powers, and the manner in which they exercise them, can vary. Here, it is pertinent to observe that Australian courts, and especially the High Court, frequently hold that legislation is unconstitutional and administrative action unlawful even when such decisions run contrary to the policies, preferences or expectations of governments, and they do so confident that their decisions will be obeyed, even if they are also occasionally publicly criticised, sometimes sharply.

Lastly, Gardbaum proposes that the consequential power actually exercised by courts depends on the immediate political, electoral and (we might add) social context in which the courts operate.[46] Countries that are totalitarian, autocratic or authoritarian usually have very weak courts that are subjected to significant political influence or control, notwithstanding the formal powers that a written constitution may appear to confer upon them. Even in democratic countries a single party may play an enduring or dominating role in the political scene and therefore be in a position to make highly politicised judicial appointments and otherwise leverage or manipulate the courts. In other democratic countries, however, it may be very rare for single parties to form governments in their own right, with the result that consensus judicial appointments acceptable to all partners in the governing coalition must be sought. Against these

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

39 *Constitution*, s 71.

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

41 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257.

42 *Australian Constitution*, s 128. For the position in other jurisdictions see Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (Oxford University Press, 2017).

43 George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (UNSW Press, 2010).

44 Patrick Keyzer, *Open Constitutional Courts* (Federation Press, 2010) 4, 27–31.

45 Gardbaum, above n 34, 13-17.

46 Ibid 17-19.

possibilities, as before, Australia falls somewhere in the middle: it is a genuine democracy in which electoral results periodically oscillate from one side of politics to another, but in which a single party, or a tightly-disciplined standing coalition of parties, is usually able to form government and therefore control judicial appointments. Although political orientations do sometimes play a role, Australian courts are not routinely packed, and appointees are not appointed for overtly partisan reasons.[47] Persons appointed to judicial office are almost always relevantly qualified and highly experienced. There is no discernible practice of systematically appointing very young lawyers as judges in order to influence the direction of the courts over the long term, or appointing lawyers who are close to retirement in order to destabilise the courts, as happens in some countries. While Australian judges are generally well-respected, they are nonetheless conscious that the goodwill of the public and the support of the political class depends on the non-partisan manner in which they exercise their powers.

IV THE RISE OF JUDICIAL POWER IN AUSTRALIA

Based on the factors discussed in the previous section, we would expect Australian courts to be moderately powerful within the basic parameters set by the Australian constitutional system. There are, throughout the history of the High Court, numerous examples of both majoritarian decisions — those which have upheld the validity of the actions of the legislative or executive branches — as well as counter-majoritarian decisions. As discussed above, however, the power of the judicial branch cannot be reduced to a single metric, but must be assessed relative to the overall patterns of decision-making within the constitutional system. The exercise of judicial power in Australia is best explained both thematically and chronologically. Considered thematically, key topics concern the High Court's jurisprudence on federalism, express rights, implied rights, the separation of powers and the principle of legality. When considered chronologically, the High Court's jurisprudence on these and other topics has undergone significant change and development.

A *Thematic overview*

For much of its history, the High Court has exercised a strong federalism-based judicial review, and has invalidated many Commonwealth and State laws on federal or federal-related grounds. The early High Court's doctrinal approach was broadly pro-states, having developed a jurisprudence designed to protect the nature of the federal compact, in particular the doctrine of implied immunities and reserved powers.[48] The Court's later doctrinal approach has been much more favourable to Commonwealth power, as illustrated by its approach to the interpretation of federal heads of power, characterisation of federal laws, approach to application of s 109 inconsistency, the

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[47] See generally Simon Evans and John Williams, 'Appointing Australian Judges: A New Model' (2008) 30 *Sydney Law Review* 295.

[48] John M Williams, 'The Griffith Court', in Rosalind Dixon and George Williams (eds.), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 88–91. These doctrines are assessed in Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly Is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* 1.

approach to Commonwealth taxation powers and the grants power under s 96.[49] While this illustrates the point that doctrinal choices by the High Court can have significant consequences for the federal balance of power, it is difficult to characterise this as a rise in judicial power relative to the other branches. For the most part, these doctrinal and constructional choices relate to the constitutional distribution of power between the Commonwealth and the States and therefore a power denied to one level of government would often be available to the other level.[50] That said, it must be acknowledged that many decisions have certainly prevented federal governments from implementing their wishes. Whether this represents an exertion of judicial power over the legislature and executive depends, in part, on whether the High Court has been faithfully applying the Constitution in such cases. Here it might be said that the Court has been too deferential to the elected branches.[51]

Australia, as is well known, has no constitutionally entrenched bill of rights, and its Constitution contains few rights, because the framers trusted the institutions of parliamentary responsible government to provide sufficient safeguards.[52] The rights that are contained in the Constitution have typically been given a relatively narrow construction. Section 41 has been interpreted as a transitional provision with no current legal effect.[53] A narrow purposive interpretation has been given to the 'establishment' and 'free exercise of religion' protections in section 116.[54] It has been argued that the Court's interpretation of s 80 has rendered it an 'illusory' protection, because it leaves it open to Parliament to determine which offences are indictable.[55] Other rights provisions have been given somewhat wider interpretations: the scope of section 117 was expanded in *Street*,[56] and s 51(xxxi) has been used to strike down a considerable

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49 Nicholas Aroney, 'The High Court of Australia: Textual Unitarism Vs Structural Federalism' in Nicholas Aroney and John Kincaid (eds.), *Courts in Federal Countries: Federalists or Unitarists?* (University of Toronto Press, 2017).

50 Compare Adrienne Stone, 'Judicial Review without Rights: Some Problems for the Democratic Legitimacy of Structural Judicial Review' (2008) 28 *Oxford Journal of Legal Studies* 1; José Casanova, 'Private and Public Religions' (1992) 59(1) *Social Research* 17; Nicholas Aroney, 'Reasonable Disagreement, Democracy and the Judicial Safeguards of Federalism' (2008) 27 *University of Queensland Law Journal* 129.

51 For critique, see James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia Has Undermined Australian Federalism' (2008) 30 *Sydney Law Review* 245.

52 Owen Dixon, *Jesting Pilate* (Law Book Company) 101–2. For critique see John M Williams, 'The Emergence of the Commonwealth Constitution', in H P Lee and George Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge University Press, 2003), 22–7.

53 *R v Pearson; Ex parte Sipka* (1983) 152 CLR 254; Jonathan Crowe and Peta Stephenson, 'An Express Constitutional Right to Vote? The Case for Reviving Section 41' (2014) 36 *Sydney Law Review* 205; Anne Twomey, 'The Federal Constitutional Right to Vote in Australia' (2000) 28 *Federal Law Review* 125.

54 See *Attorney-General (Vic) (Ex rel Black) v Commonwealth* (1981) 146 CLR 559, 579, 598–9, 616, 653. As one commentator put it: '[f]or the early High Court, religion began and ended at the church door': Joshua Puls, 'The Wall of Separation: Section 116, the First Amendment and Constitutional Religious Guarantees' (1998) 26 *Federal Law Review* 83, 142. See also Clifford L Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41, 68.

55 George Williams and David Hume, *Human Rights under the Australian Constitution* (Oxford University Press, 2nd ed, 2013) 357.

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

array of laws,[57] including the Chifley Government's bank nationalisation scheme,[58] although many more challenged laws, some of them politically very significant, have been upheld.[59] The prohibition on laws interfering with freedom of interstate trade, commerce and intercourse in section 92 of the Constitution has also been used by the Court, particularly under its 'individual rights' interpretation of the provision, to strike down legislation regulating trade and commerce of that description.[60] However, the Court's decision in *Cole v Whitfield* in 1988 considerably reduced the scope and effect of the provision, and the invalidation of laws has become less frequent.[61]

Perhaps ironically, the Court has been more adventurous in the development of implied rights, particularly an implied freedom of political communication which the Court found in 1992 imposes constraints on the ability of the Commonwealth Parliament to make laws limiting freedom to discuss political matters.[62] To this has since been added a constitutionally entrenched guarantee of universal adult suffrage (subject to reasonable and proportionate limitations)[63] and what has been called a guarantee of '[e]quality of opportunity to participate in the exercise of political sovereignty'.[64] Numerous laws, many of high political significance, have been struck down on these grounds,[65] while other laws have been read down so as to comply with the implied freedom,[66] and the common law of defamation has also been adjusted as a result.[67]

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57 Eg, *Minister of State for the Army v Dalziel* (1944) 68 CLR 261; *Georgiadis v Australian and Overseas Telecommunications Corporation* (1994) 179 CLR 297; *Newcrest Mining (WA) v Commonwealth* (1997) 190 CLR 513.

58 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

59 Eg, *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; *Commonwealth v Tasmania* (1983) 158 CLR 1; *Nintendo Co Ltd v Centronics Systems Pty Ltd* (1994) 181 CLR 134; *Mutual Pools & Staff Pty Ltd v Commonwealth* (1994) 179 CLR 155; *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480; *Health Insurance Commission v Peverill* (1994) 179 CLR 226; *Commonwealth v WMC Resources Ltd* (1998) 194 CLR 1; *ICM Agriculture Pty Ltd v Commonwealth* (2009) 240 CLR 140; *JT International SA v Commonwealth* (2012) 250 CLR 1.

60 Eg, *R v Smithers; Ex parte Benson* (1912) 16 CLR 99; *W & A McArthur v Queensland* (1920) 28 CLR 530; *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29; *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

61 *Cole v Whitfield* (1988) 165 CLR 360; *Barley Marketing Board (NSW) v Norman* (1990) 171 CLR 182; *Betfair Pty Ltd v New South Wales* (2012) 249 CLR 217. However, see *Bath v Alston Holdings Pty Ltd* (1988) 165 CLR 411; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436; *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418.

62 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

63 *Roach v Electoral Commissioner* (2007) 233 CLR 162; *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

64 *McCloy v New South Wales* (2015) 89 ALJR 857, 870 [45] (French CJ, Kiefel, Bell and Keane JJ).

65 In addition to the cases cited above, see *Unions NSW v New South Wales* (2013) 252 CLR 530; *Brown v Tasmania* (2017) 91 ALJR 1089.

66 Eg, *Coleman v Power* (2004) 220 CLR 1; *Monis v The Queen* (2013) 249 CLR 92.

67 *Theophanous v The Herald & Weekly Times Limited* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; moderated in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

The Court's decisions in these cases generated considerable controversy.[68] Some defended them on the ground that freedom of political speech is an essential element of a properly functioning democratic system, and that the decisions therefore enhanced Australian democracy rather than diminished it.[69] Others questioned their legitimacy on the ground that all of the evidence suggests that no such intention or understanding existed when the Constitution was drafted, popularly approved and enacted into law.[70] While each step in the reasoning may have seemed plausible, when the cumulative effect of the reasoning is considered, not only was the result far-removed from the text of the Constitution, but it involved a significant transfer of power to the courts to make determinations about the proper political balance to be struck in relation to the legal regulation of elections and political speech. While the framers of the Constitution intended to establish a system of representative and responsible government, it did not follow that they, or the voters who ratified the Constitution, intended that unelected judges should have the authority to determine whether laws enacted by a democratically elected Parliament are constitutional on this ground.[71]

Also noteworthy is the High Court's separation of powers jurisprudence. The High Court has jealously guarded the institutional independence of the federal judiciary, imposing limitations on the functions that may be conferred on federal courts and judges. Perhaps ironically, this doctrine limits the ability of the courts from playing a more active role under statutory human rights enactments, but it also limits the capacity of the Parliament to determine what the powers and functions of the courts should be. In its highly significant decision in *Momcilovic v The Queen* the Court held that the power to issue declarations of inconsistent interpretation under s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) was not an exercise of judicial power, and therefore could not be conferred on courts exercising federal jurisdiction.[72]

The Victorian Charter and the ACT *Human Rights Act 2004* require parliamentary committees to scrutinise legislation for its consistency with human rights norms and require public authorities to act compatibly with human rights and give proper consideration to human rights in making decisions,[73] contributing to a juridification of the way in which parliaments enact legislation and public authorities administer the law in those jurisdictions. These enactments also authorise courts to interpret legislation in a way that is compatible with human rights, but only where it is

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68 See, eg, the articles in the special editions of (1994) 16 *Sydney Law Review* and (2011) 30 *University of Queensland Law Journal*.

69 Stephen Donaghue, 'The Clamour of Silent Constitutional Principles' (1996) 24 *Federal Law Review* 133.

70 See Jeffrey Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (1997) 32 *Monash University Law Review* 362.

71 George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the Constitution' (1995) 18 *University of Queensland Law Journal* 249.

72 *Momcilovic v The Queen* (2011) 245 CLR 1, [80], [89] (French CJ), [172]–[189] (Gummow J), [280] (Hayne J), [457] (Heydon J), [584] (Crennan and Kiefel JJ), [661] (Bell J).

73 *Charter of Human Rights and Responsibilities Act 2006* (Vic) ss 30, 38; *Human Rights Act 2004* (ACT) ss 38, 40B.

possible to do so consistently with the purpose of the law.[74] Under corresponding legislative provisions in the United Kingdom and New Zealand, the courts have been willing to depart from the unambiguously clear intentions of the Parliament by 'read[ing] in words which change the meaning of the enacted legislation' so as to make it compliant with the court's interpretation of human rights norms.[75] Despite their tighter language, the Victorian and ACT Charters could arguably have been applied by Australian courts in a similarly expansive way,[76] but in *Momcilovic* a majority of the High Court adopted a narrower approach to the reading down provision in the Victorian Charter, thereby securing its constitutional validity. Central to this finding of validity was the proposition that s 32(1) preserved 'the traditional role of the courts in interpreting legislation' and did not confer on the courts what might amount to a 'law-making function'.[77] Unlike the national human rights regimes of the United Kingdom, Canada, South Africa, New Zealand and Hong Kong, the Victorian Charter is subject to a written federal Constitution which, as interpreted by the High Court, requires that courts exercising federal jurisdiction may only be invested with 'judicial power'.[78] An amendment to the Australian Constitution — such as the incorporation of a Bill of Rights — would be necessary to change this.

Momcilovic has thus had the consequence of effectively preventing Australian legislators from fully implementing a 'dialogue' model of human rights protection.[79] Rather, consistently with the reasoning in *Momcilovic*, it has been the principle of legality that has played a more significant role in Australian jurisprudence. This principle requires courts to interpret statutes 'where constructional choices are open, to avoid or minimise their encroachment upon rights and freedoms at common law'.[80] Prompted, it has been said, by the rise of human rights 'as a core concern of the international legal order' in the aftermath of World War II, the principle of legality has

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74 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32; *Human Rights Act 2004* (ACT) s 30.

75 *Ghaidan v Godin-Mendoza* [2004] UKHL 30; [2004] 2 AC 557, 571–2 (Lord Nicholls).

76 James Allan, 'The Victorian Charter of Human Rights and Responsibilities: Exegesis and Criticism' (2006) 30 *Melbourne University Law Review* 906; Julie Debeljak, 'Who Is Sovereign Now? The Momcilovic Court Hands Back Power over Human Rights That Parliament Intended It to Have' (2011) 22 *Public Law Review* 15.

77 *Momcilovic v The Queen* (2011) 245 CLR 1, 47-50 [46]-[51] (French CJ), 84 [146](vi), 92-3 [171] (Gummow J), 123 [280] (Hayne J), 217 [566] (Crennan and Kiefel JJ), 250 [684] (Bell J). In his dissenting judgment on this point, Heydon J found that the reading down provision was unconstitutional precisely because he considered it *did* confer on the courts an essentially legislative function which, when intertwined with their judicial functions, would 'alter the nature of the those judicial functions and the character of the court as an institution': *Momcilovic v The Queen* (2011) 245 CLR 1, 164 [409], 172 [431], 174-5 [436]-[439], 184 [454] (Heydon J, dissenting). His Honour's reasoning was based on the view that the reading down provision of the Victorian Charter (s 32(1)) required the courts to consider whether a human right can justifiably be limited (pursuant to s 7(2)).

78 See *Momcilovic v The Queen* (2011) 245 CLR 1, 83 [146](i), 87-90 [148]-[161] (Gummow J).

79 Will Bateman and James Stellios, 'Chapter III of the Constitution, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1.

80 *Momcilovic v The Queen* (2011) 245 CLR 1, 46 (French CJ); *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ), 446 (Deane and Dawson JJ agreeing). See also Chief Justice J J Spigelman, 'Principle of Legality and the Clear Statement Principle' (2005) 79 *Australian Law Journal* 769, 774–5, 780–1.

been applied with increasing vigour in Australia.[81] Indeed, this has occurred to such an extent that it can be said that the courts have developed 'a common law bill of rights, freedoms and principles that is strongly resistant to legislative encroachment' under the guise of the principle of legality.[82] Chief Justice French described the principle of legality 'as "constitutional" in character' and 'that common law freedoms are more than merely residual'.[83] Under the doctrine of legality, Parliament retains the power to override common law rights and freedoms, but it must do so unambiguously.

B *Chronological development*

For much of its history, the High Court has been cautious of judicial law-making, developing the law in an incremental way, and aspiring to maintain predictable and stable outcomes by adhering to precedent.[84] The predominant approach to constitutional interpretation has been characterised as 'literalism' (namely, that 'constitutional words are to be given their full, natural or literal meaning as understood in their textual and historical context') or 'legalism' (namely that 'constitutional issues can and should be resolved only by reference to norms and values within the "four corners" of the Constitution').[85] However, no one 'modality' of constitutional interpretation dominates. As Gummow J once put it, questions of interpretation of the Constitution 'are not to be answered by the adoption and application of any particular all-embracing and revelatory theory or doctrine of interpretation'.[86] Judges routinely justify their interpretations by reference to the modalities of text, structure, history, ethics, prudence and doctrine.[87] Nevertheless, the key focus remains the text of the Constitution. Justice Brad Selway argued that 'all Australian High Court judges are likely to be viewed as being fundamentally "textualists"', regarding the text as the primary interpretative tool'.[88]

The members of the early High Court under Chief Justice Griffith had all been delegates at the federation debates in the 1890s, and read the Constitution in light of

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81 Dan Meagher, 'The Common Law Principle of Legality in the Age of Rights' (2011) 35 *Melbourne University Law Review* 449, 453–6; Conor Gearty, *Can Human Rights Survive?* (Cambridge University Press, 2006) 25–8.

82 Dan Meagher, 'The Principle of Legality as Clear Statement Rule: Significance and Problems' (2014) 36 *Sydney Law Review* 413, 415. See also James Spigelman, *Statutory Interpretation and Human Rights* (University of Queensland Press, 2008).

83 Robert French, 'Human Rights Protection in Australia and the United Kingdom: Contrasts and Comparisons' (Speech delivered at the Anglo-Australasian Law Society and Constitutional and Administrative Law Bar Association, London, 5 July 2012) 22 <www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj05july12.pdf>.

84 Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (Carolina Academic Press, 2006) ch 3.

85 Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323, 324.

86 *SGH Ltd v Commissioner of Taxation* (2001) 210 CLR 51, [42].

87 Nicholas Aroney, 'Originalism and Explanatory Power' in Lisa Burton Crawford, Patrick Emerton and Dale Smith (eds.), *Festschrift in Honour of Jeffrey Goldsworthy* (Hart Publishing, forthcoming 2018).

88 Justice B M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 239.

this political context. The Court was divided by the competing approaches of Griffith, Barton and O'Connor, on the one hand, and Isaacs and Higgins, on the other, and this division continued the pre-federation debates about the 'true' nature of the federal compact.[89] With its landmark decision in the *Engineers Case*,[90] the Knox Court (1919–1930) saw a significant shift in constitutional interpretation, rejecting the reserved powers and implied intergovernmental immunities doctrines which had been such a prominent feature of the Griffith era, and emphasising the text of the Constitution, albeit in a way that endorsed a deliberately nationalistic understanding of the federation.[91] During this period the Constitution, it has been said, 'ceased to be a political document and became a legal document'.[92] Commentators have suggested that in the ensuing decades, the Court sometimes displayed a considerable degree of deference to the legislature and executive, leaving political and policy matters to be dealt with by the political branches of government, and at other times showed itself willing to overturn executive and legislative action.[93]

The Mason Court (1987–1995) is frequently said to have unashamedly embraced a more politicised and 'activist' role, introducing significant developments in numerous areas of law, several of which have been mentioned. Two studies of the Court during this time have concluded that the High Court self-consciously sought to redefine itself, considering that active law-making and policy-informed adjudication was an indispensable part of the judicial function.[94] The Mason Court excited considerable controversy, being responsible for some of the most well-known judgments in the High Court's history, including extending the common law to recognise native title,[95] discerning an implied freedom of political communication,[96] holding an amendment to a company's articles of association to expropriate minority shareholders to be invalid,[97] and holding that courts should order a stay of a criminal

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89 Williams, 'The Griffith Court', above n 48, 95.

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

91 Ibid 160, 162.

92 Anne Twomey, 'The Knox Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48, 98.

93 See Gabrielle Appleby, 'The Gavan Duffy Court' and Fiona Wheeler, 'The Latham Court: Law, War and Politics', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48.

94 Pierce, *Inside the Mason Court Revolution*, above n 84; Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000).

95 *Mabo v Queensland (No 2)* (1992) 175 CLR 1. The Court subsequently held in *Wik Peoples v Queensland* (1996) 187 CLR 1 that the grant of a pastoral lease did not necessarily extinguish native title. See Margaret Stephenson and Suri Ratnapala, *Mabo: A Judicial Revolution* (University of Queensland Press, 1993).

96 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1. See H P Lee, 'The Implied Freedom of Political Communication, in H P Lee and George Winterton (eds.), *Australian Constitutional Landmarks* (Cambridge University Press, 2003).

97 *Gambotto v WCP Ltd* (1995) 182 CLR 432. The *Australian Financial Review* referred to the High Court decision as having 'radically altered the balance of power within corporate Australia' and appeared 'to have turned Australia into a greenmailer's paradise': *Australian Financial Review*, 9 March 1995. For analysis see Ian M Ramsay and Benjamin B Saunders, 'What Do You Do with a High Court Decision You Don't Like? Legislative, Judicial and Academic Responses to *Gambotto v WCP Limited*' (2011) 25 *Australian Journal of Corporate Law* 112.

trial where an accused charged with a serious offence is unable to obtain legal representation and an unfair trial would result.[98] The Court was widely criticised for these (and other) decisions.[99]

The extent to which the Mason era represented a radical change has been debated. Some have argued that the Court 'did not revolutionize the basic judicial techniques' and characterised the Mason Court's approach as 'a restrained activism that paid due deference to the limits of the judicial function'.[100] Others consider the Mason Court to have engaged in 'opportunistic judicial activism',[101] while yet others have characterised the Court as a wholly 'unfaithful servant' of the Constitution.[102] Mason himself argued that the new approach was more 'honest' than earlier ones because it made explicit the policy values that were disguised by legalism.[103] Serious doubts remain, however, about whether the new techniques do enable the judges to explain the real grounds of their decisions.[104] What seems clear is that the Mason Court's approach was significantly different from its predecessors[105] and undeniably effected significant changes in legal doctrine, going beyond what was previously considered the legitimate role of the Court.

Since the Mason era, the High Court is often said to have retreated from the 'activist' conception of the judicial role.[106] Some commentators have noted a relatively cautious approach to constitutional interpretation during the Gleeson era (1998–2008), confirming or recasting existing lines of authority rather than 'striking out in bold new directions'.[107] However, under Chief Justice Robert French, the Court is considered to

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98 *Dietrich v The Queen* (1992) 177 CLR 292.

99 Some of the most colourful criticisms are collected in Kirby, above n 1.

100 Fiona Wheeler and John Williams, ''Restrained Activism' in the High Court of Australia', in Brice Dickson (ed.), *Judicial Activism in Common Law Supreme Courts* (Oxford University Press, 2007), 19–21, 55.

101 Tom Campbell, 'Judicial Activism — Justice or Treason?' (2003) 10 *Otago Law Review* 307, 320.

102 Greg Craven, 'The High Court and the Founders: an Unfaithful Servant' in Kathleen Dermody and K Walsh (eds.), *The Constitution Makers*: Papers on Parliament No 30 (Department of the Senate, 1997) 63. See also Greg Craven, 'The High Court of Australia: A Study in the Abuse of Power' (1999) 22 *University of New South Wales Law Journal* 216.

103 Anthony Mason, 'The Centenary of the High Court of Australia' (2003) 5 *Constitutional Law and Policy Review* 41, 45.

104 For criticism, see Nicholas Aroney, 'Julius Stone and the End of Sociological Jurisprudence: Articulating the Reasons for Decision in Political Communication Cases' (2008) 31(1) *University of New South Wales Law Journal* 107.

105 Paul Kildea and George Williams, 'The Mason Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48, 246.

106 Rosalind Dixon and Sean Lau, 'The Gleeson Court and the Howard Era: A Tale of Two Conservatives (and isms)', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48; B M Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 324; Haig Patapan, 'High Court Review 2001: Politics, Legalism, and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241. Not all agree with this assessment: see, eg, Patrick Emerton and Jeffrey Goldsworthy, 'The Brennan Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

107 Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2008 Statistics' (2009) 32 *University of New South Wales Law Journal* 181, 193.

have again become more adventurous,[108] having introduced important developments in constitutional doctrine such as constraints upon Commonwealth executive power to contract and spend,[109] and reinvigorating and extending the *Kable* principle.[110] It may be too early to form a view about the Kiefel Court, but the willingness of members of the Court to use a balancing test for the implied freedom of political communication will continue to be an important indicator of the extent to which the Court may be 'overstepping the boundaries of its supervisory role' and thereby 'undermining the very system of representative government which it is charged with protecting'.[111]

Even if a relatively more cautious approach has characterised the Court since the mid-1990s, the judicial role has continued to expand. Arguing that there has been 'a remarkable expansion of judicial power at the expense of the legislative and executive powers of elected parliaments and governments' since the 1990s,[112] former Federal Court judge Ronald Sackville has identified three areas of jurisprudence which evidenced this trend. The first is the entrenchment of judicial review of executive action at both the federal and State levels,[113] with the result that Australian Parliaments cannot remove the ability of courts to review decisions of executive bodies.[114] At the same time, the courts dramatically expanded the grounds on which such review may be undertaken.[115] According to Sackville, the High Court's assertion of power to correct jurisdictional error has profoundly altered the balance of power between the courts and elected governments and parliaments.[116] The second component is the increasing protectiveness of the institutional integrity of Australian courts by means of the *Kable* doctrine and its extension in recent cases.[117] The development of this constitutional implication limits the functions that may be conferred on State courts, requiring that State courts remain independent and impartial in the exercise of their powers, that their proceedings are fair, that they must give reasons for their decisions and must adhere to the open court principle.[118] Sackville's third illustration is the implied freedom of

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[108] Harry Hobbs, Andrew Lynch and George Williams, 'The High Court under Chief Justice Robert French' (2017) 91 *Australian Law Journal* 53; Anika Gauja and Katharine Gelber, 'The French Court', in Dixon and Williams (eds.), *The High Court, the Constitution and Australian Politics*, above n 48.

[109] *Pape v Commissioner of Taxation* (2009) 238 CLR 1; *Williams v Commonwealth* (2012) 248 CLR 156.

[110] *K-Generation v Liquor Licensing Court* (2009) 237 CLR 501; *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181; *Condon v Pompano Pty Ltd* (2013) 252 CLR 38; *A-G (NT) v Emmerson* (2014) 253 CLR 393; *Kuczborksi v Queensland* (2014) 254 CLR 51; *Pollentine v Bleijie* (2014) 253 CLR 629; *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569.

[111] *Brown v Tasmania* (2017) 91 ALJR 1089, [434] (Gordon J), see also [290] (Nettle J).

[112] Ronald Sackville, 'An Age of Judicial Hegemony' (2013) 87 *Australian Law Journal* 105, 105.

[113] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 and *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531.

[114] Sackville, 'An Age of Judicial Hegemony', above n 112, 109–113.

[115] See, eg, John McMillan, 'Natural Justice — Too Much, Too Little Or Just Right?' (2008) 58 *AIAL Forum* 33.

[116] Sackville, 'An Age of Judicial Hegemony', above n 112, 113.

[117] *Kable v Director of Public Prosecutions* (1996) 189 CLR 51.

[118] *International Finance Trust Co v NSW Crime Commission* (2009) 240 CLR 319; *South Australia v Totani* (2010) 242 CLR 1; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *Wainohu v New South Wales* (2011) 243 CLR 181; *Hogan v Hinch* (2011) 243 CLR 506.

political communication, the significance of which has been discussed. As a constitutional limitation, the implied freedom undoubtedly increases judicial power at the expense of the legislature and executive.[119] On Sackville's analysis these three areas represent a considerable transfer of power to the judiciary, with potential for 'further anti-majoritarian intrusions into areas hitherto the province of parliaments and executive governments'.[120] Other commentators have offered additional examples.[121]

C *Shifts in the Balance of Power*

The three areas of jurisprudence noted in the previous section undoubtedly amount to a rise in judicial power. But to what degree? While the Court is undoubtedly reviewing administrative action and striking down laws on grounds that were not available in previous times, the question for our purposes is: to what extent has this altered the balance of power between the different branches of government? Compared to the situation prevailing prior to the Mason Court, the overall balance has shifted towards the judiciary. However, when compared to the rise of judicial hegemony in other jurisdictions, the change has not been nearly so great. This can be shown by considering Sackville's three examples.

The first example given by Sackville is judicial review of executive action. It is certainly true that the courts have shown increased willingness to assert jurisdiction to review executive action, and in many cases to overturn executive decisions. However, key features of administrative law moderate the extent to which this involves a relative increase in judicial power, particularly in relation to the legislature. The first and most obvious reason for this is that the courts continue to preserve a firm distinction between merits and legality, with the courts' function confined to reviewing 'the manner in which the decision was made', and not the substantive merits of a decision.[122] In judicial review 'the court is not concerned with the merits or correctness of the administrative decision'.[123] That said, the distinction between merits and method may sometimes be elusive;[124] and some grounds of review clearly consider substance. As such, the precise boundary between merits and legality is yet to be satisfactorily articulated.[125] It is nevertheless true that there is a distinction between merits and legality, with the merits of administrative action being, as Brennan J put it, 'for the repository of the relevant power and, subject to political control, for the repository

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119 Sackville, 'An Age of Judicial Hegemony', above n 112, 116.

120 Sackville, 'An Age of Judicial Hegemony', above n 112, 119.

121 James Allan, *Democracy in Decline: Steps in the Wrong Direction* (McGill-Queen's University Press, 2014) 36; Brian Galligan, 'Judicial Intrusion into the Australian Cabinet', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12.

122 *Chief Constable of the North Wales Police v Evans* [1982] 3 All ER 141, 155, quoted in, among other Australian cases, *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, [23] (Gleeson CJ); *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, [105] (McHugh and Gummow JJ); *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).

123 *NAIS v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 228 CLR 470, [23] (Gleeson CJ).

124 *Kioa v West* (1985) 159 CLR 550, 622 (Brennan J).

125 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2012) 40.

alone'.[126] The courts will, likewise, not adjudicate on the merits of a policy adopted by an administrative body.[127] This distinction operates as an inbuilt limit on the ability of the courts to encroach on executive decision-making.

A second feature of administrative law is that the courts' role is largely limited to ensuring that executive bodies who make decisions under parliamentary enactments do so in accordance with applicable legal limits. The underlying policy of the statute, its purpose, provisions and powers are entirely up to the legislature: assuming constitutional validity, the legislature can determine what powers to confer on the executive and what conditions trigger the exercise of those powers. The courts will not generally inquire into the wisdom or desirability of those powers, but they will seek to ensure that the executive branch does not exceed the limits placed on its powers by the legislature. John McMillan has written that natural justice does not:

> impede the government administration from implementing statutory purposes and objectives. An unyielding principle is that natural justice is merely a doctrine of procedural fairness. It does not speak to the merits of an administrative decision. Natural justice has been likened to a last meal before the hanging, but even so it affirms a fundamental principle that procedural integrity is important, whatever the substantive outcome.[128]

This is not to deny that the power of the judiciary has increased or that judge-made doctrines have become more onerous. Clearly, they have.[129] The judicial function nevertheless remains a relatively narrow one and substantial freedom remains, especially to the legislative branch. By contrast, American courts, for example, appear to undertake a much more intrusive review function in relation to executive action, including executive rulemaking.[130]

Similar observations can be made in relation to the High Court's application of judicial separation principles to State courts in the *Kable Case*. The doctrine in *Kable*, once lamented as the 'constitutional guard dog' that only barked once,[131] has in recent times been asserted with increasing vigour, and extended to include additional defining characteristics which cannot be removed without impairing the institutional integrity of the courts.[132] In assessing the impact of *Kable* on the balance of power between the branches of government, it is important to bear in mind that the doctrine has the effect of preventing State legislatures from conferring powers on their courts (or otherwise legislating) in such a way as to impede their institutional integrity. It does not confer

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126 *A-G (NSW) v Quin* (1990) 170 CLR 1, 35–6.

127 *Drake v Minister for Immigration and Ethnic Affairs* (1979) 2 ALD 60; (1979) 24 ALR 577.

128 John McMillan, 'Natural Justice — Too Much, Too Little Or Just Right?' (2008) 58 *AIAL Forum* 33, 33.

129 John McMillan, 'The Role of Judicial Review in Australian Administrative Law' (2001) 30 *AIAL Forum* 47.

130 See, eg, Todd Garvey, 'A Brief Overview of Rulemaking and Judicial Review' (Congressional Research Service, 2017).

131 *Baker v The Queen* (2004) 223 CLR 513, [54] (Kirby J); *Fardon v A-G (Qld)* (2004) 223 CLR 575, [134] (Kirby J).

132 Gabrielle Appleby, 'The High Court and *Kable*: A study in federalism and rights protection' (2014) 40 *Monash University Law Review* 673, 683–4.

substantive rights on individuals,[133] or have any application to the powers or functions that may be conferred on non-judicial bodies.

As such, the *Kable* doctrine does not limit the substantive policy choices of State legislatures, except insofar as it prevents them from conferring certain functions on courts. Where, under the *Kable* principle, it is not permissible to confer a particular power on the courts, the legislature will often still be able to implement its policy, but will have to adopt a means of doing so that meets with court approval, for example by conferring the power on an executive body, or changing the process to ensure that it is procedurally fair. *Kable* is certainly a limitation on legislative power, and one that did not exist prior to 1996. It therefore represents an increase in judicial power. It has also led to further centralisation of judicial power within the Australian federal system.[134] However, when placed in comparative perspective, the *Kable* doctrine is less radical than constitutional doctrines developed in other jurisdictions.

The United States Supreme Court has developed very far-reaching implications for criminal procedure, for example, from the due process clause.[135] The Canadian Supreme Court, comparably, has imposed substantive constitutional limitations on criminal laws and held that the withholding of evidence from non-citizen detainees when issuing security certificates violated the Charter.[136] In the absence of corresponding rights provisions in the Australian Constitution,[137] the High Court has been much more circumspect in this field.

Of the three examples relied upon by Sackville, the implied freedom of political communication is the most significant. As noted, it constituted a revolutionary development in Australian constitutional law. As reformulated in *Lange*,[138] the implied freedom will invalidate any law or executive action which burdens political communication and which is not reasonably appropriate and adapted to advance a legitimate object in a manner that is compatible with the maintenance of the constitutionally prescribed system of representative and responsible government.[139] The second limb of the *Lange* test, it has been argued, necessarily involves the courts in making political value judgments which judges are not competent to do.[140] As

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133 For an argument that such rights should be implied from Chapter III of the Constitution, see Anthony Gray, *Criminal Due Process and Chapter III of the Australian Constitution* (Federation Press, 2016).

134 James Stellios, 'The Centralisation of Judicial Power within the Australian Federal System' (2014) 42 *Federal Law Review* 357; Stephen Mcleish, 'The Nationalisation of the State Court System' (2013) 24 *Public Law Review* 252.

135 See, eg, E Thomas Sullivan and Toni M Massaro, *The Arc of Due Process in American Constitutional Law* (Oxford University Press, 2013).

136 Kent Roach, 'Judicial Activism in the Supreme Court of Canada', in Dickson (ed.), *Judicial Activism in Common Law Supreme Courts*, above n 100, 81, 89.

137 The much more narrowly drafted section 117 of the Australian Constitution, unlike the Fourteenth Amendment to the United States Constitution, offers relatively little textual basis upon which the Court can develop corresponding doctrines. On the interpretation of s 117, see *Street v Queensland Bar Association* (1989) 168 CLR 461; *Goryl v Greyhound Australia Pty Ltd* (1994) 179 CLR 463; *Sweedman v Transport Accident Commission* (2006) 226 CLR 362.

138 And further modified in *Coleman v Power* (2004) 220 CLR 1.

139 *McCloy v New South Wales* (2015) 257 CLR 178, 194.

140 Tom Campbell and Stephen Crilly, 'The Implied Freedom of Political Communication, Twenty Years on' (2011) 30 *University of Queensland Law Journal* 59, 76.

Sackville put it, the implied freedom 'almost inevitably invites courts to make value judgments, without the benefit of clear guidance from settled principles'.[141]

The elaboration and development of the second limb in recent decisions lends further weight to these concerns, by introducing significant uncertainty in the application of the tests.[142] In *McCloy* a majority of the High Court extended the second limb of *Lange*, arguing that 'a more structured, and therefore more transparent, approach' is required.[143] It was held that the proportionality test — namely, whether the law was reasonably appropriate and adapted to advance the identified legitimate object — should be evaluated according to whether the law is 'suitable, necessary and adequate in its balance',[144] where *suitable* means 'having a rational connection to the purpose of the provision', *necessary* means that 'there is no obvious and compelling alternative, reasonably practicable means of achieving the same purpose which has a less restrictive effect on the freedom' and *adequate in its balance* means the 'balance between the importance of the purpose served by the restrictive measure and the extent of the restriction it imposes on the freedom'.[145]

While perhaps not increasing the scope for judicial value-judgment, for that was already an unavoidable consequence of the need to apply the implied freedom to politically contentious issues, the judgment unashamedly acknowledges that the 'adequate in its balance' criterion necessarily involves a value judgment, essentially inviting the judges to substitute their own views of the matter for those of the legislature.[146] For a time, members of the High Court tried to quarantine the effect of the implied freedom by adopting a test that directed attention to the constitutionally prescribed system of representative and responsible government.[147] However, the recent embrace by a majority of the Court of a balancing test effectively abandons this project, allowing the Court free reign in the balancing of what are essentially incommensurable values that can only be weighed in a manner that is 'largely intuitive and subjective'.[148]

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141 Sackville, 'An Age of Judicial Hegemony', above n 112, 118.

142 James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6th ed, 2015), 596.

143 *McCloy v New South Wales* (2015) 257 CLR 178, 201 (French CJ, Kiefel, Bell and Keane JJ).

144 This draws on comparative formulations of proportionality: Aharon Barak, *Proportionality: Constitutional Rights and Their Limitations* (Cambridge University Press, 2012), 3.

145 *McCloy v New South Wales* (2015) 257 CLR 178, 195 (French CJ, Kiefel, Bell and Keane JJ). See also *Tajjour v New South Wales* (2014) 254 CLR 508, 570–5 (Crennan, Kiefel and Bell JJ). This test does not enjoy universal support on the Court: see, eg, *Brown v Tasmania* (2017) 91 ALJR 1089, [157]–[166] (Gageler J), [428]–[438], [473]–[479] (Gordon J) and it may not be applicable in all cases: *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027, 1039 [37] (French CJ and Bell J).

146 Caroline Henckels, 'Proportionality and the Separation of Powers in Constitutional Review' (2017) 45 *Federal Law Review* 181, 182.

147 Nicholas Aroney, 'Justice Mchugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505

148 Anthony Mason, 'The Use of Proportionality in Australian Constitutional Law' (2016) 27 *Public Law Review* 109, 121. Note, however, continuing resistance to this among a minority of justices. See, eg, *Brown v Tasmania* (2017) 91 ALJR 1089, [157]–[166] (Gageler J), [428]–[438], [473]–[479] (Gordon J).

V EXPLAINING THE RISE OF JUDICIAL POWER IN AUSTRALIA

If there has been a significant, although comparatively moderate, increase in judicial power in Australia, what accounts for this? Why has Australia not followed trends in comparable countries such as the United States, Canada, the United Kingdom and India, where the growth in judicial power has been much more extensive? As noted earlier, Stephen Gardbaum has suggested three broad explanatory factors to be considered when asking such questions, namely: (1) deliberate constitutional design choices, (2) legal culture, and (3) general political context.[149]

The kinds of deliberate constitutional design choices Gardbaum has in mind correspond generally to the formal features of the Constitution discussed in the previous section, except that the focus here is on the intentions of the Constitution's framers regarding how powerful a court they wished to create and the design features they included in the Constitution in order to achieve that objective. Here, as noted, the framers of the Australian Constitution fully expected Australian courts, and especially the High Court, to exercise substantial powers of adjudication, including the power of constitutional judicial review.[150] However, closely associated with this intention was the central purpose of the Australian Constitution, which was to establish a federation of states in which the courts would exercise judicial review especially for the purpose of maintaining the federal distribution of powers set out in the Constitution.[151] Consistent with this intention, the High Court certainly has exercised judicial review in many significant federalism-related disputes, on occasion overturning government policies of great moment, such as the Bank Nationalisation scheme of the Chifley Government.

To enable the High Court to fulfil its judicial functions, the framers of the Constitution made provision for its independence from the executive government, particularly through guarantees of tenure and salary during office, guarantees that were also enjoyed by the courts of the existing colonies although these latter guarantees were not constitutionally entrenched.[152] This reinforced a political context in which judges were generally respected and enjoyed considerable independence, knowing that their rulings will usually be obeyed, particularly by political actors and agencies.

The Australian Constitution is not regarded as 'sacred',[153] but nor is it treated as dispensable,[154] and this 'rule of law' value contributes to the respect that is generally

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149 Gardbaum, above n 34, 20-31. Ran Hirschl has proposed a similar set of conditions: institutional features, judicial behaviour, political determinants: Hirschl, above n 3, 263. Neal Tate has suggested five more specific factors: separation of powers, a 'politics of rights', interest group litigation, ineffective majoritarian institutions and wilful delegation by governments: Tate, 'Why the Expansion of Judicial Power?', above n 12, 28–32.

150 Aroney, above n 40.

151 Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10 *Federal Law Review* 367.

152 See *McCawley v The King* (1918) 26 CLR 9 and *McCawley v The King* (1920) 28 CLR 106, discussed in Nicholas Aroney, 'Politics, Law and the Constitution in Mccawley's Case' (2006) 30(3) *Melbourne University Law Review* 605.

153 Pauline Maier, *American Scripture: Making the Declaration of Independence* (Knopf, 1st ed., 1997).

154 Nicholas Aroney and Jeniffer Corrin, 'Endemic Revolution: H L A Hart, Custom and the Constitution of the Fiji Islands' [2013] *Journal of Legal Pluralism and Unofficial Law* 26.

accorded to decisions of the High Court, provided its decisions are seen as genuine attempts to interpret and apply the Constitution, even when this means that government policies are thereby controlled or even thwarted. Australia's political system means that no single party is in a position to mount effectively a sustained and prolonged attack upon the courts, primarily because different parties usually hold office in different States and territories, and so no party has the ability to dominate Australian politics for long periods. Thus, the federal nature of the political system enables a kind of partisan federalism to exist in which a government of a particular political persuasion in one jurisdiction may use litigation to attack the legislation or policies of the government of another jurisdiction, with the High Court's decision in such cases determining the outcome. This entails a significant exercise of power by the Court, but it is at the instigation of one or more democratically elected governments.

While the federal design of the Constitution involved a significant qualification on A. V. Dicey's doctrine of parliamentary sovereignty insofar as it involved a distribution of power among federal and state parliaments,[155] the framers of the Constitution did not seek to add many additional constraints on the powers of the parliaments other than those entailed by the establishment of the federal system.[156] Even the scattered limitations and freedoms that were included in the Constitution were deliberately shaped by federal considerations in one way or another.[157] The framers considered that the maintenance of a healthy political system depended very substantially on the practices of parliamentary responsible government, and they did not for this reason think it necessary to include a Bill of Rights in the Constitution — deliberately departing from the American model in this respect. The consequences of this design feature of the Constitution have proven to be highly significant.

The United States and Canada possess Constitutions that are very similar to Australia's Constitution in several very important respects, except for the existence of a Bill or Charter of Rights. A 'rights culture' has arguably long characterised American politics, a theme especially prominent in American politics since the 1960s.[158] Similarly, since the entrenchment of the Canadian Charter of Rights in 1982, the consequential power of the Canadian Supreme Court has grown very substantially. Nothing of the same magnitude has occurred in Australia. The fields in which the High Court has increased its power have been much more limited and the increase in its power relative to the other branches has been relatively modest. It is only in areas where the High Court has mimicked the effect of a Bill of Rights, in its development of its separation of judicial power jurisprudence and the implied freedom of political communication that a growth in judicial power comparable to what has occurred in Canada and the United States is evident.

That said, the existence or absence of a Bill of Rights in a country is not of itself a sufficient explanatory factor because there are countries, such as Japan, with constitutional rights provisions that have not seen significant growth in judicial

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155 Aroney, above n 38, 92-96.

156 W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Maxwell, 2nd ed, 1910), 331.

157 Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (Law Book Company, 1965) 102.

158 Mary Ann Glendon, *Rights Talk: The Impoverishment of Political Discourse* (Free Press/Macmillan, 1991).

power.[159] Even where favourable conditions exist for the judicialisation of politics, this will only occur where judges are willing and able to take on such an enlarged role.[160] A degree of willingness characterised the High Court under the chief justiceship of Sir Anthony Mason,[161] but the opportunity to do so was limited by the absence of a Bill of Rights. As Mason CJ himself acknowledged, acceptance by the framers of the Constitution that citizen's rights were best protected by the common law and parliamentary institutions meant that it was —

> difficult, if not impossible, to establish a foundation for the implication of general guarantees of fundamental rights and freedoms. To make such an implication would run counter to the prevailing sentiment of the framers that there was no need to incorporate a comprehensive Bill of Rights in order to protect the rights and freedoms of citizens.[162]

Australian judicial culture is marked by a strong sense of the distinction between politics and law. As Justice Keane has written:

> there have always been marked differences between judicial and administrative decision-making. Administrative decision-making takes place in an overtly political context. Administrative decision-makers serve a representative function which judges do not: subject to the Constitution, the rights of individuals are affected in accordance with the program of the political party which controls the legislature. Administrative decision-makers are expected to bring to bear their own expertise in their particular field; and the sheer volume of decision-making required makes the Rolls Royce of judicial rigour unaffordable in terms of money and time.[163]

Justice McHugh has argued that, in order to minimise conflict between the executive and judicial branches, courts should 'remind themselves in judicial review cases that their task is to review the legality and not the merits of administrative decisions'.[164] While it is no longer possible to say that there have been no 'deliberate innovators' on the Court,[165] for the most part the High Court has operated within the

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159 Gardbaum, above n 34, 38-42; David S Law, 'The Anatomy of a Conservative Court: Judicial Review in Japan' (2009) 87 *Texas Law Review* 1545.

160 Tate, 'Why the Expansion of Judicial Power?', above n 12, 33; Martin Shapiro, 'The United States', in Tate and Vallinder (eds.), *The Global Expansion of Judicial Power*, above n 12, 44.

161 Eg, John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158.

162 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 136. See also Anthony Mason, 'The Role of a Constitutional Court in a Federation' (1986) 16 *Federal Law Review* 1.

163 P A Keane, 'Legality and Merits in Administrative Law: An Historical Perspective' (2009) 1 *Northern Territory Law Journal* 117, 138.

164 M H McHugh, 'Tensions between the Executive and the Judiciary' (2002) 76 *Australian Law Journal* 567, 579–80.

165 Paul Bickovskii, 'No Deliberate Innovators: Mr. Justice Murphy and the Australian Constitution' (1976-1977) 8 *Federal Law Review* 460; Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24(1) *Melbourne University Law Review* 1.

context of a legal and political culture which has expected it to play a constitutionally significant, but circumscribed role.

The Australian political context has reinforced that culture and that expectation. On the one hand, politics is highly contested in Australia and no one particular political party has been in a position to shape and control the High Court in the way that has occurred in Japan for example. The Court is both constitutionally and politically independent of the elected branches. This has enabled it to exercise its powers of judicial review in a robust and autonomous manner. However, on the other hand, Australian political parties are not so weak that they are unable to offer stable and effective governance or to enact their policy commitments. Australian political institutions possess many faults, but ineffectiveness is not usually among them. The Australian political system is dominated by political parties with high levels of discipline and cohesion.[166] The executive for the most part controls the proceedings of Parliament, especially the lower house,[167] and governments are usually able to secure passage of supply and their policy commitments.[168] It is not the case that chronic weaknesses of the elected branches of government have created a policy vacuum into which the courts must step in order to remedy glaring and widespread injustices.[169]

Nor are there flagrant failures of the democratic process that require judicial intervention. The High Court has been very circumspect, for example, when asked to intervene, for example, into electoral districting decisions — in sharp distinction from the United States Supreme Court. One important part of the explanation for this divergence appears to be the establishment of independent electoral commissions in Australia — in contrast to the United States, where such decisions are ultimately in the hands of the legislature and therefore especially prone to gerrymandering.[170]

In Australia, governments are generally very jealous of their powers and are not readily minded to delegate politically unpalatable decisions to the courts.[171] While they may be tempted, on occasion, to hold referendums to gauge public opinion and thereby

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166 John Warhurst, 'Conscience Voting in the Australian Federal Parliament' (2008) 54 *Australian Journal of Politics and History* 579; Alan J Ward, *Parliamentary Government in Australia* (Australian Scholarly Publishing, 2012), 186.

167 L F Crisp, *Australian National Government* (Longman Cheshire, 5th ed, 1983), 267; Stanley Bach, *Platypus and Parliament: The Australian Senate in Theory and Practice* (Department of the Senate, Parliament of Australia, 2003) 242–3; John Summers, 'Parliament and Responsible Government', in Dennis Woodward, Andrew Parkin and John Summers (eds.), *Government, Politics, Power and Policy in Australia* (Pearson, 9th ed, 2010), 76; G S Reid, 'Australia's Commonwealth Parliament and the 'Westminster Model'' (1964) 2 *Journal of Commonwealth Political Studies* 89, 93; Campbell Sharman, 'Reforming Executive Power' in George Winterton (ed.), *We the People: Australian Republican Government* (Allen and Unwin, 1994), 113; John Halligan, Robin Miller and John Power, *Parliament in the Twenty-first Century: Institutional Reform and Emerging Roles* (Melbourne University Publishing, 2007), 2–4.

168 This is not always the case, of course, particularly when governments face oppositional upper houses. For general discussion, see Nicholas Aroney, Scott Prasser and John Nethercote (eds.), *Restraining Elective Dictatorship: The Upper House Solution?* (University of Western Australia Press, 2008).

169 Cf Tate, 'Why the Expansion of Judicial Power?', above n 12, 31; Shapiro, 'The United States', above n 160, 47.

170 For a comparison of the three countries, see Nicholas Aroney, 'Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective' (2008) 58(4) *University of Toronto Law Journal* 421.

171 Tate, 'Why the Expansion of Judicial Power?', above n 12, 32.

avoid responsibility for a difficult or controversial decision, as occurred in the recent same sex marriage plebiscite, on the whole Australian politicians are assiduously protective of their right to decide controversial political matters, and are not shy of criticising the courts for overstepping what is perceived to be their legitimate role.[172]

Scholars have often noted a kind of 'exceptionalism' in Australian public law.[173] As in many comparable federations, Australian courts exercise constitutional judicial review in a manner that is robust and independent. Decisions of the High Court have often prevented elected governments from implementing their policies, but the grounds on which this has happened have usually had something to do with the federal structure of the Constitution. The High Court has come to exercise more political power than once was the case, but this has largely been through the development of constitutional implications, principally as regards the separation of judicial power and freedom of political communication. However, compared with global trends, the growth in judicial power in Australia has been relatively moderate. The prime reason for this is the absence of a constitutional bill of rights and the maintenance of a prevailing political and judicial culture that calls for a degree of restraint on the part of judges.

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[172] See, eg, Kirby, above n 1, 600–1; Pierce, *Inside the Mason Court Revolution*, above n 84, 262–7.

[173] Michael Taggart, 'Australian Exceptionalism' in Judicial Review' (2008) 36 *Federal Law Review* 1; Brian Galligan and F L Morton, 'Australian Exceptionalism: Rights Protection Without a Bill of Rights', in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds.), *Protecting Rights Without a Bill of Rights: Institutional Performance and Reform in Australia* (Ashgate Publishing, 2006).