INTRODUCTION

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We live in unsettled times. In recent years, we have witnessed a spate of Islamist terrorist atrocities, the resurgence of authoritarianism, increasing and apparently intractable concerns about inequality, and a weakening of the liberal consensus. In circumstances such as these, questions about executive power are likely to be particularly relevant. As the Honourable Robert French AC notes in his contribution to this special issue, anxieties about perceived threats to the social order are capable of fuelling expansive approaches to executive power, as the public seek the reassurance of 'strong' forms of government.[1] On the other hand, executive power, especially non-statutory executive power, is itself anxiety provoking and may be a factor in democratic decay. In an oft-cited observation in the *Communist Party Case*, Sir Owen Dixon noted that '[h]istory, and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded, it had been done not seldom by those holding the executive power.'[2]

In this light, it is perhaps unsurprising that executive power and its attendant anxieties have featured prominently in many recent events. In the United Kingdom, the Supreme Court found in *Miller* that the government could not rely upon the prerogative to trigger withdrawal from the European Union but required an Act of Parliament.[3] This decision was welcomed by some commentators on the basis that the prerogative is the 'enemy of the people',[4] but was also resisted by others due to the 'unanimity, strength and

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[1] 'Executive Power in Australia – Nurtured and Bound in Anxiety'.

[2] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 187.

[3] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017).

[4] Thomas Poole, 'Losing our Religion? Public Law and Brexit' on UK Constitutional Law Association, *UK Constitutional Law Blog* (2 Dec 2016) <https://ukconstitutionallaw.org/>.

dispatch' supposedly required by the executive to implement Brexit.[5] In the United States, President Donald Trump's executive orders creating a travel ban on people from six Muslim majority countries and two other countries have been criticised as abuses of power and challenged in the courts, but have also been defended as necessary to protect the American people against the threat of terrorism.[6] Closer to home, albeit less dramatically, in *Williams (No 1)*[7] the High Court of Australia fundamentally reshaped the Commonwealth executive's authority to spend money and enter into contracts. This judgment was partly motivated by a concern to enhance responsible government and thereby make the exercise of executive power more accountable.[8] However, it was also strongly resisted by the government, as demonstrated by the Commonwealth's attempt to reopen *Williams (No 1)* in *Williams (No 2)*.[9]

Against this background, the articles in this special issue of the *University of Western Australia Law Review* make a valuable contribution to the literature on executive power, particularly in the United Kingdom and Australia. This introduction will not attempt to canvas all of the issues covered in the special issue. However, it will explore the following themes that emerge prominently from the articles: the *content* of executive power; judicial *review* of exercises of executive power; and *limits* that exist upon executive power. As we shall see, each of these issues are pivotal in understanding executive power, but they are also subject to flux, disagreement, and uncertainty.

I THE CONTENT OF THE EXECUTIVE POWER

Many of the articles in the special issue are concerned with how to determine the content of executive power, especially the enigmatic category of non-statutory executive power. Interestingly, this issue raises similar considerations under the constitutions of the United Kingdom and Australia. The difficulties of determining the content of executive power under the United Kingdom's

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[5] Timothy Endicott, "'This Ancient, Secretive Royal Prerogative'" on UK Constitutional Law Association, *UK Constitutional Law Blog* (11 Nov 2016) <https://ukconstitutionallaw.org/>.

[6] At the time of writing the Supreme Court of the United States had allowed the latest iteration of the travel ban to go into effect while legal challenges against it continued. See 'Supreme Court Allows Trump Travel Ban to Take Effect', *The New York Times* (New York), 4 December 2017.

[7] *Williams v Commonwealth of Australia* (2012) 248 CLR 156.

[8] Ibid 206 (French CJ), 232-3 (Gummow and Bell JJ), 271 (Hayne J), 351-2 (Crennan J).

[9] *Williams v Commonwealth of Australia* (2014) 252 CLR 416.

unwritten constitution are obvious; in the absence of a text, regard must be had to other considerations. However, the sparseness of s 61 of the *Commonwealth Constitution* – 'The executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen's representative, and extends to the execution and maintenance of this Constitution' – means that the text is also not of great assistance in this jurisdiction.

Various approaches to determining the content of executive power are evident in this collection of articles. Firstly, in the context of s 61 of *Commonwealth Constitution*, there is a distinction between *historical* and *autochthonous* approaches. Historical approaches emphasise traditional conceptions of executive power sourced in the constitutional system of the United Kingdom, whereas autochthonous approaches emphasise the different context of Australia's written, federal constitution to the United Kingdom's unwritten, unitary constitution. There is also a distinction between approaches focused upon *conceptual analysis* and approaches resembling *constructive interpretation*. Conceptual analysis seeks a clearer understanding of concepts, in part through testing them against counter-examples.[10] Constructive interpretation, in contrast, seeks the interpretation of a legal concept that best fits and justifies the relevant materials.[11] These methodologies are not mutually exclusive and there are overlaps in the analyses of the authors. They are also not exhaustive; there are no doubt other approaches to determining the content of executive power. Nevertheless, these labels are useful in making sense of the contributions of the authors and the challenges involved in giving content to executive power.

The historical approach is most evident in the contribution of Professor Peter Gerangelos, 'Section 61 of the *Commonwealth Constitution* and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case.' Gerangelos draws upon the work of J W F Allison on the English Constitution[12] to advocate a 'historical constitutional approach' to s 61 of the *Commonwealth Constitution*. He argues that reliance should be

[10] Scott Shapiro, *Legality* (Harvard University Press, 2011) 13.
[11] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).
[12] *The English Historical Constitution: Continuity, Change and European Effects* (Cambridge University Press, 2009).

placed upon 'traditional conceptions' in determining the content of s 61 such as the prerogative powers found in the common law, the capacities emanating from the Commonwealth's juristic personality, the Australian understanding of the Crown at federation, the principles of responsible government, and ancient statutes that have restricted prerogative power so that it is no longer recognised at common law.[13]

Gerangelos argues further that this approach is exemplified by Gageler J's exposition of executive power in the *M68* case.[14] Indeed, Gerangelos notes that Gageler J makes no reference in his judgment to the 'nationhood' power recognised in the *Pape* case,[15] which derives not from traditional conceptions of executive power but rather from the status of the Commonwealth as a national government. Gerangelos concedes that it is unclear whether this omission is telling of Gageler J's views on the existence of such a power. However, he argues that Gageler J may implicitly regard the nationhood power as expanding the 'breadth' (that is, the subject matters over which executive power can be exercised) but not the 'depth' (that is, the types of actions that can be undertaken by the executive in relation to those subject matters) of executive power[16] – an analysis similarly advanced by Dr Peta Stephenson in her contribution to the special issue. Gageler J's judgment may also implicitly relegate the nationhood power to circumstances of clear and unambiguous emergency. Overall, Gerangelos cautions against decoupling s 61 from traditional sources on the basis that this may result in conceptions of executive power that are amorphous, self-defining and potentially invasive of civil liberties.

The 'historical constitutional approach' favoured by Gerangelos contrasts with the contribution of the Honourable Robert French AC who, in 'Executive Power in Australia – Nurtured and Bound in Anxiety', gives greater emphasis to the autochthonous aspects of s 61. His Honour traces the drafting history of 61 of the *Commonwealth Constitution* while noting that it 'says

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[13] See 'Section 61 of the Commonwealth Constitution and an "Historical Constitutional Approach": An Excursus on Justice Gageler's Reasoning in the *M68* Case' at 106-7.

[14] *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42.

[15] *Pape v Federal Commission of Taxation* (2009) 238 CLR 1.

[16] The distinction between the 'breadth' and 'depth' of executive power derives from George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 23-4.

something, but not a lot, about its scope and content.'[17] His Honour observes that the prerogative informs the content of executive power but notes that it is not exhaustive of non-statutory executive power and does not repose 'as a kind of neat organ transplant from the unwritten British Constitution into the *Constitution of the Commonwealth of Australia*.'[18] Indeed, his Honour cites authority that in Australia 'one looks not to the content of the prerogative but rather to s 61 of the Constitution...'[19]

Against this background, the Honourable Robert French AC discusses the development of the nationhood power in High Court decisions such as the *AAP* case[20] and *Davis v Commonwealth*.[21] His Honour also explores the vexed issue of whether non-statutory executive power extends to the exclusion of aliens, as exemplified by the decision of the Full Court of the Federal Court in *Ruddock v Vadarlis*.[22] Finally, his Honour provides an analysis of the High Court's seminal decisions on appropriation and spending in *Pape v Federal Commissioner of Taxation*,[23] *Williams (No 1)*[24] and *Williams (No 2)*.[25] In a marked contrast to the 'historical constitutional approach' favoured by Gerangelos, his Honour quotes the Honourable Justice James Spigelman AC to the effect that '[i]dentifying the scope and limits of executive power will now turn on a process of constitutional interpretation, rather than historical inquiry'[26] – albeit informed by fundamental assumptions of the *Commonwealth Constitution* such as the rule of law, responsible government, and federalism.

In 'The Strange Death of Prerogative in England', Professor Thomas Poole adopts an approach to determining the content of executive power under

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[17] 'Executive Power in Australia – Nurtured and Bound in Anxiety' at 22.
[18] Ibid 32. In a similar vein, in *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1 at 60 French CJ held that while history and the common law inform the content of s 61, 'it is not a locked display cabinet in a constitutional museum. It is not limited to statutory powers and the prerogative. It has to be capable of serving the proper purposes of a national government.'
[19] *Re Ditford; Ex parte Deputy Commissioner of Taxation* (1988) 19 FCR 347, 369 (Gummow J).
[20] *Victoria v Commonwealth* (1975) 134 CLR 338.
[21] (1988) 166 CLR 79.
[22] (2001) 110 FCR 491.
[23] (2009) 238 CLR 1.
[24] (2012) 248 CLR 156.
[25] (2014) 252 CLR 416.
[26] 'The Garran Oration: Public Law and the Executive' (Speech delivered at the Institute of Public Administration, Australian National Conference, Adelaide, 22 October 2010) 24-5.

the United Kingdom's unwritten constitution that is more akin to conceptual analysis. Poole reviews canonical definitions of the prerogative emanating from A V Dicey, John Locke, and William Blackstone. On this basis, he constructs a central case of the prerogative, which he expresses in a series of propositions that may be summarised as follows: prerogative is the name the constitution gives to a specific bundle of executive powers; prerogative is an expression of peremptory authority and therefore results in a direction as opposed to a general norm; an exercise of the prerogative is directed at officials and can have no meaningful effect on legal rights and obligations; prerogative has a form that dispenses with special requirements and a function bound up with special power and jurisdiction; the elements of the prerogative function as a complex whole; and although prerogative operates within the constitution its open-textured nature reserves a degree of creativity to the executive.[27]

However, conceptual analysis is also concerned to refine our understanding of concepts by testing them against counter-examples. In the process, we may revise our provisional understanding of a concept, or we may conclude that some common uses of the concept are incorrect. In this vein, Poole tests the central case of the prerogative against a quartet of recent decisions of the Supreme Court of the United Kingdom, including the *Miller* decision.[28] Poole's conclusion is that the common law powers incorporated by the prerogative are intact but the extent to which these entail a claim to special authority and hence deference on the part of the courts may be weakening – a point returned to below in the discussion of judicial review of executive power. It follows that the prerogative is not a special category but rather an 'inchoate set of executive capacities...'[29]

In contrast, in 'Nationhood and Section 61 of the *Constitution*', Dr Peta Stephenson adopts an approach to s 61 that may be analogised to Ronald Dworkin's concept of constructive interpretation, although it should be noted that Stephenson does not expressly draw upon Dworkin's work. In *Law's Empire*, Dworkin argues that legal interpretation involves assembling the set of

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[27] 'The Strange Death of Prerogative in England' at 53-5.
[28] *R (Miller) v Secretary of State for Exiting the European Union* [2017] UKSC 5 (24 January 2017). The other cases are *Belhaj v Straw; Rahmatullah (No 1) v Ministry for Defence* [2017] UKSC 3 (17 January 2017), *Al-Waheed and Mohammed v Ministry v Defence* [2017] UKSC 2 (17 January 2017), and *Rahmatullah (No 2) and Mohammed v Ministry of Defence* [2017] UKSC 1 (17 January 2017).
[29] 'The Strange Death of Prerogative in England' at 66.

principles that best fit and justify previous legislative and judicial decisions, thereby presenting the legal system in its best light when considered from the perspective of political morality. For Dworkin, constructive interpretation is not a matter of recovering the subjective intentions of individual decision-makers; rather, legal rights and duties should be identified on the assumption that 'they were all created by a single author – the community personified – expressing a coherent conception of justice and fairness.'[30] Hence, Dworkin's notion of 'law as integrity.'[31]

In her article, Stephenson arguably provides a constructive interpretation of the case law on the nationhood power that seeks to demonstrate that it does not have the amorphous and self-defining character feared by Gerangelos. Firstly, Stephenson reviews the key precedents on the nationhood power to demonstrate that Australia's acquisition of national status has expanded the 'breadth' of Commonwealth executive power, or the range of subject matters over which executive power may be exercised. However, Stephenson also argues that the nationhood power has not expanded the 'depth' of Commonwealth executive power. Instead, the case-law is 'best understood as confining the nationhood power to the established common law powers of the Crown.'[32] In other words, the nationhood power has not armed the Commonwealth with additional coercive powers but instead supports executive action that falls within existing common law capacities. Stephenson further argues that the High Court has avoided undermining the federal distribution of powers by applying Mason J's 'peculiarly adapted' test in the *AAP* case, where his Honour referred to 'a capacity to engage in enterprises and activities peculiarly adapted to the government of the nation and which cannot otherwise be carried on for the benefit of the nation.'[33] Stephenson argues that this test incorporates federalism as a limit on the nationhood power.

In so doing, Stephenson provides a coherent and morally appealing account of the case law on the nationhood power. However, a difficulty is posed for her analysis by *Ruddock v Vadarlis*,[34] in which a majority of the Full Court of the Federal Court found that the Commonwealth could exercise non-

[30] *Law's Empire* (Harvard University Press, 1986) 225.
[31] Ibid chs 6-7.
[32] 'Nationhood and Section 61 of the *Constitution*' at 153.
[33] *Victoria v Commonwealth* (1975) 134 CLR 338, 397.
[34] (2001) 110 FCR 491.

statutory executive power to prevent the entry of non-citizens into Australia. Given that the case involved a coercive use of the nationhood power, it appeared to add to the 'depth' of non-statutory executive power. Stephenson's solution is, in essence, to isolate *Ruddock v Vadarlis* as a decision falling outside the constructive interpretation of the relevant authorities. Put differently, the interpretation that best fits and justifies the precedents on the nationhood power does not include *Ruddock v Vadarlis*, thereby implicitly regarding it as wrongly decided.[35]

II JUDICIAL REVIEW OF EXECUTIVE POWER

The second theme that emerges from the articles in this special issue is judicial review of executive power, particularly non-statutory executive power. As we have seen, Poole is concerned with judicial review of exercises of prerogative power. The prerogative has been regarded as judicially reviewable by the English courts since the *GCHQ* case[36] but has typically been approached with a high level of deference. Poole refers to this as the prerogative 'two-step': the assertion that ordinary legal principles apply to prerogative decision-making, coupled to the accommodation of government interests in the application of these principles. Put differently, 'courts were disinclined to say that a challenge to a prerogative was non-justiciable, but were reluctant to decide against the government.'[37]

However, Poole argues that the common thread of the quartet of United Kingdom Supreme Court decisions discussed in his article is the absence of deference accorded to the category of prerogative. A weak reading of this development is that the prerogative has become a category of executive power that may sometimes evoke special authority in appropriate cases; a strong reading is that the prerogative no longer entails a claim to special authority and has simply begun to resemble other executive powers. Indeed, Poole speculates that invoking the prerogative may now even put the courts more on guard than they would otherwise have been, thereby becoming a liability for those tasked with defending government action.

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[35] Dworkin allows that the constructive interpretation that best fits and justifies the legal materials may identify some precedents as mistakes. See, for example, *Law's Empire* (Harvard University Press, 1986) 230.

[36] *Council of Civil Service Unions v Minister for the Civil Service (GCHQ Case)* [1985] AC 374.

[37] 'The Strange Death of Prerogative in England' at 57.

In contrast, in 'Judicial Review of Non-Statutory Executive Action: Australia and the United Kingdom Reunited?', Amanda Sapienza explains that judicial review of exercises of non-statutory executive power is less developed in Australia than in the United Kingdom. Whether a non-statutory power exists (the constitutional question) is reviewable, but the High Court has never been required to decide whether the manner of exercise of non-statutory powers (the administrative law question) is reviewable by the courts. Given that judicial review of non-statutory executive power is now uncontroversial in the United Kingdom, one might expect that English cases may provide a source of guidance to Australian courts when they are called upon to review non-statutory executive action.

However, as Sapienza explains, especially in recent decades the laws of judicial review in the United Kingdom and Australia have steadily diverged. This divergence is bound up in the different constitutional arrangements of the United Kingdom and Australia, especially the absence of a written constitution in the United Kingdom. The divergence manifests itself in various ways, including the retention of the concept of 'jurisdictional error' by Australian courts to mark the limits of judicial and executive authority. As for what constitutes jurisdictional error, the High Court has maintained an *ultra vires* approach to judicial review that means that statutory interpretation is used to attribute an intention to Parliament regarding the limits of powers conferred upon the executive.

How then should jurisdictional error be given content in the context of non-statutory executive power? Sapienza argues that in Australia it is necessary to look to the *Commonwealth Constitution* to ascertain the ambit of executive power, although the interpretation of the *Constitution* may be informed by the common law.[38] On this basis, principles of common law constitutionalism derived from English law such as parliamentary sovereignty, the presumption of reason, and the separation of powers may set limits on the exercise of non-statutory executive power. This would mark a convergence between the laws of judicial review in the United Kingdom and Australia, although Sapienza notes that the strict approach to judicial power entailed by the *Commonwealth*

[38] *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 47.

Constitution leaves less scope for the questions of deference that have preoccupied the English courts. The limits on executive power are explored further in the section that follows.

III THE LIMITS OF EXECUTIVE POWER

In Australian constitutional law, there are well-established limits on legislative power arising under the *Commonwealth Constitution* such as the implied freedom of political communication.[39] To what extent, and in what manner, might the implied freedom restrict exercises of executive power? The High Court has often stated *obiter* that the implied freedom of political communication applies to executive power,[40] but its decisions have mainly focused upon legislative power.[41] In the recent case of *Chief of the Defence Force v Gaynor*,[42] the Full Court of the Federal Court found that the implied freedom may function as a relevant consideration in judicial review of executive exercises of statutory power, although the Court declined to review the decision at issue in that case.[43] The questions of whether and how the implied freedom restricts executive power therefore remain unresolved. A further issue is whether there is a distinction in this regard between statutory and non-statutory exercises of executive power.

The relationship between the implied freedom and statutory executive power is explored by Joshua Forrester, Lorraine Finlay and Professor Augusto Zimmermann in 'Finding the Streams' True Sources: The Implied Freedom of Political Communication and Executive Power.' The authors reject the approach proposed, although not applied, by the Full Court of the Federal Court in *Gaynor*, whereby the implied freedom is treated as a relevant consideration in judicial review of executive decisions. In their view, this approach undervalues the implied freedom and allows it to be too easily

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[39] The implied freedom of political communication impliedly arises under ss 7 and 24 of the Commonwealth Constitution and protects free political communication by limiting the legislative powers of the Commonwealth, State, and Territory legislatures. See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

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

[41] Some of the early decisions also concerned the relationship between the implied freedom of political communication and the common law of defamation. See, for example, *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 and *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

[42] (2017) 246 FCR 298.

[43] Ibid 317 [80].

dismissed by the decision-maker. Instead, the authors argue that the High Court should adapt the 'reasonably appropriate and adapted' test introduced in *Lange v Australian Broadcasting Corporation*,[44] and developed in *McCloy v New South Wales*[45] to include proportionality testing, so that it applies to exercises of statutory executive power. In essence, their argument is that the constitutional significance of the implied freedom is such that a proportionality requirement should apply in Australian administrative law where an exercise of statutory executive power burdens free political communication. The test would apply to Commonwealth, State, and Territory exercises of executive power.

Forrester, Finlay and Zimmermann then apply their proposed approach to the case of *Gaynor*. The case concerned the termination of Major Bernard Gaynor's commission as an officer of the Army Reserve under reg 85(1)(d) of the *Defence (Personnel) Regulations 2002* (Cth). The termination was prompted by remarks made by Gaynor in press releases and on his personal website and social media that were critical of Defence Force polities promoting equality and diversity, especially in relation to homosexuals, transgender people, and women. The authors contend that the Full Court of the Federal Court erred by focusing upon the constitutionality of reg 85(1)(d) and by not subjecting the termination decision to their proposed development of the *Lange* test. The authors argue further that the termination decision would have failed the proportionality test, chiefly because it was not adequate in its balance. This is for various reasons, including that Gaynor's remarks were made outside the workplace and did not bear upon his conduct within the workplace. The authors conclude by calling for the Defence Force to better accommodate the implied freedom in its laws and policies.

Forrester's, Finlay's and Zimmermann's article on the extent to which the implied freedom restricts statutory executive power is complemented by Professor Gerard Carney's contribution, 'A Comment on How the Implied Freedom of Political Communication Restricts Non-Statutory Executive Power.' At the outset, Carney distinguishes between coercive and non-coercive non-statutory executive powers. Coercive non-statutory executive powers are capable of affecting legal rights and duties and include the Crown's prerogative

[44] (1997) 189 CLR 520.
[45] (2015) 237 CLR 178.

powers. Non-coercive non-statutory executive powers are incapable of affecting legal rights and duties and include the Crown's capacities, for example, the capacity to enter into contracts.

Coercive non-statutory executive powers are clearly capable of burdening the implied freedom of political communication. These include external prerogatives (such as the powers to declare and prosecute war) and domestic prerogatives (relating, for instance, to the Executive's relationship with its ministers, officers, and employees). However, the Crown's capacities, although non-coercive, are also capable of affecting the implied freedom. In this regard, Carney gives the example of a contract between the executive and other parties that imposes restrictions on communication. Given the potential for coercive and non-coercive non-statutory executive powers to burden free political communication, Carney concludes that the implied freedom of political communication constitutes an important constitutional safeguard upon the exercise of non-statutory executive power. However, Carney also discusses the *Gaynor* case to caution that the implied freedom should be asserted as an immunity rather than a right.

Apart from the implied freedom of political communication, there are also well-established limits relating to the separation of judicial power that arise under Chapter III of the *Commonwealth Constitution*.[46] To what extent might these bear upon executive power? In '*Ad Hominem* Parole Legislation, Chapter III and the High Court', Dr Sarah Murray discusses the recent decision of the High Court in *Knight v Victoria*.[47] The case concerned s 74AA of the *Corrections Act 1986* (Vic), which limits the Victorian Adult Parole Board's ability to make a parole order for a specific individual, namely, Julian Knight. The legislation is therefore *ad hominem* in character and Knight sought to challenge its constitutionality by invoking the principle established in *Kable v Director of Public Prosecutions*.[48] This may have appeared to be a promising line of argument because in *Kable* a majority of the High Court found that the *Community Protection Act 1994* (NSW), which empowered the Supreme

[46] Separation of judicial power is a limit arising under Chapter III of the Commonwealth Constitution. At the Commonwealth level, the leading case is *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers Case)* (1956) 94 CLR 254. At the State and Territory level, the leading case is *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

[47] (2017) 91 ALJR 824.

[48] (1996) 189 CLR 51.

Court of New South Wales to make an *ad hominem* preventative detention order for Gregory Wayne Kable, was unconstitutional. However, the *Kable* principle protects the institutional integrity of state courts and the insuperable difficulty for Knight was that in the previous case of *Crump v New South Wales*[49] the High Court had found that parole is an executive function that is distinct from the judicial sentencing role. Given that parole eligibility does not involve the courts, the *Kable* principle simply did not have application in *Knight*.

The extent to which the separation of judicial power might restrain the exercise of executive power is therefore not addressed by the High Court in *Knight*. Murray cites *obiter* authority that the *Kable* principle may prevent state legislatures from vesting certain judicial functions, such as the power to grant control orders, in the executive.[50] At the federal level, it has been established since the *Boilermakers' Case* that judicial power cannot be vested in the executive.[51] However, strictly speaking, these are limits upon State and Commonwealth legislative power, rather than upon the exercise of executive power itself. Whether the exercise of statutory or non-statutory executive power is capable of infringing the separation of judicial power, and whether limits should apply analogous to those proposed by the contributors to this special issue on the implied freedom of political communication, are difficult and unresolved questions. However, it should be noted that in her contribution to the special issue Sapienza cites the separation of powers as a principle of common law constitutionalism derived from English law that may limit the exercise of non-statutory executive power in Australia.

Finally, few limits on executive power are as well-established as the proposition that the executive, in the exercise of its non-statutory powers, cannot displace statute law or common law. This principle is supported by an abundance of authority stretching from the Glorious Revolution of 1688 to the recent decision of the Supreme Court of the United Kingdom in *Miller*.[52] However, with Zaccary Molloy Mencshelyi and Stephen Puttick, I explore an intriguing qualification to this proposition that may arise in the context of

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[49] (2012) 86 ALJR 623.
[50] *South Australia v Totani* (2010) 242 CLR 1, 37-8 [76] (French CJ), 67 [147]-[148] (Gummow J).
[51] *R v Kirby; Ex parte Boilermakers' Society of Australia (Boilermakers Case)* (1956) 94 CLR 254.
[52] [2017] UKSC 5 (24 January 2017) [50] (Lord Neuberger P, Lady Hale DP, Lord Mance SCJ, Lord Kerr SCJ, Lord Clarke SCJ, Lord Wilson SCJ, Lord Sumption SCJ and Lord Hodge SCJ).

treaty withdrawal or amendment under the *Commonwealth Constitution*. In 'The Executive and the External Affairs Power: Does the Executive's Prerogative Power to Vary Treaty Obligations Qualify Parliamentary Supremacy?', we explain how under the *Commonwealth Constitution* treaties are implemented pursuant to the external affairs power.[53] But, and following, we ask what is the status of the implementing legislation if the executive subsequently exercises its prerogative power to vary Australia's treaty obligations, and the legislation cannot be supported by another aspect of the external affairs power or an alternative head of power?

In an attempt to resolve this issue, we explore three possibilities. First, domestic legislation that implements a treaty should be presumptively understood as abrogating the executive's power to withdraw from or amend its treaty obligations. Second, the validity of legislation that implements a treaty should be determined by Australia's treaty obligations at the date of assent of the Act. Third, the validity of legislation that implements a treaty should be determined by Australia's treaty obligations at the date of challenge of the Act. On this view, the external affairs power is analogous to the defence power,[54] which waxes and wanes in accordance with the exigencies facing the Commonwealth.[55]

Notwithstanding the extensive authority that the executive cannot displace statute law through the exercise of its prerogative powers, we reach the perhaps surprising conclusion that the third possibility is the most persuasive understanding of the relationship between Australia's treaty obligations and legislation implementing such obligations. The Commonwealth executive may therefore possess a power generally thought to be precluded by the constitutional law of modern democratic states, although the sense of unease engendered by this conclusion may to some extent be mitigated by implying a

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[53] Section 51(xxix) of the *Commonwealth of Australia Constitution Act*: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to external affairs.'

[54] Section 51(vi) of the *Commonwealth of Australia Constitution Act*: 'The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to the naval and military defence of the Commonwealth and of the several States, and the control of the forces to execute and maintain the laws of the Commonwealth.'

[55] *Australian Communist Party v Commonwealth (Communist Party Case)* (1951) 83 CLR 1, 256 (Fullagar J).

legislative intention that the implementing statute should not endure beyond the facts that initially supported its validity.

IV CONCLUSION

As we have seen, all three of the themes explored in this special issue – the content of executive power; judicial review of exercises of executive power; and limits that exist upon executive power – are subject to flux, disagreement, and uncertainty. There are, for instance, disagreements about how to determine the content of executive power, especially non-statutory executive power. In Australia, these differences focus particularly on the emphasis that should be given to traditional conceptions of executive power derived from the constitutional system of the United Kingdom in interpreting the *Commonwealth Constitution*. However, from the contributions to the special issue it is also possible to distinguish between approaches resembling conceptual analysis and approaches more akin to constructive interpretation. Judicial review of exercises of non-statutory executive power is likewise subject to flux and uncertainty. In the United Kingdom, exercises of the prerogative powers are reviewable, although the level of deference accorded by the courts appears to be weakening. In Australia, the question of whether exercises of non-statutory executive power are reviewable remains unresolved, although principles of common law constitutionalism may have application. It is also unclear whether and how the implied freedom of political communication and the separation of judicial power may limit executive power at the Commonwealth, State, and Territory levels in Australia. However, a limit on executive power that is seemingly deeply entrenched – namely, the proposition that the executive cannot displace statute law through the exercise of its prerogative powers – may be subject to a qualification in the context of treaty withdrawal or amendment under the *Commonwealth Constitution*.

It is precisely these puzzles, differences, and uncertainties that make executive power such a rich and vital area of study, and the articles in this special issue a valuable and rewarding contribution to ongoing debates.