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"Constitutionalisation" of judicial review of administrative action in Australia

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In che misura, e in che modo, il controllo giurisdizionale è influenzato dal suo specifico contesto costituzionale? I recenti sviluppi nel controllo giurisdizionale sull'esercizio dei poteri amministrativi in Australia possono essere di un certo interesse per esplorare questo terreno. Questo paper discute dell'impatto della legge fondamentale australiana, la Costituzione, sull'applicazione giudiziaria di un concetto centrale per il sindacato giurisdizionale: l'invalidità. Sostiene che il pieno impatto della separazione del potere giudiziario nella Costituzione australiana sulla riflessione sullo status delle decisioni "invalide" deve ancora essere rivelato; e indica alcuni settori potenziali in cui possono essere necessari adeguamenti dottrinali per riflettere e integrare il ruolo dell'invalidità "costituzionalizzato".

To what extent, and in what ways, is judicial review shaped by its specific constitutional context? Recent developments in Australian judicial review of administrative and adjudicative powers may be of some interest in exploring this terrain. This paper discusses the impact of Australia's basic law, the Constitution, on judicial application of a concept central to judicial review: invalidity. It argues that the full impact of the separation of judicial power in Australia's Constitution on thinking about the status of "invalid" decisions has yet to be revealed; and indicates some potential areas where doctrinal adjustments may be necessary to reflect and integrate the 'constitutionalised' role of invalidity.

1. Introduction

Over the last two decades, Australian judicial review of administrative and adjudicative powers[1] has undergone a process of "Constitutionalisation". That is,

an iterative process of judicial interpretation of Australia's *Constitution* has revealed that a defined (limited) measure of judicial review of administrative and adjudicative action is non-derogable by ordinary statute. This entrenched measure of review extends to remedying invalid administrative and adjudicative action. Thus invalidity – a concept long present in common law – has been elevated to fulfil a constitutional role as a touchstone for that measure of judicial review that is required by the *Constitution* and cannot be ousted or thwarted by ordinary legislation. This has triggered a dynamic interplay between the *Constitution* and what was previously considered "pure" common law doctrine. The interplay is a work in progress but some of the potential doctrinal impacts are taking shape, as this paper will discuss.

The concept of invalidity has a long and contentious history within common law judicial review of administrative and adjudicative powers. In the abstract, the concept is readily defined: an invalid action is unauthorised and therefore lacks some or all of its purported legal consequences. So understood, it is clear that judicial review to remedy invalidity focuses on decision-making authority rather than the correction of error. It is also clear that an invalid decision remains a decision in fact and may have some legal consequences. Predictably, what appears clear in the abstract becomes elusive and contested in application. There are two dimensions that are vexing. First, how is invalidity identified given that some legal errors are authorised? Second, precisely which of a decision's purported legal consequences are denied by invalidity? These puzzles do not disappear when the concept is elevated to act as a touchstone for entrenched review. Rather, they must be worked through in a different legal register reflecting the "constitutionalized" function of invalidity.

Some commentators on Australian public law have expressed scepticism about the *Constitution's* impact on judicial review doctrine. The mere fact that the *Constitution* adopts invalidity as a pivotal concept (marking the boundary of entrenched review) does not necessarily mean that the *Constitution* imparts any substantive content to the concept[2]. And it must be conceded that caselaw in the era of constitutionalisation has not clearly laid out a necessary conceptual structure for judicial thinking about invalidity[3]. Should we then conclude that the *Constitution* has no substantive impact on anterior common law approaches to invalidity? I believe that might be too hasty. The impact of

constitutionalisation on review doctrine is a work in progress. I would argue that recent Australian caselaw sets a discernable trajectory for future doctrinal development, in which thinking about invalidity will be more overtly shaped by the Australian *Constitution*'s substantive demarcation between courts and other repositories of governing power over individual rights, which are seen from this vantage point as "non-courts"[4].

The traditional English-Australian common law approach to judicial review of administrative and adjudicative action does not strictly differentiate between court and non-court decisions. This is hardly surprising given that the anterior common law was originally forged in the context of an unwritten flexible constitution in which non-courts exercise judicial power. In contrast, as will be discussed below, Australia's *Constitution* makes the exercise of judicial power in federal matters exclusive to courts, and protects the essential characteristics that give "courts" qua courts their institutional integrity. This separation of judicial power generates a direct mandate for judicial review to remedy invalid decisions of non-courts (decision-makers other than courts). Importantly, that mandate for review of non-court decisions also carries implications for the status of invalid non-court decisions. As such, it seems clear that the "Constitutionalisation" process will require Australian courts to make further necessary accommodations for the demarcation between "courts" and "non-courts" under Australia's *Constitution*.

2. Judicial review of administrative and adjudicative action in Australia

In certain respects, the Australian way of thinking about judicial review of administrative and adjudicative powers reflects the historical origins of the present Australian legal system in Britain's colonisation of Australia[5]. As in the English common law tradition, judicial review is provided on an application engaging a superior court's original jurisdiction to issue remedies that have a narrow and specific purpose, namely to prevent government actors attributing a purported exercise of governing power with a legal force and effect that it does not, in law, possess. Judicial review remedies can quash (set aside) a purported exercise of state power; mandate performance of a public duty that remains

unperformed in fact or law; or prohibit government action to finalise or implement an unauthorised decision.

On the other hand, judicial review in Australia departs from the English model in some notable respects. Two should be mentioned by way of introduction, before turning to the process of constitutionalisation of Australian judicial review of administrative and adjudicative powers.

First, judicial review is available to enforce prohibitions on legislative power expressed or implied in the *Constitution*. The *Constitution* established the present Australian federation of what were then self-governing British colonies. It is the ultimate legal source of all legislative, judicial and executive power in the polities recognised in the *Constitution*. The legislative power of every Australian polity established under that basic law is subject to its terms, and every Australian court is bound to enforce the *Constitution* as superior law. For this reason, an application for judicial review of administrative or adjudicative powers conferred by statute may be made on the grounds that the statute itself is invalid for inconsistency with the *Constitution*.

Second, there is a federal dimension to judicial review in Australia. Australia is a federation comprising seven autonomous constitutional polities: six states, and a national polity ("the Commonwealth")[6]. From a domestic legal perspective, the Australian States and Commonwealth are distinct constitutional persons. Each polity possesses complete legislative, executive and judicial powers, and the capacities associated with legal personality. Each polity possesses and exercises its own judicial power, including power to review the exercise of that polity's public powers. In practical terms there is a degree of integration in judicial review doctrine. This is in large part because Australia has a single national common law; and the High Court of Australia ("the High Court") is the apex appellate court for all judicial orders of Australian courts[7].

3. "Constitutionalisation" of Australian judicial review of administrative and adjudicative action

The constitutionalisation of Australian judicial review refers to a process, unfolding over the last two decades, through which judicial review doctrine is increasingly inflected by the judiciary chapter of the *Constitution*. Specifically,

the concept of invalidity has been elevated and given a new constitutional role in demarcating the boundary of certain entrenched judicial review authorities, i.e. authorities that are non-derogable by ordinary statute. The High Court has identified three express or implied terms that entrench judicial review for invalidity:

1. By conferring original jurisdiction on the High Court in a defined class of disputes, the *Constitution* entrenches that Court's authority to remedy invalid purported exercise of Commonwealth public powers[8].
2. By requiring the continued existence of a "Supreme Court" in each Australian State, the *Constitution* impliedly requires that each Supreme Court retain a supervisory jurisdiction that is an essential feature of a "Supreme Court". This implication entrenches the authority of each State Supreme Courts to remedy invalid purported exercise of that State's public powers[9].
3. By making the exercise of judicial power in federal matters exclusive to courts, the *Constitution* entrenches judicial review to remedy invalid purported decisions by non-courts in federal matters[10].

The first two-mentioned sources of entrenchment have been at the forefront of Australian thinking about constitutionalisation and judicial review doctrine to date. This is understandable. They are implied from the express text of the *Constitution* and provide a positive guarantee of a minimum measure of judicial review, by entrenching certain superior courts' jurisdiction to issue identified remedies against invalid purported assertions of governing power.
The third-mentioned source of entrenchment is less prominent in commentary on Australian judicial review. It rests on an interpretation of an implication drawn from the text and structure of the *Constitution*. And it operates negatively, by denying legislative power to confer any power on a non-court without some avenue of judicial review to remedy invalidity. Nevertheless, I would suggest it is becoming clear that it is this third-mentioned source of entrenchment which is most likely to have a substantive generative impact on Australian judicial review doctrine.

4. A separation of powers mandate for review of invalid non-court decisions

The entrenchment of review via the separation of powers requires some unpacking. As stated, it relies on an interpretation of an implication drawn from the text and structure of the *Constitution*. In this section, I will explain the implication, then the interpretation of that implication that gives rise to entrenched review of (certain) invalid non-court decisions.

4.1 *Constitution*'s implied prohibition on non-courts exercising judicial power in federal matters

The implication of interest here is that the *Constitution* makes the exercise of judicial power in federal matters exclusive to courts. In other words, non-courts are constitutionally incapable of exercising judicial power in federal matters. It has long been recognised that Commonwealth judicial power can only be exercised by courts[11]. Until recently, it was assumed that State judicial power can be exercised by non-courts (continuing what was permitted under the flexible "uncontrolled" constitutions established in Britain's colonies in Australia that became Australia's present states). However in 2018, the High Court clarified that judicial power in certain subject-matters – those expressly identified as "federal matters" in the *Constitution* – is exclusive to courts[12]. This important ruling reveals that the *Constitution* contains a coherent scheme for adjudication on the nine categories legal controversies which are placed within the reach of federal judicial power[13]. By clarifying that judicial authority in federal matters is exclusive to courts, the High Court has for the first time recognised that the *Constitution* limits state legislative power to confer state judicial power on non-courts.

As the 2018 ruling from the High Court reveals, the judiciary chapter of the *Constitution* contains an exhaustive scheme, making the exercise of judicial power in federal matters exclusive to courts. It is important to emphasise that this ruling engages a dynamic longer-standing stream of caselaw on the defining characteristics of "courts". That stream of caselaw recognises that there are certain essential characteristics an institution must possess to qualify as a "court"

for the purpose of the *Constitution*. These features, which are said to give courts their "institutional integrity"[14], have not been comprehensively defined. They include the reality and appearance of independence and impartiality, adherence to the rules of procedural fairness, acceptance (as a general rule) of the open court principle, and the provision of reasons for decisions[15]. The essential characteristics speak to Australia's largely procedural or formal conception of the rule of law. Moreover, the standards they set are flexible being that they are «*not plucked from a platonic universe of ideal forms ... and cannot be absolutes*»[16]. It would be fair to say that the institutional integrity jurisprudence provides an oblique and relatively weak protection of civil liberties[17]. Nevertheless, given the narrow domain of Australia's *Constituton* and its minimal rights protections[18], this jurisprudence is an important safeguard for individuals in their relationship to governing power in Australia. The idea that institutional qualities of independence, impartiality and fairness differentiate "courts" from "non-courts" has a structural significance in the system of government established by the *Constitution*.

4.2 Interpretation of the boundary between judicial and executive power

As stated, the constitutional mandate for review to remedy invalid non-court decisions rests on an interpretation of the implied separation of judicial power in federal matters. That interpretation relates to the nature of "judicial power" and, more precisely, what differentiates it from executive power[19]. The interpretation holds that executive power cannot have any legal force or effect on subjects' rights or liabilities unless and to the extent it is authorised by a common law prerogative or a statute. For this reason, a non-court which is constitutionally incapable of exercising judicial power must be subject to judicial review to remedy any invalid purported exercise of governing power over subjects' rights or liabilities. The interpretation that draws a mandate for judicial review from the separation of judicial power is not without controversy. For this reason, it is necessary to say something further about the logic of this interpretation.
One way of thinking about the separation of judicial power is by reference to functions that have been identified as exclusively judicial – for example, the

adjudication and punishment of criminal guilt[20]. But this cannot be the only way of thinking about the separation of judicial power, because many functions are capable of being performed through an exercise of "executive" or "judicial" power[21]. It is therefore helpful to also consider what can permissibly be achieved through judicial performance of an innominate function, that cannot result from an executive performance of the same function.

In this regard, it is productive to recognise one simple marker that differentiates judicial from executive power. This lies in a specific quality of finality and conclusiveness that can be present in an exercise of judicial power, but which is denied to an exercise of executive power – namely a constitutional authority to bind by compulsive force of law even though impaired by invalidating (jurisdictional) error. That is, as Australian authorities recognise, an invalid purported exercise of judicial power can have a provisional legal force unless and until set aside. Conversely, an invalid purported exercise of executive power cannot have any legal force whether or not it is set aside. Recognising this to be the case confirms the importance and value of the Australian *Constitution*'s institutional safeguards on the exercise of judicial power in federal matters. The constitutional institutional integrity of courts operates on the form of state power that carries what might be considered an "authoritarian"[22] potential – namely potential to determine the subjects' rights or liabilities by compulsive force of law even though impaired by invalidating (jurisdictional) error.

This interpretation draws on themes in Australian caselaw on the nature of judicial and executive power. First and foremost, this interpretation rests on judicial accounts emphasising an executive inherent incapacity to unilaterally alter subjects' rights or obligations. By this it is meant that executive action has no intrinsic authority to unilaterally affect the legal position of the subject – to affect the subjects' rights or liabilities *in invitum* (by force of law irrespective of consent)[23]. Executive action cannot have a unilateral "non-optional" effect on rights or obligations unless and to the extent that the executive action attracts the operation of a common law prerogative or statute.

It is of course true that Australian legislators routinely enact statutes which provide that rights or liabilities are to be as specified in administrative decisions made under the statutes. Administrative decisions made in this way can have a legal effect on rights when the law identified in the statute – operating on the fact

of the decision – has this legal effect. The important point is that an administrative decision manifesting unilateral state power over rights does so as a factum by which the statute operates to affect rights[24]. The same logic applies if one of the historical common law prerogative powers over subjects' rights is available to an executive branch actor[25]. The executive action of "deciding" in and of itself – separate from a common law prerogative or statute operating through it – cannot unilaterally affect the subject's rights. Unless executive action engages a prerogative or statute, in the sense of being directly legally authorised by one or the other, executive action without more simply cannot «*dispense from the general system of law*»[26].

Relatedly, this inherent executive incapacity means that an invalid decision made by a repository constitutionally incapable of exercising judicial power cannot have any legal force, in the sense that it cannot specify subjects' rights or obligations by force of law. The result is a combination of two factors: (i) an invalid decision is one that, being unauthorised, does not attract the operation of the prerogative or statute pursuant to which it was made[27]; and (ii) the underlying inherent executive incapacity to unilaterally affect the legal position of the subject.

Of interest to the separation of powers, this inherent incapacity is not shared by the judicial power of a polity. In Australian law it is well-established that there is a potential inherent in judicial power to support orders that have legal force unless and until set aside. Examples can be found in cases considering judicial orders imposing liabilities under statutes subsequently held unconstitutional, or otherwise affected by jurisdictional error[28]. To put it another way, even a purported (invalid) exercise of judicial power can manifest the polity's state power to determine rights. The reason why is because, in constitutional terms, the judicial power of a polity exists to provide a final arbiter of rights. A necessary cost of finality is that judicial orders can have intrinsic efficacy to render a determination of rights or liabilities conclusive and binding unless and until set aside – even if invalid.

This interpretation of executive and judicial powers gives rise to the separation of powers' mandate for judicial review of invalid decisions by non-courts incapable of exercising judicial power: such non-courts cannot validly be authorised to determine the limits of their own jurisdiction over subjects' legal rights or

liabilities[29]. The key here is that the function of rendering a conclusive determination of the limits of public powers over subjects' rights or liabilities is exclusively judicial and requires an exercise of a polity's judicial power. As such, judicial review to remedy invalid decisions is constitutionally-mandated for powers vested in any non-courts in federal subject-matters – those non-courts being constitutionally incapable of exercising judicial power.

5. "Constitutionalisation" and judicial review doctrine: Generative or neutral?

As indicated earlier, some Australian public law scholars are unconvinced that the "constitutionalisation" of judicial review for invalidity has any necessary or substantive impact on doctrine. A concept that is pivotal, in marking out the boundary of entrenched review, could well be purely formal or conclusory, and therefore have no substantive impact on doctrine[30]. Certainly, it would seem that the *Constitution's* entrenchment of specific superior courts authority to issue remedies for invalidating error has not set any radical new direction for doctrines relating to the content or consequences of invalidity. Acknowledging that, I nevertheless suggest that the separation of powers mandate for review may ultimately prove more generative than those positive grants of non-derogable review authority. In fact, I would suggest that as the separation of powers mandate for review to remedy invalid non-court decisions becomes more prominent in thinking about "constitutionalisation", it will drive some reconceptualisation of the doctrines associated with invalidity. In particular, it will likely catalyse some reframing of Australian doctrines relating to the consequences of invalidity, to better reflect the distinction between "courts" and "non-courts" in the Australian *Constitution*.

5.1 Invalidity as a doctrine of Australian common law

In order to discuss the *Constitution's* influence on the content and operation of this concept, it is necessary to first briefly sketch the state of authority on the consequences of invalidity.

As a preliminary point, an invalid (or "unauthorized") decision is one impaired by "jurisdictional error". A "jurisdictional error" is a term of conclusion that

applies to a legal error of a particular kind – material breach of a legal condition on decision-making power[31]. In Australian law, "invalidity" has not been merged with "error", "legal error" or even "material legal error". On the contrary, not all material legal errors are invalidating ("jurisdictional") errors. Unsurprisingly, applying this concept often requires evaluative judgment on closely-balanced issues of law and fact that differentiate "jurisdictional" from "non-jurisdictional" errors. I will not pursue those issues here, as my argument relates instead to the consequences of invalidity.

When it comes to the consequences of invalidity, Australian authorities support three key propositions. First, the High Court has explained that invalidity deprives a decision made in purported exercise of statutory power of «*the characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it*»[32]. This is true of any decision in purported exercise of a statutory public power.

Second, Australian authorities make a categorical distinction between judicial orders of superior courts (on the one hand) and decisions of other state courts – inferior courts or non-courts (on the other). A judicial order of a superior court has a provisional legal force unless and until set aside, even if it is invalid. In contrast, an invalid decision of an inferior court or non-court is said to lack legal force whether or not the decision is set aside[33].

Third, even an invalid purported decision of an inferior court or non-court may have some legal consequences despite the fact that it is «*wholly lacking in legal force*»[34]. For instance, it may enliven a review procedure, or authorise some other secondary official action on the basis that the purported decision exists in fact. The conventional analysis of this phenomenon draws a distinction between a decisions "legal force" and its "existence in fact": «[A] *thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences*»[35].

Once this step is taken, the method of identifying legal consequences of invalid decisions devolves to a case-by-case assessment: «*The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law.*

The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, ... the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid»[36].

5.2 Constitutionalisation and invalidity

The separation of powers mandate for review (described earlier) has a clear potential to drive new approaches in Australian doctrine relating to invalidity. In this section, I seek to demonstrate this by providing a general outline of emerging doctrinal implications of the separation of powers mandate for review of non-courts. To this end, I will address two points on which the logic of the separation of powers generates new perspectives on invalidity and its consequences.

5.2.1 Constitutional limits on the legal consequences that can attach to invalid non-court decisions?

First, the separation of powers mandate suggests that there may be constitutional limits on legislative power to attach legal consequences to invalid non-court decisions. It also provides forensic clarity as to which purported legal consequences can and cannot be attributed to an invalid non-court decision.

The kind of legal consequence that raises separation of powers concerns is when a decision purports to specify the rights or obligations of the subject by force of law. This is because the quality that distinguishes judicial power is its potential to sustain a decision that specifies rights or obligations by force of law unless and until set aside even if the decision is invalid. As such, the separation of powers requires the law relating to invalidity to make a distinction between "legal force" (whether individual rights or obligations are as specified in the purported decision)[37] and other legal consequences.

Some examples might assist to demonstrate the potential impact of this distinction. On the one hand, the separation of powers would in principle

constrain legislative power to authorise secondary official action to enforce liabilities specified in an invalid non-court decision. This is because there is a constitutional scheme to ensure that the exercise of state power with the relevant potential (to have legal force unless or until set aside despite invalidating legal error) is, in federal subject-matters, exercised by institutions who are subject to the "institutional integrity" jurisprudence that generates certain structural safeguards for individuals. It is therefore important that secondary official action on the fact of a non-court decision in a federal matter does not in substance negate the fundamental constitutional incapacity of executive action to specify the subjects' rights or obligations other than through an authorised exercise of statutory power or common law prerogative.

On the other hand, the separation of powers need not constrain legislative power to create an appeal or review avenue from an invalid non-court decision. The reason being that exposing a decision to review or appeal does not assume that rights or liabilities are as specified in the primary decision. Instead, it enables examination of whether the decision is made according to law (in the case of judicial review) or whether the decision is the correct and preferable decision (in the case of merits review)[38]. Thus, conferring a right of appeal or review involves no risk to the separation of powers because creating that avenue does not, in substance, attribute legal force to the invalid non-court decision.

The idea that the *Constitution* limits legislative power to attach "legal force" to invalid decision represents a significant departure from conventional common law doctrine. Recall the conventional way of thinking about the consequences of invalidity draws a distinction between a decision's legal force and its existence in fact but goes on to propose that legislators may attach any legal consequences to an invalid purported decision, so long as they make clear that the consequences attach to the decision's existence in fact. A decision's existence in fact can, on this conventional view at common law, support any legal consequence – including a provisional legal force, unless or until set aside; or secondary regulatory action on the basis that rights or obligations are as specified in the purported decision. But if any legal consequence can attach to an invalid decision, there is an obvious risk to the structural safeguards provided by the Constitution's separation of judicial power in federal matters.

The orthodox common law approach to invalidity seems to imply that all

purported decisions that exist in fact are interchangeable artefacts when it comes to thinking about the legal consequences that the decision in fact may have even if invalid. This way of thinking sits oddly, to say the least, with the careful, principled and purposive constitutional scheme that makes judicial power in federal matters exclusive to courts. That scheme provides a distinctive institutional context for the exercise of the form of state power with a distinctive aspect – a potential to determine rights or liabilities unless or until set aside despite invalidity. By making judicial power in federal matters exclusive to "courts", the *Constitution* provides significant constitutional safeguards against arbitrary, unfair or unlawful exercise of this, the type of state power over subjects which carries this potential. Given this, it seems likely that Australian doctrine will likely evolve to clarify that while some legal consequences (such as enlivening an avenue of review or appeal) can attach to invalid non-court decisions, they cannot be treated as if they have "legal force" i.e. specifying rights or obligations by force of law.

5.2.2 Differentiating "inferior courts" and "non-courts"?

The separation of powers mandate for review may also have another substantive impact on Australian doctrine. As discussed, the *Constitution's* scheme draws a distinction between "courts" and "non-courts". As earlier mentioned, current Australian common law on invalidity makes a different categorical distinction – between judicial orders of superior courts (on the one hand) and decisions of inferior courts and non-courts (on the other). In this regard, the present common law maintains that judicial orders of inferior courts are in the same position as non-court orders[39]. This follows on anterior English common law which assumes a flexible constitution that permits executive and judicial powers to be combined in courts and non-courts alike. As the process of "Constitutionalisation" of Australian law continues, it will likely require some differentiation between inferior court and non-court decisions in federal matters. The *Constitution* does not deny legislative power to confer legal force on court orders in federal matters (on the contrary, all "courts" – even inferior courts – are subject to the "institutional integrity" caselaw that provides safeguards for individuals affected by court orders). And so in time the "Constitutionalisation" of invalidity may

well involve rethinking the present doctrine that assumes invalidity operates in the same way for inferior court and non-court decisions.

6. Conclusion

Australian judicial review of administrative and adjudicative decisions is still undergoing a process of "Constitutionalisation" that started two decades ago. The process has elevated invalidity to play a pivotal role, as a touchstone for an entrenched measure of judicial review. While some are sceptical about the *Constitution*'s impact on doctrines associated with invalidity, I would argue that this remains a work in progress. Specifically, I would argue that the trajectory of constitutionalisation will most likely follow the scheme that the *Constitution* lays down to safeguard the exercise of judicial power in federal matters.

Australia's *Constitution* lays down structural safeguards for legality, fairness, impartiality and transparency in the exercise of judicial power on subject-matters that lie within federal jurisdiction. It does this by making the exercise of judicial power in federal matters exclusive to a class of institutional repositories ("courts") whose orders are subject to the system of appeals established by and under the *Constitution* s 73; and denying legislative power to impair the essential characteristics of the nature of judicial power, or the defining features of courts – including institutional and decisional independence and impartiality, and adhere to fair process, open court principles and reason-giving. This complex jurisprudence appears very technical and detailed, but its beneficial purpose is clear: It operates to hardwire certain qualitative controls on the institutional repositories that are permitted to exercise judicial power in federal matters. The integrity of this scheme requires further doctrinal responses, to ensure that non-court decisions in federal matters are not attributed with qualities unique to judicial power, and denied to executive power. As discussed in this paper, it can be predicted that this will likely stimulate new thinking about the consequences of invalidity, to better integrate the constitutional faultline between "courts" and "non-courts" under the *Constitution* and the structural protection it affords for individuals subject to governing power.

1. I here distinguish judicial review of legislation. Legislative powers in Australia are subject to judicially-enforceable prohibitions in Australia's basic law, the *Constitution*. However,

my focus in this paper is on judicial review of administrative or adjudicative action, i.e. with action supported by a polity's executive or judicial powers (not its legislative powers).

2. Cfr. L. McDonald, *Jurisdictional Error as Conceptual Totem*, *University of New South Wales Law Journal*, 42 (3), 2019, p. 1019.
3. Cfr. J. Boughey and L. Burton Crawford, *Jurisdictional Error: Do We Really Need It?*, in M. Elliott, J. NE Varuhas and S. Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives*, Hart Publishing, Oxford, 2018, p. 395.
4. The diversity of institutional actors vested with governing power over individual rights is evident, both within and beyond the judicial and executive branches of government. For the purpose of the Australian constitutionalisation story, the key consideration is whether a repository is, or is not, a "court" within the meaning of the judiciary chapter of the *Constitution*.
5. Relevantly for the doctrinal analysis in this paper, the sovereignty acquired by the British Crown, on which Australia's present system of laws and government is based, is not justiciable in Australian domestic law. As a non-indigenous Australian, I recognise that those former British colonies were founded in territory of Australia's First Nations whose sovereignty was not ceded of extinguished, and support the proposals to provide structural recognition of the continuing First Nations' sovereignty described in the Uluru Statement from the Heart: see *https://ulurustatement.org/*.
6. Australia also has two self-governing territories whose powers of self-government are conferred by Commonwealth laws made in exercise of the power given to the Commonwealth in respect of territories (*Constitution*, s 122). As a result of that legislation, self-governing territories are on much the same footing as states, and *some* of the *Constitution*'s express and implied prohibitions apply to government in the territories in the same way as to government in the states. However, for simplicity I will focus discussion in the present paper on the polities that are directly recognised as autonomous polities in the *Constitution,* namely the (national) Commonwealth and (sub-national) States.
7. For clarity, the term "Supreme Court" applies to the highest courts within each State court system. The "High Court of Australia" is the highest federal court and hears appeals in state matters from state Supreme Courts.
8. This implication from *Constitution*, ss 75(iii) and (v) is central to judgments that protect the High Court's entrenched jurisdiction from laws that purport to oust, limit or impede effective judicial review, see: *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157/2002*'); *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651; *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1.
9. This implication from the *Constitution*, s 73 was established in Kirk v Industrial Court of New South Wales (2010) 239 CLR 531.
10. This distinct source of entrenchment for judicial review is recognised in Plaintiff S157/2002 (n 8), 484 [9] (Gleeson CJ), 505 [73], 511- 512 [98] (Gaudron, McHugh,

Gummow, Kirby, Hayne JJ); *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J), 426 – 8 (Deane and Dawson JJ).

11. This being the "first limb" of the separation of Commonwealth judicial power, see: *New South Wales v The Commonwealth* (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Waterside Workers*'); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.
12. *Burns v Corbett* (2018) 265 CLR 305, 335 [43], 342 [58] (Kiefel CJ, Bell and Keane JJ), 346 [68] (Gageler J).
13. *Constitution*, ss 75 and 76. Note that at least some of these are apt to describe disputes that could also lie within a state's jurisdiction (e.g. disputes between residents of different states; disputes arising under the *Constitution*).
14. *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*'), 591 [15] (Gleeson CJ).
15. *North Australian Aboriginal Justice Agency v Northern Territory* (2015) 256 CLR 569, 593 - 5 [39] - [40] (French CJ, Kiefel and Bell JJ).
16. *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 72 [68] (French CJ). The incompatibility test is necessarily evaluative, «*the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes*»: *Fardon* (n 14), 618 [104] (Gummow J).
17. Cfr. High Court judgments upholding court-ordered civil detention of individuals who pose a risk to public safety e.g. *Garlett v Western Australia* [2022] HCA 30. See also *SDCV v Director-General of Security* [2022] HCA 32, confirming the variable requirements of procedural fairness.
18. Discussed in, for example, E. Arcioni and A. Stone, *The small brown bird: Values and aspirations in the Australian Constitution*, in *ICON-International Journal of Constitutional Law*, 14(1), 2016, p. 60.
19. I analyse this idea and its implications for other facets of judicial review elsewhere, see: *Chapter III and Legislative Competence to Stipulate that a Material Legal Error is Non-jurisdictional*, in *Australian Journal of Administrative Law*, 28, 2021, p. 177; *Materiality and Jurisdictional Error: Constitutional Dimensions for Entrenched Review of Executive Decisions*, in *UNSW Law Journal Forum*, 6, 2021, p. 1; *The Constitution's Guarantee of Legal Accountability for Jurisdictions*, in *Federal Law Review*, 49, 2021, p. 528; *The Duality of Jurisdictional Error: Central (to Justifying Entrenched Judicial Review of Executive Action) and Pivotal (to Review Doctrine)*, in *Public Law Review*, 32, 2021, p. 132.
20. Noting that Ch III denies Commonwealth legislative power to repose an exclusively judicial function in a non-court *even if* that non-court is exercising executive power, see *Alexander v Minister for Home Affairs* [2022] HCA 19, [93] (Kiefel CJ, Keane and Gleeson JJ).
21. Examples include determining new statutory rights or liabilities according to justiciable criteria, as in the termination of statutory status with consequent loss of property (e.g. *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1); imposition of liability to involuntary hardship or detriment other than as punishment for criminal guilt

(e.g. *Thomas v Mowbray* (2007) 233 CLR 307; *Minister for Home Affairs v Benbrika* [2021] HCA 4) or to make payments or not exercise property rights as ordered (e.g. *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542 ('*Alinta*')).

22. See C. Forsyth, *The Theory of the Second Actor Revisited*, in *Acta Juridica*, 2006, pp. 209, 211.
23. The terms can be slippery, but in essence the quality is distinctive to state power over the governed and lies in the ability to alter legal rights or obligations irrespective of consensual submission to jurisdiction. See, with reference to judicial power: *Waterside Workers* (n 11), 452 (Barton J); *TCL Airconditioner v Federal Court* (2013) 251 CLR 533, 554 [28] (French CJ and Gageler J).
24. An executive decision made in exercise of statutory authority is viewed as «*adjunct to legislation*», a «*factum on which the operation of* [statute] *depends*» / «*the factum by reference to which the Act operates to alter the law in relation to the particular case*»: *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371 (McTiernan J), 378 (Kitto J). See also *Alinta* (n 21), 577 - 579 [94] - [97] (Hayne J).
25. "Prerogative powers" refers to the surviving closed class of monarchical powers over the legal rights or liabilities of subjects that the common law recognised as informing the executive power of polities with a parliamentary system of government and a constitutional monarchy which have not been extinguished by legislation or desetuede. Their range, types and susceptibility to judicial review is discussed in A. Sapienza, *Judicial Review of Non-Statutory Executive Action,* Federation Press, 2020.
26. *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98 - 9 [135] – [136] (Gageler J), 158–159 [373] (Gordon J, dissenting).
27. *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123 ('*Hossain*'), 132-133 [23] – [24] (Kiefel CJ, Gageler and Keane JJ) quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 ('*Bhardwaj*'), 613 [46] (Gaudron and Gummow JJ).
28. See for example *New South Wales v Kable* (2013) 252 CLR 118; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.
29. See (n 10).
30. McDonald (n 2).
31. *Hossain* (n 28), 135 [31] (Kiefel CJ, Gageler and Keane JJ), adopting *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 32 [23] (Gageler and Keane JJ).
32. *Hossain* (n 28), 133 [24] (Kiefel CJ, Gageler and Keane JJ).
33. *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2 ('*OCAA*'), [48] (Kiefel CJ, Bell, Gageler and Keane JJ); *MZAPC v Minister for Immigration and Border Protection* [2021] HCA 17*,* [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
34. *Ibid*.
35. *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J). See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* [2021]

HCA 19, [20] (the Court); *OCAA* (n 34), [50] (Kiefel CJ, Bell, Gageler and Keane JJ) and [94] (Edelman J).

36. *Kable* (n 36), 139 [52] (Gageler J).
37. *Bhardwaj* (n 28), 613 [46] (Gaudron and Gummow JJ).
38. Cfr. *M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, [12] (Gageler, Keane and Nettle JJ), stating that it was unnecessary to decide the extent to which Commonwealth legislation may require «*a decision to refuse to grant a visa which is ineffective in law to achieve that result*» to be treated as «*a valid decision*» because the case at hand concerned a statutory provision for merits review, and in this context «*the requisite analysis can proceed sufficiently on the basis that an* [unauthorised decision] *is a decision that is made in fact*».
39. As recently reaffirmed by the High Court in: *OCAA* (n 34), [48] (Kiefel CJ, Bell, Gageler and Keane JJ); *Citta Hobart Pty Ltd v Cawthorn* [2022] HCA 16, [27] (Kiefel CJ, Gageler, Keane, Steward and Gleeson JJ).