
**THE CONSTITUTIONAL
JURISPRUDENCE OF THE HIGH COURT
OF AUSTRALIA: LEGALISM, REALISM,
PRAGMATISM, JUDICIAL POWER AND
THE DIXON, MASON AND GLEESON
ERAS**

by

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Abstract

The discussion presented in this thesis will analyse the relationship between the *judicial approach* of members of the High Court and the wider sphere of *theoretical assumptions* that surround law generally and constitutional interpretation in particular. The theoretical perspectives that will be considered in this thesis are the ideas associated with *legalism, realism, natural law reasoning* and *pragmatism*. The analysis presented will critically analyse the judicial approaches of the Dixon, Mason and Gleeson eras. The area of constitutional law that is examined in detail is the law relating to *judicial power*.

The central thesis of this work is that the Gleeson High Court is a largely a-theoretical Court, in that, decisions of the Court are characterised by a low-level of abstraction, and the Gleeson Court does not theorise at length about the reasons for adopting a particular judicial approach. It will be argued that the methodology of the current High Court is legalistic with a number of elements of pragmatic thought also being of relevance. In the context of decisions relating to judicial power it will be concluded that a central issue for the Court has been a concern to protect the integrity of the federal judiciary. The Gleeson Court's approach will be distinguished from the realist based jurisprudence of the Mason Court, which articulated the relevance of legal theory and tended to make broad statements of legal principle. It will be argued that the approach of the Gleeson Court also diverges from Dixonian legalism, which the analysis presented in this thesis will establish is a theoretical form of legalism. The thesis will present the view that more theorised forms of legal reasoning are to be preferred over largely a-theoretical approaches.

Declaration

This work contains no material which has been accepted for the award of any other degree or diploma in any university or other tertiary institution and, to the best of my knowledge and belief, contains no material previously published or written by another person, except where due reference has been made in the text.

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Chapter 1

INTRODUCTION

The 23rd of May 1998 marked the appointment of the High Court's 11th Chief Justice. The appointment of Chief Justice Gleeson was seen to be 'welcomed by both sides of politics and lauded by most in the legal profession and judiciary'.¹ Yet headlines aside, the 'end of an era' was the line that ran through the substance of the media reports following the appointment of Chief Justice Gleeson.² The day before, on the eve of his 70th birthday, Sir Gerard Brennan had retired.³ Decisions of the High Court during the Brennan era considered together with the preceding Mason era are often viewed as having transformed Australia's political landscape.⁴ The Mason Court earned a reputation as the most creative and progressive in the High Court's history,⁵ with the Brennan Court having a 'reputation as a consolidator of the court's

¹ Janine Macdonald, 'A New Chief, A New Era In the Highest Court', *The Age*, (Melbourne), 21 May 1998, 6.

² 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9; Janine Macdonald, 'A New Chief Justice, A New Era In the Highest Court', *The Age* (Melbourne), 21 May 1998, 6.

³ David Jackson, 'Brennan Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 68; Belinda Baker and Stephen Gageler, 'Brennan (Francis) Gerard' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307; Margo Kingston, 'Public Farewell For a Very Private Man', *The Sydney Morning Herald* (Sydney), 22 May 1998, 4.

⁴ Cheryl Saunders, 'The Mason Court in Context' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 2-8; Michael Lavarch, 'The Court, the Parliament and the Executive' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 15; Sir Maurice Byers, 'Vote of Thanks' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 108; 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9; George Williams, 'Brennan's High Times', *The Sydney Morning Herald* (Sydney), 21 May 1998, 17.

⁵ Michael Lavarch, 'The Court, the Parliament and the Executive' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 15, 15; Sir Maurice Byers, 'Vote of Thanks' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 108, 108.

achievements under Sir Anthony Mason.⁶ However, the Mason and Brennan Courts were the subject of an 'unprecedented level of attack',⁷ with both Courts operating in 'a charged and often hostile political environment.'⁸

Media speculation at the time of the appointment of Chief Justice Gleeson centred primarily on the changes, if any, that the new Chief Justice would make to the approach of the Mason Court. The suggestion in the media was that the High Court would now move from the 'judicial activism' that was generally associated with the Mason era.⁹ The *nature* of the difference that the approach of the Gleeson Court might bring to Australian jurisprudence was a matter of less media concern with only a comparatively small amount of attention being given to Gleeson CJ's views concerning judicial responsibility for 'economy and efficiency' in the judicial process.¹⁰ It is clear that overall the newspaper reports of Chief Justice Gleeson's appointment accorded more significance to what the appointment was viewed as ending, than to what the appointment of Gleeson CJ heralded for the future.

The 23rd of May 2008 will mark a decade since the appointment of Chief Justice Gleeson. It will also signify the end of the Gleeson era.¹¹ Chief Justice Gleeson will have presided over the High Court for a period similar to the combined length of the Mason and Brennan eras. Yet, commentaries on the state of Australian jurisprudence say comparatively little of the approach of the Gleeson Court to constitutional issues. This may, of course, be partly a result of the Gleeson Court's reluctance to engage in dramatic terms with these issues. The central question of significance raised by legal debate concerning the Gleeson Court's approach has been the

⁶ 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9. See also, George Williams, 'Brennan's High Times', *The Sydney Morning Herald* (Sydney), 21 May 1998, 17.

⁷ 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9. See also, Margo Kingston 'Public Farewell For a Very Private Man', *The Sydney Morning Herald* (Sydney), 22 May 1998, 4.

⁸ George Williams, 'Brennan's High Times', *The Sydney Morning Herald* (Sydney), 21 May 1998, 17. See also, David Jackson, 'Brennan Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 68, 68.

⁹ Janine Macdonald, 'A New Chief Justice, A New Era In the Highest Court', *The Age* (Melbourne), 21 May 1998, 6.

¹⁰ Swearing in of Chief Justice Gleeson, 193 CLR xi, xii. See Bernard Lane, 'Gleeson Calls for Reorder in the Court', *The Australian* (Sydney) 23 May 1998, 4; Hans Van Leeuwen, 'Gleeson to Lead High Court on Efficiency Drive', *Financial Review* (Sydney) 23 May 1998, 6.

¹¹ See Bret Walker, 'Gleeson (Anthony) Murray' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 305, 305.

question of whether the attitude of the current Court signals a 'return to legalism'¹² or 'conservative orthodoxy'.¹³ Comparisons between the approach of the Gleeson Court and influential Australian jurist and former Chief Justice of the High Court, Sir Owen Dixon are often made, with the Gleeson Court being seen by some to be the 'new Dixonians'.¹⁴ The relevant literature also tends to differentiate the approach of the Gleeson Court from that associated with the Mason and Brennan eras.¹⁵ This is perhaps not surprising. The approach of the High Court during any given period is often distinguished from the approach of its immediate predecessor. For example, distinctions have been made between the Latham and Dixon Courts,¹⁶ the Dixon and Barwick Courts,¹⁷ the Barwick and Gibbs Courts,¹⁸ and the Gibbs and Mason Courts.¹⁹ However, such comparisons may be made whether the Court is reacting

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- ¹² Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241. See also Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), accessible via the High Court website: <<http://www.hcourt.gov.au>>, 14; Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331, 332; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 224, 229ff; Justice Susan Kenny, 'The High Court on Constitutional Law; The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.
- ¹³ Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139. See also Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 42-43.
- ¹⁴ See, for example, Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241.
- ¹⁵ Sir Anthony Mason, 'The Evolving Role and function of the High Court' in Brain Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 95, 119; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221, 229.
- ¹⁶ Philip Ayres, *Owen Dixon* (2003) 86. See generally, Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, 225.
- ¹⁷ For example, Sir Paul Hasluck, writing of Sir Garfield Barwick expresses the view that, 'He is far inferior to Owen Dixon in loftiness of intellect, depth of understanding and scope of humane studies. I guess that he is keenly interested in the law as a complex of intricate devices and in the Australian constitution as the starting point for legal argument. He is inventive rather than creative': see Sir Paul Hasluck, *The Chance of Politics* (1997) 98-99. See also, Gareth Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13, 52; George Winterton, 'Barwick, Garfield Edward John' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 56, 58; Sir Anthony Mason, 'Barwick Court', in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 59.
- ¹⁸ For example, Anne Twomey has written of the Gibbs Court that '[t]he Gibbs Court bridged the transition from the more conservative Barwick Court to the more liberal Mason Court': see Anne Twomey, 'Gibbs Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 303, 303. See also David Jackson and Joan Priest, 'Gibbs, Harry Talbot' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 300, 302-3. See generally Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 21.
- ¹⁹ See Sir Harry Gibbs, 'The Decline of Federalism?' (1994) 18 *University of Queensland Law Journal* 1; Sir Harry Gibbs, 'Courage in Constitutional Interpretation and Its Consequence - One Example' (1991) 14 *University of New South*

to the views of the previous era or simply applying its own interpretative method.²⁰ It follows that the approach of the Gleeson Court is a topic worthy of an extensive examination in a manner that goes beyond general comparisons with its predecessors. Suggestions of a change from *judicial activism* to *judicial conservatism* do not impart a significant amount of information.²¹ Importantly, such broad-brush comparisons may reveal little about any fundamental change in the foundations of the High Court's approach.

After almost a decade of the Gleeson Court, it is important to question the *nature* of the change that has occurred in the jurisprudence of the High Court, and to examine the contribution that the Gleeson Court has made to Australian law. It is the *character* of the change that the Gleeson Court brings that is of central significance to Australian constitutional law.

The thesis of this dissertation is that the Gleeson High Court is a largely a-theoretical Court, in that the judicial decisions of the Court are characterised by a low-level of abstraction, and the Gleeson Court does not theorise at length about the reasons for adopting a particular judicial approach. This approach distinguishes the Gleeson Court from the realist based jurisprudence of the Mason Court, which articulated the relevance of legal theory and tended to make statements of wide legal principle. The approach of the Gleeson Court also diverges from Dixonian legalism, which the analysis presented in this thesis will establish is a theoretical form of legalism.

One central aim of this thesis is to examine the nature of the movement that has occurred in the High Court's approach to constitutional issues by presenting a critical analysis of the High Court's jurisprudence that focuses upon a Dixonian approach, and the approaches of the Mason and Gleeson eras. It says much about the centrality of Sir Owen Dixon to Australian jurisprudence that both the Mason and Gleeson Courts are often defined by virtue of their

Wales Law Journal 325. See also, for example, Sir Garfield Barwick, 'Parliamentary Democracy in Australia', in *Upholding the Australian Constitution*, (1995) Volume 5, 205, 219; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 21-22; Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 4.

²⁰ By way of clarification it should be noted that these two possibilities are not mutually exclusive.

²¹ See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 562-3, 570.

movement towards or away from a Dixonian approach. The analysis presented in this thesis will take a perspective that is often overlooked in Australian jurisprudence. Almost without exception, the discussion presented in this thesis will consider the relationship between the *judicial approach* of members of the High Court and the wider sphere of *theoretical assumptions* that surround law generally and constitutional interpretation in particular.

The theoretical concepts that will be considered in this thesis are the ideas associated with *legalism, realism, natural law reasoning* and *pragmatism*. The analysis presented will focus upon the Dixon, Mason and Gleeson eras and the area of constitutional law that will be examined in detail is the law relating to *judicial power*. The discussion of these ideas, by considering the role that each approach accords to the judiciary, seeks to place Australian judicial attitudes within the wider contemporary debate concerning constitutional interpretation. This form of analysis also enables conclusions to be drawn about the direction of the change that has occurred in the High Court's constitutional jurisprudence. Perhaps most importantly the analysis presented in this thesis provides a unique perspective upon the nature of the fundamental change, that it will be argued has occurred in the foundations of the High Court's approach. There are of course, other factors that have significantly influenced constitutional interpretation in Australia, with the most obvious example being considerations of federalism. That said, in order to provide some parameters to the discussion presented in this thesis, the following analysis will focus on the legalism, realism, pragmatism²² and judicial power, with considerations of federalism only being considered in this context. The choice to concentrate on judicial power is deliberate as it provides the best vehicle to critically analyse the operation of these three theoretical perspectives.

Although this thesis seeks to establish an understanding of the relevance of theoretical reasoning in an Australian constitutional context, it should be recognised that legal writers in Australia have generally been reluctant to engage in this form of discussion. Professor Cheryl Saunders in a speech given in 1998 noted that debate about the role of constitutional judges, 'is

²² As noted, natural law perspectives will also be considered in Chapter 4 of this thesis. However, as the discussion in that Chapter will show the ideas associated with such theories have been largely rejected by the Gleeson Court, and for this reason natural law concepts will not be discussed at length.

not a debate we are accustomed to having'.²³ Saunders stated that what has been written on the judicial method in Australia has;

tended to focus on the important detail of constitutional interpretation: characterisation, proportionality, connotation and denotation, and so on. As a generalisation, it has tended not to tackle the *role of the constitutional judge from a broad theoretical perspective*.²⁴

Saunders expressed the view that Australian discourse needed to develop 'an informed constitutional dialogue', rather than focusing on 'simple myths about the potential of a literal approach, or the enlightenment of a progressive approach or the relevance of the subjective intentions of the framers of the Constitution'.²⁵ Professor John Williams has also noted that, 'Australian constitutional lawyers have been reluctant to debate the theoretical foundations of the constitutional arrangements we live under'.²⁶

In many respects the analysis of constitutional decisions in Australian legal writing has a tendency to focus on outcomes *rather than method*.²⁷ There are, of course, some exceptions to this approach, with perhaps the most influential of these being the analysis presented by leading constitutional commentator, Professor Leslie Zines.²⁸ However many Australian lawyers have shown a deep distrust of anything 'extra-constitutional'.²⁹ For example, Justice

²³ Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 7. See also Bryan Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 31, 34.

²⁴ Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 7 (emphasis added).

²⁵ *Ibid.*

²⁶ John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 119, 119.

²⁷ See Bryan Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 31, 35.

²⁸ Leslie Zines, *The High Court and the Constitution*, (first published 1981, 4th ed 1997). See also, for example, Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985).

²⁹ George Winterton, 'Extra-Constitutional Notions in Australian Constitutional Law' (1986) 16 *Federal Law Review* 223, 239. See also Tom Campbell, 'Democracy, Human Rights, and Positive Law' (1994) 16 *Sydney Law Review* 195; Sir Harry Gibbs, 'The Threat to Federalism' in Samuel Griffith Society, *Upholding the Australian Constitution* (1993) volume 2, 183-194; Sir Garfield Barwick, 'Parliamentary Democracy in Australia' in Samuel Griffith Society, *Upholding the Australian Constitution* (1995) volume 5, 205, 219; Address by Justice Dyson Heydon to Quadrant Dinner, 30 October 2002, reported as 'Judicial activism and the death of the rule of law' (2003) 47 *Quadrant* 9; 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110; 'Judicial Activism and the death of the rule of law' (2003) 14 *Australian Intellectual Property Journal* 78; 'Judicial activism and the death of the rule of law' (2004) 10 *Otago Law Review* 493. Reference in this thesis will be to the report in the *Australian Bar Review*.

McHugh in *McGinty v Western Australia* strenuously advocated the avoidance of 'top-down' reasoning on the basis that such an approach was inconsistent with the orthodox interpretive principles of Australian constitutional law, because, '[a]ny theory of constitutional interpretation must be a matter of conviction based on some theory external to the Constitution itself'.³⁰

It is perhaps because of the general disinclination to consider theories that concern constitutional interpretation that the use of the text of the Australian Constitution as the sole source of interpretation remains a persistent view in Australian constitutional law.³¹ Geoff Lindsay SC in a 2006 article commented that:

[i]n Australia debates about judicial method in an age of change adopt as their centre-point, as much for those who reject it as those who embrace it, Sir Owen Dixon's aphorism that 'there is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'³²

These comments to a large degree accurately describe the current state of Australian legal discourse concerning constitutional interpretation. Although, as Chapter 2 will discuss, there is some variance in the meaning accorded to the term *legalism*. That said, the tendency for Australian debates concerning judicial method to cling to the reference or 'centre-point' provided by Sir Owen Dixon's statement, would seem unnecessary given that, as Sir Anthony Mason has opined: '[o]nce the inadequacy of the text as a touchstone is recognised, a variety of *theoretical approaches* to constitutional interpretation begin to open up.'³³ It may be that all constitutional interpretation rests upon theoretical assumptions, with this being so even when

³⁰ *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

³¹ Sanford H. Kadish 'Judicial Review in the High Court and in the United States Supreme Court Part 1' (1959) 2 *Melbourne University Law Review* 4, 19; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106, 156; John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 119, 119.

³² Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 247 footnote 7. See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 557; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 424.

³³ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 13.

the nature of these assumptions is not clear. For example, even the idea that the text is controlling reflects a particular perspective or theory of interpretation. The connection of constitutional interpretation with theoretical constructs is not surprising as it may be argued that all knowledge and deliberative thought will reflect a specific viewpoint.³⁴ The idea of knowledge being contextual, and the related idea that the existence of absolute definitive all-embracing principles are open to doubt, suggests that a number of issues should be noted before commencing an analysis that seeks, in part, to identify broad general trends. These issues relate to three general ideas, which may be fairly simply stated at the outset. First, it is necessary to acknowledge that although this Introduction, and the analysis presented throughout this thesis, will at times use the short-hand term the 'Mason Court', as Sir Gerard Brennan makes clear 'it is not a term which accurately describes the dynamics of a Court constituted by Justices of robust independence of mind, willing and able to give cogent expression to their own views.'³⁵ A similar qualification, of course, also attaches to the use of the terms the 'Dixon Court', the 'Brennan Court' or the 'Gleeson Court'.

The second matter that should be noted at the outset attaches to the equation of a specific theoretical position with the approach of a particular judicial officer or a specific Court. Implicit in the analysis presented in this thesis is the reference to concepts such as 'Dixonian legalism', the 'realist-based jurisprudence of Mason CJ' or 'the natural-law perspectives of Justices Deane

³⁴ Michael J Detmold, 'Intention: Meaning in Relation' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001) 187, 191; Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) see especially pages 115 and 117, paragraphs, 5.5571-5.621, and 5.641[First German edition *Logisch-philosophische Abhandlung* published 1921].

³⁵ Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 10. Of the description 'Mason Court', Sir Anthony Mason speaking partly 'tongue in cheek' has commented that: 'To anyone familiar with the Court's judgments, it consisted of a Chief Justice and six Justices, united only by a disposition to disagree with each other': Sir Anthony Mason, 'A Reply' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 113, 113. Sir Anthony Mason has also written that: 'The High Court is not a monolithic institution. It is at any time a group of seven justices who are obliged to hear and determine, according to their individual judgment, particular cases. The justices may have conflicting views on the role of the Court as well as on the principles of law which should govern the case in hand. It would therefore be a serious mistake to assume that, in deciding a case, the Court as an institution embarks upon any general policy with a view to achieving a particular goal, political or otherwise, external to the disposition of that case': Sir Anthony Mason, Foreword to Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) viii-ix. See also Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 1, 2.

and Toohey'. It is however important to emphasise that, as the analysis in this thesis will demonstrate, judicial approaches cannot be described wholly within the terms of a particular abstract theoretical position. Furthermore, theory in action often best exemplifies the relative influence of a theoretical perspective. For these reasons, this thesis will analyse the relevance of particular theoretical perspectives to judicial approaches, rather than categorising specific judicial approaches within an all encompassing theoretical framework.³⁶

One reason why judicial approaches cannot be viewed as falling neatly within the four-corners of a specific legal theory,³⁷ relates to a third issue, which should be mentioned at the start of this thesis. That is, the distinction that is at times drawn between 'practical' or 'pragmatic' considerations on the one hand *and* theoretical reasoning on the other. Although there is a tendency to counterpoise these two approaches it is important to note that in common law countries, judicial reasoning usually involves a connection between a theoretical perspective or method, and a practical controversy. This is particularly apparent in Australian constitutional law as the jurisprudence of the High Court always develops in the context of a 'matter'.³⁸ For example, even the idea that judicial reasoning can be based solely upon the 'facts of the case' can be seen to reflect a particular viewpoint or theoretical approach.³⁹ The reverse also applies, in that theoretical reasoning by judges does not occur in the absence of a particular factual controversy.⁴⁰ Thus, although both the use of 'theoretical' and 'practical' constructs in judicial

³⁶ For example, natural law principles may be held up as being abstract, universal and transcendent doctrines: see Aristotle *The Ethics*, Book 5, vii, 1134b8-24, [translation by J A K Thomson first published 1953] 189-90; John Locke, *Two Treatises of Government*, Chapter II, paragraphs 4-8, [Critical edition by Peter Laslett, 2nd ed, 1967] 287-9; John Finnis, *Natural Law and Natural Rights* (1980) 24. However, as the analysis in Chapter 4 will show the reasoning of Justices Deane and Toohey is more accurately viewed as involving a complex process that balances competing issues, in a manner that is informed by natural law principles; rather than as an approach that may be characterised as the deductive application of natural law principles. For an analysis of the complex process of legal reasoning see further: Julius Stone, *Legal System and Lawyers' Reasonings* (1964) 304.

³⁷ See Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 582.

³⁸ *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257 ('*In re Judiciary and Navigation Acts*'); *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289; *DPP v B* (1998) 194 CLR 566; *Croome v Tasmania* (1997) 191 CLR 119; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

³⁹ See further Allan C Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85; Dennis Patterson, *Law and Truth* (1996) 13; Ludwig Wittgenstein, *Philosophical Investigations*, Part I, Section 198 (G E M Anscombe, trans, 1968, 3rd ed) 80e.

⁴⁰ This suggestion relates to the ideas presented by Ludwig Wittgenstein. Wittgenstein argues that all theory derives in some way from action or experiences of the world: see Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) see especially pages 115 and 117, paragraphs, 5.5571-5.621, and 5.641 [First German edition *Logisch-philosophische Abhandlung* published 1921]. See further, Michael J Detmold, 'Intention: Meaning in Relation' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention*

reasoning are examined in this thesis, and often the relevance of either a theoretical or non-theoretical approach will be emphasised, in Australian constitutional law, both theoretical and practical constructs will be relevant to judicial reasoning. Whilst a conceptual division between these concepts can be used to better understand the general approach of a court, or individual judges, it is important to acknowledge that the divide between these concepts is artificial.⁴¹

For the reasons outlined above, the discussion in this thesis will not seek to describe the approach of a particular judge or a Court as wholly theoretical or entirely pragmatic. Rather, the analysis presented will seek to identify more general trends such as a greater willingness to consider pragmatic considerations, or an inclination to engage in theoretical reasoning. The central issue that will be presented will often concern the level of theorisation involved in a particular judicial approach. For example, judicial approaches may be referred to as 'highly theorised' or they may be said to exhibit a low level of theorisation. A low-level of theorisation is often associated with approaches that are commonly referred to as being tied closely to the facts before the Court.

Although the matters referred to above should be kept in mind, an analysis of the manner in which the approach of differently constituted High Courts relates to theoretical concepts can increase the current level of understanding of the jurisprudence of the High Court.⁴² By considering judicial approaches from a broad theoretical perspective the analysis presented in this thesis can contribute to some of the recognised vacancies in theoretical analysis in Australian constitutional jurisprudence. More specifically, the analysis presented in this thesis will provide particular insights into the relative influence of theorised and largely non-theorised

in Law and Philosophy (2001) 187, 191. Wittgenstein also points out that, 'no course of action could be determined by a rule, because every course of action can be made out to accord with the rule': Ludwig Wittgenstein, *Philosophical Investigations*, Part I, Section 198 (G E M Anscombe, trans, 1968) 80e. See further, Dennis Patterson, *Law and Truth* (1996) 13. See also Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 5. See further, Chapter 5, Section IV, sub-section B below, which considers these ideas in the context of a discussion of the instrumental nature of pragmatism.

⁴¹ See further, Karl Llewellyn, *The Common Law Tradition* (1960) 35-45; Julius Stone, 'From Principles to Principles' (1981) *Law Quarterly Review* 224, 253; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1771-72. See also P S Atiyah, 'From Principles to Pragmatism; Changes in the Function of the Judicial Process and the Law' (1978) also appearing in (1980) *Iowa Law Review* 1249; P S Atiyah, *Pragmatism and Theory in English Law* (1987).

⁴² See also, for example, Justice Keith Mason's analysis of three cases argued by Sir Maurice Byers QC, before the High Court, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, *Wik Peoples v Queensland* (1996) 187 CLR 1 and *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 574, 577, 581.

reasoning in the context of the High Court's Chapter III jurisprudence. The analysis presented in this thesis will engage in discussion concerning these issues in the following way.

The thesis is divided into two Parts. Part I is comprised of Chapters 2 to 6. The analysis in these Chapters will consider concepts that have been relevant to the approach of Sir Owen Dixon, and members of the Mason and Gleeson Courts. In particular the theoretical assumptions associated with legalism, realism, natural law reasoning and pragmatism will be discussed and critiqued. More specifically, the analysis presented in Part I will take the following form.

Chapter 2 will explore the concept of legalism. In particular it will examine the relationship between the general concept of legalism, the perspective of Sir Owen Dixon's legalism and the approach of the Gleeson Court. Whilst the analysis presented in Chapter 2 will conclude that legalism is a significant influence upon the current Court, it will also argue that the approach of the Gleeson Court generally diverges from the theoretical foundations of Sir Owen Dixon's jurisprudence.

The discussion in Chapters 3 and 4 also exemplifies the manner in which debate about constitutional interpretation can proceed from a theoretical perspective. Chapter 3 will consider the theoretical constructs associated with realism. In particular it will be argued that the developments in constitutional law led by the realist-influenced jurisprudence of the Mason Court, and the approach of Sir Anthony Mason in particular, did not just extend the boundaries of an accepted legalistic interpretation to incorporate policy considerations. Rather, it will be argued in Chapter 3 that the High Court during the Mason period developed a fundamentally different and more transparent approach, which reconceptualised the role of the Court in a manner that emphasised the important function that the judiciary plays in balancing the interests of individuals with those of the State. The manner in which the Gleeson Court has declined to consider this perspective will also be outlined.

Chapter 4 will consider the foundations of natural law thinking and explore the manner in which the jurisprudence of Justices Deane and Toohey demonstrates the influence of a natural law perspective and accords the judiciary a significant role in protecting the interests of individuals. The manner in which there has been an outright rejection of this approach by the Gleeson Court will be considered. Further, the significance of this refutation in the context of the argument presented in this thesis will be discussed.

Chapters 5 and 6 will focus on pragmatism. Although pragmatism and legal pragmatism in particular is an influential and established movement in the United States, there has been little analysis of this perspective in Australian jurisprudence. The analysis in Chapter 5 will aim to fill this perceived gap in Australian literature by considering the central tenets of legal pragmatism, and examining the extent to which legal pragmatism can assist a conceptual understanding of the approach taken to constitutional issues. More specifically the analysis in Chapter 6 will focus upon the manner in which pragmatic ideas are represented in the approach of the Gleeson Court. This Chapter also contains the conclusion to Part I of this thesis. This intermediate conclusion will draw together the analysis presented in the first half of the thesis. In particular it will articulate the relationship between the approach of the Gleeson Court and the theoretical structures of legalism, realism, natural law reasoning and pragmatism.

The analysis presented in Part I of this thesis will be based largely upon extra-curial comments primarily because it is these comments that are often the most illustrative of the reasons for a particular methodology or theory of interpretation being adopted. However, any conclusions based solely upon extra-judicial comments may not give a complete understanding of the approach taken by judges. Ultimately, what is said in decided cases is likely to be of primary significance. For this reason, the *hypothesis* developed in Part I of this thesis will be subject to further scrutiny and testing in Part II of this thesis. The second half of this thesis will consider the conceptual framework put forward in Part I in the context of some significant constitutional cases concerning judicial power.

A focus on judicial power and Chapter III of the *Constitution*, in Part II of this thesis, will provide some necessary parameters for the analysis presented in this thesis. The choice of judicial power as noted is deliberate. The manner in which judges perceive their own role is most apparent when addressing issues of judicial power and for this reason the themes explored in this thesis are best illustrated in this area of law. In other words, the approach taken to judicial power is likely to be illuminative of the judges' perception of the role that the judiciary plays in constitutional interpretation. In addition, as the analysis in Part II will demonstrate, cases concerning judicial power provide perhaps the best example of the contrasting influence that various theoretical assumptions have had upon the approaches taken by differently constituted High Courts, including the Dixon, Mason and Gleeson Courts. One aim of the analysis in Part II is to consider whether the differing approaches taken to the interpretation of Chapter III are reflective of the diverse underlying theoretical assumptions that were considered in Part I of this thesis. The relevant assumptions in this regard are those implicit in the approaches of legalism, realism, natural law reasoning and pragmatism. Part II is comprised of Chapters 7 to 10.

Chapter 7 will briefly outline the theoretical presumptions that support the separation of judicial power, and examine the development of the Australian doctrine of the separation of judicial power. The cases to be examined are: *New South Wales v Commonwealth*,⁴³ *Waterside Workers' Federation of Australia v J W Alexander Ltd*,⁴⁴ *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920*⁴⁵ and *R v Kirby; Ex parte Boilermakers' Society of Australia*.⁴⁶ More specifically, this analysis will accord particular attention to the influence of Sir Owen Dixon's legalism upon the *Boilermakers'* decision.

Chapter 8 will consider the manner in which the Mason era, saw the High Court's jurisprudence move away from both the principles established in the *Boilermakers* decision, and the methodology of legalism. A central concern of the discussion in Chapter 8 will be to

⁴³ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case').

⁴⁴ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('Alexander's Case').

⁴⁵ *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257 ('*In re Judiciary and Navigation Acts*').

⁴⁶ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers'*').

examine the use of theoretical reasoning generally and the use of realist and natural law constructs in particular. This analysis will focus, in the context of the decisions of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁴⁷ and *Polyukovich v The Queen*,⁴⁸ upon the Court's use of these forms of reasoning, together with the Court's understanding of judicial power, and the concern that the High Court expressed for the interests of the individual.

Chapter 9 will firstly consider the manner in which decisions of the Brennan era, like those of the Mason era, generally continued to support a flexible approach to the separation of judicial powers doctrine. The second and central topic of discussion in Chapter 9 will concern the manner in which the judgments in *Kable v Director of Public Prosecutions*⁴⁹ witnessed some changes in judicial methodology without any substantive alteration to any of the principles developed during the Mason era. The extent to which this decision also saw an increase in the High Court's concern for the integrity of the federal judiciary will also be outlined and examined.

Chapter 10 will consider the approach of the Gleeson Court generally, as well as analysing the views of individual members of this Court in some important cases concerning judicial power. The decisions to be examined are *Re Wakim; Ex parte McNally*,⁵⁰ *Al-Kateb v Godwin*,⁵¹ *Baker v R*,⁵² *Fardon v Attorney-General (Queensland)*,⁵³ and *Forge v Australian Securities and Investments Commission & Ors*.⁵⁴ It will be argued that the *methodological* changes from the Mason to Gleeson eras have brought about some *substantive* changes in the law. The impact of these changes has been to reduce the constitutional protections that decisions from the Mason era held the *Constitution* afforded to individuals. In short, the change in *method* has brought about *substantive* changes in the law.

⁴⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Chu Kheng Lim*').

⁴⁸ *Polyukovich v The Queen* (1991) 172 CLR 501 ('*War Crimes Act Case*').

⁴⁹ *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('*Kable*').

⁵⁰ (1999) 198 CLR 511 ('*Re Wakim*').

⁵¹ (2004) 219 CLR 562 ('*Al-Kateb*').

⁵² (2004) 223 CLR 513 ('*Baker*').

⁵³ (2004) 223 CLR 575 ('*Fardon*').

⁵⁴ (2006) 229 ALR 223 ('*Forge*').

In this way Part II of this thesis, by considering the approach of differently constituted High Courts to judicial power within the detailed conceptual framework presented in Part I of this thesis, aims to contribute to the recognised underdevelopment in theoretical jurisprudence in Australian law. The analysis will do this by providing a particular perspective concerning the fundamental influences upon the Court's construction of constitutional jurisprudence generally, and the High Court's development of the law concerning judicial power, in particular.

The analysis presented in Part II of this thesis also provides a basis for the examination of the approach of individual judges. In addition, this analysis together with that presented in Part I of this thesis supports the drawing of three significant conclusions which will be presented in the conclusion to this thesis. So as to provide an understanding of the direction that the analysis presented in this thesis will be taking, it is informative to set out these findings, at this stage.

The first conclusion is that the Gleeson Court is concerned with the integrity of the federal judiciary and this can be contrasted with the approach of the realist-influence jurisprudence of the Mason era which exhibited a tendency to seek to balance the interests of the State with the interests of the individual.

The second conclusion is that the general approach of the Gleeson Court exhibits the influence of legalism with a number of pragmatic concepts also being of relevance.

The key comparisons that have been made in this thesis between the Dixon, Mason and Gleeson High Courts support the third, and perhaps the principal conclusion that may be drawn from the analysis presented. This conclusion is that the Gleeson Court generally puts forward a largely *a-theoretical* approach. The jurisprudence of the current Court in this way contrasts with the jurisprudence of its two most revered predecessors namely, the Dixon Court and the Mason Court. The reason for this distinction is that the respective judicial processes of both Sir Owen Dixon and Sir Anthony Mason are supported by, and rest upon, some fundamental theoretical foundations. The advantages and disadvantages of theorised and non-theorised approaches to judicial reasoning will be examined in this thesis. It will be argued that the jurisprudential

approach of the Gleeson Court is not to be preferred to the more theorised approaches, such as that which is exemplified by the jurisprudence of the Mason era. Theorised approaches to judicial reasoning provide a more transparent account of the judicial reasoning process, and also offer greater theoretical justification for the choice of methodology employed.

PART I

Chapter 2

LEGALISM, DIXONIAN LEGALISM AND THE GLEESON COURT

I INTRODUCTION

The influence of legalism on the Gleeson Court has been the subject of some academic analysis.¹ Whilst the approach of the Gleeson Court may be seen as signalling a return to Dixonian legalism, a distinction is drawn in this thesis between the approach taken by Sir Owen Dixon and that of the current High Court.² This Chapter will begin by setting out the background provided by the existing academic debate concerning legalism and the Gleeson Court. The analysis undertaken will focus on three concepts that inform this discussion. First, the general concept of legalism will be considered. The second discussion will present a particular

¹ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Justice Susan Kenny, 'The High Court on Constitutional Law; The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? – Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

² See also, Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241.

perspective on Sir Owen Dixon's legalism. The third topic analysed will be legalism and the Gleeson Court. This final discussion will present a particular perspective on the relationship between the general approach of the Gleeson Court and Dixonian legalism.

The analysis will take the form outlined above so that what is meant by 'legalism' in general and the more specific variant of 'Dixonian' legalism, as well as the approach of the Gleeson Court, may be accurately defined. The importance of defining the three elements that inform the analysis undertaken in this Chapter is, in part, a consequence of the fact that Sir Owen Dixon's legalism has been the subject of numerous differing interpretations.³ It will be argued that, the debate that has occurred about the extent to which the approach of the Gleeson Court represents a Dixonian form of legalism, to a degree hinges upon the perspective taken of Sir Owen Dixon's legalism, rather than being attributable to differing interpretations of the approach of the Gleeson Court. For any comparison of Dixonian legalism and the jurisprudence of the Gleeson Court to be especially informative, it is necessary to accurately specify the meaning attributed to each concept that informs such discussion. Furthermore, whilst the current literature is illuminative in a general sense about the influence of legalism and Dixonian legalism on the current High Court, there is little analysis devoted solely to a consideration of these issues. Thus, the detailed analysis provided in this Chapter aims to further the current level of understanding about the relationship between legalism, Dixonian legalism and the approach of the Gleeson Court.

In order to provide some understanding of the direction that the analysis presented in this Chapter will be taking, it is informative to firstly set out the conclusions reached in this Chapter about the relationship between legalism, Dixonian legalism and the approach of the Gleeson Court. The following analysis suggests that legalism is a significant influence on the Gleeson Court. However, rather than seeing the approach of the Gleeson Court as completely diverging

³ See, eg, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 556-561; Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543; Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 111, 113-116; Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57; Laurence Maher, 'Owen Dixon: concerning his political method' (2003) 6 *Constitutional Law and Policy Review* 33; Justice Kenneth Hayne, 'Owen Dixon' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 219; David Ritter, 'The Myth of Sir Owen Dixon' (2005) *Australian Journal of Legal History* 249. See generally, Philip Ayres, *Owen Dixon* (2003) 109, 232-233.

from Dixonian legalism or being wholly representative of Sir Owen Dixon's approach, the argument presented in this Chapter puts forward an alternative view which suggests that there are both striking similarities and important differences in these approaches.

It will be argued in this Chapter that the methodology of interpretation put forward by Sir Owen Dixon may be identified in the approach of most members of the Gleeson Court. However, and this is critical for the ultimate conclusions of this thesis, it will also be contended that Dixonian legalism as it is understood in this Chapter differs significantly from the approach generally taken by the majority of members of the Gleeson Court. In particular, the interpretation of Sir Owen Dixon's legalism presented herein views his Honour's perspective as being based upon the idea that there is, or could be presupposed to be, an identifiable body of legal knowledge.⁴ It will be argued that, to the extent that Sir Owen Dixon's legalism is based upon this theoretical position, it diverges from the general approach of the Gleeson Court as it is difficult to identify a similar *theoretical* basis to the jurisprudence of the Gleeson Court.

Put plainly, the hypothesis presented in this Chapter suggests that there are similarities in terms of the legalistic methodology employed by Sir Owen Dixon and some members of the Gleeson Court, however there is at least one fundamental underlying difference between these approaches. In other words there is a tendency for a number of members of the Gleeson Court to adopt an approach that mirrors the Dixonian legal methodology but is uncoupled from the fundamental theoretical precepts of the Dixon approach. This final point, and the ideas put forward in this Chapter, will be expanded upon in Part II of this thesis which by virtue of presenting an analysis of cases allows for a more detailed examination of the approach of individual members of the Gleeson Court.

⁴ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156.

II PERCEPTIONS OF THE GLEESON COURT AND LEGALISM

A significant issue raised by legal debate concerning the Gleeson Court has been the question of whether the approach of the High Court signals a 'return to legalism'⁵ or 'conservative orthodoxy'.⁶ It is important to acknowledge at the outset of this discussion that debate about the influence of legalism has occurred in the context of other issues.⁷ In relation to the recent influence of legalism, Haig Patapan has written that:

An important aspect of Chief Justice Gleeson's tenure in office has been his endorsement of a return to 'legalism' as the proper basis for judicial interpretation by the High Court. Legalism refers to the approach in judicial interpretation that relies on the strict analytical and conceptual techniques of formal legal argument.⁸

⁵ Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241. See also Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 14; Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331, 332; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 224, 229ff; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

⁶ Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139. See also Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 42-43.

⁷ One other issue that has been the focus of recent analysis of the Gleeson Court is the predominance of litigation raising questions associated with Chapter III of the *Constitution*: see, for example, Stephen Gageler, 'The High Court on constitutional law: the 2001 term' (2002) 25 *University of New South Wales Law Journal* 194, 201-203; Leslie Zines, 'The Present State of Constitutional Interpretation' in Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 231-237; Fiona Wheeler, 'The rise and rise of judicial power under Chapter III of the Constitution: A decade in overview' (2000) 20 *Australian Bar Review* 283. Yet another significant issue in jurisprudential analysis of the Gleeson Court is the 'originalism' and 'non-originalism' debate: see, eg, Justice Michael Kirby, 'Constitutional Interpretation and Original Intent; A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Dan Meagher, 'New day Rising? Non-originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141; Mirko Bagaric, 'Originalism: why some things should never change, or at least not too quickly' (2000) 19 *University of Tasmania Law Review* 173; Jeremy Kirk 'Constitutional interpretation and a theory of evolutionary originalism' (1999) 27 *Federal Law Review* 323; Jeffrey Goldsworthy, 'Originalism in constitutional interpretation' (1997) 25 *Federal Law Review* 1; Greg Craven, 'Original intent and the Australian Constitution: coming soon to a court near you?' (1990) 1 *Public Law Review* 166. See generally, Justice Antonin Scalia, 'The role of a constitutional court in a democratic society' (1995) 2 *Judicial Review* 141; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 326ff.

⁸ Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241.

Patapan goes on to consider the relationship of Dixonian legalism to the approach of the Gleeson Court writing that:

Without delineating the precise contours of Chief Justice Gleeson's conception of legalism, what is clear is that he is not simply returning to a Dixonian conception. His endorsement of judicial law making, of Constitutional implications, of the need to accommodate social change, suggest that he would not reject the High Court's recent jurisprudence on freedom of speech or Native Title. Perhaps it would be more accurate to characterise his position as 'new legalism' rather than a simple return to a version of judicial positivism.⁹

Justice Paul Finn has also commented on the relationship between Dixonian legalism and the approach of the Gleeson Court. In remarks that would appear to contrast with Patapan's perspective Justice Finn has emphasised the similarities in these approaches. However, it should be recognised that Finn J has also identified at least one distinction between Dixonian legalism and the approach of the Gleeson Court. His Honour wrote that,

[w]hile the lawmaking function of Judges is ordinarily no longer regarded to be as restrictive as Sir Owen Dixon would admit, some at least of the Justices of the High Court of Australia as presently constituted would appear to wish that Judges would not stray far from the Dixonian path.¹⁰

Justice Finn also comments that, '[t]here are some substantial indications of a re-embrace of Dixonian legalism, even if the now admitted area of judicial lawmaking is not so tightly confined.'¹¹ The issue of whether the approach of the Gleeson Court is representative of that advocated by Sir Owen Dixon would be thought to be of significance to debate about the form of legalism that may be associated with the approach of the Gleeson Court. However, it may well be that any divergence of opinion about this issue arises from differing interpretations of Sir Owen Dixon's position, rather than divergent perspectives on the Gleeson Court. For

⁹ *Ibid*, 243.

¹⁰ Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 224.

¹¹ *Ibid*, 229. Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555.

example, the view of Sir Owen Dixon's jurisprudence presented by Patapan¹² may be contrasted with the perspective presented by Justice Keith Mason who views Sir Owen Dixon as offering a highly theorised approach to legal reasoning.¹³

The analysis of Sir Owen Dixon's legalism presented in this Chapter argues that Dixonian legalism is not a confined form of legalism. In part because of the diversity of meaning attributed to forms of legalism, the following discussion, having discussed the manner in which the legal literature has analysed the approach of the Gleeson Court and Dixonian legalism, will focus on defining the three concepts that inform this discussion. Firstly, the general concept of legalism will be discussed, secondly the legalism of Sir Owen Dixon will be analysed; and, thirdly, legalism and the approach of the Gleeson Court will be considered.

Turning firstly by way of background to the manner in which the issue of the relationship between Dixonian legalism and the approach of the Gleeson Court has been specifically addressed by commentators, it may be said that there appears to be a general agreement that both approaches represent a form of legalism.¹⁴ However, the exact nature of any agreement concerning the influence of legalism on these jurists may be difficult to determine. One reason for this is the tendency of contemporary legal writers not to seek to define legalism. It will be argued in this Chapter that the disinclination of legal writers to define legalism has resulted from legalism in legal writings, being in many ways a mindset.¹⁵ Legalism in law may represent part of a common outlook,¹⁶ as such, it may be said that legalism forms part of the 'intellectual air we breathe.'¹⁷

¹² See Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241.

¹³ Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574, 578-9. See also, for example, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

¹⁴ See, eg. Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106 ff; See also Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) 203.

¹⁵ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964) 8; Anthony Arblaster, *The Rise and Decline of Western Liberalism* (1984) 6. See further, Leslie Zines, *The High Court and the Constitution*, (4th ed 1997) 424.

¹⁶ *Ibid.*

¹⁷ Anthony Arblaster, makes this point of liberalism in the social sciences, writing that,

Sir Anthony Mason, in reference to the influence of legalism on the Gleeson Court, expressed the view that '[t]he Court may be returning to a methodology that places great store by doctrinal discussion ostensibly little influenced by discussion of policy considerations.'¹⁸ Other commentators, such as Justice Paul Finn, Katherine Gelber, Graeme Hill, Justice Susan Kenny, Dan Meagher, Haig Patapan, Justice Bradley Selway, Adrienne Stone and Leslie Zines have also commented upon the relationship of the approach of the Gleeson Court with legalism.¹⁹ Justice Bradley Selway in identifying the approach of the Gleeson Court with legalism, stated: 'It may be not strict "legalism", but it is legalism nonetheless.'²⁰ Justice Selway's analysis of the approach of the Gleeson Court is particularly significant in that it not only connects the approach of the Gleeson Court with legalism, but also seeks to identify some general principles associated with this approach. Thus, Selway's analysis provides some guide as to the form of legalism that may be being employed by the Gleeson Court, and for this reason his Honour's analysis will be discussed below.

Fundamentally, Justice Selway viewed the approach of the Gleeson Court as being inherently flexible. Justice Susan Kenny has made a similar observation.²¹ Writing extra-judicially, Selway J described the five members of the first Gleeson Court, namely Gleeson CJ, Gaudron,

[L]iberalism in its contemporary form is not so much a set of ideas or doctrines to which people subscribe by conscious choice; it is a way of seeing the social world, and a set of assumptions about it, which are absorbed by the individual in so natural and gradual a manner that he or she is not conscious of their being assumptions at all. Liberalism makes up a large part of the intellectual air we breathe: Anthony Arblaster, *The Rise and Decline of Western Liberalism* (1984) 6.

¹⁸ Sir Anthony Mason, 'The Evolving Role and Function of the High Court' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000) 119. See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 26; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139.

¹⁹ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249. See, for example, Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555; Justice Susan Kenny, 'The High Court on Constitutional Law; The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

²⁰ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 250.

²¹ Justice Susan Kenny, 'The High Court on Constitutional Law; The 2002 Term' (2003) 26 *University of New South Wales Law Journal* 210, 210.

Gummow, Hayne and Callinan JJ as the 'flexible five',²² due to their disinclination to be bound by a particular method of constitutional interpretation.²³ However, despite this flexibility, the approach of the Gleeson Court to constitutional issues was not seen by Selway J to be unprincipled.²⁴

Justice Selway's analysis of the Gleeson Court identifies some general patterns in the approach to constitutional issues taken by a majority of members of the first Gleeson Court.²⁵ These principles are explained in more detail in Justice Selway's article in the *Public Law Review*,²⁶ however they may be summarised as follows:

1. The 'flexible five' are 'fundamentally textualists'.²⁷
2. These Justices prefer to adopt a 'purposive approach' to interpretation.²⁸
3. They have 'a strong predisposition' for 'following previous authority'.²⁹
4. These Justices have 'shown a willingness to use history', however this is generally limited to either, 'the identification of a specialised meaning', or 'to identify the purpose of the relevant concept'.³⁰

Whilst these principles allow for some degree of variance in the approach taken by the Gleeson Court to constitutional issues,³¹ Justice Selway, like most other commentators, viewed the approach of the Gleeson Court as representing a form of legalism.³²

²² Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246.

²³ *Ibid.* See also Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49, 49; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261, 273.

²⁴ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 247.

²⁵ *Ibid.*, 248-249.

²⁶ *Ibid.*

²⁷ *Ibid.*, 248. See also Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 9. See generally, Cheryl Saunders, 'Future Prospects for the Australian Constitution' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 221.

²⁸ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 248.

²⁹ *Ibid.*

³⁰ *Ibid.*, 249.

³¹ *Ibid.*

There has been, as the above discussion shows, a significant amount of debate about the approach of the Gleeson Court and legalism, which generally draws a connection between the approach of the Gleeson Court and some form of legalism.³³ Professor Leslie Zines is, however, one writer who has questioned the unequivocal identification of the Gleeson Court with legalism.³⁴ In late 1999 Zines queried the manner in which the decision in *Lange v Australian Broadcasting Corporation*³⁵ had been viewed as the beginning of a trend that saw the High Court as becoming 'more conservative, more textual in interpretation and more doctrinal than was the case, say, three years before'.³⁶ Although the *Lange* decision was decided under the leadership of Chief Justice Brennan, the decision has been regarded as significant in terms of signalling the beginning of a movement away from the 'realist' jurisprudence or the progressive form of interpretation often associated with the Mason era.³⁷ Furthermore, four members who joined in the unanimous decision in *Lange*, together with Gleeson CJ, Hayne and Callinan JJ, formed the first Gleeson Court.³⁸ In his analysis of the *Lange* decision Zines notes that 'whenever representative government was mentioned there was added the words such as "as provided by

³² *Ibid.* See, eg, Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

³³ See, for example, Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106ff.

³⁴ Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227, 231. See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

³⁵ (1997) 189 CLR 520.

³⁶ Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227. See also Leslie Zines 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

³⁷ Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227. See also Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Michael Coper, 'Constitutional law' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 142.

³⁸ Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227.

the Constitution” or other phrases to like effect’,³⁹ thus producing a more legalistic style. However, as Zines points out, ultimately the decision provided unanimous support for the concept of the implied freedom of political communication.⁴⁰

Zines identifies a similar legalistic tone to that found in *Lange* in the approach of the majority in many of the decisions that followed that case. However, Zines argues that this more conservative tone did not bring about dramatic changes in the law generally, or in the outcomes of particular cases. For example, Zines notes that the judgments of the High Court in *Egan v Willis*,⁴¹ *Sue v Hill*,⁴² and *Kartinyeri v Commonwealth*⁴³ did not represent ‘any sharp break with the recent past in judicial method.’⁴⁴ As Zines points out in relation to *Sue v Hill*, nothing said by the judgments on the issue of whether the United Kingdom was a foreign power, ‘can be described as “literalist”, “legalistic”, “textual”, “originalist” or narrowly doctrinal.’⁴⁵ Zines suggests that these decisions represent a movement in constitutional law that signifies a change that is ‘more a matter of tone and style than of substance’.⁴⁶

The emphasis that Chief Justice Gleeson has placed upon ‘legalism’, both in his Honour’s judgments, and when speaking extra-judicially will be considered further below. However it may be suggested at this point that the extent to which Chief Justice Gleeson advocates a legalistic approach indicates that Zines may be understating the influence of ‘legalism’ upon the current Court.⁴⁷ Put simply, although McHugh J continues to cite Zine’s views concerning the continuity between the Mason and Gleeson eras, it is argued that these views are no longer sustainable.⁴⁸ A departure from Zines’ early conclusions can now be made on the basis of nine

³⁹ *Ibid.*

⁴⁰ *Ibid.*, 228. See also Adrienne Stone, ‘Constitutional interpretation’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139.

⁴¹ (1998) 195 CLR 424.

⁴² (1999) 199 CLR 462.

⁴³ (1998) 195 CLR 337.

⁴⁴ Leslie Zines, ‘The Present State of Constitutional Interpretation’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 231.

⁴⁵ *Ibid.*, 229.

⁴⁶ Leslie Zines ‘Gleeson Court’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 308.

⁴⁷ See Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures (2000); Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 12 *Judicial Officers’ Bulletin* 41.

⁴⁸ Justice Michael McHugh, ‘The Constitutional Jurisprudence of the High Court: 1989-2004’ (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 3.

years of jurisprudence. In contrast to the views that have been expressed by Zines, in this thesis it is argued that legalism is a significant influence on the current Gleeson Court, and this methodology has been employed to effect substantive changes in the law.

The suggestion that the legalistic *methodology* of the Gleeson Court has brought about *substantive* changes in the law is, however, not put forward as a criticism of Zines' earlier perspective. Zines, when writing on the approach of the Gleeson Court, acknowledged the possibility that it may be too early to say what approach was being adopted.⁴⁹ Furthermore, if the view that legalism often obscures the influence of underlying policy considerations is accepted,⁵⁰ then it follows that the use of legalistic reasoning to effect any substantial overhaul of doctrines developed during the Mason era will be more covert than overt. For example, as it will be argued in Chapter 10, the legalistic approach of the majority in *Al-Kateb v Godwin*⁵¹ may be regarded as diminishing the substantive effects of the principles developed in decisions such as *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁵² in an understated way.⁵³

As mentioned, this form of change is not surprising—it would be expected that if a legalistic style is employed to bring about substantial change in the law, any change generated from this methodology would be subtle in its form, rather than representing a 'sharp break'.⁵⁴ A legalistic methodology, consistent with the orthodox common law approach, generally advocates the incremental change and development of the law. A result of this is that the substantive change brought about by the change in methodology may only be apparent over an extended timeframe. Consequently, it may be that it is only from a contemporary standpoint that the *substantive effects* of what Zines identified as largely stylistic changes are apparent in decisions

⁴⁹ Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 28-29.

⁵⁰ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

⁵¹ (2004) 219 CLR 562.

⁵² (1992) 176 CLR 1.

⁵³ (2004) 219 CLR 562. See also, Steven Churches, "'Tragic": the High Court decision in the indefinite mandatory detention case of Al-Kateb' (2004) 30 *Law Society Bulletin* 30.

⁵⁴ Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 231.

of the Gleeson Court. In any event, it is sufficient to note at this point, that legalism may have a significant although subtle influence in bringing about legal change.

In summary, the influence of legalism on the Gleeson Court has been recognised in a general way by most of the academic literature that touches on this issue.⁵⁵ It is in Zines' analysis that the *substantive* effect of a legalistic approach is the most understated. Although the relevant academic literature identifies the approach of the Gleeson Court with some form of legalism there has been relatively little analysis devoted solely to considering the precise form of legalism being employed. The general principles that Justice Selway identified in the approach of the Gleeson Court may be considered to be the most informative in this regard. Finally, the comparisons that have been made between Dixonian legalism and the approach of the Gleeson Court have not been as illuminative as they might have been, and this is probably because of some difference in the interpretation of the concepts involved in these comparisons. For example, Sir Owen Dixon's legalism has been the subject of a number of differing interpretations.⁵⁶ For this reason the following discussion will begin by firstly, considering the central tenets of the concept of legalism. Secondly, the expression of legalistic views by members of the High Court and in particular by Sir Owen Dixon will be considered. Thirdly, the approach of members of the Gleeson Court will be analysed. This form of analysis will seek to contribute to debate about legalism, Dixonian legalism and the approach of the Gleeson Court by developing a particular perspective on the relationship between these concepts.

⁵⁵ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249; Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

⁵⁶ See for example, Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574; Justice Dyson Heydon 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110; Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

III LEGALISM

Legalism as an approach to constitutional interpretation has been variously expressed.⁵⁷ As Zines in his influential work, *The High Court and the Constitution*, points out, although the description 'legalism' is frequently used, it is 'not always easy to understand what meaning is being given to that term in any particular context.'⁵⁸ However, legalistic approaches generally tend to refer to the 'plain meaning'⁵⁹ of any text to be interpreted. Although legalism generally regards 'the text as a touchstone',⁶⁰ it also advocates a specific methodology by which legal text may be interpreted that reflects 'the strict analytical and conceptual techniques of formal legal argument'.⁶¹ One method of interpretation that is central to legalism is 'reasoning by analogy'.⁶² Legalistic approaches usually suggest that, 'one starts with the words of a statute or other enactment, or with a case or a mass of cases, and moves from there—but doesn't move far'.⁶³ In contemporary discussion this is sometimes referred to as a 'bottom-up approach', which is often counterpoised to theoretical or 'top-down reasoning'.⁶⁴ A 'bottom-up' approach suggests that judicial decisions may be the product of a process of reasoning from one case to another.⁶⁵ The idea that the words of the statute and previous cases can be used as an *exclusive*

⁵⁷ See, for example, Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 16; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 307. This is perhaps an inevitable result of the somewhat artificial to attempt to divide the approaches to constitutional interpretation into categories. The approaches of individual judges, as acknowledged in the Introduction to this thesis, do not always fit neatly into categories—there may be a great divergence between judges who are classed together. Furthermore, the approaches of individual judges may vary across cases. That said, categorisation of approaches to constitutional interpretation may of course assist in the conveying of meaning, see further, Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 6-9.

⁵⁸ Leslie Zines, *The High Court and the Constitution*, (4th ed 1997) 424.

⁵⁹ Judge Richard Posner, 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 433.

⁶⁰ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13.

⁶¹ See Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

⁶² Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 433.

⁶³ *Ibid.*

⁶⁴ *Ibid.*, 433. See also Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574, 574. Cf. Stephen Gageler, 'The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution' (2000) 28 *Federal Law Review* 303.

⁶⁵ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 434.

reference source for future decisions has, however, been subject to numerous criticisms.⁶⁶ One of the more prominent contemporary critics is Judge Posner of the United States Court of Appeals for the Seventh Circuit. Posner argues that the process of reasoning from case to case should itself be analysed. As Posner writes:

It sounds a lot like induction, which from Hume to Popper has taken hard knocks from philosophers. Actually, most reasoning by analogy in law is an oblique form of logical reasoning. Cases are used as sources of interesting facts and ideas, and hence as materials for the creation of a theory that can be applied deductively to a new case.⁶⁷

However, many expositions of legalism encompass a wider range of ideas than simply starting with the words of a statute or group of cases and then reasoning by analogy. In so doing legalism may be viewed as extending beyond what has been identified as a 'bottom-up'⁶⁸ approach.

Judith Shklar, in her classic work, has identified legalism as being, 'above all, the operative outlook of the legal profession, both bench and bar.'⁶⁹ The idea that law may be thought of as a defined sphere of legal ideas, is represented in the 'shared professional outlook', that Shklar identifies with legalism.⁷⁰ Shklar writes:

The tendency to think of law as 'there' as a discrete entity, discernibly different from morals and politics, has its deepest roots in the legal profession's views of its own functions, and forms the very basis of most of our judicial institutions and procedures.⁷¹

⁶⁶ See, for example, Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 5; Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697; Judge Richard Posner, 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 435. See generally, MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 810; Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

⁶⁷ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 435.

⁶⁸ *Ibid*, 433.

⁶⁹ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964) 8.

⁷⁰ *Ibid*.

⁷¹ *Ibid*, 9.

Professor Brian Galligan has expressed a similar perspective, identifying legalism with the idea that the judiciary has a technical role in determining what the law is and applying such law to the facts without any application of moral considerations.⁷² Consistently with these ideas, legalistic approaches generally regard it as possible to delimit the matters that are relevant to the interpretation of a constitutional or statutory text, or the scope of judicial precedent, from those that are not.⁷³ This idea that legalism relies not just upon the words of any constitutional or statutory text but also upon a wider, but defined, sphere of legal ideas, is perhaps best explained by considering how legalism may be distinguished from literalism. However, in considering this distinction it should be kept in mind that there might be some overlap in the identification of these two approaches.⁷⁴

Literalism in constitutional interpretation is most often seen in an approach that calls for the words of the Constitution to be given their 'full and fair meaning'.⁷⁵ A literal approach to judicial interpretation, such as that often associated with Chief Justice Barwick, views this meaning as being derived almost exclusively from the words themselves.⁷⁶ Whilst legalism, like literalism, relies upon the text, and sees the words of the text as being of primary significance, legalism also recognises that meaning may be deduced from an understanding of the context in which words appear.⁷⁷ Legalism also emphasises the method by which words may be interpreted.⁷⁸ In other words, a legalistic approach acknowledges that meaning may be derived from general references to authoritative legal materials; however, legalism requires that the materials to which reference may be had fall within the 'self-contained autonomous body of

⁷² Brian Galligan, *A Federal Republic* (1995) 182-3.

⁷³ See Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

⁷⁴ See, for example, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 307; Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy', in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 16.

⁷⁵ Retirement of Sir Garfield Barwick as Chief Justice (1981) 148 CLR v, x.

⁷⁶ *Strickland v Rocla Concrete Pipes Ltd* ('Concrete Pipes Case') (1971) 124 CLR 468, 489 (Barwick CJ). See generally, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 310; Jeffrey Goldsworthy, 'Originalism in constitutional interpretation' (1997) 25 *Federal Law Review* 1, 14, 35-7; Geoff Lindsay, 'Owen Dixon: A Biography' (2003) 23 *Australian Bar Review* 198, 203.

⁷⁷ See, for example, the commentators' comparison of Barwick CJ and Issacs J in Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 309.

⁷⁸ See, for example, Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 152-65.

law'.⁷⁹ Fundamental to the idea that there is a defined sphere of authoritative legal materials is the emphasis that legalism places upon adherence to the doctrine of *precedent*.⁸⁰ Examples of such authoritative legal material in an Australian constitutional context include, 'the circumstances in which [the Constitution] was made'⁸¹ together with a knowledge of the recognized principles of the preceding common and statute law that are seen as underlying the expressed terms of the Constitution.⁸²

A corollary of the requirement that interpretation should only be assisted by a finite category of legal considerations is the idea that any regard for matters falling outside of these categories transgresses the boundaries of an accepted legalistic interpretation.⁸³ There may be some divergence of opinion about the precise nature of this boundary, and this suggests that it may be difficult to accurately define the legitimate reach and limits of a legalistic approach.⁸⁴ However, matters clearly beyond the scope of 'purely legal considerations'⁸⁵ would include political value judgments, such as whether a judge favours centralist Commonwealth government or believes more strongly in States' rights.⁸⁶ Another matter that would be irrelevant on a legalistic approach is any judicial view on the desirability of the policy behind any challenged legislation.⁸⁷

From this discussion of the general concept of legalism, some central legalistic ideas and some of the important implications they have for legal reasoning may be summarised as follows.

⁷⁹ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 310. See, for example, Sir Gerard Brennan, 'A Critique of Criticism' (1993) 19 *Monash Law Review* 213, 214.

⁸⁰ Leslie Zines, *The High Court and the Constitution*, (4th ed 1997) 435.

⁸¹ *Amalgamated Society of Engineers v Adelaide Steamship Co. Ltd.* (1920) 28 CLR 129, 152 (Knox CJ, Issacs, Rich and Starke JJ) ('Engineers' Case').

⁸² *Ibid.*

⁸³ See, for example, Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 152-65.

⁸⁴ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 27.

⁸⁵ See Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 311.

⁸⁶ Retirement of Sir Garfield Barwick as Chief Justice (1981) 148 CLR v, ix.

⁸⁷ See, for example, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 540 (Gleeson CJ), 548 (McHugh J). Interestingly, Zines notes that this distinction between accepted legalistic considerations and unacceptable 'policy' arguments was maintained by Chief Justice Brennan in constitutional cases: Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

First, legalism generally regards the text as being of central significance.⁸⁸ Secondly, legalism advocates a specific methodology by which legal text may be interpreted.⁸⁹ Thirdly, legalism accepts and advances a delineation of the matters that are relevant to the interpretation of a constitutional or statutory text, or the scope of judicial precedent.⁹⁰ Fourthly, and perhaps of greatest significance, legalistic approaches generally use this idea that there exists or may be presupposed to exist a *definable body of legal knowledge* to support the view that an interpretation of the text and the application of accepted rules and principles of interpretation usually leads to only *one sustainable legal conclusion*.⁹¹ Consistent with this perspective legalism often views differing judicial opinions as resulting from differences in 'impression'⁹² or 'perception',⁹³ rather than from judicial choice.⁹⁴ Although it is not the focus of the immediate discussion, it is important to note at this point that it was during Sir Anthony Mason's time as Chief Justice of the High Court of Australia that many of these assumptions were questioned.⁹⁵ The manner in which these assumptions were questioned during the Mason era will be examined further in Chapters 3, 4 and 8 below.

⁸⁸ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13. See, eg, *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

⁸⁹ Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

⁹⁰ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964) 8-9; Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 310; Brian Galligan, *A Federal Republic* (1995) 182-3.

⁹¹ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 22-23; Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155.

⁹² See Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures (2000) 85, 97-99.

⁹³ Stephen Gageler, 'Legalism' Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429; Sanford Kadish 'Judicial Review in the High Court and in the United States Supreme Court Part 1' (1959) 2 *Melbourne University Law Review* 4ff; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106ff.

⁹⁴ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 22.

⁹⁵ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5; Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111; Sir Anthony Mason, 'The Role of the Courts at the Turn of the Century' (1993) *Journal of Judicial Administration* 156, 164; Sir Anthony Mason, 'The Evolving Role and Function of the High Court' in Brian Opeskin and Fiona Wheeler (eds) *The Australian Federal Judicial System* (2000) 117; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 3-4, 10-11; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 224-8; Leslie Zines, *The High Court and the Constitution* (3rd ed, 1992) 359-62. See further, Chapter 3 of this thesis.

Legalism has been 'the dominant theme of the judicial style of the [High] Court for much of the twentieth century'.⁹⁶ It is associated with the decision in the *Engineers' Case*, which is often seen as 'the most visible symbol of the traditional supposedly non-political approach of the Court'.⁹⁷ The *Engineers' Case* presented the idea that the Australian Constitution, being an Act of the Imperial Parliament, should be interpreted like any other statute. The joint judgment in that case advocated an approach to interpretation based upon an examination of the text of the Constitution assisted by 'the settled rules of construction'.⁹⁸ In the *Engineers' Case* it was said of the *Constitution* that:

That instrument is the political compact of the whole of the people of Australia, enacted into binding law by the Imperial Parliament, and it is the chief and special duty of this Court faithfully to expound and give effect to it according to its own terms, finding the intention from the words of the compact, and upholding it throughout precisely as framed.⁹⁹

The joint judgment in the *Engineers' Case* rejected that any implication could be drawn that was not 'the result of interpreting any specific language quoted, nor referable to any recognized principle of the common law of the Constitution'.¹⁰⁰ The emphasis that the joint judgment in *Engineers'* places upon the text of the Constitution has given rise to a longstanding debate as to whether the decision advocates a literal or a legalistic approach to constitutional interpretation.¹⁰¹ For example, whilst the *Engineers' Case* has been identified with literalism,¹⁰² the decision has also been seen as 'consummating a triumph of legalism, which is then perceived as having dominated the High Court's approach ever since'.¹⁰³

⁹⁶ Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

⁹⁷ George Williams 'Engineers is Dead. Long Live the Engineers!' (1995) 17 *Sydney Law Review* 62, 85; Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227, 231; Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 250.

⁹⁸ *Engineers' Case* (1920) 28 CLR 129, 141-148, particularly 143 (Knox CJ, Issacs, Rich and Starke JJ).

⁹⁹ *Ibid*, 142 (Knox CJ, Issacs, Rich and Starke JJ).

¹⁰⁰ *Ibid*, 145 (Knox CJ, Issacs, Rich and Starke JJ).

¹⁰¹ See further Michael Wait 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57, 67 footnote 74.

¹⁰² Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 16.

¹⁰³ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 307.

The interpretation of *Engineers'* by Sir Owen Dixon in a number of cases certainly gives the decision a legalistic rather than literalist flavour.¹⁰⁴ In *West v Commissioner of Taxation (N.S.W.)* Dixon J expressly rejected any suggestion that *Engineers'* supported the view that no implication could be made in interpreting the Constitution,¹⁰⁵ pointing out that, '[s]uch a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.'¹⁰⁶ This view was affirmed by Sir Owen Dixon in a later case in which his Honour said '[w]e should avoid pedantic and narrow constructions in dealing with an instrument of government and I do not see why we should be fearful about making implications'.¹⁰⁷ Ultimately, it would seem that the *Engineers'* decision itself is open to interpretation and the manner in which it was viewed by Sir Owen Dixon reflected the *particular* form of legalism that his Honour put forward. It is this form of legalism that the following discussion will consider.

IV DIXONIAN LEGALISM

Sir Owen Dixon is the High Court jurist that is most often identified with a legalistic approach.¹⁰⁸ This is so even though other High Court judges, such as Chief Justice Latham and Chief Justice Barwick, may be viewed as advancing a stricter and more confined form of legalism.¹⁰⁹ For example, Chief Justice Dixon has been seen as considering the implications of

¹⁰⁴ Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221; Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 550; Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 24-25; Michael Wait, 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57, 66.

¹⁰⁵ *West v Commissioner of Taxation (N.S.W.)* (1937) 56 CLR 657, 681-682 (Dixon J). See also *Victoria v The Commonwealth ('Payroll Tax Case')* (1971) 122 CLR 353, 401-402 (Windeyer J).

¹⁰⁶ *West v Commissioner of Taxation (N.S.W.)* (1937) 56 CLR 657, 681 (Dixon J).

¹⁰⁷ *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 85 (Dixon J). See also *Lamshed v Lake* (1958) 99 CLR 132, 144-5 (Dixon CJ). See also Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 550 citing Latham Papers, held at National Library, Dixon to Latham, September 1942. See also Philip Ayres, *Owen Dixon* (2003) 122, 184 and 254.

¹⁰⁸ Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (1987) 30-1; Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹⁰⁹ Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18 *Federal Law Review* 27, 31. See, eg, *Strickland v Rocla Concrete Pipes Ltd ('Concrete Pipes Case')* (1971) 124 CLR 468, 489 (Barwick CJ); Retirement of Sir Garfield

the federal nature of the Australian Constitution, whereas Chief Justice Latham, in comparison, has been regarded as paying greater regard to the 'letter of the Constitution'.¹¹⁰

The connection of Sir Owen Dixon with legalism may be largely attributable to his Honour's comments upon being sworn in as Chief Justice of the High Court in 1952. On that occasion, as it is well known, Sir Owen Dixon said: 'There is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'¹¹¹ These oft-repeated comments have been viewed as representing Sir Owen Dixon's unequivocal endorsement of a strict form of legalism.¹¹² However, as many commentators have noted these words are best understood in the historical context in which they were made.¹¹³

Sir Owen Dixon's remarks were made a year after the High Court, with Dixon in the majority, gave judgment in *Australian Communist Party v Commonwealth*.¹¹⁴ When making his comments about 'strict legalism' Dixon has been said to have had that case in mind, and in particular the criticism that the High Court had received in the Sydney press as a result of the decision.¹¹⁵ In the *Communist Party Case* legislation banning the Communist Party was invalidated. Prime Minister Menzies, with whom Dixon had had a long association, was reportedly stunned by the result.¹¹⁶ A constitutional alteration to reverse the effect of that decision, was put forward by the Menzies government, however, it was defeated in a referendum. Yet the same government had chosen to appoint Dixon as Chief Justice.¹¹⁷ So it was in that context that Dixon spoke of

Barwick as Chief Justice (1981) 148 CLR v, x; Philip Ayres, *Owen Dixon* (2003) 86. See generally, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 322; Geoff Lindsay, 'Owen Dixon: A Biography' (2003) 23 *Australian Bar Review* 198, 203; Sir Garfield Barwick, Foreword to the First Edition, in P H Lane, *Lane's Commentary on the Australian Constitution* (2nd ed, 1997) v, vii-viii.

¹¹⁰ Philip Ayres, *Owen Dixon* (2003) 86. See generally, Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221; Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 44.

¹¹¹ (1952) 85 CLR xi, xiv. See generally Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹¹² See, for example, Justice Dyson Heydon 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

¹¹³ See, for example, Philip Ayres, *Owen Dixon* (2003) 233; Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹¹⁴ *Australian Communist Party v Commonwealth* ('Communist Party Case') (1951) 83 CLR 1.

¹¹⁵ Philip Ayres, *Owen Dixon* (2003) 233.

¹¹⁶ *Ibid.* See also Geoff Lindsay, 'Owen Dixon: A Biography' (2003) 23 *Australian Bar Review* 198, 202.

¹¹⁷ Philip Ayres, *Owen Dixon* (2003) 53-4.

'strict and complete legalism'¹¹⁸ and expressed the view that 'close adherence to legal reasoning is the only way to maintain the confidence of all parties in Federal conflicts.'¹¹⁹

The method of interpretation put forward by Sir Owen Dixon incorporates central legalistic notions. However, there are several factors that suggest that the limits of the legalistic approach that Sir Owen Dixon put forward were not narrowly confined. First it may be said that the form of legalism that Sir Owen Dixon applied did not deny the practical significance of the High Court's decision,¹²⁰ nor the political character of the considerations that impacted upon the judicial decision making process.¹²¹ As his Honour stated in a much cited passage in the *Melbourne Corporation Case*: 'It is not a question whether the considerations are political, for nearly every consideration arising from the Constitution can be so described, but whether they are compelling.'¹²²

Secondly, the form of legalism employed by Sir Owen Dixon did not appear to impose narrow limits on what could be regarded as a relevant consideration in determining constitutional issues. For example in the *Communist Party Case*,¹²³ his Honour held that the Constitution was: 'an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as for example in separating the judicial power from other functions of government, others of which are simply assumed.'¹²⁴ One such assumption identified in that case by his Honour was the 'rule of law',¹²⁵ which may be regarded as a 'broad political and philosophical concept.'¹²⁶ These factors mean that the judicial role as Sir Owen Dixon saw it

¹¹⁸ (1952) 85 CLR xi, xiv.

¹¹⁹ *Ibid.* See generally Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹²⁰ See Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156. See also Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 547, 549.

¹²¹ See *NSW v Commonwealth (No 1)* (1932) 46 CLR 155, 181-2, and the discussion of that case in Philip Ayres, *Owen Dixon* (2003) 59-60. See generally Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹²² *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82.

¹²³ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 ('*Communist Party Case*').

¹²⁴ *Ibid.*, 193 (Dixon J).

¹²⁵ *Ibid.*

¹²⁶ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 22. See further Keith Mason, 'The Rule of Law' in Paul Finn (ed) *Essays on Law and Government; Volume 1 Principles and Values* (1995) 114.

was not narrowly confined in terms of the matters to which reference could legitimately be made. That said, his Honour did advocate a particular view of the judicial role.

Whereas a narrow form of legalism sees the task of the judge being to ascertain the answer to a constitutional question from an authoritative body of legal materials by a formal and in some respects mechanical process,¹²⁷ Sir Owen Dixon supported the view that the judiciary had a role in making and developing the law.¹²⁸ His Honour accepted that '[i]t is the very essence of the accepted judicial method that the result is not predetermined'¹²⁹ what his Honour's jurisprudence emphasises is the importance of the *process* by which judicial decisions are made. In this regard Sir Owen Dixon distinguished between the lawful function of a member of the judiciary to expound and develop the law through the application of existing legal doctrine, and that of the 'conscious judicial innovator'.¹³⁰ Of this difference his Honour said:

It is one thing for a court to seek to extend the application of accepted principles to new cases or to reason from the more fundamental of settled legal principles to new conclusions or to decide that a category is not closed against unforeseen instances which in reason might be subsumed thereunder. It is an entirely different thing for a judge, who is discontented with a result held to flow from a long accepted legal principle, deliberately to abandon the principle in the name of justice or of social necessity or of social convenience. The former accords with the technique of the common law and amounts to no more than an enlightened application of modes of reasoning traditionally respected in the courts. It is a process by the repeated use of which the law is developed, is adapted to new conditions, and is improved in content. The latter means an abrupt and almost arbitrary change.¹³¹

The function of the High Court in constitutional cases, as Sir Owen Dixon explained it, is in line with this expectation. As Sir Owen Dixon described this role, 'the Court's sole function is to interpret a constitutional description of power or restraint upon power and say whether a given

¹²⁷ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 322.

¹²⁸ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 158-164.

¹²⁹ *Ibid*, 164. See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 559-61.

¹³⁰ *Ibid*, 159.

¹³¹ *Ibid*, 158.

measure falls on one side of a line constitutionally so drawn or the other.’¹³² This task his Honour expressed as having ‘nothing whatever to do with the merits or demerits of the measure.’¹³³

It may be suggested that a fundamental and significant idea that Sir Owen Dixon put forward in relation to the judicial role and legalism is the view that:

courts proceed upon the basis that the conclusion of the judge should not be personal to him but should be the consequence of his best endeavour to apply an external standard.¹³⁴

Further, his Honour wrote; ‘[t]he court would feel that the function it performed had lost its meaning and purpose, if there were no external standard of legal correctness.’¹³⁵

Of central significance to the analysis of Sir Owen Dixon’s jurisprudence presented in this thesis, is his Honour’s view that there is some external standard, by which judicial decisions may be judged. Sir Owen Dixon saw judicial method as being based upon a pre-supposition, as his Honour explained:

The pre-supposition is that there exists a definite system of accepted knowledge or thought and that judgments and other legal writings are evidence of its content.¹³⁶

In this thesis Sir Owen Dixon’s jurisprudence is interpreted as including the principles of the common law in this assumed body of legal knowledge.¹³⁷ It will be argued later in this Chapter that Sir Owen Dixon’s idea that the common law may form part of an assumed body of legal

¹³² Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi, xiii-xiv.

¹³³ *Ibid.*

¹³⁴ Sir Owen Dixon, ‘Concerning Judicial Method’ in Sir Owen Dixon, *Jesting Pilate* (1965) 157. See also, Sir Gerard Brennan, ‘A Critique of Criticism’ (1993) 19 *Monash Law Review* 213, 214.

¹³⁵ Sir Owen Dixon, ‘Concerning Judicial Method’ in Sir Owen Dixon, *Jesting Pilate* (1965) 155; See also Justice Kenneth Hayne, ‘Owen Dixon’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 219.

¹³⁶ Sir Owen Dixon, ‘Concerning Judicial Method’ in Sir Owen Dixon, *Jesting Pilate* (1965) 156.

¹³⁷ Sir Owen Dixon ‘The Law and the Constitution’ in Sir Owen Dixon, *Jesting Pilate* (1965) 41-53, and Sir Owen Dixon, ‘The Common Law as Ultimate Constitutional Foundation’ in Sir Owen Dixon, *Jesting Pilate* (1965) 201-203 and 211-213. See further, Justice W M C Gummow, ‘The Constitution: Ultimate foundation of Australian law?’ (2005) 79 *Australian Law Journal* 167, 170-2.

knowledge provides a degree of flexibility in Sir Owen Dixon's approach that enabled Dixon to engage with the ideas presented by realism.¹³⁸ This view is consistent with the assumptive nature of the fundamental precepts of Sir Owen Dixon's perspective. An important and central point that the argument presented in this thesis seeks to make is that Sir Owen Dixon's jurisprudence was based upon the assumption of a corpus of legal knowledge. The following analysis will seek to show that many of the ideas expressed by Sir Owen Dixon about legalism can be seen as consistent with this perspective.

The role of the judiciary, as Sir Owen Dixon saw it, which is discussed above, is consistent with the assumption of a body of legal knowledge. The idea that a '*corpus juris*'¹³⁹ exists or may be presupposed, for Sir Owen Dixon, provided a theoretical basis which confines and legitimises the judicial role.¹⁴⁰ For example, consistently with this idea, Sir Owen Dixon spoke of the idea that judicial decisions were made on the basis of a standard of reasoning 'which is not personal to the judges themselves', and the idea that legal argument was for the purpose of persuasion as to 'the true principle or doctrine' or the 'true application of principle or doctrine'.¹⁴¹

The supposition of the existence of a corpus of legal knowledge may also be seen as fundamental to the form of constitutionalism that Sir Owen Dixon postulated. One particularly relevant example is the manner in which his Honour argued that the legitimacy of the Court's role in declaring invalid legislation that exceeded the relevant legislative authority of the Parliament, derived from the fact that the courts were observing the 'supremacy of the law'.¹⁴² For Sir Owen Dixon, federalism required this supremacy of the law.¹⁴³ This 'supremacy of the law' as Sir Owen Dixon described it was founded upon the assumption of an identifiable body of legal knowledge that existed independently of the personal views of the judicial officer.¹⁴⁴

¹³⁸ For a different perspective, see, Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 5-7; Michael Wait 'The Slumbering Sovereign: Sir Owen Dixon's Common Law Constitution Revisited' (2001) 29 *Federal Law Review* 57, 59.

¹³⁹ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 159.

¹⁴⁰ *Ibid*, 155-6. Cf. Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures 2000, 134; Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41.

¹⁴¹ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155.

¹⁴² Sir Owen Dixon, 'The Law and the Constitution' in Sir Owen Dixon, *Jesting Pilate* (1965) 43.

¹⁴³ *Ibid*, 41-53. See generally, Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221.

¹⁴⁴ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155-7.

Sir Owen Dixon's writings also contain numerous examples of how the form of constitutionalism that his Honour advocated required constitutional issues to be viewed in the wider context of a defined sphere of legal knowledge.¹⁴⁵ For instance, Sir Owen Dixon spoke in the context of the Australian constitutional system of the idea of 'the common law as an antecedent system of jurisprudence',¹⁴⁶ and put forward the view that 'constitutional questions should be considered and resolved in the context of the whole law, of which the common law, including in that expression the doctrines of equity, forms not the least essential part'.¹⁴⁷

This analysis of Sir Owen Dixon's writings reveals that his Honour explicitly based his jurisprudence upon the assumption that there exists or may be presupposed to exist a 'corpus of legal knowledge' which provides a standard against which legal methodology may be assessed. In line with this perspective, his Honour consistently maintained the view that judicial method could represent a form of reasoning that was distinguishable from political reasoning.¹⁴⁸ Although Sir Owen Dixon's comments overtly express faith in the rational and logical nature of the judicial methods that he advocated, in his Honour's more private writings he acknowledged the influence of 'arbitrary methods', and as an advocate he was known to be mindful of, and to utilize, the personal persuasions of judges before whom he appeared.¹⁴⁹ Yet at the same time, Sir Owen Dixon, at least privately, treated with disdain what he viewed as being overtly political judgments.¹⁵⁰ These factors suggest that there may be some tension between the judicial method that Sir Owen Dixon publicly advocated, and his own private beliefs as to the form of reasoning that informed judicial decision-making.

¹⁴⁵ Sir Owen Dixon, 'The Common Law as Ultimate Constitutional Foundation' in Sir Owen Dixon, *Jesting Pilate* (1965) 211-213.

¹⁴⁶ *Ibid*, 211. See further, Justice W M C Gummow, 'The Constitution: Ultimate foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 170-2.

¹⁴⁷ *Ibid*, 211-213.

¹⁴⁸ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 157.

¹⁴⁹ See further, Philip Ayres, *Owen Dixon* (2003) 25; Geoffrey Lindell, 'Governor-General' in Timothy McCormack and Cheryl Saunders (eds) in *Sir Ninian Stephen: A Tribute*, (2007) 34.

¹⁵⁰ See, Philip Ayres, 'Dixon diaries' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 219; Philip Ayres, *Owen Dixon* (2003). For example, Ayres writes that, 'Dixon never much admired Evatt, seeing him as an essentially political judge and as dishonest..': Philip Ayres, *Owen Dixon* (2003). 59. Ayres also records Sir Owen Dixon disapproval of the political nature of Latham's views: see Philip Ayres, *Owen Dixon* (2003). 89-90, 256. See also, Laurence Maher, 'Owen Dixon: concerning his political method' (2003) 6 *Constitutional Law and Policy Review* 33, 35.

The perceived conflict between Sir Owen Dixon's faith in rational legal methodology and his private acknowledgement of the political nature of many judgments has been viewed as raising the question of whether Sir Owen Dixon really believed in the methodology that he put forward.¹⁵¹ Ultimately that may be a question, which it is difficult to answer. What may be suggested is that in understanding the idea that Sir Owen Dixon accepted the possibility that legal methodology may be based upon a presupposition, it is possible to in some way reconcile Sir Owen Dixon's belief in legal method and legal reasoning with his Honour's acknowledgement of the political nature of many judgments. This view is advanced for the following reasons.

First, Dixon clearly accepted that the external standard that justified the legal methodology that his Honour put forward may be a *pre-supposition*. This perspective enabled Sir Owen Dixon to acknowledge that the judicial method he advocated was the preferred, rather than the only method, by which judicial decisions could be made. The suppositional, as opposed to necessary status, of the fundamental principles upon which Sir Owen Dixon's jurisprudence rests, leaves open the possibility of other fundamental principles being put forward.¹⁵²

Secondly, consistent with the view that the legalistic approach that he advocated was to be preferred, Sir Owen Dixon was often privately critical of what he saw as the political nature of some of his fellow judges' decisions.¹⁵³ Although, Sir Owen Dixon acknowledged the political nature of considerations that impacted upon judicial reasoning,¹⁵⁴ he did not see his own judgments as being politically motivated. It has been suggested that this may be, to a large degree, a result of Sir Owen Dixon's 'convenient self-absolving definition of "politics"'.¹⁵⁵ However, even if that view is accepted, it should be recognised that Sir Owen Dixon's written

¹⁵¹ Geoffrey Lindell, 'Governor-General' in Timothy McCormack and Cheryl Saunders (eds) in *Sir Ninian Stephen: A Tribute*, (2007) 34.

¹⁵² See, for example, Section V, sub-section B below, which discusses the manner in which this perspective facilitates Sir Owen Dixon's engagement with the ideas of legal realism.

¹⁵³ Philip Ayres, 'Dixon diaries' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 219.

¹⁵⁴ See *NSW v Commonwealth No 1* (1932) 46 CLR 155, 181-2 (Dixon J). See also Philip Ayres, *Owen Dixon* (2003) 60; Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429.

¹⁵⁵ Laurence Maher, 'Owen Dixon: concerning his political method' (2003) 6 *Constitutional Law and Policy Review* 33, 34-5.

judgments succeeded in outwardly representing the judicial methods that he advocated. Despite the undeniable political effects of many of his Honour's decisions, Dixon's own judicial decisions are often characterised by the logical expressions of arguments developed from basic principles.¹⁵⁶ Not surprisingly, given this combination of influences, the period in which Dixon presided over the High Court has been viewed as representing 'overt legalism' together with the 'subtle incorporation of policy considerations'.¹⁵⁷

Finally, it may be argued that the interpretation of Sir Owen Dixon's work that is put forward in this discussion enables his Honour's perspective to be seen as reflective of the philosophical knowledge that Dixon must have acquired from his study of classical texts. Sir Owen Dixon's jurisprudence can be viewed as applying, in law, the logical and rational forms of argument that he found in classical texts.¹⁵⁸ However, Sir Owen Dixon accepted that ultimately the foundational principles of legal method lacked certainty.¹⁵⁹ Professor Michael Coper writes of the views expressed by Sir Owen Dixon at Yale that: 'He acknowledged the generally sceptical intellectual climate of the age, he held, nevertheless, to an "external standard" for judicial decision making, but as a riposte to the provocative idea of law as mere prediction'.¹⁶⁰ In Sir Owen Dixon's writings, whilst there are frequent applications of rational forms of logical arguments, there would appear to be also an acknowledgement of the impossibility of rationalising some of the fundamental assumptions upon which such legal methodology was based.¹⁶¹

The view taken in this thesis is that Sir Owen Dixon in acknowledging the difference in the extent to which legal methodology as opposed to the fundamental legal assumptions may be rationalised, maintains a degree of *intellectual integrity* in his work, despite his Honour's

¹⁵⁶ See Sir Ninian Stephen, 'The Dixon Centenary' (1986) 60 *Law Institute Journal* 534, 540. See, eg, *Commissioner for Railways (New South Wales) v Cardy* (1960) 104 CLR 274. See generally, Philip Ayres, *Owen Dixon* (2003) particularly 60 and 271-281.

¹⁵⁷ Michael Coper, 'Constitutional law' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 141.

¹⁵⁸ See, for example, Philip Ayres, *Owen Dixon* (2003) 88. See also, Philip Ayres, 'Owen Dixon's Causation lecture: Radical Scepticism' (2003) 77 *Australian Law Journal* 692.

¹⁵⁹ See, for example, Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 158-9. See also Aristotle *The Ethics*, Book 5, vii, 1134b8-24.

¹⁶⁰ Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 560-1 (references omitted).

¹⁶¹ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156.

undeniable doubts about the certainty of the basic assumptions which supported the legal methodology that he advocated. The intellectual strength of Sir Owen Dixon's work remains, although questions may be raised concerning the integrity of some of his Honour's extra-judicial activities.¹⁶² Put simply, it is argued in this thesis that Sir Owen Dixon's jurisprudence suggests that Dixon had faith in the judicial method that he advocated. Sir Owen Dixon viewed the judicial method he advocated as being the preferred method.¹⁶³ However, his Honour also acknowledged that this methodology may be based upon a presupposition. This suggests that Dixon acknowledged that his legal method was not the only method of judicial reasoning. It also suggests some doubt on Sir Owen Dixon's part, about the necessary nature of the foundational principles upon which his Honour saw legal reasoning as being based.

Legalism, which was considered as a general concept in the previous section of this Chapter, may be regarded as largely 'non-theoretical' if it is considered as a methodology that does not require judicial decision-making to rest in some way upon broad theoretical principles. However, it may be suggested that Sir Owen Dixon's legalism represents not just a practical methodology about how the Constitution should be interpreted, but a *theoretical* form of legalism. It is contended that Dixonian legalism is *theoretical*, as it is based upon a belief that a determinate body of legal knowledge exists or may be presupposed to exist.¹⁶⁴ This factor represents a point of distinction between Dixonian legalism, and many other variants of legalism.

As Dixon acknowledged, it may be possible to question the validity of theoretical assumptions that underlie legal reasoning.¹⁶⁵ However, even if these assumptions are questioned, it is still the case that the idea that there is or may be supposed to be a corpus of legal knowledge, provides a standard by which any judge-made law may be assessed. Fundamental

¹⁶² See further, Laurence Maher, 'Owen Dixon: concerning his political method' (2003) 6 *Constitutional Law and Policy Review* 33, 34-5; Geoffrey Lindell, 'Governor-General' in Timothy McCormack and Cheryl Saunders (eds) in *Sir Ninian Stephen: A Tribute*, (2007) 34.

¹⁶³ See, Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156. See also, Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 547.

¹⁶⁴ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156.

¹⁶⁵ *Ibid*, 157-8.

assumptions, even if presuppositions rather than necessary principles,¹⁶⁶ still provide a theoretical basis for the methodology that Sir Owen Dixon advocated. It is important, from the point of view of the analysis of the approach of the Gleeson Court undertaken in the following discussion, that the theoretical nature of Dixonian legalism is kept in mind, as it will be argued that it is difficult to identify similar theoretical assumptions underlying the general approach taken by the Gleeson Court.

V LEGALISM AND THE GLEESON COURT

The influence of legalism on the Gleeson Court has been noted in the relevant academic literature.¹⁶⁷ However, as the above discussion of this literature demonstrates, although commentators generally agree that some form of legalism is evident in the approach of the Gleeson Court, there has not been any significant consensus on either the extent to which legalism is influential, or on the issue of what form of legalism underlies the approach of the Court.¹⁶⁸ The question of whether the approach of the Gleeson Court resembles Dixonian legalism, as discussed above, has also been the subject of divergent views.¹⁶⁹ The following discussion will contribute to that debate. This analysis will aim to clarify the form of legalism

¹⁶⁶ *Contra*, Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 552.

¹⁶⁷ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249. See, for example, Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

¹⁶⁸ See, for example, Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 248-249; Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 227, 231. See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 308.

¹⁶⁹ Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 224, 229; Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 241.

evident in the approach of the current High Court. It will also endeavour to highlight the precise similarities as well as the essential differences between the jurisprudence of Sir Owen Dixon and the jurisprudence generally associated with the Gleeson Court.

The analysis in this thesis will show, that Gleeson CJ, in particular, has emphasised the role of legalism, with a number of other members of the Gleeson Court also taking or advocating a largely legalistic approach. This reveals that legalism is a significant influence on the current Court. It should, however, be acknowledged that the changes in membership that have occurred make it more difficult to impute a collective view to the 'Gleeson Court'.¹⁷⁰ That said, the analysis presented in this thesis will aim to identify with the approach of the Gleeson Court what may be regarded as a core methodology.

Chief Justice Gleeson and Justice McHugh have undoubtedly been the most influential in terms of openly advocating a legalistic approach. It can also be said that all of the current and former Justices of the Gleeson Court generally regard the text of the *Constitution* as being central,¹⁷¹ and all of these Justices, other than Kirby J,¹⁷² have a strong tendency to follow previous authorities.¹⁷³ In general, the manner in which judgments are presented by Justices Gummow, Hayne, Callinan and Heydon tends to represent 'the strict analytical and conceptual techniques of formal legal argument'.¹⁷⁴ It should also be noted that Justice Heydon may well support a

¹⁷⁰ With two retirements in the time in which Chief Justice Gleeson has presided; there has been what may be termed, three 'natural' courts, with a 'natural court' being defined as a Court that has a consistency in membership over a period of time: see further, Andrew Lynch, 'The Gleeson Court on constitutional law: an empirical analysis of its first five years' (2003) 26 *University of New South Wales Law Journal* 32, 37.

¹⁷¹ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 248; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 9. See generally, Cheryl Saunders, 'Future Prospects for the Australian Constitution' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 221.

¹⁷² See Andrew Lynch, 'Dissenting Judgments' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 216-218.

¹⁷³ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 9; Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 248; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 26.

¹⁷⁴ See Stephen Gageler, 'Legalism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 429. See further Part II below.

stricter and more confined form of legalism than that put forward by Chief Justice Gleeson and Justice McHugh.¹⁷⁵

Some of Justice Gummow's remarks would also tend to lend some support to the approach that Chief Justice Gleeson and Justice McHugh put forward,¹⁷⁶ however, a significant argument that will be developed in this thesis is that despite some similarities existing there are also some identifiable differences in the reasoning process articulated by Chief Justice Gleeson, and Justices McHugh, Hayne, Callinan and Heydon; and that represented in Justice Gummow's judgments.¹⁷⁷ This difference may be expressed in terms of the distinction between Chief Justice Gleeson's legalistic methodology and Justice Gummow's more theorised form of legalism, with Gummow J's approach engaging in a principled form of reasoning and also, at times, articulating the principles upon which it is based. The approach of Gummow J has a greater tendency than that of other members of the Gleeson Court to engage in a theoretical reasoning process and thus represent a theoretical form of legalism. In other words, Gummow J's approach, whilst not embracing the particular perspective of Sir Owen Dixon, like the reasoning of Sir Owen Dixon, often articulates the fundamental principles upon which his Honour's reasoning is based. Although Gummow J often engages in a theorised form of legal reasoning it should also be noted that Justice Gummow has been reluctant to embrace any *particular* theory or methodology of constitutional interpretation.¹⁷⁸ Whilst this may be part of a general judicial reluctance about being locked to a particular theoretical position,¹⁷⁹ it may also reflect the view that no definitive theoretical position exists.¹⁸⁰ The manner in which Gummow J questions the certainty of the idea of an 'all-embracing and revelatory theory or doctrine of interpretation'¹⁸¹ demonstrates a similarity with the doubt expressed by Sir Owen Dixon about the necessary nature of fundamental legal assumptions.

¹⁷⁵ Justice Dyson Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 111.

¹⁷⁶ See, for example, *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

¹⁷⁷ See further, Chapter 10 below.

¹⁷⁸ *Ibid.*

¹⁷⁹ Sir Anthony Mason 'Constitutional interpretation; Some Thoughts' (1998) 20 *Adelaide Law Review* 49, 49; Chief Justice Murray Gleeson, Foreword to Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) viii-ix.

¹⁸⁰ See *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J). See also Justice Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 247.

¹⁸¹ *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

Put simply, as the following discussion will suggest, the approach of Kirby J, and the influence of Gummow J aside, Chief Justice Gleeson and a majority of the other members of the Gleeson Court often employ a legalistic methodology. However, these Justices do not engage in the more theorised reasoning process advocated by Sir Owen Dixon, nor do these jurists tend to articulate whether the reasoning process engaged in is based upon any fundamental assumptions.

As the comments made above suggest, the influence of legalism on the Gleeson Court will result from the varying approaches of individual Justices. The analysis in Part II of this thesis, which will consider some important constitutional cases, will facilitate the further examination of these differences. In addition, it should be noted, as Justice McHugh does, that: 'It does not follow that, because courts use broadly similar methods of constitutional interpretation, or judging generally, the results of applying those methods will be the same.'¹⁸² Nor does it follow that different methods will always produce different outcomes. For example, it should be recognised that in constitutional cases it may be Justice Gummow that has the greatest influence on majority opinion,¹⁸³ but this influence may be in terms of the *outcome* reached, rather than the *methodology* adopted.¹⁸⁴

A <i>The Gleeson Court: Faith in Legalism</i>

Leslie Zines writing before the commencement of the Gleeson era referred to judges according legalism 'a eulogistic quality'.¹⁸⁵ As the following discussion will show, such a description may reflect the attitude of a number of members of the Gleeson Court to legalism. When speaking

¹⁸² Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 4.

¹⁸³ Andrew Lynch, 'The Gleeson Court on constitutional law: an empirical analysis of its first five years' (2003) 26 *University of New South Wales Law Journal* 32, 62.

¹⁸⁴ See further Chapters 6 and 10.

¹⁸⁵ Leslie Zines, *The High Court and the Constitution*, (4th ed 1997) 424.

extra-judicially, Chief Justice Gleeson has made numerous references to legalism.¹⁸⁶ On one occasion, his Honour said:

Different lawyers have different ideas as to the techniques that are appropriate to strict and complete legalism, but who would care to suggest an alternative to legalism? A complaint that a judgment is literalistic is one that I can understand, and with which on occasions, I may agree. But what exactly is the meaning of a complaint that a judgment is legalistic? Judges are appointed to interpret and apply the values inherent in the law. Within the limits of the legal method, they may disagree about those values. But they have no right to throw off the constraints of legal methodology. In particular, they have no right to base their decisions about the validity of legislation upon their personal approval or disapproval of the policy of legislation. When they do so, they forfeit their legitimacy.¹⁸⁷

Justice McHugh has also supported the idea that 'the Court is required to interpret and apply values inherent in the law'.¹⁸⁸ In this way the form of legalism put forward by Gleeson CJ and McHugh J suggests that there is a distinction to be made, in developing the law, between legal and non-legal considerations or values. The precise nature of this distinction may be difficult to determine.¹⁸⁹ For example, Justice Paul Finn has questioned whether 'legal values' are in some instances 'any less contrivances of indeterminate content' than 'community values' with which they are sometimes compared.¹⁹⁰ For Justice McHugh it would seem that legitimate considerations would include, 'developments in the common law and statute and events outside the law courts that are consistent with the text and structure of the Constitution.'¹⁹¹ Chief Justice Gleeson recognises that 'qualities of judgment, compassion, human understanding

¹⁸⁶ Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures 2000, 134; Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41.

¹⁸⁷ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44.

¹⁸⁸ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 13. See also Justice Michael McHugh 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 46.

¹⁸⁹ See Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 27.

¹⁹⁰ Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 230.

¹⁹¹ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 12 (references omitted).

and fairness' may be relevant to the judicial role,¹⁹² however, his Honour writes in reference to the judicial role that, 'there comes a point beyond which discretion cannot travel.'¹⁹³ It would seem that clearly outside the scope of relevant considerations are the personal values of the judge, or political beliefs about the desirability of the legislation in question that may effect judicial impartiality.¹⁹⁴

In line with the idea that judges should apply 'legal values', Chief Justice Gleeson and Justice McHugh have suggested that change in the law should be based upon existing doctrines. This perspective reflects what is generally termed a 'doctrinal approach',¹⁹⁵ which Justice McHugh has identified as being the '[t]he principal mode of constitutional interpretation under the Gleeson Court'.¹⁹⁶ Justice McHugh has said of the doctrinal approach that: 'This methodology applies principles derived from the Court's previous authorities relevant to the resolution of the constitutional issues in question.'¹⁹⁷ Justice McHugh has identified the judgments of the majority judges in *Re Wakim; Ex parte McNally* which 'relied heavily on past authorities in holding that the Commonwealth's attempt to confer State judicial power on federal courts pursuant to the national cross-vesting scheme contravened Chapter III of the Constitution', as representing this form of approach.¹⁹⁸

The views concerning judicial methodology expressed by Chief Justice Gleeson and Justice McHugh provide a strong endorsement of a legalistic perspective. They suggest that a particular judicial methodology should be employed and that there are limits on the range of matters that are relevant to judicial interpretations. However, such a view does not for Chief

¹⁹² Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 42.

¹⁹³ *Ibid.*

¹⁹⁴ See for example, Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures 2000, 134. See also Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 42-44.

¹⁹⁵ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 12.

¹⁹⁶ *Ibid.* See also Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 231.

¹⁹⁷ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 12 (references omitted).

¹⁹⁸ *Ibid.*, 12 (references omitted).

Justice Gleeson and Justice McHugh exclude the role of judicial law making.¹⁹⁹ In particular, both Chief Justice Gleeson and Justice McHugh hold that judges may apply legal values and recognise that there may be some divergence of opinion over the nature of these values.²⁰⁰ The approach put forward by Chief Justice Gleeson and Justice McHugh also accepts that implications may be legitimately made provided they are based upon the text and structure of the *Constitution*.²⁰¹

In reference to the judicial law-making role Chief Justice Gleeson has said that:

Some of the great developments in the common law have come from the discernment by judges of a pattern of general principle capable of making sense and justice out of what the poet Tennyson described as:

... [a] codeless myriad of precedent

[a] wilderness of single instances.

But in doing so they have endeavoured to find and apply the values inherent in the law, not to impose their personal values upon it. The technique is inductive and pragmatic, rather than ideological and legislative.²⁰²

These comments are particularly interesting in that they may be interpreted as suggesting that in reasoning from case to case it is Chief Justice Gleeson's view that reliance should be placed more upon the facts and principles drawn from previous authorities rather than any guiding

¹⁹⁹ See, for example, Chief Justice Murray Gleeson, 'Legal Oil and Political Vinegar' (1999) 10 *Public Law Review* 108; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 12.

²⁰⁰ See, for example, Chief Justice Murray Gleeson, 'Rights and Values' (Catholic Lawyers Association Dinner, Melbourne, 18 June 2004) (2004) 129 *Victorian Bar News* 45, 47; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 13.

²⁰¹ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 12; Dan Meagher, 'Guided by Voices? Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261, 271-3.

²⁰² Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures 2000, 99 (references omitted).

theory or ideological position.²⁰³ Justice McHugh in his Honour's decision in *McGinty v Western Australia*²⁰⁴ expressed a similar perspective. In that case his Honour stated that:

... it is not legitimate to construe the *Constitution* by reference to political principles or theories that are not anchored in the text of the *Constitution* or are not necessary implications from its structure. I pointed out that the *Engineers' Case* had made it plain that the *Constitution* was not to be interpreted by using such theories to control or modify the meaning of the *Constitution* unless those theories could be deduced from the terms or structure of the *Constitution* itself. It is the text and the implications to be drawn from the text and structure that contain the meaning of the *Constitution*.²⁰⁵

Whilst Chief Justice Gleeson and Justice McHugh advocate a particular methodology of interpretation, their Honours' comments in *Brownlee v The Queen*²⁰⁶ suggest that different constitutional questions may require different approaches, in terms of the extent to which the circumstances surrounding the framing of the Constitution will be relevant.²⁰⁷ The variance in this aspect of their Honours' approach may also imply that the methodology put forward by Chief Justice Gleeson and Justice McHugh is not confined by some wider fixed theoretical position.

It would also seem that for Justice Callinan, a less theorised approach than that taken by Sir Owen Dixon in constitutional cases is desirable. Justice Callinan, although indicating that he did not wish to 'denigrate the importance of constitutional principle, and the need for clarity in its expression',²⁰⁸ went on to say that:

²⁰³ See also Chief Justice Murray Gleeson, Foreword to Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) viii-ix; Chief Justice Murray Gleeson, 'Clarity or Fairness: which is more important?' (1990) 12 *Sydney Law Review* 305, 309-10.

²⁰⁴ (1996) 186 CLR 140.

²⁰⁵ *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

²⁰⁶ *Brownlee v The Queen* (2000) 207 CLR 278.

²⁰⁷ *Ibid*, 285 (Gleeson CJ, McHugh J).

²⁰⁸ Justice Ian Callinan, 'Comment on Philip Ayres article: Dixon's View of the Privy Council' (2003) 24 *Australian Bar Review* 18, 21.

As the most recent of the significant common law constitutional courts and courts of final appeal, appointees to the High Court, including Dixon, have often thought it necessary to write at length, unfortunately, it must be conceded, on occasions at inordinate length, on their understanding of the underlying philosophy of the Constitution. Constitutional courts need to be wary of this. Not every constitutional case throws up some novel or important question to be decided in such a way as to produce a constitutional principle for all time and for all purposes.²⁰⁹

In summary, it may be said that the comments made by Chief Justice Gleeson and Justice McHugh about legalism suggest that the Court should generally follow previous decisions. The legalistic approach that their Honours put forward supports the law making role of judges and the need to accommodate social change.²¹⁰ However, it is suggested by their Honours that change in the law should be developed from existing doctrines. Their Honours' approach also accepts that implications may be legitimately made provided they are based upon the text and structure of the *Constitution*.²¹¹ In these ideas similarities may be seen with the Dixonian approach. Dixonian legalism, like the legalistic methodology put forward by the Gleeson Court, acknowledges that judges may legitimately make the law in a manner that provides for some degree of judicial choice, and allows for the drawing of implications from the text and structure of the *Constitution*. In these ways, both approaches diverge from what may be regarded as a strict or confined version of legalism.²¹² Consistent with this perspective, Chief Justice Gleeson has sought to distinguish his own approach from formal legalism, describing it as legalism that is consistent with judicial law making.²¹³

²⁰⁹ *Ibid.*

²¹⁰ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 13 (references omitted).

²¹¹ *Ibid.*, 12; Dan Meagher, 'Guided by Voices? Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261, 271-3.

²¹² See, for example the definition of a confined form of legalism provided in Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 322.

²¹³ Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lectures (2000), 129.

Chief Justice Gleeson and Justice McHugh have also suggested that legalism may serve the wider purpose of providing legitimacy to the judgments of the Court.²¹⁴ However, their Honours would seem to stop short of theorising, as Sir Owen Dixon did, about the basis of this legitimacy. Chief Justice Gleeson's comments may be interpreted as suggesting that for his Honour 'fidelity' to 'legal methodology' is sufficient to maintain judicial legitimacy.²¹⁵ The idea that adherence to legalism can overcome the 'counter majoritarian difficulty' has been criticised.²¹⁶ For example, American scholar Mark Tushnet writes that,

Interpretative methods do not resolve the counter-majoritarian difficulty because none of the methods impose a sufficiently powerful constraint on the mere policy preferences of interpreters.²¹⁷

In contrast to the assertion that adherence to legalism will provide legitimacy, Sir Owen Dixon provided a theoretical argument in support of his Honour's view that judicial decisions should employ a legalistic methodology. Sir Owen Dixon, it will be recalled, argued that legalism was based upon the existence or pre-supposition of a finite body of legal knowledge. For Sir Owen Dixon this theoretical belief provided an external standard by which the validity of judicial decisions could be assessed.²¹⁸ Although, the Dixonian approach ultimately relies upon an assumption, the recognition and articulation of this assumption, enables Dixon to consider alternate views. It is difficult to identify a similar approach in the jurisprudence of most members of the Gleeson Court.

The suggested absence of theoretical arguments from the jurisprudence of Chief Justice Gleeson and Justice McHugh may be exemplified by considering the distinction that Chief Justice Gleeson and Justice McHugh make between legal and non-legal values. For their Honours

²¹⁴ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44. See also Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2001) 37 *Australian Journal of Political Science* 241, 242.

²¹⁵ See Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44.

²¹⁶ See Alexander M Bickel, *The Least Dangerous Branch; The Supreme Court at the Bar of Politics* (1962) 16-18.

²¹⁷ Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 7, 51. See also, Sanford H Kadish, 'Judicial Review in the High Court and the United States Supreme Court - Part II' (1959) 2 *Melbourne University Law Review* 127.

²¹⁸ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155-7.

judicial legitimacy is based upon this distinction. Their Honours' position is that legal values may be lawfully applied, whereas non-legal values are illegitimate considerations. Although this distinction is clearly significant to the perspective advanced by Chief Justice Gleeson and Justice McHugh, their Honours' jurisprudence does not outline any general principles to define the nature of this distinction, nor do their Honours' legal writings offer any fundamental theoretical arguments to support the division of legal from non-legal values. It might be thought that there was a need for some reasoning to be offered to support this distinction particularly if it is kept in mind that the distinction made by their Honours has itself been the subject of some significant realist criticisms.²¹⁹ Some realist critics suggest that 'legal' values which are applied by judges are not wholly distinguishable from 'non-legal' values, which may include the personal views of judicial officers, or incorporate what may be described as political or policy considerations.²²⁰ Put simply it is argued that the general jurisprudence of the Gleeson Court does not engage with realist criticisms of legalism.

Professor Zines' analysis of some of Chief Justice Gleeson's comments provides further support for this suggestion. Chief Justice Gleeson, as it will be recalled, questioned rhetorically: 'who would care to suggest an alternative to legalism?'²²¹ In reference to the speech in which Chief Justice Gleeson made these comments, Zines has said:

I find this speech puzzling in view of the fact that other High Court judges and Chief Justices did indeed 'care to suggest an alternative' to strict and complete legalism. They did not, in my view, regard themselves as throwing off 'the constraints of legal methodology'. But they found that that methodology was not confined to strict and complete legalism.²²²

²¹⁹ See Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457; Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697; Karl Llewellyn, *The Common Law Tradition* (1960) 19; Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1242-43, 1252; Julius Stone, *Social Dimensions of Law and Justice* (1966) 670-1; Julius Stone, *Legal Systems and Lawyers' Reasonings* (1964) 281-8, 304-6, 321-3; Julius Stone, *The Province and Function of Law* (1946) 137ff.

²²⁰ See, eg. Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457; Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697. See generally, MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 810; Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

²²¹ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44.

²²² Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 27.

Chief Justice Gleeson's views reflect a contemporary but largely uncritical representation of orthodox legalistic methodology. Professor Lane states without any apparent criticism, in reference to Chief Justice Gleeson's Boyer lectures, that 'one can say that Gleeson advocates "adherence to legal principle", promoting certainty in the law.'²²³ Chief Justice Gleeson, according to Lane, 'does not aspire to be a bold spirit in the law.'²²⁴ It is argued that there is a marked contrast between Lane's portrayal of Chief Justice Gleeson, and the jurisprudence of Sir Owen Dixon.

The jurisprudence of Sir Owen Dixon it will be recalled also sought to distinguish what judicial decision makers could regard as legitimate considerations, from those matters that it was against a legalistic approach to consider. However, in comparison to the non-theoretical approach that appears to have the support of most members of the Gleeson Court, theoretical arguments were offered by Sir Owen Dixon to support the form of legalism that his Honour advocated.²²⁵ The following discussion will return to consider again the theoretical nature of Sir Owen Dixon's legalism as some of the specific details of this theoretical approach highlight the fundamental dissimilarity between Sir Owen Dixon's jurisprudence and that of the current Gleeson Court. One key distinction that will be identified is the manner in which Sir Owen Dixon's theoretical approach addresses realist arguments.

<p>B <i>Realism and the Response of Legalism: A Comparison of the Dixon and Gleeson Approaches</i></p>

The arguments offered by Sir Owen Dixon in support of his Honour's legalistic methodology, unlike the jurisprudence of Chief Justice Gleeson and Justice McHugh, engage with realist

²²³ P H Lane, 'Constitutional Law' (2001) 75 *Australian Law Journal* 77, 80.

²²⁴ *Ibid.*

²²⁵ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156. See also, Sir Owen Dixon, *Address upon the occasion of first presiding as Chief Justice at Melbourne on 7th May, 1952* in Sir Owen Dixon, *Jesting Pilate* (1965) 250-1.

views. Although legalism is often 'juxtaposed to' and compared with realism,²²⁶ Sir Owen Dixon's jurisprudence has been viewed as suggesting that 'the supposed dichotomy between legalism and realism is a false dichotomy'.²²⁷ In the following discussion, it will be argued that it is the *theoretical basis* of Sir Owen Dixon's jurisprudence that enabled his Honour to engage with the ideas presented by realists, rather than seeking only to defend legalism from realist criticisms. It will be suggested that whilst Dixon acknowledges aspects of a realist perspective he maintains that the form of legalism he advocates is the preferred judicial method. Before turning to that analysis it should, however, be acknowledged, that other factors may have impacted upon Sir Owen Dixon's perceptions of realism. For example, Sir Owen Dixon's views on American realism should be seen in the context of his friendship with influential legal figures that were connected with the American legal realist movement.²²⁸

In 1955 Sir Owen Dixon spoke at Yale University to 'the very heart of American legal realism'.²²⁹ On that occasion in reference to the time at which he spoke Sir Owen Dixon said: 'It is not an age in which men would respond to a system of fixed concepts, logical categories and prescribed principles of reasoning'.²³⁰ He went on to state that: 'Philosophy appears to have forgone the search for reality and seldom speaks of the absolute. History concedes the validity of a diversity of subjective interpretation'.²³¹ Perhaps in reference to the views of contemporary realist legal scholars such as Julius Stone, Sir Owen Dixon commented in relation to the law that:

The possession of fixed concepts is now seldom conceded to the law. Rather its principles are held to be provisional; its categories, however convenient or comforting in forensic or

²²⁶ See Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582. See also Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 43; Brian Galligan, *Politics of the High Court, A Study of the Judicial Branch of Government in Australia* (1987).

²²⁷ Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 584. See also, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 560. See further Karl Llewellyn, *The Common Law Tradition* (1960) 19.

²²⁸ Philip Ayres, *Owen Dixon* (2003) 142; Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 584.

²²⁹ Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 584.

²³⁰ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 154.

²³¹ *Ibid.*

judicial life, are viewed as unreal. They are accommodated a place, it is true, but only as illusory guides formerly treated with undue respect.²³²

Sir Owen Dixon went on to state that: 'Law is confined to the realm of ideas. It is concerned with human conduct but otherwise it has no relation to objective fact.'²³³ Whilst acknowledging realist thought in these ways, Sir Owen Dixon went on to argue, in relation to the courts, 'considered as an entire hierarchical system',²³⁴ that:

Such courts do in fact proceed upon the assumption that the law provides a body of doctrine which governs the decisions of a given case. It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves. It is a tacit assumption. But it is basal.²³⁵

As Professor Michael Coper points out it is significant that, 'Sir Owen Dixon put the words "correct", "incorrect", "right" and "wrong" in inverted commas.'²³⁶ Speaking at Yale of the manner in which this assumption operated in an Australian context, Sir Owen Dixon said:

With us in Australia appeals are argued at length in open court and written briefs are not filed. The argument is dialectical and the judges engage in the discussion. At every point in an argument the existence is assumed of a body of ascertained principles or doctrine which both counsel and judges ought to know and there is a constant appeal to this body of knowledge. In the course of an argument there is usually a resort to case law, for one purpose or another. It may be for an illustration. It may be because there is a decided case to which the court will ascribe an imperative authority, if the court has established by its practice a distinction between persuasive and imperative authority. But for the most part it is for the purpose of persuasion; persuasion as to the true principle or doctrine or the true

²³² *Ibid.*

²³³ *Ibid.*

²³⁴ *Ibid.*, 155.

²³⁵ *Ibid.*

²³⁶ Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 559.

application of principle or doctrine to the whole or part of the legal complex which is under discussion.²³⁷

As these quotes demonstrate, the issue with which Sir Owen Dixon was engaging when speaking at Yale was the question of how the legalistic idea of legal truth could be regarded given the realist critics of this very notion. In relation to these seemingly divergent ideas about the nature of legal certainty, Sir Owen Dixon points out that legal methodology which appears to imply some form of objective truth may be viewed as being based upon an assumption.²³⁸ In taking the *theoretical* position that the legalist's notion of legal truth may be based upon an assumption, Sir Owen Dixon responds to the realist criticism of legal truth, without wholly rejecting the realist position. As his Honour states:

... it is a safe generalization that courts proceed upon the basis that the conclusion of the judge should not be subjective or personal to him but should be the consequence of his best endeavour to apply an external standard. The standard is found in a body of positive knowledge which he regards himself as having acquired, more or less imperfectly, no doubt, but still as having acquired. It is open to the realist, if he is so minded, to attack the validity of such an assumption. But he cannot deny its existence. To do so is in fact unreal. It is open to him to condemn it, if he chooses, as a concept of judicial survival, as a judicial method which responds insufficiently or perhaps not at all to the actual or supposed demands of an ever-changing social order. It still remains true that it is the way in which the administration of justice proceeds. Nor can the truth be avoided that it has always been so in the long history of Anglo-American law.²³⁹

In expressing this view Sir Owen Dixon has engaged with realist arguments rather than sought to ignore or wholly dismiss the realist perspective. Although Sir Owen Dixon expresses

²³⁷ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155-56.

²³⁸ *Ibid*, 156.

²³⁹ *Ibid*, 157-58.

outright criticisms of 'conscious judicial innovators', significantly, Dixon did not criticise realist ideas in the same way.²⁴⁰

Sir Owen Dixon considered the ideas presented by realists and provided a principled theoretical argument in response. In so doing, he did not reject the validity of some realist views.²⁴¹ But at the same time his Honour continued to advance the view that legal methodology should be adhered to. That is the manner in which Sir Owen Dixon's remarks are interpreted in this thesis. It should, however, be acknowledged that Dixon's remarks at Yale have been interpreted as being more critical of the realist perspective than this interpretation implies;²⁴² and Dixon's own comments on his speech are open to interpretation.²⁴³ Ultimately it would seem that whether or not Sir Owen Dixon's legalism is to be preferred, and whether or not realist criticisms of legalism are accepted, it may be suggested that the form of argument that Dixon puts forward responds to realism, and argues that legalism is to be preferred, rather than rejecting entirely the validity of the realist perspective. This approach demonstrates a degree of intellectual integrity and depth of analysis in Sir Owen Dixon's jurisprudence.

It is informative to compare the interpretation put forward in this thesis of Sir Owen Dixon's *theoretical* legalism, which is expressed most clearly by Dixon in his speech at Yale, with the writings of Chief Justice Gleeson. The reason for this is that Dixon's views provide an alternative to the unreserved equation of adherence to legal methodology with legitimacy, which is put forward at least in the writings of Chief Justice Gleeson.²⁴⁴ This is not to suggest that the current legalism put forward by the Gleeson Court cannot be seen as the preferred

²⁴⁰ It is interesting to note in this regard that, although Dixon's criticism of 'judicial innovators' and was said to have been, to a degree, directed at Lord Denning; Denning, has been said to have agreed with the views that Dixon expressed at Yale: see Philip Ayres, *Owen Dixon* (2003) 353 citing Dixon to Felix Frankfurter, 19 October 1956, in *Correspondence 1955-1956, Owen Dixon, Personal Papers*.

²⁴¹ See also Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 583-585.

²⁴² Sir Daryl Dawson and Mark Nicholls, 'Sir Owen Dixon and Judicial Method' (1986) 15 *Melbourne University Law Review* 543, 552.

²⁴³ Sir Owen Dixon is reported to have said in relation to his speech at Yale that: '... I ventured some views on current academical theories concerning judicial method and the damage done by judges acting upon them. As the paper was read at a University which had given me a prize politeness (or was it only cowardice?) led me to say less than I meant & to express myself perhaps rather indirectly.': see Philip Ayres, *Owen Dixon* (2003) 253 citing Dixon to Lord Reid, 9 January 1956, in *Correspondence 1955-1956, Owen Dixon, Personal Papers*. Ayres indicates that Dixon was not entirely positive about Denning's agreement with the views expressed by Dixon, and records Dixon as having said of his speech at Yale that, 'I was to a certain extent aiming at Denning'.

²⁴⁴ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44.

method of interpretation. It is however argued that the jurisprudence of the Gleeson Court, considered as a whole, can be criticised on the basis that it provides little justification for why the form of legalism put forward is to be preferred over other methods. In this way it appears that legalism becomes something of an article of faith. Any justification for the legalistic approach taken by members of the Gleeson Court, considered as a whole, would certainly appear to be less theorised than that put forward by Sir Owen Dixon.

VI CONCLUSION

The renewed emphasis placed on legalism by the Gleeson Court would seem to deny the suggestion made by Brian Galligan in 1987, that certain attitudes concerning legalism would become outdated, for 'the next generation of lawyers who will probably take for granted Senator Gareth Evans's view that the court be "pragmatic, purposive and openly policy-oriented in its decision-making style."²⁴⁵ It has however, been suggested in this Chapter that the Gleeson Court has emphasised legalism.

It has been argued that the point of distinction between Dixonian legalism, and the form of legalism put forward by Chief Justice Gleeson and Justice McHugh, is that Sir Owen Dixon saw the methodology that he advocated as being based upon the existence or presupposition of a *corpus* of legal knowledge. It is difficult to identify a similar theoretical belief in the form of legalism that has the general support of most members of the Gleeson Court. Although Gleeson CJ and McHugh J assert that legalism provides legitimacy to judicial decision-making, it is not apparent that this idea is supported by any principled argument. In summary, it is argued that although much of the methodology of the Dixonian form of legalism has been adopted by the current Court—it is difficult to find any support from the Gleeson Court for the underlying *theoretical* arguments that Sir Owen Dixon put forward in support of that approach.

²⁴⁵ Brian Galligan, *Politics of the High Court: a Study of the Judicial Branch of Government in Australia*, (1987) 37.

There is a tendency for contemporary legal writers to accord legalism a broad-brush definition, perhaps because legalism in many ways represents a shared mindset of legal thinkers. Put simply, legalism at its broadest may be considered to be a label for the way in which many with legal training generally tend to approach legal issues. However, as the analysis in this Chapter has demonstrated, there are various forms of legalism. As discussed, the view that the application of a legalist approach will be sufficient to establish the legitimacy of any judicial decision is not always accepted. As this Chapter has demonstrated, even Sir Owen Dixon, who is sometimes viewed as the Australian deity of legalism,²⁴⁶ did not place such an unequivocal faith in legalism. In this Chapter it has been argued that although the tacit belief that adherence to legalism will be sufficient to provide legitimacy is a perspective that is often expressed, including by a number of members of the Gleeson Court, this belief does not of itself provide a justification for the adoption of a legalistic approach. This is significant, because legalism has been the subject of considerable criticism by realist thinkers, as the following Chapter will demonstrate.

²⁴⁶ See further, Allan C Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85, 89.

Chapter 3

REALISM AND THE MASON ERA

I INTRODUCTION

Realism has been viewed as posing a challenge to many of the legalistic ideas¹ that were considered in Chapter 2. This Chapter will consider the manner in which many realist ideas can be identified in the movement by the High Court over which Sir Anthony Mason presided away from legalism and the approach of the Dixon Court.² In general, comparisons of the approach of the Gleeson High Court with its predecessors, as Chapter 2 discussed, tend to emphasise the manner in which the approach of the current High Court is similar to that of the Dixon era.³ As such, the approach of the Gleeson Court is often seen as different from that of

¹ See Karl Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222. See generally M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 799ff; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 142ff; Tony Blackshield 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582ff.

² Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

³ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? – Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

the Mason era.⁴ Although these general comparisons have been made there has been little detailed analysis of the potential relevance of realist ideas to the approach of the Gleeson Court. In part, this may be because the Gleeson Court has not tended to address realist criticisms of legalism, as was discussed in Chapter 2.

The analysis presented in this Chapter will seek to provide a detailed conceptual analysis of realism and the approach of the Gleeson Court. This Chapter will commence by firstly considering the general concept of realism. Second, the approach of the Mason era will be examined. The third topic of discussion will concern realism and the approach of the Gleeson Court. This final discussion will develop a detailed critical analysis that provides a particular perspective on the comparison of the Mason and Gleeson Courts. This analysis will also place the jurisprudence of these Courts within the wider theoretical framework of legal realism.

Before commencing this analysis, a number of points of clarification should be made. The first matter which should be acknowledged is that realist thought is diverse. The difficulty with conceptualising 'realism' may be especially apparent when it is considered that 'realist' approaches are so broad that that even in the 1920's and early 1930's when this mode of legal thought was gaining prominence in the United States, realism was considered to represent not a school but a movement.⁵ The discussion presented in this Chapter will, however, show that realism represents a shared perspective with common central themes. Perhaps the most obvious of these themes is scepticism of legal formalism.⁶ Although realism may question the precepts of legalism, the distinction between realism and legalism is overemphasised,⁷ and at times, 'superficial'.⁸ It is argued that the nature of any distinction between 'legalism' and 'realism' will vary according to which form of these theories is being considered, and as the

⁴ Sir Anthony Mason, 'The Evolving Role and function of the High Court' in Brain Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 95, 119; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221, 229.

⁵ Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1233-4.

⁶ *Ibid*, 1241.

⁷ Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

⁸ Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 41.

discussion of the jurisprudence of Sir Owen Dixon in Chapter 2 demonstrated these two theoretical positions are not *necessarily* diametrically opposed.⁹

The discussion in this Chapter will focus upon the general position of the Mason Court, and the jurisprudence of Sir Anthony Mason in particular.¹⁰ The case analysis presented in Part II of this thesis will facilitate a more detailed focus upon the approach of individual judges. There is however one important difference between members of the Mason Court, which will be considered in Part I of this thesis. This difference centres upon the distinction between the realist-based jurisprudence of Sir Anthony Mason, and the relevance of a natural law perspective to the jurisprudence of Justices Deane and Toohey, which will be discussed in Chapter 4. It should also be foreshadowed in this introduction that the analysis presented in this Chapter and Chapter 4 will aim to show that, despite the difference in the approaches of members of the Mason Court, the Mason Court considered as a whole influenced a significant movement in Australian law away from a traditional legalistic approach.¹¹

⁹ *Ibid.*

¹⁰ As mentioned previously, the qualifications attaching to the use of the term 'Mason Court' should be noted: see Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 24. Sir Gerard Brennan has noted that 'it is not a term which accurately describes the dynamics of a Court constituted by Justices of robust independence of mind, willing and able to give cogent expression to their own views': Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 10. See also, Sir Anthony Mason, 'A Reply' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 113, 113; Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 1, 2.

¹¹ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21. The eight years during which Mason presided over the High Court have been described as, 'among the most exciting and important in the Courts history': Michael Lavarch, 'The Court, the Parliament and the Executive' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 15, 15. In addition, the Mason Court has been viewed as 'one of the most gifted and courageous High Courts in our history': See Sir Maurice Byers, 'Vote of Thanks' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 108, 108.

II REALISM

American legal realism¹² developed primarily through the work of a group of legal academics mostly from Yale and Columbia.¹³ This movement is often associated with the writings of Roscoe Pound and Karl Llewellyn, although there is some divergence between Pound's 'sociological jurisprudence' and the work of later 'realists' such as Llewellyn, as the following discussion will show.¹⁴ Foundational, however, to the work of both these two scholars and to the diversity of American legal realism that was to develop most significantly in the 1920s and early 1930s was the work of Justice Oliver Wendell Holmes.

The challenges that the legal realist movement makes to orthodox legalistic views are usually consistent with the idea expressed by Holmes that the formalistic rules of legalism fail to adequately account for the various influences on both the practice of law and judicial determinations. In this way, the work of Justice Holmes may be seen as being closely aligned with the anti-formalism movement.¹⁵ Justice Holmes wrote that:

¹² The other school of realist thought is the Scandinavian legal realism, which is associated with writers such as Axel Hägerström and Karl Olivecrona: see Axel Hägerström, *Inquiries into the Nature of Law and Morals* (C D Broad trans, 1953); Karl Olivecrona, *Law as Fact* (2nd ed, 1971). See generally M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 855ff; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 142-143; Tony Blackshield 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

¹³ See Laura Kalman, *Yale Law School and the Sixties: Revolt and Reverberations* (2005) 18-19. See generally, Morton J Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992) 247-68.

¹⁴ See Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697; Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

¹⁵ It should be noted that the 'anti-formalism' of Justice Oliver Wendell Holmes' jurisprudence has resulted in the Holmes' work being viewed as foundational to both legal realism and to contemporary pragmatic thought. This issue will be examined further in Chapter 5. It should be foreshadowed that it will be argued in Chapter 5 that although the origins of realism and pragmatism may be similar in some respects, there are some significant differences between these perspectives. In particular it will be suggested that the sociological focus of Australian realism diverges from many contemporary legal pragmatic perspectives. It should also be acknowledged at this point that the precise extent to which philosophical pragmatism influenced Justice Holmes may be debated: For an analysis that emphasises the pragmatic nature of the jurisprudence of Justice Holmes see: Catherine Wells Hantzis, 'Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr' (1988) 82 *Northwestern University Law Review* 541; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787; this may be compared with: Patrick J Kelley, 'Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument' (1990) 14 *Southern Illinois University Law Journal* 427. See also the discussion of this issue in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 800, footnote 5; Paul L Gregg, 'The Pragmatism of Mr Justice Holmes', (1943) 31 *The Georgetown Law Journal* 262, 262.

The felt necessities of the time, the prevalent moral and political theories, intuitions of public policy, avowed or unconscious, even the prejudices which judges share with their fellow-men, have had a good deal more to do than the syllogism in determining the rules by which men should be governed. The law embodies the story of a nation's development through many centuries, and it cannot be dealt with as if it contained only the axioms and corollaries of a book of mathematics.¹⁶

In this questioning of legal formalism, Justice Oliver Wendell Holmes and many subsequent realist writers, have suggested that legalism fails to adequately account for the role of judicial choice.¹⁷ As Justice Holmes eloquently stated:

The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man. Behind the logical form lies a judgment as to the relative worth and importance of competing legislative grounds, often an inarticulate and unconscious judgment, it is true, and yet the very root and nerve of the whole proceeding.¹⁸

In this way Holmes expressed the challenge to the idea that judicial law-making may be explained as the application of pre-existing and determinable legal rules, with this idea forming a common theme for subsequent realist writers.¹⁹ In addition, the issues expressed by Holmes may be regarded as fundamental in widening the boundaries of legal debate in a manner which allowed realists and other writers to explore other dimensions of judicial decision.²⁰

¹⁶ Justice Oliver Wendell Holmes *The Common Law* (1881) 1.

¹⁷ See Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457; Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697; Karl Llewellyn, *The Common Law Tradition* (1960) 19; Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1242-43, 1252; Julius Stone, *Social Dimensions of Law and Justice* (1966) 670-1; Julius Stone, *Legal Systems and Lawyers' Reasonings* (1964) 281-8, 304-6, 321-3; Julius Stone, *The Province and Function of Law* (1946) 137ff.

¹⁸ Justice Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 465-466.

¹⁹ See for example, Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697, 707-8; Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1237.

²⁰ See for example, Jerome Frank, *Law and the Modern Mind* (first published, 1930, 6th impression, 1949) . See also, Karl Llewellyn, *The Common Law Tradition* (1960), Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1222-3. See generally M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 802-3. Realism has also been seen as foundational in some way to many later movements in jurisprudence including critical legal studies, and feminist legal theory: see Margaret Davies,

Roscoe Pound's 'sociological jurisprudence', which considered the social impact of law, provides an example of the broadened debate about law facilitated by Holmes' anti-formalism.²¹ Pound emphasised that law should be understood as having a specific purpose, namely that of 'harmonizing and securing interests and upholding and furthering the social order.'²² It should however be noted that Pound is not regarded either generally,²³ or by later 'realists' such as Llewellyn, as forming part of the legal realist movement.²⁴ Pound gave a negative assessment of the extent to which realist writings viewed legal rules as being uncertain.²⁵ Pound was also particularly critical of the extent to which realists did not consider the role of values in law, and the influence of values in empirical research.²⁶

Llewellyn sought to defend the realist movement from these criticisms.²⁷ For example, in response to Pound, Llewellyn suggested that realist criticisms of formalism were not overstated but reflected the view that: 'there is less possibility of accurate prediction of what courts will do than the traditional rules would lead us to suppose.'²⁸ In addition, in reply to Pound, Llewellyn outlined the manner in which empirical research could be informative.²⁹ Llewellyn also sought to establish that realists did consider the role of values in law, however for Llewellyn it was important to seek to divide the issue of what the law 'is' from any discussion of what the law 'ought' to be.³⁰ Llewellyn also argued that the analysis of what the law 'is' was the first question of significance for realist writings.³¹ Whilst there are points of divergence between the approaches of Llewellyn and Pound, both approaches are consistent, in some way, with the

Asking the Law Question (2nd ed, 2002) 146, 150. See also, Morton J Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992) 269-72.

²¹ See Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697, 703.

²² *Ibid*, 709.

²³ See M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 672-78; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 145.

²⁴ See Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

²⁵ See Roscoe Pound, 'Call for a Realist Jurisprudence' (1931) 44 *Harvard Law Review* 697, 699.

²⁶ See *ibid*, 697-8, 700-1.

²⁷ Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

²⁸ *Ibid*, 1241.

²⁹ *Ibid*, 1242ff.

³⁰ *Ibid*, 1255.

³¹ *Ibid*, 1255.

emphasis that Holmes had much earlier sought to place upon the practical and pragmatic issue of 'what the courts will do in fact.'³²

Although there was debate on a number of issues between Pound and Llewellyn, another similarity may be identified in the emphasis that Pound and Llewellyn placed upon the social purpose of law.³³ For Llewellyn, the realist movement was not concerned to represent law as an isolated entity but rather sought to understand 'law and its place in society'.³⁴ By emphasising the practical, and arguing that all judicial decisions need to be understood in the context of the particular factual controversy, the writings of Llewellyn brought to the fore the social context of law. In this way, the idea of objective legal rules was challenged.³⁵ In developing these realist ideas, Llewellyn distinguished between two forms of judicial decision-making, which he termed 'Grand-Style' and 'Formal-Style'.³⁶ 'Grand-Style' as Llewellyn defined it was based on reason; it called for an explicit examination of policy considerations, and did not require the automatic following of precedents.³⁷ In contrast, 'Formal-Style' was seen by Llewellyn to reflect the notion that cases were to be decided by the following of precedents and the rules of law, with issues of policy being for the legislature.³⁸ Although Llewellyn counterpoised these two styles, he recognised that most judicial decision making could be characterised as representing, not one or the other, but varying degrees of each approach.³⁹

It may be suggested that the scope of legal realism in Australian jurisprudence is relatively narrow in comparison to the range of thought associated with the realist movement in the United States. The narrower purview of Australian realism may in part be a result of the origins of this perspective in Australian jurisprudence. The perception of law as a practical and social construct, which is broadly consistent with the writings of both Pound and Llewellyn,

³² Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 461.

³³ Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1236.

³⁴ *Ibid.*, 1234.

³⁵ *Ibid.*, 1255.

³⁶ Karl Llewellyn, *The Common Law Tradition* (1960) 35-45.

³⁷ *Ibid.*

³⁸ *Ibid.*

³⁹ *Ibid.*

gained currency in Australian jurisprudence through the writing and teaching of Professor Julius Stone, a student of Pound.⁴⁰ As Tony Blackshield has written:

In the 1940s' Australian law schools encountered American influence through the teachings of George Paton in Melbourne and Julius Stone in Sydney. Both were influenced by Pound. Stone had worked with Pound at Harvard (1931-1936) and had personal links with many of the notable realists, including Frank and Llewellyn.⁴¹

Legal realism has been seen to be influential in Australian constitutional law primarily through Professor Stone's work *The Province and Function of Law*⁴² and his teaching has been viewed as directly impacting upon a generation of Australian lawyers and changing the method of instruction in Australian law schools.⁴³ In particular, Professor Stone's teaching has been viewed as being 'deeply influential' upon the 'future High Court Justices who studied at Sydney—including Mason, Jacobs, Murphy, Deane, and Kirby.'⁴⁴ Other High Court judges to have studied at Sydney University include Chief Justice Gleeson⁴⁵ and Justices Gaudron and Gummow, with both Gaudron and Gummow JJ being students of Sir Anthony Mason.⁴⁶ Justice Kirby has noted that:

⁴⁰ Michael Kirby 'Law as 'Ministering to Justice' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 201. See also John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 128. See further, Julius Stone, *The Province and Function of Law* (1946) 355ff.

⁴¹ Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 583.

⁴² Julius Stone, *The Province and Function of Law: Law as Logic Justice and Social Control A Study in Jurisprudence* (1946).

⁴³ Michael Kirby 'Law as 'Ministering to Justice'' in A R Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 201. See also, R J L Hawke, 'Julius Stone - Humanist, Jurist and Internationalist Inaugural Julius and Rea Stone Memorial Lecture' (1986) 9 *University of New South Wales Law Journal* 1; Gordon Samuels, 'Julius Stone' (1986) 9 *University of New South Wales Law Journal* 1, 9; Sir Zelman Cowen, Foreword, Blackshield AR (ed) *Legal Change: Essays in Honour of Julius Stone* (1983) vii; Don Hardin, 'Professor Julius Stone - In Tribute to Fifty Years of Teaching and Research' in AR Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (1983) xi. See also, for example, Michael Coper, 'Interpreting the Constitution: A Handbook for Judges and Commentators' in AR Blackshield (ed) *Legal Change: Essays in Honour of Julius Stone* (1983) 52. See further, Justice K S Jacobs, 'Comment: The Successor Books to "The Province and Function of Law"' (1967) 5 *Sydney Law Review* 425.

⁴⁴ Tony Blackshield 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 583.

⁴⁵ Bret Walker, 'Gleeson, (Anthony) Murray' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 305, 305.

⁴⁶ Henrik Kalowski, 'Gaudron, Mary Genevieve' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 293, 293; Justice John Lehane, 'Gummow, William Montague Charles' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 314, 314.

Through Stone, Pound's practical and realistic approach to jurisprudence, entirely compatible with the spirit of English common law, found acceptance amongst young lawyers of Australia and New Zealand in the 1940's, 1950's, 1960's and beyond. Those young lawyers came in time to positions of influence in the law and its institutions in the antipodes. It is only now that the impact of Stone's jurisprudential teachings upon lawyers of Australia is coming to full flower.⁴⁷

Professor Stone dismissed the idea that judicial decisions could be derived from a determinable body of law.⁴⁸ Like Pound and Llewellyn, Stone also emphasised the sociological dimension of the law.⁴⁹ It may be that the influence of these origins on realism in Australia, gives realism in Australian legal writings a *sociological* jurisprudential perspective. Arguably the most influential aspect of the jurisprudence of Julius Stone is the detailed analysis that Stone's work provides of a realist approach to judicial decision making. Stone's view of the judicial role represents a significant and fundamental change from the manner in which this concept is presented by legalism.

Judicial decisions, for Julius Stone, did not just reflect the application of legal rules; rather Stone viewed all judging as a creative role in which judicial officers had a responsibility to balance competing interests and to take into account any relevant policy considerations.⁵⁰ Implicit within this complex function, Stone acknowledged there was, what he termed, 'leeways for judicial choice'.⁵¹ Stone emphasised the role that this judicial choice could play, and provided a detailed analysis of the manner in which all judicial decisions could be viewed as being influenced by an indeterminate body of legal knowledge. This body of legal knowledge for Stone included 'categories of illusory reference'.⁵² As Stone writes:

⁴⁷ Michael Kirby, 'Law Reform as 'Ministering to justice' in Blackshield AR (ed) *Legal Change: Essays in Honour of Julius Stone* (1983) 201. See also, Garry Sturgess and Philip Chubb, *Judging the World* (1988), 13-15.

⁴⁸ Julius Stone, *The Province and Function of Law* (1946) 355ff. Tony Blackshield, 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582, 583.

⁴⁹ See also, Edward McWhinney, 'Julius Stone and the Sociological Approach to International Law' (1986) 9 *University of New South Wales* 14; Martin Krygier, 'Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law' (1986) 9 *University of New South Wales* 26.

⁵⁰ Julius Stone, *The Province and Function of Law* (1946) 192ff.

⁵¹ Julius Stone, *Legal System and Lawyers' Reasonings* (1964) 304.

⁵² *Ibid.* See generally Tony Blackshield 'Realism' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 583.

When leeways for judicial choice exist ... decisions within the leeways are, objectively speaking, creative of law. They may or may not be creative also in the subjective sense that judges are aware of the leeways, and aware that, by the decision, rules merely *potentially* law become *actually* so. When there is no such awareness judges are creating rules, without recognising responsibility for what is created, often believing that they have but decided according to pre-existing legal propositions. It is a deep meaning of the legal categories of illusory reference that they protect this belief into and after the climax of decision; and the long dominant theory that judges always merely “discover” the law perhaps generalised and legitimated this fact of *objective* creation *subjectively* unrecognised. The creativeness remains nonetheless evident from the remarkable growth of the common law under judicial cultivation.⁵³

The indeterminate body of legal knowledge was seen by Stone as having a social purpose of seeking to reconcile the interests that individuals have both in their relations with each other and as individuals existing in a relationship with the State.⁵⁴ This idea that law has as a specific purpose, the balancing of the interests of individuals with those of the State, has significant implications for constitutional law. It will be argued later in this Chapter that this view of the function of law is reflected in the approach of the Mason Court.

In summary, it may be said that although legalism was a central target of realists, the criticism made by realists of legalism may be overemphasised.⁵⁵ The realist movement generally did not deny the normative character of legal rules but rather sought to emphasise that these legal rules do not provide a complete account of the legal process and judicial decision-making.⁵⁶ The important contribution of ‘sociological jurisprudence’ and realist writings was to widen the

⁵³ Julius Stone, *Legal System and Lawyers’ Reasonings* (1964) 304 (emphasis in original). See generally, Martin Krygier, ‘Julius Stone: Leeways of Choice, Legal Tradition and the Declaratory Theory of Law’ (1986) 9 *University of New South Wales Law Journal* 26, 28-30; Michael Coper, ‘Interpreting the Constitution: A Handbook for Judges and Commentators’ in Blackshield AR (ed) *Legal Change: Essays in Honour of Julius Stone* (1983) 52.

⁵⁴ See Julius Stone, *Social Dimensions of Law and Justice* (1966) 164ff, 199. See also Roscoe Pound, ‘A Survey of Social Interests’ (1943) 57 *Harvard Law Review* 1, 1-4.

⁵⁵ M D A Freeman, *Lloyd’s Introduction to Jurisprudence* (7th ed, 2001) 800, 814; Tony Blackshield ‘Realism’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 582.

⁵⁶ See Karl Llewellyn, ‘Some Realism about Realism – Responding to Dean Pound’ (1931) 44 *Harvard Law Review* 1222, 1241; See also Roscoe Pound, ‘Call for a Realist Jurisprudence’ (1931) 44 *Harvard Law Review* 697, 699, 707-8; M D A Freeman, *Lloyd’s Introduction to Jurisprudence* (7th ed, 2001) 810. See further, Justice K S Jacobs, ‘Comment: The Successor Books to “The Province and Function of Law”’ (1967) 5 *Sydney Law Review* 425.

debate about the nature of law and in doing so establish that law must be understood in a social, cultural and political context.⁵⁷ In this way the realist movement increasingly perceived law not as an objective set of rules, but as a 'means to social ends.'⁵⁸ Again a possible genesis for this debate may be found in the writings of Holmes. Writing at a time when law was widely viewed as being formulistic, Holmes suggested that a consideration of the social advantage that any legal principle produced, would lead to a greater uncertainty about the categorical nature of the legal principle.⁵⁹ The significance of the work of Holmes, Pound, Llewellyn and Stone, that this Chapter seeks to emphasise, is that these writers not only sought to explain judicial decision making in a manner which emphasised the policy and factual component of law, but that the work of each of these scholars offers a *theoretical position which reconceptualizes law as something which has a social purpose*.⁶⁰ As Freedman writes:

Pound identified the task of the lawyer as 'social engineer', formulated a programme of action, [and] attempted to gear individual and social needs to the values of Western democratic society. The early Realist writings convey similar orientation. Pound, and Holmes too, was a 'generaliser', a purveyor of 'grand theory': he provides the theoretical context for an understanding of law in society.⁶¹

The influence of realism on the jurisprudence of the Mason Court, which is analysed below, is often regarded as resulting in an unmooring of the legalistic concept of a finite body of legal rules which may be applied by judges. Even the Dixonian concept of legal certainty, which, as Chapter 2 discussed was based upon the assumption of a corpus of legal knowledge, was challenged by the approach of the Mason Court. These points will be emphasised in the

⁵⁷ See further, Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 142, 148.

⁵⁸ Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1236. See also Benjamin N Cardozo, who wrote that: 'The final cause of law is the welfare of society...I mean that when they are called upon to say how far existing rules are to be extended or restricted, they must let the welfare of society fix the path, its direction and its distance': see Benjamin N Cardozo, *The Nature of the Judicial Process* (1921) 66-7.

⁵⁹ Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 468.

⁶⁰ See for example, Julius Stone, *Social Dimensions of Law and Justice* (1966) 164ff, 199; Roscoe Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 1-4; Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 468.

⁶¹ M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 678-79. See also Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787. This may be contrasted to a degree with Llewellyn's preference for 'narrow and real-world categories': see Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 825, footnote 176.

following discussion and it will be suggested that the purposive interpretative approach of the Mason Court exhibited a methodology that moved beyond the confines of an orthodox legalistic interpretation. It may, however, be argued that realism may have had a more significant effect on the jurisprudence of the Mason Court than merely extending legal discussion to include social and political arguments. More specifically, the case analysis presented in Chapter 8 of this thesis will suggest that the approach of the High Court in a number of judgments from the Mason era concerning judicial power reflect the idea put forward by Julius Stone that law has as a specific purpose the balancing of the interests of individuals, and the social interests of the State of which the individual is a part.⁶²

The following analysis provides an important background to the discussion of the realists' idea of law as the balancing of social interests. In particular, the following discussion will consider the initial demise of legalism and the contextual influences upon this movement in Australian jurisprudence. It will then be argued, later in this Chapter, that the realist perception of law as having a social and political purpose broadened debate about the influences on judicial decision-making in a manner that is identifiable in the general approach and jurisprudence of the High Court of the Mason era.

III THE 'DEMISE OF LEGALISM' AND THE MASON ERA

The 'demise of legalism'⁶³ in Australian constitutional law is often seen to have commenced with the appointment to the High Court of Justice Lionel Murphy in 1975.⁶⁴ As Professor Zines notes, Justice Murphy's appointment put an end to Sir Owen Dixon's view that the High Court had produced no deliberate innovator bent on express change of acknowledged doctrine.⁶⁵

⁶² See Julius Stone, *Social Dimensions of Law and Justice* (1966) 164ff, 199. See also Roscoe Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 1-4.

⁶³ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23-24.

⁶⁴ *Ibid.*, 23.

⁶⁵ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23; Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 154. See

However, whilst the influence of Murphy J cannot be overlooked, Murphy J although his Honour served with Mason J, was not a member of the High Court under the leadership of Chief Justice Mason.⁶⁶ The following analysis will begin by considering briefly the debate concerning the influence of Justice Murphy in the movement of the High Court away from legalism. The focus of the discussion will then turn to consider matters that have been identified as being central to the movement by Sir Anthony Mason away from a legalistic approach.

A Justice Murphy, Social and Political Values

Justice Murphy often had regard to broad social and political values, with the 'nature of our society' as a free and democratic state being the basis upon which he drew implications from the Constitution.⁶⁷ However, Justice Murphy did not appear to exert a great influence on his contemporaries whilst his Honour sat on the High Court, with Murphy J's judicial opinions most often representing a dissenting view.⁶⁸ The exact extent of Justice Murphy's influence

further, Paul Bickovski, 'No Deliberate Innovators: Mr Justice Murphy and the Australian Constitution' (1977) 8 *Federal Law Review* 460.

⁶⁶ See generally Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 551.

⁶⁷ *McGraw-Hinds (Aust.) Pty Ltd v Smith* (1979) 144 CLR 633, 670 (Murphy J). See also *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 581-2 (Murphy J). Justice Murphy suggested in numerous cases that the Constitution supported a number of freedoms. In a series of decisions, including *McGraw-Hinds (Aust.) Pty Ltd v Smith*, Justice Murphy referred to the right of persons to move freely across or within State borders: see *Buck v Bavone* (1976) 135 CLR 110, 137; *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth* (1977) 139 CLR 54, 88; *McGraw-Hinds (Aust) Pty Ltd v Smith* (1979) 144 CLR 633, 670; and *Miller v TCN Channel Nine Pty Ltd* (1986) 161 CLR 556, 582. In *Ansett Transport Industries (Operations) Pty Ltd v Commonwealth*, Justice Murphy held that the proper operation of the system of representative government required freedom of movement, speech and other communications. In *R v Director-General of Social Welfare (Vic); Ex parte Henry* Justice Murphy held that '[i]t would not be permissible for the Parliament of Australia or for any of the States to create or authorize slavery or serfdom': see *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 388 (Murphy J); see also *General Practitioners Society v Commonwealth* (1980) 145 CLR 532, 565 (Murphy J). In *Sillery v The Queen*, Murphy J held that there was a presumption against interpreting legislation to impose 'cruel and unusual punishment', and it followed that Commonwealth legislation should not be construed as imposing a mandatory sentence of life imprisonment regardless of mitigating circumstances: see *Sillery v The Queen* (1981) 180 CLR 353, 362. Murphy J also expressed the view that, '[i]t may be that an implication should be drawn from its terms that the Parliament's legislative powers do not extend to authorizing arbitrary discrimination between the sexes': see *Ansett Transport Industries (Operations) Pty Ltd v Wardley* (1980) 142 CLR 237, 267. See generally, Michael Coper and George Williams (eds) *Justice Lionel Murphy Influential or merely prescient?* (1997); Jean and Richard Ely (eds), *Lionel Murphy: The Rule of Law* (1986); Jocelynn A Scutt (ed), *Lionel Murphy: A Radical Judge* (1987); Jenny Hocking, *Lionel Murphy: A Political Biography* (1997).

⁶⁸ A R Blackshield, David Brown, Michael Coper and Richard Krever (eds), *The Judgments of Justice Lionel Murphy* (1986) xviii-xix; Justice Michael Kirby, 'Lionel Murphy and the power of ideas' (1993) 18 *Alternative Law Journal* 253; Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 258. See also George Williams,

upon the High Court has been the subject of extremely divergent perspectives.⁶⁹ For example, Justice Kirby has praised the contribution made by Justice Murphy, and expressed in 1993 the view that 'the powerful ideas of this remarkable man are having their continuing, and ever growing, effect on the Australian legal and judicial system.'⁷⁰ Justice Kirby has also written of Murphy J that, '[h]e saw the way in which, with fresh eyes, the Constitution could be adapted and could live as the guardian of basic rights and the protector of a democratic society.'⁷¹ This opinion may be contrasted with the view of Murphy J expressed by Professor George Winterton, who writes that,

Influence is difficult to prove, especially since it can operate indirectly through the medium of other judges and lawyers, such as Justice Kirby himself. The High Court which adopted views analogous to Murphy's was constituted differently from that of Murphy's time, although the principal catalysts - Sir Anthony Mason and Sir William Deane - did serve with Murphy, the former throughout Murphy's term. One can only speculate regarding Murphy's influence on Deane. But Mason's adoption of positions earlier rejected when Murphy espoused them might suggest the opposite of Justice Kirby's explanation, namely that the identity of their propounder hindered serious consideration of Murphy's views.⁷²

Yet another view is presented by George Williams, who, whilst acknowledging that Justice Murphy's 'impact is better measured by shifts in judicial method and the greater willingness of today's judges to apply community values in making law',⁷³ has also written that; '[a] decade after his death, Murphy's decisions on democracy and rights remain isolated from the mainstream of constitutional interpretation.'⁷⁴ George Williams also puts forward a more

'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds) *Justice Lionel Murphy Influential or merely prescient?* (1977) 50-64

⁶⁹ Justice Michael Kirby, 'Lionel Murphy and the power of ideas' (1993) 18 *Alternative Law Journal* 253, 258.

⁷⁰ *Ibid.*

⁷¹ *Ibid.* Cf. George Winterton, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204, 207. See also George Williams, 'Lionel Murphy and Democracy and Rights' in *Justice Lionel Murphy; Influential or merely prescient?* Michael Coper and George Williams (eds), 50-64; and Michael Coper 'Commentary' in *Justice Lionel Murphy; Influential or merely prescient?* Michael Coper and George Williams (eds) 64-70.

⁷² George Winterton, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204, 207.

⁷³ George Williams, 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy; Influential or merely prescient?* 50, 63.

⁷⁴ *Ibid.*, 62. Williams also argues: 'The recognition of popular sovereignty today owes more to the passing of the *Australia Act* and to the writings of Lindell than to the judgments of Murphy': see George Williams, 'Lionel

debatable point stating that: '[i]t could be said that Murphy enabled the significant achievements of a more influential judge, Justice Deane.'⁷⁵

Subsequent legal developments, which coincide with Justice Murphy's earlier views, are not always necessarily expressed as following from his Honour's decisions.⁷⁶ In part, as a consequence of this, categorical statements concerning Justice Murphy's influence may not be accurate, and the position taken in this thesis is that Justice Murphy's long-term influence on Australian constitutional law has been, and will remain, a matter of interpretation. However, whatever view is taken of Murphy J's *influence* upon Australian jurisprudence, it should be acknowledged that at least some of Justice Murphy's ideas have now gained wider acceptance.⁷⁷ Most notably his Honour's view that the Australian system of representative government protected the freedom of speech is, in part, consistent with the freedom of political communication which has been endorsed by a unanimous High Court.⁷⁸ Whilst Justice Murphy may have been the instigator of the challenge to the orthodox legalistic method,⁷⁹ as the following analysis will show, the work of Sir Anthony Mason was instrumental in the development of this challenge, and more significant in terms of putting forward an alternative approach that would command greater acceptance amongst other Justices.⁸⁰

Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy; Influential or merely prescient?* 50, 51.

⁷⁵ George Williams, 'Lionel Murphy and Democracy and Rights' in Michael Coper and George Williams (eds), *Justice Lionel Murphy; Influential or merely prescient?* 50, 64. In response to this latter point it may be suggested that the theoretical basis of the reasoning put forward Justice Deane, and the nature of the principles that Deane J articulates distinguishes the approach of Justice Deane from the methodology that Justice Murphy to such a degree that it may be suggested that the extent to which Justice Murphy effected the approach taken by Deane J, may, at times, be overstated. Put simply, it may be suggested that the broad theoretical position provided by natural law theories are more readily identifiable in the jurisprudence of Justice Deane than in the shorter expression of particular, usually democratic values found in the judgments of Justice Murphy.

⁷⁶ See Justice Michael Kirby, 'Lionel Murphy and the power of ideas' (1993) 18 *Alternative Law Journal* 253.

⁷⁷ *Ibid.* Cf. George Winterton, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204, 207. See also George Williams, 'Lionel Murphy and Democracy and Rights' in *Justice Lionel Murphy; Influential or merely prescient?* Michael Coper and George Williams (eds), 50-64 and Michael Coper 'Commentary' in *Justice Lionel Murphy; Influential or merely prescient?* Michael Coper and George Williams (eds) 64-70.

⁷⁸ Justice Michael Kirby, 'Lionel Murphy and the power of ideas' (1993) 18 *Alternative Law Journal* 253.

⁷⁹ *Ibid.* Cf. George Winterton, 'Murphy: A Maverick Reconsidered' (1997) 20(1) *University of New South Wales Law Journal* 204, 207.

⁸⁰ For an empirical analysis see Russell Smyth, "'Some Are More Equal than Others" – An Empirical Investigation into the Voting Behaviour of the Mason Court', (1999) 6 *Canberra Law Review* 193, 207. See generally Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 2. Professor Zines has also commented on the manner in which other members of the High Court generally accepted Sir Anthony Mason's approach: see Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

B *The Evolving Jurisprudence of Sir Anthony Mason*

Sir Anthony Mason was a member of the High Court from 1972 until 1995. Although a legalistic approach may be identified in many of Sir Anthony Mason's early judgments,⁸¹ it has been said that 'when he left the Court, he had been a party to more judgments making more dramatic changes in the common law than any judge in the history of Australia'.⁸² This movement in the jurisprudence of Sir Anthony Mason is particularly apparent in High Court decisions given following Mason's appointment as Chief Justice in 1986.⁸³ As Justice McHugh, speaking extra-judicially has said: 'No one reading the Commonwealth Law Reports for the period 1972 to 1995 could miss the change in Sir Anthony's approach to judging'.⁸⁴ So apparent is this change in approach that his Honour's opinions are often identified with 'what has been called Mason I and Mason II as a judge',⁸⁵ a description that seems to imply two separate personas. In order to gain a contextual understanding of such a dramatic change it is important to consider the matters that have been viewed as influential in bringing about this change.

1 *Social and Political Change in Australian Society*

Justice McHugh has suggested extra-judicially that the 'true explanation' for the change in Sir Anthony Mason's approach may be 'the political, economic and societal changes that commenced in the 1980s'.⁸⁶ More specifically, Justice McHugh has stated that Sir Anthony Mason, 'regarded Australia's evolving status as an independent nation as inevitably requiring a

⁸¹ See for example, *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 633. See also Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason From *Trigwell* to *Teoh*. (1996) 20 *Melbourne University Law Review* 1087.

⁸² Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 1, 2.

⁸³ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

⁸⁴ See Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 1.

⁸⁵ *Ibid.*

⁸⁶ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 2. See generally, Cheryl Saunders, 'The Mason Court in Context' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 1, 2-3.

change in the approach of the High Court Justices to judging.⁸⁷ These factors may, as Sir Gerard Brennan points out, have influenced a number of Sir Anthony Mason's judgments, such as *Victoria v Commonwealth and Hayden*,⁸⁸ *Koowarta v Bjelke-Petersen*,⁸⁹ *Commonwealth v Tasmania*,⁹⁰ and *Davis v Commonwealth*,⁹¹ which 'reveal a vision of Australia as an independent nation fully equipped to take its place as a member of the international community.'⁹²

Although such a view may have underscored a number of Chief Justice Mason's judicial decisions, it may be argued that the significance of the changing status of Australia as an independent nation may not, of itself, account for the change in the approach to the judicial role taken by 'Mason II as a judge'.⁹³ Changes in Australian society may have contributed to the development of the High Court's jurisprudence away from legalism, however, it is argued that the influence of these developments is at times overly emphasised.⁹⁴ Legalism may account for this emphasis. A reason for this being, that the changes in Australia's legal status were largely brought about by *legislative* change. On an orthodox legalistic approach, *legislative* change, rather than factors external to the legal system, can more readily justify a change in judicial approach. However, as the following discussion will show, a number of other factors are also likely to have contributed to the change in judicial methodology of the High Court.

2 Overseas Developments: Legal Change in Common Law Jurisdictions

Despite the tendency for changes in the approach of the Mason Court to be ascribed to Australia's evolving status as a nation, as Professor Cheryl Saunders points out 'neither changes

⁸⁷ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 2. See also Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 235-6; Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 255-6.

⁸⁸ (1975) 134 CLR 338, 397.

⁸⁹ (1982) 153 CLR 168, 229.

⁹⁰ (1983) 158 CLR 1, 124, 127.

⁹¹ (1988) 166 CLR 79, 94-95.

⁹² Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 10-11.

⁹³ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004).

⁹⁴ *Ibid.*

in methodology or doctrine in the Australian court nor the tensions to which they sometimes give rise are unique.⁹⁵ As Saunders argues:

Many of the influences on Australian legal development in the latter part of the 20th century have affected other countries with equal or greater force: the internationalisation of law and strengthening of international norms; the communications revolution; the pressure for a greater measure of popular sovereignty.⁹⁶

Further support for the changes in Australian law being viewed as part of a wider change in common law generally may be found in the comments of Sir Anthony Mason. As Sir Anthony Mason notes, some controversial decisions such as *Mabo (No 2)*⁹⁷ and the implied freedom of political communication cases,⁹⁸ brought about substantive legal changes that were in line with similar developments in the United States, New Zealand and Canada.⁹⁹

In contrast to the general view that the change in judicial reasoning in Australia was the subject of influences comparable to that of other jurisdictions, Jason Pierce, an American political scientist, has written that,

Put simply, Australia's transformation was endogenous to the High Court to an extent not seen elsewhere. The High Court under Mason's leadership abandoned the orthodoxy not out of statutory or constitutional obligation, but because the individual judges on the Court held role conceptions that compelled them to pursue the politicized role.¹⁰⁰

The views of Pierce, however, fall outside of the majority of opinion recorded in Australian legal writings. The more orthodox view that is usually expressed in Australian legal writings

⁹⁵ Cheryl Saunders in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 1A. See also Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221, 224.

⁹⁶ Cheryl Saunders in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 1, 4.

⁹⁷ *Queensland v Mabo (No 2)* (1992) 75 CLR 1.

⁹⁸ *Nationwide News v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106.

⁹⁹ Sir Anthony Mason, 'A Reply' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 113, 114. See also Cheryl Saunders, 'The Mason Court in Context' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 2, 7.

¹⁰⁰ Jason Pierce, *Inside the Mason Court Revolution: The High Court of Australia Transformed* (2006).

sees the substantive legal changes brought about by the Mason Court as being consistent with international developments, with the movement by the Australian High Court away from legalism following a similar movement by other international appellate courts.¹⁰¹

A number of examples may be cited in support of this more widely articulated perception. For example, in the United Kingdom, Lord Denning who was appointed to the bench in 1944 put forward an approach which emphasised the need to achieve justice for individuals in their relationship with governments and gave judges a significant role in making the law.¹⁰² Although Lord Denning's approach was not universally accepted by his Lordship's contemporaries,¹⁰³ from the 1960s onwards the role of the judiciary in the United Kingdom could be regarded as being more interventionist in government decisions.¹⁰⁴ By 1972 Lord Reid spoke of judicial creativity and made his now famous comments about the declaratory theory of law being a 'fairy tale' that no one believed in anymore.¹⁰⁵ In addition, the *European Communities Act 1972* (UK), decisions of the European Court of Justice and the European Court of Human Rights have influenced English law.¹⁰⁶ The emphasis on human rights in Canadian jurisprudence also followed from the entrenchment of the *Charter of Rights and Freedoms* in 1982.¹⁰⁷ In the United States, the emphasis on human rights had become prominent in the

¹⁰¹ Cheryl Saunders in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 1, 4. See also Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221, 224; Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

¹⁰² Garry Sturgess and Philip Chubb, *Judging the World* (1988), 31-32, 259-264.

¹⁰³ *Ibid*, particularly 4, 31-32, 257-293.

¹⁰⁴ *Ibid*, 31-32.

¹⁰⁵ Lord Reid, stated:

There was a time when it was thought almost indecent to suggest that judges make law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin's cave there is hidden the Common Law in all its splendour and that on a judge's appointment there descends on him knowledge of the magic words Open Sesame. Bad decisions are given when the judge has muddled the pass word and the wrong door opens. But we do not believe in fairy tales any more: see Lord Reid, 'The Judge as Law Maker' (1972) 12 *Journal of Public Teachers of Law* 22, 22.

See also the approach of the House of Lords in *Herrington v British Railways Board* [1972] AC 877, and the discussion of that case by Justice McHugh in 'The Law-making Function of the Judicial Process – Part 1' (1988) 62 *Australian Law Journal* 15, 18.

¹⁰⁶ See Sir Anthony Mason, 'The role of a Constitutional Court in a Federation; A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 12-13. This position has also been effected by the *Human Rights Act 1998* (UK): see further K D Ewing, 'The Human Rights Act and Parliamentary Democracy' (1999) 62 *The Modern Law Review* 79. See also, Justice W M C Gummow, 'The Constitution: Ultimate foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 168.

¹⁰⁷ See further, Judy Fudge, 'Reflections on the Twentieth Anniversary of the *Canadian Charter of Rights and Freedoms: A Symposium*' (2002) 40 *Osgoode Hall Law Journal* 215. See also Sir Anthony Mason, 'The role of a Constitutional Court in a Federation; A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 11-12.

constitutional dialogue of the Supreme Court much earlier. In the 1950s and 1960s the Supreme Court under Chief Justice Earl Warren, with decisions such as *Brown v Board of Education*¹⁰⁸ gave prominence to the civil rights debate.¹⁰⁹ In New Zealand law, Sir Robin Cooke, the President of the Court of Appeal was regarded as being influential in developing the law in a manner that would protect the rights and interests of individuals.¹¹⁰

3 *The Intellectual Climate: Change from Outside the Legal Profession*

Not only did the specific legal developments in other common law countries demonstrate a movement from legalism, it may be argued that by the mid-1980s 'legalism' was becoming intellectually unsustainable in political and academic circles.¹¹¹ Gareth Evans in 1974 gave a speech that was considered at the time to provide a 'provocative review of the interpretation of the constitution by the High Court of Australia'.¹¹² On that occasion Evans expressed scepticism about the legalistic role of the High Court in constitutional adjudication.¹¹³ In contrast to Sir Owen Dixon's view that 'the Court's sole function is to interpret a constitutional description of power or restraint on power and say whether a given measure falls on one side of a line constitutionally so drawn or another',¹¹⁴ Evans argued that:

¹⁰⁸ *Brown v Board of Education of Topeka*, 347 US 383 (1954). See also Morton J Horwitz, *The Transformation of American Law 1870-1960: The Crisis of Legal Orthodoxy* (1992) 258ff.

¹⁰⁹ Garry Sturgess and Philip Chubb, *Judging the World* (1988) 31-32. See also Mark Tushnet, 'The United States: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions* (2006) 7, 52-53; L A Powe Jr, *The Warren Court and American Politics* (2000) 21ff.

¹¹⁰ See further, Rick Bigwood (ed), *Legal method in New Zealand* (2001); Garry Sturgess and Philip Chubb, *Judging the World* (1988), 11-13, 375-384.

¹¹¹ See Gareth Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13ff; Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 43; Brian Galligan, *Politics of the High Court, A Study of the Judicial Branch of Government in Australia* (1987). See also Leslie Zines, 'Commentary' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 86-89 and Julius Stone, 'Some Reflections on the Seminar' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 376, 379; P S Atiyah, 'Judges and Policy' (1980) 15 *Israel Law Review* 346, 347. See further, Horst Lücke, 'Judicial Impartiality and Judge Made Law' (1982) 98 *Law Quarterly Review* 29, 33-40; Justice Michael McHugh 'The Law-making Function of the Judicial Process - Part 1' (1988) 62 *Australian Law Journal* 25.

¹¹² David Hambly and John Goldring, 'Preface' to David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) v, vi.

¹¹³ Gareth Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13ff.

¹¹⁴ Sir Owen Dixon, Address upon taking oath of office as Chief Justice (1952) 85 CLR xi, xiii-xiv. See Gareth Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13, 45.

Of all the techniques in the High Court armoury, that of characterization—the process of identifying the subject matter of a Commonwealth Act in order to match it with some subject in the Commonwealth catalogue of powers—affords the greatest opportunity for judicial manoeuvring.¹¹⁵

Evans also expressed the view that:

Lawyers now widely acknowledge many of the fundamental tenets of realist jurisprudence—the notions that judicial law-making involves creative choice, that formally enunciated rules do not always produce the decisions that purport to be based on them, and that the real grounds of judicial decision often rests on inarticulate major premises.¹¹⁶

Brian Galligan, in an article published in 1989 suggested that ‘legalism is no longer a plausible public rhetoric for the Court.’¹¹⁷ The criticisms made by writers such as Galligan and Evans not only critiqued the High Court’s choice of a legalistic methodology, they also suggested that even when the High Court had expressly adopted a legalistic approach, the decisions reached could not be solely attributed to the application of this methodology.¹¹⁸ For example, in his study of the High Court in the late 1980s Galligan argued that in constitutional cases the High Court used ‘legalism’ to give what were essentially political decisions a deceptively apolitical appearance.¹¹⁹ For Galligan the ‘public rhetoric of strict and complete legalism’ had assisted the Court by serving the ‘useful political purpose of disguising the High Court’s sensitive political role and hence facilitating its exercise and acceptance.’¹²⁰ Whilst the extent to which legalism was deliberately employed by the High Court to disguise the political nature of its decisions

¹¹⁵ Gareth Evans, ‘The Most Dangerous Branch? The High Court and the Constitution in a Changing Society’ in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13, 47 (citations omitted).

¹¹⁶ *Ibid* (citations omitted).

¹¹⁷ Brian Galligan, ‘Realistic “Realism” and the High Court’s Political Role’ (1989) 18 *Federal Law Review* 40, 43.

¹¹⁸ See Gareth Evans, ‘The Most Dangerous Branch? The High Court and the Constitution in a Changing Society’ in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 13, 45; Brian Galligan, ‘Realistic “Realism” and the High Court’s Political Role’ (1989) 18 *Federal Law Review* 40, 43; Brian Galligan, *Politics of the High Court, A Study of the Judicial Branch of Government in Australia* (1987); Sanford Kadish ‘Judicial Review in the High Court and in the United States Supreme Court Part 1’ (1959) 2 *Melbourne University Law Review* 4ff.

¹¹⁹ Brian Galligan, *Politics of the High Court, A Study of the Judicial Branch of Government in Australia* (1987).

¹²⁰ Brian Galligan, ‘Realistic “Realism” and the High Court’s Political Role’ (1989) 18 *Federal Law Review* 40, 47; Sanford Kadish ‘Judicial Review in the High Court and in the United States Supreme Court Part 1’ (1959) 2 *Melbourne University Law Review* 4ff.

was disputed by some commentators,¹²¹ there was wider support for the idea that Dixon's 'strict and complete legalism,'¹²² 'could no longer be defended as an adequate explanation of the judicial method.'¹²³

4 Self-perception: Sir Anthony Mason and the Role of the Judiciary

The national and international societal changes, as well as the criticism of legalism in wider political and academic circles are often pointed to as influences upon the Mason Court. It may, however, be argued that the outlook of members of the Mason Court themselves have also impacted upon the direction taken by the Mason Court. As Sir Anthony Mason stated in 1985, '[t]he method of interpretation a court pursues has a close inter-relationship with the court's perception of its role.'¹²⁴

Haig Patapan has suggested that although there were a number of political changes both internationally and in Australia that influenced the change in the approach of the High Court, these factors would not by themselves account for the difference in approach. For Patapan, 'what made them decisive, however, was a theoretical perspective that was predicated on the need to accommodate change. Here it is necessary to acknowledge the powerful influence of Roscoe Pound, Julius Stone and sociological jurisprudence in shaping the court's view of its role within the regime.'¹²⁵ However, the extent to which Sir Anthony Mason would accept all of the views advanced by Patapan may be questioned. For example, Sir Anthony Mason wrote in the foreword to Patapan's book that:

¹²¹ Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50; Sir Anthony Mason, Response to Interviewer, in Garry Sturgess and Philip Chubb, *Judging the World* (1988) 345.

¹²² (1952) 85 CLR xi, xiv.

¹²³ Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 12; William Deane, 'Commentary' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 76, 80.

¹²⁴ Sir Anthony Mason, 'The role of a Constitutional Court in a Federation; A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 2.

¹²⁵ Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 258.

The High Court is not a monolithic institution. It is at any time a group of seven justices who are obliged to hear and determine, according to their individual judgment, particular cases. The justices may have conflicting views on the role of the Court as well as on the principles of law which should govern the case in hand. It would therefore be a serious mistake to assume that, in deciding a case, the Court as an institution embarks upon any general policy with a view to achieving a particular goal, political or otherwise, external to the disposition of that case.¹²⁶

Whilst the analysis presented in this thesis does not suggest that realist jurisprudence influenced the Mason Court to adopt a *result oriented* approach to judicial decision making, it will be argued that a realist and sociological jurisprudential perspective may be identified in the manner in which Sir Anthony Mason came to perceive the role of the judiciary.

The jurisprudence of Julius Stone put forward the idea that the purpose of constitutional law was to balance the interests of individuals with those of the State. This approach accorded the judiciary a very significant role in having regard to the rights and interests of individuals.¹²⁷ This is significant as in Australian jurisprudence, which is dominated by a Constitution that focuses on the powers of institutions, it would be expected that judicial decisions would place less emphasis upon individual rights. However, as Sir Gerard Brennan has commented:

Especially in his later judgments, Sir Anthony manifested a concern at the power of the modern State to overreach the individual. Fastening on the proposition that the power of government is derived from the people governed, he sought jealously to protect the governed from any attempts to exceed or misuse legitimate power.¹²⁸

¹²⁶ Sir Anthony Mason, Foreword to Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) viii-ix.

¹²⁷ Julius Stone, *Social Dimensions of Law and Justice* (1966) 164ff, 199. See also Roscoe Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 1-4.

¹²⁸ Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 11.

Writing in 1992, Justice Brennan also expressed the view that the increasing amount of power given to bureaucracies and institutions may cast a different role upon the Court. His Honour said:

If the risk of discriminatory exercise of power to the disadvantage of minorities and the weak and the risk of oppressive exercise of power by the political branches of government are sufficiently grave, and if there is no other means available to avoid or diminish those risks, then a case can be made for casting on the Courts a supervisory role, albeit a role which is radically different from the role which Courts have been accustomed to exercise.¹²⁹

The manner in which Sir Anthony Mason described the modern conception of democracy also brought the interests of the individual in their relationship with the State to the forefront of judicial development of constitutional law.¹³⁰ Of this 'evolving concept of a modern democracy', Mason stated that;

That concept goes beyond simple majoritarian government and parliamentary sovereignty. It extends to a new notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the protection of the individual's rights against undue interference and intrusion by authority.¹³¹

It is argued that these comments suggest that Sir Anthony Mason accorded the judiciary a role in balancing the interests of the individual with those of the State. Importantly, from the point of view of the argument presented in this thesis, this approach meets one of the objectives of realism and sociological jurisprudence.

¹²⁹ Sir Gerard Brennan, 'The Impact of a Bill of Rights on the Role of the Judiciary: An Australian Response' in Philip Alston, *Towards an Australian Bill of Rights* (1994) 177, 180.

¹³⁰ See also Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221, 227-8; Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason From *Trigwell* to *Teoh*' (1996) 20 *Melbourne University Law Review* 1087.

¹³¹ Sir Anthony Mason, 'Opening Address', New South Wales Supreme Court Judges Conference, 10 April 1993, reported in (1993) 1 *Judicial Review* 185, 185-6.

5 *The Parameters of Legal Debate and the Influence of Deane J*

In addition to the outlook taken by Sir Anthony Mason as Chief Justice, the effects of Justice Deane's position on the Mason Court may also be seen as influential in drawing the Mason Court, considered as a whole, away from legalism and towards a perspective that considered the interests of individuals.¹³² In Chapter 4 it will be argued that Justice Deane often joined with Justice Toohey to present a perspective that in some ways reflected natural law jurisprudence and gave the judiciary a significant role in protecting the interests of individuals. This position often drew support from Justice Gaudron, particularly in circumstances which also raised issues concerning the integrity of the judicial process. Whilst Brennan J did not generally adopt a methodology and reasoning process that was similar to the perspective of Justices Deane and Toohey, as will be seen in Chapter 8 Justice Brennan's judgments often demonstrate a similar level of concern for the particular issues that formed the focus of the judgments of Justices Deane and Toohey.

C *The Multitude of Influences upon the Movement from Legalism*

It would seem likely that it was a combination of the influences discussed above rather than a single force that brought about the change in judicial approach which is associated with the Mason II era. This would suggest that the change in the High Court's jurisprudence is at times overly attributed to the influence of events external to the Court, such as the independent legal status that Australia achieved in this period.¹³³ Put simply, it may be said that the approach of all members of the High Court must be considered contextually, and the approach of Sir Anthony Mason is no exception to this principle. It is likely that a combination of the social and political change in Australian society, change in overseas jurisdictions, the changing intellectual climate, Sir Anthony Mason's evolving perception of the judicial role, and the influence of

¹³² Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason From *Trigwell* to *Teoh*. (1996) 20 *Melbourne University Law Review* 1087, 1094.

¹³³ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 2.

Justice Deane's position on the Court, may all have contributed in some way to influence the unique jurisprudence of Sir Anthony Mason. The High Court's jurisprudence from this era will be considered further in Chapter 8. However, it may be suggested at this point that the High Court of this period, when considered as a whole, was influential in expanding and fundamentally changing the scope of legal debate in Australia.

The following section will consider the manner in which the expanded nature of legal debate put forward by Sir Anthony Mason addressed issues such as judicial choice, judicial policy and purposive interpretation. The fundamental suggestion that will be drawn from the following discussion is that whilst the change in the jurisprudence of the Mason era may be viewed as expanding the boundaries of legalism to incorporate some realist policy considerations,¹³⁴ it will also be argued that in doing so some of the fundamental theoretical assumptions that underlie legalism came under challenge. It will be argued that the degree of change brought about by this expansion of the boundaries of legal debate, resulted in a theoretical form of realism being developed during the Mason era. If it is accepted that jurisprudence of the Mason era reflected the theoretical idea of law having a social purpose of balancing the interests of individuals and State, with the Court being accorded a role in achieving this balance, then this is an approach which reconceptualises the role of the Court and the function of the Constitution. Put simply, it may be said that not only did the jurisprudence of the Mason era expand the boundaries of debate beyond legalism, it provided an alternative theoretical position that at times challenged the fundamental theoretical assumptions of Australian legalism.

¹³⁴ See, for example, Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 1, 44-46.

IV THE MASON ERA: JUDICIAL CHOICE, JUDICIAL POLICY AND PURPOSEIVE INTERPRETATION

Sir Anthony Mason referred to the approach that he put forward as a 'species of legal realism'.¹³⁵ It has been recognised of Sir Anthony Mason that; '[a]s Chief Justice his judgments provided the central point around which a majority of Justices could coalesce'.¹³⁶ Furthermore an empirical analysis of the High Court's voting patterns under the leadership of Sir Anthony Mason indicates that his Honour was the central influence in the direction taken by the majority.¹³⁷ Whilst Sir Anthony Mason was an influential member of the High Court when his Honour was Chief Justice, it is important to keep in mind that there were some significant differences in the approaches of various members of the Mason Court. As Chapter 4 will consider, aspects of the jurisprudence of Justice Deane and Toohey may be seen to be consistent with a natural law perspective. It is also important to acknowledge that Justice Dawson and, at times, Justices Brennan and McHugh, often articulated a reasoning process that, in comparison to other members of the Mason Court, followed more closely orthodox legalistic techniques. This is, to a degree, reflected in the empirical data which illuminates the distance of Justice Brennan and Justice McHugh from the centre of majority opinion of the Mason Court.¹³⁸ The empirical data does not reveal similar trends with Dawson J, with his Honour often being part of a 'core' group of Justices comprised of Mason CJ, Deane, Dawson and Gaudron JJ; this form of analysis does however reveal that Dawson J did not form part of what may be regarded as the 'stronger' core group of Mason CJ, Deane, Toohey and Gaudron JJ.¹³⁹ In part because of these differences, the following discussion will focus primarily upon the jurisprudence of Sir Anthony Mason. In particular, the manner in which concepts such as judicial choice, judicial

¹³⁵ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

¹³⁶ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 2. Professor Zines has also commented on the manner in which other members of the High Court generally accepted Sir Anthony Mason's approach: see Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

¹³⁷ Russell Smyth, "'Some Are More Equal than Others' - An Empirical Investigation into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193, 207.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

policy and purposive interpretation that formed part of his Honour's jurisprudence challenged some of the underlying assumptions of legalism will be considered.¹⁴⁰

A Judicial Choice

Sir Anthony Mason's time as Chief Justice of the High Court saw a challenge to the central notions put forward by legalism, including the ideas that judicial determinations could result from the formulistic applications of legal rules and be based upon 'purely legal considerations', to reveal one 'true application of principle or doctrine'.¹⁴¹ It will be argued that in this way, not only did the Mason era move beyond the legalistic position that there *exists* a finite category of legal ideas, the Mason era also challenged the Dixonian view that judges would proceed to decide cases on the *assumption* that there was an accepted 'corpus' of legal knowledge.¹⁴² During the Mason era it was increasingly recognised that more than one view could be reasonably held and ultimately judicial choice would play a role.¹⁴³ Whilst Sir Owen Dixon had not denied judicial choice,¹⁴⁴ Dixonian legal method accepted the assumption that there was one legally correct answer. His Honour identified the 'tacit' but 'basal' assumption underlying this view as being:

that the law provides a body of doctrine which governs the decisions of a given case. It is taken for granted that the decision of the court will be "correct" or "incorrect", "right" or "wrong" as it conforms with ascertained legal principles and applies them according to a standard of reasoning which is not personal to the judges themselves.¹⁴⁵

¹⁴⁰ Michael Lavarch, 'The Court, the Parliament and the Executive' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 15, 15; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

¹⁴¹ Sir Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate* (1965) 155. See also, Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 12. See further, Justice K S Jacobs, 'Comment: The Successor Books to "The Province and Function of Law"' (1967) 5 *Sydney Law Review* 425, 429-431.

¹⁴² Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 159.

¹⁴³ See *Queensland v Commonwealth* (1977) 139 CLR 585, 603 (Stephen J), 606 (Mason J).

¹⁴⁴ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 164.

¹⁴⁵ *Ibid*, 155.

Although, as mentioned above, as Professor Michael Coper points out it is significant that Sir Owen Dixon put these words in inverted commas.¹⁴⁶ Dixon argued that whilst a realist might challenge the *validity* of a belief in the existence of a finite and determinable body of legal knowledge, a realist could not deny the *existence* of such a belief.¹⁴⁷ For Sir Owen Dixon: 'To do so is in fact unreal,'¹⁴⁸ Sir Owen Dixon's idea that judges proceed on the assumption that there is an external and definite body of legal knowledge may have represented the generally accepted belief amongst the judiciary at the time his Honour was writing, and it is a view that continues to be expressed today.¹⁴⁹ In many ways, this belief represents a working assumption that underlies much legal thinking.¹⁵⁰ However, it will be argued in this thesis that the Mason Court increasingly came not to rely on such an assumption,¹⁵¹ and Sir Anthony Mason in particular often questioned its validity.¹⁵²

The perspective of some of the High Court judges in *Queensland v Commonwealth*, the 'Second Territory Senators Case',¹⁵³ provides an example of the implicit challenge to the legalistic assumption of there being one 'correct' legal answer to the issues raised.¹⁵⁴ The *Second Territory Senators Case* challenged the principles that had been laid down in *Western Australian v Commonwealth*, the 'First Territory Senators Case'.¹⁵⁵ In the *Second Territory Senators Case* Stephen J and Mason J expressly recognised that the competing legal arguments considered in that case were both rational,¹⁵⁶ although it was the majority judgment of Murphy J¹⁵⁷ that most directly addressed the competing principles of federalism and representative democracy upon which

¹⁴⁶ Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 559.

¹⁴⁷ *Ibid.*, 158 (emphasis mine). See also Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

¹⁴⁸ Sir Owen Dixon, 'Concerning Judicial Method' in *Jesting Pilate* (1965), 158.

¹⁴⁹ *Ibid.* See also, P S Atiyah, 'Judges and Policy' (1980) 15 *Israel Law Review* 346, 347; Justice Dyson Heydon 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

¹⁵⁰ Judith Shklar, *Legalism: Law, Morals, and Political Trials* (1964) 8.

¹⁵¹ See further Chapter 8 of this thesis.

¹⁵² See for example, Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111; Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

¹⁵³ (1977) 139 CLR 585.

¹⁵⁴ See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23. See generally Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 416.

¹⁵⁵ *Western Australian v Commonwealth* (the 'First Territory Senators Case') (1975) 134 CLR 201.

¹⁵⁶ (1977) 139 CLR 585, 603 (Stephen J), 606 (Mason J). See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

¹⁵⁷ (1977) 139 CLR 585, 611-12 (Murphy J).

the arguments of the parties and interveners were based.¹⁵⁸ In relation to the two different interpretations Mason J stated:

It seemed to me then in 1975, as it seems to me now on further reflection, that the arguments which support the view that s. 122 should be construed according to its terms and that it should prevail are the stronger and are to be preferred. This is not to say that the contrary opinion deserves to be described as *wrong, incorrect or erroneous*; it is merely to say that in resolving what is by no means an easy question I have found that one of the two proffered solutions is more acceptable than the other.¹⁵⁹

This passage would seem to reflect Sir Anthony Mason's view that:

as judges we should frankly acknowledge when a decision is finely balanced, instead of writing a judgment as if it were simply an exercise in the art of advocacy. We will thereby enhance the integrity of the judicial process.¹⁶⁰

Stephen J also referred to judicial choice. In doing so Justice Stephen supported the majority decision in the *Second Territory Senators Case* although unlike Mason J, Stephen J had dissented in the earlier case. Justice Stephen also presented a similar view to Mason J stating that the issue that arose:

was very much one upon which different minds might reach different conclusions, no one view being inherently entitled to any pre-eminence as conforming better than others to principle or to precedent. In such a context phrases such as "plainly wrong" and "manifest error", which have gained currency in this field, are merely pejorative.¹⁶¹

¹⁵⁸ *Ibid*, 586-591 (submissions).

¹⁵⁹ *Ibid*, 606 (Mason J) (emphasis added).

¹⁶⁰ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation; A comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

¹⁶¹ (1977) 139 CLR 585, 603 (Stephen J). See generally (1977) 139 CLR 585, 620-31 (Aickin J), although though Aickin J ultimately expressed his dissenting conclusion, as 'taking a different view' (at 631).

Justice Aickin discussed these terms at length,¹⁶² although Aickin J ultimately expressed his dissenting conclusion as 'taking a different view'.¹⁶³

In contrast to the comments of Stephen J and Mason J, Justice Gibbs in the *Second Territory Senators Case* used terms such as 'erroneous', and 'wrong' in reference to the decision in the *First Territory Senators Case*.¹⁶⁴ Notwithstanding these views Justice Gibbs, like Justice Stephen felt that it was his duty in the case before him to follow the principles laid down in the *First Territory Senators Case*.¹⁶⁵ A different although similarly strongly worded perspective was presented by Jacobs J who joined with the majority describing the conclusion reached in the *First Territory Senators Case*, as one he would have thought was 'inevitable'.¹⁶⁶ Barwick CJ who, like Aickin J dissented, remained 'convinced that the earlier decision was erroneous'.¹⁶⁷

This range of judicial opinions presented in 1977 in the *Second Territory Senators Case* evince different perspectives about the correct or incorrect nature of constitutional decisions. Chief Justice Barwick's decision would appear to reflect most closely the orthodox Dixonian view about the role of the Court being to 'say whether a given measure falls on one side of a line constitutionally so drawn or the other'.¹⁶⁸ However, the acknowledgement by Justice Stephen and Justice Mason of the idea that two competing views could both be validly held with the role of the judge being to choose between them, appears to challenge this perspective. Justice Murphy's judgment also provides an example of a more direct analysis of the competing principles raised by the case. It is therefore possible to identify to varying degrees in the judgments of Justices Stephen, Mason and Murphy a degree of reflection of the ideas that had been expressed by Oliver Wendell Holmes. Justice Holmes questioned legal certainty,¹⁶⁹ and suggested that '[b]ehind the logical form lies a judgment as to the relative worth and

¹⁶² (1977) 139 CLR 585, 620-631 (Aickin J).

¹⁶³ *Ibid*, 631 (Aickin J).

¹⁶⁴ *Ibid*, 597-8 (Gibbs J).

¹⁶⁵ *Ibid*, 600-1 (Gibbs J).

¹⁶⁶ *Ibid*, 608 (Jacobs J).

¹⁶⁷ *Ibid*, 594 (Barwick CJ).

¹⁶⁸ Swearing in of Sir Owen Dixon as Chief Justice (1952) 85 CLR xi, xiii-xiv.

¹⁶⁹ Justice Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 465-466.

importance of competing legislative grounds'.¹⁷⁰ Julius Stone, interprets this perspective, in clear terms, writing that: 'A judge, said Oliver Wendell Holmes, Jr., who believes that his decision is absolutely right and that a dissent is wrong, is proceeding on the fallacy that judgment consists of adding up his sums correctly.'¹⁷¹ The open acknowledgment of an issue being finely balanced represents a movement from legalism and it is informative to note at this point that this approach may also be distinguished from the manner in which some recent questions of constitutional interpretation, which will be considered in Part II, have been viewed by members of the current High Court.¹⁷²

Mason J in the *Second Territory Senators Case* in acknowledging the role of judicial choice expressed an idea that appeared in the 1980s to gain momentum in Australian jurisprudence. In 1983 Justice Kirby, prior to his Honour's membership of the High Court, gave a Boyer lecture which acknowledged the influence of a judge's individual discretion or policy choices, and stressed that 'there is no inevitable and objectively right decision in much judicial work, particularly in the highest courts.'¹⁷³ For Justice Kirby, '[t]he demise of the civil jury, the growth of judicial discretion and the growing realisation of the importance of judicial policy have tended to cast the Judges adrift from the calm harbour of strict and complete legalism.'¹⁷⁴ In the late 1980s even those writers that sought to defend legalism no longer relied upon a narrow version of that doctrine.¹⁷⁵ For example, Jeffrey Goldsworthy a critic of Galligan's realism expressed the view that: 'Today's question is not whether or not judges must necessarily, on at least some occasions, make moral or political value judgments, exercise discretion, "make law", and so on, but to *what extent* they must do so.'¹⁷⁶ In the 1988 decision of *Cole v Whitfield*¹⁷⁷ the High Court, which by that time was comprised of Mason CJ, Wilson, Brennan, Deane, Dawson,

¹⁷⁰ *Ibid.*

¹⁷¹ Julius Stone, *The Province and Function of Law* (1946) 201.

¹⁷² See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 (McHugh J); 661 (Callinan J). See further, Steven Churches, "'Tragic": the High Court decision in the indefinite mandatory detention case of Al-Kateb' (2004) 26 *Law Society Bulletin* 30.

¹⁷³ Justice Michael Kirby, 'The Judges' Boyer Lectures (1983) 40.

¹⁷⁴ *Ibid.*, 42-43.

¹⁷⁵ See, for example, Jeffrey Goldsworthy, 'Reply to Galligan' (1989) 18 *Federal Law Review* 50, 51.

¹⁷⁶ *Ibid.*, 51 (emphasis in original).

¹⁷⁷ (1988) 165 CLR 360.

Toohy and Gaudron JJ, in a unanimous decision recognised that the application in that case of accepted legal doctrine would not necessarily determine the issue.¹⁷⁸

The High Court in *Cole v Whitfield*¹⁷⁹ was concerned with the interpretation of section 92 of the *Australian Constitution*. That section, in part, provides that: 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.' As the Court recognised in *Cole v Whitfield*, no provision of the Constitution had been 'the source of greater judicial concern or the subject of greater judicial effort than s. 92.'¹⁸⁰ The existence of an underlying predisposition to realist thought may be attributed at the least to the manner in which the unanimous Court in *Cole v Whitfield* approached previous High Court authorities concerning section 92. Their Honours in *Cole v Whitfield* commented that section 92 had not 'achieved a settled or accepted interpretation at any time since federation'.¹⁸¹ For the Court, '[t]he interpretation which came closest to achieving that degree of acceptance was that embodying the criterion of operation formula'.¹⁸² However, of that formula, their Honours noted that it 'appeared to have the advantage of *certainty*, but that advantage proved to be *illusory*'.¹⁸³ This phrase is spectacularly reminiscent of the comments made nearly 100 years earlier by Oliver Wendell Holmes. As it may be recalled from the earlier discussion of realism, in 1897 Holmes in his famous essay 'The Path of Law' stated that '*certainty generally is illusion*'.¹⁸⁴

The decision in *Cole v Whitfield*,¹⁸⁵ may also be seen to further reflect a realist perspective, in that the Court was more concerned with the impact of legal rules, than with their formal structure. The Court in *Cole v Whitfield*¹⁸⁶ commented on,

¹⁷⁸ *Ibid*, 384, 402. See generally Sir Maurice Byers, 'Vote of Thanks' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 108, 108-109.

¹⁷⁹ (1988) 165 CLR 360.

¹⁸⁰ *Ibid*, 383-384 (the Court).

¹⁸¹ *Ibid*, 384 (the Court).

¹⁸² *Ibid*.

¹⁸³ *Ibid*.

¹⁸⁴ Justice Oliver Wendell Holmes, 'The Path of the Law' (1897) 10 *Harvard Law Review* 457, 465-466.

¹⁸⁵ (1988) 165 CLR 360.

¹⁸⁶ *Ibid*.

the hazards of seeking certainty of operation of a constitutional guarantee through the medium of an artificial formula. Either the formula is consistently applied and subverts the substance of the guarantee; or an attempt is made to achieve uniformly satisfactory outcomes and the formula becomes uncertain in its operation.¹⁸⁷

The Court in *Cole v Whitfield* also, in relation to the 'criterion of operation formula' commented that; '[i]t's disadvantage was that it was concerned only with the formal structure of an impugned law and ignored its real or substantive effect.'¹⁸⁸ It may be concluded that the approach taken in the unanimous decision in *Cole v Whitfield* demonstrates that the High Court acknowledged judicial choice and moved from a confined legalistic approach. In addition this case also brought into focus the issues of judicial policy and purposive interpretation which will form the focus of the following discussion.

B *Judicial Policy*

The approach of Sir Anthony Mason placed 'less emphasis in legal reasoning on the formal application of rules or formula',¹⁸⁹ and was more policy-orientated.¹⁹⁰ Professor Zines identifies the beginning of this trend stating that,

– the *Tasmanian Dams Case* – was probably the beginning of an express recognition that the text and accepted legal rules and principles will not always determine the issues, and that it may be necessary to resort to other factors if a reasoned conclusion was to be reached; that is, one not fudged or disguised by indeterminative doctrinal language. The majority and the minority judgments are replete with policy considerations and value judgments. While the

¹⁸⁷ *Ibid.*, 402 (the Court).

¹⁸⁸ *Ibid.*, 384 (the Court).

¹⁸⁹ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004', (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, 26 November 2004, Banco court, Sydney).

¹⁹⁰ See Cheryl Saunders, 'The Mason Court in Context' in Cheryl Saunders (ed) *Court of Final Jurisdiction: The Mason Court in Australia* (1996) 3; Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); Greg Craven, 'Cracks in the Façade of Literalism: Is there an Engineer in the House??' (1992) 18 *Melbourne University Law Review* 540; Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 878.

issue was the meaning of 'external affairs', the judicial debate was about the place of Australia in the world and the relationship of the States to the nation.¹⁹¹

Not only were judicial decisions viewed in their wider political context, but increasingly the High Court during the Mason era began to give judicial recognition to the role that community values and judicial policy considerations could play, with the influence of these factors on judicial determinations at times being openly discussed.¹⁹²

In the late 1980s Brian Galligan relied upon this change in judicial method to express the view that legalism would increasingly be replaced by more realistic accounts of judging.¹⁹³ In particular, Galligan sought to draw support for this view from articles by Chief Justice Mason and Justice McHugh.¹⁹⁴ The articles published by both these jurists emphasised the law-making role of judges, in which values will play a role. Sir Anthony Mason stated that, 'Constitutions are documents framed in general terms to accommodate the changing course of events, so that courts interpreting them must take account of community values.'¹⁹⁵ Sir Anthony Mason also expressed the view that:

Because policy oriented interpretation exposes underlying values for debate it would enhance the open character of the judicial decision-making process and promote legal reasoning that is more comprehensive and persuasive to society as a whole. This development would lead to a better understanding of constitutional judgments and, no doubt, to a greater capacity and willingness to criticize them. But criticism is a small price to pay if the approach is one that contributes, as it seems to have done in the United States, to a

¹⁹¹ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

¹⁹² See, for example, *Dietrich v R* (1992) 177 CLR 292, 329 (Deane J); Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 5. Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004', (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, 26 November 2004, Banco Court, Sydney) 8; Michelle Dillon and John Doyle, 'Mason Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 462.

¹⁹³ Brian Galligan, 'Realistic "Realism" and the High Court's Political Role' (1989) 18 *Federal Law Review* 40, 43.

¹⁹⁴ *Ibid.*, 45-6. See Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1 and Justice Michael McHugh, 'The Law-making Function of the Judicial Process' (1988) 62 *Australian Law Journal* 15, 116.

¹⁹⁵ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 25.

stronger sense of constitutional awareness on the part of the community and a more accurate appreciation of the issues arising for decision.¹⁹⁶

The influence of realism in Sir Anthony Mason's jurisprudence may be seen in that not only was his Honour's approach increasingly policy-orientated, it also challenged the idea that policy considerations could be absent from judicial decision-making. This idea is put forward in what is perhaps Sir Anthony Mason's most well known challenge to legalism, namely his Honour's statement that:

The ever present danger is that "strict and complete legalism" will be a cloak for undisclosed and unidentified policy values Legalism, when coupled with the doctrine of *stare decisis*, has a subtle and formidable conservative influence. When judges fail to discuss the underlying values influencing a judgment, it is difficult to debate the appropriateness of those values. As judges who are unaware of the original underlying values, subsequently apply that precedent in accordance with the doctrine of *stare decisis*, those hidden values are reproduced in the new judgment - even though the community values may have changed.¹⁹⁷

In these ways, especially through the Chief Justice, the Mason era saw a challenge to the certainty and claimed objectivity of a legalistic approach.

The manner in which Sir Anthony Mason as Chief Justice approached precedents also represented a challenge to the legalistic perspective. Sir Anthony Mason came to express the view that the doctrine of precedent was,

an exercise in judicial policy which calls for an assessment of a variety of factors in which judges balance the need for continuity, consistency and predictability against the competing need for justice, flexibility and rationality.¹⁹⁸

¹⁹⁶ *Ibid*, 28.

¹⁹⁷ *Ibid*, 5 (citations omitted). See also Chief Justice John Doyle, 'Judicial law Making - Is Honesty the Best Policy?' (1995) 17 *Adelaide Law Review* 161, 210-211.

¹⁹⁸ Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111. See generally Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, 26 November 2004, Banco Court, Sydney); Justice Michael Kirby, 'Sir Anthony Mason Lecture 1996: A F Mason From *Trigwell* to *Teoh*. (1996) 20 *Melbourne University Law Review* 1087.

This approach may be seen to resemble the perspective put forward by the writings of Karl Llewellyn who argued that the doctrine of precedent was a method for achieving as well as refusing change.¹⁹⁹ For example Llewellyn stated that:

*The growth of the past has been achieved by "standing on" the decided cases; rarely by overturning them. Let this be recognized, and precedent is clearly seen to be a way of change as well as a way of refusing change. Let this be recognized, and that peculiar one of the ways of working with precedent which consists in blinding the eyes to policy loses the fictitious sanctity with which it is now enveloped some of the time: to wit, whenever judges for any reason do not wish to look at policy.*²⁰⁰

For Llewellyn: 'the available leeway in *interpretation of precedent* is (relatively to what the older tradition has *consciously* conceived) nothing less than huge.'²⁰¹

Underlying the express recognition of the realist idea that judicial policy may influence judicial interpretation, there may be identified in Sir Anthony Mason's jurisprudence a reflection of the realist and sociological idea that law has a social purpose. Sir Anthony Mason said of the judicial role that:

Our evolving concept of the democratic process is moving beyond an exclusive emphasis on parliamentary supremacy and majority will. It embraces a notion of responsible government which respects the fundamental rights and dignity of the individual and calls for the observance of procedural fairness in matters affecting the individual. *The proper function of the courts is to protect and safeguard this vision of the democratic process.*²⁰²

This perspective of Sir Anthony Mason reflects the realist idea that the judiciary has a role to play in balancing the interests of the individual with those of the State. The relevance that Sir

¹⁹⁹ Karl Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1253.

²⁰⁰ *Ibid* (emphasis in original).

²⁰¹ *Ibid*.

²⁰² Sir Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash Law Review* 149, 163 (emphasis added). See further, A R Blackshield, 'The Courts and Judicial Review' in Sol Encel, Donald Horne and Elaine Thompson (eds) *Change the Rules! Towards a Democratic Constitution* (1977) 119, 138.

Anthony Mason placed upon community values may also be seen to represent a realist perspective.²⁰³ Not surprisingly, this change from the orthodox approach of interpreting constitutional provisions to determine the scope of State and Commonwealth powers, brought about some significant substantive changes in the law. As Professor Geoffrey Lindell has commented, a number of developments during this Mason era, which culminated with decisions such as *Nationwide News v Wills*,²⁰⁴ *Australian Capital Television Pty Ltd v The Commonwealth*,²⁰⁵ and *Leeth v Commonwealth*,²⁰⁶ saw 'the Court become much more concerned with questions of fairness and justice from the point of view of the individual.'²⁰⁷ A focus on the substantive issues raised in constitutional cases may also be seen in the purposive approach that Sir Anthony Mason put forward.

C Purposive Interpretation

In moving from orthodox legalistic techniques and acknowledging judicial choice the approach put forward by Sir Anthony Mason was purposive and policy-orientated.²⁰⁸ As discussed, the 1988 decision of *Cole v Whitfield* demonstrated a movement towards a purposive approach to constitutional issues. In *Cole v Whitfield*,²⁰⁹ the High Court looked to the purpose of the constitutional provision in question. In particular the High Court held that:

²⁰³ See Julius Stone, *Social Dimensions of Law and Justice* (1966) 164ff, 199. See also Roscoe Pound, 'A Survey of Social Interests' (1943) 57 *Harvard Law Review* 1, 1-4.

²⁰⁴ (1992) 177 CLR 1.

²⁰⁵ (1992) 177 CLR 106.

²⁰⁶ (1992) 174 CLR 455.

²⁰⁷ Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 1, 20.

²⁰⁸ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16 *Federal Law Review* 1, 28; Cheryl Saunders, 'The Mason Court in Context' in Cheryl Saunders (ed) *Court of Final Jurisdiction: The Mason Court in Australia* (1996) 3; Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994); Greg Craven, 'Cracks in the Façade of Literalism: Is there an Engineer in the House?' (1992) 18 *Melbourne University Law Review* 540; Greg Craven, 'After Literalism, What?' (1992) 18 *Melbourne University Law Review* 874, 878.

²⁰⁹ (1988) 165 CLR 360.

Reference to the history of s. 92 may be made, not for the purpose of substituting for the meaning of words used the scope and effect – if such could be established – which the founding fathers subjectively intended the section to have, but for the purpose of identifying the contemporary meaning of language used, the subject to which that language was directed and the nature and objectives of the movement towards federation from which the compact of the Constitution finally emerged.²¹⁰

Notwithstanding that the terms of section 92 bring into focus the issue of purpose, it may be argued that *Cole v Whitfield* endorses an approach that looked at the *substantive* purpose of the law in question. More specifically, in *Cole v Whitfield* the Court looked not only to the purpose of the constitutional provision in question, but also to the actual economic effect of the challenged law.²¹¹ The Court established a test for invalidity that suggested that a law would contravene section 92 if ‘its effect is discriminatory and the discrimination is upon protectionist grounds.’²¹² In doing so the Court acknowledged that: ‘Whether such a law is discriminatory in effect and whether the discrimination is of a protectionist character are questions raising issues of fact and degree.’²¹³ In this way the Court focused not merely upon the *form* of the law, but upon its *substantive* operation.²¹⁴

Sir Anthony Mason, speaking extra-judicially, has also advocated a purposive approach, stating that:

As the High Court moves away from “strict and complete legalism” and towards a more policy oriented constitutional interpretation, it is a natural parallel that the Court place greater emphasis on the purposive construction of statutes.²¹⁵

²¹⁰ (1988) 165 CLR 360, 385 (the Court: Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

²¹¹ *Ibid*, 408 (the Court).

²¹² *Ibid*, 407 (the Court).

²¹³ *Ibid*, 407-408 (the Court).

²¹⁴ *Ibid*, 408 (the Court) (emphasis added). See also, for example, *Street v Queensland Bar Association* (1989) 168 CLR 461, 569 (Gaudron J).

²¹⁵ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience’ (1986) 16 *Federal Law Review* 1, 5.

However, it is important to note that the purposive method of constitutional and statutory construction put forward by Sir Anthony Mason was made in the context of advocating a judicial approach which aimed at providing and elaborating as far possible the general principles upon which judicial decisions were made.

Sir Anthony Mason viewed as desirable the disclosure and acknowledgement in judicial decisions of the principles which support the particular conclusion reached.²¹⁶ Whilst, Justice McHugh, like Sir Anthony Mason, has also advocated the use of a purposive approach to questions of constitutional and statutory construction, it may be argued that the purposive approach that McHugh J puts forward forms part of an incremental common law approach to judicial decision-making, rather than as part of a methodology that relies on wider principles. Justice McHugh, just prior to his Honour's appointment to the High Court, wrote extra-judicially concerning the law-making function of the judicial process and advocated an incremental model of judicial law-making.²¹⁷ The approach put forward by McHugh J recognised that: 'Law is a social instrument – a means, not an end', and that, '[i]f law is to serve its purpose, its rules and principles must be periodically examined and, if necessary, amended.'²¹⁸ However, for Justice McHugh the law-making role of judges was confined by the common law method. For example, his Honour wrote that:

A judge does not have authority to remake law generally. When the existing body of principles and rules are not appropriate for the resolution of the dispute before him, he must determine whether he can fashion a rule which will dispose of *this* case. Beyond that the judge is not authorised to go. More often than not he will be concerned only with whether a rule, narrowly formulated by one of the parties, should be received into the body of the law.²¹⁹

²¹⁶ *Ibid*, 28.

²¹⁷ See Justice Michael McHugh, 'The Law-making Function of the Judicial Process – Part I' (1988) 62 *Australian Law Journal* 15 and Justice Michael McHugh, 'The Law-making Function of the Judicial Process – Part II' (1988) 62 *Australian Law Journal* 116.

²¹⁸ Justice Michael McHugh, 'The Law-making Function of the Judicial Process – Part II' (1988) 62 *Australian Law Journal* 116, 116.

²¹⁹ *Ibid*, 120.

Not only did Justice McHugh view judicial law-making as being confined by the incremental method, his Honour also advocated a position whereby the role of judicial law-making may be limited when it did not accord with community values.²²⁰ For example, his Honour argued that: '[i]f a change in the common law would be rejected by the community, it should not be made, however much the judge thinks that the change is in the community's interest.'²²¹

Justice Selway has argued of Justice McHugh's approach that: 'The problem with this "purposive" approach is that there does not appear to be any obvious criteria by which to determine whether a particular provision is to be read purposively or not.'²²² This analysis is consistent with the criticism that is often made of constitutional method that is not based upon broader theoretical perspective; namely, that legal reasoning that is not supported by a theoretical stance fails to produce a coherent approach.²²³ It may be argued, as Justice Selway has, that although Justice McHugh has at times advocated a purposive approach, such an approach may not have been consistently applied by his Honour.²²⁴

It is possible to suggest from the foregoing discussion that the jurisprudence of Chief Justice Mason and Justice McHugh influenced the movement by the High Court during the Mason era towards a more purposive approach to statutory and constitutional interpretation. There is however a significant distinction in these approaches. Whereas Sir Anthony Mason sought to establish a purposive approach that develops principles of 'appropriate generality', the advancement of a purposive approach by Justice McHugh was made in the context of a more

²²⁰ *Ibid*, 122.

²²¹ *Ibid*.

²²² Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246.

²²³ Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574, citing the reference to 'legal coherence' in *Sullivan v Moody* (2001) 207 CLR 562, 581-582 (Gleeson CJ, Gaudron, McHugh, Hayne and Callinan JJ) and *Cattanach v Melchior* (2003) 215 CLR 1, 21 (Gleeson J, dissenting). See also Judge Richard Posner, 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 436. Justice Kirby has sought to show, that, in general, the approach of the Gleeson Court has not been consistent in its' rejection of the relevance of policy considerations: see *Re Wakim* (1999) 198 CLR 511, 609-610 (Kirby J); *Brownlee v The Queen* (2001) 207 CLR 278, 322 (Kirby J). Kirby J's decision in *Eastman v The Queen* provides another example of this perspective, in that case His Honour suggested that:

Constitutional elaboration, above all, should be approached in a consistent way, lest the inconsistencies of an originalist approach here and a contemporary approach there be ascribed to the selection of whatever approach produces a desired outcome: see *Eastman v The Queen* (2000) 203 CLR 1, 44 (Kirby J).

²²⁴ See further Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246.

confined incremental common-law method. In addition whilst Justice McHugh in following this approach has in general tended to apply principles of statutory construction to constitutional interpretation,²²⁵ Chief Justice Mason has often emphasised the unique nature of the constitution.²²⁶ For example Chief Justice Mason has stated that it is,

somehow surprising that we have in the past given such emphasis to the ordinary rules of statutory interpretation. The significance of the approach, so foreign to the spirit of the dynamic principle of constitutional interpretation, is best illustrated by reference to rules of English statutory interpretation which have been applied to our Constitution.²²⁷

It is important that the difference between these approaches are kept in mind as the discussion undertaken later in this Chapter will suggest that to the extent that purposive interpretation has been employed by the Gleeson Court it follows more closely from the incremental common law approach of Justice McHugh, who was until relatively recently a member of the Gleeson Court. Of course with the retirement of Justice McHugh the remaining influence of this perspective may need in time to be reassessed. It may also be suggested that this discussion highlights a more fundamental issue, namely that the Gleeson Court has not embraced the theoretically realist position that was taken by Chief Justice Mason in support of a purposive approach.

V THE JURISPRUDENCE OF THE GLEESON ERA AND THE REALISM OF THE MASON ERA AS AN ALTERNATIVE TO LEGALISM

The following discussion will examine the manner in which the Gleeson Court has approached the various elements of judicial method put forward during the Mason era. It will be concluded that the Gleeson Court is applying its own interpretative method, rather than simply seeking to

²²⁵ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234. See also, Cheryl Saunders, 'Future Prospects for the Australian Constitution', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution*, (2003) 212, 221ff.

²²⁶ See generally Cheryl Saunders, 'Future Prospects for the Australian Constitution', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution*, (2003) 212, 221.

²²⁷ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 25.

distinguish its approach from that put forward during the Mason era. This conclusion is supported by the manner in which the Gleeson Court has approached the realism of the Mason era, together with the emphasis that the Gleeson Court places on legalism and practical considerations.

In 2000, Sir Anthony Mason noted that the High Court was increasingly relying upon a doctrinal approach and moving away from an approach that acknowledged the relevance to judicial decision-making of an examination of policy issues in judicial decisions.²²⁸ Whereas members of the Gleeson Court in applying a legalistic and doctrinal approach, as Chapter 4 will consider, have been outright in their rejection of the theoretical form of reasoning put forward by Justices Deane and Toohey,²²⁹ the movement of the Gleeson Court from the realist-based jurisprudence of the Mason era has occurred in a more subtle manner. Although the movement of the Gleeson Court from realist concepts is not always openly stated, this trend can be distilled from the Gleeson Courts' general approach. It will be suggested that although the jurisprudence of Sir Anthony Mason put forward a realist position, which reconceptualised law as having a social purpose, and in this way accorded the High Court a role in constitutional adjudication of balancing the interests of individual with those of the State, it is difficult to identify a similar perspective in the jurisprudence of the current Court. It will be concluded that there is no indication from the jurisprudence of the Gleeson Court, that the current Court accepts, or is inclined to consider the *theoretical* standpoint developed by Sir Anthony Mason.

It will be recalled from Chapter 2 that when addressing the issue of constitutional interpretation and methodology, Chief Justice Gleeson posed the rhetorical question: 'Who would care to suggest an alternative to legalism?'²³⁰ Professor Leslie Zines wrote that he found these remarks are 'puzzling' as 'other High Court judges and Chief Justice did indeed "care to suggest an alternative" to strict and complete legalism.'²³¹ Chief Justice Gleeson's comments suggest that

²²⁸ See Sir Anthony Mason, 'The Evolving Role and function of the High Court' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 95, 118-119.

²²⁹ *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J). See also, for example, *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Justice Dyson Heydon to Quadrant Dinner, 30 October 2002, reported as 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

²³⁰ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 44.

²³¹ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 27.

his Honour does not seek to engage with the ideas presented by realism.²³² It would appear that this represents a dismissal of realist-based alternatives that is quite direct. However, by putting forward a version of legalism, and employing a common law methodology, Chief Justice Gleeson has enabled the substantive jurisprudence of the Gleeson Court to move in an incremental way away from some of the broader constitutional principles established in the Mason era. This gradual movement in the substantive law will be examined further in Part II of this thesis, however there are a number of aspects of the *methodological* change which are relevant to note in the context of the current theoretical discussion.

It may be said that two readily identifiable trends may be associated with both the realist movement and the Mason era. The first of these trends involves the according of less weight to precedent. The second trend demonstrates a more open discussion of policy considerations. The Gleeson Court may generally be regarded as moving away from both these approaches. The Gleeson Court has shown a strong predisposition towards following and relying upon past decisions.²³³ It may also be said that in general the Gleeson Court has sought to avoid engaging in 'policy' type arguments, although the Court has been at times been willing to consider the practical consequences of its decisions.²³⁴ The adoption of this form of reasoning by the Gleeson Court has been identified by McHugh J as being a doctrinal approach. A doctrinal approach, as it is defined by McHugh J, generally involves the application of principles that are derived from previous authorities, with reference being had to developments in the common law, and statutes, as well as events outside of the judicial system only when such developments are viewed as being consistent with the text and structure of the Constitution.²³⁵

²³² See further, Chapter 2 of this thesis. It may be recalled that it was suggested in Chapter 2, that this aspect of the form of legalism put forward by Gleeson CJ distinguished His Honour's approach from the more theorised form of legalism presented by Sir Owen Dixon which engaged with the ideas presented by realism.

²³³ Justice Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234.

²³⁴ See, for example, *Re Governor Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh, Callinan JJ).

²³⁵ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004).

It will be argued in Chapter 10 that the majority decisions in *Re Wakim*, exemplify a 'doctrinal approach'.²³⁶ In that case the majority did not use many of the available policy arguments, and cast doubt upon whether it is appropriate to use arguments of this nature.²³⁷ For example, Chief Justice Gleeson in rejecting the argument for the constitutional validity of the legislation challenged in *Re Wakim; Ex parte McNally*²³⁸ stated that: '[a]pproval of legislative policy is irrelevant to a judgment as to constitutional validity; just as disapproval of the policy would be irrelevant.'²³⁹ His Honour went on to state, '[i]t is argued that the legislation is unconstitutional. That argument must succeed or fail on its legal merits'.²⁴⁰ Justice McHugh expressed a similar view, and held that 'the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest.'²⁴¹ Justice Callinan and Justice Heydon are other members of the Court that have been critical of the basing of implications on political propositions or assumptions.²⁴² These approaches may be contrasted to those of the Mason era. For example, Sir Gerard Brennan has argued in relation to the Mason era that:

the risk of confusion between judicial policy and political policy had to be run in order to guarantee the integrity of the judicial process and to bring the influence of contemporary values to bear on modern expositions of legal principle.²⁴³

It should also be noted briefly, that whilst there is a tendency for members of the current Court to generally follow a doctrinal approach, which involves a strong reliance upon precedents and

²³⁶ *Ibid.*

²³⁷ *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ), 549 (McHugh J), 569 (Gummow and Hayne JJ), cf 610 (Kirby J in dissent).

²³⁸ (1999) 198 CLR 511 ('*Re Wakim*'). This case is discussed further in Chapter 10 below.

²³⁹ *Ibid.*, 540.

²⁴⁰ (1999) 198 CLR 511, 540 (Gleeson CJ).

²⁴¹ *Ibid.*, 549. See also his Honours comments in this case at 548. There is some contrast between these suggestions and the position previously outlined by Justice McHugh: See Justice Michael McHugh, 'The Law-making Function of the Judicial Process – Part II' (1988) 62 *Australian Law Journal* 116, 116.

²⁴² See for example, *Australian Broadcasting v Lenah Game Meats* (2001) 208 CLR 199, 331-7 (Callinan J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 (McHugh J); 639 (Hayne), 658 (Callinan J); Heydon J (662, substantially agreeing with Hayne J). See further Chapters 2, 6 and 10 of this thesis.

²⁴³ Sir Gerard Brennan, 'A Tribute to Sir Anthony Mason' in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 12.

the avoidance of policy considerations,²⁴⁴ the approach of Kirby J falls clearly outside of this approach.²⁴⁵

The Gleeson Court has criticised the use of a policy-based perspective, and put forward a legalistic and doctrinal methodology. However, there does not appear to be any judicial justification offered for this choice. It is also difficult to identify in the jurisprudence of the Gleeson Court any discussion of the realist argument that a doctrinal approach is itself an exercise of a particular policy.²⁴⁶ Rather as Chapter 2 discussed the approach of the Gleeson Court appears to assume that provided the Court follows a legalistic and doctrinal approach, the application of this methodology will be sufficient to provide legitimacy to the Court's judicial decisions.²⁴⁷

The only aspect of Sir Anthony Mason's approach that appears to have carried through to the Gleeson era is an increased willingness to take a purposive approach to constitutional issues and look at the 'purpose' of legislative provisions.²⁴⁸ The 'purposive approach' to constitutional interpretation is at times apparent in the jurisprudence of Justice McHugh.²⁴⁹ For example, Justice McHugh in *Cheng v The Queen* held that:

²⁴⁴ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004).

²⁴⁵ Justice Kirby's dissent in *Re Wakim* provides an example of this difference. In contrast to the majorities' reluctance in *Re Wakim* to consider policy considerations, Justice Kirby has demonstrated a willingness to rely upon these types of matters. In *Re Wakim* Justice Kirby was willing to have regard to matters of 'constitutional authority, principle and policy' including the 'benefits of the cross-vesting scheme' and the 'inconvenience' of 'a rigid construction of Chapter III': *Re Wakim* (1999) 198 CLR 511, 609-610 (Kirby J).

²⁴⁶ See Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5; Allan C Hutchinson 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85; Karl Llewellyn, 'Some Realism about Realism – Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

²⁴⁷ Chief Justice Murray Gleeson, 'Judicial Legitimacy' (2000) 12 *Judicial Officers' Bulletin* 41, 42, 44.

²⁴⁸ See *Cheng v The Queen* (2000) 203 CLR 248, 291 (McHugh J); *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 493-502 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J). See also Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 245.

²⁴⁹ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 245.

It is always legitimate to give a constitutional or statutory provision a meaning which will give effect to its purpose even if that requires a departure from its literal meaning. It is legitimate even if it requires giving the provision a strained meaning.²⁵⁰

Although it should be noted that Justice McHugh has developed a purposive approach in a constitutional context into a form of 'originalism',²⁵¹ it should also be made clear that most members of the Gleeson Court have not sought to apply McHugh J's originalism to all constitutional questions.²⁵² Generally, it may be said a purposive approach is at times used by the Gleeson Court, however, this form of reasoning is usually engaged in, in the context of a common law perspective which advances an incremental approach to judicial law making. In summary it may be concluded that the Gleeson Court considered as a whole has at times followed a narrow form of a purposive approach in a constitutional context that is similar to that advocated by McHugh J, however, this approach is not consistently applied, even by McHugh J, nor is it supported by all members of the Gleeson Court.²⁵³

It is concluded from this discussion that although the Gleeson Court has a tendency to use a form of purposive reasoning, the general approach of the Gleeson Court is dissimilar to the jurisprudence of Sir Anthony Mason. The current Court has sought to interpret in a legalistic way the provisions of the Constitution which focus largely upon the powers of institutions, rather than to engage in a judicial role that seeks to balance the interests of the individual with those of the State. To use the terms of Llewellyn, the current Court has shown a clear preference for a 'Formal-Style' over Llewellyn's 'Grand-Style'.²⁵⁴

²⁵⁰ (2000) 203 CLR 248, 291.

²⁵¹ See, for example, *Cheng v The Queen* (2000) 203 CLR 248, 291 (McHugh J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549-551 (McHugh J); *Eastman v The Queen* (2000) 203 CLR 1, 41-44 (McHugh J); *Brownlee v The Queen* (2001) 207 CLR 278, 285 (Gleeson CJ and McHugh J).

²⁵² See, for example, *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 493-502 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan J). See also *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 (McHugh J); 639 (Hayne), 658 (Callinan J); Heydon J (662, substantially agreeing with Hayne J).

²⁵³ See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562, 581 (McHugh J); 639 (Hayne), 658 (Callinan J); Heydon J (662, substantially agreeing with Hayne J). See further Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246. Justice Kirby has also sought to show, that in general the approach of the Gleeson Court has not been consistent in its' rejection of the relevance of policy considerations: *Re Wakim* (1999) 198 CLR 511, 609-610 (Kirby J). See also *Eastman v The Queen* (2000) 203 CLR 1, 44 (Kirby J).

²⁵⁴ Karl Llewellyn, *The Common Law Tradition* (1960) 35-45.

VI CONCLUSION: REALISM AND THE MASON ERA THE ANTECEDENT TO THE APPROACH OF THE GLEESON COURT

The jurisprudence of Chief Justice Mason can be viewed as being based upon a broad theoretical perspective. Sir Anthony Mason not only put forward a purposive and policy-orientated approach to judicial decision-making, his Honour questioned the validity of the idea that any judicial decision making could be undertaken in the absence of such considerations. More specifically, his Honour's jurisprudence pointed to the manner in which legalism could obscure the relevance of policy influences.²⁵⁵ Even the doctrine of precedent, the binding nature of which is often viewed from a legalistic perspective to deny any role for judicial choice, was seen by Sir Anthony Mason, as an exercise of a particular judicial policy.²⁵⁶ In these ways Sir Anthony Mason's jurisprudence represents not just a methodology that provides a role for judicial choice, it also presents a particular perspective which sees all judicial decision making as an exercise of some particular policy.²⁵⁷ This idea put forward by Sir Anthony Mason, bears a similarity to the views expressed in the writings of Holmes, who was profoundly influential on the development of realist thought.²⁵⁸ Put simply, the jurisprudence of Sir Anthony Mason did not just extend the boundaries of a legalistic approach by taking account of purposive and policy considerations in the context of the application of settled rules of statutory construction. The approach of Sir Anthony Mason, like much realist and sociological jurisprudence, reconceptualised law as something which has a social purpose.

The realist perspective developed by Sir Anthony Mason gave the judiciary the role of balancing the interests of the individual with those of the State, when called upon to decide constitutional questions. This approach resulted in a shift in the focus of constitutional law from the powers of State and Federal institutions, to a concern for the interests of individuals in

²⁵⁵ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5 (references omitted). See also Chief Justice John Doyle, 'Judicial law Making - Is Honesty the Best Policy?' (1995) 17 *Adelaide Law Review* 161, 210-211.

²⁵⁶ Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 111. See generally Justice McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004', The Inaugural Sir Anthony Mason Lecture in Constitutional Law, 26 November 2004, Banco court, Sydney.

²⁵⁷ Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237.

²⁵⁸ Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 468.

their relationship with government.²⁵⁹ In Chapter 2 it was argued that the form of legalism put forward by Sir Owen Dixon was based upon a wider theoretical belief in the existence or presupposition of a corpus of legal knowledge. Although the approach of Sir Anthony Mason challenges this perspective, Mason CJ puts forward an approach which, like that of Sir Owen Dixon, is based upon broad theoretical principles. In Chapter 2 it was further argued that the Gleeson Court considered as a whole did not embrace the theoretical perspective put forward by Sir Owen Dixon. The analysis offered in this Chapter has sought to show that the theoretical perspective of realism is also not a perspective that is advocated by the current High Court. Indeed, it is difficult to ascertain an alternative theoretical position in the approach of the current Court, with the adoption of the methodology of legalism seeming to be accepted almost as an article of faith.

The suggested absence from the jurisprudence of the current Court of an ascertainable theoretical perspective, does not suggest that the *methodology* of the current Court is not legitimate. The approach taken by the Gleeson Court can, for example, for the most part, be justified on the basis that it retains public confidence in both the judiciary and the Constitution.²⁶⁰ However, the argument of this thesis is that, even accepting the legitimacy of the Gleeson Court's approach, the jurisprudence of the current Court does not tend to answer the more fundamental question that debate concerning the use of policy considerations in legal arguments raises. This question is, whether a doctrinal approach which, at times, seeks to exclude the discussion of such considerations, is to be preferred to the approach taken during the Mason era when policy considerations were openly discussed. The approach taken also leaves unanswered the argument that a particular ideological perspective will always underlie the choice of a legal methodology.²⁶¹ Zines, for example, like Sir Anthony Mason has accurately

²⁵⁹ See further for example Harley Wright, 'Sovereignty of the People - The New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165; See generally Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed) *Essays on Law and Government: Volume 1 Principles and Values* (1995); Geoffrey Lindell, 'Why is Australian's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; Justice Michael Kirby, 'Deakin: Popular Sovereignty and the true foundation of the Australian Constitution' (1996) 3 *Deakin Law Review* 129; Leslie Zines, 'The Sovereignty of the people' in Michael Coper and George Williams (eds) *Power, Parliament and the People* (1997) 91, 95.

²⁶⁰ See Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 234, 250.

²⁶¹ See further, Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5; Allan C Hutchinson 'Heydon' Seek:

criticised the suggestion that 'policy' considerations can be absolutely excluded from constitutional arguments. Zines argues that:

In an age of open government it is important that, whatever the new legalism means, judicial conclusions should not be seen as simply resting on different perceptions or impressions, but examined in the light of consequences and appropriate policies

...

No one doubts that certainty, consistency and coherence of the law and legal system are important social and legal values. They are not achieved by ignoring the factors which the law (and in particular the Constitution, by reason of its indeterminacy and its longevity) invites, or rather compels, the courts to consider. This is not to argue that judicial policy-making is desirable; it is merely at times necessary.²⁶²

As the arguments presented by Zines suggest it may be inevitable that policy considerations underlie judicial reasoning. In this way it may be argued that even the doctrinal approach of the Gleeson Court reflects a particular judicial policy or ideology.²⁶³ For example, the following of precedent may be viewed as the implementation of a particular judicial policy—that of conservatism, which as Allan Hutchinson has pointed out, 'is no less ideological than its activist counterpart.'²⁶⁴ As Llewellyn has argued, any application of the doctrine of precedent involves a choice between the available policy arguments and the felt need to follow previous decisions.²⁶⁵

Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85; Karl Llewellyn, 'Some Realism about Realism — Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

²⁶² Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 29.

²⁶³ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5; Allan C Hutchinson 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85.

²⁶⁴ Allan C Hutchinson 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85.

²⁶⁵ Karl Llewellyn, 'Some Realism about Realism — Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222.

The failure to articulate the relevance of policy considerations means that it is difficult to determine the influence of such considerations.²⁶⁶ It is an approach that undermines the transparency of judicial decisions. When the influence of political or policy considerations on judicial determinations are not disclosed in judicial reasons, these reasons fail to provide a guide to future decisions.²⁶⁷ This may be particularly significant if, as Professor Saunders argues, the *Constitution* is to be developed largely through its unwritten component.²⁶⁸ The fundamental objection that may be made to judicial decisions which do not articulate the relevance of policy considerations is that decisions that do not expressly state all of the relevant reasons upon which they are based are likely to appear arbitrary, and consequently less compelling, a feature which can undermine the integrity of judicial decisions.²⁶⁹ This objection, which is central to the realist movement's criticism of legal formalism, remains largely unconsidered by the jurisprudence of the Gleeson Court. This omission is significant because as Part II of this thesis will argue, the decisions of the Gleeson Court concerning Chapter III of the *Constitution* have demonstrated a concern to protect the integrity of the judicial process, yet the underlying importance of this concern is rarely articulated. Furthermore, it may be suggested that a methodology which appears to accept, almost as an article of faith that adherence to legalism will be sufficient to maintain the legitimacy of judicial decisions; puts forward the very approach which realism has suggested will undermine the integrity of judicial decisions.

It may be that the Gleeson Court will not use policy arguments or have regard to the practical consequences of a decision, unless the Court views the outcome of a formalistic application of existing doctrine as necessitating such an approach.²⁷⁰ It is however interesting to note that in 1976 a similar suggestion was made by Gareth Evans, and Sir Anthony Mason in response stated:

²⁶⁶ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5; Allan C Hutchinson 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash University Law Review* 85.

²⁶⁷ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

²⁶⁸ Cheryl Saunders, 'Future Prospects for the Australian Constitution' Robert French, Geoffrey Lindell and Cheryl Saunders (eds) *Reflections on the Australian Constitution* (2003), 235.

²⁶⁹ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 29.

²⁷⁰ *Re Governor Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh, Callinan JJ).

I note in his reply Mr Evans states that in relation to interpretation of the Constitution he advocates regard to policy considerations only when resort to relevant legal precepts is genuinely inconclusive. When is resort to legal precepts genuinely inconclusive? One might as well ask “*How long is the Chancellor’s foot?*” to traditionalists resort to legal precepts never fails to produce an answer. To others, dazzled by a glimpse of the Elysian fields, replete as they are with policy considerations, legal precepts would prove to be singularly sterile.²⁷¹

It may be argued that policies and values do underlie decisions of the Gleeson Court, just as they do for all judicial decisions.²⁷² On this basis, the difference in the style of judgments from the Mason to Gleeson era is that any relevant policies and values are not articulated by a majority of members of the Gleeson Court. This change in method, as Part II of this thesis will show, has had a *substantive* effect of the jurisprudence of the High Court. For example, the emphasis that legalism places on the text of the Constitution, which focuses on the institutions of government, can draw attention away from the important principled arguments that were developed to protect the interests of individuals in decisions such as *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.²⁷³

Further, it is argued that to apply a doctrinal approach without regard to the policy of legal change can produce legal doctrines that are not reflective of contemporary values and circumstances.²⁷⁴ As suggested above, even established common law principles and the legal doctrines upon which the legalistic approach of the Gleeson Court appears to be based, are themselves the *constant* expressions of particular values and policies.²⁷⁵ It cannot be doubted

²⁷¹ Sir Anthony Mason, ‘Closing Reflections’ in David Hamby and John Goldring (eds), *Australian Lawyers and Social Change* (1976) 385, 390 (emphasis added).

²⁷² Allan C Hutchinson ‘Heydon’ Seek: Looking for Law in All the Wrong Places’ (2003) 29 *Monash University Law Review* 85.

²⁷³ (1992) 176 CLR 1.

²⁷⁴ Sir Gerard Brennan, ‘A Tribute to Sir Anthony Mason’ in Cheryl Saunders (ed), *Courts of Final Jurisdiction: The Mason Court in Australia* (1996) 10, 12.

²⁷⁵ Justice Keith Mason, ‘What is wrong with top-down legal reasoning?’ (2004) 78 *Australian Law Journal* 574, 583-4

that the common law is itself dynamic.²⁷⁶ It follows that the values inherent in law may themselves be in a state of flux. Legal doctrine is not static. As Holmes wrote;

In order to know what [law] is, we must know what it has been, and what it tends to become. We must alternately consult history and existing theories of legislation. But the most difficult labor will be to understand the combination of the two into new products at every stage. The substance of the law at any given time pretty nearly corresponds, so far as it goes, with what is then understood to be convenient; but its form and machinery, and the degree to which it is able to work out desired results, depend very much upon its past:²⁷⁷

In this way any common law approach, including that of the Gleeson Court, needs to be seen as the implementation of a policy that regards law as evolving and changing, with the common law being viewed as the fusion of developed principles with the facts of the particular case. It is important to clarify that this discussion recognises that the Gleeson Court acknowledges legal change. For example, Chief Justice Gleeson has described his Honour's approach to legalism that is consistent with judicial law-making.²⁷⁸ The discussion presented above does however seek to point out that the acceptance of the changing state of law raises the issue of whether continued reliance upon legalism can be justified. It is difficult to see how there can be any unqualified acceptance of the belief that a legalistic methodology will always, or at any given point in time will be, the most legitimate form of judicial decision-making. It might be that legalism is, as Sir Owen Dixon argued, the preferred method. It is however argued that some theoretical justification should be offered to support the choice of legalism.

This Chapter has sought to establish that Sir Anthony Mason, put forward a *principled* and *theoretical* approach that fundamentally reconceptualised the judicial role in a manner that reflected the theoretical perspective and principles found in realism and sociological jurisprudence. The approach of Sir Anthony Mason not only differed from the perspective put

²⁷⁶ The introduction of the tort of negligence that brought the neighbourhood principle to the common law is, of course, the most oft cited example of the influence of policy on this form of judicial law making: see *Donoghue v Stevenson* [1932] AC 562. See generally, Garry Sturgess and Philip Chubb, *Judging the World* (1988), 7.

²⁷⁷ Justice Oliver Wendell Holmes, *The Common Law* (1881) 1.

²⁷⁸ Chief Justice Murray Gleeson, *The Rule of Law and the Constitution*, Boyer Lecture (2000) 97, 129; see also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479, 498 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

forward by Sir Owen Dixon; it challenged the fundamental assumptions of legalism generally, as well as Dixonian legalism in particular. However, there is a similarity between the jurisprudence of Sir Anthony Mason and that of Sir Owen Dixon in that both these jurists advocate the 'principled elaboration' of competing arguments, with judicial decisions 'resting wherever possible on a principle of appropriate generality.'²⁷⁹ This thesis has argued that Sir Owen Dixon's put forward a *theorised* and *principled* legalistic approach which was based upon the assumption of a corpus of legal knowledge.²⁸⁰ Sir Owen Dixon, thought that jurists should aspire to develop greater principles of rationalisation in the sense of the extent to which arguments and principles could be developed in support of decisions. As Sir Owen Dixon stated:

the demands made in name of justice must not be arbitrary or fanciful. They must proceed, not from political or sociological propensities, but from deeper, more ordered, more philosophical and perhaps more enduring conceptions of justice.²⁸¹

This Chapter has demonstrated the divergence of Gleeson Court from the idea that legal reasoning may be based upon the theoretical assumptions of the realist based jurisprudence of the Mason era. Chapter 2 demonstrated the dissimilarity between the *theoretical assumptions* of Dixonian legalism, and the legalistic methodology employed by most members of the Gleeson Court, that does not articulate the nature of any theoretical assumptions that underlie their Honours' approach. In this way the argument that has been developed to this point in this thesis, is that the absence from the approach of Gleeson Court of a theoretical perspective most clearly distinguishes the current Court from two of the Courts most revered predecessors, namely the Dixon Court and the Mason Court.

The absence from the jurisprudence of the Gleeson Court of an identifiable theoretical position is a theme which will be considered throughout this thesis. In the following Chapter the extent to which the jurisprudence of Justices Deane and Toohey represents a *principled* and *theorised*

²⁷⁹ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

²⁸⁰ Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 156.

²⁸¹ *Ibid*, 165.

approach, which demonstrates the influence of a natural law perspective and gives the judiciary a role in protecting the interests of individuals, will be analysed. Although the discussion in Chapter 4, will, like the discussion presented in this Chapter and Chapter 2, engage in some critical analysis of the absence of theoretical reasoning in judicial decision-making, it should be noted that in the United States, contemporary legal writings evince a resurgence of legal pragmatism—which advocates a largely non-theoretical position.²⁸² For this reason having considered in Chapter 4 the central tenets of natural law reasoning and the jurisprudence of Justice Deane and Toohey, the benefits of a non-theorised approach will be analysed further in Chapters 5 and 6, which will consider contemporary pragmatic thought.

²⁸² M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 817. See, for example, Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1. Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

Chapter 4

NATURAL LAW AND THE JURISPRUDENCE OF JUSTICES DEANE AND TOOHEY

I INTRODUCTION

The analysis presented in this thesis seeks to provide a perspective that may further the current understanding of approaches to constitutional interpretation in general and the approach of the Gleeson Court, in particular. The analysis presented in previous Chapters focused upon concepts such as Dixonian legalism, and the realist-based jurisprudence of Sir Anthony Mason. This analysis has provided some significant insights into the broad general shifts that have occurred in the jurisprudence of the High Court. The following discussion will consider with comparative brevity the jurisprudence of Justices Deane and Toohey and a natural law perspective. One reason for this approach is that the impact of their Honours' jurisprudence upon the current Court may be fairly briefly stated. Put plainly, the Gleeson Court has in general, openly sought to distance itself from the approach of Justices Deane and Toohey.¹

¹ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 10.

Although the Gleeson Court's general disapproval of the approach taken by Justices Deane and Toohey reduces the contemporary influence of their Honour's methodology, it is argued that the approach developed by Justices Deane and Toohey made a fundamental and significant contribution to Australian jurisprudence. Their Honours' jurisprudence was influential in broadening the scope of legal discussion in Australia. Both these Justices formed part of perhaps the 'strongest', 'core' group of Justices from the Mason era, which was comprised of Mason CJ, Deane, Toohey and Gaudron JJ.² That said, the direct link between Deane and Toohey JJ is perhaps not as strong as their Honours' methodologies may suggest, and the empirical research indicates that Deane J may have been the more influential member of the Court, being one of the two identified 'pivotal' Justices of the Mason era, the other being Mason CJ.³

The *influence* of the approach of Justices Deane and Toohey upon the direction taken by the current High Court aside, it is argued in this Chapter that their Honours' jurisprudence is of continued *relevance*. The reason for this is that an understanding of the width of perspective that Justices Deane and Toohey took facilitates an appreciation of the manner in which the approach adopted by the Gleeson Court has narrowed the purview of legal debate in Australian constitutional law.

A jurisprudential approach, such as that taken by Justices Deane and Toohey, is not the central focus of the analysis presented in this thesis, and for this reason the advantages and problems associated with this approach will not be considered at length in this thesis. However, some of the grounds for preferring this form of legal reasoning will be considered. In particular, it is argued in this thesis that more theorised approaches to judicial reasoning are to be preferred as they offer a transparent account of the judicial reasoning process, as well as providing considerable guidance for future courts. The argument presented in this and following Chapters will demonstrate that the jurisprudence implicit in the approach of Justices Deane and Toohey provides a highly theorised account of judicial reasoning. On this basis, it is noted in

² Russell Smyth, "Some Are More Equal than Others" - An Empirical Investigation into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193, 207.

³ *Ibid.*

passing, that aspects of their Honours' approach are to be preferred over the other forms of legal reasoning, such as the jurisprudential approaches associated with legalism, realism and pragmatism.

Legal writings concerning the jurisprudence of Justices Deane and Toohey generally regard their Honours' approach as challenging the orthodox legalistic perspective in a manner that extends beyond the approach taken by other members of the Mason Court.⁴ For example Justice McHugh has recently labelled the approach of these Justices as 'radical', stating that:

Two members of the Mason Court - Deane and Toohey JJ - challenged traditional modes of constitutional interpretation. Their Honours propounded an approach to constitutional interpretation during the Mason Court that the rest of the Court did not accept - even those members who expressly rejected the earlier legalism. Deane and Toohey JJ articulated a radical approach that relied on sources external to the Constitution, such as the supposed assumptions of the founders and fundamental common law principles, in order to derive restraints on legislative and executive power. They also used the principle of popular sovereignty - the sovereignty of the people - as a source of the authority of the Constitution to create constitutional rights. Their Honours identified certain rights from "the conceptual basis of the Constitution" such as a right to equality.⁵

Professor Leslie Zines has also expressed a similar view stating that:

In the general area of rights and freedoms, however, Deane and Toohey JJ went beyond the methods employed by the rest of the Court. They expounded doctrines which had less connection with the text of the Constitution and which would have opened up a vast area of judicial power in respect of the formulation of entrenched individual rights. They put

⁴ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 25; Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 10.

⁵ Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 10.

forward the principle that federal power was limited by fundamental rights and freedoms recognised by the common law in 1900.⁶

The difference in the approach of Justices Deane and Toohey from other members of the Mason Court, and in particular from the realist-influenced approach of Sir Anthony Mason which was considered in Chapter 3, may result from the influence of a natural law perspective on the jurisprudence of Justices Deane and Toohey.⁷ This suggestion is supported by Justice Toohey's comments made in a speech given in Darwin shortly after the judgments in the implied freedom of political communication cases had been delivered.⁸ On that occasion Justice Toohey expressly linked the role of the judiciary in protecting the rights of individuals with a 'revival of natural law jurisprudence'.⁹

The discussion of natural law principles presented in this Chapter will focus upon the jurisprudence of John Locke for the simple reason that Locke's analysis is particularly illustrative of the relevance of natural law jurisprudence from a constitutional perspective. Locke's work influenced the drafters of the American Declaration of Independence and his theory of governance continues to be of significance to the development of American constitutional law.¹⁰ However, of particular relevance to contemporary Australian constitutional law is the way in which Locke's work addresses issues such as the relationship between the State and the individual, the role of the judiciary and the source of any ultimate constitutional or legal authority. The analysis presented in this Chapter will therefore focus on these aspects of Locke's work, as it is suggested that an understanding of these elements of the Lockean view of governance enables the influence of a natural law perspective to be identified in constitutional interpretation.

⁶ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 25. See further, Justice W M C Gummow, 'The Constitution: Ultimate foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 175-7.

⁷ Justice John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158, D A Smallbone, 'Recent suggestions of an Implied "Bill of Rights" in the Constitution, considered as part of a general trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254, 262-269; Harley Wright, 'Sovereignty of the People - The New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165.

⁸ Justice John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158.

⁹ *Ibid.*

¹⁰ Richard S Kay, 'American Constitutionalism' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 16-63, especially 18 footnote 8.

Having considered the theoretical standpoint of a natural law perspective, the analysis presented in this Chapter will seek to outline the influence of this perspective on the jurisprudence of Justices Deane and Toohey. The fundamental point that will be drawn from this discussion is that whilst the realist-influenced approach of Sir Anthony Mason sought to balance the interests of the individual with the interests of the State, the jurisprudence of Justices Deane and Toohey gave greater significance to the interests of individuals by giving the judiciary a role in protecting these interests, which allowed the judiciary to imply a restraint on the powers of the legislative and executive.¹¹ The final sections of this Chapter will demonstrate that it is the approach of these Justices from which the judicial method of the current Gleeson Court may be most clearly distinguished.

II A NATURAL LAW PERSPECTIVE

Natural law theories often assert that certain specified principles represent what is referred to as the *natural law*. These principles are not themselves derived from a legal system, but represent some form of universal reason.¹² In this way a distinction is made between natural law principles and human or posited law. As Aristotle, who is regarded as one of the early natural law theorists, wrote in *The Ethics*:

There are two sorts of political justice, one natural and the other legal. The natural is that which has the same validity everywhere and does not depend upon acceptance; the legal is that which in the first place can take one form or another indifferently, but which, once laid down is decisive ...¹³

¹¹ These distinctions will be considered further in Chapter 8 of this thesis. See generally Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 10.

¹² See, for example, Aristotle *The Ethics*, Book 5, vii, 1134b8-24, [translation by J A K Thomson first published 1953] 189; John Finnis, *Natural Law and Natural Rights* (1980) 24; John Locke, *Two Treatises of Government*, Chapter II, paragraphs 4-8, [1690, Critical edition by Peter Laslett, 2nd ed, 1967] 287-90. See generally, MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 89-90.

¹³ Aristotle *The Ethics*, Book 5, vii, 1134b8-24, [translation by J A K Thomson first published 1953] 189. See also Cicero who is quoted as saying of the natural law 'we need not look outside ourselves for an expounder or interpreter of it': Cicero *De Re Publica*, bk III, xxi: see Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 73.

John Finnis, whose work *Natural Law and Natural Rights* provides a modern reinstatement of natural law theory,¹⁴ expresses the universal and self-evident nature of natural law principles by stating that: 'of natural law itself there could, strictly speaking, be no history.'¹⁵ This form of reasoning not only distinguishes between natural and posited law—it also accords a certain status to natural law principles. Natural law principles as they are universal and discoverable by rational introspection are viewed as being more fundamental than posited law.

The status of natural law principles as fundamental and universal has led natural law theorists to argue that the authority of human or posited law may be determined by reference to natural law principles. Some proponents of the natural law perspective, view posited law, which does not conform to the specified natural law principles, as not being law at all.¹⁶ Other natural law theorists take the position that posited law, which is contrary to natural law principles, may remain valid; however, it ought to be changed to accord with the natural law.¹⁷ However, common to most proponents of a natural law perspective is a desire to establish that posited law should be guided by moral principles and rules.¹⁸ In this way, natural law theories seek to establish a relationship between law and morality. This may be compared to the positivist perspective which often underlies a legalistic approach and which, generally, does not seek to make a connection between law and morality. This approach can be further contrasted with the realist position which, particularly in the writings of Llewellyn, may be seen to emphasise what the law actually 'is' over what it 'ought' to be.¹⁹ Because natural law theories *assert* that the principles of natural law represent some form of higher law based on reason, natural law principles are capable of being seen to provide moral sanctity to posited law.²⁰ Whilst much

¹⁴ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 122.

¹⁵ John Finnis, *Natural Law and Natural Rights* (1980) 24.

¹⁶ See Cicero *De Re Publica*, bk III, xxi, , *lex injusta non est law* ('an unjust law is not law'): quoted by Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 72.

¹⁷ See John Finnis, *Natural Law and Natural Rights*, 290, 351ff. See generally Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 72ff.

¹⁸ John Finnis, *Natural Law and Natural Rights* (1980) 290. See generally, Bryan Horrigan, 'Natural Law' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 500, 500.

¹⁹ Karl Llewellyn, 'Some Realism about Realism - Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1255.

²⁰ See Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 79, 90.

jurisprudential debate has been devoted to this issue, it is sufficient for present purposes to note that the validity of this assertion has been questioned.²¹

A *John Locke*

The idea that natural law principles derive from some higher source, and that these principles should guide the development of posited law is implicit in the writings of John Locke. Locke advocated the existence of certain inalienable natural rights and based his conception of the purpose and limits of government on this theory of natural rights.²² Locke began his analysis by considering the manner in which he saw man as existing, before the development of civil society. For Locke, before civil society, man existed free from government intervention in an idyllic natural condition.²³ In such a natural state, the rule of reason and common equity prevailed with all in a 'State of perfect Freedom' and 'Equality'.²⁴ This 'perfect equality', for Locke, derived from the fact that all are equal servants of God. As such, Locke argued, 'there cannot be supposed any such *Subordination* among us'.²⁵ For Locke, there were two duties in the natural state of man, which represented the natural law. The first duty to which Locke referred was the duty to preserve oneself. The second duty was the duty to do as much as can be done to preserve the rest of mankind.²⁶ Like other natural law theorists, Locke held these two principles of the natural law to be universal, and discoverable by the use of reason.²⁷ For Locke, in the natural state of man, each individual had the right to hold others accountable for a breach

²¹ *Ibid.*, 78-90.

²² John Locke, *Two Treatises of Government*, Chapter II, paragraphs 4-8, [Critical edition by Peter Laslett, 2nd ed, 1967] 287-90; For example, Locke states 'The *State of Nature* has a Law of Nature to govern it, which obliges every one: And Reason, which is that Law, teaches all Mankind, who will but consult it, that being all equal and independent, no one ought to harm another in his Life, Health, Liberty, or Possessions': see John Locke, *Two Treatises of Government*, Chapter II, paragraph 6, [Critical edition by Peter Laslett, 2nd ed, 1967] 289.

²³ John Locke, *Two Treatises of Government*, Chapter II, paragraph 4, [Critical edition by Peter Laslett, 2nd ed, 1967] 287. This can be contrasted with the view of Thomas Hobbes who also expressed the equality of man, but saw the state of nature as a state of war, as Hobbes wrote 'and such a warre, as is of every man, against every man': see Hobbes, *Leviathan*, Pt I, Chapter 13 [first published 1651, edited by C B Macpherson, (1986) 185].

²⁴ John Locke, *Two Treatises of Government*, Chapter II, paragraph 4, [Critical edition by Peter Laslett, 2nd ed, 1967] 287.

²⁵ *Ibid.*, Chapter II paragraph 6, 289.

²⁶ *Ibid.*

²⁷ *Ibid.*

of the principles of the natural law.²⁸ Locke saw the natural state of autonomy as being voluntarily given up only as societies developed.²⁹ In this manner, Locke's theory of governance is based upon the idea of consent. Upon the entry by an individual into civilised society, the rights that people have to enforce for themselves the principles of the natural law are given up.³⁰ The State in this way becomes the custodian of the natural law, and is required to observe and enforce the natural law, which included rights to property, which form an important part of Locke's analysis.³¹ The State, for Locke, is therefore bound to protect the property rights of individuals, to preserve mankind by acting for the public good of the society, and to reinforce the *equality* of individuals.

One important feature of Locke's analysis, that influenced the concept of governance that Locke advocates, is the idea that as all are servants of God there is a limit to what can be given up upon the entrance into civil society. A person, Locke argues, cannot transfer to the State greater power over individual rights than those that the individual, possessed as their own, in the state of Nature. Rights such as those of life and liberty, being bestowed by God, cannot be cast off. As Locke states:

[N]o Body can transfer to another more power than he has in himself; and no Body has an absolute Arbitrary Power over himself, or over any other, to Destroy his own Life, or to take away the Life or Property of another. A Man, as has been proved, cannot subject himself to the Arbitrary Power of another; and having, in the State of Nature, no Arbitrary Power over the Life, Liberty, or Possession of another, but only so much as the Law of Nature gave him for the preservation of himself, and the rest of Mankind; this is all he doth, or can give up to the Commonwealth, and by it to the *Legislative Power*, so that the Legislative can have no more than this. Their Power in the utmost Bounds of it is *limited to the publick good* of the Society. It is a Power, that hath no end but preservation, and therefore can never have a right to destroy, enslave, or designedly to impoverish the Subjects.³²

²⁸ *Ibid*, Chapter II, paragraph 8, 290.

²⁹ *Ibid*, Chapter VII, paragraph 89, 343.

³⁰ *Ibid*, Chapter II, paragraph 7-9, 289-90.

³¹ *Ibid*, Chapter V, 303-320.

³² *Ibid*, Chapter XI, paragraph 135, 375.

This perspective, that Locke takes, on the inalienable nature of natural law rights, influences the view he takes of the relationship between the individual and the State. As individuals entering civil society bestowed power on the government or Parliament, Locke saw this power as being held in a relationship of *trust* with the governed. This view remains influential in American constitutional law.³³ Implicit in this Lockean view of government, which sees the power of government being held in a relationship of trust with the governed, is the view that any ultimate source of constitutional authority lies with the sovereign people.

For Locke it followed from this idea of there being a fiduciary relationship, that State power must be exercised in a manner which is consistent with the public good and the natural law rights of individuals. Thus if a Lockean perspective is taken to the balancing of the rights or interests of the individual with the rights or interests of the State, the interests of individuals that accord with natural law rights will be of primary importance. Put simply, the State may not derogate from the inalienable rights of individuals. Significantly, for Locke, the *judiciary* were responsible for protecting these interests. Locke accorded this role to the judiciary, as Locke viewed the right that each individual had in the natural state to hold others accountable for a breach of the principles of the natural law,³⁴ as something which the individual transferred to the *judiciary* when the individual entered into civil society.³⁵ This may be contrasted to the realist or sociological perspectives analysed above in Chapter 3, which gives the judiciary a role in balancing the interests of the individual with those of the State.

The idea that the judiciary, in developing the law, must have regard not only to the authority of the Parliament but also to the paramount authority of the natural law, is often identified with, the classic, though controversial, decision of Sir Edward Coke in *Dr Bonham's Case*.³⁶ In that case

³³ Richard S Kay, 'American Constitutionalism' in Larry Alexander (ed) *Constitutionalism: Philosophical Foundations* (1998) 16-63, especially 18 footnote 8.

³⁴ *Ibid*, Chapter II, paragraph 8, 290.

³⁵ *Ibid*, Chapter VII, paragraph 87, 342. As Locke writes: 'Those who are united into one Body, and have a common establish'd Law and Judicature to appeal to, with Authority to decide Controversies between them, and punish Offenders, are in Civil Society one with another: but those who have no such common Appeal, I mean on Earth, are still in the state of Nature, each being, where there is no other, Judge for himself and Executioner; which is, as I have before shew'd it, the perfect state of Nature': see John Locke, *Two Treatises of Government*, Chapter VII, paragraph 87, [Critical edition by Peter Laslett, 2nd ed, 1967] 342.

³⁶ *Dr Bonham's case* (1609) 8 Co Rep 107a, 113b; 77 ER 638; 646; 2 Brownl. & Golds 254; 123 ER 928. For a consideration of the early authorities concerning this issue see D A Smallbone 'Recent suggestions of an Implied "Bill of Rights" in the Constitution, considered as part of a general trend in Constitutional Interpretation' (1993)

'Coke struck down a law he found unsupportable'³⁷ Consistently with a natural law perspective, the courts role in making such a finding has been viewed as being qualified by Sir Edward Coke's requirement that such intervention is warranted only when the common law accords with natural law principles, and the laws of Parliament breach these natural law principles.³⁸

In summary it can be said that the Lockean natural law perspective translates to a view of governance that may influence constitutional interpretation. The Lockean perspective sees inalienable rights as being asserted in any relationship between the individual and the State. This theory also accords the judiciary a role, in addition to that of considering the authority of Parliament, namely the function of maintaining the fundamental authority of natural law principles. Finally, implicit in the Lockean view is the idea that any ultimate source of constitutional authority must lie with the sovereign people. These three key issues may affect the manner in which a constitution is interpreted—and it is the influence of these perspectives that the following analysis identifies in the jurisprudence of Justices Deane and Toohey.

III THE JURISPRUDENCE OF JUSTICES DEANE AND TOOHEY

The jurisprudence of Justices Deane and Toohey demonstrates a concern for individual and democratic rights, and may be viewed as reflecting a natural law perspective which accords the judiciary a role in protecting the inalienable rights of individuals. For example Justice Deane in

²¹ *Federal Law Review* 254, 262-269. This may be contrasted to the more limited role that positivism accords to the judiciary: see, for example, A V Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 75. Any suggestion based upon Sir Edward Coke's judgment in *Dr Bonham's Case* that the judiciary might hold a statute invalid on the basis that it offended some natural law concept, whilst influential in the development of American doctrines of judicial review, was largely abandoned in England, the case was described by Dicey (*Introduction to the Study of the Law of the Constitution*, 61–2n) in a footnote as obsolete: see Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 83-84. See generally Paul Finn, 'A Sovereign People, A Public Trust' in P Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (1995) 1; AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 39.

³⁷ A D Boyer, "Understanding, Authority, and Will": Sir Edward Coke and the Elizabethan Origins of Judicial Review' (1997) 39 *Boston College Law Review* 43. See further, *Dr Bonham's case* (1609) 8 Co Rep 107a; 77 ER 638, 646; 2 Brownl. & Golds 254; 123 ER 928.

³⁸ See D A Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, considered as part of a general trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254, 262. see further, *Calvin's case* 7 Co Rep 1a, 13a ff; 77 ER 377, 392ff.

*University of Wollongong v Metwally*³⁹ held that section 109 of the *Constitution* would not only direct the resolution of federal conflicts, but may also serve, 'the equally important function of protecting the individual from the injustice of being subjected to the requirements of valid and inconsistent laws of the Commonwealth and State Parliaments on the same subject'.⁴⁰ In this way Justice Deane may be seen as bringing to the question of the conflict of State laws with Commonwealth laws a perspective that highlights the role of the judiciary in protecting the interests of the individual. Justice Toohey has also, at times, expressed a similar view. Speaking extra-judicially Toohey J commented that lawyers were part of an institution that 'exists not only to resolve disputes between individuals but to protect the citizen against excesses of State power.'⁴¹ For Justice Toohey, '[a] society that lacks a strong and independent judiciary is in real danger of seeing its civil liberties disappear and ultimately of losing its freedom.'⁴²

A *Natural Law Perspectives and the Interest of the Individual*

The manner in which Justices Deane and Toohey interpreted Chapter III of the *Constitution* consistently with a natural law perspective to give the judiciary a role in protecting the interests of the individual will be discussed further in Part II of this thesis, however of particular note are the judgments of Deane J and Toohey J in *Polyukhovich v Commonwealth*, the 'War Crimes Act Case'.⁴³ For Justice Deane who dissented in that case, the retroactive aspect of the legislation was problematic.⁴⁴ Justice Deane's judgment emphasised the interest that individuals have in only being punished for a 'breach of the law', and the consequent need for criminal laws only to apply to 'future conduct.'⁴⁵ For Justice Deane the challenged legislation went beyond the

³⁹ *University of Wollongong v Metwally* (1984) 158 CLR 447.

⁴⁰ *Ibid*, 477 (Deane J).

⁴¹ John Toohey, 'Without Fear or Favour, Affection of Ill-Will': The Role of Courts in the Community' (1999) 28 *Western Australian Law Review* 1, 2.

⁴² *Ibid*, 1.

⁴³ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('War Crimes Act Case').

⁴⁴ *Ibid*, 632, see also 614ff (Deane J), 708, see also 697ff (Gaudron J).

⁴⁵ *War Crimes Act Case* (1991) 172 CLR 501, 609 (Deane J).

legislative power conferred by a Constitution which was based upon the doctrine of the separation of powers.⁴⁶ This finding was based in part upon the view that the effect of the legislation was to usurp the 'exclusively judicial function' of determining 'whether the accused person has in fact done an act which constituted a criminal contravention of the then applicable law.'⁴⁷ The reasoning expressed in Justice Deane's judgment emphasises not only the interests of the individual, but also the role of the court in protecting those interests.

Justice Toohey also expressed a similar perspective, although ultimately he joined with the majority, finding that the Act in its application to the information laid against the plaintiff was not 'retroactive in a way offensive to Chapter III of the Constitution.'⁴⁸ Toohey J in the *War Crimes Act Case* expressed concern about retroactive criminal legislation holding that; 'a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch III, especially if the law excludes the ordinary indicia of judicial process.'⁴⁹ For Justice Toohey the general objection to 'retroactively applied criminal liability' was based upon 'a fundamental notion of justice and fairness.'⁵⁰

Further, although the analysis presented in this thesis will not focus upon the implied freedom of political communications cases it is relevant to note that perhaps the most evident expression of the Lockean view of governance may be found in the judgment of Justices Deane and Toohey in *Nationwide News*. In that case their Honours held that:

the powers of government belong to, and are derived from, the governed, that is to say, the people of the Commonwealth. The repositories of governmental power under the Constitution hold them as representatives of the people under a relationship, between the representatives and the represented, which is a continuing one.⁵¹

⁴⁶ *Ibid*, 614 (Deane J).

⁴⁷ *Ibid*, 614 (Deane J).

⁴⁸ *Ibid*, 692. This finding was based upon the existence of the offence of murder in Australian law, the universal condemnation of murder in municipal laws generally, and the international condemnation of such conduct reflected in laws with respect to war crimes and crimes against humanity.

⁴⁹ *Ibid*, 689.

⁵⁰ *Ibid*, 689 (Toohey J).

⁵¹ *Nationwide News v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ) See also *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 185-186 (Deane J).

This view drew some support from Mason CJ.⁵² However, significantly for Deane and Toohey JJ this idea that power was held in a fiduciary relationship was explicitly extended to the judiciary.⁵³ These comments, which are consistent with a natural law perspective, sparked much discussion in Australian legal writings,⁵⁴ perhaps because the view that the people are ultimately sovereign⁵⁵ represents a departure from what may be regarded as the orthodox positivist perspective of parliamentary sovereignty, which may at times be identified in the perspective of Dawson J.⁵⁶ The idea of there being a fiduciary relationship between 'the

⁵² Chief Justice Mason in *Australian Capital Television Pty Limited and Others v Commonwealth of Australia* ('ACTV') expressed the view that 'the sovereign power which resides in the people is exercised on their behalf by their representatives': ACTV (1992) 177 CLR 106, 137 (Mason CJ).

⁵³ The repositories of government power for Deane and Toohey JJ extended to all arms of government, including the judiciary: *Nationwide News v Wills* (1992) 177 CLR 1, 74 (Deane and Toohey JJ).

⁵⁴ See for example Harley Wright, 'Sovereignty of the People - The New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165. See generally Paul Finn, 'A Sovereign People, A Public Trust', in Paul Finn (ed) *Essays on Law and Government: Volume 1 Principles and Values* (1995) 1; Anthony Dillon, 'A Turtle by any Other Name: The Legal Basis of the Australian Constitution' (2001) 29 *Federal Law Review* 241; James Thomson, 'The Australian Constitution: statute, fundamental document or compact?' (1985) *Law Institute Journal* 1199; Geoff Lindell, 'Why is Australian's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; John Tate, 'Giving Substance to Murphy's Law: The Question of Australian Sovereignty' (2001) *Monash University Law Review* 21; Justice Michael Kirby, 'Deakin: Popular Sovereignty and the true foundation of the Australian Constitution' (1996) 3 *Deakin Law Review* 129; Keith Mason, 'The Rule of Law' in Paul Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (1995); Leslie Zines, 'The Sovereignty of the people' in Michael Coper and George Williams (eds), *Power, Parliament and the People*, (1997) 91.

⁵⁵ *Nationwide News v Wills* (1992) 177 CLR 1, 72, 74 (Deane and Toohey JJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 185-186 (Deane J). See also ACTV (1992) 177 CLR 106, 137 (Mason CJ).

⁵⁶ The views of Justice Dawson appear to reflect the influence of British constitutionalism espoused in the late 19th century by AV Dicey. Dicey expressed the view that the power of the Parliament was plenary: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 39, 81. See generally G de Q Walker, 'Dicey's Dubious Dogma of Parliamentary Sovereignty' (1985) 59 *Australian Law Journal* 276, this may be compared with Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (1999). Dicey also expressly rejects that Parliament holds power in a relationship of trust with electors, for example, Dicey wrote, 'Nothing is more certain than that no English judge ever conceded, or under the present constitution, can concede, that parliament is in any legal sense a "trustee" for the electors. Of such a feigned "trust" the courts know nothing': see AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 75. See generally, Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed), *Essays on Law and Government: Volume 1 Principles and Values* (1995) (1995) 1. Dicey drew a distinction between what he referred to as 'legal sovereignty', which resided with the Parliament, and 'political sovereignty', which resided with the people. Although as Dicey used the term, Parliament referred to the 'Queen in Parliament' which was the three bodies known as the Queen, the House of Lords and the House of Commons acting together: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 39, 72-74. Whilst the electors formed part of the political sovereign, the legal sovereign consisted of Parliament alone: AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 76. For Dicey the role of judges was limited to applying the laws of Parliament. Whilst Dicey recognised that the application of precedent led to the development of fixed rules, such rules did not impinge upon the sovereignty of Parliament. For Dicey, judge-made law was always sub-ordinate to the law of Parliament, and remained subject to supervision by Parliament: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 60. Dicey rejected any suggestion that the judiciary should exercise a supervisory role over Parliament. Dicey maintained this position even if the laws passed by Parliament were morally reprehensible, as in Dicey's oft-cited remark concerning blue-eyed babies:

If a legislature decided that all blue-eyed babies should be murdered, the preservation of blue-eyed babies would be illegal; but legislators must go mad before they could pass such a law, and subjects be idiotic before they could submit to it: see AV Dicey *Introduction to the Study of the Law of the Constitution* (10th ed, 1959) 81 citing L Stephen, *Science of Ethics* (1882) at 143.

Justice Dawson's approach in ACTV would seem to reflect Dicey's views in that Dawson J went so far as to admit of the possibility that even if the Parliament used their powers to 'injure the people of Australian considered

representatives and the represented' would seem to directly reflect the natural law perspective presented by John Locke. The influence of a natural law perspective is also apparent in the manner in which this idea of the 'sovereign people' put forward in *ACTV*⁵⁷ and *Nationwide News*⁵⁸ was developed in subsequent cases by Justice Deane.⁵⁹ Whereas, in *Theophanous*, Chief Justice Mason and Justices Toohey and Gaudron, followed the majority position in *Nationwide News* and *ACTV*, and referred to the implied freedom of political discussion as being based upon the provisions and structure of the Constitution and the specific concept of representative government that the Constitution enshrined;⁶⁰ Justice Deane took a wider view of the implied freedom. Deane J, in *Theophanous*, reasoned that the Court should give effect to the 'rights, privileges and immunities from either the Constitution's express terms or the fundamental doctrines upon which it was structured and which it incorporated as part of its very fabric.'⁶¹

The idea that there may be implied from the Constitution or the fundamental doctrines upon which the Constitution was based some form of inalienable or constitutional rights was perhaps given its widest operation by Justices Deane and Toohey in *Leeth v Commonwealth*.⁶² The majority judges,⁶³ and in particular the joint judgment of Chief Justice Mason and Justices Dawson and McHugh, dealt with the issue raised in *Leeth* primarily as a question about Commonwealth power.⁶⁴ In contrast, the dissenting judgment of Justices Deane and Toohey

sectionally', no protection would be afforded by the courts: see *ACTV* (1992) 177 CLR 106, 182 (Dawson J). However, that said, Justice Dawson did hold that legislation that had the effect of denying access to information by the electors would be incompatible with the Constitution: see *ACTV* (1992) 177 CLR 106, 186-8 (Dawson J).

⁵⁷ *ACTV* (1992) 177 CLR 106, 137 (Mason CJ).

⁵⁸ *Nationwide News v Wills* (1992) 177 CLR 1, 72 (Deane and Toohey JJ).

⁵⁹ *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104.

⁶⁰ *Ibid*, 120-1.

⁶¹ *Ibid*, 171. (Deane J).

⁶² *Leeth v Commonwealth* (1992) 174 CLR 455, 488 (Deane and Toohey JJ), 499-503 (Gaudron J).

⁶³ *Ibid*, 466-70 (Mason CJ, Dawson and McHugh JJ), 479-80 (Brennan J).

⁶⁴ *Ibid*, 466-70 (Mason CJ, Dawson and McHugh JJ), 479-80 (Brennan J). It should however be noted that Justice Brennan did comment that the plaintiff's arguments would have much force if they were directed against a law prescribing different maximum penalties for the same offence. In particular Brennan J (at 475) stated that 'It would be offensive to the constitutional unity of the Australian people "in one indissoluble Federal Commonwealth", recited in the first preamble to the *Commonwealth of Australia Constitution Act 1900*, to expose offenders against the same law of the commonwealth to different maximum penalties dependent on the locality of the court in which the offender is convicted and sentenced. It follows that the maximum penalty prescribed for a breach of the law must be the same irrespective of the locality of the court before which the offender is tried and sentenced.' That said, Justice Brennan went on to state (at 475-476) that a law that discriminates between conduct in one part of Australia and like conduct in another part of Australia may be supported by the relevant head of Commonwealth power. It may therefore be argued that Justice Brennan's judgment dealt with the issue primarily as a question of power, and the suggestion by Professor Michael Detmold that Brennan J supported a

focused on the individual.⁶⁵ Their Honours found that 'there was to be discerned in the Constitution as a whole an assumption of the fundamental common law doctrine of legal equality which operates to confine the prima facie scope of the legislative powers which the Constitution vests in the Commonwealth.'⁶⁶ Although, their Honours held that this doctrine was not infringed by a law 'which discriminates between people on grounds which are reasonably capable of being seen as providing a rational and relevant basis for the discriminatory treatment,'⁶⁷ for Deane and Toohey JJ the challenged legislation discriminated in a way that was inconsistent with the doctrine of the underlying equality of the people of the Commonwealth under the law and before the courts.⁶⁸ In these ways, in some important cases the *influence* of a natural law perspective may be identified in the approach taken by Justices Deane and Toohey to constitutional issues.

B *Natural Law Perspectives: Influential Rather than Directory in the Jurisprudence of Justice Deane and Toohey*

It has been argued that a natural law perspective is associated with the jurisprudential approach of Justices Deane and Toohey. It is, however, important to note that the identification of the jurisprudence of Justices Deane and Toohey with a natural law approach should be qualified. It is not accurate to suggest that the approach of Justices Deane and Toohey reflects precisely a purely natural law perspective. Nor should it be expected that a particular judicial approach would fit neatly within the constructs of one theoretical position.⁶⁹ The judicial method put forward by Justice Deane and Toohey does *not* outline a number of inalienable human rights or natural law principles, and reason from these principles to establish limits on the powers of Parliament. For example, notions such as the text of Constitution, the doctrine of

general principle of equality based in the constitutional unity of the Australian people may be questioned: see M J Detmold, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, 234.

⁶⁵ *Leath v The Commonwealth* (1992) 174 CLR 455, 488 (Deane and Toohey JJ).

⁶⁶ *Ibid.*

⁶⁷ *Ibid.*

⁶⁸ *Ibid.*

⁶⁹ See Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 582.

separation of powers, and fundamental common law rights, were, as Deane J stated in *Theophanous*, employed to discern 'a limitation or confinement of laws and power [which] gives rise to a protanto immunity on the part of the citizen from being adversely affected by those laws or by the exercise of those powers rather than to a 'right' in the strict sense.'⁷⁰

Although the distinction between an immunity and a right has been criticised,⁷¹ the High Court in *Lange v Australian Broadcasting Corporation* unanimously endorsed this *particular* point made by Justice Deane in *Theophanous*.⁷² Another example, of the distinction from a purely natural law perspective may be identified in the approach of Justice Toohey. The jurisprudence of Toohey J may be viewed as having regard to the rule of law and giving greater deference to the Parliament than would follow from a strict application of Lord Coke's dicta in *Dr Bonham's case*.⁷³ This is evidenced by Justice Toohey's comments that judges do not have 'a free hand to dispose of the cases before them'.⁷⁴ Justice Toohey has also articulated numerous constraints on judicial law-making, including the need to have regard to the law as it was 'found in Acts of Parliament, federal and State.'⁷⁵

C <i>The Broadening of Legal Debate</i>
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It is important in considering the approach of Justices Deane and Toohey to note that although their Honours' approach is often represented as going beyond the interpretative method that

⁷⁰ (1994) 182 CLR 104, 168.

⁷¹ See Adrienne Stone, 'Rights, Personal Rights and Freedoms: The Nature of the Freedom of Political Communication' (1997) 25 *Melbourne University Law Review* 374, 374-404; Adrienne Stone, 'Justice Gaudron and constitutional rights' (2004) 15 *Public Law Review* 297, 297.

⁷² (1997) 189 CLR 520, 560.

⁷³ See James Edelman and Natalie Gray, 'Toohey, John Leslie' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 673, 673, 674. John Toohey, 'Without Fear of Favour, Affection or Ill-Will': The Role of Courts in the Community' (1999) 28 *Western Australian Law Review* 1, 3.

⁷⁴ John Toohey, 'Without Fear of Favour, Affection or Ill-Will': The Role of Courts in the Community' (1999) 28 *Western Australian Law Review* 1, 3.

⁷⁵ *Ibid.*

was acceptable to other members of the Mason Court,⁷⁶ the position advanced by Justices Deane and Toohey did draw some support from other members of the Court. Justice Gaudron for example, joined 'relatively frequently' with Justices Deane and Toohey.⁷⁷ In addition, although Justice Brennan did not regularly join with the decisions of Justices Deane and Toohey, His Honour often considered, (albeit in a manner which reflected more closely an orthodox form of legal reasoning), similar concerns to those presented by Justices Deane and Toohey, and these concerns were at times reflected in Brennan J's judgments.⁷⁸

Like Justices Deane and Toohey, Justice Gaudron was also inclined to consider the interests of individuals and to find invalid legislation which interfered with the integrity of the Court in a manner which impacted upon the Court's role in upholding those interests.⁷⁹ For example, Justice Gaudron in *Leeth* and in *Kruger v Commonwealth*⁸⁰ emphasised the importance of the 'liberty of the individual'.⁸¹ In *Leeth*, Justice Gaudron held that the principle that 'all are equal before the law' was fundamental to the judicial process.⁸² For Justice Gaudron the challenged legislation was invalid because it purported to require a court named or indicated in s. 71 of the Constitution to exercise a power in a way that would involve impermissible discrimination, namely, by preventing the treating of like offences in a like manner.⁸³ Justice Gaudron also emphasised the importance of the freedom of the individual in Her Honour's dissent in *Kruger v Commonwealth*⁸⁴ in which her Honour held that an ordinance, which was directed to restricting an individual's freedom of movement, was invalid.⁸⁵

⁷⁶ See, eg. Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 10.

⁷⁷ Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 289.

⁷⁸ See eg. *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 576, 584 (Brennan J); *Leeth v The Commonwealth* (1992) 174 CLR 455, 479-80 (Brennan J).

⁷⁹ See generally Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 293; Justice Susan Kenny, 'Concepts of judicial responsibility: The contribution of "one of seven"' (2004) 15 *Public Law Review* 283, 284-288.

⁸⁰ (1997) 190 CLR 1, 115.

⁸¹ *Leeth v The Commonwealth* (1992) 174 CLR 455, 499 (Gaudron J). See generally Adrienne Stone, 'Justice Gaudron and constitutional rights' (2004) 15 *Public Law Review* 297, 299-301.

⁸² *Leeth v The Commonwealth* (1992) 174 CLR 455, 502 (Gaudron J).

⁸³ *Ibid.* For Justice Gaudron discrimination in a constitutional context arose in two ways. It arose where there was different treatment of persons or things which were not relevantly different. It also arose if there was a relevant difference but the different treatment was not appropriate and adapted to that difference: *Leeth v The Commonwealth* (1992) 174 CLR 455, 498 (Gaudron J).

⁸⁴ (1997) 190 CLR 1, 115 (Gaudron J).

⁸⁵ *Ibid.*

In summary, it is suggested that there is a tendency for the jurisprudence of Justices Deane and Toohey to demonstrate the *influence* of a natural law perspective, rather than the unmediated application of the doctrines of natural law. Although Justices Deane and Toohey drew upon a wider range of ideas than those represented in orthodox legalistic reasoning, the importance of some of the ideas represented by legalism to their Honours' reasoning should be recognised. For example, the approaches of Justices Deane and Toohey remained constrained by the text of the Constitution. It is also important to keep in mind that whilst their Honours' jurisprudence may not have been endorsed in its entirety by the other members of the Mason Court, the approach of Deane and Toohey JJ may be seen as being towards the forefront of the general movement of the Mason Court away from a confined legalistic approach to constitutional interpretation.

IV THE GLEESON COURT: DISTANCING FROM THE APPROACH OF JUSTICES DEANE AND TOOHEY

Whilst the idea that the development of constitutional law may be guided by broad theoretical principles is a position that gained prominence in the Mason era, and was particularly apparent in the jurisprudence of Justices Deane and Toohey,⁸⁶ it would seem that Justice McHugh's criticisms of this type of approach have received some support from members of the Gleeson Court.

In *McGinty v Western Australia*⁸⁷ Justice McHugh disapproved top-down or theoretical reasoning, stating:

... I cannot accept, as Deane and Toohey JJ held in *Nationwide News Pty Ltd v Wills*, that a constitutional implication can arise from a particular doctrine that "underlies the Constitution". Underlying or overarching doctrines may explain or illuminate the meaning

⁸⁶ See Chapter 2 above.

⁸⁷ (1996) 186 CLR 140.

of the text or structure of the *Constitution* but such doctrines are not independent sources of the powers, authorities, immunities and obligations conferred by the *Constitution*. Top-down reasoning is not a legitimate method of interpreting the *Constitution*. As I pointed out in *Theophanous v Herald & Weekly Times Ltd*, after the decision of this Court in the *Engineers' Case*, the Court had consistently held, prior to *Nationwide News and Australian Capital Television Pty Ltd v Commonwealth*, that it is not legitimate to construe the *Constitution* by reference to political principles or theories that are not anchored in the text of the *Constitution* or are not necessary implications from its structure.⁸⁸

Justice Gummow has also questioned the idea that there exists an all encompassing theory of legal interpretation.⁸⁹ Similarly, Justice Callinan has queried the necessity of always seeking in constitutional cases to produce 'a constitutional principle for all time and for all purposes.'⁹⁰ A more recent member of the Gleeson Court, Justice Dyson Heydon, in an extra-judicial speech, given before his appointment to the High Court, has also openly advocated focusing on the immediate controversy and the avoidance of theoretical reasoning.⁹¹

The movement away from an approach to constitutional interpretation based on broad or overarching theoretical principles may also underlie the idea that different constitutional questions call for different approaches. For example, Chief Justice Gleeson has stated:

⁸⁸ *McGinty v Western Australia* (1996) 186 CLR 140, 231-2 (McHugh J) (references omitted). His Honour went on to state that:

I pointed out that the *Engineers' Case* had made it plain that the Constitution was not to be interpreted by using such theories to control or modify the meaning of the Constitution unless those theories could be deduced from the terms or structure of the Constitution itself. It is the text and the implications to be drawn from the text and structure that contain the meaning of the Constitution. With all due respect to the judges of this Court who have held that there is a free-standing principle of representative democracy in the Constitution, their conclusion necessarily involves a rejection of the principles of interpretation laid down in the *Engineers' Case* although perhaps not the philosophy that lies behind that decision: *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

⁸⁹ See *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J). See also, *McGinty v Western Australian* (1996) 186 CLR 140, 291 (Gummow J). See also the comments of Justice McHugh and Gummow in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* where their Honours state:

In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validity made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying to the Constitution: see *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23.

⁹⁰ Justice Ian Callinan, 'Comment on Philip Ayres article: Dixon's View of the Privy Council' (2003) 24 *Australian Bar Review* 18, 21.

⁹¹ Justice Dyson Heydon 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

The approach [is] to start with the question, not the answer. Of course, an accurate identification of the question is informed by legal principle, but the problems vary. The nature of the problem will determine the range of possible solutions. Principles of interpretation, exemplified by authoritative solutions, help to define the point, point to legitimate methods of performing it and eliminate methods that are illegitimate or simply unhelpful. There is no single solution. This is reflected in the approach of judges. It may be possible, by observing the way in which a particular judge sets about resolving a sufficiently large number of different problems, to describe the judge's methodology by some succinct and convenient formula; or it may not. But most Australian judges, if they were ever tempted to perform such task for themselves, would think it prudent to do so in their last case; not their first.⁹²

In this manner Gleeson CJ, not only criticises result-orientated judicial reasoning; His Honour also declines to endorse the idea that constitutional interpretation is likely to be guided by broad principles of general application. In *Brownlee v The Queen*, Gleeson CJ and McHugh J commented that the regard had to the 'significance of the circumstances surrounding the framing of the instrument will vary according to the nature of the problem.'⁹³ A similar reference to the need to interpret the Constitution according to the nature of issues arising was made by Justice Gummow in *SGH Ltd v Commissioner of Taxation*.⁹⁴

Of the current High Court it would appear that only Kirby J openly acknowledges the influence of a wide range of ideas. Kirby J, advances a 'textualist' approach to constitutional interpretation, however His Honour has also shown a strong tendency to consider the influence of principles of universal and fundamental rights.⁹⁵ It should however be noted that for Kirby J

⁹² Murray Gleeson, 'Foreword' to Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) viii-ix.

⁹³ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J).

⁹⁴ *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J).

⁹⁵ See Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 238-9. See, for example, Justice Kirby's reliance in *Kartinyeri v Commonwealth*, upon the text of the *Constitution*. In that case his Honour stated that:

The duty of the Court is to the Constitution. Neither the Court, nor individual Justices, are authorised to alter the essential meaning of that document. The Court itself is created by the Constitution which is expressed in a form the text of which cannot be altered except with the authority of the electors qualified to vote. It is the text (with its words and structure) which is the law to which the Court owes obedience. ... This emphasis upon the text of the document is beneficial. It tames the creative imagination of those who might be fired by the suggested requirements of changing times or by the perceived needs of justice in a

reference to a broader range of ideas at times tends to be founded upon the role of Australia as part of the international community, with membership of this community being for Justice Kirby the foundation which justifies in some circumstances judicial reference to international law or prevailing international norms.⁹⁶ This perspective may differ from that offered by natural law reasoning which founds the idea of natural law principles as being something held by individuals.⁹⁷ By way of synopsis it is suggested that, the approach of Kirby J aside, the majority of other members of the Gleeson Court have tended to distinguish their Honours judicial approach from a broad theoretical approach which is based upon natural law principles.⁹⁸

V CONCLUSION

Natural law perspectives emphasise the fundamental inalienable rights of individuals. The development of natural law ideas by John Locke is particularly significant in a constitutional context, as Locke reasons that the judiciary has a role in protecting the rights and interests of

particular case. The text is law. It may be elaborated by the most ample construction as is appropriate to a grant of legislative power in a relatively inflexible fundamental law intended to provide indefinitely the legal foundation for the government of the Australian people. But judicial interpretation of the Constitution risks the loss of legitimacy if it shifts its ultimate focus of attention away from the text and structure of the document: *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 399-400 (Kirby J) (citations omitted).

His Honour went on to state that:

Where the Constitution is ambiguous, this Court should adopt that meaning which conforms to the principles of universal and fundamental rights rather than an interpretation which would involve a departure from such rights ... There is no doubt that, if the constitutional provision is clear and if a law is clearly within power, no rule of international law, and no treaty (including one to which Australia is a party) may override the Constitution or any law validly made under it ... Where there is ambiguity, there is a strong presumption that the Constitution, adopted and accepted by the people of Australia for their government, is not intended to violate fundamental human rights and human dignity ... Likewise, the Australian Constitution, which is a special statute, does not operate in a vacuum. It speaks to the people of Australia. But it also speaks to the international community as the basic law of the Australian nation which is a member of that community: *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 417-418 (Kirby J).

Aspects of this approach may be contrasted to that advocated by Justice Callinan: see Justice IDF Callinan, 'International Law and Australian Sovereignty' *Quadrant*, (2005) July -August, 9, 13.

⁹⁶ *Ibid.*

⁹⁷ See, for example, John Locke, *Two Treatises of Government*, Chapter II, paragraph 6, [Critical edition by Peter Laslett, 2nd ed, 1967] 289.

⁹⁸ See, for example, *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J); *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Justice Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110; Justice Ian Callinan, 'Comment on Philip Ayres article: Dixon's View of the Privy Council' (2003) 24 *Australian Bar Review* 18, 21.

individuals. The analysis presented in this Chapter has argued that the theoretical perspective offered by natural law theorists is reflected in some ways in the jurisprudence of Justices Deane and Toohey. Put simply, the approach of Justices Deane and Toohey had a tendency of have regard to the rights and interests of individuals and their Honours jurisprudence accorded the judiciary a significant role in safeguarding these interests. That said, the approach of Justices Deane and Toohey, like most Australian jurists remains within the broad rubric of textualism,⁹⁹ and the extent to which their Honours departed from the text of the Constitution may at times be overemphasised.¹⁰⁰

The jurisprudence of Justices Deane and Toohey and its links with a natural law perspective have been emphasised in this Chapter. It is however important to appreciate that the approach of Justices Deane and Toohey is best understood in the context of the various movements in constitutional law and methodology that occurred whilst their Honours were members of the High Court. These contemporaneous developments were considered further in Chapter 3 and included the significant development by Sir Anthony Mason of a realist-based jurisprudential approach. Although it may be that in the context of the discussion presented in this thesis, an analysis of the jurisprudence of Justices Deane and Toohey considered in isolation would not be sufficient to establish some of the broader general themes that are considered in this thesis, there are at least three important points that may be drawn from a consideration of the jurisprudence of Justices Deane and Toohey which contribute to the analysis presented in this thesis.

From the point of view of the larger argument of this thesis, the first and perhaps the most fundamental idea that can be drawn from the above analysis is that the jurisprudence of Justices Deane and Toohey is based upon a *principled* and *theoretical* position. It is the *theoretical* aspects of their Honours' approach from which the current Court has most directly sought to distance itself. It will be recalled from the analysis presented in Chapters 2 and 3 that the Gleeson Court also moved, albeit more subtlety, in a similar direction away from the *theoretical assumptions* of

⁹⁹ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 238-9.

¹⁰⁰ See further, Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574, 576.

Dixonian legalism, and from the realist based theoretical arguments put forward by Sir Anthony Mason. Although the Gleeson Court has not embraced the theoretical aspects of judicial reasoning offered by the jurisprudence of Sir Owen Dixon, Sir Anthony Mason, Sir William Deane or Justice Toohey, it is difficult to identify in the jurisprudence of most members of the current Gleeson Court an alternative theorised or principled argument being offered by their Honours, in support of their Honours' doctrinal approach.

The second important point that may be drawn from the discussion presented in this Chapter concerns the manner in which the jurisprudence of Justices Deane and Toohey emphasised the interests of the individual. Although a similar concern was identified in the jurisprudence of Sir Anthony Mason, it is suggested that the approach of Deane and Toohey JJ was significantly different from the Mason perspective in terms of role accorded to the judiciary to protect the interests of the individual. The influence of Justices Deane and Toohey upon the Mason Court may also at times be underestimated.¹⁰¹ Although their Honours' methodology stands outside that of other members of the Mason Court, the position put forward by Justices Deane and Toohey on a number of occasions drew support from other members of that Court,¹⁰² and it is argued that their Honours' ideas were a significant influence upon the general movement by the High Court during the Mason era away from legalism. In particular, the Mason Court considered as a whole can be viewed as moving towards a position in which the interests of the individual were a fundamental concern, for the judiciary, in deciding constitutional questions. The current Gleeson Court has resiled from this approach.

The analysis presented in Part II of this thesis will seek to show in more detail the manner in which the legalistic interpretation of constitutional terms by the Gleeson Court has evidenced a shift in focus away from the perspective of Deane and Toohey JJ. In particular, it will be demonstrated that the Gleeson Court tends to highlight as a matter of concern the need to preserve the *integrity* of the *institution* of the *judiciary*, rather than the interests of individuals. Although the protection of the institution of the judiciary can have a flow on effect upon the

¹⁰¹ See, for example, Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004).

¹⁰² Most notably Gaudron J. See further, Russell Smyth, "Some Are More Equal than Others" - An Empirical Investigation into the Voting Behaviour of the Mason Court' (1999) 6 *Canberra Law Review* 193.

interests of the individual, the analysis presented in this thesis argues that even when this occurs, a perspective which focuses upon the institution of the judiciary is *different* from a natural law focus, which considers the primary interests of the individual. There is an important dissimilarity in the conception of the judicial role. For example, a perspective that focuses on the terms of the Constitution can emphasise the institution of the judiciary and may accord the judiciary a role in the interpretation of the scope of the powers of Parliament; in contrast, a natural law perspective sees the judicial role as being derived from the interest that an individual has in ensuring that others, including the State, preserve and protect the interests of the individual. The third significant conclusion is that a consideration of the width of Justice Deane's and Justice Toohey's perspective provides a basis for recognising the manner in which the scope of jurisprudence offered by the Gleeson Court is comparatively narrower.

This Chapter has focused upon the movement of the Gleeson Court away from a theorised approach to legal reasoning which is based upon broad natural law principles. This movement is consistent with the general tendencies of the Gleeson Court to avoid engaging in theorised reasoning, and to offer instead a largely practical legalistic approach, as suggested in Chapters 2 and 3. Not only is theory absent, but its avoidance is actively encouraged. Yet, numerous criticisms attach to a legal reasoning, in the absence of a sound theoretical foundation, as was discussed in Chapter 3.

The absence of theoretical reasoning in judicial decision-making is however an approach which is at times advocated. For example, jurisprudential writings in the United States evidence, with the decline of the legal realist movement, a resurgence of legal pragmatism – which advocates a largely non-theoretical position.¹⁰³ For this reason the following Chapter will consider the relevance of contemporary legal pragmatism to the jurisprudence of the Gleeson Court.

¹⁰³ M D A Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 817. See, for example, Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

Chapter 5

CONTEMPORARY PRAGMATIC THOUGHT

I INTRODUCTION

Pragmatism has a long history in American thought. It is now an established and influential movement in American jurisprudence. In contrast, as Geoff Lindsay SC points out, the 'centre-point' of Australian debate, whether it is embraced or rejected remains Sir Owen Dixon's 'aphorism' that 'there is no other safe guide to judicial decision in great conflicts than a strict and complete legalism'.¹ The discussion in this Chapter will begin by contrasting the influence of pragmatism upon constitutional interpretation in the United States and Australia. It will be concluded from this discussion that Australian jurisprudence has not tended to examine the potential relevance of pragmatic thought. The analysis presented in this thesis will seek to fill this perceived vacancy in this field of inquiry. A fundamental aim of this Chapter and Chapter 6 will be to critically assess in an Australian context, the extent to which an understanding of legal pragmatism may assist a conceptual understanding of the approach taken to constitutional issues by the current High Court.

¹ Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 247 footnote 7. See also, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

To understand the approach of the current High Court from a pragmatic perspective, it is necessary and desirable to firstly define in some detail what is meant by pragmatism. For this reason, having considered the contrasting influence of pragmatism in the United States and Australia, the discussion presented in this Chapter will focus on contemporary pragmatic thought. This discussion will seek to distinguish pragmatic approaches from other modes of thought.

The presentation of the central ideas associated with a pragmatic approach will be followed by a more detailed examination of the work of two prominent and leading writers associated with the development of pragmatic thought in a *legal* context.² The first is Judge Posner of the United States Court of Appeals. The second is American writer Professor Cass Sunstein. The descriptive analysis of the central tenets of pragmatism and the discussion of legal pragmatism presented in this Chapter will establish some workable parameters for the analysis presented in this thesis. It will also provide a basis for engaging with the final topic examined in this Chapter, namely the criticisms that have been made of pragmatic approaches. This analysis provides a critical perspective upon the benefits and disadvantages of *theorised* and largely *non-theorised* approaches to judicial decision making.

The analysis presented in this Chapter aims to provide a foundation for the discussion presented in Chapter 6, which considers the extent to which an understanding of pragmatism may assist a conceptual understanding of the approach taken by the current High Court. In addition, the conceptual understanding of pragmatism and the criticisms made of this approach that are discussed in this Chapter, will underlie the critical analysis in Part II of this thesis of the approaches taken by differently constituted High Courts in some significant constitutional decisions. In particular this analysis provides the foundations for the critical examination in Part II of the use of theoretical approaches in constitutional decisions.

² See Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 19-20, 21-22.

II CONSTITUTIONAL INTERPRETATION AND PRAGMATISM IN THE UNITED STATES AND AUSTRALIA

The traditional view that the constitutional text is the sole source of authority in any constitutional question is widely held to be untenable in contemporary times.³ For example, Professor Michael Detmold has argued that;

the truth of the matter is that law is not text, it is the use made of text. If there is a constitutional truth to be found it is not in the text of the constitution, but rather in the function of applying the text to the governance of a community.⁴

In addition, Professor Michael Coper has suggested that: 'It will be a rare case indeed in which the Constitution compels a particular answer to a disputed question.'⁵ The recognition of the limited extent to which the text will guide constitutional law, together with the relative difficulty generally associated with attempts to amend the text of a constitution, affects the role that constitutional interpretation plays in any legal system based upon a written constitution. In the context of the American system, it has been said that: '[c]onstitutional interpretation has been the only method available as a practical matter in United States constitutional law to deal with change and its consequence for the constitutional order.'⁶ Similar observations have often been made of the Australian system.⁷ It might be expected given the dependency of

³ Adrienne Stone, 'Constitutional Interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 137, 139; Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 13.

⁴ Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 5.

⁵ Michael Coper, 'Interpreting the Constitution: A Handbook for Judges and Commentators' in Tony Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (1983) 55.

⁶ Mark Tushnet, 'The United State: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 7, 16-17. See generally, John Vile, *Constitutional Change in the United States: A Comparative Study of the Role of Constitutional Amendments, Judicial Interpretations, and Legislative and Executive Actions* (1994).

⁷ Michael Coper, 'The People and the Judges: Constitutional Referendums and Judicial Interpretation' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 73, 73, 87-89; Leslie Zines, *Constitutional Change in the Commonwealth* (1991); Geoffrey Lindell, 'Recent Developments in the Judicial Interpretation of the Australian Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 1; Brian Galligan, 'The Australian High Court's Role in Institutional Maintenance and Development' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 184; Gareth Evans, 'The Most Dangerous Branch? The High Court and the Constitution in a Changing Society' in David Hambly and John

constitutional developments upon judicial interpretation, that in both the United States and Australia at the forefront of constitutional law discourse would be a wide ranging debate about issues of constitutional interpretation. However, the manner in which jurists, from each of these jurisdictions, analyse issues of constitutional interpretation differs significantly.

The lack of analysis from a wider theoretical perspective in Australian writings is particularly apparent when the large amount of jurisprudence that has developed in other jurisdictions is considered. In a survey of constitutional theories, Sir Anthony Mason focuses upon the work of only one Australian theorist.⁸ In constitutional jurisdictions other than Australia, contemporary debate concerning constitutional interpretation has expanded beyond questions concerning what other reference points beyond the text of the Constitution may be legitimately used as guides in constitutional decisions. Debate in other jurisdictions, with the United States being perhaps the most obvious example, has expanded to focus attention on more general questions about the role of the constitution and the purpose that it is intended to serve.⁹ It is also apparent from even the briefest survey of legal writings in the United States that there are countless movements, themes and methods of interpretation that may be identified in constitutional cases.¹⁰ Of particular influence in contemporary United States jurisprudence concerning *constitutional interpretation* has been the work of a number of writers associated with legal pragmatism.¹¹

Goldring (eds), *Australian Lawyers and Social Change* (1976) 13; Brian Galligan, 'The Politics of Constitutional Change' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (1997) 6, 14.

⁸ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 22. Sir Anthony Mason considers Professor Michael Detmold's articles, 'The New Constitutional Law' (1994) 16 *Sydney Law Review* 228, and 'Australian Law: Federal Movement' (1991) *Sydney Law Review* 31.

⁹ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 14.

¹⁰ See Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13; Sir Anthony Mason, 'Trends in Constitutional Interpretation' (1995) 18 *University of New South Wales Law Journal* 237, 249; Mark Tushnet, 'The United State: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 7; Haig Patapan, 'Politics of Interpretation' (2000) 22 *Sydney Law Review* 247, 270-271. For example, Jed Rubenfeld comments in the context of United States jurisprudence that, '[i]n constitutional law today, there is a surfeit of interpretive approaches: originalist, literalist, activist; moral-philosophical, structural, law-and-economical; precedent-based, process-based, tradition-based, justice-based; and more besides': Jed Rubenfeld 'Legitimacy and Interpretation' in Larry Alexander (ed), *Constitutionalism: Philosophical Foundations* (1998) 194, 198.

¹¹ See in particular, Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1; Judge Richard Posner, *The Problems of Jurisprudence* (1990); Judge Richard Posner, *Overcoming Law* (1995); Judge Richard Posner, *The Problematics of Moral*

Contemporary United States legal pragmatism may be regarded as developing significantly following the perceived decline of the legal realist movement in American jurisprudence.¹² However, pragmatic thought has a long history in America that predates the 1960s, with pragmatic thought being foundational to both legal realism and legal pragmatism. Both John Dewey¹³ and William James,¹⁴ who were writing at the turn of the last century, were exponents of pragmatism. The work of these writers has been influential, however there is a tendency for legal pragmatism, like the legal realist movement, to trace its origins to the writings of Justice Oliver Wendell Holmes.¹⁵ Although contemporary writers tend to portray the initial origins of legal pragmatism as being confined, legal pragmatism is currently an expanding area of jurisprudence in the United States and the literature associated with pragmatism is correctly described as 'vast'.¹⁶

This Chapter will draw upon a number of writings that have been identified as being 'representative' of legal pragmatic thought,¹⁷ as well as considering a number of additional or

and Legal Theory (1999); Judge Richard Posner, *Frontiers of Legal Theory* (2001); Judge Richard Posner, *Law, Pragmatism, and Democracy* (2003); Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Partial Constitution* (1993); Cass Sunstein, *Legal Reasoning and Political Conflict* (1996); Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999).

¹² MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 817. See, for example, volume 18(1) of the *Cardozo Law Review* (1996) entitled 'The Revival of Pragmatism', and volume 63(6) of the *Southern California Law Review* (1990) entitled 'Symposium on the Renaissance of Pragmatism in American Legal Thought'.

¹³ See, for example, John Dewey 'Logical Method and Law' (1924) 10 *Cornell Law Quarterly* 17.

¹⁴ William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907); William James, *The Meaning of Truth: A Sequel to 'Pragmatism'* (1909).

¹⁵ MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 799ff. There has, however, been some debate over the influence of the philosophy of pragmatism on the work of Justice Oliver Wendell Holmes. For an analysis that emphasises the pragmatic nature of the jurisprudence of Justice Holmes see: Catherine Wells Hantzis, 'Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr' (1988) 82 *Northwestern University Law Review* 541; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787. These views may be compared with: Patrick J Kelley, 'Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument' (1990) 14 *Southern Illinois University Law Journal* 427. See also the discussion of this issue in MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 800, footnote 5, and Paul L Gregg, 'The Pragmatism of Mr Justice Holmes', (1943) 31 *The Georgetown Law Journal* 262, 262. On the relevance of the philosophy of pragmatism to the work of writers associated with realism, see further: Julius Stone, *The Province and Function of Law* (1946) 355ff.

¹⁶ See Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, footnote 1. See also, Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 409; Patrick J Kelley, 'Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument' (1990) 14 *Southern Illinois University Law Journal* 427, 427.

¹⁷ Thomas Cotter, Steven Smith and Patrick Kelly have identified a number of pragmatic writings as being 'representative': see Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, footnote 1; Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 409 and Patrick J Kelley, 'Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument' (1990) 14 *Southern Illinois University Law Journal* 427, 427. The pragmatic works presented as representative by these articles, which are considered in this Chapter include: Daniel A. Faber, 'Legal Pragmatism and the Constitution' (1988) 72 *Minnesota Law Review* 1331; William N. Eskridge, Jr and Phillip P. Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Stanford Law Review* 321; Daniel A. Faber and Phillip P. Frickey, 'Practical Reason

more recent sources.¹⁸ The voluminous nature of the writings associated with pragmatism is perhaps, in part, a consequence of the diversity of opinion that may be associated with pragmatic perspectives.¹⁹ For example, the relevance of pragmatism to 'progressive and feminist scholars' has been a matter of debate: and some participants in this discussion, have stressed the similarities between feminism and pragmatism.²⁰ However, it should be noted that some writers have viewed legal pragmatism as justifying the existing societal structures to such a degree, that pragmatism is seen as diverging from the perspective of thinkers that challenge aspects of the existing social order.²¹ Conservative scholars may also be associated with pragmatism. Perhaps the most notable, and certainly the most prolific conservative scholar associated with pragmatism is Judge Richard Posner, who is also aligned ideologically with the law and economics movement.²² Within and to the centre of this political spectrum of writers

and the First Amendment' (1987) 34 *University of California Los Angeles Law Review* 1615, 1639-56; Margaret Radin, 'The Pragmatism and the Feminist' (1990) 63 *Southern California Law Review* 1699; Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision* (1985) 46 *University of Pittsburgh Law Review* 673, 680; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787; Judge Richard Posner, *Overcoming Law* (1995); Judge Richard Posner, 'What has Pragmatism to Offer Law?' (1990) 63 *Southern California Law Review* 1653; Judge Richard Posner, *The Problems of Jurisprudence* (1990); Catherine Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1728.

¹⁸ More recent or additional works considered in this Chapter that relate to legal pragmatism include: Mark Tushnet, 'The United State: Eclecticism in the Service of Pragmatism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 7; Jay Feinmann, *Practical Legal Studies and Critical Legal Studies* (1988) 87 *Michigan Law Review* 724; Paul L Gregg, 'The Pragmatism of Mr Justice Holmes' (1943) 31 *The Georgetown Law Journal* 262; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 5 Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1; Judge Richard Posner, *The Problems of Jurisprudence* (1990); Judge Richard Posner, *Overcoming Law* (1995); Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999); Judge Richard Posner, *Frontiers of Legal Theory* (2001); Judge Richard Posner, *Law, Pragmatism, and Democracy* (2003); Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Partial Constitution* (1993); Cass Sunstein, *Legal Reasoning and Political Conflict* (1996); Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005); Joshua Getzler, 'Pragmatism and the End of Ideology' (1997) 17 *Oxford Journal of Legal Studies* 525, 532; Edward Rubin, 'Legal Reasoning, Legal Process and the Judiciary as an Institution' (1997) 85 *California Law Review* 265.

¹⁹ See Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2071, 2073-4.

²⁰ See Margaret Radin, 'The Pragmatism and the Feminist' (1990) 63 *Southern California Law Review* 1699, 1705; Catherine Wells Hantzis, 'Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr' (1988) 82 *Northwestern University Law Review* 541, 543.

²¹ See, eg. Jay Feinmann, *Practical Legal Studies and Critical Legal Studies* (1988) 87 *Michigan Law Review* 724, 727-31.

²² Judge Richard Posner, *Frontiers of Legal Theory* (2001) 95-141. See also Judge Richard Posner, 'What has Pragmatism to Offer Law?' (1990) 63 *Southern California Law Review* 1653; Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1; Judge Richard Posner, *The Problems of Jurisprudence* (1990); Judge Richard Posner, *Overcoming Law* (1995); Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999); Judge Richard Posner, *Frontiers of Legal Theory* (2001); Judge Richard Posner, *Law, Pragmatism, and Democracy* (2003).

associated with pragmatism are the 'mainstream liberal moderate-conservative'²³ views of writers such as Thomas Grey and Professor Cass Sunstein. This diversity of opinion suggests that like realism, pragmatism may be more accurately described as a movement, than a fixed ideological position.²⁴ The diversity of legal pragmatic thought has however not undermined the influence of legal pragmatic perspectives. In the early 1990s, leading legal thinkers in the United States celebrated the 'revival'²⁵ or 'renaissance'²⁶ of pragmatism in American legal thought.²⁷ Legal pragmatism in the United States may now be regarded as an established and influential movement, and it is in the context of this debate, that in the field of constitutional interpretation the writings of Judge Posner and Cass Sunstein have been influential. Significantly, the work of both these writers engages in the wide theoretical debate about the role of a constitutional judge.²⁸

If it is accepted that in general the 'lure of theoretical illumination', has been 'resisted by many of Australia's constitutional scholars',²⁹ then the deficit in this form of analysis would seem to be strikingly apparent when considering legal pragmatism. Although Sir Anthony Mason has considered the writings of Posner and Sunstein,³⁰ and Adrienne Stone has commented upon the work of Sunstein,³¹ it would seem that Australian legal writings have not tended to consider in detail the ideas put forward by pragmatic writers such as Judge Posner and Professor Sunstein.

²³ See Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2074.

²⁴ See, for example Judge Richard Posner, 'What has Pragmatism to Offer Law?' (1990) 63 *Southern California Law Review* 1653; Margaret Radin, 'The Pragmatism and the Feminist' (1990) 63 *Southern California Law Review* 1699, 1705.

²⁵ See, for example, volume 18(1) of the *Cardozo Law Review* (1996) entitled 'The Revival of Pragmatism'.

²⁶ See, for example, volume 63(6) of the *Southern California Law Review* (1990) entitled 'Symposium on the Renaissance of Pragmatism in American Legal Thought'.

²⁷ The revival of pragmatic thought has been associated with the decline of legal realism, see: MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 817. It should also be noted at this point that legal realism and contemporary legal pragmatism both rely upon philosophical pragmatism. Some links between realist thought and recent writings on legal pragmatism may be identified, with the most apparent similarity being the emphasis that these methodologies place upon the practical content of the law, and a scepticism of legal foundationalism. However, it will be argued later in this Chapter, that there are significant differences between these perspectives. Furthermore, it will be argued that these differences are particularly apparent from an Australian perspective. The reason for this being that that Australian realism, as Chapter 3 discussed, has sociological emphasis that may be associated with the writings of Julius Stone and the development of legal thought in the Mason era.

²⁸ See, for example, Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 17; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1751-63.

²⁹ See John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 119, 119, 120.

³⁰ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13.

³¹ Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195.

Furthermore, the implications of these pragmatic approaches remain largely unexplored in the context of Australian decisions.³² It may be suggested that to the extent that legal pragmatism has been considered in Australian legal writings, it has tended to generate and renew the existing debate, rather than to extend the parameters of legal discussion. For example, debate concerning constitutional methodology in Australia tends to focus discussion on the legitimacy of judicial approaches that consider reference points beyond the text of the Constitution. The idea that pragmatic or result-orientated reasoning processes could be informing judicial reasoning is at times immediately rejected,³³ and discussion concerning such approaches is rarely put forward. As noted above, Geoff Lindsay SC sees the centre point of this Australian debate being Sir Owen Dixon's comments about legalism.³⁴ It is however interesting to note that Lindsay's comments³⁵ were made in the context of a review by Lindsay of a recent work on pragmatism by New Zealand judge, Justice E W Thomas.³⁶ Although, Lindsay applauded the extent to which that work engaged in a theoretical analysis, in general Lindsay's comments may be interpreted as suggesting that pragmatic writings may be of limited relevance to an Australian audience because they do not generally engage with the orthodox perspective attributed to Sir Owen Dixon.³⁷ However, the contrary perspective, as Lindsay appears to acknowledge, may also be equally arguable.³⁸ That is, because pragmatic reasoning diverges from the more formulistic approach found in orthodox legalistic techniques, it can provide a different and potentially informative basis for analysing constitutional decisions.

Although pragmatism could have some relevance to Australian jurisprudence it should be noted that, as Justice Bradley Selway has pointed out, 'American debate cannot simply be

³² See further, *ibid.*

³³ For example, as discussed in Chapter 4, Gleeson CJ has written that; 'The approach [is] to start with the question, not the answer': see Murray Gleeson, 'Foreword' to Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) viii-ix. See also the comments of Sir Anthony Mason, discussed in Chapter 3, by which Mason CJ expressed the view that: 'It would therefore be a serious mistake to assume that, in deciding a case, the Court as an institution embarks upon any general policy with a view to achieving a particular goal, political or otherwise, external to the disposition of that case': see Sir Anthony Mason, Foreword to Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (2000) viii-ix.

³⁴ Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 245. See also, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554.

³⁵ *Ibid.*

³⁶ E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005).

³⁷ Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 245.

³⁸ *Ibid.*

“transplanted” to Australia.³⁹ In addition, Professor Cheryl Saunders has cautioned against Australia adopting United States theories of adjudication indiscriminately, particularly at a time when ‘the *new pragmatism* is on the rise’.⁴⁰ The new pragmatism to which Saunders specifically referred was the writings of Judge Posner.⁴¹ Although some caution should attach to the use of United States jurisprudence in an Australian context, and the central tenets of pragmatic thought should not be uncritically adopted, pragmatism represents a particular outlook which, for the following four reasons, it is important to consider in the context of the argument presented in this thesis.

The first reason for the relevance of pragmatism in an Australian context is that Australian legal writings have not remained completely insulated from the debate generated by United States writers that are associated with legal pragmatism. In 1996 in *McGinty v Western Australia*⁴² Judge Posner’s references to ‘bottom-up’ reasoning as being the ‘more hallowed type’⁴³ of legal reasoning were picked up and quoted with rapturous approval by Justice McHugh.⁴⁴ However, Justice McHugh’s comments focused on the dichotomy drawn by Judge Posner between ‘top-down’ and ‘bottom-up’ reasoning, and did not consider in detail the pragmatic approach to judicial decision making advocated by Judge Posner.⁴⁵ That said, the use of Judge Posner’s comments, by Justice McHugh in *McGinty v Western Australia* ignited some debate in Australian legal writings, however this debate, like McHugh J’s comments, has tended to focus on the divide between ‘top-down’ and ‘bottom-up’ reasoning.⁴⁶

³⁹ Justice Bradley Selway, ‘Methodologies of constitutional interpretation in the High Court of Australia’ (2003) 14 *Public Law Review* 234, 238.

⁴⁰ Cheryl Saunders ‘Oration: Sir Daryl Dawson’ (1998) 20 *Adelaide Law Review* 1, 7 (emphasis mine).

⁴¹ In particular, Judge Richard Posner, ‘Legal Reasoning from the Top Down and from the Bottom Up’ in *Overcoming Law* (1995) 171; see Cheryl Saunders ‘Oration: Sir Daryl Dawson’ (1998) 20 *Adelaide Law Review* 1, 7 footnote 32.

⁴² *McGinty v Western Australia* (1996) 186 CLR 140 (‘*McGinty*’).

⁴³ Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 434.

⁴⁴ See *McGinty v Western Australia* (1996) 186 CLR 140, 230-232 (McHugh J).

⁴⁵ *Ibid.* Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 433.

⁴⁶ See, for example, Justice Keith Mason, ‘What is Wrong with Top-Down Legal Reasoning?’ (2004) 78 *Australian Law Journal* 574, 574; Justice Dyson Heydon, ‘Judicial activism and the death of the rule of law’ (2003) 23 *Australian Bar Review* 110; Allan C Hutchinson, ‘Heydon’ Seek: Looking for Law in all the Wrong Places’ (2003) *Monash University Law Review* 85. See also Stephen Gageler, ‘The Underpinnings of Judicial Review of Administrative Action: Common Law or Constitution’ (2000) 28 *Federal Law Review* 303, 313.

Justice Keith Mason made a relevant contribution to this debate in an article that defended the use of theoretical reasoning.⁴⁷ In contrast to the views that Justice Keith Mason expressed, Justice Dyson Heydon, in an extra judicial speech, given before his appointment to the High Court, advocated an approach that has been described as 'fundamentalist in its formalism'.⁴⁸ Justice Dyson Heydon supported a judicial methodology that focuses on the immediate controversy and avoids theoretical reasoning. Both Justice Keith Mason and Justice Dyson Heydon seek to tie their respective positions in some way to the jurisprudence of Sir Owen Dixon. But clearly Justice Keith Mason and Justice Heydon are at odds in terms of their respective positions.⁴⁹ From the point of view of the current discussion these articles illustrate the nature of the debate generated by Justice McHugh's reference to Judge Posner's work.⁵⁰

The second reason which indicates the importance of considering a pragmatic perspective is that an analysis of contemporary pragmatic thought covers much new ground in an Australian context. Even if the relevance of a pragmatic thesis to current Australian jurisprudence is found to be limited or is ultimately rejected, a consideration of the different mode of thinking that pragmatism offers has the potential to enhance and further current understandings of existing approaches.⁵¹

A third reason for considering pragmatism is that a number of leading commentators have noted the extent to which the Gleeson Court considers the practical implications of its decisions. For example, Leslie Zines has suggested that the Gleeson Court, particularly in relation to Chapter III cases, has at times had regard to practical consequences,⁵² and Justice Paul Finn has

⁴⁷ See Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 574.

⁴⁸ Allan C Hutchinson 'Heydon' Seek: Looking for Law in All the Wrong Places' (2003) 29 *Monash Law Review* 85, 86.

⁴⁹ See Justice Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

⁵⁰ It may be recalled that these articles were also referred to in Chapter 2, to illustrate that even contemporary debate concerning the legitimacy of the use of theoretical reasoning in judicial decisions in an Australian constitutional context, continues to take as its reference point the jurisprudence of Sir Owen Dixon. In addition the variance of the views of Justice Keith Mason and Justice Dyson Heydon, was referred to in Chapter 2 as exemplars of the point that Sir Owen Dixon's jurisprudence has been the subject of varying interpretations.

⁵¹ Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 245.

⁵² Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 224, 232-238.

also referred to the Gleeson Court as having a 'varying regard for consequentialist considerations when shaping doctrine.'⁵³

The fourth and final reason for considering pragmatic perspective is that there has been some tendency for Australian jurisprudence to follow the trends set by United States jurisprudence, with the debate concerning 'originalism' being the most recent relevant example.⁵⁴

Put briefly, legal pragmatism is an influential movement in United States jurisprudence. It extends across a spectrum of political opinion; and legal pragmatism is a perspective, which in the future, may be the subject of further debate by Australian jurists. Legal pragmatism may also provide a unique opportunity for a consideration of the conceptual framework provided by recent philosophical and jurisprudential writings from overseas jurisdictions.

III DEFINING AND DISTINGUISHING PRAGMATISM

The inherent flexibility in a pragmatic approach can result in pragmatism being viewed as being reconcilable with almost any form of constitutional interpretation.⁵⁵ As one critic of pragmatism has commented, pragmatism may be regarded as being either hopelessly vague or as consisting mainly of platitudes with which no reasonable person can disagree.⁵⁶

⁵³ Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 229. See also Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249-50.

⁵⁴ See, eg, Justice Antonin Scalia, 'The role of a constitutional court in a democratic society' (1995) 2 *Judicial Review* 141; Justice Michael Kirby, 'Constitutional Interpretation and Original Intent; A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Dan Meagher, 'New day Rising? Non-originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141; Mirko Bagaric, 'Originalism: why some things should never change, or at least not too quickly' (2000) 19 *University of Tasmania Law Review* 173; Jeffrey Goldsworthy 'Interpreting the Constitution in its Second Century' (2000) 24 *Melbourne University Law Review* 677; Jeremy Kirk 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27 *Federal Law Review* 323; Jeffrey Goldsworthy, 'Originalism in constitutional interpretation' (1997) 25 *Federal Law Review* 1; Greg Craven, 'Original intent and the Australian Constitution: coming soon to a court near you?' (1990) 1 *Public Law Review* 166. See generally, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 326ff.

⁵⁵ See, for example, Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2072.

⁵⁶ See Richard Rorty, 'The Banality of Pragmatism and the Poetry of Justice' (1990) 63 *Southern Californian Law Review* 1811, 1811; Larry Alexander, 'Incomplete Theorizing: A Review Essay of Cass R. Sunstein's *Legal Reasoning and Political Conflict*' (1997) 72 *Notre Dame Law Review* 531, 534. See also, Steven Smith, *The Pursuit of Pragmatism* (1990) 100 *Yale Law Journal* 409, 424-444.

Furthermore, the diverse range of views that may be associated with pragmatism suggests that it may not be particularly helpful to simply describe an approach as being pragmatic. The difficulties associated with the use of the term 'pragmatism' should be recognised. However, the following discussion will suggest that notwithstanding these criticisms and definitional issues, some of the fundamental tenets presented by philosophical pragmatism and legal pragmatism may be identified and defined. It is however important to recognise at the start of this discussion that although pragmatism advocates a practical and empirical approach, the arguments that support the adoption of this approach form part of a wider theoretical perspective.⁵⁷ For this reason the acceptance of a pragmatic perspective may involve the acceptance of a particular theoretical position.⁵⁸ Put simply, although pragmatism is a practical approach which is often contrasted with 'theoretical reasoning'; pragmatism may also be associated with a particular theoretical perspective.⁵⁹ For example, Sunstein argues that the adoption of an essentially pragmatic approach to legal decision making requires the acceptance of at least one theorized position, namely the theory which seeks to justify the use of pragmatic reasoning.⁶⁰

The discussion of contemporary pragmatic thought presented below will begin by defining a pragmatic approach to constitutional interpretation and distinguishing this approach from the other approaches to constitutional interpretation that have been considered in this thesis. The foundational knowledge provided in this discussion will then be developed further in the following section, which considers the work of two specific writers associated with the use of pragmatic thought in a *legal* context. In addition, the descriptive analysis of pragmatism presented below, will provide a basis for engaging with the criticisms that have been made of legal pragmatism.

⁵⁷ See Julius Stone, 'From Principles to Principles' (1981) *Law Quarterly Review* 224, 253. This point is even accepted by Sunstein, see Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1771-72. See also P S Atiyah, 'From Principles to Pragmatism; Changes in the Function of the Judicial Process and the Law' (1978) also appearing in (1980) *Iowa Law Review* 1249; P S Atiyah, *Pragmatism and Theory in English Law* (1987).

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*

⁶⁰ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1771-72.

IV THE CENTRAL TENETS OF PRAGMATIC APPROACHES

The three forms of thinking often associated with pragmatism are usually termed, conceptualism, instrumentalism and perspectivism.⁶¹ When initially encountering these concepts it would appear that rather than clarifying the meaning of pragmatism, these terms merely result in the conceptually nebulous concept of 'pragmatism' being identified with three equally complicated concepts. However, whilst it may not be possible to *exhaustively* define pragmatism, it is argued that it is possible to illuminate the meaning attributable to the three terms centrally associated with pragmatism. Furthermore, it is suggested that this approach provides a conceptual understanding of the general philosophical approach associated with pragmatism, and assists in the identification of the relevance of legal pragmatism to constitutional interpretation.

A *Conceptualism*

The first central idea associated with pragmatism is the view that all knowledge is contextual. Thus, for pragmatic legal theorists law is 'constituted of practices—contextual, situated, rooted in custom and shared experiences.'⁶² This is the idea often identified with Justice Holmes' famous statement that, '[t]he prophecies of what the courts will do in fact, and nothing more pretentious, are what I mean by the law.'⁶³ Justice Holmes' perspective is generally regarded as consistent with the philosophical approach put forward by pragmatic thinkers such as John Dewey⁶⁴ and William James,⁶⁵ although it should be noted that the precise extent to which

⁶¹ Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 409; Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2074.

⁶² Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 805.

⁶³ Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 461.

⁶⁴ John Dewey 'Logical Method and Law' (1924) 10 *Cornell Law Quarterly* 17.

⁶⁵ William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907); William James, *The Meaning of Truth: A Sequel to 'Pragmatism'* (1909).

philosophical pragmatism may have influenced Justice Holmes is a matter of continuing debate.⁶⁶

The philosophy of pragmatism, 'directed the quest for understanding away from a metaphysical search for truth to an understanding of truth grounded only in experience and practical relations.'⁶⁷ As William James describes this:

Pragmatism represents a perfectly familiar attitude in philosophy, the empiricist attitude, but it represents it, as it seems to me, both in a more radical and in a less objectionable form than it has ever yet assumed. A pragmatist turns his back resolutely and once for all upon a lot of inveterate habits dear to professional philosophers. He turns away from abstraction and insufficiency, from verbal solutions, from bad *a priori* reasons, from fixed principles, closed systems, and pretended absolutes and origins. He turns towards concreteness and adequacy, towards facts, towards action and towards power. That means the empiricist temper regnant and the rationalist temper sincerely given up. It means the open air and possibilities of nature, as against dogma, artificiality, and the pretence of finality in truth.⁶⁸

In this way, philosophical pragmatism places greater importance upon the *practical* than the *absolute*. Consistently with philosophical pragmatism, in law, a pragmatic outlook is often identified with an approach that requires judicial decision-making to be viewed in the context of a particular factual situation that calls for resolution.

The idea that all knowledge is contextual, and statements that suggest that all law must be understood as related to a particular factual context may seem unremarkable, however for pragmatists, this is an important point. Pragmatic theories usually state that the contextual perspective of pragmatism, distinguishes pragmatism from the assumptions that underlie more

⁶⁶ See, for example, Catherine Wells Hantzis, 'Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr' (1988) 82 *Northwestern University Law Review* 541; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787; Patrick J Kelley, 'Was Holmes a Pragmatist? Reflections on a New Twist to an Old Argument' (1990) 14 *Southern Illinois University Law Journal* 427; MDA Freeman, *Lloyd's Introduction to Jurisprudence* (7th ed, 2001) 800, footnote 5; Paul L Gregg, 'The Pragmatism of Mr Justice Holmes', (1943) 31 *The Georgetown Law Journal* 262, 262.

⁶⁷ Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 143.

⁶⁸ William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 51.

formulistic modes of legal thinking.⁶⁹ It is relevant to note at this point that, legal reasoning generally, and particularly that reasoning which concerns Australian constitutional law, tends to be connected with factual controversies.⁷⁰ The distinction that is drawn between the contextualism of pragmatism and the formalism that characterises some other methods of legal reasoning, is often exemplified through a consideration of the manner in which a contextual understanding of knowledge rejects the correspondence theory of truth.⁷¹

The correspondence theory of truth suggests that there is some external standard by which the validity of a particular view may be assessed, thus for 'correspondence theories' a view is valid if it 'corresponds' with the external standard. For example, in Chapter 4 it was suggested that natural law theories generally assert a number of inalienable principles, and allow for the validity of any particular law to be determined in accordance with whether it is consistent with or 'corresponds' to these natural law principles.⁷² In this way, natural law approaches are generally distinguishable from the 'contextualism' of pragmatism as they may be regarded as being based upon the correspondence theory of truth.⁷³

It may also be argued that legalism, which generally asserts that there is a finite body of legal knowledge and that the validity of legal enactments or judicial decisions may be determined in accordance with whether they fall within or are consistent with this body of legal knowledge, is also based upon and accepts the correspondence theory of truth. Legalism generally, or at least the least narrow version of this doctrine, usually asserts that the validity of a judicial decision

⁶⁹ See Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2075. See also, Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) see especially pages 115 and 117, paragraphs, 5.5571-5.621, and 5.641 [First German edition *Logisch-philosophische Abhandlung* published 1921].

⁷⁰ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Mellifont v Attorney-General (Queensland)* (1991) 173 CLR 289; *DPP v B* (1998) 194 CLR 566; *Croome v Tasmania* (1997) 191 CLR 119; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591.

⁷¹ Richard Rorty, *Consequences of Pragmatism* (1982) xxxvii; Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2075-6; Hilary Putnam, *Pragmatism: An Open Question* (1995) 64.

⁷² See Cicero *De Re Publica*, bk III, xxi. , *lex injusta non est law* ('an unjust law is not law'): quoted by Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 72. See also John Finnis, *Natural Law and Natural Rights*, 290, 351ff; Bryan Horrigan, 'Natural Law' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 500, 500.

⁷³ See further, Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2074.

may be 'right' or 'wrong' according to whether it corresponds with accepted legal doctrine.⁷⁴ In this way, the general approach of legalism diverges from the contextualism of a pragmatic approach.

The divergence of pragmatism from the correspondence theory of truth has also been emphasised by United States writers, such as Thomas Grey, to distinguish pragmatism from the legal science movement.⁷⁵ In contrast to the reliance that pragmatists saw natural law,⁷⁶ legalism,⁷⁷ and legal science perspectives⁷⁸ as placing upon the correspondence theory of truth, pragmatists put forward an alternative perspective which views the knowledge of facts, theories and values as being interdependent.⁷⁹ In many ways, the rejection of formalism, and the rejection of the idea that there is an external standard by which the validity of law may be assessed, remains a central point of pragmatic theories.⁸⁰ That said, legal pragmatists do not universally reject the idea that *some* laws could be based upon theoretical or conceptual positions; however pragmatism does tend to reject the idea that a *particular* formal theoretical position could explain law generally.⁸¹

⁷⁴ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (4th ed, 2006) 328. See also, Sir Owen Dixon, 'Concerning Judicial Method' in Sir Owen Dixon, *Jesting Pilate* (1965) 155.

⁷⁵ In the United States the legal science movement is most often associated with the work of Christopher Columbus Langdell. Christopher Columbus Langdell was the Dean of Harvard Law School and in Anglo-American jurisprudence is the most prominent figure associated with the legal science approach. Langdell advocated a legal science method of studying law, which emphasised the empirical analysis of decided cases: Of the distinction between the legal science movement and pragmatism Thomas Grey writes:

While conceptualism was universal during the classical period of Anglo-American legal thought, adherence to the Langdellian notion of legal science was not. Not only Holmes, but Gray, Nicholas St. John Green, Thayer, and Wigmore, and in the next generation Arthur Corbin – were critics of (or at least deviants from) Langdellianism. They did not accept Langdell's insistence that legal thought could and should be autonomous and universally formal as well as conceptually ordered. They did not aspire to make common law reasoning exact and deductive by excluding considerations of justice and social policy. Conceptual system-building had a significant but subordinate place in the law for them; they treated principles, categories, and taxonomies as instruments for use in the process of legal inquiry rather than its end result: see Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 825.

See also Catherine Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1728, especially 1729-30. See further, Eugene Wambaugh, 'Professor Langdell – A View of His Career' (1906) *Harvard Law Review* 1, Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 134ff.

⁷⁶ See further Paul Gregg, 'The Pragmatism of Mr Justice Holmes' (1943) 31 *The Georgetown Law Journal* 262, 262.

⁷⁷ See, for example, E. W. Thomas, who writes that, 'legal doctrines that inhibit the courts adopting a functional and practical bent are incompatible with a pragmatic approach. Indeed, legal pragmatism is the very converse of a doctrinaire approach. It is or tends to be stifled by the dogmatism congenial to doctrinaire legalism': see further, E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308.

⁷⁸ See further, Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 825. See also Catherine Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1728, especially 1729-30.

⁷⁹ Hilary Putnam, *Pragmatism: An Open Question* (1995) 14.

⁸⁰ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 815.

⁸¹ *Ibid*, 825.

The contextual understanding of knowledge, which is implicit in a pragmatic perspective, would appear to distinguish the approach of pragmatism from the approach of other legal theories that seek to assert abstract transcendent principles to explain law generally.⁸² One writer explains the pragmatic rejection of foundationalism as being a rejection of, 'the age-old philosopher's claim that knowledge might be grounded in a set of fundamental and indubitable beliefs'.⁸³ Yet, another writer presents this perspective, stating that:

Being essentially functional and practical, legal pragmatism is irreversibly hostile to unrealistic and abstract theories and ritualistic doctrine alike. Theories which do not accord with reality cannot be reconciled with pragmatism. They will simply get in the way.⁸⁴

On this basis, it may be suggested that the contextual understanding of knowledge put forward by pragmatism, rejects the correspondence theory of truth, which generally asserts abstract principles, and seeks to explain law by an essentially formal process of reasoning from these principles. The contextual aspect of pragmatic reasoning may also distinguish pragmatism from other more formal modes of reasoning such as natural law theories and legalism. However, whilst the distinction of pragmatism from natural law or legalistic reasoning would appear to be apparent at a theoretical level, it may be suggested that there is some difficulty identifying this distinction in actual judicial decisions. Put simply, it may be argued that the jurisprudence of Sir Owen Dixon, Justice Toohey and Sir William Deane do not represent a form of foundationalism, such as that which pragmatists often associate with legal theories.⁸⁵ For example, the influence of legalism may be identified in the jurisprudence of Sir Owen Dixon, and natural law concepts would appear to have influenced the jurisprudence of Justices Deane and Toohey. However, none of these Justices rely solely upon grand abstract transcendent principles. Dixonian legalism would clearly fall short of adopting wholeheartedly the correspondence theory of truth;⁸⁶ and the approach of Justices Deane and Toohey did not

⁸² Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 298.

⁸³ See Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 799.

⁸⁴ E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308.

⁸⁵ *Ibid.*

⁸⁶ Chapter 2 noted that some aspects of Sir Owen Dixon's reasoning suggested that the validity of legal enactments or judicial decision might be determined by the extent to which they conform with or correspond to a pre-existing corpus of legal knowledge. It will however be recalled that the analysis presented in Chapter 2 emphasised that

necessarily depend *entirely* upon the conformity or correspondence of any law with inalienable natural law principles.⁸⁷

B *Instrumentalism*

The second fundamental tenet of pragmatic thought is the idea that all thought or inquiry is instrumental.⁸⁸ This idea is connected with the rejection of foundationalism and the view that all knowledge is contextual. By instrumental, pragmatists mean that knowledge derives from practice.⁸⁹ As Thomas Grey expresses this; '[r]eflective, deliberative, even contemplative thinking originates in the practical need to solve real problems.'⁹⁰ Thus for pragmatic writers knowledge develops in a practical context. Ludwig Wittgenstein has also expressed a similar view. For Wittgenstein all theory derives in some way from action or experiences of the world.⁹¹ As Wittgenstein states, 'no course of action could be determined by a rule, because every course of action can be made out to accord with the rule.'⁹² Theory itself, for Wittgenstein, cannot produce action.⁹³ This emphasis on the instrumental nature of thought often leads pragmatists, having rejected the idea of external abstract standards, to argue that a

Sir Owen Dixon acknowledged that the 'corpus of legal knowledge' to which he referred may either 'exist' or be a 'pre-supposition'. The ascription of this suppositional status to the corpus of legal knowledge suggests that his Honour's position would fall short of adopting wholeheartedly the correspondence theory of truth: see Chapter 2 above. See more generally, Philip Ayres, 'Owen Dixon's Causation lecture: Radical Scepticism' (2003) 77 *Australian Law Journal* 692; Mark Lunney, 'Causation, Science and Sir Owen Dixon' (2004) *Australian Journal of Legal History* 205.

⁸⁷ It was suggested in Chapter 4 that the jurisprudence of Justices Deane and Toohey was *consistent* with natural law concepts, rather than representing the unmediated application of inalienable natural law principles. Their Honours' jurisprudence does not suggest that the validity of law is determinable by virtue of its correspondence with some definable principles. It follows their Honours' position can not be equated with the manner in which pragmatists generally portray judicial approaches based upon natural law principles.

⁸⁸ See Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 797, 805.

⁸⁹ *Ibid*, 797, 822.

⁹⁰ *Ibid*, 802.

⁹¹ See Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) see especially pages 115 and 117, paragraphs, 5.5571-5.621, and 5.641 [First German edition *Logisch-philosophische Abhandlung* published 1921]. See also, Michael J Detmold, 'Intention: Meaning in Relation' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001) 187, 191.

⁹² Ludwig Wittgenstein, *Philosophical Investigations*, Part I, Section 198 (G E M Anscombe, trans, 1968 3rd ed) 80e. See further, Dennis Patterson, *Law and Truth* (1996) 13. See also Michael Detmold, *The Australian Commonwealth: A Fundamental Analysis of its Constitution* (1985) 5.

⁹³ See Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) see especially pages 115 and 117, paragraphs, 5.5571-5.621, and 5.641 [First German edition *Logisch-philosophische Abhandlung* published 1921]. See also, Michael J Detmold, 'Intention: Meaning in Relation' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001) 187, 191.

better approach is to look at the consequences of a decision as the measure of its value. Thus for a pragmatist, the meaning of a proposition is often seen to lie in its consequences.⁹⁴

One of the functions of the instrumental aspect of pragmatism that is often emphasised by legal pragmatism is the manner in which a pragmatic approach may efficiently reconcile a judicial decision with both previous decisions and future needs.⁹⁵ To achieve this goal pragmatic approaches tend to emphasise the need to have regard to the practical implications of decisions upon future actions. This form of 'future orientated instrumentalism' may be seen to have originated in the writings of Justice Holmes which emphasised that to identify law it was necessary to look at both 'what it has been', and also 'what it tends to become'.⁹⁶ This for Holmes J made it necessary for the jurist to 'alternatively consult history and existing theories of legislation.'⁹⁷

The pragmatic thesis that knowledge is contextual often leads pragmatic legal writers to emphasise the social nature of law.⁹⁸ The combination of this perspective with the instrumental nature of knowledge and law, which views law as developing in response to particular practical problems, can often lead pragmatic writers to emphasise the social purpose of law in a manner similar to that put forward by realist thought. For example, Justice Thomas of the Supreme Court of New Zealand writes of pragmatism that:

I regard pragmatism as being essentially functional. The law is viewed as a social institution in its social setting and vested with the social purpose of serving society and furthering the interests and goals of society.⁹⁹

⁹⁴ See William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 200-1; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 797, 798; Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2078.

⁹⁵ Justice Oliver Wendell Holmes, *The Common Law* (1881) 1.

⁹⁶ *Ibid.*

⁹⁷ *Ibid.*

⁹⁸ For example, Thomas Grey associates the idea that thought occurs in a social context with the Aristotelian thesis that human beings are social animals: see Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 802 footnote 58.

⁹⁹ E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308. See also Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 805.

One American writer has also expressed a similar idea, stating that:

..law is, considered by pragmatists to be instrumental, it is essentially 'a means for achieving socially desired ends, and available to be adapted to their service.'¹⁰⁰

Despite the similarity of these ideas with those presented by realist writers, a closer comparison of realism and pragmatism reveals some significant differences.

It will be recalled that Chapter 3 considered the manner in which the sociological and realist influenced jurisprudence of the Mason Court had regard to the social purpose of law and the practical effect of its decisions. The decision of the Mason Court in *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)*¹⁰¹ provides but one example of this realist-based perspective, which, it may be argued exhibits some similarity to a pragmatic approach. In that case, the Court based its decision to follow the existing line of authorities on the practical significance that the overturning of the existing authorities would have had upon the States who had ordered their affairs in accordance with the legal position set down by previous decisions.¹⁰² Thus, in a similar manner to that suggested by pragmatists, the practical consequences of a decision were a relevant consideration for the realist-based jurisprudence of the Mason Court.

Whilst a consideration of practical consequences and the social context of a decision may be relevant considerations for both realist and pragmatic perspectives, a fundamental difference will be identified between these two approaches. In Chapter 3, it was contended that realists generally acknowledge and consider the specific social aim of legal principles. For example, it was argued that the realist based jurisprudence of the Mason Court, acknowledged that the judiciary in deciding constitutional issues played a fundamental role in balancing the interests of the individual with the interests of the State. In addition, the Mason Court also generally

¹⁰⁰ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 805.

¹⁰¹ (1993) 178 CLR 561.

¹⁰² *Capital Duplicators Pty Ltd v Australian Capital Territory (No 2)* (1993) 178 CLR 561, 593 (Mason CJ, Brennan, Deane and McHugh JJ).

aimed to identify the principles relied upon in drawing a balance between these interests.¹⁰³ Whilst pragmatism may acknowledge the social purpose of law, and advocate a methodology that has regard to the consequences of judicial decisions; in contrast to most realist-based theories, the pragmatist does not generally identify a specific social purpose. As William James wrote of pragmatism, 'it does not stand for any special results. It is method only.'¹⁰⁴ Judge Posner presents a similar perspective, by acknowledging that 'pragmatism will not tell us what is best.'¹⁰⁵ Judge Posner argues that if a judge is a pragmatist then the 'decision-making process will be guided by the goal of making the choice that will produce the best results'.¹⁰⁶ However, Judge Posner sees his theory as 'leave[ing] open the criteria for the "best results"'.¹⁰⁷

Whilst pragmatism does not generally specify specific moral or political aims to guide decision making, pragmatism often emphasises the importance of decision-making, being 'efficient' or 'effective', or producing a 'consensus'.¹⁰⁸ As Posner writes:

Pragmatism will not tell us what is best, but provided there is a fair degree of consensus among the judges, as I think there still is in this country, it can help judges seek the best results unhampered by philosophical doubts.¹⁰⁹

In this way, Posner argues that the 'future-orientated instrumentalism', which is implicit in pragmatic approaches, enables pragmatic approaches to produce a methodology that achieves action that is more efficient.¹¹⁰ For pragmatic decision makers disagreement on philosophical questions do not generally prevent the achieving of a consensus. In contrast to most realist perspectives, pragmatists do not generally rely upon a particular political or philosophical perspective to justify the exercise of a particular judicial discretion or choice. Pragmatists

¹⁰³ See, for example, Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

¹⁰⁴ William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 51.

¹⁰⁵ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 16.

¹⁰⁶ *Ibid*, 8.

¹⁰⁷ *Ibid*, 16.

¹⁰⁸ John Dewey, 'Logical Method and Law' (1924) 10 *Cornell Law Quarterly* 17, 19; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1735; Judge Richard Posner, *Overcoming Law* (1995) 395; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 16.

¹⁰⁹ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 16. See also Catherine Wells, 'Situating Decisionmaking' (1990) 63 *Southern California Law Review* 1728, 1745.

¹¹⁰ See, for example, Judge Richard Posner, *Overcoming Law* (1995) 12.

generally take the position that decisions should *not* be based upon *political or philosophical beliefs* where it is possible to reach a decision based upon an assessment of the relevant *practical considerations*.¹¹¹ Although this approach may initially seem similar to legalism, the difference is that pragmatists think that these beliefs *should* be excluded, whereas some legalists go further and *deny* that political or philosophical views impact upon decision makers. In law, this type of pragmatic reasoning is often identified in judicial decisions which purport to be based upon the 'facts of the case.'¹¹²

C <i>Perspectivism</i>

The combination of the contextual nature of knowledge, and the idea that knowledge is instrumental in the sense that it is viewed as developing to serve a specific purpose, has been viewed as combining to present the third central feature of pragmatism which is termed 'perspectivism.' Pragmatic philosophy is regarded as representing a kind of 'perspectivism' because it does not seek to deny the existence of an objective reality but rather seeks to establish that knowledge is connected with a particular view of reality.¹¹³ As Thomas Grey describes this:

A corollary of pragmatism, derived from the tenets that thought is always both situated and instrumental, is a kind of perspectivism ... The pragmatist recognizes that the best account of a phenomenon (such as law) from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and aimed at different goals. In its mature version, as Dewey stated it, pragmatism rejects the assumption

¹¹¹ See, for example, Judge Richard Posner, *The Problems of Jurisprudence* (1990) 124-5; Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447, 449; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1737-42.

¹¹² Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1741.

¹¹³ See, Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) paragraphs 5.6331-5.641, page 117 [First German edition *Logisch-philosophische Abhandlung* published 1921]. See further, Hilary Putnam, *Pragmatism: An Open Question* (1995) 64, 68ff; Catherine Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1728, 1728-9, 1745-6. See also Bryan Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 31, 36.

that there must exist a comprehensive and final account of “reality” that, if attained, would bring the process of scientific and philosophical inquiry to a close. ... A pragmatic legal theorist will embed questions about law in a context and address them for a purpose, and so may reach different and apparently inconsistent answers as context and purpose vary.¹¹⁴

Like many pragmatic theorists Wittgenstein has also argued that all knowledge of action or experience of the world will be shaped to the point of perception¹¹⁵ and consequently, all theory will be similarly shaped. It follows from this, as it was suggested above, that theory and the practical sense of pragmatism are necessarily connected.¹¹⁶ This philosophical outlook influences legal pragmatists to reject the idea of grand theory, and to reject formalism. Instead, pragmatists generally emphasise the utility of relying upon practical reasoning.

Put briefly, it may be said that the manner in which the three central ideas of contextualism, instrumentalism and perspectivism are developed by pragmatists demonstrates a diversity of opinion.¹¹⁷ This diversity suggests that there is some flexibility in the meaning attributed to pragmatism; however, it may be argued that, the three central tenets of pragmatic thinking, which have been considered in the above discussion, may usually be associated with most forms of pragmatism. An understanding of these concepts is relevant to the analysis presented in this thesis as the identification of these three tenets of pragmatic thought facilitates the identification of pragmatic approaches to judicial decision making.

¹¹⁴ Thomas Grey, ‘Holmes and Legal Pragmatism’ (1989) 41 *Stanford Law Review* 787, 804-5.

¹¹⁵ See, Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) paragraphs 5.6331-5.641, page 117 [First German edition *Logisch-philosophische Abhandlung* published 1921]. See generally, Michael J Detmold, ‘Intention: Meaning in Relation’ in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001) 187, 191-6.

¹¹⁶ See, Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) paragraphs 5.6331-5.641, page 117 [First German edition *Logisch-philosophische Abhandlung* published 1921].

¹¹⁷ See Margaret Radin, ‘The Pragmatism and the Feminist’ (1990) 63 *Southern California Law Review* 1699, 1705; Catherine Wells Hantzis, ‘Legal Innovation within the Wider Intellectual Tradition: The Pragmatism of Oliver Wendell Holmes, Jr’ (1988) 82 *Northwestern University Law Review* 541, 543; Judge Richard Posner, *Frontiers of Legal Theory* (2001) 95-141. See also Judge Richard Posner, ‘What has Pragmatism to Offer Law?’ (1990) 63 *Southern California Law Review* 1653; Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner ‘Pragmatic Adjudication’ (1996) 18 *Cardozo Law Review* 1; Judge Richard Posner, *The problems of jurisprudence* (1990); Judge Richard Posner, *Overcoming Law* (1995); Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999); Judge Richard Posner, *Frontiers of Legal Theory* (2001); Judge Richard Posner, *Law, Pragmatism, and Democracy* (2003).

In addition, knowledge of these concepts enables pragmatic thinking to be distinguished from other approaches to judicial decision-making that were considered in previous Chapters of this thesis. The distinction of pragmatism from other modes of thought will assist in the analysis of constitutional decisions presented in Part II of this thesis. It is however informative to consider at this stage the manner in which pragmatic thought has been developed in a *legal* context, and for this reason the following analysis will focus on the work of two influential writers on legal pragmatism.

IV LEGAL PRAGMATISM AND ITS PROPONENTS

So as to consider in more detail the form of legal methodology generally put forward by pragmatic writers, and to provide some necessary parameters on the discussion undertaken in this thesis, the analysis presented in this section will not aim to cover all the ideas that may be associated with contemporary legal pragmatic thought, assuming that such an undertaking was even possible. Rather, the work of two writers that Sir Anthony Mason has identified as offering progressive interpretive theories of constitutional interpretation will be considered.¹¹⁸ The first of these is Judge Posner of the United States Court of Appeals. The second is American legal writer Professor Cass Sunstein. These two exponents of pragmatism have been selected because the ideas of both writers have been associated with pragmatic thought in the United States.¹¹⁹ In addition, the work of these legal scholars has been considered in some way in Australian legal writings.¹²⁰

¹¹⁸ See Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 19-20 and 21-22.

¹¹⁹ See Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2071, 2074 footnote 12. See generally volume 18(1) of the *Cardozo Law Review* (1996) entitled 'The Revival of Pragmatism', and volume 63(6) of the *Southern California Law Review* (1990) entitled 'Symposium on the Renaissance of Pragmatism in American Legal Thought'.

¹²⁰ See *McGinty v Western Australian* (1996) 186 CLR 140, 231-232 (McHugh J); Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195. See also, Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 19-20 and 21-22.

A Judge Richard Posner

Judge Richard Posner of the United States Court of Appeals associates himself with pragmatism on the basis that he is 'interested in pragmatism as a disposition to ground policy judgments on facts and consequences rather than on conceptualisms and generalities.'¹²¹ For Judge Posner pragmatic reasoning represents one of three different approaches to legal interpretation.¹²² Judge Posner refers to these three types of reasoning as 'bottom-up', 'top-down' and practical or pragmatic styles.¹²³ Posner views his pragmatic approach as 'locating a ground for judicial action in instinct rather than in analysis' which, for Posner, means that his approach actually 'transcends both top-down and bottom-up reasoning.'¹²⁴

Judge Posner distinguishes pragmatic reasoning from both bottom-up and top-down methods of judicial adjudication, and is critical of the form of reasoning that these other two approaches represent. As discussed in Chapter 2, Judge Posner identifies bottom-up reasoning in an approach which starts with the words of the statute, or with a case or group of cases, and then reasons from this basis using accepted legalistic techniques, such as, expounding the 'plain meaning' of the words in question,¹²⁵ and reasoning by analogy.¹²⁶ Judge Posner is critical of the idea that the words of the statute and previous cases can be used as an *exclusive* reference source for future decisions.¹²⁷ Posner argues that such an approach would unjustifiably exclude other legitimate sources of information,¹²⁸ such as judges deeply held commitments.¹²⁹ Judge Posner, like many other contemporary legal theorists, acknowledges that the judicial interpretation of statutes involves the creation of meaning as much as the discovery of meaning,

¹²¹ Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999) 227.

¹²² Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 433, also appearing in Judge Richard Posner, *Overcoming Law* 1995, 171-197. See generally Joshua Getzler, 'Pragmatism and the End of Ideology' (1997) 17 *Oxford Journal of Legal Studies* 525, 532.

¹²³ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 433.

¹²⁴ *Ibid.*

¹²⁵ *Ibid.*

¹²⁶ *Ibid.*

¹²⁷ *Ibid.*, 435.

¹²⁸ *Ibid.*

¹²⁹ Judge Richard Posner, *The Problems of Jurisprudence* (1990) 124-125.

and he accepts the utility of judicial decision makers relying upon a wide range of materials.¹³⁰ For these reasons Judge Posner distinguishes his approach from bottom-up reasoning.

Judge Posner is also critical of judicial decision-making that is based upon broad theoretical top-down approaches to constitutional interpretation. Posner bases this criticism in part upon the view that there is a large range of different theories about constitutional interpretation, and there is no legitimate basis for distinguishing between these various theories.¹³¹ Posner argues, that for this reason, top down theories cannot provide a guide to judicial decision making.¹³² In addition, Posner sees top down approaches to judicial decision making as producing instability in constitutional doctrine.¹³³

In addition, he criticises top down theories on the basis that these theories fail to take into consideration judges deeply held views. Because of this, Judge Posner argues that, '[a] comprehensive theory of constitutional law is apt to step on the toes of many deeply held commitments without being supportable by decisive arguments.'¹³⁴ It should, however, be kept in mind that Judge Posner's arguments are made in the context of United States constitutional law that may in comparison to Australian law focus more closely upon issues which bring to the fore the defining commitments of individuals.¹³⁵ It is in this American context that Judge Posner argues that the influence of judges' strong emotional commitments means that 'instinct can be a surer guide to action than half-baked intellectualising'.¹³⁶ That said, the form of pragmatism put forward by Judge Posner does not propose that the influence of these deeply held commitments be unrestrained.¹³⁷ Judge Posner seeks to accord a role to judicial beliefs only where these beliefs reflect a consideration of competing factual issues rather than a wider

¹³⁰ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 435.

¹³¹ *Ibid*, 445.

¹³² *Ibid*, 445.

¹³³ *Ibid*.

¹³⁴ *Ibid*, 446. See also Judge Richard Posner, *Frontiers of Legal Theory* (2001).

¹³⁵ See, for example, *Roe v Wade* 410 US 113 (1973). See also Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1737.

¹³⁶ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447, 449.

¹³⁷ *Ibid*, 446. See also Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

theoretical position.¹³⁸ Judge Posner argues that according a role for judicial belief in this manner leads in the United States context to a clause-by-clause approach to constitutional interpretation.¹³⁹

In seeking to further define what is meant by a pragmatic approach to judging, Judge Posner states he can accept the following definition;

a pragmatic judge always tries to do the best he can do for the present and the future, unchecked by any felt *duty* to secure consistency in principle with what other officials have done in the past.¹⁴⁰

This definition seeks to distinguish a pragmatic approach from that of a positivist judge, as Posner argues, 'the positivist starts with and gives more weight to the authorities, whilst the pragmatist starts with and gives more weight to the facts.'¹⁴¹ For Posner a positivist faced with inconsistent lines of authority may seek to 'find a result in the present case that would promote or cohere with the best interpretation of the legal background as a whole.'¹⁴² In contrast, Judge Posner sees a pragmatic judge as having 'different priorities'.¹⁴³ For Judge Posner the pragmatic judge:

[w]ants to come up with the best decision having in mind present and future needs, and so does not regard the maintenance of consistency with past decisions as an end in itself but only as a means for bringing about the best results in the present case.¹⁴⁴

It should however be noted that this emphasis on the facts does not lead Judge Posner to advocate a position that accords precedent no role. Nor, as it will be discussed below, does

¹³⁸ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447, 449.

¹³⁹ *Ibid*, 446. See also Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999); Daniel A. Faber, 'Legal Pragmatism and the Constitution' (1988) 72 *Minnesota Law Review* 1331, 1342-3.

¹⁴⁰ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 4.

¹⁴¹ *Ibid*, 8. See also Daniel Faber, 'The Inevitability of Practical Reason: Statutes, Formalism, and the Rule of Law' (1992) 45 *Vanderbilt Law Review* 533, 536-7.

¹⁴² Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 5.

¹⁴³ *Ibid*, 5.

¹⁴⁴ *Ibid*.

Judge Posner seek to ignore accepted judicial method. Judge Posner, consistently with the position that is often taken by pragmatic writers, actually advocates the maintenance of continuity with past decisions, and a close adherence to a legal method that values the doctrine of precedent.¹⁴⁵ However, Posner seeks to justify adherence to precedent on pragmatic grounds. This may be contrasted with a legalistic perspective that views the adherence to precedent as an essential and binding part of the judicial role, which may provide legitimacy to judicial decisions.¹⁴⁶ Amongst the reasons that Judge Posner uses to emphasise the practical utility of precedents are the following:

1. Past decisions may be viewed as 'repositories of knowledge', and should be considered on this basis even if the decision in question 'had no authoritative significance'.¹⁴⁷
2. Past decisions should be followed because 'a decision that destabilized the law by departing too abruptly from precedent might have, on balance, bad results'.¹⁴⁸ This includes an acknowledgement by Judge Posner that a judge may have in some circumstances to balance the need to render 'substantive justice in the case under consideration' with the need to 'maintain the law's certainty and predictability'.¹⁴⁹
3. Past decisions may also need to be considered because 'it is often difficult to determine the purpose and scope of a rule without tracing the rule to its origins'.¹⁵⁰

¹⁴⁵ See Steven Smith, *The Pursuit of Pragmatism* (1990) 100 *Yale Law Journal* 409, 412. See also, for example, Daniel Faber, 'Legal Pragmatism and the Constitution' (1988) 72 *Minnesota Law Review* 1331, 1344-46; Robin West, *Liberalism Rediscovered: A Pragmatic Definition of the Liberal Vision* (1985) 46 *University of Pittsburgh Law Review* 673, 680; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 798-800; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 5.

¹⁴⁶ See Chapter 2 above.

¹⁴⁷ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 5.

¹⁴⁸ *Ibid.*

¹⁴⁹ *Ibid.*

¹⁵⁰ *Ibid.*

In addition to supporting compliance with the doctrine of precedent, Judge Posner stresses that even a pragmatic judge should follow accepted legal method and comply with the settled rules of law as ignoring such rules may give rise to a 'judicial tyranny'.¹⁵¹ One example given by Judge Posner of the effect of ignoring these rules is that federal judges could be given an, 'uncanalized discretion to intervene in political disputes', which would be undemocratic.¹⁵² The role that Judge Posner accords to judicial choice is however limited to choices which are justified upon an assessment of the facts.¹⁵³ Consistent with the instrumentalism of most pragmatic approaches for Judge Posner an assessment of the facts includes 'not only what is best for the present case' but also the 'implications for other cases'.¹⁵⁴ Judge Posner further confines the role for judicial choice by viewing judges as a 'different kind of rule maker from a legislator'.¹⁵⁵

Judge Posner's approach to judicial interpretation as discussed advocates a role for precedent,¹⁵⁶ and compliance with the settled rules of law and legal method.¹⁵⁷ This means that the methodology that he supports is not diametrically opposed to that of orthodox legalistic methods. Although Posner seeks to justify the approach that he puts forward on pragmatic grounds, ultimately, like legalism, the methods of decision-making that Posner advocates are fundamentally conservative. The divergence of his approach from traditional legalistic methods primarily centres on issues such as the 'binding' nature of precedents, or the scope of matters that may inform constitutional interpretation.

¹⁵¹ *Ibid*, 17.

¹⁵² *Ibid*.

¹⁵³ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447-9.

¹⁵⁴ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 16. See also Justice Oliver Holmes, *The Common Law* (1881) 1; William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 200-1; E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 805.

¹⁵⁵ Judge Posner distinguishes judicial rule making from a legislative function primarily on the basis that '[a]n appellate judge has to decide in particular cases whether to apply an old rule unmodified, modify and apply the old rule, or create and apply a new rule': Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 8.

¹⁵⁶ *Ibid*, 5.

¹⁵⁷ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 17.

It may be suggested that Judge Posner makes a significant contribution to legal pragmatism by presenting and defining a pragmatic approach to judging.¹⁵⁸ An understanding of the alternative pragmatic approach offered by Judge Posner enables a greater appreciation of the role that consequentialist arguments may play in constitutional adjudication. Posner also offers three related views in support of the pragmatic approach he advocates. These are:

1. The assertion that, 'most judges can handle facts better than they can handle theories'.¹⁵⁹
2. The preference for a pragmatic approach to the alternatives of either a top down or bottom up approach,¹⁶⁰ on the basis that it is only this approach that accords a role for judges deeply held commitments.
3. The view that judicial decisions when they are guided by pragmatic reasoning that accords with the deeply held judicial commitments produces the 'best results'.

It may, however, be suggested that in comparison to the position presented by Professor Cass Sunstein, who seeks to provide a theorised defence of pragmatism,¹⁶¹ Posner does not provide detailed arguments in support of the adoption of a pragmatic approach. The following discussion will aim to consider Professor Sunstein's approach and to analyse the numerous arguments that Sunstein offers in support of a largely pragmatic form of reasoning.

¹⁵⁸ See Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 4-8. However, such definitions have not escaped criticism, see, for example, Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 428.

¹⁵⁹ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 449.

¹⁶⁰ *Ibid*, 447.

¹⁶¹ See, Suzanna Sherry, *New York Times Book Review: Law and Order*, *New York Times*, 8 September, (1996) 17. See further, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

B Professor Cass Sunstein

In United States jurisprudence, Professor Cass Sunstein has become a prominent advocate in the movement away from legal reasoning based upon broad theoretical principles, with many of Sunstein's ideas advocating limits upon the use of theoretical arguments.¹⁶² Although in general Sunstein's position is also associated with the revival of the 'law as process' school of thought, the non-theoretical approach that Sunstein puts forward may be linked to pragmatism.¹⁶³ Sunstein identifies several types of agreements that may be reached in the absence of theory, however in the context of judicial decision making the most relevant type of agreements are those that are 'incompletely theorized'.¹⁶⁴ In particular, Sunstein argues that legal systems that function well generally allow for agreements to be reached on 'particular outcomes and low-level principles', even in the absence of a complete account or commitment to the underlying theories or principles that may justify the conclusion reached.¹⁶⁵ Sunstein sees this form of reasoning as a central and desirable strategy for producing judicial agreements in a pluralist society.¹⁶⁶ Thus, rather than judges reasoning deductively from broad theoretical principles, Sunstein advocates an approach to judicial decision-making that produces 'incompletely theorized agreements'.¹⁶⁷ In the context of Australian decisions, Sunstein's writings on 'incompletely theorized agreements' have been considered primarily in relation the High Court's implied freedom of political communication cases.¹⁶⁸ However, Sunstein's writings on 'incompletely theorized agreements' may also have a more general relevance to the 'non-theoretical' approach to constitutional interpretation which may be identified with the approach taken by some members of the Gleeson Court.¹⁶⁹

¹⁶² See Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), see particularly 35-61.

¹⁶³ Edward Rubin, 'Legal Reasoning, Legal Process and the Judiciary as an Institution' (1997) 85 *California Law Review* 265; Suzanna Sherry, *New York Times Book Review: Law and Order*, *New York Times*, 8 September, (1996) 17; Thomas Cotter, 'Legal Pragmatism and the Law and Economics Movement' (1996) 84 *The Georgetown Law Journal* 2071, 2074 footnote 12.

¹⁶⁴ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1739-1740.

¹⁶⁵ *Ibid*, 1735 particularly footnote 8.

¹⁶⁶ *Ibid*, 1735, 1769.

¹⁶⁷ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), see particularly, 35-61.

¹⁶⁸ See Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195, 202.

¹⁶⁹ See further Chapters 6 and 10 below.

Incompletely theorized agreements, for Sunstein, generally involve agreements on particular outcomes, accompanied by agreements on the low-level principles that account for them. This approach, Sunstein argues, is particularly relevant to judicial decisions as:

In law, the point of agreement is often highly particularized – absolutely as well as relatively – in the sense that it involves a specific outcome and a set of reasons that typically do not venture far from the case at hand.¹⁷⁰

However, judicial decisions do not just involve a determination of a given factual controversy; they also provide reasons for the decisions reached. Sunstein allows for this by recognising that ‘reasons are by definition more abstract than the outcome for which they account.’¹⁷¹ Sunstein also acknowledges that any systemisation of the decisions in any number of cases, which is an inevitable part of the judicial process, also leads to abstraction.¹⁷² Whilst Sunstein accepts that there may be a degree of abstraction involved in judicial decision making, Sunstein argues that incompletely theorized agreements might still be reached, provided that ‘the relevant actors seek to stay at the lowest level of abstraction necessary for the decision of the case.’¹⁷³ For Sunstein, orthodox legal reasoning techniques, such as reasoning by analogy, may be confined to a very low level of theorization.¹⁷⁴ Consistently with this perspective, Sunstein sees most judicial decisions as being ‘incompletely theorized’ on the basis that they involve the reaching of a decision or agreement in a particular case, in the absence of a complete account of the underlying theories or principles that justify the conclusion reached.

Sunstein’s work is also directed to establishing why there are significant benefits that may be associated with judicial reasoning that avoids ambitious theoretical statements. In this regard Sunstein’s arguments go beyond suggesting that judges should take a ‘non-theoretical’ stance because they may not be able to resolve theoretical issues satisfactorily.¹⁷⁵ The following

¹⁷⁰ Cass Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 *Harvard Law Review* 1733, 1741.

¹⁷¹ *Ibid*, 1737.

¹⁷² *Ibid*, 1769.

¹⁷³ *Ibid*, 1737.

¹⁷⁴ *Ibid*, 1741-42.

¹⁷⁵ Adrienne Stone, ‘Incomplete Theorizing in the High Court’ (1998) 26 *Federal Law Review* 195, 201.

discussion will focus on the four major theoretical justifications that Sunstein puts forward in favour of the use of an 'incompletely theorized' approach to judicial decision-making.¹⁷⁶

1 *High-level Theoretical Arguments and the Complex Nature of Human Relations*

What is perhaps the most fundamental argument that Sunstein puts forward in support of incompletely theorized agreements, is based upon the view that high-level theoretical arguments cannot incorporate the complicated nature of human morality. Sunstein, like a number of other pragmatic writers, argues that despite the complexity of human relations, many theories seek to reduce human morality to a single value.¹⁷⁷ Sunstein suggests that human morality cannot be represented in such a way, and it is unrealistic to make such a demand of the law.¹⁷⁸ For example, Sunstein argues that 'any simple general theory of a large area of law – free speech, contracts, property – is likely to be too crude to fit with the best understandings of the multiple values that are at stake in that area.'¹⁷⁹ This leads to what is perhaps the strongest justification that Sunstein offers for the use of incompletely theorized agreements. Consistently with the contextualism found in most pragmatic writings, Sunstein suggests that:

A completely theorized judgment would, of course, have many virtues if it were correct. But at any particular moment in time, this is an unlikely prospect for human beings, including judges, in constitutional law or elsewhere.¹⁸⁰

The reasonable nature of this criticism—which Sunstein directs at completely theorized reasoning, is apparent. However, the critical analysis of pragmatism presented later in this

¹⁷⁶ *Ibid*, 1733-1738.

¹⁷⁷ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 43. See also William N. Eskridge, Jr and Phillip P. Frickey, 'Statutory Interpretation as Practical Reasoning' (1990) 42 *Stanford Law Review* 321, 348; Daniel Faber, 'Legal Pragmatism and the Constitution' (1988) 72 *Minnesota Law Review* 1331, 1348; Daniel A. Faber and Phillip P. Frickey, 'Practical Reason and the First Amendment' (1987) 34 *University of California Los Angeles Law Review* 1615, 1639-40ff; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 797.

¹⁷⁸ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 43; Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 801.

¹⁷⁹ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1748.

¹⁸⁰ *Ibid*, 1749.

Chapter will suggest that it is important to question whether a rejection of the idea that judgments may be based on 'completely theorized' principles, necessarily leads to adopting the approach that Sunstein advocates.¹⁸¹

2 *The Benefits of Consensus*

In addition to enabling agreements to be reached that do not rely on general principles, Sunstein sees 'incompletely theorized agreements' as allowing for the role that judges play as members of an institution.¹⁸² Sunstein argues that, in the United States legal system, it is generally of primary importance that judges are able to reach a *consensus* in a particular case—even if they disagree on the fundamental principles, which support that decision. Like Judge Posner, Professor Sunstein argues that to allow a consensus to be reached on a particular outcome, it is necessary to adopt a reasoning process that does not challenge the 'most basic or defining commitments' of any person.¹⁸³ This approach may also promote a wider consensus, as Sunstein argues:

when the authoritative rationale for the result is disconnected from abstract theories of the right or the good, the losers can submit to legal obligations even if reluctantly without being forced to renounce their deepest ideals.¹⁸⁴

For Sunstein, incompletely theorized agreements, in these ways, 'serve the crucial function of reducing the political cost of enduring disagreements.'¹⁸⁵ It is apparent that Sunstein, in considering the institutional role of judges, places primary importance upon the need for a *consensus* to be reached.¹⁸⁶ However, it will be argued later in this Chapter that 'incompletely theorized' agreements may only be one of many ways in which a consensus may be reached.

¹⁸¹ See the discussion in Section V below, which considers the criticism of pragmatism.

¹⁸² Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1767.

¹⁸³ *Ibid.*, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 41.

¹⁸⁴ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1748.

¹⁸⁵ *Ibid.*, 1748.

¹⁸⁶ *Ibid.*, 1735.

Furthermore, the high value that Sunstein places upon an agreement being reached will be questioned.¹⁸⁷

3 *Precedents and Incompletely Theorized Agreements*

The third fundamental argument that Sunstein presents in support of incompletely theorized agreements is based upon the benefits that Sunstein associates with the role that incompletely theorized agreements accord to precedents.¹⁸⁸ As Sunstein recognises 'it is far easier for judges to decide cases if they can take much law as settled.'¹⁸⁹ Adherence to the doctrine of precedent, for Sunstein means that it is 'unnecessary' for a court to 'create the law anew each time.'¹⁹⁰ Sunstein argues that the lower level of theorisation involved in incompletely theorized agreements allows 'past judgments to be treated as given.'¹⁹¹ Sunstein sees incompletely theorized agreements as allowing judges to follow precedents even if they question the theoretical basis or first principles upon which the previous decision is based.¹⁹² In addition, Sunstein argues that incompletely theorized agreements are to be preferred as by justifying outcomes on 'narrow grounds that involve more modest and more reliable principles' they are 'less likely to create problems for unforeseeable future cases.'¹⁹³ Sunstein points out that the more particularised and less theorized decisions are, the more readily they may be distinguished from previous decisions.¹⁹⁴ As Sunstein explains:

If we understand the holding to be the narrowest possible basis for the decision, a subsequent court is able to offer sufficiently narrow reasons for the outcome in the previous

¹⁸⁷ See the discussion in Section V below, which considers the criticism of pragmatism.

¹⁸⁸ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 39-40; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1735, 1750.

¹⁸⁹ *Ibid*, 1749.

¹⁹⁰ *Ibid*, 1749, 1767.

¹⁹¹ *Ibid*, 1749.

¹⁹² *Ibid*, 1735, 1750.

¹⁹³ *Ibid*, 1755.

¹⁹⁴ *Ibid*, 1735, 1749.

case – that is, reasons that ensure that the outcome in the previous case does not apply to a case that is genuinely different.¹⁹⁵

On this basis, Sunstein concludes that incompletely theorized agreements may make better precedents, as they can be productive of legal ‘coherence’.¹⁹⁶ The role that Sunstein accords to precedents is a significant aspect of his work, as ‘stability’ and ‘predictability’ are, as Sunstein recognises, important values in the law.¹⁹⁷ In general, Sunstein’s approach supports the following of past decisions in all cases where the facts are sufficiently analogous, and this for Sunstein does not necessarily require the evaluation of wider pragmatic issues.¹⁹⁸ This approach leads Sunstein to an approach which, like that of most other legal pragmatists, accords a role to precedents, advocates the use of reasoning by analogy, and supports an *incremental* and *minimalist* approach to judicial decision-making.¹⁹⁹ For example, Sunstein defends judicial minimalism, which he, in part, describes in the following way:

A minimalist court settles the case before it, but it leaves many things undecided. It is alert to the existence of reasonable disagreement in a heterogeneous society. It knows that there is much that it does not know; it is intensely aware of its own limitations. It seeks to decide cases on narrow grounds. It avoids clear rules and final resolutions. ... To the extent that it can, it seeks to provide rulings that can attract support from people with diverse theoretical commitments.²⁰⁰

Sunstein in a work published in 1999, identified this approach with the United States Supreme Court. In particular, he wrote that,

Observers, including academic observers, tend to think that the Supreme Court should have some kind of “theory.” But as a general rule, those involved in constitutional law tend to be cautious about theoretical claims. For this reason, much academic work in constitutional

¹⁹⁵ *Ibid*, 1755.

¹⁹⁶ *Ibid*, 1750.

¹⁹⁷ *Ibid*, 1750.

¹⁹⁸ *Ibid*, 1755. See, however, Judge Richard Posner, ‘Pragmatic Adjudication’ (1996) 18 *Cardozo Law Review* 1, 5.

¹⁹⁹ Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999). See also Daniel A. Faber, ‘Legal Pragmatism and the Constitution’ (1988) 72 *Minnesota Law Review* 1331, 1343.

²⁰⁰ Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) ix-x.

law has been out of touch with the actual process of constitutional interpretation, especially in the last two decades. The judicial mind naturally gravitates away from abstractions and toward close encounters with particular cases. Even in constitutional law, judges tend to use abstractions only to the extent necessary to resolve a controversy.

The current Supreme Court embraces minimalism. Indeed, judicial minimalism has been the most striking feature of American law in the 1990s. The largest struggles on the Supreme Court have been over when to speak and when to remain silent, and the opposing camps among the justices contest exactly that issue, with the minimalists generally prevailing.²⁰¹

In this way, Sunstein associates the United States Supreme Court of the late 1990s with judicial minimalism. The discussion in Chapter 10 will consider further the tendency of the current Gleeson High Court to seek in constitutional cases to decide the minimum possible.

4 *High Level Theory, Social Reform and the Judicial Role*

The final key theoretical basis upon which Sunstein seeks to defend the use of incompletely theorized agreements echoes the concerns expressed in the late 19th century, by AV Dicey about British constitutionalism.²⁰² For Sunstein, 'fundamental principles are best developed politically rather than judicially.'²⁰³ Sunstein argues that high-level theory is better suited to the democratic arms of government. Sunstein attempts to take this argument further by suggesting that incompletely theorized agreements support the ideal of the rule of law to the extent that they constitute 'an effort to limit the exercise of judicial discretion.'²⁰⁴ However, the idea that incompletely theorized agreements act as a fetter upon the discretion of judges will be questioned below. The more persuasive argument that Sunstein puts forward remains that

²⁰¹ *Ibid*, xi-xii.

²⁰² AV Dicey, *Introduction to the Study of the Law of the Constitution* (10th ed, 1959).

²⁰³ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1770, see also 1751-54.

²⁰⁴ *Ibid*, 1751.

based upon the different institutional role of judges.²⁰⁵ Sunstein argues that the 'American system' is one of 'deliberative democracy in which the judges play a partial role.'²⁰⁶ A consequence of this Sunstein argues is that high-level theory may require high-level social reform that judges cannot adequately implement.²⁰⁷ For Sunstein, courts also have a limited capacity to enforce solutions and consequently the theoretical solutions that courts offer,

may produce unfortunate systemic effects, that are not visible to them at the time of decision and that may be impossible for them to correct thereafter.²⁰⁸

For these reasons, Sunstein argues that 'the development of large-scale theories of the right and the good is most fundamentally a democratic task, not a judicial one.'²⁰⁹

In addition to the four key theoretical arguments that Sunstein offers in support of incompletely theorized agreements, Sunstein also articulates several practical considerations that support this approach. Incompletely theorized agreements Sunstein argues allow for the practical constraints imposed on courts, including the 'limited time and capacity' that courts have to devote to theoretical issues.²¹⁰ Fundamentally, Sunstein sees incompletely theorized agreements as promoting *efficiency* in the judicial process as they allow for diverse opinions on theoretical issues that may occur on the bench to be brought together in a judgment that expresses agreement on the practical outcome in a particular case.²¹¹

The practical considerations together with the more theoretical arguments that Sunstein makes, consistently with the approach taken by most pragmatic writings, whilst it does not advocate

²⁰⁵ Edward Rubin, 'Legal Reasoning, Legal Process and the Judiciary as an Institution' (1997) 85 *California Law Review* 265.

²⁰⁶ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1763.

²⁰⁷ *Ibid*, 1751.

²⁰⁸ *Ibid*, 1752. Posner has also cast doubt on the ability of United States legislatures to respond in this way to judicial decisions: see Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 18. The concern that Sunstein highlights has merit, however in considering this argument in an Australian context, it may be argued that Australian legislatures have shown a capacity to respond to what may be regarded as judicially creative decisions, consider, for example, the legislative responses to decisions such as *Minister for Immigration and Ethnic Affairs v Teoh* (1995) 183 CLR 273 and *Mabo v Queensland (No 2)* (1992) 175 CLR 1.

²⁰⁹ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1763.

²¹⁰ *Ibid*, 1735, 1749.

²¹¹ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 39-40.

the complete rejection of all theoretical reasoning it at the least suggests that grand-theories should be avoided.²¹² The arguments put forward by Sunstein seek to apply and promote the application of a pragmatic perspective to legal reasoning. The reasonable nature of some of the points made by Sunstein makes aspects of Sunstein's arguments appear compelling; however, several criticisms may be made of judicial decision-making that is essentially pragmatic. It is these criticisms that will form the focus of the following discussion.

V CRITICISMS OF PRAGMATISM

Perhaps the most fundamental defining feature of pragmatism generally and legal pragmatism in particular, is the preference that pragmatic writers have for putting forward a functional and practical approach to knowledge and law that describes the law not as a set of rules, but as an activity or function.²¹³ More specifically the argument put forward by writers in support of a pragmatic approach often centres on a rejection of the validity of more abstract theories that are said to assert transcendent foundational principles to explain law generally.²¹⁴ This attitude represents the preference for a 'contextual' understanding of truth, over the 'correspondence theory of truth.'²¹⁵ However, for critics of pragmatism this depiction of legal theory is often viewed as being an attack on 'straw men'.²¹⁶ For this reason, the first of the three criticisms of pragmatism that this section will analyse is the critique of pragmatism's account of legal theory. The second criticism of pragmatism that will be considered concerns the manner in which pragmatism fails to incorporate some of the benefits that attach to theoretical reasoning. The third criticism of pragmatism discussed below, focuses on the extent to which despite the claims

²¹² See, eg, Judge Richard Posner, *Overcoming Law* (1995), 7, 19, 426-27; Thomas Grey, 'Hear the Other Side: Wallace Stevens and Pragmatist Legal Theory' (1990) 63 *Southern California Law Review* 1569, 1569.

²¹³ See Dennis M Patterson, 'Law's Pragmatism: Law as Practice and Narrative' (1990) 76 *Virginia Law Review* 937, 940.

²¹⁴ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 797, 799, 825. See also Catherine Wells, 'Situated Decisionmaking' (1990) 63 *Southern California Law Review* 1728, especially 1729-30; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 298; E.W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308.

²¹⁵ *Ibid.*

²¹⁶ See Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 428. See also Robert S. Summers, 'Judge Richard Posner's Jurisprudence' (1991) 89 *Michigan Law Review* 1302, 1306-16.

of perspectivism put forward by pragmatic theories, the application of a pragmatic approach may fail to recognise the ideological nature of legal reasoning.

A *The Depiction of Legal Theories by Pragmatic Writers*

Critics of pragmatism argue that most contemporary legal theories do not represent the formalism that pragmatic writers criticise.²¹⁷ The extent to which pragmatic writers fail to recognise that not all theoretical reasoning is based on abstract transcendent principles, may create difficulties for aspects of the pragmatic perspective. For example, United States scholar, Steven Smith writes that,

..by defining his own pragmatic position by reference to a straw man formalism that no one actually advocates, Posner renders his prescriptions indistinct and useless.²¹⁸

In support of this general contention it may be argued that the analysis of High Court reasoning presented in previous Chapters demonstrated that theoretical perspectives can serve as a guide to judicial reasoning, and judicial approaches based upon a particular theoretical perspective do not necessarily suggest that specific fixed principles will direct the solution of all legal issues that may arise. It may therefore be questioned whether pragmatism's depiction of legal theories as stating fixed principles that seek to explain law generally, fairly represents the diversity of judicial reasoning that may be based upon theoretical assumptions. For example in Chapter 2, it was suggested that legalism might be viewed as putting forward a formal system of legal rules. On a legalistic account, the validity of a judicial decision may be determined by analysing the 'correspondence' of the decision with an accepted body of legal knowledge. However, the discussion in Chapter 2 suggested that even Sir Owen Dixon the perceived leading exponent of this legalistic approach in Australia,²¹⁹ acknowledged the role of judicial

²¹⁷ *Ibid.*

²¹⁸ Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 428.

²¹⁹ See further, Allan C Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85, 89. Hutchinson in response to Justice Heydon's article, 'Judicial activism and the death

choice, and accepted that the 'corpus of legal knowledge' upon which his Honour's jurisprudence was based may be a supposition. In these ways, Dixonian legalism diverges from the 'foundationalism' that pragmatists criticise. Similar remarks may be made of natural law reasoning. Natural law principles may be held up as being abstract, universal and transcendent doctrines.²²⁰ However, as Chapter 4 discussed an examination of judicial decisions associated with this approach, such as the jurisprudence of Justices Deane and Toohey, is not accurately characterised as the deductive application of these principles. Rather, as Chapter 4 suggested, the reasoning of Justices Deane and Toohey is more accurately viewed as involving a process that analyses and balances a number of complex issues, in a manner that is informed by natural law principles.

The failure to acknowledge that theoretical reasoning does not always seek to represent transcendent principles, in addition to being problematic for the manner in which some pragmatists define pragmatic reasoning, also has implications for the arguments offered by Sunstein in favour of 'incompletely theorized agreements'. As Sunstein points out, it may be problematic to suggest that any theory can codify or reduce to static principles the complex nature of human relations and the law. However, not all legal or social theories seek to engage in such a reductive analysis of law and human relations, and it is only when this form of principles are postulated as a definitive theory that Sunstein's objection is legitimate. Put simply, the objection that Sunstein makes to the use of theories cannot be made of all theories or forms of theoretical reasoning. Sunstein's arguments like those of most pragmatists tend only to apply to ambitious theories that assert abstract transcendent principles.²²¹ The discussion presented in this thesis has suggested that it is difficult to identify in Australian jurisprudence the use of theories that 'seek to isolate a static underlying reason which explains law generally'.²²² It may therefore be said that the objections raised by Sunstein to the use of

of the rule of law' (2003) 23 *Australian Bar Review* 110, states: 'If Mason and Murphy are the villains of the piece, then former Chief Justice of Australia Sir Owen Dixon is undoubtedly the saint and saviour of Heydon's campaign to restore the rightful majesty of the common law tradition.'; see Allan C Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85, 89. See generally, David Ritter, 'The Myth of Sir Owen Dixon' (2005) *Australian Journal of Legal History* 249.

²²⁰ See, for example, Aristotle *The Ethics*, Book 5, vii, 1134b8-24, [translation by J A K Thomson first published 1953] 189; John Finnis, *Natural Law and Natural Rights* (1980) 24.

²²¹ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 815; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 298.

²²² Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 67.

theories in legal reasoning do not provide a basis for rejecting the use of all forms of theoretical reasoning in favour of an 'incompletely theorized' approach, and the objections made by Sunstein do not attach to the use made of theoretical reasoning by members of the Australian High Court. The point being that legal reasoning is a flexible and complex process,²²³ in which legal theories and theoretical reasoning can play an important role which goes beyond the deductive application of a static set of broad theoretical principles.

B *The Benefits of Theoretical Reasoning*

The second basis upon which pragmatism may be criticised centres on the argument that incompletely theorized or pragmatic approaches do not reproduce the significant benefits that may attach to more theorized forms of reasoning. One of the benefits associated with legal reasoning from a particular theoretical standpoint is that it is said to provide a guide to judicial decision-making and to produce consistency in the law.²²⁴ However, Sunstein argues that incompletely theorized agreements make good precedents, as they do not create problems for future courts.²²⁵ Posner makes a similar point about judicial decisions based upon practical or pragmatic grounds.²²⁶ However, whilst such pragmatic approaches might provide a practical solution in one particular case, even if there exists an underlying theoretical conflict, this form of reasoning is unlikely to provide a strong basis for the development of the law. A court faced with the next practical problem cannot be guided by principles or the deductive reasoning process set out in the written judgment of the previous case. The point that this criticism emphasises is that, whilst, as Sunstein suggests, incompletely theorized agreements may not create problematic precedents, they will also not provide persuasive precedents. As Adrienne Stone points out;

²²³ See, for example, the analysis of legal reasoning offered by Julius Stone in Julius Stone, *Legal System and Lawyers' Reasonings* (1964) 304. See also, Justice K S Jacobs, 'Comment: The Successor Books to "The Province and Function of Law"' (1967) 5 *Sydney Law Review* 425.

²²⁴ Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 582.

²²⁵ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1755.

²²⁶ Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 4; Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447.

[w]here a court plays a very significant role in determining the shape of the law, a clear statement, at a relatively high level of abstraction, of the court's underlying concern might be necessary to give lower courts, legislators and litigants an idea of the likely direction of the law.²²⁷

It may also be argued that incompletely theorized agreements, and pragmatic approaches generally, as they lack the guidance provided by abstract principles are likely to produce inconsistencies, with a collection of incompletely theorized agreements expressing divergent views of the law. As Thomas Grey recognises the contextual perspective of pragmatism means that pragmatic legal answers relate to a particular context and a particular purpose, and thus different and inconsistent answers may be reached, 'as context and purpose vary.'²²⁸

In addition, it may be argued that pragmatism generally and incompletely theorized agreements in particular, provide a very narrow basis for any decision, and consequently these pragmatic approaches not only fail to provide guidance to future decision makers, they also fail to represent a diversity of opinion. Pragmatic reasoning usually has as its aim the achievement of a consensus and as Larry Alexander points out reasoning that takes this perspective does not recognise the value of disagreement.²²⁹ Alexander argues that incompletely theorized agreements actually say nothing, other than that a consensus was reached in a particular case.²³⁰ For Alexander what is important from a legal perspective is how disagreements may be resolved, which involves more than articulating whether an agreement was reached in any particular case.²³¹ The utility of a consensus is not always endorsed as the most important value, for example, in an Australian context, Sir Harry Gibbs has suggested that in almost all cases, 'it is not wise to have only one judgment in an appellate court dealing with an important question on law'.²³² One reason cited for this conclusion is that 'sometimes a joint judgment may lead to compromise, or to the omission of something that might have been useful to state, but

²²⁷ Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195, 199.

²²⁸ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 805.

²²⁹ Larry Alexander, 'Incomplete Theorizing: A Review Essay of Cass R. Sunstein's *Legal Reasoning and Political Conflict*' (1997) 72 *Notre Dame Law Review* 531, 534.

²³⁰ *Ibid.*

²³¹ *Ibid.*

²³² See Sir Harry Gibbs, 'Judgment Writing' (1993) 67 *Australian Law Journal* 494, 501.

that does not command universal agreement.²³³ An important function of disagreements, and the presentation of divergent reasoning processes, is to contribute to the testing and evaluation of ideas, a point that Sunstein, in part, appears to concede.²³⁴

In response to the arguments made by critics of pragmatism based upon the benefits of theoretical reasoning Sunstein and other pragmatic writers seek to emphasize the manner in which pragmatism does accord some role to theories in judicial decision making. Sunstein, for example, recognises that disagreements can have the virtue of testing ideas, and Sunstein accepts that reference to broader principles is useful to evaluate judgments and to eliminate inconsistencies.²³⁵ On this basis, Sunstein accepts that the benefits of incompletely theorized agreements may be partial.²³⁶ However, Sunstein seeks to avoid the objection that incompletely theorized agreements result in a loss of the benefits of theoretical reasoning in two ways. Firstly, Sunstein suggests that incompletely theorized agreements may lead, over time, to the development of more abstract ideas, and possibly to a 'highly refined and coherent set of principles.'²³⁷ As Sunstein states, incompletely theorized agreements may be viewed as 'an early step towards something wider and deeper.'²³⁸ The second manner, by which Sunstein seeks to avoid the argument that incompletely theorized agreements do not reproduce the benefits of theoretical reasoning, is by not advocating the use of incompletely theorized agreements in all cases. Instead, Sunstein makes the more modest point that there should be a presumption, rather than a taboo against the use of highly theorized arguments.²³⁹ Sunstein declines to endorse 'what might be called a strong version of the argument offered' namely 'a claim that incompletely theorized agreements are always the appropriate approach to law and

²³³ *Ibid*, 501-2.

²³⁴ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1769; Larry Alexander, 'Incomplete Theorizing: A Review Essay of Cass R. Sunstein's *Legal Reasoning and Political Conflict*' (1997) 72 *Notre Dame Law Review* 531, 534-5.

²³⁵ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 51.

²³⁶ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1745, 1749.

²³⁷ *Ibid*, 1765.

²³⁸ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 51. This perspective is consistent with the manner in which Sunstein advocates the incremental development of constitutional law and a minimalist approach: see Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), Chapter 8; Cass Sunstein, *One Case at a Time: Judicial Minimalism on the Supreme Court* (1999) ix-x.

²³⁹ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), at pp 56-57; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1750, 1767.

that more ambitious theory is always illegitimate in law.²⁴⁰ Sunstein acknowledges that law may sometimes reflect thinking that is more ambitious.²⁴¹ For Sunstein:

If a good abstraction is available and if diverse judges can be persuaded that the abstraction is good, there should be no taboo against its judicial acceptance. The claims on behalf of incompletely theorized agreements are presumptive rather than conclusive.²⁴²

Sunstein also recognises the benefits of more fully theorized decisions in some cases. As he states:

If an agreement is more fully theorized, it may provide greater notice to affected parties, at least if the fuller theorization yields rule-like judgments about a wide range of cases. Moreover, fuller theorization – in the form of wider and deeper inquiry into the grounds for legal judgment – may be valuable or even necessary to prevent inconsistency, bias or self-interest. We should be wary of judicial outcomes based on grounds that have not been stated publicly. If judges on a panel actually agreed on a general theory, and if they are truly committed to it, they should say so (even if ... they should usually be reluctant to commit).²⁴³

On this basis, Sunstein supports fuller theorization where it does not prevent an agreement being reached, and where it is necessary to provide a degree of transparency in the decision making process. This approach would appear to be in line with the general, though, often unrecognised, attitude taken by pragmatists towards theory. This attitude, is, put simply, that reliance upon theory or theoretical reasoning, is acceptable if it is *useful* and does not denigrate from the achieving of a consensus. As one writer explains this:

²⁴⁰ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1767.

²⁴¹ *Ibid*, 1765.

²⁴² *Ibid*, 1764.

²⁴³ *Ibid*, 1735, 1750-1.

All the major pragmatist figures accepted and asserted the importance of general principles and systematic thought; they insisted only that the test of abstractions must be their usefulness for action and concrete inquiry.²⁴⁴

A similar perspective may be identified in the writings of Justice Holmes, who whilst often linked with pragmatism has also been viewed as a “generaliser”, a purveyor of “grand theory”.²⁴⁵ Influential pragmatic philosopher John Dewey also wrote of legal thought that:

[L]ogical systematisation with a view to the utmost generality and consistency of propositions is indispensable but is not ultimate. It is an instrumentality, not an end. It is a means of improving, facilitating, clarifying the inquiry that leads up to concrete decisions; primarily that particular inquiry which has just been engaged in, but secondarily, and of greater ultimate importance, other inquiries directed at making other decisions in similar fields. And here at least I may fall back for confirmation upon the special theme of law. It is most important that rules of law should form as coherent generalized logical systems as possible. But these logical systemizations of law in any field, whether of crime, contracts, or torts, with their reduction of a multitude of decisions to a few general principles that are logically consistent with one another while it may be an end in itself for a particular student, is clearly in last resort subservient to the economical and effective reaching of decisions in particular cases.

It follows that logic is ultimately an empirical and concrete discipline.²⁴⁶

Put plainly, it may be suggested that although pragmatists generally deny that theoretical principles represent a form of objective or universal reason, they do not deny that theories may be *useful*.²⁴⁷ The difficulty with the pragmatists’ argument that theories may be used when they represent a consensus or are useful; is that pragmatism generally provides little guidance as to when theorisation may be appropriate. On this point, as it has been suggested of pragmatism

²⁴⁴ Thomas Grey, ‘Holmes and Legal Pragmatism’ (1989) 41 *Stanford Law Review* 787, 824.

²⁴⁵ See M D A Freeman, *Lloyd’s Introduction to Jurisprudence* (7th ed, 2001) 678-79. See, for example, Justice Oliver Wendell Holmes, ‘The Path of Law’ (1897) 10 *Harvard Law Review* 457, 468.

²⁴⁶ John Dewey, ‘Logical Method and Law’ (1924) 10 *Cornell Law Quarterly* 17, 19.

²⁴⁷ *Ibid.* E. W. Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (2005) 308.

generally, that the criterion that pragmatism offers are too general, hopelessly vague, indeterminate and subjective.²⁴⁸ Justice Kirby makes a similar criticism of the general 'flexibility' in the approach of the current High Court.²⁴⁹ It may therefore be suggested that although pragmatic approaches seek to incorporate theoretical reasoning if it is *useful* to do so,²⁵⁰ the adoption of a pragmatic approach generally results in a loss of the benefits associated with theoretical reasoning. One central benefit of theoretical reasoning is transparency, and the loss of this value forms the basis of another criticism that has been made of pragmatism.

C *Transparency and Ideology in Legal Reasoning*

If transparency is a fundamental value in constitutional interpretation, a point that Sunstein seems to at least partially acknowledge, then it would seem that it would always be necessary for theoretical influences to be revealed. As Charles Sampford and Kim Preston point out:

once it is acknowledged that values and other elements external to the text *do* play a part in judicial interpretation, there is much to be said for acknowledging and recording them ... If values are used by judges subtextually or subconsciously, the quality of decision-making is likely to be far poorer for it. They will not be subject to advocacy, questioning, contrary argument and ongoing development. They may not be even consciously thought through. Failure to articulate and develop those values makes the decisions of the court less rather than more comprehensible and predictable.²⁵¹

Arguments based upon the value of transparency in legal reasoning usually suggest that articulating the relevance of the use of theoretical arguments may only assist law.²⁵² Adrienne

²⁴⁸ See Steven Smith, 'The Pursuit of Pragmatism' (1990) 100 *Yale Law Journal* 409, 424-444.

²⁴⁹ See *Eastman v The Queen* (2000) 203 CLR 1, 44 (Kirby J).

²⁵⁰ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 824.

²⁵¹ Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 5. See also Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28; Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 292.

²⁵² Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 5.

Stone has made a similar point directly in relation to incompletely theorized agreements. Stone suggests that one of the most troubling features of incompletely theorized decision-making is that it leaves the theoretical influences or motivations, unrevealed and unexamined.²⁵³ Sir Anthony Mason and Sir Gerard Brennan have also made a similar criticism of legalism.²⁵⁴ On the basis of these arguments it may be suggested that in general pragmatic approaches, rather than supporting the rule of law by acting as a fetter on judicial discretion, as Sunstein suggests, may actually allow greater judicial freedom by leaving theoretical motivations undisclosed and unexamined, whenever decisions can be justified on pragmatic grounds.

The central idea that this criticism of pragmatism puts forward is that although the perspectivism of pragmatism recognises that all judicial decision-making is the result of the individual perspective of the decision maker – the actual application of a pragmatic method can obscure this ideological position. For example, both Judge Posner and Sunstein allocate a role to ‘deeply held commitments’; however, in general the position taken by both these writers, in common with most pragmatic approaches, is that the ‘best results’ can be obtained by focusing on pragmatic, factual and consequential arguments, and avoiding where possible the articulation of the relevance of ideological grounds.²⁵⁵ The difficulty with this aspect of a pragmatism, is that such an approach often understates the influence of any ideological values. For example, Posner often emphasises the benefits of efficiency whilst also stating that ‘pragmatism will not tell us what is best’.²⁵⁶ Although the ideological nature of pragmatic reasoning is in a way recognised by Sunstein, in general, pragmatism often puts itself forward as not advocating a particular ideological position.²⁵⁷ Yet, values such as ‘efficiency’, and consistency in judicial decisions are often accorded by pragmatists a status that is almost akin to

²⁵³ Adrienne Stone, ‘Incomplete Theorizing in the High Court’ (1998) 26 *Federal Law Review* 195, 198.

²⁵⁴ Sir Anthony Mason, ‘The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience’ (1986) 16 *Federal Law Review* 1, 5.

²⁵⁵ Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 446-9; Cass Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 *Harvard Law Review* 1733, 1748.

²⁵⁶ Judge Richard Posner ‘Pragmatic Adjudication’ (1996) 18 *Cardozo Law Review* 1, 16.

²⁵⁷ *Ibid.* See also William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 51; Catherine Wells, ‘Situating Decisionmaking’ (1990) 63 *Southern California Law Review* 1728, especially 1728-9 and 1745-6; Judge Richard Posner ‘Pragmatic Adjudication’ (1996) 18 *Cardozo Law Review* 1, 16.

a universal good.²⁵⁸ In other words, it may be suggested that the difficulty with pragmatism is that the ideological value of achieving a 'consensus' often underlies pragmatic reasoning, but remains unarticulated by pragmatic writers.²⁵⁹

The tendency of pragmatic approaches to advocate the avoidance of reliance upon theoretical positions, and to be disinclined to openly state any ideological positions, is a considerable point for pragmatic theories. It is argued that this approach signifies a substantial departure from the position usually advocated by realists. As it will be recalled from Chapter 3, realists like pragmatists, often counterpoise their position to that advocated by more formal legal theories such as legalism. It was however, argued above that realist views generally diverge from pragmatic outlooks. In contrast to pragmatism, realism seeks to acknowledge and specify the particular role that theory plays in judicial decision-making.²⁶⁰ One of the fundamental arguments put forward by realists is that if a specific theory, policy considerations or ideological perspective is informing judicial reasoning, it should be stated openly.²⁶¹ By way of comparison, pragmatists whilst they generally acknowledge that theory plays a role in judicial decision making, usually suggest that the stating of theoretical perspectives should be avoided and be left unexpressed provided that a consensus can be reached on 'pragmatic grounds'. In other words if it is possible to reach a decision which can be justified on the basis of practical or pragmatic considerations, and although the conclusion reached may be consistent with 'deeply held' principles or beliefs, these theoretical values should not be expressed, and the practical or pragmatic grounds which favour the conclusion reached should instead be articulated.²⁶²

Two criticisms may be made of pragmatism, which do not attach to realism. Firstly, as it was discussed above, pragmatism by seeking to base judicial decision making on practical or

²⁵⁸ Judge Richard Posner, *Overcoming Law* (1995) 395. See also John Dewey, 'Logical Method and Law' (1924) 10 *Cornell Law Quarterly* 17, 19; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 39-40.

²⁵⁹ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1735. See also William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 51; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1, 16.

²⁶⁰ Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 5. See also Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

²⁶¹ *Ibid.*

²⁶² Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 446-9; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1748.

pragmatic considerations can obscure the influence of any theoretical or ideological position.²⁶³ Secondly, pragmatic theories generally assume that ideological beliefs or the deeply held commitments of the judicial decision maker do not affect the manner in which facts are viewed. The validity of this assumption may be questioned. Judge Posner, for example, sees himself as interested in pragmatism as ‘a disposition to ground policy judgments on facts and consequences’, however it may be argued that the manner in which facts are viewed by Judge Posner actually represent the ‘conceptualisms and generalities’ of the top-down theories with which Judge Posner is associated.²⁶⁴ Take, for example Judge Posner’s discussion of cases such as *Roe v Wade*,²⁶⁵ which concerned abortion, and *Griswold v Connecticut*²⁶⁶ which raised the issue of access to birth control. It may be suggested that Judge Posner addressed the *factual* issues raised in these cases reflected the ideological position with which Posner is usually association, namely a ‘wealth maximisation’ perspective, which reflects the values of standard economic theory, and does not consider other normative values that may be of concern from different perspectives.²⁶⁷ The criticism which is made here of pragmatic adjudication generally and the position of Judges Posner, in particular,²⁶⁸ is an example of a more general point. The more general idea, often recognised by realists, is that all judicial decision-making—including the manner in which factual arguments and practical considerations are evaluated—is ideological in some way.²⁶⁹ There is some recognition of this idea in Posner writing,²⁷⁰ however there also appears to be an underlying belief that by basing judicial decisions upon an evaluation of more

²⁶³ Adrienne Stone, ‘Incomplete Theorizing in the High Court’ (1998) 26 *Federal Law Review* 195, 198.

²⁶⁴ Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 446. See also Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999) 227. See further, Jay Feinmann, *Practical Legal Studies and Critical Legal Studies* (1988) 87 *Michigan Law Review* 724, 727-31.

²⁶⁵ *Roe v Wade* 410 US 113 (1973). See Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999) 255; Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 440-5. See also Cass Sunstein, ‘Incompletely Theorized Agreements’ (1995) 108 *Harvard Law Review* 1733, 1737.

²⁶⁶ *Griswold v Connecticut* 381 US 479 (1965).

²⁶⁷ See Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 448; Judge Richard Posner, *The Problematics of Moral and Legal Theory* (1999) 255; Judge Richard Posner, *Frontiers of Legal Theory* (2001); Judge Richard Posner, *Law, Pragmatism, and Democracy* (2003) 25-26.

²⁶⁸ See further, Jay Feinmann, *Practical Legal Studies and Critical Legal Studies* (1988) 87 *Michigan Law Review* 724, 727-31.

²⁶⁹ See Allan C Hutchinson, ‘Heydon’ Seek: Looking for Law in all the Wrong Places’ (2003) *Monash University Law Review* 85.

²⁷⁰ Judge Richard Posner ‘Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights’ (1992) 59 *University of Chicago Law Review* 433, 449.

pragmatic, or practical considerations, the disagreement which may stem from a divergence of opinion on ideological grounds will somehow be avoided.

IV CONCLUSION

While pragmatism and legal pragmatism in particular, is an influential movement in the United States, there has however been little detailed examination of pragmatism in an Australian context. The analysis presented in this thesis aims to fill this perceived gap in Australian jurisprudence by considering the relevance of legal pragmatism from an Australian perspective. The descriptive analysis and critical assessment of pragmatism, which has been presented in this Chapter, lays the foundations for the analysis of the relevance of pragmatic concepts to the approach of the Gleeson Court which will be considered in the following and subsequent Chapters.

The analysis presented in this Chapter has aimed to provide a conceptual understanding of the general philosophical approach associated with pragmatism by considering the three central tenets that are associated with pragmatism, namely of conceptualism, instrumentalism and perspectivism. In addition, the work of two influential contemporary legal pragmatists has been analysed. Legal pragmatism has also been distinguished from other influential approaches to constitutional interpretation in Australia. The analysis presented in this Chapter has also sought to examine the criticisms of pragmatism as an understanding of these criticisms, provides a foundation for the critical analysis presented in Part II of this thesis, concerning the extent to which theoretical reasoning is employed by the High Court of Australia, in some important constitutional cases concerning judicial power.

The discussion of the criticisms that have been made of pragmatism focused on three central arguments. The first criticism considered the pragmatic account of legal theory. It was suggested that pragmatists generally distinguish the perspective that they offer which is based upon a contextual understanding of knowledge from other methods of legal reasoning. The

criticism made of this account suggest that the application of legal theory does not generally represent the formalism that is attributed to it by pragmatism. The analysis presented in this Chapter suggests that there is particular merit in this critique of pragmatism, when this argument is considered from an Australian perspective.

The second criticism of pragmatism analysed above suggested that pragmatism fails to incorporate the benefits that attach to theoretical reasoning. Theoretical reasoning has the potential to produce compelling and persuasive precedents, as broad theoretical principles provide a guide for future decision-makers, and thereby promote consistency in the law.²⁷¹ Ultimately the arguments that pragmatists present place much importance on the production of a consensus, and the wider ideological goal of 'efficiency'. There is no doubt that reaching a consensus may be important and unanimous judgments often come as a welcome relief to any reader of the law; however, if the price of such unanimity is the obscuring of any theoretical reasoning, then it may be that to make such a trade-off is short sighted.

Although pragmatic approaches may produce agreements on the outcomes of particular cases, they may also have a wider destabilising effect on judge made law. In contrast, theoretical reasoning supports the integrity of the judicial process by providing a degree of transparency. Theoretical reasoning also promotes the consistent development of the law by providing a guide for future decisions. This is not to suggest that there is no role for theories that are incomplete being represented in a judgment. In new and developing areas of law, many theoretical positions may be incomplete.²⁷² It may even be argued that all theories are incomplete in some way.²⁷³ The fundamental point that the argument presented in this thesis seeks to emphasise is not that theoretical reasoning from broad abstract principles is the only method of judicial decision-making; rather it is the point, often made by realists, that, if such principles are influential, as to a certain extent they always will be,²⁷⁴ then the manner in which

²⁷¹ Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574.

²⁷² Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195.

²⁷³ Margaret Davies, for example, refers to the 'impossibility of legal closure': see Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 100.

²⁷⁴ Allan C Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85.

they impact upon judicial decisions should be acknowledged.²⁷⁵ It is only when the theoretical basis of a decision is revealed that it may be 'subject to advocacy, questioning, contrary argument and ongoing development', and the '[f]ailure to articulate and develop those values makes the decisions of the court less rather than more comprehensible and predictable'.²⁷⁶

The importance of articulating the theoretical foundations of judicial reasoning is particularly apparent if it is accepted that all judicial decision making is ideological. For example, Sir Anthony Mason has viewed the movement from legalism, as affording an opportunity for judges to provide, 'objective and principled elaboration', even if the precise scope of such principles 'must be left for later examination'.²⁷⁷ This position would not immediately appear to at odds with a pragmatic perspective; however, the third criticism of pragmatism that was analysed above suggested that the realist approach put forward by the Mason Court diverges fundamentally from a pragmatic perspective. As Chapter 3 discussed one of the fundamental aspects of the realist-influence approach of the Mason Court was the tendency for that Court, if a particular theory, policy considerations or ideological perspective informed judicial reasoning to state so openly.²⁷⁸ In contrast, the perspectivism of pragmatists whilst it suggests and acknowledges that theory has the potential to play a role in judicial decision making, usually also suggests that theoretical perspectives should be avoided if it is possible to base a judicial decision upon practical or pragmatic considerations. Two difficulties attach to this approach, which are not encountered by realist positions. The first difficulty is that pragmatic approaches by seeking to base judicial decision-making on practical or pragmatic considerations can obscure the influence of any theoretical or ideological position.²⁷⁹ The second is that pragmatism often fails to recognise that the manner in which facts are viewed, and evaluated, is likely to represent particular ideological and theoretical beliefs.

²⁷⁵ Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 5. See also Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28; Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review* 289, 292.

²⁷⁶ Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 5.

²⁷⁷ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

²⁷⁸ Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21, 23.

²⁷⁹ Adrienne Stone, 'Incomplete Theorizing in the High Court' (1998) 26 *Federal Law Review* 195, 198.

The descriptive analysis and critical assessment of pragmatism provided in this Chapter can assist a conceptual understanding of the approach taken to constitutional issues by the current High Court. The following Chapter will consider the pragmatic aspects of the jurisprudence of the Gleeson Court. The critical analysis of pragmatism, and the comparisons of pragmatism with other often more theorized approaches to constitutional interpretation presented in this Chapter, will provide a basis for the analysis presented in Part II of this thesis, which will contrast and critically compare, in the context of influential constitutional decisions, the approach of the current High Court with some of its' predecessors.

Chapter 6

THEORY, PRAGMATISM AND THE GLEESON COURT

I INTRODUCTION

The discussion presented in Chapter 5 analysed pragmatic approaches to constitutional interpretation. This Chapter will examine the relationship between pragmatism and the jurisprudence of the Gleeson Court. The discussion presented will also bring together the analysis presented in Part I of this thesis concerning the relationship between the approach of the Gleeson Court and the approaches of legalism, realism, natural law reasoning and pragmatism. The framework that this analysis provides will assist the critical jurisprudential analysis presented in Part II of this thesis, which will focus upon the approaches taken by differently constituted High Courts in some important constitutional cases.

II PRAGMATISM AND THE GLEESON COURT

Upon being sworn in as Chief Justice of the High Court of Australia, Gleeson CJ made reference to the responsibility of the judiciary for matters concerning the 'economy and efficiency' of the

judicial process.¹ As the discussion in Chapter 5 demonstrated, these are two core values that underlie much pragmatic thinking. However, a consequence of the diverse and at times nebulous manner in which pragmatic thought is represented means that it may not be particularly helpful to simply label the approach of the Gleeson Court as 'pragmatic'. Pragmatism will not necessarily provide a set of principles that will assist an analysis of the likely outcomes of particular cases.² Pragmatism does, however, attempt to provide a framework, which may assist an understanding of specific aspects of, or the general approach of, a particular court. The following analysis will consider the manner in which particular aspects of the approach of individual members of the Gleeson Court may be associated with pragmatic ideas. The four concepts that will be discussed are:

1. The idea that there is no 'over-arching' theory of constitutional interpretation.³
2. The idea that different constitutional issues require different approaches.⁴
3. The suggestion that regard should be had to practical or consequentialist arguments.⁵
4. The idea that judicial decisions should be primarily based upon low level theorizing.⁶

¹ Swearing in of Chief Justice Gleeson, 193 CLR xi, xii. See Bernard Lane, 'Gleeson Calls for Reorder in the Court', *The Australian* (Sydney) 23 May 1998, 4; Hans Van Leeuwen, 'Gleeson to Lead High Court on Efficiency Drive', *Financial Review* (Sydney) 23 May 1998, 6.

² See further, Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 822.

³ *McGinty v Western Australia* (1996) 186 CLR 140, 231-2 (McHugh J); *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733.

⁴ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

⁵ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

⁶ See Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), see particularly 35-61.

The following analysis will discuss the manner in which these four central ideas are associated with members of the Gleeson Court. The consistency of these ideas with concepts found in a *pragmatic* approach to constitutional interpretation will also be demonstrated.

A *No Over-arching Theory*

The first element of pragmatic thought that can be identified in the jurisprudence of the current Court is the idea that there is no guiding theory. Justice McHugh has, for example, questioned the validity of 'top-down' approaches to constitutional interpretation. It will be recalled that in *McGinty v Western Australia*⁷ Judge Posner's references to 'bottom-up' reasoning as being the 'more hallowed type'⁸ were quoted with approval by Justice McHugh; and Justice McHugh questioned the legitimacy of top-down or theoretical reasoning.⁹

Justice Gummow has also questioned the use of top-down approaches to constitutional interpretation. Justice Gummow's judgment in *McGinty* identified the adoption of top-down reasoning as being an issue.¹⁰ Furthermore, Justice Gummow in *SGH Ltd v Commissioner of Taxation*¹¹ stated that,

Questions of construction of the Constitution are not to be answered by the adoption and application of any particular, all-embracing and revelatory theory or doctrine of

⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 230-232 (McHugh J), ('*McGinty*'). As discussed above in Chapter 5, Section IV, sub-section A, Judge Posner distinguishes his approach from both bottom-up and top-down methods.

⁸ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 434.

⁹ *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

¹⁰ *Ibid*, 291 (Gummow J). See also *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* in which Justices McHugh and Gummow comment that:

In Australia, the observance by decision-makers of the limits within which they are constrained by the Constitution and by statutes and subsidiary laws validly made is an aspect of the rule of law under the Constitution. It may be said that the rule of law reflects values concerned in general terms with abuse of power by the executive and legislative branches of government. But it would be going much further to give those values an immediate normative operation in applying to the Constitution: *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 72 (McHugh and Gummow JJ).

¹¹ (2002) 210 CLR 51.

interpretation. Nor are they answered by the resolution of a perceived conflict between rival theories, with the placing of the victorious theory upon a high ground occupied by the modern, the enlightened and the elect.¹²

Justice Gummow has, in these ways, questioned the idea of an over-arching theory. It will however be argued in Part II that it is possible to identify some theoretical foundations to Gummow J's approach. In this regard, the approach of Gummow J can be contrasted with the reasoning of most other members of the Gleeson Court in which it is difficult to identify a theoretically-founded perspective. For example, Justice Dyson Heydon, in an extra-judicial speech, given before His Honour's appointment to the High Court, also openly advocated focusing on the immediate controversy and the avoidance of theoretical reasoning.¹³

In the manner outlined above, a number of members of the Gleeson Court have expressed the idea that there is no over-arching theory of constitutional interpretation. The view that there are no transcendent principles that explain law generally, as discussed in Chapter 5, is fundamental to legal pragmatic writings. This idea can be traced to the philosophical perspective of pragmatism that rejects the correspondence theory of truth and views knowledge as based upon experience and empirical analysis.¹⁴

B *The Diversity Approach*

The second aspect of pragmatic thought that may be found in the jurisprudence of the Gleeson Court, which is related to the view that there is no over-arching theory, is the idea that different approaches to constitutional interpretation can be applied. The idea that different constitutional questions require different approaches has been expressed by Chief Justice

¹² *Ibid*, 75. (Gummow J). See also, *McGinty v Western Australian* (1996) 186 CLR 140, 291 (Gummow J). See also the comments of Justice McHugh and Gummow in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 23.

¹³ Justice Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

¹⁴ See William James, *Pragmatism: A New Name for Some Old Ways of Thinking* (1907) 51; Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 143.

Gleeson and Justice McHugh in *Brownlee v The Queen*.¹⁵ In particular, their Honours suggested that the regard had to the 'significance of the circumstances surrounding the framing of the instrument will vary according to the nature of the problem.'¹⁶ Gleeson CJ has also commented extra-judicially that;

There is no single problem of interpretation raised by the Commonwealth Constitution; and there is no single solution. This is reflected in the approach of judges. It may be possible, by observing the way in which a particular judge sets about resolving a sufficiently large number of different problems, to describe the judge's methodology by some succinct and convenient formula; or it may not.¹⁷

This second element of pragmatic thought may also be identified in the approach of Justice Gummow. In *SGH Ltd v Commissioner of Taxation*,¹⁸ which was referred to above, Justice Gummow expressed the view that the interpretation of the scope of Commonwealth power under one of the heads of power in section 51 of the *Constitution* requires a different approach than that taken to section 44(i). In particular, His Honour stated that:

The provisions of the Constitution, as an instrument of federal government, and the issues which arise thereunder from time to time for judicial determination are too complex and diverse for either of the above courses to be a satisfactory means of discharging the mandate which the Constitution itself entrusts to the judicial power of the Commonwealth. Thus, it is one thing to determine the validity of a law, said to be supported by one or more of the heads of power in s 51 of the Constitution, by regard to the settled principles recently outlined in the joint judgment of six Justices in *Grain Pool of WA v The Commonwealth*. It may be another to construe the present scope of the term "a foreign power" in s 44(i) of the Constitution.¹⁹

¹⁵ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J).

¹⁶ *Ibid.*

¹⁷ Chief Justice Murray Gleeson, Foreword to Michael White QC and Aladin Rahemtula (eds), *Queensland Judges on the High Court*, (2003) ix.

¹⁸ (2002) 210 CLR 51.

¹⁹ *Ibid.*, 75 (Gummow J).

This view would appear to be consistent with a clause-by-clause approach to constitutional interpretation that is advocated by legal pragmatists, such as Judge Posner.²⁰ The idea that different questions may require different approaches reflects the perspectivism of pragmatism.²¹ As one pragmatic writer has expressed this idea, '[t]he pragmatist recognises that the best account of a phenomenon (such as law) from one angle, for one purpose, at one time, might not serve as well from another perspective, rooted in another temporal context, and aimed at different goals.'²² This position taken by *legal* pragmatists reflects the general philosophy of pragmatic writers, which, like the position put forward by Wittgenstein, views knowledge as being connected with a particular view of reality.²³

C Consequentialism

The third approach to constitutional interpretation taken by members of the Gleeson Court, which is also expressed in contemporary pragmatic writings, is the idea that regard should be had to the practical consequences of a decision. As Leslie Zines makes clear, this is not a novel concern and practical considerations have impacted in various ways upon much of the High Courts constitutional jurisprudence.²⁴ This element of the jurisprudence of the Gleeson Court has, however, received a significant amount of recognition in the academic literature.²⁵ This is

²⁰ See, for example, Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 446; Cass Sunstein, *One case at a time: judicial minimalism on the Supreme Court* (1999); Daniel A. Faber, 'Legal Pragmatism and the Constitution' (1988) 72 *Minnesota Law Review* 1331, 1343.

²¹ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 804.

²² *Ibid*, 804-5.

²³ See, Ludwig Wittgenstein, *Tractatus Logico-Philosophicus* (D F Pears & B F McGuinness 1961 trans) paragraphs 5.6331-5.641, 117 [First German edition *Logisch-philosophische Abhandlung* published 1921]; Hilary Putnam, *Pragmatism: An Open Question* (1995) 64, 68ff. See generally, Michael J Detmold, 'Intention: Meaning in Relation' in Ngaire Naffine, Rosemary Owens and John Williams (eds), *Intention in Law and Philosophy* (2001) 187, 191-6.

²⁴ Leslie Zines, *The High Court and the Constitution*, (4th ed 1997) 452.

²⁵ Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand: Essays and Commentaries* (2001) 229. See also Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249-50; Leslie Zines, 'The Present State of Constitutional Interpretation' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 224, 229; Chris Bleby, 'Judicial Policy in Constitutional Interpretation: "Practicality" as a Constitutional Concept' (unpublished paper delivered to the CLE Programme of the Law Society of South Australia, 21 August 2002).

not surprising as the idea that practical consequences are relevant has received a substantial, albeit varying, amount of support from members of the Gleeson Court.

The High Court decision of *Re Governor Goulburn Correction Centre; Ex parte Eastman*²⁶ provides an example of the Gleeson Court's reference to practical considerations.²⁷ In that case, one possible interpretation could have required the release of prisoners convicted in the Northern Territory or the ACT.²⁸ In taking an interpretation which avoided such a result, Gleeson CJ, McHugh and Callinan JJ held that the construction taken; 'is open on the language, and produces a sensible result, which pays due regard to the practical considerations arising from the varied nature and circumstances of the territories.'²⁹ A similar emphasis on practical considerations may also be identified in the approach taken by Chief Justice Gleeson and Justice McHugh in *Abebe v The Commonwealth*.³⁰ In *Abebe*, Gleeson CJ and McHugh J commented that the options put forward by the plaintiff in that case were 'so rigid and *impractical* that only the clearest constitutional language could compel them'.³¹

The idea that regard should be had to practical considerations, expressed in *Re Governor Goulburn Correction Centre; Ex parte Eastman*³² and *Abebe v The Commonwealth*,³³ has however not been consistently supported in all cases. For example, in *Re Wakim; Ex parte McNally*³⁴ the judgments of Chief Justice Gleeson,³⁵ Justice McHugh,³⁶ and the joint judgment of Justices Gummow and Hayne,³⁷ all cast doubt upon the validity of considering the wider practical consequences of judicial decisions. Justice McHugh expressed this view in the following way:

²⁶ (1999) 200 CLR 322.

²⁷ *Ibid*, 332 (Gleeson CJ, McHugh and Callinan JJ).

²⁸ See (1999) 200 CLR 322, 328-9 (submissions).

²⁹ (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh and Callinan JJ). See further, Tom Pauling and Sonia Brownhill, 'The Territories and Constitutional Change' (2007) 27 *Adelaide Law Review* (forthcoming).

³⁰ (1999) 197 CLR 510, 532.

³¹ *Ibid*, 532.(emphasis added)

³² (1999) 200 CLR 322.

³³ (1999) 197 CLR 510, 532.

³⁴ (1999) 198 CLR 511 ('*Re Wakim*'). See further Chapter 10 below.

³⁵ *Ibid*, 540.

³⁶ *Ibid*, 548-549, 569.

³⁷ *Ibid*, 579-580, 582.

It would be very convenient and usually less expensive and time-consuming for litigants in the federal courts if those courts could deal with all litigious issues arising between the litigants, irrespective of whether those issues have any connection with federal law. From the litigant's point of view that is saying a great deal. But unfortunately, from a constitutional point of view, it says nothing.³⁸

Justice Kirby did not support this approach. In rejecting the approach taken by the majority in *Re Wakim*, Justice Kirby sought to apply the approach taken by Gleeson CJ and McHugh J in *Abebe v The Commonwealth* and in doing so Kirby J highlighted the fact that practical considerations have not always been referred to in a consistent manner.³⁹ In this regard it is interesting to note that although some of the theorised arguments put forward by pragmatists such as Sunstein respond to the criticisms made by Kirby J of the Gleeson Court, these arguments are not generally utilised by members of the Gleeson Court.⁴⁰

In Chapter 5 it was suggested that the relevance of practical considerations to pragmatic judicial decision-making reflects the 'future-orientated instrumentalism' of pragmatism,⁴¹ which looks to the immediate practical significance of the decision as well as to the potential empirical implications.⁴² It may be recalled that legal pragmatists such as Judge Posner suggested that it was always preferable for judicial decisions to result from an analysis of the relevant pragmatic considerations. In contrast, Sunstein only put forward a presumption against theoretical reasoning. In this way it can be concluded that Sunstein's approach accords a more limited role to practical or consequential arguments, than that advocated by Judge Posner. The reason being, that Sunstein's position allows for a greater degree of judicial choice as to when regard should be had to practical considerations. It is argued that the approach put forward by the Gleeson Court probably exhibits a greater resemblance to the approach put forward by Sunstein

³⁸ *Ibid*, 548.

³⁹ *Ibid*, 600 (Kirby J) referring to *Abebe v The Commonwealth* (1999) 197 CLR 510, 532 (Gleeson CJ and McHugh J). See also *Eastman v The Queen* (2000) 203 CLR 1, 44 (Kirby J).

⁴⁰ See further, Chapter 5, section IV, sub-section B above.

⁴¹ Judge Richard Posner, *Overcoming Law* (1995) 12.

⁴² Judge Richard Posner, *The Problems of Jurisprudence* (1990) 124-5; Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433, 447, 449; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1737-42.

than that of Posner, because the approach of the Gleeson Court, like that of Sunstein, carries with it a degree of flexibility.⁴³

Whilst, as discussed above, similarities may be identified between the approach advocated by pragmatic scholars, and the judicial approach of members of the Gleeson Court, the direct influence of legal pragmatic writings upon the Gleeson Court is more difficult to identify. In addition, differences between the judicial approach of the Gleeson Court and the work of any particular pragmatic writer may also be emphasised. For example, the Gleeson Court does not appear to value the reaching of a consensus as highly as Sunstein does.⁴⁴ It is therefore argued that the approach of the Gleeson Court does not necessarily follow exactly the position taken by any particular pragmatic writers, including Sunstein or Posner. However, the Gleeson Court would appear to have reference to practical considerations on a case-by-case basis, which is consistent with the general emphasis that legal pragmatism places upon consequentialist arguments. Although the extent to which members of the Gleeson Court have regard to practical considerations may vary, their Honours general approach remains consistent with legal pragmatism as not all legal pragmatists require that the emphasis placed upon practical considerations must be the same in all cases.⁴⁵ Furthermore, it is suggested that the varying regard that members of the Gleeson Court have for practical considerations is consistent with the inherent flexibility that the perspectivism of pragmatism allows for.

D *Low Level Theorizing*

The fourth pragmatic perspective that can be identified in the jurisprudence of the Gleeson Court is the idea that if theoretical arguments are to be used they should be as 'incompletely

⁴³ See further Justice Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234.

⁴⁴ See Chapter 5, Section IV, sub-section B above. See also Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Report* 88, 93-94.

⁴⁵ Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 804-5.

theorised' as possible.⁴⁶ Although, as discussed above, members of the Gleeson Court have in general sought to avoid theoretical arguments, when such reasoning is employed, the scope of a theoretical reasoning process is restricted. Thus, to the extent that judgments of the Gleeson Court have engaged in theoretical reasoning, this reasoning has tended to stay at a low level of abstraction. Because of this approach, decisions of the Gleeson Court with limited theorizing remain consistent with a pragmatic perspective. The following discussion will draw upon a number of relevant cases to exemplify the three key ways in which it is suggested that judgments of the Gleeson Court have tended to stay at a low level of abstraction. The use of low level theorizing identified in the following examples will, however, be the subject of further discussion in Part II which will present a more exhaustive discussion of some relevant case law.

The tendency for the Gleeson Court to follow a doctrinal approach is the first manner in which the Gleeson Court has tended to stay at a low level of abstraction. As it was discussed in Chapter 2, decisions of the Gleeson Court have generally sought to follow established doctrines, and to exhibit a reasoning process that is based upon previous authorities. For example, the majority decision in *Re Wakim* is grounded in a legalistic manner upon the text of the Constitution and previous decisions.⁴⁷ All of the majority judges in *Re Wakim* relied heavily upon the decisions of *In re Judiciary and Navigation Acts*⁴⁸ and *R v Kirby; Ex parte Boilermakers' Society of Australia*.⁴⁹ It may be suggested at this point that although these decisions have generally supported a strict view of the separation of powers doctrine, the reasoning process recorded has not tended to address in broad theoretical terms the arguments that support this view.

The second manner in which it is argued that the Gleeson Court has tended to avoid theoretical reasoning can be found in decisions, which although they could have been widely theorised, are confined to narrow grounds. In Chapter 9 and 10 this argument will be considered in the context of a number of decisions, including a consideration in Chapter 9 of the decision of the

⁴⁶ See Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

⁴⁷ See further Chapter 10.

⁴⁸ (1921) 29 CLR 257.

⁴⁹ (1956) 94 CLR 254.

Brennan Court in *Kable v Director of Public Prosecutions (NSW)*.⁵⁰ The analysis of this decision will suggest that although there is some theoretical reasoning engaged in by the High Court in *Kable* the reasoning put forward in this case has tended to stay at a low level of abstraction, and in particular the conclusions reached in *Kable* are confined closely to the facts of the case. For example, many judges in *Kable* expressed concern about the *ad hominem* nature of the legislation,⁵¹ and the difficulties of preventative detention,⁵² however this uneasiness did not appear to prompt any wide-ranging theoretical discussion. Ultimately, for the judges that formed the majority, the Act was invalid⁵³ on the basis that it purported to vest in the Supreme Court a function that was incompatible with the exercise by that Court of the judicial power of the Commonwealth.⁵⁴ As it will be discussed in Chapter 9 this decision could have been more widely expressed. A similar low-level of theorization may also be identified in the decisions of the Gleeson Court in *Baker v R*⁵⁵ and *Fardon v Attorney-General (Queensland)*,⁵⁶ which will be discussed in Chapter 10.

The third manner in which the level of theorizing engaged in by members of the Gleeson Court has been limited may be identified in the approach of the Court to constitutional implications. Although it was decided before the Gleeson era, the decision in *Lange v Australian Broadcasting Corporation*⁵⁷ which supported the implied freedom of political communication provides an example of an approach that is consistent with that generally taken by the current Court. *Lange v Australian Broadcasting Corporation*⁵⁸ raised the issue of whether a 'constitutional defence' to an

⁵⁰ (1996) 189 CLR 51.

⁵¹ *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('*Kable*'), 103-107 (Gaudron J), 116-120 (McHugh J), 133-134 (Gummow J). Justice McHugh acknowledged that this was the nature of the legislation stating: 'it is plain that the legislature and the executive government which introduced the Act into the Parliament of New South Wales passed the Act for the purpose of ensuring that the appellant was kept in prison.': *ibid* 120.

⁵² *Ibid*, 107 (Gaudron J), 120 (McHugh J), 134 (Gummow J).

⁵³ *Kable* (1996) 189 CLR 51, 98-99 (Toohey J), 107-108 (Gaudron J), 124 (McHugh J), 128, 144 (Gummow J); 68 (Brennan CJ dissenting), 87 (Dawson J dissenting)

⁵⁴ As such there existed a limitation on the powers of State courts 'vested with federal jurisdiction' under Chapter III of the Constitution: *ibid*, 98 (Toohey J), 104-105 (Gaudron J), 109 (McHugh J), 128, 144 (Gummow J).

⁵⁵ (2004) 223 CLR 513 ('*Baker*').

⁵⁶ (2004) 223 CLR 575 ('*Fardon*').

⁵⁷ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

⁵⁸ *Ibid*. See also Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

action for defamation was available.⁵⁹ Whilst the unanimous court in *Lange* developed a defence based upon the freedom of communication that the Court held could be implied from the Constitution, the freedom was not absolute. The freedom was limited to what was necessary for the effective operation of a system of representative and responsible government provided for by the Constitution.⁶⁰ Furthermore, the decision in *Lange* was tied closely to the text of the Constitution, and the references made in that case to representative government tended to be qualified by the words 'as provided by the Constitution'.⁶¹ It is suggested that this decision is consistent with the general approach of the Gleeson Court. As Professors Tony Blackshield and George Williams state:

[g]one are the days when the Court under Sir Anthony Mason first implied a freedom of political communication and even considered the idea of a guarantee of legal equality. Such implications are now more likely to be narrowly construed, or indeed bypassed due to the use of principles of statutory construction that enable the Court to avoid the need for constitutional analysis at all.⁶²

Put simply, it is suggested that the Gleeson Court has sought to ensure that, to the extent that implications have been drawn, they are narrowly confined, and tied closely to the text of the *Constitution* or the legislation in question.⁶³

The brief analysis presented above indicates that by following a doctrinal approach; basing decisions on narrow grounds; and confining implications by reference to the text of the Constitution, members of the Gleeson Court have demonstrated a tendency to avoid theoretical arguments. Furthermore, when engaging in these arguments, their honours have tended to

⁵⁹ The defendant, the Australian Broadcasting Corporation asserted in their amended defence a 'constitutional defence' claiming a freedom guaranteed by the Commonwealth Constitution to publish material, styled upon the defence developed by Mason CJ, Toohey and Gaudron JJ in *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104: see *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 521 (summary of case stated).

⁶⁰ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 561.

⁶¹ *Ibid.* See Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

⁶² Tony Blackshield and George Williams, 'Preface to the Fourth Edition', Tony Blackshield and George Williams, *Australian Constitutional Law* (4th ed, 2006) v.

⁶³ See also Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574.

stay at the lowest level of abstraction possible. This approach is generally consistent with the idea expressed by Sunstein that judicial decisions should involve 'a specific outcome and a set of reasons that typically do not venture far from the case at hand'.⁶⁴

E *Pragmatic Elements in the Approach of the Gleeson Court*

It is concluded that four significant elements of the approach of the current Court are consistent with ideas presented by pragmatic writings. The first of these is the idea that there is no 'over-arching' theory of constitutional interpretation.⁶⁵ The second is the view that different constitutional issues require different approaches.⁶⁶ The third is the idea that regard should be had to practical or consequentialist arguments.⁶⁷ The fourth is the idea that judicial decisions should be based primarily upon low level theorizing.⁶⁸ These four ideas are also consistent with the wider philosophical perspective of pragmatism. However, whilst it may be relatively straightforward to identify four elements of a pragmatic approach in the general approach of the Gleeson Court, the more difficult issue is whether this correlation means that pragmatic adjudication or pragmatic modes of thought have *influenced* the approach taken by the Gleeson Court.

One reason that it is difficult to identify *influence* is that, as the analysis in Part I of this thesis has suggested, the Gleeson Court does not tend to write at length about the reasons for the

⁶⁴ Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, 1741.

⁶⁵ *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

⁶⁶ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

⁶⁷ See for example, *Re Governor Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh and Callinan JJ). See also Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

⁶⁸ See for example, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Kable v The Director of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51. See further, Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

adoption of any particular approach. As Justice Keith Mason has pointed out 'judges tend not to enunciate the theoretical underpinnings of their judicial worldview.'⁶⁹ Although judges like Justice Scalia of the United States Supreme Court, and Justice Kirby and to an extent Justice McHugh of the Australian High Court have in their judgments and extra-judicially advocated particular methods of interpretation, such approaches tend to be the exception rather than the rule.⁷⁰ In addition, as Sir Anthony Mason has noted, many recent members of the High Court have 'been diffident about embracing a particular interpretive theory.'⁷¹ In a similar vein, Justice Bradley Selway has referred to Justices of the first Gleeson Court, other than Kirby and McHugh JJ as the 'flexible five' due to their disinclination to 'be bound by any particular approach to constitutional interpretation.'⁷²

The analysis presented in Part I of this thesis has suggested that the Gleeson Court does not tend to write at length about the reasons for the adoption of any particular approach, and consequently the *influence* of any specific perspective or philosophy will be difficult to determine. For example, there are at least three possible explanations for the consistency, which the analysis presented in this Chapter has shown, between aspects of the approach of the Gleeson Court and elements of pragmatic thought. One alternative is that the regard had for pragmatic ideas which is implicit in the approach of some members of the current Gleeson Court, represents a non-theorised form of pragmatism. A second possibility is that the approach of the current Court is more likely to fit within the general rubric of pragmatism, with matters such as a regard for consequentialist considerations, or adoption of 'incompletely theorised' approach influencing judicial reasoning, only if more standard legalistic approaches are not sufficient to resolve a particular issue.⁷³ A third explanation would be that the

⁶⁹ Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574.

⁷⁰ See for example the reasoning of Scalia J in *Printz v US* 521 US 898 (1997); Justice Antonin Scalia, 'The Rule of Law as a Law of Rules' (1989) 56 *University of Chicago Law Review* 1175; Justice Antonin Scalia, *A Matter of Interpretation - Federal Courts and the Law* (1997); *Brownlee v The Queen* (2001) 207 CLR 278, 321-322 (Kirby J); Justice Michael Kirby 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; *McGinty v Western Australian* (1996) 186 CLR 140, 230-231 (McHugh J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 549-551 (McHugh J); McHugh, 'The Judicial Method' (1999) 73 *Australian Law Journal* 37, 46.

⁷¹ Sir Anthony Mason, 'Constitutional Interpretation: Some Thoughts' (1998) 20 *Adelaide Law Review* 49.

⁷² Justice Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246.

⁷³ See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Kable* (1996) 189 CLR 51.

'flexible'⁷⁴ methodology of the Gleeson Court, rather than being indicative of a pragmatic methodology or a non-theorised form of pragmatism, may represent an *ad-hoc* case by case analysis that has resulted from the absence of any theoretical foundation being developed to support and define the approach taken by the Court.

It is therefore concluded that there are difficulties that attach to any attempts to describe the approach of the Gleeson Court as *wholly pragmatic*. Further, the above analysis has demonstrated that to the extent that pragmatic thought is represented in the jurisprudence of the Gleeson Court, it is only a *non-theoretical* form of pragmatism that is apparent. As such, it may be suggested that this methodology is unlikely to have been *influenced* by the more theorised position that is represented in legal pragmatism generally and the United States movement in particular, however, categorical statements of *influence* are difficult to justify. In part, for this reason, the analysis presented in this thesis does not seek to equate the approach of the Gleeson Court with legal pragmatism. Rather, the analysis presented in this thesis will suggest that the approach of the Gleeson Court represents a non-theorised form of legalism, together with some non-theoretical aspects of pragmatic thought.

In other words, although a conceptual understanding of pragmatism may further the current understanding of the approach of the Gleeson Court, the similarities between pragmatism and the approach of the Gleeson Court, needs to be considered together with an understanding of the relationship between legalism and the approach of the Gleeson Court, which was considered above in detail in Chapter 2. An understanding of the manner in which the Gleeson Court has dealt with ideas presented by realism, natural law jurisprudence, and the approaches taken during the Mason era is also informative. For this reason the following analysis will seek to draw together the conclusions reached in this Chapter and previous Chapters about the manner in which the Gleeson Court has dealt with ideas associated with these differing approaches to constitutional interpretation. This analysis provides a conceptual framework for a consideration of the approach of the Gleeson Court, which the analysis presented in Part II

⁷⁴ See Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234.

will examine further in the context of a number of important constitutional cases concerning judicial power.

III CONCLUSION TO PART I: A CONCEPTUAL FRAMEWORK FOR THE APPROACH OF THE GLEESON COURT

Although there is a tendency for Western thought, which is influenced by the philosophical sense of modernism, to present most forms of knowledge as representing abstract, universal principles,⁷⁵ a consequence of the diversity of ideas associated with constitutional issues is that whilst an analysis from a theoretical perspective can be insightful, it is unlikely to reveal the existence of absolute principles. For this reason the conclusions of the analysis presented in Part I, that are set out below, seek to provide a *conceptual* rather than a *formulistic* analysis⁷⁶ of the relationship between the approach of the Gleeson Court and the themes that are represented by legalism, realism, natural law theories and pragmatism. A fundamental aim of this thesis is to demonstrate that an understanding of the theoretical foundations or concepts used in constitutional interpretation can further the current level of understanding about judicial approaches either in general or in specific cases. It is argued that this approach does not require the statement of a static set of all encompassing principles. Put simply, this analysis does not suggest that a definitive set of principles describe the approach of the Gleeson Court, nor is it suggested that any set of principles may be used as the basis for a deductive reasoning process that will suggest that likely *outcome* of particular cases. Rather, the analysis seeks to provide a *conceptual* framework that will extend the current level of understanding in Australian jurisprudence, concerning the presumptions that may be relevant to the approach of the Gleeson Court.

Part I of this thesis has analysed the manner in which members of the Gleeson Court have considered four approaches to constitutional interpretation—which are broadly categorised as

⁷⁵ Margaret Davies, *Asking the Law Question* (2nd ed, 2002) 298.

⁷⁶ See further Chapter 5, Section IV, sub-section A above.

legalism, realism, natural law theories and pragmatism. This analysis has provided a particular perspective on the manner in which these concepts can be interpreted in the context of Australian constitutional jurisprudence generally, and the approach of the Gleeson Court in particular. The central conclusions that may be drawn from that analysis may be summarised as follows:

1. Legalism is a significant influence on the Gleeson Court. The form of legalism that appears to have the general support of most members of the Gleeson Court is not a strict or confined legalistic approach. The form of legalism advocated represents the methodology of Dixonian legalism in that it supports the law-making role of judges, the making of constitutional implications, and the need to accommodate social change. However, Dixonian legalism is based upon the existence or pre-supposition of a *corpus* of legal knowledge, which is capable of providing an external standard by which the validity of judicial decisions may be determined. A similar theoretical foundation is noticeably absent from the form of legalism associated with the Gleeson Court. It is difficult to identify in the jurisprudence of the Gleeson Court any theoretical argument that would support the claim that adherence to the methodology of legalism is capable of providing legitimacy to judicial decisions.
2. The jurisprudence of the Gleeson Court has in general rejected two identifiable trends that are associated with legal realism and the Mason era. One realist trend of the Mason era involved the according of less weight to precedents. This approach has been abandoned in the doctrinal approach adopted by most members of the Gleeson Court, which has a strong tendency to follow previous authorities. The second realist tendency rejected by the Gleeson Court is the idea that policy considerations could and should be discussed in judicial decisions. The Gleeson Court has demonstrated some willingness to take a purposive approach to constitutional issues and look at the 'purpose' of legislative provisions, however as Chapter 3 discussed, this purposive analysis is more confined than that which is associated with the jurisprudence of Sir

Anthony Mason. Perhaps, most significantly, the Gleeson Court has tended not to engage with realist criticisms of legalism.

3. There has been an overall rejection by the majority of the Gleeson Court of approaches to constitutional interpretation that are based upon broad theoretical principles, and in particular the Gleeson Court has sought to distance its approach from the jurisprudence of Justices Deane and Toohey, which as Chapter 4 considered reflected in some ways the influence of a natural law perspective.

4. Four significant elements of the approach of the current Gleeson Court are consistent with ideas presented by pragmatic writings. The first of these is the idea that there is no 'over-arching' theory of constitutional interpretation.⁷⁷ The second is the view that different constitutional issues require different approaches.⁷⁸ The third suggestion that has been identified is the idea that regard should be had to practical or consequentialist arguments.⁷⁹ The fourth is the idea that judicial decisions should be primarily based upon low level theorizing.⁸⁰ However, the jurisprudence of the Gleeson Court has not put forward any significant theoretical arguments in support of the adoption of a pragmatic approach, and consequently it is difficult to assess whether the consistency of the aspects of the approach of the Gleeson Court with pragmatism is a result of a general presumption against theoretical reasoning, or

⁷⁷ *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

⁷⁸ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

⁷⁹ See for example, *Re Governor Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh and Callinan JJ). See also Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

⁸⁰ See for example, *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Kable* (1996) 189 CLR 51. See also Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

an ad-hoc tendency to have regard to practical or pragmatic considerations, or some other undefined influence.

In summary it can be said that the methodology of the Gleeson Court generally rejects the idea that constitutional interpretation can be guided by any over-arching, 'top-down' theoretical approach. In addition, the Court has specifically sought to distance the approach that it engages in from concepts associated with natural law reasoning. The concepts associated with realism, and perhaps most significantly, the realist critiques of legalism, remain largely unaddressed by the general approach of the Gleeson Court. The most central influences upon the current Court would stem from legalism, however as the analysis presented in this Chapter shows a number of pragmatic ideas are also relevant.

Although legalistic and pragmatic concepts are associated with the approach of the Gleeson Court, the tendency of the Gleeson Court not to theorise about why a particular approach is adopted makes it difficult to define the precise *influence* of legalism and pragmatism. It should however be noted that the methodologies of legalism and pragmatism are not necessarily inconsistent. Pragmatism generally, in moving away from the use of theory and 'extra-constitutional' notions, can come close to advocating a position which in some respects reflects quite closely the 'traditional dogma' that sees constitutional interpretations as based almost solely upon the constitutional text.⁸¹ For example, as Chapter 5 discussed Judge Richard Posner advocates, on pragmatic grounds, a close adherence to orthodox legal methods. The jurisprudence of Justice Oliver Wendell Holmes has also been viewed as having regard to both legalistic doctrinal reasoning and practical and pragmatic considerations. For example, Holmes has been viewed as seeking a 'practical balance' between 'claims of habit on the one hand, and those of taxonomic efficiency on the other.'⁸²

The argument presented in Part I of this thesis provides a reasoned basis for the identification of at least one significant trend that may be associated with the general approach of the Gleeson

⁸¹ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 13.

⁸² Thomas Grey, 'Holmes and Legal Pragmatism' (1989) 41 *Stanford Law Review* 787, 823.

Court. It suggests that the manner in which the Gleeson Court has approached the various concepts of legalism, realism, natural law reasoning and pragmatism, is consistent in one fundamental respect: what is noticeably absent from the jurisprudence of the Gleeson Court is any theoretical argument to support or justify the perspective that their Honours are taking to constitutional issues. In other words, the Gleeson Court generally puts forward an orthodox but largely un-theorized methodology.

The conceptual framework that has been summarised in this section is based upon the analysis undertaken in Part I of this thesis concerning the manner in which the jurisprudence of members of the Gleeson Court relates to four major approaches to constitutional interpretation. The concepts put forward by each of these four approaches has been presented and critically examined in previous Chapters. In Part II of this thesis some significant constitutional cases, both from the Gleeson era and from previous differently constituted High Courts will be examined. The examination of specific cases will enable the conceptual framework presented above to be considered further. This form of analysis will also provide a basis for a critical comparison of the approaches of the Dixon, Mason and Gleeson High Courts.

PART II

Chapter 7

FOUNDATIONAL DEVELOPMENTS CONCERNING THE SEPARATION OF POWERS DOCTRINE IN AUSTRALIAN JURISPRUDENCE

I INTRODUCTION TO PART II

Part II of this thesis will test the theoretical arguments developed in Part I against the approach taken in particular cases. More specifically, the analysis presented in Part II will examine and critically assess the manner in which differently constituted High Courts have interpreted the provisions contained in Chapter III of the *Constitution*. The focus of the Part will be upon the movement that has occurred from the Dixon to Mason era, through the Brennan Court and to the Gleeson era. One primary object of this analysis is to consider whether the differing approaches taken to the interpretation of Chapter III are reflective of the diverse underlying theoretical assumptions of legalism, realism, natural law reasoning and pragmatism that were considered in Part I of this thesis.

Before engaging in an analysis concerning judicial power, it should be acknowledged that there are various areas of constitutional law that could be considered in order to examine the

influence of the theoretical constructs considered in Part I of this thesis. For example, the cases concerning the implied freedom of political communication could equally have been a vehicle to test the argument. However, this area of law has been the subject of a greater amount of academic analysis that considers the influence of different theoretical perspectives.¹ There are, in addition, a number of reasons which commend a focus upon the manner in which judicial power has been considered by differently constituted High Courts.

First, a focus on judicial power provides some necessary parameters for the analysis presented in this thesis. Constitutional law is diverse and it is not possible to consider within the scope of this thesis even all areas of this discipline. Secondly, it may be argued that a consideration of judicial power provides perhaps the best example of the contrasting influence that differing theoretical constructs have had upon the approaches taken by differently constituted High Courts, including the Dixon, Mason and Gleeson Courts.² For example, the separation of judicial power was considered by Sir Owen Dixon to be 'basal' to the whole legal system.³ In the Mason era, the manner in which the High Court interpreted the constitutional provisions

¹ See, for example, Justice Keith Mason, 'What is wrong with top-down legal reasoning?' (2004) 78 *Australian Law Journal* 574, 574-577; Harley Wright, 'Sovereignty of the People - The New Constitutional Grundnorm?' (1998) 26 *Federal Law Review* 165; Anthony Dillon, 'A Turtle by any Other Name: The Legal Basis of the Australian Constitution' 29 *Federal Law Review* 241; D A Smallbone 'Recent suggestions of an Implied "Bill of Rights" in the Constitution, considered as part of a general trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254.

² See for example, *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330; *New South Wales v Commonwealth* ('Wheat Case') (1915) 20 CLR 54; *Waterside Workers' Federation of Australia v J W Alexander Ltd* ('Alexander's Case') (1918) 25 CLR 434; *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257, ('In re Judiciary and Navigation Acts'); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('Boilermakers'); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361; *R v Joske; Ex parte Australian Building Construction Employees & Builders' Labourers' Federation* (1974) 130 CLR 87; *Hilton v Wells* (1985) 157 CLR 57; *Harris v Caladine* (1991) 172 CLR 84; *Polyukovich v The Queen* ('War Crimes Act Case') (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *Brady v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245; *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1; *Nicholas v The Queen* (1998) 193 CLR 173; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511; *Luton v Lessels* (2002) 210 CLR 333; *Behrooz v Secretary of the Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575; *Al-Kateb v Godwin* (2004) 219 CLR 562. By way of comparison although the implied freedom of political communication cases provide a good contemporary example of the movement that has occurred in constitutional law, judicial recognition of an implied freedom of political communication did not occur until the late 1970s with the judgments of Justice Murphy. Furthermore, this area of law was only considered by all members of the High Court during and after the Mason era: see for example, *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television v Commonwealth (No 2)* (1992) 177 CLR 106; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104; *Stephens v West Australian Newspapers Ltd* (1994) 182 CLR 211; *Levy v Victoria* (1997) 189 CLR 579; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Roberts v Bass* (2002) 212 CLR 1; *Coleman v Power* (2004) 220 CLR 1; *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181; *APLA Ltd v Legal Services Commission (NSW)* (2005) 224 CLR 322.

³ See Philip Ayres, *Owen Dixon* (2003) 257 citing Dixon to Lord Simonds, draft, 12 February 1957 in *Correspondence 1955-1956, Owen Dixon, Personal Papers*. See also *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

concerning judicial power had fundamental implications for the interests of individuals.⁴ Furthermore, as a number of commentators have noted, the interpretation of Chapter III of the Constitution and the protection of the integrity of the federal judiciary has been a primary concern for the Gleeson Court.⁵ The Chapters that comprise Part II of this thesis will focus upon the consideration of judicial power by each of these three Courts. In particular this Chapter will consider the manner in which this concept is approached by the Dixon Court. Chapter 8 will consider the approach of the Mason Court. The analysis in Chapter 9 will focus upon the Brennan era, the reason for this being that the Brennan Court played an important role in the development of Chapter III jurisprudence between the Mason and Gleeson Courts. Finally, Chapter 10 will examine the methodology of the Gleeson Court.

A third reason for focusing on judicial power is that this is an area of law in which a court's understanding of its role may be profoundly influential. A reason for this is that the exercise of judicial power can have significant implications for individuals in their relationship with the State. Importantly, in a constitutional context, the judiciary can act as a mediator between individuals and the State.⁶ However, the extent to which a court will assume such a role is likely to be affected by the court's perception of its role,⁷ and there is much latitude for

⁴ See, for example, *Polyukovich v The Queen* ('War Crimes Act Case') (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

⁵ Stephen Gageler, 'The High Court on Constitutional Law: the 2001 term' (2002) 25 *University of New South Wales Law Journal* 194, 201-203; Leslie Zines, 'The Present State of Constitutional Interpretation' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 231-237; Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review* 283; Justice Bradley Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 249. See also Katherine Gelber, 'High Court Review 2003: The Centenary Year' (2004) 29 *Australian Journal of Political Science* 331; Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21; Justice Paul Finn, 'Australia Compared' in Rick Bigwood (ed), *Legal Method in New Zealand* (2001) 221; Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 555; Haig Patapan, 'High Court Review 2001: Politics, Legalism and the Gleeson Court' (2002) 37 *Australian Journal of Political Science* 241; Dan Meagher, 'Guided by voices? - Constitutional interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261; Adrienne Stone, 'Constitutional interpretation' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 139; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307.

⁶ Keith Mason, 'The Rule of Law' in Paul Finn (ed) *Essays on Law and Government; Volume 1 Principles and Values* (1995) 114, 119; TRS Allan, 'Legislative Supremacy and the Rule of Law' (1985) 44 *Cambridge Law Journal* 111, 125.

⁷ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 30.

interpretation in this area of law, with judicial power itself being an 'elusive' and 'nebulous' concept.⁸

So as to provide an understanding of the direction that the analysis presented in Part II of this thesis will take, and in order to indicate the relevance of the discussion presented in this Part to the matters considered in Part I of this thesis, the arguments presented in the following Chapters will be outlined in a preliminary way in this introduction.

A Outline of Part II

1 Chapter 7

The discussion presented in this Chapter will begin by considering some of the historical influences that have impacted upon the understanding of judicial power that has developed in Australian jurisprudence. This analysis will aim to illustrate the manner in which a number of important theoretical arguments support a specific conception of judicial power, as well as the notion that judicial power should be separated from other governmental functions. The influence of these perspectives will then be examined in the context of a number of cases that were foundational in the establishment of the Australian view of the separation of judicial power. The cases to be examined are, *New South Wales v Commonwealth*,⁹ *Waterside Workers' Federation of Australia v J W Alexander Ltd*,¹⁰ *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920*¹¹ and *R v Kirby; Ex parte Boilermakers' Society of Australia*.¹² It will be

⁸ *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 532 (Mason CJ); Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 124; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 323. See also *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J); *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 394 (Windeyer J); *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 66 (McHugh J); *Nicholas v The Queen* (1998) 193 CLR 173, 207 (Gaudron J), 256 (Kirby J).

⁹ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case').

¹⁰ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('Alexander's Case').

¹¹ *In re the Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257 ('In re Judiciary and Navigation Acts').

¹² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('Boilermakers').

argued that although the reasoning process presented by the judges in these cases demonstrates the influence of a number of perspectives, the most significant influence upon the development of the separation of powers doctrine in these cases is *legalism*. In particular, it will be argued that apparent in the *Boilermakers'* decision is the distinctive influence of a *Dixonian* form of legalism that was defined in Chapter 2.

2 Chapter 8

The analysis presented in Chapter 8 of this thesis will consider the movement in constitutional law that occurred following the decision in *Boilermakers*. In particular it will be suggested that in a number of cases leading up to the Mason era, and in cases decided during the Mason era, the High Court gave increased recognition to the idea that the doctrine of the separation of judicial power may be more flexible than that described by the two limbs of the decision in *Boilermakers*. The second topic analysed in Chapter 8 will however concern the manner in which the High Court during the Mason era developed the notion of the separation of judicial power to provide particular protections to individuals.¹³ It is argued that these developments are reflective of the influence of realism and sociological jurisprudence. These theories, as Chapter 3 considered, explicitly acknowledge the role that the Court plays in balancing the interests of individuals with those of the State. In addition, in Chapter 8 it will be argued that in some of Justice Deane's and Justice Toohey's judgments concerning judicial power, the underlying influence of natural law principles are identifiable. Further, it will be argued that judgments concerning judicial power from the Mason era, in comparison to the High Court's earlier jurisprudence concerning Chapter III, exhibit a greater tendency to explicitly articulate the broad theoretical principles upon which the decisions are based.

¹³ See for example, *Polyukovich v The Queen* ('War Crimes Act Case') (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('Chu Kheng Lim').

3 Chapter 9

Chapter 9 will consider the manner in which judicial power was considered in the Brennan era. More specifically, the analysis presented will suggest that during this time a flexible understanding of the notion of judicial power continued to be expressed. It will be argued that there were some changes in the methodology of the Court during this period, however, the important constitutional protections that the Mason Court held Chapter III accorded to individuals were maintained.¹⁴ This era also witnessed an increase in the regard had for the need to preserve the integrity of Chapter III Courts.

4 Chapter 10

In Chapter 10 in the context of cases concerning judicial power the approach of the Gleeson Court will be counterpoised with both the more realist-orientated approach of the Mason era and with the concept of Dixonian legalism.¹⁵ The analysis presented in Chapter 10 suggests that whilst the approach of the Mason Court sought to confront the challenges of constitutionalism,¹⁶ by acknowledging and addressing the role that the Court plays in balancing the interests of the State and the interests of the individual, there has been some movement away from this approach by the Gleeson Court. In particular, the Gleeson Court has moved to an approach that is concerned to protect the integrity of the federal judiciary. The discussion in Chapter 10 concludes that the approach of the Gleeson Court to judicial power exhibits a non-theoretical form of legalism together with a varying regard for the practical consequences of a decision. It will be demonstrated that this approach of the Gleeson Court, is consistent with aspects of both legalism and pragmatism, which were outlined in Chapter 6. It will be

¹⁴ See *Kable v The Directory of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('Kable').

¹⁵ The cases to be examined include; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('Re Wakim'); *Al-Kateb v Godwin* (2004) 219 CLR 562 ('Al-Kateb'); *Baker v The Queen* (2004) 223 CLR 513 ('Baker'); *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 ('Fardon'); *Forge v Australian Securities and Investments Commission* (2006) 229 ALR 223 ('Forge').

¹⁶ Constitutionalism has been viewed as seeking whilst maintaining the State structure, to place some form of limits on the power of the government: see M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 1. See further, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 21; RM Dworkin, *Taking Rights Seriously* (1977), 190ff; J H Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980).

demonstrated that in adopting this approach, as other commentators have noted, the Gleeson Court exhibits a tendency to decide matters on the narrowest available basis.¹⁷ As a result of this approach the Gleeson Court has been inclined whenever possible to resolve questions on the basis of a statutory construction of the legislation in question and thus avoid constitutional questions.¹⁸

It is not desirable, nor possible, to attempt to consider within the confines of the following Chapters all High Court decisions concerning judicial power. The cases considered in this Part have, however, been chosen over others for one or more of the following reasons. One reason is that they are fundamental to the establishment and development of Australian perspectives concerning judicial power. A second reason is that they provide a sound basis for examining the differing approaches outlined in Part I of this thesis. Thirdly, these cases may exemplify the general approach of a specific Court. These cases have of course been the subject of some detailed academic analysis, however, in line with the general approach of Australian jurisprudence this analysis has generally tended to focus upon the outcome of the cases.¹⁹ It is, however, perhaps more informative, to consider the type of matters that are concerning the Court.²⁰ In contrast to the usual approach taken in Australian jurisprudence, the discussion presented in Part II of this thesis will draw from the cases an understanding of the form of reasoning that has resulted in the High Court developing a particular view of judicial power. By considering within this context the detailed conceptual framework presented in Part I of this thesis, the *fundamental influences* upon the Court's construction of constitutional jurisprudence generally, and the High Court's development of the law concerning judicial power, in particular, may be discerned.

¹⁷ See Tony Blackshield and George Williams, 'Preface to the Fourth Edition' *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) v.

¹⁸ *Ibid.*

¹⁹ See Chapter 5 Section II above. See also, Cheryl Saunders, 'Oration: Sir Daryl Dawson' (1998) 20 *Adelaide Law Review* 1, 7; Bryan Horrigan, 'Paradigm Shifts in Interpretation: Reframing Legal and Constitutional Reasoning' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 31, 34; John Williams, 'The Australian Constitution and the Challenge of Theory' in Charles Sampford and Tom Round (eds), *Beyond the Republic: Meeting the Global Challenges to Constitutionalism* (2001) 119, 119.

²⁰ See Karl Llewellyn, 'Some Realism about Realism -- Responding to Dean Pound' (1931) 44 *Harvard Law Review* 1222, 1234-42.

Put simply, the discussion of judicial power presented in this thesis will demonstrate the manner in which the High Court has at times tended to interpret the notion of judicial power in a legalistic manner, rather than considering in detail the important theoretical and policy arguments which support the separation of judicial power. In addition, the extent to which the High Court has had regard to the practical and pragmatic consequences of the interpretation of judicial power will be considered.

In order to fully understand the influence of different approaches to Chapter III jurisprudence, the analysis presented in this Chapter will begin by briefly considering the historical influences upon the development of the Australian notions concerning the separation of judicial power. It is important to outline these historical influences as it will be argued in this and following Chapters that the theoretical underpinnings of these matters have been instrumental in the development of this area of law, even though the influence of particular historical and theoretical constructs is something which receives a varying degree of express acknowledgment by the High Court.

II THE IMPORTANCE OF THE SEPARATION OF JUDICIAL POWER

The Australian approach to the separation of judicial power may be unique to our constitutional system. However, the origins of this doctrine, which have influenced its development in Australia, are diverse, and Australian perspectives at times reflect influences that are shared with other common law jurisdictions. The following discussion will briefly consider the historical background to the development of the doctrine separation of judicial power. In doing so, the important theoretical considerations that lie behind the separation of judicial powers doctrine in Australia will be highlighted.

The matters which have impacted upon the development of the separation of judicial power may be divided into a number of categories.²¹ The first of these is the concept of the separation of powers as it has developed in western constitutionalism.²² The second is the influence of the idea of judicial independence.²³ A third, and obvious influence is that associated with the United States Constitution, and in particular the United States Supreme Court's decision in *Marbury v Madison*.²⁴ Other matters which are more distinctive in the Australian constitutional system include the role that colonial courts played in declaring legislation invalid, and the unique dual role of the High Court, which is both an arbiter of State and federal relations, as well as the highest court of appeal in both State and federal matters.

A *The Separation of Powers Doctrine*

The division of power between the institutions of government, as it has developed in western constitutionalism, checks the concentration of power that may be harmful to the freedom of the individual.²⁵ In particular, there has been sustained acknowledgment of the need for the separation of judicial power so as to preserve the liberty of the individual and to protect persons from arbitrary government power.²⁶ The idea of the functional separation of the powers of government has its origins in the writings of Aristotle, although as M.J.C. Vile has pointed out, the work of Aristotle promotes the theory of mixed government rather than a doctrine of separation of powers.²⁷ That said, there is some commonality between the ideas of

²¹ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 4-5.

²² *Ibid*, 4.

²³ *Ibid*, 5.

²⁴ *Marbury v Madison* 5 US 137 (1803); Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 5.

²⁵ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 33; TRS Allan, 'Legislative Supremacy and the Rule of Law' (1985) 44 *Cambridge Law Journal* 111, 125. See also Phillip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24 *Univerisry New South Wales Law Journal* 724.

²⁶ Montesquieu, *The Spirit of Laws* (translated by Thomas Nuent, 1949) 151, Sir William Blackstone *Commentaries*, Vol I, 269, WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 322.

²⁷ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 36. See furhter, Aristotle, *The Politics*, Book IV, ix (Translated by TA Sinclair, 1962, Revised edition by T.Saunders , 1992) 261.

Aristotle and ideas that relate to the separation of powers, in that both approaches insist upon a number of separate branches of government in order to avoid arbitrary rule.²⁸

The idea that powers should be separated along functional lines, gained increased recognition in the 18th century, in part through the work of French writer, Charles Louis de Secondat, Baron De Montesquieu.²⁹ As Montesquieu famously wrote:

[T]here is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.

There would be the end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.³⁰

Montesquieu was sceptical of the concentration of power in one person or institution for '[p]olitical liberty is to be found only in moderate governments; and even in these it is not always found. It is there only when there is no abuse of power.'³¹ Montesquieu made the remarkably timeless observation that 'constant experience shows us that every man invested with power is apt to abuse it, and to carry his authority as far as it will go.'³² By seeking to divide power, the potential for persons to be subjected to the arbitrary will of another is thought to be reduced.³³ The theory of the separation of powers put forward by Montesquieu, followed

²⁸ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 36. See also, Aristotle, *The Politics*, Book IV, ix (Translated by TA Sinclair, 1962, Revised edition by T.Saunders, 1992) 261; John Locke, *Two Treatises of Government*, (1690, Critical edition by Peter Laslett, 2nd ed, 1967) 382; Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 10; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 603; Phillip Pettit, 'Deliberative Democracy and the Case for Depoliticising Government' (2001) 24 *University New South Wales Law Journal* 724.

²⁹ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 603.

³⁰ Baron de Montesquieu, *The Spirit of Laws* (translated by Thomas Nuent, 1949) 152. See also John Locke, *Two Treatises of Government*, [1690, Critical edition by Peter Laslett, 2nd ed, 1967] 382; Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 10; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 603.

³¹ Baron de Montesquieu, *The Spirit of Laws* (translated by Thomas Nugent, 1949) 151.

³² *Ibid*, 150.

³³ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 14.

the attempts of Aristotle and also those of John Locke to divide the powers of government,³⁴ and it is the ideas articulated by all of these writers as well as others, that may be viewed as foundational to the notion of the separation of powers between three branches of government referred to as the legislature, the executive and the judiciary.³⁵

As noted above, Montesquieu expressed the general idea behind the separation of powers as being to prevent the subjection of individuals to the arbitrary powers of government. Put simply, the separation of powers doctrine, by separating power, restricts the potential for such power to be abused. In this way, there is an important connection between the separation of powers and the rule of law. The idea of the rule of law has been identified in the writings of Aristotle. Aristotle, saw the rule of law, as preferable to the tyranny of an individual.³⁶ Aristotle's view of the rule of law has been seen as making the crucial distinction between the rule of law and the rule of an arbitrary sovereign.³⁷ A similar concept was later expressed by Locke in terms of Parliament holding power in a relationship of trust with the governed.³⁸ The rule of law seeks not only to ensure that government acts in accordance with the law, which would justify the application of any lawful enactment, but also to prevent the application of arbitrary government power.³⁹ In the words of the late 19th century British jurist, AV Dicey, one requirement of rule of law was, 'the absolute supremacy or predominance of regular law as

³⁴ See Aristotle, *The Politics*, Book IV, ix (Translated by TA Sinclair, 1962, Revised edition by T.Saunders, 1992) 261; John Locke, *Two Treatises of Government*, [1690, Critical edition by Peter Laslett, 2nd ed, 1967] 382ff; Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 10; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 603. See also M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 36.

³⁵ Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 10; Gerard Carney, 'Separation of Powers in the Westminster System' (1994) 8 *Legislative Studies* 59, 60.

³⁶ Aristotle, *The Politics*, Book IV, ix (Translated by TA Sinclair, 1962, Revised edition by T.Saunders, 1992) 261.

³⁷ *Ibid*; M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 23; TRS Allan, 'Legislative Supremacy and the Rule of Law' (1985) 44 *Cambridge Law Journal* 111, 112; Keith Mason, 'The Rule of Law' in Paul Finn (ed) *Essays on Law and Government: Volume 1 Principles and Values* (1995) 119. See also, John Locke, *Two Treatises of Government*, [1690, Critical edition by Peter Laslett, 2nd ed, 1967] 285ff.

³⁸ See also, John Locke, *Two Treatises of Government*, Book II Chapter 11 [1690, Critical edition by Peter Laslett, 2nd ed, 1967] 285ff. See generally, Paul Finn, 'A Sovereign People, A Public Trust' in Paul Finn (ed) *Essays on Law and Government Volume 1 Principles and Values* (1995) 1.

³⁹ TRS Allan, 'The Rule of Law as the Rule of Reason: Consent and Constitutionalism' (1999) 115 *Law Quarterly Review* 221, 221.

opposed to the influence of arbitrary power', and the exclusion of 'the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of government.'⁴⁰

A number of considerations, some of which directly relate to the separation of powers doctrine, suggest that the separation of judicial power is necessary to preserve the rule of law. For example, the judiciary serves the fundamental function of bringing citizens under the rule of law through its constitutional function of interpreting and applying the law to individuals.⁴¹ Another example which may be cited is the separation of the judicial power from the exercise of administrative and legislative powers,⁴² which may be necessary to preserve the essential function that the judiciary performs in protecting individuals from arbitrary government power. Fundamentally, the judiciary may act as an important mediator between the citizen and the State. These considerations indicate the importance of judicial power. They also suggest that judicial power can and should be separated in some way from the legislative and executive functions of government, as this form of separation supports the ideals that may be associated with the rule of law and constitutionalism.⁴³

B *Judicial Independence*

Obviously, the separation of judicial power is part of the general separation of powers doctrine. However, it should be noted that historically judicial independence developed in British

⁴⁰ AV Dicey, *Introduction to the Study of the Law of the Constitution* (1st ed 1885, 10th ed 1959) 202. WI Jennings, *The Law and the Constitution* (5th ed, 1959); TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutional Law* (1993) 16.

⁴¹ TRS Allan, 'Legislative Supremacy and the Rule of Law' (1985) 44 *Cambridge Law Journal* 111, 124.

⁴² Montesquieu, *The Spirit of Laws* (translated by Thomas Nuent, New York: Hafner Press, 1949) 152, Sir William Blackstone *Commentaries*, Vol I, 269; WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 321-2.

⁴³ See further, Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 12. Most writings concerning the rule of law encompass in some way the following two ideals, which were articulated by the International Congress of Jurists in 1959 (International congress of jurists on The Rule of Law in A Free Society, New Delhi, India, January 5-10, 1959). The first ideal is the implication that all power of the State should be derived from and exercised in accordance with the law. The second ideal is the assumption that the law itself is based on a respect for the intrinsic value of persons: see conclusions of the International Commission of Jurists of The Rule of Law in a Free Society, New Delhi 1959, recorded in International Commission of Jurists, *Executive Action and the Rule of Law : A Report on the Proceedings of the International Congress of Jurists, Rio De Janeiro, Brazil 1962* (Geneva, 1965).

common law jurisprudence independently of the doctrine of the separation of powers.⁴⁴ The concept of judicial independence as it developed in the British legal system may be seen as relevant to the development of the Australian view of the separation of judicial power.

In England, the justices of the Royal courts began to hold office in the Norman and Plantagenet times.⁴⁵ They were, however, considered to be the King's servants.⁴⁶ Up until and including the time of the Stuarts, judicial office was held '*durante bene placito*', meaning during the Crown's pleasure.⁴⁷ Like other Crown servants, the King could dismiss at will the holders of judicial office.⁴⁸ The influence of the Royal will was evident in judicial decisions during the reign of James I and Charles I.⁴⁹ The dismissal of Lord Coke from all offices under the Crown in 1616 can be directly linked to his position as the only one of twelve justice to openly defy the King.⁵⁰ Prior to Lord Coke's dismissal all twelve justices were summonsed by James I and requested, at the King's application, to stay any proceedings before them. All justices except Lord Coke acknowledged their duty to do so.⁵¹

Political events were to hasten the independence of the judiciary that Lord Coke championed. In the Bloodless revolution of 1688 Parliament resisted the King. As a result, James II fled to France and William III and Mary (1689-1702) were invited to accede to the throne of England in return for which the Bill of Rights was passed in 1689.⁵² After the revolution in 1688 the judges of superior courts were appointed '*quamdiu se bene gesserint*', meaning during good behaviour.⁵³

⁴⁴ Charles Howard McIlwain, *Constitutionalism: Ancient & Modern* (Revised edition, 1947) 141-42; Enid Campbell and HP Lee, *The Australian Judiciary* (2001) 48; O Hood Phillips, 'A Constitutional Myth: Separation of Powers' (1977) 93 *Law Quarterly Review* 11, 13; Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 10; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 5.

⁴⁵ Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 25.

⁴⁶ *Ibid.*

⁴⁷ Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 101.

⁴⁸ Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 25.

⁴⁹ *Ibid.*

⁵⁰ G Smith, *A Constitutional and Legal History of England* (1990) 312.

⁵¹ *Ibid.* See further, Sir William Holdsworth, *A History of the English Law* (3rd Ed, Reprinted 1966) Vol V, 430, 431 esp. n 2.

⁵² G Smith, *A Constitutional and Legal History of England* (1990) 366-70.

⁵³ 12 & 13 Will III, c 2, s 3. See further, Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 25. Whilst judges could still be removed following the demise of the monarch this was overcome by an Act of 1760 1 Geo III, c 23 which provided that their commissions should

In particular, the *Act of Settlement 1701* provided that, '[j]udges commissions be made *quamdiu se bene gesserint*, and their salaries be ascertained and established, but upon the address of both Houses of Parliament it may be lawful to remove them.'⁵⁴ These requirements have continued in the British system, and similar provisions have been established in Australia.⁵⁵ Judicial independence can therefore be seen to have originated independently from the idea of the functional separation of the powers of government, although there is some commonality in the influences upon both doctrines.⁵⁶

Although the term 'judicial independence' is often used, the positive aspects of this concept may be difficult to exhaustively define and often judicial independence is defined in the negative, for example, by the absence of external influence.⁵⁷ Attempts to describe judicial independence in positive terms usually emphasise that the central feature that the independence of the judiciary protects is the impartiality of judging, or the perception thereof.⁵⁸ Impartiality of judging is viewed as essential to the resolution of disputes in society and thus imperative for the maintenance of social cohesion.⁵⁹ It has been argued that in an adversarial system, the perception of the impartiality of judging is obtained when opposing parties and the

continue notwithstanding the demise of the monarch: see Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 3.

⁵⁴ *Ibid.*

⁵⁵ Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 25. In respect of federal judicial power in Australia see section 72 of the Constitution. In respect of State judicial power provisions for judicial independence and security of tenure are established by ordinary legislation or through entrenched provisions in State Constitutions: see for example Part 9 of the *Constitution Act 1902 (NSW)*, although such provisions at a State level do not amount to an entrenched doctrine of the separation of powers: see *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51. See further, Bradley Selway, *The Constitution of South Australia* (1997) 108ff; *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223.

⁵⁶ Whilst struggles between the King and the judiciary (and between Parliament and the King) in the late 1600's are often highlighted, power struggles existed between all three branches of government: see Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 2; Enid Campbell, 'Judges at the Bar of Parliament' (1999) 18 *Australian Bar Review* 131.

⁵⁷ Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 65.

⁵⁸ Sir Gerard Brennan, 'The State of the Judicature' (1998) 72 *Australian Law Journal* 33. Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 48-9; Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 63; Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 6. Implicit in the legal concept of judicial impartiality is the distinction between actual and perceived impartiality: see further Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 68-69; Michael Detmold 'The Nature of Judicial Power' (2001) 12 *Public Law Review* 135.

⁵⁹ Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 63.

judge who adjudicates the dispute exist at equidistant points.⁶⁰ The maintenance of equality in the relationship between the parties and the judge is seen as being essential to ensure that the unsuccessful litigant will accept the outcome of the litigation.⁶¹ This perception of impartiality may be understood as having been breached if an unsuccessful litigant in any dispute views the successful litigant to have benefited from having a closer relationship with the judge than that enjoyed by the losing party.⁶²

Whilst it is difficult to accurately and exhaustively define the positive aspects of judicial independence and impartiality, as suggested above, judicial independence may also be described in terms of a negative, namely the absence of external influence. In this manner, impartiality may be seen in decision-making where;

a judge must be individually independent in the sense of being free of pressures which would tend to influence a judge to reach a decision in a case other than that which is indicated by intellect and conscience based on a genuine assessment of the evidence and an honest application of the law.⁶³

Judicial independence may mean 'that no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions.'⁶⁴ It follows that 'neither the parliament nor the executive nor anyone else, should be able to bring pressure of any kind to bear upon a judge in the performance of judicial duties.'⁶⁵ These matters indicate that a central value protected by judicial independence is impartiality in adjudication, and this among other things requires the independence of the judiciary from the

⁶⁰ *Ibid*, 68.

⁶¹ See generally, Enid Campbell and H P Lee, *The Australian Judiciary* (2001).

⁶² Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 68.

⁶³ Justice R E McGarvie, 'The Foundations of Judicial Independence in a Modern Democracy' (1991) 1 *Journal of Judicial Administration* 3, 6.

⁶⁴ Sir Harry Gibbs, response to interviewer, in Garry Sturgess and Philip Chubb, *Judging the World, Law and Politics in the World's Leading Courts* (1988) 353. See also Barton J in *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 451.

⁶⁵ Sir Harry Gibbs, response to interviewer, in Garry Sturgess and Philip Chubb, *Judging the World, Law and Politics in the World's Leading Courts* (1988) 353.

'contaminating' effect of the executive and the parliament.⁶⁶ The manner and extent of explicit acknowledgment of these values by the Dixon, Mason, Brennan and Gleeson Courts, will be examined in this and following Chapters.

C *Marbury v Madison*

Relevant to the development of the separation of powers doctrine in common law jurisdictions such as Australia is the United States decision of *Marbury v Madison*.⁶⁷ In Britain, the legislature is supreme over any constitutional instruments or conventions. Traditionally, the British courts had no power to declare that legislation is unconstitutional.⁶⁸ It is therefore not surprising that following the establishment of the United States Constitution it was unclear as to whether it was to be assumed that the judiciary had the power to declare legislation which was beyond the constitutional powers of the legislature void.⁶⁹ The position was, however, authoritatively established by the much-cited decision of the United States Supreme Court in *Marbury v Madison*.⁷⁰ In that case, Chief Justice Marshall who delivered the judgment of the Court emphasised the fundamental status of a written constitution stating:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.⁷¹

Of judicial power His Honour said:

⁶⁶ George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 188; Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 48-9; Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62, 63.

⁶⁷ 5 US (1Cranch) 137 (1803).

⁶⁸ Paul Jackson, Patricia Leopold and O H Phillips, *O Hood Phillips and Jackson: Constitutional and Administrative Law* (8th ed, 2001) 22.

⁶⁹ Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 7.

⁷⁰ 5 US (1Cranch) 137 (1803).

⁷¹ *Ibid*, 177-178.

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the law to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each ... the courts must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.⁷²

For Chief Justice Marshall the fundamental status of the Constitution required the Court to declare a law, repugnant to the Constitution, to be void.⁷³ Famously, in Australia the principle that *Marbury v Madison* established has been regarded as 'axiomatic'.⁷⁴ At the time the Australian Constitution was drafted little may have been known of the *Marbury v Madison* decision.⁷⁵ However, as it will be discussed below, colonial courts were familiar with the concept of invalidating legislation for want of power, and it is generally accepted that Australian Courts have power to invalidate enactments that are unconstitutional.⁷⁶

D *The Uniquely Australian Doctrine of the Separation of Powers*

The foregoing discussion has examined some of the origins of the separation of judicial power doctrine including the concept of the separation of powers as it has developed in western constitutionalism, the idea of judicial independence and the influence of the United States decision of *Marbury v Madison*⁷⁷. It is against this background that a number of other matters

⁷² *Ibid.*

⁷³ *Ibid.*, 178- 180.

⁷⁴ *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J). See also *Commonwealth v Mewett* (1997) 191 CLR 471, 497 (Dawson J), 547 (Gummow and Kirby JJ; Brennan CJ and Gaudron J agreeing); *Kartinyari v Commonwealth (Hindmarsh Island Bridge Case)* (1988) 195 CLR 337, 381 (Gummow and Hayne JJ).

⁷⁵ See J La Nauze, *The Making of the Australian Constitution* (1972) 234, and the letter from Edmund Barton to Andrew Inglis Clark, 14 February 1898 reproduced in John Williams, *The Australian Constitution; A Documentary History* (2005) 846, 941.

⁷⁶ Gavan Griffith and Geoffrey Kennett, 'Judicial Federalism' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 38; Enid Campbell, 'Unconstitutionality and its Consequences' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 90. See also Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 7.

⁷⁷ 5 US 137 (1803).

that are of particular significance to the development of the Australian view of the separation of judicial powers doctrine may be considered. The first of these is the role that colonial courts played in invalidating legislation for want of power.

The Supreme Courts of the Australian colonies were familiar with the concept of 'striking down local enactments'.⁷⁸ As Alex Castles has pointed out, from the mid 1850s the infamous decisions of Justice Boothby of the South Australian Supreme Court challenged enactments of the colonial legislature in a number of ways.⁷⁹ For example, Justice Boothby found colonial laws were invalid, if repugnancy with the laws of England was established.⁸⁰ Justice Boothby's erratic actions led to the passing of the *Colonial Laws Validity Act 1865 (UK)*.⁸¹ Whilst this legislation furthered the political and constitutional development of colonial parliaments,⁸² the courts remained familiar with the concept of 'plenary power within limits',⁸³ and with the notion of courts having jurisdiction to declare repugnant colonial legislation invalid.⁸⁴

The accepted position that has been reached in Australian law is that where a statute is enacted by the Parliament of the Commonwealth or by any State or Territory that exceeds the legislative conferral of powers, the courts (and in particular the High Court) have the power to declare the enactment to be unconstitutional and therefore invalid.⁸⁵ This position is founded upon a

⁷⁸ See Alex Castles, 'The Reception and Status of English Law in Australia' (1963) *Adelaide Law Review* 1, 23. See also, John Williams, 'Justice Boothby: A Disaster that Happened' in George Winterton (ed), *State Constitutional Landmarks* (2006) 21; Keven Booker, 'Plenary Within Limits: *Powell v Apollo Candle*' in George Winterton (ed), *State Constitutional Landmarks* (2006) 52.

⁷⁹ As Alex Castles wrote, 'Three separate grounds were called in aid to test the validity of South Australian legislation. Firstly, Boothby J sometimes claimed that the South Australian Parliament had exceeded its specific powers under its own Constitution and British statutes which applied in the Province by paramount force. Secondly, he argued that some Acts were void because the Governor had failed to reserve the local legislation to England to obtain Royal Assent. Thirdly, he often asserted that legislation was repugnant to the law of England, and should be struck down on this ground': see Alex Castles, 'The Reception and Status of English Law in Australia' (1963) *Adelaide Law Review* 1, 23-4.

⁸⁰ *Ibid.*

⁸¹ See John Williams, 'Justice Boothby: A Disaster that Happened' in George Winterton (ed), *State Constitutional Landmarks* (2006) 21, 21.

⁸² See further, Sir Gerard Brennan, 'The Privy Council and the Constitution' in HP Lee and George Winterton (eds) *Australian Constitutional Landmarks* (2003) 312, 329.

⁸³ See Keven Booker, 'Plenary Within Limits: *Powell v Apollo Candle*' in George Winterton (ed), *State Constitutional Landmarks* (2006) 52, 68.

⁸⁴ See further, Nicholas Aroney, '*Thomas McCawley v The King*' in George Winterton (ed), *State Constitutional Landmarks* (2006) 69, 88; Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106, 110.

⁸⁵ Gavan Griffith and Geoffrey Kennett, 'Judicial Federalism' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 38; Enid Campbell, 'Unconstitutionality and its Consequences' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 90; Tony Blackshield and George Williams,

number of constitutional provisions, which will be discussed below. These constitutional provisions have been viewed as having been drafted on the assumption that the High Court would exercise the power of judicial review. As Jeffrey Goldsworthy writes:

The Constitution does not explicitly confer on the courts the power of judicial review, that is, the power to restrain or remedy unconstitutional acts of the other branches of government. But the framers clearly assumed that the courts would possess it. Courts throughout the Empire had regularly invalidated colonial legislation inconsistent with local constitutions and other Imperial legislation. Discussion in the Convention Debates reveals that the power was taken for granted.⁸⁶

Another matter that has impacted upon the development of the Australian concept of the separation of judicial power, which falls within the broad framework of federalism, relates to the role of the High Court. The *Constitution* accords the High Court the dual functions of a court of appeal, and as an arbitrator of disputes between the States and the Commonwealth.⁸⁷ These functions, as the discussion in this Chapter and following Chapters will show, have given the High Court a role in not only determining the limits of State and Commonwealth legislative power, but also in a role in defining the nature and scope of State and federal judicial power.⁸⁸

It may be suggested that a range of matters have combined to produce a doctrine of the separation of powers that is unique to the Australian constitutional system. This doctrine of separation of powers by virtue of the diverse influences underlying its development has the capacity to incorporate many of the theoretical concepts that stand behind the historical developments, which were discussed above. For example, the Australian doctrine of separation of powers is capable of incorporating the important notion of restraint on the powers of government. This notion underlies the doctrine of separation of powers as articulated by

Australian Constitutional Law & Theory (3rd ed, 2002) 7; *Residual Assco Group Limited v Spalvins and Others* (2000) 202 CLR 629.

⁸⁶ Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 106, 110.

⁸⁷ See further, Sir Anthony Mason, 'The Evolving Role and Function of the High Court' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 95, 102; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 180.

⁸⁸ See further, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267-8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), and the following discussion of this case.

Montesquieu, who followed attempts by Aristotle and Locke to divide the powers of government. The Australian doctrine, following as it does from the British concept of judicial independence, is also capable of upholding the importance of judicial impartiality in adjudication. The influence of the United States decision in *Marbury v Madison*, the role that colonial courts played in invalidating legislation, and the constitutional role of the High Court, brings to Australian jurisprudence the idea of the legislature being subject to the law in the form of the Constitution.

The following sections of this Chapter will consider the manner in which the High Court of Australia in interpreting Chapter III has had regard to the important theoretical constructs that concern the notion of judicial power outlined above. In particular, the analysis presented in Part II of this thesis suggests that the extent to which reference is had by the Court to the important theoretical constructs that underlie the doctrine of the separation of judicial power may be reflective of the respective influence of the approaches described in Part I, namely, legalism, realism, natural law perspectives and pragmatism. For example, the case analysis presented in this and following Chapters will consider the extent to which the High Court has directly considered the theoretical arguments in favour of the separation of judicial power, and used these theoretical constructs to support implications drawn from Chapter III. This approach will be compared to a judicial methodology that has a greater tendency to proceed on a case by case basis, and to adopt a more doctrinal approach that rests the notion of the separation of powers almost entirely upon an implication drawn from the terms of the Constitution. Before engaging in this analysis it is however important to consider the constitutional provisions that concern the separation of judicial power.

III AUSTRALIAN CONSTITUTIONAL PROVISIONS CONCERNING JUDICIAL POWER

The Commonwealth Constitution vests legislative power in the Parliament, executive power in the Executive Government and judicial power in the Judicature.⁸⁹ Chapters I, II and III of the Constitution each concern one of these three branches of government. Despite the symmetrical structure of these Chapters there is an asymmetry in the nature of the separation of powers established by the Constitution.⁹⁰ In effect, the Westminster system of government effects only a partial separation of government powers and in the Australian legal system a system of checks and balances has developed to ensure that whilst the practicalities of government are assisted by the existence of some overlap between the branches of government, a degree of separation remains.⁹¹ Within this framework, significant arguments have been put forward in favour of maintaining a degree of separation. Perhaps the most prevalent of these arguments is that which suggests that whilst the Australian Constitution incorporates the concept of responsible government, and thus establishes a significant overlap between the legislature and the executive,⁹² Chapter III does not expressly provide for a similar degree of collaboration between the judicature and the other branches of government. The focus of the relevant constitutional provisions is upon matters such as the appointment and removal of judges, the vesting of judicial power in 'other courts' and the establishment of federal courts. The following discussion will further demonstrate that the nature of these constitutional provisions concerning judicial power has been influential in the development of an Australian doctrine concerning the separation of judicial power which significantly limits any overlap between judicial power and the other functions of government.

⁸⁹ See *Australian Constitution* ss 1, 61 and 71.

⁹⁰ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 8.

⁹¹ M.J.C. Vile, *Constitutionalism and the Separation of Powers* (1967) 2; Gerard Carney, 'Separation of Powers in the Westminster System' (1994) 8 *Legislative Studies* 59, 60.

⁹² See *Australian Constitution* s 64.

Chapter III of the Constitution contains only ten sections. Perhaps most relevantly to the separation of powers is section 71⁹³ which provides that:

The judicial power of the Commonwealth shall be vested in a Federal Supreme Court to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes.

Also of significance to judicial independence is section 72, which provides for judicial appointment, tenure and remuneration. By virtue of section 79 the responsibility for the number of judicial appointments lies with the Parliament.⁹⁴

In relation to the jurisdiction of Chapter III courts, sections 75 and 76 list the nine heads of power that are either vested in the High Court or pursuant to which Parliament may make laws conferring original jurisdiction on the High Court.⁹⁵ Section 77 confers on Parliament the power to define the jurisdiction of federal courts other than the High Court, including the power to invest any court of a State with federal jurisdiction. Section 73 concerns the appellate jurisdiction of the High Court.⁹⁶

A degree of separation of judicial power may be implied from the terms of the *Constitution*, and Australian constitutional law has from the start generally accepted the basic proposition that

⁹³ See further, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 62.

⁹⁴ Although section 71 does mean that at least three judges will be appointed to the High Court. See further *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223.

⁹⁵ See also, Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9.

⁹⁶ Section 74 also provided for appeals to the Queen in Council however this section has been substantially affected by legislative enactments. The *Privy Council (Appeals from the High Court) Act 1975* marked the end of all federal appeals to the Privy Council from the High Court save for the theoretical possibility of appeal upon the certificate of the High Court. Non-federal appeals were removed by the *Australia Acts 1986* (Cth) and (UK). See generally, Sir Anthony Mason, 'The Evolving Role and Function of the High Court' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 99-102. Section 78 concerns proceedings against a Commonwealth or State. Section 80 provides for trial by jury.

judicial power should be separate from the political functions of government.⁹⁷ That said, at any given point in time there has rarely been a consensus of opinion about the exact form that the separation of judicial power should take.⁹⁸

Although subtle differences may be identified in judicial opinions concerning the separation of judicial power, opinion on this issue has generally moved between two fairly well defined views rather than being spread across a spectrum of opinion. These views may be fairly simply stated. One view of the separation of powers is usually termed a strict view of the separation of powers.⁹⁹ The strict view of the separation of judicial power under Chapter III of the Constitution has resulted in the development of the following two principles:

- (i) Commonwealth judicial power may only be conferred on a Chapter III Court, (that is a courts described within section 71 of the Constitution, namely the High Court, federal Courts created by the Commonwealth Parliament and State courts invested with federal jurisdiction). Power incidental to federal judicial power may also be conferred.¹⁰⁰
- (ii) Power, other than federal judicial power or power incidental to federal judicial power, cannot be conferred by the Commonwealth on any court described within section 71 of the Constitution.¹⁰¹

⁹⁷ WH Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910) 321-2. See further, John Finnis, 'Separation of Powers in the Australian Constitution' (1967) 3 *Adelaide Law Review* 159, 170-179; Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Power in Australia' (1996) 7 *Public Law Review* 96; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 161.

⁹⁸ Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 161. See, for example, *New South Wales v Commonwealth* (1915) 20 CLR 54; *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511. See also, Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 36.

⁹⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁰⁰ Power, which is incidental to the judicial power, may also be conferred on a Chapter III Court pursuant to section 51(xxxix).

¹⁰¹ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 171. Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 129.

These principles, which represent aspects of the decision in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹⁰² are commonly referred to as the first and second limb of the separation of powers doctrine.¹⁰³ The nature and degree of the separation of powers that these two principles entail, has been ascribed to the 'detailed and exhaustive' character of the provisions of Chapter III.¹⁰⁴ However, the provisions of Chapter III do not expressly prohibit any form of co-operation between the judicature and the other branches of government. The principles are 'negative' implications drawn from what is said in Chapter III, combined with an assumption that the Chapter is exhaustive.¹⁰⁵ As at least one commentator has pointed out, there are numerous provisions in the Constitution that indicate a more flexible and less exclusive view of judicial power.¹⁰⁶ Not surprisingly, the second limb of the doctrine of separation of powers has been viewed as 'more controversial, and probably unnecessary.'¹⁰⁷

In contrast to a strict view of the separation of judicial power, the advantages of a more relaxed outlook on the separation of powers doctrine are at times stressed.¹⁰⁸ This second view usually adheres to the first limb of the doctrine. It does; however, tend to allow for the High Court and other federal courts created by Parliament to exercise other functions including those of a legislative or executive nature, provided that the exercise of such functions is not incompatible with the exercise of the judicial function.¹⁰⁹ In doing so, what may be referred to as a narrower implication is drawn from Chapter III of the Constitution. The implication is more confined in

¹⁰² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁰³ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 11; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 160.

¹⁰⁴ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 538.

¹⁰⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* ('Boilermakers') (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ agreeing with Gummow and Hayne JJ), 546 (Gaudron J agreeing with Gummow and Hayne JJ), 554-563 (McHugh J), 582 (Gummow and Hayne JJ), 626 (Callinan J agreeing with McHugh J), 596-618 (Kirby J dissenting). See also *Gould v Brown* (1998) 193 CLR 346, 418-19 (McHugh J), 448-9 (Gummow J).

¹⁰⁶ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9-10. See further, George Winterton, *Parliament, the Executive and the Governor-General* (1983) 62; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 188.

¹⁰⁷ George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 188. See also George Winterton, *Parliament, the Executive and the Governor-General* (1983) 61-2; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9.

¹⁰⁸ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9.

¹⁰⁹ See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 276 (Higgins J).

that unlike the strict view of the separation of judicial powers which places a very wide prohibition on the conferral of non-judicial powers on Chapter III Courts, the narrower implication places only a partial prohibition on the conferral of such powers.

Whilst opinions may have fluctuated between the strict view of the separation of powers and the idea of a narrower implication, it is clear that the weight of current judicial opinion quite clearly favours a very strict notion of the separation of judicial power.¹¹⁰ As suggested above, Chapters 8, 9 and 10 will consider some of the more recent interpretations by the High Court concerning the doctrine of the separation of judicial power. In the context of the contemporary cases concerning Chapter III of the Constitution, the manner in which the idea that Chapter III may confer some form of constitutional immunity upon citizens has been approached by the Mason, Brennan and Gleeson Courts will be examined.

This Chapter, which considers the High Court's early jurisprudence concerning Chapter III will focus upon cases that have been instrumental in the establishment of the strict separation of judicial power of the Commonwealth.¹¹¹ It is timely to consider the methodology adopted in cases. One reason for this is that a consideration of these early cases provides markers by which the changes in this area of law may be assessed. Another reason is that this analysis facilitates an understanding of the relevance, to the current High Court, of the reasoning in decisions such as *In re Judiciary* and *Boilermakers*.

IV INITIAL DEVELOPMENTS CONCERNING THE FIRST LIMB OF THE SEPARATION OF JUDICIAL POWERS DOCTRINE

The exclusive nature of Chapter III of the Constitution, on which the current doctrine of the separation of power relies, was recognised by the High Court within two decades after

¹¹⁰ Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2001) 20 *Australian Bar Review* 283.

¹¹¹ *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case'); *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('Alexander's Case').

federation in cases such as *New South Wales v Commonwealth*, 1915¹¹² and the 1918 decision of *Waterside Workers' Federation of Australia v J W Alexander Ltd.*¹¹³ It was, however, not until 1956 that the decision of the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia* unmistakably identified the double effect of the doctrine.¹¹⁴ *Boilermakers'* recognized the two well known principles which form the basis of the current view of the separation of judicial power, limiting the conferral of federal judicial power on non-judicial bodies as well as limiting the conferral of non-judicial power on federal judicial bodies.¹¹⁵ This section will examine two major decisions that were influential in establishing the first limb of the *Boilermakers'* decision, namely, *New South Wales v Commonwealth*¹¹⁶ and *Waterside Workers' Federation of Australia v J W Alexander Ltd.*¹¹⁷

A *New South Wales v The Commonwealth*

The decision in *New South Wales v The Commonwealth*¹¹⁸ concerned the powers of the Inter-State Commission. The Inter-state Commission was established by the *Inter-State Commission Act 1912* (Cth). The power to establish such a Commission was conferred by section 101 of the Constitution.¹¹⁹ The tenure of members of the Commission was established in accordance with section 103 of the Constitution, which in part provided that members held office for seven years.¹²⁰ The Commonwealth had vested the Inter-State Commission with a mixture of judicial

¹¹² *New South Wales v Commonwealth* (1915) 20 CLR 54 ('Wheat Case'). See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330. See generally Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 143ff.

¹¹³ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*').

¹¹⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers'*). Dixon CJ, McTiernan, Fullagar and Kitto JJ forming the majority in this case, Williams, Webb and Taylor JJ dissented.

¹¹⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹¹⁶ *Wheat Case* (1915) 20 CLR 54.

¹¹⁷ *Alexander's Case* (1918) 25 CLR 434.

¹¹⁸ *Wheat Case* (1915) 20 CLR 54.

¹¹⁹ Section 101 provides: 'There shall be an Inter-State Commission, with such powers of adjudication and administration as the Parliament deems necessary for the execution and maintenance, within the Commonwealth, of the provisions of this Constitution relating to trade and commerce, and of all laws made thereunder.'

¹²⁰ Section 103 provides: 'The members of the Inter-State Commission-

(i.) Shall be appointed by the Governor-General in Council:

and non-judicial power.¹²¹ The Inter-State Commission exercised judicial power in declaring an Act of the NSW Parliament, the *Wheat Acquisition Act 1914* (NSW), constitutionally invalid on the grounds that it contravened section 92 of the Constitution. The Commission had issued an order purporting to enjoin the State of New South Wales from taking certain action in accordance with the provisions of the *Wheat Acquisition Act 1914* (NSW).¹²² The validity of this order was challenged.

Griffith CJ, Isaacs and Powers JJ formed a majority in *New South Wales v The Commonwealth*,¹²³ and held that the terms of reference of the Inter-state Commission authorised the exercise of quasi-judicial power, but not judicial power.¹²⁴ The reasoning of the majority judgments relied primarily on the meaning of the words of the Constitution. Their Honours emphasised that section 71 provided an exhaustive description of the bodies that could be invested with the judicial power of the Commonwealth.¹²⁵ These bodies included the High Court, other federal Courts created by the Parliament, and other Courts (such as State Courts) that are invested with federal jurisdiction.¹²⁶ For the majority, the provisions of section 103 in not providing for life tenure of judges (as section 72 of the Constitution at that time required) meant that the Commission could not be constituted in accordance with that section as a federal court.¹²⁷

(ii.) Shall hold office for seven years, but may be removed within that time by the Governor-General in Council, on an address from both Houses of the Parliament in the same session praying for such removal on the ground of proved misbehaviour or incapacity:

(iii.) Shall receive such remuneration as the Parliament may fix; but such remuneration shall not be diminished during their continuance in office.'

¹²¹ For example, Part V of the *Inter-State Commission Act* was entitled 'Judicial Powers of the Commission', this section in part provided that the Commission would be a court of record and may exercise its powers for the hearing or determination of any complaint, dispute or question, or for the adjudication of any matter. Functions of an administrative nature were also conferred, for example Part III of the Act conferred powers of investigation: see further, *New South Wales v Commonwealth* (1915) 20 CLR 54, 60 (Griffith CJ).

¹²² See further, *New South Wales v Commonwealth* (1915) 20 CLR 54, 59 (Griffith CJ).

¹²³ (1915) 20 CLR 54.

¹²⁴ *Ibid.*, 62 (Griffith CJ), 94 (Isaacs J), 106 (Powers J agreeing with both Griffith CJ and Isaacs J), 109-110 (Rich J); Barton and Gavan Duffy JJ dissented.

¹²⁵ *Ibid.*, 62 (Griffith CJ), 93 (Isaacs J), 16 (Powers J agreeing with both Griffith CJ and Isaacs J), 109 (Rich J). For the dissenting judges, Chapter III did not grant exhaustive power: see *ibid.* 70-1 (Barton J) and 103 (Gavan Duffy J). Both dissenting judges emphasised the power of the Parliament to choose the nature of the power conferred upon the Inter-State Commission: see *New South Wales v Commonwealth* (1915) 20 CLR 54, 70-1 (Barton J) and 104 (Gavan Duffy J).

¹²⁶ *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 93-94 (Isaacs J), (Powers J at 106 agreeing with both Griffith CJ and Isaacs J), 109-110 (Rich J).

¹²⁷ *Ibid.*, 62 (Griffith CJ), 94 (Isaacs J), (Powers J at 106 agreeing with both Griffith CJ and Isaacs J), 109 (Rich J). Griffith CJ went on to emphasise the administrative powers of the Inter-State Commission, holding that 'the functions of the Inter-State Commission contemplated by the Constitution are executive or administrative and the powers of adjudication intended are such powers of determining questions of fact as may be necessary for the performance of its executive or administrative functions, that is, such powers of adjudication as are incidental and

Consequently, the Commission fell outside the three types of Courts that could be invested with federal judicial power, namely the High Court, federal Courts and the State Courts. It followed, so the majority reasoned, that the legislation, which purported to constitute the Inter-State Commission as a Court, was invalid and the Inter-State Commission had no power to issue the challenged injunction.¹²⁸

B *Alexander's Case*

The same principle as discussed in the *Wheat Case* was applied in *Waterside Workers' Federation of Australia v J W Alexander Ltd (Alexander's Case)*.¹²⁹ That case concerned the Commonwealth Court of Conciliation and Arbitration. The Arbitration Court was established to deal with industrial disputes by way of conciliation and arbitration. The Court was also given power to enforce awards that were made as part of this process. In this manner, the Arbitration Court exercised what was held to be both judicial and non-judicial power.¹³⁰ In the litigation giving rise to *Alexander's Case* a summons issued by the Waterside Worker's Federation alleging breach of an award by an employer, J W Alexander Ltd, was heard in the Arbitration Court by the then President, Justice Higgins, who was also a judge of the High Court. The employer challenged the Arbitration Court's jurisdiction in the High Court. The submission made on the employer's behalf in the High Court, was that the Arbitration Court was invalidly constituted because of the President's seven year term.¹³¹ In this manner the issue arose as to whether the President, Higgins J, who was appointed for a seven year term, could validly discharge the arbitral functions which included the making of awards, as well as the judicial function of enforcing

ancillary to those functions': *ibid* 62 (Griffith CJ). Issacs J and Rich J expressed a similar view: see *ibid* 94 (Isaacs J), 110 (Rich J).

¹²⁸ *Ibid*, 65 (Griffith CJ), 95 (Isaacs J), (Powers J at 106 agreeing with both Griffith CJ and Isaacs J), 110 (Rich J). For a more recent application of this principle see *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

¹²⁹ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*').

¹³⁰ See further, *Alexander's Case* (1918) 25 CLR 434, 463 (Issacs and Rich JJ). See also *Alexander's Case* (1918) 25 CLR 434, 442 (Griffith CJ) and 451-2 (Barton J).

¹³¹ Section 12(1) of the *Commonwealth Conciliation and Arbitration Act 1904* (Cth) provided that the President should be a High Court Justice appointed by the Governor-General. The removal provisions replicated those in s 72 of the Constitution with the exception of the fact that removal was from a seven-year term. At the time section 72 of the Constitution provided for judicial appointments for life.

awards. A majority of the High Court held that section 72 of the Constitution as it then stood required life tenure for federal judges.¹³² By differently constituted majorities it was held that the arbitral functions were validly conferred, but that the judicial functions were not.¹³³ This meant that in *Alexander's Case* the relevant award had validly been made by Higgins J as an arbitrator but could not be validly enforced by him as a judge. The combined effect of the judgments achieved a position by which the invalid conferral of judicial power was severed.¹³⁴ The decision in *Alexander's Case* held only the exercise of the judicial power to be unenforceable, and as a consequence, the more difficult practical effect of holding (as Barton J would have done) both the conferral of judicial power and the arbitral power invalid was avoided.¹³⁵ Although, the decision in *Alexander's Case* averted an impractical outcome, the divided nature of the judgments suggests that this was a fortuitous result rather than the outcome of any direct concern for the practical consequences of the decision.¹³⁶

¹³² *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 448, 457 (Griffith CJ), 468 (Isaacs and Rich JJ), 486 (Powers J); Higgins J (at 474) and Gavan Duffy J (at 478-479) dissented. Griffith CJ held (at 448) that the seven-year appointment should be read as meaning "assigned" and therefore His Honour held that the challenged provision did not infringe the Constitutional requirement of section 72.

¹³³ The conferral of arbitral functions was held to be valid by Griffith CJ (at 449); Isaacs and Rich JJ (at 471); Higgins J (at 475), Gavan Duffy J (at 479), Powers J (at 486); Barton J being unable (as Griffith CJ was) to distinguish between the arbitral and judicial functions dissented, (see His Honour's comments at 462). The conferral of judicial functions was held to be invalid by Barton J (at 462), Isaacs and Rich JJ (at 471), Powers J (at 489) with dissenting opinions on the issue being given by Griffith CJ (at 449), Higgins J (at 475), and Gavan Duffy J (at 479). Higgins and Gavan Duffy JJ, held that section 72 did not require life tenure and therefore dissented on the basis that they thought the whole Act was valid. Griffith CJ also dissented, although Griffith CJ thought that federal judges did require life tenure, the Chief Justice held that Higgins J as a High Court judge could be validly 'assigned' to the Arbitration Court for a shorter period, and thus held the Act to be valid. The Chief Justice (like Barton J) could not distinguish between the arbitral and judicial functions, and thought it wrong to do so.

¹³⁴ Isaacs, Rich and Powers JJ held that the invalid conferral of judicial powers was severable. On the invalidity of the conferral of judicial powers they combined with Barton J, to form a majority. Barton J it will be recalled held the conferral of both arbitral and judicial functions to be inseparable and held both to be invalidly conferred.

¹³⁵ A similar point is made in relation to the decision in *Boilermakers* by Cheryl Saunders in 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 12. See also, Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 168. See further, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 612ff for an outline of contextual developments following this decision, including the initial legislative response to this decision, and the manner in which judicial and arbitral powers were again combined with that situation remaining largely unchallenged for 30 years until it was formally questioned in the litigation giving rise to the decision in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*');

¹³⁶ The practical outcome of the decision in *Alexander's Case* definitely did not concur with Chief Justice Griffith's idea of the function of the judiciary, in particular His Honour stated: 'I do not think that this Court can, consistently with its previous decisions or with common sense dissect the Arbitration Act, and hold, contrary to the plain intention of Parliament, that the President, a single person, is validly appointed for some of its purposes and not appointed for others. In my opinion, his appointment if bad in part is bad altogether. To hold otherwise is to make, not to declare, the law, and to declare a very different law from that enacted by the Parliament': see Griffith CJ at 448-449. See further, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 612.

The *Wheat Case* and the decision in *Alexander's Case* clearly established that Commonwealth judicial power could not be validly conferred on a non-judicial body. The method of reasoning employed in these cases relied predominantly on the text and structure of the Constitution and the relevant legislation.¹³⁷ A central concern of *Alexander's Case* was the nature of any distinction between the process of judging and the process of arbitrating.¹³⁸ In this context, reference was made to the importance of the judicial process. Justices Isaacs and Rich described why life tenure was important to the doctrine of separation of judicial power, stating:

It is plain that the independence of the tribunal would be seriously weakened if the Commonwealth Parliament could fix any less permanent tenure than for life, subject to proved misbehaviour or incapacity.¹³⁹

Griffith CJ also referred to the judicial process emphasising that the necessity of rules for settled communities, was apparent '[a]s soon as man emerged from the savage state.'¹⁴⁰ A process to make provision for the enforcement of such rules was held, by Griffith CJ, to be necessary, and '[i]n each case the right to do so was assumed by the community at large, and vested in some person or authority representing that community.'¹⁴¹ Lawgivers and judges were seen to arise as part of this process. The distinction between such lawgivers and judges was viewed by Griffith CJ to be something that developed 'as civilisation advanced.'¹⁴² It may be suggested that these comments are consistent with the theoretical concerns underlying the notion of judicial independence as it developed in the British common law system. These views also reflect ideas concerning the judicial process that were expressed by John Locke.¹⁴³

Whilst the comments made in these cases do not consider at length the theoretical importance of the separation of judicial power, the judgments do reveal that the separation of judicial

¹³⁷ See for example *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 93 (Isaacs J), 109 (Rich J). See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 447-8 (Griffith CJ), (455-7) Barton J, 468 (Isaacs and Rich JJ), 472-3 (Higgins J) (in dissent), 478 (Gavan Duffy J) (in dissent), 484-5 (Powers J).

¹³⁸ See *Alexander's Case* (1918) 25 CLR 434, 442 (Griffith CJ) and 451-2 (Barton J). See also the definition of judicial power given by Isaacs and Rich JJ at 463.

¹³⁹ *Ibid*, 469-470 (Isaacs and Rich JJ).

¹⁴⁰ *Ibid*, 442 (Griffith CJ).

¹⁴¹ *Ibid*.

¹⁴² *Ibid*, 442 (Griffith CJ); see also *Alexander's Case* (1918) 25 CLR 434, 451-2 (Barton J).

¹⁴³ See further Chapter 4, Section II, sub-section A.

power was regarded almost as axiomatic in 'advanced societies', rather than something for which a case should be made. The assumption by early High Court judges that in advanced societies judicial power will be separate, may account for the lack of emphasis in their Honour's judgments on the importance of the separation of judicial power. The absence of any lengthy articulation of the arguments which favour the separation of the judicial process may also have resulted from the dominance of the perception that the judges should merely declare the law.¹⁴⁴ The judges in the *Wheat Case* and *Alexander's Case* seek to explain their conclusions primarily as an interpretation of the text of the Constitution. This approach fits neatly with the role of the judge as an interpreter or declarer of the law, and reflects a form of legalism.¹⁴⁵ It may, however, be suggested at this point that behind these interpretations of the text of the *Constitution* there may be discerned the influence of a particular theoretical perspective of judicial power, with this understanding of judicial power reflecting the historical concern of the British common law with judicial independence. This approach differs significantly from a realist perspective, which it would be expected would articulate many of the policy and theoretical arguments, which support the separation of judicial power. However, to make decisions about the exclusive nature of judicial power based upon broad policy considerations envisages a much wider role for the judicial officer than that admitted by the declaratory theory of law.

The discussion at the start of this Chapter emphasised the significant theoretical and historical considerations that support the first limb of the doctrine of separation of powers. These matters emphasise the importance of the judicial process as well as the importance of the separation of this process. As one leading commentator has stated,

the policy arguments in favour of the principle of confining judicial power to the courts relate ... both to the notion of freedom under the law and to the particular requirements of a federal system. The principle itself has never been questioned by the High Court.¹⁴⁶

¹⁴⁴ See for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 448-9 (Griffith CJ) discussed above.

¹⁴⁵ See further, Chapter 2 above.

¹⁴⁶ Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 180.

The analysis undertaken thus far of the early cases concerning Chapter III of the Constitution shows that despite the broad ranging nature of the arguments that may be offered in support of the separation of judicial power, the early jurisprudence of the High Court that established the first limb of the doctrine of the separation of powers, as it is known in Australian law, are based primarily on legalistic interpretations of the Constitution, and the notion of judicial independence as expressed in the British common law system. The reliance placed upon these factors may have reflected the prevailing judicial approach of the times. However, the declaratory approach to judicial reasoning which is reflected to a degree in these judgments would seem to insufficiently articulate the important theoretical principles and historical considerations which favour the separation of judicial power. That said, as the following discussion will show the decision in *In re Judiciary and Navigations Acts* gave even less expression to the theoretical precepts that support the separation of power.

V INITIAL DEVELOPMENTS CONCERNING THE SECOND LIMB OF THE SEPARATION OF JUDICIAL POWERS DOCTRINE

The development of the second limb of the doctrine of the separation of judicial power has been less straightforward than the development of the first. A foundational case in respect of this second limb is *In re the Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920*.¹⁴⁷ The decision in *In re Judiciary and Navigation Acts* went some way towards establishing the principle that non-judicial power could not be conferred on a Chapter III Court; however that conclusion has been seen to be more obvious with the benefit of hindsight.¹⁴⁸

The decision in *In re Judiciary and Navigation Acts* may be conceptually difficult viewed from a contemporary standpoint in that the majority decision proceeds on the assumption, that the giving of an advisory opinion is an exercise of judicial power, although not an exercise of the

¹⁴⁷ *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257 (*In re Judiciary and Navigation Acts*).

¹⁴⁸ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 12.

judicial power of the Commonwealth.¹⁴⁹ Differing opinions on this issue have been, and continue to be expressed.¹⁵⁰ The majority in *Boilermakers* clearly doubted that the giving of an advisory opinion amounted to an exercise of judicial power.¹⁵¹ However, more recently, Chief Justice Gleeson relied upon the decision in *In re Judiciary and Navigation Acts* and did not express any concern about the notion that the giving of an advisory opinion may be an exercise of judicial power, although not the judicial power of the Commonwealth.¹⁵²

The decision *In re Judiciary and Navigation Acts* concerned the validity of Part XII of the *Judiciary Act 1903-1920*. Section 88 of that legislation sought to give the High Court jurisdiction to 'hear and determine' any question referred to it by the Governor-General concerning the validity of any enactment of the Commonwealth Parliament. Section 93 of the same statute made such a determination 'final and conclusive and not subject to any appeal.' Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ delivered the majority judgment.¹⁵³ The majority held that the challenged provisions of the *Judiciary Act* required the Court to perform a judicial function and it was not possible for the Court to do so unless it was an exercise of part of the judicial power of the Commonwealth.¹⁵⁴ This distinction between judicial power and the judicial power of the Commonwealth had been made in submissions. The preliminary objection to the validity of Part XII of the *Judiciary Act 1903-1920* was made by Owen Dixon, as he then was, who appeared for the Attorney-General for the State of Victoria. Dixon put the submission that the legislation was invalid on the basis that it sought to obtain a judicial decision from the High Court, which

¹⁴⁹ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264-6 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

¹⁵⁰ As John Williams states 'at the 1929 Royal Commission into the Constitution Higgins J, Sir Robert Garran, the Bar Council and the Law Institute of NSW presented evidence which favoured a constitutional amendment to allow advisory opinions. Opposing such an amendment were Messers Owen Dixon and Inglis Clark Jnr, and the Southern Law Society of Tasmania': John Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205 referring to the *Report of the Royal Commission on the Constitution* (Commonwealth Government Printer, 1929) 255. See also, for example, *Re Wakim; Ex P McNally* (1999) 198 CLR 511, 541-544 (Gleeson CJ). Compare *North Ganalanja Aboriginal Corporation v Queensland* (1996) 185 CLR 595, 666-668 (Kirby J). See generally, Stephen Crawshaw, 'The High Court of Australia and Advisory Opinions' (1977) 51 *Australian Law Journal* 112; and John Williams, 'Re-thinking Advisory Opinions' (1996) 7 *Public Law Review* 205; Helen Irving, 'Advisory Opinions, the Rule of Law and the Separation of Powers' (2004) 4 *Macquarie Law Journal* 105.

¹⁵¹ In particular the distinction between judicial power and the judicial power of the Commonwealth made in *In re Judiciary and Navigation Acts* was described by the majority in *Boilermakers* (at 274) as being 'tenuous and unreal': see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁵² *Re Wakim; ex p McNally* (1999) 198 CLR 511, 541-544 (Gleeson CJ).

¹⁵³ Higgins J dissented as His Honour had done in *Alexanders Case*.

¹⁵⁴ *In re Judiciary and Navigation Acts*, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

did not involve a 'matter' within the meaning of section 72.¹⁵⁵ It was contended that the Commonwealth Parliament only had power to confer jurisdiction on the High Court to determine 'matters', and that an abstract question of law was not a matter. As discussed below, the issue arising in *In re Judiciary and Navigation Acts* was decided on this basis, and the concept of a 'matter' is an important element in Australian constitutional law.¹⁵⁶ It should however be noted that the alternative submission was also put, namely, that if the giving of an advisory opinion was not an exercise of judicial power, then there was an implied prohibition in the Constitution against conferring anything other than judicial powers upon the High Court.¹⁵⁷

A *The Reasoning of the Majority in In re Judiciary and Navigation Acts*

The decision of the majority in *In re Judiciary and Navigation Acts* proceeded on the assumption that the legislation involved an exercise of judicial power. As a result of this assumption the majority held that it was unnecessary for any opinion to be expressed as to whether Parliament could impose on the High Court or on its members any, and if so what, duties other than judicial duties.¹⁵⁸ Having thus confined the basis of their Honours' judgment, the majority went on to decide that there were limits on the judicial power of the Commonwealth. The decision was reached on a narrow, somewhat technical basis, namely that, section 76 of the Constitution provides that Parliament may confer jurisdiction on the High Court in respect of certain 'matters.' The majority in *In re Judiciary and Navigation Acts* held that 'there can be no matter within the meaning of the section unless there is some immediate right, duty or liability to be established by the determination of the Court.'¹⁵⁹ In their Honours' opinion, authority

¹⁵⁵ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 258-259 (Owen Dixon, Counsel for the Attorney-General for the State of Victoria, summary of oral submissions).

¹⁵⁶ See Leslie Zines, *Cowen and Zines: Federal Jurisdiction in Australia* (3rd edition, 2002) 15 ff.

¹⁵⁷ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 258-259 (Owen Dixon, Counsel for the Attorney-General for the State of Victoria, summary of oral submissions).

¹⁵⁸ *Ibid.*, 264. It was not until 1956 that the decision in *Boilermakers* directly addressed that issue. As, Chief Justice Gleeson has pointed out (see, *Re Wakim; ex p McNally* (1999) 198 CLR 511, 541-544 (Gleeson CJ)) the law as it stood at the time of the decision in *In re Judiciary and Navigation Acts* did not necessarily require a conclusion that it was impossible to impose a non-judicial function on the High Court. See also, *The Commonwealth v Queensland* (1975) 134 CLR 298, 325 (Jacobs J).

¹⁵⁹ *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 265 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

supported the proposition that 'a matter under the judicature provisions of the Constitution must involve some right or privilege or protection given by law, or the prevention, redress or punishment of some act inhibited by law.'¹⁶⁰ The majority held that Parliament 'cannot authorise this Court to make a declaration of the law divorced from any attempt to administer the law.'¹⁶¹ The challenged provisions of the *Judiciary Act 1903-1920* sought to confer jurisdiction on the Court to determine abstract questions of law. It followed, the majority reasoned, that an advisory opinion did not concern a 'matter'.¹⁶² This view was primarily supported on the basis of the structure of the Constitution that, in respect of legislative, executive and judicial power, 'first grants power and then delimits the scope of its operation.'¹⁶³ The majority in reference to the provisions of Chapter III also held that,

[t]his express statement of the matters in respect of which and the Courts by which the judicial power of the Commonwealth may be exercised is, we think, clearly intended as a delimitation of the whole of the original jurisdiction which may be exercised under the judicial power of the Commonwealth, and as a necessary exclusion of any other exercise of original jurisdiction.¹⁶⁴

As the above discussion shows the decision of the majority in *In re Judiciary and Navigation Acts* is based primarily upon the text and structure of the Constitution, with the decision ultimately resting upon a narrow and technical reading of the word 'matter', with the wider principles raised by the challenger's alternative submission not being addressed by the Court.

¹⁶⁰ *Ibid*, 266.

¹⁶¹ *Ibid*, 266.

¹⁶² *Ibid*, 267.

¹⁶³ *Ibid*, 264, referring to both *New South Wales v Commonwealth* (1915) 20 CLR 54 and *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

¹⁶⁴ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.

B *The Narrow Implication and the Dissent of Higgins J*

Like the majority, Higgins J, in dissent, relied upon the text of the Constitution. However, Higgins J pointed out that the conclusion of the majority rested on a negative implication—it did not flow as a matter of logic from the provisions of the Constitution. In His Honour's words:

It is said that this Court, as a Court, is forbidden by the Constitution to perform any functions which are not within "the judicial power of the Commonwealth," and that the function of determining the validity of an Act except between litigating parties is not within that judicial power. I cannot accept either proposition. To say that Blackacre shall be vested in A (and in A only) does not carry as a corollary that Whiteacre shall *not* be vested in A; to say that the judicial power of the Commonwealth shall be vested in the High Court (and other Federal Courts and such other Courts as Parliament invests with Federal jurisdiction—sec. 71 of the Constitution) does not imply that no other jurisdiction, or power, shall be vested in the High Court or in the other Courts. This is surely obvious, on the mere form of words.¹⁶⁵

Higgins J, as he had done in *Alexander's Case*, adopted a much more flexible view of the separation of judicial power. For his Honour, the separation of powers, effected by the Australian Constitution left each arm of government 'interdependent' rather than independent.¹⁶⁶ In support of this view, his Honour contrasted the position achieved by section 64, which incorporates the notion of responsible government into the federal system of government, with the United States position.¹⁶⁷

Further, Justice Higgins, held that the challenged legislation involved an exercise of judicial power. For Higgins J, the legislation fell within section 76 as it involved deciding a 'matter

¹⁶⁵ *Ibid*, 271.

¹⁶⁶ *Ibid*, 276. Higgins J also referred (at 274-276) to the jurisdiction of the Canadian Courts to give an advisory opinion, which may be subject to an appeal, and to the inclination of the United States Courts to refuse requests for advice from the Executive on abstract questions.

¹⁶⁷ *Ibid*, 276 (Higgins J).

arising under the Constitution, or involving its interpretation.¹⁶⁸ In his Honour's view, it was probable that the word 'matter' connoted some form of legal proceeding, however, Higgins J reasoned that it did not require that the Court determine some immediate right, duty or liability.¹⁶⁹ That said, Justice Higgins went on to state in the alternative that even if the power conferred did not fall within section 76 of the Constitution, there was nothing in the Constitution to prohibit the conferral by Parliament of executive powers upon the High Court, provided the Court continued to act 'judicially'.¹⁷⁰ This aspect of Justice Higgins' judgment which refers to the requirement that the Court, exercising other functions, must act judicially, is consistent with the idea that a narrower implication may be drawn.

C *In re Judiciary and the Influence of Legalism*

The reasoning of both the majority justices and the minority justice in *In re Judiciary and Navigation Acts*, like the reasoning in the earlier cases of *New South Wales v Commonwealth* and *Alexander's Case*, relied primarily on the text of the Constitution.¹⁷¹ Higgins J in dissent also referred to overseas authority.¹⁷² Of the cases considered in this Chapter the majority in *In re Judiciary and Navigation Acts* places arguably the greatest emphasis upon the interpretation to be made of the text of the Constitution. This may be illustrated by contrasting the approach of the majority in that case with the comments made by the Privy Council in *Attorney-General of the Commonwealth of Australia v The Queen*,¹⁷³ (the appeal from the *Boilermaker's* decision). The Privy Council in *Attorney-General v The Queen* commented in relation to advisory opinions that,

¹⁶⁸ *Ibid*, 276 (Higgins J).

¹⁶⁹ *Ibid*, 274 (Higgins J).

¹⁷⁰ *Ibid*, 276 (Higgins J).

¹⁷¹ See *New South Wales v Commonwealth* (1915) 20 CLR 54 and *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

¹⁷² See *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 276 (Higgins J).

¹⁷³ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541.

it has by many been thought an unwise practice to try to anticipate judicial decisions extra-judicially by obtaining the opinion or advice of the Judges, the reason being that it is regarded as tending to sap their *independence and impartiality*.¹⁷⁴

This approach appears to reflect the influence of the notion of judicial independence which may be traced to the historical developments in the British common law considered above. In contrast to this position, and to the comments in *Waterside Workers' Federation of Australia v J W Alexander Ltd*,¹⁷⁵ the majority decision in *In re Judiciary and Navigation Acts* contains little direct reference to the importance of judicial independence and impartiality. Rather, the majority in *In re Judiciary and Navigation Acts* tend to focus, in a legalistic manner, upon the interpretation to be made of the constitutional provisions contained in Chapter III of the Constitution. In addition, the majority in *In re Judiciary and Navigation Acts* do not address the alternative submission put concerning the invalidity of the challenged legislation,¹⁷⁶ nor did their Honours address the nature of the arguments put forward in the dissenting judgments. It may therefore be concluded that their Honours seem to base their decision on the narrowest possible basis. This approach is consistent with a narrow form of legalism.

A consideration of both the majority and minority views in *In re Judiciary and Navigation Acts*, together with views expressed in the earlier decisions of the *Wheat Case* and *Alexander's Case*, clearly indicates that prior to *Boilermakers* Chapter III had been the subject of differing views. The following section will analyse the manner in which the *Boilermakers'* decision, reinforced a strict separation of judicial power that has remained influential in Australian constitutional law.

¹⁷⁴ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541 (emphasis mine).

¹⁷⁵ *Waterside Workers' Federation of Australia v J W Alexander Ltd (Alexander's Case)* (1918) 25 CLR 434, 442 (Griffith CJ), 469-70 (Issacs and Rich JJ).

¹⁷⁶ For example, addressing the validity of the challenged legislation their Honours commented that: '...To make such a declaration is clearly a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth. If this be so, it is not within our province in this case to inquire whether Parliament can impose on this Court or on its members any, and if so what, duties other than judicial duties, and we refrain from expressing any opinion on that question.' *In re the Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ) (emphasis added).

VI *BOILERMAKERS AND THE TWO LIMBS OF THE SEPARATION OF JUDICIAL POWERS DOCTRINE*

The litigation in *R v Kirby; Ex parte Boilermakers' Society of Australia*¹⁷⁷ arose out of a strike by workers at a shipyard in Sydney. Members of the Boilermakers Society were employed at the Sydney shipyard and had implemented bans in support of striking ironworkers. The Court of Conciliation and Arbitration imposed orders on the Boilermakers Society. The purpose of those orders was to require the Society to comply with an award of the Arbitration Court that prohibited the Society from placing bans, limitations or restrictions on the performance of work. The litigation challenged the orders of the Arbitration Court, including an order that imposed a £500 fine on the Boilermakers Society for contempt of the orders of that Court. The challenge asserted that the legislation that purported to give the Arbitration Court power to impose the orders was constitutionally invalid. The constitutional invalidity was said to arise from the fact that the Court was invested by statute with numerous incompatible powers. In particular, functions and authorities of an administrative, arbitral, executive and legislative character were conferred on the Court, together with powers of a judicial character. It was said that such a conferral was repugnant to the terms of Chapter III of the Constitution, and that any attempt to confer powers in this manner was beyond the power of the legislature.¹⁷⁸

The High Court by a majority (Dixon CJ, McTiernan, Fullagar and Kitto JJ; Williams, Webb and Taylor JJ dissenting) accepted that some of the challenged provisions were constitutionally invalid. The majority held that Chapter III of the Constitution did not permit powers that were foreign to the judicial power, being attached to the courts created by or under that Chapter for the purposes of exercising Commonwealth judicial power.¹⁷⁹ The High Court decision was the subject of an unsuccessful appeal to the Privy Council.¹⁸⁰ The decision in *Boilermakers* therefore

¹⁷⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁷⁸ See the grounds of the order nisi: (1956) 94 CLR 254, 255.

¹⁷⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁸⁰ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 538.

authoritatively established the dual nature of the separation of judicial powers doctrine. In particular, the majority held that:

Chap. III does not allow the exercise of a jurisdiction which of its very nature belongs to the judicial power of the Commonwealth by a body established for purposes foreign to the judicial power, notwithstanding that it is organized as a court and in a manner which might otherwise satisfy ss. 71 and 72, and that Chap. III does not allow a combination with judicial power of functions which are not ancillary or incidental to its exercise but are foreign to it.¹⁸¹

Whilst the decision in *Boilermakers* is often cited for the above conclusions, the following analysis will focus upon the reasoning process that led to the adoption of this strict view of the separation of judicial power, and in doing so make a key contribution to the larger argument presented in this thesis concerning approaches to constitutional interpretation.

A multitude of factors, including the political debate, which formed the background to the action, may have impacted upon the decision in *Boilermakers*.¹⁸² Sir Owen Dixon is widely regarded as the author of the majority decision,¹⁸³ and it is clear, particularly in His Honour's extra-judicial writings, that Sir Owen Dixon had an underlying perception of the separation of judicial power.¹⁸⁴ On being sworn in as Chief Justice, Sir Owen Dixon emphasised the importance of the maintenance of the status of the judiciary, and referred to the public confusion created by the large number of jurisdictions that existed in Australia. In particular, Sir Owen Dixon singled out the public misunderstanding of the distinction between the

¹⁸¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁸² In this regard *Boilermakers* may be seen as 'one battle in a protracted war between employers and unions in the 1950s and 1960s over enforcement of industrial awards': see Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 161.

¹⁸³ See Philip Ayres, *Owen Dixon* (2003) 257; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 166.

¹⁸⁴ For example, Sir Owen Dixon is recorded as having expressed privately the view that the manner in which the Arbitration Court was reconstituted, was: 'out of the frying pan and into the fire': D I Menzies, 'The Right Honourable Sir Owen Dixon' (1973) 9 *Melbourne University Law Review* 1, 3. The teaching of Sir William Harrison Moore, whose work is quoted by the majority in *Boilermakers*, may also have been influential: see George Winterton, 'Introduction to the 1997 Reprint', in W.H. Moore, *The Constitution of the Commonwealth of Australia* (2nd ed, 1910, reprinted 1997) xlv. See generally Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 163.

function of industrial tribunals and the administration of justice according to the law.¹⁸⁵ It may be that, influential upon the *Boilermakers'* decision, was a desire to insulate the federal judiciary from the 'public dissatisfaction with the Arbitration Court'.¹⁸⁶

The dual nature of the separation of powers doctrine, which was to reinforce this distinction in the *Boilermaker's Case*, had previously been referred to by Justice Dixon in *Dignan's case*.¹⁸⁷ Sir Owen Dixon also corresponded about the *Boilermakers' Case* with Lord Simonds, who was to sit on the appeal from the decision in *Boilermakers*. At the very least, the appropriateness of some of the later correspondence between Sir Owen Dixon and Lord Simonds concerning *Boilermakers* could be questioned.¹⁸⁸ The correspondence suggests that in February 1957 Dixon wrote to Lord Simonds stating,

You will of course have gathered from what I wrote that I regard the doctrine concerning judicial power on which the decision rests as almost basal to the system. I would not like to say how long ago I formed that view, and I have always felt that any other doctrine involved a misunderstanding of the whole instrument of government & one that might conceivably lead to fatal consequences. That has become only too apparent here lately ... I blame myself for not intervening from the Bench years ago & forcing the issue. I ought to have done so twenty years ago.¹⁸⁹

The influence of these views provide some of the context to the *Boilermakers* decision and they should be acknowledged and borne in mind when considering the following analysis which

¹⁸⁵ 'Swearing In of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xvi. In particular his Honour, upon being sworn in as Chief Justice commented that, '[t]here is in Australia a large number of jurisdictions and a confusion in the public mind as to the functions the jurisdictions possess. The character of the functions is misunderstood and the public do not maintain the distinction between the administration of justice according to law and the very important functions of industrial tribunals.'

¹⁸⁶ See Linda Kirk, 'Boilermakers Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 65, 65.

¹⁸⁷ *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 97-8.

¹⁸⁸ Phillip Ayres expresses the view that Dixon who had corresponded with Lord Simonds about the *Boilermakers* case earlier, 'had no qualms about writing to Simonds regarding the case because he considered it an *inter se* case that would not come before the Board,': see Phillip Ayres, *Owen Dixon* (2003) 257. It is however difficult to see how this view could attach to some of Dixon's correspondence with Lord Simonds which appears to have been continued after Dixon was aware of Lord Simonds's involvement in the case. See further, Laurence Maher, 'Owen Dixon: Concerning his Political Method' (2003) 6 *Constitutional Law and Policy Review* 33.

¹⁸⁹ Dixon to Lord Simonds, draft, 12 February 1957 in Correspondence 1955-1956, Owen Dixon, Personal Papers cited by Phillip Ayres, *Owen Dixon* (2003) 257.

will focus primarily upon the reasoning expressed in the written reasons of the majority. The written decision of the majority in *Boilermakers* will be analysed in terms of three main influences. The first influence is the interpretation to be given to the text of the Constitution. The second influence is that of federalism. The third influence is the notion of judicial independence.

A *Boilermakers and Dixonian Legalism*

The first influence, which was expressed to carry the greatest weight with the majority judges in *Boilermakers*, was the terms of the Constitution itself.¹⁹⁰ The majority saw the text of the Constitution and in particular the demarcation of powers affected by section 1, 61 and 71 as supporting the view that governmental powers were, in the absence of any contrary provision, to be strictly divided between the three branches of government. As the majority stated:

If you knew nothing of the history of the separation of powers, if you made no comparison of the American instrument of government with ours, if you were unaware of the interpretation it had received before our Constitution was framed according to the same plan, you would still feel the strength of the logical inferences from Chaps. I, II and III and the form and contents of ss. 1, 61 and 71.¹⁹¹

For the majority, the existence of Chapter III and the nature of the provisions that it contained made it clear that judicial power could only be exercised or conferred within the limits of ss71-80.¹⁹² The majority held that the exhaustive nature of the provisions of Chapter III, whilst they established and affirmed the jurisdiction and powers of the Court, also carried with them the

¹⁹⁰ See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹¹ *Ibid*, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). A similar point is made in the Privy Council decision where their Lordships state: 'but first and last, the question is one of construction and they doubt whether, had Locke and Montesquieu never lived nor the Constitution of the United States ever been framed, a different interpretation of the Constitution of the Commonwealth could validly have been reached': see *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 540.

¹⁹² *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 269 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

negative implication that judicial power could not be conferred otherwise than in accordance with those provisions.¹⁹³ The majority judges reasoned that the 'careful provisions for the creation of a federal judicature' to exercise judicial power combined with the 'precise specification of the content or subject matter of the power' would be incompatible with the exercise of other powers by the institution of the judiciary.¹⁹⁴ The response to this argument of course is that articulated by Higgins J in *In re Judiciary and Navigation Acts*.¹⁹⁵ The majority in *Boilermakers* to further support their Honour's conclusion, referred to the absence in section 51 of any reference to the judiciary, save that with respect to the incidental power in section 51(xxxix).¹⁹⁶

It may be argued that the reasoning style of the majority in *Boilermakers* is legalistic in that it refers primarily to the text of the Constitution, and to cases that touch upon the issue of the separation of powers. In particular, the judgment evinces considerable efforts to gather support from precedents that are consistent with the majority view, and not surprisingly spends much time distinguishing or seeking to limit the scope of cases, which arguably supported the opposing view.¹⁹⁷ However, in a manner which is reflective of what Chapter 2 of this thesis has described as 'Dixonian legalism', the majority, having considered the relevant cases, acknowledged the judicial law-making function of the Court which stems from the duty of the Court to proceed according to law.¹⁹⁸ This duty, for the majority, involved giving 'effect to the Constitution according to the interpretation which on proper consideration they are satisfied that it bears.'¹⁹⁹

¹⁹³ *Ibid*, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹⁴ *Ibid*, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹⁵ *In re The Judiciary Act 1903-1920 and In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 271 (Higgins J, in dissent).

¹⁹⁶ *Ibid*, 269, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹⁷ A typical example of this approach may be found in the majority's treatment of the judgment of Latham CJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, which is discussed further below: see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 293-5 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹⁸ *Ibid*, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁹⁹ *Ibid*, 296. (Dixon CJ, McTiernan, Fullagar and Kitto JJ) The majority did acknowledge that matters such as 'judicial dicta, common assumptions tacitly made and acted upon, and the fact that the legislation has passed unchallenged for a considerable period of time' may have created a presumption that the legislation should prevail, 'until the judicial mind reaches a clear conviction that consistently with the Constitution the validity of the provisions impugned cannot be sustained': see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). This presumption was however, in the view of the majority, clearly rebutted.

Whilst the text of the Constitution was supportive of the majority view, the reliance that the majority judgment needed to place upon a negative implication has resulted in the necessity of the second limb of the *Boilermakers* doctrine, being questioned. As Professor Cheryl Saunders has stated:

[n]owhere does the Constitution say that courts may not exercise other powers properly conferred on them or that judicial power may not be vested elsewhere. These are 'negative' implications, drawn from the affirmative provisions of Chapter III, with the assistance of the assumption that the chapter is exhaustive ... The implications are persuasive, but not necessarily compelling.²⁰⁰

Whilst doubt may be cast upon the strength of the argument put forward by the majority in *Boilermakers*, it should be acknowledged that the majority opinion adamantly expresses the view that the interpretation of the text of the Constitution, the judicial role of interpreting those constitutional terms, and the relevant precedents all support the exclusive nature of the separation of judicial power.²⁰¹

It may be argued that noticeably absent from the majority judgment is any attempt to engage with the arguments that suggest that a narrower implication could have been drawn. At the time of the *Boilermakers*' decision the idea that the second limb of the doctrine does not involve a total prohibition on the conferral of non-judicial powers, but merely a prohibition on non-judicial powers that were 'inconsistent' with the exercise of judicial power, had been put forward.²⁰² For example, Justice Williams, in his dissent in *Boilermakers*, drew a narrower implication of this nature.²⁰³ The reluctance of the majority, to address this possibility may also be identified in the manner in which Chief Justice Latham's comments in *Lowenstein's Case*, are

²⁰⁰ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9 (references omitted). See also George Winterton, *Parliament, the Executive and the Governor-General* (1983) 62; George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 188.

²⁰¹ See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²⁰² Such an implication had been suggested by Justice Higgins in dissent in *In re Judiciary and Navigation Act*: see *In re Judiciary and Navigation Act 1912-1920* (1921) 29 CLR 257, 276 (Higgins J). It is also possible that a similar view underscored Chief Justice Latham's comments in *Lowenstein's Case*: see *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 576 (Latham CJ).

²⁰³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 314-15 (Williams J).

treated.²⁰⁴ The approach of the majority in this regard may be contrasted to that taken by the Privy Council.

Although the Privy Council ultimately rejected the argument that a narrower implication should be drawn, in so doing, the Privy Council directly confronted the arguments in favour of such an approach.²⁰⁵ The Privy Council, upholding the decision in *Boilermakers*, preferred to adopt a total prohibition on the Commonwealth Parliament conferring non-judicial powers on a Chapter III Court than to make a narrower implication.²⁰⁶ One reason given by the Privy Council for rejecting the view that a narrower implication could be drawn was based upon the indeterminacy in the nature of the implication to be drawn.²⁰⁷ In particular, their Lordships referred to the fact that the text of the Constitution did not support one particular version of the narrower implication, and to the 'obvious difficulty of arriving at a sure conclusion if it is sought by implication to read something into the Constitution which is not there.'²⁰⁸ It is interesting to note in this regard that the arguments put forward in favour of the drawing of a narrower implication, had varied in terms of the nature of the implication to be drawn. More

²⁰⁴ Chief Justice Latham in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* stated: 'Thus, in my opinion, it is not possible to rely upon any doctrine of absolute separation of powers, for the purpose of establishing a universal proposition that no court or person who discharges Federal judicial functions can lawfully discharge any other function which has been entrusted to him by statute. This proposition, however, does not involve the further proposition that any powers or duties, of any description whatsoever, may be conferred or imposed upon Federal courts or Federal judges. If a power or duty were in its nature such as to be inconsistent with the co-existence of judicial power, it might well be held that a statutory provision purporting to confer or impose such a power or duty could not stand with the creation of the judicial tribunal or the appointment of a person to act as a member of it': see *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 566-567 (Latham CJ). This case was distinguished by the majority judgment in *Boilermakers*. *Lowenstein's Case* had been said (in argument in *Boilermakers*) to support the proposition that 'non-judicial powers could be attached to a federal court', however the majority in *Boilermakers* regarded the decision in *Lowenstein's Case* as holding that 'there was no repugnancy to the exercise of the judicial power and there could be no doubt of the matter being incidental to a proceeding arising in bankruptcy': see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 294 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). The *Boilermakers'* majority did not go on to consider at length whether the narrower implication, that is that non-judicial power could be conferred provided that it was not incompatible with the exercise of judicial power, could be made in circumstances where such a power was not supported by the incidental power.

²⁰⁵ In this regard their Lordships referred to the comments of Evatt J in *Dignan's Case* (1931) 46 CLR 73, the comments of Latham CJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 566. Reference was also made to the submissions put on behalf of the appellant: see *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 542.

²⁰⁶ *Ibid*, 543.

²⁰⁷ In particular their Lordships stated: 'It appears to their Lordships very difficult to determine the intended scope of this exception but it would be reasonable to include within it any combination of functions in which a tribunal might be both actor and judge. The fundamental principle which makes such a combination appear contrary to natural justice is not remote from that which inspires the theory of separation of powers': see *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 542.

²⁰⁸ *Ibid*, 543.

specifically, the Privy Council compared the nature of the implication put forward by the appellants with that which had been drawn by Williams J in his dissenting judgment.²⁰⁹

Lord Simonds' correspondence to Sir Owen Dixon about the *Boilermaker's Case* makes it clear there was some debate on the issues raised in *Boilermakers*.²¹⁰ The Privy Council's consideration of the alternative arguments for the drawing of a narrower implication may have stemmed from this discussion. It may, however, be argued that whatever the impetus for considering these arguments, the reasoning of the Privy Council to the extent that it responds to the suggestions that a narrower implication could be drawn from Chapter III of the Constitution, is more compelling than the analysis presented by the majority of the High Court.

Ultimately it may be questioned whether the 'strength of the logical inference' from the text of the Constitution,²¹¹ or some preconceived notion of the exclusive nature of the separation of judicial power was influential in the outcome of the majority High Court decision in *Boilermakers*. It is, however, clear that the reliance placed in the written decision of the majority upon the interpretation to be made of the text of the Constitution, is in line with the method of reasoning adopted in previous cases that considered Chapter III of the Constitution.²¹²

²⁰⁹ See *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 542. Douglas Menzies QC who put submissions on this point for the Commonwealth as appellant had submitted that 'any power might be joined to the judicial power which was not inconsistent with its exercise' however the Privy Council was of the view that a different perspective had been expressed in the dissent in the High Court decision. In particular, the Privy Council held that '[f]ar different test was the test suggested by Williams J': see *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 542. Williams J had, in part, expressed the view that, 'functions must not be functions which courts are not capable of performing consistently with the judicial process. Purely administrative discretions governed by nothing but standards of convenience and general fairness could not be imposed upon them': see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 315 (Williams J, in dissent).

²¹⁰ See Philip Ayres, *Owen Dixon* (2003) 257 citing Lord Simonds to Dixon, 3 February 1957, in *Correspondence 1957-1959*, Owen Dixon, Personal Papers.

²¹¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²¹² See *New South Wales v Commonwealth* (1915) 20 CLR 54, 88; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 441; *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 264.

B <i>Boilermakers and Australian Federalism</i>
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The second influence on the majority decision in *Boilermakers* is that of federalism. The *Boilermakers* litigation raised the issue of the competing influences of the British and United States conceptions of the separations of powers doctrine. Federalism was a crucial determinate in this debate. Douglas Menzies QC who appeared for the Commonwealth in the *Boilermakers* litigation submitted that the Constitution incorporated a separation of powers based on British constitutional practice, rather than the 'distortion' of that doctrine that had developed in the United States.²¹³ The majority made it clear that the incorporation of British concepts such as ministerial responsibility meant that the Australian system was not based upon the American theory of the separation of powers, particularly when regard was had to the position of the legislature and the executive.²¹⁴ That said the majority judgment did hold that despite the indivisible nature of the legislature and executive government, the Australian Constitution effects a separation in respect of the 'legal powers' of each branch of government.²¹⁵ Again in this respect, the views of Sir Owen Dixon are likely to have been influential.²¹⁶ For example, Sir Owen Dixon speaking extra-judicially on another occasion had expressed the view that decisions such as *Engineers* inappropriately minimised the influence of the American model on the Australian Constitution.²¹⁷

The majority judgment emphasised the federal nature of the Australian system by holding that the federal form of government placed the judicature in a position that was unknown in a unitary system of government.²¹⁸ The majority in *Boilermakers* held that a federal constitution

²¹³ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 259. ('*Boilermakers*')

²¹⁴ *Ibid*, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²¹⁵ *Ibid*, 275 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). In this respect, their Honour's line of reasoning is analogous to that of the earlier cases which emphasise the manner in which the Constitution grants power and then defines the scope of its operation: see *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 441; *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257, 264.

²¹⁶ See further Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221; Philip Ayres, *Owen Dixon* (2003) 86. See also Chapter 2, Section IV.

²¹⁷ See Sir Owen Dixon, 'Marshall and the Australian Constitution' in Sir Owen Dixon, *Jesting Pilate* (1965) 166-79. See also Philip Ayres, *Owen Dixon* (2003) 254.

²¹⁸ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 267 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

establishes governments with defined powers and therefore it must be rigid.²¹⁹ It was said by the majority to follow that the ultimate responsibility for defining the limits of those powers lay with the federal judiciary.²²⁰ The majority judgment articulated the view that it could not be left to the judicial power of the States to determine the 'ambit of federal power or the extent of the residuary power of the States.'²²¹ They went on to hold that,

[t]he powers of the federal judicature must therefore be at once paramount and limited. The organs to which federal power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained.²²²

In *Boilermakers* the majorities' view of Australian federalism, including their Honour's view of the unique position of the federal judicature in a federal system was undoubtedly influential in establishing a strict view of the separation of federal judicial power.²²³ It will be argued in Chapter 10 that this line of reasoning was influential in the High Court decision in *Re Wakim; Ex parte McNally*.²²⁴

C *Judicial Independence and the Boilermakers' doctrine*

The third influence which may have impacted upon the majority decision in *Boilermakers* was a concern for the independence of the judiciary. It has been widely accepted that this notion was central to the outcome of the *Boilermakers* decision.²²⁵ As Sir Owen Dixon's comments make

²¹⁹ *Ibid*, 267.

²²⁰ *Ibid*, 268, 276.

²²¹ *Ibid*, 267.

²²² *Ibid*, 268.

²²³ *Ibid*, 267, 275-78.

²²⁴ *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Re Wakim*'). See especially, *Re Wakim* (1999) 198 CLR 511, 543-4 (Gleeson CJ), and 575 (Gummow and Hayne JJ). However, *Re Wakim* maintains a distinction between State and Federal judicial power, and does not pick up from *Boilermakers* the idea that the distinction between judicial power and judicial power of the Commonwealth is 'tenuous and unreal': see *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 274 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²²⁵ Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 168. See, for example, Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 184; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 133.

clear, his Honour regarded the separation of judicial power as being almost a 'basal' assumption of the Australian legal system.²²⁶ The written reasons of the majority in *Boilermakers*, however, contain little reference to the virtues of this doctrine, and, in particular, the important impact that judicial independence has for the rule of law is not articulated at length in the judgment. In contrast, the importance of these doctrines was more clearly articulated in the Privy Council decision, which otherwise adopted the reasoning of the High Court majority. Their Lordships stated that,

in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.²²⁷

Dissimilarity with the Privy Council may also be identified in that the High Court judgment does not refer to the importance of the judiciary in safeguarding the interests of the individual. In contrast, the Privy Council, having considered the problems associated with advisory opinions, states that,

[m]ore serious objection may for the same reason be taken to vesting in them powers which if exercised by another would be open to challenge on all the grounds that are available to a citizen who thinks his rights have been infringed. For it is their own executive act which they may be invited judicially to examine.²²⁸

It may be suggested that the approach of the Privy Council, whilst producing the same result as the High Court decision, has a slightly different emphasis. Whereas the High Court focused upon the separation of powers doctrine as described in the text of the Constitution and upon notions of federalism, the Privy Council gave greater emphasis to notions of judicial independence and impartiality. This difference is not surprising—the English legal system is not a federal system and the notions of judicial independence and impartiality have a long and

²²⁶ See, for example, Dixon to Lord Simonds, draft, 12 February 1957 in Correspondence 1955-1956, Owen Dixon, Personal Papers cited in Philip Ayres, *Owen Dixon* (2003) 257.

²²⁷ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 540-1.

²²⁸ *Ibid*, 541.

significant history in the English common law system, as the analysis at the start of this Chapter suggested. In these respects, the Privy Council's approach is more widely theorised than the reasoning of the High Court. It may be possible to explain the absence from the High Court decision of any reference to the interests of individuals in terms of the institutional character of the litigation. In the *Boilermakers' Case*, as in many industrial relations decisions, the parties were collective bodies and the State. It is a matter for speculation as to whether, had the litigation directly brought the plight of an individual to the attention of the High Court the focus of the judgment may have been any different. The High Court's lack of focus on individuals is likely to reflect not only the nature of the litigation before it, but also the prevailing legal culture of the time—the judgment was given at a time when legalism and positivism dominated the legal landscape.²²⁹ Furthermore, any legalistic interpretation of the terms of the Australian Constitution is likely to emphasise the powers of institutions and their relative authority rather than the interests of individuals. The reason for this being, that for the most part, the terms of the Australian Constitution, are not concerned with individual rights.

D *The Reinterpretation of the Boilermakers Decision*

Tony Blackshield and George Williams have viewed the 'essential rationale' in *Boilermakers* as being based upon 'the need to insulate from political interference the special judicial responsibility for "the maintenance of the constitution"'.²³⁰ However, these commentators suggest that,

there has been a shift in recent years towards a different rationale: one that treats the courts as the bulwarks or bastions of individual liberty and thereby implies that their role in policing constitutional limits on government has as much to do with the protection of

²²⁹ See, for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 448-9 (Griffith CJ).

²³⁰ See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 660. See however, Zines critique of this reasoning in Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 212-13.

individual freedom as with the federal distribution of powers. Nowadays it is on this basis, rather than that of federalism, that the *Boilermakers* doctrine is most frequently upheld.²³¹

Justice Gaudron, speaking extra judicially, has viewed *Boilermakers* as protecting individual rights and freedoms. In particular, her Honour has stated that,

Boilermakers was one of the early cases in which constitutional freedoms and prohibitions were implied because they were necessary for the maintenance of the body politic the Constitution brought into existence. In *Boilermakers*, the implication was that no person could be punished for breach of the law except at the hands of a separate and independent judiciary.²³²

However, as Justice Gaudron points out, the emphasis in the judgment was not upon the individual but on the body politic which had been brought into existence by the Constitution.²³³ It may be argued that any implication that the *Boilermakers' Case* has for the individual is a beneficial but largely unintended consequence of the decision as the litigation and the judgment both focus upon institutions. Whilst contemporary interpretations of *Boilermakers* may at times focus upon the role of the courts in protecting individual freedoms,²³⁴ it may be suggested that such an approach does not express a new or particularly innovative idea. A reason for this is that the ideals of judicial independence and impartiality were emphasised by the decision of the Privy Council, which decided the appeal from the *Boilermakers* decision.²³⁵ Furthermore, as the forgoing analysis has demonstrated the idea of courts as the protectors of individual liberty has a significant historical origin in common law legal systems.

²³¹ See Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 660.

²³² Justice Mary Gaudron, 'Some Reflections on the *Boilermakers Case*' (1995) 37 *The Journal of Industrial Relations* 306, 309.

²³³ *Ibid.*

²³⁴ See further, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 660.

²³⁵ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541

E *The Ending of the Litigation in Boilermakers*

The outcome of the litigation in *Boilermakers* was to declare only the judicial functions of the Court invalid. As a consequence, the practical difficulties associated with declaring both the judicial and arbitral functions invalid, were avoided.²³⁶ As Fiona Wheeler has been pointed out '[i]f the Court's arbitral functions had been declared invalid, or the Court declared unconstitutional as a whole, the legal and economic consequences would have been more difficult for the legislature to remedy.'²³⁷ The result of the decision in *Boilermakers* was overcome by amendments to the *Conciliation and Arbitration Act 1904* (Cth) that divided the former Court of Conciliation and Arbitration into the Conciliation and Arbitration Commission, and the Commonwealth Industrial Court. Legislative provisions saved judicial orders, which had been made by the previous Court of Conciliation and Arbitration, by deeming such orders to be orders of the newly created Commonwealth Industrial Court.²³⁸ The outcome of the decision in the *Boilermakers Case* achieved a practical result with the effect of the decision being something that could be remedied by the legislature. Importantly, however, the reasoning of the majority did not articulate the influence that the practical outcome of the litigation had on the reasoning process.

IV CONCLUSION

The reasoning in *R v Kirby; Ex parte Boilermakers' Society of Australia* is legalistic.²³⁹ The greatest weight is placed in the judgment upon the interpretation to be made of the text of the

²³⁶ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 12; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 168.

²³⁷ Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 168.

²³⁸ See generally Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 616; Justice Bob French, 'Federal Courts Created by Parliament' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 123, 133.

²³⁹ See Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 11; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 160.

Constitution.²⁴⁰ As such the reasoning process articulated in *Boilermakers* is generally consistent with the foundational cases of *New South Wales v Commonwealth*,²⁴¹ *Waterside Workers' Federation of Australia v J W Alexander Ltd*²⁴² and *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920*,²⁴³ in that all of these decisions would fall under the rubric of a legalistic approach. However, the differences in the form of legalism adopted in particular cases, as the analysis presented in this Chapter has demonstrated, may be reflective of the respective degree of influence of two fundamentally different, though not necessarily inconsistent approaches to the interpretation of Chapter III. One approach is to seek to explain the exclusive nature of judicial power primarily as a result of the interpretation of the text of the Constitution. The second is to interpret the requirements of the separation of judicial power in a manner that is informed by the relevant concepts that underlie this doctrine. The applicable concepts in this regard include those considered at the start of this Chapter—the idea that the division of power checks the concentration of power, the historical concept of judicial independence in British common law jurisprudence, the United States decision of *Marbury v Madison*, the role of Australian colonial courts in declaring invalid *ultra vires* legislation, and the unique role of the High Court as both a constitutional court and a final court of appeal.

In this Chapter, in relation to the first limb of the separation of judicial powers doctrine, the cases examined were *New South Wales v Commonwealth*,²⁴⁴ and *Waterside Workers' Federation of Australia v J W Alexander Ltd*.²⁴⁵ The combined effect of those decisions was to establish that Commonwealth judicial power could not be conferred on a non-judicial body. It was argued that the approach taken in each case was legalistic, and overwhelmingly the decisions emphasised the need to interpret the text and structure of the Constitution and the relevant legislation.²⁴⁶ That said, there are some clear references which may be identified in these decisions to the underlying historical and theoretical assumptions which informed the

²⁴⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

²⁴¹ *New South Wales v Commonwealth* (1915) 20 CLR 54.

²⁴² *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

²⁴³ *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257.

²⁴⁴ *New South Wales v Commonwealth* (1915) 20 CLR 54.

²⁴⁵ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

²⁴⁶ See particularly *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 93 (Isaacs J), and 109 (Rich J). See also *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 447-8 (Griffith CJ), 455-7 (Barton J), 468 (Isaacs and Rich JJ), 472-3 (Higgins J, in dissent), 478 (Gavan Duffy J, in dissent); 484-5 (Powers J).

conclusions reached.²⁴⁷ Thus, whilst it may be argued that these early decisions reflect a fairly narrow form of legalism, this form of legalism is based upon a number of assumptions about the importance of the separation and independence of the judiciary, although these matters may only be articulated to a limited degree. The minimal discussion of these assumptions might be reflective of the prevailing legal culture at the time these cases were decided. In particular, the narrow focus of the judgments in the *Wheat Case* and *Alexander's Case* could be explained on the basis that the separation of judicial power was in some ways regarded as axiomatic and thus not subject to judicial enunciation.²⁴⁸ The emphasis on the text of the Constitution also fits well with the judicial role envisaged by a declaratory theory of the law, which was propounded by Chief Justice Griffith in *Alexander's Case*.²⁴⁹

In relation to the second limb of the doctrine of the separation of judicial power two cases were examined in this Chapter. The first was the foundational case of *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920*.²⁵⁰ The second, somewhat more decisive case was *R v Kirby; Ex parte Boilermakers' Society of Australia*.²⁵¹ The foundations of the strict view of the separation of powers doctrine as well as the argument for the drawing of a narrower implication may be identified in the majority and minority judgments in *In re Judiciary and Navigation Acts*.²⁵² However, the *Boilermakers* majority firmly established a strict and exclusive view of the separation of judicial power.²⁵³ From the point of view of the larger argument presented in this thesis, it is the reasoning processes that led to this conclusion being reached that is important. The reasoning in *In re Judiciary* is particularly narrow in that a number of theoretical arguments that could have been articulated in support of the majority view remain

²⁴⁷ For example, the comments of Justices Isaacs and Rich in *Alexander's Case* reflected a concern for the independence of the judicial institution, and the comments of Chief Justice Griffith revealed some fundamental assumptions about the necessity of a separate and independent judiciary: see, for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 442 (Griffith CJ), 469-70 (Isaacs and Rich JJ). See also, 451-2 (Barton J).

²⁴⁸ See, for example, *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 442 (Griffith CJ), 451-2 (Barton J).

²⁴⁹ *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 448-9 (Griffith CJ).

²⁵⁰ *In re The Judiciary Act 1903-1920* and *In re the Navigation Act 1912-1920* (1921) 29 CLR 257.

²⁵¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

²⁵² See further, *New South Wales v Commonwealth* (1915) 20 CLR 54, 62; *Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

²⁵³ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 11; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160, 160.

unexpressed. For example, as the Privy Council later held, advisory opinions may be viewed as having a detrimental affect upon judicial independence and impartiality.²⁵⁴

In contrast to the cases leading up to *Boilermakers* the reasoning of the majority in the *Boilermakers Case* shows a significant increase in the attention accorded to the influence of federalism. In addition it may be suggested that underlying the decision, and reflected (although only to a limited degree) in the written reasons of the *Boilermakers* majority is a regard for the doctrine of the separation of powers and the idea of judicial independence. There is, however, some difficulty in being too categorical about the influence of these underlying perceptions of judicial power. It is argued that, one reason for this is that if these factors were influential in a significant way, it would seem that the judgment leaves much unsaid, and this approach leaves much scope for debate on this issue. For example, one commentator has noted of the *Boilermakers Case*,

[t]he Court did not attempt to review the deeper justification for the separation of powers in political theory, nor the long history of the doctrine in the United States Constitution. The prohibition against an admixture of functions was said by the majority to be supported by the textual division of legislative, executive and judicial power in Chapters I, II and III of the Constitution.²⁵⁵

It may be suggested that the influence of an underlying theory concerning Chapter III of the *Constitution* is more readily identifiable when the written reasons of the majority are read in conjunction with some of Sir Owen Dixon's extra-judicial writings. As it was argued in Chapter 2, Dixonian legalism represented a legalistic methodology. However, this methodology is supported by a number of fundamental theoretical assumptions, such as the existence of a corpus of legal knowledge. The interpretive process put forward in *Boilermakers* may be regarded as consistent with this approach in that the decision appears likely to be supported by a belief in some fundamental assumptions such as the requirement for the independence of the judiciary and the need for the separation of the judicial power. The majority decision in

²⁵⁴ *Attorney-General of the Commonwealth of Australia v The Queen* (1957) 95 CLR 529, 541.

²⁵⁵ Linda Kirk, 'Boilermakers Case' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 65, 65.

Boilermakers also expresses a particular view of the federal judicial system which accords the High Court a significant role in defining both State and federal judicial powers.²⁵⁶

Whilst the relevance of theoretical constructs to the *Boilermakers* decision may be a matter of debate, it is clear that the *Boilermakers* decision establishes a strict view of the separation of the judicial power of the Commonwealth. The written reasons of the majority base this doctrine almost entirely upon a negative implication, which is drawn from the text of the Constitution and, as such, the strength of the majority conclusion has been questioned.²⁵⁷ That said, whilst the necessity of the strict form of the separation of powers may be questioned, as the analysis presented at the start of this Chapter demonstrated, the concepts that informed the development of the separation of judicial power have a sound historical origin in common law jurisprudence.

The reasoning process adopted in *Boilermakers* will be contrasted in Chapter 8 with the approach in a number of cases concerning judicial power that were decided in the Mason era. In particular, it will be argued in Chapter 8, that unlike the approach in *Boilermakers*, a number of cases decided by the Mason Court sought to explore some of the assumptions underlying Chapter III of the Constitution in a different manner. More specifically, it will be argued that during the Mason era when called upon to interpret Chapter III of the *Constitution*, the High Court sought to acknowledge the role that the Court plays in balancing the interests of the individual with those of the State.

In Chapter 10 the approach that the Gleeson Court has taken to considering issues relating to judicial power will be compared with the more realist-orientated approach of the Mason era. Chapter 10 will also consider both the similarities and differences between the approach of the Gleeson Court and the Dixonian form of legalism considered in this Chapter. More specifically, it will be argued that the cases considered in this Chapter have left a legacy concerning the

²⁵⁶ See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.

²⁵⁷ George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed), *Future Directions in Australian Constitutional Law* (1994) 188. See also George Winterton, *Parliament, the Executive and the Governor-General* (1983) 62; and Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 9.

interpretation of Chapter III of the Constitution that resonates in the legalistic analysis presented in contemporary decisions of the Gleeson Court concerning the judicial power of the Commonwealth.

The difference, however, of the Gleeson Court from the approach taken in the cases considered in this Chapter is that the existence or influence of any underlying theoretical assumptions is more difficult to determine. Whereas the legalistic focus of many of the cases considered in this Chapter may be explicable in terms of a declaratory theory of law, or a positivist perspective that focuses on the power of institutions, or Sir Owen Dixon's fundamental assumptions regarding judicial power, much of the contemporary jurisprudence lacks a similar theoretical standpoint. The approach of the Gleeson Court says little of the Court's understanding of the judicial role. Ultimately, as Chapter 10 will consider, these differences raise the question of whether, unlike the approach of the High Court in the cases considered in this Chapter, the current High Court is tied to a narrow legalistic methodology even though it may have cast aside its ties to the theoretical basis that supports such an approach.

Chapter 8

CHAPTER III AND THE MASON ERA

I INTRODUCTION

The analysis presented in this Chapter will consider a number of High Court cases concerning judicial power from the Mason era. One aim of this analysis is to further the current understanding of the approach of the Mason Court by examining the extent to which its judgments reflect some of the theoretical assumptions examined in Part I of this thesis. It will be argued that the changes in Chapter III jurisprudence that have occurred in the Mason era evince a movement away from the legalistic approach that was identified in the cases discussed in Chapter 7. It will also be contended that the relevance of realism and sociological jurisprudence to the Mason Court's approach is apparent. In particular, it will be argued that consistently with these theoretical positions, a number of judgments from the Mason era explicitly acknowledge the role that the Court plays in balancing the interests of the individual with those of the State. In addition, the underlying influence of natural law principles, which may be identified in some of Justice Deane's and Justice Toohey's judgments, will be discussed.

The first movement that will be briefly examined concerns the manner in which, in a number of cases decided in and around the Mason era, the High Court gave increasing recognition to the idea that the doctrine of the separation of judicial power may be more flexible than that

described by the two limbs of the *Boilermakers* decision. In this context, the key changes in decisions such as *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*,¹ *R v Joske; Ex parte Shop Distributive and Allied Employees' Association*,² *Harris v Caladine*³ and *Hilton v Wells*,⁴ will be briefly discussed.

The second topic, which will be the subject of the largest proportion of analysis presented in this Chapter, is the renewed focus of the Mason era upon the idea that the separation of judicial power, brought about by Chapter III of the *Constitution*, may provide particular protections to individuals.⁵ The manner, in which the Mason Court, considered this idea will be examined in detail in context of the decisions of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁶ and *Polyukhovich v Commonwealth*.⁷

It should be noted at the outset of this analysis that cases examined below, which concern judicial power, cannot be considered in isolation from other cases, or other legal developments from the Mason era. As mentioned previously, also of significance was the development and expansion by the Mason Court of the implied freedom of political communication. In particular, it should be recognised that the High Court's contraction of the implied freedom of political communication from the mid-to-late 1990s affected litigation concerning Chapter III of the *Constitution*. However, the increasing trend in litigation following from the implied freedom of political communication cases, and particularly after the decision in *Kable* (which will be examined in Chapter 9) was to look to Chapter III as the only viable source of new implied constitutional rights.⁸ This has contributed to what one commentator has noted as, '[t]he move to centre stage of Ch III of the *Constitution*', which may be viewed as 'one of the

¹ (1974) 130 CLR 87.

² (1976) 135 CLR 194.

³ (1991) 172 CLR 84.

⁴ (1985) 157 CLR 57.

⁵ See for example, *Polyukovich v The Queen* (1991) 172 CLR 501 ('*War Crimes Act Case*'); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1 ('*Chu Kheng Lim*'). As mentioned previously these changes need to be seen in the context of other changes that occurred during the Mason era. For example, it is at times noted that less substantive legal changes were affected by the High Court during the Mason era in Australian constitutional law in comparison to the significant changes that were made to the common law in the same period: see Justice Michael McHugh 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004).

⁶ (1992) 176 CLR 1.

⁷ (1991) 172 CLR 501.

⁸ See further Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 124.

defining features in the last decade of Australian constitutional law.⁹ In this way, although it may be the Mason era which is readily identifiable with the trend in constitutional litigation towards Chapter III issues, the Gleeson era has evidenced a greater proportion of cases raising issues arising under Chapter III of the *Constitution*. In part, for this reason, so as to better understand the movement in the High Court's jurisprudence, it is timely to refocus upon some central decisions from this Mason era, which concern this area of law.¹⁰

II DOUBTS ABOUT THE *BOILERMAKERS'* DOCTRINE

As discussed in Chapter 7 of the decision of *R v Kirby; Ex parte Boilermakers' Society of Australia* clearly established two principles concerning the separation of judicial power. The first principle is that Chapter III prohibits the exercise of Commonwealth judicial power by a non-judicial body. The second is that Chapter III Courts may not exercise non-judicial power.¹¹ Although there are significant historical and theoretical considerations that support the separation of judicial power,¹² a rigid and strict version of the doctrine of the separation of judicial power has been criticised on the basis that it produces some practical difficulties. In particular, a strict form of the doctrine of the separation of judicial power may require a degree of institutional duplication.¹³ It can also limit the capacity of the Commonwealth to establish informal tribunals with effective dispute resolving capacities.¹⁴

⁹ Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review* 283, 283. See also Stephen Gageler, 'The High Court on Constitutional Law: The 2001 Term' (2002) *University of New South Wales Law Journal* 194, 201ff.

¹⁰ Leslie Zines, 'Legalism, Realism and Judicial Rhetoric in Constitutional Law' (2002) 5 *Constitutional Law and Policy Review* 21, 26.

¹¹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹² See further Chapter 7, Section II.

¹³ Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 34.

¹⁴ See further, Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 627; Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 129.

The most oft cited criticism of the *Boilermakers* decision is the comments of Chief Justice Barwick in *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*.¹⁵ In that case the Chief Justice stated,

[t]he principal conclusion of the *Boilermakers' Case* (1956) 94 CLR 254; (1957) 95 CLR 529; (1957) AC 288 was unnecessary, in my opinion, for the effective working of the Australian Constitution or for the maintenance of the separation of the judicial power of the Commonwealth or for the protection of the independence of courts exercising that power. The decision leads to excessive subtlety and technicality in the operation of the Constitution without, in my opinion, any compensating benefit. But none the less and notwithstanding the unprofitable inconveniences it entails it may be proper that it should continue to be followed. On the other hand, it may be thought so unsuited to the working of the Constitution in the circumstances of the nation that there should now be a departure from some or all of its conclusions.¹⁶

In the same case Justice Mason said,

I agree also that a serious question arises as to the course which this Court should adopt in relation to the princip[al] conclusion reached in *R v Kirby; ex parte Boilermakers' Society of Australia*. However, it is not a question which needs to be considered in order to resolve this case.¹⁷

Ultimately, the High Court in *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* did not re-examine the validity of the doctrine in *Boilermakers*, with the Court deciding *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* on the basis that the relevant sections did not confer non-judicial power.¹⁸ The idea expressed in this case, namely that too rigid a construction of Chapter III of

¹⁵ (1974) 130 CLR 87.

¹⁶ *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90.

¹⁷ *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 102.

¹⁸ *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

the Constitution may lead to 'unprofitable inconveniences'¹⁹ was influential in a number of the decisions of the High Court during the Mason era and also in *Gould v Brown*,²⁰ which was the first High Court case to examine the validity of the cross-vesting legislation.²¹

In addition to the necessity of the strict delineation of judicial power being questioned in *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation*, a number of cases which followed on from *Boilermakers* altered the scope of the two limbs that *Boilermakers* established. Professors Blackshield and Williams have suggested that it is, in part, because of these developments that much discussion concerning the validity of the *Boilermakers* decision has been avoided. In particular, these commentators write that,

[o]ne reason for the absence of direct challenge to the *Boilermakers* decision is that in practice, it has frequently been circumvented. The definitions of what does and does not constitute "judicial power" are sufficiently imprecise to allow a significant measure of pragmatic flexibility.²²

A number of exceptions to the principal conclusions in *Boilermakers* are now well established. For example, the High Court decision of *Harris v Caladine*²³ established that, in certain circumstances, judicial power might be delegated.²⁴ The second limb of the doctrine in *Boilermakers* was also found not to have been breached in *R v Joske; Ex parte Shop Distributive and Allied Employees' Association*.²⁵ In that case, broad discretionary powers had been conferred upon the Industrial Court, to rectify or validate the actions of or approve schemes to reorganize

¹⁹ *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ).

²⁰ (1998) 193 CLR 346.

²¹ See Chapter 9.

²² Tony Blackshield and George Williams, 'Preface to the Fourth Edition' *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 662.

²³ (1991) 172 CLR 84.

²⁴ In *Harris v Caladine*, a majority comprised of Mason CJ, Deane, Dawson, Gaudron and McHugh JJ held that s 37A of the *Family Law Act 1975* (Cth) was valid; Brennan and Toohey JJ dissented. The effect of the challenged provisions was to authorize the Family Court registrar to exercise certain judicial functions, such as the making of consent orders: see *Harris v Caladine* (1991) 172 CLR 84. For a further discussion of the conditions under which delegation of judicial functions may be valid, see *Harris v Caladine* (1991) 172 CLR 84, 95 (Mason CJ and Deane J).

²⁵ (1976) 135 CLR 194.

trade unions, following a decision of the Industrial Court.²⁶ A series of cases, including *Hilton v Wells*,²⁷ *Grollo v Palmer*,²⁸ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,²⁹ confirmed and outlined the scope of the 'persona designata' exception to the principle that the Commonwealth may not confer non-judicial powers on Chapter III Courts.

From the point of view of the wider argument presented in this thesis, it is sufficient to note that the reasoning process adopted in the cases which sought to ameliorate some of the effects of the *Boilermakers* principles demonstrated a movement from the legalism that characterised earlier decisions. The majority decision in *Harris v Caladine*³⁰ provides an example of an approach which, in comparison to the *Boilermakers* decision, promotes a less rigid understanding of the constitutional requirements concerning the exercise of judicial power contained in Chapter III of the *Constitution*. Mason and Deane JJ in *Harris v Caladine* commented that,

[i]t makes little sense either as a matter of logic or policy to require that power be exercised solely by federal judges to the exclusion of officers of a court when, in the case of invested federal jurisdiction, the power may be exercised by officers of State Courts.³¹

The approach of the majority of the High Court in *Hilton v Wells* also allows for a more flexible division of power.³² In that case, it was held that a person who exercises federal judicial power may be validly appointed or assigned to perform non-judicial functions, provided that the appointment attaches to the person individually, and the person appointed is assigned as an individual *persona designata*.

It is argued that these cases exemplify the flexibility of a realist approach. Whereas the legalistic approaches discussed in Chapter 7, relied heavily upon the text of the *Constitution* (with this document being interpreted as strictly delimiting power between the three institutions of

²⁶ (1976) 135 CLR 194.

²⁷ (1985) 157 CLR 57.

²⁸ (1995) 184 CLR 348.

²⁹ (1996) 189 CLR 1.

³⁰ (1991) 172 CLR 84.

³¹ (1991) 172 CLR 84, 93.

³² See *Hilton v Wells* (1985) 157 CLR 57, 72-3 (Gibbs CJ, Wilson and Dawson JJ).

government in Chapters I-III), realism can allow for a greater scope for consideration of the theory behind the separation of judicial power. It is therefore contended that realism can allow for a broader consideration of the nature of any minimum requirements, which may be necessary to maintain important notions such as judicial independence that lie behind the separation of judicial power. Sir Anthony Mason speaking following his Honour's retirement commented that,

[t]he great importance attaching to maintaining an independent judiciary and government according to law explains the strong emphasis given to the separation of judicial power. The separation of judicial power is not only protection against the exercise of arbitrary power, but it also assists in maintaining the independence of the judiciary and contributes to public confidence in the administration of justice.

Recognition of these two purposes as being the objects to be served by the separation of the judicial power, coupled with the incompatibility test, would provide a more convincing and functional test than the reliance on the abstract classification test which *Boilermakers* demands.³³

As Sir Anthony Mason's comments demonstrate, a greater degree of latitude in the overlap between the judicial power and other governmental powers may be allowed for on a realist approach, in comparison to the almost blanket prohibition that follows from a strict reading of the *Boilermakers* decision. In this way, the Mason era evinced a significant movement away from a doctrinal and legalistic approach to the interpretation of the provisions of Chapter III of the *Constitution*. This trend, as the following discussion will consider, is also apparent in another important movement in the High Courts Chapter III jurisprudence that occurred in that Mason era. This is, namely, the manner in which the Mason Court considered the idea that Chapter III may provide certain protections to individuals.³⁴

³³ Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 6.

³⁴ See generally Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the Constitution: A Decade in Overview' (2000) 20 *Australian Bar Review* 283, 286; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 11; Melissa Perry, 'Ch III and the Powers of Non-Judicial Tribunals: Breckler and Beyond' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 169.

III JUDICIAL POWER, THE INDIVIDUAL AND THEORY IN CONSTITUTIONAL INTERPRETATION

The remaining analysis in this Chapter will focus upon the manner in which the Mason era re-emphasised the idea that Chapter III may operate to afford certain protections to individuals. The key cases that will be examined in detail in this context are *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*³⁵ and *Polyukhovich v Commonwealth*.³⁶ Whilst the focus of the following analysis will be upon these significant cases, it should be noted that the ideas expressed in *Chu Kheng Lim* and *Polyukhovich* were not unique to the Mason era. As the analysis presented in foregoing Chapters has demonstrated the idea of courts as protectors of individual liberties has a long history in common law jurisprudence.³⁷ In an Australian context, Harrison Moore expressed the view in 1910 that,

[i]t may be accepted as a general rule that the separation of powers in the Constitution imports within the range of Commonwealth action that the legality of any governmental action, or the existence of any right, or the liability to any penalty, cannot be determined elsewhere than in the Courts: that determination is a part of the judicial power of the Commonwealth...

...The rule which assigns the judicial power of the Commonwealth to Courts is thus a safeguard against arbitrary power more important than at first appears and importing restrictions upon the power of Parliament more extensive than is at first realized.³⁸

In addition, prior to *Chu Kheng Lim* and *Polyukhovich* Justice Deane in *Street v Queensland Bar Association*³⁹ presented the view that the Constitution contained 'a significant number of express and implied guarantees of rights and immunities,' with the most important of these being 'the

³⁵ (1992) 176 CLR 1.

³⁶ (1991) 172 CLR 501.

³⁷ See particularly, Chapter 7, Section II.

³⁸ See W Harrison Moore, *The Constitution of the Commonwealth of Australia* (2nd ed 1910) 321-2.

³⁹ *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J); Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1250.

guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch III.⁴⁰ The underlying premise of these statements is that Chapter III may be a source of individual rights, or immunities.⁴¹ The relevance of this idea will be considered further in the following case analysis. Importantly, any reliance upon this premise usually involves recognition of the judiciary having a role to play in balancing the interests of individuals with the interests of the State. A traditional conception of the role preformed by the High Court in constitutional cases was that the High Court would be primarily concerned with delimiting the governmental powers of the States and the Commonwealth.⁴² The following analysis will argue that the decisions of *Chu Kheng Lim* and *Polyukhovich*, exemplify a significant shift in focus from this orthodox view of the primary role of the High Court in constitutional cases to an approach that considers the interests of individuals as something which needs to be balanced with the powers of the State.

IV CHU KHENG LIM V MINISTER FOR IMMIGRATION, LOCAL GOVERNMENT AND ETHNIC AFFAIRS: THE USE OF THEORETICAL REASONING IN CONSTITUTIONAL INTERPRETATION

It is argued that in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* the High Court considered that citizens may by virtue of the separation of judicial power enjoy a constitutional immunity.⁴³ In *Chu Kheng Lim* an argument alleging interference with the judicial process was in part successful, however, a wider argument alleging the usurpation of judicial power was rejected.

⁴⁰ *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J); Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1250.

⁴¹ See further, George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Geoff Lindell (ed) *Future Directions in Australian Constitutional Law* (1994) 185; Geoffrey Kennett 'Individual Rights, The High Court and the Constitution' (1994) 19 *Melbourne University Law Review* 581, 581. See, for example, *Polyukovich v The Queen* ('War Crimes Act Case') (1991) 172 CLR 501; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

⁴² See further, Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 660.

⁴³ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ).

A *The Facts*

In *Chu Kheng Lim* the validity of the *Migration Amendment Act 1992* was challenged. That Act sought to amend the *Migration Act 1958*, by adding a new Division 4B, entitled 'Custody of certain non-citizens'. The Act was aimed at certain 'designated persons' to whom Div 4B applied. These persons were identified by section 54K of the Act to be persons who had 'been on a boat in the territorial sea of Australia after 19 November 1989 and before 1 December 1992'. The relevant provisions sought to prevent the hearings of applications for the release of two groups of people that had arrived in Australian territorial waters between the specified dates, with the members of these groups also being plaintiffs in certain High Court proceedings. The provisions were said to take effect from 6 May 1992, and the legislation in question also required that after the commencement of the amendments a designated person must be kept in custody until he or she either left Australia, or was given an entry permit. In addition s 54N provided that, 'a designated person ... not in custody immediately after commencement' was liable to be detained without warrant. Section 54N(2) added that this applied even to 'a designated person ... whose release was ordered by a court'. Section 54R provided, 'A court is not to order the release from custody of a designated person'.

The legislative provisions in question, including sections 54L, 54N and 54R of the *Migration Act 1958*, were challenged on the basis that they interfered with the judicial process itself. It was said that Parliament sought to affect the relief obtainable in the applications by legislation ostensibly directed at a class of aliens but described in a way so limited as effectively to be directed specifically at the applicants.⁴⁴ The idea that judicial power may not be usurped by the executive or legislative branches of government was said, by the challengers, to follow from the Privy Council decision of *Liyanage v The Queen*.⁴⁵ In that case Lord Pearce who delivered the judgment of their Lordships stated, 'in their Lordships' view ... there exists a separate power in the judicature which under the Constitution [of Ceylon] as it stands cannot be usurped or

⁴⁴ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 4 (submissions of counsel for the plaintiffs).

⁴⁵ [1967] 1 AC 259.

infringed by the executive or the legislature.⁴⁶ Applying this principle, the Privy Council in *Liyanaige* held the challenged legislation, which was directed to an identifiable group of persons, to be unconstitutional.

B *The Decision*

All members of the High Court in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* agreed that sections 54L and 54N did not infringe Chapter III of the Constitution,⁴⁷ although Justice Gaudron expressed a qualification in her judgment concerning the validity of sections 54L and 54N.⁴⁸ This qualification in part required that the sections were valid only to the extent that the meaning attributed to 'non-citizen' remained synonymous with the constitutional meaning of alien.⁴⁹ The High Court divided on the question of the validity of section 54R. By a majority consisting of Brennan, Deane, Dawson, and Gaudron JJ, section 54R was held to be invalid. Mason CJ, Toohey and McHugh JJ dissented on this point.⁵⁰ Although there was a general agreement on the validity of sections 54L and 54N, as argued below there are discernable differences in the manner in which these conclusions are reached.

⁴⁶ [1967] 1 AC 259, 289. That case concerned the validity of legislation passed to redefine relevant offences and penalties, to modify the laws of evidence, to provide for trial by three judges sitting without a jury and to validate retrospectively the defendants' arrest without warrant and their detention before trial. The legislation was 'deemed .. to have come into operation on January 1, 1962' and was 'limited in its application to any offence against the State alleged to have been committed on or about January 27, 1962'. Specifically, the legislation was aimed at persons alleged to have been involved in an attempted coup d'état on 27 January 1962. Eleven persons had been tried by the Supreme Court of Ceylon pursuant to the legislation. In contrast to the Australian Constitution, the Constitution of Ceylon contained no specific provision 'vesting' judicial power, however the Privy Council found in it sufficient indications of a concern for judicial independence, and concluded that the Constitution was intended to embody a separation of powers. See generally Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1253ff.

⁴⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10 (Mason CJ), 32-35, 38 (Brennan, Deane and Dawson JJ), 44-47, 52 (Toohey J), 53-54, 58 (Gaudron J), 74 (McHugh J).

⁴⁸ *Ibid*, 53-54, 58 (Gaudron J).

⁴⁹ Her Honour's conclusion concerning the validity of these sections was expressed in the following terms:

Sections 54L and 54N are valid in so far as they apply to person who entered Australia unlawfully or whose entry would have been unlawful but for executive intervention resulting in their presence on Australian soil in circumstances in which s.88(8) of the Act deems them not to have entered the country and to children born of such persons, but only to the extent that "non-citizen" in s.54K of the Act is and remains synonymous with the constitutional meaning of alien: *ibid*, 58.

⁵⁰ *Ibid*, 35ff (Brennan, Deane and Dawson JJ), 53 (Gaudron J agreeing with the joint judgment); cf. 11-14 (Mason CJ dissenting), 50-51 (Toohey J adopting the reasons of Mason CJ in dissent), 67-69 (McHugh J dissenting).

The joint judgment of Justices Brennan, Deane and Dawson, with whom Justice Gaudron in a separate judgment agreed, held that, 'the Constitution is structured upon, and incorporates, the doctrine of the separation of judicial from executive and legislative powers.'⁵¹ Their Honours also expressed the view that if the powers conferred upon the Executive, which was in essence a non-examinable power to imprison, had been conferred with respect to citizens, such a conferral would be inconsistent with the Constitution's separation of judicial power from executive and legislative power.⁵² In forming these conclusions, the joint judgment points out that one of the exclusively judicial functions of government, is the adjudging of criminal guilt and the imposition of punishment following conviction. This is expressed in the following way,

[t]here are some functions which by reason of their nature or because of historical considerations, have become established as essentially and exclusively judicial in character. The most important of them is the adjudgment and punishment of criminal guilt under a law of the Commonwealth. That function appertains exclusively to ... and 'could not be excluded from' the judicial power of the Commonwealth ... That being so, Ch III of the Constitution precludes the enactment, in purported pursuance of any of the sub-sections of s 51 of the Constitution, of any law purporting to vest any part of that function in the Commonwealth Executive.⁵³

This view of punitive imprisonment as an exclusively judicial power was influential in the joint judgment's finding that,

⁵¹ *Ibid*, 26 (Brennan, Deane and Dawson JJ).

⁵² *Ibid*, 29 (Brennan, Deane and Dawson JJ). That this conclusion followed from the separation of judicial power is evident in their Honours statement that:

Such a conferral upon the Executive of an essentially unexaminable power to imprison a citizen would ... be inconsistent with the Constitution's doctrine of the separation of judicial from executive and legislative power and its exclusive vesting of judicial power in the courts: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29.

⁵³ *Ibid*, 1, 27 (Brennan, Deane and Dawson JJ). McHugh J also emphasised the relevance of historical practice in defining judicial power, pointing out that the line between judicial and executive power will often be blurred:

The line between judicial power and executive power in particular is very blurred. Prescriptively separating the three powers has proved impossible ... The application of analytical tests and descriptions does not always determine the correct classification. Historical practice plays an important, sometimes decisive, part in determining whether the exercise of a particular power is legislative, executive or judicial in character: *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 67.

putting to one side the exceptional cases to which reference is made below, the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.⁵⁴

In this manner, the idea is clearly represented that for citizen's imprisonment as a form of punishment at the federal level may only be ordered, by a court, exercising the judicial power of the Commonwealth.⁵⁵ This gave rise to a constitutional immunity, which was expressed in the following terms,

the citizens of this country enjoy, at least in times of peace, a constitutional immunity from being imprisoned by Commonwealth authority except pursuant to an order by a court in the exercise of the judicial power of the Commonwealth.⁵⁶

Whilst this constitutional protection was conferred on citizens, non-citizens did not enjoy a similar immunity. The 'protection' afforded to the citizen by Chapter III of the Constitution was held to be significantly diminished in respect of aliens.⁵⁷ Their Honours Justices Brennan, Deane and Dawson (with Gaudron J agreeing) held that the separation of powers was not infringed by sections 54L and 54N of the *Migration Act*, as those provisions only applied to 'non-citizens' or 'aliens'.⁵⁸ Although, as indicated above, Gaudron J's general agreement with the joint judgment was subject to two requirements, including the requirement that the definition of 'non-citizen' remain 'synonymous with the constitutional meaning of "alien"'.⁵⁹ The joint judgment went on to hold that Parliament had power to confer upon the Executive pursuant to section 51(xix) of the Constitution the authority to detain an alien in custody for the purposes of expulsion or deportation. The authority to detain and deport an alien by the Executive was

⁵⁴ *Ibid*, 27.

⁵⁵ *Ibid*, 27 (Brennan, Deane and Dawson JJ).

⁵⁶ *Ibid*, 28-29.

⁵⁷ *Ibid*, 29 (Brennan, Deane and Dawson JJ).

⁵⁸ *Ibid*, 29-32.

⁵⁹ *Ibid*, 54.

held to be an exercise of executive and not judicial power.⁶⁰ Mason CJ expresses his concurrence with this point in the following way:

[T]he legislative power conferred by s 51(xix) of the Constitution extends to conferring upon the Executive authority to detain an alien in custody for the purposes of expulsion or deportation and that such an authority constitutes an incident of executive power.⁶¹

A similar conclusion is also expressed in the separate judgments of Justices Toohey and McHugh.⁶² Thus, there is a concurrence of all members of the Court on the validity of sections 54L and 54N of the legislation with regard to its operation in respect of non-citizens. However, only four of these judges also express the view that citizens enjoy a constitutional immunity.⁶³ Although Justices Toohey and McHugh did not go as far as the joint judgment both judges impliedly recognised that there may be limitations arising from the separation of judicial power.⁶⁴

The only part of the plaintiff's argument to succeed was the challenge to the validity of section 54R. That section provided that a court, 'is not to order the release from custody of a designated person.' Justices Brennan, Deane and Dawson (with whom Justice Gaudron agreed) held that section to be inconsistent with Chapter III as it sought to direct the courts as to the manner and outcome of the exercise of their jurisdiction.⁶⁵ This general principle was expressed by the joint judgment in the following way:

⁶⁰ *Ibid*, 32 (Brennan, Deane and Dawson JJ).

⁶¹ *Ibid*, 10.

⁶² *Ibid*, 46-47 (Toohey J), 66-67 (McHugh J).

⁶³ *Ibid*, 28-29 (Brennan, Deane and Dawson JJ), 53 (Gaudron J agreeing).

⁶⁴ Justice Toohey indicated that legislation in question did not breach any relevant limitation on ad hominem legislation that may be derived from the separation of judicial power: see *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 50 (Toohey J). Justice McHugh reached a similar conclusion to that expressed by Justice Toohey, however Justice McHugh's conclusion was influenced by the 'non-punitive' nature of the detention in question: see *Chu Kheng Lim* (1992) 176 CLR 1, 50 (Toohey J), 70-1 (McHugh J). Chief Justice Mason did not separately address the issue concerning the usurpation of or interference with judicial power.

⁶⁵ *Ibid*, 36-37 (Brennan, Deane and Dawson JJ). See also *Actors & Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169, 214 (Murphy J).

A law of the parliament which purports to direct, in unqualified terms, that no court, including this Court, shall order the release from custody of a person whom the Executive of the Commonwealth has imprisoned purports to derogate from that direct vesting of judicial power and to remove ultra vires acts of the Executive from the control of this Court. Such a law manifestly exceeds the legislative powers of the Commonwealth and is invalid.⁶⁶

Whilst the scope of this limitation was not exhaustively defined, the following was said:

[I]t is one thing for the Parliament, within the limits of the legislative power conferred upon it by the Constitution, to grant or withhold jurisdiction. It is a quite a different thing for the Parliament to purport to direct the courts as to the manner and outcome of the exercise of their jurisdiction. The former falls within the legislative power which the Constitution, including Ch III itself, entrusts to the Parliament. The latter constitutes an impermissible intrusion into the judicial power which Ch III vests exclusively in the courts which it designates.⁶⁷

Mason CJ, Toohey and McHugh JJ held that even section 54R was valid, however, they did so on the basis that they thought the section could be read down in a manner that the other judges thought it could not.⁶⁸ In particular, Chief Justice Mason stated that a construction that involves 'superfluity' was to be preferred to one that 'infringes the liberty of the individual'.⁶⁹

C *Chu Kheng Lim; Theoretical Reasoning and the Individual*

The manner in which the joint judgment in *Chu Kheng Lim* is framed indicates that their Honours' focus is on the effect of the challenged legislation on the individual. In this way, the idea that Chapter III may operate to confer upon the citizens a constitutional immunity, is

⁶⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36.

⁶⁷ *Ibid*, 36-37.

⁶⁸ *Ibid*, 12-13 (Mason CJ), 51 (Toohey J adopting the reasons of Mason CJ), 67-69 (McHugh J).

⁶⁹ *Ibid*, 12-13 (Mason CJ).

developed. A distinction in this regard is clearly drawn between the case of the citizen and the non-citizen. Ultimately the view expressed in the judgment of Justices Brennan, Deane and Dawson rests on the fact that the legislation did not remove from the citizen the right not to be subjected to punitive imprisonment by a Commonwealth authority, except by virtue of an order of a Chapter III Court.

It is important to note, for the purposes of this thesis that, it would have been possible for a similar conclusion to be reached by emphasising the role of the Court. The joint judgment could have rested its conclusions on the basis that the integrity of a federal court as the exclusive arbitrator of criminal guilt would in some way be diminished if its functions were shared with the executive. There are certainly elements of this approach in the judgment. The joint judgment, for instance, states,

[s]uch a conferral upon the Executive of an essentially unexaminable power to imprison a citizen would, for the reasons given above, be inconsistent with the Constitution's doctrine of the separation of judicial from executive and legislative power and its exclusive vesting of judicial power in the courts.⁷⁰

A similar concern for the integrity of the Court also underlies the majorities' unease with legislation that purports to direct the Court in the exercise of its judicial function, which was considered in relation to the validity of section 54R.⁷¹ However, the joint judgment takes the matter one step further to produce arguably a more individualist focus when it reveals its concern that the legislation may 'diminish the protection which Ch III of the Constitution provides, in the case of the *citizen*.'⁷² This focus on the individual is further reflected in the joint judgment's emphasis on the principle, also expressed by Professor Dicey, that, '[e]very citizen is "ruled by the law, and by the law alone" and "may with us be punished for a breach of law, but he can be punished for nothing else."⁷³

⁷⁰ *Ibid*, 29 (Brennan, Deane and Dawson JJ).

⁷¹ *Ibid*, 36.

⁷² *Ibid*, 29 (emphasis added).

⁷³ *Ibid*, 27-28 (Brennan, Deane, Dawson JJ) citing AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 202.

Importantly, from the point of view of the analysis presented in this thesis, the judges that formed the majority in *Chu Kheng Lim* do not seem reluctant to engage in a *theoretical* form of analysis. All members of the Court could clearly have confined their reasons to considering only the case of non-citizens, and merely made the finding that at least as far as the detention and custody of these persons went this was an exercise of executive power not judicial power. However, the joint judgment, with which Gaudron J substantially agreed, did not take this approach.

The decisions of Mason CJ, Toohey and McHugh JJ were more confined than the joint judgment, in that these Justices considered only the position of non-citizens. More specifically, although Toohey J may be generally regarded as advocating a highly theorised approach,⁷⁴ his Honour did not take a broad theoretical approach in *Chu Kheng Lim*. Both Justices Toohey and McHugh place a greater emphasis upon finding a practical solution to the immediate controversy, and do not consider the wider theoretical implications of the dispute.⁷⁵ In particular, the reasoning contained in the judgments of both these judges is confined to a consideration of the position of the non-citizen and does not consider whether the citizen may enjoy any immunity that flows from the constitutional separation of judicial power. Chief Justice Mason did not address the issue of citizens in his judgment. The Chief Justice agreed only with the conclusion reached by the joint judgment, as it related to non-citizens. In addition, his Honour expressed no view on the arguments concerning the usurpation of judicial power.⁷⁶

The theoretical aspect of the reasoning of the joint judgment in *Chu Kheng Lim* diverges from the 'incompletely theorised' approach advocated by American writer Cass Sunstein,⁷⁷ or the concern of pragmatic writers generally to decide the minimum possible. It is argued that this form of theoretical reasoning also demonstrates that their Honours were not concerned to follow the approach that Justice Heydon has advocated, and to decide only the absolute

⁷⁴ See Justice John Toohey, 'A Government of Laws and Not of Men?' (1993) 4 *Public Law Review* 158.

⁷⁵ *Ibid.*, 50 (Toohey J), 70 (McHugh J).

⁷⁶ *Ibid.*, 10.(Mason CJ).

⁷⁷ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 35-61.

minimum possible.⁷⁸ A less theorised approach in line with that advocated by Cass Sunstein and others may have produced a wider consensus in the reasons expressed in the written judgments of the Court concerning the validity of sections 54N and 54L of the *Migration Act*. The actual decision in *Chu Kheng Lim* reveals an agreement by all members of the Court as to the validity of these sections, on the basis that they applied to non-citizens.⁷⁹ Had all members of the Court in *Chu Kheng Lim* limited their finding to non-citizens, that is, confined their reasoning to consider only the factual scenario before the Court, a greater level of agreement in relation to non-citizens could have been expressed. However, the members of the joint judgment took a wider approach in reaching their Honour's conclusion.

It is argued that the general approach in *Chu Kheng Lim* in this way demonstrates a movement from a confined form of legalism, towards an approach that interprets judicial power in a manner which sees the Court playing a role in seeking to balance the interests of the individual with those of the State. In so doing a number of the judgments in *Chu Kheng Lim* demonstrate a consistency with the general aims of realism and sociological jurisprudence. In Chapter 10 it will be argued that recent decisions of the High Court have confined the scope of the constitutional immunity that *Chu Kheng Lim* puts forward, and indicated a movement from the general aims of realism and sociological jurisprudence.⁸⁰

Although as discussed in Chapter 6 there is value in achieving a consensus, it is arguable that limited statements about the validity of the legislation in its application to non-citizens would have obscured the foundations of the joint judgment. The distinction between the citizen and the non-citizen was clearly a matter of relevance to the joint judgment, and it is therefore important that this be included in the reasons for the decision. As this analysis shows, it is possible to see in *Chu Kheng Lim* a practical example of the manner in which a more *theorised* approach avoids one of the central *criticisms* made of *pragmatism* in Chapter 5. In short, the joint judgment provides a transparent account of the judicial reasoning process. The criticism made

⁷⁸ Justice Dyson Heydon to Quadrant Dinner, 30 October 2002, reported as 'Judicial activism and the death of the rule of law' (2003) 47 *Quadrant* 9; 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

⁷⁹ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10 (Mason CJ), 32-35, 38 (Brennan, Deane and Dawson JJ), 44-47, 52 (Toohey J), 53-54, 58 (Gaudron J), 74 (McHugh J).

⁸⁰ See, for example, *Al-Kateb v Godwin* (2004) 219 CLR 562.

of pragmatism in Chapter 5 was that narrow, pragmatic approaches do not make good precedents, as they do not provide direction for future courts. A focus on finding only a practical solution to the immediate controversy in *Chu Kheng Lim* would have obscured the fundamental theoretical concerns of members of the joint judgment. The foundational concern expressed related to both the integrity of the courts, and to the interests of citizens being protected by these courts.

It is argued that the manner in which the joint judgment analysed the issue raised in *Chu Kheng Lim* renders the decision of much greater value as a precedent, than would be the case had their Honours adopted a more pragmatic approach. In short, the judges that issued a joint judgment in *Chu Kheng Lim* demonstrated a tendency to support theoretical reasoning, rather than merely focusing on finding a pragmatic solution to the immediate controversy that the case presented, and there are readily discernable benefits associated with this approach.

V *POLYUKOVICH V COMMONWEALTH*

A second example of the idea that limits may be imposed upon Parliaments by virtue of the vesting of judicial power in Chapter III Courts, may be found in the decision of *Polyukhovich v Commonwealth*.⁸¹ More specifically, this case addressed the issue of whether the vesting of judicial power in federal Courts by virtue of Chapter III of the *Constitution* could give rise to an individual immunity. The High Court in *Polyukhovich v Commonwealth* examined the validity of amendments to the *War Crimes Act 1945* (Cth). Section 9(1) of the *War Crimes Act 1945* (Cth) and other relevant provisions, which were inserted by the *War Crimes Amendment Act 1988*, in effect provided that an Australian citizen or resident was guilty of an indictable offence if he or she 'committed a war crime' in Europe between 1 September 1939 and 8 May 1945. A majority of the High Court, (Mason CJ, Dawson, Deane, McHugh, Gaudron JJ, Brennan J dissenting) held

⁸¹ *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('War Crimes Act Case').

that the legislation was within the external affairs power.⁸² Those judges that considered the issue also held that the legislation fell outside of the Commonwealth's power with respect to defence.⁸³ However also in question was whether the law was invalid by reason of its retroactive operation. The challenged law in effect enacted that past conduct constituted a criminal offence. This was said by the challenger to be invalid as it involved an attempt to usurp the judicial power of the Commonwealth that was vested by the Constitution in Chapter III Courts. Justices Deane and Gaudron held that the challenged legislation was invalid on the basis that the legislation was incompatible with Chapter III of the Constitution. Justices Deane and Gaudron therefore (like Brennan J) dissented, holding the legislation to be invalid.

It has generally been accepted that parliaments have power to pass retrospective legislation if that intention is made unmistakably clear. The 1915 High Court decision of *R v Kidman*⁸⁴ supported this view. That position was maintained by the judgments of Mason CJ, Dawson and McHugh JJ, who held that the legislation was valid, and in doing so found that the retroactive aspect of the legislation did not impermissibly interfere with or usurp judicial power.⁸⁵ They were joined by Justice Toohey to form a majority, upholding the validity of the legislation.⁸⁶ However, Justice Toohey upheld the legislation on a much narrower basis. His Honour held that the Act in its application to the information laid against the plaintiff was not

⁸² See *Australian Constitution* s 51(xxix); *War Crimes Act Case* (1991) 172 CLR 501, 530 (Mason CJ), 603 (Deane J), 641-642 (Dawson J), 653, 659 (Toohey J), 696 (Gaudron J), 712 (McHugh J). Chief Justice Mason, Justices Deane, Dawson, Gaudron and McHugh held that the legislation was a law with respect to external affairs to the extent that section 9 operated upon conduct which took place outside Australia and made that conduct a criminal offence: see *Australian Constitution* s 51(xxix). However, Justice McHugh held that with respect to the retrospective operation of the legislation this was supported by section 51(xxix): *War Crimes Act Case* (1991) 172 CLR 501, 715. Justice Toohey held that section 9 was a law with respect to external affairs because it was a law with respect to a matter external to Australia that was of concern to Australia, in the sense that there existed a national interest in some person, thing or matter: *War Crimes Act Case* (1991) 172 CLR 501, 653. Justice Toohey also held that section 9 was a law with respect to external affairs as it concerned the perceived commission of an international crime subject to the universal jurisdiction with respect to war crimes or crimes against humanity as those concepts were understood by international law of the relevant time: *War Crimes Act Case* (1991) 172 CLR 501, 684, see also 659, 677. Brennan J concluded that the Act could not be characterised as a law with respect to Australia's external affairs: *War Crimes Act Case* (1991) 172 CLR 501, 592.

⁸³ See *Australian Constitution* s 51(vi). The availability of this head of power was rejected by Brennan J, with whom Toohey J agreed: *War Crimes Act Case* (1991) 172 CLR 501, 592-593 (Brennan J), 684 (Toohey J). Justice Gaudron also rejected the contention that the legislation was a law with respect to defence: *War Crimes Act Case* (1991) 172 CLR 501, 697 (Gaudron J).

⁸⁴ *R v Kidman* (1915) 20 CLR 425.

⁸⁵ See *War Crimes Act Case* (1991) 172 CLR 501, 531, 536-554 (Mason CJ), 641-644 (Dawson J), 717-722 especially 718, 721 (McHugh J).

⁸⁶ *Ibid*, 692.

'retroactive in a way offensive to Chapter III of the Constitution.'⁸⁷ This finding was based upon the existence of the offence of murder in Australian law, the universal condemnation of murder in municipal laws generally, and the international condemnation of such conduct reflected in laws with respect to war crimes and crimes against humanity. Relevantly, Justice Toohey found a 'general correspondence' between the challenged legislation and international law.⁸⁸ In contrast, all three of the dissenting judges emphasised the disconformity of the Act with the relevant international law.⁸⁹ Whilst Justice Toohey joined with the majority to find the challenged legislation valid, His Honour indicated that 'a law, which purports to make criminal conduct which attracted no criminal sanction at the time it was done, may offend Ch III, especially if the law excludes the ordinary indicia of judicial process.'⁹⁰ In this respect, his Honour's judgment is more in line with the position taken by Justices Deane and Gaudron, for whom the retroactive aspect of the legislation was problematic.⁹¹

Justices Deane and Gaudron, in dissent, held that the retrospective aspect of the challenged legislation rendered it invalid on the basis that it involved an impermissible interference with or usurpation of judicial power.⁹² Brennan J also dissented, and found the legislation to be invalid, however Brennan J did so on the grounds that the Act was not within the Commonwealth heads of power with respect to external affairs or defence.⁹³ The retrospective affect of the legislation was of relevance to Justice Brennan reaching these conclusions, both in relation to the availability of the external affairs power, and the defence power.⁹⁴ In particular, his Honour stated that he might have accepted that the law was valid as falling within the external affairs

⁸⁷ *Ibid*, 692.

⁸⁸ *Ibid*, 684.

⁸⁹ *Ibid*, 575-592, especially 576, 584 (Brennan J), 596 (Deane J), 700 (Gaudron J).

⁹⁰ *Ibid*, 689.

⁹¹ *Ibid*, 632, see also 614ff (Deane J), 708, see also 697ff (Gaudron J).

⁹² *Ibid*, 531, 536-554 (Mason CJ), 641-644 (Dawson J), 717-722, especially 718, 721 (McHugh J). *Contra* 614ff, especially 632 (Deane J) 697, especially 708 (Gaudron J).

⁹³ For Brennan J's rejection of the availability of the external affairs power: see *War Crimes Act Case* (1991) 172 CLR 501, 592 (Brennan J). In relation to the rejection of the availability of the defence power see: *War Crimes Act Case* (1991) 172 CLR 501, 592-593 (Brennan J), 684 (Toohey J, agreeing with Brennan J), and 697 (Justice Gaudron).

⁹⁴ See Justice Brennan's comments in relation to the external affairs power and the retrospective aspect of the legislation: *War Crimes Act Case* (1991) 172 CLR 501, 576, 584. See also His Honour's comments about the defence power and the retrospective nature of the legislation: *War Crimes Act Case* (1991) 172 CLR 501, 593.

power, if it were not for the fact that the Act did not correspond with the relevant international law, including its condemnation of retrospective criminal law.⁹⁵

Even though Chief Justice Mason, and at least two other members of the majority, substantially rejected the reasoning of the minority, (and particularly that of Justice Deane), these judges did acknowledge that there might be some limitations on legislative power implied from Chapter III of the Constitution. Chief Justice Mason acknowledged that bills of attainder or other ex post facto laws that adjudged persons guilty of a crime or imposed punishment upon them, could amount to a trial by the legislature, and as such amount to an usurpation of judicial power.⁹⁶ The prohibition drawn by Mason CJ was based upon the institutional separation of powers affected by the Constitution, and in particular the vesting of judicial power in Chapter III courts.⁹⁷ A similar line of reasoning is also expressed in the judgment of Justice Dawson. However, Justice Dawson ties his Honour's statements concerning any limitation on the power of the Parliament deriving from Chapter III, more closely to the legislation the subject of the challenge. In his judgment, Justice Dawson indicates that the challenged legislation does not prohibit any limitation that may derive from the separation of judicial power as it was not aimed at 'particular known individuals', and as such did not amount to a 'trial by legislature.'⁹⁸ Justice McHugh addresses this issue somewhat briefly, however, his Honour does express the view that the 'enactment of a Bill of Attainder or Bill of Pains and penalties would infringe the provisions of Ch. III of the Constitution.'⁹⁹

The approach of Mason CJ, Dawson and McHugh JJ acknowledges the existence of limitations drawn from Chapter III, however, their Honours also emphasised the sovereign powers of parliament to pass retrospective criminal legislation. Particularly for Mason CJ and McHugh J the power of Parliament is recognised as something that may need to be balanced with the interests of the individual.¹⁰⁰ The reasoning of Justices Deane and Toohey places a greater

⁹⁵ *Ibid*, 575-592 especially 576, 584 (Brennan J).

⁹⁶ *Ibid*, 536-539.

⁹⁷ *Ibid*, 536.

⁹⁸ *Ibid*, 648-650, citing in particular *United States v Brown* (1965) 381 U.S., at p 442 and *Linanage v The Queen* [1967] 1 AC 259, 289.

⁹⁹ *War Crimes Act Case* (1991) 172 CLR 501, 721.

¹⁰⁰ *Ibid*, 536-9 (Mason CJ), 721 (McHugh J).

emphasis upon the effect of the legislation on the individual.¹⁰¹ Although the difference in these approaches may be subtle, the following discussion will consider the manner in which these differences may reflect of the underlying divide between the influence of realism and a natural law perspective on the Mason Court of this period.¹⁰²

As noted, the dissenting judgments of Justices Deane and Gaudron found the legislation invalid as infringing an implication drawn from Chapter III of the Constitution. In this respect these judgments are consistent with the general approach of Justice Deane discussed in Chapter 4. However, whilst Justice Gaudron's judgment referred to the interests of individuals, consistent with her Honour's approach in other cases, Gaudron J focused upon the effect of encroachment by the legislature on the institutional role of the judiciary.¹⁰³ These judgments, in drawing a limitation from Chapter III, provide some scope for theoretical arguments and thus focus to a greater degree on the individual. Justice Deane highlights that from the perspective of the individual retroactive legislation, is contrary to the fundamental tenets upon which the criminal legal system is founded. In particular, his Honour states,

[t]he basic tenet of our penal jurisprudence is that every citizen is "ruled by the law, and by the law alone". The citizen "may with us be punished for a breach of law, but he can be punished for nothing else" (Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (1959), p 202). Thus, more than two hundred years ago, Blackstone taught (see *Commentaries* (1830), vol 1, pp 45-46) that it is of the nature of law that it be "a rule prescribed" and that, in the criminal area, an enactment which proscribes otherwise lawful conduct as criminal will not be such a rule unless it applies only to future conduct.¹⁰⁴

A similar concern was expressed in the majority judgment of Justice Toohey. His Honour in rejecting the Commonwealth's contention that there was no constitutional prohibition against

¹⁰¹ *Ibid*, 609 (Deane J), 689 (Toohey J). Contrast *War Crimes Act Case* (1991) 172 CLR 501, 535ff (Mason CJ), 643ff (Dawson J), 717ff (McHugh J).

¹⁰² See further Chapters 3 and 4 above.

¹⁰³ *War Crimes Act Case* (1991) 172 CLR 501, 703-704 (Gaudron J). See, for example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 57 (Gaudron J); and the subsequent cases, *Kable v DPP* (1996) 189 CLR 51, 107 (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 208-209 (Gaudron J); *Re Wakim* (1999) 198 CLR 511, 546 (Gaudron J, agreeing with Gummow and Hayne JJ).

¹⁰⁴ *War Crimes Act Case* (1991) 172 CLR 501, 609.

the Parliament enacting retroactive legislation, referred to the 'general abhorrence of retroactive criminal law', reflected in numerous legislative provisions, judicial decisions and statements of principle. Justice Toohey went on to state,

[a]ll these general objections to retroactively applied criminal liability have their source in a fundamental notion of justice and fairness. They refer to the desire to ensure that individuals are reasonably free to maintain control of their lives by choosing to avoid conduct which will attract criminal sanction; a choice made impossible if conduct is assessed by rules made in the future.¹⁰⁵

These statements reflect an approach that places the individual at the centre of the interpretive model. The approach is theoretical in that wide principled statements are made about the law and, from these principles, some narrower conclusions are drawn and applied to the particular controversy presented to the Court.

The manner in which Justice Deane ultimately frames the limitation derives from a theoretical position regarding the separation of powers and a particular concern for the implications that this separation of powers has for the individual.¹⁰⁶ A similar line of reasoning may also be found in the judgments of Justices Toohey and Gaudron.¹⁰⁷ That said, two reasons upon which Justice Deane relies also reflect a concern for the integrity of the judicial power of the Commonwealth. These reasons are put forward by Deane J to establish why the process leading up to conviction prescribed by the challenged legislation is contrary to the separation of powers embodied in Chapter III. In particular, his Honour states:

[f]irst, the legislature's interference in that process would go beyond the limits of the legislative function under a constitution structured upon the separation of judicial and legislative powers in that it would involve a usurpation and partial exercise of what lies at the heart of the exclusively judicial function in criminal matters, namely the determination of whether the accused person has in fact done an act which constituted a criminal

¹⁰⁵ *Ibid*, 689 (Toohey J).

¹⁰⁶ *Ibid*, 611ff (Deane J).

¹⁰⁷ *Ibid*, 689 (Toohey J), 703ff (Gaudron J).

contravention of the then applicable law. Second, a court's participation in that process would also be inconsistent with the doctrine of the separation of powers in that it would represent an abdication of the judicial function of determining in a criminal trial whether past conduct had contravened the law in favour of the legislature's decrees that a past non-criminal act is to be punished as a crime.¹⁰⁸

In this way the reasoning of Deane J not only focuses upon the interests of the individual, it also expresses a concern for the institutional integrity of the judiciary. Justice Gaudron in her Honour's written reasons also refers to the institutional effect of legislative encroachment on the judicial process, as does Justice Toohey.¹⁰⁹ Justice Gaudron states,

[t]he usurpation of judicial power by a law which declares a person guilty of an offence produces the consequence that the application of that law by a court would involve it in an exercise repugnant to the judicial process. It is repugnant to the judicial process because the determination of guilt or innocence is foreclosed by the law. The only issue is whether the person concerned was a person declared guilty by the law. And all that involves is the determination, as a matter of fact, whether some person is the person, or answers the description (whatever form it takes) of the persons, declared guilty by the Act. It does not involve, and indeed negates, that which is the essence of judicial power in a criminal proceeding, namely, the determination of guilt or innocence by the application of the law to the facts as found.¹¹⁰

The judgments of Justices Toohey, Deane and Gaudron engage in what may also be termed a broad theoretical approach to constitutional interpretation. There is also, and this is most apparent in the judgments of Justices Toohey and Deane, an expressed concern for the effect of the legislation on the individual. This is, however, combined with a concern for the integrity of the judicial process, which is expressed by all three of these judges.

¹⁰⁸ *Ibid*, 614 (Deane J).

¹⁰⁹ *Ibid*, 689 (Toohey J), 706 (Gaudron J).

¹¹⁰ *Ibid*, 706 (Gaudron J).

In conclusion, it may be said that most members of the High Court in the *War Crimes Act Case* engage in some form of principled and policy-oriented argument.¹¹¹ The general approach views the judicial role as being, not only to interpret the terms or words of Chapter III, but to also consider and examine as part of this process the policy and philosophy behind the separation of judicial power. All four of the majority judges indicate that there may be some limitation on legislative power based upon the usurpation of judicial power. This limitation is derived by their Honours from the separation of judicial power and in particular the vesting of judicial power by the Constitution in Chapter III courts. This reasoning is based upon the broad underlying principles that concern the separation of judicial power. The reasoning process also demonstrates a concern for the integrity of Chapter III Courts. It should however be noted, that whilst Mason CJ, Toohey J and McHugh J state the limitations that they draw in general terms, Justice Dawson ties any statements in this regard very closely to the facts of the case before the Court.¹¹² In this respect, the judgment of Justice Dawson has a narrower focus. Justice Dawson appears to be content to decide the minimum possible—merely making the point that if there was a limitation on the power of parliament, it was not infringed by the legislation in question.¹¹³ In contrast, the matter is taken further in the dissenting judgments of Justices Deane and Gaudron. Justices Deane and Gaudron also base the implication that their Honours make upon the separation of powers, however, their Honours hold that there is a much wider prohibition on legislative power. This prohibition was held by their Honours to be infringed by the legislation in question.¹¹⁴

The issue of the scope of any limitation on the power of parliament that may derive from the vesting of judicial power in the courts was clearly raised in the *War Crimes Act Case* and was not merely peripheral or tangential to the decision. By addressing this issue in general terms, as, for example, Mason CJ did, future courts and legislators are provided with at least some guidance as to the scope of any prohibition on legislative power that derives from the vesting of judicial

¹¹¹ It is more difficult to make such a conclusion about the judgment of Justice Brennan as His Honour found the legislation to be beyond the scope of any relevant head of Commonwealth power, and did not address the issue of invalidity based upon the usurpation of judicial power. It is this later issue which provides a greater scope for theoretical arguments concerning the nature of the separation of judicial power.

¹¹² *Ibid*, 536-539 (Mason CJ), 689 (Toohey J), 721 (McHugh J).

¹¹³ *Ibid*, 648-650 (Dawson J).

¹¹⁴ *Ibid*, 614 (Deane J), 706 (Gaudron J).

power in the courts. This guidance would not have been provided if the legislation was held to be valid on the grounds indicated by Dawson J, which really amounted to saying there may be a prohibition, but if there was it would not be infringed in this case.¹¹⁵

The approach of Mason CJ, Dawson and McHugh JJ, emphasises the power of parliament to pass retrospective criminal legislation. That said, both Mason CJ and McHugh J, expressly indicate that there may be some limitation upon the power of the Parliament to pass legislation that usurps the exercise of judicial power. In doing so their Honours indicate that the sovereign powers of Parliament is considered to be something which should to be balanced with the need to preserve the integrity of the judiciary, so as to preserve the institutional role of the judiciary in safeguarding particular protections that are afforded to individuals.¹¹⁶ As this comparison suggests, the approach of Mason CJ is consistent with the realist's concern to reveal the reasons for the decision reached. In this way, the approach of Mason CJ incorporates one of the benefits associated with theoretical reasoning that was discussed in Chapters 3 and 5.

In comparison to the approach of Mason CJ and McHugh J, Justices Deane, Toohey and Gaudron places an even greater emphasis upon the effect of the legislation on the individual. The effect of the legislation upon the individual is viewed by their Honours as something that is capable of indicating that the legislation is invalid.¹¹⁷ It is arguable that the different approaches represented in these judgments reflect the underlying theoretical influences of realist and natural law perspectives.¹¹⁸ An understanding of these perspectives can serve to increase the level of understanding of the Court's approach in an individual case, as well as providing a guide to future developments of the law. It is difficult to see how the obscuring of the influence of such viewpoints through 'incompletely theorized agreements' or through an approach of deciding the minimum possible and not addressing 'difficult questions' as advocated by some writers could adequately explain the reasons for the court's decision, in any

¹¹⁵ *Ibid*, 648-649 (Dawson J).

¹¹⁶ *Ibid*, 535ff (Mason CJ), 643-644 (Dawson J), 718 (McHugh J).

¹¹⁷ *War Crimes Act Case* (1991) 172 CLR 501, 609 (Deane J), 689 (Toohey J).

¹¹⁸ For comments which are indicative of the influence of the natural law perspective, see *War Crimes Act Case* (1991) 172 CLR 501, 609 (Deane J), 689 (Toohey J). For comments reflective of a greater regard for the need to consider the implications of the legislation upon the individual, and the sovereign powers of parliament, see *War Crimes Act Case* (1991) 172 CLR 501, 535ff (Mason CJ), 643-644 (Dawson J), 718 (McHugh J).

particular case.¹¹⁹ As Toohey J points out, 'whether a court may declare a statute to be invalid because it is unjust is a question that goes to the very heart of the relationship between the courts and Parliament.'¹²⁰ Although this issue is not directly addressed in the *War Crimes Act Case* to the extent that the judgments in that case demonstrate a willingness to engage in some form of theoretical or policy-orientated reasoning that seeks to address what are undoubtedly difficult questions, they are to be commended. It is argued that the general willingness of the Court to engage in and consider the policy and philosophy behind the separation of powers, which is consistent with and supported by the historical origins of this doctrine, provides a more compelling basis for this doctrine than a textual implication drawn from the brief terms of Chapter III.

In short, at least two of the judgments in the *War Crimes Act Case* focus upon the interests of the individual. This is combined with a concern in nearly all of the judgments with the necessity of maintaining the integrity of the judiciary. The manner in which the theoretical issues that inform the judicial reasoning are articulated in the *War Crimes Act Case* allows for a greater understanding of the underlying foundation of their Honour's judicial perspectives. In addition, it illuminates their Honour's reasons for reaching a particular outcome. As such, this approach provides a guide for future decisions. In this way the form of judicial reasoning presented in the *War Crimes Act* provides an example of some of the benefits that the analysis presented in Part I of this thesis associated with theoretical reasoning.

It is argued that the decisions of the Mason Court in *Chu Kheng Lim* and the *War Crimes Act Case* evince a tendency to expressly engage in some form of theoretical argument and to openly acknowledge the manner in which consideration is given to the underlying rationale behind the separation of judicial powers doctrine¹²¹ These movements are however general in nature. It should, again, be noted that constitutional law develops from different judgments addressing

¹¹⁹ Cass Sunstein, *Legal Reasoning and Political Conflict* (1996) 35-61; Justice Dyson Heydon, 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110.

¹²⁰ *War Crimes Act Case* (1991) 172 CLR 501, 687. See generally, Bryan Horrigan, 'Is the High Court Crossing the Rubicon? - A Framework for Balanced Debate' (1995) 6 *Public Law Review* 284.

¹²¹ See, for example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36-37 (Brennan, Deane and Dawson JJ), 50 (Toohey J), 70 (McHugh J); *War Crimes Act Case* (1991) 172 CLR 501, 536 (Mason CJ), 614 (Deane J), 648-650 (Dawson J), 689 (Toohey J), 706 (Gaudron J), 721 (McHugh J).

different practical controversies, rather than being directed to a singular uniform issue. Furthermore, different judges may not adopt the same approach in all cases.¹²² It follows that the changes in approach analysed in this Chapter will not necessarily bring about a radical change in the outcome of cases. Significantly, many of the judgments from the Mason era (and often in Sir Anthony Mason's judgments) the result of balancing the interests of the individual with the powers of the *legislature* brought about an outcome that emphasised the power of the legislature to pass the legislation in question. The decision in *Polyukovich* provides an example of a decision that, whilst considering the interests of the individuals, ultimately produced an outcome that emphasised the sovereign powers of the Parliament. Two inferences may however be drawn from the conclusion that Sir Anthony Mason engaged in a form of realism that sought to balance the interests of the individual with those of the sovereign parliament. These conclusions may be put forward even though the outcome of this balancing process at times emphasised the powers of the sovereign parliament.

First, the type of realist based reasoning expressed by Chief Justice Mason diverges from the jurisprudence of Justice Deane, which is more inclined to follow a natural law perspective and see the need to protect the interests of the individual as something that will curtail the powers of a sovereign Parliament. Whilst this difference may be identified, as suggested in Chapter 3 and 4 it should be acknowledged that Justice Deane may have been influential in drawing the Mason Court away from legalism, with Sir Anthony Mason, (at least), ultimately moving towards a realist position.¹²³

The second conclusion that may be drawn is that there has been a movement in the *outcome* of constitutional cases which has occurred between the Mason era and the Gleeson era, albeit that this movement may not be as apparent as the *methodological change* that has occurred in this period. It is argued that a reason for this is that whilst Sir Anthony Mason sought to balance the

¹²² For example, Justice Dawson can be seen to adopt a more legalistic method of reasoning in *Polyukovich v Commonwealth*, albeit that this approach was applied in a way that had regard for both the implications of the legislation upon the individual, and the sovereign powers of parliament. His Honour also formed part of what the analysis presented in this Chapter has argued was a 'theoretical' approach taken by joint judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*: see *Chu Kheng Lim* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ), *Polyukovich v Commonwealth* (1991) 172 CLR 501, 648-650 (Dawson J).

¹²³ See further Justice Michael Kirby, 'Sir Anthony Mason lecture 1996: A F Mason - From *Trigwell* to *Teoh*' (1996) 20 *Melbourne University Law Review* 1087, 1094. See also Chapter 3, Section III above.

interests of the individual with the interests of the sovereign Parliament, his Honour ultimately often decided that parliament had the power to pass the legislation in question. As Chapter 10 will discuss, a factor that has impacted upon the degree of change from the Mason era is the tendency for the Gleeson Court to focus upon a legalistic interpretation of the power of the sovereign Parliament. A result of this is that the outcome of cases from the Gleeson era, like a number of Chief Justice Mason's decisions also, but for different reasons, emphasise the powers of the sovereign parliament. This similarity in the outcome of cases may in part explain a number of comments that have been made suggesting that the divergence between the Mason and Gleeson eras has at times been over emphasised.¹²⁴ For example, Justice McHugh has commented that,

[a] number of controversial new propositions seeking to constitutionalise individual rights were propounded by counsel in the Mason Court, but none, other than the freedom of political communication, succeeded. For example, in the Ch III cases, the majority of the Court refused to invalidate the legislation in *Polyukhovick* and *Chu Kheng Lim* on the basis of a right to freedom from, respectively, retrospective criminal law or executive detention. Nor would it accept the submission that rights to equality before the law or legal representation could be derived from the Constitution in, respectively, *Leeth* and *Dietrich*.¹²⁵

As McHugh J indicates there are some similarities in the outcome of cases from both the Mason and Gleeson eras. However, accepting that there are instances of similarities in outcomes, it is argued in this thesis there has been an identifiable change in both the *methodology* and the *substance* of the High Court's Chapter III jurisprudence from the Mason to Gleeson eras.

¹²⁴ See Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 9; Leslie Zines, 'Gleeson Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 307, 308. See also, Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Leslie Zines, 'Legalism, realism and judicial rhetoric in constitutional law' (2002) 5 *Constitutional Law and Policy Review* 21.

¹²⁵ Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004), 9 (references omitted). See also Justice Michael McHugh, 'Does Chapter III of the Constitution protect substantive as well as procedural rights?' (2001) 21 *Australian Bar Review* 235.

IV CONCLUSION: THEORIES AND JUDICIAL POWER

In this Chapter it has been argued that the approaches to Chapter III taken in a number of cases from the Mason era evince a tendency to engage in a theoretical approach to judicial decision-making. In particular the Mason Court demonstrates a tendency, rather than drawing a strict delineation between various government powers, to focus instead upon the need to maintain the separation of judicial power only to the extent necessary to preserve the integrity of the federal judiciary. This approach relies upon the essential rationale that informs the separation of powers. It is suggested that this approach can support a flexible understanding of the doctrine of the separation of judicial power and has enabled the development of a number of exceptions to the *Boilermakers* principles. As demonstrated at the start of this Chapter, a number of cases associated with the Mason era exhibit a tendency to move from a strict notion of the separation of judicial power to a more flexible understanding of that doctrine.

In addition to the development of a more flexible understanding of the separation of judicial power through exceptions to the *Boilermakers* principles, this Chapter has suggested that one of the most significant developments from the jurisprudence of the Mason era concerning Chapter III of the *Constitution*, was the growth of the idea that the legislature may not interfere with or usurp the exercise of federal judicial power by Chapter III courts. This idea was presented in some way by all of the judgments in *Chu Kheng Lim* and *Polyukhovich v Commonwealth* that addressed this issue.¹²⁶ Furthermore, the manner in which this requirement was applied by some of the judges in those cases supported the view that Chapter III can be the source of individual rights or immunities.¹²⁷

In the context of the current analysis what is particularly interesting about the decisions of *Chu Kheng Lim* and the *War Crimes Act Case* is the manner in which these issues were addressed.

¹²⁶ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 36-37 (Brennan, Deane and Dawson JJ), 50 (Toohey J), 70 (McHugh J); *War Crimes Act Case* (1991) 172 CLR 501, 536 (Mason CJ), 614 (Deane J), 648-650 (Dawson J), 689 (Toohey J), 706 (Gaudron J), 721 (McHugh J). In comparison, this issue is not raised as directly in the approaches of Mason CJ in *Chu Kheng Lim*, and Brennan J in the *War Crimes Act Case*.

¹²⁷ See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 28-29 (Brennan, Deane and Dawson JJ); *War Crimes Act Case* (1991) 172 CLR 501, 609 (Deane J), 689 (Toohey J); 706 (Gaudron J).

These cases demonstrate a focus upon the interests of the individual and a movement from the approach in *Boilermakers*, which focused more directly upon the institution of the judiciary. This, however, was not at the cost of an appreciation of the integrity of Chapter III Courts and the judicial process. This will perhaps inevitably be the case, one of the underlying rationales for the separation of powers doctrine, as Chapter 7 discusses, is to enshrine in any legal system the impartiality of the courts for the benefit of individuals who come before those courts.¹²⁸

The analysis presented in this Chapter has exemplified that the jurisprudence of the Mason era moved from a legalistic approach which seeks primarily to interpret the constitutional provisions contained in Chapter III of the Constitution. In place of legalism, a more realist based approach which seeks to interpret the provisions of Chapter III in a manner which acknowledges the role that the Court plays in balancing the interests of the individual with the interests of the State, may be identified with the Mason era. This is a theorised position.

As Part I established there are a number of benefits that may be associated with an approach that sets out the fundamental principles upon which it is based.¹²⁹ Not only do theoretically based decisions have an increased value as precedents, the actual judgments themselves by engaging in theoretical reasoning are more persuasive and appear less arbitrary. The expression in the judgments of the influence of theoretical considerations provides a degree of lucidity, which provides for a more honest account of the reasoning process. Furthermore, as a discussion of some of the cases in this Chapter revealed, a more pragmatic approach focused on the practical outcome of the immediate controversy can have the effect of obscuring fundamental viewpoints and values that exert an influence on judicial decision-making.¹³⁰ Despite the problems that may be associated with a failure to express the relevance of particular policies or theoretical influences, the High Court has not moved in a direction that involves the articulation of theoretical matters.

¹²⁸ See Section II, Chapter 7 above. See also Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 147.

¹²⁹ See also, Justice Keith Mason, 'What is Wrong with Top-Down Legal Reasoning?' (2004) 78 *Australian Law Journal* 574, 574; Allan Hutchinson, 'Heydon' Seek: Looking for Law in all the Wrong Places' (2003) *Monash University Law Review* 85.

¹³⁰ See also the similar comments made by Sir Anthony Mason about legalism: Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 5.

The analysis presented in this thesis focuses in the context of Chapter III jurisprudence upon the comparisons that may be made between the Dixon, Mason and Gleeson eras. However, in the context of the High Court's consideration of Chapter III of the *Constitution* the Brennan Court has played an important intermediate role. Therefore, before turning to consider the Gleeson Court's Chapter III jurisprudence, Chapter 9 will examine the manner in which the Brennan era, as well as developing new constitutional principles concerning Chapter III of the *Constitution*, also saw the High Court move towards a more orthodox methodological position whilst maintaining and consolidating the substantive principles developed in the Mason era.

Chapter 9

THE BRENNAN ERA: CHAPTER III, CONSTITUTIONAL PRINCIPLE AND METHODOLOGICAL CHANGE

I INTRODUCTION

The focus of this thesis is upon the Dixon, Mason and Gleeson High Courts. However, as previously mentioned, the Brennan Court played an important role in the development of the law between the Mason and Gleeson eras. The Brennan Court is, however, difficult to categorise for two reasons. First, Sir Gerard Brennan was Chief Justice for a relatively short period of time (21 April 1995-21 May 1998).¹ Secondly, there was a significant change in the membership of the Court during this time, such that 'the continuity of membership implied in the term "Brennan Court" was not present.'² These factors, together with the difficulty inherent in seeking to describe any High Court consisting of seven independent members, render problematic any attempt to classify the approach of the High Court during the Brennan era.

¹ See David Jackson QC, 'Brennan Court', in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 68, 68.

² *Ibid.* As David Jackson QC writes: 'in addition to the new Justice, Gummow, appointed in consequence of Mason's retirement, three further appointments would be made during the life of the Brennan Court. They would be brought about by the early retirement of Deane (to become Governor-General), Dawson and Toohey. They were replaced by Kirby (appointed February 1996), Hayne (September 1997) and Callinan (February 1998).'

However, a number of significant decisions handed down in this period made a substantial contribution to the Court's jurisprudence concerning Chapter III of the Constitution. They were influential in the general direction taken by the High Court in constitutional cases. For these reasons, although it is difficult to be categorical about the Brennan Court, the analysis presented in this Chapter will argue that particular trends may be identified with the Brennan Court. An understanding of these trends contributes to and supports the wider argument presented in this thesis concerning the movement in Australian constitutional law and methodology in the context of Chapter III jurisprudence.

The fundamental argument that will be made in this Chapter is that the Brennan era saw a return to a more orthodox methodology whilst maintaining and consolidating some of the substantive developments of the Mason era. In this way, the Brennan Court may be seen to represent an intermediate position between the Mason and Gleeson eras. It will further be argued that there was a change in methodology that saw the Court as being less concerned with articulating its role along realist lines. In particular, little expression is given by the Brennan Court to the idea that the Court has a role to play in balancing the rights of the individual with the rights of the State. As such this period help to loosen the methodological hold of the Mason approach upon the High Court.

The Brennan era developed some significant constitutional principles. Fundamentally, these principles were based upon *the need to preserve the integrity of the federal judiciary*. It will be argued in this Chapter that the Brennan Court saw some significant changes in methodology, without retreating from the substantive important constitutional principles recognised in the Mason era.³ In addition, this period also saw the development of some substantive constitutional principles that were based upon a concern for the integrity of the federal judiciary. This concern for the judicial institution has, as Chapter 10 will show, become a fundamental theme in the jurisprudence of the Gleeson Court.

³ See 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9. See also, George Williams, 'Brennan's High Times', *The Sydney Morning Herald* (Sydney), 21 May 1998, 17.

The first area of analysis presented in this Chapter will be those decisions that generally continued to support a more flexible approach to the separation of powers doctrine. Like the approach of the Mason Court, this approach departed further from the confined version this doctrine implied from the Dixon Court's decision in *Boilermakers*. In particular, *Grollo v Palmer*,⁴ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,⁵ confirmed and further outlined the scope of the 'persona designata' exception to the principle that the Commonwealth may not confer non-judicial powers on Chapter III Courts.⁶ A further example of a flexible understanding of the separation of powers doctrine may be seen in the statutory majority in *Gould v Brown*,⁷ the effect of which was to uphold the validity of legislation that provided for the cross-vesting of jurisdiction between State and federal Courts.

A second area of analysis in this Chapter will concern the decision of the High Court in *Kable v Director of Public Prosecutions*.⁸ The central themes that will be drawn from this case will concern the manner in which this decision, whilst not undermining the substantive principles that the Mason Court drew from Chapter III, evinced a change in focus. It will be argued that while the Mason era saw the Court as interpreting Chapter III in a manner which saw the court as playing a role in balancing the interests of the individual with those of the State (and being concerned to protect the integrity of the federal courts so as to ensure that a federal Court can perform this function in an independent and impartial way)—the emphasis in *Kable* is upon the need to preserve the *institutional integrity of the Court*. Significantly, the decisions in *Kable* do not generally focus at length upon the manner in which the institutional integrity of the Court can further the *interests of the individual*. In this way, the *Kable* decision forms an important background to both to the growth of Chapter III jurisprudence, and to the general approach of the Gleeson Court, which will be considered in Chapter 10.

⁴ (1995) 184 CLR 348.

⁵ (1996) 189 CLR 1.

⁶ As mentioned in Chapter 8 this doctrine had been developed by the Gibbs Court in *Hilton v Wells* (1985) 157 CLR 57.

⁷ (1998) 193 CLR 346.

⁸ *Kable v The Directory of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('*Kable*').

II THE BRENNAN COURT, THE SEPARATION OF JUDICIAL POWER AND THE FLEXIBLE PRACTICAL ARRANGEMENTS GOVERNING THE EXERCISE OF FEDERAL JUDICIAL POWER

In Chapter 8 it was argued that implicit in the approach of the Mason Court was a more flexible understanding of the notion of the separation of judicial power than that which was put forward in *Boilermakers*.⁹ More specifically, it was concluded that this approach was in part achieved by a change in the Court's methodology which saw the Court considering to a greater extent the underlying rationale for the separation of judicial powers. This approach enabled the Court to focus on the nature of the minimum requirements necessary to preserve judicial independence, rather than relying upon broad prohibitions such as those which may be implied from a strict reading of the *Boilermakers* principles. The following discussion will analyse this trend in the context of a number of decisions of the Brennan Court, such as *Grollo v Palmer*,¹⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,¹¹ and *Gould v Brown*.¹²

As is well known the High Court in *Grollo v Palmer*,¹³ and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,¹⁴ dealt with the 'persona designata' exception to the principle that the Commonwealth may not confer non-judicial powers on Chapter III Courts.¹⁵ In *Grollo v Palmer*, Chief Justice Brennan, and Justices Deane, Dawson, Toohey and Gummow formed a majority, holding that the *persona designata* doctrine did not support the performance by a federal judge of a non-judicial function, if that function was 'incompatible' with the holding of judicial office.¹⁶

⁹ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

¹⁰ (1995) 184 CLR 348.

¹¹ (1996) 189 CLR 1.

¹² (1998) 193 CLR 346.

¹³ (1995) 184 CLR 348.

¹⁴ (1996) 189 CLR 1.

¹⁵ See also *Hilton v Wells* (1985) 157 CLR 57, 72-3 (Gibbs CJ, Wilson and Dawson JJ).

¹⁶ See *Grollo v Palmer* (1995) 184 CLR 348, 364-5 (Brennan CJ, Deane, Dawson and Toohey JJ), 386, 398 (Gummow J). Chief Justice Brennan, and Justices Deane, Dawson and Toohey handed down a joint majority judgment, Justice Gummow in a separate judgment joined with the majority, however, His Honour did so on the basis that the challenged provisions could be interpreted so as not to apply in any case where they might conflict with a judicial duty that flowed from Chapter III of the *Constitution*. Justice McHugh dissented on the basis that the function of issuing warrants for telephone tapping was incompatible with judicial office: see *ibid*, 379-84 (McHugh J).

The principles established in *Grollo v Palmer* were developed further in the decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.¹⁷ Chief Justice Brennan, and Justices Dawson, Toohey, McHugh, Gaudron and Gummow formed the majority in that case.¹⁸ Justice Kirby dissented.¹⁹ The effect of the majority decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* was to establish a three stage test for incompatibility, which was set out in the joint judgment. The questions that the joint judgment held needed to be determined were first whether the function conferred upon a Chapter III judge is 'an integral part of, or is closely connected with, the functions of the Legislature or the Executive Government'.²⁰ If there was no close connection found then no question of incompatibility arose. The second question to be determined was 'whether the function is required to be preformed independently of any instruction, advice or wish of the Legislature or the Executive Government, other than a law or an instrument made under a law.'²¹ This second question needed to be answered in the affirmative; otherwise the separation had been breached. The third question which may arise was framed in the following way:

If the function is one which must be preformed independently of any non-judicial instruction, advice or wish, a further question arises: Is any discretion purportedly possessed by the Ch III judge to be exercised on political grounds – that is, on grounds that are not confined by factors expressly or impliedly prescribed by law?²²

In this way, the general effect of the line of High Court cases concerning the *persona designata* exception, which culminated in the three stage test in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*, was to hold that in certain circumstances the exercise by a judge of non-judicial powers would be valid. A significant requirement was that the power conferred upon a

¹⁷ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

¹⁸ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 26 (Gaudron J).

¹⁹ See *ibid*, 50 (Kirby J). See further, Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 446.

²⁰ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

²¹ *Ibid*.

²² *Ibid*.

Judge in the Judge's capacity as a 'designated person' or 'persona designata' rather than upon a Judge in the Judge's capacity as a member of a Federal Court.²³

Of particular relevance to an analysis of the approach of the Brennan Court is a consideration of the relevance of the public perception of the independence of the judiciary. As the discussion in Chapter 7 suggested, a similar concern may also be implied from some of Sir Owen Dixon's views concerning the Arbitration Court.²⁴ In *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,²⁵ Brennan CJ, Dawson, Toohey, McHugh, Gaudron and Gummow JJ emphasised the importance of public confidence in the judiciary.²⁶ In particular, the joint judgment held that,

[p]ublic confidence in the independence of the judiciary is achieved by a separation of the judges from the persons exercising the political functions of government, no functions can be conferred on a Ch III judge that would breach that separation.²⁷

In determining this issue, however, the majority emphasised that it was necessary to take a purposive approach to interpretation,

[c]onstitutional incompatibility has the effect of limiting legislative and executive power. Where it has that effect, it is discovered on the face of the statute, or on the face of those measures taken pursuant to a statute, that purports or purport to confer a non-judicial function on a Ch III judge. *That is not to say that constitutional incompatibility is a matter of mere form.* The operation of the statute or of the measures taken pursuant to it is ascertained by looking to the circumstances in which the purported function might be performed.²⁸

²³ See, for example, *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.

²⁴ See 'Swearing In of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xvi.

²⁵ (1996) 189 CLR 1.

²⁶ (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 23 (Gaudron J).

²⁷ (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

²⁸ *Ibid*, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) (emphasis added).

The above analysis demonstrates that when compared to the cases analysed in Chapter 7, a number of cases from the Brennan era, like decisions from the Mason era, in the context of cases concerning the *persona designata* exception to the *Boilermakers* principles adopt a more flexible approach to the separation of judicial powers doctrine

Constitutional law is dynamic, and often it will be the case that although particular differences may be emphasised between differently constituted High Courts there is a degree of continuity between cases and similarities in approach may be cited. In this regard, it should be recognised that there is also in the decision in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*²⁹ some similarity with both the approach of the majority views in *Boilermakers*,³⁰ and that expressed by members of the Gleeson Court in *Re Wakim; Ex parte McNally*.³¹ In particular, in common with these decisions, the majority in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* expressed a concern for the maintenance of public confidence in the *integrity of the judiciary*.³² It is suggested that, in this way, there is both *continuity* and *change* between the Mason, Brennan and Gleeson Courts.

It is argued that the decision of the High Court in *Gould v Brown*,³³ also reflects the idea of the Brennan era being a time of both *continuity* and *change* with the majority approach continuing to adopt a flexible notion of the separation of powers. At the same time, a strong dissent, that was ultimately to prevail, was issued, which emphasised the need to protect the integrity of the federal judiciary. The majority decision in *Gould v Brown* can be viewed as reflective of the idea that a rigid construction of Chapter III of the Constitution can produce 'unprofitable inconveniences'.³⁴ In *Gould v Brown* the High Court was called upon to decide the validity of a scheme established by legislation passed in 1987 by the Commonwealth and each of the States. The scheme provided for the cross vesting of jurisdiction between federal, State and Territory

²⁹ (1996) 189 CLR 1.

³⁰ See *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

³¹ *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ), 549 (McHugh J), 569 (Gummow and Hayne JJ), 621 (Callinan 621); cf 610 (Kirby J in dissent).

³² (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ), 23 (Gaudron J).

³³ (1998) 193 CLR 346.

³⁴ See *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90.

courts.³⁵ Three of the six judges of the High Court who heard the appeal in *Gould v Brown*³⁶ held that the impugned provisions, which conferred State jurisdiction on the Federal Court, were valid.³⁷ The Federal Court had also held that the provisions were valid. Being equally divided in opinion, the decision appealed from was affirmed, by virtue of section 23(2)(a) of the *Judiciary Act 1903* (Cth).

Chief Justice Brennan and Justice Toohey expressed the view that the cross-vesting legislation was valid in a joint judgment, with Justice Kirby in a separate judgment also reaching this conclusion. The joint judgment of Brennan CJ and Toohey J referred to the combined legislative powers of the Commonwealth and State legislatures,³⁸ placing particular emphasis upon the power of the State legislatures and the absence of any constitutional impediment. More specifically, their Honours commented that,

provided the State law which purports to invest State jurisdiction in the federal court invests only judicial power as that term is understood in the context of Ch III, and provided the Commonwealth agrees to the investing, there is no constitutional inhibition against its reception and exercise by the federal court.³⁹

Justice Kirby in a separate judgment came to the same conclusion. However, the reasoning of Kirby J had a different emphasis. Specifically, the approach of Kirby J placed weight upon the idea that the Constitution should be construed to meet contemporary Australian needs,⁴⁰ the cooperative intent of the Australian Constitution,⁴¹ the integrated system of State and Federal

³⁵ In each jurisdiction, the short title of the relevant Act was the *Jurisdiction of Courts (Cross-vesting) Act 1987*. The legislation has been viewed as seeking to address the predicted difficulty of jurisdictional conflict and competition which had emerged following the exercise by the Family Court and the Federal Court of their substantial national jurisdictions: *Gould v Brown* (1998) 193 CLR 346, 470 fn 494 (Kirby J).

³⁶ (1998) 193 CLR 346.

³⁷ (1998) 193 CLR 346, 386 (Brennan CJ and Toohey J), 501 (Kirby J); cf 411 (Gaudron J), 432 (McHugh J) and 464 (Gummow J).

³⁸ *Ibid*, 374 (Brennan CJ and Toohey J).

³⁹ *Ibid*, 386 (Brennan CJ and Toohey J).

⁴⁰ *Ibid*, 476 (Kirby J).

⁴¹ *Ibid*, 477 (Kirby J).

Courts,⁴² the combined powers of the State and federal legislatures,⁴³ and the absence of any constitutional prohibition on the investing of a federal court with State jurisdiction.⁴⁴

Justices Gaudron, McHugh and Gummow, in separate judgments, expressed the view that the legislation was invalid.⁴⁵ These conclusions were based upon the view that State laws could not validly confer jurisdiction on federal Courts, and that the Commonwealth could not consent to such a legislative conferral.⁴⁶ In particular, Justices Gaudron, McHugh and Gummow each expressed the view that Chapter III of the Constitution *exhaustively* defined both the nature of the judicial power of the Commonwealth and the manner in which it could be vested.⁴⁷

Constitutional law is never settled for all time and, although the view of Justices Gaudron, McHugh and Gummow, which is more closely aligned with the approach taken in *Boilermakers* and re-emphasised the strict view of the separation of power did not prevail in *Gould v Brown*, this view was to become influential.⁴⁸ In contrast, the majority view can be seen as consistent with the flexible realist based jurisprudence of the Mason era, which as Chapter 8 demonstrated, emphasised the principles that the separation of powers supported, and focused upon the minimum degree of separation required to preserve these values.

III CONTINUITY AND CHANGE: THE BRENNAN ERA AND THE SEPARATION OF JUDICIAL POWER

Chapter 8 argued that the movement from the strict view of the separation of judicial power was a significant development of the Mason era. The analysis thus far presented in this Chapter

⁴² *Ibid*, 479 (Kirby J).

⁴³ *Ibid*, 480 (Kirby J).

⁴⁴ *Ibid*, 480-1 (Kirby J).

⁴⁵ *Ibid*, 400-1, 410 (Gaudron J), 418-21, 431 (McHugh J), 445-8, 459-60 (Gummow J).

⁴⁶ *Ibid*, 410 (Gaudron J), 431 (McHugh J), 459-60 (Gummow J).

⁴⁷ *Ibid*, 400-1 (Gaudron J), 418-21 (McHugh J), 445-8 (Gummow J).

⁴⁸ See *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ agreeing with Gummow and Hayne JJ), 546 (Gaudron J agreeing with Gummow and Hayne JJ), 554-563 (McHugh J), 582 (Gummow and Hayne JJ), 626 (Callinan J agreeing with McHugh J); 596-618 (Kirby J dissenting).

has demonstrated that the changes in this area of Chapter III jurisprudence continued during the Brennan era. Put simply, the understanding of the separation of powers doctrine put forward by the Brennan Court was more flexible than that implied from a strict reading of the *Boilermakers* decision. This approach evinces a degree of continuity between the Mason and the Brennan Court. That said, some changes in focus may be identified between the Mason and the Brennan Court. For example, the Brennan Court's jurisprudence diverges from the manner in which decisions of the Mason Court expressly focused upon the role that the Court plays in balancing the interests of the individual with the State. The Brennan Court moved to a position which emphasised, as a primary concern, the need to protect the *integrity of the federal judiciary*. This emphasis demonstrates a degree of change from the realist and sociological jurisprudential basis of the Mason Court's approach. The regard had for the institution of the judiciary is also consistent with a legalistic interpretation of the text of the *Constitution*. The terms of the Australian Constitution focus closely upon the institutions of government and contain comparatively less reference to individual rights.⁴⁹ As Chapter 10 will show, a concern for the integrity of the federal judiciary is generally consistent with the approach of the Gleeson Court. In this way, as the above analysis has suggested, the position of the Brennan Court between the Mason and Gleeson eras was a time of both continuity and change.

Whilst there is a degree of continuity between the Mason and Brennan Court's approach to judicial power, there are also some other developments of the Brennan era that took Chapter III jurisprudence in a previously unexplored direction. The most apparent example may be found in the decision of *Kable v Director of Public Prosecutions*⁵⁰ which will be discussed below. The analysis of that case will argue that an underlying theme is a concern for the integrity of the federal judiciary. The argument presented in this thesis will seek to show that although the Gleeson Court has not tended to expand the principles put forward in *Kable*, the concern expressed in *Kable* for the integrity of the federal judiciary is a theme that has become foundational to much of the Gleeson Court's jurisprudence concerning Chapter III.

⁴⁹ See D A Smallbone, 'Recent Suggestions of an Implied "Bill of Rights" in the Constitution, Considered as Part of a General Trend in Constitutional Interpretation' (1993) 21 *Federal Law Review* 254, 267.

⁵⁰ *Kable v The Directory of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('*Kable*').

IV *KABLE V DIRECTOR OF PUBLIC PROSECUTIONS*

*Kable v Director of Public Prosecutions*⁵¹ was decided during the time that Sir Gerard Brennan presided, though his Honour together with Dawson J, dissented. In this section it will be argued that the decision cannot be seen as the natural extension of the approach to Chapter III taken during the Mason era. In particular, it will be argued that whilst the actual decision in *Kable* may be based upon a particular theoretical perspective of the Australian federal structure, it is not a decision that articulates broad theoretical principles that would afford protection to individuals. The following discussion will demonstrate that the majority decision in *Kable* declared invalid legislation that sought to confer functions that were incompatible with the exercise of judicial power, in circumstances in which such legislation constituted a breach of the *Kable*'s interest in liberty and freedom from arbitrary detention.⁵² However, it will also be argued that a central concern for the court in that case may have been 'the maintenance of the public confidence in the independence of the judiciary, rather than the preservations of *Kable*'s rights per se.'⁵³ One fundamental argument that the following discussion makes is that whilst *Kable* may, like *Re Wakim*, be a landmark decision concerning the nature of the Australian federal system, the decision does not necessarily accord significant protection to *individuals*.

The analysis of *Kable* in this Chapter will also identify the manner in which the High Court in *Kable*, in seeking to confine the decision to the immediate controversy before the Court, put forward a limited approach. It will be suggested that, in this respect, the *Kable* decision can be seen as an early signal of the movement away from the more widely theorised methodology of the Mason era.⁵⁴

⁵¹ *Ibid.*

⁵² See further, H P Lee, 'The *Kable* Case: A Guard-Dog that Barked But Once' in George Winterton (ed), *State Constitutional Landmarks* (2006) 390.

⁵³ Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 146. See further, Elizabeth Handley, 'Public Confidence in the Judiciary: A Red Herring for the Separation of Judicial Power' (1998) 20 *Sydney Law Review*, 183, 198.

⁵⁴ See *Baker v The Queen* (2004) 223 CLR 513 ('*Baker*'); *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575 ('*Fardon*'); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223 ('*Forge*'), and the discussion of these cases in Chapter 10.

In short, in this Chapter it will be suggested that there are two central trends that were significant in the *Kable* decision. The first trend that may be identified with the *Kable* decision is the concern for the integrity of the federal judiciary. The second theme identified in the *Kable* decision is an approach which seeks to decide the minimum possible and to tie any conclusions reached very closely to the facts of the particular case.

A *Kable v Director of Public Prosecutions and the Integrity of the Federal Judiciary*

The decision in *Kable v The Director of Public Prosecutions* concerned the validity of the *Community Protection Act 1994* (NSW). Section 5(1) of the *Community Protection Act 1994* (NSW) empowered the Supreme Court to make an order that 'a specified person be detained in prison for a specified period', if the Court was satisfied on reasonable grounds of two matters. The first of these matters was that the person was more likely than not to commit a serious act of violence; the second, that it was appropriate, for the protection of a particular person, or the community generally, that the person be held in custody. The maximum period for detention was six months (s5(2)), however, more than one application could be made in relation to the same person (5(4)). Although many provisions of the Act were couched in terms of general application, the result of amendments being made as the Act passed through the Parliament was that the Act applied only to one named individual, Gregory Wayne Kable.⁵⁵

The High Court by a majority (Toohey, Gaudron, McHugh and Gummow JJ; Brennan CJ and Dawson J dissenting)⁵⁶ found that the Act was invalid. For the judges that formed the majority the Act was invalid on the basis that it purported to vest in the Supreme Court a function that was incompatible with the exercise by that Court of the judicial power of the Commonwealth.⁵⁷

⁵⁵ For a general discussion of the relevant factual background, including the political context in which the amendments were made, see Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 143; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 1285ff.

⁵⁶ *Kable v The Directory of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51 ('*Kable*'), 98-99 (Toohey J), 107-108 (Gaudron J), 124 (McHugh J), 128, 144 (Gummow J); 68 (Brennan CJ dissenting), 87 (Dawson J dissenting).

⁵⁷ *Ibid*, 98 (Toohey J), 104-105 (Gaudron J), 109 (McHugh J), 128, 144 (Gummow J).

Justice Toohey limited his finding to the extent that he held that such incompatibility arose because the Supreme Court was actually exercising judicial power of the Commonwealth.⁵⁸ For Justices Gaudron, McHugh and Gummow the incompatibility arose on the basis that the Supreme Court was a Court in which federal jurisdiction had also been or was capable of being invested, under Chapter III of the Constitution.⁵⁹ In contrast, the dissenting judgments of Brennan CJ and Dawson J found the Act to be valid on the basis that no separation of powers, including that based upon Chapter III of the Constitution, bound the State legislature.⁶⁰ Their Honours also found, as did two of the majority judges, that the New South Wales Constitution did not embody a doctrine of the separation of legislative and judicial power.⁶¹

Justice McHugh gave the most detailed explanation of the manner in which the implication limiting the powers that could be vested in the State Supreme Courts was drawn from the terms of the Constitution. Central to the conclusion reached by Justice McHugh was the idea that the Constitution, in respect of the exercise of federal judicial power, provided for an integrated judicial system of federal and State courts. In his Honours words,

[u]nder the Constitution ... the State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as State judicial power. Moreover, the Constitution contemplates no distinction between the status of State courts invested with federal jurisdiction and those created as federal courts. There are not two grades of federal judicial power. The terms of s 71 of the Constitution equate the vesting of judicial power in the federal courts with the vesting of federal judicial power in the State courts.⁶²

⁵⁸ See *ibid*, 95-98 (Toohey J). For a critic of this aspect of Justice Toohey's judgment see George Zdenkowski, 'Community Protection Through Imprisonment Without Conviction: Pragmatism Versus Justice' (1997) 3(2) *Australian Journal of Human Rights* 8.

⁵⁹ *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 124 (McHugh J), 126-128, 139 (Gummow J).

⁶⁰ *Ibid*, 66-68 (Brennan CJ), 80-87 (Dawson J).

⁶¹ *Ibid*, 65 (Brennan CJ agreeing with the reasons of Dawson J), 78 (Dawson J), 92-94 (Toohey J), 109 (McHugh J agreeing with the reasons given by Brennan CJ and Dawson J).

⁶² *Ibid*, 114-115. Justice McHugh also went on to refer to the terms of s77(iii) of the Constitution as permitting 'the Parliament of the Commonwealth to invest any court of a State with federal jurisdiction in respect of all matters that are or can be vested in the original jurisdiction of this Court or the federal courts': *ibid*, 115. His Honour also referred to ss 78, 79 at 80 of the Constitution as drawing 'no distinction between the exercise of federal judicial power by the State courts and its exercise by federal courts': *ibid*.

A similar line of reasoning is evident in the judgments of at least two other of the majority judges.⁶³ The incompatibility doctrine derived by the majority in *Kable* in this way concerns the separation of judicial power, and is specifically based upon the fact that the Constitution requires the continued existence of a system of State courts, which, with the federal courts, forms part of an 'integrated court system' dealing with an 'integrated system of law'.⁶⁴ Justice Dawson, however, unequivocally rejects this contention in his Honour's dissenting judgment.⁶⁵ Justice Dawson refers to the constitutional provisions relating to State and federal courts. Of the division affected by these provisions, his Honour states, 'it is difficult to conceive of a clearer distinction.'⁶⁶

From the notion that there existed an integrated system of courts for the exercising of federal jurisdiction, at least three of the majority judges reasoned that the constitutional limitations derived from the separation of powers at a federal level had an impact on State courts that could exercise federal jurisdiction.⁶⁷ Justice McHugh expressed this in the following way:

Because the State courts are an integral and equal part of the judicial system set up by Ch III, it follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power. Thus, neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power.⁶⁸

⁶³ *Ibid*, 102-103 (Gaudron J), 127-128, 137-138 (Gummow J). Justice Gaudron in *Kable* states:

Neither the recognition in Ch III that State courts are the creature of the States nor its consequence that, in the respects indicated, the Commonwealth must take State courts as it finds them detracts from what is, to my mind, one of the clearest features of our Constitution, namely, that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth: *ibid*, 102.

Her Honour also referred to *Leeth v The Commonwealth* (1992) 174 CLR 455, 489-499: *ibid*, 103.

⁶⁴ *Kable v DPP* (1996) 189 CLR 51, 101-104 (Gaudron J), 110-117 (McHugh J), 139-144 (Gummow J).

⁶⁵ *Ibid*, 82.

⁶⁶ *Ibid*, 82.

⁶⁷ *Kable v DPP* (1996) 189 CLR 51, 103 (Gaudron J), 116-118 (McHugh J), 143 (Gummow J). It will be recalled that Justice Toohey's finding of incompatibility arose because the Supreme Court was actually exercising judicial power of the Commonwealth: *ibid*, 95-96.

⁶⁸ *Kable v DPP* (1996) 189 CLR 51, 116 (McHugh J). See also Justice Gaudron's statement that:

Once the notion that the Constitution permits of different grades or qualities of justice is rejected, the consideration that State courts have a role and existence transcending their status as State courts directs the conclusion that Ch III requires that the parliaments of the States not legislate to confer powers on State courts

The exact nature of the constitutional limitation that operates at a State level was not exhaustively defined by the majority judgments.⁶⁹ It was, however, distinguished from the limitations that operate at a federal level. More specifically, it is clear from the majority judgments that the limitations do not extend to preventing at a State level, the conferring of judicial powers on bodies other than courts, or to preventing the conferral of any power on State courts that is not judicial power or incidental thereto.⁷⁰ Put simply, the majority judgments in *Kable* do not precisely replicate at a State level the principles enunciated in *Boilermakers' Case*. As the discussion in Chapter 10 will argue, this distinction has been maintained in *Forge v Australian Securities and Investments Commission & Ors*.⁷¹

The implication at a State level was also expressed in *Kable* to be distinguishable from the *persona designata* exception that operates at a federal level to prohibit the conferral on federal judges, in their individual capacity, of functions that are inconsistent with the exercise of the judicial power of the Commonwealth.⁷² As Justice Gaudron explains in *Kable*,

[t]he limitation on State legislative power is more closely confined and relates to the powers or functions imposed on a State court, rather than its judges in their capacity as individuals, and is concerned with powers or functions that are repugnant to or incompatible with the exercise of the judicial power of the Commonwealth.⁷³

In commenting upon the scope of the limitation, the majority judges demonstrate that the focus of their Honours' decision is on the institution of the judiciary. Implicit in the manner in which the implication is being framed by the majority judges is the idea that the doctrine of the separation of powers is a doctrine affecting institutions.⁷⁴ The majority judgments do not expressly contemplate at length the manner in which such a separation can give rise to

which are repugnant to or incompatible with their exercise of the judicial power of the Commonwealth: *ibid*, 103.

⁶⁹ See further, H P Lee, 'The *Kable* Case: A Guard-Dog that Barked But Once' in George Winterton (ed), *State Constitutional Landmarks* (2006) 390, 396-9, 412.

⁷⁰ *Kable v DPP* (1996) 189 CLR 51, 103 (Gaudron J), 116-118 (McHugh J), 142 (Gummow J).

⁷¹ *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223.

⁷² See *Kable v DPP* (1996) 189 CLR 51, 103-104 (Gaudron J), 116-118 (McHugh J). See, however, Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash Law Review* 397, 421.

⁷³ *Kable v DPP* (1996) 189 CLR 51, 104.

⁷⁴ *Kable v DPP* (1996) 189 CLR 51, 116 (McHugh J). See also *Nicholas v the Queen* (1998) 193 CLR 173, 220 (McHugh J).

individual rights or immunities. In this regard it is distinct from the approach of the joint judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.⁷⁵

The institutional perspective taken of the separation of powers doctrine is reflected in the manner in which the limitation that the *Kable* decision implied from Chapter III is framed.⁷⁶ The limitation derived is institutional in its focus. Justice McHugh saw the limitation as meaning that '[i]n the case of State courts, ... they must be independent and appear to be independent of their own State's legislature and executive government as well as the federal legislature and government.'⁷⁷ Such a limitation was for his Honour necessary to ensure 'public confidence' in the judiciary, and it is only in this respect that the perception of individual litigants became relevant.⁷⁸ The limitation for Justice McHugh would prevent the conferral of any function on the State Supreme Court that would result in the Court losing 'its identity as a court.'⁷⁹ His Honour also made it clear, as did Justices Gaudron and Gummow that the limitation would operate to prevent States from abolishing their Supreme Courts.⁸⁰ A concern for the integrity of the institution of the judiciary is further reflected in Justice Gummow's judgment, in that his Honour refers to the much cited case of *Misteretta* in which the point was made that,

[t]he legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.⁸¹

Justice McHugh referred at length to the public perception of the institution of the judiciary as well as making reference to the judicial process, whereas in comparison Justice Gaudron places a greater and more singular emphasis upon the judicial process.⁸² Although discernable

⁷⁵ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ).

⁷⁶ See, for example, *Kable v DPP* (1996) 189 CLR 51, 116 (McHugh J).

⁷⁷ *Ibid*, 116.

⁷⁸ *Ibid*, 116-117.

⁷⁹ *Ibid*, 117.

⁸⁰ *Ibid*, 103 (Gaudron J), 117 (McHugh J), 140 (Gummow J).

⁸¹ *Mistretta v United States* (1989) 488 US 361 at 407 cited by Gummow J in *Kable v DPP* (1996) 189 CLR 51, 133.

⁸² See *Kable v DPP* (1996) 189 CLR 51, 107 (Gaudron J), 122, 124 (McHugh J). The manner in which Justice Gaudron addresses this issue is consistent with Her Honour's approach in other cases: see, for example, *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-704; *Nicholas v The Queen* (1998) 193 CLR 173, 208-209.

differences may be identified in the ways in which the majority judges frame the implication drawn from Chapter III, a common thread underlying the reasoning of these judges may be recognized. This is a concern for the integrity of the federal judiciary. The integrity of the federal judiciary may be seen as being supported either by public confidence in the institution of the federal judiciary or by the integrity of the judicial process.⁸³

The majority judges explore further the scope of the constitutional limitation in their Honour's consideration of the manner in which the *Community Protection Act* breached the limitation that was found to exist at a State level. Again, the concerns of the majority judgments relate to the affects of the challenged legislation upon the integrity of courts as institutions, rather than the implications for the interests of the individual. This is evident in two related respects. First, whilst the *ad hominem* nature of the legislation was relevant to the majority finding in *Kable*, their Honours did not limit the scope of the limitation that they drew from Chapter III on this basis.⁸⁴ Secondly, whilst the majority alludes to the difficulties of preventative detention, their Honour's primary concern related to the involvement of the courts in this process.⁸⁵ Justice Gaudron distinguishing at length the process of incarceration for which the *Community Protection Act* provided from 'proceeding otherwise know to the law.'⁸⁶ Her Honour went on to state that,

[t]he integrity of the courts depends on their acting in accordance with the judicial process and, in no small measure, on the maintenance of public confidence in that process. ... Public confidence cannot be maintained in the courts and their criminal processes if, as postulated by s 5(1), the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed, by reference to material which may or may not be admissible in legal proceedings, that on the balance of probabilities, they may do so.⁸⁷

⁸³ *Kable v DPP* (1996) 189 CLR 51, 107 (Gaudron J), 122, 124 (McHugh J).

⁸⁴ *Kable v DPP* (1996) 189 CLR 51, 103-107 (Gaudron J), 116-120 (McHugh J), 133-134 (Gummow J).

⁸⁵ *Ibid*, 107 (Gaudron J), 120 (McHugh J), 134 (Gummow J).

⁸⁶ *Ibid*, 106.

⁸⁷ *Ibid*, 107.

A similar concern was expressed by Justice Gummow regarding, 'the incarceration of a citizen by court order but not as punishment for a finding of criminal conduct.'⁸⁸ His Honour's concern, however, was not directed specifically at the individual concerned but at the attempt to have such a process, 'ratified by the reputation and authority of the Australian judiciary.'⁸⁹ Of greatest concern to the majority judges was the involvement of a court exercising federal jurisdiction in a process that the majority found objectionable. This view is reflected in a finding of invalidity that was clearly based on the potential of the legislation to 'compromise the *institutional* impartiality of the Supreme Court.'⁹⁰ Given the emphasis that the *Kable* decision placed upon a particular view of Chapter III, it is not surprising that Justice McHugh's judgment has been viewed as being 'difficult to reconcile'⁹¹ with the view that 'it is not legitimate to construe the Constitution by reference to political policies or theories'.⁹²

B *Kable v Director of Public Prosecutions and Constitutional Methodology*

The *Kable* decision may be viewed as drawing an implication from the Constitution that was fairly narrow in its scope. The limitation is expressed primarily in terms of what it is not. For instance, the implication is distinguished from the wider implications that exist at a federal level as a result of the *Boilermakers* decision, and the *persona designata* exception. By defining the limitation in this way the Court can avoid the more theoretical task of setting out the exact nature of the limitation drawn from Chapter III. Whilst the majority did not expressly limit their findings to the specific legislation considered in that case, it is difficult, on the basis of the decision in *Kable*, to extend the doctrine much beyond what was said in that case. This view is

⁸⁸ *Ibid*, 134.

⁸⁹ *Ibid*.

⁹⁰ *Ibid*, 121 (McHugh J)(emphasis mine). See also *Kable v DPP* (1996) 189 CLR 51106-107 (Gaudron J), 134 (Gummow J).

⁹¹ Justice Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 246.

⁹² *McGinty v Western Australia* (1996) 186 CLR 140, 232 (McHugh J).

confirmed by the manner in which the Gleeson Court has interpreted *Kable* in subsequent decisions.⁹³

In summary, it may be said that the decision in *Kable v The Director of Public Prosecutions* emphasised the institutional character of the separation of the judicial power affected by Chapter III of the Constitution.⁹⁴ This may be compared to the approach of the joint judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.⁹⁵ It may be recalled that the joint judgment in *Chu Kheng Lim* focused on the institutional separation of powers, however a further step was taken which acknowledged the Court's concern that the legislation may 'diminish the protection which Ch III of the Constitution provides, in the case of the citizen.'⁹⁶ In contrast to the approach of the joint judgment in *Chu Kheng Lim*, the majority judgments in *Kable* do not focus at length upon the individual. That said, it should be emphasised that the decision in *Kable* did not narrow the constitutional protection recognised in *Chu Kheng Lim*.

It may be concluded that *Kable* is a landmark decision concerning the structure of the judiciary in the Australian federation. However, despite the fact that a majority of the Court held invalid, legislation which infringed the challenger's liberty, the decision cannot necessarily be regarded as explicitly based upon a concern for the liberty of individuals.

IV CONCLUSION

The High Court under the leadership of Chief Justice Brennan moved away from the characteristic approach of the Mason Court, which as Chapter 8 discussed, sought to balance

⁹³ See *Baker v The Queen* (2004) 223 CLR 513; *Fardon v Attorney-General (Queensland)* (2004) 223 CLR 575; *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223.

⁹⁴ *Kable v DPP* (1996) 189 CLR 51, 106-107 (Gaudron J), 120-121 (McHugh J), 133-134 (Gummow J). See further, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the Constitution' (2003) 31 *Federal Law Review* 57, 75.

⁹⁵ See *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 29 (Brennan, Deane and Dawson JJ).

⁹⁶ *Ibid.*

the interests of the individual with those of the State. As a newspaper article concerning Sir Gerard Brennan's retirement reported,

[a]n exciting and controversial phase of High Court history began to recede before the eyes of Australia's most senior judges and lawyers yesterday, during the retirement ceremony for the Chief Justice, Sir Gerard Brennan, on the eve of his 70th birthday. Sir Gerard, appointed to the court in 1981, served in Sir Anthony Mason's activist court, which began speaking of the Constitution as a compact with the people, and gave common law recognition to Aboriginal land rights for the first time. Yesterday, Sir Anthony and two of his most activist colleagues – Governor-General Sir William Deane and former Justice John Toohey, joined Sir Gerard on the Bench. He was always the most *conservative* of the four, yet the retiring, deeply private man was called upon as the new chief to publicly defend his court more firmly than any other.⁹⁷

Not surprisingly, it was Sir Gerard Brennan who had observed in 1990 in an administrative law context, that:

[T]he court needs to remember that the judicature is but one of three co-ordinate branches of government and that the authority of the judicature is not derived from a superior capacity to balance the interests of the community against the interests of an individual.⁹⁸

The Brennan Court moved from a realist or sociological jurisprudential perspective of the Court's role, which can be implied from the Mason era. That said, the Brennan era did not significantly confine either the scope of any constitutional principles developed by the Mason Court concerning Chapter III, nor, did the Brennan era, see a retreat from the role of the Court in establishing such principles. The combination of a more confined judicial approach, together with the support for and development of constitutional principles, can be seen to reflect of the tensions that have been identified as underlying Sir Gerard Brennan's jurisprudence. Belinda Baker and Stephen Gageler write that,

⁹⁷ Margo Kingston, 'Public Farewell For a Very Private Man', *The Sydney Morning Herald* (Sydney), 22 May 1998, 4 (emphasis added).

⁹⁸ *Attorney-General for the State of New South Wales v Quin* (1990) 170 CLR 1, 37.

[i]n many respects, Brennan embodied the tension that is at the heart of the judicial oath. He believed that it was a primary function of law to protect minorities and the disadvantaged, and his decisions struggled to achieve this result. Yet Brennan was also a strong adherent of the rule of law, believing that a Justice was limited in his or her ability to engage in judicial law-making. The tension between these imperatives characterised Brennan's judgments throughout his time as a Justice of the High Court.⁹⁹

Another potential influence upon the change in method, without any substantial change in constitutional principles is the shifting membership of the Brennan Court. The arrival of Gummow J is likely to have been significant. For example, the empirical significance of the appointment of Gummow J following the retirement of Sir Anthony Mason upon the Gleeson Court in constitutional cases has been noted.¹⁰⁰ It is also relevant to observe that during the Brennan era, Gummow J formed part of the minority in *Gould v Brown*, a decision which was later reversed during the Gleeson era. Gummow J also in a number of decisions such as *Kable* focused strongly on the need to preserve the integrity of the federal judiciary—a line of argument which Chapter 10 will suggest has been influential in shaping the Gleeson Court's Chapter III jurisprudence. The Brennan Court's concern for the integrity of the federal judiciary can also be viewed as a response to some of the criticisms that had been made of the perceived activism of the Mason era.¹⁰¹

Although the exact nature of the influences upon the Brennan era is not readily identifiable or quantifiable, the analysis in this Chapter has identified some general trends in the approach of the Brennan Court. In very broad terms the Brennan era put forward an approach that was more confined than some of the broadly theorised methodologies put forward in the Mason era. That said, the Brennan era did not substantially limit any of the constitutional protections recognised by the Mason Court.¹⁰² There was also a degree of continuity between the

⁹⁹ Belinda Baker and Stephen Gageler, 'Brennan, (Francis) Gerard' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 66, 66.

¹⁰⁰ Andrew Lynch and George Williams, 'The High Court on Constitutional Law: The 2003 Statistics' (2004) 27 *University of New South Wales Law Report* 88, 93-94.

¹⁰¹ See further, 'Courts in the Firing Line', *The Age* (Melbourne), 23 May 1998, 9, George Williams, 'Brennan's High Times', *The Sydney Morning Herald* (Sydney), 21 May 1998, 17.

¹⁰² Even though the unanimous decision in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 adopted a more limited formulation of the implied freedom of political communication, it ultimately upheld the existence of

approaches of the Mason Court and the Brennan Court, in decisions such as *Grollo v Palmer*,¹⁰³ *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,¹⁰⁴ and *Gould v Brown*.¹⁰⁵ The jurisprudence from these cases, like that of the Mason era, seemed to allow for a greater degree of flexibility in the interpretation of Chapter III, than that which would flow from a strict interpretation of the principles set out in *Boilermakers*.

Significantly, the methodology of the Brennan Court, and the increasing concern that the Court expressed for the need to preserve the institutional integrity of the federal judiciary, can be seen as an early signal to the shift from the realist based jurisprudence of the Mason era. Whilst the Brennan era saw the High Court return to a more orthodox interpretive methodology, this was not a static time for Chapter III jurisprudence. Although Brennan CJ together with Dawson J dissented, the Brennan Court in decisions such as *Kable* was willing to establish new constitutional principles.

The analysis presented in this Chapter has shown that the Brennan era saw some changes away from the *methodology* and ideas associated with the realism of the Mason era. The Brennan Court also developed some new ideas. This period did not, however, produce a significant amount of change to the *substantive* principles concerning Chapter III jurisprudence developed by the Mason Court. This form of movement in constitutional law can be contrasted with the analysis presented in the following Chapter which will establish that the Gleeson era has seen a change in *method* and a retreat from some of the *substantive* constitutional principles of the Mason era.

this freedom: see Belinda Baker and Stephen Gageler, 'Brennan, (Francis) Gerard' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 66, 68.

¹⁰³ (1995) 184 CLR 348.

¹⁰⁴ (1996) 189 CLR 1.

¹⁰⁵ *Gould v Brown* (1998) 193 CLR 346.

Chapter 10

SUBSTANTIVE AND METHODOLOGICAL CHANGE IN CHAPTER III JURISPRUDENCE AND THE GLEESON ERA

I INTRODUCTION

The analysis presented in this Chapter will consider the approach of the Gleeson Court in cases concerning the doctrine of the separation of judicial powers. More specifically, the following discussion will demonstrate that the approach of the Gleeson Court in this area of law may be analysed within the conceptual framework summarised in the conclusion to Part I. It will be recalled that the analysis in Part I identified the primary characteristics of the Gleeson Court's approach as being consistent with the methodologies associated with legalism and pragmatism. It will be argued that the manner in which these theories are applied supports the conclusion that the Gleeson Court is a largely a-theoretical Court.

The essential movement examined in this Chapter concerns the extent to which the approach taken to the interpretation of the separation of judicial power by the Gleeson Court has evinced a retreat from the approach of the Mason Court. The degree to which the Gleeson Court may be

returning to a Dixonian approach will also be examined. It has been argued throughout this thesis that legalism is a significant influence on the Gleeson Court. However, more specifically, Chapter 2 argued that the form of legalism generally associated with the Gleeson Court can be distinguished from Dixonian legalism. It was argued that unlike in the approach of Sir Owen Dixon it is difficult to identify the theoretical assumptions that underpin the form of legalism employed by a number of members of the Gleeson Court. In this Chapter by examining the renewed emphasis that the current High Court has placed upon the *Boilermakers* decision, the difference and similarities between the approach of the Gleeson Court and the approach of the Dixon Court will be demonstrated.

It was also argued in previous Chapters that the Gleeson Court may be seen to be moving away from approaches associated with realism or natural law reasoning which are evident in decisions of the Mason era, such as *Polyukovich v The Queen*¹ and *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.² It will be argued in this Chapter that the Gleeson Court has interpreted these decisions in a manner that obviously distances the Gleeson Court from both the principles and approach of the Mason Court. In this Chapter, it will be further argued that the Gleeson Court has not viewed the judicial role along the lines of realism or sociological jurisprudence, in that members of the Gleeson Court have not expressly been concerned with the relationship between the individual and the State. Rather, the Gleeson Court has adopted a more legalistic and pragmatic approach which focuses upon the institution of the judiciary. In short, in the context of Chapter III decisions the Gleeson Court has tended to take a doctrinal approach, which focuses upon interpreting the text of the *Constitution* together with a varying regard for practical considerations. This approach seeks wherever possible to dispose of constitutional cases on the basis of principles of statutory construction.³

Some significant conclusions will be drawn from the comparative analysis presented in this Chapter about the movement in Chapter III jurisprudence that has occurred from the Mason to

¹ (1991) 172 CLR 501 ('*War Crimes Act Case*').

² (1992) 176 CLR 1 ('*Chu Kheng Lim*').

³ Tony Blackshield and George Williams, 'Preface to the Fourth Edition' *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) v. See further, Steven Churches, "'Tragic': the High Court decision in the indefinite mandatory detention case of Al-Kateb' (2004) 26 *Law Society Bulletin* 30.

Gleeson eras. First, it will be concluded that the general approach of the Gleeson Court has resulted in the incremental development of the High Court's jurisprudence and has not produced the broad principles which characterised the Mason era. Secondly, the legalistic focus of the Gleeson Court upon the terms of Chapter III which focus on the *institution* of the judiciary, and the concern that the Gleeson Court has shown for the institutional integrity of the judicial arm of government, does not reflect an attempt to balance the interests of the individual with the powers of the State. This Chapter will conclude that the Gleeson Court's Chapter III jurisprudence has *reduced* the constitutional protections that decisions from the Mason era held the *Constitution* afforded to individuals. In short, the change in *method* has brought about *substantive* changes in the law.

The decisions that will form the focus of the analysis presented in this Chapter are, *Re Wakim; Ex parte McNally*,⁴ *Al-Kateb v Godwin*,⁵ *Baker v R*,⁶ *Fardon v Attorney-General (Queensland)*,⁷ and *Forge v Australian Securities and Investments Commission & Ors*.⁸ Although there are a great number of cases from the Gleeson era that have considered issues concerning Chapter III of the *Constitution*, these cases have been chosen because they are each significant in some respect, and they represent in some way the general themes associated with the approach of the Gleeson Court to Chapter III issues.

Two final points about the form that the analysis presented in this Chapter will take, should also be mentioned in this introduction. First, it should be acknowledged that the decision in *Re Wakim* was specifically included for examination in this Chapter because it is the most oft-cited counter-example to any suggestion that the approach of the Gleeson Court is pragmatic. The analysis put forward in this Chapter will suggest that despite the practical difficulties that flowed from the *Re Wakim* decision, the approach of the majority in that case, remains consistent with the general conceptual framework that this thesis associates with the Gleeson Court. Secondly, it should be mentioned that the cases considered in this thesis could be considered

⁴ (1999) 198 CLR 511 ('*Re Wakim*').

⁵ (2004) 219 CLR 562 ('*Al-Kateb*').

⁶ (2004) 223 CLR 513 ('*Baker*').

⁷ (2004) 223 CLR 575 ('*Fardon*').

⁸ (2006) 226 ALR 223 ('*Forge*').

thematically. For example the decisions of *Baker v The Queen* and *Fardon v Attorney-General (Queensland)* raise most directly the principles established in the *Kable* decision, discussed in Chapter 9. However, the cases presented in Part II of this thesis are, for the most part, considered in chronological order for the simple reason that this form of analysis most clearly demonstrates the movement in Chapter III jurisprudence that has occurred.

II *RE WAKIM*; PRACTICALITY AND CONSTITUTIONAL PRINCIPLE

The judgment *Re Wakim; ex parte McNally*⁹ followed from a number of proceedings which were heard together by the High Court. These proceedings raised the issue of the validity of legislative schemes, which providing for the cross vesting of jurisdiction between federal, State and Territory courts. In very general terms, one cross-vesting scheme that was challenged enabled participating courts to exercise jurisdiction with respect to civil matters within the jurisdiction of other participating courts and also provided for matters to be transferred to another court in the scheme.¹⁰ The *Corporations Law* cross vesting scheme was also challenged. That legislative scheme had, in part, sought to confer jurisdiction on the Federal Court to exercise powers under the *Corporations Law* of a State.

The High Court in *Re Wakim* was called upon to decide a number of issues, however in the context of the current analysis the key constitutional point raised in the proceedings concerned whether State jurisdiction could vest in a Federal Court.¹¹ Relevantly, the majority of the High

⁹ *Re Wakim; ex parte McNally* (1999) 198 CLR 511 ('*Re Wakim*').

¹⁰ Transfer was possible where it was 'more appropriate' that the matter be heard by that other Court. See further, Graeme Hill, 'The Demise of Cross-Vesting' (1999) 27 *Federal Law Review* 547, 547-548.

¹¹ *Re Wakim* (1999) 198 CLR 511. A number of other issues, such as issues relating to accrued jurisdiction, the discretionary nature of particular remedies, and issues concerning the conferral of power by legislation of a Territory, also arose. For example, in two of the High Court proceedings, *Re Wakim; Ex parte McNally* and *Re Wakim; Ex Parte Darvall* the applicants sought prohibition directed to the Federal Court. In these proceedings the High Court held that the general cross-vesting scheme did not validly confer jurisdiction on the Federal Court to hear the common law claims against the Official Trustee's solicitors and barrister: see *Re Wakim* (1999) 198 CLR 511, 582 (Gummow and Hayne JJ), with Gleeson CJ (at 540) and Gaudron J (at 546) agreeing; McHugh J (at 554-563) with Callinan J agreeing (at 626); Kirby J (at 596-618) dissented. A majority of the High Court went on to find that the Federal Court had jurisdiction to determine these claims as they came within that Court's accrued jurisdiction: see *Re Wakim* (1999) 198 CLR 511, 588 (Gummow and Hayne JJ) with Gleeson CJ (at 546) and Gaudron J (at 546) agreeing; McHugh J (at 563) agreeing in the orders proposed; Callinan J (at 627-628) dissenting.

Court, with Kirby J dissenting, held that that State jurisdiction could not vest in a federal court.¹² In very basic terms the essential effect of the decision in *Re Wakim* was to limit conferral of cross vesting of jurisdiction between State and federal courts by prohibiting the exercise by federal courts of State jurisdiction.

The starkest divide and the one that ultimately split the Court in *Re Wakim* concerned the implications to be drawn from the text of the *Constitution*. As the following analysis demonstrates, the majority reasoning in *Re Wakim* was dominated by a legalistic and doctrinal approach that sought to base the conclusion reached upon the interpretation of the text of the *Constitution* and the relevant precedents. As such, it will be argued that this decision

For Justices Gummow and Hayne the existence of a common substratum of facts led to the conclusion that the proceedings raised a single justiciable controversy: see *Re Wakim* (1999) 198 CLR 511, 583-588. Their Honours doubted that the exercise of accrued jurisdiction was discretionary: *ibid* 588. Justice McHugh was sceptical of whether there was a single controversy, however he was not prepared to say on the materials before him that the matter was outside the jurisdiction of the Federal Court: *Re Wakim* (1999) 198 CLR 511, 563, 564. Justice Callinan emphasised the separate nature of the proceedings and held that accrued jurisdiction was discretionary. Applying the test of 'impression and practical judgment' propounded in *Stack v Coast Securities (No 9) Pty Ltd* (1983) 154 CLR 261, 294, he held that there was not one justiciable controversy. (Justices Gummow and Hayne also referred to this authority, however their Honours did not understand the references to 'impression' and 'practical judgment' as stating a test to be applied). In *Re Brown; Ex parte Amann* the applicants challenged the provisions of the corporations cross-vesting scheme that purported to enable the Federal Court to exercise powers under the *Corporations Law* of a State. The High Court held that the *Corporations Law* cross-vesting scheme did not validly confer jurisdiction on the Federal Court to exercise powers under the *Corporations Law* of a State. The majority of the High Court prohibited further steps in the Federal Court under the order for winding up and quashed the order for examination, on the application of Mr Amann, who has not been a party to the proceedings in *Gould v Brown*: see *Re Wakim* (1999) 198 CLR 511, 592 (Gummow and Hayne JJ), with Gleeson CJ (546) and Gaudron J (at 546), McHugh J (at 564) agreeing in the order for prohibition, and Callinan J (at 635) agreeing; Kirby J dissenting (at 620). For Justices Gummow and Hayne identity of parties was a necessary element for the application of both issue estoppel and *res judicata*. Part of Mr Amann's application was therefore allowed. The same majority, (Gummow and Hayne JJ, with Gleeson CJ, Gaudron, McHugh and Callinan JJ agreeing), declined to grant certiorari to quash the winding up order, by refusing the extension of time required for such an application. Justices Gummow and Hayne stated that a significant reason for doing so was that third parties acquired rights may well have been affected by such an order: *Re Wakim* (1999) 198 CLR 511, 592 (Gummow and Hayne JJ), see also 565 (McHugh J), 635 (Callinan J). Justice McHugh and Justice Callinan also referred to these considerations. However, Justice McHugh was to later suggest in his remarkable judgment in *Re Macks; Ex parte Saint* (2000) 204 CLR 158, 221 that the Court was wrong to do so. The application for the ancillary orders, such as the delivery and destruction of the examination tapes, was refused on the basis that the validity of use of these materials may depend on matters that were not before the High Court: *Re Wakim* (1999) 198 CLR 511, 592 (Gummow and Hayne JJ). Mr Gould's application for certiorari was also dismissed. The final matter of *Sprinks v Prentice* concerned orders for examination made under the *Corporations Law* (ACT). Once again, the jurisdiction of the Federal Court was challenged. The matter had been before the Full Court of the Federal Court. The Full Court held that s 51(1) of the *Commonwealth Corporations Act* validly conferred jurisdiction on the Federal Court with respect to civil matters arising under the *Corporations Law* (ACT). The Full Court also found that it had power to make the examination orders under sections 596B and 597(9) of the *Corporations Law* (ACT) where there had been a winding up. The applicants in the High Court sought special leave to appeal from the orders of the Full Court of the Federal Court. The challenge was dismissed on the authority of *Northern Territory v GPAO* (1999) 196 CLR 553, with the High Court unanimously holding that the *Commonwealth Corporations Act* validly conferred power on the Federal Court to exercise powers under the *Corporations Law* of the ACT: see *Re Wakim* (1999) 198 CLR 511, 596 (Gummow and Hayne JJ), 540 (Gleeson CJ agreeing), 546 (Gaudron J agreeing), 565 (McHugh J), 619 (Kirby J), 636 (Callinan J).

¹² *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ agreeing with Gummow and Hayne JJ), 546 (Gaudron J agreeing with Gummow and Hayne JJ), 554-563 (McHugh J), 582 (Gummow and Hayne JJ), 626 (Callinan J agreeing with McHugh J); 596-618 (Kirby J dissenting).

demonstrates a return to legalism. It will also be argued that implicit in the reasoning expressed by the majority in *Re Wakim* there may be discerned a concern for the integrity of the federal judiciary.

A *Text and Policy: Re Wakim, the Gleeson Court and Legalism*

In *Re Wakim* the importance of sections 71, 75, 76 and 77 of the *Constitution* were considered. Section 77 provides that with respect to any of the matters mentioned in section 75 and 76, the Parliament may make laws:

- (i) Defining the jurisdiction of any federal court other than the High Court:
- (ii) Defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States:
- (iii) Investing any court of a State with federal jurisdiction.

The combined effect of sections 75, 76 and 77 is to empower the Federal Parliament to confer jurisdiction on federal courts in respect of 'matters' which are defined in ss 75 and 76. The divide between the majority and the minority in *Re Wakim* reflects differing conceptions of these constitutional provisions.¹³ The six judges who formed the majority, Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ, held that Chapter III exhaustively defined the original jurisdiction that could be conferred on federal courts. For Justice Kirby, who dissented, Chapter III did not set out the totality of the jurisdiction that could be conferred on federal courts.

The argument in favour of the validity of the legislative provisions which provided that the Federal Court may exercise jurisdiction conferred on that Court by a law of a State, asserted that Chapter III did not exhaustively define the jurisdiction that could be conferred on a Chapter III

¹³ See also Dung Lam, '*Wakim*' Case Note, (2000) 22 *Sydney Law Review* 155, 162.

Court. The Parliament of a State, it was said, had power to vest jurisdiction to decide matters arising under its laws in courts of other jurisdictions including the Federal Court. It was also suggested that section 109 of the *Constitution* could frustrate the exercise of this power, in the absence of Commonwealth consent. However, with Commonwealth agreement it was argued that Chapter III did not prevent the vesting by State legislation of State judicial power in a federal court.¹⁴

All of the majority judges in *Re Wakim* relied upon the decisions of *In re Judiciary and Navigation Acts*¹⁵ and *R v Kirby; Ex parte Boilermakers' Society of Australia*.¹⁶ Even Justice Kirby in dissent accepted that observations could be found in those cases, which appeared to stand against the proposition that States may confer judicial power on a federal court.¹⁷ The majority judges' reliance in *Re Wakim* upon the text of the *Constitution* and precedent was coupled with a refusal to consider wider policy considerations. It should, however, be acknowledged that in the majority judgments there are some subtle differences regarding the manner in which Chapter III was interpreted.

Chief Justice Gleeson agreed with the judgments of Justices Gummow and Hayne concerning the validity of the cross-vesting legislation, as did Justice Gaudron.¹⁸ However, Chief Justice Gleeson's judgment went on to provide reasons which emphasised the relevance of both the text of the *Constitution* and precedents. For Chief Justice Gleeson, the primary issue in the matters before the Court turned on 'the meaning and effect of Chapter III of the *Constitution*.'¹⁹ His Honour viewed the decision of *In re Judiciary and Navigation Acts* as being inconsistent with the argument put forward by those in favour of the validity of the cross-vesting provisions.²⁰ In

¹⁴ See *Gould v Brown* (1998) 193 CLR 346, 479-481 (Brennan CJ and Toohey J). See also *Re Wakim* (1999) 198 CLR 511, 541 (Gleeson CJ).

¹⁵ (1921) 29 CLR 257.

¹⁶ (1956) 94 CLR 254.

¹⁷ *Re Wakim* (1999) 198 CLR 511, 607. That said, Justice Kirby went on to point out these authorities did not address the conferral of State jurisdiction as they were concerned with the limits of the judicial power of the Commonwealth. His Honour also sought to distinguish these cases on the basis that they were decided in a different constitutional era, before the creation of significant federal courts.

¹⁸ *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ), 546 (Gaudron J).

¹⁹ *Ibid*, 540.

²⁰ *In re Judiciary and Navigation Acts* (1921) 29 CLR 257. For Chief Justice Gleeson the argument of the proponents of the legislation removed any limitation on States conferring, on the High Court, the power to give advisory opinions. For his Honour, such a result would 'expose the fragility of the concept of delimitation regarded by the

addition Gleeson CJ emphatically rejected the argument that the constitutional validity of the legislation could be influenced by any view concerning the desirability of the legislation. In particular, his Honour stated that, '[a]pproval of legislative policy is irrelevant to a judgment as to constitutional validity; just as disapproval of the policy would be irrelevant.'²¹

A similar emphasis on the text of the *Constitution* and precedents may be found in the judgment of Justice McHugh. Like the Chief Justice, Justice McHugh denied the relevance of the *policy* considerations concerning the desirability of the cross-vesting legislation.²² In addition, Justice McHugh directly addressed the question of how the constitution should be interpreted, arguing that '[t]he starting point for a principled interpretation of the *Constitution* is the search for the intention of its makers.'²³ This aspect of Justice McHugh's judgment may be contrasted to that of Justice Kirby, who also addressed the issue concerning the relevance of the intentions of the framers of the *Constitution*. These diverging opinions gave rise to a debate in Australian jurisprudence concerning the relevance of the intent of the framers of the Australian *Constitution* and the manner in which the *Constitution* may be interpreted as a living document.²⁴

majority in *In re Judiciary and Navigation Acts* as underpinning the separation of powers': see *Re Wakim* (1999) 198 CLR 511, 543-544 (Gleeson CJ).

²¹ *Ibid*, 540.

²² His Honour states:

It would be very convenient and usually less expensive and time-consuming for litigants in the federal courts if those courts could deal with all litigious issues arising between the litigants, irrespective of whether those issues have any connection with federal law. From the litigant's point of view that is saying a great deal. But unfortunately, from a constitutional point of view, it says nothing: *ibid* 548.

Justice McHugh also held that 'the judiciary has no power to amend or modernise the Constitution to give effect to what the judges think is in the public interest': *ibid* 549.

²³ *Ibid*, 551.

²⁴ See *Re Wakim* (1999) 198 CLR 511, 599-600. See also, for example, *Eastman v The Queen* (2000) 203 CLR 1, 44-51 (McHugh J), 80 (Kirby J); *Brownlee v The Queen* (2001) 207 CLR 278, 314ff (Kirby J); *Al-Kateb v Godwin* 219 CLR 562, 592ff (McHugh J), 622ff (Kirby J). See further, Cheryl Saunders, 'In the Shadow of *Re Wakim*' (1999) 17 *Company and Securities Law Journal* 507, 517; Justice Michael Kirby, 'Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?' (2000) 24 *Melbourne University Law Review* 1; Dan Meagher, 'New day Rising? Non-originalism, Justice Kirby and Section 80 of the Constitution' (2002) 24 *Sydney Law Review* 141; Mirko Bagaric, 'Originalism: why some things should never change, or at least not too quickly' (2000) 19 *University of Tasmania Law Review* 173; Jeremy Kirk 'Constitutional interpretation and a theory of evolutionary originalism' (1999) 27 *Federal Law Review* 323; Jeffrey Goldsworthy, 'Originalism in constitutional interpretation' (1997) 25 *Federal Law Review* 1; Greg Craven, 'Original intent and the Australian Constitution: coming soon to a court near you?' (1990) 1 *Public Law Review* 166. See generally, Justice Antonin Scalia, 'The role of a constitutional court in a democratic society' (1995) 2 *Judicial Review* 141; Tony Blackshield and George Williams, *Australian Constitutional Law & Theory* (3rd ed, 2002) 326ff.

Justice McHugh relied upon what he saw as the exhaustive nature of the terms of Chapter III of the *Constitution* and the decisions in *In re Judiciary and Navigation Acts* and *Boilermakers* to support the view that Chapter III is an exhaustive delimitation of the original jurisdiction that may be exercised under the judicial power of the Commonwealth.²⁵ His Honour also doubted that a State could invest a federal court with jurisdiction that the Parliament of the Commonwealth, who created the court, could not invest in that court. In his Honour's view, such courts would be 'curial vessels into which could be poured unlimited jurisdiction by any polity except their creator.'²⁶ By granting power to the Parliament of the Commonwealth to create federal courts and by expressly stating the matters in respect of which the Parliament may confer jurisdiction on those courts, his Honour reasoned that Chapter III of the *Constitution* impliedly forbade the conferring of any other jurisdiction on those courts, by the Commonwealth or the States.²⁷ In this way, Justice McHugh concluded that both the State and Commonwealth legislative provisions were invalid (in so far as they purported to give the Federal Court jurisdiction to exercise State judicial power). The reasoning is legalistic in the sense that his Honour's line of reasoning is expressly based upon an interpretation of the text of the *Constitution* and the relevant established precedents.²⁸ Justice Callinan adopted a similar approach, and his Honour's written reasons place perhaps the greatest emphasis of any member of the majority, upon the terms of Chapter III of the *Constitution*.²⁹

The approach of Justices Gummow and Hayne differed slightly from that expressed in the reasons of Gleeson CJ and McHugh J, in that their Honours sought to support their argument by reasoning from fundamental principles. At the beginning of their Honours' joint judgment, Justices Gummow and Hayne consider the authority of courts to decide a matter. Their Honours conclude that this authority comes from the law of the polity of the courts concerned. Gummow and Hayne JJ reject the notion that this authority could come from the legislature of

²⁵ *Re Wakim* (1999) 198 CLR 511, 554ff.

²⁶ *Re Wakim* (1999) 198 CLR 511, 558.

²⁷ *Ibid*, 558-560.

²⁸ *Ibid*, 555-557.

²⁹ *Ibid*, 625 (Callinan J).

some other polity.³⁰ For Justices Gummow and Hayne, the classic statement in *Huddart, Parker & Co Pty Ltd v Moorehead* was the starting point.³¹ In this respect, the judgment of Justices Gummow and Hayne reflects the orthodox view of judicial decisions as the exercise of sovereign power according to law. Further, relying on *In re Judiciary and Navigation Acts* and *Boilermakers'*, Justices Gummow and Hayne considered the role of the federal judicature and the limited nature of judicial power.³² Following these cases, their Honours held that, in a federal system the federal judicature had the ultimate responsibility for deciding upon the limits of the respective power of the governments. Thus, section 76 of the *Constitution* was an exclusive source of the power to confer jurisdiction on the High Court.³³ From this it followed that:

1. The jurisdiction that may be conferred on a federal court under s 77 is limited to the heads identified in ss 75 and 76; and
2. No other polity can confer jurisdiction on a federal court.

Their Honours conclusion concerning the validity of the cross-vesting legislation is based, like the other members of the majority, upon the constitutional provisions concerning judicial power. However, it is apparent that underlying their Honours' reasoning is a specific conception of federal judicial power. This conception not only incorporates the ideas expressed in ss 75 and 76, but also the notion that the authority of federal courts to decide a matter, must come from the federal polity. This represents a more theorised approach than that apparent in the reasoning of the other members of the majority. For Justices Gummow and Hayne, a

³⁰ *Re Wakim* (1999) 198 CLR 511, 573. For a critical assessment of this view see Dennis Rose, 'The Bizarre Destruction of Cross-Vesting' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 186, 190.

³¹ Chief Justice Griffith in *Huddart, Parker & Co Pty Ltd v Moorehead* refers to: 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property': see *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ) cited by Gummow and Hayne JJ in *Re Wakim* (1999) 198 CLR 511, 573.

³² *Re Wakim* (1999) 198 CLR 511, 575 referring to *In re Judiciary and Navigation Acts* (1921) 94 CLR 254, 270 and *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 29 CLR 257, 264-267.

³³ It will be recalled that the majority in *R v Kirby; Ex parte Boilermakers' Society of Australia* held that 'it cannot be left to the judicial power of the States to determine either the ambit of federal power or the extent of the residuary power of the States.' The joint judgment reasoned that it followed that, '[t]he powers of the federal judicature must therefore be at once paramount and limited': *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto). See further Chapter 7 above.

defined concept of federal judicial power led to the conclusion that legislation that purports to confer State jurisdiction on a federal court is invalid.³⁴

The decision of Justice Kirby differed not only in the conclusion that his Honour reached concerning the validity of the challenged legislation, but also in the method of reasoning that he adopted. Justice Kirby was particularly critical of the construction of Chapter III taken by the majority. He argued that the majority needlessly implied that Chapter III exhaustively defined the original jurisdiction that could be conferred on federal courts.³⁵ His Honour applied the approach of Gleeson CJ and McHugh J in *Abebe v The Commonwealth* holding that, '[r]igid and impractical outcomes are justified only by "the clearest constitutional language" which "compel them"'.³⁶ For Justice Kirby,

[a] negative implication will only arise where it is manifest from the language used in the provisions within Chapter III or is logically or practically necessary for the preservation of the integrity and structure of the Judicature envisaged in that Chapter.³⁷

In deciding the matters in *Re Wakim*, Justice Kirby argued that, whilst in the case of the High Court there may well be negative implications in Chapter III that would prevent any attempt to confer State jurisdiction upon it, a similar implication did not apply in respect of other federal courts created by Parliament.

Accordingly, Justice Kirby held that State jurisdiction could be conferred on the Federal Court. That said, like the statutory majority in *Gould v Brown*, his Honour held that the type of State jurisdiction that could be conferred was limited.³⁸ Justice Kirby held that any attempt to confer upon a federal court jurisdiction incompatible with the constitutional character of that Court or inconsistent with the functions accorded to that Court by the federal Parliament, would have no

³⁴ *Re Wakim* (1999) 198 CLR 511, 575, 582.

³⁵ *Ibid*, 610 (Kirby J).

³⁶ *Ibid*, 600 (Kirby J) quoting from the joint judgment of Gleeson CJ and McHugh J in *Abebe v The Commonwealth* (1999) 197 CLR 510, 532.

³⁷ *Re Wakim* (1999) 198 CLR 511, 601 (Kirby J) relying on *Australian Capital Television Pty Ltd v The Commonwealth* [No 2] (1992) 177 CLR 106, 135 and *McGinty v Western Australia* (1996) 186 CLR 140, 168-171, 184-185, 231, 284-286.

³⁸ *Re Wakim* (1999) 198 CLR 511, 617 (Kirby J) referring to *Gould v Brown* (1998) 193 CLR 346, 386 (Brennan CJ and Toohey J), 496-498 (Kirby J).

constitutional effect.³⁹ In this respect, his Honour's judgment falls in line with the narrower view of the implication to be drawn from Chapter III. The approach adopted by Justice Kirby led to his dissenting view that the cross-vesting legislation was valid. In formulating this opinion his Honour was willing to have regard to matters of 'constitutional authority, principle and policy' including the 'benefits of the cross-vesting scheme' and the 'inconvenience' of 'a rigid construction of Chapter III.'⁴⁰

The divide between the majority approach and that of Kirby J in *Re Wakim* is based upon the inferences that may be drawn from the text of the *Constitution*. However, the manner in which the text is interpreted also demonstrates a divergence over the use of policy considerations. The legalistic approach of the majority, as would be expected, does not refer at length to policy arguments, whereas policy considerations are openly acknowledged in Kirby J's dissent. As the following discussion demonstrates a rejection of the use of policy arguments by the majority may also be seen in the manner in which the majority addressed two issues raised in *Re Wakim* concerning the nature of the Australian federal system, and in doing so the majority approach meets a core aim of legalism.

B *Policy considerations and the Nature of the Australian Federal System*

Dissimilar conceptions of the nature of Australian federalism underlie two central differences between the majority and minority approaches in *Re Wakim*, namely, the idea of co-operative federalism and the need for Commonwealth consent. In particular, the manner in which these issues are addressed by the majority demonstrates a reluctance to allow the use of a particular policy to inform judicial reasoning, or to articulate the particular perspective of Australian federalism that is relevant to their Honours' reasoning.

³⁹ *Re Wakim* (1999) 198 CLR 511, 617 (Kirby J).

⁴⁰ *Re Wakim* (1999) 198 CLR 511, 609-610 (Kirby J).

1 Co-operative Federalism

The *Constitution* provides for the continued existence of the States⁴¹ and for the relations between the States and the Commonwealth.⁴² Whilst various references in the *Constitution* to State and Federal interaction may be cited,⁴³ co-operation is not a major theme in the Australian *Constitution*, and not surprisingly the *Constitution* has been described as 'somewhat ambivalent about the idea of intergovernmental cooperation.'⁴⁴

Whilst State and federal co-operation may not be a focus of the *Constitution*, prior to *Re Wakim* there had been some judicial exploration of the doctrine of co-operative federalism in decisions such as *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd*, albeit that that case concerned the conferral of jurisdiction upon a Tribunal.⁴⁵ In *Duncan* the Court upheld joint Commonwealth and State legislation establishing the Coal Industry Tribunal and enabling the Tribunal to perform both Commonwealth and State functions.⁴⁶ It was made clear in *Duncan* that it mattered not that the object of the co-operative legislation could not be achieved by either polity acting alone.⁴⁷ Gibbs CJ in *Duncan* held that there was no prohibition on the States and the Commonwealth exercising their respective powers in a complementary way.⁴⁸ Deane J referred

⁴¹ ss 106, 107 and 108.

⁴² See s 51(xxxiii), (xxxvii), (xxxviii), s 77(iii), s 91, s 114, and s 120.

⁴³ See Cheryl Saunders, 'In the Shadow of Re Wakim' (1999) 17 *Company and Securities Law Journal* 507, 513-514. Section 118 requires that full faith and credit be given to the laws and judicial proceedings of every State. A State may require Commonwealth consent to undertake certain activities such as the raising of any naval or military force, or the imposing of tax on the property of the Commonwealth: s 114. Similarly, the Commonwealth may require State consent to acquire State railways: s 51(xxxiii). See also s 51(xxxviii). The Commonwealth may use State prisons (s 120) and State Courts (s 77(iii)) for federal purposes, and the Commonwealth may exercise power referred to it by the States (s 51(xxxvii)).

⁴⁴ Brian Opeskin, 'Commentary: A Valediction Forbidding Mourning' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 216, 217. Brian Opeskin also makes the interesting point that when constitutions of more recent origin are compared to the Australian Constitution this deficit in the Australian Constitution is apparent. He cites as an example the 1996 South African Constitution which exhorts the three levels of government to 'cooperate with one another in mutual trust and good faith': *ibid.* Cheryl Saunders makes a related point when she refers to 'the inconvenience of *Re Wakim*' as 'part of the price that Australians pay for an aging Constitution, written for vastly different circumstances and adapted only with partial success to contemporary circumstances by governments Parliaments and courts.': Cheryl Saunders, 'In the Shadow of Re Wakim' (1999) 17 *Company and Securities Law Journal* 507, 517.

⁴⁵ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 533. See also *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 774-6 (Starke J).

⁴⁶ (1983) 158 CLR 533.

⁴⁷ See *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 533, 552-553 (Gibbs CJ), 579-580 (Brennan J) 589, (Deane J). See also *Deputy Federal Commissioner of Taxation (NSW) v WR Moran Pty Ltd* (1939) 61 CLR 735, 774-6 (Starke J).

⁴⁸ *R v Duncan; Ex parte Australian Iron and Steel Pty Ltd* (1983) 158 CLR 533, 552 (Gibbs CJ).

to co-operation as being 'a positive objective of the Constitution.'⁴⁹ Any potential for the development of this doctrine, following from the decision in *Duncan*, was severely diminished by the majority judgments in *Re Wakim*. Most pointedly, co-operative federalism was referred to by Justice McHugh in *Re Wakim* as being 'not a constitutional term ... [but] ... a political slogan.'⁵⁰

The judgments in *Re Wakim* reflect a clear distinction in their respective approaches to the interpretation of co-operative schemes.⁵¹ Gleeson CJ, like McHugh J, emphasised that co-operative federalism would not answer any prohibition that may be drawn from Chapter III, nor could it supply a source of constitutional authority.⁵² Justices Gummow and Hayne took a similar line, holding that 'no amount of co-operation can supply power where none exists.'⁵³ Justice McHugh expanded on that argument by pointing to section 92 as an example of matters upon which no amount of co-operation would give the States or the Commonwealth powers to legislate (although section 92 is of course a limitation on power, not a grant).⁵⁴ In the end, Chief Justice Gleeson may be seen to articulate the majority view in his statement that *Duncan* established not much more than the fact that 'federalism and co-operation are not inconsistent.'⁵⁵

Justice Kirby's view of the Australian federation may be compared, not only to the judgment of the majority in *Re Wakim*, but also to that of Chief Justice Brennan and Justice Toohey in *Gould v Brown*. As discussed in Chapter 9, in *Gould v Brown* Brennan CJ and Toohey placed particular emphasis upon the plenary nature of the State parliaments.⁵⁶ Justice Kirby diverged from this

⁴⁹ *Ibid*, 589.

⁵⁰ *Re Wakim* (1999) 198 CLR 511, 556.

⁵¹ *Ibid*, 545 (Gleeson CJ), 556 (McHugh J), 577 (Gummow and Hayne JJ); cf, 610 (Kirby J).

⁵² *Ibid*, 545.

⁵³ *Ibid*, 577.

⁵⁴ *Ibid*, 556. His Honour referred to Menzies KC who put the submission in *James v The Commonwealth* [1936] AC 578, 595 (submissions) that as a result of the operation of section 92, 'the totality of legislative power in Australia [proves] to be less than the totality of power in other civilised countries.' To avoid this result Menzies KC submitted unsuccessfully that the Judicial Committee should hold that s 92 did not bind the Commonwealth.

⁵⁵ *Re Wakim* (1999) 198 CLR 511, 545.

⁵⁶ The judgment of Chief Justice Brennan and Justice Toohey in *Gould v Brown* envisaged a federation in which the co-operative capacities of the Commonwealth and States extended to all matters relevant to self-government. In particular, Chief Justice Brennan and Justice Toohey emphasised the plenary nature of the State parliaments following the passing of the *Australia Acts*: see *Gould v Brown* (1998) 193 CLR 346, 372-373, 376-377 (Brennan CJ and Toohey J).

perspective in placing less emphasis on State powers, preferring to stress the importance of having regard to the combined powers of the State and Federal parliaments.⁵⁷ Justice Kirby in *Re Wakim* referred to the benefits of co-operation, emphasising the totality of the powers held by the respective polities.⁵⁸ His Honour commented that 'it is not as if the polities constituting the Australian Commonwealth are, in relation to each other, foreign states. All of them are parts of an integrated federal nation which the Constitution itself summoned forth.'⁵⁹ In a manner which contrasted with the majority approach, and particularly the reasoning of McHugh J,⁶⁰ Justice Kirby emphasised the benefits of the co-operative schemes, and the former powers of the Imperial Parliament to implement such a scheme.⁶¹

2 Commonwealth Consent

A second aspect of *Re Wakim* that reveals a particular perspective of the Australian federation, as well as demonstrating a reluctance to engage with what may be characterised as policy arguments is the approach of the majority judges to the issue of Commonwealth consent. The proponents of the cross-vesting legislation conceded that unless Commonwealth consent was given, section 109 of the *Constitution* would invalidate the attempted vesting of State judicial power in federal courts. That is, the State law would be inconsistent with the Commonwealth legislative scheme.

⁵⁷ *Re Wakim* (1999) 198 CLR 511, 610; see Nicholas Aroney, 'The Constitutional Demise of the Cross-vesting Scheme' (1999) 7 *Insolvency Law Journal* 116, 119ff.

⁵⁸ *Re Wakim* (1999) 198 CLR 511, 610.

⁵⁹ *Ibid*, 601.

⁶⁰ For example, Justice McHugh accepted that federalism could mean that there was a reduction in the totality of powers available. McHugh J cited Professor Dicey's view that, '[f]ederal government means weak government.': *ibid* 556-557 (McHugh J), citing AV Dicey, *Introduction to the Study of the Law of the Constitution* (first published 1885, 10th ed, 1959) 171. The approach taken by Justice McHugh, which may be identified in some respects in other majority judgments, by focusing on the respective powers of each level of government in a federation, and by accepting that federalism may mean a reduction in the totality of available powers, further emphasises the unique role that the federal judiciary plays in determining the scope of these powers. See also Justice McHugh's comments in *Nicholas v The Queen* (1998) 193 CLR 173, 226.

⁶¹ *Ibid*, 610. In particular, Kirby J commented that,

[i]t would require the most compelling of arguments of constitutional authority, principle and policy to persuade me that the combined Parliaments of the Commonwealth of Australia cannot, after nearly a century of federation, do together (with all the travail that such a course involved) what the Imperial Parliament might readily have done in 1901 on a relatively straight forward machinery matter of this kind: *Re Wakim* (1999) 198 CLR 511, 610.

Chief Justice Gleeson held that there was no constitutional source of power for the Commonwealth legislation, which purported to give the Commonwealth power to consent to the conferral of State jurisdiction.⁶² In forming this conclusion, his Honour reasoned that the exercise of the judicial power of the States did not assist in the execution of the principal power, namely the exercise of Commonwealth judicial power.⁶³ Justice McHugh, with whom Justice Callinan agreed, denied that Commonwealth consent was required.⁶⁴ For Justices Gummow and Hayne, Commonwealth consent only became an issue if it had some operative effect in the sense of conferring, or assisting in the conferring of an authority to decide a matter.⁶⁵ In the event that the legislation had such an effect, their Honours denied that it could be supported by the incidental powers.⁶⁶

Justice Kirby held that the consent of the Commonwealth was necessary for a number of reasons.⁶⁷ Justice Kirby readily found a source of power for the Commonwealth legislation in the express and implied incidental powers, including the implied nationhood power.⁶⁸ Of relevance to Kirby J's conclusion was the idea that the cross vesting legislation reduced the likelihood of the commencement of proceedings in an inappropriate jurisdiction. This line of reasoning was most emphatically rejected by Justices Gummow and Hayne, who stated that,

[c]haracterising a set of circumstances as having an Australian rather than a local flavour or as a desirable response to the complexity of a modern national society is to use perceived

⁶² *Re Wakim* (1999) 198 CLR 511, 545-546.

⁶³ *Ibid*, 546.

⁶⁴ *Re Wakim* (1999) 198 CLR 511, 561-2 (McHugh J).

⁶⁵ *Ibid*, 578.

⁶⁶ *Ibid*, 580.

⁶⁷ Firstly, it was necessary to overcome any assumption that the jurisdiction of a federal court would be only that conferred upon it by the legislature of the polity creating it. Consent was also necessary because of the implications in terms of expenditure of funds and deployment of judges that the conferral of State jurisdiction on the Federal Court would have: *ibid*, 611.

⁶⁸ See section 71 and section 51(xxxix) of the *Constitution*. For Kirby J whilst it would not be within the incidental powers for the Commonwealth to confer on the Federal Court jurisdiction in addition to that specifically and expressly provided for by the *Constitution*, it was within the incidental powers for the Federal Parliament to consent to the conferral of such jurisdiction by another legislature: *ibid* 614. Justice Kirby also expressed the view that the implied nationhood power, which his Honour saw as one aspect of the incidental power, was an additional source of constitutional authority: *ibid*, 614-616.

convenience as a criterion of constitutional validity instead of legal analysis and the application of accepted constitutional doctrine.⁶⁹

This passage reflects not only their Honour's views of Justice Kirby's interpretation of the implied nationhood power; it also reinforces their approach as one that eschews policy considerations.

It may be concluded at this point that the majority judges in *Re Wakim* do not expressly employ what might be called policy arguments, and cast doubt upon whether it is appropriate to use arguments of this nature.⁷⁰ This is so, even though as the analysis in Chapter 7 demonstrated, there are significant policy considerations that support the separation of judicial power, both in terms of supporting the rule of law and enhancing and protecting individual liberty through its division and restraint of power. Regard for the important considerations behind the doctrine of the separation of powers could have bolstered the majority reasoning and rendered the argument of the majority more compelling.⁷¹ It would also have enabled the majority to meet head on the important policy considerations, referred to by Justice Kirby, which called for the Court not to strike down useful legislation which supported the value of co-operation between State and Federal Parliaments.⁷² Although the majority was less ready to point to policy considerations than Justice Kirby, it is evident that, for the majority, the need to preserve the integrity of the federal judiciary was a real concern.⁷³ It is only in an examination of this issue that there can be any greater appreciation of the majority decision in *Re Wakim*. As argued throughout this Chapter, a fundamental theme of the Gleeson Court's Chapter III jurisprudence is a concern for the integrity of the federal judiciary.

⁶⁹ *Ibid*, 581-582 (Gummow and Hayne JJ).

⁷⁰ *Re Wakim* (1999) 198 CLR 511, 540 (Gleeson CJ), 549 (McHugh J), 569 (Gummow and Hayne JJ), cf 610 (Kirby J in dissent).

⁷¹ See Cheryl Saunders, 'In the Shadow of *Re Wakim*' (1999) 17 *Company and Securities Law Journal* 507, 510. See also Brian Opeskin, 'Commentary: A Valediction Forbidding Mourning' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 216, 217.

⁷² *Re Wakim* (1999) 198 CLR 511, 601, 610 (Kirby J).

⁷³ *Ibid*, 540 (Gleeson CJ), 562-563 (McHugh J), 569 (Gummow and Hayne JJ).

C *Re Wakim and the Integrity of the Federal Judiciary*

Fundamental to the reasoning of the majority judges in *Re Wakim* was the assumption that the integrity of the federal judiciary was protected by the maintenance of a strict view of the separation of judicial power. The corollary of this perspective is that the drawing of a narrower implication and the allowing of cross-vesting in some way impinged upon the exercise of federal judicial power.⁷⁴ It may be argued that these perspectives stem from the view expressed by a number of majority judges, that the cross-vesting legislation had a *negative impact* upon the exercise of *federal judicial power*. For example, Justice McHugh held that the conferral of State jurisdiction may make the exercise of State jurisdiction more effective, however, it did not assist, and may even hamper, the exercise of federal jurisdiction.⁷⁵

Justices Gummow and Hayne also expressed a similar perspective, viewing the cross-vesting legislation as supplementing the power the Commonwealth given by the *Constitution*, not as complementing it.⁷⁶ These comments reveal that underlying the majority decision (which refers predominantly to the force of the text of the *Constitution* and to precedents) is a particular view as to the operational effect of the cross-vesting legislation. More specifically, it is a perspective that views the cross vesting of jurisdiction as having a detrimental effect on the integrity of the federal judiciary.⁷⁷

⁷⁴ Brian Opeskin, 'Commentary: A Valediction Forbidding Mourning' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 216, 219. Opeskin views majority judgments in *Re Wakim* as suggesting that that Chapter III Courts ought to be immunised from the burden of adjudicating State matters because of the need to preserve them for their constitutional task of exercising federal jurisdiction. He defends this concern, arguing that the need for Commonwealth consent does not protect Federal Courts from this burden. Federal courts he suggests need to be protected from incursions by the Federal Parliament as well as from the States. He points out that '[t]he Constitution is replete with express and implied prohibitions on federal power, the function of which is to protect individuals and institutions from the tyranny of the majority expressed through elected federal representatives': Brian Opeskin, 'Commentary: A Valediction Forbidding Mourning' in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 216, 219. Cf. Dung Lam, 'Wakim' Case Note, (2000) 22 *Sydney Law Review* 155, 170.

⁷⁵ *Re Wakim* (1999) 198 CLR 511, 562 (McHugh J).

⁷⁶ *Ibid*, 581 (Gummow and Hayne JJ).

⁷⁷ *Ibid*, 546 (Gleeson CJ), 562-563 (McHugh J), 581 (Gummow and Hayne JJ).

D Trends emerging from the decision in *Re Wakim*

In the context of the wider argument presented in this thesis concerning approaches to constitutional interpretation, the decision in *Re Wakim* is important because it appears to stand at odds with any suggestion that the Gleeson Court adopts a pragmatic approach to constitutional interpretation. Indeed, media reports following the *Re Wakim* decision ran under the headline of 'Principle triumphs over pragmatism in High Court ruling'.⁷⁸ Only Kirby J, in dissent, looked beyond the immediate controversy presented to the Court and considered the wider practical implications that the judgment will have. However, it is important to highlight that the argument presented in this thesis does not suggest that the approach of the Gleeson Court is wholly pragmatic. Rather, it has been argued that the general approach of the Gleeson Court has a strong tendency to engage in legalistic interpretations of the text of the constitution, and also demonstrates a varying regard for practical or pragmatic considerations.

The approach of the majority in *Re Wakim* to the interpretation of Chapter III of the *Constitution* is legalistic. The majority judges largely reject policy based arguments. In general, their Honours tend to rely on the text and established precedents rather than considering the fundamental principles underlying previous decisions. There is, however, some contrast between the form of legalism that is apparent in the approach taken in the written reasons of Chief Justice Gleeson, and Justices McHugh and Callinan, and that of Justices Gummow and Hayne.⁷⁹ For example, the majority in *Boilermakers* viewed the position of the federal judiciary in a federal system to be unique.⁸⁰ This line of reasoning was carried through the decision in *Re Wakim*. It is, however, particularly apparent in the joint judgment of Justices Gummow and

⁷⁸ See 'Principle triumphs over pragmatism in High Court ruling' Transcript of Australian Broadcasting Commission's, *7.30 Report*, 17 June 1999. Transcript viewed on world wide web on 19 August 2006 at <http://www.abc.net.au/7.30/stories/s29997.htm>.

⁷⁹ Gaudron J adopted the reasoning of Gummow and Hayne JJ with the additional comments that Her Honour provided largely relating to the relationship between Chapter III and section 122 of the *Constitution*: see *Re Wakim* (1999) 198 CLR 511, 546-7.

⁸⁰ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 29 CLR 257, 264-267. See also, *In re Judiciary and Navigation Acts* (1921) 94 CLR 254, 270.

Hayne.⁸¹ Whilst McHugh and Callinan JJ are inclined to follow and apply the *conclusions* expressed in *Boilermakers*, the written reasons of Justices Gummow and Hayne exhibit a willingness to consider the *reasoning process* and *underlying rationale* presented in *Boilermakers*. In particular, their Honours specifically consider the emphasis that the *Boilermakers'* decision places upon the role of the federal judiciary in the Australian federal system. In this way, the joint judgment of Justices Gummow and Hayne considers how the fundamental federal principles underlying the decision in *Boilermakers* might be applied when seeking to determine the validity of the cross-vesting legislation.

The High Court decision of *Re Wakim* has been seen to extend the second limb of the doctrine expressed in *Boilermakers*, by holding that only judicial power of the Commonwealth could be vested in federal courts. It followed that States could not confer State judicial power on federal courts.⁸² That said, the debate concerning the implications that flowed from a federal system in *Re Wakim* incorporated matters beyond those referred to in the *Boilermakers' Case*. Thus, it is difficult to see how the outcome in *Re Wakim* could be sufficiently explained as a legalistic application of the decision in *Boilermakers*. The extent to which the *Boilermakers'* decision necessarily required a particular result in *Re Wakim* is a matter of debate. It is, however, clear that the approach in *Re Wakim* diverges from the perspective of the Mason era. As discussed in Chapter 8, the High Court of the Mason era did not read strictly the *Boilermakers'* decision, and readily found exceptions which ameliorated the effect of this decision.

A concern to protect the integrity of the federal judiciary was clearly a central issue for the majority judges in *Re Wakim*, and one which may be seen to underlie the majority approach to the issues of co-operative federalism and the requirement for Commonwealth consent to the cross-vesting legislation. The majority judgments' approach to these issues in *Re Wakim* has been viewed as representing the Australian federation as one of divided sovereignties, with the Commonwealth and the States each governing their strictly separated spheres.⁸³ Arguably the

⁸¹ *Re Wakim* (1999) 198 CLR 511, 575 referring to *In re Judiciary and Navigation Acts* (1921) 94 CLR 254, 270 and *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 29 CLR 257, 264-267 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

⁸² Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (2001) 129, 133.

⁸³ See, for example, Nicholas Aroney, 'The Constitutional Demise of the Cross-vesting Scheme' (1999) 7 *Insolvency Law Journal* 116, 131.

majority judges' perception of federalism is better conceptualised, as a perspective that requires a protection of the integrity of the federal judiciary, because of the important role that this institution plays in the maintenance of the federation.⁸⁴ This view consistent with the approach that the majority judges have taken in other cases, that expressly provide for an integrated judicial system, (such as *Kable*).⁸⁵ In addition, it represents more closely the concerns that the majority judges express about the manner in which the cross-vesting scheme operated.⁸⁶ Relevantly, from the point of view of the analysis presented in this thesis it is argued that the difficulty with defining the exact nature of Australian federalism adopted by the majority judges is a consequence of the methodology adopted. The essentially legalistic and non-theorised approach put forward does not articulate at length the theoretical foundation of the decision in *Re Wakim*. This approach is consistent with two ideas that are presented in pragmatic legal writings. The first is the idea that there is no over arching theory of constitutional interpretation, the second is the view that that any theorisation should be limited in scope.

In summary, it may be concluded from the above analysis that the approach of the majority in *Re Wakim* is largely legalistic. Fundamentally, the decision places less emphasis upon consequential arguments than that identified in other cases from the Gleeson era,⁸⁷ with the majority approach in *Re Wakim* tending to rely upon text and precedents and to eschew policy considerations, as well as generally avoiding theoretically based reasoning. That said, the joint judgment of Justices Gummow and Hayne demonstrates a more theorised form of legalism than that apparent in the written reasons of Chief Justice Gleeson, and Justices McHugh and Callinan.

It may be said that the majorities' primary concern in *Re Wakim* was the need to preserve the integrity of the federal judiciary. This concern is apparent in subsequent cases of the Gleeson

⁸⁴ *Ibid*, 556-557 (McHugh J), 575 (Gummow and Hayne JJ).

⁸⁵ (1996) 189 CLR 51, 102-103 (Gaudron J), 114-115 (McHugh J), 127-128, 137-138 (Gummow J).

⁸⁶ *Re Wakim* (1999) 198 CLR 511, 546 (Gleeson CJ), 562 (McHugh J), 581 (Gummow and Hayne JJ).

⁸⁷ See, for example, *Re the Governor Goulburn Correctional Centre and Another; ex parte Eastman* (1999) 200 CLR 322; *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223.

Court including, *Al-Kateb v Godwin*,⁸⁸ *Baker v R*,⁸⁹ *Fardon v Attorney-General (Queensland)*⁹⁰ and *Forge v Australian Securities and Investments Commission & Ors*⁹¹ as the following discussion will show.

**III *AL-KATEB V GODWIN*; LIBERTY OF THE NON-CITIZEN,
LEGISLATIVE POWERS AND THE INTEGRITY OF THE FEDERAL
JUDICIARY**

The focus on the integrity of the federal judiciary is particularly significant in cases such as *Al-Kateb*,⁹² *Baker*,⁹³ and *Fardon*,⁹⁴ because the Court in each of these cases was called upon to consider the constitutional validity of legislation that had significant implications for the liberty of individuals. It is the first of these cases, namely *Al-Kateb v Godwin*,⁹⁵ which will form the focus of the following discussion.

Al-Kateb is an interesting decision in the context of this thesis, which considers judicial methodology. The reason for this is that the *Al-Kateb* decision demonstrates that the approach of each member of the Court falls within the general rubric of legalism. However, perhaps more significantly, it will be argued that this decision also reveals the individual tendencies or focuses of particular Justices. Importantly, the individual approaches evident in *Al-Kateb* are indicative of the usual approach of these judges. These individual tendencies are often more difficult to discern and examine in circumstances where there are a number of joint judgments.

⁸⁸ (2004) 219 CLR 562.

⁸⁹ (2004) 223 CLR 513.

⁹⁰ (2004) 223 CLR 575.

⁹¹ (2006) 229 ALR 223.

⁹² (2004) 219 CLR 562.

⁹³ (2004) 223 CLR 513.

⁹⁴ (2004) 223 CLR 575.

⁹⁵ (2004) 219 CLR 562.

The High Court decision of *Al-Kateb*⁹⁶ concerned the validity of legislation which provided for immigration detention in circumstances in which the length of this detention could not be determined. Related issues also arose in *Minister for Immigration and Multicultural Affairs and Indigenous Affairs v Al Khafaji*⁹⁷ and *Behrooz v Secretary, Department of Immigration and Multicultural and Indigenous Affairs and Others*.⁹⁸ The following analysis will, however, focus upon the approach of the Court in *Al-Kateb*, as this decision best exemplifies many of the trends in Chapter III jurisprudence that may be associated with individual members of the Gleeson Court.

*Al-Kateb v Godwin*⁹⁹ concerned the validity of sections 189, 196 and 189 of the *Migration Act 1958* (Cth). The validity of these provisions arose from the circumstances of Ahmed Al-Kateb, who was detained in immigration detention following his arrival in Australia by boat in December 2000. Al-Kateb's application for a protection visa was refused, and his subsequent appeals were unsuccessful. Section 198(6) of the *Migration Act* therefore required that Mr Al-Kateb, as an 'unlawful non-citizen', be removed from Australia 'as soon as reasonably practicable'. Mr Al-Kateb had indicated that he wished to be deported to Kuwait, or if that was not possible, to Gaza. Mr Al-Kateb had been born in Kuwait to Palestinian parents. His birth in Kuwait did not confer Kuwaiti citizenship, and, as there is no recognised Palestinian State, Mr Al-Kateb was in effect a 'Stateless Person', as that term is defined in the 1954 Convention relating to the Status of Stateless Persons.¹⁰⁰ Relevantly, that Convention defined a Stateless Person as being someone 'who is not considered as a national by any State under the operation of its law'.¹⁰¹ The Commonwealth had sought unsuccessfully to remove Mr Al-Kateb to Egypt, Jordan, Kuwait and Syria, as well as to Palestinian territories (which required the co-operation of Israel).

Mr Al-Kateb's application to the Federal Court for his release on the basis that he was being unlawfully detained was unsuccessful. However, following this decision Mr Al-Kateb was

⁹⁶ (2004) 219 CLR 562.

⁹⁷ (2004) 219 CLR 664.

⁹⁸ (2004) 219 CLR 486. See also *Al Masri v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 192 ALR 609; *affd* (2003) 126 FCR 54 (Special leave refused to appeal to the High Court refused, 14 August 2003).

⁹⁹ (2004) 219 CLR 562.

¹⁰⁰ *Ibid*, 596 (Gummow J).

¹⁰¹ *Ibid*, 596 (Gummow J).

released by the consent of the parties, pending the determination of his High Court appeal. The High Court, by a majority comprised of McHugh, Hayne, Callinan and Heydon JJ, dismissed the appeal. In three separate judgments, Chief Justice Gleeson, and Justices Gummow and Kirby dissented.

The majority judgments relied primarily upon a construction of the relevant legislation. The minority decisions also considered at length the principles of statutory construction. However, the minority decisions, and most particularly Justices Gummow and Kirby, gave a greater emphasis to the impact of constitutional principles upon the process of statutory construction.¹⁰² The appeal essentially raised two issues. The first issue involved a question of statutory construction, namely, whether the challenged sections of the *Migration Act 1958* (Cth) purported to authorise the detention of an unlawful non-citizen in circumstances where there was no real prospect of removing the person detained.¹⁰³ The second issue concerned the constitutional question of whether, if so construed, the *Migration Act* requirement of indefinite detention was a valid exercise of Commonwealth legislative power.¹⁰⁴

For the judges that formed the majority, both of these questions were answered in the affirmative. The majority held that the relevant sections of the *Migration Act 1958* authorised the detention of unlawful non-citizens for an indefinite period when there was no real prospect of removing the detained person. Secondly, the majority held that this was a lawful exercise of legislative power.¹⁰⁵ However, what is most relevant to the discussion presented in this thesis is the process by which this conclusion was reached.

¹⁰² See further, Steven Churches, "'Tragic': the High Court decision in the indefinite mandatory detention case of Al-Kateb' (2004) 26 *Law Society Bulletin* 30.

¹⁰³ See, *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 580 (McHugh J).

¹⁰⁴ *Ibid*, 580-1 (McHugh J), although McHugh J framed this second question in the negative.

¹⁰⁵ *Ibid*, 580-1 (McHugh J).

A <i>Principles of Statutory Construction</i>

For the judges that formed the majority, the wording of the challenged legislation was sufficiently clear to indicate that the Parliament had intended to limit the freedoms of individuals.¹⁰⁶ McHugh J, for example, referred to the legislative provisions as being ‘unambiguous’, as did Callinan J.¹⁰⁷ For the majority justices, the language of the statute indicated that detention was to continue even though the application of this principle to the case of Mr Al-Kateb meant that it was not possible to say when removal would occur.¹⁰⁸ Relevantly, for the majority, the legislation did not specify a period of detention, but rather provided for detention until the occurrence of a specified event, as Hayne J explained:

The present legislation, prescribing the period of detention as it does, may therefore be read as providing for detention for the purposes of processing any visa application and removal. But that does *not* decide the point of how long that detention may persist. It does not decide when that purpose (of detention for removal) is spent. It does not decide that the time during which a person may be detained is “a reasonable time”. Here the period of detention is governed by the requirement to effect removal “as soon as reasonably practicable”.¹⁰⁹

The majority judges held that as it was possible to say that removal may occur in the future, this was sufficient to give the legislative provisions a valid operation and consequently detention pending this possible future event remained lawful.¹¹⁰ For McHugh J, ‘[a] law requiring the detention of the alien takes its character from the purpose of the detention. As long as the purpose of the detention is to make the alien available for deportation or to prevent the alien from entering Australia or the Australian community, the detention is non-punitive.’¹¹¹ It is argued that this approach can privilege form over substance. Hayne J expressed a similar view, holding that the legislation in question was supported by the legislative head of power with

¹⁰⁶ *Ibid*, 581 (McHugh J), 638 (Hayne J), 661 (Callinan J).

¹⁰⁷ *Ibid*.

¹⁰⁸ *Ibid*, 581 (McHugh J), 639 (Hayne J), 658 (Callinan J), Heydon J (662, substantially agreeing with Hayne J).

¹⁰⁹ *Ibid*, 638-9 (Hayne J).

¹¹⁰ *Ibid*, 581 (McHugh J), 639 (Hayne J), 658 (Callinan J).

¹¹¹ *Ibid*, 584.

respect to aliens and consequently a power to order detention for non-punitive purposes could be conferred on the executive.¹¹² Heydon J substantially agreed with the reasons of Hayne J.¹¹³ Justice Callinan went further than some other majority judges and suggested that executive detention of non-citizens for punitive purposes, or for reasons of general deterrence, may also be permissible.¹¹⁴ The following discussion will argue that the majority approach significantly narrowed the principles established in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.¹¹⁵

The decision of *Chu Kheng Lim*, which was discussed in Chapter 8, accorded a significant constitutional protection to citizens against imprisonment other than pursuant to the order of a Chapter III Court.¹¹⁶ This protection was not conferred upon a non-citizen. All members of the High Court in *Chu Kheng Lim* held that the authority to detain and deport an alien by the Executive was an exercise of executive and not judicial power.¹¹⁷ That said, significantly the joint judgment in *Chu Kheng Lim* did not express the view that the power to detain aliens was unlimited. In particular, the joint judgment held that laws authorising the administrative detention of aliens will only be valid,

if the detention which they require and authorize is limited to what is reasonably capable of being seen as necessary for the purposes of deportation or necessary to enable an application for an entry permit to be made and considered. On the other hand, if the detention which those sections require and authorize is not so limited, the authority which they purportedly confer upon the Executive cannot properly be seen as an incident of the executive power to exclude, admit and deport an alien. In that event, they will be of a punitive nature and

¹¹² *Ibid*, 645 (Hayne J).

¹¹³ *Ibid*, 662 (Heydon J). Heydon J expressed his Honour's agreement with reasons given by Hayne J which supported the finding that the appellant's continued detention was lawful, and with the orders proposed by Hayne J; however this agreement was subject to the reservation by Heydon J of 'any decision about whether s 196 should be interpreted in a manner consistent with treaties to which Australia is a party but which have not been incorporated into Australian law by statutory enactment': *ibid* 662-3 (Heydon J).

¹¹⁴ *Ibid*, 659 (Callinan J).

¹¹⁵ (1992) 176 CLR 1.

¹¹⁶ (1992) 176 CLR 1, 28-9 (Brennan, Deane and Dawson JJ).

¹¹⁷ *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 10 (Mason CJ), 32-35, 38 (Brennan, Deane and Dawson JJ), 44-47, 52 (Toohey J), 53-54, 58 (Gaudron J), 74 (McHugh J).

contravene Ch. III's insistence that the judicial power of the Commonwealth be vested exclusively in the courts which it designates.¹¹⁸

Gaudron J also referred in *Chu Kheng Lim* to the need for the laws to be 'appropriate and adapted to regulating entry or facilitating departure as and when required'.¹¹⁹ For Hayne J the primary issue that arose in *Al-Kateb* was not the nature of the limitations that could be derived from the separation of powers, but rather a question of whether the law in question could be characterised as one with respect to 'aliens' and 'immigration'. Justice Hayne emphasised that *Chu Kheng Lim* recognised that the detention of non-citizens could be valid for some purposes.¹²⁰ Hayne J also held that he would not confine the scope of the heads of powers raised in *Al-Kateb* to the extent that the joint judgment in *Chu Kheng Lim* suggested. His Honour indicated that the idea that there was only a limited class of cases in which executive detention could be justified, was open to doubt.¹²¹ Hayne J reasoned that it followed from having identified the law in question as a law with respect to aliens, and from finding that detention was for the purposes of effecting removal, that this purpose continued until it became reasonably practicable to remove the non-citizen. As such, for Hayne J the law did not breach Chapter III. Callinan J expressed a similar view, emphasising the relevant issue as being the 'purpose' of the detention.¹²²

Justice McHugh rejected the argument that the legislation was beyond power as it breached the separation of powers mandated by Chapter III. Significantly, McHugh J reached this conclusion by a fundamentally legalistic technique of narrowly construing the 'ratio' of the joint judgment in *Chu Kheng Lim*.¹²³ Although Justice McHugh did not seek to overrule or disapprove of the majority position in *Chu Kheng Lim*, McHugh J relied upon comments that his Honour had made in that case. In particular, McHugh J in *Al-Kateb* held that his Honour's judgment in *Chu Kheng Lim* supported the view that 'a law requiring detention of aliens for the purpose of deportation or processing of applications would not cease to be one with respect to aliens even

¹¹⁸ 176 CLR 1, 33 (Brennan, Deane and Dawson JJ).

¹¹⁹ *Ibid*, 57 (Gaudron J).

¹²⁰ *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 645-6 (Hayne J).

¹²¹ *Ibid*, 648 (Hayne J).

¹²² *Ibid*, 660 (Callinan J).

¹²³ *Ibid*, 581-3 (McHugh J).

if the detention went beyond what was necessary to effect those objects.¹²⁴ It is argued that such a view was a minority view in *Chu Kheng Lim*, with much greater weight being given by the Court in *Chu Kheng Lim* to the idea expressed in the joint judgment that the power with respect to aliens was more confined.¹²⁵ It is therefore difficult to reconcile the reliance by McHugh J upon his Honour's earlier views in *Che Kheng Lim* as being consistent with accepted legalistic techniques.

The approach of both McHugh and Hayne JJ, it is argued, significantly confines the principles set out in *Chu Kheng Lim*. For this reason, their Honour's approach is perhaps more accurately described as a 're-interpretation' of the earlier decision of the Mason Court in *Chu Kheng Lim*.¹²⁶ The majority approach in *Al-Kateb* demonstrates a fundamental movement from the approach of the joint judgment in *Chu Kheng Lim* which emphasises the interests of the individuals, with McHugh, Hayne, Callinan and Heydon JJ in *Al-Kateb* focusing upon the powers of the legislature.¹²⁷ It is also significant that the judges forming the majority in *Al-Kateb* do not consider at length the need to preserve the integrity of the federal judiciary. As the following discussion will show it is the dissenting judgment of Justice Gummow that has the greatest regard to the High Court's role in protecting the integrity of the federal judiciary. This perspective is consistent with the view that Gummow J has expressed in other cases, and it is a position which usually draws more support from other members of the Gleeson High Court.¹²⁸ In contrast to the majorities' focus on Commonwealth legislative heads of power, a central issue for the dissenting judges was the *purpose* of the detention, which, in the case of *Al-Kateb* purported to be for deportation.¹²⁹ For the dissenters, the detention was not authorised if it could not be said to be being implemented for the relevant purpose. Thus, in the case of Mr Al-

¹²⁴ See *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 583 (McHugh J) citing, *Chu Kheng Lim* 176 CLR 1, 65-66 (McHugh J).

¹²⁵ See *Chu Kheng Lim* 176 CLR 1, 31, 33 (Brennan, Deane and Dawson JJ), 57 (Gaudron J).

¹²⁶ (1992) 176 CLR 1.

¹²⁷ *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 581 (McHugh J), 639 (Hayne J), 658 (Callinan J).

¹²⁸ See, for example, *Gould v Brown* (1998) 193 CLR 346, 445-8 (Gummow J, in dissent); *Al-Kateb v Godwin* 219 CLR 562, 613 (Gummow J, in dissent); *Re Wakim* (1999) 198 CLR 511, 546 (Gleeson CJ), 546 (Gaudron J, agreeing with Gummow and Hayne JJ); 562 (McHugh J), 581 (Gummow and Hayne JJ), 626 (Callinan J, agreeing with McHugh J); *Baker v R* (2004) 223 CLR 513, 522 (Gleeson CJ), 534 (McHugh, Gummow, Hayne, Heydon JJ), 573 (Callinan J); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 586 (Gleeson CJ), 598 (McHugh J), 612 (Gummow J), 647-8 (Hayne J, agreeing with Gummow J), 658 (Callinan and Heydon JJ).

¹²⁹ *Ibid*, 573 (Gleeson CJ), 607-8 (Gummow J), 615-6 (Kirby J).

Kateb, continued detention beyond the point at which it became apparent that deportation was not possible was unconstitutional.¹³⁰

The dissenting judgment of Gleeson CJ, like the majority judgments, rested upon principles of statutory construction. However, for Gleeson CJ the principles of statutory construction led to a different result. According to the Chief Justice, the provisions in question provided for detention until the happening of a specified event, namely, removal or the grant of a visa, and the provisions required the removal to be effected 'as soon as reasonably practicable'.¹³¹ For Gleeson CJ, the circumstances of Mr Al-Kateb, namely a situation in which removal could not occur, raised the issue of whether detention should be *suspended* or *indefinite*. Chief Justice Gleeson held that a construction that viewed detention as being *suspended* was to be preferred, as detention was mandatory not discretionary. His Honour's decision in this regard was influenced by the effect of the legislation, which was to interfere with personal liberty.¹³² As Gleeson CJ commented,

[c]ourts do not impute to the legislature an intention to abrogate or curtail certain human rights or freedoms (of which personal liberty is the most basic) unless such an intention is clearly manifested by unambiguous language, which indicates that the legislature has directed its attention to the rights or freedoms in question, and has consciously decided upon abrogation or curtailment.¹³³

Relevantly for Chief Justice Gleeson, the Act did not specifically provide for detention for an indefinite period. Further it did not distinguish between detainees. This meant that the operation of the Act would result in some detainees being held for a finite period and for a limited purpose (namely to effect deportation) and others, such as Mr Al-Kateb, would be indefinitely detained.¹³⁴ As Gleeson CJ commented,

¹³⁰ *Ibid*, 580 (Gleeson CJ), 614 (Gummow J), 630 (Kirby J).

¹³¹ *Ibid*, 573 (Gleeson CJ). See s 198 *Migration Act 1958 (Cth)*.

¹³² *Ibid*, 574-5, 577-8 (Gleeson CJ).

¹³³ *Ibid*, 577 (Gleeson CJ).

¹³⁴ *Ibid*, 575 (Gleeson CJ).

[t]he Act does not in terms provide for a person to be kept in administrative detention permanently, or indefinitely. A scheme of mandatory detention, operating regardless of the personal characteristics of the detainee, when the detention is for a limited purpose, and of finite duration, is one thing. It may take on a different aspect when the detention is indefinite, and possibly for life.¹³⁵

For Gleeson CJ the Act was not precise enough to support the power to detain for an indefinite period. It is apparent that the approach of Gleeson CJ places a significant emphasis upon principles of statutory construction. However, this approach has the potential to reduce the protections afforded by *Chu Kheng Lim*. The reasoning of Gleeson CJ leaves open the issue of whether, had the legislature made that intent clear, executive detention for an indefinite period may be lawful. That said, it should be acknowledged that Gleeson CJ regarded as a relevant consideration the non-punitive character of the detention.¹³⁶

For Gummow J, the purpose of the legislative provision was to make available to the appellant the option of removal from Australia as soon as reasonably practicable, and this did not authorise such a delay that the detention of the appellant had the appearance of being for an unlimited time.¹³⁷ For Gummow J, like Gleeson CJ, it was important to avoid a construction that infringed liberty. As his Honour stated,

[i]n considering these provisions, it is important to eschew, if a construction doing so is reasonably open, a reading of the legislation which recognises a power to keep a detainee in custody for an unlimited time. That reluctance is evident in the construction given the legislation in *Calwell*. Rather, temporal limits are linked to the purposive nature of the detention requirement in the legislation.¹³⁸

Gummow J reasoned that it followed that the legislative provisions validly provided for the 'detention of the appellant to facilitate his availability to removal from Australia but not with

¹³⁵ *Ibid.*

¹³⁶ *Ibid.*, 573 (Gleeson CJ).

¹³⁷ *Ibid.*, 608 (Gummow J).

¹³⁸ *Ibid.*, 607 (Gummow J). See also 612 (Gummow J).

such delay that his detention has the appearance of being for an unlimited time.¹³⁹ Thus, Gummow J reached the same conclusion as Gleeson CJ on the question of statutory construction. However, unlike Gleeson CJ, Justice Gummow, (as did Kirby J)¹⁴⁰ also addressed the constitutional issue concerning the nature of any individual protection that could flow from Chapter III.¹⁴¹

B *The Constitutional Issue and Al-Kateb*

The approach of Gummow J to the constitutional issue concerning the scope of the legislative powers to detain non-citizens, may be contrasted to that of the majority, which construed these constitutional powers widely. In the context of the analysis presented in this thesis, it is argued that Gummow J took a more theorised approach, and had a greater regard for the interests of individuals. Gummow J held that,

[t]he continued viability of the purpose of deportation or expulsion cannot be treated by the legislature as a matter purely for the opinion of the executive government. The reason is that it cannot be for the executive government to determine the placing from time to time of that boundary line which marks off a category of deprivation of liberty from the reach of Ch III. The location of that boundary line itself is a question arising under the Constitution or involving its interpretation, hence the present significance of the *Communist Party Case*.¹⁴²

For Gummow J, the issue of the validity of detention was not necessarily delineated in the terms set out in *Chu Kheng Lim* which distinguished between punitive and non-punitive detention. As Gummow J commented, 'there is often no clear line between purely punitive and purely non-

¹³⁹ *Ibid*, 608 (Gummow J).

¹⁴⁰ Kirby J also expressed a view on the constitutional issue, although his Honour agreed with the manner in which Gummow J construed the legislation and was of the view that the issues arising could be determined primarily on the basis of the statutory construction of the legislation in question: see *ibid*, 614 (Kirby J).

¹⁴¹ *Ibid*, 609ff (Gummow J).

¹⁴² *Ibid*, 613 (Gummow J).

punitive detention.¹⁴³ His Honour reasoned that this distinction could not be the basis for invoking the 'Ch III limitations respecting administrative detention'.¹⁴⁴ The core issue arising for Gummow J was the deprivation of an individual's liberty.¹⁴⁵ Although Gummow J did not accept in their entirety the manner in which any limitations respecting administrative detention were framed in *Chu Kheng Lim*, his Honour gave a strong indication that the Court has a role in determining the scope of any constitutional immunity from deprivation of liberty, by holding that this role cannot be removed by the legislature from the Court.¹⁴⁶

A consideration of the ideals behind the separation of judicial power and the common law concern for judicial independence may also be found in the judgment of Kirby J. Kirby J took a similar approach to Gummow J in that his Honour agreed with Gummow J that the issues arising could be decided primarily on the basis of the statutory construction of the legislation in question.¹⁴⁷ That said, Kirby J also agreed with Gummow J that Chapter III impacted upon legislative power. In particular, his Honour stated that, '[i]ndefinite detention at the will of the Executive, and according to its opinions actions and judgments, is alien to Australia's constitutional arrangements.'¹⁴⁸ Kirby J, like Gummow J, considered the need to preserve the integrity of the federal judiciary and, in particular, his Honour held that the Court 'should reject Executive assertions of self-defining and self-fulfilling powers.'¹⁴⁹ Kirby J viewed the conclusions reached by Gummow J as being further supported by 'considerations of international law and the common law presumption in favour of personal liberty.'¹⁵⁰

¹⁴³ *Ibid*, 611 (Gummow J).

¹⁴⁴ *Ibid*, 612 (Gummow J).

¹⁴⁵ *Ibid*, 611-2 (Gummow J). See also *ibid*, Kirby J 615-7.

¹⁴⁶ *Ibid*, 610 (Gummow J), 615 (Kirby J).

¹⁴⁷ *Ibid*, 614 (Kirby J).

¹⁴⁸ *Ibid*, 615 (Kirby J).

¹⁴⁹ *Ibid*, 616 (Kirby J).

¹⁵⁰ *Ibid*, 616 (Kirby J).

C *Al-Kateb and Constitutional Movement*

The judges that formed the majority in *Al-Kateb*, namely Justices McHugh, Hayne, Callinan and Heydon, relied primarily upon an orthodox common law methodology and accepted principles of statutory construction. Although, the extent to which McHugh J's reliance upon his Honour's earlier dissenting judgment in *Chu Kheng Lim* reflects an accepted application of the doctrine of precedent may be questioned. This aspect of McHugh J's judgment aside, the majority approach is consistent with an incremental common law approach in that it confines rather than overrules previous decisions. This approach decides the minimum possible necessary to dispose of the case, and does not go on to consider the constitutional questions. This tendency can also be identified in the approach of Gleeson CJ, however, the form of legalism employed by Gleeson CJ would appear to be somewhat wider than that of the majority. As Steven Churches points out, the majority approach in relation to issues of statutory construction is removed from the context, including the constitutional setting, in which the issues arose. In contrast, the minority judges exhibit a greater understanding of the relevance of this contextual background.¹⁵¹

Although the form of legalism employed by Gleeson CJ is wider in scope than the legalism of the majority judges, Gleeson CJ, in line with the majority approach, has a strong tendency to seek to dispose of the issues raised primarily by the application of principles of statutory construction.¹⁵² In this regard, the reasoning of Gummow J concerning the constitutional issue raised in *Al-Kateb* is clearly distinct from the approach of the majority justices, and from the dissent of Gleeson CJ. The approach of Gummow J again demonstrates a concern to protect the integrity of the federal judiciary. However, atypically, Gummow J does not in *Al-Kateb* draw a significant amount of support for this perspective from his Honour's judicial colleagues, with only Kirby J lending some support to the perspective of Gummow J. This is unusual in that in other cases such as *Re Wakim*, *Fardon* and *Forge*, Gummow J expressed a similar concern for the

¹⁵¹ See further, Steven Churches, "'Tragic': the High Court decision in the indefinite mandatory detention case of *Al-Kateb*" (2004) 26 *Law Society Bulletin* 30, 33.

¹⁵² Tony Blackshield and George Williams, 'Preface to the Fourth Edition' *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) v.

integrity of the federal judiciary, and his Honour's approach was either part of a joint judgment or was supported by at least one other member of the Court. Whereas for Gummow J a foundational principle was the need to preserve the integrity of the federal judiciary, the starting point for the majority reasoning in *Al-Kateb* was a consideration of the scope of legislative powers.¹⁵³ Justice Kirby, consistent with his Honour's usual approach, had a regard to a wider range of matters, including considerations of international law.

It is argued that the approaches of Gummow J and Kirby J are to be preferred on the grounds that these judgments give greater recognition to the role that courts play in determining and protecting any constitutional immunity that individuals may have from being deprived of their liberty by the other branches of government. This approach is consistent with the concerns of realism and sociological jurisprudence in that it recognises that the courts have a role to play in balancing the interests of the individual with those of the State. The approach of Gummow J is also to be favoured over that of the majority judges on the basis that it recognises a more sophisticated form of constitutionalism than the comparatively more simplistic focus of the majority, which does not move much beyond a consideration of legislative powers. The recognition of the more complex structure of the Australian federal system, that the analysis above suggests underlies the reasoning of Gummow J, has the advantage of giving greater recognition to the terms and structure of the *Constitution*, which divides the institutions of government. In addition, it is more closely aligned with the significant constitutional role that common law systems historically and traditionally accord to the courts, which have the primary responsibility for the maintenance of the ideals of judicial independence.¹⁵⁴

In addition to providing a good example of the typical approaches of individual judges, the decision in *Al-Kateb* also demonstrates the movement of the High Court from the Chapter III jurisprudence of the Mason era. In *Al-Kateb*, a foundational premise for the reasoning of a number of the majority justices was that the individuals in questions, namely, non-citizens, have limited rights of *liberty* in Australia. As Hayne J expressed this, '[t]he premise for the

¹⁵³ See, for example, *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 595 (McHugh J), 639-45 (Hayne J), 658-9 (Callinan J), Heydon J (662, substantially agreeing with Hayne J).

¹⁵⁴ See further, Chapter 7.

debate is that the non-citizen does not have permission to be at liberty in the community.¹⁵⁵ Justice McHugh also expressed a similar view.¹⁵⁶ The majority judges did not focus upon the impact of indefinite detention of non-citizens upon the Australian federal system, either in terms of the protection of the federal judicial system, or the protection of the interests of individual. Rather, the majority emphasised Commonwealth legislative powers. In doing so their Honours moved away from the approach that dominated the Mason era. As argued in Chapter 8 the Mason Court was concerned with the interests of individuals, and with the role of courts in balancing these individual interests with the powers of the State.

The following discussion will demonstrate that the form of legalism identified in *Al-Kateb* was developed further by the Gleeson Court in two cases, namely, *Baker v The Queen* and *Fardon v Attorney-General (Queensland)*. In particular, the analysis will argue that although the inclinations of individual judges are less apparent in these two cases than in the number of separate judgments delivered in *Al-Kateb*, the issues that were of concern to individual justices in *Al-Kateb* may also be identified in *Baker v The Queen* and *Fardon v Attorney-General (Queensland)*. The most apparent issue that gained a greater degree of consensus in *Baker v The Queen* and *Fardon v Attorney-General (Queensland)* was the concern expressed for the integrity of the federal judiciary.

IV LIBERTY OF THE CITIZEN AND THE FEDERAL JUDICIARY: THE GLEESON COURT AND THE GLEESON COURT AND THE *KABLE* PRINCIPLES

A concern for the integrity of the federal judiciary, was expressed in the decisions of *Baker v The Queen* and *Fardon v Attorney-General (Queensland)*, however this concern, did not, for the majority, require the legislation challenged in these cases to be invalidated. In *Baker v The Queen* and *Fardon v Attorney-General (Queensland)*, the challengers sought to rely upon the principles

¹⁵⁵ *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 647 (Hayne J).

¹⁵⁶ *Ibid*, 595 (McHugh J).

established by the *Kable* decision to invalidate State legislation. The decision in *Kable* may be seen as a catalyst for the increase in litigation concerning Chapter III of the *Constitution*.

The decisions of *Baker v The Queen* and *Fardon v Attorney-General (Queensland)* are significant because they further demonstrate the Gleeson Court's retreat from the idea that gained currency in the Mason era. That is, namely, the idea that the separation of judicial power affected by Chapter III of the *Constitution* may give rise to individual immunities. Although, the Gleeson Court in *Baker v The Queen* and *Fardon v Attorney-General (Queensland)* has continued to recognise that the separation of judicial power may give rise to some limitations on the functions that Parliaments may confer on courts, there has been a shift in focus. This movement has been away from the idea of Chapter III as protecting *individual rights*, and towards the notion that Chapter III is concerned with protecting the *integrity of the judiciary*, and most significantly the *federal judiciary*. The approach of the majority in *Baker v R*¹⁵⁷ and *Fardon v Attorney-General (Queensland)*¹⁵⁸ indicates that the Gleeson Court will not expand the potential trajectory of the *Kable* decision. The potential scope of the *Kable* decision is apparent in Kirby J's dissenting judgments in *Baker* and *Fardon*. In other words, the Gleeson Court has not interpreted the *Kable* principles to expand the protections that Chapter III affords to individuals. A fundamental point that the following analysis makes is that the decisions in *Baker v R*¹⁵⁹ and *Fardon v Attorney-General (Queensland)*¹⁶⁰ confirm that the *Kable* decision is unlikely to be interpreted to offer protections to individuals. Rather, the High Court decision of *Kable* like the *Re Wakim* decision will be a landmark decision concerning the nature of Australian federalism. The following discussion, in addition to examining this shift in focus, will also consider the influence of legalism in the general approach of the Gleeson Court in *Baker v R*¹⁶¹ and *Fardon v Attorney-General (Queensland)*.¹⁶² It will be argued that the majority judgments are focused upon finding a solution that is limited to the facts before the Court, and in this way the majority generally adopts an essentially a-theoretical approach.

¹⁵⁷ (2004) 223 CLR 513.

¹⁵⁸ (2004) 223 CLR 575.

¹⁵⁹ (2004) 223 CLR 513.

¹⁶⁰ (2004) 223 CLR 575.

¹⁶¹ (2004) 223 CLR 513.

¹⁶² (2004) 223 CLR 575.

The following discussion will consider firstly with comparative brevity the decision in *Baker* as the decision of *Fardon v The Queen*, which will be discussed later in this section also addresses a number of the key issues raised in *Baker v Queen*. The focus of the following analysis will be upon drawing from these decisions the key issues that have significance for the argument presented in this thesis.

A *Baker v The Queen: Institutional and Individual Constitutional Protections*

The decision in *Baker v The Queen* concerned a 1997 amendment to s 13A of the *Sentencing Act 1989* (NSW), which in effect provided that persons who had been the subject of a 'non-release recommendation' would be required to serve at least 20 years before they could apply for the setting of a minimum non-parole term. Stated briefly, the constitutional challenge to these provisions questioned the selective nature of the provisions and the involvement of the Supreme Court in a process said to involve imprisonment by legislative decree. These arguments were largely rejected by the judges that formed the majority, with the validity of the challenged amendments to the *Sentencing Act 1989* (NSW) being upheld by Gleeson, McHugh, Gummow, Hayne, Callinan and Heydon JJ. Justice Kirby was the sole dissenter.

In the context of the wider argument presented in this thesis, the central point that it is argued is to be drawn from the approach of the majority justices in *Baker*, is that, the idea that Courts as the protectors of individuals liberties, is not a perspective that is emphasised by a majority of members of the Gleeson Court.

In *R v Baker* Gleeson CJ held that the challenged legislation did not amount to indefinite imprisonment by legislative decree.¹⁶³ In addition, Chief Justice Gleeson, in rejecting the submission put forward by the challenger, drew a clear distinction between issues of *legislative policy* and *legislative power*. Gleeson CJ sought to distinguish political arguments concerning the

¹⁶³ *Baker v R* (2004) 223 CLR 513, 522 (Gleeson CJ).

desirability of the legislation from legal arguments concerning the validity of the legislation in question.¹⁶⁴ His Honour acknowledged that the policy of singling out offenders the subject of non-release recommendations for 'special, and disadvantageous, treatment' could be viewed as being unreasonable because others may have escaped such recommendations based upon the 'inclination of a particular sentencing judge'.¹⁶⁵ However, for Chief Justice Gleeson any perceived unreasonableness of the challenged legislation did not indicate that the legislation was beyond power.¹⁶⁶ In deciding that the Parliament had power to pass the legislation in question, Gleeson CJ emphasised that the legislation was *not arbitrary*. For Gleeson CJ, it was open to the Parliament to discriminate between persons receiving life sentences by according a special regime for the most serious offenders that received 'non-release' recommendations.¹⁶⁷ Gleeson CJ held that the provisions were not devoid of content, and referred to a number of matters that the Supreme Court could legitimately consider in making a determination as to special circumstances. The reasons of Chief Justice Gleeson also emphasise the principle of statutory construction that legislation was to be read where possible as being within power.¹⁶⁸

The judgment in which Justices McHugh, Gummow, Hayne and Heydon joined, expressed similar concerns. For example, the joint judgment emphasised that 'the doctrine in *Kable* is expressed to be protective of the *institutional integrity* of the State courts as recipients and potential recipients of federal jurisdiction.'¹⁶⁹ The joint judgment held that there was nothing repugnant to the exercise of judicial power in the criterion set by the Parliament which specified the particular circumstances in which the legislation would operate.¹⁷⁰ In so holding the joint judgment supported the view that the legislation in question would have been valid even if it

¹⁶⁴ *Ibid*, 525.

¹⁶⁵ *Ibid*, 521.

¹⁶⁶ *Ibid*, 521-22.

¹⁶⁷ *Ibid*, 522.

¹⁶⁸ See *ibid*, 523-4, referring to *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

¹⁶⁹ *Baker v R* (2004) 223 CLR 513, 534 (McHugh, Gummow, Hayne and Heydon JJ).

¹⁷⁰ *Ibid*.

operated at a federal level.¹⁷¹ Justice Callinan, in separate reasons, also rejected the submissions put by the challengers.¹⁷²

The views of the majority centre upon the *institutional* protections afforded to the federal judiciary which is supported by Chapter III of the *Constitution* and the precedent set by *Kable*, whereas Kirby J focuses upon the *individual* character of the protection that his Honour derives from the *Kable* decision. Kirby J was particularly critical of the narrow interpretation that his Honour felt the majority had given to the *Kable* decision. His Honour reasoned that '[h]aving propounded this implication of the *Constitution*, this Court should not now unduly narrow its operation.'¹⁷³ His Honour noted that the limited application given to the *Kable* decision in effect treated '*Kable* as a constitutional guard-dog that would bark but once.'¹⁷⁴ In contrast to the narrow form of legalism evident in the majority approach, Justice Kirby held that to apply the principle in *Kable* it was necessary to take a theoretical approach. As his Honour stated,

[t]o apply *Kable*, it is essential to have a theory about the operation of courts in the integrated judicature of the Australian Commonwealth. In particular, as relevant to the present case, it is necessary to have a conception of the operation of a Supreme Court of a state, whose continued existence is expressly provided for in, and so guaranteed by, the *Constitution*.¹⁷⁵

Justice Kirby readily identified the repugnance of the legislation with the principles established in *Kable*.¹⁷⁶ Fundamentally, Kirby J's views are best expressed in his Honour's statement that the implication drawn from *Kable* exists, 'not for the protection of the *judiciary*, as such, but for the protection of all *people* in the Commonwealth.'¹⁷⁷

¹⁷¹ *Ibid*, 534-5.

¹⁷² *Ibid*, 573 (Callinan J). In particular, his Honour held (at 573) that the appeal failed because the appellant had not established that the Supreme Court in making a determination pursuant to the challenged legislation was not exercising judicial power, and his Honour went on to say, '[i]n deciding the application in the present case the court was undertaking an orthodox and conventional judicial exercise': *ibid*, 574.

¹⁷³ *Ibid*, 544.

¹⁷⁴ *Ibid*, 535.

¹⁷⁵ *Ibid*, 536 (Kirby J).

¹⁷⁶ *Ibid*, 546ff.

¹⁷⁷ *Ibid*, 544 (emphasis added).

The approach of Justice Kirby may be preferred on the basis that it is consistent with both the historical role of the Courts as the protectors of individual liberties,¹⁷⁸ and it is also in line with earlier decisions of the High Court such as *Chu Kheng Lim*.¹⁷⁹ It is, however, debatable whether the decision in *Kable* necessarily supports an implication of the form that Kirby J suggests, as opposed to an implication based upon a desire to protect the integrity of the federal judiciary. Further, it can be questioned whether the approach of Kirby J gives sufficient recognition to the distinction between State and federal Courts. This latter issue, which concerns the manner in which the *Kable* decision drew a distinction between State and federal Courts, was examined in greater detail in the decision of *Fardon v Attorney-General (Queensland)*, which will be the focus of the following analysis.

B *Fardon v Attorney-General (Queensland)*

The majority decision in *Fardon* confirmed the idea put forward in *Kable* that a law which may be invalid at a federal level because it breaches the separation of judicial power mandated by Chapter III, may nonetheless be valid at a State level provided certain requirements are met. The decision in *Fardon* concerned the validity of the *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld). That legislation authorised the Supreme Court of Queensland to make 'interim detention orders', 'supervision orders' or 'continuing detention orders' to provide for the detention of 'prisoners'. The legislation for the purposes of making these orders defined a 'prisoner' as being 'a prisoner detained in custody who is serving a period of imprisonment for a serious sexual offence, whether the person was sentenced to the term or period of imprisonment before or after the commencement of this section.'¹⁸⁰ The six judges that formed the majority in *Baker* (namely, Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ) also formed a majority in *Fardon*. Their Honours upheld the validity of the challenged

¹⁷⁸ See further, Chapter 7, Section II, above.

¹⁷⁹ See further, Chapter 8, Section IV, above.

¹⁸⁰ The statutory provisions are set out in the joint judgment of Justices Callinan and Heydon; see *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 650-2.

legislation.¹⁸¹ Kirby J was again the sole dissenter.¹⁸² That said, Gummow J expressed the view that the same legislation, if enacted at a federal level would have been invalid.¹⁸³ Kirby J, in his Honour's dissenting judgment also supported this conclusion.¹⁸⁴ No finding on this issue was made by the other members of the Court.¹⁸⁵

The following discussion argues that in the context of circumstances such as those raised in *Fardon* and *Baker*, the Gleeson Court is unlikely to find that there is interference with the institutional integrity of the State Court. The relevant circumstances in this regard are those in which the primary implications that follow from the conferred powers are of significance, not for the *institution integrity* of the Courts, but for the liberty of *individuals* coming before those Courts. This approach moves from the manner in which the realist influenced jurisprudence of the Mason era viewed the court as having a role in determining the nature of the relationship between the individual and governmental powers. In place of the realist's concern with balancing competing interests, there may be discerned in the legalistic approach of the Gleeson Court, a focus upon the institutional integrity of the judicial system. This movement is particularly apparent in the manner in which a number of justices in *Fardon* approach the constitutional protections put forward by the joint judgment in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.¹⁸⁶

Chief Justice Gleeson upheld the validity of the legislation challenged in *Fardon* and found that the relevant provisions did not compromise the institutional integrity of the Supreme Court by seeking to confer a function on the Court that was inconsistent with the Court's role as a repository of federal jurisdiction.¹⁸⁷ In making this determination Chief Justice Gleeson characterised the legislation as 'a general law authorising the preventive detention of a prisoner

¹⁸¹ See *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 593 (Gleeson CJ), 602 (McHugh J), 621 (Gummow J), 647 (Hayne J, substantially agreeing with the reasons of Gummow J), 658 (Callinan and Heydon JJ).

¹⁸² *Ibid*, 647 (Kirby J).

¹⁸³ *Ibid*, 608ff, 614 (Gummow J).

¹⁸⁴ *Ibid*, 631 (Kirby J).

¹⁸⁵ More specifically, Gleeson CJ found this issue unnecessary to decide: *ibid*, 591. This issue was not directly addressed by McHugh J. Hayne J (at 647) explicitly declined to express a view on this issue. Justices Callinan and Heydon made no finding on this issue, however their Honours did (at 658) recognise a distinction between State and federal Courts in this regard.

¹⁸⁶ (1992) 176 CLR 1.

¹⁸⁷ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 592-3 (Gleeson CJ).

in the interests of community protection'.¹⁸⁸ As such, his Honour held that the legislation 'authorises and empowers the Supreme Court to act in a manner which is consistent with its judicial character.'¹⁸⁹ Of relevance to Gleeson CJ was the effect of the legislation upon the judicial institution rather than the individual. As his Honour commented,

[i]t is the effect of the legislation upon the institutional integrity of the Supreme Court, rather than its effect upon the personal liberty of the appellant, that is said to conflict with the requirements of the Constitution¹⁹⁰

His Honour went on to comment that,

[t]here are important issues that could be raised about the legislative policy of continuing detention of offenders who have served their terms of imprisonment, and who are regarded as a danger to the community when released. Substantial questions of civil liberty arise. This case, however, is not concerned with those wider issues. The outcome turns upon a relatively narrow point, concerning the nature and function which the Act confers upon the Supreme Court. If it is concluded that the function is not repugnant to the institutional integrity of that Court, the argument for invalidity fails.¹⁹¹

This approach is consistent with the perspective usually taken by Chief Justice Gleeson and with the approach advocated by contemporary pragmatic writers. In particular, Gleeson CJ tends wherever possible to reach a decision on the basis of a low level of theorisation. In addition, the conclusion reached by Gleeson CJ can be seen to rest largely upon principles of statutory construction, rather than broad constitutional principles.

Justice McHugh also found that the Act did not compromise the institutional integrity of the Supreme Court of Queensland.¹⁹² His Honour found that the function conferred on the Supreme Court required the Court to determine whether there was 'an unacceptable risk that

¹⁸⁸ *Ibid*, 592.

¹⁸⁹ *Ibid*.

¹⁹⁰ *Ibid*, 586.

¹⁹¹ *Ibid*, 586-7 (Gleeson CJ)

¹⁹² *Ibid*, 598 (McHugh J).

the prisoner will commit a serious sexual offence'.¹⁹³ For McHugh J, this standard was 'sufficiently precise to engage the exercise of State judicial power.'¹⁹⁴ Interestingly, McHugh J commented that '*Kable* is a decision of very limited application.'¹⁹⁵ McHugh J noted the distinctions between the background to the *Kable* decision and the matters raised by the challenged legislation. In particular, his Honour emphasised that the legislative scheme in *Kable* was designed to ensure that that 'Mr Kable alone of all people in New South Wales, would be kept in prison after his term of imprisonment had expired.'¹⁹⁶ In contrast, the legislation challenged in *Fardon* required the Court to adjudicate upon 'the claim by the Executive that a prisoner is "a serious danger to the community" in accordance with the rules of evidence and "to a high degree of probability".'¹⁹⁷ However, arguably this distinction drawn by Justice McHugh is difficult to maintain. As argued in Chapter 9, although the fact that the legislation in *Kable* was directed to one named individual was clearly a matter of concern for the Court, the finding of invalidity in the *Kable* decision was based, not upon the effect of the legislation upon a named individual. Rather, the legislation was held invalid because it sought to involve the judiciary in a process that lacked the normal indicia of the judicial process.¹⁹⁸

Justice Gummow in *Fardon* also upheld the validity of the function conferred by the challenged legislation upon the State Supreme Court. His Honour reached this conclusion on the basis that both the criteria of operation set by the challenged legislation, and the nature of the inquiry that the Supreme Court was required to conduct pursuant to the challenged provisions, could be distinguished from the functions that the legislation in *Kable* had sought to confer upon the Supreme Court.¹⁹⁹ However, his Honour's approach differed from some of the other majority judges in a number of significant respects. First, his Honour gave greater consideration than the other majority justices to the effect of the challenged legislation upon individuals. In particular, his Honour considered the consequences of detention of sometimes indefinite duration upon

¹⁹³ *Ibid*, 597.

¹⁹⁴ *Ibid*.

¹⁹⁵ *Ibid*, 601.

¹⁹⁶ *Ibid*.

¹⁹⁷ *Ibid*, 602.

¹⁹⁸ See, for example, *Kable v The Directory of Public Prosecutions for the State of New South Wales* (1996) 189 CLR 51, 107 (Gaudron J), 120 (McHugh J), 134 (Gummow J).

¹⁹⁹ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 616-9 (Gummow J).

individuals in circumstances where such detention is imposed otherwise than as a punitive penalty imposed following conviction of a criminal offence.²⁰⁰ Secondly, Gummow J addressed the issue of whether the law in question, if enacted at a federal level and directed to federal courts, would be valid. On this point, Gummow J found that the challenged legislation, if it operated in this manner at a federal level, would contravene the requirements of Chapter III of the *Constitution* and be invalid.²⁰¹ Although Kirby J delivered the sole dissenting judgment, his Honour agreed with Gummow J on this point.²⁰² Justice Gummow, in reaching this conclusion about the validity of the legislation if it operated at a federal level, relied upon the decision of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*.²⁰³

For Gummow J, *Chu Kheng Lim* supported the view that citizens generally enjoyed a constitutional protection from executive detention other than as a form of punishment at the federal level, in which case such detention could only be ordered by a court exercising the judicial power of the Commonwealth.²⁰⁴ Justice Gummow in *Fardon* did not overturn this idea. However, his Honour put forward an alternative formulation of this principle, stating that,

I would prefer a formulation of the principle derived from Ch III in terms that, the “exceptional cases” aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts.²⁰⁵

Such a formulation is consistent with his Honour’s approach in *Al-Kateb*. In both cases, Gummow J indicates a willingness to consider the foundational principles upon which any constitutional protection may rest. In particular, in *Fardon* his Honour states,

[t]hat formulation also eschews the phrase “is penal or punitive in character”. In doing so, the formulation emphasises that the concern is with the deprivation of liberty without

²⁰⁰ *Ibid*, 612-4, 619ff (Gummow J).

²⁰¹ *Ibid*, 608ff, 614.

²⁰² *Ibid*, 631 (Kirby J).

²⁰³ (1992) 176 CLR 1.

²⁰⁴ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 611 (Gummow J).

²⁰⁵ *Ibid*, 612.

adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose.²⁰⁶

This finding is significant as it suggests that Gummow J recognises that the federal judiciary has a constitutional role in protecting the liberty of individuals, and that an encroachment on this role by the other branches of government may undermine the integrity of the federal judiciary. On this basis the approach of Gummow J is to be preferred over that of the other majority judges in *Fardon*. However, whilst Justice Gummow in *Fardon* has the greatest regard to the nature of any constitutional protection that may arise from the decision of *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*,²⁰⁷ it should be noted that the manner in which Justice Gummow interprets this case has the potential to significantly narrow the protection that the joint judgment in *Chu Kheng Lim* afforded to citizens. In particular, Gummow J commented that, 'the list of exceptions to which reference was made in *Lim* is not closed.'²⁰⁸

Hayne J agreed with Gummow J subject to the exception that his Honour refrained from expressing any view as to whether federal legislation along the same lines as the challenged legislation would be invalid.²⁰⁹ In this manner, Hayne J, consistent with the approach generally advocated by legal pragmatists, indicates a clear preference for deciding the minimum necessary to dispose of the case before the Court. This approach is particularly apparent in the approach of Hayne J in *Fardon*, the reason being that, as Gummow J points out, addressing the validity of the legislation if it operated at a federal level does not involve addressing a legal fiction, but rather it addresses a supposition which could form the basis of a logical argument.²¹⁰

Callinan and Heydon JJ in *Fardon* also found that the challenged legislation did not seek to confer a power upon the Supreme Court that was incompatible with its role as a repository of

²⁰⁶ *Ibid*, 612-3.

²⁰⁷ (1992) 176 CLR 1.

²⁰⁸ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 613 (Gummow J).

²⁰⁹ *Ibid*, 647-8 (Hayne J).

²¹⁰ *Ibid*, 614 (Gummow J).

federal jurisdiction.²¹¹ Although their Honours did not, as Gummow J did, hold that the legislation would be invalid if enacted at a federal level, their Honours did indicate that they would recognise a distinction between State and federal Courts in this regard.²¹²

Kirby J dissented. In doing so, his Honour emphasised the unreliability of predictions of criminal dangerousness, the Acts operation to deprive certain persons of the fundamental human right of personal liberty, and the distinction of the process contemplated by the Act from past and present notions of the judicial functions in Australia.²¹³ In particular, his Honour citing *Chu Kheng Lim* held that,

[a]s framed, the Act is invalid. It sets a very bad example, which, unless stopped in its tracks, will expand to endanger freedoms protected by the *Constitution*. In this country, judges do not impose punishment on people for their beliefs, however foolish or undesirable they may be regarded, nor for future crimes that people fear but which those concerned have not committed. In strictly limited circumstances, the judiciary permits “executive interference with the liberty of the individual” where “the purpose of the imprisonment is to achieve some legitimate non-punitive object.” Despite some attempts to give the Act that appearance, that is not the true meaning and effect of its terms. The appellant’s continued imprisonment is unlawful.²¹⁴

In this way, contrary to the approach taken by the majority judges in *Fardon*, Justice Kirby upheld, rather than narrowed, the constitutional protection established in *Lim*, and took a much wider approach to the interpretation of the legislation in question.

²¹¹ *Ibid*, 658 (Callinan and Heydon JJ).

²¹² *Ibid*.

²¹³ *Ibid*, 622ff, especially 623, 628 and 631 (Kirby J).

²¹⁴ *Ibid*, 623-4 (references omitted).

C Fardon: Federal Structure and Individual Protections

In summary it is argued that the general approach of the majority judges in *Fardon* suggests that the implication found in *Kable* will continue to be significant for the structure of the Australian federal system. In particular, it is likely that the High Court will continue to prohibit the conferral on State Supreme Courts of functions that are incompatible with the exercise of federal judicial power. That is, in the sense that the exercise of the functions that are sought to be conferred interferes with the *institutional integrity* of the Court. However, the approach in *Fardon* indicates that the Gleeson Court is unlikely to find that the institutional integrity of the State Court is being interfered with in circumstances where the primary implications of the exercise of the powers conferred are of significance, not for the *institutional integrity* of the Courts, but for the liberty of *individuals* coming before those Courts.²¹⁵ There is, of course, as Justice Kirby points out, some difficulty with this distinction. This distinction is problematic if it is accepted that an encroachment upon the ability of the Courts to protect the liberty of individuals *necessarily*, or in any particular case, undermines the institutional integrity of the judicial institution. This type of argument is addressed in a substantial way in the judgment of Gummow J. It is not addressed at length by the other members of the majority. In particular, a number of the majority do not consider the implications of the legislation for the rights and interests of individuals. Rather, underlying the approach of a number of the majority to the issues raised in *Fardon*, there may be perceived an understanding of the judicial role as being primarily to determine the scope of legislative powers.

As discussed above, the approaches of Gummow and Kirby JJ aside, the remaining members of the Court have adopted a largely un-theorised approach, which decides the minimum possible. This methodology advocates a position that is consistent with the low-level theorising advocated by legal pragmatists. It has been argued that the approach of Justice Gummow and that of Kirby J (in dissent), are exceptions to the prevailing perspectives which focus largely upon the scope of legislative powers. There is, however, a distinction between these two

²¹⁵ See also, H P Lee, 'The *Kable* Case: A Guard-Dog that Barked But Once' in George Winterton (ed), *State Constitutional Landmarks* (2006) 390.

judges, in that Kirby J demonstrates a greater concern for the rights and interests of individuals *per se* and the need of Courts to protect these rights. The emphasis in the judgment of Gummow J is on the need to preserve the integrity of the federal judiciary so as to enable the federal judiciary to perform its constitutional function of ascertaining the demarcation of powers between the three institutions of government.

Implicit in the judgment of Gummow J is the idea that the judicial and constitutional role of the federal court requires the federal judiciary to remain insulated from the performance of executive functions. To the extent that the constitutional role of the judiciary in protecting the interests of individuals is accepted and acknowledged by Gummow and Kirby JJ, their Honours approach is to be preferred to that of the other members of the Court, on the basis that it recognises the more complex role that the judiciary plays in the Australian federation. Furthermore, it is argued that the analysis of Gummow J, in considering the foundational principles upon which any constitutional protection may rest, provides a transparent account of the judicial reasoning process which has the advantage of offering guidance to future Courts and legislatures. The following discussion will consider further the differences between the approaches of members of the Gleeson Court in the final case examined in the chapter, namely *Forge v Australian Securities and Investments Commission*.²¹⁶

VII *FORGE V AUSTRALIAN SECURITIES AND INVESTMENTS COMMISSION*

The decision in *Forge v Australian Securities and Investments Commission*²¹⁷ raised the issue of the validity of the appointment of acting judges to State Supreme Courts.²¹⁸ This was one of two issues that arose in the proceedings. The other issue that arose concerned the construction and validity of the transitional provisions of Chapter 10 of the *Corporations Act 2001* (Cth). In relation to this later issue the Court unanimously held that the provisions validly operated with

²¹⁶ (2006) 229 ALR 223.

²¹⁷ *Ibid.*

²¹⁸ See generally, Enid Campbell and HP Lee, *The Australian Judiciary* (2001) 86ff.

the effect that the proceedings in question constituted a matter arising under a law made by the parliament within the meaning of section 76(ii) of the *Constitution*.²¹⁹ Of particular relevance to the current discussion, however, is the challenge to section 37 of the *Supreme Court Act 1970* (NSW) which provided for the appointment of acting judges for a period not exceeding 12 months. This challenge raised the central issue of the interpretation of Chapter III of the *Constitution*.

The question of the validity of the provisions that provided for the appointment of acting judges is particularly significant in the context of the current analysis. The reason being that whilst the six judges that formed the majority, upheld the validity of these legislative provisions, the reasons that their Honours provided, rested upon substantially different origins.²²⁰ In particular, it will be argued that there is a divide between the approach taken to this issue by Gleeson CJ, Callinan and Heydon J, and that taken by Gummow, Hayne and Crennan JJ.

Chief Justice Gleeson gave separate reasons for reaching a conclusion as to the validity of legislation providing for the appointment of acting judges.²²¹ Callinan J agreed with the reasoning of Gleeson CJ on the issue of the validity of the legislation appointing acting judges, and provided some additional reasons.²²² Heydon J in a separate judgment expressed a similar line of reasoning to that employed by Gleeson CJ. Justice Heydon's approach diverges significantly from the approach of the joint judgment of Gummow, Hayne and Crennan JJ.²²³ Justice Kirby was the sole dissenter in *Forge*. Kirby J held that the number of acting judicial appointments made showed a clear trend affecting the integrity of the Court. In particular his Honour held that, the number and type of acting appointments made under the challenged

²¹⁹ (2006) 229 ALR 223, 225 [4] (Gleeson CJ, agreeing with the reasons of Gummow, Hayne and Crennan JJ on this issue), 251 [103]ff (Gummow, Hayne and Crennan JJ), 290 [233] (Kirby J), 290 [237] (Callinan J, agreeing with the reasons of Gummow, Hayne and Crennan JJ on this issue), 302 [278] Heydon J agreeing with the reasons of Gummow, Hayne and Crennan JJ on this issue).

²²⁰ See *Forge* (2006) 229 ALR 223, 225 [5]ff (Gleeson CJ), 236 [50]ff (Gummow, Hayne and Crennan JJ), 290 [238]ff (Callinan J), 292 [244]ff (Heydon J); 256 [124]ff (Kirby J, dissenting). Acknowledgment is also given to the analysis of this case provided in the presentations entitled '*Forge v ASIC: Acting Judges in State Courts*' by Justice Tom Gray, Sashi Maharaj QC, and Dr Chris Bleby at the South Australian Chapter, Australian Association of Constitutional Law meeting, Adelaide, 16 October 2006.

²²¹ *Ibid*, 225 [5]ff (Gleeson CJ).

²²² *Ibid*, 290 [238]ff (Callinan J).

²²³ *Ibid*, 292 [244]ff (Heydon J).

legislation were 'such as to amount to an impermissible attempt to alter the character of the Supreme Court.'²²⁴

In addressing the issue of the validity of legislation providing for the appointment of acting judges, Gleeson CJ notes that 'Australia has an integrated, but not unitary, court system'.²²⁵ Gleeson CJ also made it clear that whilst section 72 of the *Constitution* applied to federal courts, the requirements of section 72 did not directly attach to State Courts.²²⁶ That said; Gleeson CJ went on to address the applicant's argument which was based upon the decision in *Kable v Director of Public Prosecutions (NSW)*.²²⁷ The applicant submitted that *Kable* established that,

since the Constitution established an integrated court system, and contemplates the exercise of federal jurisdiction by state Supreme Courts, state legislation which purports to confer upon such a court a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.²²⁸

The challengers in *Forge* submitted that, by parity of reasoning, the *Kable* principle rendered the challenged legislation invalid. Rejecting the suggestion that the applicant's argument was supported by the *Kable* decision, Gleeson CJ held that '[i]f the conclusion for which the applicants contend truly followed from the principle, then the principle would require reconsideration'.²²⁹ Gleeson CJ held that State Supreme Courts were required to follow and answer the description of 'courts' defined in the *Constitution*, however his Honour reasoned that to do this all that was required was that the State Supreme Courts meet the '*minimum requirements of independence and impartiality*'.²³⁰ For Gleeson CJ, although it was possible to imagine extreme cases in which abuses of power could occur, the challenged legislation did not

²²⁴ *Ibid*, 256 [124]ff. In reaching this conclusion his Honour also had a regard for international law and covenants that addressed issues such as the need for impartiality in judicial adjudication and the requirements of security of judicial tenure. See further, *ibid*, 283 [207]ff.

²²⁵ *Ibid*, 232 [36] (Gleeson CJ).

²²⁶ *Ibid*, 233 [38] (Gleeson CJ). See also *ibid*, 295 [255] (Heydon J).

²²⁷ *Ibid*, 233 [40].

²²⁸ *Ibid*.

²²⁹ *Ibid*, 234 [40].

²³⁰ *Ibid*, 234 [41] (emphasis added).

interfere with these minimum requirements. In comparison to the joint judgment, the approach of Gleeson CJ can be seen to be less interventionist upon the role of the Executive in appointing judges. The general tenor of Gleeson CJ's comments, reflect the view that judicial appointments are a matter for the Executive:

The responsibility for making decisions about judicial appointments, including numbers and circumstances of appointments, rests with those who have the responsibility of paying the salaries, and providing the necessary resources, of the appointees, and who have political accountability for bad or unpopular decisions about appointments.²³¹

In this way, Gleeson CJ recognises a greater degree of latitude to the Executive in making such an appointment. His Honour is less willing than the joint judgment to find a basis for interfering with the exercise of this discretion by the Executive. This perspective is particularly apparent in his Honour's comments which suggest that whilst criticisms may be made of the particular circumstances of judicial appointment, it is difficult to identify this as being a *justiciable* point.²³²

Consistent with the concerns of legal pragmatists, the approach that Gleeson CJ adopted was in a number of ways mindful of the *practical issues* that the challenge raised. First, Gleeson CJ referred in some detail to a number of practical considerations that led to the appointment of acting judges as follows:²³³

Minimum standards of judicial independence are not developed in a vacuum. They take account of considerations of history, and of the exigencies of government. There are sound practical reasons why State governments might need the flexibility provided by a power to appoint acting judges.²³⁴

²³¹ *Ibid*, 228 [19].

²³² *Ibid*, 235 [45]. See also *ibid*, 228 [20].

²³³ *Ibid*, 229-232 [25]-[32].

²³⁴ *Ibid*, 231[32], 234 [42].

Secondly, Gleeson CJ was also mindful of the practical consequences that could follow from any finding that the legislation was invalid. More specifically, Gleeson CJ commented that, '[t]he potential consequences for him [Forster AJ], and for other litigants, if the challenge succeeds have not been explored'.²³⁵ These matters indicate that, consistent with his Honour's usual approach, considerations of practicality continue to inform the reasoning of Gleeson CJ.

Two central themes can be identified in the approach of Gleeson CJ. The first is a reluctance to interfere with decisions of the executive that can be characterised as influenced by policy considerations.²³⁶ The second trend is a regard for matters of practicability.²³⁷ These themes are apparent even though in addressing the constitutional challenge in *Forge*, his Honour's reasoning is tied very closely to the facts of the immediate challenge. Gleeson CJ was content to decide the minimum possible, and to hold back on seeking to set out exhaustive criteria by which the validity of legislation that may raise similar issues could be determined. This approach is consistent with the incremental development of the law that may be associated with an orthodox common law technique, and is also reflective of the preferred approach of legal pragmatists. However, the criticism that is generally levelled at this form of reasoning, and which may be made of the Chief Justice's approach, is that it gives little guidance to individuals, legislators and future courts.

Justice Callinan agreed with the approach of Gleeson CJ, and Heydon J followed a similar line of reasoning, although his Honour indicated an even narrower approach in many respects. For example, Heydon J gave the principles in *Kable* an even narrower construction than that given by the judgment of Gleeson CJ and the joint judgment.²³⁸ His Honour also relied upon the practice of appointing acting judges prior to federation to support 'the conclusion that Ch III contemplates the validity of State legislation permitting the appointment of acting judges.'²³⁹ Heydon J construed widely the powers of the Executive to appoint acting judges. For instance, his Honour was critical of the defendant's and the interveners' concession that there may be

²³⁵ *Ibid*, 225 [7].

²³⁶ *Ibid*, 229 [26].

²³⁷ *Ibid*, 225 [7], 231 [32], 234 [42].

²³⁸ *Ibid*, 295 [255] (Heydon J).

²³⁹ *Ibid*, 302 [277].

some limits on the power of the Executive to appoint acting judges.²⁴⁰ In taking this approach Justice Heydon indicated a desire to decide the minimum possible and gave reasons which were even more limited in their scope than those of the other majority judges. In particular, his Honour held that in respect of the challenged legislation it was better to construe this legislation broadly without finally deciding 'what its true construction is'.²⁴¹

Gummow, Hayne and Crennan JJ also upheld the validity of the challenged legislation. In so doing their Honours recognised that the issue raised a fundamental question about the operation of Chapter III. Justices Gummow, Hayne and Crennan, in addressing the issues raised in *Forge*, held that the Attorney-General's power to appoint acting judges was not unlimited.²⁴² The joint judgment recognised that the High Court could have a role in holding invalid particular judicial appointments made by the Executive.²⁴³ In particular, the joint judgment held that:

Because Chapter III requires that there be a body fitting the description "the Supreme Court of a State", it is beyond the legislative power of a State to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.²⁴⁴

In reference to the principle established in *Kable* their Honours held as follows:

If the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark the court apart from other decision-making bodies.²⁴⁵

In this way the joint judgment took an approach that gave the judiciary a significantly wider role in determining the validity of judicial appointments than that recognised by the other judges that formed the majority. Of critical importance to an understanding of the perspective

²⁴⁰ *Ibid*, 293 [247]-[248].

²⁴¹ *Ibid*, 293 [249].

²⁴² *Ibid*, 244-5 [78] (Gummow, Hayne and Crennan JJ).

²⁴³ *Ibid*, 240-1 [63], 251 [101].

²⁴⁴ *Ibid*, 240 [63].

²⁴⁵ *Ibid*, 241 [63].

taken by the joint judgment is a consideration of the starting point of their Honours' reasoning. The starting point for the determination of the joint judgment was the understanding of Chapter III put forward in *Boilermakers*.²⁴⁶ That is the view that it is the role of the federal judiciary to determine the limits of the powers of the three branches of government.²⁴⁷ This may be compared to the approach of Gleeson CJ which appears to take, as a starting point, the view that the appointment of judicial officers is a matter for the Executive, and to consider the historical role of appointing acting judges.²⁴⁸ The joint judgment may also in this regard be distinguished from the approach of Heydon J, who places an even greater focus than Gleeson CJ upon the historical practice of appointing acting judges.²⁴⁹

Whilst it will be argued that the reasons of the joint judgment were wider in their scope than that of Gleeson CJ, Callinan and Heydon JJ, the joint judgment did not set out exhaustive criteria or seek to set (even generally) well defined boundaries to indicate the validity of acting judicial appointments. In this way, the approach of the joint judgment can be distinguished from the tendency of the Mason era, (and particularly the judgments of Deane J), to at times state principles of general application. The joint judgment of Justices Gummow, Hayne and Crennan did, however, provide some general comments that indicate the matters that may support a future argument for the invalidity of a particular acting judicial appointment. In particular, their Honours indicated that the Court must be principally comprised of permanent judges.²⁵⁰ Their Honours also indicated that satisfaction of the constitutional description of the 'Supreme Court of a State' is not sufficiently met by the application of the apprehension of bias principle. That said, their Honours went on to hold that this principle could have application in particular cases.²⁵¹ For instance, their Honours indicated that the number of legal practitioners appointed had the potential to distort the character of the Court (their Honours did not quantify

²⁴⁶ *Ibid*, 238 [56].

²⁴⁷ *Ibid*.

²⁴⁸ *Ibid*, 228 [19] (Gleeson CJ).

²⁴⁹ *Ibid*, 295 [256]ff (Heydon J). In particular his Honour concludes that 'the history of acting judges in the Colonies before federation points to the conclusion that Ch III contemplates the validity of State legislation permitting the appointment of acting judges': see *ibid*, 302 [277].

²⁵⁰ *Ibid*, 248 [89]-[90] (Gummow, Hayne and Crennan JJ).

²⁵¹ In particular, their Honours indicated the relevance of both the 'fact and the appearance of independence and impartiality in identifying whether particular legislative steps distort the character of the court concerned': *ibid* 242 [68] (Gummow, Hayne and Crennan JJ).

the number of practitioner appointments required to have this effect).²⁵² Their Honours' approach, in comparison to that of the other majority judges, also appeared less sympathetic to arguments based upon the 'cost' to the Executive of any constitutional prohibition upon the appointment of acting judges.²⁵³

In making these findings their Honours indicated that requirements that attach to inferior courts may differ from those that attach to courts of record.²⁵⁴ What is, however, particularly significant about the manner in which these issues were raised by the joint judgment was the willingness to indicate and specify the fundamental principle that was informing their Honours' judicial reasoning.

The net effect of the reasoning of the joint judgment was to hold that a number of substantive matters would affect the institutional impartiality of the Court. For their Honours, 'the institutional integrity of State Supreme Courts' was not inevitably compromised by the appointment of acting judges.²⁵⁵ This approach indicates that in general, quantitative criteria alone will be unlikely to be a sufficient indicator of invalidity.²⁵⁶ As those alleging invalidity had not sought to make any case separate from and additional to their basic proposition that section 37 was wholly invalid, the argument failed because it had 'not demonstrated that s 37 was not validly engaged to appoint Forster AJ as an acting judge of the Supreme Court of New South Wales'.²⁵⁷ The joint judgment leaves open the possibility that different factual situations may call for the Court to find other acting judicial appointments invalid.

²⁵² *Ibid*, 250 [97].

²⁵³ *Ibid*, 248 [90]. Their Honours also commented that

Rather than pursue the illusion that some numerical boundary can be set, it is more profitable to give due attention to the considerations that would have to inform any attempt to fix such a boundary: the fact and appearance of judicial independence and impartiality: *Forge* (2006) 229 ALR 223, 248 [90] (Gummow, Hayne and Crennan JJ).

²⁵⁴ *Forge* (2006) 229 ALR 223, 245[82] - 246[85] (Gummow, Hayne and Crennan JJ).

²⁵⁵ *Ibid*, 249 [93].

²⁵⁶ *Ibid*, 251 [101].

²⁵⁷ *Ibid*, 251 [102].

A *The Decision of Forge and the Divide between the Approaches of Members of the Gleeson Court*

It can be concluded that the approach taken by members of the current High Court to the issues raised in *Forge*, are representative of the general approach and trends that have been associated with the Gleeson Court. The approaches of all of the majority judges are generally legalistic, with Kirby J taking the widest approach. In addition, there is a significant divide between the approach of Gleeson CJ, Callinan and Heydon JJ and that of Gummow CJ, Hayne and Crennan JJ. The reasons of Gleeson CJ, Callinan and Heydon JJ focus upon the scope of legislative powers and the historical practice of appointing acting judges, with Gleeson CJ expressing the greatest degree of concern for the practical consequences of the challenger's submissions. In comparison, the approach of Gummow, Hayne and Crennan JJ focuses in a more fundamental way upon the need to preserve the integrity of the federal judiciary.

Discernable in the approach of all members of the majority, is a tendency to seek to limit the scope of their Honours' reasoning to the immediate controversy before the Court. This approach is the most apparent in the reasoning of Heydon J. Although the joint judgment of Gummow, Hayne and Crennan JJ sets out some indicia of invalidity, their Honours do not attempt to state broad principles of general application. Therefore, although their Honours can be seen to adopt a more theorised form of legalism than that found in the reasoning of Gleeson CJ, Callinan and Heydon JJ, even this approach would seem to stop short of establishing general principles in the manner characteristic of the Mason era.

VIII CONCLUSION TO PART II

The arguments put forward in this Chapter, considered together with the analysis presented in foregoing Chapters, present a critical and comparative perspective of the approaches of the Dixon, Mason and Gleeson Courts. The central conclusions made concerning the Dixon, Mason

and Gleeson Courts are reviewed in the conclusion to this thesis. The fundamental point made in this Chapter is that the change in *methodology* that has occurred in Chapter III jurisprudence from the Mason to Gleeson era has brought about some *substantive* changes in the law. Other themes may also be identified. A significant theme has been the concern that members of the Gleeson Court have shown for the integrity of the federal judiciary. The analysis presented in this Chapter has also enabled the approach of individual judges to be examined.

Turning first to the methodological changes, the following points may be stated. The approach and methodology of the Gleeson Court has significantly shifted from the approach of the Mason Court. The general methodology of the Gleeson Court is legalistic. There is a significant emphasis placed upon the terms of the *Constitution* and established precedents. In addition to the influence of legalism, a number of elements that may be associated with pragmatic thought may also be identified to varying degrees in decisions of the Gleeson Court.²⁵⁸ For example, the movement of the Gleeson Court away from the approach of the Mason era (which tended to state broad general principles), may be viewed as being consistent with elements of pragmatic legal thought. The idea that there is no 'over-arching' theory may be seen in the reluctance of the Gleeson Court to openly and consistently embrace any particular interpretive method. The Gleeson Court's inclination to have a varying regard for practical considerations has received a varying degree of support from members of the Court. These considerations, as discussed in Chapter 5, are consistent with the ideology of pragmatism.²⁵⁹ The analysis presented in this Chapter demonstrates that Gleeson CJ expresses the most concern for practical considerations. The idea that judicial decisions should be based primarily upon low level theorising may be seen in the Gleeson Court's tendency to seek to base their Honour's reasoning, wherever possible, upon principles of statutory construction.²⁶⁰ The general tendency of the Court to tie

²⁵⁸ See further Conclusion to Part I, above.

²⁵⁹ See, for example, *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 232 (Gleeson CJ). See also, *Re Governor Goulburn Correction Centre; Ex parte Eastman* (1999) 200 CLR 322, 332 (Gleeson CJ, McHugh and Callinan JJ); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

²⁶⁰ See, for example, *Al-Kateb v Godwin* 219 CLR 562, 581 (McHugh J), 638 (Hayne J), 661 (Callinan J); 573 (Gleeson, in dissent); *Baker v R* (2004) 223 CLR 513, 523-4 (Gleeson CJ) referring to *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), 35-61.

any conclusions reached very closely to the facts of the case is also consistent with this aspect of pragmatic thought.

The legalistic and pragmatic elements of the approach of the Gleeson Court may be contrasted to the realist and natural law influenced jurisprudence of the Mason era, which saw the High Court at times seeking to balance the interests of individuals with governmental powers. There was also significant support on the High Court of the Mason era for the idea that the interests of individuals may at times be of paramount importance. It has been argued that the Gleeson Court's legalistic focus on the *text* of the *Constitution*, which focuses upon the institutions of government, has resulted in the Gleeson Court emphasising institutional powers rather than individual interests. Stated in general terms, the change in *method* has resulted in some *substantive* changes.

The *substantive* changes in the law that have been identified in this Chapter are apparent in two fundamental respects. First, the cases considered in this Chapter show that there has been a retreat from the idea that Chapter III may be a source of individual protections.²⁶¹ This approach is, for example, apparent in *Al-Kateb*, *Baker* and *Fardon* in the manner in which the decisions of *Chu Kheng Lim* and *Kable* are interpreted.²⁶² Secondly, there has been a change in the understanding of Australian federalism with the Court moving to a position which emphasises that a strict separation of judicial power is necessary in order to protect the integrity of the federal judiciary.²⁶³ These two substantive changes in the law relate to the central theme that may be identified in the Gleeson Court's Chapter III jurisprudence, namely, a concern to protect the integrity of the federal judiciary.

It has been argued that a concern for the integrity for the federal judiciary is most apparent in the approach of Gummow J. Gummow J accords the federal judiciary a fundamental and foundational role in the Australian federation, with his Honour's approach to the separation of

²⁶¹ See, for example, *Al-Kateb v Godwin and Others* (2004) 219 CLR 562, 581-3 (McHugh J), 648 (Hayne J), 659 (Callinan J); *Baker v R* (2004) 223 CLR 513, 534 (McHugh, Gummow, Hayne, Heydon JJ); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 586 (Gleeson CJ), 598 (McHugh J), 658 (Callinan and Heydon JJ).

²⁶² *Ibid.*

²⁶³ See, for example, *Re Wakim* (1999) 198 CLR 511, 546 (Gleeson CJ), 562 (McHugh J), 581 (Gummow and Hayne JJ).

judicial power resembling the reasoning of Sir Owen Dixon in decisions such as *Boilermakers* and the *Australian Communist Party v Commonwealth*.²⁶⁴ A concern for the integrity of the federal judiciary may also be seen to underlie his Honour's dissents in cases such as *Gould v Brown* and *Al-Kateb*.²⁶⁵ However, whilst a concern for the integrity of the federal judiciary is an issue championed by Gummow J, there is at times wide support for this perspective from the Gleeson bench. For example, this concern can be seen as a fundamental influence upon all members of the majority in decisions such as *Re Wakim, Baker and Fardon*.²⁶⁶ It should also be recognised that the influence of this perspective may at times be at the expense of considerations of practicability.²⁶⁷ Whilst a concern for the integrity of the federal judiciary is a common theme that may be identified in the judgments of Gummow J and most other members of the Gleeson Court, there are some unique differences in the approach of Gummow J.

A fundamental argument made in this Chapter is that the difference of the approach of Gummow J indicates that whilst the approach of most members of the Gleeson Court falls within the general rubric of legalism (with elements of a pragmatic approach also being apparent), there are some fundamental differences in the forms of legalism adopted. Justice Heydon clearly, as it would be expected,²⁶⁸ exhibits the narrowest and most confined form of legalism. A form of legalistic analysis that is limited in scope has also been advocated and applied by McHugh J,²⁶⁹ and it is an approach that often draws the support of Callinan J.²⁷⁰

²⁶⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 29 CLR 257; *Australian Communist Party v Commonwealth* ('*Communist Party Case*') (1951) 83 CLR 1. See, for example, *Re Wakim* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ); *Al-Kateb v Godwin* 219 CLR 562, 613 (Gummow J, in dissent). See further, Justice W M C Gummow, 'The Constitution: Ultimate foundation of Australian law?' (2005) 79 *Australian Law Journal* 167, 177-81.

²⁶⁵ See, *Gould v Brown* (1998) 193 CLR 346, 445-8 (Gummow J, in dissent); *Al-Kateb v Godwin* 219 CLR 562, 613 (Gummow J, in dissent).

²⁶⁶ *Re Wakim* (1999) 198 CLR 511, 546 (Gleeson CJ), 546 (Gaudron J, agreeing with Gummow and Hayne JJ); 562 (McHugh J), 581 (Gummow and Hayne JJ), 626 (Callinan J, agreeing with McHugh J); *Baker v R* (2004) 223 CLR 513, 522 (Gleeson CJ), 534 (McHugh, Gummow, Hayne, Heydon JJ), 573 (Callinan J); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 586 (Gleeson CJ), 598 (McHugh J), 612 (Gummow J, although as argued above Gummow J also in this case had a significant regard for the liberty of the individual), 647-8 (Hayne J, agreeing with Gummow J), 658 (Callinan and Heydon JJ).

²⁶⁷ See *Re Wakim* (1999) 198 CLR 511. See further, Chris Bleby, 'Judicial Policy in Constitutional Interpretation: "Practicality" as a Constitutional Concept' (unpublished paper delivered to the CLE Programme of the Law Society of South Australia, 21 August 2002).

²⁶⁸ Justice Dyson Heydon to Quadrant Dinner, 30 October 2002, reported as 'Judicial activism and the death of the rule of law' (2003) 47 *Quadrant* 9; 'Judicial activism and the death of the rule of law' (2003) 23 *Australian Bar Review* 110. See also, for example, *Al-Kateb v Godwin* 219 CLR 562, 662-3 (Hayne J); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 293 [249] (Heydon J).

²⁶⁹ See, for example, *Re Wakim* (1999) 198 CLR 511, 548-9 (McHugh J), *Al-Kateb v Godwin* 219 CLR 562, 584 (McHugh J).

Hayne J may also, at times, be viewed as adopting this approach particularly when his Honour issues separate reasons.²⁷¹ Gleeson CJ takes a somewhat wider approach than Heydon J but demonstrates a clear tendency to focus on questions of statutory construction and to seek to decide the minimum possible.²⁷² Thus, in general, a tendency to avoid theoretical reasoning and to not engage at length in any discussion of the judicial role may be identified in the reasoning of Gleeson CJ, McHugh, Callinan and Heydon JJ, and sometimes Hayne J. The low-level of theorisation that is implicit in the approach of these Justices is reflected in the reliance placed upon the principles of statutory construction or the process of characterisation of a legislative head of power. These approaches are also, at times, employed in conjunction with a regard to considerations of practicability, with this latter influence being particularly apparent in the approach of Gleeson CJ.²⁷³

In contrast to the form of legalism generally put forward by Gleeson CJ, McHugh, Heydon and Callinan JJ, the form of legalism put forward by Gummow J is more generally theorised than the approach of other judges.²⁷⁴ The approach of Gummow J in *Al-Kateb* and in the approach of the joint judgment in *Forge*, exemplify this type of reasoning.²⁷⁵ It has been argued that there are grounds for the more theorised form of legalism (associated with Gummow J) being preferred over the more confined form of legalism identified in the approach of most other members of the Gleeson Court (apart from Kirby J). In particular, it has been argued that Justice Gummow often articulates the foundational principles upon which his Honour relies. The written judgments of Justice Gummow also tend to specify the manner in which the core or fundamental principles are applied by his Honour to the matter before the Court. It has been argued that, in this way, the approach of Gummow J often provides a more transparent account of the judicial reasoning process, which usually provides a compelling argument in favour of

²⁷⁰ See, for example, *Al-Kateb v Godwin* 219 CLR 562, 659 (Callinan J); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 290 [238] (Callinan J).

²⁷¹ See, for example, *Al-Kateb v Godwin* 219 CLR 562, 645 (Hayne J).

²⁷² See, for example, *Al-Kateb v Godwin* 219 CLR 562, 573 (Gleeson CJ, in dissent); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 229[26]ff (Gleeson CJ).

²⁷³ See, for example, *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 225 [7] (Gleeson CJ).

²⁷⁴ See, for example, *Re Wakim* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ), *Al-Kateb v Godwin* 219 CLR 562, 609 ff (Gummow J); *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, 614 (Gummow J).

²⁷⁵ See, *Al-Kateb v Godwin* 219 CLR 562, 609 ff (Gummow J), *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 238 [56]ff (Gummow, Hayne and Crennan JJ).

the conclusions reached. As such, his Honour's judgments have a greater value as precedents as they provide better guidance to other judges and legislators. Put generally, Gummow J's expression of logical principled reasoning that rests upon specified foundational principles resembles attributes of both the Dixon and Mason Courts. That said, Gummow J does not go as far as some decisions of the Mason era, in that his Honour does not generally seek to set out exhaustive criterion, or principles of general application.

The legalistic approach of Gummow J, based upon the identification of and the reasoning from fundamental principles, is an approach which was also advocated and put forward by Gaudron J.²⁷⁶ It is an approach with which Hayne J sometimes joins.²⁷⁷ It is too early to say, but there is some initial indication that this approach will be supported by Crennan J.²⁷⁸ These comments should, however, be qualified, by noting that when Hayne J delivers separate reasons the approach represented in such reasoning usually bears a greater resemblance to the approach of Gleeson CJ than it does to that of Gummow J.²⁷⁹

The general connotation that may be drawn from these tendencies is that a judicial approach which seeks either to avoid theoretical reasoning altogether, or if engaging in such reasoning to do so a low level of abstraction and to decide the minimum possible, has wide support on the Gleeson Court. The most apparent exception to this approach may be found in the jurisprudence of Kirby J, with his Honour demonstrating an inclination to at times rely upon broad constitutional principles.²⁸⁰ In this respect, Kirby J takes a wider approach that often incorporates matters that are outside of the scope of the orthodox view of legalism.²⁸¹

²⁷⁶ See, for example, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 57 (Gaudron J); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 703-704 (Gaudron J); *Kable v DPP* (1996) 189 CLR 51, 107 (Gaudron J); *Nicholas* (1998) 193 CLR 173, 208-209 (Gaudron J); *Re Wakim* (1999) 198 CLR 511, 546 (Gaudron J, agreeing with Gummow and Hayne JJ). See further, Cheryl Saunders, 'Interpreting the Constitution' (2004) 15 *Public Law Review*, 289; Justice Susan Kenny, 'Concepts of judicial responsibility: the contribution of the "one of seven"' (2004) 15 *Public Law Review*, 283; Adrienne Stone, 'Justice Gaudron and constitutional rights' (2004) 15 *Public Law Review*, 297.

²⁷⁷ See, for example, *Re Wakim* (1999) 198 CLR 511, 575 (Gummow and Hayne JJ); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 238 [56]ff (Gummow, Hayne and Crennan JJ).

²⁷⁸ See *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 238 [56]ff (Gummow, Hayne and Crennan JJ).

²⁷⁹ See, for example, *Al-Kateb v Godwin* 219 CLR 562, 645 (Hayne J).

²⁸⁰ See, for example, *Al-Kateb v Godwin* 219 CLR 562, 615 (Kirby J, in dissent); *Forge v Australian Securities and Investments Commission & Ors* (2006) 229 ALR 223, 256 [124]ff, especially 283 [207]ff (Kirby J, in dissent).

²⁸¹ *Ibid.*

Chapter 10

As this Chapter has demonstrated a number of important conclusions may be drawn from an analysis of the Gleeson Court's Chapter III jurisprudence. They include the shift to legalism, the retreat from the idea of Chapter III as a source of individual constitutional protections, the re-emphasis upon the strict view of the separation of judicial power and the Gleeson Court's concern for the integrity of the federal judiciary.

Thesis

CONCLUSION

I think the Court has shown an ever-growing tendency to decide cases upon the minor premises and not to concern itself with general propositions but to go to the precise facts and circumstances

...

The profession has never, I think, been sufficiently solid in the presentation of a policy or a view, but possibly that lies in the hands of those who practise it at present. Sitting here, I can only say that as I view it, the tradition of the law is a trust, entrusted to the hands of the lawyers of the day for the benefit of the future as well as for the benefit of the present.

Sir Owen Dixon, 7th May, 1952.¹

This thesis has analysed the issue raised by Sir Owen Dixon in the above quotation. That is, the extent to which theoretical reasoning, as opposed to a narrow debate based upon the facts of the case can be of relevance to Australian constitutional jurisprudence. The theoretical perspectives of *legalism*, *realism*, and *pragmatism* have been analysed in Part I. Ideas associated with natural law theories were also considered with comparative brevity.² The analysis throughout this thesis has primarily considered the judicial approaches of the Dixon, Mason and Gleeson eras, with the Brennan era also being briefly discussed. Part II of thesis offered a more diffuse analysis considering these theoretical assumptions in the context of the High Court's constitutional jurisprudence concerning *judicial power*.

¹ Sir Owen Dixon, Address upon the occasion of first presiding as Chief Justice at Melbourne on 7th May, 1952, in Sir Owen Dixon, *Jesting Pilate* (1965) 250, 251.

² See Chapter 4.

At the start of this thesis, it was noted that debates about judicial method in Australian jurisprudence have tended to take as their starting point the ideas associated with legalism. Almost axiomatic in that discussion is the centrality of Sir Owen Dixon's statement that '[t]here is no other safe guide to judicial decisions in great conflicts than a strict and complete legalism.'³ However, as Chapter 2 demonstrated Sir Owen Dixon's legalism is *not* a narrow version of this doctrine, which is at times implied from his Honour's reference to 'strict and complete legalism'. Rather, Sir Owen Dixon put forward a version of legalism that was based upon some fundamental theoretical assumptions, including the assumption that a *corpus* of legal knowledge existed or could be presupposed to exist. It was also argued that whilst the approach of the Gleeson Court followed the methodology of legalism it was uncoupled from the fundamental precepts of the Dixonian approach.

Legalism remains at the core of Australian jurisprudence, however, the analysis in this thesis, questioned the tendency for debates concerning judicial method to cling to the reference or 'centre-point' provided by Sir Owen Dixon's statement.⁴ The reason for this, as Sir Anthony Mason states, is that '[o]nce the inadequacy of the text as a touchstone is recognised, a variety of *theoretical approaches* to constitutional interpretation begin to open up.'⁵ As Chapter 3 explained the Mason Court moved away from a legalistic approach, and challenged some of the fundamental assumptions of legalism. As a consequence the Mason era witnessed a challenge to Dixonian legalism. In place of a legalistic approach, the Mason era developed a theorised form of jurisprudence, characterised by a tendency to state broad principles. Sir Anthony Mason was the central advocate of this change, writing in 1986 that,

[t]he movement away from formal, legalistic interpretation, if it continues, should reinforce our determination as judges to provide objective and principled elaboration in support of our decisions. By objective and principled elaboration I mean reasons that deal fairly and

³ (1952) 85 CLR xi, xiv. See especially, Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 247 footnote 7. See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 557.

⁴ Geoff Lindsay, 'Book Review of E W Thomas, *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles*' (2006) 27 *Australian Bar Review* 245, 247 footnote 7. See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 557.

⁵ Sir Anthony Mason, 'The Interpretation of a Constitution in a Modern Liberal Democracy' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 13, 13.

impartially with the competing considerations, resting wherever possible on a principle of appropriate generality, even though the full reach of the principle must be left for later examination.⁶

In Chapter 3, it was argued that the 'principles of appropriate generality', which are characteristic of the Mason Court, are consistent with particular theoretical positions. Chapter 3 considered the relevance of realism and sociological jurisprudence, with natural law reasoning and the jurisprudence of Justices Deane and Toohey being analysed in Chapter 4.

In these ways, it was argued in Chapters 2, 3 and 4 that underlying the jurisprudence of the Dixon and Mason Courts were a number of theoretical assumptions. There has been much debate in United States jurisprudence concerning the use of theorised forms of legal reasoning, with the vast amount of literature devoted to *legal pragmatism* advocating a non-theorised approach to judicial reasoning. This is a debate that Australian writers have not generally engaged in. Legal pragmatism, and in particular the work of Judge Posner and Cass Sunstein was analysed in Chapter 5. This analysis facilitated a consideration of the *advantages* and *disadvantages* of the use of *theoretical perspectives* in legal reasoning.

In Chapter 6 it was concluded that the Gleeson Court did not embrace the theoretical positions implicit in the approaches of the Dixon and Mason Court. It was further argued that the dominant influence upon the approach of the Gleeson Court has been a non-theorised form of legalism, with a number of ideas associated with legal pragmatism also being of relevance. In particular, the pragmatic ideas associated with the general approach of the Gleeson Court were:

1. The idea that there is no 'over-arching' theory of constitutional interpretation.⁷
2. The idea that different constitutional issues require different approaches.⁸

⁶ Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1, 28.

⁷ *McGinty v Western Australia* (1996) 186 CLR 140, 231-2 (McHugh J); *SGH Ltd v Commissioner of Taxation* (2002) 210 CLR 51, 75 (Gummow J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733.

3. The suggestion that regard should be had to practical or consequentialist arguments.⁹
4. The idea that judicial decisions should be primarily based upon low level theorizing.¹⁰

It has been argued that these pragmatic ideas are aligned in the Gleeson Courts' approach with a faith in orthodox legalistic methodology. In particular, the Gleeson Court has a tendency to view adherence to a legalistic methodology as providing legitimacy to judicial decisions. These developments deny Brian Galligan's suggestion made 20 years ago, that certain attitudes concerning, 'the public rhetoric and rationalizations of a neutral legalism' would probably appear 'quaintly archaic to the next generation of lawyers.'¹¹ These comments may have predicted the further challenges to legalism that would be made by the realist based jurisprudence of the Mason Court, but they did not foresee the renewed relevance of legalism to the Gleeson Court and the manner in which the Gleeson Court would respond to the jurisprudence of the Mason era.

The conceptual framework presented in Part I of this thesis was analysed further in Part II in the context of some significant constitutional cases concerning judicial power. The choice of judicial power was deliberate as it best exemplifies judicial perceptions of the judicial role. In Chapter 7 some of the fundamental historical and theoretical foundations supporting the separation of judicial power and the manner in which legalistic interpretations of the text of the *Constitution* dominated the development of the Australian view of the separation of judicial power, were considered. Particular attention was accorded to the influence of Dixonian legalism in the *Boilermakers' Case*. It was demonstrated that this decision was based upon a

⁸ *Brownlee v The Queen* (2000) 207 CLR 278, 285 (Gleeson CJ, McHugh J); Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Cass Sunstein, *Legal Reasoning and Political Conflict* (1996).

⁹ Judge Richard Posner 'Legal Reasoning From the Top Down and From the Bottom Up: The Question of Unenumerated Constitutional Rights' (1992) 59 *University of Chicago Law Review* 433; Judge Richard Posner 'Pragmatic Adjudication' (1996) 18 *Cardozo Law Review* 1.

¹⁰ See Cass Sunstein, 'Incompletely Theorized Agreements' (1995) 108 *Harvard Law Review* 1733, Cass Sunstein, *Legal Reasoning and Political Conflict* (1996), see particularly 35-61.

¹¹ Brian Galligan, *Politics of the High Court: a Study of the Judicial Branch of Government in Australia* (1987) 37.

fundamentally theoretical perspective of the unique role of the federal judiciary in the Australian federation.

The Mason Court's approach was analysed further in Chapter 8, in the context of a number of decisions concerning judicial power. It was argued, that implicit in the Mason Court's Chapter III jurisprudence, there could be discerned the relevance of ideas associated with realism and natural law theories. In particular, these cases demonstrated the Court's concern for the interests of the individual, with the Court acknowledging a conception of the judicial function, which saw the Court having a role to play in the balancing of individual interests with the interests of the State. In this way it was suggested that the approach of the Mason Court, whilst diverging from and questioning some of the fundamental assumptions made by the Dixon era, also articulated a theoretical perspective.

The analysis presented in Chapter 9 demonstrated that in the context of decision concerning judicial power the Brennan era saw the development of some new ideas and a movement from the *methodology* and ideas associated with the realism of the Mason era. This period did not, however, produce a significant amount of change to the *substantive* principles concerning Chapter III jurisprudence developed by the Mason Court. This form of movement in constitutional law can be contrasted with the analysis presented in Chapter 10. In that Chapter, it was argued that the Gleeson era witnessed a change in *method* and a retreat from some of the *substantive* constitutional principles of the Mason era. The conclusion to Chapter 10 set out the inferences reached concerning the differing approaches of individual members of this Court. It suffices to say here that the judicial approaches of Justice Gummow and Justice Kirby, albeit in different ways, diverge to the greatest extent from the governing perspective of the Gleeson Court. In short, Chapter 10 demonstrated that whilst there was some divergence between individual members of the Gleeson Court, the fundamental influences upon the Court's Chapter III jurisprudence was *legalism*, with a number of *pragmatic* concepts also being of relevance.

The Gleeson Court's reliance upon legalism is at times seen as a reaction to the activism of the Mason era, and a return to a more confined approach that is associated with Sir Owen Dixon's

Conclusion

legalism. However, as noted at the outset, suggestions of a change from *judicial activism* to *judicial conservatism* are not particularly informative.¹² Importantly, such broad-brush comparisons do not indicate the nature of any movement in the foundations of the High Court's approach.

The last decade has witnessed a fundamental change in the foundational assumptions that underlie the High Court's approach. This change indicates that the Gleeson Court is applying its own interpretive method rather than simply returning to, or reacting to, the respective approaches of the Dixon or Mason Courts. More specifically, three central conclusions can be made about the approach of the Gleeson Court. These conclusions relate to the general or dominant approach of the Gleeson Court considered as a whole.

The first conclusion is that a central theme of the Gleeson Court's Chapter III jurisprudence is a concern to protect the integrity of the federal judiciary. This contrasts with the approach taken in the realist-influenced jurisprudence of the Mason era, which exhibited a tendency to seek to balance the interests of the State with the interests of the individual. The fundamental conclusion that was made in this regard is that, in addition to the change in *methodology* from the realist based jurisprudence of the Mason era, the Gleeson Court's Chapter III jurisprudence has produced some *substantive* changes in the law. The effect of these substantive changes has been to reduce the constitutional protections that Chapter III had been understood in the Mason era to provide to individuals.

The second conclusion is that the legalism of the Gleeson Court reflects much of the Dixonian method, but it is not clearly linked with the key theoretical foundations of Sir Owen Dixon's approach. In this way, whilst the general approach of the Gleeson Court exhibits the influence of legalism, with a number of pragmatic constructs also being of relevance—there is little theoretical justification offered to support the choice of these methods of reasoning. For example, it was argued that it is difficult to find the Gleeson Court articulating any form of

¹² See further, Michael Coper, 'Concern About Judicial Method' (2006) 30 *Melbourne University Law Review* 554, 562-3, 570.

support for the underlying theoretical arguments that Sir Owen Dixon put forward in support of his Honour's approach.

The critical comparative perspective presented in this thesis concerning the Dixon, Mason and Gleeson Courts supports the third and perhaps the most fundamental conclusion; namely, that the Gleeson Court puts forward a largely *a-theoretical* approach. That is to say, consistent with the approach advocated by legal pragmatists, the jurisprudence of the Gleeson Court tends to stay at a low level of abstraction. Furthermore, the Gleeson Court does not seek to put forward a theoretical justification for the adoption of this methodology.

The fundamental conclusion is that, with nearly a decade of the Gleeson Court's jurisprudence to consider, a clear trend towards a largely *a-theoretical* approach may be identified. This conclusion negates the suggestions of a large degree of continuity between the Mason and Gleeson eras.¹³

The criticisms that this thesis has made of the legalistic approach employed by the Gleeson Court, is *not* that it is illegitimate. In fact, it has been suggested that legalism forms part of the collective mindset of much of the legal profession and, as such, the approach taken is largely representative of the dominant orthodoxy. Justice Bradley Selway, for example, has argued the approach of the Gleeson Court is the proper approach in that:

The primacy of the constitutional text has been asserted and maintained. The approach is fundamentally conservative and legalistic, based upon precedent and logical analysis. But the approach is not rigid or "tied to the past". Where it is clear that the *Constitution* needs to develop then this has been achieved.¹⁴

Whilst the approach of the Gleeson Court may be commended on this basis, such praise does not establish that the approach of the Gleeson Court is to be *preferred* over other approaches to

¹³ See further, Justice Michael McHugh, 'The Constitutional Jurisprudence of the High Court: 1989-2004' (The Inaugural Sir Anthony Mason Lecture in Constitutional Law, Banco Court, Sydney, 26 November 2004) 1, 14.

¹⁴ Justice Bradley Selway, 'Methodologies of constitutional interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234, 250.

judicial reasoning. The analysis presented in this thesis has questioned the value of decisions that are based on a low level of theorization or reasoning tied closely to the facts of the case. It has been argued that decisions based upon these forms of reasoning do not necessarily provide a transparent account of the judicial decision making process. Such decisions may also fail to provide guidance to other individuals, judges and legislators. That said, perhaps the most fundamental criticism that has been made of the adoption of a largely legalistic approach by the Gleeson Court, is that little argument is provided in support of the choice of that method. Rather, there is a tendency for a number of members of the current Court to equate adherence to legalism with legitimacy. Legalism in these circumstances becomes akin to an article of *faith*. Justice Oliver Wendall Holmes, writing in 1897 commented that,

[i]t does not follow, because we all are compelled to take on faith at second hand most of the rules on which we base our action and our thoughts, that each of us may not try to set some corner of his world in the order of reason, or that all of us collectively should not aspire to carry reason as far as it will go throughout the whole domain.¹⁵

The aspiration expressed is a powerful one. It follows Justice Holmes' later statement that 'we have too little theory in the law, rather than too much.'¹⁶ Fundamentally, this thesis has, to use Justice Holmes' terms, argued that there is too little theory about the law in approach of the Gleeson Court. It has been demonstrated that the largely *a-theoretical* approach of the current Court distinguishes the Gleeson Court from its two most revered predecessors, namely the Dixon and Mason Courts. The Gleeson Court considered as a whole takes a justifiable position. It has, however, been argued that to the extent that the general perspective and methodology of the Gleeson Court's is *a-theoretical*, this approach is, with respect, not to be preferred over other more theorized forms of legal reasoning. More theorized forms of judicial reasoning, such as that exemplified by the jurisprudence of the Mason era, offer a more transparent account of the judicial reasoning process. In addition, such approaches tend to provide a theoretical justification for the choice of judicial method that is applied.

¹⁵ Justice Oliver Wendell Holmes, 'The Path of Law' (1897) 10 *Harvard Law Review* 457, 468 (emphasis added).

¹⁶ *Ibid*, 476.

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