[1.20] Finally, in the political discourse of the United States, 'the word "liberal" has come to be associated … with *étatiste* and left-wing ideologies rather than with the Lockean notions of laissez-faire and mistrust of organized power': 'Just as in France the word "liberal" had been used by some writers for almost any kind of left-wing opinion, so in America the word "liberal" was widely adopted after the depression as a soubriquet for "socialist".'

[1.21] In the closing decades of the 20th century, 'liberalism' underwent another metamorphosis. Its underlying ideas were reconstructed, by critics and defenders alike, as a more schematic theoretical position, supposedly unifying the development of Western political systems into a plan of unilinear growth unfolding from the 17th century onwards. This revisionist history was used as a unifying framework around which orthodox legal theories tended to converge in defence of the status quo – while, conversely, the more radical challenges to orthodoxy were united in rejecting that version of 'liberalism'.

[1.22] In part, all this was simply a reaction to the upheavals of the 1960s. For those young people in America and elsewhere encouraged to re-engage in political activity through the charismatic presidency of John F Kennedy, his assassination in 1963 was the cause of traumatic disillusionment. Already before his assassination, reformist movements like Students for a Democratic Society (formed in 1960) were moving towards more activist programs of participatory democracy and civil disobedience. Explosions of student activism like the Berkeley Free Speech Movement (1964) were both more widespread and more radical, and opened up a receptive climate for more militant protest movements like the Black Panthers (founded in 1966). Alongside massive campaigns of peaceful civil disobedience like those led by Martin Luther King, there were increasing outbreaks of violent protest, met by an increasingly brutal response. In August 1965 America was rocked by six days of race riots in the Los Angeles suburb of Watts. In 1968 the assassination of Martin Luther King (in April) was followed (in June) by the assassination of Robert Kennedy, and then (in August) by violent clashes between protesters and police in the riots at the Democratic National Convention in Chicago. Meanwhile, in Paris, a historic alliance of students and workers, initially erupting through a series of street battles and barricades (including the police seizure of the Sorbonne and its subsequent recapture by students), had culminated in May 1968 in a two-week general strike that almost succeeded in bringing down the government. Meanwhile, protests against the Vietnam War were drawing thousands of supporters of all ages and from all walks of life; and throughout this time, all the turbulence of political upheaval was interacting in complex ways with the essentially anti-political flowering of the counter-culture (see Theodore Roszak, *The Making of a Counter Culture: Reflections on the Technocratic Society and its Youthful Opposition* (Doubleday, 1969)).

[1.23] While 'liberalism' as a political motivation lay close to the heart of this ferment, the reawakening of interest in 'liberalism' as a scholarly theory was partly a reaction against it, in response to what was seen as a 'legitimation crisis' arising from the apparent undermining of the popular beliefs and allegiances on which the legitimacy of democratic government was thought to depend. The challenge was to devise a new legitimating framework appropriate to the needs of the 'post-modern' age that appeared to be dawning. Instead, a generation of writers anxious to preserve the status quo reacted '**[126]** by dusting off the underpinnings of the age we were moving away from' (AR Blackshield, 'The Pious Editor's Creed' in AR Blackshield (ed), *Legal Change: Essays in Honour of Julius Stone* (Butterworths, 1983) 123).

[1.24] Historically, the foundations of liberal thought in England had been laid through the device of the 'social contract' (that is, the idea that the legitimacy of government is derived from the consent of the governed, through a 'contract' in which citizens give up rights and powers in return for stability and social order). It is not always clear whether entry into this 'contract' is supposed to have occurred as an actual historical event, or whether the fictional postulate of such a 'contract' is being used as a schematic framework for philosophical inference of what the terms of such a 'contract' would be.

[1.25] John Rawls (*A Theory of Justice* (Harvard University Press, 1971)) authored the most influential re-working of social contract theory of recent times. In his thought experiment, people were placed behind a 'veil of ignorance', denying them knowledge of their position in society and encouraging them to think impartially about optimal social arrangements. By using their powers of reason, Rawls asked them to devise a social contract fit for contemporary democracies. Rawls followed Immanuel Kant (1724-1804), who developed the idea that the philosophical foundations of liberalism are best understood as depending on an *a priori* ideal of individual autonomy. As Dryzek, Honig and Phillips have said ('Introduction' in John S Dryzek, Bonnie Honig and Anne Phillips (eds), *The Oxford Handbook of Political Theory* (Oxford University Press, 2008)), Rawls did so '**[9]** in looking to reason to adjudicate what he saw as the fundamental question of politics: the conflict between liberty and equality … Much subsequent work on questions of justice and equality has continued in this vein, and while those who have followed Rawls have not necessarily shared his conclusions, they have often employed similar mind experiments to arrive at the appropriate relationship between equality and choice.'

[1.26] Not all political theorists applauded the revival of social contract theory. Some said that it was based on a false neutrality which disguised or smuggled in undisclosed ideological preferences. Gray said it was '**[28]** unfortunate', and should ultimately be seen 'as an ideological manoeuvre, inevitably unsuccessful, undertaken in response to the current crisis of liberal society'. A 'social contract' conceived as a real event is an ahistorical fiction; a 'social contract' conceived as a logical device, Gray said at 249-54, leads only to circularity. The theories of the 1970s sought to reintegrate 'liberalism' into a resurrection of its 17th century origins in the 'social contract' theories of Locke, and before him of Thomas Hobbes (1588-1679); yet whether Hobbes should be counted as a liberal at all is controversial given his authoritarian leanings and his pessimistic view of human nature (see John Gray, *Liberalism* (Open University Press, 2nd ed, 1995) 10, 56).

[1.27] Views differ on the contemporary value of the theories of Hobbes and Locke. There is no question that their theories were, if nothing else, devised to meet the historical exigencies of their own time and place. Hobbes, writing in 1651 from virtual exile in Paris, was seeking a formula for the political stability which, amid the upheavals of the time, neither King nor Parliament seemed able to provide. Locke, writing in 1689, one year after the English 'Glorious' or 'Bloodless' Revolution (see Chapter 2, §2(d)), sought to ground political legitimacy in concepts of 'rights' and 'trust'. If Hobbes was an ambiguous apologist for the King, Locke was an undoubted apologist for the Revolution.

Thomas Hobbes, *Leviathan, Or the Matter, Forme and Power of a Commonwealth Ecclesiasticall and Civil*

(1651; Everyman's Library, 1914)

[64] [I]n the nature of man, we find three principall causes of quarrell. First, Competition; Secondly, Diffidence; Thirdly, Glory.

The first, maketh men invade for Gain; the second, for Safety; and the third, for Reputation. The first use Violence, to make themselves Masters of other mens persons, wives, children, and cattell; the second, to defend them; the third, for trifles, as a word, a smile, a different opinion, and any other signe of undervalue …

Hereby it is manifest, that during the time men live without a common Power to keep them all in awe, they are in that condition which is called Warre; and such a warre, as is of every man against every man. For WARRE, consisteth not in Battell onely, or the act of fighting; but in a tract of time, wherein the Will to contend by Battell is sufficiently known: and therefore the notion of *Time*, is to be considered in the nature of Warre; as it is in the nature of Weather. For as the nature of Foule weather, lyeth not in a showre or two of rain; but in an inclination thereto of many dayes together; So the nature of War, consisteth not in actual fighting; but in the known disposition thereto, during all the time there is no assurance to the contrary. All other time is PEACE.

Whatsoever therefore is consequent to a time of Warre, where every man is Enemy to every man; the same is consequent to the time, wherein men live without other security, than what their own strength, and their own invention shall furnish them withall. In such condition, there is no place for Industry; because the fruit **[65]** thereof is uncertain: and consequently no Culture of the Earth, no Navigation, nor use of the commodities that may be imported by Sea; no commodious Building; no Instruments of moving, and removing such things as require much force; no Knowledge of the face of the Earth; no account of Time; no Arts; no Letters; no Society; and which is worst of all, continuall feare, and danger of violent death; And the life of man, solitary, poore, nasty, brutish, and short …

February 1801, the Congress passed the *Organic Act*, creating 42 new justices of the peace, and the *Circuit Court Act*, which doubled the size of the federal judiciary (thus enabling Adams to appoint a large number of Federalist judges). The outgoing Congress also reduced the size of the Supreme Court, eliminating a vacancy which Jefferson would have been able to fill.

[2.55] Throughout February 1801, President Adams nominated many new Federalist judges, with Congressional advice and consent. On 2-3 March, Adams and Marshall (as the outgoing President and Secretary of State) worked frantically to issue, seal and deliver the commissions to the new 'midnight judges'. They managed to deliver commissions to all but four of the newly confirmed justices of the peace. One of the four was William Marbury.

[2.56] On 4 March, Jefferson was inaugurated and James Madison became his Secretary of State. When the four Federalist justices of the peace asked for their commissions, Jefferson refused, calling them 'nullities'. They then applied to the Supreme Court (now presided over by Marshall) for a writ of mandamus to compel the issue of their commissions. Marshall's response was '**[129]** a Solomonic blend of diplomacy and defiance' (AR Blackshield, 'The Courts and Judicial Review' in S Encel, D Horne and E Thompson (eds), *Change the Rules! Towards a Democratic Constitution* (Penguin Books, 1977) 118). He held that the appointees were entitled to their commissions, and hence to a writ of mandamus, but that the Court could not grant such a writ because the *Judiciary Act* of 1789, which empowered it to do so, was unconstitutional. Writs of mandamus pertained to a court's *original* jurisdiction and, under the Constitution, Congress could invest the Supreme Court only with *appellate* jurisdiction.

Marbury v Madison
5 US (1 Cranch) 137 (1803)

Marshall CJ: [176] The question, whether an act, repugnant to the constitution, can become the law of the land, is a question deeply interesting to the United States; but, happily, not of an intricacy proportioned to its interest. It seems only necessary to recognise certain principles, supposed to have been long and well established, to decide it.

That the people have an original right to establish, for their future government, such principles as, in their opinion, shall most conduce to their own happiness, is the basis, on which the whole American fabric has been erected. The exercise of this original right is a very great exertion; nor can it, nor ought it to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority, from which they proceed, is supreme, and can seldom act, they are designed to be permanent.

This original and supreme will organizes the government, and assigns, to different departments, their respective powers. It may either stop here; or establish certain limits not to be transcended by those departments.

The government of the United States is of the latter description. The powers of the legislature are defined, and limited; and that those limits may not be mistaken, or forgotten, the constitution is written. To what purpose are powers limited, and to what purpose is that limitation committed to writing, if these limits may, at any time, be passed by those intended to be restrained? The distinction, between a government with limited and unlimited powers, is abolished, if those limits do not confine the persons on whom they are imposed, and if acts pro-**[177]**-hibited and acts allowed, are of equal obligation. It is a proposition too plain to be contested, that the constitution controls any legislative act repugnant to it; or, that the legislature may alter the constitution by an ordinary act.

Between these alternatives there is no middle ground. The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

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.

This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society …

If an act of the legislature, repugnant to the constitution, is void, does it, notwithstanding its invalidity, bind the courts, and oblige them to give it effect? Or, in other words, though it be not law, does it constitute a rule as operative as if it was a law? …

It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule 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.

[178] So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court 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 of the very essence of judicial duty.

If then the courts are to regard the constitution; and the constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.

Those then who controvert the principle that the constitution is to be considered, in court, as a paramount law, are reduced to the necessity of maintaining that courts must close their eyes on the constitution, and see only the law.

This doctrine would subvert the very foundation of all written constitutions. It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare, that if the legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the legislature a practical and real omnipotence, with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.

That it thus reduces to nothing what we have deemed the greatest improvement on political institutions – a written constitution – would of itself be sufficient, in America, where written constitutions have been viewed with so much reverence, for rejecting the construction. But the peculiar expressions of the constitution of the United States furnish additional arguments in favour of its rejection.

The judicial power of the United States is extended to all cases arising under the constitution.

[179] Could it be the intention of those who gave this power, to say that, in using it, the constitution should not be looked into? That a case arising under the constitution should be decided without examining the instrument under which it arises?

This is too extravagant to be maintained.

In some cases then, the constitution must be looked into by the judges. And if they can open it at all, what part of it are they forbidden to read, or to obey?

There are many other parts of the constitution which serve to illustrate this subject.

It is declared that 'no tax or duty shall be laid on articles exported from any state.' Suppose a duty on the export of cotton, of tobacco, or of flour; and a suit instituted to recover it. Ought judgment to be rendered in such a case? ought the judges to close their eyes on the constitution, and only see the law.

The constitution declares that 'no bill of attainder or *ex post facto* law shall be passed.'

If, however, such a bill should be passed and a person should be prosecuted under it; must the court condemn to death those victims whom the constitution endeavours to preserve?

'No person,' says the constitution, 'shall be convicted of treason unless on the testimony of two witnesses to the same overt act, or on confession in open court.'

Here the language of the constitution is addressed especially to the courts. It prescribes, directly for them, a rule of evidence not to be departed from. If the legislature should change that rule, and declare *one* witness, or a confession *out* of court, sufficient for conviction, must the constitutional principle yield to the legislative act?

From these, and many other selections which might be made, it is apparent, that the framers of the consti-**[180]**-tution contemplated that instrument, as a rule for the government of *courts*, as well as of the legislature.

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies, in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

> **[646]** The truth is, that too great a respect for established rules, and too great a regard for consequence and analogy, has generally been shewn by the authors of judiciary law. Where the introduction of a new rule would interfere with interests and expectations which have grown out of established ones, it is clearly **[647]** incumbent on the Judge *stare decisis*; since it is not in his power to indemnify the injured parties. But it is much to be regretted that Judges of capacity, experience and weight, have not seized every opportunity of introducing a new rule (a rule beneficial for the future), whenever its introduction would have no such effect …
>
> A striking example of this backwardness of Judges to innovate, is to be found in the origin of the distinction between law and equity; which arose because the Judges of the Common Law Courts would not do what they ought to have done, namely to model their rules of law and of procedure to the growing exigencies of society, instead of stupidly and sulkily adhering to the old and barbarous usages.

[5.10] For all this, given the ideological needs of lawyers and judges in the 1860s – and for several decades thereafter – what was attractive about Austin's attempt to locate the study of law in a systematic intellectual framework was precisely the hope it appeared to offer that the legal materials to be deployed as the basis for judicial decision might be reduced to a schematic body of expert 'knowledge', from which predeterminate 'correct' solutions to particular problems might be derived in a mechanical way. Legal problems were to have 'single right answers' and the task of judges was to *discover* those answers, not to *invent* them. The move to the teaching of law as a university discipline intensified these aspirations.

[5.11] In the United States, the mythology of the judicial process as a value-free application of determinate pre-existing legal rules never had quite the same impact as in Australia (for a recent reappraisal, see Brian Z Tamanaha, *Beyond the Formalist-Realist Divide: The Role of Politics in Judging* (Princeton University Press, 2010)). Various factors in American legal history contributed to the relatively candid acceptance of the judges' responsibility for the shaping of social and legal policy. Not least among these was the flexible adaptation of the system of precedent to frontier conditions (see FG Kempin, 'Precedent and Stare Decisis: The Critical Years, 1800 to 1850' (1959) 3 *American Journal of Legal History* 28). By 1908, Roscoe Pound had launched his famous attack on mechanical jurisprudence in 'Mechanical Jurisprudence' (1908) 8 *Columbia Law Review* 605. By 1923, he had delivered his series of lectures on 'The Theory of Judicial Decision' (1923) 36 *Harvard Law Review* 641, 802, 940, ending with a rallying call for greater judicial self-awareness as a step towards more adequate judicial performance: '**[959]** Much will be gained when courts have perceived what it is that they are doing, and are thus enabled to address themselves consciously to doing it the best that they may.' By the 1930s, 'American legal realism' was in unrestrained ferment, particularly at the Law Schools of Columbia and Yale Universities (see William Twining, *Karl Llewellyn and the Realist Movement* (Weidenfeld & Nicolson, 1973)).

[5.12] At the University of Sydney from 1942 to 1972, and thereafter at the University of New South Wales until 1985, Julius Stone translated these American perspectives into a systematic demonstration of the pervasive indeterminacy of legal materials (see *The Province and Function of Law* (Maitland Publications, 1946)). Stone's method was to demonstrate that the orthodox legalistic use of authoritative legal materials depends on 'categories of illusory reference', the effect of which is that the judge's resort to legal doctrine *cannot* provide predetermined solutions to the problems of evaluative choice by which litigious outcomes must be determined, since what the legal materials do is precisely to confront the judge with the inescapable need for choice. Through ambiguities, indeterminate terms, logical circularities and contradictions, and above all through the constant presentation of alternative starting points, the judge is *required* to make personal choices in order to apply 'the law'. The central point is that, wherever a judge is driven to make a choice between two versions of 'the law', that choice itself cannot be controlled or determined by 'the law', but must ultimately depend on the judge's own sense of what 'the law' *ought* to be. By mid-century, even in Commonwealth countries, this kind of understanding of the judicial process had gained widespread academic and judicial acceptance. In Australia, the University of Sydney graduates who carried these teachings with them onto the High Court bench included Justices Mason, Jacobs, Murphy, Deane and Kirby (see Michael Kirby, 'Julius Stone and the High Court of Australia' (1997) 20 *University of New South Wales Law Journal* 239). The demise of legalism as a satisfactory explanation of the complexity of judicial decision-making appeared complete in remarks made by Sir Anthony Mason in

the first Menzies Memorial Lecture at the University of Virginia, just months before he was elevated to the position of Chief Justice.

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] The asserted advantage of a legalistic approach is that decisions proceed from the application of objective legal rules and principles of interpretation rather than from the subjective values of the justices who make the decisions. Unfortunately, it is impossible to interpret any instrument, let alone a constitution, divorced from values. To the extent they are taken into account, they should be acknowledged and should be accepted community values rather than mere personal values. 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.

The High Court has more fully embraced this conservative interpretive approach than the [United States] Supreme Court, in large part because of its different diet. The High Court has general appellate jurisdiction and has a mainly non-constitutional workload; the Supreme Court is competent only in federal law matters and, in enforcing the Bill of Rights, has become something of a roving constitutional commission. While the High Court grapples with the complexities of Commonwealth and state statutes, the Supreme Court expounds the meaning of such constitutional proscriptions as those prohibiting the states from depriving anyone 'of life, liberty, or property, without due process of law', or denying anyone 'the equal protection of the laws.'

Statutes more readily lend themselves to a legalistic approach. They often have a relatively narrow focus and are fairly detailed, especially Australian statutes which are more detailed than the American. Moreover, the argument that the legislature can amend the law if circumstances change carries some force. However, a constitution, and especially a Bill of Rights, invites or rather requires a court to do more. 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. Additionally, amending constitutions, while possible, is enormously difficult. Unless the courts openly grapple with the issues they will not be debated.

Because the Supreme Court's caseload involves a high proportion of constitutional (or Bill of Rights) matters, it has adopted an openly policy oriented approach. The High Court, immersed in the common law and statutes, has in the past been less inclined to veer from a legalistic approach. As the High Court moves away from 'strict and complete legalism' and toward a more policy oriented constitutional interpretation, it is a natural parallel that the Court place greater emphasis on the purposive construction of statutes.

[5.13] This speech heralded a distinctive era in the High Court's history, popularly referred to as 'the Mason Court' (1987-1995), in which legalism was supplanted by judicial candour about the way in which the choices presented by the 'authoritative legal materials' were actually resolved. During this period, and in the following three years of Sir Gerard Brennan's time as Chief Justice (1995-1998), the Court handed down a number of decisions of great legal and national significance, including on the recognition of native title in *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (see Chapter 4, §3) and a constitutionally implied freedom of political communication in *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (see Chapter 28, §3). This provoked strong public criticism of the Court, fuelled in large part by the greater acknowledgment given by its judges to the role that policy considerations played in reaching those results (see Haig Patapan, *Judging Democracy: The New Politics of the High Court of Australia* (Cambridge University Press, 2000)). It was during this period that the High Court was described as an '**[601]** "unfaithful servant of the Constitution", a "pathetic … self-appointed [group of] Kings and Queens", "gripped … in a mania for

The powers granted to the National government are delegated powers, enumerated in and defined by the instrument **[319]** which has created the Union. Hence the rule that when a question arises whether the National government possesses a particular power, proof must be given that the power was positively granted. If not granted, it is not possessed, because the Union is an artificial creation, whose government can have nothing but what the people have by the Constitution conferred. The presumption is therefore against the National government in such a case, just as it is for the State in a like case.

VII. The authority of the National government over the citizens of every State is direct and immediate, not exerted through the State organization, and not requiring the co-operation of the State government. For most purposes the National government ignores the States; and it treats the citizens of different States as being simply its own citizens, equally bound by its laws. The Federal courts, revenue officers, and post-office draw no help from any State officials, but depend directly on Washington …

On the other hand, the State in no wise depends on the National government for its organization or its effective working. It is the creation of its own inhabitants … It goes its own way, touching the National government at but few points. That the two should touch at the fewest possible points was the intent of those who framed the Federal Constitution … Their aim was to keep the two mechanisms as distinct and independent of each other as was compatible with the still higher need of subordinating, for national purposes, the State to the Central government …

[320] VIII. It is a further consequence of this principle that the National government has but little to do with the States as States. Its relations are with their citizens, who are also its citizens, rather than with them as ruling commonwealths …

[321] IX. A State is, within its proper sphere, just as legally supreme, just as well entitled to give effect to its own will, as is the National government within its sphere; and for the same reason. All authority flows from the people. The people have given part of their supreme authority to the National, part to the State governments. Both hold by the same title, and therefore the National government, although superior wherever there is a concurrence of powers, has no more right to trespass upon the domain of a State than a State has upon the domain of Federal action. That the course which a State is following is pernicious, that its motives are bad and its sentiments disloyal to the Union, makes no difference until or unless it infringes on the sphere of Federal authority …

[322] X. There are several remarkable omissions in the constitution of the American federation.

One is that there is no grant of power to the National government to coerce a recalcitrant or rebellious State. Another is that nothing is said as to the right of secession. Any one can understand why this right should not have been granted. But neither is it mentioned to be negatived.

The Constitution was an instrument of compromises; and these were questions which it would have been unwise to raise.

There is no abstract or theoretic declaration regarding the nature of the federation and its government, nothing as to the ultimate supremacy of the central authority outside the particular sphere allotted to it, nothing as to the so-called sovereign rights of the States. As if with a prescience of the dangers to follow, the wise men of 1787 resolved to give no opening for abstract inquiry and metaphysical dialectic. But in vain. The human mind is not to be so restrained … The drily legal and practical character of the Constitution did not prevent the growth of a mass of subtle and, so to speak, scholastic metaphysics regarding the nature of the government it created. The inextricable knots which American lawyers and publicists went on tying, down until 1861, were cut by the sword of the North in the Civil War, and need concern us no longer. It is now admitted that the Union is not a mere compact between commonwealths, dissoluble at pleasure, but an instrument of perpetual efficacy, emanating from the whole people, **[323]** and alterable by them only in the manner which its own terms prescribe. It is 'an indestructible Union of indestructible States'.

It follows from the recognition of the indestructibility of the Union that there must somewhere exist a force capable of preserving it. The National government is now admitted to be such a force. 'It can exercise all powers essential to preserve and protect its own existence and that of the States, and the constitutional relation of the States to itself, and to one another.'

'May it not', some one will ask, 'abuse these powers, abuse them so as to extinguish the States themselves, and turn the **[324]** federation into a unified government? What is there but the Federal judiciary to prevent this catastrophe? and the Federal judiciary has only moral and not also physical force at its command.'

No doubt it may, but not until public opinion supports it in so doing – that is to say, not until the mass of the nation which now maintains, because it values, the Federal system, is possessed by a desire to overthrow that system. Such a desire may express itself in proper legal form by carrying

amendments to the Constitution which will entirely change the nature of the government. Or if the minority be numerous enough to prevent the passing of such amendments, and if the desire of the majority be sufficiently vehement, the majority which sways the National government may disregard legal sanctions and effect its object by a revolution. In either event – and both are improbable – the change which will have passed upon the sentiments of the American people will be a sign that Federalism has done its work, and that the time has arrived for new forms of political life.

[6.4] The American federation was conceived in its Constitution as 'a more perfect Union', superseding the earlier 'confederacy' of 1781 by which the original 13 States had entered into 'a firm league of friendship with each other for their common defence, the security of their liberties, and their mutual and general welfare'. Under the Articles of Confederation, the capacity to enforce the obligations of member States was obscure, with disputes resolved by an ad hoc panel of judges appointed by the confederate Congress and acceptable to the disputants. Only member States were bound by the Articles; the Congress had no capacity to make laws binding on individuals. The absence, in that sense, of a national government was seen as a crucial weakness, which the 1789 United States Constitution was to solve. The issue was explained by James Madison in *The Federalist (No 39)*. *The Federalist* – a series of letters and essays written in 1787-1788 by Madison, Alexander Hamilton and John Jay to convince the people of New York to join the new federation – is widely used as a guide to the intended operation of the 1789 Constitution.

James Madison, *The Federalist (No 39)*

in Isaac Kramnick (ed), *The Federalist Papers* (Penguin Books, 1987)

[256] [I]t appears, on one hand, that the Constitution is to be founded on the assent and ratification of the people of America, given by deputies elected for the special purpose; but, on the other, that this assent and ratification is to be given by the people, not as **[257]** individuals composing one entire nation, but as composing the distinct and independent States to which they respectively belong. It is to be the assent and ratification of the several States, derived from the supreme authority in each State – the authority of the people themselves. The act, therefore, establishing the Constitution will not be a *national* but a *federal* act.

That it will be a federal and not a national act, … the act of the people, as forming so many independent States, not as forming one aggregate nation – is obvious from this single consideration: that it is to result neither from the decision of a *majority* of the people of the Union, nor from that of a *majority* of the States. It must result from the *unanimous* assent of the several States that are parties to it … Each State, in ratifying the Constitution, is considered as a sovereign body independent of all others, and only to be bound by its own voluntary act. In this relation, then, the new Constitution will, if established, be a *federal*, and not a *national* constitution.

The next relation is to the sources from which the ordinary powers of government are to be derived. The House of Representatives will derive its powers from the people of America; and the people will be represented in the same proportion and on the same principle as they are in the legislature of a particular State. So far the government is *national*, not *federal*. The Senate, on the other hand, will derive its powers from the States as political and coequal societies; and these will be represented on the principle of equality in the Senate, as they now are in the existing Congress. So far the government is *federal*, not *national*. The executive power will be derived from a very compound source. The immediate election of the President is to be made by the States in their political characters. The votes allotted to them are in a compound ratio, which considers them partly as distinct and coequal societies, partly as unequal members of the same society. The eventual election … is to be made by that branch of the legislature which consists of the national representatives; but in this particular act they are to be thrown into the form of individual delegations from so many distinct and coequal bodies politic. From this aspect of the government it **[258]** appears to be of a mixed character, presenting at least as many *federal* as *national* features.

The difference between a federal and national government, as it relates to the *operation of the government*, is by the adversaries of the plan of the convention supposed to consist in this, that in the former the powers operate on the political bodies composing the Confederacy in their political capacities; in the latter, on the individual citizens composing the nation in their individual capacities. On trying the Constitution by this criterion, it falls under the *national* not the *federal* character; though

part of the text of the legislation'. On the basis of that definition, Kirby J held that the new Division 104 was neither an 'express amendment' nor a 'direct amendment', but rather '**[379]** an addition to the scope and function of Pt 5.3 of the Code by federal law alone'. However, Hayne J, the only other judge to consider this issue, took the view that the referral '**[462]** permits amendment by insertion of new matter', provided only that it be inserted into the existing text.

[7.34] A more fundamental set of problems related to s 100.8 of the *Criminal Code* itself. That section, which formed part of the original text of Pt 5.3 as approved by the Referring Acts, purported to restrict the future scope for 'express amendments' to that text by providing that such amendments were 'not to be made' unless approved by at least four States and 'a majority of the group consisting of the States, the Australian Capital Territory and the Northern Territory'. Kirby, Callinan and Hayne JJ – again the only judges to consider the issue – all expressed the view that this provision was invalid. They did so for three different reasons.

[7.35] For Hayne J, its enactment as part of the *Criminal Code* was unconstitutional because it then became '**[462]** a provision of federal law which purports to fetter the federal Parliament in its future action: certain amending laws may be made *only* if prior approval is given'. This, he said, was invalid because the Parliament 'may not fetter the future exercise of its legislative powers' (see Chapter 16, §3). For Callinan J, the problem was that, by agreeing to such a provision, the States had fettered their future powers: if the requisite majority, including four States, approved of a proposed amendment, then the other two States would be bound to accept it although they did *not* approve. Thus, s 100.8 was drafted in a way that required the States to make a referral of legislative power in a way that potentially deprived them of their future control of that power. He could see no basis for '**[510]** a proposition that s 51(xxxvii) could validly be used to establish a regime in which a State might renounce or forgo its power in the future … to a majority decision of the other States, and indeed also the Territories. The Constitution specifically states that the referral may be to the Commonwealth: it does not say that referral may be to the decision of a majority of States and Territories. Nor does it suggest that one State may refer its power to legislate on a particular matter to another State or Territory.'

[7.36] For Kirby J, the problem was more fundamental. In his view, s 100.8 was symptomatic of the way in which the contemporary practice of 'cooperative federalism' has involved a shift of power from State and Commonwealth Parliaments to the Council of Australian Governments (COAG).

Thomas v Mowbray
(2007) 233 CLR 307

Kirby J: [382] [I]t would appear that a COAG meeting, with the affirmative support of a majority of the governments of the States, was to be a necessary political precondition to any significant amendments to Pt 5.3 of the Code. This was so despite the fact that s 51(xxxvii) refers to 'matters referred to the Parliament of the Commonwealth by the Parliament or Parliaments of any State or States' and not to matters referred by the Executive Governments 'of any State or States'. The modern tendency of governments in Australia to identify themselves with the Parliaments, at the cost of the respect owed to those Parliaments, is of no effect when a matter comes before this Court. Our obligation is to give effect to the Constitution. As the language of the Constitution makes clear, the reference power belongs to the Parliaments of the States and only to those Parliaments …

[383] [T]he 'consent' envisaged by s 100.8 of the Code, even when obtained inferentially by meetings and other such representations, is no substitute for a referral of constitutional power by a State Parliament. Such a referral is plainly a serious constitutional step. I have heard of legislation made effective by reference to a Ministerial press release. However, I decline to interpret the provisions of s 51(xxxvii) of the Constitution to permit the parliamentary reference of constitutional power to be achieved without any relevant parliamentary involvement, as by the use of communiqués by heads of government alone.

Approval of a proposed text by COAG, by State Premiers and Territory Chief Ministers (or, as ultimately occurred in the case of Victoria, the Secretary of the Victorian Department of Premier and Cabinet), was apparently intended to convey the consent of the State or Territory concerned. These government officials must be reminded that constitutional power in Australia is derived ultimately

from the people who elect Parliaments. The alteration of the allocation of constitutional powers must therefore either involve the people as electors directly (under s 128 of the Constitution) or, exceptionally, it must involve their representatives in the several Parliaments (as provided by s 51(xxxvii) and (xxxviii)). It cannot be achieved merely by the actions of governments and governmental officials.

[7.37] Although s 51(xxxvii) has received only sporadic and limited judicial consideration, this should not obscure the fact that the rise of co-operative federalism in Australia since the 1990s has made it a power of real significance. It is currently used to support national legislative schemes of great importance in fields such as corporate regulation, industrial relations and water management. However, Andrew Lynch ('After a Referral: The Amendment and Termination of Commonwealth Laws Relying on s 51(xxxvii)' (2010) 32 *Sydney Law Review* 363) has noted that '**[386]** [w]hat has been singularly lacking from most judicial consideration of the power has been clear acknowledgement of its distinctive characteristics as a facilitator of co-operative federalism', and that construction of s 51(xxxvii) would benefit from recognition of the continued interest of the referring States in the subject-matter they have made available for the operation of Commonwealth legislative power.

4. Powers of the United Kingdom Parliament

[7.38] Another significant co-operative mechanism for the redistribution of legislative power is s 51(xxxviii) of the Constitution, which enables the Commonwealth, 'at the request or with the concurrence of the Parliaments of all the States directly concerned', to exercise any power that was formerly exercisable only by the Imperial Parliament or by the Federal Council of Australasia. For example, as a result of Commonwealth-State negotiations following the High Court decision in *New South Wales v Commonwealth* (*Seas and Submerged Lands Case*) (1975) 135 CLR 337, the States were given the power to legislate over the territorial sea, or at least that part of it extending three nautical miles from the coast. This was achieved through complementary legislation by the State and Commonwealth Parliaments. The Commonwealth, pursuant to its power under s 51(xxxviii), and in response to a request by the Parliament of each of the States, enacted the *Coastal Waters (State Title) Act 1980* (Cth) and the *Coastal Waters (State Powers) Act 1980* (Cth), providing for the exercise of legislative power by the States.

Coastal Waters (State Powers) Act 1980 (Cth)

5 The legislative powers exercisable from time to time under the constitution of each State extend to the making of – …

(c) laws of the State with respect to fisheries in Australian waters beyond the outer limits of the coastal waters of the State, being laws applying to or in relation to those fisheries only to the extent to which those fisheries are, under an arrangement to which the Commonwealth and the State are parties, to be managed in accordance with the laws of the State.

[7.39] In 1989, the validity of s 5(c) was upheld by the High Court.

Port MacDonnell Professional Fishermen's Association Inc v South Australia
(1989) 168 CLR 340

The Court: [378] [T]he primary subject to which par (xxxviii) was addressed was the perceived need to ensure that legislative powers necessary for the purposes of the new nation could be exercised locally notwithstanding that, prior to federation, they were beyond the competence of local legislatures. In that context, there is no valid reason why the words 'within the Commonwealth' should be given a more constrictive operation than that which flows from their ordinary grammatical construction. On that ordinary grammatical construction, the words refer to the location of the exercise of legislative power of the designated kind and not to the area of operation of the laws made by the exercise of such power …

As the references to the United Kingdom Parliament and the Federal Council of Australasia make plain, the 'power' to which the paragraph refers is legislative power. Shortly stated, the effect of s 51(xxxviii) is to empower the Commonwealth Parliament to make laws with respect to the local

which underpins all that has subsequently been written about the relationship between s 51(xxxi) and other heads of legislative power. What was said by Barwick CJ in *Teori Tau* also does not sit well with his later statement in *Trade Practices Commission v Tooth & Co Ltd* [(1979) 142 CLR 397, 403] that s 51(xxxi) is 'a very great constitutional safeguard' whose 'constitutional purpose is to ensure that in no circumstances will a law of the Commonwealth provide for the acquisition of property except upon just terms' …

[386] [T]here are … fundamental defects in the reasoning in *Teori Tau* …

Writing in 1945, Dixon J had said that for his part he had 'always found it hard to see why s 122 should be disjoined from the rest of the Constitution' [*Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 85]. Thereafter, in *Lamshed v Lake* [99 CLR, 141], Dixon CJ pointed out that '[i]n considering the operation of s 122 an obvious starting point is that it is "the Parliament" that is to make the law pursuant to the power s 122 confers'. And as Dixon CJ went on to say [99 CLR, 143-4]:

> '[W]hen s 122 gives a legislative power to the Parliament for the government of a territory the Parliament takes the power in its character as the legislature of the Commonwealth, established in accordance with the Constitution as the national legislature of Australia, so that the territory may be governed not as a *quasi* foreign country remote from and unconnected with Australia except for owing obedience to the sovereignty of the same Parliament but as a territory of Australia about the government of which the Parliament may make every proper provision as part of its legislative power operating throughout its jurisdiction.'

Thus, whatever differences may be observed between the legislative power conferred on the Parliament by s 122 and other heads of legislative power, it is necessary to bear steadily in mind that s 122 is but one of several heads of legislative power given to the national legislature of Australia, and that a law which is made under s 122 is made in exercise of the legislative power of the Parliament and operates according to its tenor throughout the area of the Parliament's authority.

Next, for present purposes, the critical point to be derived from *Schmidt* is that the application of the principle of interpretation described there – that conferral of an express legislative power subject to a limitation is inconsistent with construction of other legislative powers in a way that would authorise the same kind of legislation but without the safeguard or restriction – cannot be confined to construction of the heads of power enumerated in s 51. The **[387]** principle, the soundness of which is not disputed, must be applied to all heads of the power of the Parliament.

The application of this principle of construction has been described as 'abstracting' the power of acquisition from other heads of power. That description may readily be accepted if it is intended as no more than a shorthand description of the effect of applying the principle of construction identified by Dixon CJ in *Schmidt*. In the present case, however, the notion of 'abstraction' was, at times during the argument for the Commonwealth, treated as leading to 'incongruous' results in the construction of s 122. But when it is recognised that the task to be undertaken is the construction, as a whole, of the legislative powers of the Parliament, any supposed incongruity said to follow from reading s 122 as limited in relevant respects by s 51(xxxi) disappears.

It disappears essentially for two reasons. In considering the validity of a law passed by the Parliament, it is neither necessary nor appropriate to seek to characterise that law as a law with respect to a single head of legislative power. The law may, and commonly will, find support in several heads of power. The present case, and the situation considered in *Newcrest*, are examples where s 122 is one of several heads. So also is *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Ame* [(2005) 222 CLR 439]. Secondly, if, in addition to whatever other characters it may have, the law has the character of a law with respect to the acquisition of property, the law in that aspect must satisfy the safeguard, restriction or qualification provided by s 51(xxxi), namely, the provision of just terms.

It has been well said of the reasoning in *Teori Tau* that it is 'totally at odds' with that in *Lamshed v Lake*. Further, as the Territory, in particular, illustrated by the many instances given in its written submissions, the tenor of decisions since *Teori Tau* indicates a retreat from the 'disjunction' seen in that case between s 122 and the remainder of the structure of government established and maintained by the Constitution. Further, s 128 of the Constitution since 1977 has engaged electors in the territories, and valid provision **[388]** has been made by the Parliament for representation in both chambers of the Parliament of electors in the two populous territories.

To preserve the authority of *Teori Tau* would be to maintain what was an error in basic constitutional principle and to preserve what subsequent events have rendered an anomaly. It should be overruled.

[9.45] Although the decisions in *Newcrest* and *Wurridjal* were limited to the application of s 51(xxxi), much of the reasoning in the majority judgments has implications for other aspects of the supposed 'disjoinder' of s 122 from the rest of the Constitution, suggesting that those aspects too might now require reconsideration. For example, both Gummow and Kirby JJ emphasised in *Newcrest* that no significance should be attached to the absence, from s 122, of the words 'subject to this Constitution'. In *Bennett v Commonwealth* (2007) 231 CLR 91, Kirby J made a similar point: although the provisions of s 122 are not stated to be 'subject to this Constitution', '**[125]** it is inherent from the context, that they will be so read'.

[9.46] One issue not yet resolved is whether the legislative power given by s 122 is subject to the various guarantees of religious freedom contained in s 116 of the Constitution. In *Kruger v Commonwealth* (*Stolen Generations Case*) (1997) 190 CLR 1, handed down just two weeks before *Newcrest*, the Court was divided on that issue. Before *Kruger*, the dicta on the point had been typically unclear. In *Lamshed v Lake*, Dixon CJ saw no reason '**[143]** why s 116 should not apply to laws made under s 122'; and even in *Teori Tau*, Barwick CJ conceded that s 122 must be subject to '**[570]** appropriate provisions … as, for example, s 116'. By contrast, in *Attorney-General (Vic); Ex rel Black v Commonwealth* (*DOGS Case*) (1981) 146 CLR 559, Gibbs CJ found such dicta '**[593]** very difficult to **[594]** reconcile' with the general assumption that laws made under s 122 stand outside the normal constitutional framework.

[9.47] Reviewing these dicta in *Kruger*, Gaudron J held that s 116 does apply as a limit on laws enacted under s 122, though she added that '**[123]** s 116 is directed to laws made by the Commonwealth, not laws enacted by the legislature of a self-governing Territory'. Toohey and Gummow JJ were strongly inclined to agree. Dawson J, with whom McHugh J agreed, expressed a contrary view: for him, the decision in *R v Bernasconi* was a barrier against the extension to the Territories of *any* express or implied constitutional limitations on power. He concluded: '**[60]** I do not think that it is possible while *R v Bernasconi* stands to hold that s 116 restricts s 122. Nor do I think that the reasoning in *Lamshed v Lake* is necessarily to be preferred to that in *R v Bernasconi*.' Contrary to the common assumption that the place of s 116 in Ch V of the Constitution ('The States') is anomalous, he argued that the limit it imposes on Commonwealth laws affecting religion was part of 'the division of legislative power between the Commonwealth and the States within the federation', and hence should have no application to laws under s 122. Clearly, the opinions expressed in *Kruger* in relation to s 116 by Gaudron, Toohey and Gummow JJ on one hand, and by Dawson and McHugh JJ on the other, were consistent with their subsequent views in *Newcrest* in relation to s 51(xxxi).

[9.48] Equally divisive in *Kruger* was the application of Ch III. Dawson J, with whom McHugh J agreed, held simply that '**[62]** [c]ourts created under s 122 are not federal courts', and accordingly that the doctrine of separate and independent judicial power 'has no application in the territories'. Brennan CJ applied '**[44]** the accepted doctrine' to that effect. On the other hand, Toohey, Gaudron and Gummow JJ all expressed support for the opposite view, though not finally deciding the issue. (Gummow J held that in order to do so it would be necessary to reconsider '**[170]** at least' the decisions in *Spratt v Hermes* and *Capital TV and Appliances Pty Ltd v Falconer*.) Thus, in substance, the Court in *Kruger* was evenly divided on the issue. However, later decisions have confirmed the insistence of Barwick CJ in *Spratt v Hermes* that the issue must be fragmented: that is, not *all* provisions in Ch III can be put aside as not 'applicable to the Territories'.

[9.49] In *Northern Territory v GPAO* (1999) 196 CLR 553, the High Court held that confidentiality provisions in the *Community Welfare Act 1983* (NT) were an effective answer to a subpoena issued by the Family Court of Australia. In order to arrive at that decision, it was necessary to clarify the basis on which, in the Northern Territory, the Family Court exercises its powers under Pt VII of the *Family Law Act 1975* (Cth) in relation to children. Part VII was added in 1987, and in 1995 its operation was extended by a new Subdiv F, providing in part, by s 69ZG: 'This Part applies in and in relation to the Territories.'

[9.50] In *GPAO* it was assumed that, despite its insertion in a general law operating throughout the Commonwealth, s 69ZG is a law made under s 122 for the government of the Territories. It was nevertheless held that the jurisdiction exercised pursuant to s 69ZG is federal jurisdiction, and that Pt VII as applied by s 69ZG is 'a law of the Commonwealth' for the purposes of s 76(ii) of the Constitution. In that sense, s 76(ii) is 'applicable in the Territories'. However, it also followed that,

McHugh J: [412] When a person claims that the writ of certiorari should issue to quash an order or decision of a lower court, tribunal or public **[413]** authority, the claim gives rise to a 'matter' within the meaning of Ch III of the Constitution. The claim asserts that the *record* of the court, embodying the order, is defective and that the order is of no force and effect. It gives rise to a controversy – concerning 'some immediate right, duty or liability to be established by the determination of the Court' [*Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265] – with the maker of, and any party supporting, the order or decision. If the order or decision is that of a court, it is irrelevant that it may have settled a controversy between parties who are strangers to the applicant for certiorari … A claim for certiorari gives rise to a new and different controversy from that involved in the proceedings that gave rise to the order. It gives rise to a separate 'matter'. The contrary view could only be maintained if the dissenting view in *Abebe v Commonwealth* [(1999) 197 CLR 510] had prevailed …

A stranger to the proceedings that gives rise to the relevant *record* may apply for certiorari to quash an order or judgment contained in the record. The judgment of Blackburn J in *R v Justices of Surrey* [(1870) LR 5 QB 466] is frequently cited for this proposition, although earlier cases had also recognised the right of a stranger to obtain certiorari. The rule that a stranger to the proceedings can apply for certiorari to quash an order, made without jurisdiction, has the same historical basis as the rule that a stranger can apply for prohibition to quash such an order. Permitting strangers to apply for certiorari helps to ensure that 'the prescribed order of the administration of justice' is not disobeyed. In *Worthington v Jeffries* [(1875) LR 10 CP 379, 382] … Brett J said:

> '**[414]** [T]he ground of decision, in considering whether prohibition is or is not to be granted, is not whether the individual suitor has or has not suffered damage, but is, whether the royal prerogative has been encroached upon by reason of the prescribed order of administration of justice having been disobeyed. If this were not so, it seems difficult to understand why a stranger may interfere at all.'

Perhaps a better reason – particularly in a federal system where cases deal with questions of constitutional validity – is that, if the losing party does not appeal, a judgment or order made without jurisdiction will become a precedent. Hence, the public interest may be enhanced by allowing a stranger to apply for certiorari to quash such a judgment or order. As Barwick CJ pointed out in *R v Federal Court of Australia; Ex parte WA National Football League* [(1979) 143 CLR 190, 204], such considerations 'apply with equal, if not greater, force with respect to matters where jurisdiction depends on constitutional competence'. In similar vein, Professor Wade has written [(1967) 83 *Law Quarterly Review* 499, 503] that certiorari 'is designed to keep the machinery of justice in proper working order by preventing inferior tribunals and public authorities from abusing their powers'. These statements of Barwick CJ and Professor Wade apply with equal force to *records* of curial proceedings, made within jurisdiction, but which on their face demonstrate an error of law.

Given that a stranger may apply for certiorari, it is not surprising that the Attorney-General, when representing the Crown in cases within the Attorney's jurisdiction, always has standing to apply for the issue of certiorari even though he or she was not a party to the proceedings in the lower court or tribunal. That is because the Crown, as guardian of the public interest, has an interest in seeing that tribunals stay within their jurisdiction and that they do justice according to law …

Accordingly, in my opinion, both applications for certiorari give rise to a matter in the original jurisdiction of this Court. In both proceedings, the applicants contend that the record of the Federal Court should be quashed because it shows an error of law on its face. The controversy between the applicants and the respondents is whether the order of the Federal Court does show an error of law on its face and whether the applicants are entitled to have certiorari issue to quash the order. Other controversies between the parties – such as standing **[415]** – are incidental to those issues. In some cases, the existence of a matter may depend on the plaintiff or applicant having standing. But 'neither the concept of "judicial power" nor the constitutional meaning of "matter" dictates that a person who institutes proceedings must have a direct or special interest in the subject matter of those proceedings' [*Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591, 611]. True it is that no matter exists for constitutional purposes unless 'there is a remedy available at the suit of the person instituting the proceedings in question' [200 CLR, 612]. Here there is a remedy available to the applicants. Subject to the exercise of the Court's discretion, even a stranger may obtain certiorari even though he or she is not a person aggrieved by the order made in the proceedings.

The fact that the applicants were not parties to the proceedings in the Federal Court is irrelevant, as is the fact that the Federal Court order settled a controversy between the respondents. A stranger has the right to assert that the record of a court is defective for want of jurisdiction or for error of law on the face of the record. That claim of right gives rise to a justiciable controversy against the maker of the record and those who were parties to its making.

Finally … the controversy between the parties arises under the Constitution and is therefore a 'matter' within the meaning of the Constitution.

[11.60] Callinan J broadly agreed with McHugh J. Indeed, he suggested that the decision in *Mellifont v Attorney-General (Qld)* may nowadays '**[476]** provide a basis for a broad view of what is a "matter" and … perhaps, the absence of an "immediate" right, duty, privilege or liability may not of itself always be decisive'. Kirby J, too, was prepared to hold that the Court was seised of a 'matter', at least in the relator action authorised by the Attorney-General's fiat.

[11.61] However, even these three judges who held that there was a relevant 'matter' agreed that the applications should be dismissed on discretionary grounds. Moreover, Gaudron, Gummow and Hayne JJ said that, even if they had discerned a relevant 'matter', they too would have declined on discretionary grounds to issue certiorari. Various factors were adduced as pointing to this denial of discretionary relief. For example, it was said that an unknown number of doctors (including McBain), acting in good faith on the decision of Sundberg J, might have carried out IVF treatments for which, if the decision were now overturned, they might find themselves liable to prosecution under the Victorian Act. Some of those treatments might already have been completed; others might have to be abandoned prematurely. Again, it was said that the Episcopal Conference, having been permitted to make submissions to Sundberg J as an *amicus*, had abandoned its application to be joined as a party to the Federal Court proceedings. Had it persisted and been joined as a party, it would have had a right to appeal, and for that reason it would not then have been permitted to proceed by way of certiorari. As McHugh J put it, '**[425]** the Conference's failure to seek to become a party cannot put it in a better position than it would be in if it had been a party'. Similarly, the belated entry into the proceedings by the Commonwealth Attorney-General was judged against his earlier failure to intervene in the Federal Court proceedings or to seek their removal into the High Court. In addition, Kirby J noted that '**[456]** all of the actual parties to the proceedings before Sundberg J were content with the outcome of those proceedings'; and McHugh J noted that, in particular, the Victorian government, which might have had an interest in contesting the decision, was evidently content to accept it. It had not appealed, nor had it made any attempt to repeal or amend the legislation. Its attitude made it doubtful whether it would enforce its legislation even if there was no declaration of invalidity … **[426]** One must assume that the Victorian government thinks that it is in the public interest of that State to accept the correctness of the order made by Sundberg J'.

(d) Standing

[11.62] The requirement that a plaintiff must have *locus standi*, and the restrictive criteria by which that requirement must be satisfied, have their origins in a version of the public/private distinction going back to medieval times. Traditionally, if as between individual neighbouring occupiers of land, the amenity of one was impaired by the land use of the other, the afflicted individual had a personal remedy for 'private nuisance'. However, if a whole neighbourhood was affected so that the grievance affected the local community generally, no individual plaintiff had a private right of action. 'Public nuisance' was a public concern, and required a public remedy. This meant either that the author of the nuisance was prosecuted for a criminal misdemeanour, or that the Attorney-General, as the chief law officer of the Crown in its capacity as *parens patriae* [parent of the nation], could institute proceedings in the public interest for an injunction to abate the nuisance. As time went on this remedy was modified in two ways.

[11.63] First, it came to be accepted that proceedings for 'public nuisance' could be initiated by a private individual in the Attorney-General's name. The Attorney-General's consent was required, but was usually given (by the granting of a 'fiat'). The action is thus brought by the Attorney-General 'on the relation of' ('*ex rel*') the real plaintiff; but the latter (the 'relator') has the control and conduct of the proceedings, and pays the costs. The 'relator' may be someone directly affected by the nuisance, but need not be. In modern times, municipal councils have frequently brought 'relator' actions.

ultimately disposed of on the ground that the relevant sections did not, after all, confer non-judicial power. The *Boilermakers* issue did not need to be resolved.

[12.20] A further challenge is now unlikely because, since the 1970s, the underlying rationale of the *Boilermakers* doctrine has shifted. In *Boilermakers*, an essential rationale was the need to insulate from political interference the special judicial responsibility for 'the maintenance of the Constitution'. Leslie Zines has suggested that this rationale applies peculiarly to the High Court, so that the position of other federal courts could be distinguished (*The High Court and the Constitution* (Federation Press, 5th ed, 2008) 296). Zines concedes, however, that while such a distinction might be drawn on policy grounds, the textual and structural arguments that were relied on in the *Boilermakers Case* admit no such distinction. In any event, 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 individual freedom as with the federal distribution of powers.

[12.21] This wider rationale is reflected, for instance, in the assertion by Deane J in *Street v Queensland Bar Association* (1989) 168 CLR 461 that the Constitution '**[521]** contains a significant number of express or implied guarantees of rights and immunities', and that '[t]he most important of them is the guarantee that the citizen can be subjected to the exercise of Commonwealth judicial power only by the "courts" designated by Ch III'. The shift in emphasis was signalled by Jacobs J in *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1, in which the Court held that the power of the Registrar of Trade Marks to order the removal of a trade mark from the register did not involve judicial power.

R v Quinn; Ex parte Consolidated Foods Corporation
(1977) 138 CLR 1

Jacobs J: [11] The historical approach to the question whether a power is exclusively a judicial power is based upon the recognition that we have inherited and were intended by our Constitution to live under a system of law and government which has traditionally protected the rights of persons by ensuring that those rights are determined by a judiciary independent of the parliament and the executive. But the rights referred to in such an enunciation are the basic rights which traditionally and therefore historically, are judged by that independent judiciary which is the bulwark of freedom. The governance of a trial for the determination of criminal guilt is the classic example …

[12] The right to have a trade mark remain upon a register is not such a right as I have described.

[12.22] In both *Alexander's Case* and *Boilermakers*, the relevant distinction was between, on the one hand, the non-judicial power to make arbitral awards derived from the agreement of the parties to submit their dispute to arbitration, and, on the other, the enforcement of the rights established by such awards through the exercise of judicial power. That clear divide has been affirmed by the High Court many times since, most recently in *TCL Air Conditioner (Zhongsan) Co Ltd v Judges of the Federal Court of Australia* (2013) 295 ALR 596. But with the development of a broader liberty-protecting rationale, the significance of the *Boilermakers* principle has long since transcended its origins in the resolution of industrial disputes.

2. The Separation of State Judicial Power

[12.23] While there is a strong textual and structural basis for the separation of powers in the Commonwealth Constitution, the same is not true of the State constitutions. In both *Clyne v East* (1967) 68 SR(NSW) 385 and *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, it was held that the separation of powers is not constitutionally entrenched in the *Constitution Act 1902* (NSW). In the latter case, Kirby P stated that '**[401]** far from providing a constitutional protection, separation and entrenchment of the judiciary … the *Constitution Statute* [*New South Wales Constitution Act 1855* (Imp)] and the *Constitution Act* both specifically contemplated that, in respect of New South Wales, power would be held by the legislature not just to impinge upon courts and the judicial function but even to abolish, alter or vary such courts'.

[12.24] The first edition of this book suggested (at 902) that the position in New South Wales might have been changed by the *Constitution (Entrenchment) Amendment Act 1992* (NSW), which was carried in a referendum held on 25 March 1995 and assented to on 2 May 1995. That Act amended s 7B of the *Constitution Act* by adding to the provisions thereby 'entrenched' (see Chapter 16, §3) the provisions for judicial independence and security of tenure contained in Pt 9 of the *Constitution Act* (as also inserted by the *Constitution (Amendment) Act 1992* (NSW)). However, in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, an argument to that effect failed. It failed in part on the technical ground that all of the material events in *Kable* had taken place before 2 May 1995 (when the new entrenchment provisions came into force). But it also failed on the more substantial ground that the protections of judicial independence now entrenched in the New South Wales Constitution were insufficient to furnish either the textual indicia of a strict constitutional insulation of judicial independence, or the long-established historical tradition of such insulation, which were found in respect of the Commonwealth of Australia in the *Boilermakers Case*, and Ceylon in *Liyanage v The Queen* [1967] 1 AC 259 (see §7 below).

Kable v Director of Public Prosecutions (NSW)
(1996) 189 CLR 51

Dawson J: [77] The appellant contended that the *Constitution Act* 1902 embodies a separation of powers whereby the judicial power of the State is separated from its legislative and executive powers … However, there is nothing in the structure of the *Constitution Act* 1902 to support this contention … Whilst Pt 9 of that Act is headed 'The Judiciary' nowhere does it provide that the judicial power of the State is vested in the judiciary. Section 53, which is contained in Pt 9, provides that no holder of judicial office may be removed from office save on an address of both Houses of Parliament seeking removal on the ground of proved misbehaviour or incapacity. There are additional provisions relating to the suspension of judicial office and the fixing or changing of retirement age. Section 56 provides that Pt 9 does not prevent abolition by legislation of a judicial office whether that be done directly or indirectly by the abolition of a court or part of a court.

While these provisions are concerned with the preservation of judicial independence, they cannot be seen as reposing the exercise of judicial power exclusively in the holders of judicial office. Nor can they be seen as precluding the exercise of non-judicial power by persons in their capacity as holders of judicial office. They clearly do not constitute an exhaustive statement of the manner in which the judicial power of the State is or may be vested. Had Pt 9 attempted such an exercise it would have cut across a long history of **[78]** the exercise of non-judicial power by the courts and the exercise of judicial power by bodies exercising non-judicial functions.

The *Constitution Act* 1902 may be contrasted with the provisions of the Commonwealth Constitution, in particular ss 1, 61 and 71. Those sections respectively vest the legislative power of the Commonwealth in the Parliament, the executive power in the Executive and the judicial power in the Judicature. Section 1 appears at the commencement of Ch I, which is headed 'The Parliament'. Section 61 appears at the commencement of Ch II which is headed 'The Executive Government'. Section 71 appears at the commencement of Ch III which is headed 'The Judicature'. In *R v Kirby; Ex parte Boilermakers' Society of Australia* [(1956) 94 CLR 254, 275] this Court held that this pattern could not be treated as a 'mere draftsman's arrangement' or as 'meaningless and of no legal consequence'. It is because the judicial power of the Commonwealth is vested by Ch III in those courts which it identifies and is dealt with nowhere else (save for s 51 (xxxix)) that this Court was compelled to conclude that no functions other than judicial functions may be reposed in the federal judicature and that no powers which are foreign to the judicial power may be attached to courts created by or under that chapter. Not only that, but it was recognised that the position and constitution of the federal judicature was bound up in the federal structure established by the Constitution, 'for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised' [94 CLR, 276].

The latter consideration has no application to the judicature of a State and the failure of the New South Wales Constitution to vest judicial power exclusively in the judicature must be fatal to any contention that the separation of that power from the other powers of government is a constitutional requirement. Even if it could be said that it was required, it might, in contrast to the requirement imposed by the Commonwealth Constitution, be disregarded by an Act of Parliament, for in that