Chapter 5

Chief Justice French, Judicial Power and Chapter III of the Commonwealth Constitution

*Justice James Edelman**

Introduction

Two decades ago, I attended a series of Friday twilight Constitutional Law seminars, which were hosted and held in the Federal Court chambers of Justice French. These were convivial affairs, open to anyone interested, which was generally a small group of practitioners and academics. The discussion was shaped by Justice French and a dear friend of his, the late Professor Peter Johnston, who had one of the most brilliantly creative constitutional minds. The topic at the first of the seminars I attended was Chapter III of the Constitution. Two decades later, I write this chapter on the same topic to honour the contribution of Chief Justice French. It is a subject upon which he has reflected and written for more than three decades of service on the federal judiciary. This chapter is descriptive, not prescriptive. It focuses upon the contributions of Chief Justice French to the state of the law in which it currently exists, in light of its development.

Chapter III of the Commonwealth Constitution – The Judicature – comprises 10 sections. It begins with s 71 which vests the judicial power of the Commonwealth in (i) the High Court of Australia, (ii) such other federal courts as Parliament creates, and (iii) such other courts as it invests with federal jurisdiction, most notably State Supreme Courts. A fundamental concept in that section, and in Chapter III generally, is the meaning of the 'judicial power of the Commonwealth'. In *Davison*,[1] Kitto J said that at the time the Constitution was being formed, neither England nor Australia 'had any precise tests by which the respective functions of the three organs [of government] might be distinguished'. The concept and boundaries of judicial power are still evolving. Indeed, it seems inevitable that it will remain the case that 'no single combination of necessary or sufficient factors identifies what is judicial power'.[2]

This contribution to the *festschrift* held to honour Chief Justice French focuses upon the boundaries of judicial power. It begins by considering, in Part I, the historical foundations of a constitutionally separate and independent Commonwealth judicial power. In Part II, it turns to what has come to be recognised as the underlying basis for

* Justice of the High Court of Australia.

1 *R v Davison ('Davison')* (1954) 90 CLR 353, 381.

2 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577 [93] (Hayne J).

the separation of powers and, distinctly, a ground which might invalidate the conferral of non-federal power upon federal courts or judges. That underlying basis is the notion of incompatibility between judicial power and other exercises of power. Part III then considers the fundamental question: what is judicial power? Finally, in Part IV, it is explained that in the absence of a clear definition of judicial power, and with the elasticity of the concept of incompatibility, Chief Justice French developed a functional approach to judicial power.

Many of the cases chosen as the launching points for this discussion are decisions in which Chief Justice French wrote separate reasons. In a chapter which honours the contribution of the Chief Justice to the law, it is fitting that these separate reasons for decision be used as the backbone of the discussion of these indicia and what they might tell us about large issues concerning the nature of judicial power.

Part I – The historical foundations of a separate Commonwealth judicial power

The identification, and separation, of Commonwealth judicial power is a matter of great importance to Australian government. In the first reported decision of the High Court of Australia, Griffith CJ (giving the opinion of the Court) emphasised that the Commonwealth Parliament has no authority to create any additional appellate jurisdiction other than that specified in Chapter III of the Constitution.[3] One fundamental reason for the importance of identifying the scope of judicial power is the negative implications in Chapter III of the Constitution arising from the separation of powers. The first two of these negative implications are those (i) which prevent a federal judge exercising other than judicial power, and (ii) which prevent federal judicial power from being reposed in bodies other than Chapter III courts.

Looking back, the law in relation to these negative implications could have developed very differently. Judicial power might have been treated in the same way as the separation of legislative and executive power without such strict separation. For instance, today it is commonly recognised that there is no implication which separates legislative and executive powers in a way which prohibits Parliament conferring upon the executive the 'power to make laws'.[4] In *Berbatis Holdings*,[5] French J described the permeable boundaries between legislative and executive power, quoting from Barwick CJ who, in upholding a delegated discretion conferred upon the Commissioner of Taxation, said that 'there is in the Australian Constitution no such separation of powers as would deny the Parliament the power to give an officer of the executive government such a legislative discretion as I have described'.[6] This had been recognised as early as 1931, when the High Court upheld a power enabling the executive to make

3 *Dalgarno v Hannah* (1903) 1 CLR 1, 10.
4 *Victorian Stevedoring & General Contracting Company Pty Ltd v Dignan ('Dignan')* (1931) 46 CLR 73.
5 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd ('Berbatis Holdings')* (2000) 96 FCR 491, 505-506 [31].
6 *Giris Pty Ltd v Federal Commissioner of Taxation ('Giris')* (1969) 119 CLR 365, 373.

regulations which could take effect notwithstanding anything in any other Act other than the *Acts Interpretation Acts*.[7] Such provisions, which were described by French CJ as 'analogous to so-called "Henry VIII" clauses',[8] were considered by Windeyer J, in *Giris*, to be 'very close to the boundary'.[9] However, it became an accepted principle that the Constitution did not prohibit Parliament from conferring on the executive an 'essentially legislative'[10] power.

This more flexible approach, which permits a comingling of legislative and executive power, stands in contrast with the development of the separation of judicial power. One counsel, Owen Dixon, noticed this contrast at an early point but thought, and argued, that the oddity was not the need for a separation of judicial power but the comingling of legislative and executive power. Although Sir Owen Dixon, as a judge, had supported the conclusion in *Dignan*, only four years later he gave a speech to the University of Melbourne, from which it might be implied that he had supported that conclusion mainly for reasons of precedent.[11] He explained that the conclusion in *Dignan* may have been reached because the Australian courts had not understood the United States' 'mutually exclusive' separation of powers between the executive, the legislature, and the judiciary. He described how British practice and theory would have seen such separation as an 'artificial and almost impracticable classification' and how the 'notion that all law-making was confined to the legislature which, therefore, could not authorize the executive to complete its work was so foreign to the conceptions of English law that the Australian Courts ignored or were unaware of the full consequences of the American plan we had adopted'.[12] After all, the Lord Chancellor in England had long occupied high office in the judiciary, the executive, and the legislature.

Sir Owen Dixon's view that Australia had not appreciated the strictness of its separation of powers was not a new view which he first expressed after *Dignan's* case. In 1921, he had argued as counsel that: '[j]ust as the Constitution does not permit the judicial power of the Commonwealth to be vested in any tribunal other than the High Court and other Federal Courts … so the vesting of the legislative power in any other body than Parliament is prohibited'.[13] It is likely that this submission reflected Sir Owen's personal view, but it was not accepted. A decade later when he had become a judge and heard *Dignan* he considered that it was too late for Australian law to turn back. There are other examples of his Honour's insistence upon the strictness of separation of powers. For instance, he thought that the concept of *persona designata*, by which a judge can exercise non-judicial powers but not in his or her capacity as a judge, involved 'distinctions without differences'.[14]

7 *Dignan* (1931) 46 CLR 73.
8 *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 355 [18].
9 *Giris* (1969) 119 CLR 365, 385. See also 379 (Kitto J) and 381 (Menzies J).
10 *Dignan* (1931) 46 CLR 73, 100-101 (Dixon J).
11 Sir Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590. Republished in Sir Owen Dixon, *Jesting Pilate* (Law Book Co, 1965) 38.
12 Ibid at 605-606; republished at 52.
13 *Roche v Kronheimer* (1921) 29 CLR 329, 331.
14 *Medical Board (Vic) v Meyer* (1937) 58 CLR 62, 97.

In summary, by the time Sir Owen Dixon had been appointed to the High Court there was a curious situation in which a doctrine of separation of powers at the Commonwealth level required that federal judicial power be separate from executive and legislative power but that executive and legislative power were not generally required to be separate from each other. How did this situation arise?

The most fundamental decision which set Australian law on the path of separation of Commonwealth judicial power in a way which was not applied to other powers was the *Wheat Case* in 1915.[15] The *Wheat Case* concerned the *Inter-State Commission Act 1912* (Cth). That Act had been delayed for a variety of reasons, including the early opposition by the Federal Steamship Owners of Australasia and the Australian Shipping Federation.[16] The Act was subject to trenchant debate. It was expected that the Inter-State Commission would have dramatic effects, and it was subject to strong opposition. Indeed, the first bill for the Commission was introduced, on 17 July 1901, *before* the introduction of the bill which became the *Judiciary Act 1903* (Cth). The 1912 Act invested the Commission with a range of judicial and non-judicial powers. It was enacted in reliance upon s 101 of the Commonwealth Constitution which 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.

After it was enacted, the Commonwealth brought a complaint under s 92 of the Constitution on behalf of wheat growers. The complaint concerned New South Wales legislation that permitted the State to acquire wheat produced in New South Wales. The Inter-State Commission, by majority (with the Chief Commissioner, Mr Piddington, in dissent) held the New South Wales legislation to be contrary to s 92 of the Constitution. The State appealed the decision to the High Court under the appellate power in s 73(iii) of the Constitution. In the High Court, Part V of the *Inter-State Commission Act* was struck down as unconstitutional. The High Court split 4:2. In the majority was Isaacs J. In the minority was Barton J. The identity of those judges is important.

The basis upon which the majority of the High Court struck down the legislation in the *Wheat Case* was the separation of judicial power in the Constitution which was said to confine the exercise of federal judicial power to the provisions in Chapter III of the Constitution. Section 101 was not in Chapter III. However, there was a strong argument that s 101 contradicted a negative implication that only Chapter III courts could exercise the judicial power of the Commonwealth. Section 101 of the Constitution, as noted above, had established an Inter-State Commission for the execution and maintenance of provisions of the Constitution relating to trade and commerce 'with such powers of adjudication and administration as Parliament deems necessary'. During the Convention debates, views were expressed about the breadth of these powers. Mr Kingston remarked that 'we are conferring on the Inter-State Commission judicial

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

16 See Andrew Bell, 'The Missing Constitutional Cog: The Omission of the Inter-State Commission' (2009) *Bar News: The Journal of the NSW Bar Association* 59, 61-62.

powers of the highest order'.[17] There were significant indications that s 101 embodied judicial power, a view which Sir John Quick and Sir Robert Garran thought to be clear.[18]

The textual indications supporting the view of Mr Kingston also included the following. First, s 103(i) of the Constitution, as enacted, provided that the members of the Inter-State Commission should be appointed by the Governor-General in Council; this was the same procedure as Chapter III judges under s 72(i). Second, s 103(iii) also provided that remuneration was to be set by Parliament but was not to reduce during the term of office; again, this was the same as Chapter III judges under s 72(iii). Third, s 103(ii) of the Constitution, although limiting the term of a member of the Commission to seven years, provided that the member could not be removed other than on an address from both Houses of the Parliament in the same session; this was also the same procedure as Chapter III judges under s 72(ii). Finally, the Inter-State Commission was included in the appellate hierarchy created by s 73 of the Constitution, although appeals from it to the High Court were limited to questions of law only.

Contrary views were taken by others during the Convention debates, including Mr Isaacs and Mr Higgins. Mr Isaacs remarked that although Parliament should have power to create the Inter-State Commission, 'it is a mistake to constitute that body under the Constitution'[19] and that '[i]t looks to me like an enormous branch being set up which may seriously affect other portions of the Constitution'.[20] Mr Higgins remarked in 1898 that 'I think it desirable that the High Court should be kept to the decision of law points, while the Inter-State Commission should be confined to the decision of expert questions with regard to railway management'.[21] Another example is when Mr Barton proposed an amendment to an earlier draft of the clause which removed the words 'but so that the commission shall be charged with' its powers and replaced them with the word 'for'. Mr Barton's amendment was proposed because he considered that in its previous form the Commission could not do anything until Parliament legislated. Mr Isaacs strongly disagreed with the amendment, but the amendment passed.[22]

Professor Finnis has attacked the High Court's decision in the *Wheat Case*, describing it as a 'judicial mini *coup d'état*'.[23] To some degree his reasoning elided the subjective views of the founders, including Messrs Isaacs and Higgins, with an objective process of construction. However, as he has accurately observed elsewhere, the decision of Isaacs J in the *Wheat Case* was extremely influential:

17 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2458 (Charles Kingston).

18 Sir John Quick and Sir Robert Garran, *The Annotated Constitution of the Australian* Commonwealth (LexisNexis, first published 1901, 1976 edition) 900.

19 *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 25 February 1898, 1516 (Sir Isaac Isaacs).

20 *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 16 March 1898, 2461 (Sir Isaac Isaacs).

21 *Official Record of the Debates of the Australasian Federal Convention,* Melbourne, 22 February 1898, 1265 (Henry Higgins).

22 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2396.

23 John Finnis, 'Judicial Power: Past, Present and Future' (Speech given for the Judicial Power Project, Grays Inn Hall, 20 October 2015) <https://judicialpowerproject.org.uk/john-finnis-judicial-power-past-present-and-future>.

> [T]he judgments of Griffith CJ, and Powers and Rich JJ have a perfunctoriness that would, in so important a case, be remarkable (especially for Griffith CJ), were it not that the majority view was so exhaustively argued by Isaacs J. The judgment of Isaacs J, in fact, is seminal in the history of the Australian Constitution; it provides the major premise for almost every significant development in the law of separation of powers, and its implications are not yet exhausted.[24]

A central tenet of the reasoning of Isaacs J was as follows:

> So far we find delimited with scrupulous care, the three great branches of government. To use the words of *Marshall* CJ in *Wayman v Southard* 10 Wheat, 1, at p 46: 'The difference between the departments undoubtedly is, that the legislature makes, the executive executes, and the judiciary construes the law'. That describes the primary function of each department, though there may be incidents to each power which resemble the other main powers, but are incidents only.
>
> It would require, in view of the careful delimitation I have mentioned, in my opinion, very explicit and unmistakable words to undo the effect of the dominant principle of demarcation.[25]

A critique of the reasoning of Isaacs J might not merely be based on the history of the Inter-State Commission and the conception of judicial power reflected in the Convention debates. Another issue, considered in Part III of this chapter, is that judicial power was arguably not capable of definition in a way which permitted 'careful delimitation' between executive and legislative power. Indeed, even as a textual implication, only two days after the High Court heard the *Wheat Case,* the Court heard another case in which it reached a result which has some tension with it. In *Bernasconi*,[26] the High Court held that the jury trial requirements of s 80 in Chapter III had no place in relation to the Territories which, in the words of Isaacs J, were the subject of a s 122 'unqualified grant complete in itself … [which] implies that a "territory" is not yet in a condition to enter into the full participation of Commonwealth constitutional rights and powers'.[27] This conclusion was reinforced in *Porter*,[28] where Isaacs, Higgins, Rich, and Starke JJ held that the High Court could hear an appeal from the Supreme Court of the Northern Territory despite the fact that the Supreme Court was not a Federal Court within the meaning of s 71 of the Constitution. The rationale of Isaacs J in *Porter*, developing his view in *Bernasconi*, was adopted by later decisions in the High Court,[29] although McHugh J expressed the firm view that the decisions in *Bernasconi* and *Porter* had been wrong.[30] A rationale of those decisions was that Chapter III was concerned with 'the Commonwealth proper, which means [only] the area included within States'.[31]

24 John Finnis, 'Separation of Powers in the Australian Constitution – Some Preliminary Considerations' (1968) 3 *Adelaide Law Review* 159, 164.
25 *Wheat Case* (1915) 20 CLR 54, 90.
26 *R v Bernasconi ('Bernasconi')* (1915) 19 CLR 629.
27 Ibid at 637.
28 *Porter v The King; Ex parte Yee ('Porter')* (1926) 37 CLR 432.
29 See *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 594-595 [173]-[174] (Gummow and Hayne JJ); *Northern Territory v GPAO* (1999) 196 CLR 553, 599-600 [116]-[117] (Gaudron J); *R v Kirby; Ex parte Boilermakers' Society of Australia ('Boilermakers')* (1956) 94 CLR 254, 290 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).
30 *Gould v Brown* (1998) 193 CLR 346, 426 [131].
31 *Porter* (1926) 37 CLR 432, 441 (Isaacs J).

However, putting to one side the Territories, the negative implication of Chapter III was reiterated in 1918 by Isaacs and Rich JJ in *Waterside Workers' Federation of Australia v JW Alexander Ltd*[32] and in a unanimous judgment of the High Court in 1921 in *Re Judiciary and Navigation Acts*.[33] After describing the terms of ss 71 to 77 of the Constitution, the Court in the latter case said that this:

> 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.[34]

Four decades later, in *Boilermakers*,[35] a 'negative implication' was affirmed by the narrowest majority of the High Court. That case concerned whether the Commonwealth Court of Conciliation and Arbitration could combine its arbitral powers with judicial powers. A majority of the High Court[36] held that this violated the separation of powers in Chapter III. There were dissents from Williams, Webb and Taylor JJ. In his dissent, Williams J accepted that only courts can exercise the judicial power of the Commonwealth but he denied that there was any prohibition upon courts exercising any other power. He said that such a negative implication must arise 'from the vague concept of the separation of powers',[37] explaining that the demarcation in the Constitution 'could hardly have been conveniently framed otherwise when its purpose was to create a new statutory political entity. And with the model of the United States as a guide, its authors were almost bound to frame it this way'.[38] The majority approach which prevailed, however, contained a statement of the negative implication which has been cited many times. The common statement of the negative implication by the majority was:

> to study Chap III is to see at once that it is an exhaustive statement of the manner in which the judicial power of the Commonwealth is or may be vested. It is true that it is expressed in the affirmative but its very nature puts out of question the possibility that the legislature may be at liberty to turn away from Chap III to any other source of power when it makes a law giving judicial power exercisable within the Federal Commonwealth of Australia.[39]

This decision of the majority of the High Court was followed on appeal to the Privy Council. The Privy Council emphasised both aspects of the negative implication, and quoted from the majority: judicial power cannot be exercised by a body other than a Chapter III court *and* a Chapter III court cannot exercise non-judicial power.[40] The latter proposition had previously been controversial. Even Higgins J, a strong supporter of the separation of powers, had denied that such an implication could be drawn.[41]

32 (1918) 25 CLR 434, 464: 'The judicial function is an entirely separate branch'.
33 (1921) 29 CLR 257, 265.
34 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 265.
35 *Boilermakers* (1956) 94 CLR 254.
36 Dixon CJ, McTiernan, Fullagar and Kitto JJ.
37 *Boilermakers* (1956) 94 CLR 254, 306.
38 Ibid at 302.
39 Ibid at 270.
40 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 535.
41 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 276.

Part II – The rationale of a separate Commonwealth judicial power and its expansion

The incompatibility rationale

Cases like *Boilermakers'* were concerned with the existence or extent of the structural and textual implication of the separation of powers in the Constitution. Once the elasticity of the separation of powers doctrine was recognised, courts began to consider closely the ways in which the boundary could be established. One early suggestion of a rationale of 'inconsistency' was in 1938 by Latham CJ in *Lowenstein*.[42] This 'inconsistency' or 'incompatibility' rationale was developed to explain a qualification upon a proviso which exceptionally permitted the exercise by federal judges of non-judicial power. The general principle was that federal judges cannot exercise non-judicial power. The proviso was that non-judicial power could be exercised if it is incidental to judicial power. However the qualification upon the proviso was that if 'the nature or extent of the functions cast upon judges were such as to prejudice their independence or to conflict with the proper performance of their judicial function the principal underlying the Boilermakers' Case would … render the legislation invalid'.[43] Hence, a federal judge could exercise non-judicial power as persona designata, rather than as a 'judge', but this non-judicial power was subject to the consent of the judge and the principle of ensuring that there is no incompatibility in the exercise of the power.[44]

The most considered discussion of the incompatibility rationale came in a string of cases from 1996. The first of the line of cases was the decision of the High Court, by majority, in *Kable*.[45] Prior to the decision in *Kable*, it was not generally thought that Chapter III of the Constitution had any effect on State courts. For example, in 1982, Mason J said that:

> Generally speaking, the Parliament of a State may in the exercise of its plenary legislative power alter the composition, structure, and organization of its Supreme Court for the purposes of the exercise of State jurisdiction. It is in the exercise of this power that provisions of the kind already discussed have been enacted. Chapter III of the Constitution contains no provision which restricts the legislative competence of the States in this respect. Nor does it make any discernible attempt to regulate the composition, structure or organization of the Supreme Courts as appropriate vehicles for the exercise of invested federal jurisdiction.[46]

It may be that the 'generally speaking' qualification by Mason J was to exclude the possibility of changes to the composition or structure of a court which are so radical that the institution ceases to be a court. That minimum content of a court was thought to be in narrow compass. In *Waterside Workers' Federation of Australia v JW Alexander Ltd*, Barton J described the essential features of a court:

42 *R v Federal Court of Bankruptcy; Ex parte Lowenstein ('Lowenstein')* (1938) 59 CLR 556, 566-567.
43 *Hilton v Wells* (1985) 157 CLR 57, 73-74 (Gibbs CJ, Wilson and Dawson JJ). See, also, 81 (Mason and Deane JJ). See further *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ) and 392 (Gummow J).
44 *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.
45 *Kable v Director of Public Prosecutions (NSW) ('Kable')* (1996) 189 CLR 51.
46 *Commonwealth v Hospital Contribution Fund of Australia* (1982) 50 CLR 49, 61.

> It is a Court, if the legislature gives it the attributes of one, from the institution down to the determination, and if necessary the enforcement of the claim. When such intention and attributes are clear it must also be clear that the Court is granted the exercise of judicial power.[47]

Kable altered this view of Chapter III. That case concerned New South Wales legislation called the *Community Protection Act 1994* (NSW). The legislation was enacted shortly before Mr Kable's release from prison for the manslaughter of his wife. The legislation empowered the New South Wales Supreme Court to make an order detaining Mr Kable upon various conditions being satisfied. An order was made detaining Mr Kable for six months following an allegation that he had sent threatening letters. The New South Wales Court of Appeal dismissed an appeal from that order. Mr Kable appealed to the High Court, alleging that the legislation was unconstitutional.

In the majority, the narrowest view was that of Toohey J who considered that the New South Wales law was contrary to Chapter III because the power to order preventative detention involved the performance of a non-judicial function in the course of the exercise of federal judicial power. The other judges did not base their conclusion on the premise that the Supreme Court was exercising federal judicial power. Gaudron J considered that the law conferred powers or functions that were incompatible with the integrity of a State court which was part of an integrated system including the exercise of the judicial power of the Commonwealth.[48] McHugh J held that as the State courts are an integral and equal part of the judicial system set up by Chapter III, it also 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. This included the exercise of functions incompatible with federal judicial power (legislative or executive power *or* removing natural justice) as well as the need for other courts exercising federal judicial power to be perceived to be independent of the legislature and the executive.[49] Gummow J held that the power was a non-judicial power which was 'repugnant to the judicial process in a fundamental degree'.[50]

After *Kable,* the dominant view as to inconsistency is that expressed in the joint judgment of Hayne, Crennan, Kiefel and Bell JJ in *Pompano*, that 'the essential notion is that of repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system'.[51] Examples of laws contrary to these notions include laws of a State legislature abolishing the State Supreme Court,[52] or requiring judicial decision-making to be directed by the executive;[53] or excluding judicial review for jurisdictional error of any

47 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 452.
48 *Kable* (1996) 189 CLR 51, 102 and 107.
49 Ibid at 116.
50 Ibid at 132.
51 *Assistant Commissioner Condon v Pompano Pty Ltd ('Pompano')* (2013) 252 CLR 38, 89-90 [125], citing Gummow J in *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 617 [101].
52 *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 139 (Gummow J). See also *K-Generation Pty Ltd v Liquor Licensing Court ('K-Generation')* (2009) 237 CLR 501, 543-544 [151]-[153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
53 *International Finance Trust Co Ltd v NSW Crime Commission ('International Finance')* (2009) 240 CLR 319.

class of an official decision made under a law of the State.[54] This might suggest a very limited role for incompatibility, in effect confining it to a circumstance where a State court is not really functioning as a court as contemplated by s 73 of the Constitution due to the omission of a defining characteristic of a court.[55] But, in *Totani*, French CJ said that this is too narrow a view of incompatibility:

> the true question is not whether a court of a State, subject to impugned legislation, can still be called a court of a State nor whether it bears a sufficient relation to a court of a State. The question indicated by the use of the term 'integrity' is whether the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity. By way of example, a law which requires that a court give effect to a decision of an executive authority, as if it were a judicial decision of the court, would be inconsistent with the subsistence of judicial decisional independence.[56] (citation omitted)

The application of the incompatibility rationale

The incompatibility rationale, as it has developed, can be considered in three different categories. Incompatibility has been applied to test the validity of:

(i) the conferral of power on a federal court or federal judge;
(ii) the conferral of power on a federal *or* State court or a federal or State judge involving the exercise of federal judicial power; and
(iii) the conferral of power on a State court or judge not requiring the exercise of federal judicial power.

Each of these is considered below.

As to category (i), a legislative conferral of power on a federal court or federal judge might be invalid because of the incompatibility between the possession of federal judicial power by a federal judge and the possession of any non-judicial power by the federal judge acting as a judge. This is a basic separation of powers point. The incompatibility which has been implied from the Constitution is an incompatibility between judicial power and other types of power. The obvious example of such incompatibility is the conferral of a non-incidental, non-judicial power on a Chapter III court. The rationale for this first category of incompatibility has been recognised for a century. The implication that has generally been drawn is that the Constitution treats the exercise of judicial power as separate from, and incompatible with, executive and legislative power. In category (i) (and category (ii)) an important question may be to identify the nature of the power being conferred: is it 'judicial power' or 'non-judicial power'? That is the subject of the next part of this chapter.

54 *Kirk v Industrial Court (NSW) ('Kirk')* (2010) 239 CLR 531.
55 *Momcilovic v The Queen ('Momcilovic')* (2011) 245 CLR 1, 174-175 [436]-[437] (Heydon J). See also *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).
56 *South Australia v Totani ('Totani')* (2010) 242 CLR 1, 48 [70].

As to category (ii), the conferral of power might be invalid because of the incompatibility between the possession of federal judicial power by a federal or State judge and an unjudicial manner of exercise of that federal power. The basis of this point is not necessarily the separation of federal judicial power, because this second species of incompatibility does not require the power to be characterised as a non-judicial power. Commonly the focus is on the *manner* in which the federal power conferred is to be exercised. As French CJ has observed, Parliament cannot direct courts as to the outcome *or manner* of the exercise of federal jurisdiction.[57] An example of this, explained by McHugh J in *Kable*, is requiring federal judicial power to be exercised, either by a federal or a State court, without natural justice.[58]

As to category (iii), as Gaudron, McHugh, and Gummow JJ held in *Kable,* the conferral of power might be invalid because of an incompatibility between the mere fact of possession of federal judicial power and the exercise of potentially unrelated *non-federal* judicial power by a State court. Again, this question of incompatibility does not depend upon a separation of powers which is not strict at State level. An example of this is the conferral of State power upon a State court in a manner which excludes judicial review. This category (iii) is currently narrow. As French CJ observed in *Pompano*,[59] even after *Kable* it remains possible for the Supreme Court of a State to be conferred with non-judicial power. In *Wainohu*,[60] French CJ and Kiefel J observed that the doctrine in *Kable* was not based on the separation of powers but on the existence of an integrated Australian legal system with the High Court at the apex exercising the judicial power of the Commonwealth. This does not mean that the incompatibility arises only because the institutional integrity of the High Court could be affected if it might be required, on appeal, to consider the exercise of a State power. Indeed, as Professor Goldsworthy has observed,[61] the mere exercise of non-judicial power by a State court cannot directly affect any federal court because, as French CJ observed in *Momcilovic,* an appeal to the High Court would be precluded as outside appellate jurisdiction.[62] Instead, the incompatibility doctrine in the second and third categories is concerned, as French CJ (in common on this point with Crennan and Kiefel JJ and Bell J) said, with the integrated nature of the court system involving the conferral of federal judicial power on State courts as well as federal courts. The focus is upon whether the power conferred impairs the institutional integrity of the State court and therefore is incompatible with its position in this integrated court system, which includes the reposal of federal jurisdiction in the State court.[63]

As to categories (ii) and (iii) generally, a number of decisions of the High Court during the tenure of Chief Justice French have emphasised the considerable importance of open justice to the requirement of compatibility of the manner of exercise of judicial

57 *International Finance* (2009) 240 CLR 319, 352 [50].
58 *Kable* (1996) 189 CLR 51, 116.
59 *Pompano* (2013) 252 CLR 38, 53 [22].
60 *Wainohu v New South Wales ('Wainohu')* (2011) 243 CLR 181, 209-210 [45], quoting from *Totani* (2010) 148 CLR 1, 81 [201] (Hayne J).
61 Jeffrey Goldsworthy, 'Kable, Kirk, and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75, 82-83.
62 *Momcilovic* (2011) 245 CLR 1, 31-32 [6], 70 [101].
63 Ibid at 66-67 [92]-[93] (French CJ).

power with the exercise or possession of federal judicial power. As French CJ said in *K-Generation*,[64] the open court principle is of long historical standing, is well established in all common law jurisdictions, and has been recognised as an essential aspect of the character of State courts. I will focus on just three examples.

The first example is *International Finance*.[65] One issue in that case was whether s 10 of the *Criminal Assets Recovery Act 1990* (NSW) was invalid. A majority of the High Court held that the section was invalid. As French CJ explained, s 10 required the New South Wales Supreme Court to hear applications for restraining orders without notice to the affected persons. It was not to the point that the restriction was only temporary or that the order could be varied by an exclusion order if the affected party showed that the property was not illegally acquired. One of the essential matters relied upon by French CJ was that the New South Wales Crime Commission could *require* the Court to hear an application without notice to the affected person, who would have no opportunity to test the evidence put against him or her on that application. French CJ observed that procedural fairness lies at the heart of the judicial process.[66] The power of the executive to direct that a court hear an application without notice to the affected party was therefore a power enabling the executive to direct the judiciary as to an essential manner in which judicial power was to be exercised. This was incompatible with the institutional integrity of the Court.

A second example is *Wainohu*.[67] In that case, the question was the validity of the *Crimes (Criminal Organisations Control) Act 2009* (NSW). The Act empowered the State Attorney-General to declare judges, with their consent, to be 'eligible judges'. Eligible judges had the power to make declarations concerning an organisation if satisfied that the organisation's members associated for purposes concerning serious criminal activity, and that the organisation was a risk to public safety. The rules of evidence did not apply and the judge was not required to provide any reasons or grounds for the declaration or decision. A majority of the High Court held that the Act was invalid because the exemption of a duty to give reasons for any declaration made was incompatible with the institutional integrity of the New South Wales Supreme Court. In a joint judgment, French CJ and Kiefel J explained the historical acceptance of 'a public explanation of reasons for final decisions and important interlocutory rulings'.[68] They explained that the constitutional character of reasons for decision from a Supreme Court arose because s 73 of the Constitution provides for the jurisdiction of the High Court to hear appeals from all judgments, decrees, orders and sentences of the Supreme Courts of the States.[69] The provision of reasons was also an expression of the open court principle which, as their Honours explained, 'is an essential incident of the judicial function'.[70]

A third example is *Pompano*.[71] The issue in that case was whether the *Criminal Organisation Act 2009* (Qld) was contrary to Chapter III by conferring powers on the

64 *K-Generation* (2009) 237 CLR 501, 520.
65 *International Finance* (2009) 240 CLR 319.
66 Ibid at 354 [54].
67 (2011) 243 CLR 181.
68 Ibid at 213 [54].
69 Ibid at 215 [57].
70 Ibid at 215 [58].
71 (2013) 252 CLR 38.

Supreme Court of Queensland which were incompatible with its institutional integrity. Under that legislation, the Supreme Court was empowered to make a declaration that a particular organisation was a 'criminal organisation'. The Court was required to consider the application without notice to the respondent and in a 'special closed hearing' where the Court was required to exclude the criminal organisation during any consideration of 'declared criminal intelligence', although a 'public interest monitor' could attend the hearing and make submissions. The informant who had provided criminal intelligence could not be called or required to give evidence. French CJ spoke of how the issue was not 'black and white'. He explained the evaluative nature of the decision involved in the question of incompatibility:

> The deeply rooted common law tradition of the open court, presided over by an independent judge according procedural fairness to both parties, is adapted to protect the public interest in cases such as those involving national security, commercially sensitive documents and the protection of police informants. Similarly, the constitutional limits do not prevent parliaments from making laws for the protection of the public interest in such areas.[72]

Part III – The meaning of 'judicial power'

We have seen, in Part II of this chapter, that the concept of judicial power has been treated as fundamental to determining the validity of Commonwealth laws in category (i) (incompatibility between the *possession* of federal judicial power by a federal judge and the exercise of *any* non-judicial power by a federal judge acting as a judge). Outside of this category, the concept of judicial power can still be an important part of considering whether the nature of the power conferred is incompatible with the exercise or possession of federal judicial power by a court in an integrated court system.

In this Part of the chapter, the focus is on the meaning of 'judicial power' rather than the more confined meaning of 'federal judicial power'. Plainly, if a power is not judicial it cannot be federal judicial power. There are additional constraints upon whether judicial power is federal judicial power. In particular, there are constraints that flow from the concept of a 'matter' in Chapter III of the Constitution. In *Momcilovic*,[73] French CJ explained that the judicial power of the Commonwealth, which is closely linked to the concept of a 'matter', does not mark out the bounds of the judicial functions able to be exercised by State courts.

It is impossible, against a long history of precedent, to give a single, comprehensive definition of judicial power. One difficulty is the use of history. Although historical considerations *alone* cannot supply a sufficient basis for defining a power as judicial,[74] Hayne, Crennan, Kiefel and Bell JJ said in *TCL Air Conditioner*, that historical considerations can support a conclusion 'that the power to take [a particular] action

72 Ibid at 47 [5].
73 (2011) 245 CLR 1, 62 [83].
74 *Palmer v Ayres; Ferguson v Ayres* (2017) 91 ALJR 325, 334 [37] (Kiefel CJ, Keane, Nettle and Gordon JJ).

is within the concept of judicial power as the framers of the Constitution must be taken to have understood it'.[75] An irony of the use of historical considerations even as a supporting mechanism is that it might then permit matters to fall within the concept of judicial power as a result of the *practice* of English and Colonial courts prior to Federation even though that practice was one which was not subject to a doctrine of separation of powers and where there was no need to characterise powers exercised by judges as judicial, administrative or legislative. Nevertheless, as long ago as *Davison's* case, the High Court emphasised the importance of historical considerations. In that case, Dixon CJ and McTiernan J quoted from Dean Pound, saying that:

> In doubtful cases, however, we employ a historical criterion. We ask whether, at the time our constitutions were adopted, the power in question was exercised by the Crown, by Parliament, or by the judges. Unless analysis compels us to say in a given case that there is a historical anomaly, we are guided chiefly by the historical criterion.[76]

The historical criterion is often qualified by emphasising that it applies only in 'doubtful cases' and that it must be applied with care to ensure there is a relevant pre-federation analogue to the power, bearing in mind the considerable differences introduced by the modern regulatory State.[77] In *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd*,[78] French J considered the range of administrative and investigative functions exercised by courts from a time well before Federation. However, his Honour said that this '[did] not mean that all investigative functions conferred on a court, absent relevant historical antecedents or analogues, are to be regarded as judicial if not otherwise incidental to the exercise of judicial power'.[79]

A second difficulty is a doctrine which can only avoid circularity by operating in marginal cases where the power is not peculiarly judicial, legislative, or administrative. This is the concept described as the chameleon principle.[80] It is the 'chameleon' principle that 'a grant of power not insusceptible of a judicial exercise is to be understood as a grant of judicial power because the recipient of the grant is judicial'.[81]

A third difficulty is that some powers that would not otherwise be judicial are treated as judicial because they are said to be permissible 'incidents in the exercise of strictly judicial powers'.[82] Examples of powers which are judicial as permissible incidents of the exercise of judicial power were given in 1954 by Dixon CJ and McTiernan J

75 *TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia ('TCL Air Conditioner')* (2013) 251 CLR 533, 574 [105], quoting from *Davison* (1954) 90 CLR 353, 382 (Kitto J).

76 *Davison* (1954) 90 CLR 353, 369, quoting from Dean Pound, 'The Rule Making Power' (1926) 12 *American Bar Association* 599.

77 *White v Director of Military Prosecutions ('White')* (2007) 231 CLR 570, 595 [48] (Gummow, Hayne and Crennan JJ).

78 (2007) 156 FCR 501.

79 *Highstoke Pty Ltd v Hayes Knight GTO Pty Ltd* (2007) 156 FCR 501, 534 [108].

80 The expression of Aickin J in *R v Quinn; Ex parte Consolidated Foods Corporation ('Consolidated Foods')* (1977) 138 CLR 1, 18.

81 *R v Spicer; Ex parte Australian Builders' Labourers' Federation ('Spicer')* (1957) 100 CLR 277, 305 (Kitto J).

82 *Queen Victoria Memorial Hospital v Thornton* (1953) 87 CLR 144, 151 (the Court).

in *Davison*, including: the administration of trusts by the courts of Chancery; the winding up of companies; the grant of probate of a will or letters of administration; the enforcement of a judgment or judicial decree; and the making of rules of Court.[83] Some of these functions are easily seen as executive or administrative powers. Some, like rules of court, are legislative. But all have, so far, *also* been treated as falling within the scope of permissible power by the federal judiciary.

Although each of these three matters means that a single conception of judicial power is impossible, they do not prevent formulation of a core concept of judicial power from which it is possible to consider (i) historical analogues; (ii) whether the power is one which is susceptible to the chameleon doctrine; and (iii) whether a power is incidental to it.

The process of adjudication – Determining rights rather than creating rights

A broad, and well-known,[84] general definition of judicial power was given by Griffith CJ, over a hundred years ago, in *Huddart, Parker & Co Pty Ltd v Moorehead*.[85] Although this is a definition subject to all of the exceptions and historical carve-outs that I have mentioned, it is one which has had huge currency. Griffith CJ said:

> I am of opinion that the words 'judicial power' as used in sec 71 of the Constitution mean 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. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[86]

83 *Davison* (1954) 90 CLR 353, 368-369.

84 Approved by the Privy Council or House of Lords in *Attorney-General v British Broadcasting Corporation* [1981] AC 303, 359 (Lord Scarman); *Mohamed Samsudeen Kariapper v SS Wijesinha* [1968] AC 717, 733 (Sir Douglas Menzies); *Labour Relations Board of Saskatchewan v John East Iron Works Ltd* [1949] AC 134, 149 (Lord Simonds); *Shell Company of Australia Ltd v Federal Commissioner of Taxation* [1931] AC 275, 295-296 (Lord Sankey LC); and by the High Court of Australia in *Lowenstein* (1938) 59 CLR 556, 575-576 (Starke J); *Davison* (1954) 90 CLR 353, 367 (Dixon CJ and McTiernan J); *Boilermakers* (1956) 94 CLR 254, 307 (Williams J); *Spicer* (1957) 100 CLR 277, 297 (Williams J); *Consolidated Foods* (1977) 138 CLR 1, 16 (Aickin J); *Polyukhovich v Commonwealth ('Polyukhovich')* (1991) 172 CLR 501, 532 (Mason CJ); *Harris v Caladine* (1991) 172 CLR 84, 107 (Brennan J), 135, 137 (Toohey J); *Mellifont v Attorney-General (Qld)* (1991) 173 CLR 289, 314 (Brennan J); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 66 (McHugh J); *Gould v Brown* (1998) 193 CLR 346, 386 [29] (Brennan CJ and Toohey J), 404 [67] (Gaudron J); *Nicholas v The Queen* (1998) 193 CLR 173, 187 [17] (Brennan CJ), 219 [107] (McHugh J), 273 [237] (Hayne J); *Sue v Hill* (1999) 199 CLR 462, 515 [131], 522 [156] (Gaudron J); *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 130 [92] (Kirby J); *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 573 [108] (Gummow and Hayne JJ); *Abebe v Commonwealth* (1999) 197 CLR 510, 570 [164] (Gummow and Hayne JJ); *White* (2007) 231 CLR 570, 614 [117] (Kirby J); *Thomas v Mowbray* (2007) 233 CLR 307, 413 [304] (Kirby J), 464 [465] (Hayne J).

85 (1909) 8 CLR 330.

86 Ibid at 357.

This definition was adopted by French CJ and Gageler J in *TCL Air Conditioner*.[87] In his 2015 Foreword to a recent book on constitutional law,[88] Chief Justice French noted that the authors observe 'that a defining distinction of judicial power – that it involves the determination of rights rather than their creation – provides a conceptually neat framework for differentiating between judicial and non-judicial power'. The same notion of determination of rights, rather than creation of rights, was emphasised by Dixon CJ and McTiernan J in *Davison*.[89]

The distinction between adjudicating upon controversies rather than creating rights is also embedded in the commonly cited[90] passage of Kitto J:

> [A] judicial power involves, as a general rule, a decision settling for the future, as between defined persons or classes of persons, a question as to the existence of a right or obligation, so that an exercise of the power creates a new charter by reference to which that question is in future to be decided as between those persons or classes of persons. In other words, the process to be followed must generally be an inquiry concerning the law as it is and the facts as they are, followed by an application of the law as determined to the facts as determined; and the end to be reached must be an act which, so long as it stands, entitles and obliges the persons between whom it intervenes, to observance of the rights and obligations that the application of law to facts has shown to exist.[91]

This definition of judicial power can be summarised broadly as involving the determination of rights, rather than the creation of rights which is the province of legislative and executive power. This broad summary is not wholly accurate. One reason why it is inaccurate is because judicial power creates rights all the time. Almost every order made by a judge creates new rights. The distinction which is sought to be made by the pithy statement is really that, as Dr Zakrzewski explains,[92] the exercise of judicial power to make orders generally creates new rights which generally *replicate existing rights* which the judge is recognising.

An example is the decision in *Momcilovic*.[93] In that case, the question arose whether the power to make a declaration of inconsistent interpretation was a judicial power. Section 36(2) of the *Charter of Human Rights and Responsibilities Act 2006* (Vic) empowered the Supreme Court of Victoria to declare that a statutory provision cannot be interpreted consistently with a human right. The declaration would not affect the validity of the statutory provision, create in any person any legal right, or give rise to any cause of action. All of the High Court judges held that this power was, by itself, not

87 (2013) 251 CLR 533, 553-554 [28].

88 Nicholas Aroney, Peter Gerangelos, Sarah Murray and James Stellios, *The Constitution of the Commonwealth of Australia: History, Principle and Interpretation* (Cambridge University Press, 2015) ix.

89 (1954) 90 CLR 353, 368.

90 *R v Ludeke; Ex parte Australian Building Construction Employees' and Builders Labourers' Federation* (1985) 159 CLR 636, 655; *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 12; *Love v Attorney-General (NSW)* (1990) 169 CLR 307, 320; *Polyukhovich* (1991) 172 CLR 501, 532, 685; *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 109-110 [41].

91 *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374.

92 Rafal Zakrzewski, *Remedies Reclassified* (Oxford University Press, 2005).

93 (2011) 245 CLR 1.

judicial, although Crennan and Kiefel JJ held that it was incidental to judicial power. As French CJ explained:

> The declaration sets down no guidance for the disposition of future cases involving similar principles of law. It has no legal effect upon the validity of the statutory provision which is its subject. It has statutory consequences of a procedural character. Those statutory consequences are relevant to the Attorney-General as a member of the Executive and as a member of the Victorian Parliament and to the Parliament itself. The declaration of inconsistent interpretation cannot be regarded as analogous to the judicial function nor to any functions historically exercised by courts and which, for that reason, have been regarded as judicial.[94]

Sir Anthony Mason, channelling Macbeth, has argued that this conception of judicial power is a 'cribbed, cabined and confined view'.[95] Whether this is so may depend upon what one sees as the nature of adjudication involved in the exercise of judicial power. Some have argued that recognising pre-existing rights involves a declaratory theory of law which requires belief in a fairy tale that judges do not make law. John Austin described these notions as a 'childish fiction'.[96] In 1974, Lord Reid said this before the Society for Public Teachers of Law:

> 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.[97]

Professor Beever has argued that this 'fairy tale' attack on the declaratory theory sets up a straw man.[98] His point is that although the common law is constantly being changed by judges, the change is part of a movement to express the best conception of the law. In other words, the declaratory theory is not an absurd assertion that the common law does not change. Instead, it is an assertion that the true or natural legal result does not change even if (i) judges had previously made errors which later required the positive law to be corrected, or (ii) the same underlying legal principles might be developed to apply to new circumstances. To use the metaphor that Ronald Dworkin powerfully defended, the 'law works itself pure' as the judges struggle to enunciate a common law principle.[99]

The notion that there exists a natural conception of law, independent of the positive results of legal decisions means that there must be rights which exist independently of them being given effect to by a judge. One consequence of this view is that the retrospective effect of judicial decisions is explicable. As I will explain later, Australia

94 Ibid at 65 [89].

95 Sir Anthony Mason, 'Foreword' to Geoffrey Lindell, *Cowen and Zines' Federal Jurisdiction in Australia* (Federation Press, 2016) vi.

96 John Austin, *Lectures on Jurisprudence or The Philosophy of Positive Law* (John Murray, first published 1861, Student's ed, 1895) 321.

97 Lord Reid, 'The Judge as Lawmaker' (1972) *Journal of Public Teachers of Law* 22, 22.

98 Allan Beever, 'The Declaratory Theory of Law' (2013) 33(3) *Oxford Journal of Legal Studies* 421.

99 Ronald Dworkin, 'Law's Ambitions for Itself' (1985) 71(2) *Virginia Law Review* 173. See also Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) Ch 11.

is one of the last remaining countries in the world which has refused to endorse prospective overruling. The second consequence is that the process of recognising new rights can involve consideration of principles which do not change from day to day, rather than public policy which will depend upon political philosophy and which can rapidly change, especially with changes to surrounding legislation. This second consequence is generally acknowledged in Australia when courts distinguish between principle and policy. In *Precision Data*, the High Court in a joint judgment said that 'if the ultimate decision may be determined not merely by the application of legal principles to ascertained facts but by considerations of policy also, then the determination does not proceed from an exercise of judicial power'.[100] Although the High Court in *Precision Data* went on to suggest that the formulation of legal principles was itself affected by questions of policy,[101] this is using 'policy' in a different sense from 'public policy'. It is using policy in the sense of the 'policy of the law' of identifying norms that underlie behaviour.

It is important, however, to reiterate that the adjudication of existing rights cannot be a single definition of judicial power. As French CJ observed in *Momcilovic*,[102] there are numerous examples of judicial orders which do not replicate existing rights but which create new legal relationships, including adoption orders, decrees of divorce or nullity, and orders dissolving partnerships.

Judicial power and legislative power

Apart from an attempt to identify judicial power by its core of adjudicating upon disputed rights, a functional way of identifying judicial power might be to compare it with executive or legislative power.

Exercise of judicial power by the legislature

In *Crump*,[103] French CJ said that the plaintiffs' major premise posed three 'large questions' including 'whether a law of a State altering a judicial decision would be a purported exercise of judicial power by the legislature of the State'.[104] In that case, the Chief Justice did not need to answer those questions because the relevant sentencing law did not alter or vary the effect of the sentence imposed on the plaintiff and his co-offender. The judicial order fixed a minimum term which enlivened the power of the Parole Board under the statutory scheme to consider release on parole at the expiry of that term. The legislation had the effect that persons like the plaintiff could only obtain release on parole in very limited circumstances. French CJ held that while the legislation might have altered a statutory consequence of the sentence it did not alter the legal effect.[105]

100 *Precision Data Holdings Ltd v Wills ('Precision Data')* (1991) 173 CLR 167, 189.
101 Ibid.
102 *Momcilovic* (2011) 245 CLR 1, 61 [81].
103 *Crump v New South Wales ('Crump')* (2012) 247 CLR 1, 18 [33].
104 Another was whether the State legislature would be prevented from enacting such a law by an implication drawn from the provisions of Chapter III of the Constitution.
105 *Crump* (2012) 247 CLR 1, 19 [35].

A related question arose in the United States Supreme Court in *Bank Markazi v Petersen*.[106] In that case, judgment against the State of Iran was obtained by 1000 victims, family members, or estates of the victims of Iran-sponsored acts of terrorism. They faced enforcement difficulties due to legislation which shielded from execution the property owned by a foreign state. An exception to the immunity was where the assets had been frozen. The plaintiffs brought enforcement proceedings in 2008 against $1.75 billion held by the Central Bank of Iran. In 2012 the President of the United States issued an Executive Order which froze the assets of Iranian financial institutions, including the Central Bank of Iran. To put the Executive Order beyond dispute, in 2012 Congress passed the *Iran Threat Reduction and Syria Human Rights Act 2012* which had the effect of permitting execution against the assets of the Central Bank of Iran, subject to conditions such as the Supreme Court being satisfied that Iran holds equitable title to, or the beneficial interest in, the assets. The 2012 Act even identified the case by its docket number.

The question before the Supreme Court was whether the 2012 Act contravened Article III of the United States Constitution. That Article vests the judicial power of the United States in the Supreme Court and such inferior courts as Congress establishes. Since *Marbury v Madison*,[107] it has been established that Article III of the Constitution provides the judiciary with 'province and duty … to say what the law is' in cases and controversies. A majority of the Supreme Court held that the 2012 Act had not violated Article III. The dissentients, Roberts CJ and Sotomayor J, began their dissent by imagining a law suit between you and your neighbour over a boundary. Your neighbour's evidence was a letter from the previous owner of your home. Your evidence was an official county map. You also argued that your neighbour's claim was six months outside the statute of limitations. They said:

> Now imagine that while the lawsuit is pending, your neighbor persuades the legislature to enact a new statute. The new statute provides that for your case, and your case alone, a letter from one neighbor to another is conclusive of property boundaries, and the statute of limitations is one year longer. Your neighbor wins. Who would you say decided your case: the legislature, which targeted your specific case and eliminated your specific defenses so as to ensure your neighbor's victory, or the court, which presided over the *fait accompli*?[108]

Exercise of legislative power by the judiciary

Another 'large question' which corresponds to the question raised by French CJ about when the legislature impermissibly exercises judicial power. The second question is when the *judiciary* impermissibly exercises *legislative* power. Even staunch critics of the *Kable* doctrine, like Heydon J,[109] have argued that the conferral of legislative power on a State court could mean that the State court is no longer a 'Supreme Court' or a

106 136 S Ct 1310 (2016).
107 5 US (1 Cranch) 137, 177 (1803).
108 136 S Ct 1310, 1329 (2016).
109 See, eg, *Public Service Association and Professional Officers' Association Amalgamated of NSW v Director of Public Employment* (2012) 250 CLR 343, 369-373 [62]-[70].

'court of [a] State' within the meaning of s 73 of the Constitution.[110] Heydon J said in *Momcilovic* that 'in 1900 the expression "court" meant a body which exercised judicial power, and the expression excluded bodies having "some non-judicial powers that are not ancillary but are directed to a non-judicial purpose"'.[111]

Putting *Momcilovic* to one side, two examples can be given of the purported exercise of legislative power by the judiciary. The first is where the Commonwealth Parliament purports to transmute future judicial decisions, or the common law, into legislation. The second is where the judiciary purports to adjudicate on a matter with only prospective effect.

The first scenario arose in the *Native Title Act Case.*[112] In that case, the High Court considered the validity of s 12 of the *Native Title Act 1993* (Cth) which read as follows: 'Subject to this Act, the common law of Australia in respect of native title has, after 30 June 1993, the force of a law of the Commonwealth'. A joint judgment of six members of the Court (with which Dawson J agreed on this point) held that s 12 was constitutionally invalid. The Court explained that the reference to 'common law' could mean one of two things. Either it was a reference to the source of the common law in judicial reasons for decision or it was a reference to the content of the common law as developing from time to time. If it was the first (a reference to judicial reasons for decision) then s 12 was invalid because it attempted to confer legislative power upon the judicial branch of government. If it was the second (a reference to the content of the common law as developing from time to time) then it was invalid essentially because it attempted to confer judicial power on the legislative branch: a law of the Commonwealth cannot be the unwritten common law.[113] Recently, Sir Anthony Mason has doubted the correctness of this decision, arguing that the making of the common law on a particular subject as the law of the Commonwealth might not involve a delegation of legislative power to the courts.[114] He referred to a joint judgment of five justices of the High Court, including French CJ, in *Aid/Watch*:

> Where statute picks up as a criterion for its operation a body of the general law, such as the equitable principles respecting charitable trusts, then, in the absence of a contrary indication in the statute, the statute speaks continuously to the present, and picks up the case law as it stands from time to time.[115]

The issue arose subsequent to the *Native Title Act Case* on the first day of the hearing in *Berbatis Holdings.*[116] The parties had not noticed the issue but French J raised with counsel the constitutional validity of s 51AA of the *Trade Practices Act 1974* (Cth). That section provided that '[a] corporation must not in trade or commerce, engage in conduct that is unconscionable within the meaning of the unwritten law, from time

110 *Momcilovic* (2011) 245 CLR 1, 174-175 [436]-[437].
111 Ibid at 175 [437].
112 *Western Australia v Commonwealth ('Native Title Act Case')* (1995) 183 CLR 373.
113 See also the judgment of McHugh J in *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 398-405.
114 Sir Anthony Mason, 'The Interaction of Statute Law and Common Law' (2016) 90(5) *Australian Law Journal* 324, 328.
115 *Aid/Watch Inc v Commissioner of Taxation ('Aid/Watch')* (2010) 241 CLR 539, 549 [23] (French CJ, Gummow, Hayne, Crennan and Bell JJ).
116 *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* (1999) 95 FCR 292. The decision on this point was given in *Berbatis Holdings* (2000) 96 FCR 491.

to time, of the States and Territories'. His Honour heard argument and ultimately held that the section was valid, a conclusion which has been subsequently followed.[117] The section did not transmute the common law directly into Commonwealth law. Instead it provided for an evaluative decision which was closely related to the decision in s 51AB and s 51AC in which the Court considered particular criteria. In the course of his reasons, his Honour said of the separation between legislative and judicial power:

> [T]he separation is not absolute. Courts, particularly the High Court and ultimate appeal courts in the common law world, exercise a law making function in the development of the common law and through processes of statutory construction. The myth that courts merely find and declare the law and that the judges are, to use the words of Blackstone, 'living oracles', is long exploded. There is no clear definition of the limits of judicial law making. For the most part it is incremental subject to self imposed restraints which themselves derive from recognition of the overriding principle that laws are made by parliaments. Neither is there, nor has there ever been, an impermeable boundary between statute law and judge-made law.[118]

There is a fine line between s 51AA of the *Trade Practices Act*, which was held to be constitutionally valid, and s 10 of the *Native Title Act* which was held not to be. At first blush, the High Court decision in the *Native Title Act Case* seemed to draw a neat line between the adjudication and determination of existing rights, which is the province of the judiciary, and the creation of new rights, which is the province of the legislature. But, as French J observed in *Berbatis*, this line is not so neat or sharp.

The second scenario is prospective overruling. Australia is one of the last holdouts against prospective overruling. Whatever the boundaries between adjudication and legislation are, an acceptance of prospective overruling obliterates them. The strongest version of prospective overruling asks: can a court hear a case and then decline to decide in favour of one party on the basis that the old law should apply to the case but in every subsequent case a new law should apply? Or would that be judicial legislation? Versions of prospective overruling have been applied in the European Court of Justice,[119] the European Court of Human Rights[120] and in the United States,[121] and considered in New Zealand.[122] Even in England, where a formal conception and understanding of adjudication was strongly held for hundreds of years, prospective overruling now has a foothold. In *Re Spectrum Plus Ltd (in liq)*, Lord Nicholls refused to rule out prospective overruling as a legitimate exercise of judicial power, saying:

> If, altogether exceptionally, the House as the country's supreme court were to follow this course I would not regard it as trespassing outside the functions properly to be discharged by the judiciary under this country's constitution. Rigidity in the operation of a legal system is a sign of weakness, not strength. It deprives a legal system of necessary elasticity. Far from achieving a constitutionally exemplary result,

117 *POS Media Online Ltd v Queensland Investment Corporation* [2001] FCA 809, [163] (Wilcox J).
118 *Berbatis Holdings* (2000) 96 FCR 491, 507 [34].
119 *Defrenne v Sabena* [1976] ECR 455, [69]-[75].
120 *Marckx v Belgium* (1979) 2 EHRR 330, 352-353 [58].
121 *Linkletter v Walker* 381 US 618 (1965).
122 *Lai v Chamberlains* [2007] 2 NZLR 7, 56-61 [129]-[154] (Tipping J), 73 [205] (Thomas J). No opinion was expressed by Elias CJ, Gault, and Keith JJ (at 48 [95]).

> it can produce a legal system unable to function effectively in changing times. 'Never say never' is a wise judicial precept, in the interest of all citizens of the country.[123]

There was a significant reason why his Lordship was reluctant to rule out prospective overruling. In *Royal Bank of Scotland plc v Etridge (No 2)*,[124] Lord Nicholls, delivering the decision in which a majority of the House of Lords agreed, held that the older rules concerning undue influence should no longer apply from the date of the decision in that case. Again, in *Arthur JS Hall & Co v Simons*, Lord Hope held that in civil cases the so-called immunity of an advocate from claims for negligence could 'no longer be justified' but that 'this is a change in the law which should take effect only from the date when your Lordships deliver the judgment in this case'.[125] Most recently, in *Cadder v Her Majesty's Advocate*, Lord Hope (with whom Lord Mance agreed) observed that there was considerable dicta in support of prospective overruling and, were it not for a statutory obstacle in the present case, he would have exercised what he considered to be an inherent power to overrule prospectively.[126]

Canada too recognises prospective overruling although far more common is a related technique of refusing to give retrospective effect, and suspending prospective effect of a decision, for a period of time. Perhaps the most famous example of this technique is the decision of the Supreme Court of Canada in *Re Manitoba Language Rights*.[127] In that case, the 1870 *Manitoba Act*, which is constitutionally entrenched, provided that Acts of the Manitoban legislature shall be published in English and in French. An 1890 Act, however, purported to permit the Acts to be published only in English. For nearly 100 years all Acts were published in English only. Then the Supreme Court held that the 1890 Act was invalid. However, rather than conclude that 100 years' worth of legislation was invalid, the Supreme Court of Canada in effect temporarily stayed the effect of its judgment and deemed the laws to be 'temporarily valid'. It may be that there were other solutions which would not have caused such havoc without recognising something close to prospective overruling in that case.

In contrast, prospective overruling is illegitimate in Australia. In 1987, Mason J had raised prospective overruling as a possibility, but acknowledged that it was 'not without problems',[128] citing an article by Lord Devlin in which his Lordship argued that it turns judges into 'undisguised legislators'.[129] A decade later, this idea was quashed by a majority of the High Court in *Ha*.[130] In that case, it was submitted that if earlier decisions concerning s 90 of the Constitution were to be overruled then the High Court should only do so prospectively. A majority of the High Court, which overruled the earlier decisions, rejected this submission. Brennan CJ, McHugh, Gummow and Kirby JJ said:

> The adjudication of existing rights and obligations as distinct from the creation of rights and obligations distinguishes the judicial power from non-judicial power.

123 [2005] 2 AC 680, 699 [41].
124 [2002] 2 AC 773.
125 [2002] 1 AC 615, 726.
126 *Cadder v Her Majesty's Advocate* [2010] 1 WLR 2601, 2627 [58]-[59].
127 [1985] 1 SCR 721.
128 *Babaniaris v Lutony Fashions Pty Ltd* (1987) 163 CLR 1, 15.
129 Lord Devlin, 'Judges and Law Makers' (1976) 39 *Modern Law Review* 1, 11-12.
130 *Ha v New South Wales ('Ha')* (1997) 189 CLR 465.

> Prospective overruling is thus inconsistent with judicial power on the simple ground that the new regime that would be ushered in when the overruling took effect would alter existing rights and obligations.[131] (citations omitted.)

Speaking of this decision, Dr Juratowitch argued that '[t]his objection is only as strong as the idea that judges never alter the existing law. That is not strong'.[132] Dr Juratowitch favoured a position which allowed prospective overruling in truly exceptional cases. Without any intention of otherwise detracting from an exceptional work of scholarship, it suffices to say that there is much to be said for the view that remarks such as those by Chief Justice French in his 2015 Foreword referred to above (that is, that to say that judicial power involves the determination of rights, rather than their creation, provides a 'conceptually neat' framework for differentiating between judicial and non-judicial power) are not an application of the idea that judges never alter the existing law. The point can be illustrated by the decision of the House of Lords in *Kleinwort Benson*.[133] In that case, Kleinwort Benson entered into interest rate swap transactions with four local authorities. Each transaction was fully completed and resulted in the bank making net payments of £811,208 to the local authorities. After the transactions were completed, the House of Lords delivered its decision in *Hazell*,[134] which held that these types of interest rate swap transactions were ultra vires and void. Kleinwort Benson argued that it had made the payments by mistake and that it should be entitled to restitution. The question was whether it was mistaken. It argued that it paid in the mistaken belief that it was legally obliged to do so when that was, as it turned out, incorrect. This was accepted by a majority of the House of Lords.[135] Curiously, only Lord Hope focused upon what the state of the law was *at the time of the payments*.[136] It is strongly arguable that the way that the case ought to have been decided was to ask whether the law at the time Kleinwort Benson made its payments was inconsistent with Kleinwort Benson's understanding. If so, then Kleinwort Benson was mistaken. Simply because *Hazell* had not yet been decided does not make this approach a fiction. It simply meant that the trial judge had the benefit of a subsequent, powerfully reasoned decision of the House of Lords which indicated what the law was at the earlier time when Kleinwort Benson made its payments. Nor is it an objection to say that this law was not reasonably discoverable. Many facts are not reasonably discoverable. If, at the same earlier time, Kleinwort Benson had made a large payment to a person on the basis of a particular identity which could only be falsified by later DNA testing, the mistake would still have existed at that earlier time despite its undiscoverability. The answer to the puzzle in *Kleinwort Benson*, concerning the correct law of the earlier time, might be found in the comments of Brennan J in *Giannarelli v Wraith*,[137] which were quoted by six judges in the *Native Title Act Case*:[138]

131 Ibid at 504.
132 Ben Juratowitch, *Retroactivity and the Common Law* (Hart Publishing, 2008) 216.
133 *Kleinwort Benson Ltd v Lincoln City Council ('Kleinwort Benson')* [1999] 2 AC 349.
134 *Hazell v Hammersmith and Fulham LBC ('Hazell')* [1992] 2 AC 1.
135 Lords Goff, Hoffmann and Hope; Lords Browne-Wilkinson and Lloyd dissenting.
136 *Kleinwort Benson* [1999] 2 AC 349, 411 (Lord Hope).
137 (1988) 165 CLR 543, 584.
138 *Native Title Act Case* (1995) 183 CLR 373, 485 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ).

> In the view of a court sitting at the present time, earlier decisions which are not binding upon it do not necessarily represent the common law of the earlier time, though they record the perception of the common law which was then current.

The law concerning invalidity of swap transactions in *Kleinwort Benson* was an example of the most common instance in which the law changes. The decision in *Hazell* had held that the earlier swap transactions were invalid by the best interpretation of the law as it had previously been, and as it had remained.

Part IV – Implications and constitutional values

The first part of this chapter identified reasons why the identification of judicial power is a matter of great importance. The importance came to the fore as a consequence of the separation of federal judicial power in the Commonwealth Constitution. The boundaries of the separation of power doctrine were held to depend upon principles of incompatibility. But, from the line of cases beginning with *Kable* in 1996, incompatibility became an independent principle.

The second part of this chapter identified the three different aspects of the principle of incompatibility: only the first is an explanation of the implication of a separation of powers. All three are strongly affected by conceptions of judicial power.

The third part of this chapter then turned to the meaning of judicial power. It was seen there that while the common definition of judicial power, involving (in very broad terms) the adjudication of existing rights rather than the creation of new rights, cannot be a comprehensive definition, it does provide an outline of the core of judicial power. Functional approaches can be combined with this to compare the nature of the power with executive power or legislative power.

The difficulty of identifying judicial power was one matter relied upon by some of those judges who dissented from the various negative implications that were drawn in relation to Chapter III judicial power. Whatever the merit of their views, it is too late to turn back. Professor Dworkin once described the development of the law with the analogy of a chain novel.[139] Another analogy might be the process of restoration of a great, but incomplete painting. The restorer can add colour or content to areas that have faded or even areas that had not been completed. The completion might also involve corrections, and the removal of what is seen to be erroneous brushstrokes. But the structure and substance of the painting cannot be changed. A painting of the Madonna and child cannot be repainted as Marge Simpson and Maggie, on the basis that the painter might think that to do so would make the painting more attractive or more contemporary.

Given the uncertainty about the scope of judicial power, what then is the underlying *principle* which could be used in the three categories where it is necessary to identify whether the conferral of power is incompatible with (i) the separation of federal judicial power, or (ii) the institutional integrity of a federal court or a State court as a repository of federal judicial power?

139 Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 228-232.

One answer is utilitarian. The answer is that institutional integrity depends upon public confidence. This answer has been rejected. In *North Australian Aboriginal Justice Agency Ltd v Northern Territory*, a joint judgment to which French CJ was a party, after observing that the touchstone of invalidity for contravention of Chapter III is institutional integrity, said that this 'extends to maintaining the appearance as well as the realities of impartiality and independence of the courts from the executive'.[140] The Court emphasised that this is not the same as public confidence in the courts, although institutional integrity might be seen as necessary for public confidence.[141]

A second answer is a rights-based view. In *Consolidated Foods*, Jacobs J (Mason and Stephen JJ agreeing) said that:

> 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'.[142]

This view would confine the scope of the concept of institutional integrity to those 'basic rights' which, in the words of Jacobs J, are the 'bulwark of freedom' such as '[t]he governance of a trial for the determination of criminal guilt'.[143] In *Kable*, Toohey J said that the function of the separation of judicial power was 'to protect not only the role of the independent judiciary but also the personal interests of litigants in having those interests determined by judges independent of the legislature and the executive'.[144] A similar view was expressed more recently by Scalia J in the United States Supreme Court in *Bond v United States*[145] who said that the separation of powers safeguards individual freedom. Montesquieu wrote:

> There 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 then be the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.[146]

A third answer is that an assessment of incompatibility and institutional integrity depends upon those normative values which are essential for, or the essence of, the exercise of judicial power. In *Wainohu*, French CJ and Kiefel J explained that 'questions of compatibility which require evaluative judgments are unlikely to be answered by the application of precisely stated verbal tests'.[147] Although evaluation is involved, their Honours quoted from Chief Judge Cardozo saying that '[e]lasticity has not meant that what is of the essence of the judicial function may be destroyed'.[148]

140 (2015) 256 CLR 569, 595 [40] (French CJ, Kiefel and Bell JJ).
141 Ibid. Cf *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ), 376-377, 380, 382 (McHugh J).
142 *Consolidated Foods* (1977) 138 CLR 1, 11.
143 Ibid.
144 *Kable* (1996) 189 CLR 51, 58.
145 564 US 211, 223 (2011).
146 Baron de Montesquieu, *The Spirit of Laws* (first published 1750, Robert Clarke & Co, new ed rev, 1873) (translated from French by Thomas Nugent) 174.
147 *Wainohu* (2011) 243 CLR 181, 201 [30].
148 Ibid, quoting *Re Richardson* 160 NE 655, 657 (1928).

This third evaluative approach is very similar to the view of Professors Rosalind Dixon and Peter Gerangelos which they describe as 'purposive functionalism'.[149] Purposive functionalism, echoing the words of French CJ and Kiefel J in *Wainohu*, involves the Court relying openly upon constitutional values in developing doctrine, but with those values anchored in the text, history, or structure of the Constitution. In *Wainohu*, French CJ and Kiefel J explained some of those values. Referring to the defining characteristics of the reality and appearance of a court's independence and impartiality, they mentioned procedural fairness, adherence generally to an open court principle, and the giving of reasons for final decisions or important interlocutory matters.[150] It appears that the view of French CJ is that this purposive functionalism is not a policy based approach dependent upon the preconceptions of the particular judge. It would develop, by reference to text, history, and structure, a framework of values to structure the evaluation of incompatibility. As French CJ explained, the approach to incompatibility in *Totani* was based on 'the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States'.[151]

Conclusion

On the current state of authority, it is extremely difficult, if not impossible, to formulate a single test which could identify when the exercise of power is an exercise of judicial power. However, an understanding of the concept of judicial power is necessary in cases at the margins to determine whether a legislative grant of power is contrary to Chapter III. In many cases, the boundary of a permissible grant of power, whether to a State court or a federal court, or a State judge or federal judge, now requires consideration of the normative concept of the institutional integrity of the court. But how does one identify those matters which are necessary for institutional integrity? The approach of French CJ has been to focus upon those normative values which are essential for 'justice'. As French CJ said in *Alqudsi*, '[t]he final and paramount purpose of the exercise of federal judicial power is "to do justice"'.[152] Of course, the difficulty with using 'justice' as a yardstick is that it is an abstract concept that could embody many values. On 18 August 2016, delivering the Campion lecture, Chief Justice French said:

> Much has been written on theories of justice. As an abstract concept it is hard to reduce to words. At its core, for many, is an idea of fairness, substantive and procedural. It imports a principle of equality which requires that similar cases be treated alike and different cases differently.[153]

149 Rosalind Dixon, 'The Functional Constitution: Re-reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455. Peter Gerangelos, *The Separation of Powers and Legislative Interference in the Judicial Process: Constitutional Principles and Limitations* (Hart Publishing, 2009) 313.

150 *Wainohu* (2011) 243 CLR 181, 208-209 [44].

151 *Totani* (2010) 242 CLR 1, 45 [66].

152 *Alqudsi v The Queen* (2016) 258 CLR 203, 207 [1], 238 [74].

153 Chief Justice Robert French, 'Seeking Higher Things in Higher Education – The Case of the Lawyers' (Campion lecture, St Aloysius College, Kirribilli, Sydney, 18 August 2016) <http://www.hcourt.gov.au/publications/speeches/current/speeches-by-chief-justice-french-ac>.

The broader the conception of justice in this area, the further the concept will be from the constitutional implication upon which it is based. As French CJ and Kiefel J acknowledged in *Wainohu,* the functionalist rather than formalist approach to institutional integrity means that the issue must be approached with restraint.[154] This restrained approach would involve consideration of the text, history, and structure of the Constitution in the identification and application of principles concerning the very essence of judicial power and justice. We have come a long way from the *Wheat Case* 100 years ago. But from everything I have said in this chapter it should be apparent that the contribution of Chief Justice French to the development of the concept of judicial power in Chapter III of the Constitution has been extremely significant.

154 *Wainohu* (2011) 243 CLR 181, 212 [52].