

Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*

Oscar I Roos*

Abstract

This article critiques one aspect of the High Court's reasoning in its landmark 2010 decision of *Kirk v Industrial Court of New South Wales*, namely its reliance on 'accepted doctrine at the time of federation' to determine the 'defining characteristics' of the state Supreme Courts. I argue that the relevant passages in *Kirk* are ambiguous and capable of two alternative readings, which I term the 'pre-Federation entrenchment theory' and the 'on-Federation entrenchment theory'. With extensive reference to primary and secondary materials from the Federation era, I argue that both theories are flawed and, indeed, contrary to accepted doctrine at the time of Federation. Consequently, if the holding in *Kirk* is to be defended, other justifications for the entrenchment of judicial review in the state jurisdictions, which were only touched upon in *Kirk*, need to be developed and articulated with greater thoroughness and rigour.

I Introduction

In 2010 in *Kirk v Industrial Court of New South Wales*¹ the High Court unanimously held that in each Australian state jurisdiction, where an inferior court or state executive decision-maker makes a decision arguably involving jurisdictional error, the capacity of the Supreme Court to engage in judicial review is constitutionally entrenched.² *Kirk* overturned the orthodox understanding that

* Lecturer, School of Law, Faculty of Business and Law, Deakin University. I express my thanks to Anne Rees, John Morss, Danuta Mendelson, Mirko Bagaric and Jeffrey Goldsworthy for their support, guidance and assistance, to the various anonymous reviewers for their helpful comments, to Deakin University for granting me study leave to enable me to finish this article, and to Monash University for hosting me while on leave. Responsibility for any errors lies entirely with me. I dedicate this paper to my mother, Christine Jeanette ('Tica') Roos (1931–2012).

¹ (2010) 239 CLR 531 ('*Kirk*').

² French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ wrote the plurality judgment. Heydon J wrote a separate judgment but agreed with the holding described above and the reasoning of the majority, which supported it: *Kirk* (2010) 239 CLR 531, 585, 591–6 (Heydon J). See generally Chris Finn, 'Constitutionalising Supervisory Review at State Level: the End of *Hickman*?' (2010) 21 *Public Law Review* 92, 92–102; Wendy Lacey, '*Kirk v Industrial Court of New South Wales* Breathing Life into *Kable*' (2010) 34 *Melbourne University Law Review* 641; John Basten, 'The Supervisory

state Parliaments have the power to enact strong privative clauses that are effective in ousting judicial review on grounds of jurisdictional, as well as non-jurisdictional, error.³

I do not defend or criticise constitutional originalism in this article, nor do I explore different originalist methodologies of constitutional interpretation. Rather, I take issue with one of the historical foundations of the Court's reasoning in *Kirk*, specifically the Court's reliance on what it termed 'accepted doctrine at the time of federation',⁴ concerning the supervisory jurisdiction of the Supreme Courts. In mounting this critique of the High Court's originalist reasoning in *Kirk*, I acknowledge that the Court in *Kirk* did not rely on originalist reasoning alone. Specifically, the joint judgment also referred to the relationship between the supervisory jurisdiction of the state Supreme Courts and the entrenched appellate jurisdiction of the High Court under s 73 of the *Australian Constitution*,⁵ and the need to avoid the creation of 'islands of power immune from supervision and restraint'⁶ which would permit the development of 'distorted positions'⁷ and compromise the unity of the Australian common law.⁸ Critically, however, the High Court claimed that when the *Australian Constitution* was framed, accepted legal doctrine determined that the colonial Supreme Courts' jurisdiction to issue

Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 274–6, 283–4; Alexander Vial, 'The Minimum Entrenched Supervisory Review of State Supreme Courts: *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531' (2011) 32 *Adelaide Law Review* 145; Luke Beck, 'What is a "Supreme Court of a State"' (2012) 34 *Sydney Law Review* 295, 299–302.

³ Subject, arguably, to the so-called 'Hickman principle': *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 634 (Gaudron and Gummow JJ). See also *Mitchforce Pty Ltd v Industrial Relations Commission (NSW)* (2003) 57 NSWLR 212, 228–33 (Spigelman CJ), 252–4 (Handley); *Kirk Group Holdings v Workcover Authority (NSW)* (2006) 66 NSWLR 151, 158 (Spigelman CJ), 169–72 (Basten JA); Matthew Groves, 'Federal Constitutional Influences on State Judicial Review' (2011) 39 *Federal Law Review* 399, 404–5. See generally *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 (Street CJ); Michael Sexton and Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5(4) *Constitutional Law and Policy Review* 69, 71–3; J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 81–2; Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 876; Finn, above n 2, 102–3; Ronald Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters' (2011) 18 *Australian Journal of Administrative Law* 67, 70; George Williams and Andrew Lynch, 'The High Court on Constitutional Law: The 2010 Term' (2011) 34 *University of New South Wales Law Journal* 1006, 1014–15; Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305; Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012) 19 *Australian Journal of Administrative Law* 127, 128–9; Suri Ratnapala and Jonathon Crowe, 'Broadening the Reach of Chapter III: the Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 189–94, 201–15; Mark Aronson, Bruce Dyer and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 4th ed, 2009) 953–91.

⁴ *Kirk* (2010) 239 CLR 531, 580.

⁵ *Ibid* 581. See also Groves, above n 3, 411; Basten, above n 2, 276–7; Ratnapala and Crowe, above n 3, 201.

⁶ *Kirk* (2010) 239 CLR 531, 581. See also at 570.

⁷ *Ibid* 581 quoting Louis Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70 *Harvard Law Review* 953, 963. See generally Groves, above n 3, 408.

⁸ *Kirk* (2010) 239 CLR 531, 581. See also Lacey, above n 2, 656–7. See generally Simon Young and Sarah Murray, 'An Elegant Convergence? The Constitutional Entrenchment of "Jurisdictional Error" Review in Australia' (2011) 11 *Oxford University Commonwealth Law Journal* 117, 121–2.

prerogative writs to correct jurisdictional errors was an essential characteristic of those courts; and therefore, any privative clause removing that jurisdiction from a Supreme Court would be inconsistent with it being a ‘Supreme Court’, and (after Federation) inconsistent with the constitutional requirement that there be a Supreme Court in every state.

In Part II, I extract and analyse the relevant passages in *Kirk* in which the High Court referred to accepted doctrine. I argue that those passages are ambiguous, in that they can be interpreted in two ways. I term one interpretation the ‘pre-Federation entrenchment theory’, and the other interpretation the ‘on-Federation entrenchment theory’. In Part III, I argue that the pre-Federation entrenchment theory is wrong because it is historically inaccurate. In Part IV, I argue that the on-Federation entrenchment theory is arguable, but that the originalist justification for it, advanced by the High Court in *Kirk*, is flawed.

II The Relevant Passages in *Kirk* and Their Meaning

A *The Relevant Passages*

The passages in *Kirk* where the High Court referred to ‘accepted doctrine at the time of federation’ concerning the supervisory jurisdiction of the Supreme Courts appear in the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ.⁹

The High Court reiterated the principle that ch III of the *Australian Constitution* requires that there be a ‘body fitting the description [of] “the Supreme Court of the State”’ in each state, and that it is therefore ‘beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description’.¹⁰ The Court then stated:

At federation, each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen’s Bench had in England. It followed that each had ‘a general power to issue the writ [of certiorari] to any inferior Court’ in the State. Victoria and South Australia, intervening, pointed out that statutory privative provisions had been enacted by colonial legislatures seeking to cut down the availability of certiorari. But in *Colonial Bank of Australasia v Willan*, the Privy Council said of such provisions that:

‘It is, however, scarcely necessary to observe that the effect of [such a privative provision] is not absolutely to deprive the Supreme Court of its power to issue a writ of certiorari to bring up the proceedings of the inferior Court, but to control and limit its action on such writ. *There are numerous cases in the books which establish that, notwithstanding the privative clause in a statute, the Court of Queen’s Bench will grant a certiorari*; but some of those authorities establish, and none are inconsistent with, the proposition that

⁹ *Kirk* (2010) 239 CLR 531, 580–1.

¹⁰ Ibid 580 quoting *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (Gummow, Crennan and Hayne JJ). See also Finn, above n 2, 98; Gouliaditis, above n 3, 876–7. But see Vial, above n 2, 147, 155–60.

in any such case that Court will not quash the order removed, except upon the ground either of a manifest defect of jurisdiction in the tribunal that made it, or of manifest fraud in the party procuring it.' (Emphasis added)

That is, accepted doctrine at the time of federation was that the jurisdiction of the Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.¹¹

Having made this assertion about 'accepted doctrine at the time of federation', the Court concluded that 'the supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts'.¹² This 'defining characteristic' then limits the legislative powers of the state Parliaments to enact broad privative clauses:

Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond state legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.¹³

B *Interpreting the Relevant Passages*

There are two ways to interpret the passages from *Kirk* extracted above.

The first interpretation is that, prior to Federation, the Supreme Courts exercised a jurisdiction to grant certiorari to bring up the proceedings of an inferior court that could *not* be removed by the colonial Parliaments *because the colonial Parliaments lacked the legislative capacity to do so*. On this interpretation, some form of judicial review was entrenched in the colonial Supreme Courts prior to Federation and this entrenchment continued in the state Supreme Courts upon the commencement of the *Australian Constitution*; in other words, Federation changed the legal foundations for entrenchment, but not what was entrenched. I term this first interpretation the 'pre-Federation entrenchment theory'. I note that Zines, Gouliaditis, Groves, Basten, Sackville, Williams and Lynch appear to have interpreted the relevant passages from *Kirk* consistently with the pre-Federation entrenchment theory.¹⁴

¹¹ *Kirk* (2010) 239 CLR 531, 580 (emphasis in original) (citations omitted).

¹² *Ibid* 581 (emphasis added). See also Finn, above n 2, 98–9; Basten, above n 2, 283–4; Zach Meyers, 'Revisiting the Purposes of Judicial Review: Can There Be a Minimum Content to Jurisdictional Error?' (2012) 19 *Australian Journal of Administrative Law* 138, 143; Lacey, above n 2, 655–6.

¹³ *Kirk* (2010) 239 CLR 531, 581. See also *South Australia v Totani* (2010) 242 CLR 1, 27 (French CJ), 62 (Gummow J); *Wainohu v New South Wales* (2011) 243 CLR 181, 195 (French CJ and Kiefel J), 244 (Gummow, Hayne, Crennan and Bell JJ); *Public Service Association of South Australia v Industrial Relations Commission (SA)* (2012) 289 ALR 1, 10 (French CJ), 17 (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 20–4 (Heydon J).

¹⁴ Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of NSW* and *SA v Totani*' (Speech delivered at the Centre for Comparative Constitutional Studies/Australian Association of Constitutional Law Seminar, Melbourne, 26 November 2010) 7–9; Gouliaditis, above n 3, 877–9; Groves, above n 3, 407–8; Basten, above n 2, 284; Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters', above n 3, 78; Williams and Lynch, above n 3, 1018.

The second interpretation differs from the pre-Federation entrenchment theory because it assumes that the colonial Parliaments did have the legislative capacity to oust the jurisdiction of the Supreme Courts to grant certiorari to bring up the proceedings of an inferior court. On this second interpretation, because courts in the colonial era invariably read down privative clauses to preserve this jurisdiction of the Supreme Courts to grant certiorari, this practice can be viewed as one of the ‘defining characteristics’ of the Supreme Courts. This defining characteristic, which had hitherto been a product of judge-made common law, became entrenched by operation of ch III of the *Australian Constitution*: once the *Australian Constitution* commenced on Federation, the colonial Supreme Courts became state Supreme Courts and acquired an entrenched status and entrenched characteristics. I term this second interpretation the ‘on-Federation entrenchment theory’ and I describe the relevant passages in *Kirk*, on this second interpretation, as advancing an originalist justification for the on-Federation entrenchment theory. I note that some contextual support for this second interpretation of the relevant passages in *Kirk* can be found elsewhere in the joint judgment¹⁵ and that Finn appears to interpret *Kirk* consistently with the on-Federation entrenchment theory.¹⁶

III A Critical Assessment of the pre-Federation Entrenchment Theory

In this Part, I argue that the pre-Federation entrenchment theory is inconsistent with fundamental and obvious principles of constitutional law. It is important, however, to refute the pre-Federation entrenchment theory comprehensively in relation to each Australian colony because the majority of commentators appear to have interpreted the relevant passages from *Kirk* as consistent with that theory, even though those commentators have also cast doubt upon its correctness.¹⁷

A Plenary Legislative Power

By 1890, each colony had a Parliament that had been conferred with legislative power pursuant to imperial legislation. In the colonies of New South Wales, South Australia, Queensland and Tasmania this conferral of legislative power was expressed as a power ‘to make laws for the peace, welfare and good government’ of the colony;¹⁸ in the colony of Western Australia it was expressed as a power ‘to

¹⁵ See *Kirk* (2010) 239 CLR 531, 572. See also Transcript of Proceedings, *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 237 (29 September 2009) 51 (Gummow J); Transcript of Proceedings, *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 238 (30 September 2009) 13.

¹⁶ Finn, above n 2, 99. See also Basten, above n 2, 284.

¹⁷ Zines, above n 14, 7–9; Groves, above n 3, 408; Sackville, ‘Bills of Rights: Chapter III of the Constitution and State Charters’, above n 3, 78; Williams and Lynch, above n 3, 1018; Basten, above n 2, 284; Gouliaditis, above n 3, 877–9; Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2012) 190–1.

¹⁸ See, in relation to New South Wales, *New South Wales Constitution Act 1855* (Imp) s 1, which appears as *New South Wales Constitution Statute 1855* (Imp) 18 & 19 Vict, c 54, sch 1 (‘New South Wales Constitution Statute 1855’); in relation to Tasmania, *Australian Constitutions Act (No 2) 1850* (Imp) 13 & 14 Vict, c 59, s 14 (‘*Australian Constitutions Act (No 2) 1850*’); in relation

make laws for the peace, order and good government' of the colony;¹⁹ and in the colony of Victoria it was expressed as a power 'to make laws in and for Victoria in all cases whatsoever'.²⁰ These phrases appear to be interchangeable.²¹

By the 1890s, it was settled law that the colonial Parliaments enjoyed plenary legislative powers within each colony commensurate with the plenary legislative powers of the imperial Parliament. In 1878 in *R v Burah*,²² in 1883 in *Hodge v The Queen*,²³ and in 1885 in *Riel v The Queen*²⁴ and *Powell v The Apollo Candle Co Ltd*²⁵ the Privy Council repeatedly recognised that a subordinate Parliament within the British Empire, conferred with such a broad grant of legislative power by the imperial Parliament, exercised 'authority as plenary and as ample ... as the imperial Parliament in the plenitude of its power possessed and could bestow'.²⁶ This was clearly 'accepted doctrine' in the period immediately prior to Federation:²⁷ the Privy Council decisions of *Burah* and *Hodge*, in particular, were famous throughout the common law world, and Privy Council decisions were binding on all Australian courts.²⁸ In 1988 in *Union Steamship Company Pty Ltd v King*²⁹ the High Court unanimously acknowledged that this accepted doctrine applied in the colonial era.³⁰

to South Australia, *Australian Constitutions Act (No 2) 1850* (Imp) 13 & 14 Vict, c 59 s 14, and *South Australian Constitution Act 1855* (SA) s 1; and in relation to Queensland, *Constitution Act 1867* (Qld) s 2. See generally R D Lumb, *The Constitutions of the Australian States* (University of Queensland Press, 4th ed, 1977) 81; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 42–9, 51–3, 55–7.

¹⁹ *Western Australian Constitution Act 1889* (Imp) s 2, which appears as *Western Australian Constitution Act 1890* (Imp) 53 & 54 Vict, c 26, sch 1. See generally Carney, above n 18, 49–51.

²⁰ *Victorian Constitution Act 1855* (Imp) s 1, which appears as *Constitution Act 1855* (Imp) 18 & 19 Vict c 55 sch 1.

²¹ *Union Steamship Company of Australia Pty Ltd v King* (1988) 166 CLR 1, 9. See also *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 408 (Mahoney JA); Lumb, above n 18, 81. *Contra*, in relation to Victoria, Ian Killey, "Peace, Order and Good Government": A Limitation on Legislative Competence' (1989) 17 *Melbourne University Law Review* 24.

²² (1878) 3 App Cas 889 ('*Burah*').

²³ (1883) 9 App Cas 117 ('*Hodge*').

²⁴ (1885) 10 App Cas 675.

²⁵ (1885) 10 App Cas 282.

²⁶ *Hodge* (1883) 9 App Cas 117, 132. See also *McCawley v The King* [1920] AC 691, 712.

²⁷ See, eg, A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 105–6; Alpheus Todd, *Parliamentary Government in the British Colonies* (Longmans, Green, 2nd ed, 1894) 159; W Harrison Moore, *The Commonwealth of Australia: Four Lectures on the Constitution Bill 1897* (George Robertson, 1897) 45 ('[T]he Parliament of an Australian Colony possesses the widest powers. It dominates the executive and the judiciary, as does the imperial Parliament') (emphasis added).

²⁸ See Henry Hardcastle, *A Treatise on the Construction and Effect of Statute Law* (Stevens and Haynes, 3rd ed, 1901) 15; Alex Castles, 'The Reception and Status of English Law in Australia' (1963) 2 *Adelaide Law Review* 1, 10.

²⁹ (1988) 166 CLR 1.

³⁰ *Ibid* 9–10. See also *McCawley v The King* [1920] AC 691, 706; *Clyne v East* (1967) 68 SR(NSW) 385, 395 (Herron CJ), 400 (Sugerman JA); *Gilbertson v South Australia* (1976) 15 SASR 66, 82 (Bray CJ); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 395–7 (Kirby P), 408 (Mahoney JA); Lumb, above n 18, 81–2. Cf *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 382–5 (Street CJ), 421 (Priestley JA).

If we begin our assessment of the pre-Federation entrenchment theory with the principle stated by the Privy Council in *Burah* and *Hodge*, we must focus initially on the legislative powers of the imperial Parliament. As Goldsworthy has comprehensively demonstrated,³¹ the period around the end of the 19th century was the highest of high water marks for the doctrine of parliamentary sovereignty, and the ‘absolute omnipotence’ of the imperial Parliament was recognised by commentators,³² Parliamentarians and courts throughout the British Empire, including in the Australian colonies.³³ Thus, it was axiomatic in the late 19th century that a statute of the imperial Parliament that ousted judicial review in either the courts of England or the courts of the colonies was within the legislative capacity of the imperial Parliament. Given the legislative omnipotence of the imperial Parliament, the question of the effectiveness of privative clauses enacted by it was therefore dealt with as a matter of statutory interpretation by the courts, not as a matter of legislative competence.³⁴

B *The Subordinate Status of the Colonial Parliaments*

1 *Introduction*

Of course, none of the colonial Parliaments was absolutely sovereign and the plenary legislative powers of the colonial Parliaments could be, and were, limited by the imperial Parliament.³⁵ We must consider, therefore, whether there were any limitations imposed by the imperial Parliament on the legislative powers of the

³¹ See Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, 1999) 221–8.

³² See, eg, Dicey, above n 27, 85–6; Todd, above n 27, 245, 301; Hardcastle, above n 28, 78–80; *Halsbury's Laws of England* (Butterworths, 1909) vol 6, Constitutional Law, ‘Part I — Introduction’ 317–18 [458].

³³ See Goldsworthy, above n 31, 221–8. See also *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 71–6 (Dawson J).

³⁴ See, eg, *R v Allen* (1812) 15 East 333, 340 (Grose J), 341–2 (Le Blanc J), 342–3 (Bayley J); 104 ER 870, 873 (Grose J), 873–4 (Le Blanc J), 874 (Bayley J); *R v Justices of the Hundred of Cashiobury* (1823) 3 Dow & Ry 53; 26 RR 604; *R v Fowler* (1834) 1 Ad & E 836; 110 ER 1427; *Symonds v Dimsdale* (1848) 2 Ex 533; 154 ER 603; *R v Badger* (1856) 6 El & Bl 137, 171 (Campbell CJ); 119 ER 816, 828 (Campbell CJ); *Manning v Farquharson* (1860) 30 LJ QB 22; 126 RR 849; *Mayor and Aldermen of the City of London v Cox* (1866) LR 2 HL 239, 259 (Willies J); *Baker v Clark* (1873) LR 8 CP 121; *Jacobs v Brett* (1875) LR 20 Eq 1, 6–11; *Evans v Nicholson* (1875) 32 LT 664; *R v Chantrell* (1875) 10 QB 587, 589–90; *Hawes v Paveley* (1876) 1 CPD 418; *Bridge v Branch* (1876) LR 1 CPD 633; *Ex parte Bradlaugh* (1878) 3 QBD 509, 513 (Cockburn CJ); *Hedley v Bates* (1880) 13 Ch D 498; *Chadwick v Ball* (1885) 14 QBD 855; *Cherry v Endean* (1886) 54 LT NS 793; *R v Bradley* (1894) 70 LT NS 379; *Skinner v County Court Judge of North-Allerton* [1898] 2 QB 680; *Garnsey v Flood* [1898] AC 687, 692; *Payne v Hogg* (1900) 2 QB 43; F H Short and F H Mellor, *The Practice of the Crown Office* (Stevens and Haynes, 1890) 91–2, 116. See also Gouliaditis, above n 3, 878 n 52; Harry Woolf, Jeffrey Jowell and Andrew Le Sueur, *De Smith's Judicial Review* (Sweet & Maxwell, 6th ed, 2007) 184–9; Sir William Wade and Christopher Forsyth, *Administrative Law* (Oxford University Press, 9th ed, 2004) 712–18.

³⁵ See generally Dicey, above n 27, 106–13; Todd, above n 27, 29, 159–60, 213, 241–2, 301; Harrison Moore, above n 27, 27, 45; Hardcastle, above n 28, 428–9; W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Sweet & Maxwell, 1910) 17–18, 45–62. See also *Attorney-General for Queensland v Attorney-General for the Commonwealth* (1915) 20 CLR 148, 166 (Isaacs J).

colonial Parliaments in relation to their capacity to legislate to remove jurisdiction from the Supreme Courts.

At this point our assessment becomes complicated by the fact that the Supreme Courts were not all established in the same way. In the colonies of New South Wales and Tasmania, the Supreme Courts were established by imperial *Charters of Justice* and were conferred with the jurisdiction of the Court of Queen's Bench pursuant to imperial legislation;³⁶ in the colonies of South Australia and Western Australia, the Supreme Courts were established and conferred with jurisdiction of the Court of Queen's Bench by local Ordinances or Acts that were made pursuant to imperial orders in council under the authority of imperial legislation;³⁷ in the colony of Victoria, the Supreme Court was established and conferred with the jurisdiction of the Court of Queen's Bench by a local Act enacted pursuant to imperial legislation;³⁸ and in the colony of Queensland, the Supreme Court was established and conferred with jurisdiction by a local Act enacted by the Queensland Parliament.³⁹ These differences mean that we cannot deal with all the colonies in a completely uniform fashion, although I maintain that all of the colonial Parliaments were equally free to legislate to oust the jurisdiction of the Supreme Courts. I propose to proceed with my assessment by making a number of observations applicable to all the colonies, before dealing with each in turn.

2 *The Colonial Parliaments Generally*

My first observation is that, in the period between the granting of self-government in the colonies and Federation, the colonial Parliaments actually exercised extensive legislative powers in relation to the Supreme Courts. In all the colonies, the colonial Parliaments used their legislative powers to alter the structure of the Supreme Courts, to confer jurisdiction on them, to remove jurisdiction from them and to increase the number of Supreme Court justices.⁴⁰ The fact that this legislative power was exercised by the colonial Parliaments without any questions being raised as to the legislative capacity of any of the Parliaments to do so (with the notable exception of the controversy surrounding the judgments of Boothby J in South Australia between 1859 and 1865, which was effectively resolved with

³⁶ See, in relation to New South Wales, *Charter Establishing Courts of Judicature in New South Wales 1823* (Imp) and *New South Wales Act 1823* (Imp) 4 Geo 4, c 96 s 2. See, in relation to Tasmania, *Warrant for Supreme Court in Van Diemen's Land 1823* (Imp) and *New South Wales Act 1823* (Imp) 4 Geo 4, c 96 s 2.

³⁷ See, in relation to South Australia, *Supreme Court Act 1837* (SA) s 7; *Order in Council Establishing Government* (UK) (St James Court, 23 February 1836); *South Australian Colonisation Act 1834* (Imp) 4 & 5 Will 4, c 95, s 2. See, in relation to Western Australia, *Supreme Court Ordinance 1861* (WA) s 4; *Order in Council* (UK) (1 November 1830); *Government of Western Australia Act 1829* (Imp) 10 Geo 4, c 22.

³⁸ See *Supreme Court (Administration) Act 1852* (Vic) s 10; *Australian Constitutions Act (No 2) 1850* ss 2, 5, 14.

³⁹ See *Supreme Court Constitution Amendment Act 1861* (Qld) ss 2, 16.

⁴⁰ See, eg, *Supreme Court Act 1855* (SA); *Supreme Court Act 1890* (Vic); *Moses v Parker*; *Ex parte Moses* [1896] AC 245. See also *Moxham v McDonald* (1874) 4 QSCR 41, 42 (Lilley CJ); *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 401 (Kirby P) and, in relation to Queensland, *McCawley v The King* (1918) 26 CLR 9, 56–7 (Isaacs and Rich JJ). See generally Alex Castles, *An Australian Legal History* (Law Book, 1982) 326–77.

the enactment of the *Colonial Laws Validity Act 1865*)⁴¹ strongly suggests that it was accepted doctrine that all the colonial Parliaments enjoyed plenary legislative powers in relation to the Supreme Courts.⁴²

My second observation draws upon the decision in *Burah*, where the Privy Council made clear that any limitation on the plenary legislative power of the colonial Parliaments in imperial legislation needed to be express, not implied.⁴³ Subject to four exceptions, no imperial legislation applicable to the Australian colonies in the 1890s imposed any specific limitation on the legislative powers of the colonial Parliaments in relation to the Supreme Courts.⁴⁴ The four exceptions related to the admiralty jurisdiction,⁴⁵ appeals to the Privy Council,⁴⁶ offences occurring on foreign vessels in Australian territorial waters⁴⁷ and merchant shipping.⁴⁸ None of these exceptions is relevant to this assessment of the capacity of the colonial Parliaments to oust the jurisdiction of the Supreme Courts to issue the prerogative writs.

My third observation builds upon my second: imperial legislation expressly contemplated that the colonial Parliaments could exercise extensive legislative powers in relation to all the colonial courts, including the Supreme Courts. Specifically, in all of the colonies, with the exception of the colonies of South Australia and Queensland, this power was expressly conferred by imperial legislation. In the colonies of New South Wales, Victoria and Western Australia, it was conferred in each colony's *Constitution Act*, enacted, in each instance, by the imperial Parliament as a schedule to an imperial Act;⁴⁹ in the colony of Tasmania, it was conferred prior to responsible government on the colonial Legislative Council by the *Australian Constitutions Act (No 2)*, then transferred to the new

⁴¹ (Imp) 28 & 29 Vict, c 63 ('*Colonial Laws Validity Act*'). See also *R v Marais; Ex parte Marais* [1902] AC 51, 53–4; *McCawley v The King* (1918) 26 CLR 9, 48–51 (Isaacs and Rich JJ); Castles, above n 40, 355–7, 406–12; Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 51–2; Carney, above n 18, 47, 143; Lumb, above n 18, 89–90.

⁴² See, eg, Harrison Moore, above n 27, 45. See also Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 45.

⁴³ *Burah* (1878) 3 App Cas 889, 905. See also *McCawley v The King* (1918) 26 CLR 9, 64 (Isaacs and Rich JJ); Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 45.

⁴⁴ See generally Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 45–62. See also Lumb, above n 18, 91–2.

⁴⁵ See *Admiralty Offences (Colonial) Act 1849* (Imp) 12 & 13 Vict, c 96; *Courts (Colonial Jurisdiction) Act 1874* (Imp) 37 & 38 Vict, c 27; *Colonial Courts of Admiralty Act 1890* (Imp) 53 & 54 Vict, c 27. See generally Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 54; Castles, above n 40, 363–4.

⁴⁶ See *Judicial Committee Act 1833* (Imp) 3 & 4 Wm 4, c 41; *Judicial Committee Act 1844* (Imp) 7 & 8 Vict, c 69.

⁴⁷ See *Territorial Waters Jurisdiction Act 1878* (Imp) 41 & 42 Vict, c 73.

⁴⁸ See *Merchant Shipping Act 1894* (Imp) 57 & 58 Vict, c 60. See generally Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 53; Castles, above n 40, 412, 419–21.

⁴⁹ See, in relation to New South Wales, *New South Wales Constitution Act 1855* (Imp) s 42, which appears as *New South Wales Constitution Statute 1855* c 54, sch 1; in relation to Victoria, *Victorian Constitution Act 1855* (Imp) s 41, which appears as *Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, sch 1; and, in relation to Western Australia, *Western Australian Constitution Act 1889* (Imp) s 58, which appears as *Western Australian Constitution Act 1890* (Imp) 53 & 54 Vict, c 26 sch 1.

colonial Parliament pursuant the *Constitution Act 1855* (Tas) s 1.⁵⁰ Generally, and even more significantly, the *Colonial Laws Validity Act* expressly contemplated that all the colonial legislatures could exercise extensive powers in relation to all the colonial courts. This was unambiguously stated in s 5:

Every colonial legislature shall have, and be deemed at all times to have had full power within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein.

My fourth observation is that, with the commencement of the *Colonial Laws Validity Act* in 1865, if not previously,⁵¹ it was clearly established that the colonial Parliaments had the power to amend or abrogate all aspects of the common law.⁵² The *Colonial Laws Validity Act* s 3 limited the operation of the doctrine of repugnancy to primary and subordinate legislation enacted by the imperial Parliament such that no colonial legislation was to be void on the grounds that it was repugnant to fundamental features of English law.⁵³ There is no reason to conclude that the powers of the colonial Parliaments to amend or abrogate the common law — those powers being consistent with general notions of the parliamentary sovereignty long established by the 1890s⁵⁴ — did not extend to the common law of the prerogative writs within the jurisdiction of each colony.

My fifth observation is that the reported cases from the colonial era about the efficacy of privative clauses dealt with the issue as one of statutory interpretation, rather than as one of legislative capacity.⁵⁵ I maintain that the Privy Council's 1874 decision in *Colonial Bank of Australasia v Willan*⁵⁶ supports this observation for two reasons. The first is that Willan's counsel, in argument, accepted that the right to certiorari might be taken away by express words and that the availability of certiorari was merely a presumption, albeit a strong one, which

⁵⁰ The *Constitution Act 1855* (Tas) was itself enacted by the Legislative Council of the then Van Diemen's Land, pursuant to powers granted under the *Australian Constitutions Act (No 2) 1850*: see Carney, above n 18, 48–9.

⁵¹ See generally *McCawley v The King* (1918) 26 CLR 9, 48–51 (Isaacs and Rich JJ); *Liyanage v The Queen* [1967] 1 AC 259, 284–5; Castles, above n 40, 406–12.

⁵² Lumb, above n 18, 89–90; Dicey, above n 27, 101; Hardcastle, above n 28, 438. See also *Riel v The Queen* (1885) 10 App Cas 675, 678–9; *Gilbertson v South Australia* (1976) 15 SASR 66, 94 (Walters J); Castles, above n 28, 22–8.

⁵³ *Colonial Laws Validity Act* s 3; *R v Marais; Ex parte Marais* [1902] AC 51, 54; *Liyanage v The Queen* [1967] 1 AC 259, 284–5; Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 47–9; Lumb, above n 18, 90; Castles, above n 28, 22–8; Enid Campbell, 'Colonial Legislation and the Laws of England' (1965) 2 *University of Tasmania Law Review* 148, 173–5; Castles, above n 40, 501–2.

⁵⁴ See generally Hardcastle, above n 28, 307–8.

⁵⁵ See, eg, *Re M'Mullen* (1859) 3 QSCR 205, 208; *Ex parte Gaynor* (1860) 2 Legge 1299, 1300; *Phillips v Bennett* (1866) 1 SALR (Pelham) 75; *Hunter v Sherwin* (1869) 6 W W & A'B (L) 26, 32 (Stawell CJ); *Ex parte Sempill*; *Re Wilkinson* (1875) 14 NSWSCR (L) 164, 170–1 (Hargrave J); *R v Bindon, Ex parte Cairns* (1879) 5 VLR (L) 93, 97 (Barry J); *R v Cope, Ex Parte the Mayor of Essendon and Flemington* (1881) 7 VLR (L) 337; *Ellis v Butler* (1887) 21 SALR 136, 137–8 (Way CJ), 139 (Boucaut J), 139 (Bundey J); *Ex parte Browne* (1888) 9 NSWLR (L) 102, 115 (Innes J); *Re Bell*; *Ex parte Marine Board of Victoria* (1892) 18 VLR 432, 440 (Hodges J); *Re Biel* (1893) 18 VLR 456. See also William Irvine and David Wanliss, *Irvine's Justices of the Peace* (Maxwell, 2nd ed, 1899) 284–5. See generally Goldsworthy, above n 3, 306.

⁵⁶ (1874) LR 5 PC 417, 433 ('Willan').

had not been displaced in this instance.⁵⁷ The second is that, if the Privy Council had intended to move away from well-established 19th-century orthodoxies concerning parliamentary sovereignty, notwithstanding the concessions made by Willan's counsel, it would do so using much clearer language than that in its judgment. I should also add that my interpretation of the Privy Council's judgment in *Willan* is consistent with the vast majority of subsequent decisions that cite *Willan* as an authority,⁵⁸ and numerous secondary materials that cite or discuss the decision.⁵⁹ Indeed, in one such consistent decision, *Re Biel*,⁶⁰ the Victorian Supreme Court cited *Willan* and determined that a privative clause, cast in wider terms than the privative clause at issue before the Privy Council in *Willan*,⁶¹ was effective to oust judicial review, on grounds of want or excess of jurisdiction, *as a matter of statutory interpretation*.⁶² The fact that *Re Biel* was not even cited in the Court's judgment in *Kirk*, let alone distinguished or disapproved, is, in itself, noteworthy. *Re Biel* is a colonial Supreme Court decision that is inconsistent with the High Court's argument about the defining characteristics of the Supreme Courts at the time of Federation.⁶³ It was cited by counsel in written submissions

⁵⁷ Ibid 433.

⁵⁸ See, eg, *Waterside Workers' Federation of Australia v Gilchrist, Watt and Sanderson Ltd* (1924) 34 CLR 482, 524–6 (Isaacs and Rich JJ); *Architects Registration Board of Victoria v Hutchinson* (1925) 35 CLR 404, 409 (Isaacs J); *Wall v The King (No 1)* (1927) 39 CLR 245, 256 (Isaacs J); *Magrath v Goldsbrough Mort & Co Ltd* (1932) 47 CLR 121, 134–5 (Dixon J); *Australian Coal and Shale Employees' Federation v Aberfeld Coal Mining Co Ltd* (1942) 66 CLR 161, 182 (Starke J); *Bruton v Policemen's Association* [1945] 3 CLR 437 [48]; *R v Murray*; *Ex parte Proctor* (1949) 77 CLR 387, 398–9 (Dixon J); *Canada Safeway Ltd v British Columbia (Labour Relations Board)* (1952) 7 WWR NS 145, 157 (O'Halloran JA); *Coal Miners' Industrial Union of Workers (WA) v Amalgamated Collieries of Western Australia* (1960) 104 CLR 437, 442 (Dixon CJ), 454–5 (Menzies J); *Rammell v Workmen's Compensation Board* (1961) 35 WWR NS 145, 151; 28 DLR (2d) 138, 144–5 (O'Halloran, JA); *R v Commissioner of Police for the Northern Territory* (1965) 7 FLR 8, 10–11; *R v Deland & Dredge*; *Ex parte Willie* (1996) 6 NTLR 72, 77–8; *NAAV v Minister for Immigration and Indigenous Affairs* (2002) 123 FCR 298, 335–7, 366–7 (Beaumont J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484–7 (Gleeson CJ); *Applicants A1 and A2 v Brouwer* [2007] VSC 66 (16 March 2007) [80]–[88] (Gillard J). Cf *Re Taraira Block No 1J No 2* [1916] NZLR 46, 55; *Ex parte Blackwell*; *Re Hateley* [1965] 2 NSWLR 1061, 1063–5.

⁵⁹ See, eg, *Halsbury's Laws of England* (Butterworths, 1909) vol 10 Crown Practice, 'Part III — Proceedings on the Crown Side of the King's Bench Division' 177 [348]; Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 96; Gouliaditis, above n 3, 878; Zines, above n 14; Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters', above n 3, 78; Williams and Lynch, above n 3, 1018; Sackville, 'The Constitutionalisation of State Administrative Law', above n 3, 131; Ratnapala and Crowe, above n 3, 193; Woolf, Jowell and Le Sueur, above n 34, 187; A W Bradley and K D Ewing, *Constitutional and Administrative Law* (Longman, 15th ed, 2011) 721. See also Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 96; Groves, above n 3, 407–8.

⁶⁰ (1892) 18 VLR 456.

⁶¹ The privative clause in *Re Biel* was contained in *Licensing Act 1890* (Vic) s 203 and provided that 'no determination, order or proceedings under Part II of the Statute shall be removed into the Supreme Court for any want or alleged want of jurisdiction, or for any error or alleged error of form or substance, or any ground whatsoever'.

⁶² *Re Biel* (1892) 18 VLR 456, 458–60. See also Gouliaditis, above n 3, 878–9.

⁶³ If the pre-Federation theory is the correct interpretation of the relevant passages, then *Re Biel* clearly should have been overruled. If, however, the on-Federation entrenchment theory is the correct interpretation of the relevant passages, then *Re Biel* should have been distinguished as an aberration from the characteristic judicial practice of reading down privative clauses to preserve the jurisdiction of colonial Supreme Courts to grant certiorari on grounds of jurisdictional error. Cf Finn, above n 2, 100.

and in argument before the High Court and was the subject of some discussion at the hearing.⁶⁴ The lack of any reference to *Re Biel* in *Kirk* provides but one illustration of the inadequate nature of the Court's historical analysis, a criticism I will take up in more detail in my assessment of the on-Federation entrenchment theory in Part IV.

3 *The Colonies of Queensland, Victoria, Western Australia and South Australia*

If one applies these five general observations to the colonies of Queensland, Victoria, Western Australia and South Australia, it is clear that, by the 1890s, the Parliaments of those colonies each enjoyed the legislative capacity to enact a broad privative clause to remove the availability of the prerogative writs in its Supreme Court.

In the colonies of Queensland, Victoria, Western Australia and South Australia, the Supreme Courts were each established and conferred with jurisdiction by domestic legislation. As this domestic legislation was made for each colony by an authority other than the imperial Parliament, it was 'colonial law', within the terms of the *Colonial Laws Validity Act* s 1, not imperial law extended to the colonies.⁶⁵ Consequently, with the commencement of the *Colonial Laws Validity Act* in 1865, if not before, the Parliaments of Queensland, Victoria, Western Australia and South Australia had the power to oust the jurisdiction of each colony's Supreme Court by repealing or amending the domestic legislation conferring jurisdiction on each Supreme Court.

In the colony of Queensland specifically, the jurisdiction of the Supreme Court was conferred by a domestic Act of the Queensland Parliament in 1861.⁶⁶ The Queensland Parliament was vested with plenary legislative power in 1859 by an imperial *Order in Council*⁶⁷ made pursuant to imperial legislation.⁶⁸ In the 1890s, the jurisdiction of the Queensland Supreme Court could therefore be ousted by ordinary legislation of the Queensland Parliament. The power of the Queensland Parliament to enact such legislation was confirmed the *Colonial Laws Validity Act* s 5.

In the colony of Victoria specifically, the jurisdiction of the Supreme Court was conferred by a domestic Act of the interim Victorian Legislative Council in 1852.⁶⁹ The subsequent Victorian Parliament was vested with plenary legislative

⁶⁴ Transcript of Proceedings, *Kirk* [2009] HCATrans 239 (1 October 2009) 18, 20, 33–7, 41–2. See also Gouliaditis, above n 3, 879 n 55.

⁶⁵ *Colonial Laws Validity Act* s 1 provided that 'the terms "legislature" and "colonial legislature" shall severally signify the authority, other than the imperial Parliament or Her Majesty in Council, competent to make laws for any Colony'. Section 1 then defined the term 'colonial law' as including 'laws made for any Colony either by such legislature as aforesaid or by Her Majesty in Council'. See also *Gilbertson v South Australia* [1978] AC 772, 781–3.

⁶⁶ See above n 39.

⁶⁷ *Order in Council* '[e]mpowering the Governor of Queensland to make laws, and to provide for the Administration of Justice in the said Colony' (Imp) (5 June 1859) s 2. See generally Carney, above n 18, 55–7.

⁶⁸ New South Wales *Constitution Statute 1855* s 7. See generally Carney, above n 18, 55–7.

⁶⁹ See above n 38.

power by imperial legislation in 1855.⁷⁰ In 1890, the Victorian Parliament enacted the *Supreme Court Act 1890* (Vic), re-establishing the Victorian Supreme Court and vesting it with the jurisdiction of the Court of Queen's Bench.⁷¹ In the 1890s, the jurisdiction of the Victorian Supreme Court could therefore be ousted by ordinary legislation of the Victorian Parliament. The power of the Victorian Parliament to legislate in such a way was also implied by the Victorian *Constitution Act 1855* (Imp) s 41, which appears as *Constitution Act 1855* (Imp) 18 & 19 Vict, c 55 sch1, and confirmed by the *Colonial Laws Validity Act* s 5.

In the colony of Western Australia specifically, the jurisdiction of the Supreme Court was conferred by a domestic Act of the Western Australian Legislative Council in 1861.⁷² The subsequent Western Australian Parliament was vested with plenary legislative power in 1890 by imperial legislation.⁷³ In the 1890s, the jurisdiction of the Western Australian Supreme Court could therefore be ousted by ordinary legislation of the Western Australian Parliament. The power of the Western Australian Parliament to do so was also implied by the Western Australian *Constitution Act 1889* (Imp) s 58⁷⁴ and confirmed by the *Colonial Laws Validity Act* s 5.

In the colony of South Australia specifically, the jurisdiction of the South Australian Supreme Court was conferred by a domestic Act of the South Australian Legislative Council in 1837.⁷⁵ The subsequent South Australian Parliament was conferred with plenary legislative power pursuant to imperial legislation.⁷⁶ In the 1890s, the jurisdiction of the South Australian Supreme Court could therefore be ousted by ordinary legislation of the South Australian Parliament. The power of the South Australian Parliament to do so was confirmed by the *Colonial Laws Validity Act* s 5.

4 *The Colonies of New South Wales and Tasmania*

The colonial Supreme Court of New South Wales was established by the *Charter of Justice* granted by Letters Patent dated 13 October 1823, issued under the *New South Wales Act 1823* (Imp) 4 Geo 4, c 96.⁷⁷ The Supreme Court of (then) Van Diemen's Land was permanently established by the *Charter of Justice* granted by Letters Patent dated 4 March 1831, issued under the *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83.⁷⁸ As we would expect, given that each imperial Act predates

⁷⁰ Victorian *Constitution Act 1855* (Imp) s 1, which appears as *Constitution Act 1855* (Imp) 18 & 19 Vict, c 55 sch 1.

⁷¹ *Supreme Court Act 1890* (Vic) ss 9, 10, 18. See also Irvine and Wanliss, above n 55, 276.

⁷² See above n 37.

⁷³ Western Australian *Constitution Act 1889* (Imp) s 2 which appears as the *Western Australian Constitution Act 1890* (Imp) 53 & 54 Vict, c 26 sch 1.

⁷⁴ Western Australian *Constitution Act 1890* (Imp) 53 & 54 Vict, c 26 sch 1.

⁷⁵ See above n 37. See generally *Gilbertson v South Australia* [1978] AC 772, 780–3; Carney, above n 18, 52.

⁷⁶ *Australian Constitutions Act (No 2) 1850* (Imp) 13 & 14 Vict, c 59 ss 14, 32. See also *Constitution Act 1855* (SA) s 1. See generally Carney, above n 18, 52–3.

⁷⁷ Twomey, above n 41, 718. See also *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 411 (Mahoney JA), 419 (Priestley JA).

⁷⁸ Michael Stokes, 'The Constitution of Tasmania' (1992) 3 *Public Law Review* 99, 100.

the establishment of a colonial legislature, neither of the imperial Acts makes any reference to the prospective powers of a colonial legislature to alter or oust any jurisdiction conferred by the imperial Act on the Supreme Courts. However, by the time of Federation, the colonial Parliaments of New South Wales and Tasmania did enjoy such a power as a consequence of the enactment by the imperial Parliament of the *Australian Constitution Act 1842* (Imp) 5 & 6 Vict, c 76 (*'Australian Constitutions Act (No 1) 1842'*), the *Australian Constitutions Act (No 2) 1850* and, in the case of the colony of New South Wales, the *New South Wales Constitution Statute 1855*. Any remaining doubt about the existence of this power was removed by the enactment of the *Colonial Laws Validity Act* in 1865.

The colonial Parliaments of New South Wales and Tasmania were, of course, bound by the doctrine of repugnancy. This limited their capacity to legislate in a manner inconsistent with British law, including, *prima facie*, the imperial legislation that conferred jurisdiction on the colonial Supreme Courts of New South Wales and Tasmania. However, it is a basic principle — derived from the doctrine of parliamentary sovereignty — that a sovereign Parliament, such as the imperial Parliament, cannot bind itself; it is a corollary of that principle that subsequent legislation enacted by a sovereign Parliament may supersede or displace earlier legislation.⁷⁹ When the imperial Parliament enacted the *Australian Constitutions Act (No 1) 1842*, the *Australian Constitutions Act (No 2) 1850* and the *New South Wales Constitution Statute 1855*, it specifically provided that the legislatures of the colonies of New South Wales and Tasmania would have legislative power to alter, abolish or vary the colonial court structure established by earlier imperial legislation.⁸⁰ The enactment of the *Colonial Laws Validity Act* s 5 by the imperial Parliament in 1865 merely confirmed that all the colonial Parliaments, including the Parliaments of the colonies of New South Wales and Tasmania, enjoyed plenary legislative power in relation to their courts, even if those courts had imperial origins.⁸¹

The pre-Federation entrenchment theory is impossible to sustain in relation to each of the six Australian colonies. It is inconsistent with elementary principles of constitutional law.

IV A Critical Analysis of the on-Federation Entrenchment Theory

The on-Federation entrenchment theory rests on the interpretative practices of judges at the time of Federation and not the legislative capacities of the colonial Parliaments, and is therefore at least arguable, unlike the pre-Federation

⁷⁹ See generally D C Pearce and R S Geddes, *Statutory Interpretation in Australia* (LexisNexis, 7th ed, 2011) 263–72.

⁸⁰ See *Australian Constitutions Act (No 1) 1842* s 53; *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83 ss 1, 3; *Australian Constitutions Act (No 2) 1850* s 29; *New South Wales Constitution Statute 1855* s 42 which appears as *New South Wales Constitution Statute 1855* (Imp) 18 & 19 Vict, c 54 sch 1. See also *Baxter v New South Wales Clickers' Association* (1909) 10 CLR 114, 118–19 (Wise KC) (during argument), 162 (Isaacs J) (*'Baxter'*).

⁸¹ See also *McCawley v The King* (1918) 26 CLR 9, 44, 48–53 (Isaacs and Rich JJ); *McCawley v The King* [1920] AC 691; *Clyne v East* (1967) 68 SR (NSW) 385, 401 (Sugerman JA); Dicey, above n 32, 101.

entrenchment theory.⁸² It is arguable for a number of reasons: it has some degree of historical veracity; it is consistent with the notion that the common law is an assumption of constitutional interpretation; and it builds upon a body of High Court jurisprudence concerning the relationship between the *Australian Constitution* and the state Supreme Courts.

At the time of Federation, it was the (almost) universal practice of courts,⁸³ in both Australia and the United Kingdom, to read down privative clauses so as to preserve some form of judicial review.⁸⁴ This interpretative practice forms part of the ‘common law for the construction of statutes’.⁸⁵ As the common law, and in particular, the common law at the time of Federation, is a legitimate contextual aid in the interpretation of the *Australian Constitution*,⁸⁶ the existence of this fundamental interpretative practice can legitimately be used to interpret the references to the state Supreme Courts in the *Australian Constitution* s 73.

However, while the on-Federation entrenchment theory is arguable, the originalist justification for the theory advanced by the High Court in *Kirk* is flawed in at least two respects. The first flaw relates to the contemporary materials from the time of Federation and the second to the Court’s failure to engage with the emergence and evolution of administrative law in the period from Federation to the present day.

A *Contemporary Materials and Historical Analysis*

There is no authoritative contemporary material from the Federation period to support the on-Federation entrenchment theory. There is nothing, for example, in the Australian Constitutional Convention Debates of the 1890s, nor in W Harrison Moore’s *Four Lectures on the Constitution Bill 1897*,⁸⁷ nor in Quick and Garran’s *Annotated Constitution of the Commonwealth of Australia* published in 1901.⁸⁸ Indeed, it is directly contradicted by a passage in W Harrison Moore’s *The Constitution of the Commonwealth of Australia*⁸⁹ published in 1910. More significantly, High Court precedents from the first decade of Federation directly contradict the theory.

⁸² See also Ratnapala and Crowe, above n 3, 194.

⁸³ My qualification relates to *Re Biel* (1892) 18 VLR 456. See also Transcript of Proceedings, *Kirk* [2009] HCATrans 239 (1 October 2009) 41–2. See generally Ratnapala and Crowe, above n 3, 193–4.

⁸⁴ See, in relation to courts in the United Kingdom, above n 34 and, in relation to Australian courts, above n 55.

⁸⁵ Transcript of Proceedings, *Kirk* [2009] HCATrans 239 (1 October 2009) 41.

⁸⁶ See, eg, *Amalgamated Society of Engineers v The Adelaide Steamship Company Limited* (1920) 28 CLR 129, 149, 152 (Knox CJ, Isaacs, Rich and Starke JJ); Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 567–9. See also Basten, above n 2, 281–3.

⁸⁷ See generally Harrison Moore, above n 27, 30–6, 45–6.

⁸⁸ Sir John Quick and Robert Garran, *Annotated Constitution of the Commonwealth of Australia* (Angus & Robertson, 1901).

⁸⁹ Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 15 ([‘T]he position of the state Governments is different. They are not created and established by the [Australian Constitution]; their executive and judiciary are not co-ordinate with, but subordinate to the state Parliament’ (emphasis added). See also at 6.

In the first decade after Federation, the High Court handed down two lengthy decisions that considered the effectiveness of strong privative clauses enacted in New South Wales that purported to oust the jurisdiction of the New South Wales Supreme Court.⁹⁰

In *Clancy*, the High Court was called upon to determine the effectiveness of a broad ‘no certiorari’ clause in the *Industrial Arbitration Act 1901* (NSW), which purported to protect decisions of the New South Wales Court of Arbitration from judicial review in the New South Wales Supreme Court.⁹¹ The Court found that the ‘no certiorari’ clause did not oust the jurisdiction of the New South Wales Supreme Court to interfere when the New South Wales Court of Arbitration exceeded its jurisdiction, but came to that conclusion as a matter of statutory construction.⁹² While Griffith CJ did not expressly address the question of the legislative competence of the New South Wales Parliament to enact a privative clause ousting judicial review in the New South Wales Supreme Court where an inferior court exceeds its jurisdiction, it is implicit in his reasoning that the New South Wales Parliament did have such a power, given his Honour’s reliance on the orthodox interpretative touchstone of legislative intent to read down the no certiorari clause.⁹³ Certainly the Chief Justice did not reject the respondents’ submissions that the New South Wales Parliament had the legislative capacity completely to oust the jurisdiction of the New South Wales Supreme Court.⁹⁴ Barton J, in a very brief judgment, adopted the reasoning of the Chief Justice.⁹⁵ By contrast, O’Connor J was more explicit: his Honour expressly acknowledged that the New South Wales Parliament had the power to oust the jurisdiction of the New South Wales Supreme Court to keep inferior courts within their jurisdiction.⁹⁶

In response to the High Court’s decision in *Clancy*, the New South Wales Parliament enacted the *Industrial Disputes Act 1908* (NSW), which contained an even more strongly worded privative clause than that in the *Industrial Arbitration Act 1901* (NSW).⁹⁷ The effect of this new clause became the subject of litigation in the High Court in *Baxter*. Although the Court’s comments about the effectiveness of the new privative clause are obiter — because the Court decided, as a matter of statutory construction, that the old privative clause applied to the impugned decision of the New South Wales Industrial Court⁹⁸ — the question of the effectiveness of the new privative clause was fully argued, and the Court’s comments on its effectiveness are detailed and instructive. While Griffith CJ and Barton J expressed some disquiet with the notion that the New South Wales

⁹⁰ *Clancy v Butchers’ Shop Employees Union* (1904) 1 CLR 181 (‘*Clancy*’) and *Baxter v* (1909) 10 CLR 114 (‘*Baxter*’).

⁹¹ *Industrial Arbitration Act 1901* (NSW) s 32. See generally Sexton and Quilter, above n 3, 69–70.

⁹² *Clancy* (1904) 1 CLR 181, 196–7 (Griffith CJ), 203–4 (Barton J), 204–5 (O’Connor J).

⁹³ *Ibid* 196–7.

⁹⁴ *Ibid* 187–8 (Piddington), 194 (Delohery) (during argument).

⁹⁵ *Ibid* 203–4.

⁹⁶ ‘It is within the power of the legislature, if it thinks fit, to make the Arbitration Court the sole judge of the extent of its own jurisdiction’: *ibid* 204.

⁹⁷ *Industrial Disputes Act 1908* (NSW) s 52. See generally Sexton and Quilter, above n 3, 69–70.

⁹⁸ *Baxter* (1909) 10 CLR 114, 125–31 (Griffith CJ), 134–9 (Barton J), 149–50 (O’Connor J) *contra* 162–6 (Isaacs J). See also Sexton and Quilter, above n 3, 70.

Parliament could create a court of unchallengeable jurisdiction,⁹⁹ neither identified any constitutional limitation on the New South Wales Parliament's powers to do so. Indeed, Barton J, along with O'Connor and Isaacs JJ, expressly affirmed the power of the New South Wales Parliament to create courts of unlimited jurisdiction.¹⁰⁰ Using language, in 1909, that is utterly inconsistent with the Court's assertion in *Kirk* in 2010 about accepted doctrine at the time of Federation, both Barton and O'Connor JJ regarded it as self-evident that the New South Wales Parliament could create inferior courts of unlimited jurisdiction free from the supervision of the New South Wales Supreme Court.¹⁰¹ All justices dealt with the question of the effectiveness of the new privative clause as a question of statutory construction,¹⁰² and all justices, save Barton J who equivocated on the point,¹⁰³ concluded that the new privative clause was effective to limit the power of the New South Wales Supreme Court to review decisions of the New South Wales Industrial Court.¹⁰⁴

The High Court is, of course, not bound by its own decisions, although we would expect it to at least acknowledge its former decisions when it engages in novel reasoning in direct conflict with them.¹⁰⁵ However, the Court's failure in *Kirk* to consider *Clancy*, *Baxter*¹⁰⁶ and other authoritative Federation-era material

⁹⁹ *Baxter* (1909) 10 CLR 114, 131 (Griffith CJ), 140 (Barton J).

¹⁰⁰ *Ibid* 140 (Barton J), 146 (O'Connor J), 161 (Isaacs J).

¹⁰¹ *Ibid* 140 (Barton J) ('The legislature has *of course* the power to make an inferior Court the sole custodian of the extent of its jurisdiction') (emphasis added), 146 (O'Connor J) ('It is, *of course*, open to the legislature to invest a tribunal with unlimited power, and should the enactment constituting it clearly express that intention, it would be the duty of this Court to give full effect to it') (emphasis added). See also at 161 (Isaacs J).

¹⁰² *Ibid* 131–2 (Griffith CJ), 138–41 (Barton J), 145–9 (O'Connor J), 156–61 (Isaacs J).

¹⁰³ *Ibid* 140–1.

¹⁰⁴ *Ibid* 132 (Griffith CJ), 148 (O'Connor J), 162 (Isaacs J). By contrast, Isaacs J, earlier in his judgment in *Baxter*, had opined that the new privative clause 'does abolish prohibition in every form': at 161.

¹⁰⁵ *John v Federal Minister of Taxation* (1989) 166 CLR 417, 438–40 (Mason CJ, Wilson, Dawson, Toohey and Gaudron JJ), 450–2 (Brennan J). The High Court's decision in *Kirk* is also inconsistent with its decisions in *Minister for Labour and Industry (New South Wales) v Mutual Life and Citizens' Assurance Company Ltd* (1922) 30 CLR 488; *Morgan and Industrial Workers Union v Rylands Brothers (Australia) Limited* (1927) 39 CLR 517; *Houssein v Undersecretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88; and *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132; *Minister for Labour and Industry (New South Wales) v Mutual Life and Citizens' Assurance Company Limited* (1922) 30 CLR 488, 496 (Knox CJ, Isaacs, Gavan Duffy and Starke JJ); *Morgan and Industrial Workers Union v Rylands Brothers (Australia) Limited* (1927) 39 CLR 517, 524 (Isaacs ACJ and Powers J), 525 (Higgins J); *Houssein v Undersecretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 95; *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132, 142 (Brennan J), 160–1 (Dawson and Gaudron JJ), 165 (McHugh J). Of these four inconsistent decisions, only *Houssein v Undersecretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88 and *Public Service Association of South Australia v Federated Clerks' Union of Australia, South Australian Branch* (1991) 173 CLR 132 were cited in *Kirk* (*Kirk* (2010) 239 CLR 531, 571 n 188, 574 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ)) and the inconsistency of those two decisions with the holding in *Kirk* was not addressed. See also Gouliaditis, above n 3, 876 n 43. Cf Finn, above n 2, 100.

¹⁰⁶ *Clancy* was not cited at all in the Court's decision in *Kirk*, and *Baxter* was accorded a single, scant citation (at *Kirk* (2010) 239 CLR 531, 570 n 182) in relation to an unrelated point. Both *Clancy* and

is not merely a case of inadequate historical research and analysis. The interpretative maxim *contemporanea expositio est optima et fortissimo in lege*,¹⁰⁷ while of general application, should have especial weight in originalist reasoning; self-evidently, decisions of the Court from the first decade after Federation on the effectiveness of state privative clauses, delivered by justices who were involved in the drafting of the *Australian Constitution* and contemporary authorities such as the Convention Debates, are highly relevant to an argument about the interpretation of the *Australian Constitution* that relies on claims about accepted doctrine at the time of Federation. If the High Court is correct, in *Kirk*, about accepted doctrine at the time of Federation informing the content of the concept of a state Supreme Court in the *Australian Constitution*, one would expect High Court justices shortly after Federation to share that understanding in considered comments directly on point. On the contrary, as it was obvious and indisputable to the early High Court justices that the jurisdiction of the state Supreme Courts to issue prerogative writs to correct for jurisdictional errors could be taken away by the state Parliaments, how could that jurisdiction have been an essential characteristic of those very Supreme Courts at the time of Federation?

It is telling to compare the on-Federation entrenchment theory — and the historical justification for it advanced by the High Court in *Kirk* — with the Court's interpretation of the trial by jury guarantee in the *Australian Constitution* s 80 in *Cheatle v The Queen*.¹⁰⁸ In *Cheatle*, the Court determined that the guarantee of trial by jury in relation to Commonwealth indictable offences contained in s 80 incorporated a requirement of jury unanimity because unanimity was an 'essential feature' of the common law institution of the jury at the time of Federation.¹⁰⁹ To that extent, the Court's reasoning in *Cheatle* is analogous with the on-Federation entrenchment theory. However, a closer comparison of *Cheatle* and *Kirk* reveals two pertinent differences.

The first difference relates to the on-Federation entrenchment theory itself. There is a much sounder textual foundation for the High Court's reasoning in *Cheatle* than for the on-Federation entrenchment theory. The *Australian Constitution* contains a specific reference to the institution of trial by jury in s 80, and expressly limits the guarantee to prosecutions brought on indictment by the new entity of the Commonwealth.¹¹⁰

The second difference relates to the historical justification for the on-Federation entrenchment theory advanced by the High Court in *Kirk*. In *Cheatle*, the High Court cited tens of cases, several canonical commentators and a plethora of secondary materials in support of its historical argument about the practical

Baxter were, however, raised in argument: see Transcript of Proceedings, *Kirk* [2009] HCATrans 239 (1 October 2009) 42–5. See also Gouliaditis, above n 3, 876 n 43.

¹⁰⁷ Translated as 'in law, a contemporaneous definition is the best and strongest': Butterworths, *Concise Australian Legal Dictionary* (3rd ed, 2004) 91.

¹⁰⁸ (1993) 177 CLR 541 ('*Cheatle*').

¹⁰⁹ *Ibid* 552.

¹¹⁰ See generally Sarah Joseph and Melissa Castan, *Federal Constitutional Law: A Contemporary View* (Lawbook, 3rd ed, 2010) 406–11; James Stellios, *The Federal Judicature: Chapter III of the Constitution Commentary and Cases* (LexisNexis, 2010) 517–68.

content of the s 80 guarantee.¹¹¹ That wealth of historical material pointed unequivocally to a requirement of jury unanimity stretching back over many centuries to 1367.¹¹² By contrast, in *Kirk*, the Court only extracted one ambiguous passage from one case, *Willan*,¹¹³ to support its originalist reasoning. As already noted, the Court also ignored a unanimous contemporary decision of the Full Court of the Supreme Court of Victoria, *Re Biel*, and its own decisions in *Clancy* and *Baxter*, all cited in argument¹¹⁴ and all inconsistent with the Court's reasoning. Moreover, the requirement of jury unanimity at issue in *Cheatle* is a concrete requirement that has persisted unchanged through several centuries, whereas the concept of jurisdictional error, which defines the boundaries of the entrenched minimum standard of judicial review, is not.

B The Evolution of Administrative Law Post-Federation

A further problem with the High Court's originalist reasoning in *Kirk* is that relies on accepted doctrine concerning judicial review in 1900 in order to entrench the very different law of judicial review that exists today, without acknowledging the obvious methodological problems with this transition. It is beyond dispute that judicial supervision of government action is radically different now to how it was at the end of the 19th century. In particular, there are four related changes that have occurred in the period between the end of the 19th century and the present day that further undermine the High Court's originalist justification for the on-Federation entrenchment theory, even if one ignores the fact that the theory is utterly inconsistent with the contemporary historical materials.

The first change is that government decision-makers are now far more likely to make a legal error in the course of decision-making than they were at the time of Federation. This is, in part, a consequence of the increase in the amount and complexity of legislation that confers and regulates decision-making powers. However, it is also a result of the imposition of novel and stricter standards upon government decision-makers by courts. The expansion of the procedural fairness ground of judicial review is a case in point. At the end of the 19th century, the requirements of a classically curial concept of natural justice only applied to several well-established categories of decision-makers; now an evolving obligation to afford 'procedural fairness' applies presumptively to all decision makers.¹¹⁵

The second change relates to the availability of the writs of prohibition and certiorari. At the end of the 19th century, the writs were largely confined to the review of decision-making by inferior courts and a limited range of other bodies

¹¹¹ *Cheatle* (1993) 177 CLR 541, 550–62.

¹¹² *Ibid* 550.

¹¹³ (1874) LR 5 PC 417, 433

¹¹⁴ See above nn 64, 106.

¹¹⁵ *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57, 93 (McHugh J). See also Basten, above n 2, 280–1, 288; Robin Creyke, John McMillan and Mark Smyth, *Control of Government Action: Text, Cases and Commentary* (LexisNexis, 3rd ed, 2012) 562. See generally Aronson, Dwyer and Groves, above n 3, 106–8, 117–22, 414–26. Cf *R v Arndel* (1906) 3 CLR 557, 571–2 (Griffith CJ), 574–9 (Barton J), 582 (O'Connor J); Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 96–7.

exercising ‘quasi-judicial’ functions.¹¹⁶ Over the course of the 20th century, the writs become available against a much broader range of decision-makers.¹¹⁷

The third change relates to the availability of mandamus. In the 19th century, an applicant for mandamus was required to prove that he or she had made a specific demand for performance of the duty that was sought to be enforced,¹¹⁸ and a court would only grant the remedy if there was no other effective remedy available to the applicant.¹¹⁹ By contrast, in the 20th century, these requirements ceased to be requirements, and became instead relevant factors in determining whether the writ was granted.¹²⁰ Further, in the 19th century, mandamus was largely confined to an *actual* failure to exercise jurisdiction;¹²¹ in the 20th century judges showed an increasing willingness to find that a decision-maker had *constructively* failed to exercise jurisdiction by making a jurisdictional error in the process of making a decision.¹²²

¹¹⁶ See *Ex parte King* (1861) 2 Legge 1307, 1316; *R v Nicholl* (1862) 1 QSCR 42, 43; *Re Slack* (1871) 2 VLR (L) 135, 136; *R v Board of Education* (1871) 2 VLR (L) 176, 178–9; *Ex parte Thackeray* (1874) 13 NSWSCR (L) 1, 50–1; *Re Boddington* (1880) 14 SALR 68, 75; *Re Lange and the Licensed Victuallers Act* (1880) 14 SALR 150; *R v Hamilton*; *Ex parte Attorney-General* (1881) 7 VLR (L) 194, 199; *Ex parte M’Innes* (1883) 4 NSWLR (L) 143, 148–9; *R v Maude*; *Ex parte Ryan* (1888) 14 VLR 227, 237; *Holmes v Cohuna Irrigation and Water Supply Trust* (1893) 19 VLR 429, 431; *R v Edwards*; *Ex parte Howells* (1896) 7 QLJR 25, 26; *R v Sharman*; *Ex parte Denton* [1898] 1 QB 578, 579–80; *R v Bowman* [1898] 1 QB 663; *R v Cotham* [1898] 1 QB 802, 806. See also Gouliaditis, above n 3, 878 n 51. See generally Aronson, Dwyer and Groves, above n 3, 799, 812–15.

¹¹⁷ See generally Aronson, Dwyer and Groves, above n 3, 72–3, 812–13. By contrast, the prerogative writ of mandamus has always been available against persons or bodies exercising non-judicial functions other than the Crown, to the extent that the decision-maker is under a public duty to perform the function: at 835–6. See also *Ex parte Hamilton* (1859) 2 Legge 1233; *R v Registrar-General*; *R v Municipal Council of East Collingwood* (1861) 1 W & W (L) 1; *Irving v Mayor and Councillors of Footscray* (1866) 3 W & A’B (L) 9; *R v Medical Board of Victoria* (1867) 4 W & A’B (L) 139; *R v Registrar-General*; *Ex parte Roxburgh* (1868) 1 QSCR 201; *Smith v Mayor of Clunes* (1868) 5 W & A’B (L) 86; *Ex parte Attenborough*; *Re Bent* (1868) 5 W & A’B (L) 103, 105; *Ex parte Mills*; *Re Mills* (1881) 1 QLJR 1; *Ex parte Gibson* (1881) 2 NSWLR (L) 203; *R v President of the Shire of Oakleigh*; *Ex parte Wilson* (1884) 10 VLR (L) 67; *Re Glenelg Shire*; *Ex parte Sealey* (1885) 11 VLR 64, 69; *Re O’Rourke* (1886) 7 NSWLR (L) 64, 70; *Re Carroll*; *Ex parte Dagnall* (1888) 14 VLR 607; *Re Barnes* (1889) 15 VLR 237; *R v Central Board of Health*; *Ex parte Wilson* (1889) 15 VLR 375; *Re Bollen and South Australian Medical Board* (1889) 23 SALR 107; *R v Gee* (1889) 23 SALR 164; *Re Wall* (1890) 16 VLR 686; *Re Transfer of Land Act 1890*; *Ex parte Clark* (1891) 17 VLR 82; *Ex parte Bouchier* (1892) 13 NSWLR (L) 105; *Ex parte New Zealand Loan and Mercantile Agency* (1893) 14 NSWLR (L) 96, 99; *R v President of the Shire of Winchelsea* (1896) 12 VLR 171; *R v Medical Board of Queensland* (1896) 7 QLJR 122; *Stalker v Commissioner of Crown Lands* (1897) 1 TLR 23; *R v Bourne*; *Ex parte Spresser* (1897) 8 QLJR 14; *Ex parte Atkins*; *Re Warden of Evandale* (1898) 1 TLR 70, 74–5; *R v Bowman* [1898] 1 QB 663; *R v Cotham* [1898] 1 QB 802; *Re Municipal District of Lambton* (1899) 20 NSWLR (L) 375; *Re Municipal District of Lambton (No 2)* (1899) 20 NSWLR (L) 378; *Re Council of the Shire of East Loddon*; *Ex parte Cheyne* (1899) 24 VLR 703. *Contra*, in relation to the availability of the writ of mandamus, Emiliios Kyrrou, ‘Judicial Review of Decisions of Non-Governmental Bodies Exercising Governmental Powers: Is Datafin Part of Australian Law?’ (2012) 86 *Australian Law Journal* 20.

¹¹⁸ Short and Mellor, above n 34, 27. See also *R v Arndel* (1906) 3 CLR 557, 568–9 (Griffith CJ).

¹¹⁹ Short and Mellor, above n 34, 24–6.

¹²⁰ Aronson, Dwyer and Groves, above n 3, 72–3, 833–4.

¹²¹ See, eg, *R v Fawcett*; *Ex parte Hodson* (1868) LT NS 396; *R v Nicholson* [1899] 2 QB 455; Short and Mellor, above n 34, 13. See also *R v Brown* (1857) 7 El & Bl 757; 119 ER 1427. But see *R v Adamson* (1875) 1 QBD 201.

¹²² See, eg, *R v War Pensions Entitlement Appeal Tribunal*; *Ex parte Bott* (1933) 50 CLR 228, 242–3 (Rich, Dixon and McTiernan JJ). See also *NAIS v Minister for Immigration and Multicultural and*

The fourth change relates to the development of the concept of jurisdictional error. Putting to one side the remedy of certiorari for error of law on the face of the record¹²³ (which the High Court in *Kirk* expressly recognised as a distinct remedy which was *not* entrenched),¹²⁴ in the 19th century, provided a decision-maker commenced with jurisdiction, any subsequent legal error a decision-maker made was generally irremediable at common law.¹²⁵ A survey of 19th-century law reveals only limited circumstances in which a decision-maker who commenced with jurisdiction could lose it: the legal error had to be related to matters that were genuinely preliminary or ‘collateral’;¹²⁶ the decision-maker was an inferior court (or other ‘quasi-judicial’ decision-maker) and acted in breach of a limited, curial conception of natural justice;¹²⁷ the decision-maker made its decision in the complete absence of evidence¹²⁸ or on the basis of clear and

Indigenous Affairs (2005) 228 CLR 470, 484 (Gummow J). See generally Aronson, Dwyer and Groves, above n 3, 835.

¹²³ See generally Wade and Forsyth, above n 34, 268–9; Cane and McDonald, above n 17, 84–6. See also *Ex parte Blackwell*; *Re Hateley* [1965] 2 NSWLR 1061, 1063.

¹²⁴ *Kirk* (2010) 239 CLR 531, 567, 581 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Ratnapala and Crowe, above n 3, 203–4; Lacey, above n 2, 658.

¹²⁵ *R v Bolton* (1841) 1 QB 66, 74; 113 ER 1054, 1057; *Ex parte Hopwood* (1850) 15 QB 121, 128; 117 ER 404, 407; *R v Wood* (1855) 5 El & Bl 49, 56; 119 ER 400, 403; *R v Bindon*, *Ex parte Cairns* (1879) 5 VLR (L) 93, 96–7; *R v Cope*, *Ex parte the Mayor of Essendon and Flemington* (1881) 7 VLR (L) 337, 346; *R v Edney*; *Ex parte Skinner* (1882) 8 VLR (L) 1; *R v Justices of London* [1895] 1 QB 214, 217; *Ex parte Minister for Lands* (1896) 17 NSWLR (L) 394, 400–1; *R v Casey* (1897) 13 VLR 495, 498. See generally P P Craig, *Administrative Law* (Thomson, 5th ed, 2003) 490–1; Wade and Forsyth, above n 34, 258–60, 262–3; Woolf, Jowell and Le Sueur, above n 34, 181–2; Aronson, Dwyer and Groves, above n 3, 11–12.

¹²⁶ See, eg, *Bunbury v Fuller* (1853) 9 Ex 111, 140; 156 ER 47, 60. See also *R v Wrottesley* (1830) 1 B & Ad 648; 109 ER 928; *R v Colling* (1852) 17 QB 816; 117 ER 1493; *R v Badger* (1856) 6 El & Bl 137, 166–7; 119 ER 816, 826; *R v Brown* (1857) 7 El & Bl 757; 119 ER 1427; *R v Nunneley* (1858) El Bl & El 852; 120 ER 728; *Pease v Chaytor* (1863) 3 B & S 620, 636, 640–1; 122 ER 233, 239, 241; *Elston v Rose* (1868) LR 4 QB 4; *Taylor v Nicholls* (1876) 1 CPD 242. See generally Craig, above n 125, 491–2; Aronson, Dwyer and Groves, above n 3, 12; Wade and Forsyth, above n 34, 252–3, 258–60.

¹²⁷ *Municipal Council of Prahran v Clough* (1862) 1 W & W (L) 238; *R v Myers* (1875) 34 LT NS 247; *R v Justices of Great Yarmouth* (1882) 8 QBD 525; *Ex parte Webber* (1886) 7 NSWLR (L) 317, 321–2; *Re O’Lachlan* (1886) 3 WN (NSW) 54; *R v Farrant* (1887) 20 QBD 58; *Woolcock v City of Collingwood* (1889) 15 VLR 81; *Purcell v Perpetual Trustee* (1894) 15 NSWLR (L) 385, 387; *Ex parte Shakespeare* (1894) 15 NSWLR (L) 477, 481; *Re Scadden* (1895) 16 NSWLR (L) 125; *Ex parte Martin* (1896) 17 NSWLR (L) 200, 202; *R v Court of Marine Inquiry* (1898) 23 VLR 179; *Ex parte Mansfield* (1899) 20 NSWLR (L) 75. See also *Ex parte Hopwood* (1850) 15 QB 121; 117 ER 404; *Paul v Buttenshaw* (1877) 5 QSCR 8; 1(2) QLR 4; *Markey v Murray* (1884) 2 QLJR 7; *Burrey v Marine Board of Queensland* (1892) 4 QLJR 151; *R v Morris* (1894) 6 QLJR 9; *Raven v Queensland Divisional Board* (1894) 6 QLJR 67; *R v Tchorzewski* (1897) 8 QLJR 79. Cf *Re Balcombe*; *Ex parte Hann* (1861) 1 W & W (L) 49.

¹²⁸ *Re Bailey* (1854) 3 El & Bl 607; 118 ER 1269; *Re M’Mullen* (1859) 3 QSCR 205, 209; *Ex parte Taylor*, *Re Rede* (1863) 2 W & W (L) 19; *Ex parte Barclay*, *Re Pasco* (1863) 2 W & W (L) 38; *Ogle v Townley* (1872) 2 QSCR 202; *Re Haughton* (1877) 5 QSCR 53; *R v Taylor*; *R v Walker*; *Ex parte Kennedy* (1878) 4 VLR (L) 452; *R v Taylor*; *Ex parte Blain* (1879) 5 VLR (L) 271; *R v Grover*; *Ex parte Parsons* (1881) 7 VLR (L) 334; *R v Little*; *Ex parte Reynolds* (1882) 8 VLR (L) 124; *Dunn v Boyle* (1884) 2 QLJR 25; *R v Attorney-General*; *Ex parte Gillick* (1885) 11 VLR 508, 515; *Re Scully* (1886) 3 WN (NSW) 50, 51; *Re Barnes* (1889) 15 VLR 237; *Ex parte Hales* (1898) NSWLR (L) 378, 382; *R v Lawrence* (1899) 1 WALR 99, 102; *Re Electoral Justices of Barcoo*; *Ex parte Collins* (1899) 9 QLJR 111, 114.

manifest fraud;¹²⁹ the decision-maker handed down a sentence, or made an order that was clearly ultra vires;¹³⁰ or (exceptionally) the decision-maker took into account an irrelevant consideration or failed to take into account a relevant consideration.¹³¹ In contrast, by the end of the 20th century, the so-called ‘commencement theory of jurisdiction’ had been utterly discarded and replaced with a more or less open-ended list of remediable ‘jurisdictional errors’.¹³² Even more significantly, it is clear that, in the 19th century, the catalogue of legal errors going to jurisdiction would largely, if not entirely, yield in the face of a strong privative clause,¹³³ a point I will take up when I compare the *Willan* concept of ‘manifest defect of jurisdiction’ with the modern concept of jurisdictional error.

While the High Court in *Kirk* at least acknowledged some of these developments,¹³⁴ it failed to acknowledge how these four related changes undermine its originalist reasoning concerning accepted doctrine and the essential characteristics of the state Supreme Courts at the time of Federation. The extract from *Willan* in the relevant passages in *Kirk* referred to the availability of the writ of certiorari to control the actions of inferior courts on grounds of ‘manifest defect of jurisdiction’ or ‘manifest fraud’ by the party procuring jurisdiction.¹³⁵ Yet in *Kirk* the High Court jumped, without explanation, from this extract in *Willan* to a series of assertions about the prerogative writs of certiorari and prohibition, mandamus, and habeas corpus,¹³⁶ to control the exercise of state judicial and executive power,¹³⁷ where the decision-maker has made any jurisdictional error, as presumably determined by 20th- and 21st-century Australian case law.¹³⁸ Of all

¹²⁹ See, eg, *R v Gillyard* (1848) 12 QB 527; 116 ER 965; *R v Lawrence* (1899) 1 WALR 99, 103 (Hensman J).

¹³⁰ See, eg, *R v Cridland* (1857) 7 El & Bl 853; 119 ER 1463. See also Short and Mellor, above n 34, 117. In referring to an order or sentence which is clearly ultra vires, I am referring to the type of example used by the High Court in *Craig v South Australia* (1995) 184 CLR 163, 177.

¹³¹ See, eg, *R v Vestry of St Pancras* (1890) 24 QBD 371; *Sharp v Wakefield* [1891] AC 173. See also Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 96.

¹³² As Gageler has pointed out, the term ‘jurisdictional error’ makes its first appearance in the *Commonwealth Law Reports* in 1954, and it is only referred to in passing in a few judgments of the High Court prior to the 1990s: Stephen Gageler, ‘Impact of Migration Law on the Development of Australian Administrative Law’ (2010) 17 *Australian Journal of Administrative Law* 92, 95–6. See also Sackville, ‘The Constitutionalisation of State Administrative Law’, above n 3, 131; Meyers, above n 12, 142. See generally Cane and McDonald, above n 17, 149–53; Aronson, Dwyer and Groves, above n 3, 11–15, 171–2.

¹³³ See, eg, Harrison Moore, *The Constitution of the Commonwealth of Australia*, above n 35, 96.

¹³⁴ *Kirk* (2009) 239 CLR 531, 567–73 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹³⁵ *Willan* (1874) LR 5 PC 417, 442 as extracted in *Kirk* (2010) 239 CLR 531, 580 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

¹³⁶ See also *Public Service Association of South Australia v Industrial Relations Commission (SA)* (2012) 289 ALR 1, 16–17 (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 20–2 (Heydon J); Lauren Butterly, ‘Public Service Association (SA) Inc v Industrial Relations Commission (SA)’ (2012) 20 *Australian Journal of Administrative Law* 11, 12–14.

¹³⁷ Cf *Ex parte M’Innes* (1883) 4 NSWLR (L) 143, 148–9 (Martin CJ). See also *South Australia v Totani* (2010) 242 CLR 1, 27 (French CJ), 78 (Hayne J); *Public Service Association of South Australia v Industrial Relations Commission (SA)* (2012) 289 ALR 1, 10 (French CJ), 17 (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 20–4 (Heydon J); Gouliaditis, above n 3, 871 n 51; Basten, above n 2, 283, 296, 299; Ratnapala and Crowe, above n 3, 204–5; Butterly, above n 136, 14–15. See generally Groves, above n 3, 425–7.

¹³⁸ See, eg, *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92–101 (Gaudron and Gummow JJ). See also *Public Service Association of South Australia v Industrial Relations*

those precarious leaps, there is one which merits particular scrutiny: the leap from the reference in *Willan* to ‘manifest defect of jurisdiction’ to that in *Kirk* to ‘jurisdictional error’.

Gageler has asserted that the origins of the modern concept of jurisdictional error are to be found in the passages in *Willan* that refer to ineffectiveness of the privative clause to oust judicial review on the ground of ‘manifest defect in jurisdiction’.¹³⁹ That may be so, but it is also clear that, both in theory and in substance, the ground of manifest defect of jurisdiction referred to in *Willan* provided a much narrower basis for judicial review in the face of a strong privative clause than judicial review based on the ever-evolving early 21st-century Australian concept of jurisdictional error.¹⁴⁰ While *Willan* has been cited as an authority for a limited exception to the commencement theory of jurisdiction in the case of ‘jurisdictional facts’,¹⁴¹ the Privy Council in *Willan* was almost entirely wedded to the commencement theory of jurisdiction, as most famously articulated by the Court of Queen’s Bench in *R v Bolton* in 1841.¹⁴² An example of the difference between the concept of jurisdiction at the turn of the 20th century and the modern concept of jurisdiction is provided by the first edition of *Halsbury’s Laws of England*, published in 1909, which asserts, ‘[w]here certiorari is taken away by statute, even if it appears on the face of the proceedings that there was no evidence whatever in support of a conviction, the writ would not be granted’ and cites *Re Shropshire Justices; Ex parte Blewitt*¹⁴³ (a case ‘where the magistrate convicted on the faith of a charge by a police constable, without any hearing of the complaint, or plea of guilty or witnesses called’) in support of the assertion.¹⁴⁴ By contrast, it is inconceivable today that any magistrate who convicted a defendant purely on the faith of the informant’s charge and in the complete absence of any evidence led by the prosecution could escape a finding that he or she had made a jurisdictional error should the decision be judicially reviewed. It is noteworthy that Wade and Forsyth are of the view that the reference in *Willan* to ‘manifest defect of

Commission (SA) (2012) 289 ALR 1, 9–11 (French CJ), 15–19 (Gummow, Hayne, Crennan, Kiefel and Bell JJ), 20–22, 24–5 (Heydon J); Butterly, above n 136, 12–14.

¹³⁹ Gageler, above n 132, 96.

¹⁴⁰ See also *Applicants A1 and A2 v Brouwer* [2007] VSC 66 (16 March 2007) [75]–[88] (Gillard J); Gouliaditis, above n 3, 877–8. See generally Joshua Knackstedt, ‘Judicial Review after *Kirk v Industrial Court (NSW)*’ (2011) 18 *Australian Journal of Administrative Law* 203, 206–11; Aronson, Dwyer and Groves, above n 3, 171–2, 293.

¹⁴¹ Wade and Forsyth, above n 34, 262 n 64. See also at 259 n 40. See, eg, *Stratford Borough v Wilkinson* [1951] NZLR 814, 822–3.

¹⁴² *Willan* (1874) LR 5 PC 417, 442–5. See also *R v Cope, Ex parte the Mayor of Essendon and Flemington* (1881) 7 VLR (L) 337, 346 (Stawell CJ), 347 (Higginbotham J); *Re Howell and Ross* (1899) 17 NZLR 458, 461; *R v Nat Bell Liquors* [1922] 2 AC 128, 153–4, 156–9; *R v Magistrates Court; Ex parte Beazley* [1928] QSR 349; *Ex parte Mullen; Re Hood* (1935) 35 SR(NSW) 289, 298–300 (Jordan CJ); *Cornford v Greenwood* [1938] NZLR 291, 303; *Courtney v Simpson* (1940) 57 WN (NSW) 5, 7–8; *R v Foster; Ex parte Isaacs* [1941] VLR 77, 82–4; *Ex parte Hulin; Re Gillespie* [1965] NSW 313, 316 (Sugerman J); *Manfal Pty Ltd v Burton* (1988) ASC ¶55-694; *Re Ackland; Ex parte Love* (1989) 1 WAR 562, 567; *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 367 (Beaumont J). But see *Toronto Newspaper Guild v Globe Printing Co* [1951] OR 435, 463–6.

¹⁴³ (1866) 14 LT NS 598.

¹⁴⁴ *Halsbury’s Laws of England*, above n 59, vol 10, 198–9 [381]. See also *Ex parte Hopwood* (1850) 15 QB 121; 117 ER 404.

jurisdiction' was the precursor to the so called '*Hickman* principle'¹⁴⁵ which protects judicial review in the face of a strong privative clause, but does so on a narrower basis than the 'full range of jurisdictional error'¹⁴⁶ now entrenched by the holding in *Kirk*.¹⁴⁷

While identifying some of the discrepancies between the scope of judicial review asserted in *Willan* and the scope of judicial review based on the modern concept of jurisdictional error, Knackstredt has suggested that the High Court's reasoning in *Kirk* may be supported by reference to what he terms the 'trite' observation 'that the *Constitution* is a living document and is to be interpreted in the light of the development of the common law'.¹⁴⁸ To that suggestion, I make three objections.

My first is that Knackstredt's observation is hardly trite. It runs directly counter to originalist methods of constitutional interpretation, which the High Court has arguably employed for most of its existence.¹⁴⁹ If the notion that the *Australian Constitution* could entrench dynamic, judge-made common law was really uncontroversial, we might have expected the High Court to rely on that notion expressly in *Kirk*, rather than invoking originalist reasoning.

My second objection is that while the text of the *Australian Constitution* contains numerous expressions, such as 'copyrights',¹⁵⁰ or 'bills of exchange',¹⁵¹

¹⁴⁵ After *R v Hickman; Ex parte Fox* (1945) 70 CLR 598.

¹⁴⁶ Wade and Forsyth, above n 34, 726–7, cf 261, 716. See also *Coal Miners' Industrial Union of Workers v Amalgamated Collieries of Western Australia* (1960) 104 CLR 437, 454 (Menzies J); *Houssein v Under Secretary of Industrial Relations and Technology (NSW)* (1982) 148 CLR 88, 94–5; *Darling Casino Ltd v New South Wales Casino Control Authority* (1997) 191 CLR 602, 633–4 (Gaudron and Gummow JJ); *NAAV v Minister for Immigration and Multicultural and Indigenous Affairs* (2002) 123 FCR 298, 335–40 (Beaumont J); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 485–8 (Gleeson CJ), 530–2 (Callinan J); *Mitchforce v Industrial Relations Commission* (2003) 57 NSWLR 212; *Lobo v Minister for Immigration, Multicultural and Indigenous Affairs* [2003] FCA 144 (6 March 2003) [14]; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707, 722–4 (Spigelman CJ); *Minister for Immigration and Multicultural and Indigenous Affairs v SGLB* (2004) 207 ALR 12, 25–6 (Gummow and Hayne JJ); *Maitland City Council v Anambah Homes Pty Ltd* (2005) 64 NSWLR 695, 704 (Ipp JA); *Director General, New South Wales Department of Health v Industrial Relations Commission of New South Wales* (2010) 77 NSWLR 159, 163 (Spigelman CJ); Gouliaditis, above n 3, 877–8; Spigelman, above n 3, 82; Finn, above n 2, 102–3; Knackstredt, above n 140, 207–10; Young and Murray, above n 8, 120, 128–9, 137–8; Ratnapala and Crowe, above n 3, 204; Groves, above n 3, 408 n 57. Cf Aronson, Dwyer and Groves, above n 3, 961–2, 968–70.

¹⁴⁷ The proposition that *Kirk* entrenches judicial review in relation to *all* jurisdictional errors, and not just certain categories or types of jurisdictional error has been confirmed by the High Court's subsequent 2012 judgment in *Public Service Association of South Australia Incorporated v Industrial Relations Commission of South Australia* (2012) 289 ALR 1. See also Bill Lane, 'Judicial Review and the Shrinking World of Privative Clauses — The High Court Decision in *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* [2012] HCA 25' (2012) 32 *Queensland Lawyer* 181, 183. But see Vial, above n 2, 154, 160–3.

¹⁴⁸ Knackstredt, above n 140, 210.

¹⁴⁹ See generally Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Jeffrey Goldsworthy, 'Interpreting the *Constitution* in its Second Century' (2000) 24 *Melbourne University Law Review* 677; cf Helen Irving, 'Constitutional Interpretation, the High Court and the Discipline of History' (2013) 41 *Federal Law Review* 95, 108–15.

¹⁵⁰ See *Australian Constitution* s 51(xviii).

¹⁵¹ *Ibid* s 51(xvi).

which can only be understood by reference to judge-made law,¹⁵² the so-called ‘constitutional expression’¹⁵³ of the ‘Supreme Courts of the States’ cannot convincingly be placed in the same category. State Supreme Courts are institutions that, as detailed in Part III, were established, either directly or indirectly, by legislative fiat in the 19th century. It is one thing to refer to evolving common law principles to interpret a specific term in the text of the *Australian Constitution*, such as ‘a writ ... of prohibition’ in s 75(v), which ‘has no meaning other than as a technical legal expression’¹⁵⁴ and which has clearly been shaped over the centuries, both pre- and post-Federation, by judge-made law.¹⁵⁵ It is another altogether to pluck a term from the text of the *Australian Constitution* which contains a ‘cryptic reference’¹⁵⁶ to an institution created by legislation, and invest it, by the ‘draw[ing] [of] sweeping inferences’,¹⁵⁷ with a meaning that entrenches an evolving corpus of judge-made law.

My third objection relates to the fluidity and breadth of the concept of jurisdictional error. My objection, of course, is not to the work of judges in developing and expanding the concept of jurisdictional error in the 20th and 21st centuries, but to the linking of that common law concept to accepted doctrine at the time of Federation and an originalist interpretation of the term ‘Supreme Court of any State’ in s 73 of the *Australian Constitution*. Jurisdictional error, as an ‘ever expanding concept’¹⁵⁸ ‘almost entirely unbound by principle’,¹⁵⁹ is significantly different from other, more historically determined common law concepts that inform the interpretation of the text of the *Australian Constitution*, such as, for example, the common law concept of property, which informs the interpretation of the reference to property in the text of s 51(xxxi),¹⁶⁰ or indeed the concept of ‘trial by jury’ analysed in *Cheatle*.¹⁶¹ Ironically, the High Court’s decision in *Kirk* adds force to my objection: in *Kirk* the Court was at pains to point out that the numerous categories of jurisdictional error it had previously identified in 1995 in *Craig v South Australia*¹⁶² are ‘not to be seen as providing a rigid taxonomy of jurisdictional error’ but are merely ‘examples’.¹⁶³

V Conclusion

There are a number of good policy reasons that can be advanced to justify the entrenchment of a minimum standard of judicial review in the state jurisdictions.

¹⁵² See W M C Gummow, ‘The *Constitution*: Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167, 172–3.

¹⁵³ *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (Gummow JJ).

¹⁵⁴ *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 93 (Gaudron and Gummow JJ).

¹⁵⁵ See, eg, *ibid* 93–101 (Gaudron and Gummow JJ). See also Goldsworthy, above n 3, 306 n 6.

¹⁵⁶ Sackville, ‘The Constitutionalisation of State Administrative Law’, above n 3, 131.

¹⁵⁷ *Ibid*.

¹⁵⁸ Gouliaditis, above n 3, 883.

¹⁵⁹ Knackstedt, above n 140, 211. See also Finn, above n 2, 103–4. But see Basten, above n 2, 287.

¹⁶⁰ See Gummow, above n 152, 173. See also Basten, above n 2, 280.

¹⁶¹ (1993) 177 CLR 541.

¹⁶² (1995) 184 CLR 163.

¹⁶³ *Kirk* (2010) 239 CLR 531, 574 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Finn, above n 2, 94–6, 103; Young and Murray, above n 8, 131; Groves, above n 3, 414–15; Lacey, above n 2, 649, 658–60; Vial, above n 2, 153–4. But see Basten, above n 2, 291.

There are also a number of good policy reasons for the entrenchment of a minimum standard of review in the state jurisdictions based on jurisdictional error, given the High Court's jurisprudence on the entrenched minimum standard of judicial review in the Commonwealth jurisdiction and the existence of a unified Australian common law.¹⁶⁴ However, it is not legitimate for judges to propound a novel interpretation of the *Australian Constitution* based on policy reasons alone.

In *Kirk*, the High Court purported to provide a legal justification for the entrenchment in the state jurisdictions of a minimum standard of judicial review based on jurisdictional error using originalist reasoning to interpret the *Australian Constitution*. In this paper I have argued that this originalist reasoning is seriously flawed. In striving to arrive at a 'happy ending',¹⁶⁵ for both the convicted defendants in *Kirk* and the rule of law under the *Australian Constitution*, the Court has engaged in some well-meaning but sloppy thinking in interpreting the *Australian Constitution* based on a half-truth. It has accurately alluded to the practice of statutory interpretation that allowed the colonial courts to preserve judicial review in the face of strong privative clauses, but has ignored the critical qualification to that practice: the supremacy of the colonial Parliaments over the colonial courts.

In particular, the entrenchment of judicial review centred on a modern concept of jurisdictional error is incompatible with any originalist conception of the essential characteristics of the state Supreme Courts. Even if one accepts, for the sake of argument, the proposition that the common law interpretative practices of the Supreme Courts in the colonial era justify the entrenchment of some form of judicial review as an essential characteristic of those courts on Federation, it stretches all credulity to accept that an essential characteristic of those courts at the time of Federation encompassed the modern concept of jurisdictional error. The fluidity and breadth of the concept of jurisdictional error enhance the power of the judiciary. They create greater uncertainty about the validity of executive action, which can only be conclusively dispelled by the judiciary 'marking the boundaries of the relevant field'.¹⁶⁶ If jurisdictional error were solely confined to the common law, this manifestation of judicial power would be of only minor constitutional significance, given the supremacy of Parliament over the common law. But the critical constitutional issue is the extent to which this perpetually evolving corpus of law regulating the activities of democratically accountable governments, which was historically formulated and developed in a common law setting, may legitimately be entrenched within the *Australian Constitution*.¹⁶⁷ The High Court's flawed originalist reasoning in *Kirk* is a fig leaf, which conceals the reality of judicial creativity and avoids engagement with this critical constitutional issue.

¹⁶⁴ See generally Finn, above n 2, 100–1, 108.

¹⁶⁵ Goldsworthy, above n 3, 307.

¹⁶⁶ *Kirk* (2010) 239 CLR 531, 574 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Knackstedt, above n 140, 211, 213; Finn, above n 2, 103–4; Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters', above n 3, 78; Groves, above n 3, 415–18; Sackville, 'The Constitutionalisation of State Administrative Law', above n 3, 130–3; Lacey, above n 2, 660; Vial, above n 2, 154, 166.

¹⁶⁷ See also Sackville, 'Bills of Rights: Chapter III of the Constitution and State Charters', above n 3, 79; Basten, above n 2, 283, 294; Sackville, 'The Constitutionalisation of State Administrative Law', above n 3, 131, 137.

Given that the Court's originalist reasoning in *Kirk* is seriously flawed, the other justifications for entrenchment of a minimum standard of judicial review in the state jurisdictions based on jurisdictional error, which were only touched upon in *Kirk*, need to be developed and articulated with a much higher degree of thoroughness and rigour.