
The entrenched minimum provision of judicial review and the rule of law

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In Plaintiff S157/2002 v Commonwealth (2003) 211 CLR 476, the High Court held that s 75(v) of the Constitution entrenches a “minimum provision of judicial review” which limits the effectiveness of statutory attempts to impair the judicial review of Commonwealth administrative action and constitutes a “textual reinforcement” of the “rule of law”. This article identifies two possible ways in which the rule of law might give content to the idea of the minimum provision of judicial review. The article proceeds primarily through an analysis of the High Court’s reasons in Commissioner of Taxation v Futuris Corp Ltd (2008) 237 CLR 146 and argues that neither of the suggested approaches to thinking about the rule of law is likely to generate a clearly demarcated minimum provision of judicial review applicable to all statutory contexts. The article analyses two distinct statutory techniques aimed at restricting judicial review – privative clauses and no-invalidity clauses – and identifies and discusses the particular challenge posed by no-invalidity clauses to the rule-of-law purpose the High Court has attributed to s 75(v).

INTRODUCTION

Section 75(v) of the Australian *Constitution* gives the High Court original jurisdiction to hear matters in which mandamus, prohibition or injunction is sought against an officer of the Commonwealth. In *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*), the High Court held that s 75(v) entrenches a “minimum provision of judicial review” which limits the effectiveness of statutory attempts to impair the judicial review of Commonwealth administrative action.¹ The joint judgment went on to claim that by providing for an entrenched measure of judicial review, s 75(v) constitutes a “textual reinforcement” of the rule of law, a concept said to be an underlying assumption of the *Constitution*. Beyond this gesture towards the rule of law, however, the court has done little to clarify how the core content of s 75(v) is to be determined.² What role might the legal and political ideal of the “rule of law” play in determining the extent to which judicial review of administrative action is entrenched by the *Constitution*? Of course, one answer is “none at all”. That answer, however, would leave unexplained the court’s claim that the resolution of the issues in *Plaintiff S157* was not based on a mere technical question of statutory interpretation, but rather reflects the place of the rule of law in Australia’s constitutional structure.³

This article distinguishes between two approaches which may be taken to thinking about the rule of law in the context of the entrenched minimum provision of judicial review derived from s 75(v). The “doctrinal approach” attempts to mine the rule-of-law ideal for particular values which may then be translated into relatively hard-edged constitutional principles used to define the boundaries of the entrenched minimum provision of judicial review. This approach can be contrasted with one in which

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¹ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 513 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (*Plaintiff S157*); Gleeson CJ and Callinan J wrote separate concurring judgments.

² Kirk J, “The Entrenched Minimum Provision of Judicial Review” (2004) 12 AJ Admin L 64.

³ *Plaintiff S157* (2003) 211 CLR 476.

s 75(v)'s role in the preservation of the rule of law is considered in the broader institutional context of legal accountability. Under this "institutional approach", the appropriate level of judicial review under s 75(v) is not determined by deriving principles from an identified conception of the rule of law; instead, it is calibrated to the existence and extent of alternative institutional arrangements for keeping Commonwealth administrative actions legally accountable. Although it will be argued that the "doctrinal" and "institutional" approaches are distinct, it is not claimed that they are mutually exclusive. Both approaches to thinking about the rule of law have limitations and both may figure in any particular judicial response to a statutory attempt to limit s 75(v) judicial review. Further, although both approaches connect with important aspects of the rule-of-law concept, it is suggested neither approach is likely to generate a clearly defined set of rules or principles that are entrenched by s 75(v) as a minimum set of administrative law norms, the breach of which will lead to reviewable errors.

The distinction between these two possible approaches to understanding the role of the rule of law in the context of s 75(v) will be illustrated by reference to the High Court's reasons for the judgments in *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 (*Futuris*). The judgments in that case cast interesting light on the possible role of "rule-of-law thinking" in understanding the content of the minimum provision of judicial review, despite the fact that the joint majority judgment does not directly grapple with this question.⁴ More particularly, it will be argued that the approach of the joint judgment in *Futuris* is consistent with an institutional approach to thinking about the rule of law and that (despite Kirby J's doubts) this approach has some potential to help explain the claim (in *Plaintiff S157*) that s 75(v) plays an important role in the protection of the rule of law in Australia.

Futuris involved the interpretation of what will be called a "no-invalidity clause". To understand the challenge posed by no-invalidity clauses to the rule-of-law purpose the High Court has ascribed to s 75(v), it is helpful to begin by distinguishing such clauses from an alternative broad statutory strategy aimed at limiting judicial review, namely, what can be thought of as traditionally-framed privative clauses.

PRIVATIVE CLAUSES AND NO-INVALIDITY CLAUSES

This article refers to "traditional privative clauses" as meaning statutory provisions which attempt to deprive the courts of their judicial review jurisdiction and/or the power to issue remedies which would otherwise be available in a judicial review application. Such clauses are directed at the powers of courts to review administrative decisions. By their terms, they purport to deny courts the power to undertake judicial review even if, but for the privative provision, a judicial review remedy would be available. Such clauses can be contrasted with a variety of other statutory attempts to exclude judicial review or to limit its efficacy.⁵ For the purposes of this article, however, it is sufficient to emphasise a general distinction between statutory attempts to diminish judicial review which are aimed at depriving the courts of their review or remedial powers, and those which change the powers of administrators by removing the substantive basis upon which a judicial review remedy may be issued.

There are a number of ways in which the substantive basis for a judicial review remedy might be removed, but the specific instance upon which this article focuses can be described as a "no-invalidity clause". Such a clause does not, by its terms, deprive the courts of their review jurisdiction. Rather, the provision indicates that an act done or decision made in breach of a particular statutory requirement or other administrative law norm does not result in the invalidity of that act or decision. The conclusion that a decision is not invalid means that the decision-maker had the power (that is, jurisdiction) to make it. To the extent that, in general, judicial review remedies are only issued on the basis of jurisdictional errors, no-invalidity clauses may be read as converting errors that would otherwise be

⁴ Gummow, Hayne, Heydon and Crennan JJ authored the joint judgment. Kirby J did not dissent from the proposed orders but his reasons were, in key respects, different to those given in the joint judgment.

⁵ For a comprehensive discussion, see Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th ed, Lawbook Co., 2009) Ch 17.

jurisdictional in nature and result in invalidity into errors which are made within the decision-maker's powers and will not justify a remedy. In this way, no-invalidity clauses expand the decision-maker's powers to make legally valid decisions.

To explain the particular problem posed by no-invalidity clauses to the rule-of-law purposes s 75(v) is claimed to serve, it is necessary to recall some of the conclusions reached, and questions raised, about the potential (in)effectiveness of statutory schemes to restrict judicial review in *Plaintiff S157*.

The evisceration of the Migration Act privative clause

The decision in *Plaintiff S157* had the effect of rendering the privative clause in the *Migration Act 1958* (Cth) inoperative in that case, despite the fact that the court refused to declare it unconstitutional. By its terms, the clause was patently inconsistent with s 75(v) of the *Constitution*: it purported to prevent any court (including the High Court) from issuing the standard catalogue of judicial review remedies (including those remedies mentioned in s 75(v)). Of course, the reason why the sponsors of the legislation containing the clause believed that it would not inevitably be invalidated due to its inconsistency with the terms of the *Constitution* was the High Court's longstanding willingness to interpret such clauses as meaning something quite different from the literal meaning of words in the statute book. The court's general approach to privative clauses, whereby their validity in Commonwealth legislation could be preserved, came to be known as the *Hickman* principle (*R v Hickman; Ex parte Fox* (1945) 70 CLR 598).

The premise of the *Hickman* principle is that a process of reconciliation is required, as a general principle of statutory construction, where a statute contains an internal conflict or contradiction. In the case of a statute containing a privative clause, the more particular premise is that the statutory limits which are inevitably placed on a decision-maker's powers are in conflict with a clause which appears to license the breach of those limits by removing the role of courts in enforcing them. Prior to *Plaintiff S157*, many administrative lawyers (including judges of the High Court) appeared to believe that the application of the reconciliation process attributed to *Hickman* had the result that decisions would be valid on the proviso that the decision must be bona fide, related to the subject matter of the legislation and reasonably capable of reference to the power conferred.⁶ In *Plaintiff S157*, the court rejected this interpretation, saying that the powers of the decision-maker were not, in effect, expanded so that the only limits were those constituted by the "*Hickman* provisos". Rather, any protection a privative clause purported to afford would "be inapplicable unless those provisos are satisfied".⁷

The key argument made in the joint judgment was not, however, based on an application of the *Hickman* principle. Rather, it was based on an interpretation of the privative clause itself to determine what protection it purported to afford. Only after this step was it thought possible to examine whether there was a conflict between the privative clause and the statutory limits on powers which might then require reconciliation. The privative clause, so reasoned the joint judgment, only purported to apply to decisions made "under" the *Migration Act*. It followed from this premise that if a migration decision was infected by jurisdictional error it was not, in truth, a decision made under the *Migration Act*. Such a decision was to be "regarded, in law, as no decision at all".⁸ On this interpretation, the privative clause did not purport to protect the sort of errors (namely, jurisdictional errors) for which the constitutional writs of mandamus and prohibition may be issued, and therefore it was not inconsistent with the constitutional entrenchment by s 75(v) of the availability of those writs against officers of the

⁶ The decision in *Hickman* also made it clear that the privative clause could not prevent review for breach of fundamental jurisdictional requirements – described as "inviolable", "essential" or "indispensable" in later cases. See, eg *R v Murray; Ex parte Proctor* (1949) 77 CLR 387.

⁷ *Plaintiff S157* (2003) 211 CLR 476 at 502.

⁸ *Plaintiff S157* (2003) 211 CLR 476 at 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597 at 614-615 (Gaudron and Gummow JJ).

Commonwealth.⁹ As the alleged error in *Plaintiff S157* was a denial of procedural fairness, an accepted instance of a jurisdictional error, the privative clause was left with no role to play in protecting the decision from review.

Although the joint judgment's analysis saved the privative clause in the *Migration Act* from constitutional invalidity, it also created a problem: courts normally try to avoid reading a statutory provision in ways which would give it no work to do (but it appears from the above analysis that the joint judgment deprives the privative clause of any meaningful role). It is for this reason that David Dyzenhaus characterised the joint judgment in *Plaintiff S157* as adopting an "evisceration approach" to privative clauses insofar as he concludes that its reading of the *Migration Act* privative clause emptied it of all meaning.¹⁰ The High Court's attempt to answer this objection can be found in the suggestion, "it may be that, by reference to the words of [the privative clause], some procedural or other requirements laid down by the Act are to be construed as not essential to the validity of the decision".¹¹ The suggestion is that what may at first appear to be a "mandatory" statutory requirement (that is, a requirement which if breached would result in invalidity) might be converted, by reference to the privative clause, into a "directory" requirement (such that any breach does not lead to invalidity).¹² Two brief comments can be made about this suggestion. First, the terms of the privative clause do not provide any guidance whatsoever in the interpretive task of determining which statutory limits on decision-making powers are mandatory and which are merely directory.¹³ Thus, if the privative clause is to be given a central role in characterising particular statutory requirements as mandatory or directory, much will necessarily be left to the judge's sense of whether review is appropriate in the circumstances. Secondly, despite the theoretical possibility that a privative clause may play a role in changing the jurisdictional boundaries of a decision-maker's powers (that is, by converting mandatory requirements into directory ones) the post-*Plaintiff S157* litigation history in the Federal Court has demonstrated that the *Migration Act* privative clause has, in practical effect, been read out of the legislation,¹⁴ supporting Dyzenhaus' interpretation. One lesson, then, of this history is that generally worded federal privative clauses, even if held to be constitutionally valid, leave judges with considerable scope to avoid any serious encroachment of the constitutional review regime entrenched by s 75(v).

Jurisdictional error, the minimum provision of judicial review and the problem of no-invalidity clauses

In the introduction above, it was noted that the joint judgment in *Plaintiff S157* emphasised that the minimum provision of judicial review entrenched by s 75(v) is a textual reinforcement of the constitutional importance of the rule of law. However, rather than fleshing out what is meant by the contested notion of the rule of law in this context, the court was content to state that the protective purpose of s 75(v) is achieved by "assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them".¹⁵ This

⁹ The court accepted that the privative clause could prevent the issue of certiorari, which is not a writ named in s 75(v), for non-jurisdictional errors: *Plaintiff S157* (2003) 211 CLR 476 at 507.

¹⁰ Dyzenhaus D, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) pp 106, 113.

¹¹ *Plaintiff S157* (2003) 211 CLR 476 at 504 (Gummow, Hayne, Heydon and Crennan JJ).

¹² The High Court has said that the directory/mandatory distinction does not assist in determining whether breach of a statutory provision has the remedial consequence of invalidity: *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 389-390 (*Project Blue Sky*). Nevertheless, the terms can (usefully) be used to record the outcome of the process of statutory construction directed to that question: cf Gleeson CJ in *Plaintiff S157* (2003) 211 CLR 476 at 489.

¹³ Kirk, n 2 at 71. As noted above, privative clauses are, by their terms, directed to the review powers of the court, not to the powers of the administrative decision-maker.

¹⁴ Beaton-Wells C, "Judicial Review of Migration Decisions: Life After S157" (2005) 33 Fed LR 141; see also Aronson et al, n 5, p 974. In *Minister for Immigration and Citizenship v SZIZO* (2009) 238 CLR 627, where it was held that failure to strictly comply with an aspect of s 441G of the *Migration Act* did not, in the circumstances, affect the validity of the tribunal's decision, no emphasis was placed upon the Act's privative clause.

¹⁵ *Plaintiff S157* (2003) 211 CLR 476 at 514.

comment suggests that the protection given by s 75(v) to the rule of law is that the review jurisdiction thereby entrenched can be used to invalidate decisions based upon jurisdictional errors. There are, however, at least two difficulties with conceptualising the minimum entrenched content of judicial review in terms of jurisdictional error.

First, the concept of jurisdictional error is notoriously slippery. For administrative decision-makers, the category of errors that qualify as jurisdictional has clearly expanded well beyond the traditional theory of jurisdiction so as to cover most of the standard grounds of judicial review, grounds including procedural errors and errors concerning the decision-maker's reasoning processes (for example, the considerations, grounds and improper application of policy).¹⁶ Which, then, of the accepted species of the genus "jurisdictional error" are constitutionally entrenched? Which (if any) types of jurisdictional errors can Parliament exclude as a basis for s 75(v) review? The conclusion that none of the standard grounds (including breach of statutory requirements) are entrenched would enable Parliament to evade the court's constitutional review jurisdiction. But the conclusion that all the grounds of review are entrenched is equally implausible: not only are there many instances where the court has accepted that even core elements of the rules of procedural fairness (for example) may be excluded by statute,¹⁷ it may also be objected that entrenching judicial interpretations of the grounds of review, in the context of a complete absence of textual guidance from the *Constitution*, leaves too much discretion to judges.¹⁸ The grounds of review may be less abstract than the values that ultimately justify judicial review, but they are nonetheless best thought of as principles rather than clear-cut rules capable of straightforward application.¹⁹

The second problem with the court's conclusion that the minimum provision of judicial review is to be understood in terms of the concept of jurisdictional error, is that the characterisation of an error as one going to jurisdiction²⁰ ultimately depends upon questions of statutory interpretation (at least for statutory powers). If the categorisation of an error as one which goes to jurisdiction is ultimately a matter of statutory interpretation, then Parliament might attempt to evade any meaningful review by simply expanding the powers (that is, widening the jurisdiction) given to administrators such that there are no meaningful statutory limits on power. Indeed, this problem was acknowledged in *Plaintiff S157*, in response to the suggestion (put in argument by the Commonwealth) that Parliament may drastically diminish s 75(v)'s role in preserving the rule of law by conferring something like "totally open-ended" discretionary powers on administrators. One of the suggested ways in which this result might be achieved, so it was said, would be for the Parliament to indicate that its detailed provisions amounted to no more than "non-binding guidelines".²¹ Put another way, it was suggested that Parliament could specify that some or all of an Act's requirements are directory, not mandatory, so that a breach would not amount to a jurisdictional error.

On one level, such drafting techniques appear to be consistent with well-accepted administrative law doctrine. In *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 (*Project Blue Sky*), the High Court held that whether or not a breach of statute amounts to a jurisdictional error, and therefore results in retrospective invalidity (that is, a "mandatory" provision), is to be determined by ordinary methods of statutory interpretation: was it "a purpose of the legislation

¹⁶ See Cane P and McDonald L, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2008) pp 164-168.

¹⁷ It has been assumed in many cases that the rules of procedural fairness can be excluded by a sufficiently clear expression of intent by the legislature. However, in argument in *Minister for Immigration and Citizenship v SZIZO* [2009] HCATrans 71 at [495]-[505], Gummow J suggested that there may be a "cloud" for the Commonwealth over the extent to which the exclusion of procedural fairness is "constitutionally permissible".

¹⁸ Kirk J, "Administrative Justice and the Australian Constitution" in Creyke R and McMillan J (eds), *Administrative Justice – The Core and the Fringe* (Australian Institute of Administrative Law, 2000).

¹⁹ See Cane and McDonald, n 16, pp 122-124.

²⁰ The remedial consequence of a jurisdictional error in a decision already made is invalidity: see *Project Blue Sky* (1998) 194 CLR 355.

²¹ *Plaintiff S157* (2003) 211 CLR 476 at 512.

that an act done in breach of the provision should be invalid”²² Thus, in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212 (*Palme*), the High Court gave effect to a “no-invalidity clause” which expressly stated that non-compliance with a particular statutory requirement did not invalidate the decision.²³ Although the outcome in *Palme* is defensible, the problem posed to conceptualising the minimum entrenched provision of judicial review by reference to “jurisdictional error” can now be framed with more precision: what is to stop Parliament expressly indicating that breaches of a particular provision (or, indeed, of all provisions) are not to have the remedial result of invalidity (that is, that statutory requirements are not mandatory requirements on which jurisdiction depends)? In the case of a “narrow” no-invalidity clause (relating to a particular or a restricted number of statutory provisions), *Palme* and the logic of *Project Blue Sky* indicate that the breach of such provisions would not amount to jurisdictional error, and therefore that there would be no inconsistency between such a clause and the continuing availability of the writs named in s 75(v) (which are only available where jurisdictional error can be demonstrated).²⁴ However, the application of this logic to an “all-encompassing” no-invalidity clause – that is, a clause which stated something like the “breach of any statutory provision in this Act or any administrative law requirement does not result in the invalidity of a decision” – would have the practical effect of evading the High Court’s s 75(v) jurisdiction. Why? Because breaches of the statute or of administrative law norms (that is, norms accepted by the common law or as routinely implied statutory requirements) would not amount to jurisdictional errors. Could the protective purpose emphasised in *Plaintiff S157* be so easily outflanked by the Parliament?²⁵

In its brief consideration of the possibility that the conferral of “open-ended discretions” on Commonwealth administrators may in practice insulate their decisions from meaningful review under s 75(v), the joint judgment in *Plaintiff S157* raised serious doubts as to the constitutional validity of any such efforts, including “all-encompassing” no-invalidity clauses. One basis for doubting Parliament’s authority to delegate open-ended discretions to administrative officials is that a statute which confers an extremely broad discretion may not really be a “law” because it would not exemplify the concept of a law “as a rule of conduct or a declaration as to power, right or duty”.²⁶ This is a difficult thought and raises contestable conclusions about the nature of “law”.²⁷ Whether advisable or not, it may suggest that the court would be willing to enter such treacherous jurisprudential waters should the Parliament adopt drastic measures to disable the High Court from performing its constitutional function. Another, less controversial, constitutional principle emphasised in the *Plaintiff S157* joint judgment is that a Commonwealth law could not operate so as to allow a non-judicial decision-maker to determine conclusively the limits of its own jurisdiction, as this is said to be an exercise of the judicial power of the Commonwealth.²⁸ Given that the court’s reference to the concept of an entrenched minimum provision of judicial review, and its underlying rule of law justification, immediately follows its discussion of constitutional objections to open-ended discretions (such as would be created by an all-encompassing no-invalidity clause), the clear message is that attempts to

²² *Project Blue Sky* (1998) 194 CLR 355 at 392-393. For analysis, see Cane and McDonald, n 16, pp 96-99.

²³ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 216 CLR 212. The statutory requirement in question imposed an obligation to give reasons. The court also emphasised the idea that the breach of a requirement to do something after a decision had been made could invalidate the decision was counter-intuitive (though possible in theory).

²⁴ On the constitutional injunction, see n 33.

²⁵ Cf *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1 at 367.

²⁶ *Plaintiff S157* (2003) 211 CLR 476 at 513. The court also stated that such a law may not, as it must, identify a factual connection between a given state of affairs and a constitutional head of power.

²⁷ For two different jurisprudential approaches to the identification of valid legal norms, see Hart HLA, *The Concept of Law* (rev ed, Clarendon Press, 1992); Dworkin R, *Law’s Empire* (Harvard University Press, 1986). There are, of course, many other theories.

²⁸ *Plaintiff S157* (2003) 211 CLR 476 at 505; see also at 484 (Gleeson CJ).

completely evade the operation of s 75(v) will likely be resisted. Indeed, if such resistance were not forthcoming, then the claimed rule-of-law significance of s 75(v) would be nothing more than empty rhetoric.²⁹

The above discussion leads to the conclusion that although some “no-invalidity clauses” are likely to be given effect,³⁰ there are serious doubts about the constitutionality of no-invalidity clauses purporting to have a general application. If the minimum provision of judicial review is to mean anything, there must, it seems, be limits to the extent to which such no-invalidity clauses can be given effect. The difficulty, however, is that the criteria for determining when a no-invalidity clause goes too far have not been articulated and no clues are to be found in the constitutional text.³¹

Unlike privative clauses, which attempt to directly remove the judicial review jurisdiction of courts (by prohibiting the review completely or in certain circumstances, or by limiting in part or whole the availability of particular remedies), no-invalidity clauses are not specifically directed to the review powers of the courts. Nevertheless, no-invalidity clauses clearly have the capacity to limit the effective exercise of the High Court’s s 75(v) jurisdiction insofar as they remove, to a significant extent, the substantive basis on which that review jurisdiction might be exercised. To the extent that the rule of law is relevant and important to the judicial response to direct attempts to prevent judicial review, one might therefore also expect that it should be of relevance to the response to no-invalidity clauses.

FUTURIS: GIVING EFFECT TO A “BROAD” NO-INVALIDITY CLAUSE

The question of how a broadly framed federal no-invalidity clause should be interpreted arose in the *Futuris* case. *Futuris* objected to a tax assessment which purported to apply difficult anti-avoidance provisions concerning capital gains tax. Although it originally sought to appeal the assessment to the Federal Court through the process provided for under Pt IVC of the *Taxation Administration Act 1953* (Cth), that appeal was left in abeyance while *Futuris*’ later application for judicial review under s 39B(1) of the *Judiciary Act 1903* (Cth) was determined. The matter thus came to the High Court as a s 39B(1) judicial review case, on appeal from a Full Court of the Federal Court.

Section 39B(1) of the *Judiciary Act* gives the Federal Court judicial review jurisdiction which is, in relevant respects, the same as the original jurisdiction conferred on the High Court by s 75(v) of the *Constitution*. Section 39B(1) has thus been interpreted in line with the constitutional regime of judicial review established by s 75(v).³² This jurisdiction is conferred in terms of the availability of the named remedies – mandamus, prohibition and injunction – against an “officer of the Commonwealth”. Although there are questions about the basis on which constitutional injunctions may be available (in particular, whether some errors not amounting to jurisdictional errors may justify their award),³³ the basis on which the constitutional writs may issue is the existence of a jurisdictional error.³⁴

²⁹ James Stellios has identified three distinct justifications which appear in the debates that led to the inclusion of s 75(v) in the *Constitution*: see Stellios J, *The Federal Judicature: Chapter III of the Constitution – Commentary and Cases* (LexisNexis, 2010) pp 323-328.

³⁰ In a context where judicial review is limited to jurisdictional errors, a no-invalidity clause directed at a particular statutory requirement has the same effect as a provision excluding a particular ground of review (such as the duty to observe procedural fairness).

³¹ Aronson et al, n 5, p 7.

³² See *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168.

³³ In *Plaintiff S157* (2003) 211 CLR 476 at 508, Gummow, Hayne, Heydon and Crennan JJ stated, without elaborating, that: “it may be that injunctive relief is available on grounds that are wider than [jurisdictional error]. In any event, injunctive relief would clearly be available for fraud, bribery, dishonesty or other improper purpose.” The listed examples of “improper purposes” grounding injunctive relief also, presumably, constitute implied restrictions on the *jurisdiction* of a decision-maker’s exercise of statutory powers: see, eg *SZFDE v Minister for Immigration and Citizenship* (2007) 232 CLR 189. In *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 162 (*Futuris*), the court again suggested that the principles of jurisdictional error which “control the constitutional writs ... do not attend the remedy of injunction including that provided in s 75(v) and thus in s 39B of the *Judiciary Act*”. However, it was added that “the equitable remedies ... operate to declare invalidity and to restrain the implementation of invalid exercises of power”. Perhaps these comments imply that, where a clause which states that the breach of any of the provisions of the legislation do not affect a decision’s validity applies, an

To succeed in its judicial review claim, *Futuris* thus needed to show that the errors it alleged occurred were jurisdictional errors. Here, however, the legislation presented it with a serious problem. Section 175 of the *Income Tax Assessment Act 1936* (Cth) (the Tax Act) provides that: “The validity of any assessment shall not be affected by reason that any of the provisions of this Act have not been complied with.” Perhaps this is not an *all-encompassing* no-invalidity clause (insofar as it makes no mention of “common law” administrative law principles or requirements which are readily implied from the statute), but its terms are nonetheless very broad. Taken literally, it indicates that any statutory provision which may (in its absence) be thought to be a mandatory requirement is to be treated as directory; put differently, non-compliance with such provisions would not affect the decision-maker’s jurisdiction to make a legally valid decision. As the constitutional writs are available only for jurisdictional error, the clause appears to render review on the basis of an error in applying the provisions of the Tax Act a theoretical possibility with little practical bite.

The unavailability of judicial review of taxation assessments on the basis of a failure to correctly apply the legislation may appear to be an alarming result. This result is, however, ameliorated by the fact the tax legislation provides for merits review by the Administrative Appeals Tribunal, and also for appeals to the Federal Court. The Tax Act states (in s 175A) that: “a taxpayer who is dissatisfied with an assessment made in relation to the taxpayer may object against it in the manner set out in Part IVC of the *Taxation Administration Act*.”³⁵ And s 177(1) makes it clear that although a notice of assessment is in general to be taken as “conclusive evidence of the due making of the assessment”, such assessments can be challenged in Pt IVC proceedings.

How, then, did the court interpret the s 175 no-invalidity clause in the Tax Act? The joint judgment stated that:

The significance of s 175 for the operation of the Act and for the scope of judicial review outside Pt IVC is to be assessed in the manner indicated in *Project Blue Sky* ... Section 175 must be read with ss 175A and 177(1). If that be done, the result is that the validity of an assessment is not affected by failure to comply with any provision of the Act, but a dissatisfied taxpayer may object to the assessment in the manner set out in Pt IVC of the *Administration Act* ... Where s 175 applies, errors in the process of assessment do not go to jurisdiction and so do not attract the remedy of a constitutional writ under s 75(v) of the *Constitution* or under s 39B of the *Judiciary Act*.³⁶

A number of preliminary comments can be made about this passage. First, it is clear that the court was prepared to give effect to s 175 according to its terms – despite the potential for broadly-worded no-invalidity clauses to significantly limit the extent of review under the constitutional scheme of judicial review and the High Court’s clear doubts in *Plaintiff S157* about any such legislative attempts at evasion. Due to the s 175 no-invalidity clause, errors made in applying the terms of the Tax Act occur “within, not beyond, the exercise of the powers of assessment given by the Act to the Commissioner”; such errors can thus only be challenged in Pt IVC proceedings.³⁷ Secondly, the court states that this conclusion is the result of applying the *Project Blue Sky* method of considering the

injunction may not be available to correct a breach of the statute because this does not result in invalidity. On the other hand, the comments are difficult to reconcile with *Project Blue Sky* (1998) 194 CLR 355 where it was suggested (in the context of a case originally commenced in the High Court’s s 75(iii) jurisdiction) that an injunction might be awarded to prevent a decision-maker relying on an unlawful, though not invalid, decision. For further discussion of *Project Blue Sky*, see Cane and McDonald, n 16, pp 96-98. Suffice it to say that the operation of the constitutional injunction remains to be clarified by the High Court and it is not proposed to speculate further on the question here. For one possible approach, see Cane and McDonald, n 16, p 114; cf O’Donnell B, “Jurisdictional Error, Invalidity and the Role of Injunction in s 75(v) of the Australian Constitution” (2007) 28 Aust Bar Rev 291 at 328-329.

³⁴ As explained above, it was only because the privative clause in the *Migration Act 1958* (Cth) was read so as not to apply to jurisdictionally-flawed decisions that it could be concluded in *Plaintiff S157* (2003) 211 CLR 476 that it did not conflict with the terms of s 75(v).

³⁵ As the joint judgment (*Futuris* (2008) 237 CLR 146 at 153) points out, Pt IVC “meets the requirement of the *Constitution* that a tax may not be made incontestable because to do so would place beyond examination the limits upon legislative power”, citing *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622 at 639-640.

³⁶ *Futuris* (2008) 237 CLR 146 at 156-157.

³⁷ *Futuris* (2008) 237 CLR 146 at 161-162.

“purposes of the legislation” when determining whether the consequence of a particular error is the invalidity of the decision made.³⁸ Clearly, importance is placed on s 175A and the statutory appeal process, but the import of these provisions is not fully explained.³⁹ Lastly, neither s 175 nor s 177(1) of the Tax Act is characterised as a privative clause, nor is mention made of the role of s 75(v) of the *Constitution* in preserving the much vaunted ideal of the rule of law, despite the reality that s 175 drastically limits the capacity for meaningful judicial review of taxation assessments under s 75(v).

Futuris’ judicial review application could not, however, be dismissed merely on the basis of this generous reading of the Act’s no-invalidity clause. Although Futuris had argued that the Commissioner had misapplied the provisions of the legislation in coming to his assessment, its argument that this amounted to a jurisdictional error went further than this: it included the claim that the Commissioner had *knowingly* misapplied the legislation and thereby had engaged in “double counting” amounting to “conscious maladministration of the assessment process”.⁴⁰ This argument raised the question of whether there might be some errors which the s 175 no-invalidity clause would not “reach” because the error meant that there was no “assessment” whose validity could be questioned in the first place. Indeed, Futuris also argued that s 175 did not “reach” the impugned assessment on the basis that it was “provisional or tentative” and thus not an “assessment” whose validity could not be questioned. The High Court concluded that the Full Court of the Federal Court’s rejection of this argument was plainly correct – there was nothing indicating that the assessment was not “definitive of liability”.⁴¹

There is no doubt that exercising statutory powers for ulterior or improper purposes (whether bona fide or not) will give rise to jurisdictional error.⁴² Should, however, s 175 be interpreted to mean that such an error is within the Commissioner’s jurisdiction because breach of the Tax Act does not affect validity? Or is an assessment based on a deliberate failure to comply with the Act not an “assessment” for the purposes of s 175? The joint judgment concluded that the fact that a public officer who knowingly acts in excess of his or her powers may face tortious liability (misfeasance in public office) and the background assumption of an “ethos of an apolitical public service” both “point decisively against a construction of s 175 which would encompass deliberate failures to administer the law according to its terms”.⁴³ However, although the no-invalidity clause did not, therefore, prevent all potential bases on which jurisdictional errors may arise for breach of a statutory requirement,⁴⁴ the joint judgment concluded that the case should be dismissed on the basis that the Commissioner’s assessment was premised on a construction of the relevant law that was open to him and that the evidence did not support the conclusion that he had knowingly “engaged in ‘double counting’”.⁴⁵

THE RELEVANCE OF THE RULE OF LAW TO THE INTERPRETATION OF NO-INVALIDITY CLAUSES?

It is true that the court’s reading of the s 175 no-invalidity clause did not completely preclude judicial review. As explained above, the court accepted that s 175 would not reach a decision which *knowingly* breached the Tax Act. It may also be thought that s 175 would not, for similar reasons, “reach” decisions in breach of administrative law norms which are jealously guarded by the common law tradition, such as procedural fairness obligations, unless they were explicitly excluded by the statute.

³⁸ See text at n 22.

³⁹ Cf *Project Blue Sky* (1998) 194 CLR 355 where the court referred, among other things, to questions of inconvenience to the public in reaching the conclusion that compliance with the statutory requirement under consideration should not be thought of as affecting the validity of the decision.

⁴⁰ *Futuris* (2008) 237 CLR 146 at 157.

⁴¹ This argument will not be discussed further.

⁴² See, Aronson et al, n 5, pp 322-331; Cane and McDonald, n 16, p 154.

⁴³ *Futuris* (2008) 237 CLR 146 at 164-165.

⁴⁴ That is, it was accepted that the no-invalidity clause did not preclude a *knowing* breach of the Act from giving rise to a jurisdictional error.

⁴⁵ *Futuris* (2008) 237 CLR 146 at 165.

The question in each instance is how to interpret s 175. Yet, to the extent that the court accepted that it was the intention of the Parliament that breaches of *any* of the Act's express provisions in making an assessment be errors "within, not beyond", the exercise of the Commissioner's powers,⁴⁶ the application of s 175 inevitably did work to significantly restrict the extent of review which would otherwise have been available under the scheme of review established by s 75(v) of the *Constitution* (and replicated by s 39B(1) of the *Judiciary Act*). In practical terms, judicial review was restricted to a much greater degree than had been effected by the comprehensive privative clause in the *Migration Act*. Recall, also, that in *Plaintiff S157* the High Court doubted the constitutionality of attempts to evade s 75(v) by legislative attempts to convert all the detailed provisions of the *Migration Act* into non-binding guidelines, due in part to the importance attributed to the rule-of-law purpose served by s 75(v) in ensuring official compliance with the law. Giving emphasis to these points raises a puzzle: how to explain the fact that in the *Futuris* joint judgment neither the concept of the minimum provision of judicial review nor the ideal of the rule of law rate a mention?

Although it will be argued that Kirby J in *Futuris* appeared to misunderstand the argument made in the joint judgment, his reasons can be read as an attempt to highlight this puzzle. Kirby J agreed with the orders proposed in the joint judgment, though he disagreed, in part, with the reasons given. His Honour's reasons are lengthy and broad ranging, but the focus below will be upon what they reveal about his approach to the definition of the minimum content of judicial review and the relevance of the rule of law to that inquiry.

The main point of disagreement with the joint judgment concerns the question of whether there may be grounds of jurisdictional error, in addition to that caused by a deliberate failure to comply with the Tax Act, which would not be protected by the language of s 175 (because a jurisdictionally flawed assessment would not, in truth, be an "assessment" to which s 175 applies). Kirby J began with the claim that his approach to the interpretation of the relevant legislation and the resolution of the appeal is animated by the constitutional significance of the rule of law.⁴⁷ Like the joint judgment, Kirby J accepted that success in judicial review under s 39B(1) of the *Judiciary Act* (and s 75(v) of the *Constitution*) requires applicants to show jurisdictional error. However, the question of whether there was a jurisdictional error is approached quite differently. As explained above, in considering whether there was a reviewable jurisdictional error, the joint judgment applied the methodology set out in *Project Blue Sky* to determine whether or not s 175, when read in the context of the legislation, demonstrated that it was a purpose of the legislation that the breach of statutory requirements should result in invalidity (that is, should be treated as an error going to the decision-maker's jurisdiction). Although it was concluded that the legislation evinced an intention that the validity of assessments was not affected by the failure to comply with any provision of the Tax Act, s 175 was read so as not to cover errors consisting of a deliberate failure to comply with the Act. Such a purported assessment would be beyond jurisdiction and therefore not an "assessment" to which the no-invalidity clause could apply.

According to Kirby J, the approach taken in the joint judgment fell into a trap set by the litigation history of taxation cases, where successful judicial review applications have typically been confined to whether the assessment was made in the absence of good faith (or whether it was reviewable on account of its provisional character). To avoid this trap, Kirby J listed "categories" of jurisdictional errors recognised by contemporary administrative law doctrine.⁴⁸ These categories illustrate how broad jurisdictional review under the constitutional regime for judicial review has become. Given the constitutional purpose of s 75(v) of the *Constitution*, Kirby J argues against confining or narrowing the

⁴⁶ *Futuris* (2008) 237 CLR 146 at 161-162.

⁴⁷ *Futuris* (2008) 237 CLR 146 at 174-175, 171-172.

⁴⁸ The categories, taken from Aronson M, "Jurisdictional Error without the Tears" in Groves M and Lee HP (eds), *Australian Administrative Law: Fundamentals, Principles and Doctrines* (Cambridge University Press, 2007) pp 335-336, cited in *Futuris* (2008) 237 CLR 146 at 185-186, are as follows:

1. A mistaken assertion or denial of the very existence of jurisdiction.
2. A misapprehension or disregard of the nature or limits of the decision maker's functions or powers.
3. Acting wholly or partly outside the general area of the decision maker's jurisdiction, by entertaining issues or making the types of decisions or orders which are forbidden under any circumstances ...

categories of invalidity in this context.⁴⁹ Although the exposition of the categories of jurisdictional error does not lead to the identification of a particular jurisdictional error which, on the facts in *Futuris*, did impugn the assessment, Kirby J concluded that it is only once these further arguments about jurisdictional error have been explored that decisions can be made “about the possible engagement of ss 175 and 177(1) of the Act”.⁵⁰ That is, if a category of jurisdictional error is made out, one then asks whether the s 175 no-invalidity clause prevents review on the basis of that error. In contrast, the approach in the joint judgment read s 175 not as an attempt to prevent judicial review in relation to either jurisdictional or non-jurisdictional errors, but rather as a key provision in determining which errors are non-jurisdictional (and do not result in invalidity) and which are jurisdictional (and do result in invalidity). On the majority’s “*Project Blue Sky* analysis” then, s 175 is part of determining whether any error is jurisdictional in the first place.

It, therefore, appears that Kirby J’s analysis assumes (incorrectly according to the *Project Blue Sky* orthodoxy) that the question of whether there is a jurisdictional error is to be determined prior to any consideration of the no-invalidity clause. Nevertheless, his Honour was right to insist that no-invalidity clauses can be at least as threatening to the entrenched minimum provision of judicial review and the rule of law as traditional privative clauses.⁵¹ However, Kirby J does nothing to explain how one is to determine which categories of jurisdictional error might be invoked to afford protection against no-invalidity clauses. In *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 (*Fish*) his Honour suggested that even privative clauses enacted by State Parliaments (which are neither directly, nor by any obvious indirect route, covered by the terms of s 75(v)) could not completely oust judicial review.⁵² Courts, it was asserted, must always be able to review for the breach of “fundamental requirements” as the rule of law “imposes ultimate limits on the power of any legislature to render governmental action, federal, State or Territory, immune from conformity to the law and scrutiny by the courts against that basal standard”.⁵³ Unfortunately, the introduction of the notion of “fundamental requirements” does nothing to clarify which grounds of review – or categories of jurisdictional error – might constitute a minimum entrenched provision of judicial review whose justification lies in the concept of the rule of law.

Fish was part of a trilogy of cases that considered a State privative clause which stated that judicial review (and its remedies) were unavailable in relation to both decisions and *purported* decisions. In *Batterham v QSR Ltd* (2006) 225 CLR 237, a five-member majority of the court concluded (not very convincingly) that this particular clause should not be interpreted any differently to a clause which protected only “decisions”.⁵⁴ This conclusion was reached as a matter of statutory

4. ... Acting on the mistaken assumption or opinion as to the existence of a certain event, occurrence or fact ... or other requirement, when the Act makes the validity of the decision maker’s acts contingent on the actual or objective existence of those things, rather than on the decision maker’s subjective opinion.
5. Disregarding a relevant consideration which the Act required to be considered or paying regard to an irrelevant consideration which the Act required not to be considered, in circumstances where the Act’s requirements constitute preconditions to the validity of the decision maker’s act or decision ...
6. Misconstruing the decision maker’s Act ... in such a way as to misconceive the nature of the function being performed or the extent of the decision maker’s powers ...
7. [Acting in] bad faith.
8. [A] breach of natural justice.

⁴⁹ *Futuris* (2008) 237 CLR 146 at 187.

⁵⁰ *Futuris* (2008) 237 CLR 146 at 191.

⁵¹ Indeed, although the constitutional validity of s 175 was not raised in *Futuris*, Kirby J moots the possibility that ss 175 and 177(1) may be inconsistent with the scheme envisaged by s 75(v) of the *Constitution*: “The validity of an assessment (like any other legislative, executive or judicial act of a Commonwealth officer) can only be finally determined by a court, not by parliamentary fiat nor by administrative action”: at 183, citing the discussion in *Plaintiff S157* directed to the possibility of open-ended discretions, the minimum provision of judicial review and the rule of law.

⁵² *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at 223-224.

⁵³ *Fish v Solution 6 Holdings Ltd* (2006) 225 CLR 180 at 224.

⁵⁴ *Batterham v QSR Ltd* (2006) 225 CLR 237 at 249.

construction, and thus the majority avoided the question of whether there is an entrenched constitutional provision of judicial review at the State level analogous to that effected by s 75(v) in relation to decisions of Commonwealth officers.⁵⁵

TWO APPROACHES TO THE RULE OF LAW AND THE ENTRENCHED MINIMUM PROVISION OF JUDICIAL REVIEW

If one thinks of the minimum content of judicial review in terms of the concept of jurisdictional error, it is natural to ask, as Jeremy Kirk did after *Plaintiff S157*, which of the broad range of grounds of review now encompassed by the notion of jurisdictional error are constitutionally entrenched by s 75(v) of the *Constitution*.⁵⁶ Similarly, Kirby J's reasons in *Futuris* invite an approach to the minimum content of judicial review which asks the question: which "categories" of jurisdictional error are entrenched, and therefore cannot be evaded by the Parliament (either by way of a traditional privative clause or by way of a broadly framed no-invalidity clause)? It may also be that Kirby J's emphasis of the rule of law as an important part of the constitutional context in *Futuris* indicates a level of agreement with Kirk's view that the constitutional commitment to the rule of law, represented by s 75(v), "offers the surest foundation for establishing the entrenched minimum provision of judicial review".⁵⁷

The article below considers the extent to which the rule-of-law ideal might assist in delimiting the entrenched minimum provision of judicial review by distinguishing two possible approaches to thinking about the concept in the context of s 75(v). It begins with a discussion of the "doctrinal" approach, and then turns to a discussion of the "institutional" approach. The institutional approach reveals a possible line of argument for concluding that the joint judgment in *Futuris* is consistent with the rule-of-law purposes of s 75(v) as emphasised in *Plaintiff S157*. Next, the article discusses the role that the so-called principle of legality (as it has been called by Gleeson CJ and others) may play in any attempt to give substance to the claim that s 75(v) review serves a significant rule-of-law purpose. Finally, the article highlights the limitations implicit in the discussion of the institutional approach to thinking about the rule-of-law purposes of s 75(v).

The "doctrinal approach"

Kirk has offered the most sophisticated discussion of the role the rule of law may play in defining the boundaries of the entrenched minimum provision of judicial review. Although Kirk argues that the rule of law is the best foundation for determining which grounds of review (or categories of jurisdictional error) are constitutionally entrenched, he is quick to acknowledge a serious objection to the court specifying its preferred conception of the ideal and then attempting to work out what principles flow from it.⁵⁸ The rule of law is a vigorously contested concept.⁵⁹ Given ongoing disagreements about its content, judicial stipulations that aspects of the ideal are constitutional requirements would be likely to lead to accusations of rule by the judges, as opposed to the rule of law. Moreover, many aspects of the

⁵⁵ It is "unclear how a clause designed to keep a Supreme Court out of a matter could be said to violate *Kable's* ban on a court being made to participate in something that is incompatible with the court's institutional integrity": Aronson et al, n 5, p 975. In *Mitchforce Pty Ltd v Industrial Relations Commission NSW* (2003) 57 NSWLR 212 at 237-238, Spigelman CJ raised, though did not determine, the question of whether an implication, to be found in Ch III of the *Constitution*, that requires the continued existence of the State Supreme Courts as part of an integrated federal judicial system with the High Court at its apex, may limit State Parliaments' capacity to remove judicial review in relation to inferior State courts or tribunals, at least in relation to the determination of issues which lie "at the heart of the exercise of the judicial power". For a philosophically ambitious argument that State privative clauses should be approached identically to Commonwealth clauses, see Meyerson D, "State and Federal Privative Clauses Not So Different After All" (2005) 16 PLR 39; cf Cane and McDonald, n 16, p 211. See now *Kirk v Industrial Court (NSW)* [2010] HCA 1, which is briefly discussed in the postscript below.

⁵⁶ Kirk, n 2.

⁵⁷ Kirk, n 2 at 69.

⁵⁸ Kirk, n 2.

⁵⁹ Legal philosophers have designated it an "essentially contested concept": Waldron J, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 L & Phil 137; Green L, "The Political Content of Legal Theory" (1987) 17 *Philosophy of the Social Sciences* 1 at 18.

rule of law – even on relatively “thin” or “formal” accounts – raise difficult questions of degree and judgment.⁶⁰ How clear must laws be to satisfy the desideratum of clarity? Is retrospectivity always inimical to the ideal’s underlying values? Is under-enforcement of the law on the books (even if the laws are antiquated or no longer command community support) always a deficit in the achievement of the rule of law?⁶¹ And so on. It was for this reason that Lon Fuller concluded that, though judges may play an important role in preserving rule-of-law values, any significant achievement is primarily a matter of legislative craft.⁶² More recently, it has been persuasively argued that any achievement (by courts or legislatures) of the legal conditions which are thought necessary for the rule of law “themselves depend on conditions that are not legal”, namely, social conditions which relate to the extent to which law counts “as a source of restraint and a normative resource, usable and with some routine confidence used in social life”.⁶³

In addition to these matters of theory, there is a practical difficulty with ambitious invocations of the rule-of-law ideal to derive constitutional doctrine. As McHugh and Gummow JJ have argued, the High Court is unlikely to give the ideal (despite its status as a constitutional assumption) “an immediate normative operation in applying the *Constitution*”.⁶⁴ This position is said to reflect the Australian approach to the separation of powers (and the legality/merits distinction) which emphasises the limited role judges should play in second-guessing outcomes reached in the “executive function of administration”.⁶⁵ It thus seems unlikely that the values underpinning the rule of law (whatever preferred version of the ideal might be adopted) would be directly invoked to articulate doctrinal boundaries of the entrenched minimum provision of judicial review. This conclusion follows a fortiori with respect to substantive theories of the rule of law which include requirements about the content of legal norms (as opposed to matters of form or process).⁶⁶

It is for these sorts of reasons that Kirk conceives of the aspect of the rule of law which is relevant in the context of s 75(v) in very narrow terms, namely, what he labels “the principle of legality”; by which he means the idea that “governments must act according to law”.⁶⁷ (A more elaborate account of the “principle of legality” is considered below.) Although conceding that this principle does not exhaust the meaning of the rule of law (even on formal or thin versions), it is certainly an aspect of the ideal included in most (if not all) contemporary accounts.⁶⁸ Moreover, the idea that government must act according to law is, as Kirk notes, consistent with the court’s analysis in *Plaintiff S157*: the rule-of-law purpose which the court attributes to s 75(v) was fleshed out in terms of the assurance given to all that “officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them”.⁶⁹ That is, Commonwealth officers must act according to law.

⁶⁰ The seminal discussion is Fuller LL, *The Morality of Law* (rev ed, Yale University Press, 1969).

⁶¹ A question raised by McHugh J in *Bateman’s Bay Local Aboriginal Council v Aboriginal Community Benefit Fund Pty Ltd* (1998) 194 CLR 247 at 276-277.

⁶² Fuller, n 60, pp 33-94. See also Goldsworthy J, “Legislative Sovereignty and the Rule of Law” in Campbell T, Ewing KD and Tomkins A (eds), *Sceptical Essays on Human Rights* (Oxford University Press, 2001) p 61.

⁶³ Krygier M, “The Rule of Law: Legality, Teleology, Sociology” in Palombella G and Walker N (eds), *Re-locating the Rule of Law* (Hart Publishing, 2008) pp 60-61.

⁶⁴ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 (McHugh and Gummow JJ).

⁶⁵ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 24-25. See generally Groves M, “Judicial Review of Administrative Action in the High Court of Australia” (2008) 33 Queen’s LJ 327; Cane and McDonald, n 16, pp 48-51.

⁶⁶ On the distinction between formal and substantive theories of the rule of law, see McDonald L, “Positivism and the Formal Rule of Law: Questioning the Connection” (2001) 26 AJLP 93.

⁶⁷ Kirk, n 2 at 69.

⁶⁸ For an overview of the literature which supports this conclusion, see Tamanaha B, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) Chs 7-8.

⁶⁹ *Plaintiff S157* (2003) 211 CLR 476 at 514.

The difficulty with this attempt to rely on the rule of law to draw doctrinal conclusions about how the relevant lines are to be drawn around the entrenched minimum provision of judicial review is that the idea that governments must act according to law does little more than lead back to the concept of jurisdictional error.⁷⁰ As Kirk says, “officers cannot [validly] do something that is not authorised” nor can they “fail to do something which is required” if they are to comply with the law;⁷¹ put differently, they must properly exercise their jurisdiction. This, then, leads to the question of which categories or elements of jurisdictional error are constitutionally protected. And this, of course, is the question which the reference to the rule of law was supposed to help provide answers. Here Kirk suggests that a distinction be drawn between jurisdictional errors which are closely linked to the statute and those which are based upon “common law grounds of review”. Grounds of judicial review which depend for their application on statutory interpretation (the considerations grounds, improper purpose and compliance with mandatory statutory requirements) fall in the first category. In contrast, Kirk contends that grounds such as procedural fairness, unreasonableness and the inflexible application of policy derive from the common law.

It is unclear how Kirk’s distinction between the grounds of review progresses the argument. First, the persistent efforts of courts to distinguish some core notion of jurisdiction (in their quest to distinguish jurisdictional and non-jurisdictional errors) have not been encouraging.⁷² Secondly, the distinction between errors related to statutory requirements and those based on non-statutory “common law” requirements glosses over the unresolved theoretical disagreement as to whether all grounds of review are ultimately based on statute or whether some (the exemplar being natural justice) have an independent common law provenance.⁷³ Although the High Court has not authoritatively resolved this dispute, Mark Aronson has recently suggested that there are indications that the debate will be resolved in favour of the statutory interpretation approach.⁷⁴ If that comes to pass, then Kirk’s suggested distinction would presumably need to be reformulated.⁷⁵

In any event, whether grounds of review derive their legal authority from statute or from the common law, they may be excluded by a sufficiently determined legislature (subject to any constitutional prohibitions). This points to the most important difficulty with the suggested distinction. Tying the entrenched minimum provision of judicial review to the content of a particular statute arguably affords too little practical protection to the High Court’s s 75(v) jurisdiction.⁷⁶ In particular, such an approach appears to lack the resources to resist broadly framed no-invalidity clauses; and without such resources, the inspiring rule-of-law rhetoric in *Plaintiff S157* becomes difficult to explain. Indeed, as Kirk insightfully notes:

If Commonwealth legislation provided that the decision-maker could take account of any matter, that no considerations nor particular procedures were mandatory, that there were no restrictions on the purposes for which the power could be exercised, then – subject perhaps to some limits at the extremes – whilst the grounds of review would still be available, they might be of little practical effect.⁷⁷

⁷⁰ See text above under the heading “Jurisdictional error, the minimum provision of judicial review and the problem of no-invalidity clauses”.

⁷¹ Kirk, n 2 at 70.

⁷² Indeed, the attempt has been called off in English law: see *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147; *R v Lord President of the Privy Council; Ex parte Page* [1993] AC 682.

⁷³ See generally *Kioa v West* (1985) 159 CLR 550; Forsyth C (ed), *Judicial Review and the Constitution* (Hart Publishing, 2000); Selway B, “The Principle Behind Common Law Judicial Review of Administrative Action” (2002) 30 Fed LR 217.

⁷⁴ Aronson M, “Private Bodies, Public Power and Soft Law in the High Court” (2007) 35 Fed LR 1 at 2.

⁷⁵ Typically, of course, the boundaries of administrative powers are defined by a complex amalgam of statutory limitations and common law doctrine as applied to an individual case: see Allan TRS, “Legislative Supremacy and Legislative Intent: A Reply to Professor Craig” (2004) 24 OJLS 563.

⁷⁶ That is, the answer to the question of which categories of jurisdictional error are entrenched may be “none”.

⁷⁷ Kirk, n 2 at 70.

The rule of law, understood as the principle that government must obey the law, does not, therefore, amount to an independent source of principle that explains what it means to obey the law (beyond the concept of jurisdictional error).

It seems clear enough that the High Court would strike down a no-invalidity clause purporting to validate decisions based on personal animosity, fraud or other types of dishonesty. In *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, six members of the High Court warned that:

It would be a bold exercise of legislative choice for the Parliament to enact that Ministers and their delegates were authorised to exercise fraudulently any of the powers of decision conferred upon them by statute ... [I]n such an unlikely eventuality question of validity might well arise of the nature outlined in *Plaintiff S157/2002*.⁷⁸

Yet to preserve its s 75(v) review jurisdiction in relation to these sorts of errors, it may be thought that reference to the contested rule-of-law ideal is to invoke unnecessary theoretical bells and whistles.⁷⁹ It might also be thought highly unlikely that Parliament would ever attempt to expressly prevent review on such grounds. One wonders, therefore, whether the articulation of an entrenched minimum provision of judicial review (and the ideal of the rule of law) in *Plaintiff S157* is best thought of as a rhetorical strategy, as opposed to a serious attempt to mark out a doctrinal category likely to gain clear definition.

Here it is worth recalling the political context of *Plaintiff S157*. Prior to the High Court challenge in *Plaintiff S157*, the Federal Court had been publicly and strongly criticised by the government on the basis that some of the court's decisions undermined the implementation of government policy choices in migration decision-making. The privative clause was enacted in 2001 after the failure of successive legislative attempts to limit judicial review of migration decisions in the context of an ever-rising number of applications, and in the political wake of the arrival of the MV Tampa, a ship carrying a large number of asylum-seekers who, in controversial circumstances, had not been allowed to set foot on Australian soil. Against this background, the High Court's decision in *Plaintiff S157* can be understood not only as an exercise in legal interpretation but also as a political compromise. On the one hand, the court upheld the constitutional validity of the clause. Striking the clause down as invalid may have elicited further attacks against the judiciary which may ultimately have adversely affected the High Court's political legitimacy. On the other hand, the clause was restrictively interpreted, enabling the court to maintain its declared commitment to the rule of law. This understanding of the *Plaintiff S157* judgment as having political concerns might also be thought consistent with an interpretation of the High Court's references to the importance of the rule of law as amounting to a stern warning that any future attempt to find alternative legislative means to dramatically diminish its constitutionally entrenched review function would be resisted, rather than a source of principle intended to give clear doctrinal content to the concept of a minimum provision of judicial review.⁸⁰

It may be that over time a number of substantive requirements or values are, as a doctrinal matter, read into the minimum provision of judicial review entrenched by s 75(v). In addition to principles linked to obligations of good faith, there have been suggestions that aspects of the rules of procedural fairness might also be constitutionally protected.⁸¹ It remains unclear, however, whether the rule of law is a necessary or useful organising principle for such developments. And, although the concept of jurisdictional error has proved effective in out-maneuvring the *Migration Act's* privative clause, it can also be asked whether any need to identify such substantive principles entrenched by s 75(v) is

⁷⁸ *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651 at 663. See also Basten J, "Constitutional Elements of Judicial Review" (2004) 15 PLR 187 at 201.

⁷⁹ All that is required is a constitutional assumption or implication that the executive government is supposed to act "not according to standards of private interest, but in the public interest": *Commonwealth v John Fairfax & Sons Ltd* (1980) 147 CLR 39 at 51 (Mason J).

⁸⁰ This paragraph draws on Cane and McDonald, n 16, pp 213-214. See also McMillan J, "Controlling Immigration Litigation – A Legislative Challenge" (2002) 10 *People and Place* 16; Beaton-Wells C, "Australian Administrative Law: The Asylum-Seeker Legacy" [2005] PL 267.

⁸¹ See n 17.

likely to be hindered or helped by the language of jurisdictional error which is so tightly linked (on the approach to validity set out in *Project Blue Sky*) to the “purposes” of the statute under consideration.

The “institutional approach”

Although the joint judgment in *Futuris* does not make the argument, there is an approach to thinking about the rule-of-law justification for s 75(v) which is consistent with its reasoning. On this approach, the rule of law is not looked to as a source for putting doctrinal flesh on the bones of the minimum provision of judicial review. Rather, s 75(v)’s role in the preservation of the rule of law is considered in the broader institutional context of legal accountability. Thus understood, the question is whether any particular statutory attempt to diminish judicial review, considered in broader institutional context, threatens the purposes protected by s 75(v).

In *Futuris* the joint judgment clearly placed emphasis on the role of s 175A of the Tax Act and the Pt IVC statutory appeal process. Why are these provisions important for the interpretive conclusion that fulsome effect should be given to the s 175 no-invalidity clause?⁸² The joint judgment does not clearly articulate an answer to this question, but perhaps this was because the reason should be taken as obvious: it is appropriate to read s 175 as limiting the role played by judicial review in the protection of the rule of law because the legislature had provided (more than) adequate alternative processes of legal accountability through which the commitment to the rule of law could be served. Part IVC not only allowed for a full merits review; it also allowed for the review of *all* errors of law (regardless of whether they happen to qualify as jurisdictional errors).

Interestingly, all judges in *Futuris* thought that the Pt IVC scheme of review should have led the Federal Court to exercise its remedial discretion to refuse relief in its judicial review application.⁸³ There was no issue which *Futuris* wished to raise in its judicial review application which could not be fully agitated in Pt IVC proceedings. It is suggested that this “institutional design” reason for refusing relief as a discretionary matter was also the main reason for the interpretive conclusion that s 175 should be read as drastically limiting the practical scope for the judicial review of assessments under s 75(v) of the *Constitution* by reducing the likelihood of decisions being affected by jurisdictional error. There is, in short, a rationale for reading s 175 in the way the majority did which is consistent with the preservation of the rule of law, even though the result was to limit the practical utility of judicial review under s 75(v) of the *Constitution*.

Is the “institutional approach” to the role s 75(v) plays in preserving the rule of law (an approach which is arguably implicit in the conclusions reached by the majority in *Futuris*)⁸⁴ preferable to an approach which attempts to derive doctrinal conclusions directly from the rule of law ideal? One obvious difficulty with the institutional approach is that it will often be unclear whether alternatives to s 75(v) review are “adequate”. *Futuris* was a clear case as the alternative avenues of appeal enabled the sort of questions which might be raised in any judicial review application to be raised in an appeal under Pt IVC proceedings. What, if anything, might the institutional approach have to say in cases which are less clear? Perhaps the institutional approach offers few answers precisely when the rule of law is under most threat, namely, when there are (arguably) insufficient alternative means to keeping decision-makers to legal account.

⁸² That is, the conclusion that s 175 means that a breach of any of the Act’s provisions is not reviewable (because it does not affect validity and thereby broadens the decision-maker’s jurisdiction) and thus that the scope for meaningful review under the constitutional scheme of review established by s 75(v) is severely limited.

⁸³ *Futuris* (2008) 237 CLR 146 at 162 (joint judgment), 191-197 (Kirby J). Indeed, it was for this reason that Kirby J declined to offer a concluded view as to how ss 175 and 177(1) of the Act should be interpreted. Although the point cannot be developed here, the fact that the court has a discretionary power to refuse relief (*Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82), even for established jurisdictional errors, may be best justified by reference to an institutional approach to thinking about s 75(v)’s relation to the protection of the rule of law.

⁸⁴ For a more explicit appeal to the institutional approach, see *A v B (Investigatory Powers Tribunal: Jurisdiction)* [2010] 2 WLR 1. The United Kingdom Supreme Court accepted that the judicial review of a decision to refuse permission to publish sensitive security information was excluded by statute. This conclusion was in part based on the fact that the legislature had provided an effective alternative means of challenging a decision in a tribunal “of like standing and authority to that of” the ordinary courts: at [23]-[24].

One way to advance the discussion is to ask how an institutional approach to the rule of law might have influenced the interpretation of s 175 of the Tax Act, assuming that s 175A and Pt IVC (or provisions like them) were absent from the taxation legislation. In such circumstances, viewing the no-invalidity clause in broader institutional context would certainly place the question of the importance of the maintenance of the rule of law squarely on the table. Beyond alerting courts to the problem, however, it might be thought that the institutional approach to thinking about the rule of law would have nothing further to add. At this point, it may be assumed that a person who takes the rhetoric that s 75(v) serves a rule-of-law purpose seriously would be forced to revert to something like the “doctrinal” approach – that is, to consider the question of whether s 75(v) protects particular values or principles (and the extent to which these may be linked to a conception of the rule of law). This is certainly possible as there is no reason to think that the doctrinal and institutional approaches are mutually exclusive. As argued above, however, there are theoretical and pragmatic reasons for scepticism about the feasibility of attempts to derive doctrinal conclusions directly from the rule of law as a general legal/political ideal.

An alternative answer to the question is, however, open. By emphasising the institutional role s 75(v) is intended to play in protecting the rule of law, the institutional approach may encourage interpretations of statutory provisions that attempt to diminish the judicial review role (such as no-invalidity clauses) which are creatively calibrated to the existence and adequacy of alternative institutional arrangements for keeping administrative actions legally accountable.

In *Futuris* the joint judgment concluded its reasons with some obiter remarks about the role the *Hickman* principle might play in the interpretation of ss 175 and 177(1) of the Tax Act. As explained above, the *Hickman* principle involves the “reconciliation” of conflicting parts of the statute: privative clauses purporting to remove the jurisdiction of courts to award judicial review remedies have been said to *conflict* with statutory limitations placed on an administrator’s jurisdiction or powers. The nature and results of this reconciliation process have undoubtedly led to creative and surprising interpretations of legislation. Indeed, one of the clear lessons of *Plaintiff S157* is that these interpretive surprises are to be expected: there can be no general meaning of privative clauses given as any reconciliation process must be undertaken in the context of each particular statute in which a privative clause appears. In contrast to the reconciliation approach taken in relation to privative clauses, the joint judgment in *Futuris* concluded that there was no inconsistency between s 175 of the Tax Act and the “requirements of the Act governing assessment” because s 175 provides “that the validity of any assessment shall not be affected by reason of the fact that any of the provisions of the Act have not been complied with”.⁸⁵ No reconciliation, in the context of the Tax Act, was therefore required. On one level, this is a plausible reading of the Tax Act, consistent with the orthodox view that Parliament can indicate whether or not the breach of a statutory provision amounts to a jurisdictional error that would result in invalidity.⁸⁶

A different conclusion as to the consistency between broadly framed no-invalidity clauses and detailed statutory limitations on administrator’s powers may, however, be available in circumstances where adequate means of legal accountability (alternative to s 75(v) judicial review) are not provided for in the legislation. In the case of traditionally-worded privative clauses (directed at the jurisdiction of courts to review decisions and award remedies), there is arguably no inconsistency between the privative clause and the substantive provisions limiting the jurisdiction of administrators.⁸⁷ The need for reconciliation only arises if the premise – that the statute is internally inconsistent – is true. Arguably, however, there is no true inconsistency because the provisions are logically distinct. By their terms the provisions said to involve inconsistency address different issues, namely, the powers of the courts, on the one hand, and the powers of administrators, on the other. It may be thought unwise for statutory limits on powers to be enforced through mechanisms other than judicial review (for

⁸⁵ *Futuris* (2008) 237 CLR 146 at 167, quoting *Deputy Commissioner of Taxation v Richard Walter Pty Ltd* (1995) 183 CLR 168 at 222-223 (Dawson J).

⁸⁶ *Project Blue Sky* (1998) 194 CLR 355.

⁸⁷ Kirk, n 2 at 65-66.

example, through political processes, oversight by investigative agencies, merits review or statutory appeals on questions of law), but it can at least be argued that this is indeed a question of wisdom and judgment rather than logic.⁸⁸

Where, however, a “broad” or “all-encompassing” no-invalidity clause is enacted, there is a stronger argument that this may be interpreted as being in conflict with at least some of the explicit limitations on the decision-maker’s powers: a no-invalidity clause (unlike a traditional privative clause) has the same subject matter as the statutory provisions, the effect of which it purports to specify, namely, the powers of the administrator to make valid decisions. Whether or not there is thought to be a “logical” contradiction here, it can be argued that a conclusion that there is such a contradiction is no more surprising than the similar conclusion which has been drawn in the context of the interpretation of traditional privative clauses. In circumstances where a statute contains a broadly worded no-invalidity clause and does not envisage statutorily prescribed forms of legal accountability, the rule-of-law purpose served by s 75(v) may provide the normative basis for an interpretation of the statute based upon the identification of an internal contradiction or tension between the no-invalidity clause and provisions which appear to limit decision-making power. It may also be that the suggestion in *Plaintiff S157* that Parliament is unable to confer entirely open-ended discretions could encourage the identification and resolution of a conflict between a broadly-framed no-invalidity clause and statutory provisions defining and limiting decision-making powers on the basis of the interpretive principle that legislation should be interpreted consistently with the *Constitution* if that is fairly open.⁸⁹

The “institutional approach” and the “principle of legality”

It has been argued above that the institutional approach may assist in identifying the situations where no-invalidity clauses should be construed creatively by reference to the question of whether the rule-of-law purpose served by s 75(v) is imperilled. In *Plaintiff S157*, Gleeson CJ considered that the process of reconciliation of provisions which seem to send mixed messages should rely upon *all* relevant principles of statutory interpretation.⁹⁰ Similarly, where a broad no-invalidity clause is enacted so as to reduce effective judicial review (in the absence of adequate alternative mechanisms to maintain legal accountability) and decisions are likely to affect fundamental common law rights or freedoms, courts may, through the process of statutory interpretation, be less prepared to accept the diminution of the practical application of judicial review pursuant to s 75(v) of the *Constitution*.

It was in this context that Gleeson CJ invoked the “principle of legality” as it has been understood in recent English jurisprudence,⁹¹ a notion carrying more meaning than the bare requirement that government officers must act according to law. This rendition of the principle of legality reflects the idea that “Parliament must [when limiting the courts role in securing fundamental common law rights] squarely confront what it is doing and accept the political cost”.⁹² Interestingly, Gleeson CJ has also explicitly stated that the rule that irresistible clarity is required before Parliament will be taken to abrogate fundamental or common law rights is an “aspect of the rule of law”.⁹³ This approach to the protection of the rule of law accepts Parliament’s authority to abrogate values commonly associated

⁸⁸ Dyzenhaus, n 10, p 104 accepts that the existence of an internal conflict requiring reconciliation “assumes that it is of the essence of there being legal limits that these are enforceable by judges”. This assumption is contestable. See Cane and McDonald, n 16, p 214. Of course, were clauses purporting to oust the High Court’s capacity to issue remedies named in s 75(v) read literally, they would be constitutionally invalid.

⁸⁹ *Plaintiff S157* (2003) 211 CLR 476 at 504.

⁹⁰ *Plaintiff S157* (2003) 211 CLR 476 at 491-492.

⁹¹ This understanding of the “principle of legality” is gaining salience in Australian courts: see, eg *Evans v New South Wales* (2008) 168 FCR 576.

⁹² *R v Home Secretary; Ex parte Simms* [2000] 2 AC 115 at 131 (Lord Hoffman), cited in *Plaintiff S157* (2003) 211 CLR 476 at 492 (Gleeson CJ).

⁹³ *Electrolux Home Products Pty Ltd v Australian Workers Union* (2004) 221 CLR 309 at 329.

with the ideal of legality,⁹⁴ but nonetheless sees a valuable role for the courts as part of a complex process of institutional interaction between the judiciary and legislature as to the meaning and importance of particular rights or fundamental principles.⁹⁵

The application of the principle of legality in this context will not lead to general rules concerning the interpretation of no-invalidity clauses; each such clause will, like privative clauses, be interpreted in its particular statutory context. Nevertheless, the principle of legality can be understood as at least part of the explanation of the claim that s 75(v) plays an important role in the protection of the rule of law – even if the court shies away from more ambitious invocations of the ideal to derive substantive principles which are said to constitute part of the entrenched minimum protection of judicial review.⁹⁶ As Cheryl Saunders concluded in her study of *Plaintiff S157*, “uncodified constitutional principles can, in some circumstances, resolve disputes of a broadly constitutional kind”.⁹⁷

Of course, it is always open to Parliament to attempt to clarify an unsuccessful attempt it has made to provide that breach of statutory requirements, or indeed broader norms of administrative law, do not result in the invalidity of administrative decisions. And these attempts may reach a point where they cannot plausibly be resisted by the rigorous application of the techniques of statutory interpretation, including the “principle of legality”. The point may, therefore, be reached where a court – determined to give some content to the rule-of-law purpose attributed to s 75(v) – would be forced to articulate harder-edged and substantive legal principles thought to constitute the entrenched minimum provision of judicial review. It may, however, be thought that Parliament would be unwilling (or at least unwise)⁹⁸ to provoke the need for such a strong assertion of judicial power by inviting judges to give elements of its preferred conception of the rule-of-law ideal constitutional status.

It can also be observed that the High Court is unlikely to adopt all of the principles which have been associated with the rule of law in the United Kingdom administrative law literature. As Thomas Poole has shown, some of the proponents of “common law constitutionalism” consider the grounds of review to be an appropriate site for moral reasoning.⁹⁹ The High Court’s insistence on the distinction between questions of legality and merits, its retention of the concept of jurisdictional error, and its emphasis of the separation of powers,¹⁰⁰ all point towards the likelihood that the “principle of legality” will be fleshed out by reference to rights thought to be well grounded in the common law (such as property rights and procedural fairness) and to those civil and political rights which have a strong foothold in the *Constitution* (such as freedom of political communication).¹⁰¹

Limits to the institutional approach

What has been called the institutional approach to the rule of law, encourages judges to consider the threat posed by statutory attempts to diminish judicial review in the broader context of administrative accountability. Such an approach may mean that not all attempts to reduce judicial review are

⁹⁴ Unless some aspects of the ideal are considered to be entrenched.

⁹⁵ See Meagher D, “The Principle of Legality and the Judicial Protection of Rights – *Evans v State of New South Wales*” (2009) 35 Fed LR 294 at 309.

⁹⁶ For this reason, Gleeson CJ’s reasons in *Plaintiff S157* may prove a more useful model than those given in the joint judgment when it comes to the interpretation of broadly framed no-invalidity clauses, at least in circumstances where other adequate means of legal redress are lacking. Of course, how successful such a strategy of protecting the rule of law is depends on outcomes and one’s own understanding of the rule-of-law ideal. So-called “common law constitutionalists” have been accused of placing unjustified faith in “heroic” judges to resist an overreaching Executive: see Poole T, “Constitutional Exceptionalism and the Common Law” (2009) 7 ICON 247 at 270.

⁹⁷ Saunders C, “*Plaintiff S157/2002: A Case-study in Common Law Constitutionalism*” (2005) 12 AJ Admin L 115 at 124.

⁹⁸ As Saunders, n 97 at 125, has also observed, “mature constitutionalism depends on the commitment of institutions of government to the system of which they are part and self-restraint in the exercise of their powers”.

⁹⁹ Poole T, “Questioning Common Law Constitutionalism” (2005) 25 LS 142.

¹⁰⁰ *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1. See also Selway, n 73.

¹⁰¹ *Evans v New South Wales* (2008) 168 FCR 576.

necessarily problematic, in terms of the preservation of values associated with the rule of law, for the legislature may have provided alternative accountability mechanisms which at least are as good as judicial review. Where the legislature has not so provided, and especially where administrative decision-making impacts on values which are deeply ingrained in the common law, the institutional approach to thinking about the rule of law can be thought of as providing the normative basis for standard (though creative) interpretive strategies to reassert the role of judicial review. Thus understood, the application of the institutional approach will not lead to general rules concerning the interpretation of statutory attempts to diminish review, be they privative clauses or no-invalidity clauses.

To the extent that the institutional approach (including reference to the “principle of legality”) relies on strategies of statutory interpretation (whose relevance is not limited to the s 75(v) context), it has clear limitations. Importantly, it will disappoint those seeking clarity. For example, influential invocations of the “principle of legality” (particularly the problem raised by the need to identify what common law rights or values are fundamental) have been criticised for their lack of specificity.¹⁰² Secondly, there are limits to the weight such interpretive strategies can plausibly bear, unless their underpinning principles are given constitutional status.

CONCLUSION

There are at least two distinct ways of thinking about how the rule-of-law ideal may be relevant to determining legal effect of statutory attempts to restrict judicial review of the actions and decisions of Commonwealth officers. The first, what has been dubbed the “doctrinal approach”, is to mine the rule-of-law ideal for particular values which may then be translated into legal principles that define what the High Court has declared to be an entrenched minimum provision of judicial review. Despite the identification of an entrenched minimum provision of judicial review in *Plaintiff S157*, however, there are reasons to doubt that clear doctrinal boundaries are likely to be drawn from the contested rule-of-law ideal. The language of an “entrenched minimum provision of judicial review” – while rhetorically powerful – is likely to mislead in this respect. Indeed, the concept of a minimum entrenched provision of judicial review and the link, drawn in *Plaintiff S157*, between it and the rule-of-law purpose of s 75(v) may be best understood as part of a rhetorical strategy designed to remind the Parliament that when it comes to Commonwealth attempts to diminish judicial review the High Court “holds all the cards”.¹⁰³

The second “institutional” approach to thinking about the rule of law in the context of s 75(v), is to consider the role played by a court’s jurisdiction in the broader institutional context of legal accountability. On this approach, the appropriate level of judicial review might – through standard techniques of statutory interpretation – be calibrated to the existence and extent of alternative institutional arrangements for keeping administrative actions legally accountable. The primary reliance on statutory interpretation to protect values associated with the rule of law can be thought of as being triggered by an institutional approach to the protection of the ideal.

Although these two ways of thinking about the relevance of the rule of law to understanding the boundaries of judicial review under the *Constitution* are distinct, it is not claimed that they are mutually exclusive. The alternative approaches do, however, provide different lenses through which the interpretation by the courts of statutory attempts to limit judicial review can be understood. Finally, it can be observed that, although identification of a minimum entrenched provision of judicial review has induced administrative lawyers to seek its boundaries, neither of the suggested approaches to thinking about the rule of law are likely to generate a clearly demarcated minimum provision of review applicable to all statutory contexts in which attempts are made by the Parliament to limit the extent of review under s 75(v) of the *Constitution*.

¹⁰² Poole, n 96.

¹⁰³ As Mark Aronson puts it in his commentary: see (2010) 21 PLR 35.

POSTSCRIPT

On 3 February 2010, the High Court published its reasons in *Kirk v Industrial Court (NSW)* [2010] HCA 1 (*Kirk*). *Kirk* confirms that the concept of jurisdictional error is malleable and heavily dependant on statutory context. Most significantly, for the analysis in this article, *Kirk* held that State Parliaments cannot, through privative clauses, oust judicial review for jurisdictional error. In effect, this places the treatment of State privative clauses on the same footing as that set out in *Plaintiff S157* for Commonwealth privative clauses, though the court did not rely on s 75(v) or any concept of the rule of law in reaching this conclusion. Rather, the court held that to allow the ouster of review for jurisdictional error by a Supreme Court of a State would alter one of its defining characteristic and, thereby, undermine the constitutional scheme of review and appeal (to the High Court) envisaged by s 73 of the *Constitution*.¹⁰⁴ The court has thus now answered the question posed at footnote 55 above in the affirmative. The prominence given in *Kirk* to the concept of jurisdictional error squarely raises the question of the extent to which no-invalidity clauses may be validly used to diminish the scope for judicial review in a Supreme Court of a State.

¹⁰⁴ *Kirk v Industrial Court (NSW)* [2010] HCA 1 at [98]-[100].

Commentary on “The entrenched minimum provision of judicial review and the rule of law” by Leighton McDonald

Mark Aronson*

Leighton McDonald’s paper covers a lot of ground, but I will confine my comments to some of its more theoretical aspects. I want to start at a point which has long interested McDonald, which is the use and abuse of different conceptions of the rule of law.

One of the grounds of opposition to the administrative state used to be that it contained too many broad, discretionary powers. To exaggerate only slightly, it used to be argued that discretionary power was a per se violation of the rule of law.¹ The basic idea is still current, although it is no longer confined to neo-liberal objections to the administrative state.² A few years ago, McDonald’s response was to argue that we had to adjust our understanding of the rule of law. Otherwise, he said, we would be left lamenting that no country has it.³ I think that his analysis of the so-called entrenched minimum provision of judicial review leads towards the same point, but by a different route. His analysis argues that there is a sense, albeit a necessarily vague sense, in which our conceptions of the rule of law might occasionally predispose our interpretive approach to two types of statutes. His first type of statutory provision is the privative clause, which seeks to stop courts doing anything about invalid administrative action. Of course, administrative violations of statutory requirements do not necessarily result in invalidity, but where they do, the strong form of privative clause tries to prevent judicial redress.

McDonald calls his second type of statutory provision a “no-invalidity” clause. This is because it seeks to tell the world that contrary to what might otherwise have been the case, invalidity will not be one of the consequences of having breached a particular statutory or common law requirement. Speaking broadly, and in terms condemned by the High Court as conclusory,⁴ administrators face two sorts of statutory rules. If they are challenged for having breached mandatory rules, the usual result will be a remedy that treats the administrative action as invalid. Breaches of directory rules do not result in invalidity although, of course, there are some situations in which the plaintiff does not need a remedy that is predicated on the administrative action having been void. Declaratory and injunctive

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¹ See von Hayek FA, *The Road to Serfdom* (Routledge & Sons, 1944).

² Until recently, English prosecutors had refused to disclose their discretionary criteria for declining to prosecute people who had assisted another’s suicide. The applicant in *R (Purdy) v Director of Public Prosecutions* [2009] 3 WLR 403 wanted more guidance as to whether her husband would be prosecuted if he were to assist her suicide at a time when she would no longer be able to kill herself. Her ground was Art 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms* (1953), as enacted into domestic law by the *Human Rights Act 1998* (UK). That gave her a right to respect for her private life, subject (relevantly) to such interference “as is in accordance with the law”. *Purdy* said that the breadth of prosecutorial discretion not to prosecute, coupled with the frequency of its exercise, produced such a want of clarity and predictability as to amount to a lack of “law” on the issue. The Director of Public Prosecutions was ordered to issue specific guidelines. Lord Hope’s link to the rule of law was explicit (at [43]): “This is where the requirement that the law should be formulated with sufficient precision to enable the individual, if need be with appropriate advice, to regulate his conduct is brought into focus in this case. In *Hasan and Chaush v Bulgaria* (2000) 34 EHRR 1339 at [84], the court said: ‘For domestic law to meet these requirements [that is, of accessibility and foreseeability] it must afford a measure of legal protection against arbitrary interferences by public authorities with the rights safeguarded by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law, one of the basic principles of a democratic society enshrined in the Convention, for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion conferred on the competent authorities and the manner of its exercise.’” *Purdy* was the last appeal decided by the House of Lords. See also *Her Majesty’s Treasury v Ahmed* [2010] UKSC 2.

³ McDonald L, “The Rule of Law and the New Regulatory State” (2004) 33 CLWR 197.

⁴ *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355 at 390.

relief, for example, are available against administrative action that might be valid but nevertheless illegal (in the sense that it breaches a statutory requirement). McDonald's "no-invalidity" clauses seek to convert mandatory rules into directory rules.

McDonald has good arguments for saying that "no-invalidity" clauses are not *always* bad legal policy. They do not necessarily violate the rule of law if they belong to a statute that provides fair access to the courts by means other than judicial review. I would add that the same argument could be made with regard to privative clauses. We need not view them all as per se violations of the rule of law. It all depends on whether the Act in question provides other mechanisms for legal accountability that are as good as, or better than, judicial review. If you take away appeal rights as well as judicial review rights, the result is equally worrying, regardless of whether you do this by way of a privative clause or a "no invalidity" clause.

I agree with McDonald that the High Court's decision in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 (*Plaintiff S157*) filleted the *Migration Act's* privative clause. And I agree that the court's weapon was fairly blunt. The court said that the privative clause was unavailing in the presence of any jurisdictional error, and it is certainly difficult to see much room for the suggestion in the joint judgment that the clause might have shifted some technical requirements out of the "mandatory" camp and into the "directory" camp. But their Honours were not left with many options.

Of course, there are differences of degree in the catalogue of errors that might be called jurisdictional, and Gleeson CJ adverted to this in *Plaintiff S157* when he said that "there are degrees of error", corresponding to "degrees of strictness of scrutiny to which decisions may be subjected".⁵ But it would have been a tall order to expect the courts to pick and choose between the dozens, if not hundreds of rules in the *Migration Act*, and rank or calibrate them according to an intuitive sense of their inherent importance or linguistic emphasis. In practical terms, it was impossible to treat the generalist privative clause at issue in *Plaintiff S157* as having converted all of the *Migration Act's* rules that were once mandatory into rules that were henceforth all to be regarded as directory. The court said that it was a stretch too far to interpret one single privative clause as having re-fashioned every other clause in such a long Act. The court was able to say this without having to repeat something that McHugh J had said in argument, namely, that maybe an Act that contained nothing which a court could enforce would not be a real "law", at least in the Austinian sense of a law having to embody a genuine command.⁶

However, it might make sense in other contexts to take the privative clause as one of the factors relevant to deciding whether some other part of an Act is mandatory or directory. I have in mind the industrial legislation of New South Wales,⁷ and the same State's planning and assessment legislation.⁸ In both cases, the New South Wales Court of Appeal does seem to be treating privative clauses as having shifted the boundary line between mandatory and directory. In language that no court would dream of using, the Court of Appeal can be thought of as distinguishing between jurisdictional error *lite*, and jurisdictional error *heavy*.⁹

With McDonald, I agree that it is not easy to distinguish between lite and heavy errors, no matter what labels we might use. However, it is important to note that we have always had to make these

⁵ *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 485.

⁶ *Plaintiff S157/2002 v Commonwealth* [2002] HCATrans 420 (3 September 2002).

⁷ *Industrial Relations Act 1996* (NSW), s 179. See: Aronson M, Dyer B and Groves M, *Judicial Review of Administrative Action* (4th ed, Lawbook Co., 2009) pp 987-989; *Kirk Group Holdings Pty Ltd v Workcover Authority (NSW)* (2006) 66 NSWLR 151; *Yim v Industrial Relations Commission (NSW)* (2007) 162 IR 62; *Commissioner of Police v Industrial Relations Commission (NSW)* (2009) 185 IR 458 at 468.

⁸ See *Environmental Planning and Assessment Act 1979* (NSW), ss 35, 101. See also *Vanmeld Pty Ltd v Fairfield City Council* (1999) 46 NSWLR 78; *Woolworths Ltd v Pallas Newco Pty Ltd* (2004) 61 NSWLR 707; *Lesnewski v Mosman Municipal Council* (2005) 138 LGERA 207.

⁹ Similarly, it has been suggested that fewer errors might count as jurisdictional for the purposes of the constitutional writs than otherwise: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611 at 657; *Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165 at 1172. Kirby J disagreed, in *S20/2002* at 1191.

distinctions, and we always will continue to do so, regardless of whether we retain linguistic labels such as mandatory and directory provisions, or jurisdictional and non-jurisdictional errors. Behind what I regard as an excess of angst over those labels¹⁰ lies an obvious need for courts to ration declarations of invalidity to the more serious, less technical instances of statutory breach.

Acts that contain both rules directed to administrators, and provisions aimed at limiting or stopping judicial redress for their breach, are commonly criticised as being internally inconsistent. A rule that is judge-proofed is often said to be a “contradiction in terms”, and therefore in need of some interpretive remodelling before it can make sense. “Contradiction in terms” is a powerful phrase, but it is wrong to the extent that it assumes that rules without judicial enforcement cannot be real rules. There is nothing *logically* impossible about a directory rule whose breach has only political or administrative consequences. Our legal system is full of contradictions, but almost devoid of “contradictions in terms” if by that one means a strict antinomy – two legal rules that command the same person to perform and refrain from performing a single act at a single point in time. There are contradictions aplenty to be found in both the common law and the statute books, but they are contradictions of underlying purpose, message, value or goal. A judge-proofed legislative rule is a contradiction, but not logically in its terms or with the terms of the rest of its Act. The contradiction lies in its challenge to a very deep-seated set of assumptions about the role of the independent courts in a society that adheres to the rule of law. Leaving redress of administrative illegality entirely to the administrative or political processes contradicts Anglo Australian (but not American) conceptions of the rule of law and the separation of powers.

I want to suggest that it is Dicey’s view of the rule of law that makes us see McDonald’s privative and “no-invalidity” clauses as contradicting the rest of their Acts. The so-called contradiction is not internal to the Act in question. Rather, it is a contradiction between such Acts and Dicey’s version of the rule of law. Dicey’s model did two different things. It placed the ordinary courts at the apex of every claim that government has broken the law. But, at the same time, it told us that aside from constitutional limitations,¹¹ we had to respect what Parliament enacted. And with these particular clauses, we cannot do both things at the same time.

If I am right, then it is an adherence to an unmodified Diceyan version of the rule of law that creates our contradiction, whose resolution needs some other principle. Section 75(v) of the *Constitution* is an obvious candidate at the Commonwealth level. I should pause here to add that s 75(v) goes further than just entrenching the High Court’s constitutional writ jurisdiction. It also entrenches the injunctive jurisdiction against Commonwealth officers, and injunctions have always been available in cases of fraud or dishonesty quite aside from issues about jurisdictional error. As the High Court has hinted on a number of occasions, the net result is that fraud and dishonesty are entrenched grounds of judicial review in the High Court.¹²

Of course, s 75(v) offers no help in dealing with State privative clauses, and some of those are particularly troubling. Queensland’s prisoners, for example, can still access judicial review for disciplinary decisions. But most other decisions by that State’s prison managers are now unreviewable in any court, even if they are only *purported* decisions, and even if they are “affected by jurisdictional error”.¹³

An alternative circuit breaker to s 75(v) could be to imply something into our unwritten constitution. In the current English fashion, one would call that common law constitutionalism. The English judges have actually threatened to abandon Dicey’s vision of unlimited legislative supremacy,

¹⁰ They are conclusory, and conclusory terminology is useful. The excess of angst starts when their conclusory nature is overlooked, leading one on a search for their fixed and essentialist meaning.

¹¹ Limitations that were absent from the UK’s lower case “c” constitutional law in Dicey’s time; hence his extreme version of the United Kingdom Parliament’s “sovereignty” or legal competence.

¹² *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 508; *Bodruddaza v Minister for Immigration and Multicultural and Indigenous Affairs* (2007) 228 CLR 651 at 663; *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 at 165.

¹³ *Corrective Services Act 2006* (Qld), ss 17, 66, 68, 71.

if that is what it would take to avoid having to obey a well-drafted privative clause.¹⁴ That strategy, however, would require us to revise our version of the rule of law, and although that is where I think that McDonald might be heading, I doubt that he would endorse the common law constitutionalists' frontal assault on parliamentary supremacy. Rather, he appears to be content (as am I) with an interpretivist strategy.

McDonald has shown how our fundamental assumptions have propelled the courts into ever more resourceful strategies of statutory interpretation, but that those strategies will run out at some point. And it is at that point that we might have to look at how much sense and nonsense there is in our fears of these clauses.

It is not nonsense to want access to an independent judiciary. But must it always be access to a State Supreme Court or the High Court? The High Court was surely right in *Federal Commissioner of Taxation v Futuris Corp Ltd* (2008) 237 CLR 146 (*Futuris*) to see no "contradiction in terms" whatsoever. Taxpayers have full appeal rights to the Administrative Appeals Tribunal and the courts.

I will conclude with a couple of comments about McDonald's two models. He sets up two broad approaches. He calls them "doctrinal" and "institutional", although I suspect that it might be more straightforward to call his second model a "holistic approach". That is because it clearly represents a pragmatic and contextual adjustment of a Diceyan version of the rule of law.

McDonald's doctrinal model has the High Court looking for a hard-edged interpretation of privative clauses, and of course, they seem unable to find it. Frankly, I do not think the High Court was looking for that. With Commonwealth privative clauses, the High Court holds all the cards, and its most important card is jurisdictional error, generated by breaches of so-called "imperative duties or inviolable limitations or restraints"¹⁵ (mandatory rules). The content of jurisdictional error can, and indeed should be, adjusted to context. Some people think that *Plaintiff S157*'s joint judgment was fuzzy because it was written by a committee,¹⁶ or perhaps because its authors were typically hyper-cautious. I disagree. I think its fuzziness was intentional, and that that fuzziness is proving to have been a good strategy. The Commonwealth Parliament appears to have backed off trying to refine its tired old privative clause.

At the Commonwealth level, the focus is now shifting to McDonald's "no-invalidity" clauses, and to a third variant, which is a clause declaring that this or that administrative law principle simply does not apply to certain fields of administrative activity. It is too early to tell how this third variant will fare, although the drafters and the courts have been making heavy weather of it so far.¹⁷

As for the "no-invalidity" clause, I should note that McDonald's holistic approach makes a lot of sense, but only at the *start* of the court's interpretive process, when it has the choice of deciding whether to adopt a hostile or friendly interpretive stance to the clause in question. But having once decided that a particular "no-invalidity" clause poses no threat to the rule of law, and can therefore be read literally, it will be hard to reinterpret the clause if its context is subsequently amended without

¹⁴ The short account is in Aronson et al, n 7, p 990. The full story appears in Rawlings R, "Review, Revenge and Retreat" (2005) 68 Mod LR 378.

¹⁵ *R v Metal Trades Employers' Assn; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208 at 248 (Dixon J), quoted in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 489 (Gleeson CJ), 506 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

¹⁶ McHugh and Gummow JJ said in *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Lam* (2003) 214 CLR 1 at 23 that some values that the rule of law "reflects" (such as opposition to abuse of public power) have no "immediate normative value". Kirby, Hayne and Gaudron JJ joined their Honours in *Plaintiff S157*'s joint judgment.

¹⁷ The *Migration Act*'s successive attempts to replace the common law's procedural fairness principles with a statutory "code" (of sorts) have had a mixed success. The first draft lacked the clarity needed to exclude the principles: *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57. Adherence to the code under version 2 was a reasonably reliable shield from attack on procedural fairness grounds: *Minister for Immigration and Multicultural Affairs v Lat* (2006) 151 FCR 214, but the consequences of breaching of the code are still measured against the standards of procedural fairness: *Minister for Immigration and Citizenship v SZIAI* (2009) 83 ALJR 1123. Version 3 requires the code's procedures to be exercised in a way that is "fair and just", but it is difficult to see how that differs from the common law's procedural fairness: see *Minister for Immigration and Citizenship v SZMOK* (2009) 257 ALR 427.

any alteration to the clause itself. For example, the “no-invalidity” clause raised no judicial hackles in *Futuris* because the tax laws give very generous appeal rights in lieu of judicial review. Now imagine that a subsequent legislative amendment were to remove the appeal rights without touching the “no-invalidity” clause. It might, in that situation, be very hard to say that there has been an implied amendment of the “no invalidity” clause.¹⁸

By way of postscript, I should add that shortly before this issue of the *Public Law Review* was due to be printed, the High Court decided that a State privative clause could not validly stop that State’s Supreme Court from exercising its jurisdiction to grant judicial review for jurisdictional error.¹⁹ In effect, State Supreme Courts now have their own entrenched minimum provision of judicial review, with the result that a State Act’s protection of “purported” decisions will not preclude review if there was a jurisdictional error. The court emphasised that there could be no prescribed formula for determining whether an error was jurisdictional, because so much would depend upon context. Importantly, however, that context included concerns not only for the functionality of the relevant administrative or adjudicative structure, but also for the constitutional principles underpinning judicial review. The court left the detail of those principles for another day, so I can conclude by remarking that McDonald’s concerns will continue to resonate for some time.

¹⁸ A similar problem arose in *Farley v Secretary of State for Work and Pensions (No 2)* [2006] 1 WLR 1817. Magistrates could entertain a merits appeal against a finding that a non-custodial parent had breached a child support assessment, but they could not allow the assessment to be “questioned”. Lord Nicholls read that as excluding collateral challenge, partly because of the generous appeal rights. The fact that subsequent amendments had withdrawn those appeal rights for a period of five years could not alter his Lordship’s interpretation of the ban on “questioning”.

¹⁹ *Kirk v Industrial Relations Commission (NSW)* [2010] HCA 1.