DOES THE *AUSTRALIAN CONSTITUTION* PRECLUDE A VOID-FOR-VAGUENESS DOCTRINE?

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This article will offer an account of the Australian Constitution *in which the development of a United States ('US')-style void-for-vagueness doctrine, or at least one important aspect of it, is not precluded. To that extent, it takes issue with the High Court's recent and emphatic rejection of such a doctrinal possibility in* Brown v Tasmania. *Yet the proffered basis of that rejection was sound: without an Australian equivalent to the due process requirements of the Fifth and Fourteenth Amendments of the* United States Constitution, *there was no constitutional basis to support such a doctrinal development. But the analysis undertaken throughout this article highlights that the contemporary US void-for-vagueness doctrine has two aspects: fair notice and arbitrary enforcement. Due process is the justification for the former; separation of powers is the justification for the latter. The* Australian Constitution *recognises a qualified separation of powers due to its incorporation of the principle of responsible government. This principle — and the constitutional relationship it establishes between the legislative and executive arms of government — authorises (vague) statutes, which, in the US context, would invite arbitrary enforcement by police and prosecutors and so offend executive separation of powers. This aspect of the US doctrine has no constitutional basis in Australia. However, a vague or 'standardless' law also invites arbitrary enforcement if it requires a judge to effectively 'legislate' to determine a legal controversy. The argument offered is that the* Australian Constitution *does not preclude development of an Australian void-for-vagueness doctrine if necessary to maintain judicial separation of powers.*

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I Introduction

In the United States ('US'), the Supreme Court recognises a void-for-vagueness doctrine, which

> guarantees that ordinary people have 'fair notice' of the conduct a statute proscribes. … And the doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provides standards to govern the actions of police officers, prosecutors, juries, and judges.[1]

[1] *Sessions v Dimaya*, 584 US 148, 156 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ) (2018) ('*Dimaya*').

The void-for-vagueness doctrine is a constitutional doctrine. An impermissibly vague law 'violates the first essential of due process'[2] guaranteed by the Fifth and Fourteenth Amendments of the *United States Constitution*. Those Amendments state that no person shall be deprived of life, liberty or property without due process of law.[3] In addition, the arbitrary enforcement aspect of the doctrine implicates the separation of powers recognised by the *United States Constitution*. It does so

> by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries and judges [and] … [it] requir[es] that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.[4]

The US void-for-vagueness doctrine, then, has two prongs: fair notice and arbitrary enforcement. A law which fails to give fair notice *or* requires arbitrary enforcement in the relevant constitutional sense is impermissibly vague and invalid.[5] The upshot is that in the US 'constitutional order, a vague law is no law at all'.[6]

Recently, the High Court of Australia considered and rejected the possibility of a void-for-vagueness doctrine in Australian constitutional law.[7] It did so on the basis that '[t]he US doctrine … is rooted in the due process requirements of the Fifth and Fourteenth Amendments, neither of which has a counterpart in the *Australian Constitution*'.[8] Indeed, Andrew Inglis Clark proposed an amendment to the 1891 draft of the *Australian Constitution*, which sought adoption of a close approximation of the Fourteenth Amendment.[9] That proposal (which included a due process clause) was not adopted.[10] In *Brown v Tasmania* ('*Brown*'), moreover, Edelman J and Gordon J confirmed an established line of authority stating that it is the duty of the courts — which

[2] *Connally v General Construction Co*, 269 US 385, 391 (Sutherland J for the Court) (1926) ('*Connally*').

[3] *United States Constitution* amends V, XIV § 1.

[4] *Dimaya* (n 1) 156 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ) (citations omitted).

[5] Ibid 155–6 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ).

[6] *United States v Davis*, 588 US 445, 447 (Gorsuch J for the Court) (2019) ('*Davis*').

[7] *Brown v Tasmania* (2017) 261 CLR 328, 373 [147]–[148] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]), 469 [447] (Gordon J), 487 [507] (Edelman J) ('*Brown*').

[8] Ibid 373 [148] (Kiefel CJ, Bell and Keane JJ). See also at 469 [447] (Gordon J), 487 [507] (Edelman J).

[9] John M Williams, 'Race, Citizenship and the Formation of the Australian Constitution: Andrew Inglis Clark and the "14th Amendment"' (1996) 42(1) *Australian Journal of Politics and History* 10, 11 ('Race, Citizenship').

[10] Ibid 11, 14. See also below n 16 and accompanying text.

cannot be forsaken in the Australian constitutional order — to clarify the legal meaning of a statute:[11]

> Legislation, like language generally, is often unclear. Where a lack of clarity is exposed to the court, it is the task of the court to make it clear. In Australia, the resolution of statutory uncertainty is, emphatically, both the province and the duty of the judiciary.[12]

When statutory vagueness is problematic, interpretation — rather than invalidation — is the constitutional solution. That being so, on current and long-standing High Court authorities, the *Australian Constitution* precludes recognition of a void-for-vagueness doctrine.

The US void-for-vagueness doctrine has two prongs, as noted. The contemporary jurisprudence of the US Supreme Court has made clear that the primary constitutional justification for the arbitrary enforcement prong is separation of powers.[13] In doing so, the Supreme Court has invoked two aspects of separation of powers. The issue of arbitrary enforcement of vague laws concerns *executive* infringement of separation of powers by handing to police and prosecutors the responsibility for defining the proscribed conduct; and those 'standardless' laws which invite arbitrary enforcement also require judges to craft (and then apply) a legal rule which concerns *judicial* infringement of separation of powers.[14]

Yet the High Court has not considered this increasingly important aspect of — and justification for — the US void-for-vagueness doctrine in *Brown* or any other case. That is surprising. The framers of the *Australian Constitution* consciously incorporated a separation of powers doctrine based on its US counterpart;[15] and most relevantly, the text and structure of the judiciary

[11] See, eg, *Cann's Pty Ltd v Commonwealth* (1946) 71 CLR 210, 227–8 (Dixon J) ('*Cann's*'); *R v Holmes; Ex parte Altona Petrochemical Co Ltd* (1972) 126 CLR 529, 562 (Windeyer J) ('*Holmes*'); *Lee Vanit v The Queen* (1997) 190 CLR 378, 393–4 (Kirby J) ('*Lee Vanit*'); *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ) ('*Project Blue Sky*').

[12] *Brown* (n 7) 486 [506] (Edelman J), citing *Holmes* (n 11) 562 (Windeyer J). See also *Brown* (n 7) 471 [451]–[452] (Gordon J), citing *Project Blue Sky* (n 11) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ); *Kennedy v Lowe; Ex parte Lowe* [1985] 1 Qd R 48, 49 (Thomas J, Connolly J agreeing at 48, Derrington J agreeing at 50); *Lee Vanit* (n 11) 393–4 (Kirby J).

[13] See below Part IV(B).

[14] My thanks to one of the referees for highlighting the two aspects of separation of powers which the US Supreme Court has invoked in the arbitrary enforcement prong of its contemporary void-for-vagueness doctrine.

[15] See Sir Harry Gibbs, 'The Separation of Powers: A Comparison' (1987) 17(3) *Federal Law Review* 151, 152; William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the

provisions in the *Australian Constitution* and the *United States Constitution* are strikingly similar: a fact expressly acknowledged by architect of the Australian provisions Andrew Inglis Clark in a memorandum to Convention delegates accompanying his 1891 draft.[16] If the separation of powers provides the constitutional basis for one prong of the void-for-vagueness doctrine in the US, then it logically follows that this justification *may* be available in Australia as well.

This article will consider whether it is doctrinally *possible* for the separation of powers to underpin such a development in Australian constitutional law. Beyond the scope of this inquiry, however, is detailed treatment of the related issue as to whether the High Court ought to do so if it were possible. That is a complex inquiry in its own right. Suffice it to say that in the US, the void-for-vagueness doctrine has long attracted judicial and scholarly criticism.[17] Accordingly, what may be constitutionally permissible may not ultimately prove to be doctrinally prudent. Other than some preliminary thoughts offered in this regard towards the end of the article, that is an issue for another day. But central to my analysis is the proposition that *problematic* statutory vagueness is a serious and ongoing judicial concern in Australia. To this end, it will be suggested that Australian judges have long used a range of interpretive techniques *and* constitutional tools to cure problematic vagueness so far as is institutionally appropriate. If so, at the very least there is value in giving further consideration to whether the *Australian Constitution* precludes the development of an autochthonous void-for-vagueness doctrine.

In order to do so, the article proceeds as follows. Part II provides a brief outline of the nature of vagueness in law and those statutory contexts where it is problematic. The existing body of Australian law which has considered the issue of problematic statutory vagueness will be detailed in Part III. A particular focus of the analysis undertaken will be the recent High Court decision in *Brown*.[18] There, the Court provided a detailed explanation as to why the *Australian Constitution* is said to solely require an approach to vagueness of interpretation, rather than invalidation. *Brown* also illustrates the range of interpretive techniques *and* other constitutional tools used to cure problematic

Australian Constitution, and the Assist from Article III of the *Constitution of the United States*' (2009) 33(3) *Melbourne University Law Review* 718, 722.

[16] Reproduced in John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 69 ('*Documentary History*').

[17] See, eg, Note, 'Void for Vagueness: An Escape from Statutory Interpretation' (1948) 23(3) *Indiana Law Journal* 272, 285 ('An Escape').

[18] See especially Part III(C).

statutory vagueness. In Part IV, the 'twin constitutional pillars'[19] of the US doctrine — due process and separation of powers — are outlined. There, it will be explained how and why separation of powers has become an important justification for the contemporary void-for-vagueness doctrine in US constitutional law. In light of this US analysis, Part V then assesses whether there are comparable Australian foundations which could underpin the development of a similar constitutional doctrine. The *Australian Constitution* recognises a qualified separation of powers due to its incorporation of the principle of responsible government. This principle — and the constitutional relationship it establishes between the legislative and executive arms of government — authorises (vague) statutes which in the US context would invite arbitrary enforcement and so offend the *executive* separation of powers. That being so, it will be argued that no constitutional basis exists in Australia to recognise this aspect of the US void-for-vagueness doctrine. The *Australian Constitution* does not, however, preclude the development of an Australian species of the arbitrary enforcement prong of the US void-for-vagueness doctrine if necessary to maintain the *judicial* separation of powers. Indeed, the analysis undertaken will suggest the compatibility of such a development with the High Court's existing ch III jurisprudence. Part VI concludes.

II Statutory Vagueness

A *Vagueness in Law*

To consider the nature and role of a void-for-vagueness doctrine requires a basic understanding of what constitutes statutory vagueness and when such vagueness is problematic. As to the former, there exists in statutory interpretation an important conceptual and doctrinal distinction between an ambiguous and vague statute. John Manning and Matthew Stephenson have explained the basic distinction as follows:

> 'Ambiguity' refers to situations in which a word or phrase can plausibly convey more than one meaning. … 'Vagueness' refers to language that is open-ended, and requires judgment calls about borderline cases whose inclusion or exclusion cannot be determined by reference to semantic meaning.[20]

[19] *Davis* (n 6) 451 (Gorsuch J for the Court).

[20] John F Manning and Matthew C Stephenson, *Legislation and Regulation*: *Cases and Materials* (Foundation Press, 2nd ed, 2013) 172. See also Michael J Zydney Mannheimer, 'Vagueness as Impossibility' (2020) 98(6) *Texas Law Review* 1049, 1100–2.

The jurisprudential problem posed by vague statutes is that borderline cases cannot always be resolved by the diligent application of interpretive principle.[21] Consider, for example, a statutory requirement of 'reasonableness'. It provides a paradigmatic example of 'the really extravagant (and very common) instances of vagueness in law [which] are the general evaluative terms used to regulate diverse activities in a broad class'.[22] Timothy Endicott explains why and how this species of statutory indeterminacy is jurisprudentially problematic:

> The resulting vagueness in the law can generate serious and deep disputes over the principles of the standard in question. Because it may allow different, incompatible views as to the nature of the standard and the principles of its application (even among sincere and competent interpreters), it leads to the danger that its application will be incoherent. By that I mean that decisions made in a purported application of the norm will not be intelligible as the application of a single norm — a standard that can regulate behaviour.[23]

It is, however, important to recognise that vague statutes are commonplace; and they may not only be inevitable — '[l]egislation, like language generally, is often unclear'[24] — but sometimes valuable. Endicott, for example, persuasively argues that '[t]he rule of law *requires* vague regulation in every legal system. … That is because some forms of regulation cannot be performed at all by the use of precise rules'.[25] The use of such inherently vague concepts as 'reasonable grounds' in criminal statutes or 'reasonable foreseeability' in tort law provide relevant examples.[26] To do so 'enables the regulation of activities that simply cannot be regulated with precision'.[27] There are also certain factual and legal contexts where legislators may choose to incorporate a vague statutory term or norm to best further a statute's regulatory purpose. Consider an anti-avoidance

[21] See Joel S Johnson, 'Vagueness Avoidance' (2024) 110(1) *Virginia Law Review* 71, 74 ('Vagueness Avoidance').

[22] Timothy Endicott, 'The Value of Vagueness' in Vijay K Bhatia et al (eds), *Vagueness in Normative Texts* (Peter Lang, 2005) 27, 32.

[23] Ibid 32–3.

[24] *Brown* (n 7) 486 [506] (Edelman J).

[25] Endicott (n 22) 46 (emphasis in original).

[26] See, eg, *Criminal Code Act 1995* (Cth) s 12.3(4)(b); *Summary Offences Act 1988* (NSW) s 11(2) ('*NSW Offences Act*'); *Police Offences Act 1935* (Tas) s 13(3AAA) ('*Police Offences Act*'); *Summary Offences Act 1966* (Vic) s 6(1) ('*Vic Offences Act*'); *Wyong Shire Council v Shirt* (1980) 146 CLR 40, 47–8 (Mason J).

[27] Endicott (n 22) 45.

provision in a tax statute[28] or a statute which seeks to proscribe misleading or deceptive conduct in trade and commerce.[29] In these contexts, the range and variety of conduct which the law seeks to regulate is not only extraordinarily wide, but, at the time of legislating, it is often unknown and unknowable to legislators.[30] If so, it is neither possible nor desirable to frame precise legal rules to further the important regulatory purposes of such statutes.[31]

B *Problematic Statutory Vagueness*

There are contexts, however, where statutory vagueness poses a serious jurisprudential problem for judges and to whom the laws apply. In the US, as noted, constitutional due process is implicated if a vague statute may deprive a person of life, liberty, or property.[32] Therefore, statutory vagueness is constitutionally problematic when, for example, a law's uncertain application may have criminal or penal consequences.[33] An additional example is in the First Amendment context, where the uncertain scope and application of a vague statute may infringe a person's constitutional right to freedom of assembly.[34] Relatedly, as Erwin Chemerinsky has observed,

> [a]lthough all laws regulating conduct can be challenged under the due process vagueness doctrine, courts are particularly troubled about vague laws restricting speech out of concern that they will chill constitutionally protected speech.[35]

1 *Fundamental Rights and Freedoms*

Likewise, Australian courts have expressed vagueness concerns in contexts where the uncertain scope of a statute may infringe upon a fundamental right

[28] Judith Freedman, 'Defining Taxpayer Responsibility: In Support of a General Anti-Avoidance Principle' [2004] (4) *British Tax Review* 332, 345–7, 353–4. Cf GT Pagone, 'Taxation by Discretion' (2011) 22(4) *Public Law Review* 298, 300.

[29] See, eg, *Competition and Consumer Act 2010* (Cth) sch 2 s 18(1): 'A person must not, in trade or commerce, engage in conduct that is misleading or deceptive or is likely to mislead or deceive.'

[30] See Freedman (n 28) 343–6.

[31] See Endicott (n 22) 42–4. Yet the 'valuable' vagueness which characterises important tax rules can become problematic if the wording of the rule lacks any judicially ascertainable content: see, eg, *Giris Pty Ltd v Federal Commissioner of Taxation* (1969) 119 CLR 365, 372 (Barwick CJ).

[32] See above nn 2–3 and accompanying text.

[33] See *Kolender v Lawson*, 461 US 352, 357 (O'Connor J for the Court) (1983) ('*Kolender*').

[34] *Coates v City of Cincinnati*, 402 US 611, 614–15 (Stewart J for the Court) (1971).

[35] Erwin Chemerinsky, *Constitutional Law* (Aspen Publishers, 2nd ed, 2005) 1085.

or constitutionally protected freedom.[36] These concerns are heightened when that infringement attracts criminal or penal consequences.[37] Recently, for example, the Supreme Court of New South Wales invalidated penalty notices issued during COVID-19 lockdowns in Sydney.[38] It did so as s 20 of the empowering statute (*Fines Act 1996* (NSW) ('*Fines Act*')) required that a penalty notice issued had to specify the offence which the relevant person had committed.[39] In terms of this requirement, the New South Wales Supreme Court found that 'the statutory context and purpose favour[ed] an interpretation whereby the penalty notice offence must be *clearly and unambiguously* specified in the notice itself'.[40] In addition, the

> clearly punitive character of the penalty notice scheme under the *Fines Act* sets into motion a series of steps that could result in the eventual seizure of a person's property without compensation and a requirement to perform community service. The issuance of a penalty notice is a precondition to that process, which can interfere with property rights and personal liberty, which have been held to be fundamental at common law.[41]

It was held that 'in each case … the description [was] so vague that it render[ed] the notice invalid'.[42]

2 *Discretionary Power*

The High Court has also long expressed concerns with statutes which delegate lawmaking power or confer discretionary power in extremely broad and open-ended terms.[43] These inherently vague and increasingly common statutes may

[36] See, eg, *Brown* (n 7) 358–9 [84]–[88] (Kiefel CJ, Bell and Keane JJ), 412–13 [269]–[270] (Nettle J); *A-G (SA) v Adelaide City Corporation* (2013) 249 CLR 1, 31–3 [43]–[46] (French CJ) ('*Adelaide City*'); *Evans v New South Wales* (2008) 168 FCR 576, 596–7 [78]–[84] (French, Branson and Stone JJ) ('*Evans*').

[37] See *Scott v Cawsey* (1907) 5 CLR 132, 154–5 (Isaacs J); *Beckwith v The Queen* (1976) 135 CLR 569, 576 (Gibbs J); *DPP (Cth) v Keating* (2013) 248 CLR 459, 479 [48] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

[38] *Beame v Commissioner of Police (NSW)* (2023) 297 A Crim R 131, 136 [13], 137 [18], 154–5 [120] (Yehia J) ('*Beame*').

[39] Ibid 148 [84] (Yehia J).

[40] Ibid (emphasis in original).

[41] Ibid 148 [83] (Yehia J) (citations omitted).

[42] Ibid 153 [109] (Yehia J).

[43] See, eg, *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 101 (Dixon J, Rich J agreeing at 86–7), 121 (Evatt J) ('*Dignan*'). On how the High Court has explained the interaction between broadly framed statutory powers and the *Australian Constitution*: see generally Bret Walker and David Hume, 'Broadly Framed Powers and the

implicate core principles in the Australian constitutional order: federalism,[44] responsible government,[45] separation of powers[46] and the rule of law.[47]

Even so, the High Court has said that '[i]t is well settled that the structure of the *Australian Constitution* does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of its legislative power'.[48] As detailed in Part V below, this well-established proposition — which stems from the constitutional recognition of the principle of responsible government — is relevant to whether the *Australian Constitution* precludes an Australian species of the void-for-vagueness doctrine.

3 *Public Order Offences*

Of especial judicial concern in Australia are public order statutes, which are often problematically vague. Common at the state and local government level, these broadly defined offences have the capacity to limit freedom of speech, particularly political communication which is, prima facie, constitutionally protected.[49] For example, these statutes make it an offence to use insulting, offensive, obscene, indecent or abusive language in a public place within the

Constitution' in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2017) 144, 146–71.

[44] See, eg, *Dignan* (n 43) 101 (Dixon J), 121 (Evatt J) in the context of characterising Commonwealth legislation.

[45] See Secondary Legislation Scrutiny Committee, *Government by Diktat: A Call to Return Power to Parliament* (House of Lords Paper No 105, Session 2021–22) 11–12 [23] <https://publications.parliament.uk/pa/ld5802/ldselect/ldsecleg/105/105.pdf>, archived at <https://perma.cc/992E-7GDF>; Senate Standing Committee on Regulations and Ordinances, Parliament of Australia, *Parliamentary Scrutiny of Delegated Legislation* (Report, 3 June 2019) 40–2 [3.26]–[3.33] <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/DelegatedLegislation/report.pdf>, archived at <https://perma.cc/X38P-8H8X>; Cheryl Saunders, 'Separation of Legislative and Executive Power' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 617, 623–4.

[46] *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 512–13 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) ('*Plaintiff S157*'), citing *Dignan* (n 43); Denise Meyerson, 'Rethinking the Constitutionality of Delegated Legislation' (2003) 11(1) *Australian Journal of Administrative Law* 45, 53.

[47] See *Plaintiff M79/2012 v Minister for Immigration and Citizenship* (2013) 252 CLR 336, 366–7 [87] (Hayne J); Kenneth Hayne, 'Rule of Law' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 167, 187.

[48] *Plaintiff S157* (n 46) 512 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[49] See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*').

view or hearing of another person.[50] In *Coleman v Power*, the High Court had to consider whether this kind of inherently vague statute could be interpreted to further its public order purpose without impermissibly infringing freedom of (political) speech.[51] There is, indeed, a body of recent case law at the senior appellate level in Australia where courts are asked to 'remedy' (through interpretation or invalidation) the kind of problematic statutory vagueness which often arises with public order statutes.[52]

It is *Brown*, however, which best illustrates problematic statutory vagueness in the freedom of (political) speech or public order context. That case involved a Tasmanian statute which sought to prohibit protesters from entering places where logging operations were being undertaken by Forestry Tasmania.[53] Those operations took place in the Lapoinya Forest on Crown land where, '[h]istorically, members of the public ha[d] in fact enjoyed access'.[54] That public access was legally maintained by requiring Forestry Tasmania to '"perform its functions and exercise its powers so as to allow access to permanent timber production zone land for such purposes as are not incompatible with the management" of th[e] land'.[55] The places where 'protesters' were prohibited from entering were 'business premises' and the 'business access area'.[56] These key terms were defined as follows:

- Protester: 'a person engaging in a "protest activity", namely, an activity that takes place on business premises or a business access area in relation to business premises in furtherance of, or for the purposes of promoting awareness of or support for, an opinion or belief in respect of a political, environmental, social, cultural or economic issue'.[57]

[50] See,eg, *Moreland City Council General Local Law 2018* (Vic) cls 2.1(e)–(f); *NSW Offences Act* (n 26) s 4A(1); *Summary Offences Act 2005* (Qld) ss 6(1)–(3); *Police Offences Act 1935* (Tas) ss 12, 13(1)(b), (1)(d)–(e), (3AA)(a); *Vic Offences Act* (n 26) s 17(1).

[51] (2004) 220 CLR 1, 64 [146]–[147] (Gummow and Hayne JJ).

[52] See, eg, *Adelaide City* (n 36) 15–16 [2] (French CJ); *Evans* (n 36) 579 [4]–[5] (French, Branson and Stone JJ); *O'Flaherty v City of Sydney Council* (2013) 210 FCR 484, 489–90 [27]–[28] (Katzmann J); *Muldoon v Melbourne City Council* (2013) 217 FCR 450, 461–2 [22] (North J).

[53] *Brown* (n 7) 339 [1]–[4], 341 [7] (Kiefel CJ, Bell and Keane JJ).

[54] Ibid 386 [189] (Gageler J).

[55] Ibid.

[56] *Workplaces (Protection from Protesters) Act 2014* (Tas) ss 6(1)–(3) ('*Protesters Act*'), discussed in ibid 348–9 [40] (Kiefel CJ, Bell and Keane JJ), 380–1 [173]–[175] (Gageler J), 404 [250] (Nettle J), 436–7 [334]–[337], 456 [399]–[400] (Gordon J), 492 [522] (Edelman J).

[57] *Brown* (n 7) 339 [2] (Kiefel CJ, Bell and Keane JJ), citing *Protesters Act* (n 56) ss 4(1)–(2).

- Business premises: 'premises that are "forestry land" … [which is] "an area of land on which forest operations are being carried out"'.[58]
- Business access area: '"so much of an area (including but not limited to any road, footpath or public place), that is outside the business premises, as is reasonably necessary to enable access to an entrance to, or to an exit from, the business premises"'.[59]

The High Court had to determine whether the statute impermissibly burdened the implied constitutional freedom of political communication.[60] The plaintiffs (who were protesting the logging operations) were arrested for entering and refusing to leave a prohibited place.[61] Ultimately, Tasmania chose not to pursue the charges as they accepted that the plaintiffs were not within an area to which the statute applied.[62] The plurality noted that the withdrawal of the charges highlighted the 'difficulties relating to the identification of "forestry land" to which the [*Workplaces (Protection from Protesters) Act 2014* (Tas) ('*Protesters Act*')]' applied.[63] These difficulties arose because the definitions of 'business premises' and 'business access area' — and so the scope of the legislative prohibitions — were uncertain.[64] It was this statutory uncertainty — with its concomitant capacity to burden constitutionally-protected political communication — that was central to the plaintiffs' invalidity argument.[65] Four members of the Court noted that the plaintiffs did not invoke the US void-for-vagueness doctrine as a basis for their argument.[66] But as Gordon J observed, 'the plaintiffs' contentions about uncertainty and unlawful exercise had echoes' of that doctrine.[67] It was in this context that five members of the Court took the opportunity to consider (and reject) the possibility of an Australian void-for-

[58] *Brown* (n 7) 349 [45] (Kiefel CJ, Bell and Keane JJ), quoting *Protesters Act* (n 56) ss 3, 5(1)(b).

[59] *Brown* (n 7) 349 [46] (Kiefel CJ, Bell and Keane JJ), quoting *Protesters Act* (n 56) s 3.

[60] *Brown* (n 7) 340–1 [5] (Kiefel CJ, Bell and Keane JJ).

[61] See ibid 340 [4] (Kiefel CJ, Bell and Keane JJ).

[62] Ibid 343 [16] (Kiefel CJ, Bell and Keane JJ). Nonetheless, several members of the Court accepted that the plaintiffs had standing as they had 'a "real interest" in the question of the validity of the *Protesters Act* because, unless constrained by it, the plaintiffs intend to engage in conduct which it proscribes. They are therefore interested to know whether they are required to observe the law': at 343 [17] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]). See also at 484 [499] (Edelman J).

[63] Ibid 343 [17] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]).

[64] Ibid 347 [37] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]).

[65] See ibid 340–1 [5] (Kiefel CJ, Bell and Keane JJ).

[66] Ibid 373 [147] (Kiefel CJ, Bell and Keane JJ), 469 [446] (Gordon J).

[67] Ibid 469 [446].

vagueness doctrine.[68] The doctrinal reasons for doing so will be detailed in Part III below.

Nevertheless, the plurality *did* note the vagueness of the terms 'business premises' and 'business access area'.[69] This vagueness was constitutionally problematic as 'some lawful protests will be prevented or discontinued and protesters will be deterred from further protesting'.[70] The plurality further noted that it would also be

> likely to work against a protester in seeking a remedy by means of judicial review of a direction made to leave the area where they were protesting. It is one thing for lawyers advising the government to determine whether it can be proved that a protester was in an area to which the *Protesters Act* applied. It is another for protesters to have a direction ruled unlawful in time to return to continue their protest. The result will be that protests will be stifled when they should not be.[71]

This highlights an important consequence of problematic statutory vagueness. As a practical and systemic matter, the rule of law is undermined if a citizen must go to court to establish the lawful scope of a statute before exercising a fundamental right or constitutional freedom.[72] That is plainly unsatisfactory in a legal system where 'the rule of law forms an assumption' upon which the *Australian Constitution* was framed.[73] One of its core and uncontroversial characteristics is that the law should be knowable:

> The first reason for this is a pragmatic one: if the people who are supposed to be bound by the law cannot know what it is, then they are less likely to follow it. The second is a point of principle. Law is a tool of governance that is — or at least, should strive to be — distinct from coercion or brute force. Governing through law acknowledges that the people are autonomous agents who are entitled to know what the law is, and choose whether to obey it.[74]

[68] See below nn 128–9 and accompanying text.

[69] *Brown* (n 7) 357 [78] (Kiefel CJ, Bell and Keane JJ).

[70] See ibid 356 [77] (Kiefel CJ, Bell and Keane JJ).

[71] Ibid 357 [78].

[72] See Freedman (n 28) 345–6.

[73] *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon J) ('*Communist Party Case*'). See also Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 59, 73–6 ('*Rule of Law*').

[74] Lisa Burton Crawford and Dan Meagher, 'Statutory Precedents under the "Modern Approach" to Statutory Interpretation' (2020) 42(2) *Sydney Law Review* 209, 234–5.

C *Provisional Conclusion*

In any event, as detailed further in Part III below, the High Court invalidated the statute in *Brown*.[75] It did so on account of the statute's impermissible burdening of the constitutional implied freedom of political communication, not on an independent ground of vagueness.[76] Both aspects of this reasoning are relevant for the analysis and argument which is to follow. It illustrates the willingness of the High Court to use interpretive technique and constitutional principle to remedy problematic statutory vagueness. It also suggests workable criteria for identifying when statutes are problematic in the Australian context. Relevantly, if the uncertain scope of a statute may infringe a fundamental right or constitutional freedom, then it is prima facie problematic. The courts are, then, presumptively justified in seeking to cure that vagueness through interpretation or invalidation if required to vindicate constitutional principle.

To be sure, statutory vagueness is contextual and a matter of degree; and some instances of vagueness are not only unproblematic but desirable in terms of legislative design.[77] So if, for example, the text and wider context of a tax statute make clear that its legitimate purpose(s) can be sensibly advanced only by the incorporation of a vague term or concept, then there is no justification for an interpretive 'remedy'.[78] Indeed, fidelity to the modern approach to statutory interpretation requires the contrary.[79] To give a strict construction would amount to judicial rewriting (not interpretation) of the tax statute, even though the fundamental right to property is, necessarily, engaged.

III Vagueness in the Australian Constitutional Context

A *The Orthodox Position*

Approximately eight months after its first sitting, O'Connor J made clear the High Court's judicial duty regarding statutes:

> I do not think it can be too strongly stated that our duty in interpreting a Statute is to declare and administer the law according to the intention expressed in the Statute itself. … The intention of the enactment is to be gathered from its words.

[75] See especially below n 142 and accompanying text.

[76] See below n 143 and accompanying text.

[77] See above nn 28–31 and accompanying text.

[78] See Freedman (n 28) 345.

[79] See, eg, *CIC Insurance Ltd v Bankstown Football Club Ltd* (1997) 187 CLR 384, 408 (Brennan CJ, Dawson, Toohey and Gummow JJ), cited in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362, 368 [14] (Kiefel CJ, Nettle and Gordon JJ), 374 [36] (Gageler J); *Project Blue Sky* (n 11) 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

> If the words are plain, effect must be given to them; if they are doubtful, the intention of the legislature is to be gathered from the other provisions of the Statute aided by a consideration of surrounding circumstances.[80]

Then, nearly four years later, in 1908, the Court considered a statute with 'provisos [that] [we]re no doubt clumsily drawn'.[81] Yet again, O'Connor J was clear as to the Court's duty: 'The general rule of interpretation, no doubt, is that meaning must be given, if possible, to every word of a Statute.'[82] The qualification 'if possible' did not imply that there may be contexts where it would be impossible for judicial interpretation to determine the legal meaning of a statute.[83] Rather, it referred to the Court's recognition (triggered by the relevant statute) 'that the legislature does sometimes repeat itself, and does not always convey its meaning in the style of literary perfection'.[84]

In the wider common law world at this time there were authorities suggesting that certain species of statutory indeterminacy may trigger invalidity. For example, the seminal 1898 English case of *Kruse v Johnson* ('*Kruse*')[85] was decided just prior to Federation and the High Court's establishment in 1903.[86] There, Lord Russell CJ famously outlined the test for unreasonableness in the context of delegated legislation.[87] The case is also significant for the suggestion of Mathew J that a valid by-law must 'have two properties — it must be certain, that is, it must contain adequate information as to the duties of those who are to obey, and it must be reasonable'.[88] Additionally, the US Supreme Court had formally recognised and applied the void-for-vagueness doctrine in its 1914 decision of *International Harvester Co of America v Kentucky* ('*International Harvester*').[89] The constitutional basis of that decision was that 'the statute … prescribed no standard of conduct that it was possible to know [and] violated the fundamental principles of justice embraced in the conception of due process in law'.[90] There are earlier cases

[80] *Tasmania v Commonwealth* (1904) 1 CLR 329, 358–9.

[81] *Brisbane City Council v A-G (Qld)* (1908) 5 CLR 695, 720 (O'Connor J).

[82] Ibid.

[83] See ibid.

[84] Ibid.

[85] [1898] 2 QB 91 ('*Kruse*').

[86] See Hayne (n 47) 173; *Judiciary Act 1903* (Cth) s 4, as enacted.

[87] See *Kruse* (n 85) 99–100.

[88] Ibid 108.

[89] 234 US 216, 221–4 (Holmes J for the Court) (1914) ('*International Harvester*').

[90] *Collins v Kentucky*, 234 US 634, 638 (Hughes J for the Court) (1914) ('*Collins*'), discussing ibid.

where state and circuit courts refused to apply statutes that were unintelligible.[91] *International Harvester* was, however, the first time the Supreme Court invalidated a vague statute on due process grounds.[92]

There is no case law to suggest that the early High Court considered certainty of delegated legislation to be a condition of its validity. Indeed, Dixon J expressly rejected that proposition in 1945 in *King Gee Clothing Co Pty Ltd v Commonwealth* ('*King Gee*').[93] *King Gee* is also significant because it represents the High Court's first direct consideration of the US void-for-vagueness doctrine and its (in)applicability in the Australian constitutional context.[94] In *King Gee*, the relevant regulations empowered the Commissioner of Prices in the exercise of discretion to fix and declare a maximum price for certain items of men's clothing during wartime.[95] The impugned order giving effect to the Commissioner's exercise of discretion outlined a method for calculating that fixed price.[96] It was problematic as the basis of that price involved matters which were not 'ascertainable fact[s] or figure[s] but … matter[s] of estimate'.[97] In Dixon J's view, '[w]hen that is done no certain objective standard is prescribed; it is not a calculation and the result is not a price fixed or a fixed price'.[98] The Court deemed the order invalid as a consequence.[99] In the course of doing so, Dixon J stated two important propositions of present relevance. The first, as noted, concerned the uncertainty proposition offered in *Kruse*.[100] After citing the relevant passage of Mathew J and noting 'that in America, too, certainty has come to be required of a municipal by-law or ordinance', Dixon J stated that he could not 'see how this history warrants the courts in adopting as a general rule of law the proposition that subordinate or delegated legislation is invalid if

[91] See, eg, *United States v Sharp*, 27 Fed Cas 1041, 1043 (Washington J) (Pa Cir, 1815) ('*Sharp*'), discussed in *Johnson v United States*, 576 US 591, 615 (Thomas J) (2015) ('*Johnson*'). See also generally Emily M Snoddon, 'Clarifying Vagueness: Rethinking the Supreme Court's Vagueness Doctrine' (2019) 86(8) *University of Chicago Law Review* 2301, 2316–23.

[92] Note, 'An Escape' (n 17) 279.

[93] (1945) 71 CLR 184, 194 ('*King Gee*'), discussed in Dennis Pearce, 'The Uncertainty of Certainty in Legislation' in Greg Weeks and Matthew Groves (eds), *Administrative Redress in and out of the Courts: Essays in Honour of Robin Creyke and John McMillan* (Federation Press, 2019) 255, 258–9.

[94] See *Brown* (n 7) 373 [148] (Kiefel CJ, Bell and Keane JJ). See also 487 [507] (Edelman J), citing *King Gee* (n 93) 195 (Dixon J).

[95] *King Gee* (n 93) 188 (Rich J), 200, 204 (Williams J).

[96] Ibid 190–1 (Starke J).

[97] Ibid 197 (Dixon J).

[98] Ibid.

[99] Ibid 190 (Rich J), 193 (Starke J), 200 (Dixon J), 209 (Williams J).

[100] See above n 88 and accompanying text.

uncertain'.[101] In terms of the impugned order, 'uncertainty, as a test of validity, arose from the nature of the power. On this footing, in the end, the question comes back to *ultra vires*'.[102] In other words, as the relevant regulations conferred a power to set a *fixed* price, the impugned order required this species of certainty to be a valid exercise of the Commissioner's power. The second, related proposition concerned the US void-for-vagueness doctrine, where Dixon J noted that '[o]ur [*Australian*] *Constitution* contains no due process clause and we cannot follow the jurisprudence of the United States by saying that uncertainty violates a constitutional safeguard'.[103] In the result, once 'the meaning of those [impugned] provisions [had been] ascertained, it [was] found that there [was] no independent question of uncertainty or vagueness as a ground affecting the validity of the Order'.[104]

The rejection of the void-for-vagueness doctrine in Dixon J's judgment in the Australian constitutional context was brief but emphatic. Without a due process clause, there was no constitutional foundation upon which such a doctrine could be developed. That reasoning, though perfunctory, was sound. It was a conscious decision by the framers of the *Australian Constitution* to reject a US-style constitutional bill of rights including, most relevantly, an equivalent of the Fourteenth Amendment.[105] The framers were concerned that existing colonial legislation, which discriminated on the basis of race, would be imperilled by the implementation of an Australian version of the Fourteenth Amendment.[106] In a speech delivered to the American Bar Association in Detroit on 26 August 1942 — shortly before *King Gee* was decided — Sir Owen Dixon relevantly observed:

> In this country men have come to regard formal guarantees of life, liberty and property against invasion by government, as indispensable to a free constitution. Bred in this doctrine you may think it strange that in Australia, a democracy if ever there was one, the cherished American practice of placing in the fundamental law guarantees of personal liberty should prove unacceptable to our constitution makers. But so it was. … With the probably unnecessary exception

[101] Ibid 195, citing *Kruse* (n 85) 108.

[102] Ibid 195–6 (Dixon J).

[103] Ibid 195 (Dixon J), citing *Connally* (n 2); *Yu Cong Eng v Trinidad*, 271 US 500 (1926); *Cline v Frink Dairy Co*, 274 US 445, 458–9 (Taft CJ for the Court) (1927); *Champlin Refining Co v Corporation Commission of Oklahoma*, 286 US 210, 243 (Butler J for the Court) (1932); *Lanzetta v New Jersey*, 306 US 451, 453 (Butler J for the Court) (1939).

[104] *King Gee* (n 93) 196 (Dixon J).

[105] See Williams, 'Race, Citizenship' (n 9) 11, 14; Williams, *Documentary History* (n 16) 708–9.

[106] See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 686–7 (Isaac Isaacs); Williams, 'Race, Citizenship' (n 9) 19.

> of the guarantee of religious freedom, our constitution makers refused to adopt any part of the *Bill of Rights* of 1791 and *a fortiori* they refused to adopt the Fourteenth Amendment. It may surprise you to learn that in Australia one view held was that these checks on legislative action were undemocratic, because to adopt them argued a want of confidence in the will of the people.[107]

In any event, one year after *King Gee* was decided — once again in the context of delegated legislation — Dixon J confirmed and expanded upon the relevant interpretive propositions in *Cann's Pty Ltd v Commonwealth*:

> [T]o resolve ambiguities and uncertainties about the meaning of any writing is a function of interpretation and, unless the power under which a legislative or administrative order is made is read as requiring certainty of expression as a condition of its valid exercise … the meaning of the order must be ascertained according to the rules of construction and the principles of interpretation as with any other document.[108]

Since these seminal decisions, the constitutional orthodoxy in Australia that the judicial duty is to *always* determine the legal meaning of a statute, irrespective of uncertainty or vagueness, has been routinely confirmed.[109]

B *The Outlier*

The only clear outlier in this regard is the 2015 decision of the Victorian Court of Appeal in *Director of Public Prosecutions (Vic) v Walters* ('*Walters*').[110] There,

[107] Sir Owen Dixon, 'Two Constitutions Compared' in Judge Woinarski (ed), *Jesting Pilate: And Other Papers and Addresses* (William S Hein, 2nd ed, 1997) 100, 100–2.

[108] *Cann's* (n 11) 227–8.

[109] See, eg, *Pollentine v Bleijie* (2014) 253 CLR 629, 645 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ) and the cases cited at n 11 above. By way of contrast, it is interesting to note that a doctrine or principle of uncertainty of the kind eschewed in statutory interpretation exists in the private law context of contract and operates to void a clause so characterised: see, eg, *Whitlock v Brew* (1968) 118 CLR 445, 460–1 (Taylor, Menzies and Owen JJ); *Bellevue Station Pty Ltd v Consolidated Pastoral Co Pty Ltd* [2024] QCA 47, [18] (Dalton JA, Mullins P agreeing at [1]). Yet it is said that the modern approach to uncertainty in contract law involves a judicial willingness to resolve that uncertainty through interpretation if at all possible to uphold 'contracts, especially commercial arrangements': JW Carter, *Cases and Materials on Contract Law in Australia* (LexisNexis Butterworths, 7th ed, 2019) 84 [4-18], citing *Upper Hunter County District Council v Australian Chilling and Freezing Co Ltd* (1968) 118 CLR 429.

[110] (2015) 49 VR 356 ('*Walters*'). But see the following dicta of Sholl J in *Parry v Osborn* [1955] VLR 152, 154:

> The principles applicable to the interpretation of an ambiguous or uncertain statute are thus also applicable to regulations of the kind here under discussion, save that, if no certain

Maxwell P, Redlich, Tate and Priest JJA held that statutory provisions which provided for median baseline sentencing were 'incapable of being given any practical operation'.[111] That was so because the statute specified an objective (that the median sentence for the relevant offence will be 10 years imprisonment)[112] but was 'silent as to the means by which' that objective was to be achieved.[113] Consequently, it was held that

> the defect in the legislation [was] incurable. Parliament did not provide any mechanism for the achievement of the intended future median, and the Court [of Appeal] ha[d] no authority to create one … [t]o do so would be to legislate, not to interpret.[114]

The Court of Appeal considered that its 'conclusion follow[ed] from the application of established rules of interpretation'.[115] The orthodoxy of those rules was made clear by established High Court authorities to which the judgment referred.[116] Indeed, the Court of Appeal offered a constitutional (separation of powers) justification for its incapacity to cure the statute's unintelligibility:

> [T]he court has no power to fill a gap in a statute or otherwise to read in words which the legislature has not used. The limits of the judicial role require that

meaning whatever can be attributed to some provision of an Act itself, so that it is unintelligible in relation to the subject matter, the provision may, in such an extreme case, be regarded simply as inoperative; whereas, if a provision of a regulation is of that character, it may be held *ultra vires*.

111 *Walters* (n 110) 360 [9] (Maxwell P, Redlich, Tate and Priest JJA).

112 Ibid 359 [5], 366 [32] (Maxwell P, Redlich, Tate and Priest JJA). See also *Sentencing Act 1991* (Vic) ss 5A(1)(b), (3)(a), as repealed by *Sentencing Amendment (Sentencing Standards) Act 2017* (Vic) s 5.

113 It is, however, worth noting that the problematic sentencing provisions in *Walters* (n 110) were not 'vague' in the relevant sense. The 'uncertainty' problem was that these provisions provided no mechanism for determining the future median sentence for the relevant offence: see ibid 359 [5]–[6] (Maxwell P, Redlich, Tate and Priest JJA). The Court of Appeal was nonetheless required to sentence the offender in accordance with Victoria's baseline sentencing guidelines: see at 360 [8], 373 [59]–[62] (Maxwell P, Redlich, Tate and Priest JJA). The statutory uncertainty was therefore due to its incompleteness, not vagueness. My thanks to Nathan van Wees for this point.

114 Ibid 360 [8] (Maxwell P, Redlich, Tate and Priest JJA).

115 Ibid 373 [62] (Maxwell P, Redlich, Tate and Priest JJA).

116 Ibid 373 [62] n 40, citing *Zheng v Cai* (2009) 239 CLR 446, 455–6 (French CJ, Gummow, Crennan, Kiefel and Bell JJ); *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, 666 [97] (Gummow, Hayne, Crennan and Bell JJ).

> courts 'abstain from any course which might have the appearance of judicial legislation'.[117]

Notably, Whelan JA dissented, stating that he was 'unable to accept that the legislation is meaningless or is incapable of practical application'[118] notwithstanding the problematic nature of the relevant provisions:

> It is true that the concept of the 'median' in the context of sentencing is beset with uncertainty and difficulty. By its very nature the median is dependent on other cases. The legislation sets no period for the determination of the median. The effect of any particular sentence on the future median is incapable of accurate prediction.[119]

The *Walters* decision has attracted criticism. That is unsurprising when one considers its interpretive and doctrinal novelty in the Australian constitutional context. Former High Court Justice Kenneth Hayne did so extra-judicially in his chapter titled 'Rule of Law' for *The Oxford Handbook of the Australian Constitution*. He cited *Walters* as '[t]he decision to the contrary'[120] to the following established proposition:

> [C]ourts cannot decline to enforce the provisions of a statute (if those provisions are not held to be invalid) on the basis that their meaning is too difficult to discern. In particular, Australia has not developed any doctrine that a statute may be held 'void for vagueness'. And unlike the *Constitution* of the United States where the due process clause is seen to support such a doctrine, there is no Australian constitutional provision on which such a doctrine could be founded.[121]

Relevantly, the joint judgment in *Walters* 'cite[d] no authority and state[d] no argument from accepted principles which justifie[d] the result reached in that case'.[122] That was certainly true. Despite its interpretive and doctrinal novelty, one aspect of *Walters* — and the proposition that it stated 'no argument from accepted principles'[123] to justify the finding reached — is worth noting here. The joint judgment did state that it had 'no power to fill a gap in a statute or

117 *Walters* (n 110) 359 [4] (Maxwell P, Redlich, Tate and Priest JJA), quoting *Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, 592 (Lord Nicholls).

118 Ibid 391 [141].

119 Ibid 392 [146] (Whelan JA).

120 Hayne (n 47) 176.

121 Ibid.

122 Ibid 176 n 48.

123 Ibid.

otherwise to read in words which the legislature has not used'.[124] That is to state an interpretive argument from a constitutional principle: the separation of powers. Even so, Hayne is correct to assert that such an argument did not proceed from *accepted* principles. The proposition that the separation of powers provides an independent basis to invalidate a statute for uncertainty or vagueness has not been accepted in Australian law. It is that proposition and possibility which is explored in Part V below.

C *The Orthodoxy Confirmed*

In 2017, the High Court took the opportunity in *Brown* to confirm the relevant interpretive principles to be applied in Australia when faced with an uncertain or vague statute. To recall, the Court had to determine whether a Tasmanian statute (the *Protesters Act*), which prohibited protesters from entering 'business premises' and the 'business access area' (ie 'forestry land' where logging was being undertaken), impermissibly burdened the implied constitutional freedom of political communication.[125] As the joint judgment noted, the *Protesters Act* was problematically vague:

> The principal problem, practically speaking, for both police officers exercising powers under the *Protesters Act* and protesters is that it will often not be possible to determine the boundaries of 'business premises' or a 'business access area'. That problem arises because the term 'business premises' is inapt for use with respect to forestry land. The definition of 'business premises' with respect to forestry land does not provide much guidance. The question simply becomes whether a protester is in an area of land on which forest operations (a widely defined term) are being carried out. The vagueness of the definition of 'business access area' compounds the problem.[126]

In any event, the Court's reasoning in *Brown* is notable for at least three reasons. First, it is the High Court's most detailed examination of the US void-for-vagueness doctrine and why the *Australian Constitution* precludes an Australian equivalent. The judgments of Kiefel CJ, Bell and Keane JJ, Gordon J and Edelman J expressly engaged with the issue.[127] Common to each was the identification of the US doctrine with 'the due process requirements of the Fifth and Fourteenth Amendments, neither of which has a counterpart in the

[124] *Walters* (n 110) 359 [4] (Maxwell P, Redlich, Tate and Priest JJA).

[125] See above n 60 and accompanying text.

[126] *Brown* (n 7) 354 [67] (Kiefel CJ, Bell and Keane JJ).

[127] Ibid 373–4 [147]–[150] (Kiefel CJ, Bell and Keane JJ), 469–71 [446]–[453] (Gordon J), 487–8 [507]–[509] (Edelman J).

Australian Constitution'.[128] The upshot, as Gordon J stated, was that '[o]nce it is accepted, as it must be, that Australia knows no doctrine of statutory uncertainty, there is no legal basis for importing a doctrine of vagueness by speaking of a law having "that quality"'.[129]

Second, *Brown* confirmed the Australian constitutional orthodoxy regarding the judicial duty to *always* interpret and apply statutes. As Edelman J observed: 'Where a lack of clarity is exposed to the court, it is the task of the court to make it clear. In Australia, the resolution of statutory uncertainty is, emphatically, both the province and the duty of the judiciary.'[130] The judgment of Gordon J quoted the seminal passages from *King Gee* and *Cann's*, and traced the consistent line of Australian authority which had established that the 'duty remains constant, regardless of whether the words of a statutory provision are uncertain or unclear. Courts cannot abandon the task.'[131] The only (but important) qualifiers to this orthodoxy Gordon J flagged in *Brown* were as follows:

> There may be a point at which a law appears to be expressed with such indefinite width, or to delegate power to such an extent, that it invites judicial consideration of questions of the kind discussed by the plurality in *Plaintiff S157/2002 v The Commonwealth*, including whether the law truly provides for 'a rule of conduct or a declaration as to power, right or duty'.[132]

In a similar vein, Edelman J suggested that

> if it were concluded that Parliament's 'attempt … to frame a rule' had failed, then any attempt to construe the legislation by substituting some other rule might, in Sedgwick's words, require the judge to exercise 'truly legislative power'.[133]

One might reasonably observe here the parallel between this proposition and the argument offered by the joint judgment in *Walters*. It also echoes other important and orthodox statements regarding the limits of judicial

[128] Ibid 373 [148] (Kiefel CJ, Bell and Keane JJ). See also 469–70 [446]–[447] (Gordon J), 487 [507] (Edelman J).

[129] Ibid 471 [453].

[130] Ibid 486 [506]. See also at 470–1 [449]–[452] (Gordon J).

[131] Ibid 470–1 [450]–[452].

[132] Ibid 475 [468], quoting *Commonwealth v Grunseit* (1943) 67 CLR 58, 82 (Latham CJ) ('*Grunseit*').

[133] *Brown* (n 7) 481 [489], quoting Theodore Sedgwick, *A Treatise on the Rules Which Govern the Interpretation and Application of Statutory and Constitutional Law* (John S Voorhies, 1857) 294. See James Stellios, *Zines and Stellios's the High Court and the Constitution* (Federation Press, 7th ed, 2022) 223 n 40, discussing *Brown* (n 7) 481 [489], 486 [505] (Edelman J).

interpretation in the Australian constitutional context.[134] Of particular relevance is Gummow J's observation in *Momcilovic v The Queen* ('*Momcilovic*') that '[n]o doubt the Parliament of the Commonwealth cannot delegate to courts exercising the judicial power an authority conferring a discretion or choice as to the content of a federal law'.[135]

Finally, the judgments illustrate how interpretive technique *and* constitutional principle can be used to cure problematic statutory vagueness in Australia. For example, Edelman J held in dissent that the statute did not offend the implied freedom.[136] In order to do so he narrowly construed the statutory terms 'business premises' and 'business access areas'.[137] Relevantly, his Honour stated that 'general principles of construction support this narrow approach to the *Protesters Act* to create a regime which is intelligible and capable of practical operation. One of those principles is an expectation of clarity in penal provisions'.[138] Another 'even more fundamental' principle was the principle of legality,[139] which strongly presumes that when Parliament legislates it does not intend to infringe fundamental rights and freedoms unless that intention is 'clearly manifested by unmistakable and unambiguous [statutory] language'.[140] As '[o]ne fundamental common law freedom is freedom of speech', the application of the principle of legality 'also supports the narrow approach confining the *Protesters Act* to independently unlawful conduct relating to forest operations'.[141]

On the other hand, the majority — comprising Kiefel CJ, Bell and Keane JJ's joint judgment, alongside Gageler J and Nettle J's separate judgments — invalidated the *Protesters Act*.[142] They did so, as noted, as they held it offended

134 See, eg, *Momcilovic v The Queen* (2011) 245 CLR 1, 45 [40] (French CJ) ('*Momcilovic*'), citing *Minister for Immigration and Citizenship v SZJGV* (2009) 238 CLR 642, 651–2 [9] (French CJ and Bell J).

135 *Momcilovic* (n 134) 92 [169].

136 *Brown* (n 7) 482 [491]–[492].

137 Ibid 494–500 [535]–[549] (Edelman J).

138 Ibid 496–7 [542] (Edelman J).

139 Ibid 498 [544] (Edelman J).

140 *Coco v The Queen* (1994) 179 CLR 427, 437 (Mason CJ, Brennan, Gaudron and McHugh JJ). Brendan Lim has suggested that the application of the principle of legality is — or ought to be — primarily concerned with vague statutes which confer power on the executive and limit its capacity to infringe fundamental rights and principles: Brendan Lim, 'Executive Power and the Principle of Legality' in Janina Boughey and Lisa Burton Crawford (eds), *Interpreting Executive Power* (Federation Press, 2020) 76, 78.

141 *Brown* (n 7) 498 [544]–[545] (Edelman J).

142 Ibid 375 [154] (Kiefel CJ, Bell and Keane JJ), 397 [232], [234] (Gageler J), 425 [295] (Nettle J).

the implied freedom of political communication.[143] This constitutional principle will invalidate a statute if in its legal or practical operation it burdens political communication in a manner which is not reasonably appropriate and adapted to advance a legitimate purpose.[144] Importantly, the vagueness of the statutory terms 'business premises' and 'business access areas' fed into the principle's application, as Kiefel CJ, Bell and Keane JJ explained:

> Under Australian law a vague law is not invalid on that account alone, but laws which have that quality and which, in their practical operation and effect, burden the freedom must be justified according to the questions in *Lange* if they are to survive challenge. This does not involve the importation of foreign constitutional doctrine.[145]

In the doctrinal context of the implied freedom, Nettle J also recognised that the vague or uncertain application of a statute *is* relevant to its constitutional validity: 'the terms of the *Protesters Act* are of such breadth that the likelihood of them so operating in practice as to burden the implied freedom to a significant extent cannot be discounted'.[146] To assess validity, a court must fix the *practical operation and effect* of an impugned statute in order to determine whether the burden placed on constitutionally protected political speech can be justified.[147] The majority held that the *extent* of the burden on the implied freedom — occasioned by the breadth and uncertain application of the *Protesters Act* — could not be justified.[148]

The important point for present purposes is the judicial willingness in Australia to cure problematic statutory vagueness to the extent doctrinally and institutionally possible. In *Brown*, that was achieved by constitutional principle/invalidation (majority judges)[149] and interpretive principle/interpretation (minority judges).[150] Yet the Australian constitutional

143 Ibid 375 [154] (Kiefel CJ, Bell and Keane JJ), 397 [234] (Gageler J), 425 [295] (Nettle J).

144 *Lange* (n 49) 567–8 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

145 *Brown* (n 7) 373 [149].

146 Ibid 412–13 [269]. See also Rosalind Dixon, 'Calibrated Proportionality' (2020) 48(1) *Federal Law Review* 92, 106.

147 *Brown* (n 7) 351 [61] (Kiefel CJ, Bell and Keane JJ), 398–9 [237] (Nettle J).

148 See ibid 374 [152] (Kiefel CJ, Bell and Keane JJ), 397 [232] (Gageler J), 425 [295] (Nettle J).

149 See ibid 374 [152], 375 [154] (Kiefel CJ, Bell and Keane JJ, Nettle J agreeing at 398 [236]), 397 [232], [234] (Gageler J).

150 Ibid 458–9 [408], 471 [449]–[452] (Gordon J), 482 [491], 496–7 [542], 498 [544] (Edelman J).

orthodoxy confirmed in *Brown* is that interpretation — rather than invalidation — remains the primary remedy for vague statutes.[151]

In the US, courts will also use interpretation to cure problematic statutory vagueness where possible.[152] And in most cases, it is possible.[153] Indeed, prior to the US Supreme Court's recognition and application of a void-for-vagueness doctrine in *International Harvester*, the US interpretive approach resembled the Australian orthodoxy outlined above.[154] It is to these points and the place of the void-for-vagueness doctrine in contemporary US constitutional law that I now turn.

IV The Constitutional Basis of the Void-for-Vagueness Doctrine in Contemporary US Law

A *Twin Constitutional Pillars: Due Process and Separation of Powers*

The aim of this Part is to explain the constitutional foundations and doctrinal parameters of the void-for-vagueness doctrine in contemporary US law. It is well understood that the requirement of constitutional due process is one of those foundations.[155] As detailed below, however, the legitimacy of this requirement is not universally accepted by the Supreme Court. Despite this, the Supreme Court has come to emphasise that the void-for-vagueness doctrine 'rests on the twin constitutional pillars of due process and separation of powers'.[156] Due process underpins the first doctrinal prong of fair notice and separation of powers underpins the second prong of arbitrary enforcement.[157] The separation of powers has become increasingly prominent in how the Supreme Court has explained and justified its contemporary void-for-vagueness doctrine.[158] Three aspects of this doctrine detailed below will shed light on why this has occurred. Before doing so, however, it is worth briefly noting what US courts did (mostly) prior to the recognition of the void-for-

[151] See above nn 130–1 and accompanying text.

[152] See, eg, *Skilling v United States*, 561 US 358, 405–6 (Ginsburg J for the Court) (2010) ('*Skilling*'), citing *Hooper v California*, 155 US 648, 657 (White J for the Court) (1895) ('*Hooper*').

[153] See, eg, *Dubin v United States*, 599 US 110, (Sotomayor J for the Court) (2023) ('*Dubin*'); *Skilling* (n 152) 405–6 (Ginsburg J for the Court), citing *Hooper* (n 152) 657 (White J for the Court). See also Johnson, 'Vagueness Avoidance' (n 21) 95–102.

[154] See *Hooper* (n 152) 657 (White J for the Court).

[155] *Davis* (n 6) 451 (Gorsuch J for the Court).

[156] Ibid.

[157] Ibid.

[158] See below Part IV(B).

vagueness doctrine and how most cases of problematic statutory vagueness are still resolved.

The Supreme Court first recognised and applied a void-for-vagueness doctrine to invalidate a statute in *International Harvester*, as noted.[159] Yet the interpretive challenge of determining the legal meaning of uncertain and vague statutes had long been an issue with which state and federal US courts wrestled. Historically, concerns most commonly arose around public order statutes or those which imposed new forms of economic regulation.[160] It appears from the relevant case law and associated scholarship that two techniques were used: interpretation[161] and, in the most problematic of cases, non-application of the statute.[162] For example, regarding the latter, we see in two pre-Civil War cases where vagueness concerns were central to the courts' decisions — *The Enterprise*[163] and *United States v Sharp*[164] — a judicial unwillingness to apply statutes that were seriously unintelligible, especially when important liberty interests were at stake.[165]

Yet in most cases, interpretation was, and indeed remains, the default judicial position.[166] As the Supreme Court noted in *Skilling v United States*, '[i]t has long been our practice, however, before striking a federal statute as impermissibly vague, to consider whether the prescription is amenable to a limiting construction'.[167] This is because the 'threshold for declaring a law void for vagueness is high'.[168] The application of interpretive principles — including

[159] See above n 92 and accompanying text.

[160] See Note, 'An Escape' (n 17) 275–81.

[161] See, eg, *Hooper* (n 152) 657 (White J for the Court), cited in *Skilling* (n 152) 405–6 (Ginsburg J for the Court); *Johnson* (n 91) 613–16 (Thomas J); Note, 'The Void-for-Vagueness Doctrine in the Supreme Court' (1960) 109(1) *University of Pennsylvania Law Review* 67, 86 ('Void-for-Vagueness').

[162] See, eg, *Dimaya* (n 1) 178–9 (Gorsuch J), discussing *The Enterprise*, 8 Fed Cas 732 (NY Cir, 1810) 735 (Livingston J) ('*The Enterprise*'), *Sharp* (n 91) 1043 (Washington J); Note, 'An Escape' (n 17) 275–8, 285 n 83; Snoddon (n 91) 2316–20.

[163] See *The Enterprise* (n 162) 734–5 (Livingston J).

[164] See *Sharp* (n 91) 1043 (Washington J).

[165] See Note, 'An Escape' (n 17) 275–6; Snoddon (n 91) 2317–19.

[166] See, eg, *Hooper* (n 152) 657 (White J for the Court), cited in *Skilling* (n 152) 405–6 (Ginsburg J for the Court); *Davis* (n 6) 492–4 (Kavanagh J for Thomas, Alito and Kavanagh JJ). See also Joel S Johnson, 'Vagueness and Federal-State Relations' (2023) 90(6) *University of Chicago Law Review* 1565, 1570–1 ('Federal-State Relations'). But see *Dimaya* (n 1) 208–10 (Thomas J).

[167] *Skilling* (n 152) 405 (Ginsburg J for the Court).

[168] *Johnson* (n 91) 629 (Alito J).

the canon of constitutional avoidance[169] and the rule of lenity[170] — will fix the legal meaning of a vague statute where fairly possible.[171] To do so accords proper respect to the democratic will of the legislature.[172] It also recognises that invalidation is an extraordinary remedy in a constitutional system of separated powers.[173] It is one of last resort when the interpretive process cannot yield a legal standard or identifiable core from the terms of a problematically vague statute.

Indeed, as Joel Johnson has noted, with the exception of one instance in 1921 the Supreme Court

> did not invalidate a single federal law on a constitutional vagueness ground until 2015. Instead, when faced with a potentially vague federal law, the Court virtually always did precisely what it could not do in the state-law cases — impose its own narrowing construction to avoid any vagueness concerns.[174]

The above observation highlights another important aspect of the US void-for-vagueness doctrine. The Supreme Court can only use interpretation to cure problematic vagueness in *federal* statutes but not those of the states.[175] In cases involving the latter, the Supreme Court must adopt the interpretation given to the statute by the highest state court.[176] This may explain why much of the Supreme Court's vagueness invalidation jurisprudence has involved state statutes. Only since 2015 has the Supreme Court has resumed invalidating federal statutes for vagueness.[177] The last three instances of invalidation have involved federal statutes.[178] These three instances have coincided with the

169 See *Davis* (n 6) 492–4 (Kavanagh J for Thomas, Alito and Kavanagh JJ). Cf Johnson, 'Vagueness Avoidance' (n 21) 72–4.

170 See generally *Johnson* (n 91) 613 (Thomas J).

171 See *United States v National Dairy Products Corp*, 372 US 29, 32 (Clark J for the Court) (1963) (citations omitted):

> The strong presumptive validity that attaches to an Act of Congress has led this Court to hold many times that statutes are not automatically invalidated as vague simply because difficulty is found in determining whether certain marginal offenses fall within their language.

172 Ibid.

173 See ibid.

174 Johnson, 'Federal-State Relations' (n 166) 1588. My thanks to Joel Johnson for this point.

175 Ibid 1571.

176 See, eg, *Wainwright v Stone*, 414 US 21, 22–3 (*per curiam*) (1973); *Winters v New York*, 333 US 507, 514 (Reed J for the Court) (1948) ('*Winters*').

177 Johnson, 'Federal-State Relations' (n 166) 1588.

178 *Johnson* (n 91) 595–8, 606 (Scalia J for the Court); *Dimaya* (n 1) 174–5 (Kagan J for the Court); *Davis* (n 6) 448, 470 (Gorsuch J for the Court). See also ibid 1599–600, 1602 n 213.

Supreme Court asserting the importance of separation of powers to its contemporary void-for-vagueness doctrine, as detailed below.

In any event, as noted above, the Supreme Court first recognised a void-for-vagueness doctrine in *International Harvester* and *Collins v Kentucky* ('*Collins*').[179] As these cases involved state (Kentucky) statutes, the Supreme Court could not rely on its default position of interpretation to cure the problematic statutory vagueness.[180] The doctrine was recognised on the basis that it facilitated the due process requirements of the Fifth and Fourteenth Amendments.[181] Those provisions extend to the *individual* the important constitutional right that they cannot be deprived of their life, liberty or property without due process of law.[182] And as the Supreme Court has routinely stated since — especially in the domain of criminal and penal statutes — impermissible vagueness 'violates the first essential of due process'.[183] So, for example, in *Johnson*, Scalia J outlined why and when statutory vagueness violates constitutional due process:

> Our cases establish that the Government violates this guarantee by taking away someone's life, liberty, or property under a criminal law so vague that it fails to give ordinary people fair notice of the conduct it punishes, or so standardless that it invites arbitrary enforcement.[184]

Since the doctrine's derivation in the early 20th century, the constitutional basis of due process has been a consistent thread running through the Supreme Court's vagueness jurisprudence.[185] As noted, it is one of the 'twin constitutional pillars' of the doctrine.[186] And its two prongs — fair notice and

[179] See above nn 89–90 and accompanying text.

[180] See *International Harvester* (n 89) 219 (Holmes J for the Court); *Collins* (n 90) 636 (Hughes J for the Court).

[181] *International Harvester* (n 89) 219, 223–4 (Holmes J for the Court); *Collins* (n 90) 635, 637–8 (Hughes J for the Court).

[182] *United States Constitution* amends V, XIV § 1.

[183] *Connally* (n 2) 391 (Sutherland J for the Court), quoted in *Johnson* (n 91) 595 (Scalia J for the Court); *Davis* (n 6) 451 (Gorsuch J for the Court). See also *Kolender* (n 33) 353–4 (O'Connor J for the Court); *Dimaya* (n 1) 159 (Kagan J for Ginsburg, Breyer, Sotomayor, Gorsuch and Kagan JJ).

[184] *Johnson* (n 91) 595 (Scalia J for the Court).

[185] See, eg, *Collins* (n 90) 637–8 (Hughes J for the Court); *Papachristou v City of Jacksonville*, 405 US 156, 162, 165 (Douglas J for the Court) (1972) ('*Papachristou*'); *Dimaya* (n 1) 155 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ); *Davis* (n 6) 451 (Gorsuch J for the Court). See also Cristina D Lockwood, 'Defining Indefiniteness: Suggested Revisions to the Void for Vagueness Doctrine' (2010) 8(2) *Cardozo Public Law, Policy and Ethics Journal* 255, 265–8.

[186] *Davis* (n 6) 451 (Gorsuch J for the Court).

arbitrary enforcement — are established doctrinal orthodoxy with statutory violation of either sufficient to trigger invalidity.[187]

B *The Contemporary Void-for-Vagueness Doctrine*

There are three aspects of the contemporary void-for-vagueness doctrine and its justification(s) worth noting here. The first is that its two prongs are animated by different constitutional concerns. Fair notice is about the individual. The due process requirement is that an individual must have fair notice of what conduct the statute proscribes before it may deprive them of their life, liberty or property.[188] Arbitrary enforcement, on the other hand, is about constitutional structure. Specifically, that statutes must provide an ascertainable legal standard 'to govern the actions of police officers, prosecutors, juries, and judges'.[189] Otherwise they effectively, and impermissibly, transfer the task of crafting legal standards (legislative power) to the executive (police, prosecutors) and judicial (juries, judges) arms of government. On this account, the Supreme Court has invoked two aspects of the separation of powers (executive and judicial) as the basis of the arbitrary enforcement prong of the void-for-vagueness doctrine.[190]

The second is that for more than a century the Supreme Court has struggled to articulate a coherent account of the doctrine's scope on the constitutional basis of due process. Emily Snoddon makes this important point in a recent review of the Supreme Court's void-for-vagueness jurisprudence.[191] She observes that '[t]he lack of coherent guidance results from the Supreme Court's misattribution of the constitutional purpose for the vagueness doctrine to due process alone'.[192] Specifically, '[u]ntil the Court explicitly recognizes the role of the separation of powers and integrates that role into the vagueness test, the doctrine will remain confused'.[193] Relevantly, it was not until the 1972 decision in *Papachristou v City of Jacksonville*[194] that the Supreme Court 'cited arbitrary

[187] *Dimaya* (n 1) 155–6 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ); *City of Chicago v Morales*, 527 US 41, 56 (Stevens J for Souter, Ginsburg and Stevens JJ) (1999). See also Mannheimer (n 20) 1055–9.

[188] *Dimaya* (n 1) 176–7 (Gorsuch J).

[189] Ibid 156 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ).

[190] See, eg, ibid 156 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ), 181–2 (Gorsuch J); *Kolender* (n 33) 358 n 7 (O'Connor J for the Court).

[191] See generally Snoddon (n 91) 2307–13, discussing *Papachristou* (n 185), *Dimaya* (n 1).

[192] Ibid 2308.

[193] Ibid.

[194] *Papachristou* (n 185) 170–1 (Douglas J for the Court).

enforcement as a prominent component of the vagueness analysis'.[195] There, it invalidated a Florida ordinance[196] which made it an offence to be a vagrant punishable by 90 days imprisonment, a $500 fine or both.[197] A vagrant was deemed to include the following:

> Rogues and vagabonds, or dissolute persons who go about begging, common gamblers, persons who use juggling or unlawful games or plays, common drunkards, common night walkers, thieves, pilferers or pickpockets, traders in stolen property, lewd, wanton and lascivious persons, keepers of gambling places, common railers and brawlers, persons wandering or strolling around from place to place without any lawful purpose or object …[198]

The Supreme Court noted the due process requirement of fair notice but focussed on 'the effect of the unfettered discretion it place[d] in the hands of the Jacksonville police'.[199] As Snoddon has observed, the Supreme Court's reasoning

> rested primarily on arbitrary enforcement. The formal and shallow nature of the notice requirement may explain this result. For one, the well-settled principle that ignorance of the law is no excuse for violation of the law means that *actual* notice is not required under due process …[200]

In the 1983 decision of *Kolender v Lawson*, the Supreme Court confirmed this doctrinal trajectory. There, it invalidated a Californian statute[201] which deemed an individual guilty of 'disorderly conduct' or a 'misdemeanour' if they 'loiter[ed] or wander[ed] upon the streets … and … refuse[d] to identify [themselves] and to account for [their] presence when requested by any peace officer'.[202] The Supreme Court noted that:

> [W]e have recognized recently that the more important aspect of the vagueness doctrine 'is not actual notice, but the other principal element of the doctrine —

195 Snoddon (n 91) 2308.

196 *Papachristou* (n 185) 171 (Douglas J for the Court).

197 Jacksonville Ordinance Code §§ 1–8, 26–57 (1965) ('Jacksonville Code'), quoted in *Papachristou* (n 185) 156–7 n 1 (Douglas J for the Court).

198 Jacksonville Code (n 197) §§ 26–57 (1965), quoted in *Papachristou* (n 185) 156–7 n 1 (Douglas J for the Court).

199 *Papachristou* (n 185) 168 (Douglas J for the Court).

200 Snoddon (n 91) 2309 (emphasis in original).

201 *Kolender* (n 33) 353 (O'Connor J for the Court).

202 Cal Penal Code § 647(e) (West 1970), quoted in *Kolender* (n 33) 353 n 1 (O'Connor J for the Court).

> the requirement that a legislature establish minimal guidelines to govern law enforcement.[203]

Importantly, the Supreme Court expressly invoked the two aspects of the separation of powers implicated by such 'standardless' laws and the arbitrary enforcement they invited.[204] In terms of *executive* infringement of the separation of powers, the Supreme Court stated that:

> It is clear that the full discretion accorded to the police to determine whether the suspect has provided a 'credible and reliable' identification necessarily 'entrust[s] lawmaking to the moment-to-moment judgment of the policeman on his beat'.[205]

In terms of *judicial* infringement of the separation of powers, the Supreme Court quoted the following proposition from a late 19th-century decision:

> It would certainly be dangerous if the legislature could set a net large enough to catch all possible offenders, and leave it to the courts to step inside and say who could be rightfully detained, and who should be set at large. This would, to some extent, substitute the judicial for the legislative department of government.[206]

Here, we see how the emergence and increased doctrinal prominence of the second prong (arbitrary enforcement) was the catalyst for the Supreme Court's assertion of the separation of powers as one of the 'twin constitutional pillars'[207] of the contemporary void-for-vagueness doctrine.

The third is the lingering concerns expressed in case law and scholarship as to the legitimacy of the due process justification for the void-for-vagueness doctrine. In a 1948 note for the *Indiana Law Journal*, for example, the author observed that 'it seems a coincidence of some moment that the device of invalidating a statute for vagueness should develop on the federal level concurrently with the growth of the tool of substantive due process'.[208] The latter was developed and applied to protect freedom of contract — as a form of economic liberty — from new forms of economic regulation.[209] That

[203] *Kolender* (n 33) 358 (O'Connor J for the Court) (citations omitted).

[204] Ibid, quoting *Smith v Goguen*, 415 US 566, 575 (Powell J for the Court) (1974).

[205] *Kolender* (n 33) 360 (O'Connor J for the Court) (citations omitted).

[206] Ibid 358 n 7 (O'Connor J for the Court), quoting *United States v Reese*, 92 US 214, 221 (Waite CJ for the Court) (1875).

[207] *Davis* (n 6) 451 (Gorsuch J for the Court).

[208] Note, 'An Escape' (n 17) 278.

[209] See, eg, *Allgeyer v Louisiana*, 165 US 578, 589, 591–2 (Peckham J for the Court) (1897); *Lochner v New York*, 198 US 45, 53 (Peckham J for the Court) (1905).

manifestation of the doctrine, which has been long since discredited, was rejected as a constitutionally improper 'usurpation of legislative power'.[210]

Likewise, in the first two federal cases where the void-for-vagueness doctrine was 'successfully' argued — *International Harvester* and *Collins* — the Supreme Court invalidated a suite of anti-trust statutes of the Kentucky legislature[211] and '[o]nce established, the primary use of the doctrine continued to lie in the field of economic regulation'.[212] That focus — as with the doctrine of substantive due process[213] — was not to last, however. As early as the 1930s, the Supreme Court began to use the void-for-vagueness doctrine to invalidate statutes in the field of civil liberties.[214] It has led Thomas J to claim that since its recognition 'the [Supreme] Court's application of its void-for-vagueness doctrine has largely mirrored its application of substantive due process'.[215] However, the judicial focus has changed from the protection of economic interests to the vindication of fundamental (non-economic) rights such as privacy, speech and association.[216] The opinion of Thomas J in *Johnson v United States* ('*Johnson*') hardened his scepticism regarding the due process basis for the void-for-vagueness doctrine:

> Although I have joined the Court in applying our modern vagueness in the past … I have become increasingly concerned about its origins and application. Simply put, our vagueness doctrine shares an uncomfortably similar history with substantive due process, a judicially created doctrine lacking any basis in the *Constitution*.[217]

The opinion went on to trace the judicial treatment of vagueness from 16th century England, its formal doctrinal recognition in *International Harvester* through to its contemporary application to vindicate fundamental (non-economic) rights.[218] The upshot of this historical analysis and analogical argument was clear enough: 'We as a Court have a bad habit of using indefinite

[210] Nathan S Chapman and Michael W McConnell, 'Due Process as Separation of Powers' (2012) 121(7) *Yale Law Journal* 1672, 1795, citing *Ferguson v Skrupa*, 372 US 726, 730–1 (Black J for the Court) (1963).

[211] See *International Harvester* (n 89) 219, 223–4 (Holmes J for the Court); *Collins* (n 90) 637–8 (Hughes J for the Court).

[212] Note, 'An Escape' (n 17) 280.

[213] See Chapman and McConnell (n 210) 1792–5.

[214] See ibid 1795–800; Note, 'An Escape' (n 17) 281–4.

[215] *Johnson* (n 91) 618.

[216] Ibid 618–21 (Thomas J).

[217] Ibid 607–8 (citations omitted).

[218] Ibid 613–18 (Thomas J).

concepts — especially ones rooted in "due process" — to invalidate democratically enacted laws.'[219] In addition, Thomas J — a committed originalist[220] — said it is 'also not clear that our vagueness doctrine can be reconciled with the original understanding of the term "due process of law"'.[221]

In *Johnson*, however, this fundamental scepticism as to the constitutional basis of the doctrine was not shared by the rest of the Supreme Court. Even Alito J, who dissented, did so on the basis that the impugned statute was not unconstitutionally vague, rather than that the doctrine itself had no grounding in constitutional due process.[222] Nevertheless, the scepticism seems to have impacted the Supreme Court's more recent doctrinal and theoretical exegesis on the void-for-vagueness doctrine. Three years later in *Sessions v Dimaya* ('*Dimaya*'), the Supreme Court split 5:4, invalidating a provision that was incorporated into the *Immigration and Nationality Act* which contained an impermissibly vague definition for a 'crime of violence' for deportation purposes.[223] In his dissenting opinion, Thomas J continued his theoretical assault on the due process basis for the void-for-vagueness doctrine.[224] Significantly, it prompted a robust defence of the void-for-vagueness doctrine from fellow originalist Gorsuch J.[225] His Honour delivered this defence as 'the Court ha[d] yet to offer a reply [to Thomas J's theoretical assault]' and Gorsuch J 'believe[d] [his] colleague's challenge [was] a serious and thoughtful one that merit[ed] careful attention'.[226] He continued:

> At day's end, though, it is a challenge to which I find myself unable to subscribe. Respectfully, I am persuaded instead that void for vagueness doctrine, at least properly conceived, serves as a faithful expression of ancient due process and

[219] Ibid 621.

[220] Lee J Strang, 'The Most Faithful Originalist?: Justice Thomas, Justice Scalia, and the Future of Originalism' (2011) 38(4) *University of Detroit Mercy Law Review* 873, 873–4, 877.

[221] *Johnson* (n 91) 622.

[222] Ibid 629.

[223] Ibid 174–5 (Kagan J for the Court). 18 USC § 16 (2012) provides the definition of 'crime of violence' for the federal criminal code:

> (a) an offense that has as an element the use, attempted use, or threatened use of physical force against the person or property of another, or (b) any other offense that is a felony and that, by its nature, involves a substantial risk that physical force against the person or property of another may be used in the course of committing the offense.

[224] See *Dimaya* (n 1) 206–10.

[225] Ibid 175–83. See also Neil M Gorsuch, *A Republic, If You Can Keep It* (Crown Forum, 2019) 125.

[226] *Dimaya* (n 1) 176 (Gorsuch J).

> separation of powers principles the framers recognized as vital to ordered liberty under our *Constitution*.[227]

The emphasis here is upon *ancient due process and separation of powers principles* as the constitutional basis of the doctrine. In terms of due process principles, Gorsuch J seemed to pick up on the argument made by Nathan Chapman and Michael McConnell that the original understanding of due process was rooted in 'separation-of-powers logic' and can, ultimately, be traced to *Magna Carta*.[228] Relevantly, for example, '[l]egislative acts violated due process not because they were unreasonable or in violation of higher law, but because they exercised judicial power or abrogated common law procedural protections'.[229] On the separation of powers principles as a constitutional basis for the doctrine, Gorsuch J observed: 'Although today's vagueness doctrine owes much to the guarantee of fair notice embodied in the Due Process Clause, it would be a mistake to overlook the doctrine's equal debt to the separation of powers.'[230] Indeed, his judgment then provided a detailed account of the structural (arbitrary enforcement) justification for the doctrine.[231] It concluded with a quote from Alexander Hamilton in *The Federalist Papers* and the upshot for contemporary US doctrine:

> Hamilton warned, while 'liberty can have nothing to fear from the judiciary alone,' it has 'every thing to fear from' the union of the judicial and legislative powers. … No doubt, too, for reasons like these this Court has held 'that the *more important* aspect of vagueness doctrine "is not actual notice, but … the requirement that a legislature establish minimal guidelines to govern law enforcement"' and keep the separate branches within their proper spheres.[232]

The other majority Justices confirmed the twin constitutional bases of the void-for-vagueness doctrine. Prohibiting statutory vagueness was 'an "essential" of due process' which 'guarantees that ordinary people have "fair notice" of the conduct a statute proscribes'.[233] In addition, the majority opinion noted that:

[227] Ibid.

[228] See Chapman and McConnell (n 210) 1677–8, 1681.

[229] Ibid 1677.

[230] *Dimaya* (n 1) 181.

[231] Ibid 181–3 (Gorsuch J).

[232] Ibid 182–3, quoting Alexander Hamilton, 'The Federalist No 78: Hamilton' in Alexander Hamilton, James Madison and John Jay, *The Federalist Papers*, ed Ian Shapiro (Yale University Press, 2009) 392–3; *Kolender* (n 33) 358 (O'Connor J for the Court) (emphasis in original).

[233] Ibid 155–6 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ).

> [T]he doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. … In that sense, the doctrine is a corollary of the separation of powers — requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.[234]

Even Thomas J, who rejects the constitutional basis of due process and doubts the legitimacy of the doctrine more generally, observed that 'perhaps the vagueness doctrine is really a way to enforce the separation of powers — specifically, the doctrine of nondelegation'.[235] And relatedly, 'that, at some point, a statute could be so devoid of content that a court tasked with interpreting it "would simply be making up a law — that is, exercising legislative power"'.[236] We see, then, the Supreme Court recognising in *Dimaya* that the two aspects of the separation of powers (executive and judicial) are the constitutional basis of the arbitrary enforcement prong of its contemporary void-for-vagueness doctrine. This development was, arguably, prompted by Thomas J's sustained attack on the doctrine and the legitimacy of its original justification specifically based on due process.[237]

The significance of this development is underlined in *United States v Davis* ('*Davis*'), the most recent decision of the Supreme Court to invalidate a statute for impermissible vagueness.[238] There, the opinion of the Supreme Court was delivered by Gorsuch J.[239] His Honour stated that '[o]ur doctrine prohibiting the enforcement of vague laws rests on the twin constitutional pillars of due process and separation of powers'.[240] In doing so, he acknowledged doctrinal orthodoxy. Yet, to recall, that orthodoxy for Gorsuch J served 'as a faithful

[234] Ibid 156 (citations omitted).

[235] Ibid 216, citing Chapman and McConnell (n 210) 1806. Chapman and McConnell (n 210) noted that '[v]ague statutes have the effect of delegating lawmaking authority to the executive': at 1806.

[236] *Dimaya* (n 1) 218 (Thomas J), quoting Gary Lawson, 'Delegation and Original Meaning' (2002) 88(2) *Virginia Law Review* 327, 339.

[237] See above nn 215–21, 224 and accompanying text.

[238] *Davis* (n 6) 448 (Gorsuch J for the Court). See also *Dubin* (n 153), where Gorsuch J made clear that he considered the impugned statutory provision to be impermissibly vague but nevertheless concurred with the opinion of the Supreme Court, which gave the statute a narrow construction to cure its indeterminacy: at 133, 138–9. The opinion of the Court in *Dubin* (n 153) was delivered by Sotomayor J and was joined by Roberts CJ, Thomas, Alito, Kagan, Kavanaugh, Barrett and Jackson JJ: at 113.

[239] The Supreme Court's opinion was delivered by Gorsuch J and joined by Ginsburg, Breyer, Sotomayor and Kagan JJ: *Davis* (n 6) 447.

[240] Ibid 451 (Gorsuch J for the Court).

expression of *ancient* due process and separation of powers principles'.[241] In any event, unsurprisingly, Gorsuch J foregrounds separation of powers concerns in his *Davis* analysis. He does so not at the expense of the due process requirement of fair notice, *but to explain that the constitutional problem with a vague statute arises due to the failure of Congress to properly discharge its lawmaking power*. His opinion began as follows:

> In our constitutional order, a vague law is no law at all. Only the people's elected representatives in Congress have the power to write new federal criminal laws. And when Congress exercises that power, it has to write statutes that give ordinary people fair warning about what the law demands of them.[242]

Separation of powers was, moreover, at the core of Gorsuch J's account of the relevant judicial duty and power in these statutory contexts: 'When Congress passes a vague law, the role of the courts under our *Constitution* is not to fashion a new, clearer law to take its place, but to treat the law as a nullity and invite Congress to try again.'[243] As a result, the Supreme Court rejected a construction of the statute which the government said would avoid unconstitutionality.[244] It did so, for 'adopt[ing] [the alternative reading], would be effectively stepping outside [the Supreme Court's] role … and writing a new law rather than applying the one Congress adopted'.[245]

C *Provisional Conclusion*

The core vice of the statutes invalidated in *Johnson*, *Dimaya* and *Davis* was that their legal indeterminacy required courts to perform the essentially legislative task of crafting (and then applying) a legal standard. Relevantly, the application of these 'standardless' laws would involve *judicial* infringement of the separation of powers. In *Johnson*, for example, the Supreme Court held that the relevant judicial inquiry raised by the impugned statutory provision 'produce[d] more unpredictability and arbitrariness' than the *United States Constitution* tolerates.[246] The theme which emerges from this contemporary jurisprudence is that what distinguishes problematic from unconstitutional statutory vagueness is that the application of interpretive principles can cure the former, but not the latter. To clarify the legal meaning of the latter requires

241 *Dimaya* (n 1) 176 (emphasis added).

242 *Davis* (n 6) 447–8 (Gorsuch J for the Court).

243 Ibid 448.

244 Ibid.

245 Ibid.

246 *Johnson* (n 91) 598 (Scalia J for the Court), quoted in ibid 452 (Gorsuch J for the Court).

judicial 'legislation', not statutory interpretation. This may explain why the US Supreme Court has come to emphasise the increasing importance of the structural (separation of powers) justification in recent cases where it has invalidated a vague statute. This emphasis has underlined the centrality of the second (arbitrary enforcement) prong of the contemporary void-for-vagueness doctrine and why the Supreme Court has invoked two aspects of the separation of powers (executive and judicial) as its constitutional basis.

To be sure, such hopelessly vague statutes, by definition, fail to provide fair notice to ordinary people. However, that is a by-product, not the root cause of the statute's impermissible vagueness. As Gorsuch J noted in *Davis*, unconstitutionally vague laws 'hand off the legislature's responsibility for defining criminal behaviour to unelected prosecutors and judges, and they leave people with no sure way to know what consequences will attach to their conduct'.[247]

V Is There a Constitutional Basis for a Void-for-Vagueness Doctrine in Australia?

A *Due Process*

Part III detailed the consistent and long-held view of the High Court that, without a due process clause, there was no constitutional foundation upon which a void-for-vagueness doctrine could be developed. That is certainly true. Indeed, as noted, it was a foundational decision of constitutional design to reject the Australian version of the Fourteenth Amendment of the *United States Constitution* advocated by Andrew Inglis Clark.[248] Even so, the Court *has* recognised a form of procedural due process as an implied constitutional principle.[249] The principle has emerged as an aspect of the strict separation of judicial power established by the *Australian Constitution*. Its core notion is that Parliament cannot make a law that

> requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner

[247] *Davis* (n 6) 448 (Gorsuch J for the Court).

[248] See above nn 9–10 and accompanying text.

[249] See, eg, *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) ('*Lim*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 63, 67–8 (Dawson J) ('*Kruger*'); *Nicholas v The Queen* (1998) 193 CLR 173, 185 [13] (Brennan CJ), 202 [53] (Toohey J), 208–9 [74] (Gaudron J), 232 [146] (Gummow J); *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ) ('*Bass*'). See generally Will Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31(3) *Sydney Law Review* 411.

> which is inconsistent with the essential character of a court or with the nature of judicial power.[250]

In terms of the principle's content, Fiona Wheeler has suggested that

> whatever else due process may mean, judges in federal jurisdiction must resolve disputes by legal reasoning — in most situations by finding the facts and applying the relevant law. In addition, the rules of natural justice must be observed.[251]

Yet Wheeler warns that '[t]he due process label, although convenient, can obscure the implication's foundations in the separation doctrine and suggest unwarranted parallels with United States due process jurisprudence'.[252]

There are two important distinctions between the Australian and US due process principles of present relevance. The first relates to the nature of the respective principles. In the US, as noted, the principle is an *individual* constitutional right which states that a person cannot be deprived of their life, liberty or property without due process of law.[253] It is in that context that the individual must have fair notice of what conduct a statute proscribes before a deprivation of these fundamental rights can lawfully occur. In Australia, due process is a *structural* implication rooted in the separation of powers which protects the essential characteristics of courts and ensures that the core requirements of the curial process are observed in the exercise of judicial power.[254] The second distinction, which is related to the first, involves the due process requirements of the *relevant law* to be judicially administered. In the US, due process applies to legislative acts by imposing certain minimal requirements regarding the substantive content of statutes.[255] One of those minimal requirements is fair notice as to the content of the relevant statutory proscription.[256] In Australia, on the other hand, due process applies to legislative acts only to the extent that a statute cannot deprive a court of its essential characteristics or require a court to observe a process that is antithetical to the manner in which judicial power is exercised.[257] Importantly, it imposes no requirements on the substantive content of statutes courts

[250] *Lim* (n 249) 27 (Brennan, Deane and Dawson JJ).

[251] Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205, 211.

[252] Ibid.

[253] See above nn 2–3 and accompanying text.

[254] *Bass* (n 249) 359 [56] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See also Wheeler (n 251) 207–11.

[255] See *Johnson* (n 91) 595 (Scalia J for the Court).

[256] Ibid.

[257] *Lim* (n 249) 27 (Brennan, Deane and Dawson JJ).

administer in the exercise of that judicial power.[258] As Dawson J relevantly observed in *Kruger v Commonwealth*:

> A [c]h III court cannot be made to perform a function which is of a non-judicial nature or is required to be performed in a non-judicial manner. Chapter III may, perhaps, be regarded in this way as affording a measure of due process, but it is due process of a procedural rather than substantive nature. As was pointed out in *Leeth v The Commonwealth*, 'to speak of judicial power in this context is to speak of the function of a court rather than the law which a court is to apply'.[259]

In the US, then, constitutional due process requires that the substantive content of a statute meets a threshold requirement of certainty. The Australian due process principle lacks this same requirement. That being so, there is no legitimate scope for the development of a void-for-vagueness doctrine on this constitutional basis as presently articulated by the High Court.

B *The Rule of Law*

In *Dimaya*, Gorsuch J stated that '[p]erhaps the most basic of due process's customary protections is the demand of fair notice'.[260] In doing so he quoted with approval the following proposition from a Note in the *Harvard Law Review*: 'From the inception of Western culture, fair notice has been recognized as an essential element of the rule of law.'[261] It suggests that a bedrock of the rule of law is that citizens must be able to ascertain what the laws require to which they are subject.[262] To the extent which vague statutes preclude this, the rule of law is undermined as a consequence. If so, could the rule of law provide an alternative constitutional basis for a void-for-vagueness doctrine in Australia, at least regarding the requirement that a statute provide fair notice? In the *Australian Communist Party v Commonwealth* ('*Communist Party Case*'), Dixon J (as his Honour then was) famously said of the *Australian Constitution*:

> [It] is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating judicial power from

[258] *Kruger* (n 249) 63 (Dawson J, McHugh J agreeing at 141–2), 112 (Gaudron J), 155 (Gummow J).

[259] Ibid 63 (citations omitted).

[260] *Dimaya* (n 1) 177.

[261] Ibid, citing Note, 'Textualism as Fair Notice' (2009) 123(2) *Harvard Law Review* 542, 543.

[262] See, eg, *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 349 [42] (French CJ); Tom Bingham, *The Rule of Law* (Penguin Books, 2011) 37–40; Lon L Fuller, *The Morality of Law* (Yale University Press, rev ed, 1969) 39; Hayne (n 47) 186–8.

> other functions of government, others of which are simply assumed. Among these I think it may fairly be said that the rule of law forms an assumption.[263]

Is, then, the rule of law an implication or doctrine of Australian constitutional law? Lisa Burton Crawford has suggested that 'Dixon J meant that the rule of law is an ideal or objective that is not given direct constitutional force'.[264] This Australian conception of the rule of law was recently endorsed by the joint judgment of Kiefel CJ, Gageler, Keane, Gordon, Steward and Gleeson JJ in *Palmer v Western Australia*:

> 'The rule of law' is a useful shorthand description of a complex concept central to an appreciation of the form of government that inheres in the text and structure of the *Constitution*. Acknowledged repeatedly has been that the *Constitution* was framed on the 'assumption' of the rule of law. Reference to the rule of law can help to elucidate the scope and operation of a conferral of judicial power, just as it can help to elucidate the scope and operation of an express or implied limitation on legislative or executive power. Also acknowledged repeatedly, however, has been that the rule of law supports neither expansion of judicial power nor contraction of legislative or executive power beyond those limits that inhere in the text and structure of the *Constitution*. Of the rule of law, no less than of 'representative democracy', it 'is logically impermissible to treat [the term] as though it were contained in the *Constitution*, to attribute to the term a meaning or content derived from sources extrinsic to the *Constitution* and then to invalidate a law for inconsistency with the meaning or content so attributed'.[265]

The rule of law is not, therefore, an independent principle or rule of constitutional law in Australia. As a constitutional objective and value it can,[266] and indeed should, inform the scope and application of existing rules and principles of law: constitutional, statutory and common. But unless, for example, the *Australian Constitution* gives aspects of the rule of law concrete

263 *Communist Party Case* (n 73) 193.

264 Crawford, *Rule of Law* (n 73) 75.

265 (2021) 274 CLR 286, 294 [8] ('*Palmer*').

266 See, eg, Lisa Burton Crawford, 'The Rule of Law' in Rosalind Dixon (ed), *Australian Constitutional* Values (Hart Publishing, 2018) 77, 93–8 ('The Rule of Law'); Stephen Gageler, 'Administrative Law within the Common Law Tradition' (2023) 53(1) *Australian Bar Review* 1, 3–5, 8.

expression — which it does in covering cl 5[267] and s 75(v)[268] — then it cannot alone supply the basis upon which a new doctrine or principle of constitutional law can be developed. That being so, the rule of law as constitutional (and political) ideal quite properly requires sufficient clarity in the content of statutes. It cannot, however, provide the independent basis for a void-for-vagueness doctrine to make that requirement of clarity a rule of Australian constitutional law.[269]

C *Separation of Powers*

The seminal passage from Dixon J's judgment in the *Communist Party Case* makes clear that the *Australian Constitution* established a separation of judicial power from the other functions of government.[270] This was no accident or happenstance of constitutional design. As noted, the structural and textual parallels between ch III of the *Australian Constitution* and art III of the *United States Constitution* are striking.[271] This, again, was largely due to Andrew Inglis Clark, who expressly acknowledged in the accompanying memorandum to his 1891 draft to Convention delegates: 'The matters I have placed under the jurisdiction of the Federal Judicatory are the same as those placed by the *Constitution* of the United States under the jurisdiction of the Supreme Court of the American Union.'[272] In addition and most relevantly, the framers of the *Australian Constitution* copied the structure of the American model with the establishment of the Parliament (ch I), Executive Government (ch II) and the Federal Judicature (ch III); and with the first section of each chapter to have conferred upon the respective institutions legislative power (s 1), executive power (s 61) and judicial power (s 71). As Dixon J relevantly observed in *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan*:

[267] *Commonwealth of Australian Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 5: 'This Act, and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State.'

[268] *Australian Constitution* s 75(v): 'In all matters … in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth … the High Court shall have original jurisdiction.'

[269] But see Anthony Davidson Gray, 'The *First Amendment* to the *United States Constitution* and the Implied Freedom of Political Communication in the *Australian Constitution*' (2019) 48(3) *Common Law World Review* 142, 168–71.

[270] See above n 263 and accompanying text.

[271] See above n 16 and accompanying text. See also William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33(3) *Melbourne University Law Review* 718, 728.

[272] Reproduced in Williams, *Documentary History* (n 16) 69.

> These provisions, both in substance and in arrangement, closely follow the American model upon which they were framed. … In adopting this division of the functions of government, the members of the Convention of 1787 meant that the theory of the separation of powers should be embodied in the fundamental law which they were framing.[273]

In his Honour's view, '[i]ndeed it may be said that, roughly speaking, the *Australian Constitution* is a redraft of the US *Constitution* of 1787'[274] with 'one great change'[275] — the incorporation of the principle of responsible government, where 'Ministers are responsible to the Parliament and must go out of office whenever they lose the confidence of the legislature'.[276] Consequently, the framers of the *Australian Constitution* were 'unable to accept the principle by which the executive government is made independent of the legislature'.[277]

The analysis undertaken in Part IV detailed why the separation of powers has become increasingly prominent in how the US Supreme Court has explained and justified its contemporary void-for-vagueness doctrine. That being so, there is no reason *in principle* why the separation of powers could not provide the constitutional basis for a similar doctrinal development in Australia. If anything, as Aryan Mohseni has recently observed, the separation of judicial powers 'is necessarily stronger in the *Australian Constitution*'.[278] Unlike 'the *United States Constitution*, there does not exist in the *Commonwealth Constitution* any express power outside Ch III to constitute federal courts'.[279] In any event, consider, again, the structural justification for the second (arbitrary enforcement) prong of the US void-for-vagueness doctrine:

> [T]he doctrine guards against arbitrary or discriminatory law enforcement by insisting that a statute provide standards to govern the actions of police officers, prosecutors, juries, and judges. … In that sense, the doctrine is a corollary of the

273 *Dignan* (n 43) 89.

274 Sir Owen Dixon (n 107) 102.

275 Ibid 101.

276 Ibid.

277 Ibid.

278 Aryan Mohseni, 'Convergence and Divergence: The Influence of American Constitutionalism on Sir Owen Dixon' (2023) 34(3) *Public Law Review* 241, 258, citing *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*').

279 Mohseni (n 278) 258.

> separation of powers — requiring that Congress, rather than the executive or judicial branch, define what conduct is sanctionable and what is not.[280]

As noted, the contemporary US account of the void-for-vagueness doctrine invokes two aspects of the separation of powers: executive and judicial.[281] In terms of the latter, it is well established in Australia that the strict separation of judicial power prohibits courts from exercising legislative power.[282] Indeed, important aspects of contemporary public law doctrine have been driven by the High Court's insistence upon maintaining the independence of the judiciary and a resistance to being co-opted into the legislative process.[283] To insist that 'interpretation' is always the constitutionally mandated cure for a hopelessly vague — but otherwise valid — statute may, arguably, require a court to craft a legal rule and then apply it to resolve the relevant controversy. Doing so effectively allows a court to 'legislate', rather than interpret. It sits uneasily with contemporary and orthodox aspects of the Court's jurisprudence on the separation of powers.[284] To recall, Gummow J stated that '[n]o doubt the Parliament of the Commonwealth cannot delegate to courts exercising the judicial power an authority conferring a discretion or choice as to the content of a federal law'.[285] Likewise, in *Western Australia v Commonwealth* ('*Native Title Act Case*'), the Court stated that '[u]nder the *Constitution*, the Parliament cannot delegate to the Courts the power to make law involving, as that power does, a discretion or, at least, a choice as to what that law should be'.[286] Whilst it is legislatively directed[287] and constitutionally permissible for courts to read down a statute to secure its validity,[288] this interpretive process cannot involve its rewriting, as Kirby J has explained:

[280] *Dimaya* (n 1) 156 (Kagan J for Ginsburg, Breyer, Sotomayor and Kagan JJ) (citations omitted).

[281] See above n 190 and accompanying text.

[282] *Boilermakers' Case* (n 278) 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[283] See, eg, the discussion in *Momcilovic* (n 134) on the validity of provisions of the *Charter of Human Rights and Responsibilities Act 2006* (Vic): at 29–31 [1]–[3], 47–8 [46], 66 [92], 68 [97] (French CJ), 92–3 [171], 97 [188] (Gummow J, Hayne J agreeing at 123 [280]), 158 [398] (Heydon J), 207–8 [534]–[537] (Crennan and Kiefel JJ), 241 [661] (Bell J); and the principle recognised in *Kable v DPP (NSW)* (1996) 189 CLR 51 and its consequent development in later High Court decisions, canvassed in James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2nd ed, 2020) ch 9 pt 2.

[284] See Crawford, 'The Rule of Law' (n 266) 86. My thanks to Lisa Burton Crawford for this point.

[285] See above n 135 and accompanying text.

[286] (1995) 183 CLR 373, 486 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) ('*Native Title Act Case*').

[287] *Acts Interpretation Act 1901* (Cth) s 15A.

[288] *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

> The reason why this Court will not undertake such a task is ultimately based on the proper function of the Judicature established by the *Constitution* and on the principle of the separation of the judicial from other governmental powers. Thus, in the guise of construing a challenged federal law, the Court cannot be required to perform a feat that is, in essence, legislative and not judicial.[289]

It was this constitutional prohibition that was the primary basis upon which the US Supreme Court invalidated the statutes in *Johnson*, *Dimaya* and *Davis*.[290] The 'standardless' laws impermissibly required courts to perform the essentially legislative task of crafting (and then applying) a legal standard. If so, then ch III of the *Australian Constitution* does not preclude an Australian species of the arbitrary enforcement prong of the US void-for-vagueness doctrine. To the extent that the application of a vague statute requires an Australian court to supply the relevant legal standard, it infringes the *judicial* separation of powers. To recall, that point was made by the Victorian Court of Appeal in *Walters*:

> [T]he court has no power to fill a gap in a statute or otherwise read in words which the legislature has not used. The limits of the judicial role require that courts 'abstain from any course which might have the appearance of judicial legislation'.[291]

The infringement of the judicial separation of powers also describes the 'extreme possibility' which Edelman J left open in Brown,[292] namely that 'if it were concluded that Parliament's "attempt … to frame a rule had failed, then any attempt to construe the legislation by substituting some other rule might … require the judge to exercise "truly legislative power"'.[293]

What about vague statutes regarding the executive arm of government in Australia? In the US, as noted, these 'standardless' laws invite arbitrary enforcement which occasions *executive* infringement of separation of powers by handing to police and prosecutors the responsibility for defining the proscribed conduct.[294] Unlike in the US, however, there is no strict constitutional separation of the executive and the legislature in Australia. Indeed, on the contrary, the constitutional recognition of the principle of responsible government in Australia must necessarily qualify the extent to

289 *New South Wales v Commonwealth* (2006) 229 CLR 1, 241 [596].

290 See *Johnson* (n 91) 597–8 (Scalia J for the Court); *Dimaya* (n 1) 161–2 (Kagan J for the Court); *Davis* (n 6) 448 (Gorsuch J for the Court).

291 See above n 117 and accompanying text.

292 *Brown* (n 7) 486 [505].

293 Ibid 481 [489] (citations omitted).

294 See above n 247 and accompanying text.

which an autochthonous void-for-vagueness doctrine could be justified on this basis.[295] The principle of responsible government is one of the

> constitutional imperatives which are intended — albeit the intention is imperfectly effected — to make both the legislative and executive branches of the government of the Commonwealth ultimately answerable to the Australian people.[296]

The principle operates by providing for the executive's accountability to Parliament. It also facilitates a constitutional relationship designed 'to enlarge the powers of self-government of the people of Australia',[297] which is — consequently and principally — mediated through electoral and parliamentary processes.[298] That accountability necessarily includes the lawmaking undertaken by the executive (or other persons or bodies) as delegate of the Parliament.[299]

Consequently, in Australia, the uniting of the legislative and executive arms of government — which responsible government is said to entail[300] — makes it 'well settled that the structure of the *Constitution* does not preclude the Parliament from authorising in wide and general terms subordinate legislation under any of the heads of legislative power'.[301] This positively authorises *executive* infringement of separation of powers in this lawmaking context.[302] If so, then the *qualified* separation of powers recognised by the *Australian Constitution* precludes a doctrine which could invalidate broad delegations of

295 See *Dignan* (n 43) 100–2 (Dixon J), 113–14 (Evatt J).

296 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47 (Brennan J).

297 *Official Report of the National Australasian Convention Debates*, Adelaide, 23 March 1897, 17 (Edmund Barton).

298 See *Egan v Willis* (1998) 195 CLR 424, 451 [42] (Gaudron, Gummow and Hayne JJ); Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 152; Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) 182.

299 See Cheryl Saunders (n 45) 624.

300 See ibid 623–4.

301 *Plaintiff S157* (n 46) 512 [102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ), citing *Dignan* (n 43).

302 See Meyerson (n 46) 51. In the US, on the other hand, the Supreme Court has recently applied the major questions doctrine, which provides that clear statutory authorisation is required for the legislature to confer powers on agencies to deal with issues of great economic and political significance, to invalidate secondary rules on major policy issues which the federal government argued were supported by broad delegations of authority to government agencies: see, eg, *Alabama Association of Realtors v Department of Health and Human Services*, 594 US 758, 764–6 (*per curiam*) (2021), *West Virginia v Environmental Protection Agency*, 597 US 697, 724, 732, 734–5 (Roberts CJ for the Court) (2022); *Biden v Nebraska*, 600 US 477, 504–6 (Roberts CJ for the Court) (2023).

legislative power on vagueness grounds.[303] It is primarily the constitutional responsibility of Parliament to undertake effective supervision of *its* delegated legislation through its processes of scrutiny and review.[304] The same constitutional logic and principle pertains to statutes which confer broad discretionary powers on members of the executive.[305] This is supplemented by the availability of judicial review of administrative decisions, a jurisdiction that is constitutionally entrenched for senior appellate courts in Australia.[306] The judicial review process ensures that the courts can determine whether or not the *exercise* of broad discretionary powers by the executive is authorised and undertaken according to law.[307]

However, the conferral of an unfettered discretionary power on the executive — a paradigmatic example of statutory vagueness — is constitutionally impermissible in Australia.[308] But such powers are rare in practical terms. As Gordon J noted in *Brown*, in most contexts the exercise of an apparently unfettered executive discretion 'is necessarily limited by the

[303] It is, however, worth noting that in the US the legislature is also permitted an extremely wide latitude to confer broad policy discretion to the executive: John F Manning, 'The Nondelegation Doctrine as a Canon of Avoidance' [2000] (6) *Supreme Court Review* 223, 238–42; Clinton T Summers, 'Nondelegation of Major Questions' (2021) 74(1) *Arkansas Law Review* 83, 85–90.

[304] See Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (Final Report, 16 March 2021) 29 [3.41]–[3.42] <https://www.aph.gov.au/-/media/Committees/Senate/committee/regord_ctte/Exemptfromoversight/Final_Report_-_Exemption__of_delegated_legislation_from_Parliamentary_oversight.pdf>, archived at <https://perma.cc/QQ8K-RXBQ>, citing Anne Twomey, Submission No 18 to Senate Standing Committee for the Scrutiny of Delegated Legislation, Parliament of Australia, *Inquiry into the Exemption of Delegated Legislation from Parliamentary Oversight* (28 June 2020) <https://www.aph.gov.au/DocumentStore.ashx?id=b12d3ec5-7595-4f25-a691-f1e339ad9801&subId=685546>, archived at <https://perma.cc/EUZ9-BWAD>.

[305] See *A-G (NSW) v Quin* (1990) 170 CLR 1, 33 (Brennan J) ('*Quin*'); Senate Standing Committee for the Scrutiny of Bills, Parliament of Australia, *Guidelines: 2nd Edition* (Document, July 2022) 11–13 <https://www.aph.gov.au/-/media/Committees/Senate/committee/scrutiny/Guidelines/Scrutiny_of_Bills_Guidelines_-_2nd_edition.pdf?la=en&hash=3AD5C17A8F569396A7B1B98FAB7FE10F78C1A766>, archived at <https://perma.cc/JTN3-NFPX>.

[306] *Plaintiff S157* (n 46) 513–14 [103]–[104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, 579–81 [95]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). On the scope of judicial power to engage in judicial review: see generally Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 7th ed, 2022) ch 2.

[307] *Quin* (n 305) 35–6 (Brennan J); *Church of Scientology Inc v Woodward* (1982) 154 CLR 25, 70 (Brennan J).

[308] See *Wotton v Queensland* (2012) 246 CLR 1, 9–10 [10] (French CJ, Gummow, Hayne, Crennan and Bell JJ).

subject matter, scope and purpose' of the relevant statute.[309] Even so, the High Court in *Plaintiff S157/2002 v Commonwealth* rejected an argument made by the Commonwealth

> that the Parliament might validly delegate to the Minister 'the power to exercise a totally open-ended discretion as to what aliens can and what aliens cannot come to and stay in Australia', subject only to this Court deciding any dispute as to the 'constitutional fact' of alien status.[310]

The Court rejected this particular argument for the following reasons:

> The provisions canvassed by the Commonwealth would appear to lack that hallmark of the exercise of legislative power … namely, the determination of 'the content of a law as a rule of conduct or a declaration as to power, right or duty'. Moreover, there would be delineated by the Parliament no factual requirements to connect any given state of affairs with the constitutional head of power. Nor could it be for a court exercising the judicial power of the Commonwealth to supply this connection in deciding litigation said to arise under that law. That would involve the court in the rewriting of the statute, the function of the Parliament, not a Ch III court.[311]

The first proposition in the above passage closely tracks the 'extreme possibility' left open by Edelman J in *Brown*.[312] The second posits that invalidity of such a provision may arise on orthodox characterisation grounds. The third (related) proposition is that the application of such a provision would require a court to rewrite the statute to supply the necessary connection to the relevant head of legislative power. That is significant. On this account, the statutory conferral of an unfettered discretionary power on the executive fails for its application by courts would occasion *judicial* infringement of separation of powers.

This analysis confirms two important points for present purposes. The first is that the *Australian Constitution* recognises a qualified separation of powers due to its incorporation of the principle of responsible government. This principle — and the constitutional relationship it establishes between the legislative and executive arms of government — authorises (vague) statutes which in the US context would invite 'arbitrary enforcement' and so offend the *executive* separation of powers. That being so, there is no constitutional basis in Australia to recognise this aspect of the US void-for-vagueness doctrine. The

[309] *Brown* (n 7) 457–8 [405].

[310] *Plaintiff S157* (n 46) 512 [101]–[102] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

[311] Ibid 513 [102], quoting *Grunseit* (n 132) 82 (Latham CJ).

[312] See above nn 292–3 and accompanying text.

second is that the *Australian Constitution* does not preclude development of an Australian species of the arbitrary enforcement prong of the US void-for-vagueness doctrine if necessary to maintain the *judicial* separation of powers. Indeed, the analysis undertaken above suggests the compatibility of such a development with the High Court's existing ch III jurisprudence.

VI Conclusion

On the account which this article has offered, the *Australian Constitution* does not preclude the development of a void-for-vagueness doctrine. To that extent, it takes issue with the High Court's recent and emphatic rejection in *Brown* of such a doctrinal possibility in Australian constitutional law. Yet the proffered basis of that rejection was sound: without an Australian equivalent to the due process requirements of the Fifth and Fourteenth Amendments of the *United States Constitution*, there was no constitutional basis to support such a development.

However, the analysis undertaken in Part IV demonstrated that the contemporary US void-for-vagueness doctrine has two prongs: fair notice and arbitrary enforcement. The constitutional justification for the former is due process. This aspect of the US doctrine is precluded by the *Australian Constitution*. The justification for the arbitrary enforcement prong is primarily grounded in the separation of powers. In terms of vague laws which invite arbitrary enforcement, the US Supreme Court has invoked two aspects of the separation of powers: executive and judicial. The analysis undertaken in Part V suggested that the equivalent structural (separation of powers) justification was available in Australia. That finding is unsurprising, as the US model provided the structural and textual template for the separation of powers established by the *Australian Constitution*. Even so, the *Australian Constitution* recognises a *qualified* separation of powers due to its incorporation of the principle of responsible government. The upshot is that recognition of the arbitrary enforcement prong of the void-for-vagueness doctrine to maintain the *executive* separation of powers is precluded. The *Australian Constitution* does not, however, preclude development of this aspect of the US void-for-vagueness doctrine if necessary to maintain the *judicial* separation of powers. Indeed, the analysis undertaken in Part V suggested the compatibility of such a development with the High Court's existing ch III jurisprudence.

Of course, whether it would be prudent for the High Court to develop a void-for-vagueness doctrine is another matter and not the focus of my present inquiry. Yet any consideration of the issue in Australian constitutional law should at least consider the following attributes of vagueness in statute law and

of the US void-for-vagueness doctrine specifically. First, vague laws are common and inevitable, and not all statutory vagueness is problematic in the relevant sense. There will be some important legislative goals which cannot be sensibly advanced without the use of a vague term or concept. Second, problematic statutory vagueness in Australia has long been of judicial concern. To this end, Australian judges already use interpretive technique *and* constitutional principle to cure problematic statutory vagueness. Third, judges in Australia and the US will rely on interpretation — rather than invalidation — to address statutory uncertainty if doctrinally possible; and in most hard cases that *is* possible. To mandate that 'interpretation' is *always* used to cure hopelessly vague statutes may, however, require a court to perform the essentially legislative task of a crafting (and then applying) a legal rule. Finally, the void-for-vagueness doctrine in the US remains the subject of disagreement both in terms of doctrine and the manner of its application. There is, it appears, some truth in Frankfurter J's observation that '"indefiniteness" is not a quantitative concept. It is not even a technical concept of definite components. It is itself an indefinite concept'.[313] This does not make the doctrine illegitimate or unworkable. But it may suggest that such a doctrine should only be deployed when judicial application of interpretive and constitutional principle can fix no ascertainable legal standard to guide conduct. To supply it would require the court to rewrite the statute and so occasion judicial infringement of separation of powers.

The power to make laws is conferred on Parliament for good constitutional reasons. It provides a process for public deliberation and debate of contested issues of policy and ensures democratic accountability for legislated outcomes.[314] These carefully designed features of parliamentary lawmaking are undermined when a hopelessly vague statute requires the courts or executive to craft a legal standard to fix a core meaning. Given that the rule of law is an assumption upon which the *Australian Constitution* was formed,[315] this value is vindicated only to the extent that Parliament makes laws in a manner ascertainable by those to whom they apply. If so, there *may* be value in a supervisory doctrine which provides a discipline for and reminder of this constitutional duty of lawmaking in our age of statutes. An autochthonous void-for-vagueness doctrine of the kind outlined in Part V would be compatible with the qualified and distinctive separation of powers recognised by the *Australian Constitution*.

313 *Winters* (n 176) 524 (Frankfurter J for Jackson, Burton and Frankfurter JJ).

314 Gageler (n 298) 152. See also at 139, quoting *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 109–11 (Sir Maurice Byers QC) (during argument).

315 See above n 73.