RESTRAINT AND RADICALISM: SIR JOHN LATHAM'S CONSTITUTIONAL EXCEPTIONALISM

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This article tracks the development of Sir John Latham's constitutional doctrine and asks if we can identify a conceptual explanation for it. Latham was the fifth Chief Justice of the High Court of Australia (1935–52). But he set out a vision of the Constitution *in his earlier political career, advocating its sweeping reform. As a judge, Latham stridently avoided drawing even modest constitutional implications in the interpretive process. But the charge that his literalistic reading of the* Constitution *masked a politically driven jurisprudence is flawed. Latham's interpretive formalism was primarily rooted in a much deeper fixation over public perceptions of legal integrity. Paradoxically, despite his grave concerns over the stability of the constitutional order, Latham's restraint permitted a radical expansion of Commonwealth power and, in turn, transformation of the federal balance. How did these countervailing forces — restraint and radicalism — arise, and then combine, to forge Latham's exceptional constitutional doctrine?*

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I Introduction

This article explores the unity of Sir John Latham's constitutional doctrine. Latham was appointed the fifth Chief Justice of the High Court of Australia in October 1935 and remained on the Bench until April 1952.[1] He held an unrivalled position from which to develop constitutional doctrine during a 16-year chief justiceship that coincided with Australia's participation in total war, its post-war reconstruction, and then-nascent political institutions taking root under the *Constitution*. His arrival at the Court followed a varied and distinguished career, first at the Victorian Bar and, from 1922 until 1934, in federal conservative politics.[2] Latham spent most of 1941 away from the Court as Australia's first Minister to Japan in a luckless return to diplomacy after his European postings immediately after the First World War.[3] But my focus here is on Latham's interpretive method in constitutional argument. It is in his approach to the development of constitutional doctrine that Latham made the most significant contribution of his judicial career.[4]

Wartime exigency and post-war reconstruction during the course of the Latham Court were used to expand the scope of the Commonwealth's authority, which, in turn, fundamentally altered Australia's federal compact.[5] The legislative power established by the *Constitution* was exercised broadly and, in turn, interpreted broadly by the High Court. This was a transformative period for Australian constitutional doctrine.

As a judge, Latham applied a distinctive mode of highly literal constitutional reasoning. He construed textual meaning as it stood in 1900, when the *Constitution* was enacted, and was determined to show that the task could be shorn of political considerations.[6] Latham often went to extreme lengths to disavow the possibility of judicial choice in constitutional litigation. His method was 'interpretivist' in the sense that it confined the resolution of constitutional disputes to the use of rules and principles unambiguously set out in the text of

[1] Zelman Cowen, *Sir John Latham and Other Papers* (Oxford University Press, 1965) 33 ('*Sir John Latham*'); Stuart Macintyre, 'Latham, Sir John Greig (1877–1964)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1966–91) vol 10, 2, 5.

[2] Cowen, *Sir John Latham* (n 1) 6, 25. For a more comprehensive biographical sketch, see, eg, at 3–33; Macintyre (n 1); Fiona Wheeler, 'Sir John Latham's Extra-Judicial Advising' (2011) 35(2) *Melbourne University Law Review* 651.

[3] Cowen, *Sir John Latham* (n 1) 4–5, 26–7; Macintyre (n 1) 3, 5.

[4] See, eg, Macintyre (n 1) 5; Cowen, *Sir John Latham* (n 1) 53.

[5] See, eg, *South Australia v Commonwealth* (1942) 65 CLR 373 ('*First Uniform Tax Case*').

[6] See, eg, ibid 405–36.

the *Constitution*.[7] But by the late 1940s, some of the Court's puisne members began to subtly question the ostensibly formalist logic of the formative joint opinion in the 1920 case *Amalgamated Society of Engineers v The Adelaide Steamship Co Ltd* ('*Engineers*' *Case*').[8] Justice Dixon, in particular, reasserted tenets of pre-*Engineers*' *Case* orthodoxy in respect of intergovernmental immunities.[9] He did so by soberly expanding the range of implications drawn from constitutional principle in the interpretive process, which, in turn, could act as restraints on legislative power.[10] Chief Justice Latham, however, stood apart in rejecting those innovations:[11] instead, his constitutional doctrine evolved along an exceptionalist path.

Two countervailing forces shaped the development of Latham's constitutional doctrine. The first is the unbending focus on the constitutional text which Latham adopted: the product of his highly distinct view on what constituted arbitrary power. Judicial discretion very rarely arose in interpretive disputes, Latham argued, given the permanence of ascertainable, fixed legal meaning within the constitutional order.[12] The second force was Latham's zeal for dynamic reform of the *Constitution*. Reflected also in his many years in the top reaches of federal politics, and later during his retirement, Latham argued that the instrument had to swiftly adapt to Australia's evolving national condition.[13] But such was the strength of Latham's fidelity to textualism that he would routinely emphasise that amendment could not be legitimately effected by anti-formalist methods of judicial review.[14] It could come only through the legal order's ultimate '[rule] of change':[15] the *Constitution*'s s 128 amendment process.

Here, then, lies a central paradox in the development of Latham's constitutional doctrine. His ultra-conservative reading of the text opened up the space

[7] See, eg, John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (Harvard University Press, 1980) ch 1.

[8] (1920) 28 CLR 129 ('*Engineers*' *Case*'). For judgments questioning the formalist logic of the *Engineers*' *Case* (n 8), see, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 78–9 (Dixon J), 98–9 (Williams J) ('*Melbourne Corporation*').

[9] *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 681–2 ('*West*').

[10] Ibid 681–3.

[11] See, eg, *First Uniform Tax Case* (n 5) 424.

[12] 'Retirement of the Chief Justice' (1952) 85 CLR vii, x; Sir John Latham, 'Interpretation of the Constitution' in Justice Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book, 2nd ed, 1961) 1, 8.

[13] JG Latham, *Australia and the British Commonwealth* (Macmillan and Co, 1929) 61–2; 'Retirement of the Chief Justice' (n 12) viii–x.

[14] See, eg, 'Retirement of the Chief Justice' (n 12) viii; *First Uniform Tax Case* (n 5) 424.

[15] See generally HLA Hart, *The Concept of Law* (Oxford University Press, 3rd ed, 2012) 95–6.

for profound doctrinal change, even as he simultaneously claimed that this interpretive method foreclosed the possibility of judge-led 'informal' revision of the *Constitution*: that is, change outside of the s 128 amendment process.[16] Constitutional renewal was not so much hindered from realisation by Latham's strict interpretivism; it was in many respects significantly *advanced* by those same conservative forces. But this should not be read as an interpretive method — an intense cultural 'legalism' — that cloaked the advancement of political ends behind abstract reasoning.[17] Few checks on the use of government's legislative authority could be legitimately identified in the constitutional text properly construed, Latham CJ argued.[18]

In what follows, I set out to uncover what a conceptual explanation for Latham's exceptional approach to constitutional doctrine might look like.[19] How was it that Latham's constitutional reasoning supported radical growth in the central power and a transformative adjustment of the federal balance? What were the animating features of his view on the constitutional restraints properly placed on government power? And, more broadly, what were the values that drove Latham's view of the *Constitution* and its interpretation?

These questions have yet to be addressed in academic scholarship. Latham's legacy in constitutional law (or any area of law, for that matter) continues to evade detailed scrutiny. Two studies from 1987 and 2002 deal with, respectively, the often dysfunctional workings of the early Latham Court[20] and, relatedly,

[16] See generally Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017) 14.

[17] Elisa Arcioni and Adrienne Stone make a similar, though much broader, argument that the history of post-*Engineers' Case* constitutional interpretation in Australia is one in which a culture of judicial legalism has facilitated constitutional change through the application of 'orthodox interpretive methods': Elisa Arcioni and Adrienne Stone, 'Constitutional Change in Australia: The Paradox of the Frozen Continent' in Xenophon Contiades and Alkmene Fotiadou (eds), *Routledge Handbook of Comparative Constitutional Change* (Routledge, 2021) 388, 399. However, Latham's approach differed significantly from his contemporaries', and not least from that of Dixonian 'strict and complete legalism': 'Swearing In of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv. While legalism, both as an adjudicative technique and a legal culture, sometimes accommodated reference to policy issues, breaks from precedent, and the recognition of constitutional implications, Latham CJ's textual literalism forcefully rejected all of those features as having any relevance in the interpretive task: see, eg, *First Uniform Tax Case* (n 5) 409, 424; *West* (n 9) 669.

[18] See, eg, *First Uniform Tax Case* (n 5) 424.

[19] I take my inspiration here directly from the question posed by (then Commonwealth Solicitor-General) Stephen Gageler on the nature of forces driving the post-*Engineers' Case* evolution of Australian constitutional doctrine: Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32(2) *Australian Bar Review* 138, 139–40, 157.

[20] Clem Lloyd, 'Not Peace but a Sword!: The High Court under JG Latham' (1987) 11(2) *Adelaide Law Review* 175.

how marked personality differences affected the institution's 'voting patterns'.[21] But since Zelman Cowen's quasi-obituary of Latham in 1965, which also set out the broad sweep of his constitutional doctrine,[22] the only focused work on Latham is Fiona Wheeler's 2011 study of Latham's remarkable extrajudicial advisory work.[23]

As important as those insights are, there remains a lot more to be said about the exceptional constitutional doctrine of this outstanding figure in Australian public life. How could it be, for example, that in his penultimate constitutional case (decided exactly 70 years ago), Latham CJ found himself alone as the sole dissentient in one of the High Court's most celebrated decisions, *Australian Communist Party v Commonwealth* ('*Communist Party Case*')?[24]

Part of the reason for this glaring absence of discussion may lie within a broader trend of a dearth of works on Australian judicial biography. The relative scarcity of scholarship in this field is not only long recognised, but also commonly ascribed to a culture of Australian legalism that is unreceptive to scrutiny of a judge's values and personal hinterland.[25] More recent analysis reveals not only the enduring hold of legalism — broadly speaking, on judges rather than academic lawyers — as a barrier to Australian judicial biography. Tanya Josev points to local structural factors, including a lack of cross-disciplinary

[21] Russell Smyth, 'Explaining Voting Patterns on the Latham High Court 1935–50' (2002) 26(1) *Melbourne University Law Review* 88.

[22] Cowen, *Sir John Latham* (n 1) 36–57.

[23] Wheeler, 'Sir John Latham's Extra-Judicial Advising' (n 2). For an overview of the Latham Court's constitutional decision-making, see generally Fiona Wheeler, 'The Latham Court: Law, War and Politics' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 159. For an additional overview of the Latham Court, see, eg, Roger Douglas, 'Latham Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 421. Leslie Zines provided a brief, but penetrating, analysis of Latham's constitutional doctrine: Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 599–602.

[24] (1951) 83 CLR 1 ('*Communist Party Case*').

[25] For example:

> [I]t is contended that the relationship between the judge and the community would be endangered if the screen which obscures the judge's work from the public eye were parted. It would upset that air of mysticism, which we have on high authority, should surround the administration of the law in its higher reaches. The public's respect for and confidence in the judiciary depends upon the complete removal of a judge from the influences that affect lesser men.

Clifford L Pannam, 'Judicial Biography: A Preliminary Obstacle' (1961) 4(1) *University of Queensland Law Journal* 57, 59–60.

focus in academia, in addition to practical difficulties in obtaining relevant archival papers.[26] It is also beyond question that the Latham Court's intellectual leadership was provided by Sir Owen Dixon. Latham's legacy has, then, been overshadowed by his fellow Victorian.[27]

While this article is not a study in judicial biography, or intellectual history, I want to uncover Latham's *complete* conception of constitutional authority. This is located not only in his judgments, but also in Latham's extensive extrajudicial remarks on the nature of Australian constitutional power: those made as statesman, as judge, and in retirement. These works — which primarily take the form of speeches, private letters, and academic articles — remain unexamined as a collective, and yet their recovery and analysis are essential to any proper understanding of the distinctive constitutional jurisprudence which Latham crafted. As James Thomson noted, '[m]ilieu does matter' when it comes to understanding the judicial role, and we ought to 'glean from available fragments of a judicial life the larger themes and premises which often provide unstated but controlling and pervading postulates'.[28] It is in those extrajudicial sources, and not — for the most part — his judgments, that Latham's views on constitutional amendment, interpretive method in constitutional review, and the relevance of the legal source of the *Constitution* are articulated and elaborated. It is in these 'fragments' that Latham explained with remarkable consistency his grand vision of the *Constitution*.

On the High Court Bench, however, beyond repeated incantations on the ultimacy of political, as opposed to legal, modes of restraint on Australian public power, Latham demurred from setting out a rationale for his interpretive method, much less his broader constitutional vision and restiveness for innovation in that area. The exceptional constitutional doctrine that Latham crafted, then, can only be fully understood by reference to extrajudicial material. While the *how* of Latham's constitutional review is set out in his judgments, the *why* is only fully revealed through those sources. And it is only from that vantage that we can fully appreciate the distinct way in which Latham held that government power was primarily 'constitutionalised' — that is, its arbitrary exercise averted, and evolution directed — by the judgement of the Australian people as expressed in periodic elections.

[26] Tanya Josev, 'Judicial Biography in Australia: Current Obstacles and Opportunities' (2017) 40(2) *University of New South Wales Law Journal* 842, 845. But see Wilfrid Prest, 'History and Biography, Legal and Otherwise' (2011) 32(2) *Adelaide Law Review* 185, 196–8.

[27] See generally Philip Ayres, *Owen Dixon* (Miegunyah Press, 2003). For more recent work, see also generally John Eldridge and Timothy Pilkington (eds), *Sir Owen Dixon's Legacy* (Federation Press, 2019).

[28] James A Thomson, 'Judicial Biography: Some Tentative Observations on the Australian Enterprise' (1985) 8(2) *University of New South Wales Law Journal* 380, 384.

I explore these themes in the following stages. I begin, in Part II, with an outline of the constitutional reform that Latham argued for throughout his life, as well as his view of the legitimation of constitutional change. I then move, in Part III, to Latham's judicial career and consider the forces which underpinned his interpretive choices in constitutional adjudication. Critical here is the juristic significance of his unusual view of law's indeterminacy. I also consider Latham's unique approach to the significance of the seminal *Engineers' Case*. In Part IV, I closely track Latham's doctrine as it developed while he was on the High Court through his approach to, first, the *Constitution*'s economic freedoms; secondly, constitutional implications relevant to the federal balance; and, finally, emergency power. The paper then concludes, in Part V, with a reflection on the implications of Latham's attachment to the primacy of political constitutionalising forces.

II 'Artificial and Self-Created Obstacles': Latham and Constitutional Amendment

> [I]t is both our duty and our opportunity to make the *Constitution* as effective and successful an instrument of government as possible.[29]
>
> John Greig Latham, 1930

Discussion over the nature and possibility of constitutional change in Australia naturally begins with the formal referendum process set out in s 128 of the *Constitution*. But, as Sir Robert Garran identified early in the *Constitution*'s life, pathways of constitutional amendment exist beyond this rather narrow conception.[30] Questions arise primarily over the role and legitimacy of practices of judge-led[31] and political[32] alteration of constitutional meaning, as well as interpretive practices developed by the 'common consent of the community'.[33] Those issues are particularly acute given the relative lack of formal constitutional amendment by referendum in Australia, due in no small part to the onerous

[29] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 March 1930, 507 (John Greig Latham).

[30] Robert Garran, 'The Development of the Australian Constitution' (1924) 40 (April) *Law Quarterly Review* 202, 203.

[31] See, eg, Jeffrey Goldsworthy, 'Interpreting the *Constitution* in Its Second Century' (2000) 24(3) *Melbourne University Law Review* 677, 683.

[32] See, eg, Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 163–4 ('Foundations of Australian Federalism').

[33] Garran (n 30) 203.

threshold set by the dual s 128 process.[34] The *Constitution*, replete with gaps and ambiguities in its open-textured drafting,[35] and in the absence of any significant formal reform since 1901, could not have remained relevant as a source of government power and restraints in modern Australia in the absence of extra-s 128, or 'informal', amendment mechanisms.

Sir Anthony Mason argues that the application of 'static' interpretive principles can only take us to a certain point as political demands will, ultimately, make the case for constitutional reform in its various guises stronger.[36] A second, closely related issue requiring resolution is the possibility of 'a shared understanding of what the "constitution" actually *is*'.[37] That is, does the form of our constitutional order extend beyond the *Constitution* as canonical text? Clearly, it does.[38] As such, as Brendan Lim has recently argued, our impression of constitutional law, and the possibility of its amendment, must be broadened beyond the text of its foundational document.[39] To do so requires the integration of modes of constitutional change beyond the s 128 process.

Latham, by contrast, appeared to resolve these complex questions in an exceptionally narrow sense. His attention was directed to those matters long before he arrived at the Court. He focused only on s 128 amendment and, particularly while on the High Court Bench, appeared to reject judicially imposed change to constitutional meaning. But looking under this particularly austere expression of interpretivism, Latham's position is much more embracing of informal constitutional change than it first appears.

[34] As per s 128 of the *Constitution*, following parliamentary approval for a proposed amendment (which can be secured in one of two ways), it must be endorsed by a majority of Australian electors *and* an electoral majority in at least four of the six states. See generally George Williams and David Hume, *People Power: The History and Future of the Referendum in Australia* (University of New South Wales Press, 2010). Notably, only eight out of 44 amendment proposals that have reached the formal referendum stage have been ratified: at 88.

[35] See, eg, Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 114–15.

[36] Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 2. In respect of 'in-built' methods of alteration contained in the *Constitution* itself, eg the states' referral power set out in s 51(xxxvii), see also Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2008) 300–1, 326–32.

[37] Lim (n 16) 15 (emphasis in original).

[38] See John Gardner, 'Can There Be a Written Constitution?' in Leslie Green and Brian Leiter (eds), *Oxford Studies in Philosophy of Law* (Oxford University Press, 2011) vol 1, 162, 169–74.

[39] Lim (n 16) 15–22.

Latham entered federal Parliament after he was elected in December 1922 to the Lower House as the Member for Kooyong in Melbourne.[40] He left behind a thriving practice at the Bar, having only recently taken silk at the age of 44.[41] Latham joined the Nationalist Party after entering Parliament (having stood as an 'Independent Liberal Union' candidate at the election) and, from December 1925, served as Attorney-General for over three years in Stanley Bruce's coalition government before a relatively brief stint as Leader of the Opposition.[42] He returned to the post of Attorney-General in Joseph Lyons's United Australia Party government in early 1932 while simultaneously serving as Deputy Prime Minister, Minister for External Affairs and Minister for Industry.[43] Latham departed politics at the October 1934 general election with one eye on Sir Frank Gavan Duffy's impending retirement as Chief Justice of the High Court.[44]

Latham's first contribution to parliamentary debate, in March 1923, included a proposal to establish an independent expert committee to look at areas of formal constitutional amendment.[45] The advisory group's immediate concern, Latham argued, should be review of the *Constitution*'s finance provisions 'which really ought not to be party questions at all, and which urgently require attention'.[46] '[T]he *Constitution* must not be regarded as sacrosanct', he told Parliament as Attorney-General in 1926, and it had to be continually reimagined to advance the national project.[47] In his first spell in the role, Latham introduced proposals for three constitutional amendments, only one of which was successful at the referendum stage.[48] And, in 1930, by now leading the Nationalists in Opposition, Latham proposed a further six areas of

[40] Cowen, *Sir John Latham* (n 1) 6; Macintyre (n 1) 3.

[41] Cowen, *Sir John Latham* (n 1) 30; Macintyre (n 1) 3; FW Mabbott, 'Appointments: King's Counsel' in Victoria, *Victoria Government Gazette*, No 21, 22 February 1922, 602, 602.

[42] Cowen, *Sir John Latham* (n 1) 6–7, 18; Macintyre (n 1) 3–4.

[43] Cowen, *Sir John Latham* (n 1) 24; Macintyre (n 1) 4.

[44] Cowen, *Sir John Latham* (n 1) 26; Macintyre (n 1) 5. For press speculation to that end, see, eg, 'Mr Latham: Retirement from Politics', *The Sydney Morning Herald* (Sydney, 12 June 1934) 9.

[45] Commonwealth, *Parliamentary Debates*, House of Representatives, 7 March 1923, 181.

[46] Ibid.

[47] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1926, 2830.

[48] The first set of proposed amendments, rejected by referendum in September 1926, set out an expansion of the Commonwealth's legislative power in respect of industrial relations: Constitution Alteration (Industry and Commerce) 1926 (Cth); Parliamentary Library, Department of Parliamentary Services, *Parliamentary Handbook of the Commonwealth of Australia 2020* (Handbook, 2020) 422 ('*Parliamentary Handbook*'). The second proposal, which was decisively carried by a majority in all states in a November 1928 referendum, related to the states' debt arrangements and resulted in the addition of s 105A to the *Constitution*: *Constitution Alteration (State Debts) 1929* (Cth) ('*State Debts Alteration*'); *Parliamentary Handbook* (n 48) 423.

formal constitutional amendment as 'a real and useful extension of Commonwealth power', including on the subjects of restraint of trade, communications, and industrial power.[49]

But a recurring theme of Latham's parliamentary oratory was the stringency of the formal s 128 amendment process. In a public lecture in 1928, Latham predicted that 'efforts will be made to make the *Constitution* more flexible and more readily responsive to the rapidly changing conditions of the modern world'.[50] Shortly after leaving the Court, Latham indicated how constitutional amendment could result in the establishment of 'a completely unitary' state, with an 'all-powerful parliament', and strongly indicated that this would be a desirable outcome.[51] With remarkable candour, he wrote that 'unification in some form is inevitable' given that the Commonwealth's supremacy in the field of income tax had irreversibly changed the federal balance.[52] (I explore the ultimate driver of that alteration, the judgment in *South Australia v Commonwealth* ('*First Uniform Tax Case*'),[53] in Part IV.) Separately, and a few years before his death, Latham gave a talk in which he once again argued for substantially increased Commonwealth legislative power over industrial employment, infrastructure, atomic energy, and intrastate transport.[54] Australia could not, he argued, 'afford to handicap itself by artificial and self-created obstacles in the highly competitive world of the present day'.[55] The historical record, however, is one of invariable failure for referendum proposals that are aimed at expanding federal power.[56]

While on the Bench, Latham's campaign for reform was pursued behind closed doors too. As the embodiment of the 'politician-judge',[57] Latham deviated from separation of powers norms to an alarming degree. As Chief Justice,

[49] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 April 1930, 1012.

[50] Latham, *Australia and the British Commonwealth* (n 13) 61–2.

[51] Sir JG Latham, 'Changing the Constitution' (1953) 1(1) *Sydney Law Review* 14, 18.

[52] Ibid 20.

[53] *First Uniform Tax Case* (n 5).

[54] Sir John Latham, 'The Constitution in a Changing World' (1961) 1(4) *Tasmanian University Law Review* 529, 529, 532–5.

[55] Ibid 535.

[56] Michael Coper, 'Judicial Review and the Politics of Constitutional Amendment' in Rosalind Dixon and George Williams (eds), *The High Court, the Constitution and Australian Politics* (Cambridge University Press, 2015) 38, 41. In addition to the *State Debts Alteration* (n 48), the only other referendum to pass during Latham's time in politics or on the High Court was the 1946 amendment proposal which would insert s 51(xxiiiA) into the *Constitution* in respect of the making of laws on a broad swathe of social welfare matters: see *Constitution Alteration (Social Services) 1946* (Cth); *Parliamentary Handbook* (n 48) 426.

[57] Wheeler, 'Sir John Latham's Extra-Judicial Advising' (n 2) 652.

he engaged in a range of surreptitious advisory work on behalf of, for the most part, conservative federal governments, on a broad sweep of legal and constitutional matters.[58] The application of modern standards of propriety to past conduct is fraught with difficulty. But there is little room for disagreement, as Wheeler's archival study shows, that Latham's actions were highly inappropriate even by contemporaneous measures.[59] In December 1943, for example, at the midpoint of his High Court tenure, Latham sent a remarkable treatise to Prime Minister John Curtin on constitutional reform.[60] He proposed that s 92, on freedom of interstate trade and commerce, 'might well disappear altogether', with repeal being complemented by a constitutional amendment empowering the federal legislature to 'declare void' any state law interfering with freedom of trade and commerce.[61] As such, the Australian people would be found 'trusting the Parliament to legislate fairly as between the States'.[62] Warming to his task, and further betraying his preference for political unitarism, Latham also proposed a radical expansion of both the s 51(i) trade and commerce legislative power, so that it could embrace intrastate activity, and supplementing the s 51(xxxv) industrial power with a power encompassing 'employment and unemployment in industry generally'.[63] Finally, Latham advised that new legislative powers should be created in respect of health and housing.[64] Curtin replied in a characteristically courteous, but non-committal, manner and expressed his appreciation for Latham's views on what he described as 'a complex question'.[65]

Latham made the case for radical constitutional reform more forcefully and publicly after he left the Bench.[66] This again centred on s 92, which he argued

[58] Ibid 653. See also Lloyd (n 20) 195. Though, as Wheeler demonstrates, those contacts were not confined to the conservative Lyons (1932–39) and Menzies (1939–41, 1949–66) governments but, seemingly prompted by Latham's concerns about the war, extended — though in a more subdued fashion — to his former political adversaries in the Curtin Labor government (1941–45).

Wheeler, 'Sir John Latham's Extra-Judicial Advising' (n 2) 653.

[59] Wheeler, 'Sir John Latham's Extra-Judicial Advising' (n 2) 673.

[60] Letter from Sir John Latham to John Curtin, 6 December 1943 (Personal Papers of Prime Minister Curtin, Correspondence 'L', National Archives of Australia Series M1415/307) ('6 December 1943 Letter from Latham'). The letter began as follows (emphasis in original): 'The enclosure is absolutely unofficial and *completely* personal and confidential to *yourself alone*.'

[61] Ibid.

[62] Ibid.

[63] Ibid.

[64] Ibid.

[65] Letter from John Curtin to Sir John Latham, 15 December 1943 (Personal Papers of Prime Minister Curtin, Correspondence 'L', National Archives of Australia Series M1415/307).

[66] See, eg, Latham, 'Changing the Constitution' (n 51); Latham, 'The Constitution in a Changing World' (n 54).

should be repealed in order to augment the Commonwealth's economic power.[67] He attacked the provision as a 'politico-economic slogan' and 'the curse of the *Constitution*' for the intractable controversy that then surrounded the meaning of the word 'free' in its terms.[68] It was a 'boon to lawyers and to road-hauliers and to people who want to sell skins of protected animals or to trade in possibly diseased potatoes'.[69] Extraordinarily for a man who studiously tempered his use of words, Latham lamented in his retirement address in 1952 that the text of s 92 would 'be found written on [his] heart' after he died.[70] The press coverage of the address also focused on Latham's call for a wideranging, nonpartisan review of the *Constitution*.[71]

Latham's lobbying reveals not only that he envisaged sweeping constitutional revision as inexorable — the *Constitution* had to be applied to circumstances which 'were never contemplated when it was first adopted'[72] — but also the extent to which he fixated on the formal s 128 amendment process as the device through which that change was to be realised. But, crucially, he also left open the possibility, albeit inexplicitly, of political forces directing 'informal' modes of constitutional change. His appeal to Curtin, noted above, included the condition that repeal of the s 92 free trade provision was to be balanced by the Australian people's 'trust' in the Commonwealth government's policy decisions.[73] Latham thus impliedly viewed democratic preferences as a constitutional check on federal power, while also acting as a principal constraint on the development of constitutional doctrine over interstate trade and commerce. The *Constitution* was, then, no ordinary Imperial statute, despite what Latham argued (as I outline below): it was responsive enough to accommodate electoral forces capable of shaping the ever-evolving spirit of the federal balance, as well as the scope of government power. This form of constitutional

67 Latham, 'Changing the Constitution' (n 51) 23–8.

68 Sir JG Latham, 'Book Review: *Cases on the Constitution of the Commonwealth of Australia* by Geoffrey Sawer and *Legislative, Executive and Judicial Powers in Australia* by W Anstey Wynes' (1957) 1(2) *Melbourne University Law Review* 266, 268, 271.

69 Ibid 271–2. The first paragraph of s 92 reads as follows: 'On the imposition of uniform duties of customs, trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation, shall be absolutely free.'

70 'Retirement of the Chief Justice' (n 12) ix.

71 'Legal Men's Farewell to Sir John Latham', *The Sydney Morning Herald* (Sydney, 8 April 1952) 2; 'Call for Constitutional Reform', *The Sydney Morning Herald* (Sydney, 8 April 1952) 2; 'Farewell to Chief Justice: Sir J Latham Suggests Review of Constitution', *The Age* (Melbourne, 8 April 1952) 4.

72 Latham, 'The Constitution in a Changing World' (n 54) 529.

73 6 December 1943 Letter from Latham (n 60).

change outside the realm of the formal s 128 process unmistakably altered constitutional meaning.

The nuance and exceptionality of Latham's approach is revealed more clearly when mapped onto Michael Coper's two competing models of constitutional change.[74] In one pattern, Coper posits interpretivist courts deferring to the people — acting through s 128 — as the primary agent of constitutional change.[75] The other model imagines the people to be 'the ultimate safety-valve' within a framework of anti-formalist judicial reasoning in which constitutional amendment is primarily steered by the courts.[76] Latham's position fits uneasily within either of these modes. True, his interpretive method, as I explore below, was intensely formalistic. But he at once viewed the people as the key drivers of formal *and* informal constitutional change: in the former case, in its 'primary agent' guise, through choosing representatives to instigate the s 128 process, and then having the final say in a referendum; in the latter case, as 'ultimate safety-valve', through placing implicit limits (the government exercises power with one eye on its re-election) *and* explicit limits (with its electoral vote) on the direction and scope of government policy.

Similarly, judicial alteration of constitutional meaning is a key component of this second mode of informal change. It is revealed in the Court's judgment in the *First Uniform Tax Case*, for example: the Court cannot be said to have merely given effect to the evident meaning of the federal taxation power.[77] The contested meaning of that constitutional power is not only open to divergent interpretation, but susceptible of changing content in response to evolving federal dynamics. The exact nature of Latham's attitude towards this second mode of change will become clearer in Parts IV and V.

III 'Passionless Machines': Interpretive Choice and Constitutionalising Forces

In his retirement address to the High Court in April 1952, Latham emphasised that as a 'general court of appeal', constitutional cases were only 'a fraction of its work'.[78] He was, however, conscious of the allure of the Court's role in constitutional argument, even if it was his view that, on the whole, the *Constitution*

[74] Michael Coper, 'The People and the Judges: Constitutional Referendums and Judicial Interpretation' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 73.

[75] Ibid 74.

[76] Ibid 73–7, 85.

[77] *First Uniform Tax Case* (n 5). See below Part IV(B).

[78] 'Retirement of the Chief Justice' (n 12) viii.

'worked well'.[79] Latham expressed deep unease over how those disputes contained the potential to cast doubt in the minds of the public over the function and legitimacy of the *Constitution*, particularly as a reaction to judicial divergence of opinion on interpretive questions.[80] As a result, he hoped that

> the [legal] profession will not be led into doubts as to the value and validity of the law by academic discussions of marginal cases. Naturally those who write on legal subjects are interested in the marginalia of the law, but I ask you to remember that the law as a whole works very well indeed, and that you should not judge the certainty of the law upon divisions of opinion in the final court of appeal …[81]

This is a remarkable betrayal of Latham's anxiety toward the power of legal indeterminism, as he viewed it, to undermine the integrity of the constitutional order. His antipathy towards constitutional review was not rooted in democratic concerns over the legitimacy of judicial oversight of the political process. Rather, it arose from his fears over the potential for judicial reasoning to weaken the public's trust in the objectivity of the constitutional order, all of which, ultimately, arose from an innate fear of arbitrary power. Better, then, to substantially foreclose the need for judicial review by emphasising law's determinacy, and to concede that where it does arise in constitutional litigation, the interpretive process is essentially revelatory.

Latham repeatedly expressed concerns over the effect of arbitrary power during his time in politics. As early as 1926, he spoke in Parliament of the inexorable nature of constitutional review in a federal polity.[82] But such disputes reflected only the natural order of difficulties

> under federation [and were] such as [were] to be expected in connexion with the institution of a new system of government. It would be unreasonable to expect new legislative machinery to operate without any friction, and to require no adjustment.[83]

[79] Ibid.

[80] Ibid x.

[81] Ibid. Those views are also echoed in his comments at his swearing-in ceremony on 17 October 1935:

> In these difficult days, when the world is changing almost daily before our eyes; when the sphere of legal regulation is being extended every year … it is, perhaps, more important than ever that the administration of justice should be such as to deserve and to earn the confidence of the people …

'Oath of Office: New Chief Justice', *The Sydney Morning Herald* (Sydney, 18 October 1935) 10.

[82] Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1926, 2830–43.

[83] Ibid 2832.

Latham's approach to constitutional reasoning must be understood against this much broader view of law's role as a bulwark against discretionary power. Moreover, given that a potent source of arbitrariness can be found in interpretive choice, Latham believed that confidence in the integrity of the constitutional order could be preserved by showing that the meaning of its rules was uncoverable through orthodox constitutional reasoning. 'The great body of the law is reasonably certain', he told the jurist Wolfgang Friedmann in a letter written the day after his retirement from the Bench in 1952, and the legal academy's focus on 'borderline cases' served to undermine the broader perception of legal integrity.[84] He had cautioned Friedmann about going

> too far in [his] enthusiasm in insisting that judges are frequently influenced by political considerations, constituted generally by some reprehensible 'inarticulate premises' attributed to them.[85]

Similarly, in the past, Latham had heavily criticised the work of the American jurist, and former Supreme Court Justice, Benjamin Cardozo, on the interpretive method. In a letter to Sir Owen Dixon in April 1944, Latham complained that Cardozo's doctrine 'emphasise[d] quite unduly the small number of cases in which there is no ascertainable established principle according to which a case can be decided'.[86] And in those few cases that required the development of legal principle, it was, besides, 'very seldom that there are not guides, at least by way of analogy, in cases already decided'.[87]

More insidious for Latham was Cardozo's view of the role of political preferences in the adjudicative process. 'A judge is not a purely intellectual, passionless machine', wrote Latham, but

> the idea that he ought to allow some political principles, described as liberal by his friends, and reactionary by those who disagree with him, to determine his decisions in cases is to me a very vicious principle indeed.[88]

The United States Supreme Court had developed into a 'political body', Latham felt, and employed offensive terminology, such as judges 'voting', akin to the

[84] Letter from Sir John Latham to Wolfgang Friedmann, 8 April 1952 (National Library of Australia, MS 1009/63/596) ('Friedmann Letter').

[85] Ibid.

[86] Letter from Sir John Latham to Sir Owen Dixon, 17 April 1944 (National Library of Australia, MS 1009/1/5680).

[87] Ibid.

[88] Ibid.

language of 'party politicians'.[89] He apportioned some of the blame for that development to the 'political war-cries in the form of legal enactments' found in the text of the *United States Constitution*.[90] It followed, then, that the Australian judiciary's 'strength … as an element in a constitutional system' depended on its 'record and reputation for complete political impartiality'.[91] And, as he wrote to Friedmann in his aforementioned letter, the 'independence and integrity of the judiciary', being 'one of the principal safeguards of a free civilisation', can be maintained only by an explicit separation between politics and law in the interpretive process.[92] This sentiment preceded by two weeks Dixon's famous remarks on 'strict and complete legalism' delivered during his swearing-in as Chief Justice.[93] Though Latham did not refer to it explicitly, there is little doubt that, as was true in Dixon's case,[94] sensitivities on interpretive method in constitutional review were acute given the fallout surrounding the *Communist Party Case* decision handed down a year earlier.[95]

Relatedly, as Commonwealth Attorney-General, Latham had spoken in existential terms of the judiciary's proper function in a democratic society. In a speech at the first meeting of the Australian Legal Societies, a forerunner of the Law Council of Australia, Latham had 'eulogised' the Australian judiciary, 'emphasising that they were the agents of justice': if the courts were to fail in their duty, then 'our whole system fails', Latham said, and 'no man or woman in the community is safe from the exercise of arbitrary power'.[96]

Latham responded to this test, as he saw it, of the constitutional order's integrity by setting out an extremely narrow compass within which the resolution of interpretive disputes could legitimately occur. His interpretivism took shape from the source of the *Constitution*'s ultimate authority. Its legal force is derived not from political acts or principles extraneous to the legal order, but simply, 'from the fact that it is a statute which was enacted by a legislature which had power to make laws for Australia'.[97] This, in turn, precluded the incorporation

89 Ibid.

90 Ibid.

91 Ibid.

92 Friedmann Letter (n 84).

93 'Swearing In of Sir Owen Dixon as Chief Justice' (n 17) xiv.

94 Ayres (n 27) 233. See also George Winterton, 'The *Communist Party* Case' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 108, 135.

95 *Communist Party Case* (n 24).

96 'Legal Profession: Judiciary Eulogised', *The Sydney Morning Herald* (Sydney, 19 April 1933) 12.

97 Latham, 'Interpretation of the Constitution' (n 12) 5.

of notions of popular sovereignty, or implied doctrines, in constitutional reasoning, as had occurred in the United States. Those forces did not, in Latham's view, possess any constitutionalising force or significance in the interpretive process.[98] '[A]ttempts to define the *Constitution* as a contract or compact have not been very successful', Latham wrote in 1961, not least given that the referendums of the late 1890s, in which its text was approved by the Australian people, 'produced no legal result'.[99] On this account, then, legal meaning is that which had been specified in the text of the *Constitution* by the Imperial Parliament in 1900 in its capacity as the Australian legal sovereign (as opposed to the intent of the Convention attendees, or that of the Australian electors who approved the text in late-19th-century referendums).

Constitutional reasoning in the middle part of the 20th century took place in the long shadow of the High Court's August 1920 decision in the *Engineers' Case*.[100] The formative joint opinion in the case, which was directed and written by Isaacs J, swept aside the implied constitutional doctrines of reserved state powers and intergovernmental immunities.[101] The textual meaning of the *Constitution* had to be determined according to the 'ordinary lines of statutory construction'.[102] The instrument was to be read 'naturally in the light of the circumstances in which it was made'.[103] As Latham's son — the jurist, Richard Latham — wrote, the *Engineers' Case* marks the point at which Isaacs's 'heterodoxy became the new orthodoxy' as 'the crabbed English rules of statutory interpretation' were now applied to the *Constitution*.[104]

But masked within Isaacs's interpretive formalism was a high degree of political ambition to expand the central power as Australia grew as a nation. With

98 Ibid 5, 8–12.

99 Ibid 4–5.

100 *Engineers' Case* (n 8). Latham set out the relevance of the *Engineers' Case* (n 8) as early as 1926, when, as Commonwealth Attorney-General, he stated in Parliament that the case had set aside constitutionally implied doctrinal restraints on Parliament's legislative power and that

> the powers under section 51 of the *Constitution* were to be construed according to the plain meaning of their terms, and not in the light of any supposed restrictions in the nature of an implied prohibition …

Commonwealth, *Parliamentary Debates*, House of Representatives, 10 June 1926, 2911–12. Latham would go on to quote directly from the joint judgment in the case: at 2912, quoting *Engineers' Case* (n 8) 154 (Knox CJ, Isaacs, Rich and Starke JJ). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1933, 1157 (John Greig Latham).

101 Latham acted with Sir Edward Mitchell KC for the States of Victoria, South Australia and Tasmania as interveners in the case: *Engineers' Case* (n 8) 134.

102 Ibid 149–50 (Knox CJ, Isaacs, Rich and Starke JJ).

103 Ibid 152.

104 RTE Latham, 'The Law and the Commonwealth' in WK Hancock (ed), *Survey of British Commonwealth Affairs* (Oxford University Press, 1937–42) vol 1, 510, 563.

the adjudicative method established by the *Engineers' Case*, one that was devoid of judicially implied restrictions, federal power could then be read expansively. The *Engineers' Case* decision can, then, be properly 'credited with holding the Commonwealth's line' and taking 'some of the load off the shoulders of the nationalist judges' until centralising federal authority was asserted more forcefully.[105] Unlike Latham, however, Isaacs was 'no literalist'[106] and, outwardly at least, shared little of his successor's preoccupation with the legitimacy of the judicial role. Justice Isaacs incorporated the use of constitutional implications within his reasoning when expedient, such as in the *Engineers' Case* when he looked to the principle of responsible government.[107] His primary aim, rather, was to show how the *Constitution* could be read in a way that would both forge and legitimise a 'progressive' political direction for the new country.[108] Zelman Cowen wrote of Isaacs's insistence that the instrument should be interpreted in a way that took 'account of changing circumstances, and in particular that the court should acknowledge the needs of the nation'.[109] He was also 'one of the earliest of Australian Federal judges to give explicit recognition to the social implications of decision-making'; in his judgments 'he spelled out social (and, where appropriate, economic) policies, often in detail'.[110]

While Latham's approach to reasoning on the High Court lacked the palpable 'flame of an aggressive nationalism' evident in Isaacs's constitutional doctrine,[111] his jurisprudence ultimately took shape in a similar sense to his predecessor's 'position of strong, almost undeviating support for the exercise of national — that is to say, central — power'.[112] 'In his decisions on constitutional

[105] LF Crisp, *The Unrelenting Penance of Federalist Isaac Isaacs: 1897–1947* (1981) 97.

[106] Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25(1) *Federal Law Review* 1, 14.

[107] *Engineers' Case* (n 8) 146–8 (Knox CJ, Isaacs, Rich and Starke JJ). See also, eg, *Commonwealth v The Colonial Combing, Spinning & Weaving Co Ltd* (1922) 31 CLR 421, 438–9 (Isaacs J) ('*Wooltops Case*'); *Commonwealth v Kreglinger & Fernau Ltd* (1926) 37 CLR 393, 413 (Isaacs J) ('*Kreglinger*').

[108] *Wooltops Case* (n 107) 438–9.

[109] Zelman Cowen, *Isaac Isaacs* (Oxford University Press, 1967) 150.

[110] Zelman Cowen, 'Isaacs, Sir Isaac Alfred (1855–1948)' in Bede Nairn and Geoffrey Serle (eds), *Australian Dictionary of Biography* (Melbourne University Press, 1966–91) vol 9, 444, 447.

[111] Ross Anderson, 'The States and Relations with the Commonwealth' in Justice Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book, 2nd ed, 1961) 93, 97.

[112] Zelman Cowen, 'Isaacs, Isaac Alfred' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (Oxford University Press, 2001) 359, 359–60.

questions', wrote Latham, 'Sir Isaac emphasised the position of the Commonwealth in our political and legal organisation' and put it 'paramount within the spheres constitutionally assigned to [it]'.[113]

But Isaacs's proactive, even aggressive, approach was anathema to Latham. So too was the constitutionalising force of the basis for the joint opinion in the *Engineers' Case*, built, as it was, upon interpretive principles that find no explicit textual exposition. Latham wrote that 'it [could not] be said that the *Engineers' Case* settled all the constitutional problems to which at first glance it might be thought to have provided a solution'.[114] For Latham, the judgment's doctrinal bedrock, Crown indivisibility and responsible government, was wholly misconceived and, therefore, possessed no interpretive force in constitutional reasoning. This view was set out long before he joined the High Court. As Commonwealth Attorney-General in 1933, Latham stated that the *Engineers' Case* revealed that federal constitutional power should be interpreted 'according to the natural meaning of the words without any limitation derived from any implications or reservations in favour of the powers of a State'.[115] As a result, Commonwealth power should be construed 'independently of any supposed reserved powers of the States'.[116] Later, in his dissent in the wartime case of *Minister for Works (WA) v Gulson*, which concerned the binding effect of federal wartime regulations on the Crown in right of a state, Latham CJ held that in light of the *Engineers' Case* decision, the issue arising was *not* one of constitutional power — the Commonwealth's capacity to bind a state by law — but one of construction of those regulations.[117] The Crown, as per the *Engineers' Case*, was indeed comprised of a single juristic entity, but this had an exclusively political, as opposed to legal, effect.[118] And 'when stated as a legal principle', the theory of Crown indivisibility 'tends to dissolve into verbally impressive mysticism'.[119]

It was Latham's view, then, that the *legal* significance of the *Engineers' Case* lay in its assertion of the primacy of apolitical interpretivism. The *Constitution*,

113 Sir John Greig Latham, 'Sir Isaac Isaacs' (1948) 22(2) *Australian Law Journal* 66, 66.

114 Ibid.

115 Commonwealth, *Parliamentary Debates*, House of Representatives, 3 May 1933, 1157.

116 Ibid. See also his comments in 1926, as Attorney-General, on the nature of post-*Engineers' Case* constitutional adjudication: 'each power under section 51 is read independently, and according to the natural meaning of its own words, apart from any implied prohibition relating to interference with intra-state trade': Commonwealth, *Parliamentary Debates*, House of Representatives, 11 June 1926, 2987–8.

117 (1944) 69 CLR 338, 347.

118 Ibid 350.

119 Ibid.

as a document illustrative of a constitutive moment, was frozen in time: its capacity to restrain government power arose exclusively from the textual provisions instituting a procedural framework for government. It could not constitutionalise power on the basis of extraneous or implied principles. '[T]hough emphatic reference is made in the *Engineers' Case* to the principle of responsible government as permeating the *Constitution*', wrote Latham, 'it has not yet been made apparent how … [it] has any bearing upon' constitutional interpretation.[120] And as with Crown indivisibility, which 'lends itself to Athanasian distinctions', Isaacs J's 'cardinal features' of the constitutional system possessed no legal force in the interpretive process.[121] The *Constitution* was, then, 'a statute which was passed in the year 1900 and it [was] to be construed according to the general rules of statutory interpretation'.[122]

This was true of the reasoning in the *Engineers' Case* joint judgment, too, as it was 'difficult to see precisely what effect these cardinal principles had upon the decision'.[123] Testament to the vagaries of Isaacs's constitutional doctrine, Latham found support for this view from his predecessor,[124] where Isaacs J had once held that constitutional interpretation must look to the ordinary meaning of words 'in the systems of law in Australia at the time of federation'.[125]

As a result, Latham attempted to contain the contingency that arises as a natural part of constitutional reasoning, not least from the unavoidable obscurities and silences produced by constitutional drafting, by reducing the legitimate role of the judicial method in the interpretive process to one of austere textualism. He signified a preference for a weak form of *legal* constitutionalism, under which government power is subject to a curtailed form of judicial oversight: not on the basis of any normative understanding of the *Constitution*, but from its construal according to orthodox British principles of statutory interpretation. Constitutional reasoning is merely revelatory, on this account, and is incapable of producing judicially imposed change.[126] Latham could, then, reliably inform those attending his retirement address that it was only in 'a very small' or 'infinitesimal proportion of the legal transactions that take place' that there was room for legitimate interpretive disharmony.[127]

120 Latham, 'Interpretation of the Constitution' (n 12) 3.

121 Ibid 28–9.

122 Ibid 8, 31.

123 Ibid 28.

124 Ibid 8.

125 *Australian Steamships Ltd v Malcolm* (1914) 19 CLR 298, 328. Cf *Kreglinger* (n 107) 411–13 (Isaacs J).

126 See, eg, Lim (n 16) ch 2.

127 'Retirement of the Chief Justice' (n 12) x.

IV The Latham Court and Constitutional Doctrine

A *Economic Freedoms*

The influence of this distinct conception of legal indeterminacy is obvious in the reasoning of the first significant constitutional law judgment of Latham's chief justiceship. The 1936 decision in *Elliott v Commonwealth* ('*Elliott*') concerned a challenge to a federal licensing system on the basis that it breached the non-discrimination rule set out in s 99 of the *Constitution* after the scheme had been applied to specified ports across four states.[128] Chief Justice Latham wrote that the discovery of parliamentary intent in the resolution of the dispute was 'immaterial' as the task was, by its very nature, 'a matter of imputation rather than of evidence'.[129] As a result, the 'political aspects' of the law were irrelevant to the interpretive method, and, ultimately, the nature of a preference enjoyed by a state, or part of a state, was a non-justiciable 'question of opinion'.[130]

Extraordinary for its forthrightness is Latham CJ's concession that this approach to the non-discrimination protection could render it 'largely illusory'.[131] Leslie Zines speculated that Latham CJ's admission — 'a remarkable thing to do'[132] — may have reflected a desire to overcome the clause's original objective: inserted, as it was, to assuage the smaller colonies' fears over the economic dominance of the larger colonies.[133] But by the 1930s, it stood for a 'policy that many regard[ed] as having little relevance to Australian conditions'.[134] Latham's approach, by contrast, in diminishing the force of a constitutional restraint on power, opened up a path through which economic growth could be stimulated by the Commonwealth 'in particular parts of the country for national reasons'.[135] Zines then ventured that

[128] (1936) 54 CLR 657, 663–4 (Latham CJ).

[129] Ibid 665.

[130] Ibid 665, 670.

[131] Ibid 675.

[132] Leslie Zines, 'Form and Substance: "Discrimination" in Modern Constitutional Law' (1992) 21(1) *Federal Law Review* 136, 137 ('Form and Substance').

[133] Ibid.

[134] Leslie Zines, 'Commentary: "The High Court and the Constitution in a Changing Society" by Gareth Evans' in David Hambly and John Goldring (eds), *Australian Lawyers and Social Change* (Law Book, 1976) 81, 93–4.

[135] Ibid 94.

> whatever one may think of the method, the result of a wooden legalistic approach might, from a policy viewpoint, in some cases be more desirable than that which might come from a broader examination of the issues.[136]

This implies that normative political factors — specifically, the progression of Australian economic interests and, ultimately, nationhood — operated as a concealed interpretive force in Latham's constitutional reasoning. It has been argued from the High Court Bench that those forces can also be seen at work in the reasoning in the *Engineers' Case*.[137] The suggestion, then, is that textual interpretivism — a method which exploits the vagaries of legal drafting — is employed as a designedly weak form of judicial review: that it is a means through which an expansive reading of constitutional power can be supported almost by stealth. But this misreads the key driver of Latham's interpretive method: that is, the realisation of legal stability by severely constraining, if not eliminating, the range of judicial choice in constitutional argument. 'Wooden' legalism was not the means through which constitutional reasoning was conducted, but the end in and of itself.

After *Elliott*, Latham's doctrine continued to evolve as it both expanded the central power and appealed to the primacy of political mechanisms of constitutional constraint. In *Deputy Federal Commissioner of Taxation (NSW) v W R Moran Pty Ltd* ('*W R Moran*') in 1939, for example, in upholding the possibility of discrimination in relation to Commonwealth financial grants to the states made pursuant to s 96 of the *Constitution*, Latham CJ held that redress on purported grounds of discrimination should be sought in Parliament, not the courts.[138]

But it is in his approach to s 92 of the *Constitution* — which sets out an absolute freedom of trade among the states — that Latham's pursuit of apolitical interpretivism in constitutional disputes met its most profound challenge. The interpretive ambiguity created by the freedom's unqualified wording flummoxed generations of Australian constitutional lawyers[139] until a near complete

[136] Zines, 'Form and Substance' (n 132) 137.

[137] See *Victoria v Commonwealth* (1971) 122 CLR 353, 396–7 (Windeyer J) ('*Payroll Tax Case*').

[138] (1939) 61 CLR 735, 764 ('*W R Moran*').

[139] Justice Stephen Gageler, 'The Section 92 Revolution' in James Stellios (ed), *Encounters with Constitutional Interpretation and Legal Education: Essays in Honour of Michael Coper* (Federation Press, 2018) 26, 27. Justice Gageler writes that at least one third of Australian constitutional cases between 1903 and 1987 related to s 92: at 28.

resolution was arrived at in the High Court's 1988 decision in *Cole v Whitfield*.[140] In March 1898, Isaacs prophetically warned in the Convention Debates that the clause which would become s 92 was 'open to the very serious objection that, while it says "absolutely free", it does not say free of what'.[141] His proposal to clarify that the wording referred to freedom from taxation and restriction only was overwhelmingly rejected:[142] better to trust 'a little bit of laymen's language', in George Reid's opinion, 'which comes in here very well'.[143] Within a literalist interpretive framework, then, the s 92 freedom would fully prohibit *any* government regulation of interstate trade and commerce. Such an approach would render redundant s 51(i) of the *Constitution*, the legislative power over interstate trade and commerce.

But economic regulation of *some* degree, in upholding basic standards of hygiene and safety, for example, is a prerequisite for any functional liberal economy. It was a danger that Latham had clearly recognised when, as Attorney-General, he said in Parliament in 1928 that the words of s 92 'appear to be absolutely clear until one asks the simple question "absolutely free from what?" Then one begins to realize the difficulties associated with the subject'.[144]

In setting out an approach to s 92, Latham sought to balance doctrinal stability with a degree of regulatory oversight. This necessitated a partial retreat from strict interpretivism. In an extra-curial address weeks before his retirement, Latham argued that 'absolute freedom, notwithstanding section 92 of the *Constitution*, means violence and anarchy and the destruction of any general free action'.[145] The concept was, he said, 'a contradiction in terms' in any ordered society.[146] In the 1939 case of *Milk Board (NSW) v Metropolitan Cream Pty Ltd*, Latham CJ held that s 92 meant 'orderly dealing' and, accordingly, 'any sensible meaning' of the freedom had to allow for trade and commerce to be subject to government regulation.[147] 'The only solution of the problem', then, was to

[140] (1988) 165 CLR 360. Geoffrey Sawer described the provision as one of 'gothic horrors and theological complexities': Geoffrey Sawer, 'Book Review: *Constitutional Law* by Christopher Enright' (1977) 8(3) *Federal Law Review* 376, 377.

[141] *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2365.

[142] Ibid 2367.

[143] Ibid.

[144] Commonwealth, *Parliamentary Debates*, House of Representatives, 26 April 1928, 4394.

[145] Sir John Latham, 'Address to the Seventh Legal Convention of the Law Council of Australia: Second Session' (1951) 25(5) *Australian Law Journal* 245, 246 ('Law Council Convention Address').

[146] Ibid.

[147] (1939) 62 CLR 116, 125 ('*Milk Board*').

> hold that "free" means free from some kind of legislative control, but not free from all kinds of legislative control … the freedom which is protected by sec 92 is not absolute freedom but is limited or conditioned freedom.[148]

To move beyond the text and open the space for government intervention required the courts to engage in substantive constitutional reasoning: a wider political context had to be attached to the provision in order to revert, at least to some extent, to its anti-protectionist roots. This degree of doctrinal innovation jarred with Latham CJ's interpretive preferences.[149] It further brought the courts deeper into the realm of public policy oversight.[150] This, no doubt, explains Latham's astonishing lament in his High Court retirement address that s 92 would 'be found written on [his] heart' after he died.[151]

The unhappy doctrinal compromise arrived at in the Privy Council decision in *James v Commonwealth* ('*James*')[152] handed down shortly after Latham joined the Court offered him an opportune, though imperfect, solution to the puzzle. The Judicial Committee held that the freedom could embrace significant government regulation of interstate trade, while still retaining its rationale by allowing the invalidation of protectionist trade barriers.[153] It also aligned much more closely to Evatt J's reading of the freedom, as a guarantee on the physical flow of goods interstate, than Dixon J's individual rights-based interpretation.[154] The Privy Council reasoned that, since Federation, the diverse forms of the restraints and burdens placed in the way of interstate trade and commerce by governments proved that the only proper constitutional test under s 92 pertained to 'freedom as at the frontier'.[155] Restriction of freedom of trade at this point of a transaction — that is, at an interstate 'frontier' — thus constituted a breach of s 92.[156]

As inelegant as the *James* test was, its precedential weight allowed Latham to reject the need for interpretive parsing in s 92 disputes. It was Latham CJ's view, then, that constitutional invalidity arose where a law was 'directed against' interstate trade and commerce in a prohibitive or restrictive sense, rather than

148 Ibid.

149 See, eg, ibid 132–3 (Latham CJ).

150 See, eg, Gageler, 'The Section 92 Revolution' (n 139) 28.

151 'Retirement of the Chief Justice' (n 12) ix.

152 (1936) 55 CLR 1 ('*James*').

153 Ibid 58–9 (Lord Wright MR for the Judicial Committee). See also *Gratwick v Johnson* (1945) 70 CLR 1, 14 (Latham CJ) ('*Gratwick*'); *Milk Board* (n 147) 127 (Latham CJ).

154 Michael Coper, *Freedom of Interstate Trade under the Australian Constitution* (Butterworths, 1983) chs 5–7. See especially at 46–7, 59.

155 *James* (n 152) 58 (Lord Wright MR for the Judicial Committee).

156 Ibid.

in a regulatory manner, even where the policy was applied discriminatorily.[157] While this distinction between regulation and prohibition was flawed, and potentially open to complex abstractions,[158] *James* was nevertheless the 'binding exposition' of s 92, in Latham CJ's view,[159] and the bedrock of his jurisprudence in disputes related to the constitutional freedom.[160] It allowed Latham to navigate interpretive questions over the validity of complex legislative initiatives — both in respect of state protectionism, and, particularly after the war, Labor's contentious nationalisation initiatives — within a narrowly legalistic framework. In *Australian National Airways Pty Ltd v Commonwealth* ('*Airlines Nationalisation Case*'), for example, Latham CJ rejected the Commonwealth's argument that the provision of 'adequate services' by a public body, Trans-Australia Airlines, that was authorised to provide a monopolised interstate aviation service was not a breach of s 92.[161] The freedom extended not only to the public as customers, but also to 'persons who [were] engaged, or who [might] desire to engage, in the business of providing inter-State air services'.[162]

Yet Latham still occasionally baulked at entanglements with the freedom's doctrinal niceties. In *Riverina Transport Pty Ltd v Victoria*, he rejected with uncharacteristic terseness a challenge to the validity of a Victorian statutory licensing scheme for vehicles.[163] Chief Justice Latham did so by relying solely on the *James* principle and appealed, once again, to the primacy of the political process as a constitutionalising force.[164] He held that even if it were accepted that, in the scheme's administration by the state regulatory body, licences were denied to those carrying goods into New South Wales pursuant to a policy to

[157] *Gratwick* (n 153) 13–14.

[158] Chief Justice Latham addressed those potential shortcomings in *Home Benefits Pty Ltd v Crafter* (1939) 61 CLR 701, 713. On the decision in *R v Connare; Ex parte Wawn* (1939) 61 CLR 596 ('*Connare*'), see Coper, *Freedom of Interstate Trade under the Australian Constitution* (n 154) 78–80.

[159] *Hartley v Walsh* (1937) 57 CLR 372, 380.

[160] See, eg, ibid 380–2; *Riverina Transport Pty Ltd v Victoria* (1937) 57 CLR 327, 348 ('*Riverina*'); *Connare* (n 158) 604; *Gratwick* (n 153) 11, 13–14.

[161] (1945) 71 CLR 29, 60–1 ('*Airlines Nationalisation Case*').

[162] Ibid 60 (Latham CJ).

[163] *Riverina* (n 160) 340.

[164] Ibid 348–9.

impede interstate transportation, the discretionary exercise of the power remained irrelevant to the governing statute's constitutional validity.[165] Disputes in relation to the ostensibly discriminatory nature of (in this case) a Victorian scheme *and* its administration, Latham CJ argued, should be addressed through the political process and not the courts.[166] Resolution of that nature 'cannot be done by any court acting upon legal principles'.[167]

He went much further, however, in *Bank of New South Wales v Commonwealth* ('*Bank Nationalisation Case*') — the epochal constitutional dispute arising from the Chifley government's post-war nationalisation program[168] — in his efforts to avoid the complexity of whether 'freedom at the frontier' had been invalidly burdened.[169] The case concerned a federal law that provided the Commonwealth Bank with a monopoly over banking services.[170] While four High Court Justices struck down the legislation as a breach of the s 92 freedom,[171] Latham CJ de-escalated the severity of the interpretive challenge by holding that banking did not fall within the meaning of interstate trade or commerce and that, even if banking was an instrument of trade or commerce, there was no general rule against regulating instruments of trade or commerce.[172] As a result, the law was compatible with s 92.[173]

'Freedom', Latham would say in an extra-curial address soon after the *Bank Nationalisation Case*, 'means in practice freedom from illegal restraint' and not 'licence or anarchy with complete freedom for some and subjection for others'.[174] It was a relative concept, he argued, and this specifically extended to the 'plain words' of s 92.[175] Latham then quoted at length from the author Emery Reves's *The Anatomy of Peace*, in which Reves had explained how freedom, as a

[165] See ibid 341:

> It is, I think, a serious error to suppose that a statute can begin life as a valid statute and then at some point of time become invalid because some person takes some action which he unsuccessfully attempts to justify under the statute. The validity of the Act obviously cannot depend upon what people do, or think that they are entitled to do, under the Act.

[166] Ibid 349.

[167] Ibid.

[168] See generally John Hawkins, 'Ben Chifley: The True Believer' [2011] (3) *Economic Roundup* 103, 117–21.

[169] (1948) 76 CLR 1 ('*Bank Nationalisation Case*').

[170] Ibid 149–50 (Latham CJ), citing *Banking Act 1947* (Cth).

[171] *Bank Nationalisation Case* (n 169) 295 (Rich and Williams JJ), 325 (Starke J), 388–91 (Dixon J).

[172] Ibid 233–40.

[173] Ibid 235, 240.

[174] Latham, 'Law Council Convention Address' (n 145) 246.

[175] Ibid.

means of protecting the individual, meant a social order predicated on law and the legal method.[176] Latham's encounters with s 92, then, formed a preoccupation that bordered on the existential: the integrity of the constitutional order depended on the application of a clear and intelligible rule shorn of its resultant policy and practical effects.

B *Constitutional Implications and Federalism*

In stark contrast to Latham's hostility to the accommodation of interpretive implications in constitutional reasoning, several of the Court's puisne Justices located structural constraints on government power beyond the constitutional text. As 'an instrument of government', Dixon J wrote in 1945, the *Constitution* had to be 'capable of flexible application to changing circumstances', and this extended to the use of its textual 'general propositions'.[177] As a result, and as there was no reason 'why we should be fearful about making implications', the use of 'pedantic and narrow constructions' of the constitutional text had to be avoided.[178]

It may well be that Dixon had Latham's approach in mind. In the early stages of his chief justiceship Latham CJ rejected the claim that 'a principle' or 'strict doctrine' of 'separation of powers [was] embodied in the *Constitution*', which, in turn, could block the legislative conferral of non-judicial functions upon federal courts.[179] In the same case, however, and in a harbinger of the doctrine *R v Kirby; Ex parte Boilermakers' Society of Australia* established shortly after Latham's retirement,[180] Dixon and Evatt JJ dissented on the same question. Their Honours wrote that although it was not a 'guiding purpose' in the *Constitution*'s framing that Commonwealth power should be restricted in order to 'establish personal liberty', it remained possible to locate an implication that government could not enlarge the constitutionally prescribed 'conception of judicial power'.[181]

[176] Ibid 246–7, quoting Emery Reves, *The Anatomy of Peace* (George Allen & Unwin, 1946) 57, 68.

[177] *Airlines Nationalisation Case* (n 161) 81.

[178] Ibid 85. These remarks were contemporaneously criticised by Geoffrey Sawer, who wrote that 'the making of implications is not a positive virtue, and the question which needs examining is whether there is a distinction between implications which a *Court* is entitled to make and implications which it ought not to make': Geoffrey Sawer, 'Implication and the Constitution' (Pt I) (1948) 4(1) *Res Judicatae* 15, 17 (emphasis in original) ('Implication Pt I').

[179] *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 564–5 ('*Ex parte Lowenstein*').

[180] (1956) 94 CLR 254.

[181] *Ex parte Lowenstein* (n 179) 580, 588.

But it is in respect of dynamics of the federal balance that the Court's divided approach to structural implications is most obvious. It is a period in which Dixon J began to carefully resurrect aspects of the intergovernmental immunity doctrine that had been largely abandoned following the *Engineers' Case* decision. In a number of significant cases, including a surge of judgments handed down in 1947, members of the Court revisited *Engineers' Case* orthodoxy and revived the drawing of implied restraints on government power from the *Constitution*'s federal structure.[182] And during Dixon's chief justiceship (1952–64), the Court crowned the partial restoration of the implied prohibitions doctrine that had been fostered in the 1940s.[183] But a pre-war prelude exists in *West v Commissioner of Taxation (NSW)* ('*West*').[184] There, the Court unanimously held that state legislation rendering a Commonwealth pension liable to income tax assessment was valid.[185] A legal objection to that law, Latham CJ held, need not 'depend upon any implication' recognised in the *Constitution*.[186] Instead, in keeping with the *Engineers' Case*, it had to be sourced in 'specific provisions' as opposed to a specific, but illusory, 'implication prohibiting [a] State from interfering with the means employed by the Commonwealth for the performance of its constitutional functions'.[187] But in separate opinions, Dixon J and Evatt J forcefully asserted that interpretive implications were relevant.[188] Remarkably, Dixon J used the *Engineers' Case* as authority for the revision by stealth of the implied immunity that the joint opinion in the decision had expressly precluded.[189] Since that foundational decision in 1920, Dixon J noted,

182 See, eg, *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* (1947) 74 CLR 508, 528–30 (Dixon J) ('*Uther's Case*').

183 *Commonwealth v Cigamatic Pty Ltd (in liq)* (1962) 108 CLR 372, 377 (Dixon CJ, Kitto J agreeing at 381, Windeyer J agreeing at 390), 389 (Menzies J, Kitto J agreeing at 381, Owen J agreeing at 390) ('*Cigamatic*').

184 *West* (n 9).

185 Ibid 673 (Latham CJ), 676 (Rich J), 678 (Starke J), 683 (Dixon J), 710 (Evatt J), 714 (McTiernan J).

186 Ibid 669.

187 Ibid 665, 669 (Latham CJ).

188 Ibid 681–3 (Dixon J), 687–8 (Evatt J).

189 Ibid 681–2. See also JJ Doyle, '1947 Revisited: The Immunity of the Commonwealth from State Law' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (Federation Press, 1994) 47, 54.

> a notion seems to have gained currency that in interpreting the *Constitution* no implications can be made. Such a method of construction would defeat the intention of any instrument, but of all instruments a written constitution seems the last to which it could be applied.[190]

The decision in the *Engineers' Case* had, Dixon J wrote, merely settled that Commonwealth legislative power, other than that which is discriminatory, may validly operate so as to affect 'the operations of the States and their agencies' (with the exception of the states' Crown prerogatives).[191] It was important, then, not to find in 'the *Engineers' Case* authority for more than was decided'.[192] But he went further still in relying upon the view set out by Isaacs J in his dissent in *Pirrie v McFarlane* in 1925 that distinct polities exercising 'separate and exclusive governmental powers' within one constitutional order cannot 'in the absence of distinct provision to the contrary … destroy or weaken the *capacity* or *functions* expressly conferred on the other'.[193] Justice Evatt similarly criticised the post-*Engineers' Case* emergence of an 'unqualified dogma that the *Constitution* leaves no room whatever for implications arising from the co-existence side by side of seven legislatures'.[194] It was, in Evatt J's view, clear that the *Constitution* proscribed the making of laws that are directed 'toward the destruction of the normal activities of the Commonwealth or States'.[195] As the *Engineers' Case* could not have anticipated 'every future difficulty in the working of our Federal constitutional scheme', it was necessary, then, to assess discriminatory legislation passed by the Commonwealth or a state according to constitutional principles 'which are not immediately discoverable in its words'.[196]

In the wartime *First Uniform Tax Case*, too, Latham CJ rejected the existence of a revived form of the implied immunities doctrine.[197] A central aspect of South Australia's challenge to the validity of the Commonwealth's tax scheme concerned its impact on the integrity of the system of 'dual' spheres said to be implied in the *Constitution*.[198] However, Latham CJ rejected that argument and held that a prohibition on the use of the central power to 'destroy or weaken the

[190] *West* (n 9) 681.

[191] Ibid 682.

[192] Ibid (citations omitted).

[193] (1925) 36 CLR 170, 191 (Isaacs J) (emphasis in original), quoted in *West* (n 9) 682 (Dixon J).

[194] *West* (n 9) 687. See also at 698–9 (citations omitted): 'But I am not prepared to accept all the *obiter dicta* in the *Engineers' Case* as having achieved the impossible task of anticipating every future difficulty in the working of our Federal constitutional scheme.'

[195] Ibid 687.

[196] Ibid 698–9 (Evatt J).

[197] *First Uniform Tax Case* (n 5) 424.

[198] Ibid 386–7 (Ligertwood KC) (during argument).

constitutional functions or capacities' of the states, 'or to control the normal activities of the States', did not exist.[199] Therefore:

> It is not for a court to impose upon any parliament any political doctrine as to what are and what are not functions of government … Only the firm establishment of some political doctrine as an obligatory dogma could bring about certainty in such a sphere, and Australia has not come to that.[200]

Justice Dixon's temporary absence from the Bench in the *First Uniform Tax Case* — having taken up the post of Australia's Minister to the United States for much of the latter part of the Second World War — decelerated the Court's move towards a stronger reassertion of interpretive implications.[201]

The re-examination of the intergovernmental immunities doctrine that had been foreshadowed in *West* came to pass in a number of significant post-war judgments.[202] In *Essendon Corporation v Criterion Theatres Ltd*, Dixon J again attacked the 'misapprehensions' that had developed as a result of the *Engineers' Case*.[203] This included the assertion it 'meant that the *Constitution* implies nothing; that it means nothing that it does not say in express words'.[204] In invalidating a Victorian statutory power, Dixon J relied on a constitutional implication prohibiting the states from levying a tax on the Commonwealth in the performance of its duties and functions.[205] That implication arose as 'a necessary consequence of the system of government established by the *Constitution*'.[206]

A few months later, in *Melbourne Corporation v Commonwealth* ('*Melbourne Corporation*'),[207] Latham CJ made his most fervent attempt to halt the movement towards a revived form of the intergovernmental immunities doctrine. But the case is the most striking, and enduring, defeat of his resistance to the Court's restoration of implied constitutional doctrines. Chief Justice Latham set out a close textual analysis, a 'characterisation detour' of a Commonwealth statutory provision which had prevented state instrumentalities from

199 Ibid 420.

200 Ibid 423 (Latham CJ).

201 See, eg, Cheryl Saunders, 'The Uniform Income Tax Cases' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 62, 74–5.

202 See, eg, *Essendon Corporation v Criterion Theatres Ltd* (1947) 74 CLR 1.

203 Ibid 22.

204 Ibid.

205 Ibid 17–18, 22, 27.

206 Ibid 22.

207 *Melbourne Corporation* (n 8).

employing private banking facilities.[208] He held that the legislation was invalid because it was, fundamentally, a law 'with respect to a State or State functions as such' — which the Commonwealth had no power to make — but rejected the contention that there were implied limitations on Commonwealth power such as 'discriminatory' laws directed at a state's 'essential governmental power[s] or function[s]'.[209] Rather, constitutional validity is

> determined by reference to the terms of the *Constitution*, without applying any presumption that there are certain powers reserved to the States which must not be impaired or interfered with by federal laws.[210]

It was the case, then, that the charge of 'discrimination' proved only that the impugned provision was a law 'with respect to a State or State functions', in respect of which the Commonwealth had no legislative authority.[211] While acknowledging that the distinction would sometimes be difficult to apply, Latham CJ still felt that it was 'a more satisfactory ground of decision than an opinion that a particular federal "interference" with a State function reaches a degree which is "undue"'.[212]

This reveals again Latham's sensitivity — contempt, even — towards the potential for legal indeterminacy to seep into the constitutional order through the imposition of, as he viewed it, politicised judicial analysis. It is worth noting here that Latham CJ did not point to the express constitutional role of the Senate to protect the states' interests within Australia's federal architecture.[213]

For a majority of the Justices, however, the impugned law conflicted with an implied limitation on Commonwealth power over the states.[214] The federal structure of the *Constitution*, it was held, implied the existence of separate polities.[215] In the exercise of their constitutional powers or functions, then, states cannot be subject to Commonwealth interference in a way that either discriminatorily affects their independent capacity to govern, or their continued operation as distinct polities. Most notably, Dixon J anchored his interpretive

[208] Jeremy Kirk, 'Constitutional Implications: Nature, Legitimacy, Classification, Examples' (Pt 1) (2000) 24(3) *Melbourne University Law Review* 645, 672.

[209] *Melbourne Corporation* (n 8) 52, 61.

[210] Ibid 55.

[211] Ibid 61.

[212] Ibid 62.

[213] Cf Geoffrey Sawer, 'Implication and the Constitution' (Pt 2) (1948) 4(2) *Res Judicatae* 85, 90.

[214] *Melbourne Corporation* (n 8) 65–7 (Rich J), 74–6 (Starke J), 81–5 (Dixon J), 99–100 (Williams J). Justice McTiernan was the sole dissentient in the case and took a similar characterisation-based approach to that adopted by Latham CJ: at 86–8.

[215] Ibid 65–6 (Rich J), 74–5 (Starke J), 81–3 (Dixon J), 98–9 (Williams J).

method in the most 'compelling' considerations that arise from the *Constitution*'s inexorable status as a 'political instrument',[216] not least the distribution of governmental power predicated on the 'continued existence' of the states as entities 'independent' of the central power.[217] This meant that a law discriminatory against the states, or one which 'places a particular disability or burden upon an operation or activity of a State' or upon the exercise of its constitutional power, was unconstitutional.[218]

Justice Dixon then applied a 'reverse' noninterference prohibition — that is, the states' constitutionally implied incapacity to bind the Commonwealth and its agents in *any* manner — in his lone dissent in *Re Richard Foreman & Sons Pty Ltd; Uther v Federal Commissioner of Taxation* a few months later.[219] In doing so, he relied on the proposition that, at Federation, the states did not possess a constitutional power to regulate the Commonwealth or the Commonwealth's legal relations with its subjects.[220] Others have pointed out the weakness of the argument: state legislative power extends to polities — and persons — that did not exist before 1901.[221] Chief Justice Latham, however, relied on s 109 of the *Constitution* to reject the proposition that the *Melbourne Corporation* principle could be applied so as to 'protect Commonwealth governmental functions against destruction or impairment' by the states.[222] As the Australian government 'was not born into a vacuum'[223] — rather, it was established in a system of common law and statute — the states retained their pre-Federation plenary legislative powers.[224]

The resolution of the complex issues stemming from the *Constitution*'s federal settlement, not least the capacity of Australian polities to legislatively bind one another, reveals the limits of Latham's apolitical method. He resiled from

216 Ibid 82.

217 Ibid.

218 Ibid 79.

219 *Uther's Case* (n 182) 528–30.

220 Ibid 530–1.

221 Anne Twomey, 'Federal Limitations on the Legislative Power of the States and the Commonwealth to Bind One Another' (2003) 31(3) *Federal Law Review* 507, 526–7. See generally Doyle (n 189) 49–52. For a critical comment on Dixon J's doctrine of implied prohibitions, see RP Meagher and WMC Gummow, 'Sir Owen Dixon's Heresy' (1980) 54(1) *Australian Law Journal* 25, 28–9. However, Dixon J's approach would ultimately be adopted by other members of the Court: see *Commonwealth v Bogle* (1953) 89 CLR 229, 259 (Fullagar J, Dixon CJ agreeing at 249, Kitto J agreeing at 274); *Cigamatic* (n 183) 377 (Dixon CJ, Kitto J agreeing at 381, Windeyer J agreeing at 390), 389 (Menzies J, Kitto J agreeing at 381, Owen J agreeing at 390).

222 *Uther's Case* (n 182) 519–21.

223 Ibid 521.

224 Ibid 521–2.

engagement with those thorny issues by insisting that the exact nature of the forces at work in Australian federalism could be entirely deduced from textual considerations, and not from the employment of 'vague' and politically motivated constitutional implications.[225] '[P]olitical doctrine', he warned, could not be employed in the courtroom to disentangle the intricacies of constitutional argument involved in federalism.[226]

The treatment of intergovernmental immunities offered by Dixon, as doctrinally fuzzy and contentious as it may at times have been,[227] at least grappled with the reality that the political process cannot fully resolve the tensions produced by ever-evolving federal relations, and that treatment of unmistakably political constitutional assumptions is inescapable.[228] While legislative action, constrained ultimately by electoral forces, may be the principal driver of the ever-evolving federal balance at a given moment, political acts *alone* cannot hope to reduce the complex, intricate nature of a federal settlement. Nor can political processes alone codify, and ultimately constitutionalise, the precise boundaries of intergovernmental power. Inevitably, the judiciary must identify and draw such limits with reference to political values. Thus, while Latham's approach may have offered remarkable consistency, the absence of a clear basis for his interpretive method despite the *Constitution*'s palpable silences left him open to the charge that his judgments were driven by political preferences.

C *Emergency Power*

Latham recognised the existential threat posed to Australia at a very early stage of the Second World War. In a letter to Prime Minister Robert Menzies in April 1940, Latham warned that a German invasion of the Netherlands would have profound regional implications: 'A potentially hostile power in the [Dutch] East Indies would be a constant meance [sic] to Australia. It might easily result in the conquest of our country.'[229] In the pursuit of Australia's enemies, the Commonwealth's defence power, as set out in s 51(vi) of the *Constitution*, provides a

[225] Note that Latham CJ's approach in *Melbourne Corporation* (n 8) was contemporaneously supported by Geoffrey Sawer as faithful to *Engineers' Case* (n 8) rules of constitutional interpretation. At the same time, Sawer criticised the interpretive method employed by Rich J, Starke J and Dixon J to imply and invoke the doctrinal check on the Commonwealth's power arising from the federal structure of the *Constitution*: Sawer, 'Implication Pt I' (n 178) 15–17.

[226] *First Uniform Tax Case* (n 5) 423.

[227] For a critique of the *Cigamatic* doctrine, see, eg, Twomey (n 221) 526–36.

[228] Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1(2) *Federal Law Review* 221, 232–3.

[229] Letter from Sir John Latham to Robert Menzies, 16 April 1940 (National Library of Australia, MS 1009/1/5428).

supreme source of legislative authority. The scope of the authority that it provides depends not upon abstract formulation, but stems from a subjective interpretation of constitutional facts that exist at a particular moment in time.[230] It is unnecessary to demonstrate that a legislative measure definitively furthers the purposes of defence, only that it has the *potential* to do so.[231] In a national crisis, then, constitutional reasoning in respect of s 51(vi) requires a 'correct ascertainment of the true nature and operation of the provisions impugned and of their bearing upon the prosecution of the war'.[232] This is the unstable framework within which the High Court evaluated claims to emergency power during the Second World War and in the seminal post-war *Communist Party Case*.

The nature of s 51(vi) means that, compared to peacetime, there is markedly reduced scope in a time of national crisis for judicial invalidation of measures purportedly enacted with a defence purpose. The defence power gave rise to executive measures that resulted in what was, 'for all practical purposes', Brian Galligan argued, 'a unitary government' during the Second World War, as the High Court was 'prepared to allow virtually every regulation of individual and economic freedom'.[233] And as Geoffrey Sawer put it in 1946, instances where the courts did strike down legal regulations as not falling within the scope of the defence power 'have been few in number and relatively unimportant in content'.[234]

We might be forgiven, then, for thinking that the defence power acted as a quasi-suspensory mechanism at the heart of the *Constitution*: one that prescribed almost unlimited government power during the Second World War that was free from orthodox constitutional constraints. But such an account would be partial and incomplete. Latham baulked at any suggestion that the judiciary should derogate from its supervisory role — even in an emergency. A few weeks before his retirement, Latham wrote to Kenneth Wheare, an Australian professor of government at All Souls College, Oxford, and noted that he 'deplore[d] references by Judges' in conditions of emergency to the maxim *salus populi suprema lex*.[235] The reference had no legal force and 'really represents the

[230] See, eg, *Farey v Burvett* (1916) 21 CLR 433, 455–6 (Isaacs J) ('*Farey*').

[231] See, eg, *First Uniform Tax Case* (n 5) 432 (Latham CJ), quoting *Farey* (n 230) 460 (Higgins J). See also Geoffrey Sawer, 'The Defence Power of the Commonwealth in Time of War' (1946) 20(8) *Australian Law Journal* 295, 297 ('The Defence Power').

[232] *Stenhouse v Coleman* (1944) 69 CLR 457, 469 (Dixon J).

[233] Brian Galligan, *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (University of Queensland Press, 1987) 121, 126–7, 129.

[234] Sawer, 'The Defence Power' (n 231) 295–6.

[235] Letter from Sir John Latham to Kenneth Wheare, 6 February 1952 (National Library of Australia, MS 1009/63/590) 591 ('Wheare Letter').

abandonment of law under pressure of what is regarded as overwhelming necessity'.[236] Latham noted that in the 1945 decision in *Gratwick v Johnson*,[237] he had renounced judicial reliance on the maxim as an 'abandonment of law under pressure of what is regarded as overwhelming necessity'.[238] Constitutional norms, he concluded, prevailed even in a moment of grave crisis. Moreover, it was his view that a workable principle of emergency had been set out in his dissent in the *Communist Party Case*.[239] In a similar manner to his approach to the s 92 freedom of interstate trade, Latham fixated on a particular conception of the defence power and did not deviate in its application.

In the *First Uniform Tax Case*, Latham CJ held that the foundational case on the scope of the defence power, *Farey v Burvett* ('*Farey*'),[240] showed that even the defence power had defined limits: '[I]t is not sufficient to wave the flag as if that were a conclusive argument'.[241] He then distilled the constitutional test arising from *Farey* as one requiring that the government demonstrate '*some* connection between the legislation in question and the defence of the country'.[242] However, Latham CJ went further in subsequent wartime defence cases in circumscribing the power. He said that the '*Constitution* cannot be made to disappear because a particular power conferred by the *Constitution* upon the Commonwealth Parliament is exercised by that Parliament'.[243] Though the means and methods adopted by the government in relation to a war-related problem were non-justiciable, it still fell to the courts to decide whether a law had 'some real and substantial' connection to the war's prosecution in a way that was also 'calculated in some appreciable degree to advance it'.[244]

Few judicial treatments of the defence power have attracted more attention than Latham CJ's 'lone, vehement and incredulous dissent'[245] in the *Communist Party Case*. This was the last case of significance heard by Latham CJ. Often lost

[236] Ibid.

[237] *Gratwick* (n 153).

[238] Wheare Letter (n 235) 591.

[239] Ibid.

[240] *Farey* (n 230).

[241] *First Uniform Tax Case* (n 5) 431.

[242] Ibid 432 (emphasis in original).

[243] *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Victoria* (1942) 66 CLR 488, 507.

[244] *Victorian Chamber of Manufactures v Commonwealth* (1943) 67 CLR 347, 358, quoting *A-G (Vic) ex rel Victorian Chamber of Manufactures v Commonwealth* (1935) 52 CLR 533, 566 (Starke J).

[245] Cowen, *Sir John Latham* (n 1) 45. See, eg, George Williams, '"Lone, Vehement and Incredulous": Chief Justice Latham in the *Communist Party Case* (1951)' in Andrew Lynch (ed), *Great Australian Dissents* (Cambridge University Press, 2016) 97.

within the multitude of insights on the case is that, though he upheld the validity of the impugned *Communist Party Dissolution Act 1950* (Cth) ('*Dissolution Act*'), which inter alia proscribed the Australian Communist Party and appropriated its property,[246] Latham CJ did not at any point advocate that the judiciary vacate its supervisory role. The point that Latham CJ stressed in a caustic attack on politicised judicial reasoning is that the calibration of the correct response to national security threats is fundamentally 'a question of policy and not of law':[247]

> The Court should, in my opinion, have no political opinions. … I am aware that it is sometimes said that legal questions before the High Court should be determined upon sociological grounds — political, economic or social. I can understand courts being directed (as in Russia and in Germany in recent years) to determine questions in accordance with the interests of a particular political party. There the court is provided with at least a political standard.[248]

And in a rebuke to critics of the Court's recent decision in the *Bank Nationalisation Case* for its adoption of 'an attitude of detachment from all political considerations',[249] Latham CJ again stressed that an assessment of the policy's utility could only take place within the democratic realm:

> [It] appears to me merely to ask the Court to vote again upon an issue upon which the electors and Parliament had already voted … The governing questions in relation to defence and to the protection of constitutional government are questions of policy with which a court has nothing to do.[250]

The cogency of the government's view of, and response to, national security threats was, then, ultimately subject to the mechanics of responsible government, with the executive being 'answerable to the people' through a democratically elected legislature.[251] 'The question is — "By what authority — by Parliament or by a court?"'[252] The *Dissolution Act*'s constitutionality depended only upon a valid connection between its purpose (as opposed to the nature of the means pursued) and the subject matter of defence, which he defined broadly

246 *Communist Party Dissolution Act 1950* (Cth) s 4.

247 *Communist Party Case* (n 24) 148.

248 Ibid.

249 Ibid 149.

250 Ibid.

251 Ibid 154. Chief Justice Latham discusses principles of responsible government earlier: at 151–2.

252 Ibid 142.

(as did the other Justices) so as to encompass subversion.[253] That low threshold was met in this instance. And in a partial (if Pyrrhic) vindication of Latham CJ's position, the Australian people ultimately refused, in a September 1951 referendum, to support a formal amendment of the *Constitution* which would have provided to the Commonwealth the legislative power to make laws with respect to communism and its ideological adherents.[254]

At the same time, we would do well not to overstate the civil libertarian credentials of the six High Court Justices who held the Act to be unconstitutional.[255] The majority judgments' analysis was every bit as positivistic as that of Latham CJ, with the six Justices invalidating the Act on the basis of a question of constitutional fact: that is, in light of prevailing geopolitical conditions, its terms were not directed against subversion, and so the statute fell outside the scope of the defence power.[256] The issue of constitutional validity turned, then, on a question of degrees of judicial deference. The legislation did not, in Latham CJ's view, constitute arbitrary government power[257] given that broad formal authority arose from s 51(vi) and, once again, the constitutionalising force exerted by the democratic process. My attention will now turn to the function of those political forces in Latham's constitutional doctrine.

V Political Constitutionalism

In the *Engineers' Case*, the majority Justices held that the 'extravagant use' of constitutional authority was remediable 'by the constituencies': that is, through the electorate determining the composition of Parliament and, subsequently, the executive branch under the doctrine of responsible government.[258]

253 Ibid 142, 169.

254 Constitution Alteration (Powers to Deal with Communists and Communism) 1951 (Cth). See also Commonwealth, *Parliamentary Debates*, House of Representatives, 5 July 1951, 1076 (Robert Gordon Menzies); *Parliamentary Handbook* (n 48) 429.

255 See also Winterton (n 94) 132–3.

256 See, eg, *Communist Party Case* (n 24) 194–6 (Dixon J), 207–8 (McTiernan J), 225 (Williams J), 244–5 (Webb J), 254–6 (Fullagar J), 275–6 (Kitto J).

257 Justice Williams enquired at the hearing of the case if the logical force of the Commonwealth's argument meant that 'Parliament could say that the existence of John Smith, an ordinary citizen, was a menace to the security of Australia and require that he be shot at dawn?': Transcript of Proceedings, *Australian Communist Party v Commonwealth* (High Court of Australia, 11–17, Latham CJ, Dixon, McTiernan, Williams, Webb, Fullagar and Kitto JJ, 14–17, 20–4, 27–8, 30 November 1950, 1, 4, 6–8, 11–15, 18–19 December 1950) 34, quoted in George Williams, 'Reading the Judicial Mind: Appellate Argument in the Communist Party Case' (1993) 15(1) *Sydney Law Review* 3, 3.

258 *Engineers' Case* (n 8) 151–2 (Knox CJ, Isaacs, Rich and Starke JJ).

> [P]ossible abuse of powers is no reason in British law for limiting the natural force of the language creating them. … No protection of this Court in such a case is necessary or proper.[259]

This emphasis on judicial restraint in constitutional review is emblematic of a broader Australian practice of Diceyan constitutionalism to which Latham belonged. Haig Patapan writes that Albert Venn Dicey's embrace of 'a science of law' posited that, so long as law is applied in a scientific manner,

> the result would be clear and uncontested. Thus, in returning to the orthodoxy, the *Engineers* case reveals a Diceyan understanding of judicial review and its role in the development of the law and society.[260]

This means a division of sovereign power between its legal and political emanations.[261] Thus, the framework embraces the primacy of parliamentary modes of control on government power. Dicey emphasised that the legal sovereignty from which government power is derived is, ultimately, constrained by the political sovereignty possessed by the electorate.[262] It may be said, then, that this invocation of constitutional restraint is not to assert the literal 'immediate capacity of the people to govern themselves, but rather to assert the source of fundamental limitations on' government power.[263]

Alongside his judgment in the *Communist Party Case*, Latham CJ set out his most forceful expression of this Diceyan approach in the most consequential judgment in constitutional law handed down during his time on the Bench. In the *First Uniform Tax Case*, he wrote that

> [t]he determination of the propriety of any such policy must rest with the Commonwealth Parliament and ultimately with the people. The remedy for alleged abuse of power … is to be found in the political arena and not in the Courts.[264]

In retirement, Latham wrote that the decision had 'very largely destroyed the independence of the States', but the Australian constitutional settlement, and its

[259] Ibid.

[260] Haig Patapan, 'A Return To Dicey? The Philosophical Foundations of the High Court's Implied Rights Jurisprudence' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 146, 149. Cf Mark D Walters, 'Dicey on Writing the *Law of the Constitution*' (2012) 32(1) *Oxford Journal of Legal Studies* 21.

[261] AV Dicey, *Introduction to the Study of the Law of the Constitution* (LibertyClassics, 1982) 26–9, 285–6.

[262] Ibid 285–6. Cf James Kirby, 'A V Dicey and English Constitutionalism' (2019) 45(1) *History of European Ideas* 33, 37.

[263] Lim (n 16) 28. Note that Lim uses the term 'popular sovereignty' in this extract.

[264] *First Uniform Tax Case* (n 5) 429.

configuration of taxation power, made such a conclusion 'inescapable'.[265] And, as with the *Melbourne Corporation* decision, any reversal of that evolution of constitutional doctrine had to 'be left to political and not judicial action'.[266] Having properly construed the scope of constitutional authority in its strictly legal sense, then, Latham concluded that political intricacies demanded political solutions. We may also extrapolate from Latham's writings on the legal source of the *Constitution* the contention that Australia's ultimate legal sovereignty stayed with the Crown-in-Parliament: the term 'Parliament' here meaning the Imperial Parliament.

In an extra-curial address in 1949, Latham wrote that the Court did not 'overrule the will of people' in declaring a law to be unconstitutional.[267] Rather, in doing so, the judicial branch simply gave 'effect to the will of the people as deliberately expressed in the *Constitution*'.[268] This uncharacteristically ambiguous statement casts some doubt on whether Latham did not believe, after all, that the *Constitution*'s 'juristic authority', as Dixon described it,[269] can be found in the Australian people's *political* sovereignty. But it is more accurate to view that statement as a recognition of the Australian people as, in the Diceyan sense, 'the predominant part of the politically sovereign power'.[270] It follows, then, that constitutional arrangements are

> such as to ensure that the will of the electors shall by regular and constitutional means always in the end assert itself as the predominant influence in the country. But this is a political, not a legal fact. The electors can in the long run always enforce their will. But the Courts will take no notice of the will of the electors.[271]

Indeed, to the extent that Australians disagree with the Court's view on the country's changing national condition, Latham wrote, the *Constitution* is responsive as amendment can be effected by the democratic processes set out in

[265] Latham, 'Interpretation of the Constitution' (n 12) 32.

[266] Ibid.

[267] Sir John Greig Latham, 'Law and the Citizen' (1949) 23(4) *Australian Law Journal* 152, 155.

[268] Ibid.

[269] Sir Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' (1957) 31(4) *Australian Law Journal* 240, 240.

[270] Dicey (n 261) 29.

[271] Ibid 27–8 (citations omitted).

s 128.[272] But the bare expression of political preference holds no juristic significance: it is not a manifestation of legal sovereignty. Therefore, it is not a form recognisable by the courts in the interpretive process.[273]

An expression of political sovereignty can, however, actively work as a constitutionalising force — both to check and reshape government power — in two ways. The first is in the choice of the composition of Parliament, as expressed in periodic elections. Fundamentally, then, the breadth of constitutional power afforded to the federal government can be moderated. This was the case, for example, in respect of the taxation power in the four decades preceding the decision to implement the uniform scheme that was the subject of the states' litigation in the *First Uniform Tax Case*. The second way is that, in choosing those representatives, constitutional amendment can be initiated, and ultimately effected in a referendum process, through the will of the people.

All of which equally serves to explain why the radical expansion of federal power occurring in the middle part of the 20th century, and which might at first appear unnerving to a jurist so fixated on constitutional rigidity as Latham, instead won his endorsement. It was the Court's role, Latham believed, to adjudicate according to the natural meaning of the constitutional text shorn of political considerations. The calibration of the *exercise* of constitutional power is directed by the political will of the people, not according to judicial preference. And to the extent that it is felt that the Court improperly construes the limits of constitutional authority, or that the *Constitution* requires modification, the people can translate that political will into a rule recognisable by the courts through the exercise of legal sovereignty. Thus, constitutional stability is ultimately maintained through the political will of the people. Latham recognised the political process to be the fundamental constitutionalising restraint on government power: even if those political forces could not find immediate recognition as a juristic constraint.

Latham's constitutional doctrine is, then, inadequately captured as belonging to an elaborate, yet pervasive, culture of Australian judicial 'legalism'. Legalism is the subject of a critique most associated with the work of Galligan, who argued that, in fulfilling its review function, the High Court employs the language of apolitical, positivist interpretivism.[274] And it does so through the

[272] Latham, 'Law and the Citizen' (n 267) 155.

[273] Dicey (n 261) 285–6. The course of that legal sovereignty has had, in the words of Paul Finn, a 'tortured' history: Paul Finn, 'A Sovereign People, a Public Trust' in PD Finn (ed), *Essays on Law and Government: Principles and Values* (Law Book, 1995) vol 1, 1, 3. That is, in respect of the complexity involved in ascertaining the precise date on which Australia acquired the *sole* capacity to make its own laws: at 3–4.

[274] Galligan (n 233) 30–41.

prism of legalism.[275] This rhetoric, or 'profess[ed] method' — for legalism is no more than hollow abstractionism — masks the exercise of the judiciary's inescapably 'delicate' political function in constitutional review.[276] It thereby ensures, Galligan argued, stability in the constitutional order.[277]

Galligan's elaborate 'noble lie' theory has been heavily criticised elsewhere,[278] not least for the difficulty in falsifying the thesis regardless of the interpretive method at issue.[279] The partial brake which Dixon J applied to the increasing capacity of federal power to regulate the states, for example, required the recognition of an irrefutably *political* restraining force located beyond the constitutional text. Yet this hardly 'destroy[ed] the whole [legalist] creed',[280] nor was it an aberration from Dixonian orthodoxy.[281] Rather, the re-imposition of implied limits as a constitutionalising force emphasises that the culture and technique of Australian legalism were a 'broad (and accommodating) church', and one which Dixon, as its '[h]igh priest', cultivated through an intellectual prowess and agility responsive to 'continuing intellectual and methodological developments'.[282]

For different reasons, the legalist epithet also inadequately captures the distinctiveness of Latham's 'hyper'-interpretivism. Latham's approach to constitutional reasoning encompassed little of Dixonian legalism's nuance or dexterity.[283] Nor does it securely fall within the culture of 'moderate originalism' that has prevailed as the principal mode of judicial determination of constitutional meaning in Australia.[284] That method, Jeffrey Goldsworthy explains, does not seek to prohibit judicial 'creativity' in the resolution of constitutional disputes, but it does stress that the interpretive process must first exhaust exploration of

275 Ibid 30.

276 Ibid 39.

277 Ibid 39–41.

278 See, eg, Jeffrey Goldsworthy, 'Realism about the High Court' (1989) 18(1) *Federal Law Review* 27; Theunis Roux, 'Reinterpreting "The Mason Court Revolution": An Historical Institutionalist Account of Judge-Driven Constitutional Transformation in Australia' (2015) 43(1) *Federal Law Review* 1, 3–6, 14–16.

279 Goldsworthy, 'Realism about the High Court' (n 278) 34.

280 Jeremy Kirk, 'Constitutional Interpretation and a Theory of Evolutionary Originalism' (1999) 27(3) *Federal Law Review* 323, 327.

281 See also Roux (n 278) 19.

282 Tanya Josev, 'The Late Arrival of the "Judicial Activism" Debate in Australian Public Discourse' (2013) 24(1) *Public Law Review* 17, 27–8.

283 See, eg, Sir Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27(3) *Melbourne University Law Review* 864, 873.

284 Goldsworthy, 'Originalism in Constitutional Interpretation' (n 106) 19–21.

the textual meaning established by the *Constitution*'s founders.[285] Latham, by contrast, argued that constitutional meaning can *only* be ascertained by a textual analysis of the instrument's words.[286]

It would be a mistake, however, to fall into the trap set by the broad-brush, anti-legalist critique and to hold that within Latham's methodological approach lay a subterranean operation of political preferences from which constitutional doctrine evolved.[287] As the sweep of decisions explored in Part IV demonstrates, Latham found few constitutional constraints on the use of federal power (whether established by the text, or implied through its terms) by governments on either side of Australia's partisan divide. He was Labor's 'second-best friend [after McTiernan J] when it came to challenges to its postwar legislation'.[288]

A related, though much subtler, critique is Zines's view that Latham's frequent emphasis on the exclusively legal character of interpretive disputes did not just reflect fidelity to literalism but was also shaped by his institutionalist sympathies.[289] While accepting that Latham's interpretive method was 'that which he considered the only proper one for a judge to adopt', Zines argued that it was also true that this 'attitude' had been '*bolstered* both by his views of the inherent limitations on effective judicial action and his concern for the problems of government'.[290]

There may be a degree of circular reasoning to this first point as the confines of legalistic constitutional review can be overcome by less deferential — and more purposive — interpretive methods.[291] Yet legal realist methods were, as we have seen, anathema to Latham. His view on the limits of judicial review, then, stemmed from his deliberate approach to constitutional reasoning, and not the other way around.

The second point, with respect to what we might call Latham's deference to government power, is not supported by the extensive extra-curial material available to us. To be sure, the extent of Latham's politicking and extrajudicial advising during his time on the Bench — which, as Wheeler has presented in meticulous detail, extended to both Labor and conservative administrations[292] — is stark and marks a serious violation of separation of power norms.

285 Ibid 20–1.

286 See, eg, Latham, 'Interpretation of the Constitution' (n 12) 8.

287 Galligan (n 233) 33.

288 RN Douglas, 'Judges and Policy on the Latham Court' (1969) 4(1) *Politics* 20, 36.

289 See Zines, *The High Court and the Constitution* (n 23) 601.

290 Ibid (emphasis added).

291 Goldsworthy, 'Australia: Devotion to Legalism' (n 35) 115.

292 See Wheeler (n 1).

And, doubtless, Latham believed in a powerful, unitary Australian polity, signalling a preference for semi-authoritarian, conservative governance.[293] But we can point to Latham's consistent record — tracing it not just right back to the 1920s, but also after his time on the High Court — of recognising the undisputed primacy of the Australian people in reshaping the constitutional framework should the need for expanded Commonwealth power arise. Latham repeatedly distanced himself from the *Engineers' Case* approach to constitutional review, finding even the majority opinion too purposive, even though it would have offered a much clearer interpretive path towards expansive federal power.

While Latham was unquestionably deeply sensitive to the challenges of modern government, the 'declaratory' account of adjudication within which his constitutional doctrine evolved and crystallised stood separate from Latham's political leanings. There is scant evidence to suggest that Latham guilefully tailored his interpretive method in order to broaden federal power or ally it with his preference for a powerful central government: his restless calls for formal constitutional amendment under s 128 in order to expand federal power lend further weight to that thesis. The evolution of constitutional forces could, in Latham's view, be primarily attuned by the expression of democratic preferences — *not* by the judiciary — as the Australian constitutional order continued to operate within the common law courts' precedential system. The new Australian polity embodied, after all, a continuity of British constitutional traditions and values.[294] Theories of constitutional autochthony, which many Australian jurists used as an opportunity to reimagine the interpretive methods most suitable to constitutional adjudication, would not be seriously developed until decades later.[295]

All of which is not to refute the role of values, or ideological drivers, in Latham's interpretivism. His approach reflected both a particular conception of the rule of law, one that sought to eliminate capricious acts of government power, and a view of Australia's place as a young nation within an imperial constitutional arrangement then in a state of flux. It is also not to claim that Latham's interpretivism offered an entirely consistent or stable approach to constitutional review. The limits of his literalistic approach are painfully evident in, for example, the confused outcomes that Latham CJ reached in his interpretation of the

[293] Latham, 'Changing the Constitution' (n 51) 18.

[294] Elisa Arcioni and Adrienne Stone, 'The Small Brown Bird: Values and Aspirations in the Australian Constitution' (2016) 14(1) *International Journal of Constitutional Law* 60, 75.

[295] See especially *Kirmani v Captain Cook Cruises Pty Ltd [No 1]* (1985) 159 CLR 351, 442–3 (Deane J); GJ Lindell, 'Why Is Australia's Constitution Binding?: The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16(1) *Federal Law Review* 29.

federal balance and most obvious in the *Melbourne Corporation* decision.[296] Latham's reading of the *Constitution* permitted a transformation in how Australia was governed, and yet that was driven by fundamentally different interpretive forces than those of the High Court's puisne judges: thus, again, introducing serious doctrinal instability into the constitutional order.

But it is, rather, an invitation not to overstate, much less fixate on, the influence of nakedly political impetuses in the evolution of his constitutional doctrine. We should instead look more closely to the particular conception of arbitrary power that Latham held. At no point did Latham disavow law's social function. In fact, the opposite is true when we consider the existential terms in which he spoke of the role of apolitical courts in the constitutional order.

Looking past the coincidence of nomenclature, this is a judicial culture of 'legalism' — pronounced in Latham's case as an interpretive method — that more accurately aligns with that described by Judith Shklar.[297] Lawyers, Shklar wrote, including judges, are 'less afraid of tyranny, than of arbitrary power … [and] if they fear tyranny, it is because it tends to be arbitrary, not because it is repressive'.[298] 'Legalism' was, then, reducible to the lawyerly ethical attitude that justice is attained by 'following rules impartially'.[299] This is, regardless of what the legal positivist may claim, not a politically neutral creed, but it is 'conservative' only in the sense that it requires a commitment to the maintenance of law's formal integrity.[300]

Shklar wrote that this legalist ideology 'hides a social preference': specifically, 'that certainty in law is the best guarantee of individual freedom'.[301] This was a cornerstone of Latham's constitutional doctrine. Yet, paradoxically, his commitment to the static quality of constitutional rules permitted a vast expansion of federal power. Relatedly, Latham's broad conception of the capricious nature of non-textual judicial reasoning proved incapable of unlocking implied restraints on power from the *Constitution*'s structure and underlying principles.

296 *Melbourne Corporation* (n 8).

297 For an exploration of Shklar's theory in the context of Australian legalism, see Ann Genovese, '*Australian Communist Party of Australia v The Commonwealth*: Histories of Australian Legalism' (2013) 44(1) *Australian Historical Studies* 6, 14–16. See generally Robin West, 'Reconsidering Legalism' (2003) 88(1) *Minnesota Law Review* 119.

298 Judith N Shklar, *Legalism: Law, Morals, and Political Trials* (Harvard University Press, 1964) 15, quoting Alexis de Tocqueville, *Democracy in America*, tr Henry Reeve, Francis Brown and Phillips Bradley (Alfred A Knopf, 5th ed, 1951) vol 1, 275.

299 Shklar (n 298) 113.

300 Ibid 11.

301 Ibid 95.

VI Conclusion

Latham's approach to constitutional argument evoked a bygone age of Blackstonian 'declaratory' adjudication, according to which courts evade the lure of judicial lawmaking by asserting the law as it always has been.[302] Such an 'oracular view'[303] of the judicial role is particularly unsuited to constitutional argument, not least in a young federation, given its intrinsically political nature and the broad terms in which constitutional text is framed. Latham's struggles with s 92 of the *Constitution* starkly revealed as much. As Gageler observed:

> The general description of a power or restraint on power simply cannot dictate the drawing of a line in a particular concrete case. Nor can general concepts be neutrally derived from the nature of the federal system. There is always an element of choice.[304]

Although Latham's interpretivism precluded even modest forms of judge-led constitutional adjustment, it nevertheless facilitated significant 'informal' change in constitutional doctrine. This can be explained conceptually by the impetus provided by political will, which could be channelled, and translated into legal form, by the parliamentary process. Latham mediated countervailing forces of constitutional innovation and judicial restraint through a view of the Australian electors' political sovereignty. He at once understood that democratic power as constraining government power, where necessary, *and* as a force for vibrant constitutional renewal. In this way, then, Latham believed that constitutional doctrine primarily found its legitimation in, and evolved according to, the changing political forces revealed by periodic elections.

[302] See generally Allan Beever, 'The Declaratory Theory of Law' (2013) 33(3) *Oxford Journal of Legal Studies* 421, 421–3.

[303] Justice Michael McHugh, 'The Law-Making Function of the Judicial Process' (Pt 1) (1988) 62(1) *Australian Law Journal* 15, 25.

[304] Gageler, 'Foundations of Australian Federalism' (n 32) 181.