The ‘second actor problem’ — a Chapter III twist?

*Emily Hammond**

This article addresses a practical legal issue for regulatory systems that arises when official actions are based on a prior official decision purporting to determine individual rights or obligations. If that first official decision lacks legal force due to jurisdictional error, is there a ‘domino effect’ on legal authority for the secondary acts based on that decision?

More particularly, the aim of the article is to analyse a constitutional dimension to this problem in the Australian context, flowing from the constitutional structure laid down in the judiciary chapter of the *Constitution* (‘Ch III’). I will provide an argument that Ch III can be read as constraining legislative power to authorise action based on invalid executive decisions. The constraint can be formulated as follows:

> No Australian legislation can authorise official action on the basis that rights or obligations are as specified in an invalid decision by a non-court, where to do so would be inconsistent with the safeguards inherent in Ch III’s prescription that judicial power in federal matters is exclusive to courts.

This is dense, and the work of the article is to unpack and explain it. It is work worth doing, as it indicates an implication from Ch III prescriptions denying the exercise of judicial power in federal matters to non-courts, one that is plausible on current case law. My argument here is motivated by the view that there is a discernible scheme, within Ch III, that safeguards the governed in their relationship to governing power in federal matters; and that the constraint I have indicated preserves the integrity of that scheme.

I will begin by describing the established orthodox approach to ‘second actor’ problems, which operates entirely in the register of statutory interpretation. I will then provide the argument for recognising an additional element — a constitutional constraint on legislative power to authorise action on the basis of invalid executive decisions in federal matters. That is, I will explain why I think this may be warranted with reference to Ch III’s prescriptions for the exercise of governing powers in federal matters. Finally, I will indicate in broad terms how this might impact on second actor powers in Australian polities.

The practical implications of this constraint on legislative power are difficult to predict, given the evaluative nature of a criterion of ‘substantial compatibility’ between specific legislated consequences or effects of invalid decisions (on the one hand) and the abstract principles and values advanced by the Ch III scheme (on the other). In this article, I will seek to emphasise key features of this constraint that may bear on its application. This work will show that the constraint, being closely tailored to the Ch III scheme, will not drastically disrupt the range of legal consequences that can validly flow from an invalid executive decision. However, it may require some reconsideration of legislation that authorises secondary action which subjects individuals to the very same liabilities that an invalid executive decision purports to impose.

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* Emily Hammond is Associate Lecturer in Law, the University of Sydney Law School. The working version of this article was the basis for a presentation at the Australian Institute of Administrative Law National Conference in Canberra on 22 July 2022. My thanks to the Forum’s referees for their review and helpful comments.Compare *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 [53]–[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

This is not to say that any such legislation will necessarily be constitutionally invalid. The important point is that the Ch III scheme produces a criterion for constitutional validity that must be met in *substance*, not merely form.[1]

The 'second actor problem' and the orthodox solution

The 'actor' in my title is a repository of a legal public power. For convenience, I will call them an 'official'[2] and assume that their legal power is conferred by statute.[3] They are a 'second' actor in that they act in reliance on a prior official decision. This can occur in various legal and factual contexts. For reasons that we will come to, it is useful to identify two types of scenario:

1. The second actor bases their decision on an assumption that legal rights or obligations are as specified in the prior decision.
2. The second actor bases their decision on findings of fact or policy determinations (evaluative judgment) made in a prior assessment or evaluation.

The 'problem' arises if the first decision is *not* a judicial order of a superior court and *is* impaired by jurisdictional error. The source of the problem lies in the legal principle that invalid decisions by inferior courts or non-courts have no legal force. That being the case, on what basis does the law — including the law that confers powers on secondary actors — attribute legal consequences to an invalid inferior court or non-court decision?

Refining the 'problem' — consequences of jurisdictional error in inferior court and non-court decisions

Some reference to doctrinal detail may be helpful at this point, to clarify the precise legal problem. As a preliminary matter, we should note that the problem addressed here emerges when the first decision is impaired by jurisdictional error. That term refers to a legal error of a particular kind — material breach of a legal condition on decision-making power.[4] It is a term of conclusion, application of which requires an evaluation that the decision is affected by breach of a legal principle or requirement, compliance with which is a condition

1 Compare *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 671 [53]–[54] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ).

2 I should not be taken to suggest that the analysis would differ when public power is reposed in a 'private' actor. The critical inquiry is whether action draws legal force from a polity's public power *over* the legal rights of the governed. The identity of the repository of power may be a factor in deciding this point, but it cannot be the sole criterion: cf adjudicators' determinations of liability to make progress payments under security of payments legislation as considered in, for example *Chase Oyster Bar v Hamo Industries Pty Ltd* (2010) 78 NSWLR 393.

3 The critical consideration is whether the action asserts the polity's public power *over* the legal rights of the governed. Such power is typically found in statute, but the analysis should in principle apply to any prerogative power over the subjects' rights or obligations — that is, any prerogative in the Blackstone sense that is capable of unilateral legal effect on subjects' rights or obligations. For discussion of the scope of this category of prerogative, see Amanda Sapienza, *Judicial Review of Non-Statutory Executive Action* (Federation Press, 2020), 24−9.

4 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 135 [31] (Kiefel CJ, Gageler and Keane JJ), adopting *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 32 [23] (Gageler and Keane JJ).

on decision-making power. As is well understood, reaching this conclusion in relation to a given decision can call for close evaluative judgment on issues of law and fact. The details and controversies involved in distinguishing jurisdictional from non-jurisdictional error need not concern us here, because our topic relates to the consequences of a jurisdictional error.

On this topic, recent High Court authorities make three relevant points. First, *all* jurisdictional errors result in 'invalidity': a decision impaired by jurisdictional error is *necessarily* 'invalid'. The law does not recognise the possibility of a 'jurisdictional error' that does not invalidate.[5] As the Court explained in *Hossain*, this is an analytic impossibility because 'jurisdictional error' is a functional label for those legal errors, the occurrence of which take a decision-maker outside the scope of their legal authority. In a precise formulation (to which we will return), the Court explains that the essence of a jurisdictional error is that it deprives a decision of 'the characteristics necessary for it to be given force and effect by the statute pursuant to which the decision-maker purported to make it'.[6]

Secondly, an invalid decision of an inferior court or non-court is 'lacking in legal force'.[7] On first consideration, it might seem that this repeats the point already made about the 'essence' of jurisdictional error: a decision impaired by jurisdictional error is not given force and effect by the statute pursuant to which it was purported to be made. However, on closer inspection we can see it combines that with a distinct proposition — the decision does not derive any legal force from any *other* source distinct from the statute pursuant to which it was purported to be made.

Thirdly, the invalid decision of an inferior court or non-court is lacking in legal force *whether or not the decision is set aside*.[8] This is a significant point. It rejects an hypothesis — sometimes referred to as a 'relative theory of invalidity' and attributed to William Wade — that official decisions have legal force and effect unless or until set aside.[9] That hypothesis is accurate for judicial orders of superior courts.[10] Its application to invalid *executive* decisions has always been contentious and has never taken root in Australian case law. Recent High Court statements make clear that it is inapplicable to invalid decisions of inferior courts and non-courts.[11]

These three interrelated points bring out the problem that arises when second actors rely on a decision of an inferior court or non-court that is impaired by jurisdictional error. That invalid purported decision is 'wholly lacking in legal force', whether or not it has been put aside; and yet the law may authorise some secondary official action on the basis that the purported

5 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 134 [26] (Kiefel CJ, Gageler and Keane JJ).
6 Ibid 133 [24] (Kiefel CJ, Gageler and Keane JJ).
7 *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [48] (Kiefel CJ, Bell, Gageler and Keane JJ).
8 Ibid; *MZAPC v Minister for Immigration and Border Protection* (2021) 390 ALR 590; [2021] HCA 17, [29] (Kiefel CJ, Gageler, Keane and Gleeson JJ).
9 See, for example, Christopher Forsyth, 'The Metaphysic of Nullity: Invalidity, Conceptual Reasoning and the Rule of Law' in Christopher Fosyth and Ivan Hare (eds), *The Golden Metwand and the Crooked Cord — Essays on Public Law in Honour of Sir William Wade* (Clarendon Press, 1998) 141, 143−4.
10 *Cameron v Cole* (1944) 68 CLR 571, 590−1; *New South Wales v Kable* (2013) 252 CLR 118, 140 [56] (Gageler J).
11 Presumably the same would be said of executive orders of superior courts.

decision exists in fact. What principles help us to understand whether the legal authority for secondary action is unaffected by invalidity of the first decision?

Orthodox resolution to the problem

The orthodox resolution to the 'second actor' problem is well-established and will be familiar to readers. It begins by making a distinction between a decision's legal force and its existence in fact:

> [A] thing done in the purported but invalid exercise of a power conferred by law, remains at all times a thing in fact. That is so whether or not it has been judicially determined to be invalid. The thing is, as is sometimes said, a 'nullity' in the sense that it lacks the legal force it purports to have. But the thing is not a nullity in the sense that it has no existence at all or that it is incapable of having legal consequences.[12]

Having made this distinction, the orthodox approach frames the problem as one of statutory interpretation, focusing on the legal powers of the second actor:

> The factual existence of the thing might be the foundation of rights or duties that arise by force of another, valid, law. The factual existence of the thing might have led to the taking of some other action in fact. The action so taken might then have consequences for the creation or extinguishment or alteration of legal rights or legal obligations, which consequences do not depend on the legal force of the thing itself. For example, ... the exercise of a statutory power might in some circumstances be authorised by statute, even if the repository of the power acted in the mistaken belief that some other, purported but invalid exercise of power is valid.[13]

In this way, the answer to the second actor problem is to be discovered through a process of statutory construction, in which the critical inquiry is whether legislation authorises the second actor to proceed on the basis of a purported decision that exists *in fact*, irrespective that it is invalid in point of law.

Elements adopted from Forsyth's 'second actor theory'

The orthodox Australian doctrine adopts key elements from Christopher Forsyth's 'second actor theory'.[14] Forsyth provided[15] a conceptual move that explains second actor's authority *without* conceding 'legal force' to an invalid administrative decision: the invalid administrative act has an 'existence in fact' despite its 'non-existence in law'. Drawing on this observation,

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12 *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J). See also *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19, [20] (the Court); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [50] (Kiefel CJ, Bell, Gageler and Keane JJ) and [94] (Edelman J).

13 *New South Wales v Kable* (2013) 252 CLR 118, 139 [52] (Gageler J).

14 Forsyth's theory is cited in *New South Wales v Kable* (2013) 252 CLR 118, 138 [52] (Gageler J); *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19, [20] (the Court); and *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [50] (Kiefel CJ, Bell, Gageler and Keane JJ) and [94] (Edelman J) for example. Forsyth's influence on Australian doctrine is discussed and evaluated in, for example, Ethan Heywood, 'Second Actor Theory: A Principled and Practical Resolution to the Legality of Domino Effect Administraive Decision-making' (2019) 97 *AIAL Forum* 103; Benjamin Coles, 'The Effect of Legally Infirm Administrative and Judicial Decisions' (2017) 24 *Australian Journal of Administrative Law* 158, 162.

15 Forsyth 'The Metaphysic of Nullity' (n 9); 'The Theory of the Second Actor Revisited' [2006] *Acta Juridica* 209. 'Showing the Fly the Way Out of the Fly Bottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66(2) *Cambridge Law Journal* 325, 341.

Forsyth sought to explain the observable reality that invalid administrative decisions have *some* legal consequences without thereby compromising the foundational precept that invalid administrative decisions do not determine rights or obligations by force of law: 'The invalid decision's factual existence is the cause of the subsequent act, but that act is valid since the legal existence of the first act is not a precondition for the second.'[16]

It is worth emphasising that, in proposing this resolution, Forsyth insisted on the importance of recognising that unauthorised administrative acts are void. He proposed his second actor theory as an alternative to a theory that unauthorised administrative acts are 'voidable' in the sense that they have legal force unless and until set aside.[17] Forsyth rejected this as an 'inherently authoritarian approach' — 'no one, I believe, asserts that legal force is or should be given to the decisions of any person, just because he is an official — but that is what is being required'.[18]

It also bears emphasising that Forsyth's theory provides a formal rationale for legal consequences and effects attaching to invalid decisions. That is, Forsyth's theory can justify *any* legal authority to take action based an invalid decision provided that in *form* the law operates on the purported decision's existence in fact.[19] Forsyth was clear that his theory does no more than indicate *where* we are to look to identify the powers of a second actor. His second actor theory does not 'lay down what the powers of the second actor are' and 'provides no specific guidance as to how the powers of the second actor are to be determined when not expressly laid down in statute'.[20] Forsyth was, of course, writing in the context of an unwritten and flexible constitution, in which there are no recognised legal limits on the sovereign parliament's power to define the scope of the second actor's powers.[21] That there may be limits on legislative power to authorise secondary action is — unsurprisingly — entirely absent from Forsyth's account.

It can be seen that the Australian doctrine (described above) has broadly adopted Forsyth's theory — at least in relation to decisions of inferior courts and non-courts. Specifically, Australian authorities endorse the premise that invalid inferior court and non-court decisions are not legally effective unless or until set aside. Australian doctrine would also seem to accept parliaments' essentially plenary power to attach any legal consequences to the fact of an invalid inferior court or non-court decision.[22] There are numerous judicial statements that legislative power in this regard is unqualified.[23]

16 Forsyth (n 9), 147.
17 Forsyth (n 9) 141−2; Forsyth, 'Theory of the Second Actor Revisited' (n 15), 210−13.
18 Forsyth, 'Theory of the Second Actor Revisited' (n 15) 211.
19 Forsyth argued in response that 'conceptual reasoning' is not 'sterile formalism' but 'crucial to the rule of law': Forsyth, 'The Theory of the Second Actor Revisited' (n 15).
20 Forsyth, 'Formalism and Conceptual Reasoning' (n 15), 341. See further Forsyth, 'The Theory of the Second Actor Revisited' (n 15), 219−23.
21 Forsyth did, however, call for a principled approach to judicial construction of statutes authorising official action on the basis of an administrative decision, see Forsyth, 'The Theory of the Second Actor Revisited' (n 15), 221.
22 Albeit tempered by a presumption against legislation giving administrative decisions greater force or effect than strictly necessary, see eg *Minister for Immigration v Bhwardwaj* (2002) 209 CLR 597, 614 [48] (Gaudron and Gummow JJ); *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [100] (Edelman J).
23 As discussed in Heywood (n 14) 103; Coles (n 14) 158.

Incremental evolution in Australian doctrine?

There is one aspect of Australian doctrine that bears emphasis if we are to explore a potential constitutional dimension to 'second actor' problems. This aspect is how — precisely — we think about the 'legal force' that is absent from an invalid inferior court or non-court decision.

To repeat a recently favoured judicial formulation, a void decision of an inferior court or non-court decision does not attract the operation of the statute under which it was purported to be made such that 'the rights and liabilities of the individual to whom the decision relates are as specified in that decision'.[24] This provides a precise, sharply rendered, interpretation of 'legal force' — contrasting it with other legal consequences or effects a decision may have. This careful elaboration on 'legal force' lends emphasis to a key insight, namely that 'legal effects' or 'legal consequences' are not an undifferentiated class. There is an important distinction between 'legal force' (specifying rights or obligations by force of law) and *other* legal effects or consequences.

The formulation used in Australian cases emphasises a precise diagnosis of what is *absent* from an inferior court or non-court decision impaired by jurisdictional error[25] — this is 'legal force' precisely defined, as specification of rights or obligations by force of law. This precision helps us to see that certain legal consequences can be attached to a purported decision without, in substance, treating the decision as if it had legal force. For instance, it might help us to appreciate why conferring rights to review invalid decisions should not be controversial. Recognising that a decision in fact enlivens a review authority does not *in substance* treat the decision as effective in law to specify rights or obligations. That is because exposing the decision to review does not rely on or give effect to the decision's purported determination of rights or obligations. Instead, it enables examination of whether the decision is made according to law (in the case of judicial review) or whether the decision is the correct and preferable decision (in the case of merits review).[26]

Australian law's elaboration of 'legal force' in distinction from *other* legal consequences of effects elaborates on Forsyth's blunter distinction between a decision's existence 'in fact' and its existence 'in law'. As such, it provides a more nuanced analytical lens on second actor powers that may prove useful in thinking through any implied constraints on legislative power to authorise secondary action.

To be clear, I do not suggest that the emergence of this 'Australian twist' on Forsyth's second actor theory necessarily leads to qualifications on legislative power to authorise acts based on an invalid administrative decision. Even in commentary that illuminates the specificity of

24 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ).

25 A point made in, for example, Melissa Perry, 'The Riddle of Jurisdictional Error: Comment on Article by O'Donnell' (2007) 28 *Australian Bar Review* 336, 341.

26 Cf *M174/2016 v Minister for Immigration and Border Protection* (2018) 264 CLR 217, [12] (Gageler, Keane and Nettle JJ), stating that it was unnecessary to decide the extent to which Commonwealth legislation may require 'a decision to refuse to grant a visa which is ineffective in law to achieve that result' to be treated as 'a valid decision' because the case at hand concerned a statutory provision for merits review, and in this context 'the requisite analysis can proceed sufficiently on the basis that an [invalid decision] is a decision that is made in fact.'

‘legal force’ in contrast with other legal consequences, it is assumed that secondary action can be authorised on the basis of an invalid purported decision provided that it is treated as ‘part of the factual criteria on the basis of which a valid decision may be made by another’.[27] My point is simply that the Australian distinction can assist when we turn to analyse the implications to be drawn from Ch III prescriptions for the exercise of public powers in federal matters. If ‘invalidity’ implies a bundle of legal consequences,[28] this precise rendering of ‘legal force’ may help to sort the bundle.

A constitutional dimension to ‘second actor’ problems in Australia?

When the official decision in question is a non-court exercising executive power in a subject-matter within the ambit of federal jurisdiction,[29] it is worth considering the possibility that there is a constitutional dimension to second actor powers. My aim in this part is to explain why. My argument rests on a premise that there is a discernible scheme laid down in Ch III for the exercise of governing powers in federal matters, which contains significant safeguards for individuals which should be upheld in substance, not just form. Ordinary legislation authorising official actions based on executive decisions should not be permitted to ‘do an end run’ around the safeguards achieved by making judicial power in federal matters exclusive to courts. For this reason, it is arguable that Ch III denies legislative power to authorise official action on the basis that rights or obligations are as specified in a purported but invalid decision of a non-court in a federal matter in certain circumstances — namely, where to do so would be substantially incompatible with the safeguards for individuals in their relationship with governing power that are delivered through the Ch III scheme.

Ch III scheme for the exercise of judicial power in federal matters

The argument proceeds from an understanding that Ch III lays down systemic safeguards for legality, fairness, impartiality and transparency in the exercise of a distinctive public power of the state (‘judicial power’) in the subject-matters that lie within federal jurisdiction (‘federal matters’). Ch III does this by making the exercise of judicial power in those subject-matters exclusive to a class of institutional repositories (‘courts’) whose orders are subject to the system of appeals established by and under the *Constitution*, s 73;[30] and denying legislative power to impair the essential characteristics of courts or judicial power,[31] or the defining

27 Perry (n 25) 341.

28 Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Thomson Reuters (Professional) Australia Limited, 6th ed, 2017) 732.

29 There is some contention about the meaning of ‘matter’ in the context of state legislative power to confer rights-determining powers on non-courts. See n 48 below. I here assume that the limit is engaged when a rights-determining power is exercised in a subject-matter within ss 75 and 76. Whether this assumption is sound does not affect the fundamentals of this article’s argument: if a narrower understanding of ‘matter’ is required, this would narrow the potential application to decision-making in state non-courts.

30 This is the combined effect of two limits on legislative power recognised in High Court authorities some 100 years apart. *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434 established that Commonwealth judicial power is exclusive to courts within the meaning of Ch III. In *Burns v Corbett* (2018) 265 CLR 304 four members of the Court further recognised that Ch III denies state legislative power to confer *state* judicial power in federal matters on non-courts: 355−61 [41]−[55] (Kiefel CJ, Bell and Keane JJ), 355−60 [94]−[106] (Gageler J).

31 Cf *Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26−7 (Brennan, Deane and Dawson JJ) for uncontentious statement that Commonwealth legislative power does not extend to making laws inconsistent with the essential character of a court or with the nature of judicial power.

features of courts — including institutional and decisional independence and impartiality, and adherence to fair process, open court principles and reason-giving.[32]

This institutional context for the exercise of judicial power (in federal subject-matters) is an important safeguard for individuals subject to any exercise of that form of public power over rights and obligations identified as 'judicial power'. From this, we can infer that it is important to understand what it is that is distinctive about what can be done in exercise of judicial power, so as to better understand what it is that warrants this intricate constitutional scheme for its exercise in federal subject-matters. It does not seem controversial to think that, if there is a distinctive potential of 'judicial power' that warrants the institutional arrangements prescribed by Ch III, this will have a bearing on the implications of Ch III for legislative power. Would it not be odd if ordinary legislation could in substance undermine a purpose of the scheme by treating executive decisions as if they were endowed with the very same potential that inheres in judicial power?

A quality inherent in judicial power and exclusive of executive power?

To follow this line of inquiry, we need to identify the distinctive potential that is inherent in judicial power but denied to executive power. Here I make a proposal that picks up on patterns in Australian case law and a discernible logic to recent judicial statements on the nature of executive and judicial power over the governed.[33]

One way of thinking about the separation of judicial power is by reference to functions that have been identified as exclusively judicial — for example, the adjudication and punishment of criminal guilt.[34] But this cannot be the only way of thinking about the separation of judicial power, because many functions are innominate — that is, capable of being performed through an exercise of 'executive' or 'judicial' power.[35] It is therefore helpful to also consider what can permissibly be achieved through judicial performance of an innominate function that cannot result from an executive performance of the function.

32 Cf *North Australia Aboriginal Justice Agency Limited v Northern Territory* (2015) 256 CLR 579, 594−5 [39]−[40] (French C, Kiefel and Bell JJ) for a distillation of the evolving 'Kable doctrine' that denies state legislative power to make laws that substantially impair the institutional integrity of state tribunals that are 'courts' within the meaning of Ch III.

33 I analyse this idea and its implications for other facets of judicial review elsewhere — see Emily Hammond, 'Chapter III and Legislative Competence to Stipulate that a Material Legal Error is Non-jurisdictional' (2021) 28 *Australian Journal of Administrative Law* 177; 'Materiality and Jurisdictional Error: Constitutional Dimensions for Entrenched Review of Executive Decisions' (2021) 6 *UNSW Law Journal Forum* 1; 'The Constitution's Guarantee of Legal Accountability for Jurisdictions' (2021) 49 *Federal Law Review* 528; 'The Duality of Jurisdictional Error: Central (to Justifying Entrenched Judicial Review of Executive Action) and Pivotal (to Review Doctrine)' (2021) 32 *Public Law Review* 132.

34 Noting that Ch III denies Commonwealth legislative power to repose an exclusively judicial function in a non-court *even if* that non-court is exercising executive power — see *Alexander v Minister for Home Affairs* (2022) 401 ALR 438; [2022] HCA 19, [93] (Kiefel CJ, Keane and Gleeson JJ).

35 Examples include determining new statutory rights or liabilities according to justiciable criteria, as in the termination of statutory status with consequent loss of property (eg *R v Quinn; Ex parte Consolidated Foods Corporation* (1977) 138 CLR 1); imposition of liability to involuntary hardship or detriment *other than* as punishment for criminal guilt (eg *Thomas v Mowbray* (2007) 233 CLR 307; *Minister for Home Affairs v Benbrika* (2021) 388 ALR 1; [2021] HCA 4) or to make payments or not exercise property rights as ordered (eg *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542).

I suggest that, in this regard, it is productive to recognise one simple marker — namely, an invalid purported exercise of executive power *cannot* have legal force unless and until set aside. I use 'legal force' here in the sense discussed earlier — the capacity to specify a subjects' rights or obligations by force of law attributable to an exercise of public power over the governed. My suggestion is that an invalid *executive* decision cannot have *any* legal force, not even a provisional legal force ('unless and until set aside'). This quality (having legal force unless and until set aside) *can* inhere in a purported exercise of judicial power but cannot be conferred on a purported exercise of executive power. Recognising this confirms the importance and value of the evolving Ch III institutional safeguards on the exercise of judicial power in federal matters. Those constitutional constraints operate on the form of state power ('judicial power') that carries the 'authoritarian'[36] potential Forsyth spoke of — that is, the constitutional authority to bind by compulsive force of law *even though impaired by invalidating (jurisdictional) error*.

Does the case law support this account of a definitive constitutional boundary between judicial and executive power? The idea that there is a definitive constitutional demarcation may at first seem at odds with established ways of thinking about Ch III's prescriptions. The definition of judicial power is 'elusive'[37] and 'it has never been found possible to frame a definition that is at once exclusive and exhaustive'.[38] My argument does not deny this. It does not propose a comprehensive definition of judicial power. What it requires is recognition that there is a quality that *can* inhere in a judicial order but *cannot* inhere in an executive determination — in other words, a quality that, if present in an exercise of state power over the governed, conclusively indicates that the category of public power engaged is 'judicial power'. Recognising that this quality is exclusive of executive power resonates with the institutional arrangements laid down in Ch III. We see that Ch III's prescriptions for the exercise of judicial power (in federal matters) ensure that this category of power with its unique 'authoritarian' potential is exercised in an institutional context with certain inbuilt safeguards for the governed.

Constitutional characteristics of executive power

First and foremost, this account rests on the executive's inherent incapacity to unilaterally alter subjects' rights or obligations. By this I mean simply that executive action has no *intrinsic* authority to unilaterally affect the legal position of the subject — to affect the subjects' rights or liabilities 'in invitum' (by force of law irrespective of consent).[39] The executive does not possess intrinsic state authority over subjects' rights or obligations. On the contrary: executive action cannot have a unilateral 'non-optional' effect on rights or obligations *unless* and *to the extent* that the executive action attracts the operation of a common law prerogative or statute.

36 See text at n 18 above.

37 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (2nd ed, Lexis Nexis, 2020) 103.

38 *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J).

39 The terms can be slippery, but in essence the quality is distinctive to state power over the governed and lies in the ability to alter legal rights or obligations irrespective of consensual submission to jurisdiction. See, with reference to judicial power, *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 452 (Barton J); *TCL Airconditioner v Federal Court* (2013) 251 CLR 533, 554 [28] (French CJ and Gageler J).

It is, of course, true that Australian legislators routinely enact statutes which provide that rights or liabilities are to be as specified in administrative decisions made under the statutes. Administrative decisions made in this way can have a legal effect on rights when the law identified in the *statute* — operating on the fact of the decision — has this legal effect. The important point is that an administrative decision manifesting 'unilateral' state power over rights does so as a *factum* by which statute or common law prerogative operates to affect rights.[40] The executive action of 'deciding' in and of itself — separate from a common law prerogative or statute operating through it — cannot unilaterally affect the subject's rights. Unless executive action engages a prerogative or statute, in the sense of being directly legally authorised by one or the other, executive action without more simply cannot 'dispense from the general system of law'.[41]

Relatedly, this inherent incapacity means that an invalid decision made by a repository constitutionally incapable of exercising judicial power cannot have *any* legal force — that is, it cannot specify subjects' rights or obligations by force of law. The result is a combination of two factors:

i. an invalid decision is one that, being unauthorised, does not attract the operation of the prerogative or statute pursuant to which it was made;[42] and

ii. the underlying inherent executive incapacity to unilaterally affect the legal position of the subject.

This point is also made, indirectly, in the Court's identification of a separation of powers mandate for judicial review of invalid decisions by non-courts incapable of exercising judicial power: such non-courts cannot validly be authorised to determine the limits of their own jurisdiction over subjects' legal rights or obligations.[43]

Constitutional characteristics of judicial power

Turning from the inherent limit on executive power to the contrast with judicial power, it is recognised that there is a potential inherent in judicial power to support orders that have legal force *unless and until set aside*. This quality is seen in judicial orders of superior courts of record. Examples can be found in cases considering judicial orders imposing liabilities under statutes subsequently held unconstitutional, or otherwise affected by jurisdictional

40 An executive decision made in exercise of statutory authority is viewed as 'adjunct to legislation', a 'factum on which the operation of [statute] depends' / 'the factum by reference to which the Act operates to alter the law in relation to the particular case': *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 371 (McTiernan J), 378 (Kitto J). See also *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 577−9 [94]−[97] (Hayne J).

41 *A v Hayden* (1984) 156 CLR 532, 580 (Brennan J); *Plaintiff M68/2015 v Minister for Immigration and Border Protection* (2016) 257 CLR 42, 98−9 [135]–[136] (Gageler J), 158–159 [373] (Gordon J, dissenting).

42 *Hossain v Minister for Immigration and Border Protection* (2018) 264 CLR 123, 132−3 [23]–[24] (Kiefel CJ, Gageler and Keane JJ) quoting *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ).

43 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 484 [9] (Gleeson CJ), 505 [73], 511−12 [98] (Gaudron, McHugh, Gummow, Kirby, Hayne JJ); *R v Coldham; Ex parte Australian Workers' Union* (1983) 153 CLR 415, 419 (Mason ACJ and Brennan J), 426–8 (Deane and Dawson JJ).

error.[44] To put it another way, even a purported (invalid) exercise of judicial power can manifest the polity's state power to determine rights. The reason is that, in constitutional terms, the judicial power of a polity exists to provide a final arbiter of rights. A necessary cost of finality is that judicial orders can have intrinsic efficacy to render a determination of rights or liabilities conclusive and binding unless and until set aside — even if invalid.

Invalid judicial orders of inferior courts

There is a wrinkle in the Australian authorities. As previously mentioned, Australian authorities hold that invalid judicial orders of inferior courts and others are, like executive decisions, wholly lacking in legal force and effect.[45] However, the argument that there is a quality that *can* be conferred on judicial orders and *cannot* be conferred on executive powers is not denied by Australian doctrine on the status of invalid judicial orders of inferior courts and tribunals. Two points can be made here.

The first and most important is that any distinction made between categories of judicial order (according to the identity of the repository of power) does not deny the constitutional proposition that an invalid purported exercise of *executive* power cannot determine the subject's legal rights or obligations. The constitutional characteristics of executive power make clear that executive action can only affect the legal status of subjects if it draws legal force from a statute or prerogative, which requires that it is authorised by the statute or prerogative. The quality of specifying the subjects' rights or obligations unless set aside *can* be conferred on invalid judicial orders but *cannot* be conferred on executive decisions.

The second point is that Australian doctrine withholding this quality from judicial orders other than those of superior courts is not referable to the text and structure of Ch III. The status of judicial orders of inferior courts and tribunals may be best understood as an aspect of Australian common law, perhaps even one that has 'small c' constitutional status. From what has been judicially revealed to date, it is difficult to see that the Ch III scheme requires that invalid judicial orders of inferior courts in federal matters should be wholly lacking in legal force until set aside — which is to say that Australia's unentrenched doctrine concerning the status of inferior court orders in federal matters does not operate in the same universe as the entrenched doctrine concerning the status of non-court decisions in federal matters.

Summary — why contemplate the constitutional dimension to 'second actor' problem?

In this section, I have outlined a reason for thinking that Ch III *should* have a bearing on how we think about legislative power to authorise secondary action on the basis of invalid executive decisions. In essence, I've suggested that we can read Ch III as a scheme to create a distinctive institutional context for that class of governmental power that can have compulsive legal force on the rights or obligations of subjects *despite* jurisdictional error.

44 See for example *New South Wales v Kable* (2013) 252 CLR 118; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

45 As recently reaffirmed by the High Court: in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2, [48] (Kiefel CJ, Bell, Gageler and Keane JJ); *Citta Hobart Pty Ltd v Cawthorn* (2022) 400 ALR 1; [2022] HCA 16, [27] (Kiefel CJ, Gageler, Keane, Steward and Gleeson JJ).

That this potential inheres in judicial power is not a merely technical point of doctrine. It is an animating purpose that underlies the specific careful provisions laid down in Ch III to safeguard the exercise of judicial power in federal matters. A significant purpose of the whole Ch III enterprise would be undermined if Australian parliaments retained legislative power to enact a prospective rule[46] that that rights or obligations are as specified in an invalid non-court order unless and until it is set aside.

Implications for second actor authorities?

The argument in the section above indicates why we might seriously consider that Ch III bears on how we think about legislative power to authorise action on the basis of invalid non-court decisions in federal matters. It suggests that there is a constitutional dimension when Australian legislation authorises action on the basis of non-court decisions in federal matters. And it helps us to formulate two more productive contentions: first, contrary to current orthodoxy, the *Constitution* may constrain ordinary legislative power to authorise action on the basis that rights or obligations are as specified in an invalid non-court decision. Secondly, the criterion for validity is whether a law authorising secondary action is substantially compatible with the safeguards that Ch III provides for individuals affected by governing power in federal matters. In this section, I will sketch out some preliminary observations on what recognising this constraint would mean for the handling 'second actor' powers in Australian law.

As indicated at the outset, the constraint on legislative power identified can be formulated along these lines: no Australian legislation may authorise official action on the basis that rights or obligations are as specified in an invalid decision by a non-court, where to do so would be inconsistent with the safeguards inherent in Ch III's prescription that judicial power in federal matters is exclusive to courts.

This constraint is closely tailored to the Ch III scheme for adjudication in federal matters. Much of the detail of how such a constraint would operate in practice will therefore depend on the meaning and application of constitutional concepts descriptive of the Ch III scheme. Within the scope of this article, I will offer some observations on four features of this constraint that may affect its application, as follows.

First decision is made by a 'non-court' and on a subject-matter within ss 75 and 76

Most obviously, the constraint only applies if the first decision is made by a non-court constitutionally incapable of exercising judicial power — namely, a non-court[47] exercising governmental power over rights in a subject-matter that lies within the ambit of federal

46 Distinguishing here, authorities recognising legislative power to retroactively enact the purported legal force of invalid administrative action.

47 On the characterisation of tribunals as courts for the purpose of Ch III, see, for example, Rebecca Ananian-Walsh, 'CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System' (2020) 43(3) *Melbourne University Law Review* 852.

jurisdiction.[48] The constitutional concepts at play here reflect the source of the constraint — in the *Constitution*'s provisions that deny any Australian parliament legislative power to confer judicial power on non-courts in the subject-matters that lie within the ambit of federal jurisdiction.[49]

First decision purports to specify rights and obligations of subjects

Next, the constraint applies when the first decision is one that purports to have 'legal force' in the sense that engages the relevant constitutional marker that is exclusive of executive power. That is, it engages the constitutional incapacity of executive power to unilaterally affect the legal status of the governed. In essence, this means that the first decision is one that purports to determine rights or obligations, as an exercise of state power over the governed[50] — to provide that the subjects' rights or obligations are to be as specified in the decision.

Arguably, then, the 'big-C' constitutional limit I propose here would not be engaged if the first decision purports to determine issues of ordinary[51] fact or policy alone, whether as a standalone decision[52] or even as a preliminary step in a statutory process to determine rights or obligations.[53] The separation of judicial power does not deny legislative power to make a non-court executive decision conclusive as to ordinary facts or permissible policy choices on which a non-court executive actor will base their decision.[54] That the fact-finding or policy determination is distributed between different decision-makers and stages in a decision-making process should not change this point. In such cases, the critical question remains one of statutory construction: does the legislation authorise a final decision based on the findings or policy choices arrived at in a manner impaired by material breach of conditions on the decision-making power?

48 *Burns v Corbett* (2018) 265 CLR 304, 360 [105]−[106] (Gageler J). It is noted that Kiefel CJ, Bell and Keane JJ state that Ch III denies state legislative power to confer judicial power in relation to the 'matters' described in ss 75 and 76. It has been suggested that their Honours' reasons might therefore imply that state legislative power extends to conferring judicial power on non-courts on any subject-matter, provided that it is not conferred in a 'matter': see *Attorney General for NSW v Gatsby* (2018) 99 NSWLR 1, 47−59 [229]–[274] (Basten JA). If that is correct, it would reduce the impact of the constraint on *state* legislative power (eg to those instances where non-courts are exercising governmental power to issue a remedy to enforce a right, duty or liability), rather than alter the fundamental analysis.

49 See n 30.

50 Contrast through private arbitration, see *TCL Airconditioner v Federal Court* (2013) 251 CLR 533.

51 Constitutional facts require separate analysis, which I do not attempt here. It may be relevant to note that an executive decision does not purport to 'determine' the constitutional validity of a law's application to the case at hand.

52 Such as the public report of a statutory agency in *Ainsworth v Criminal Justice Commission* (1992) 125 CLR 564 or of the ombuds in *Kaldas v Barbour* (2017) 350 ALR 292; [2017] NSWCA 275; *King v Ombudsman* (2020) 137 SASR 18.

53 Such as the recommendations to final decision-makers considered in *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* (2021) 386 ALR 212; [2021] HCA 2; *Hot Holdings Pty Ltd v Creasy* (1996) 185 CLR 149; and *Wingfoot Australia Partners Pty Ltd v Kocak* (2013) 252 CLR 480.

54 This reading of legislation will not be lightly reached. Further, the final decision may itself be invalid if it is based on findings or policy choices that do not comply with such standards of legal rationality and reasonableness as condition the final decision-making power: compare *Australian Broadcasting Tribunal v Bond* (1990) 170 CLR 321, 341 (Mason CJ).

Secondary action is based on rights or obligations being as specified in the first decision

Relatedly, the constraint on legislative power could only be invoked for secondary action that is based on rights or obligations being as specified in the invalid first decision. (Because this is the 'legal force' that engages the quality exclusive of executive power).

This clarification provides some assurance that the proposed constraint would not impose drastic limits on legislative power to authorise action following invalid executive decisions. To return to an earlier-mentioned example, the constraint would not be engaged if the second action involves a judicial review of the first decision or a redetermination on its merits. And this is for a substantial reason: in a judicial review or a merits review, the reviewer does not proceed on the basis that rights or obligations are as specified in the decision under review. Rather, that is put in issue by the review.

Similarly, a legislative provision that an administrator is not to reopen a decision-making process unless a purported decision in fact is set aside — a possibility conceded in *Minister for Immigration and Multicultural Affairs v Bhardwaj*[55] — may not offend the constraint on legislative power. This too, is for a substantial reason: a provision of this kind does not require the administrator (or anyone else) to treat the purported decision as legally effective to specify the subjects' rights or obligations until set aside. If we assume that the decision in fact made was in purported performance of a statutory duty to consider and decide then the effect of such a provision could be thought of as something in the nature of a qualified 'no consideration'[56] clause — the decision-maker is bound to consider as required by law (and that duty is enforceable by mandamus if a court determines it remains unfulfilled in law), but a purported consideration in fact fulfils the duty unless redetermination is ordered by a superior court.

On the other hand, the proposed constraint on legislative power would do some work. It would, for example, require *some* reconsideration of established ways of thinking about judicial enforcement of liabilities imposed by executive order. The constraint I have outlined would preclude a court determining that an offence has been committed by contravening a liability specified in an *invalid* executive order in a federal matter. This would qualify the orthodox assumption that administrative determinations (in federal matters) are only open to collateral review by a court *in the absence of legislative provision to the contrary*.[57]

55 *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 616 [54] (Gaudron and Gummow JJ).

56 That is, a clause providing that there is no legal duty to consider the exercise of a power on application or request or otherwise. The High Court has upheld the constitutionality of such clauses, explaining that '[m]aintenance of the capacity to enforce limits on power does not entail that consideration of the exercise of a power must always be amenable to enforcement, whether by mandamus or otherwise. Nor does it entail that every discretion to exercise a power must be read as if satisfaction of identified criteria would require its exercise': *Plaintiff M61/2010E v Commonwealth* (2010) 243 CLR 319, 347 [57].

57 *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83, 108 [36] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ). See generally Jules O'Donnell, 'Re-evaluating the Collateral Challenge in the Era of Statutory Interpretation' (2020) 48 *Federal Law Review* 69.

Recognising this qualification need not have drastic practical implications for the present system of Commonwealth enforcement of liabilities imposed by executive order. This is because substantial incompatibility could be avoided in multiple ways. Most straightforwardly, there would be no substantial incompatibility with the Ch III scheme where the invalidity of the administrative act is able to be insisted upon collaterally in the court adjudicating on the alleged contravention.[58] But this may not exhaust the possibilities. Compatibility with Ch III may also be secure if, collateral challenge being unavailable in a court exercising federal jurisdiction,[59] there is an effective means to ensure that no liability or penalty will be judicially imposed absent opportunity to insist on validity in in a superior court with review authority.[60]

Ultimate question is whether legislated consequences of an invalid purported decision are, in substance, compatible with the Ch III scheme

A final point takes us back to the overarching question: are legislated consequences of an impaired executive decision compatible with the Ch III scheme? Answering the question will necessarily require attention to features of the Ch III scheme, itself subject to iterative case law development. To make a trite point, there will be some legislated consequences that are compatible with the Ch III scheme, as described in the authorities. For instance, the Ch III scheme does not deny legislative power to confer immunity from liability for unauthorised executive contravention of individual legal rights. Detention pursuant to an executive decision provides a case in point. An invalid executive determination imposing liability to detention cannot, in federal matters, provide lawful authority for detention until set aside. However, as authorities recognise, a statute may validly immunise officers from liability in tort for unlawful detention et cetera.[61]

A more controversial case could arise if a law purports to authorise enforcement of liabilities specified in an administrative decision (without collateral challenge) after a superior court with full authority to review for jurisdictional error has declined to determine its validity — for instance, if the court has declined to determine an application for judicial review on discretionary grounds or because the court refused leave to apply for review out of time. In such cases, a law that requires or authorises action on the basis that rights or obligations are as specified in the impugned decision might conceivably be upheld as compatible with the Ch III scheme. The court's refusal to review the decision may be considered conclusive that secondary action giving effect to liabilities specified in the decision is consistent with

58 See *Ousley v The Queen* (1997) 192 CLR 69, 100 (McHugh J); *Attorney-General Commonwealth v Alinta Ltd* (2008) 233 CLR 542, 579 [100] (Hayne J).

59 For reasons of legislative policy such as those defended in Jules O'Donnell, 'Re-evaluating the Collateral Challenge in the Era of Statutory Interpretation' (2020) 48 *Federal Law Review* 69, 88−90.

60 There are likely multiple ways this could be provided — for example, discretionary authority to stay proceedings to enable a review application (or to refer the question of law to a superior court); or a right of appeal against any liability or penalty imposed by an inferior court denied collateral review authority to a superior court where validity can be insisted on collaterally, cases evaluating whether laws modifying principles of fair process are compatible with the institutional integrity of courts — for example, *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38.

61 See, for example, the immunity provision considered in *Little v Commonwealth* (1947) 75 CLR 94, distinguished in *Ruddock v Taylor* (2005) 222 CLR 612.

Ch III's provisions for realising the ideal of government under law[62] — although it would be hoped that, should this outcome be possible, it would be a strong factor *against* discretionary refusal to determine the review application.

The inevitability of difficult cases

What I have said to this point highlights that there will inevitably be difficulties in applying a Ch III constraint on 'second actor' powers. On the one hand, Ch III implications for legislative power should be upheld in *substance*. It would be unsatisfactory if the constitutional scheme ultimately *only* dictates the *form* of legislation addressing the legal consequences of invalid executive decisions in federal matters. On the other hand, it would be naive to think that answering the question of substance will be uncontroversial. There will inevitably be difficult cases, where statutes authorise action that is not *in form* based on rights or liabilities being as specified in an invalid decision; and yet there is a sense that the action is *in substance* based on the earlier purported (but ineffective) specification of individual rights or liabilities. In some such cases, it might be concluded that there is a real substantial distinction between the basis for the secondary action and the earlier decision.[63] However, this resolution is not readily available if, for instance, if legislation authorises action that harms individuals in much the same way as they would have been harmed had the purported specification of rights or liabilities been legally effective, based on a second actor's 'reasonable suspicion' about those rights or liabilities attributable to the purported decision's existence in fact. In such scenarios, there may be no easy answer to the question of substantive compatibility with the Ch III scheme.

The case of immigration detention based on a 'reasonable suspicion' that a person is an unlawful non-citizen comes readily to mind. To briefly elaborate: the *Migration Act 1958* (Cth), s 196, mandates (and authorises) immigration detention of any non-citizen who is present in, or seeking entry to, Australia without a visa until they are granted a visa or removed from Australia. Section 189 requires (and authorises) an officer to detain an individual if the officer 'knows or reasonably suspects' that they are an unlawful non-citizen — that is, a citizen present in Australia without a visa. *Ruddock v Taylor*[64] ('*Taylor*'), recently reaffirmed in *Thoms v Commonwealth*[65] ('*Thoms*'), establishes that s 189 confers power to detain — it is *not* an immunity provision; rather, it authorises detention. Further, the 'reasonable suspicion' that enlivens the power can exist even if it is based on facts which are not legally effective to render the person an unlawful non-citizen: the 'reasonable suspicion' referred to in s 189 reaches cases where an officer 'is subjectively convinced that a person is an unlawful non-citizen but later examination reveals that opinion to have been legally flawed'.[66]

62 Compare *Leung v Minister for Immigration and Multicultural Affairs* (1997) 79 FCR 400, 413 (Finkelstein J). I emphasise the point is debateable. Discretionary orders dismissing an application for review need not mean that the decision has legal effect or that the person affected cannot bring other proceedings to vindicate their rights: *Lansen v Minister for the Environment* (2008) 174 FCR 14, 49 [166] (Moore and Lander JJ).

63 Cf the meaning given to 'removed' in context of the statutory criterion for refusing a special entry visa to a 'behaviour concern non-citizen': *Minister for Immigration, Citizenship, Migrant Services and Multicultural Affairs v Moorcroft* (2021) 391 ALR 270; [2021] HCA 19.

64 (2005) 222 CLR 612.

65 [2022] HCA 20.

66 *Ruddock v Taylor* (2005) 222 CLR 612, 622 [27] (Gleeson CJ, Gummow, Hayne and Heydon JJ). See also 674−5 [228]−[229] (Callinan J). Although McHugh J dissented on the interpretation of s 189, he did so on the basis of the 'principle of legality' and conceded that parliament *could* legislate a power of detention exercisable on the basis of an opinion that is legally flawed (at [109]).

If legislative power is constrained in the way I have proposed, it may prompt some reconsideration of extent of legislative power to authorise detention on the basis of a reasonable but mistaken opinion that a purported visa cancellation renders a person an 'unlawful non-citizen'.[67] We might well think it is quite unlikely that the reconsideration would result in any qualification to the *Taylor* and *Thoms* reading of s 189. Further, any reconsideration would be in limited compass: it would not deny the legality of detention that is independently authorised by s 196 — such as where detention follows the invalid refusal of a visa *application* or the invalid refusal of an application for *revocation* of a visa cancellation.[68] And it would not deny legislative power to enact immunity from liability for wrongful detention.[69]

The operation of s 189 is a salient reminder that the application of the constraint on legislative power I have proposed in this article will not be uncontroversial. It might appear that *Taylor* and *Thoms* show that the constraint I have proposed will ultimately have *no* substantive bite: that legislators can, so long as they are careful about the form of the secondary authority, authorise action identical to what could be done if the invalid purported decision had legal force until set aside.

However, before we draw that conclusion, we should recognise that the inevitable tussle between form and substance in Ch III jurisprudence does not deny the value of the principles and prescriptions for governing power that Ch III lays down. Starting points matter. If a Ch III constraint on legislative power is recognised, it means that the validity of a law like s 189 cannot be upheld *simply* because it adopts a criterion that is formally distinct from the objective legal status of the person detained. If the operation of s 189 is upheld, it must be because it is *in substance* compatible with the Ch III scheme (read purposively — to ensure that the state power with potential to determine rights or obligations despite jurisdictional error is, in federal matters, only exercised by courts). Whether any reconsideration would result in any different understanding of the valid reach of s 189 — and whether that different understanding would have a radical impact on mandatory detention regime — does not determine the value of the reconsideration. There is value in recognising that a criterion of substantial compatibility with the Ch III scheme is at stake.

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67 *Taylor* and *Thoms* did consider constitutional validity, but only through the lens of a head of power characterisation — is there a sufficient connection to Commonwealth power to legislate with respect to 'aliens' if the person is *not* an alien? The Court was not considering any implications flowing from Ch III's separation of judicial power in federal matters.

68 There would be no effect on the legality of detaining an alien non-citizen whose application for a visa is invalidly refused (because that person's detention is required by s 196 until a visa is granted, and invalidity of the purported refusal does not establish that the person is entitled to a visa). Nor would it affect the legality of detaining an alien non-citizen whose application for *revocation* of a (valid) visa cancellation is invalidly refused (because that person's detention is required by s 196 until the automatic cancellation is revoked, and the invalidity of the purported refusal does not establish that the person is entitled to the revocation).

69 See n 61. Additionally, the constraint in this article may not preclude recognising as 'reasonable' a suspicion based on a misapprehension that a non-citizen is an 'alien' (as in *Thoms*). This may be a separate issue, because the constitutional validity of legislation's application to a non-citizen is *not* something that is purported to be determined by an executive official exercising statutory power to cancel the non-citizen's visa.

Looking ahead?

The orthodox approach to 'second actor' problems proceeds on the basis that ordinary legislation can validly authorise secondary official action on the basis of a purported (but invalid) official decision, provided that the legislation authorising the secondary action clearly operates on the factual existence of the decision. This approach is well-supported by authority. And yet, at the same time, there is something troubling about the orthodox approach in its application to governing power in federal matters. The orthodox approach seems to imply that all purported decisions that exist in fact are interchangeable artefacts for legislation to handle as legislators deem fit. However, this way of thinking sits oddly with the careful, principled and purposive Ch III constitutional scheme that makes judicial power in federal matters exclusive to courts.

In this article I have analysed the possibility that there is a constitutional dimension to the problem in Australia due to Ch III's framework for governing power in federal matters. My aim has been to demonstrate that this is an idea that we might take seriously. At core, my argument entails a reading of Ch III, in which it is understood to provide a distinctive institutional context for the exercise of that form of governing power which has what Forsyth calls an 'authoritarian' aspect — a potential to sustain a unilateral (non-optional) determination of subjects' rights or liabilities that has legal force *despite* jurisdictional error unless or until set aside. By making judicial power in federal matters exclusive to 'courts', Ch III provides significant constitutional safeguards against arbitrary, unfair or unlawful exercise of this, the type of state power over subjects which carries this quality. And the courts will enforce such implied limits on legislative power as are necessary to preserve the integrity of the Ch III scheme. Arguably a necessary step is to ensure that *executive* (non-court) decisions in federal matters are *not* treated as possessing the specific quality of conclusiveness that is exclusive to judicial power. In this space, the orthodox approach to statutory construction of second actor powers will continue to apply, but the ultimate question will not be (simply) whether legislation authorises secondary action on the basis of a purported decision in fact. Rather, the ultimate question will be whether any legislation authorising secondary action on the basis of a purported decision in fact is compatible, in substance, with the constitutional safeguards that Ch III affords for individuals affected by governing power in federal matters.