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The Australian Constitution as a Framework for Securing Economic Justice

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Abstract

We contend that, contrary to mainstream understanding, the *Australian Constitution* provides a meaningful framework for ensuring economic justice, by virtue of its conferral upon the Commonwealth Parliament of particular legislative powers, namely the income justice and taxation powers. We draw on Rawlsian political theory, together with constitutional theory including recent work on constitutional directive principles, to explain how a constitution, and specifically the *Australian Constitution*, can impose requirements upon the political order independently of its operation as a legal instrument whose legal meaning is interpreted and applied by the courts. We use this novel account of the relationship between political and legal constitutionalism to establish the consequences, for each branch of government, of this constitutional requirement to secure economic justice. This includes a defence, from the perspective of political as well as legal constitutionalism, of the constitutionality of laws imposing retrospective taxation.

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I Introduction

This article argues that the *Australian Constitution* provides a meaningful framework for ensuring economic justice, by virtue of its conferral upon the Commonwealth Parliament of particular

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legislative powers. We focus on two classes of power: what we call the *income justice* powers, namely, the powers to legislate for the provision of pensions,[1] and for arbitration in respect of industrial disputes that extend beyond the limits of one state;[2] and the taxation power.[3]

Central to our argument is a novel theory of the relationship between political and legal constitutionalism in the Australian context, which explains the distinct but interrelated roles these powers play within the Australian constitutional order. 'The key divide between *legal* constitutionalism and *political* constitutionalism', says Khaitan, 'relates to a difference over whether courts or politicians should bear the primary responsibility for protecting and enforcing a constitution'.[4] Our theory explains how a constitution — and how the *Australian Constitution* — can impose requirements upon the political order independently of its operation as a legal instrument whose legal meaning is interpreted and applied by the courts. As we explain in Section II, a constitution can serve as a source of requirements — substantive as well as procedural — that political decision-making, including legislating, must conform to if it is to be defensible within the constitutional order. We build on the idea of constitutional convention, and on recent work on constitutional directive principles, to locate this claim within constitutional theory. However, because this is a novel claim, particularly in the Australian context in which the *Constitution* has famously been described as a 'small brown bird',[5] we need to say something about it at the outset.

From the perspective of *legal constitutionalism*, it can be easy to think of a constitution as 'self-actualising', that is, as bringing politics into conformity with its requirements by dint of those requirements' legal character. But as Krygier emphasises, this force of law depends upon a sometimes neglected *social* fact, namely, that people within a society, in particular powerful actors (including judges, and those to whom judges issue their orders), act in conformity with what the law requires. That is, the force of law operates in societies that subscribe to the rule of law.[6] In this sense, law is a social process, in which a constitution can play a fundamental role. Central to our argument is the observation that a constitution can also be important in social and especially political processes that are *not* primarily legal in character: a constitution can serve as one important source of public political values and standards that establish parameters for political argument. This is a distinctive manifestation of *political constitutionalism*.

The central *normative* premise we adopt but do not specifically defend is an intuitive, broadly egalitarian, notion of justice that places particular emphasis on the equal worth of political liberties, fair equality of opportunity, and the threat that may be posed to these forms of equality by economic

1. *Australian Constitution* s 51(xxiii). This article does not consider s 51(xxiiiA), which confers power to legislate for the provision of other social security benefits and social services.
2. Ibid s 51(xxxv).
3. Ibid s 51(ii).
4. Tarunabh Khaitan, 'Constitutional Directives: Morally-Committed Political Constitutionalism' (2019) 82(4) *Modern Law Review* 603, 607.
5. Patrick Keane, 'In Celebration of the Constitution' (Speech, Banco Court, 12 June 2008), quoted in 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, 63.
6. Martin Krygier, 'Transitional Questions About the Rule of Law: Why, What and How?' (2001) 28(1) *East Central Europe* 1, 12–16.

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inequality, especially extreme differences between the bottom and the top.[7] This intuitive notion distils the broad commitments of an expansive theoretical body of liberal-egalitarian work concerned with distributive justice and taxation.[8] We do not attempt to demonstrate that the Australian constitutional order is committed to any particular model of egalitarian economic justice (such as Rawls' famous difference principle, or Sen and Nussbaum's capabilities approach). Rather, we aim to show that the features of the *Constitution* with which we are concerned — the income justice powers and the taxation power — generate an orientation towards economic justice in the broadly egalitarian sense of these theories.

Section II develops a theoretical framework which enables constitutional commitments to justice to be understood, and hence realised, by drawing on and integrating central methodological (rather than normative) elements of Rawls' political philosophy. Rawls provides a powerful set of conceptual and analytical tools for investigating the workings of social and political institutions, and the ways in which those workings answer the demands of justice, including economic justice. We use a number of these, in particular Rawls' account of legitimate law-making and his account of public reason.

In Section III, we develop an account of the income justice and taxation powers. Our analysis of the income justice powers takes place entirely within the domain of political constitutionalism, and draws upon the enduring place in Australian politics of concerns with income justice. Our analysis of the taxation power is more complex, as we consider it from the perspective of both political and legal constitutionalism. The theory developed in Section II explains why there can be good reasons for the legal domain to be insulated, in its methods, from the demands of the political domain; and in Section III we show that the High Court's legalistic interpretation of the tax power has, in general, permitted that power to play its essential role in a constitutional scheme of economic justice.

Section IV concludes by considering the Australian approach to retrospective tax legislation. Justice Gordon has argued extra-curially for revisiting the High Court's treatment of such laws. We show that those arguments depend upon a mingling of *political* and *legal* constitutionalism in a way that runs counter to the basic features of the constitutional framework we have identified. This example therefore provides further illustration of the way in which the *Constitution* provides a framework for securing economic justice.

7. See also Patrick Emerton and Kathryn James, 'The Justice of the Tax Base and the Case for Income Tax' in Monica Bhandari (ed), *The Philosophical Foundations of Tax Law* (Oxford University Press, 2017) 125, 126–7, 140–1.
8. See, eg, John Rawls, *A Theory of Justice* (Oxford University Press, 1971) 60–83, 277–80 ('*Theory*'); Jørgen Pedersen, *Distributive Justice and Taxation* (Routledge, 2021) 1, 14; Martha C Nussbaum and Amartya Sen (eds) *The Quality of Life* (Clarendon Press, 1993); Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000); Amartya Sen, *The Idea of Justice* (Belknap Press, 2009); Liam Murphy and Tom Nagel, *The Myth of Ownership* (Oxford University Press, 2002); Helmut P Gaisbauer, Gottfried Schweiger and Clemens Sedmak (eds) *Philosophical Explorations of Taxation and Justice* (Springer, 2015); Alexander W Cappelen and Bertil Tungodden, 'Tax Policy and Fair Inequality' in Martin O'Neill and Shepley Orr (eds), *Taxation: Philosophical Perspectives* (Oxford University Press, 2018) 112; GA Cohen, *On the Currency of Egalitarian Justice and Other Essays in Political Philosophy* (Princeton University Press, 2011); GA Cohen, *Rescuing Justice and Equality* (Harvard University Press, 2008); Daniel Halliday, *The Inheritance of Wealth: Justice, Equality, & the Right to Bequeath* (Oxford University Press, 2018). For a strident judicial affirmation of the significance, in Australia, of the equal worth of the political liberties, see *McCloy v New South Wales* (2015) 257 CLR 178, 202 [27]–[28] (French CJ, Kiefel, Bell and Keane JJ), 283–4 [318], 285 [324], 290 [344], 294 [365] (Gordon J). For a well-known criticism of egalitarianism, see, eg, Robert Nozick, *Anarchy, State, and Utopia* (Wiley-Blackwell, 1974). We accept the rebuttal of Nozick in Thomas Pogge, *Realizing Rawls* (Cornell University Press, 1989), ch 1.

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II Theoretical Framework

Our theoretical framework begins with two key notions — *political legitimacy* and *public reason*. We explain the connection between these phenomena, how they play out in a constitutional regime, and how they affect and structure the relationship between legal and political constitutionalism. We use the example of directive principles both to illustrate our ideas, and to lay the foundation for our explanation of how the Australian constitutional order can be understood as a distinctive interplay of political and legal constitutionalism.

A *Political Legitimacy, Public Reason and the Constitution*

Political legitimacy distinguishes the sort of government to which a democracy such as Australia aspires from rule by force or acquiescence. The democratic state and its framework of laws and government are legitimate when they are appropriate exercises of citizens' collective power.[9] (We use the notion of *the state and its framework of laws* in a capacious sense, as including the private law, and so the legitimacy with which we are concerned is dependant (in part) on the private law appropriately constraining and channelling the conduct of private actors).[10]

To help understand what makes an exercise of power *appropriate*, it is necessary to contrast legitimacy with *justification*.[11] Complying with a framework of laws and government may sometimes be a *good* or *right thing*, and hence *justified,* even if that framework is not legitimate. A well-known example would be compliance with the law that prohibits murder, which (roughly) tracks a moral duty not to commit unjustifiable homicide. Similarly, a regulatory regime may generate independent moral duties, regardless of its legitimacy, because of the contribution it makes to coordination solutions.[12] More generally, morality or prudence may demand some compliance with an illegitimate framework because total non-compliance would produce worse consequences (eg, disruption or disorder).

Just as importantly, there may be cases where a framework of laws and government is legitimate, although not fully justified. 'No human institution can be [perfectly just]',[13] and thus 'any feasible political procedure may yield an unjust outcome'.[14] Hence, as Rawls puts it, we must sometimes '[accept] as legitimate (even when not just) a particular statute or a decision in a particular matter of policy',[15] and must 'recognize unjust laws as binding provided that they do not exceed certain limits of injustice.'[16]

Rawls' account of how those limits are established, and the role of the constitution in that respect, is of particular interest. In *A Theory of Justice*, Rawls says that, 'We must rely on the actual course of discussion at the legislative stage to select a policy within the allowed bounds.'[17] The 'allowed

9. John Rawls, *Political Liberalism* (Columbia University Press, 1996) 137 ('*Liberalism*').
10. In Rawlsian terminology, we are referring to the basic structure: Rawls, *Theory* (n 8) 7; *Liberalism* (n 9) 258. On the place of private rights and private law within the basic structure see Emerton and James (n 7) 127, 137–9; Patrick Emerton, 'Public Reason, Public Benefit, and "Political" Charities' in Daniel Halliday and Matthew Harding (eds), *Charity Law: Exploring the Concept of Public Benefit* (Routledge, 2022) 227–34.
11. A John Simmons, *Justification and Legitimacy: Essays on Rights and Obligations* (Cambridge University Press, 2001) ch 7.
12. See Joseph Raz, 'Authority and Justification' (1985) 14(1) *Philosophy & Public Affairs* 3, 17–18.
13. Rawls, *Liberalism* (n 9) 428.
14. Rawls, *Theory* (n 8) 198.
15. Rawls, *Liberalism* (n 9) 393.
16. Rawls, *Theory* (n 8) 351.
17. Ibid 362. Page 201 uses the phrase 'allowed range'.

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bounds', in turn, are settled by what he describes as 'the framework of the public conception of justice':

> If the law actually voted is … within the range of those that could reasonably be favoured by rational legislators trying to conscientiously follow the principles of justice, then the decision … is practically authoritative. … [T]hose who disagree with the decision made cannot convincingly establish their point within the framework of the public conception of justice.[18]

Political Liberalism elaborates upon the idea of 'the framework of the public conception of justice', using the term 'public reason', and henceforth we adopt this usage. Rawls describes *public reason* as 'the reason of citizens as such', that is in their capacity as citizens rather than as members of private associations and bearers of personal concerns and commitments. The 'nature and content' of public reason is 'given by the ideals and principles expressed by society's conception of political justice'.[19] Thus, legislation and governmental decision-making are legitimate even if (arguably) not just, binding even those who disagree, if the latter cannot convincingly establish their objection within public reason. This is how the 'allowed bounds', the limits of injustice that are consistent with a legitimate framework of laws and government, are established.

The inability to establish an objection within the scope of public reason does not mean that public reason *entails* the contentious law or decision. Determining whether or not some institutional arrangement or policy conduces to justice 'frequently depends upon speculative political and economic doctrines and upon social theory generally',[20] and these are matters of reasonable disagreement. A law or decision that depends for its justification upon such 'speculation' will therefore not be entailed by public reason. Consider, for instance, a compulsory education law: it may be unequivocally aimed at providing all children with opportunities, but in its details may presuppose how certain sorts of compulsion (e, zoning, curriculum, etc) affect the development of those opportunities. Such presuppositions would be examples of 'speculative' doctrine. Those who disagree about how children develop opportunities in the context of their schooling might therefore oppose the law on the grounds that it will not in fact produce a just distribution of opportunities. But as long as the speculative doctrine itself conforms to public reason then the law cannot be refuted within public reason (e, so-called 'race science' would be excluded on this measure because inconsistent with the basic principle of justice of Australian or any other society; but mainstream psychology and sociology would not be).

We can now explain the contribution that a democratic society's *constitution* makes to legitimacy. Rawls describes the principal demand on constitution-makers as being 'to choose … the constitution that satisfies the principles of justice and is best calculated to lead to just and effective legislation' given the 'general facts about their society'.[21] The constitution contributes to legitimacy in two ways. The first is by establishing the legislative process: the legislature enjoys its power to generate authoritative law, that may be legitimate even if not just, because of its special constitutional position, of having been adopted as the best calculated means of achieving just and effective

18. Ibid 362.
19. Rawls, *Liberalism* (n 9) 213.
20. Rawls, *Theory* (n 8) 199.
21. Ibid (n 8) 197. See also Rawls, *Liberalism* (n 9) 336, 408–9, 415–16. Rawls' formulation of this task takes the relevant principles of justice to already be known: Rawls, *Theory* (n 8) 198.

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legislation.[22] It is this, and not (for example) special insight or expertise, that distinguishes the legislature from any other group of citizens that meets to discuss and debate political matters.

The second is by contributing to the 'allowed bounds'. As Rawls notes, legislation 'must accord both with the constitution' and with the principles of justice to which the constitution aims to give effect.[23] For the reasons considered above, there is no way of *guaranteeing* that legislation will be just. But a society's constitution is part of that society's expression of its conception of political justice, and thus contributes to public reason.[24] We call this *constitutional public reason*. Constitutional public reason may be expressed in various ways, such as specifying rights, setting out directive principles (discussed below), or conferring powers (as we argue is the case for the *Australian Constitution*). A law that can be refuted within constitutional public reason is not legitimate: it is not defensible as an expression of the public conception of justice, and it cannot claim to be supported by the constitution. Thus, the special role that the legislature enjoys by virtue of its constitutional position cannot be called upon in support of such a law. From the perspective of legitimacy, the status of such a law is no different from an expression of the legislators' private whims or interests. Whether crossing the bounds established by constitutional public reason ought to be remediable by way of judicial review is a further question of constitutional design. We agree with Rawls that philosophy provides no general answer to this question.[25]

This account of legitimacy puts the process of political argument, and political reasoning, at its centre, but does not accept that political argument and political reasoning are unconstrained: they are constrained by the requirements imposed by public reason, including constitutional public reason. The account is quite different, for instance, from Raz's account of practical authorities, which grounds such authority, especially in the political case, in the authority's capacity to resolve coordination problems and prisoners' dilemmas, and to identify and proclaim 'dependent reasons' (that is, reasons that are meant to reflect the balance of reasons that already apply to those subject to the authority) that will better enable its subjects to conform to the reasons that already apply to them.[26] Our account, which grounds authority on occupying a certain institutional role in the constitutional scheme while having the appropriate orientation to public reason, is a better fit with Australia's constitutionally mandated scheme of electoral democracy than one which grounds authority on a distinctive capacity. This is for at least two reasons: it does not demand any particular wisdom or expertise of political decision-makers; and it makes the special role of the legislature a matter of principle, rather than of being simply a salient provider of coordination and like solutions.

Legitimacy, and the lack of it, may be matters of degree, in two senses. First, it may be that most but not all of what the state does and demands — its laws, the decisions made and actions taken by its government, etc — may be legitimate. So illegitimacy may be local rather than widespread or total. Second, failures of legitimacy may be more or less egregious.[27] Constitutional public reason may play a role in making these assessments.

22. See Emerton and James (n 7) 128–33.
23. Rawls, *Liberalism* (n 9) 340.
24. See, eg, ibid 339–40, where Rawls states that 'at each stage [ie pure philosophy, constitution-making, and legislating] the reasonable frames and subordinates' the pursuit of rational self-interest, and '[a]s the stages follow one another … the constraints of the reasonable become stronger'.
25. Ibid 235.
26. Raz (n 12) 9–10, 14–21.
27. These dimensions of degree of illegitimacy inform Rawls' accounts of civil disobedience and militant resistance: Rawls, *Theory* (n 8) 363–8, 371–7, 382–91.

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B *Political and Legal Constitutionalism, and Constitutional Public Reason*

The relationship between political constitutionalism, legal constitutionalism, and constitutional public reason, is a complicated matter. Using Rawls as our foil, we identify a number of ways — several more than Rawls envisages — in which they may interrelate.

Rawls identifies one possible set of such relationships when he describes the Supreme Court as an exemplar of public reason.[28] He says that:

> [The ideal of public reason] applies in official forums and … in a special way to the judiciary and above all to a supreme court in a constitutional democracy with judicial review. This is because the justices have to explain and justify their decisions as based on their understanding of the constitution and relevant statutes and precedents. …
>
> Citizens and legislators … need not justify by public reason why they vote as they do or make their grounds consistent and fit them into a coherent constitutional view over the whole range of their decisions. The role of the justices is to do precisely that …
>
> The justices cannot, of course, invoke their own personal morality, nor the ideals and virtue of morality generally. … Rather, they must appeal to the political values they think belong to the most reasonable understanding of the public conception and its political values of justice and public reason.[29]

This argument rests on four premises. One of them — that a constitution contributes to public reason — we agree with, for the reasons we have already given. But the other three premises may be rejected.

The first of these is that political actors do not have to justify their actions by reference to an understanding, or at least a systematic understanding, of the constitution. This rests on Rawls' assumption that a constitution will not have content extending beyond protection of civil and political rights, and the basic machinery of democratic government (ie elections, office-holders, etc).[30] Rawls assumes that although principles of economic justice are part of public reason,[31] they will not be part of the constitution,[32] and hence will not inform *constitutional* public reason (he notes the 16th Amendment to the Constitution of the United States, permitting a national income tax, but describes it as a dealing with a 'basic [matter] of policy'[33] without considering its possible implications for the role of public reason in non-judicial political discourse). This is not because securing social and economic justice is less important than the matters dealt with by the constitution, and nor is it for anti-perfectionist reasons:[34] Rawlsian political liberalism is fully committed to ensuring an adequate distribution of all-purpose means, of just the sort that many (not all) constitutional directive principles are concerned with.[35] It is because securing social and economic justice requires knowledge of particular and concrete social and historical circumstances, which (according to Rawls) makes its attainment harder to ascertain without controversy;[36] in other words,

28. Rawls, *Liberalism* (n 9) 231–40.
29. Ibid 216, 235–6.
30. Ibid 232, 238–9.
31. Ibid 223–5.
32. Ibid 232, especially fn 14.
33. Ibid 239.
34. Cf Khaitan (n 4) 608–9.
35. Rawls, *Liberalism* (n 9) 179–82, 186–90.
36. Rawls, *Theory* (n 8) 197–200, 224, 275; Rawls, *Liberalism* (n 9) 227–30, 337–8.

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it is said to be a consequence of the fact, discussed above, that determining whether some institutional arrangement or policy conduces to social and economic justice 'frequently depends upon speculative … doctrines'.[37]

Rawls asserts that the content of rights is not contentious in the same fashion as 'speculative' doctrine, but this is an empirical claim for which no evidence is provided beyond the dubious claim that the list of protected rights is much the same in all democratic constitutions.[38] Furthermore, Rawls includes within the scope of constitutional rights not just formally equal political liberties, but political liberties of equal worth,[39] and these depend (in part) upon the distribution of wealth,[40] and a 'social minimum'.[41] It is quite unclear how a constitution can secure the equal worth of political liberties, and a social minimum, if it leaves questions of social and economic justice to be resolved via an unguided process of legislation. We therefore reject Rawls' arguments in favour of such thin constitutional content.

A further reason why Rawls assumes that politicians do not have to justify their actions by reference to a systematic understanding of the constitution is that he envisages the constitution being protected by judicial review.[42] This relieves political actors from the need to systematise their own understanding of constitutional requirements. However, this assumption simply begs the question in favour of legal rather than political constitutionalism. We therefore treat it as an open question whether political actors are obliged to have regard to constitutional public reason. This will depend on the details of a society's constitution and political culture. We take this up below, first in relation to constitutional directive principles, and then in relation to Australia.

The second premise that may be rejected is that constitutional public reason plays the role that it does (at least in part) in virtue of its *legal meaning*. The third is that legal meaning, which the judiciary is obliged to draw upon, develop and apply, is itself informed by elements of public reason that lie *outside* constitutional public reason (that is, the broader public conception of justice).

Accepting these three premises yields a picture of constitutionalism very similar to Ackerman's:[43] the people adopt a constitution, a 'higher law' that expresses and is informed by their public political conception of justice, which then governs 'ordinary' politics by setting up (*i*) the democratic institutional machinery, and (*ii*) agreed boundaries to protect democratic citizenship in the form of fundamental rights, which are enforced by the courts. The courts, in playing this role, develop the legal meaning of the constitution by reference to the public conception of justice. On this picture, the Supreme Court is thus

> the highest judicial interpreter but not the final interpreter of the higher law; … The constitution is not what the Court says it is. Rather, it is what the people acting constitutionally through the other branches eventually allow the Court to say it is.[44]

37. Rawls, *Theory* (n 8) 199.
38. Rawls, *Liberalism* (n 9) 228, 230, 292–3.
39. Rawls, *Theory* (n 8) 204, 224–27; Rawls, *Liberalism* (n 9) 324–31, 338.
40. Rawls, *Theory* (n 8) 225–26, 277.
41. Rawls, *Liberalism* (n 9) 228.
42. Ibid 165, 216.
43. Bruce Ackerman, *We The People: Foundations* (Harvard University Press, 1991–2018) vol 1. Rawls cites Ackerman with approval: Rawls, *Liberalism* (n 9) 231, 233, 234. Rawls adopts Ackerman's idea of 'higher law', locating it within a theory of constituent power and hence of the possibility of constitutional change by the people without the need for formal amendment: Rawls, *Liberalism* (n 9) 231–8.
44. Rawls, *Liberalism* (n 9) 231, 237.

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Thus, says Rawls,

> By applying public reason the court is to prevent that [higher] law from being eroded by … legislation … [I]t is incorrect to say that it is straightforwardly anti-democratic. It is indeed antimajoritarian with respect to ordinary law … Nevertheless, the higher authority of the people supports that … when [the court's] decisions reasonably accord with the constitution itself and with its amendments and politically mandated interpretations.[45]

On this understanding, as the content of public reason changes, so the legal meaning of the constitution and the content of constitutional public reason changes (or should change) with it, without necessarily requiring formal amendment.[46]

Rawls identifies two other possibilities: a system of parliamentary supremacy with no bill of rights, in which public reason has no *constitutional* expression at all; and a German-like system, in which certain rights are entrenched and unamendable, and hence beyond the control of the people.[47] But these are not exhaustive. A constitution may contain content that goes beyond basic democratic machinery and protection of civil and political rights. It may also contain content that is addressed not to the courts, to be given legal meaning and applied via a process of legal reasoning, but rather to politicians, to help establish the 'allowed bounds' of legislation and other political decision-making. Constitutional directive principles, discussed in the next sub-section, exemplify both these possibilities. By making economic justice a subject of constitutional public reason, such arrangements may do better at helping ensure a just constitutional order than Rawls' own picture.

It may also be possible to have a regime in which *legal* meaning, even of the constitution, is *insulated* from public reason. This would be a system, at least in aspiration, of 'strict legalism'. Rawls, in a relatively early article, sets out a general framework for understanding why this might be desirable.[48] Rawls points out that *what it is that justifies an institution or practice* (for instance, that it tends to secure worthwhile ends) differs from *what it is that justifies an action within an institution or practice* (for instance, that it conforms to the rules that govern the role that a particular actor occupies within that institution or practice). Sometimes, the best way to ensure that an institution or practice serves the purpose for which it has been instituted is to govern those within it according to rules that *do not* have express regard to that purpose. A simple example is the institution of *promising*: it is at least arguable that this institution serves a general social purpose, of facilitating trust and hence cooperation among people; but what helps *promising* achieve this purpose is precisely that promisors are precluded from having regard to broader social considerations in deciding whether and how to keep their promises. Rather, the only relevant considerations (except in the direst circumstances) are those which are personal to the giver of the promise and the person to whom it was given.[49]

In a legalist system, therefore, the constitution might conceivably play two distinct functions. It might act as a source of constitutional public reason for political decision-makers, contributing to the establishment of the 'allowed bounds'. At the same time, it might be interpreted and applied by courts, in accordance with its legal meaning, which is determined by the application of technical

45. Ibid 233–4.
46. Following Ackerman, Rawls instances the New Deal as an example: ibid 238.
47. Ibid 234–5.
48. 'Two Concepts of Rules' (1955) in Samuel Freeman (ed), *John Rawls: Collected Papers* (Harvard University Press, 1999).
49. For further discussion of *promising*, and other examples, see Emerton (n 10) 225–6; Emerton and James (n 7) 128–9.

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legal methodologies which do not treat public reason as weighing on the scales. This, we assert, is the basic character of the *Australian Constitution*. We make the argument for this claim in Sections III and IV.

C The Example of Directive Principles

Constitutional directive principles are best known perhaps from the Irish and Indian constitutions but are also found in many others. They require the political mechanisms of government (particularly the legislature) to pursue certain goals,[50] and 'are not designed to be given effect by direct judicial enforcement'.[51] Thus, s 37 of the *Constitution of India* states that 'provisions contained in this Part' — entitled 'Directive Principles of State Policy' — 'shall not be enforceable by any court, but the principles therein laid down are nevertheless fundamental in the governance of the country and it shall be the duty of the State to apply these principles in making laws'. Section 38 states the following principle: '[t]he State shall strive to promote the welfare of the people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life'.

Khaitan and Weis both identify directive principles as primarily a political constitutional device.[52] As Weis observes, constitutional directive principles:[53]

> Shift the allocation of institutional responsibility for articulating the scope and content of constitutionally entrenched ('fundamental') social values … from the judiciary to the political organs of the state.… [They] thus appear to insert an element of political constitutionalism within the domain of legal constitutionalism.…
>
> They complicate our understanding of … the relationship between legal and political constitutionalism.[54]

Khaitan says more about what this complication consists in. Constitutional directives demonstrate that political constitutionalism, as an *institutional mechanism for the pursuit of constitutional government*, need not entail that the constitution does nothing but establish institutional machinery:[55]

> The key divide between *legal* constitutionalism and *political* constitutionalism relates to a difference over whether courts or politicians should bear the primary responsibility for protecting and enforcing a constitution. The debaters typically assume that any *substantive* constitutional norms automatically implies legal constitutionalism, ie enforcement by the courts. As a corollary, it is assumed that political constitutionalism rules out all substantive constitutional commitments, beyond the settlement of institutional procedures. Directives – as substantial constitutional norms to be implemented politically – challenge these assumptions.

50. Lael K Weis, 'Constitutional Directive Principles' (2017) 37(4) *Oxford Journal of Legal Studies* 916, 916–17 ('Constitutional Directive Principles'); Khaitan (n 4) 607.
51. Weis, 'Constitutional Directive Principles' (n 50) 920. See also Khaitan (n 4) 610–11.
52. Weis, 'Constitutional Directive Principles' (n 50) 922–3; Khaitan (n 4) 610.
53. Weis, 'Constitutional Directive Principles' (n 50) 917. See also at 923, 936, 940.
54. Ibid 917, 945.
55. Khaitan (n 4) 607 (emphasis in original). See also at 610.

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Furthermore, Khaitan recognises that constitutional directives directly inform constitutional legitimacy. Being posited (either expressly or by implication) by the constitution,[56] they 'set the agenda for the political discourse, and are used by political actors to legitimise or criticise certain acts and agendas.'[57]

The framework we have set out above straightforwardly explains these features of directive principles. As noted above, they are an example of constitutional content that goes beyond basic democratic machinery and rights protection, but that is addressed primarily to politicians. They are a part of public reason, and moreover of constitutional public reason, in those societies in whose constitutions they are found. But their primary purpose is not to contribute to the legal meaning of the constitution as applied and interpreted by the courts.[58] Rather, they contribute to the 'allowed bounds' of political, including legislative, decision-making, by creating obligations, [59] thereby setting boundaries which cannot be crossed if the state and its framework of laws and government are to be legitimate.

The *Australian Constitution* contains statements of obligation addressed to the legislature. There are provisions mandating certain institutions (eg, the Inter-State Commission)[60] that cannot come into being except by legislation,[61] and also express imperatives to legislate, most prominently s 88 which states that '[u]niform duties of customs shall be imposed within 2 years after the establishment of the Commonwealth'. There is no adjudicative mechanism for enforcing these provisions: it is a basic principle of Australian constitutional law that Parliament is immune from (purported) orders mandating that it enact a certain law.[62] During the Convention that finalised the *Australian Constitution*, George Reid (then Premier of New South Wales, later the fourth Prime Minister of Australia) nevertheless described s 88 as a 'legal compulsion' to establish a uniform tariff.[63] On the other hand, Quick and Garran describe it differently:[64]

> Such a direction in a constitutional instrument has almost the weight of a mandate, and obedience to it may be anticipated with perfect confidence. It is necessary, however, to observe that in strict legal effect the words must be interpreted as directory only, not mandatory … [A] solemn constitutional obligation has been laid upon the Parliament; but … no attempt has been made to threaten pains and penalties in the improbable event of that obligation not being fulfilled …

Our argument does not require determining whether or not these provisions impose legal obligations on the Parliament. What is relevant for our purposes is that they do *not* contribute any substantive content to constitutional public reason. For similar reasons, Khaitan would not characterise s 88 of the *Australian Constitution* as a *directive*: while it requires Parliament to enact

56. Ibid 611.
57. Ibid 611, 628.
58. For discussion of whether and how it might be permissible for courts to have regard to directive principles in interpreting and applying other constitutional provisions, see Weis, 'Constitutional Directive Principles' (n 50) 926–9, 931–3, 940–4.
59. Weis recognises this obligatory character and contrasts it with mere statements of constitutional value or aspiration: ibid 920, 924–5, 930, 936.
60. *Australian Constitution* s 101.
61. As is implicitly recognised by *Australian Constitution* s 101, in which the imperative '[t]here shall be an Inter-State Commission' is followed by the words 'with such powers … as the Parliament deems necessary'.
62. See, eg, *Australian Constitution* s 49; *Murphy v Electoral Commissioner* (2016) 261 CLR 28, 74 [110] (Gageler J), 89–90 [188] (Keane J), 123 [299]–[302] (Gordon J).
63. Official Report of the National Australasian Convention Debates, Melbourne, 16 February 1898, 1012.
64. John Quick and Robert Randolph Garran, *The Annotated Constitution of the Commonwealth of Australia* (Angus and Robinson, 1901) 374.

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legislation, it does not specify any substantive content.[65] As is well-known, s 88 represented a decision to postpone the making of any substantive decision about the content of the tariff law, and to allow it to be determined by the political process that the *Australian Constitution* was to establish.[66]

There are features of the *Australian Constitution*, however, that are not neutral as to the course of action to be pursued. Thus, while Khaitan identifies the *Australian Constitution* as the 'best approximat[ion]' to 'the purest form of proceduralist political constitutionalism',[67] we disagree.

D *Conferrals of Power and Constitutional Public Reason*

Goldsworthy and Burton Crawford state that political constitutionalism in the context of the *Australian Constitution* 'uses political mechanisms to control government' and observe that:[68]

> In many respects the *Australian Constitution* implements the British model [of political constitutionalism] …
>
> The political branches of government are subject to relatively few legal constraints other than the limited nature of their powers inherent in federalism, and those imposed by Chapter III.

However, the absence of legal constraints, including constraints amenable to judicial review, does not mean that the constitution imposes no requirements on politicians. Constitutional directive principles are a counter-example to such an assumption. So too, we argue, are the powers in the *Australian Constitution* with which we are concerned.

It may seem puzzling to suggest that a conferral of power can impose requirements and generate constraints. Khaitan, for instance, illustrates his claim that '[d]irectives are … distinct … from constitutional provisions that are non-obligatory'[69] by reference to the conferral of power on Canadian provinces to 'make Laws in relation to Education'.[70] However, while the textual difference between a conferral of power and an imposition of a duty is apparent, this does not preclude a conferral of power from generating a constitutional requirement. A conferral of power need not be a *bare* power and may bring with it an implication as to whether and how it is to be used.

A relatively pedestrian example is s 64 of the *Australian Constitution*. This confers a power on the Governor-General 'to appoint officers to administer … departments of State' who must be drawn from the Parliament and who 'shall be members of the Federal Executive Council' that is to advise the Governor-General.[71] Although in strictly textual terms a power, s 64 establishes a constitutional

65. Khaitan (n 4) 612, discussing a constitutional provision obliging enactment of a citizenship law.
66. John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (Oxford University Press, 2000) ch 3, 167, 284, 290.
67. Khaitan (n 4) 607.
68. Jeffrey Goldsworthy and Lisa Burton Crawford, 'Constitutionalism' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 358, 362, 367.
69. Khaitan (n 4) 613.
70. Ibid 612–13; *Constitution Act 1867* (Imp), 30 & 31 Vict, c 3, s 93.
71. *Australian Constitution* ss 62, 64.

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requirement that the Governor-General appoint a government that enjoys the confidence of the House of Representatives (the core of responsible government).[72] It is debatable whether this is a justiciable, or even legal, requirement;[73] but it is clearly a constitutional one, and departing from it can — and in 1975 did — provoke a significant crisis of legitimacy.

Khaitan recognises that constitutional conventions may establish non-justiciable and non-legal constitutional obligations, but takes them to differ from directive principles because they are concerned with procedural questions (eg, about assenting to legislation and appointing governments) rather than substantive goals of state action.[74] Expressed in our terms, procedural conventions do not contribute substantive content to constitutional public reason. But these sorts of conventions are not the only requirements that can be generated by the constitutional conferral of powers: a constitution may confer powers in circumstances where there is a clear political understanding, associated with the introduction of the power into the constitution in which it is found, that such powers are to be exercised, or that the purposes for which the powers were conferred are otherwise to be pursued. This will give rise to a corresponding requirement within constitutional public reason.

We are not suggesting that such a requirement implies any obligation to exercise the power as a matter of *legal meaning*. But as we explained above, constitutional public reason need not be a source of legal meaning in order to contribute to the 'allowed bounds'. The *United States Constitution* provides two candidate illustrations of such powers: the 14th and 15th Amendments provide for civil rights and voting rights respectively, and each concludes with a statement that '[t]he Congress shall have the power to enforce [it] by appropriate legislation'. These seem to be not *merely* conferrals of power upon Congress. They establish an expectation that Congress shall use its legislative powers, including but not limited to those conferred by the Amendments,[75] to ensure that civil and voting rights are secured. A parallel Australian example would be the 1967 referendum, which established the welfare of, and perhaps justice for, Aboriginal and Torres Strait Islander peoples, as a requirement within constitutional public reason.[76]

In a case of this sort, failure by the legislature to exercise the powers conferred upon it will generate two bases for criticism. First, laws that do not conform to the expectation generated *within constitutional public reason* by the conferral of the relevant legislative powers will thus be liable to refutation within public reason, falling outside the 'allowed bounds', and therefore lacking legitimacy. Second, and more profoundly, such failure may cast doubt on the legitimacy of the legislature itself, either because it has forfeited its claim to be legislating within the 'allowed bounds' in general, or because its failure to pursue justice as is constitutionally required raises doubts about the legitimacy of the political process that the constitution provides for, severing the connection between the constitution and justice. Keeping the example of the 1967 referendum in mind, there is an argument that one or both sorts of failure have occurred in Australia, given that Australia's framework of law and government does not secure either welfare or justice for

72. See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 558–9.
73. James Stellios, *Zines's the High Court and the Constitution* (The Federation Press, 6th ed, 2015) 369; 'In the Matter of the Validity of the Appointment of Mr Morrison to Administer the Department of Industry, Science, Energy and Resources' (SG No 12 of 2022, 22 August 2022) [30]–[33] <https://www.pmc.gov.au/sites/default/files/media-releases/sg-no-12-of-2022.pdf>.
74. Khaitan (n 4) 607, 612.
75. The Civil Rights Act relies primarily on the commerce power: *Civil Rights Act 1964*, 42 USC, Titles II, VII; *Heart of Atlanta Motel Inc v United States* (1964) 379 US 241.
76. See, eg, Megan Davis, 'Modern Australian Federalism and the Uluru Statement' (23rd Geoffrey Sawer Lecture, ANU, 16 February 2022). See also text to n 103.

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Aboriginal and Torres Strait Islander peoples. This article does not further explore the implications of the resulting lack of legitimacy for the Australian constitutional order,[77] but we do note that our framework clearly enables it to be identified.

III The Powers

This Part applies the theoretical framework developed in Section II to the income justice and taxation powers.

A *Income Justice*

As the introduction explained, our analysis of the income justice powers takes place entirely within the domain of political constitutionalism. The income justice powers conferred by the *Australian Constitution*, we assert, establish expectations that the Parliament will use its legislative powers to secure income justice, and hence a requirement in constitutional public reason that it do so, although that requirement does not inform the legal meaning of the *Australian Constitution*.

In his closing address to the drafting Convention, Edmund Barton spoke in support of the draft constitution. He adduced 'evidence of the want of foundation of accusations against this Bill on account of its alleged illiberal character' and this included 'some very important … powers' such as 'the power to legislate with reference to invalid and old-age pensions' and 'the right to legislate for the appointment of courts of conciliation and arbitration in industrial disputes which extend beyond the limits of one state'.[78] Barton thus identifies these powers as part of what makes the *Australian Constitution* a 'liberal' one, by which he clearly intends that it aims at justice; and part of what ensures that a framework of laws and government established under the *Australian Constitution* will fall within the 'allowed bounds' is this capacity of the Parliament to legislate in pursuit of income justice. This understanding is reinforced by what seems to be these provisions' obvious logic in the constitutional scheme: s 92 provides for a national free trade area; s 51(xxxi) protects property rights, reinforcing the character of the society as a liberal market one; and the national legislature is conferred with the power to ensure that income justice within that national market economy can be secured.

Furthermore, Barton adduces these powers as fundamental features of the *Australian Constitution*, despite having voted against their inclusion,[79] and he went on to emphasise both in his policy as Australia's first Prime Minister.[80] This demonstrates an acceptance of their place in constitutional *public* reason, as part of the shared conception of justice to which the *Australian Constitution* contributes.

The place of these powers in the public conception of justice is something that has endured since Barton's time. This article does not canvass in detail the Australian political history that establishes this point, but points to two key pieces of evidence. First, wage-fixing by way of industrial arbitration was central to Australian economic policy from the celebrated *Harvester* judgment until

77. See (n 27) for possible responses to various sorts of failures of legitimacy.

78. *Official Report of the National Australasian Convention Debates*, Melbourne, 17 March 1898, 2468. Hirst discusses these powers' inclusion in the draft Constitution: Hirst (n 66) 165–67.

79. *Official Report of the National Australasian Convention Debates*, Melbourne, 21 January 1898, 29; 27 January 1898, 215 (industrial arbitration); 7 March 1898, 1996 (pensions); Adelaide, 17 April 1897, 793 (industrial arbitration).

80. Hirst (n 66) 285.

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what Kelly describes as the end of the 'Australian Settlement' in the 1980s,[81] which saw the emergence of new legal mechanisms for establishing minimum wages. Second is the 2007 election, in which the central issue was the industrial relations regime known as 'WorkChoices' and that regime's effect on those new mechanisms. Within the legal constitutionalist domain, the bulk of WorkChoices comfortably survived a constitutional challenge that turned on technical legal questions as to the legal meaning of key constitutional provisions (in particular s 51(xx) (the corporations power), including whether its legal meaning is affected by that of s 51(xxxv)).[82] But in the domain of political constitutionalism, the debates around WorkChoices showed the enduring importance, within public reason, of expectations about the Parliament's role in securing income justice, an expectation which has its foundation in the contribution of the income justice powers to constitutional public reason.

This also suggests a contrast with the political dynamics of constitutional directive principles. Weis and Khaitan associate directive principles with 'transformative' constitutionalism'.[83] Khaitan, in particular, contends that: 'a directive will also lack normative force in politics if its goal has largely been achieved … [D]irectives are politically useful only when they add extra weight to a political agenda by borrowing some of the constitution's legitimacy'.[84]

Whether or not Khaitan's statement is true of directives, it does not seem to be true of those elements of constitutional public reason that follow from conferrals of power such as the income justice powers. As Rawls says, it is the role of fundamental institutions to 'secure' and to 'maintain' justice.[85] In Australia, this is done primarily by legislating. Once legislation is enacted, if its repeal could be shown to be contrary to constitutional public reason, then that repeal would not fall within the allowed bounds, and the extant legislation would enjoy the support of public reason even were its function one of *maintaining* rather than *transforming*. This is one way in which legislation may take on constitutional significance: it can give effect to a constitutional requirement grounded in a conferral of power, such that its repeal (in the absence of a suitable replacement) would be illegitimate.[86]

Our final point in relation to the income justice powers concerns both the methodology and the conclusion of our argument. As the introduction stated, this article does not defend a particular conception of economic justice in general, nor income justice. We therefore do not attempt to specify where the 'allowed bounds' might lie in relation to income justice in Australia beyond what was said in the introduction: legislation will fall outside those bounds if it allows differences of income that undermine political equality or fair equality of opportunity. Furthermore, recall our introductory remarks about the importance of social processes to the realisation of constitutional requirements: when constitutional public reason operates in the domain of political constitutionalism, it is a task for actors in the political realm to articulate and deploy the content of constitutional public reason in defending and criticising legislation. What we have shown is that the *Australian Constitution* contains provisions that make a distinctive contribution to this, by keeping the demands of income justice at the forefront of debates in Australia about whether political decisions fall within the 'allowed bounds'.

81. *Ex parte HV McKay* (1907) 2 CAR 1; Paul Kelly, *The End of Certainty: The Story of the 1980s* (Allen & Unwin, 1992).
82. *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*WorkChoices Case*').
83. Weis, 'Constitutional Directive Principles' (n 50) 938; Khaitan (n 4) 628–9.
84. Khaitan (n 4) 628–29.
85. Rawls, *Liberalism* (n 9) 266, 284.
86. Cf Weis, 'Constitutional Directive Principles' (n 50) 925–6, 940–4; Lael K Weis, 'Legislative Constitutional Baselines' (2019) 41(4) *Sydney Law Review* 481 discusses other ways in which legislation may enjoy constitutional significance, locating that significance within the domain of legal constitutionalism.

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B *Taxation in the Domain of Political Constitutionalism*

The importance of taxation to securing economic justice has long been recognised. Tax provides the primary means of funding to secure income justice in the context of a liberal market economy and is an important method of breaking up concentrated holdings that undermine democracy.[87] However, the failure to translate this recognition into requirements (including constitutional requirements) for the design of the tax system is widely acknowledged.[88] Sugin notes that 'Rawls wrote a great deal about economic justice generally, but very little about taxation in particular, and what he did say is puzzling'.[89] Moreover, much of the 'speculative' doctrine in taxation derives from economics which, over the course of the past half-century, has been dominated by a mode of analysis that favours tax policies that are as neutral as possible to market-based actions and outcomes, on the presumption that markets are the best way to maximise individual and therefore collective welfare. Therefore, tax policy has moved away from a broad and progressive income tax, arguing that it is too distortive, and towards taxing consumption, such as through a value-added tax, on the assumption that this interferes less with market outcomes.[90] This has had profound distributional implications — it is no coincidence that wealth and income inequality has increased in Australia over the near three-decade-long period of economic growth up to 2018.[91]

As the introduction said, we consider the taxation power from the perspective of both political and legal constitutionalism. This illustrates how the *Australian Constitution* involves an interplay between political constitutionalism, in which constitutional public reason operates, and legal constitutionalism, which is a domain of technical legal reasoning largely insulated from public reason. From the political point of view, taxation serves three main functions: raising revenue; breaking up holdings of wealth; and influencing behaviour. The last of these functions may support or undermine economic justice, depending on the behaviour in question. The first two are essential in securing economic justice: revenue provides the means to fund social services spending, including direct income support, public health, and education. Breaking up concentrations of wealth reduces the distorting effect these have on political and civic equality. Our previous work has argued that, under contemporary conditions, the income tax is the most effective way to realise these two functions because, properly designed and implemented, it is the only mass revenue-raising tax (in contrast to a wealth tax) that is progressive in its impact before considering public spending (in contrast to the value-added tax).[92]

In Australia, taxation is a concurrent power of the Commonwealth and the States, but the Commonwealth dominates the raising of revenue. This largely results from a series of decisions

87. See, eg, Emerton and James (n 7); Pedersen (n 8); Rawls, '*Theory*' (n 8) 275–80; Murphy and Nagel (n 8); Schweiger and Sedmak (n 8); Cappelen and Tunggoden (n 8); Halliday (n 8).
88. See, eg, Murphy and Nagel (n 8) 3–4; Pedersen (n 8) 7; Halliday (n 8) 184–8; Alex Raskolnikov, 'Accepting the Limits of Tax Law and Economics' (2013) 98(3) *Cornell Law Review* 523, 562. Cf Geoffrey Brennan and James M Buchanan, *The Power to Tax: Analytical foundations of a Fiscal Constitution* (Cambridge University Press, 1980); Monica Bhandari (ed) *Philosophical Foundations of Tax Law* (Oxford University Press, 2015).
89. Linda Sugin, 'Theories of Distributive Justice and Limitations on Taxation: What Rawls Demands from Tax Systems' (2004) 72(5) *Fordham Law Review* 1991, 1994. See Linda Sugin, 'A Philosophical Objection to the Optimal Tax Model' (2011) 64 *Tax Law Review* 229, 273.
90. See, eg, Australia's Future Tax System Review Panel, *Australia's Future Tax System Part 1: Overview* (Final Report, 23 December 2009) 15–21, 32 ('*Henry Review*').
91. Productivity Commission, *Rising Inequality? A Stocktake of the Evidence* (Research Paper, August 2018) 1–3.
92. Emerton and James (n 7) 144–55.

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about the legal meaning of the *Australian Constitution* that have given the Commonwealth exclusive de facto power to levy income taxes[93] and expansively interpreted the Commonwealth's exclusive power to impose customs and excise duties so as to effectively exclude the States' levying a general sales tax.[94] This centralisation of revenue-raising power has led to the well-documented problems of vertical fiscal imbalance whereby, the Commonwealth dominates the raising of revenues while the states are responsible for much spending.[95] For our purposes it is sufficient to note that this state of affairs makes proper use of the Commonwealth's legislative power to impose taxation, and particularly income taxation, central to economic justice in contemporary Australia.

This does not, however, mean that the taxation power contributes to the content of constitutional public reason in the same way as the income justice powers do. As Section II explained, the content of public reason is a matter of political history and culture. As the previous sub-section explained, the significance of the income justice powers in this respect is established by the Convention debates and the prominence given to these powers by Barton, which has endured since then. We do not know of any evidence that the tax power has played, or does play, the same role. It is true that in both 1993 and 1998, the central issue in the national election was a proposal to introduce a broad-based consumption tax.[96] However, we think that this illustrates a different, though still significant, relationship of the tax power to constitutional public reason within the domain of political constitutionalism: a regime of tax legislation that is not adequate to ensuring legitimacy in respect of income justice, and perhaps economic justice more broadly, will itself be able to be refuted within public reason, precisely because of that inadequacy. Thus, the successful 1998 campaign for the GST was supported by other policy changes such as increases in certain welfare payments (which entailed public debate over the adequacy (or otherwise) of the increases in these payments, that is, whether they fell within the 'allowed bounds').[97] (The same point would apply to a fully confiscatory tax system, which would be refuted in constitutional public reason by reference to those features of the *Australian Constitution*, noted above, which clearly mandate a liberal market economy.)

This point about the instrumental significance of taxation within constitutional public reason extends beyond who pays what rates. Consider, for instance, legislation granting tax concessions. While some tax concessions might foster economic justice,[98] many do not. Estimates suggest that the top 10 tax concessions alone amount to roughly one-third of federal government revenue, with the gains accruing mostly to high income/wealth taxpayers.[99] Granting such concessions may thus undermine the capacity of taxation to perform its economic justice functions. That does not mean that such laws are constitutionally invalid. Legislation enacted by the Australian Parliament can be

93. *South Australia v Commonwealth* (1942) 65 CLR 373 ('*Uniform Tax Case (No 1)*'); *Victoria v Commonwealth* (1957) 99 CLR 575 ('*Uniform Tax Case (No 2)*').
94. *Australian Constitution* s 90. See, eg, *Ha v New South Wales* (1997) 189 CLR 465.
95. Will Bateman et al, *Hanks Constitutional Law: Commentary and Materials* (LexisNexis, 11th ed, 2021) 337 [6.5] ('*Hanks Constitutional Law*'); G Cooper et al, *Income Taxation Commentary and Materials* (Thomson Reuters, 9th ed, 2020) 32–3 [1.305].
96. Despite the political controversy, the GST had no difficulty surviving constitutional challenge. See, eg, *O'Meara v Commissioner of Taxation* (2003) 128 FCR 376; *Halliday v Commonwealth* (2000) 45 ATR 458; *McKinnon v Commonwealth* [2000] FCA 936, [10] (Hill J). See also Gordon Brysland, 'GST and Government in 2010' in Christine Peacock (ed), *GST in Australia: Looking Forward from the First Decade* (Lawbook, 2011) 3, 6–11.
97. Commonwealth of Australia, *Tax Reform: Not a new tax, a new tax system* (Australian Government Publishing Service, 1998).
98. See, eg, *R v Barger (*1908) 6 CLR 41 ('*Barger*'); *Roy Morgan Research Pty Ltd v Federal Commissioner of Taxation* (2011) 244 CLR 97 ('*Roy Morgan*').
99. Australian Treasury, *Tax Expenditures and Insights Statement* (February 2023) 5–7, ch 2.

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struck down, upon judicial review, if it does not fall under a head of legislative power,[100] or if it contravenes an express or implied, legal, constitutional limitation or prohibition.[101] As a general rule, however, judicial review does not consider whether a piece of legislation conduces to constitutional ends or imperatives, where those are given primarily in the domain of political constitutionalism.[102] Thus legislation may fall under a head of power and hence be valid in the domain of legal constitutionalism, as determined by the application of legal meanings in the context of adjudication, even if it contradicts requirements of constitutional public reason that are established in the domain of political constitutionalism. (Any illustration of this point is apt to be controversial, but we nominate the interpretation and application of the (post-1967) race power in *Kartinyeri v Commonwealth*.)[103]

Monitoring tax expenditures is, therefore, not an aspect of judicial review. It is primarily the Executive's responsibility to identify and measure these concessions (for example as part of the budget process),[99] and to appropriately administer them; and Parliament is obliged to ensure that such concessions are defensible within public reason, including constitutional public reason as it applies within the domain of political constitutionalism, and to repeal them if not.

C *Taxation in the Domain of Legal Constitutionalism*

In the domain of *legal* constitutionalism, the validity of a tax regime is hostage to two exercises of adjudication: the interpretation of the taxation power itself; and the interpretation and application of the statutes enacted pursuant to it. In this sub-section we show how the High Court interprets the taxation power by way of a legalistic approach, insulated from public reason, of the sort that we outlined at the end of sub-section II B. We further show that the resulting broad interpretation of the power contributes to the legitimacy of the Australian framework of laws and government, because it enables Australian tax laws to satisfy the demands of constitutional public reason within the domain of political constitutionalism. In Section IV we argue that attempting to break down this divide between Australia's legal and political constitutionalism would risk undermining that legitimacy. The interpretation of taxation statutes, and how this relates to public reason and potentially affects legitimacy, we leave as a matter for future research.[104]

Over the course of more than a century of jurisprudence, the High Court has adopted a relatively broad understanding of what constitutes a tax, for the purposes of s 51(ii) and related constitutional provisions (including ss 53, 55, 81, 88, 92 and 99). The limits these establish on Commonwealth taxing power, including (*i*) the primacy of the House of Representatives over the Senate in the enactment of tax laws and restrictions on the content of such laws,[105] and (*ii*) requirements of federal uniformity in relation to taxation,[106] do not bear upon our contention that the Constitution creates a framework for economic justice.

100. *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 258, 262–4 (Fullagar J) ('*Communist Party Case*').
101. See, eg, *R v Burgess; Ex parte Henry* (1936) 55 CLR 608 (Starke J).
102. Cf, as a possible exception, some legislation enacted in pursuit of the defence of Australia: *Communist Party Case* (n 100) 185 (Dixon J), 253–6 (Fullagar J).
103. (1998) 195 CLR 337.
104. See, eg, Rick Krever, 'The Ironic Australian Legacy of Eisner v. Macomber' (1990) 7(2) *Australian Tax Forum* 191.
105. *Australian Constitution* ss 53, 55; *Permanent Trustee Australia Ltd v Commissioner of State Revenue (Vic)* (2004) 220 CLR 388, 413–14 [57] ('*Permanent Trustee*').
106. *Australian Constitution* ss 51(ii), 99; *Elliott v Commonwealth* (1936) 54 CLR 657, 666–93; *Fortescue Metals Group Ltd v Commonwealth* (2013) 250 CLR 548, 601, 629; *Permanent Trustee* (n 105) at 423.

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The Court has not adopted a universal or exhaustive definition of taxation; its conception has evolved over time and in response to changing contexts.[107] The starting point is generally Latham CJ's statement in *Matthews v Chicory Marketing Board (Vic)*, that a tax is 'a compulsory exaction of money by a public authority for public purposes, enforceable by law, and … not a payment for services rendered'.[108] The High Court has used this statement to develop a number of positive and negative elements to guide the approach to identifying a tax.[109] (Consistent with the *Communist Party Case*, the legislative description of an impost as a tax is not determinative.[110])

Positive elements include 'a compulsory extraction of money' (but 'there is no reason in principle why a tax should not take a form other than the exaction of money'[111] and so might include something measurable in money's worth), 'by a public authority for public purposes' (although neither is an essential requirement),[112] 'enforceable by law' (requiring that the impost not be arbitrary[113] and be open to judicial challenge).[114] *Public purpose* has been interpreted broadly,[115] and is more readily satisfied if the impost, firstly, raises revenue and, secondly, if that revenue is directed into consolidated revenue. As Windeyer J observed in *Fairfax*, '[t]axes are ordinarily levied to replenish the Treasury, that is to provide the Crown with revenue to meet the expenses of government. That is the primary purpose of the income tax.'[116] However, the mere fact that an impost is paid into consolidated revenue is not determinative of its status as a tax.[117] The High Court has additionally recognised that an impost can be a tax even if it lacks the intention to raise revenue or raises negligible revenue.[118] The Court has also recognised the redistributive possibility of taxation by acknowledging that '[i]mposing a financial burden on one group in society for the benefit of another group in society will often constitute a tax'.[119]

107. *Air Caledonie International v Commonwealth* (1988) 165 CLR 462, 467 ('*Air Caledonie*'); Peter Gerangelos et al, *Winterton's Australian Federal Constitutional Law Commentary & Materials* (Thomson Lawbook, 4th ed, 2017) 560 [7.20] ('*Winterton's Constitutional Law*').
108. (1938) 60 CLR 263, 276, citing *Lower Mainland Dairy Products Sales Adjustment Committee v Crystal Dairy Ltd* (1933) AC 168, 175.
109. *Air Caledonie* (n 108) 466–7; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555, 587 (Dawson J) ('*Northern Suburbs General Cemetery Reserve Trust*'); *Luton v Lessels* (2002) 210 CLR 333, 341 [10] ('*Luton v Lessels*'); *Australian Tape Manufacturers Association Ltd v Commonwealth* (1993) 176 CLR 480, 500 ('*Australian Tape Manufacturers*'); *Winterton's Constitutional Law* (n 108) 560 [7.20].
110. *Air Caledonie* (n 108) 467; *Barger* (n 98) 118; *Fairfax v Commissioner of Taxation* (Cth) (1965) 114 CLR 1, 7 ('*Fairfax*').
111. *Air Caledonie* (n 108) 467.
112. Ibid 467. See *Australian Tape Manufacturers* (n 110) 501 (Mason CJ, Brennan, Deane, Gaudron JJ). Cf *Australian Tape Manufacturers* (n 106) 521–2 (Dawson and Toohey JJ), 529 (McHugh J); *Roy Morgan* (n 98) 110.
113. *Commissioner of Taxation v Truhold Benefit Pty Ltd* (1985) 158 CLR 678, 684–8 ('*Truhold*').
114. *MacCormick v Federal Commissioner of Taxation* (1984) 158 CLR 622, 639–41 ('*MacCormick*').
115. *Australian Tape Manufacturers* (n 110) 504–5.
116. *Fairfax* (n 111) 19.
117. *Luton v Lessels* (n 110) 343–4 [13] (Gleeson CJ), 361 [80] (McHugh J); *Roy Morgan* (n 98) 110, 113.
118. *Airservices Australia v Canadian Airlines International Ltd* (2000) 202 CLR 133, 178 [91] (Gleeson CJ and Kirby J) ('*Airservices Australia*'). See also *Fairfax* (n 111) 12 (Kitto J); *Roy Morgan* (n 98) 104; *Luton v Lessels* (n 110) 372 [120] (Kirby J).
119. *Luton v Lessels* (n 110) 354 [60] (Gaudron and Hayne JJ). See also *Luton v Lessels* (n 110) 343–4 [13] (Gleeson CJ); *Australian Tape Manufacturers* (n 110) 508.

Negative elements which might determine that a compulsory extraction of money is not a tax include being 'fees for services' or 'payment for services rendered', quid pro quo arrangements for which the recipient, or some other identifiable person receives some benefit in proportion to the fee.[120] Further excluded by virtue of section 53 of the *Australian Constitution* are 'the imposition of fines or other pecuniary penalties' (which generally entail a liability that flows from a 'failure to discharge antecedent obligations'),[121] as well as laws 'for the demand or payment…of fees for licences'.[122] The list of exceptions is open and further includes royalties, fees for a privilege, and fees for the acquisition or use of property.[123] We consider a further possible exclusion below.

Consistent with its generally permissive approach to characterisation,[124] the High Court has adopted a broad approach to determining whether a law can be described as one 'with respect to' taxation.[125] Provided that the subject matter of an Act is properly described as taxation, it is not fatal to the validity of the Act if, in substance, the Act is designed to achieve another (economic or social) end other than the raising of revenue for public purposes.[126] In *Fairfax*, Kitto J stated that it is 'beyond serious question that a tax does not cease to be valid merely because it regulates, discourages, or even definitely deters the activities taxed.'[127] This reinforces the conclusion that an impost can be a tax even if raising revenue is a secondary consideration, or the revenue raised is negligible.[128]

The combination of a broad interpretation of 'taxation' and a permissive approach to characterisation permits Commonwealth taxes to perform all three functions identified above, not merely the raising of revenue. The function of influencing behaviour is enabled by the recognition of the validity of tax expenditures (tax concessions or exemptions designed for purposes other than revenue-raising),[129] including: the use of tax concessions and exemptions to incentivise investment in Commonwealth government securities;[130] to encourage conformity with industrial relations obligations including those supporting income justice (through incentivising employers to meet minimum training requirements,[131] employee pension/superannuation requirements,[132] or (possibly) minimum wage requirements).[133] The Court has also enabled the function of breaking up holdings, by confirming the validity of additional or progressive tax burdens to achieve an end

120. *Air Caledonie* (n 108) 469–70. See also *Harper v Victoria* (1966) 114 CLR 361, 378 (Taylor J), 379 (Menzies J), 382 (Owen J); *Logan Downs Pty Ltd v Queensland* (1977) 137 CLR 59, 63 (Gibbs J). For more complex examples, see *Airservices Australia* (n 119) 274–8 [420]–[433], 287–8 [463] (Gummow J); 234–5 [297]–[299], 238–9 [309], 240 [314]) (McHugh J); 192 [141] (Gaudron J); *Luton v Lessels* (n 110) 340 (Gleeson CJ), 344 [13]–[14], 372 (Kirby J).
121. *Northern Suburbs General Cemetery Reserve Trust* (n 110) 587 (Dawson J).
122. *Australian Constitution* s 53.
123. *Air Caledonie* (n 108) 467; *Winterton's Constitutional Law* (n 108) 560 [7.20].
124. See, eg, *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 79 (Dixon J); *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1, 11, 19–20; *WorkChoices Case* (n 82) 127 [219], 128 [223]. See also James Stellios, 'Constitutional Characterisation: Embedding Value Judgements about the Relationship between the Legislature and the Judiciary' (2021) 45(1) *Melbourne University Law Review* 277.
125. See *Northern Suburbs General Cemetery Reserve Trust* (n 110) 569 (Mason CJ, Deane, Toohey and Gaudron JJ).
126. *Barger* (n 98) 99 (Isaacs J); *Fairfax* (n 111) 12–13 (Kitto J); *Northern Suburbs General Cemetery Reserve Trust* (n 110) 570, 572; Cf *Barger* (n 98) 63–81 (Griffith CJ, Barton, O'Connor JJ).
127. *Fairfax* (n 111) 12 (Kitto J).
128. Ibid.
129. Ibid 11, 12, 18–19; *Northern Suburbs General Cemetery Reserve Trust* (n 110) 589–90 (Dawson J).
130. *Fairfax* (n 111) 13 (Kitto J).
131. *Northern Suburbs General Cemetery Reserve Trust* (n 110).
132. *Roy Morgan* (n 98).
133. *Fairfax* (n 111) 11–12. *Cf Barger* (n 98).

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beyond revenue-raising. In *Osborne v Commonwealth* ('*Osborne*') the Court upheld the validity of a progressive land tax that included higher rates on absentee landlords, imposed to break up land holdings and force non-residents to sell.[134] We can imagine a tax similar to that in *Osborne* where all three functions are complementary: a steeply progressive land tax on unused land above a certain value to encourage owners to sell, thus engaging the third function while supporting the second if the targeted landholders do in fact sell, and fostering the first (of raising revenue, assuming broad compliance) in the event they do not.

This review of the tax power within the domain of legal constitutionalism has shown that the High Court adjudicates the power without any express regard to the requirements of economic justice that arise in constitutional public reason. The Court applies technical legal methods, and to the extent that these methods cloak more substantive considerations, those pertain primarily to the proper scope and concern of judicial review, rather than the elements of public reason that are the focus of this article.[135] This insulation of the legal constitutional domain from considerations of public reason has not prevented that domain serving the ends of constitutional public reason, however; it has in fact facilitated it. In Section IV we argue against suggested changes to the Court's interpretive approach, which would reduce that insulation, because they risk undermining the contribution made to legitimacy by the operation of the tax power within the domain of legal constitutionalism.

IV Retrospective Tax Laws

We begin our discussion of the place of retrospective tax law in the Australian constitutional order with a general consideration of the relationship, within that order, between taxation and private property. We then turn to the issue of retrospectivity itself to show how the question of retrospective taxation turns upon the relationship between political and legal constitutionalism, and their distinct but related roles in securing economic justice.

A *Taxation and s 51(xxxi)*

In political theoretical discussions about taxation, and also in political debates about it, the relationship between taxation and private property is a recurrent theme.[136] This might seem to be a difficult problem in Australian constitutional law, because s 51(xxxi) of the *Constitution* establishes a general requirement that any acquisition of property by way of Commonwealth statute must be on just terms. This has been described as a 'guarantee' that 'is there to protect private property'.[137] However, the High Court's interpretation of s 51(xxxi) — which occurs within the domain of legal constitutionalism — recognises certain exceptions, of which taxation is one. The High Court has held that 'what is validly within s 51(ii) is outside s 51(xxxi), for the two powers are mutually exclusive'.[138] As Mason CJ explained:

134. (1911) 12 CLR 321.
135. Stellios (n 125) pt III.
136. See, eg, Patrick Emerton, 'Tax Justice in Australia: Some Critical Considerations' (2022) 51(2) *Australian Tax Review* 144, 148–50; Murphy and Nagel (n 8).
137. *Smith v ANL Ltd* (2000) 204 CLR 493 at 501 [9] (Gleeson CJ).
138. *Mutual Pools & Staff Pty Ltd v The Commonwealth* (1994) 179 CLR 155, 224 (McHugh J); see also 170–1 (Mason CJ), 184–190 (Deane and Gaudron JJ) ('*Mutual Pools*').

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> because the purpose served by an exercise of the taxation power conferred by s 51(ii) is compulsorily to acquire money for public purposes, a law that relates to the imposition of taxation will rarely, if ever, amount at the same time to a law with respect to the acquisition of property within the meaning of s 51(xxxi). Of its nature 'taxation' presupposes the absence of the kind of quid pro quo involved in the 'just terms' prescribed by s 51(xxxi).[139]

This sort of approach to the relation between the taxation power and the protection of private property by s 51 (xxxi) has been criticised, because it 'proceeds by examining whether a law has the formal characteristics that qualify for exemption, rather than *the reasons* for exemption', thereby giving rise to a risk that constitutional protection will be 'categorically denied in cases that, at the very least, appear to require further analysis to ensure that the confiscation of property is not arbitrary'.[140] However, we do not accept this criticism. The High Court's technical, legalistic approach to the interaction of s 51(xxxi) with the tax power supports the use of the latter power for the three functions identified above.

B *Retrospectivity and s 51(xxxi)*

A further feature of the Commonwealth taxation power, as interpreted by the High Court, is that it includes power to enact tax laws with retrospective effect, provided these are not arbitrary or capricious.[141] In this sub-section, we defend this feature of the Court's jurisprudence against suggestions that some retrospective taxation may amount to an unjust acquisition of private property that raises s 51 (xxxi) concerns.

Retrospectivity can be important for achieving both the first and second purposes of taxation — raising revenue and securing justice in holdings — often by addressing tax evasion or aggressive tax minimisation. (If retrospective legislation deters future avoidance or minimisation, it may also serve the third function of influencing behaviour.) Because of the importance of the first two functions to economic justice, it follows that retrospective tax legislation can be a necessary component of a constitutionally legitimate framework of laws and government.

There are systemic reasons why taxation may need to operate retrospectively to achieve outcomes within the 'allowed bounds'. As we have seen, in constitutional adjudication the High Court uses formal legal reasoning. The same is true of private law adjudication, which develops the judge-made private law. And in Australia's liberal market economy, itself a constitutional imperative, the holdings and transactions that are the subject matter upon which taxation operates are defined, at least in part, by this private law. Thus, there is always the prospect of ingenious use of private law concepts and devices to circumvent extant taxation laws, no matter how well drafted these might be. (As noted above, this article sets aside the question of the degree to which the High Court's approach to the interpretation and application of tax laws tends to facilitate such ingenuity — something others have argued forcefully elsewhere).[142] This (relative) autonomy of legal reasoning, in a

139. *Mutual Pools* (n 139) 170–1 (Mason CJ) citing *Federal Commissioner of Taxation v Clyne* (1958) 100 CLR 246; *Trade Practices Commission v Tooth & Co Ltd* (1979) 142 CLR 397; *Australian Tape Manufacturers* (n 110).

140. Lael K Weis, '"On Just Terms", Revisited' (2017) 45(2) *Federal Law Review* 223, 244 (emphasis in original).

141. *Mutual Pools* (n 139) 167–168 (Mason CJ); 210, 217–218 (McHugh J); *MacCormick* (n 115); *Truhold* (n 114); see also *Chevron Australia Holdings Pty Ltd v FCT* (2017) 251 FCR 40, 82 [141] ('*Chevron*'); *Giris v Commissioner of Taxation* (1969) 119 CLR 365.

142. Yuri Grbich, 'The Duke of Westminster's Graven Idol: On Extending Property Authorities into Tax and Back Again' (1978) 9(2) *Federal Law Review* 185; Richard Krever, 'Avoidance, Evasion and Reform: Who Dismantled and Who's Rebuilding the Australian Income Tax System?' (1987) 10(2) *University of New South Wales Law Journal* 215.

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legalistic constitutional order, from the demands of public reason that operate in the domain of political constitutionalism, means that there is always the prospect of a need for retrospective taxation legislation.

Justice Gordon, however, writing extra-crucially, puts forward a case where a law that relates to the imposition of taxation may also enliven s 51(xxxi), and hence be invalid for violation of the constitutional guarantee, arguing that 'the retrospective alteration of taxation liabilities may (I do not say must) reach a point where some question of the acquisition of property arises..[143] She has in mind 'laws that, on enactment, apply retrospectively and, on one view, apply differently to different taxpayers' which might therefore give rise to '[a]dditional questions' such as those 'that may arise from what can be seen to be the potential destruction, or degradation of longstanding rights'.[144] Her focus is on a retrospective law that:[145]

> is better seen as a law directed at particular individuals (the class of which is closed), identified according to defined criteria that, if satisfied, lead to the liability of those persons to make certain payments, in respect of periods or transactions or events that, by the time the law is made, have passed and are complete … [and] which were entered into consistent with the legislation that was in force at the time of the relevant transactions or events.

She suggests, without definitively concluding, that such a law may be an acquisition by the Commonwealth of property in the form of established rights.[146]

Her Honour similarly argues that such retrospective tax laws might fail for arbitrariness, being 'laws that treat particular taxpayers in a different way depending on the way in which they legitimately ordered their affairs in the past' that is, '*solely* because of the change in the applicable criteria as a result of the retrospective legislation'.[147] However, this seems not to add to the argument with respect to s 51(xxxi): if a law failed to be with respect to taxation because arbitrary in character, then presumably it would cease to fall outside of the s 51(xxxi) guarantee, which has the prevention of arbitrariness as a key function.[148] Finally, Her Honour suggests that such laws might fail for want of due process (an idea developed by reference to US Fifth Amendment jurisprudence) but it is not clear how this would operate in Australia independently of the 'just terms' requirement of s 51(xxxi).[149])

In *Chevron Australia Holdings Pty Ltd v FCT* ('*Chevron*'), the full Federal Court considered Justice Gordon's argument in the context of legislation retrospectively validating the extant use by the Commission of extrinsic materials (the relevant OECD model convention) in applying the legislative framework so as to value intra-company transactions in the course of determining the tax liability of the corporate group.[150] The taxpayer 'accepted that the Commonwealth parliament has power to enact tax legislation with some retrospective effect',[151] but contended that the retrospective law in question 'imposed an arbitrary and

143. Justice Michelle Gordon, 'The Commonwealth's Taxing Power and its Limits — Are we there yet?' (2013) 36(3) *Melbourne University Law Review* 1037, 1053.
144. Ibid 1053.
145. Ibid 1053–4.
146. Ibid 1054–6.
147. Ibid 1062–3 (emphasis in original).
148. *Attorney-General (NT) v Emmerson* (2014) 253 CLR 393, 446 [109], 448 [116] (Gageler J).
149. Gordon (n 144) 1058–9.
150. *Chevron* (n 142) 81 [139].
151. Ibid 81 [140].

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incontestable tax' because it was not 'ascertainable and sufficiently general in nature' and because a taxpayer could not '[know] the criteria for liability in the tax year in question'.[152] Pagone J (with whom Allsop CJ and Perram J agreed) rejected this argument, stating 'that a person may not be aware at an earlier point in time what the (sic) criteria of liability may subsequently be made to apply to that earlier point in time does not make the legislation arbitrary or incontestable'.[153]

We agree with this conclusion. But *Chevron* does not address the s 51(xxxi) argument. This argument pits two constitutional requirements against one another: the demands of economic justice (which arise in political constitutionalism) and the constitutional guarantee of private property (which operates in both political and legal constitutionalism in the distinct ways described earlier). We now explain why *Chevron* was correct not to countenance this argument.

We accept the *possibility* that a retrospective tax liability that is so targeted in its operation that, in effect, it reallocates particular privately-owned assets *may* generate a legal *question*. Perhaps the strongest example would be a near confiscatory land tax levied at a particular address or on a particular individual. However, if a retrospective tax is expressed as a general norm then its validity should be affirmed in the orthodox manner (ie that there is no right or entitlement to be shielded from retrospective taxation, and hence no s51(xxxi) question), even if it alters the tax liability and thus unsettles expectations based on a previous legal state of affairs, of only a small, known group of taxpayers. (This is consistent with the Rawlsian method of this article: Rawlsian justice is not concerned with concrete allocations to known individuals but with the ongoing operation of an institutional scheme.[154])

The political need for retrospectivity may often be generated by the actions of a few who have the resources and inclination to engage in complex arbitrage involving tens or hundreds of millions of dollars (as *Chevron* demonstrates). In such circumstances, the general norm (eg, the levying of a broad-based and progressive income tax), consistently with its intended operation, fosters economic justice via the first and second functions of taxation. There is thus no warrant, from the perspective of political constitutionalism responsive to the demands of constitutional public reason, to expand the operation of s 51(xxxi) so as to strike down such a law. And ex hypothesi there is no such warrant within the technical reasoning of the domain of legal constitutionalism. Expanding the operation of s 51(xxxi) to strike down such a law would represent a *departure* from the legalistic approach the High Court has adopted to the relationship between the tax power and s 51(xxxi). Considerations of constitutional public reason, arising from the presence of s 51(xxxi) in the *Constitution*, would be allowed to affect legal meaning, resulting in a purposive or functional approach to the application of the guarantee.[155] This would have a distorting effect upon Australian constitutional law: private property interests would gain the additional protection of substantive, public reason-based consideration in adjudication; but there would be no corresponding change to the legal meaning of the powers that permit economic justice to be pursued, given that their existing legal meaning already

152. Ibid 81 [140].
153. Ibid 84 [144].
154. Rawls, *Theory* (n 8) 64, 88, 96–99.
155. As advocated, for instance, by Weis, '"On Just Terms," Revisited' (n 141), see especially 246–8; Rosalind Dixon, 'The Functional Constitution: Re-reading the 2104 High Court constitutional term' (2015) 43(3) *Federal Law Review* 455, 477–80.

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permits them to operate in an expansive fashion.[156] This change, therefore, would simply undermine the support that the existing legalistic approach to legal meaning provides to the demands that constitutional public reason imposes within the domain of political constitutionalism. This is why we support the Court's current approach to the relationship between the taxation power, s 51 (xxxi), and the retrospective imposition of tax liabilities.

V Conclusion

This article has shown how the income justice and taxation powers in the *Australian Constitution* establish a framework for securing economic justice. This framework is not self-actualising — no constitutional framework can be. Rather, it is a framework which places these demands of economic justice, including in particular income justice, at the centre of constitutional public reason.

The framework operates through an interplay of political and legal constitutionalism. Within the domain of political constitutionalism, constitutional public reason establishes the 'allowed bounds' within which political decision-making, including legislation, must take place if it is to be legitimate. We have shown how conferrals of legislative power can generate requirements within constitutional public reason, without those requirements being part of the legal meaning of the power. This is a way of making economic justice central to a constitutional regime that is an alternative to directive principles. It is also an alternative to Rawls' assumption that matters of economic justice are to be purely legislative rather than constitutional concerns; it strengthens the commitment to economic justice within public reason, by making it an element of the constitutional order.

Within the domain of legal constitutionalism, a formal, legalist approach to the legal meaning of the taxation power supports the satisfaction of the demands of public reason that arise in the domain of political constitutionalism. We have shown how alternative approaches to the relevance of s 51(xxxi) and to the constitutional validity of retrospective tax laws threaten that support, and hence should be rejected.

Finally, our account of the *Constitution* as a framework for securing economic justice lays a foundation for enquiry into other possible components of that framework, such as sections 51(xiii), 51(xx) and 51(xxiiiA) — the banking, corporations and social services powers, respectively. Analysing these powers would likely lead to further understanding of the 'allowed bounds' within which public reason, as it operates in the domain of political constitutionalism, confines legitimate laws and government in Australia.

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156. Stellios (n 125).

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