

Australian State Courts and Chapter III of the Commonwealth Constitution – Interpretation and Re-Interpretation and the Creation of Australian Constitutional “Orthodoxy”

SARAH MURRAY

Introduction

In his classic novel, *Nineteen Eighty-Four*, George Orwell wrote that “[o]rthodoxy means not thinking--not needing to think. Orthodoxy is unconsciousness”¹. Applied to constitutional interpretation or constitutional reasoning this seems almost paradoxical as constitutional exegesis is typically associated with logical, articulate, black-letter thinking. However, it is clear that as constitutional principles or approaches become generally well-accepted, or orthodox, they can become so habitual and sometimes unthinkingly applied as to shift into a state of constitutional unconsciousness. This, of course, does not mean that concepts cannot be contested, but that assailing them requires a degree of iconoclasm.

This paper will explore the process by which constitutional readings relating to State courts within the Australian federation have been interpreted and re-interpreted. Part 1 will reflect on the historical

framing of the role of the “Courts of a State” in the *Commonwealth Constitution* (the *Constitution*) by Australia’s constitutional founders in the 1890s and in early interpretations by the High Court of Australia. Part 2 explores the seismic decision of *Kable*, the implications of its radical interpretation of Chapter III and the track-record of subsequent challenges to the decision. Part 3 reflects on the High Court’s imbuing of new meaning into key state constitutional phrases in Chapter III and how these have risen into the Australian constitutional consciousness.

Part 1

1.1. History and Constitutional Framing of State Courts

In the drafting of the first three chapters (Chs I, II and III) of Australia’s *Commonwealth Constitution* in the 1890s, the in-

dependence and separation of the federal judiciary from the legislative and executive governmental arms was almost received wisdom². The High Court was conceived by the framers as the “bedrock” of this independent federal judicial structure³.

Australian State courts, unlike in the United States⁴, were to be vested with federal jurisdiction by the *Commonwealth Constitution* for “economical” reasons⁵. Sections 71 and 77(iii) contemplate this vesting in State courts with the latter providing that the Commonwealth Parliament can make laws “investing any court of a State with federal jurisdiction”. This unique attribute of Australia’s judicial system has come to be known as the “autochthonous expedient”⁶.

Whilst the autochthonous expedient gives State courts a role to play within the integrated national court structure, the “court[s] of a State” were regarded as self-governing institutions within what was traditionally the colonies’ domain. State legislatures and State constitutions were therefore able to independently regulate the operation of the State courts and the appointment of State judges. Consistently with this, Sir William Downer referred at the 1898 Melbourne Constitutional Convention to the fact that the “the Federation has no control over the state courts, and no right to dictate to the state courts”⁷.

1.2. *Attempts to Re-Frame the Interpretation of State Courts*

For nearly 100 years the High Court of Australia did not impose significant federal limits on State legislation regulating courts within the State court hierarchy and con-

tinued to recognise the constitutional independence of the “court[s] of a State”⁸. In *Le Mesurier v Connor* Knox CJ, Rich and Dixon JJ explained that⁹:

The Parliament may create Federal Courts, and over them and their organization it has ample power. But the Courts of a State are the judicial organs of another Government. They are created by State law; their existence depends upon State law.

Although s 77(iii) allowed federal jurisdiction to be vested in such courts, this did not mean that the Commonwealth Parliament was able to “affect or alter the constitution of the Court itself”¹⁰. Even 50 years later Mason J confirmed in the *Hospital Contribution Fund* case that State parliaments have the “legislative competence to alter the structure and organization of State Courts”¹¹. His Honour continued that¹²:

Chapter III of the Constitution contains no provision which restricts the legislative competence of the States in this respect. Nor does it make any discernible attempt to regulate the composition, structure or organization of the Supreme Courts as appropriate vehicles for the exercise of invested federal jurisdiction.

At the State level this position was affirmed. In *S (A Child)*, the Supreme Court of Western Australia rejected an argument that any implied federal constitutional limit, or s 106 in the *Commonwealth Constitution*, could invalidate a State law which empowered the Supreme Court of Western Australia to keep a juvenile in prison after the conclusion of the juvenile’s term of imprisonment¹³. This meant that coupled with the consistent recognition of the absence of a separation of power in State constitutions¹⁴, State parliaments were granted considerable legislative freedom in relation to the operations of their courts.

Part 2

2.1. *The Earthquake of Kable*

The well-established constitutional position of State courts was shattered by the High Court in *Kable*¹⁵. This iconoclastic decision departed from what had, for nearly a century, been accepted constitutional doctrine, namely that the *Constitution* did not impede legislation regulating State courts. It did not find that Australian State courts are subject to a formal separation of powers, like Australian federal courts. However, the decision was a significant foil to the relative sovereignty of parliaments of the State.

Kable concluded that, even without a separation of powers doctrine, the New South Wales Parliament could not empower the State's Supreme Court to order the ongoing preventative detention of Gregory Wayne Kable, on an ad hominem basis, after the conclusion of his sentence. A majority of the High Court concluded that such State legislation was incompatible with the *Constitution* as it undermined the integrated Australian court system and the ability of the New South Wales Supreme Court to continue to be vested with Commonwealth judicial power under s 77(iii) of the *Constitution*¹⁶. The order thwarted this ability by compromising "public confidence in the impartial administration of the judicial functions of the Supreme Court" through making the court appear as no more than an instrument of government policy¹⁷. As McHugh J explained¹⁸:

State courts have a status and a role that extends beyond their status and role as part of the State judicial systems. They are part of an integrated system of State and federal courts and organs for the exercise of federal judicial power as well as

State judicial power... It is axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the *Constitution*... Because the State courts are an integral and equal part of the judicial system set up by Ch III, it also follows that no State or federal parliament can legislate in a way that might undermine the role of those courts as repositories of federal judicial power.

For Brennan CJ and Dawson J in dissent, the majority's approach represented a too radical interpretation of Chapter III of the *Constitution*. Brennan CJ contended that there was no "textual or structural foundation for the submission" of the plaintiff and that it is well-established that the Commonwealth Parliament must take State courts as it finds them¹⁹. His Honour further indicated that should such limitations apply to State courts then it would "surely have provoked debate" amongst the framers in the 1890s²⁰. Dawson J agreed. He concluded that Chapter III did not require State courts to take on the attributes of federal courts²¹, when the *Constitution* conceived them as "existing institutions"²².

The fretfulness caused by the decision cannot be underplayed. The late Professor George Winterton referred to it as having "enormous implications" which the States were powerless to stop²³. Its significance stemmed from what Dawson J described as rendering "a quasi-separation of powers" for the Australian States, in spite of the fact that the High Court had consistently shied away from this finding in the past. For Winterton, the majority's position was unpersuasive²⁴. He concluded that the *Commonwealth Constitution* does not force the Commonwealth Parliament to vest jurisdiction in a State court which is not fit to act as a repository, that the Supreme Court

of New South Wales had, in fact, been sufficiently independent to refuse to renew *Kable*'s detention order²⁵ and that it was more appropriate that the courts undertake the functions contemplated by the *Community Protection Act 1994* (NSW) than such roles being administered by the executive alone²⁶. The criticism of the decision was not reserved to the academy and it has been noted that sitting and future members of the High Court also received it unwelcomely²⁷.

Remarkably, and contrary to predictions, the aftershocks of *Kable* were hardly felt at all. Consistently, the High Court refused to re-apply the decision's reasoning. The facts in *Kable* were repeatedly cited as "exceptional"²⁸ and "unlikely to be repeated"²⁹ such that cases such as *Fardon v Attorney-General for the State of Queensland*³⁰, *Forge v Australian Securities and Investment Commission*³¹, *Gypsy Jokers Motorcycle Club Incorporated v Commissioner of Police*³² and *K-Generation Pty Ltd v Liquor Licensing Court*³³ saw appeals on *Kable* grounds fail. In *Fardon*, McHugh J explained³⁴:

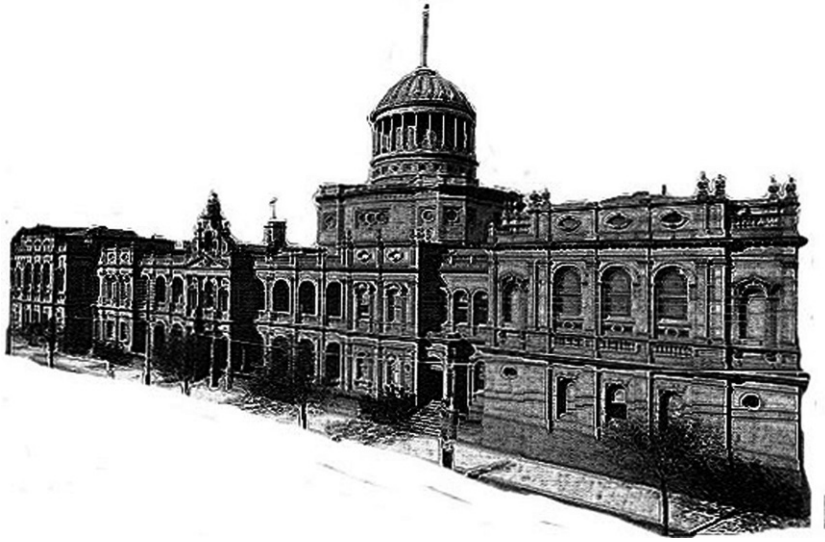
Kable is a decision of very limited application. That is not surprising. One would not expect the States to legislate, whether by accident or design, in a manner that would compromise the institutional integrity of their courts.

The constitutional reality of this was captured by Kirby J's reference to *Kable* as "the constitutional guard-dog that would bark but once"³⁵. Ever since, this canine allusion has become the almost trite way of referring to the decision³⁶. With some rare exceptions³⁷, courts within the State court hierarchy were also very reticent to hear the dog bark again³⁸.

Subsequent attempts to apply *Kable* prior to 2009, although ultimately unsuccessful

did result in considerable refinement of the newfound doctrine. First, the High Court clarified that the principle in *Kable* did not mean that State courts are required to operate in accordance with federal court stringencies. Rather, the *Constitution* imposes on State courts some limits while allowing greater flexibility than are possible within the federal court hierarchy. The upshot of this greater legislative freedom at the State level is that if a function would be considered constitutional at the federal level its constitutional acceptability at the State level is likely to be assured³⁹.

Second, the High Court has come to denounce the assumption, drawn from the majority judgments in *Kable*, that the constitutional test to be applied is the impact of a law on public confidence⁴⁰. In its place, the High Court emphasised that the impact of state legislation on "institutional integrity" is the appropriate gauge⁴¹. For example, in *Fardon*, Gummow J referred to "repugnancy to or incompatibility with that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system"⁴². In the same case Gleeson CJ referred to the State legislation as invalid if it bestows on a State court "a function which substantially impairs its institutional integrity" so as to be "incompatible with its role as a repository of federal jurisdiction"⁴³. "Institutional integrity", a phrase initially used by the United States Supreme Court⁴⁴, has therefore become the key State constitutional criterion, with the focus being on whether a State law substantially impairs a State court's institutional integrity so as to compromise the investiture of federal judicial power in that body. This criterion ultimately operates to qualify the



A drawing of the building of the Supreme Court of Victoria. The Court was established by an Act of the Victorian Parliament in 1852. (Source: Supreme Court of Victoria)

general principle that the Commonwealth Parliament, in investing its jurisdiction, must take a State court "as it finds it"⁴⁵.

The concept of "institutional integrity" has not, however, been uniformly or definitively described. Nevertheless, the courts have tended to relate it to the fundamental attributes of a court and particularly to the retention of a State court's "institutional independence" and "integrity"⁴⁶. For example, in *Forge*, Gummow, Hayne and Crennan JJ explained, in relation to "institutional integrity", that⁴⁷:

the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining char-

acteristics which mark a court apart from other decision-making bodies.

It is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court. The cases concerning identification of judicial power reveal why that is so. An important element, however, in the institutional characteristics of courts in Australia is their capacity to administer the common law system of adversarial trial. Essential to that system is the conduct of trial by an independent and impartial tribunal.

Third, after *Kable*, there was some doubt about whether a State court had to be in the process of exercising federal jurisdiction for the doctrine to apply⁴⁸. It now seems clear that it applies if the court is capable of exercising federal jurisdiction even if it is not actually being exercised by the court at that particular point in time⁴⁹.

Fourth, *K-Generation* has clarified that a body does not cease to be a "court of a State"

if its institutional integrity is called into question⁵⁰. In that case, Queensland and Western Australia quite shrewdly submitted that, while not applicable to a Supreme Court, if the Licensing Court was constitutionally tainted by the functions conferred upon it by the *Liquor Licensing Act 1997* (SA), it would simply cease to be a "court of a State" capable of being a repository of federal jurisdiction under s 77(iii) of the *Constitution*. This submission was rejected on the basis that it would subvert s 77(iii) and render the "*Kable* principle impotent"⁵¹. The outcome of this approach was that "the States may not establish a 'court of a State' within the constitutional description and deprive it, whether when established or subsequently, of those minimum characteristics of [...] institutional independence and impartiality"⁵². Consequently, a court vested with incompatible functions "retains its character as a 'court of a State'" capable of being vested with federal jurisdiction but the legislation vesting those incompatible functions is invalidated.

In spite of its rarity of application, the *Kable* principle continued to exist in constitutional consciousness. The High Court refrained from overruling it and was not requested to do so⁵³. Meagher commented that, whatever reservations one might formulate there was little "sense" in calling for a "a reconsideration of the correctness of the *Kable* principle" as it has become "a settled feature of Australian constitutional law" and even failed attempts to re-activate the decision still sanctioned it⁵⁴. Appeals to the Court continued, albeit courageously, to present arguments calling for State legislation to be struck down in *Kable* grounds. It was not, however, until French CJ's appointment to the position of Chief Justice

that the doctrine was again resuscitated to invalidate functions conferred by State legislation on a State court.

2.2. *Kable* – *Alive and Kicking*?

In 2008, French CJ became the Chief Justice of the High Court, following Gleeson CJ's retirement. In the next year, *International Finance Trust*⁵⁵ heralded, for the first time, an increased willingness by the High Court to apply *Kable*, this time in the context of New South Wales assets forfeiture legislation which applied to those suspected of serious criminal activity. The legislation was struck down by a majority of the Court as "repugnant to the judicial process in a fundamental degree"⁵⁶ because it could require the Supreme Court to hear an application *ex parte*. Soon after, the principle was again resuscitated in *Totani*⁵⁷. By 6:1, the High Court found s 14 of the *Serious and Organised Crime (Control) Act 2008* (SA) was substantially incompatible with the South Australian Magistrate Court's institutional integrity and placement within the integrated court structure. It was in this case that French CJ also clearly began to map out his "list" of the "defining characteristics" of State courts including "independence, impartiality, fairness and adherence to the open-court principle"⁵⁸.

The principles in *Kable* were further built upon, albeit silently⁵⁹, in the decision in *Kirk Industrial Relations Commission of New South Wales*⁶⁰. In *Kirk* it was determined that, by virtue of s 73 of the *Constitution*, Parliaments could not deprive a State of a Supreme Court, or, remove a Supreme Court's ability to review and provide re-

lief for decisions tainted by jurisdictional error. The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ argued that not only does s 73 require an avenue of appeal from Supreme Courts to the High Court (subject to exceptions enacted by the Commonwealth Parliament) but also the continuation of the "Supreme Courts" as institutions which retain the essence of what a "Supreme Court" necessitates⁶¹. Accordingly, the Supreme Courts' supervisory jurisdiction for jurisdictional error was determined to be unassailable as it amounted to a "defining characteristic" of a "Supreme Court of a State"⁶². This conclusion was based on the historical status of such Courts prior to federation⁶³ but is probably more readily explainable by the nature of the integrated constitutional and court system developed in *Kable*⁶⁴. For example, in *Kable* McHugh J commented that⁶⁵:

a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.

While, in *Hogan v Hinch*⁶⁶, the successful *Kable* run stalled. *Kable*'s re-emergence continued in *Wainohu* where a six judge High Court majority invalidated organised crime legislation as compromising the institutional integrity of New South Wales Supreme Court⁶⁷. The impugned legislation, the *Crimes (Criminal Organisations Control) Act 2009* (NSW), conferred administrative powers on Supreme Court judges without requiring reasons to be given in relation to the exercise of those powers. French CJ and Kiefel J commented that⁶⁸:

The term 'institutional integrity', applied to a court, refers to its possession of the defining or essential characteristics of a court. Those characteristics include the reality and appearance of the court's independence and its impartiality. Other defining characteristics are the application of procedural fairness and adherence, as a general rule, to the open court principle. As explained later, it is also a defining characteristic of a court that it generally gives reasons for its decisions. In the case of the Supreme Courts of the States, that characteristic has a constitutional dimension by reason of the appellate jurisdiction conferred on this Court by s 73 of the Constitution.

The continuity of the *Kable* principle was again solidified in a significant High Court case on the constitutionality of the Victorian statutory rights charter (the *Charter of Human Rights and Responsibilities Act 2006* (Vic)), *Momcilovic v The Queen*⁶⁹.

Ultimately, under the current High Court approach, the role of a State court as a "court" referred to in Chapter III operates as a limiting factor. Certainly, State courts can adapt to new circumstances and reform agendas but there are, by virtue of Chapter III, "limits upon permissible departures from the basic character and methodologies of a court"⁷⁰. Further, French CJ has recently indicated that it is not necessarily possible to argue that these departures are "confined" or "limited" in nature when these can combine to result in the "death of the judicial function by a thousand cuts"⁷¹.

Part 3

3.1. *Reflections on the imbuing of meaning to "Court of a State"*

There are two apparent aspects to the creation of constitutional orthodoxy. First,

the establishment by a court of a doctrine or principle. Second, the widespread acceptance of that doctrine as a durable, legitimate and convincing statement of legal principle. It is the latter which has proven the most interesting in the refinement of *Kable*.

The post-2009 rejuvenation of *Kable* has coincided with much greater emphasis upon the text of Chapter III of the *Constitution*. This move began with the shift in language after *Kable* from "public confidence" to "institutional integrity" and has become much more closely tethered to Chapter III phrases such as "court of a State" in s 77(iii) or "Supreme Court of any State" in s 73(ii). Chief Justice Spigelman, as he then was, has noted that this textual focus is particularly evident in *Kirk* where the Court has sought to instil substantive constitutional content or essential characteristics in such constitutional phrases⁷². His Honour explained that⁷³:

the contemporary jurisprudence of the court exhibits a proclivity to clearly anchor significant constitutional developments in the text and structure of the Constitution. The concept of a 'constitutional expression' provides a textual basis for and, therefore, an aura of orthodoxy to, significant changes in constitutional jurisprudence. That aura dissipates when the court undertakes the unavoidably creative task of instilling substantive content to the constitutional dimension of a constitutional expression by identifying its 'essential' features or characteristics.

The accuracy of this is evident. In *Kirk*, quoting *Forge*, the majority note that it is imperative⁷⁴:

to take account of the requirement of Ch III of the Constitution that there be a body fitting the description 'the Supreme Court of a State', and the constitutional corollary that 'it is beyond the

legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description'.

The High Court's shift towards a focus on the meaning of the constitutional phrase, "court" was not entirely unexpected. Winterton impliedly predicted this shift back in 2002 in highlighting that the Commonwealth Parliament could decide in which State bodies it vested its power, "provided, of course, that the State body in which jurisdiction is to be vested is sufficiently judicial to be characterised as a 'court' within Ch III of the Constitution"⁷⁵. Similarly, the Court is, as earlier favoured by Meagher, drawing upon comments made by Dawson J in dissent in *Kable* that s 77(iii) "treats State courts as existing institutions... so long as they are in fact courts"⁷⁶. Meagher⁷⁷ also linked this with comments made by the majority judges in *Kable* concerning the "identity" of a body as a "court"⁷⁸ and the "constitutional expression" of a "Supreme Court" in s 73⁷⁹.

It is submitted that, while such an approach does not necessarily draw a clear or definitive boundary around what amounts to a "court", it provides a conceptual tool which can be fleshed out on the basis of the surrounding constitutional provisions in Chapter III and how these interplay with the curial role. This ensures that the attributes identified derive from the *Constitution's* text and structure as 'a starting point'⁸⁰, rather than being entirely 'free-standing'⁸¹. While the High Court has indicated that the core characteristics of a 'court' cannot be exhaustively set down⁸² it has accepted that some fundamental curial attributes flow from the constitutional expectations and functions conferred on the judicature.

The Court has also brought the focus to State courts' constitutionally contemplated role within the wider Australian court structure. This is evident within s 73(iii)'s reference to an appellate pathway from Supreme Courts to the High Court as well as ss 71 and 77(iii)'s express reference to federal judicial power being vested in sub-national courts.

Further, the Court has increasingly sought to ground its constitutional reasoning in this context in history to try to avoid the perceived "creativity" eluded to by Chief Justice Spigelman. In *Kirk*, although heavily criticised, the majority argued that, "[t]he supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power"⁸³. In *Totani*, French CJ stated that the⁸⁴:

Ch III of the *Constitution* rests upon assumptions about the continuing existence and essential characteristics of State courts as part of a national judicial system and the implications that this Court has drawn from those assumptions. The assumptions are historical realities and not the product of judicial implication.

His Honour sought to connect this "assumption" with the Framers' conceptions pre and post-Federation⁸⁵, these included the "rule of law", the competence assumed by ss 71 and 77(iii) of State courts as repositories of federal jurisdiction and that the State judiciary "continue to bear the defining characteristics of courts and, in particular, the characteristics of independence, impartiality, fairness and adherence to the open-court principle". These characteristics do not however amount to a closed list⁸⁶. The Chief Justice makes it clear that retention of these assumptions in

the *Commonwealth Constitution*'s formulation is also evident in other constitutional provisions such as ss 106, 108 and covering clause 5. His Honour stated⁸⁷:

The absence of an entrenched doctrine of separation of powers under the constitutions of the States at Federation and thereafter does not detract from the acceptance at Federation and the continuation today of independence, impartiality, fairness and openness as essential characteristics of the courts of the States. Nor does the undoubted power of State Parliaments to determine the constitution and organisation of State courts detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.

Similarly, in *Kirk*, the joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ relied heavily on the characteristics of a "Supreme Court of a State" at federation which State parliaments were not able to stray from, most notably their ability to review decisions on the ground of jurisdictional error⁸⁸.

In the context of United States' constitutional jurisprudence, Kahn and Kersch have referred to the "backward-looking, after-constructed 'constitutive stories' of constitutional development" as an "important form of constitutional construction"⁸⁹. However, the authors do not see this constructive process as one undertaken by the courts alone. Instead, they refer to the role of the "interpretive community" as "an active participant in the process of constructing authoritative constitutional stories"⁹⁰. The process is an ongoing and organic one which is "taken into the interpretive and advocacy community, to be accepted, contested, or reworked"⁹¹. Further, the process cannot be considered without an ap-

preciation of the "Court's unique needs as an institution"⁹².

Kahn and Kersch's work is highly relevant in the Australian constitutional setting of *Kable*. In the *Kable* context the "interpretive community" is a rich one; judges, barristers, academics, students, politicians and other government actors and the public at large. For the courts the question is how their fashioning of constitutional doctrine can resonate with the interpretive community. This is particularly pertinent in the Chapter III context when there is the potential for constitutional doctrine to be perceived as self-interested and as "the courts protecting the courts".

The *Kable* principle, in applying a quasi-separation of powers principle to State courts, and in turn restricting the sovereignty of State Parliaments, is prone to a criticism of feather-bedding and as being strategically self-determining. A focus upon interpreting the constitutional text within a historical and broader constitutional context defends the Court to some extent from criticisms of arbitrariness by mooring it within the *Commonwealth Constitution*, and within Spigelman's "aura of orthodoxy"⁹³. Ironically though, through interpreting the text, it also has the potential to provide the Court with some malleability to continue to shape constitutional doctrine.

For example, take the risk in the State sphere that, if courts become too prescriptive, State legislatures will choose to confer functions on non-curial bodies instead and vest "dangerous" functions in the executive, away from unwanted interference by the courts. In earlier cases, like *Fardon*, the constitutionality of this was accepted by members of the High Court⁹⁴. The con-

stitutional focus upon the text and phrases such as "court of a State" and "Supreme Court of a State" is particularly beneficial because it allows the identity and characteristics of courts to develop such that certain functions, such as criminal determinations, have instead begun to be classed as reserved for curial exercise⁹⁵. What is evident is that the creation of constitutional orthodoxy is being influenced by and is influencing the relationship of the courts with the other branches of government⁹⁶. The process is delicate and dynamic and is an inevitable part of the creation of constitutional consciousness.

It is submitted that, criticisms aside, the 'interpretive community' at the time of *Kable* were well placed to receive the High Court's new interpretation of Chapter III. There are three key reasons for this. First, the legal community had consistently failed to find alternative constitutional means by which to restrict the activity of State legislatures. The absence of a separation of powers within State constitutions had been consistently re-affirmed and the restrictions that trickled down from the *Commonwealth Constitution*, such as ss 92 or 109 were not broadly applicable. *Kable*'s potential limit on State parliamentary sovereignty was therefore able to very quickly capture the profession's constitutional imagination.

Second, the persuasive influence of counsel in *Kable*, Sir Maurice Byers QC, cannot be ignored. Byers had 'penned' and eloquently made the argument in *Australian Capital Television Pty Ltd v Commonwealth* "which... in a slightly edited form"⁹⁷ became the focus of the High Court's "discovery" of an implied freedom of political communication in the *Commonwealth Constitution* in 1992. Byers' innovative ar-

gument in *Kable* was made to the Court at a point when the barrister's "influence... was at its height"⁹⁸. His submission in *Kable*, very much resembles the approach now taken by the Court nearly 16 years later⁹⁹:

Chapter III of the *Constitution* applied to State courts from 1 January 1901; they were impressed with the characteristics necessary for the possession and exercise of Commonwealth judicial power. No legislature, State or federal, might impose on them jurisdiction incompatible with the exercise of that judicial power. Nor could it control the manner of the exercise of judicial power whether conferred by the Commonwealth or States. Since Ch III envisages State courts as being capable of investiture with and exercise of the judicial power of the Commonwealth, it grants to them or prevents their deprivation of those characteristics required of recipients of that power. A State law which controlled the State court in the exercise of jurisdiction granted by the State is invalid if it is inconsistent with the court's possession of the constitutional characteristics.

Third, the legal abhorrence of the legislation encountered in *Kable* also played a significant part. Section 3(3) of the *Community Protection Act 1994* (NSW) contained the extraordinary ad hominem provision that 'This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person'. Kable was to be preventatively detained by the Court beyond the end of his sentence without being found guilty of further criminal conduct. The High Court, although emphasising the rarity of such an enactment, were going to be more inclined to accept pioneering arguments so as to find a means to invalidate it. Certainly, the exceptional nature of the legislation in *Kable* made it more difficult for the facts in subsequent cases to approach its severity. However, the pro-

gressive re-interpretation of the principle by the Court, and emphasis upon essential characteristics of a court as relevant to its institutional integrity, have meant that the essence of *Kable* has been more readily applied by the Court in recent years, particularly when, like in *Kable*, the State court's independent judicial role is compromised by becoming a mere puppet of the executive or legislative arms.

Conclusion

The *Kable* principle has become an accepted part of the Australian constitutional orthodoxy. The process of interpretation and re-interpretation of the principle has been an iterative constitutional "story" by which the initial ratio decidendi and reasoning has been re-imagined and re-fashioned as new factual scenarios have been presented to the High Court. The *Kable* principle's journey is incomplete and the Court's tools of "institutional integrity" and "essential curial characteristics" provide sufficient malleability to allow the concept to evolve further through an ongoing dialogue with the legal profession, the academy, the community and the other governmental arms.

As Kahn and Kersch explain, the shape of the doctrine is not set purely by the constitutional text, and although this is being increasingly relied upon by the Court, different available interpretations mean that the ultimate principle is collaboratively "built" by influences both "inside and outside the Court"¹⁰⁰. The acceptance or legitimacy of this process is determined by a number of factors. However, the High Court has to find ways to respond to de-

velopments within the executive or legislative arms, while retaining legitimacy and not being accused of jeopardising the democratic process through overly interventionist forms of judicial review¹⁰¹. *Kable* provides an interesting example of this dynamic process, by which the Court has institutionalised a means of drawing a con-

stitutional line in the sand for State legislation, by reconceptualising the import of Chapter III of the *Constitution* and its implications for the operations of 'courts of a State'.

¹ George Orwell, *Nineteen Eighty-Four*, Pt 1, Ch 5, London, Penguin Books, 1949, p. 46.

² *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, p. 257 (Inglis Clark); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, p. 268 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, p. 313 (Charles Kingston); 1 February 1898, p. 363 (Josiah Symon), p. 371 (William McMillan), pp. 365-366 (Bernhard Wise).

³ *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, p. 950 (Josiah Symon); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, p. 343 (Josiah Symon).

⁴ J. Quick and R.R. Garran, *The Annotated Constitution of the Australian Commonwealth Part 2* (1901), Kessinger Legacy Reprints, p. 727.

⁵ *South Australia v Totani* (2010) 85 ALJR 19, pp. 48-50, per French CJ.

⁶ *R v Kirby: Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, p. 268, per Dixon CJ, McTiernan, Fullager and Kitto JJ.

⁷ *Official Record of the Debates of the Australasian Federal Convention*,

Melbourne, 28 January 1898, p. 276.

⁸ *The King v Murray: Ex Parte the Commonwealth* (1916) 22 CLR 437, p. 452, per Isaacs J.

⁹ (1929) 42 CLR 481, p. 495.

¹⁰ Ivi p. 496. See also *Kotsis v Kotsis* (1970) 122 CLR 69, p. 88 per Menzies J, 109, per Gibbs J. Gibbs J although in dissent in *Kotsis* was later accepted as correct in *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49.

¹¹ *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, p. 61.

¹² *Ibidem*. See also 56-57 (Gibbs CJ). See also L. Zines, *The High Court and the Constitution* (5th ed.), Sydney, Federation Press, p. 268.

¹³ (1995) 12 WAR 392.

¹⁴ *JD & WG Nicholas v Western Australia* [1972] WAR 168, p. 173, per Jackson CJ, p. 175, per Burt J; *Gilbertson v South Australia* (1976) 15 SASR 66, p. 85, per Bray CJ; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, p. 381, per Street CJ, p. 400, p. 401 per Kirby P, p. 412 per Mahoney JA; *City of Collingwood v Victoria* (No 2) [1994] 1 VR 652, p. 663 (Brooking J, Southwell and Teague JJ agreeing).

¹⁵ *Kable v Director of Public*

Prosecutions (1996) 189 CLR 51.

¹⁶ The majority comprised Gaudron, McHugh, Gummow and Toohey JJ with Dawson and Brennan CJ dissenting.

¹⁷ Ivi, p. 107 per Gaudron J, p. 124 per McHugh J, p. 133 per Gummow J.

¹⁸ Ivi, pp. 114-116.

¹⁹ Ivi, p. 67.

²⁰ Ivi, p. 68.

²¹ Ivi, p. 80.

²² Ivi, p. 83.

²³ B. Lane, *Separation of Powers for States Inevitable*, *The Australian*, 17 September 1996, p. 6.

²⁴ See also D. Meagher, *The Status of the Kable Principle in Australian Constitutional Law*, in «Public Law Review», vol. 16, 2005, pp. 182, at p. 183.

²⁵ See eg. *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 64 per Brennan CJ.

²⁶ G. Winterton, *Justice Kirby's Coda in Durham*, in «Public Law Review», vol. 13, pp. 165-168.

²⁷ H.P. Lee, *The Kable Case: A Guard-Dog that Barked But Once?*, in G. Winterton (edited by), *State Constitutional Landmarks*, Sydney, The Federation Press, 2006, pp. 390, 411 referring to Callinan J in *APLA Ltd v Legal Service Commissioner (NSW)*, 2005, p. 469; *R v Moffatt* (1997) 91 A Crim R 557, p. 577 (Hayne JA, as he then was).

²⁸ *Kable v Director of Public Prosecutions* (1996) 189 CLR

51. p. 134 per Gummow J, p. 98 per Toohey J; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 33, p. 37 (McHugh J), p. 144 per Kirby J.
- ²⁹ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 43, per McHugh J.
- ³⁰ (2004) 223 CLR 575.
- ³¹ (2006) 228 CLR 45.
- ³² (2008) 234 CLR 532.
- ³³ (2009) 237 CLR 501.
- ³⁴ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, p. 43.
- ³⁵ *Baker v The Queen* (2004) 223 CLR 513, p. 54 per Kirby J.
- ³⁶ See eg. Transcript of Proceedings, *Forge v ASIC* [2006] HCA-Trans 25 (8 February 2006) (Mr Gageler SC); Justice Brian Preston, *Commentary on paper by Dr M Groves: "Federal Constitutional Influences on State Judicial Review"*, AACL Seminar, Sydney, 26 August 2010, p. 5; Chief Justice Marilyn Warren, *The Dog That Regained its Bark: A New Era of Administrative Justice in the Australian States*. Speech delivered to the Australian Institute of Administrative Law Conference, Sydney, 23 July 2010, pp. 14-15.
- ³⁷ See *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.
- ³⁸ See eg. *Moffatt* (1997) 91 A Crim R 557; *R v England* (2004) 89 SASR 316; *McGarry v Western Australia* (2005) 32 WAR 69.
- ³⁹ *Gypsy Jokers Motorcycle Club v Commissioner of Police* (2007) 33 WAR 245, p. 85 per Steytler P; *Baker v The Queen* (2004) 223 CLR 513, p. 51 per McHugh, Gummow, Hayne and Heydon JJ; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 87 per McHugh J; *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, p. 11 per Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ.
- ⁴⁰ *Baker v The Queen* (2004) 223 CLR 513, p. 79 per Kirby J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 23 per Gleeson CJ, p. 102 per Gummow J, p. 144 per Kirby J; *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, p. 194 per Kirby J; *South Australia v Totani* (2010) 85 ALJR 19, p. 73 per French CJ.
- ⁴¹ G. Carney, *The Constitutional Systems of the Australian States and Territories*, Melbourne, Cambridge University Press 2006, p. 250.
- ⁴² *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 101.
- ⁴³ Ivi, p. 15.
- ⁴⁴ *Commodity Futures Trading Commission v Schor* 478 US 833, p. 851 (1986).
- ⁴⁵ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 102 per Gaudron J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 37 per McHugh J; *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, p. 61 per Gummow, Hayne and Crennan JJ. See also *South Australia v Totani* (2010) 85 ALJR 19, pp. 67-68 per French CJ.
- ⁴⁶ See for example *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, pp. 255-256 per Kirby J; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 219 per Callinan and Heydon JJ.
- ⁴⁷ *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, pp. 63-64.
- ⁴⁸ This confusion stemmed from the judgment of Toohey J in *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 96.
- ⁴⁹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, p. 86 per Gummow and Bell JJ; *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 37 per McHugh J; *Re Crinter: Ex parte Hall* (2004) 28 WAR 427, p. 41 per Malcolm CJ; *H.A. Bachrach Pty Ltd v. State of Queensland* (1998) 195 CLR 547, 561; *R v Moffatt* [1998] 2 VR 229, p. 248 per Hayne JA. See also P. Johnston and R. Hardcastle, *State Courts: The Limits of Kable*, in «Sydney Law Review», vol. 20, 1998, p. 214 at p. 227; Carney, *The Constitutional Systems of the Australian States and Territories* cit., p. 356.
- ⁵⁰ *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, p. 99 per French CJ, p. 154 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ, pp. 236-244 per Kirby J.
- ⁵¹ *Ibidem*.
- ⁵² Ivi, p. 53 per McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ. See also p. 99 per French CJ and pp. 236-237, p. 243 per Kirby J.
- ⁵³ *South Australia v Totani* (2010) 85 ALJR 19, p. 245 per Heydon J (in dissent).
- ⁵⁴ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 183.
- ⁵⁵ (2009) 240 CLR 319.
- ⁵⁶ Ivi, p. 96 per Gummow and Bell JJ, p. 136 per Hayne, Crennan and Kiefel JJ, p. 140 per Heydon J.
- ⁵⁷ (2010) 85 ALJR 19.
- ⁵⁸ Ivi, p. 62.
- ⁵⁹ Although not mentioned in the judgment it was discussed during argument: see detailed discussion of this in S. Young and S. Murray, *An Elegant Convergence? The Constitutional Entrenchment of Jurisdictional Error Review in Australia*, in «Oxford University Commonwealth Law», vol. 11, n. 2, 2011, p. 117.
- ⁶⁰ (2010) 239 CLR 531.
- ⁶¹ Ivi, p. 96.
- ⁶² Ivi, p. 98.
- ⁶³ For criticisms of this historical reasoning see C. Finn, *Constitutionalism Supervisory Review at State Level: The End of Hickman?*, in «Public Law Review», vol. 21, 2010, p. 92, p. 99; N. Gouliaditis, *Privative Clauses: Epic Fail*, paper presented at the Gilbert & Tobin Centre for Public Law 2010 Constitutional Law Conference, Sydney, 19 February 2010, p. 7. L. Zines, *Recent Developments in Chapter III: Kirk v Industrial Relations Commission of New South*

- Wales & South Australia v Totani* (CCCS/AACL Seminar, Melbourne Law School, Melbourne, 26 November 2010); G. Williams and A. Lynch, *The High Court on Constitutional Law: The 2010 Term*, Paper presented at the Gilbert & Tobin Centre for Public Law 2011 Constitutional Law Conference, Sydney, 18 February 2011, p. 8.
- ⁶⁴ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 93; Zines, *Recent Developments in Chapter III* cit., pp. 10–11; Williams and Lynch, *The High Court on Constitutional Law: The 2010 Term* cit., p. 8.
- ⁶⁵ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 114. See also *South Australia v Totani* (2010) 85 ALJR 19, p. 4 per French CJ.
- ⁶⁶ (2011) 85 ALJR 398.
- ⁶⁷ *Wainohu* (2011) 85 ALJR 746, p. 69 per French CJ, p. 109 per Gummow, Hayne, Crennan and Bell JJ.
- ⁶⁸ Ivi, p. 44.
- ⁶⁹ (2011) 85 ALJR 957.
- ⁷⁰ *Gypsy Jokers Motorcycle Club Incorporated v Commissioner for Police* (2008) 234 CLR 532, p. 103 per Kirby J, although in dissent.
- ⁷¹ *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, p. 57.
- ⁷² For a further discussion of this in the *Kirk* context see *Ibidem*.
- ⁷³ Hon J.J. Spigelman, *The Centrality of Jurisdictional Error*, in «Public Law Review», vol. 21, 2010, p. 77, p. 80.
- ⁷⁴ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 96.
- ⁷⁵ G. Winterton, *Justice Kirby's Coda in Durham*, in «Public Law Review», vol. 13, 2002, p. 165, at p. 168.
- ⁷⁶ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 186 quoting Dawson J at *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 83.
- ⁷⁷ Meagher, *The Status of the Kable Principle in Australian Constitutional Law* cit., p. 186.
- ⁷⁸ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 117 per McHugh J.
- ⁷⁹ Ivi, p. 141 per Gummow J.
- ⁸⁰ *McInty v Western Australia* (1996) 186 CLR 140, p. 231 per McHugh J.
- ⁸¹ Ivi, p. 232.
- ⁸² *Forge v Australian Securities Investments Commission* (2006) 228 CLR 45, pp. 63–64 per Gummow, Hayne and Crennan JJ; *South Australia v Totani* (2010) 85 ALJR 19, p. 62 per French CJ.
- ⁸³ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 98.
- ⁸⁴ *South Australia v Totani* (2010) 85 ALJR 19, p. 47.
- ⁸⁵ Ivi, pp. 48–52 and pp. 59 ff.
- ⁸⁶ Ivi, p. 62.
- ⁸⁷ Ivi, p. 66.
- ⁸⁸ *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531, p. 96, p. 98.
- ⁸⁹ R. Kahn and K.I. Kersch, *Conclusion – Supreme Court Decision Making and American Political Development*, in R. Kahn and K.I. Kersch (edited by), *The Supreme Court & American Political Development*, University Press of Kansas, 2006, pp. 443, 457.
- ⁹⁰ Ivi, p. 458.
- ⁹¹ *Ibidem*.
- ⁹² *Ibidem*.
- ⁹³ Spigelman, *The Centrality of Jurisdictional Error* cit., p. 80.
- ⁹⁴ *Fardon v Attorney-General for the State of Queensland* (2004) 223 CLR 575, p. 40 per McHugh J.
- ⁹⁵ Statements by the High Court in cases like *Totani* demonstrate that members of the bench are increasingly gravitating towards this conception: see *South Australia v Totani* (2010) 85 ALJR 19, p. 76, p. 82 per French CJ, pp. 146–147 per Gummow J.
- ⁹⁶ B. Friedman, *The Politics of Judicial Review*, in «Texas Law Review», vol. 84, n. 2, 2005, p. 257, at p. 308.
- ⁹⁷ S. Gageler, *Beyond the Text: A Vision of the Structure and Function of the Constitution*, in «Australian Bar Review», vol. 32, 2009, p. 138, at p. 139.
- ⁹⁸ *Ibidem*.
- ⁹⁹ *Kable v Director of Public Prosecutions* (1996) 189 CLR 51, p. 54.
- ¹⁰⁰ Kahn and Kersch, *Conclusion – Supreme Court Decision Making and American Political Development* cit., p. 450.
- ¹⁰¹ See eg, J.H. Ely, *Democracy and Distrust – A Theory of Judicial Review*, Harvard University Press, 1980.