

KABLE, KIRK AND JUDICIAL STATESMANSHIP

JEFFREY GOLDSWORTHY*

I INTRODUCTION

The purpose of this article is to ask the following question: when the *Constitution* is clear, is it the High Court's duty to apply it strictly as it is, or does the Court have a broader responsibility to guard the public interest in justice and good governance, by (in effect) changing the *Constitution* if necessary, even if it must exceed its legal authority to do so? I will use *Kable v Director of Public Prosecutions (NSW)*¹ and *Kirk v Industrial Court of New South Wales*² as case studies that raise this question. Much of the article is critical of the High Court's reasoning in these cases, but (appearances to the contrary) my purpose is not to criticise the Court. I argue that this reasoning is very implausible in order to ask whether it may nevertheless have been justified by the pursuit of 'judicial statesmanship' — the subordination of legal norms to higher norms of political morality, in the disinterested pursuit of the public interest, in exceptional cases.³ (Judicial statesmanship is a species of judicial activism, but I want to avoid the negative connotation of the latter term.⁴)

George Winterton described the majority's reasoning in *Kable* as 'barely plausible'.⁵ In Part II, I explain why I believe that he overstated its plausibility and that the Court's subsequent attempts to provide more persuasive reasoning have failed. In Part III, I argue that the Court's reasoning in *Kirk*, in relation to the validity of state privative clauses, is even less plausible. All this raises two questions that I discuss in Part IV.

The first question is: what is the best explanation for the Court's implausible reasoning? Many commentators have surmised that the majority in *Kable* was

* Professor of Law, Monash University. I thank Patrick Emerton for helpful discussion of many of the ideas in this article, Brendan Lim, Helen Irving, the anonymous referees for very useful written comments, and Oscar Roos for allowing me to draw on his extensive research on the *Kirk* case, subsequently published as Oscar I Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35 *Sydney Law Review* 781. None of them should be assumed to agree with my arguments.

1 (1996) 189 CLR 51 ('*Kable*').

2 (2010) 239 CLR 531 ('*Kirk*').

3 This definition differs from the way this term has been used by others. Literature using the term includes Gary J Jacobsohn, *Pragmatism, Statesmanship, and the Supreme Court* (Cornell University Press, 1977) 16–17; Harry M Clor, 'Judicial Statesmanship and Constitutional Interpretation' (1985) 26 *South Texas Law Journal* 397; Matthew J Franck, 'Statesmanship and the Judiciary' (1989) 51 *Review of Politics* 510; James E Bond, *The Art of Judging* (Transaction Books, 1987) ii, ch 2; Neil S Siegel, 'The Virtue of Judicial Statesmanship' (2008) 86 *Texas Law Review* 959; Robert Post, 'Theorizing Disagreement: Reconciling the Relationship Between Law and Politics' (2010) 98 *California Law Review* 1319.

4 The often expressed view that judicial activism does not exist, at least in Australia, and that it is merely a derogatory label used to express disagreement with a judicial decision, is in my opinion extraordinarily naïve.

5 George Winterton, 'Justice Kirby's Coda in *Durham*' (2002) 13 *Public Law Review* 165, 168.

motivated primarily by a desire to extend the *Constitution's* protection of the rule of law, and a similar explanation for *Kirk* has been suggested.⁶ On this view, at least some of the judges have pursued a proactive agenda of expanding the scope of Chapter III of the *Constitution*, with respect to state courts, well beyond its actual scope. Their agenda has been a noble one — to enlarge the *Constitution's* protection of judicial independence and the rule of law, creating greater symmetry between the constitutional standing of Commonwealth and state courts, and enhancing the security of due process rights. But if they have knowingly employed implausible legal reasoning in pursuing this agenda, then instead of applying the *Constitution* as it actually is — warts and all — they have applied what they believe the *Constitution* ought to be. They have strayed from the Court's tradition of legalism and engaged in 'judicial statesmanship'.⁷

The second question is whether, if some members of the Court have done this, they were morally justified in doing so, despite knowing that their decisions were legally erroneous. The answer depends on one of the most important but neglected questions in legal philosophy, which I have begun to explore elsewhere: under what circumstances are judges morally justified in covertly changing the law, when they have no legal authority to do so, in order (by their lights) to improve it?⁸

I will conclude that the best explanation for the majority's reasoning in *Kable* may be a lack of methodological rigour, rather than statesmanship. But the reasoning in *Kirk* is a strong candidate for the statesmanship hypothesis. I will briefly consider, but leave open, the question of whether or not judicial statesmanship was, or would have been, justified in either case.

I anticipate criticism for even raising these questions, on virtually opposite grounds, from two different quarters: the practising profession, and academia. On the one hand, I expect some members of the profession to consider it impertinent or even offensive for an academic to allege that High Court judges may have deliberately strayed from strict legal reasoning in order to change the *Constitution* in desirable ways. On the other hand, I expect some members of the academy to complain that I have merely stated the obvious, but have done a disservice to progressive legal development by doing so, because judicial dissembling in a noble cause may be acknowledged by insiders in private but not aired in public.

I believe that if judges do engage in judicial statesmanship, by using ingenious but dubious legal reasoning to advance the public interest in good governance (as they see it), it should be acknowledged and debated, at least within the legal academy and practising profession. It raises important questions about intellectual integrity and judicial duty, the answers to which must affect how we teach students to think about law and adjudication, and how we deliberate about legal issues. In mainstream legal theory it is now commonplace that judges must sometimes

6 See below Part IV; below n 175–87, 211–14.

7 On that tradition, see Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106.

8 Jeffrey Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture' (2011) 24 *Canadian Journal of Law and Jurisprudence* 305; Jeffrey Goldsworthy, 'Should Judges Covertly Disobey the Law to Prevent Injustice?' (2011) 47 *Tulsa Law Review* 133.

act creatively and supplement the meaning of a law, when it is unclear because of ambiguity, vagueness, inconsistency, silence or uncertainty about possible implications. But are they also justified in acting creatively to change the law — not just common law, which they are legally authorised to change, but statutes and the *Constitution*, which they are not — when it is relatively determinate?

II THE KABLE DOCTRINE

A Kable's Case

In *Kable*, the Court held that Chapter III of the *Constitution*, by implication, prohibits a state Parliament from conferring non-judicial functions on state courts that are incompatible with their exercise of federal jurisdiction or, more broadly, with the judicial power of the Commonwealth.⁹ The majority judges asserted that Australia had an 'integrated' judicial system, of which state courts and in particular their Supreme Courts are components. This is mainly because of s 77(iii), which empowers the Commonwealth Parliament to invest state courts with federal jurisdiction, and s 73(ii), which provides for appeals from state Supreme Courts to the High Court even in matters involving state jurisdiction. In *Kable*, s 73(ii) was relied on mainly for the obiter dictum that each state must maintain a 'Supreme Court' that has certain defining characteristics determined by the requirements of Chapter III, whatever the court happens to be called in state legislation.¹⁰

In striking down the New South Wales statute whose validity had been challenged, the majority judges relied mainly on s 77(iii), reasoning that the statute conferred non-judicial functions on the State's Supreme Court that were incompatible with its exercise of federal jurisdiction. This reasoning relied on a 'structural implication', which is inferred from some structural feature of the *Constitution* such as judicial independence or representative democracy.¹¹ The principles that must normally be satisfied to justify such an implication are as follows. As Mason CJ said in *Australian Capital Television Pty Ltd v Commonwealth* 'where the implication is structural rather than textual ... the term sought to be implied must be logically or practically necessary for the preservation of the integrity of that structure'.¹² In later cases, it has been rightly said that it is not sufficient that a

9 (1996) 189 CLR 51, 90, 94–6 (Toohey J), 100, 103–4 (Gaudron J), 109–10, 116 (McHugh J), 126, 137 (Gummow J). The Court later argued that in *Kable* it had invalidated an incompatible 'function' or 'task' that was intertwined with the exercise of 'judicial power': *New South Wales v Kable* (2013) 87 ALJR 737, 742–3 [16]–[18], 745 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 753 [73]–[74], 754 [77] (Gageler J). No distinction between 'functions' and 'powers' can affect my criticisms of the reasoning in *Kable*.

10 (1996) 189 CLR 51, 111 (McHugh J), 138–9, 141–2 (Gummow J).

11 See the text to footnote 12 below.

12 (1992) 177 CLR 106, 135 ('ACTV').

suggested implication would be desirable, reasonable or avoid injustice¹³ — it must be ‘truly necessary to give effect to the express constitutional provisions’¹⁴ — and it must be confined to the necessity that justifies it.¹⁵ To prepare for what follows, I emphasise that final principle.

In *Kable*, the majority had to show that an implication was necessary to ensure that state courts can exercise, with independence and integrity, any federal jurisdiction vested in them pursuant to s 77(iii).¹⁶ It has been objected that no such implication is truly necessary, because the Commonwealth Parliament can protect the exercise of federal jurisdiction from contamination by declining to vest it in any unsuitable state court or by repealing an earlier investment.¹⁷ On the other hand, it could be argued that relying on Parliament’s vigilance is not an adequate safeguard. In order to raise further issues, I will assume that this threshold objection fails. This entails assuming that an implication is, in principle, justified. If, for example, a statute made all members of the State Cabinet judges of the Supreme Court, the Court would no longer be fit to exercise federal jurisdiction. But the problem is that the High Court has applied this principle only in cases, starting with *Kable* itself, where a Supreme Court’s ability to exercise federal jurisdiction with independence and integrity could not plausibly be considered to have been adversely affected.¹⁸

The majority judges in *Kable* did not ignore the requirement of ‘necessity’, although curiously they seldom adverted to it. They accepted that to be invalid, the statute had to be shown to have some adverse effect on the exercise of federal jurisdiction by the Supreme Court. In what follows, I will call this the ‘adverse effect requirement’.

For Toohey J, the required adverse effect was that the state court must actually be exercising federal jurisdiction at the relevant time, and the state law corrupts or interferes with this.¹⁹ He and several other judges pointed out that the Supreme Court in *Kable* had been exercising federal jurisdiction, although the others did not regard that as crucial.²⁰ Toohey J’s approach has been criticised, but might be acceptable provided that parties cannot recite themselves into federal jurisdiction

13 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 453 [389], 454 [393] (Hayne J), 352 [33] (Gleeson CJ and Heydon J) (*‘APLA’*); *Bennett v Commonwealth* (2007) 231 CLR 91, 137 [135] (Kirby J).

14 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 635 [83] (*‘MZXOT’*). The ‘necessity’ test for ‘structural’ implications was also emphasised by the High Court in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (*‘Lange’*); *Coleman v Power* (2004) 220 CLR 1, 48–9 [89] (McHugh J) (*‘Coleman’*); *APLA* (2005) 224 CLR 322, 484–5 [89] (Callinan J); *MZXOT* (2008) 233 CLR 601, 623 [39] (Gleeson CJ, Gummow and Hayne JJ), 635 [83] (Kirby J), 656 [171] (Heydon, Crennan and Kiefel JJ).

15 *APLA* (2005) 224 CLR 322, 350 [27] (Gleeson CJ and Heydon J), 361 [66] (McHugh J). Note that McHugh J’s observation in *APLA* was quoted with approval by Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ in *Hogan v Hinch* (2011) 243 CLR 506, 554–5 [93].

16 See *Kable* (1996) 189 CLR 51, 104 (Gaudron J), 110, 116, 118 (McHugh J), 131–7, 143 (Gummow J).

17 Winterton, ‘Justice Kirby’s Coda in *Durham*’, above n 5, 168.

18 See also Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 447–8.

19 *Kable* (1996) 189 CLR 51, 94, 96, 98–9.

20 *Ibid* 94–6 (Toohey J), 114 (McHugh J), 136 (Gummow J).

merely by raising a *Kable* objection.²¹ Subject to that requirement, his approach would severely limit the reach of the *Kable* doctrine. But his approach was not subsequently followed, and will therefore be set aside here.

For Gaudron, McHugh and Gummow JJ, a state law is invalid if it adversely affects public confidence in a state court's ability to exercise federal jurisdiction with independence from the state's political branches, whether or not it is exercising federal jurisdiction at the relevant time.²² As McHugh J put it, '[p]ublic confidence in the exercise of federal jurisdiction by the courts of a State could not be retained if litigants in those courts believed that the judges of those courts were sympathetic to the interests of their State or its executive government'.²³ If 'public confidence in the impartial administration of the judicial functions of State courts' were undermined, 'it would inevitably result in a lack of public confidence in the administration of invested federal jurisdiction in those courts'.²⁴ These judges concluded that the law in question had this adverse effect.²⁵

With respect, even if the relevant principle includes the maintenance of public confidence, the conclusion that the statute in question violated the principle lacks plausibility. For a start, it is difficult to see how the statutory powers conferred on the New South Wales Supreme Court could be thought to have damaged its independence at all, given that the Court eventually decided to release Mr Kable

21 For some criticisms see Peter Johnston and Rohan Hardcastle, 'State Courts: The Limits of *Kable*' (1998) 20 *Sydney Law Review* 216, 225–6; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 270–1; Anne Twomey, 'The Limitation of State Legislative Power' (2001) 4 *Constitutional Law and Policy Review* 13, 15; George Williams, *Human Rights Under the Australian Constitution* (Oxford University Press, 1999) 212. One objection is that Toohey J's approach might lead to circularity. Federal jurisdiction is invoked only when a party raises an issue that falls within federal jurisdiction with bona fides: see Leslie Zines, *Cowan and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 147–8. The whole matter before the Court then comes within federal jurisdiction. Toohey J thought that this happened in *Kable*. Mr Kable may have raised the Chapter III issue with bona fides, because the question was being raised for the first time. But consider the next case that arises. A state court commences to hear a case that in itself involves nothing but state jurisdiction. At some point, a party raises a *Kable* objection — which is a Chapter III objection — to the state legislation. Applying Toohey J's reasoning, the whole matter before the court might then become one of federal jurisdiction, provided that the objection is bona fide. But surely this would be circular: the *Kable* doctrine applies only if the court is exercising federal jurisdiction, but it is exercising federal jurisdiction only if an issue of federal jurisdiction (here, the *Kable* doctrine) is raised with bona fides. In a case where the only federal issue raised is the *Kable* issue, that is the only factor that could convert the matter into federal jurisdiction: apart from that, it involves nothing but state jurisdiction. But if the party who raises the *Kable* issue understands this, then he or she knows that it is only by raising the *Kable* doctrine that the *Kable* doctrine becomes applicable. Surely this would be such a blatantly artificial and circular device to make the *Kable* doctrine applicable that the party could not possibly be raising the issue with bona fides. That conclusion would be even stronger if an objective rather than subjective test for bona fides were applicable. The whole point of the bona fides requirement is surely to prevent parties being able to recite themselves into federal jurisdiction simply by uttering some magic words.

22 *Kable* (1996) 189 CLR 51, 107–8 (Gaudron J), 116–17 (McHugh J), 133–4, 143 (Gummow J).

23 *Ibid* 117 (emphasis added).

24 *Ibid* 118. See also 133–4 (Gummow J).

25 Gummow J also relied on damage to the Supreme Court's appearance of institutional impartiality: *ibid* 133–4. He concluded that the state Act inflicted 'institutional impairment' upon 'the judicial power of the Commonwealth': at 143.

contrary to the supposed desires of the state government.²⁶ McHugh J conceded that no one who read the judgments of the Supreme Court judges who dealt with Mr Kable ‘could doubt their independence and impartiality in administering the law’.²⁷

But there is a bigger problem when the principle in *Kable* is generalised to apply to statutory powers exercised by a state court solely within state jurisdiction. It is then even more difficult to see how powers such as those challenged in *Kable* could possibly undermine either its actual or perceived independence or integrity *when exercising federal jurisdiction*. It is simply not plausible to think that, if Supreme Court judges are obligated to depart from some traditional judicial practice in dealing with particular, limited matters in their state jurisdiction, they are more likely to depart from it in exercising federal jurisdiction when they are not legally required to do so. The actual integrity and independence of Supreme Court judges are well known to be far stronger and more resilient than that. As Heydon J later put it, their ‘actual impartiality as between the government and the governed has never been questioned ... they have the touchy pride of Castilian aristocrats’.²⁸ There is no reason whatsoever to suspect that their independent exercise of federal jurisdiction might be somehow corrupted or compromised by their having to enforce undesirable state legislation in cases involving state jurisdiction. And that is fatal to the argument that such legislation undermines public confidence in the Court’s integrity and independence in general. There is simply no reason to think that any reasonable member of the public would suspect that questionable powers such as those conferred on the Supreme Court by the statute in question would have any adverse effect at all on a Court’s discharge of its judicial responsibilities in its federal jurisdiction with complete independence and integrity.

The implausibility of the ‘public confidence’ argument was exposed by Elizabeth Handsley in a much-cited article,²⁹ and criticised by former Chief Justice Sir Anthony Mason.³⁰ Justices in subsequent cases appeared to repudiate the argument until it was recently revived in *Wainohu*.³¹ Heydon J in *Totani* cited various judgments to support the conclusion that undermining ‘public confidence’ is not ‘a criterion of invalidity’ but ‘merely an indication of it’.³² In *Fardon*, Gummow

26 Elizabeth Handsley, ‘Do Hard Laws Make Bad Cases? — The High Court’s Decision in *Kable v Director of Public Prosecutions (NSW)*’ (1997) 25 *Federal Law Review* 171, 176–7; Taylor, above n 18, 448; George Winterton, ‘Introduction’ in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 1, 16. The majority judges in *Kable* acknowledged this point, but did not regard it as decisive: *Kable* (1996) 189 CLR 51, 91–2 (Toohey J).

27 *Kable* (1996) 189 CLR 51, 123.

28 *Wainohu v New South Wales* (2011) 243 CLR 181, 239 [148] (‘*Wainohu*’).

29 Handsley, above n 26, 175–7. See also Winterton, above n 26, 16.

30 Sir Anthony Mason, ‘The Australian Constitution in Retrospect and Prospect’ in Geoffrey Lindell (ed), *The Mason Papers: Selected Articles and Speeches by Sir Anthony Mason AC, KBE* (Federation Press, 2007) 144, 157.

31 See the list of adverse comments in *South Australia v Totani* (2010) 242 CLR 1, 95–6 [245] (Heydon J) (‘*Totani*’). See also: at 49 [73] (French CJ); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 593 [23] (Gleeson CJ) (‘*Fardon*’). For the revival in *Wainohu*, see *Wainohu* (2011) 243 CLR 181, 192 [7], 219 [68] (French CJ and Kiefel J), 225–6 [94], 229 [106] (Gummow, Hayne, Crennan and Bell JJ).

32 (2010) 242 CLR 1, 96 [245].

J said that ‘public confidence’ was merely an indicator of damage to institutional integrity, which was the real ‘touchstone’ of invalidity.³³

But there is an intractable difficulty here: how can the Court satisfy the adverse effect requirement, if it cannot rely on damage to public confidence? How else can it show that a state law of strictly limited operation, when applied by a state court within state jurisdiction, adversely affects the court’s exercise of federal jurisdiction? What other adverse effect on the exercise of federal jurisdiction could the court’s application of the law possibly have? As we will see, the Court has subsequently struggled to find an alternative foundation for the *Kable* doctrine.

The following observation of Gaudron J is often said to express one of the major premises of the majority’s approach:³⁴

To put the matter plainly, there is nothing anywhere in the *Constitution* to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts created by the Parliament.³⁵

Read in context, this seems to be a reference to Commonwealth judicial power, not judicial power in general.³⁶ Gaudron J later added that ‘[o]nce the notion that the *Constitution* permits of different grades or qualities of justice is rejected’, the role of state courts in the integrated Australian judicial system ‘directs the conclusion’ that they may not be given powers that are ‘repugnant to or incompatible with their exercise of the judicial power of the Commonwealth’.³⁷ This suggested that her initial observation was a premise leading to that conclusion.

With respect, such a premise is quite odd. It is true that nothing in the *Constitution* expressly permits different grades or qualities of justice in the exercise of Commonwealth judicial power. But there is also nothing in the *Constitution* that expressly forbids it. The *Constitution* expresses nothing at all about the quality of justice in state courts. The question, then, is whether the *Constitution*’s silence suggests, by implication, that it deals with this question one way or the other. As Gleeson CJ has said:

we are bound by [the framers’] choice *not* to say certain things ... if they remained silent upon a matter, and legitimate techniques of interpretation cannot fill the gap they have left, then we are bound by their silence. In some respects, what the *Constitution* does not say is just as important as what it says.³⁸

33 *Fardon* (2004) 223 CLR 575, 618 [102].

34 See Gabrielle J Appleby and John M Williams, ‘A New Coat of Paint: Law and Order and the Refurbishment of *Kable*’ (2012) 40 *Federal Law Review* 1, 7; Brendan Lim, ‘Attributes and Attribution of State Courts — Federalism and the *Kable* Principle’ (2012) 40 *Federal Law Review* 31, 43.

35 *Kable* (1996) 189 CLR 51, 103.

36 See *ibid* 114–15 (McHugh J), 127 (Gummow J) for similar observations that were more explicit in this regard.

37 *Ibid* 103.

38 Chief Justice Murray Gleeson, *The Rule of Law and the Constitution* (ABC Books, 2000) 16 (original emphasis).

Note that when an organ of government possesses some general power — such as the plenary power of state legislatures — in determining whether or not the power is subject to some legal limit, the default position is this: the power is not so limited unless the limit can be shown to be expressed or implied by some binding law. The question, then, is whether legitimate interpretive techniques establish that, notwithstanding its silence on the matter, the *Constitution* by implication forbids different qualities or grades of justice in state and federal courts. If not, the default position permits such differences. Therefore the onus to establish an implication, in the absence of an express provision, is on those who maintain that the *Constitution* forbids it. Any effort to discharge that onus would presumably have to rely on the argument that a structural implication is necessary to ensure the efficacy of the vesting of federal jurisdiction in state courts. In other words, Gaudron J's observation contributes nothing to that argument. The observation cannot be a premise for the argument, but, instead, depends on it.

Sometimes the majority judges wrote not just of the integrity of the exercise of federal jurisdiction or judicial power by state courts, but of the integrity of 'the [integrated] judicial system brought into existence by Ch III of the *Constitution*'.³⁹ In particular, Gummow J, while explicitly making the 'public confidence' argument that I have criticised, might also have had in mind a more subtle point based on the broader role of state courts in the 'integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth'.⁴⁰ He relied not only on s 77(iii), but also on the provision in s 73(ii) for appeals from Supreme Courts to the High Court, which he said entails that 'the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States'.⁴¹ He clearly regarded this as significant to his conclusion that the state law inflicted 'institutional impairment' on 'the judicial power of the Commonwealth'.⁴²

Precisely why he thought it did so, in this regard, is not clear to me. But he may have had in mind that, if the High Court entertained an appeal from a Supreme Court whose institutional integrity had been damaged by a state law, the High Court's own institutional integrity would also be damaged.⁴³ He does not make this argument explicitly, it is not clear to me how it would proceed, and it would no doubt be met with various objections. First, if the state law required the Supreme Court to exercise a non-judicial function, the High Court would be unable to entertain an appeal against its exercise because the exercise of non-judicial functions falls outside its appellate jurisdiction.⁴⁴ Gummow J himself

39 *Kable* (1996) 189 CLR 51, 108 (Gaudron J).

40 *Ibid* 143. My colleague Dr Patrick Emerton suggested this possibility to me. No published commentators on *Kable* seem to have detected such an argument in Gummow J's judgment.

41 *Ibid* 142.

42 *Ibid* 143.

43 An argument along these lines was made by the Commonwealth in *Momcilovic v The Queen* (2011) 245 CLR 1 ('*Momcilovic*'). See also the discussion in Lim, above n 34, 66–7.

44 *Mellifont v A-G (Qld)* (1991) 173 CLR 289, 299 (Mason CJ, Deane, Dawson, Gaudron and McHugh JJ), 312 (Brennan J); *Mobil Oil Australia Pty Ltd v Victoria* (2002) 211 CLR 1, 27 [20] (Gleeson CJ), 38 [63], 39 [66] (Kirby J); *Momcilovic* (2011) 245 CLR 1, 31–2 [6], 70 [101] (French CJ).

stated that the only reason the High Court had been able to hear Kable's appeal was that he had raised a constitutional issue. In the absence of any such issue, the Court could not have entertained an appeal from the making of the preventive detention order, because that would not have involved an exercise of judicial power.⁴⁵ How could the High Court's institutional integrity be damaged if it could not become involved? Secondly, even if the High Court could entertain an appeal, and decided to grant special leave, it would not directly apply the state law based on fresh evidence tendered to it. It would, instead, decide whether or not the Supreme Court had correctly applied the law, given the evidence put before that Court. The High Court's own process would be strictly one of review, and its institutional integrity in following that process would be undamaged.

B Fardon's Case

One attempted solution to the implausibility of the majority's reasoning in *Kable* has been to drop not only the public confidence argument, but also the adverse effect requirement. The key move was in *Fardon*. To my mind, the most important aspect of that case was a disagreement over basic principles between McHugh and Gummow JJ. It may have been concealed by their subscribing to a joint judgment in the companion case of *Baker v The Queen*,⁴⁶ but that turned on a finding that the challenged law could have been validly enacted even by the Commonwealth Parliament; since it satisfied the full doctrine of the separation of powers, it necessarily satisfied the 'less stringent' requirements of the *Kable* doctrine.⁴⁷ But in *Fardon*, Gummow J's approach was much more like Kirby J's than McHugh J's.

McHugh J described *Kable* as being concerned with 'legislation that ... compromises the institutional integrity of State courts and affects their capacity to exercise federal jurisdiction invested under Ch III impartially and competently'.⁴⁸ He indicated that such legislation was very unlikely to be enacted:⁴⁹

The bare fact that particular State legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial process will seldom, if ever, compromise the institutional integrity of that court to the extent that it affects that court's capacity to exercise federal jurisdiction impartially and according to federal law. ...

That which judges regard as repugnant to the judicial process may be no more than a reflection of their personal dislike of legislation ... State legislation that requires State courts to act in ways inconsistent with the traditional judicial process will be invalid *only when it leads to the conclusion that reasonable persons might think that the legislation*

45 *Kable* (1996) 189 CLR 51, 142–3.

46 (2004) 223 CLR 513 ('*Baker*').

47 Ibid 534 [51] (McHugh, Gummow, Hayne and Heydon JJ).

48 *Fardon* (2004) 223 CLR 575, 598–9 [37] (emphasis added).

49 Ibid 601–2 [43].

*compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law.*⁵⁰

These are very clear reaffirmations of what I have called the adverse effect requirement.

McHugh J explicitly rejected ‘repugnan[cy] to the judicial process’ as the ‘constitutional criterion’.⁵¹ Gummow J, on the other hand, adopted what he called ‘the repugnancy doctrine’,⁵² which he defined vaguely as prohibiting repugnancy to or incompatibility either with a court’s character as a state court available for investment with federal jurisdiction,⁵³ or with ‘that institutional integrity of the State courts which bespeaks their constitutionally mandated position in the Australian legal system’.⁵⁴ In applying this ‘repugnancy doctrine’ to the law in question, he focused entirely on whether or not the law violated the integrity of the Supreme Court, without mentioning any requirement that the law must either actually undermine, or be capable of being reasonably perceived to undermine, its integrity when exercising federal jurisdiction.⁵⁵ ‘Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity’.⁵⁶ Gummow J also insisted that the *Kable* principle was not a ‘dead letter’, as Kirby J had complained.⁵⁷ Perhaps he anticipated its imminent expansion.

Gummow J’s ‘repugnancy doctrine’ was almost identical to Kirby J’s formulation of the applicable test in *Baker* in terms of ‘repugnancy’ to the supposed requirements of Chapter III.⁵⁸ Indeed, in *Fardon*, Kirby J cited Gummow J’s use of that expression in *Kable*.⁵⁹ This principle, Kirby J said, prevents a state from requiring its courts to act in ways ‘inconsistent with traditional judicial process’.⁶⁰ Kirby J also airbrushed any reference to the adverse effect requirement from his description of the majority judgments in *Kable*.⁶¹

Hayne J expressly agreed with Gummow J’s formulation of the principle.⁶² Gleeson CJ framed the issue in terms of whether the function conferred on the Supreme Court was ‘repugnant to’⁶³ or ‘substantially impairs’ the Court’s ‘institutional

50 Ibid 600–1 [41]–[42] (emphasis added).

51 Ibid 601 [42].

52 Ibid 614 [86].

53 Ibid 608 [67].

54 Ibid 617 [101].

55 Ibid 619–21.

56 Ibid 618 [102].

57 Ibid 618 [104]. See Kirby J at 626 [134]–[135]; *Baker* (2004) 223 CLR 513, 561 [142].

58 (2004) 223 CLR 513, 542–4 [79]–[82].

59 *Fardon* (2004) 223 CLR 575, 622 [122], 628 [141].

60 Ibid 628 [141], quoting *Kable* (1996) CLR 51, 98 (Toohey J). See also *Fardon* (2004) 223 CLR 575, 630–1 [144].

61 See *Baker* (2004) 223 CLR 513, 541–2 [74]–[78]; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 562–3 [50] (‘*Gypsy Jokers Motorcycle Club*’).

62 *Fardon* (2004) 223 CLR 575, 647–8 [195]–[198].

63 Ibid 587 [3].

integrity'.⁶⁴ Although he added that such a function was 'incompatible with its role as a repository of federal jurisdiction', he seems to have taken that as given rather than as something to be established.⁶⁵ In the later case of *Forge*,⁶⁶ Gleeson CJ described the *Kable* principle thus:

State legislation which purports to confer upon [a State Supreme Court] ... a function which substantially impairs its institutional integrity, and which is therefore incompatible with its role as a repository of federal jurisdiction, is invalid.⁶⁷

The concluding 'therefore' clause suggests that an adverse effect on federal jurisdiction was now to be simply assumed, although no reason was given for such an assumption.

Callinan and Heydon JJ favoured a narrower definition of the principle by asking:

whether the process which the legislation required the Supreme Court of New South Wales to undertake, was so far removed from a truly judicial process that the Court, by undertaking it, would be so tainted or polluted that it would no longer be a suitable receptacle for the exercise of federal judicial power under Ch III of the *Constitution*.⁶⁸

This suggested that an adverse effect was still required, and that it occurs only when a state law inflicts extreme damage upon a state court's integrity.

But a majority of the Court had, in effect, quietly discarded the adverse effect requirement. It was as if it had served its purpose: like a ladder needed to climb to a higher position, it could be kicked away once that position had been reached. In subsequent cases, the other Justices followed Gummow J's approach, with the sole exception of Heydon J in *Totani*. He quoted McHugh J's insistence in *Fardon* that state legislation is invalid 'only when it leads to the conclusion that reasonable persons might think that the legislation compromises the capacity of State courts to administer invested federal jurisdiction impartially according to federal law'.⁶⁹ Later, Heydon J concluded a number of pointed questions about the application of the *Kable* doctrine to the challenged legislation by asking: 'And how is the court's integrity as a repository of *federal* (as distinct from non-

64 *Ibid* 587, 591 [15]. See also *Baker* (2004) 223 CLR 513, 519 [5].

65 *Fardon* (2004) 223 CLR 575, 591 [15]. On the other hand, the tenor of many of his remarks suggested that he favoured a very strict approach to the application of the principle: at 592–3 [21]–[23]. See also *Baker* (2004) 223 CLR 513, 519–20 [6].

66 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

67 *Ibid* 67 [40] (Gleeson CJ). See also: at 138 [244] (Heydon J). Gleeson CJ's formulation was adopted by Crennan J in *Gypsy Jokers Motorcycle Club* (2008) 234 CLR 532, 591 [159].

68 *Fardon* (2004) 223 CLR 575, 655 [219].

69 *Totani* (2010) 242 CLR 1, 97 [248], quoting *Fardon* (2004) 233 CLR 575, 601 [42] (McHugh J). See also *Wainohu* (2011) 243 CLR 181, 242 [159] (Heydon J).

federal) jurisdiction affected?⁷⁰ On the other hand, in *Momcilovic*, even Heydon J shifted to an extremely broad version of the *Kable* doctrine.⁷¹

C Forge's Case

One way to justify discarding the adverse effect requirement is to adopt a different justification of the *Kable* doctrine, so that it is not a structural implication dependent on being necessary to protect the exercise of federal jurisdiction. The seeds of this different justification may have been sown in *Kable*,⁷² but it first came to prominence in *Forge*. It is often said today that interpretation of the *Constitution* must focus on its 'text and structure'.⁷³ The key move in *Forge* was to shift the focus from structure to text, namely, the words 'court' and 'Supreme Court' in ss 73(ii) and 77(iii). Gummow, Hayne and Crennan JJ said:

Because Ch III requires that there be a body fitting the description 'the Supreme Court of a State', 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 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 characteristics which mark a court apart from other decision-making bodies.⁷⁴

On this view, the true rationale for the integrity requirement is that, if a law removes from a state court any of the 'defining characteristics' of a court, then it is no longer a court and loses its eligibility to be vested with federal jurisdiction. If this is indeed 'the relevant principle' established by *Kable*, there is no need to show that a state law has an adverse effect on a state court's exercise of federal jurisdiction.

There is nothing wrong with the major premise. It is true that under Chapter III the High Court can hear appeals only from state Supreme Courts and state courts vested with federal jurisdiction, and not from other state bodies, and that federal jurisdiction can be invested only in state courts, and not in other state bodies.

70 *Totani* (2010) 242 CLR 1, 123 [323] (emphasis in original).

71 See *Momcilovic* (2011) 245 CLR 1, 174–5 [436]–[437]. But see Heydon J's subsequent scathing criticisms of the *Kable* doctrine in *Public Service Association and Professional Officers' Association Amalgamated (NSW) v Director of Public Employment* (2012) 293 ALR 450, 467–70 [62]–[70].

72 See, eg, *Kable* (1996) 189 CLR 51, 117 (McHugh J), 139, 141–3 (Gummow J); *Fardon* (2004) 223 CLR 575, 626–7 [136]–[138] (Kirby J).

73 This terminology has been frequently used since its appearance in *Lange* (1997) 189 CLR 520, 566–7.

74 *Forge* (2006) 228 CLR 45, 76 [63]. On 'defining characteristics' see Jeffrey Goldsworthy, 'Original Meanings and Contemporary Understandings in Constitutional Interpretation' in H P Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent — Essays in Honour of George Winterton* (Federation Press, 2009) 245, 257–61.

It is also true that, like other terms in the *Constitution*, the words ‘court’ and ‘Supreme Court’ must have meanings, which might be capable of expression in lists of ‘defining characteristics’.⁷⁵ But there are major problems with the Court’s application of this premise.

One problem is that, arguably, the consequence of a state institution ceasing to possess all the essential characteristics of a court due to the operation of some state law should be, not that the law is invalid, but that the unfortunate institution that was formerly a court is no longer eligible to exercise federal jurisdiction. But I will put that problem aside: the High Court held otherwise in *K-Generation Pty Ltd v Liquor Licensing Court*.⁷⁶

A second and more daunting problem arises if the ‘defining characteristics’ of a ‘court’ today must be the same as they were in 1900.⁷⁷ With the exception of Kirby J, the general approach of the Justices, most notably in the later case of *Kirk*, suggests that they must be.⁷⁸ But if so, strong claims about the necessity for independence from the executive branch are implausible. As noted in *Forge*, before and long after federation, state magistrates were part of the public service.⁷⁹ Gummow, Hayne and Crennan JJ denied that this meant that ‘real and perceived independence and impartiality’ were not partly definitive of a ‘court’.⁸⁰ They insisted that it meant merely that ‘different mechanisms for ensuring independence and impartiality’ applied to different levels of courts.⁸¹ But in *Kable*, Dawson J noted that ‘in South Australia at federation an appeal lay from the Supreme Court to the Court of Appeals which comprised the Governor in Executive Council’.⁸² The formal existence of this Court was the reason why special provision was made in s 73(ii) of the *Constitution* for appeals to the High Court from any Supreme Court or ‘any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council’.⁸³ In 1905, Griffith CJ said that this was ‘common knowledge’.⁸⁴ Even if by 1900 this Court had become, for practical purposes, defunct,⁸⁵ it was still universally referred to as a ‘court’ — no-one suggested that it lacked the defining characteristics of a court.

75 Ibid 121–3 [192]–[195] (Kirby J).

76 (2009) 237 CLR 501, 532 [99] (French CJ), 543–4 [152]–[154] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 567–9 [235]–[243] (Kirby J) (*K-Generation*).

77 *Forge* (2006) 228 CLR 45, 141–2 [256] (Heydon J). *Contra* at 126 [206] (Kirby J).

78 See below Part II (D) for a discussion of French CJ’s approach in *Totani*; see below Part III (A) for a discussion of the Court’s approach in *Kirk*. See also Goldsworthy, ‘Australia: Devotion to Legalism’, above n 7, 150–4.

79 *Forge* (2006) 228 CLR 45, 65–6 [36] (Gleeson CJ), 82 [82] (Gummow, Hayne and Crennan JJ). See also *Totani* (2010) 242 CLR 1, 39 [53], 40–1 [57] (French CJ).

80 *Forge* (2006) 228 CLR 45, 83 [85].

81 Ibid. See also at 82–3 [84].

82 *Kable* (1996) 189 CLR 51, 81.

83 *Australian Constitution* s 73(ii), discussed in *Kable* (1996) 189 CLR 51, 111–12. McHugh J noted that ‘this “court” does not seem to have exercised jurisdiction for many years’: at 111–12 n 216. The court was apparently ‘virtually obsolete’ by 1900, but survived until 1936: Bradley Selway, *The Constitution of South Australia* (Federation Press, 1997) 108 n 9.

84 *Parkin v James* (1905) 2 CLR 315, 330.

85 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 743.

It is also notable that in 1900 the Chief Justice of a state was, and in at least some states still is, the state's Lieutenant-Governor, and other Supreme Court judges can be appointed as its Administrator.⁸⁶ In Victoria, for example, the current Chief Justice has been appointed as the Lieutenant-Governor.⁸⁷ Whether or not this should now be regarded as inappropriate,⁸⁸ the point is that in 1900 no one seems to have considered that it was inconsistent with the definition of the words 'Supreme Court', or for that matter, with basic constitutional principles.

A third problem is that the premise lacks a persuasive application in the kinds of cases that have arisen, such as *Kable, International Finance Trust Co Ltd v New South Wales Crime Commission*,⁸⁹ *Totani* and *Wainohu*. It is hard enough to accept that a state court could not accurately be called a 'court' if and when it exercised the kinds of functions held invalid in those cases. It is even harder to accept that it would lose its character as a court for all purposes, including the exercise of federal jurisdiction. A clock does not cease to be a clock when it no longer tells the time accurately; it becomes a defective clock. *A fortiori*, when the clock functions perfectly well except on isolated occasions, such as when it is held under water. Even if it would not deserve to be called a clock when not working while under water, it would unquestionably be a clock when, upon being returned to normal conditions, it again begins to work properly. In an extreme case, it might become so permanently defective that it would cease to be a clock — if, for example, all its numbers and hands fell off, or its mechanism completely failed.

So, too, with the concepts of 'judge' and 'court'. Even if a judge were shown to have been actually biased in a particular case, for reasons unlikely to recur, we would say that the judge had been a defective judge in that case, and not that he could no longer be regarded as a judge at all (although it might justify his removal from office). Similarly, a court's defects must be extreme indeed before we can plausibly say that it is no longer a court. In *Forge*, Gleeson CJ was therefore right to say: 'It is possible to imagine extreme cases in which abuse of the power [to appoint acting judges] ... could so affect the character of the Supreme Court that it no longer answered the description of a court', but that this was not such a case.⁹⁰ When the alleged defect affects only the exercise of powers under a particular statute in state jurisdiction, it cannot possibly deprive the court of its identity as a court for all purposes, including its exercise of federal jurisdiction (just as the malfunctioning of a clock when held under water cannot deprive it of its identity as a clock when it is functioning normally).

Consider the first Builders' Labourers Federation (BLF) case in 1986, in which the NSW Court of Appeal declined to invalidate state legislation that required the Supreme Court to uphold the validity of a Ministerial order challenged by the

86 See, eg, *Constitution Act 1975* (Vic) s 6A.

87 Taylor, above n 18, 81.

88 See Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 271 n 102, 368.

89 (2009) 240 CLR 319 ('*International Finance Trust*').

90 *Forge* (2006) 228 CLR 45, 69 [46]. See also at 87 [97] (Gummow, Hayne and Crennan JJ).

BLF in pending proceedings, and to award costs against the BLF.⁹¹ Today, that legislation would probably be held invalid for infringing the *Kable* doctrine, a result that many would applaud.⁹² Yet it did not occur to anybody at the time, or subsequently, that one effect of the legislation was that the Supreme Court had ceased to be a court, even in that case itself, let alone in other cases when it was able to operate with traditional judicial processes intact.

In the latest instalment of the *Kable* saga, *New South Wales v Kable*, the High Court rejected Mr Kable's claim for damages for false imprisonment by denying that, in enforcing the state statute that the High Court had previously held invalid, the Supreme Court had not acted as a 'court'.⁹³ To the contrary, '[t]he incompatibility with institutional integrity which was identified in *Kable (No 1)* lay in the Supreme Court being required to act *as a court* in the performance of a function identified as not being a function for the judicial branch of government'.⁹⁴ The detention order made by the Supreme Court under the statute was 'a judicial order of a superior court of record',⁹⁵ made in the Court's 'judicial capacity'.⁹⁶ This seems fatal to the suggestion in *Forge* that 'the relevant principle' underlying the *Kable* line of authority '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'.⁹⁷ It has been frequently observed that the legislation invalidated in *Kable* was very unusual and extreme in its departure from traditional judicial processes; if its operation did not cause the Supreme Court to lose its identity as a 'court', it is hard to imagine any other legislation that is likely to be enacted doing so.

In *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police*, in the Supreme Court of Western Australia, Steytler P explained what follows logically from the *Kable* principle, as reinterpreted by Gummow, Hayne and Crennan JJ in *Forge*, when he said that:

Unless there is something extraordinary in the legislation (as was the case in *Kable*), legislation having a limited operation in the exercise of State jurisdiction is unlikely to alter the essential characteristics of a Supreme Court, or the public's perception of them, to such a degree as to detract from its fitness to be a repository of federal jurisdiction of the kind contemplated by the framers of the constitution.⁹⁸

This explanation was answered by Kirby J as follows:

91 *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

92 This is not completely certain: for discussion, see Fiona Wheeler, 'BLF v Minister for Industrial Relations: The Limits of State Legislative and Judicial Power' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 362, 385–6.

93 (2013) 87 ALJR 737, 742–3 [15]–[16] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

94 *Ibid* 742 [16] (emphasis in original).

95 *Ibid* 747 [41] (Gageler J).

96 *Ibid* 745 [27] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

97 *Forge* (2006) 228 CLR 45, 76 [63], discussed at above n 74 and accompanying text.

98 (2007) 33 WAR 245, 270 [87].

The basic error of the majority in the Court of Appeal lay in their conclusion that, to find offence to the *Kable* principle, the appellant had to show that the impugned legislation rendered the Supreme Court ‘no longer a court of the kind contemplated by Ch III’. If that were indeed the criterion to be applied, it would be rare, if ever, that constitutional incompatibility could be shown. *Kable*’s constitutional toothlessness would then be revealed for all to see. The fact is that, whatever the outcome of this case, the Supreme Court would continue to discharge its regular functions. Overwhelmingly, it would do so as the *Constitution* requires. A particular provision, such as s 76 of the Act, will rarely be such as to poison the entire character and performance by a Supreme Court of its constitutional mandate as such or alone to result in a complete re-characterisation of the Court.

Adoption of such an approach would, in effect, define the *Kable* doctrine out of existence. This should not be done.⁹⁹

This seems to amount to the claim that, even if the justification that had been given for the *Kable* doctrine is such that, logically, the doctrine would rarely apply, it should be given a much broader scope and operation because that would be a good thing to do.

D *French CJ in Totani*

In *Totani*, French CJ denied that the crucial question was whether or not legislation damaged a state court’s institutional integrity to such an extent that it could no longer be called a ‘court’.¹⁰⁰ He said that instead, the question was whether or not:

the court is required or empowered by the impugned legislation to do something which is substantially inconsistent or incompatible with the continuing subsistence, in every aspect of its judicial role, of its defining characteristics as a court. So much is implicit in the constitutional mandate of continuing institutional integrity.¹⁰¹

The problem is that this requirement does not seem to follow from the rationale for the requirement of institutional integrity suggested by Gummow, Hayne and Crennan JJ in *Forge*. It is therefore not surprising that in *Totani*, French CJ proposed yet another justification for the *Kable* principle. As two commentators have observed, his judgment ‘appear[s] strongly defensive of the legitimacy of the judicial creation of the limitation’,¹⁰² an observation whose use of the word ‘creation’ itself implies illegitimacy, given that the Court has no authority to create new constitutional limitations of legislative power.

99 *Gypsy Jokers Motorcycle Club* (2008) 234 CLR 532, 578 [105]–[106] (citations omitted).

100 *Totani* (2010) 242 CLR 1, 48 [70].

101 *Ibid.*

102 Appleby and Williams, above n 34, 15.

French CJ argued that the *Constitution* guarantees the independence of state, as well as federal and territory courts,¹⁰³ because in 1900 this was an unexpressed assumption of Chapter III.¹⁰⁴ He denied that this assumption is ‘the product of judicial implication’, on the ground that it was a historical reality at the time of Federation.¹⁰⁵ Although he also suggested that it informs the meaning of the word ‘court’ in Chapter III,¹⁰⁶ for the most part he relied on the idea of an unstated, underlying assumption. In *Wainohu*, a somewhat similar claim was made by Gummow, Hayne, Crennan and Bell JJ, who asserted that a constitutional principle protecting the institutional integrity of all Australian courts exists ‘because it has been appreciated since federation that the *Constitution* does not permit of different grades or qualities of justice’.¹⁰⁷

French CJ’s suggestion might be criticised on the ground that the founders’ assumptions about how the *Constitution* would operate are not necessarily part of the *Constitution*.¹⁰⁸ Consider, for example, their assumptions about the role of the Senate as a ‘States’ House’. But I take the view that some unexpressed assumptions can form part of the meaning of a legal text. This is because the meaning of every communication depends to some extent on implicit or background assumptions — when the speaker knows that these are so obvious to the intended audience that they can be taken for granted, they do not need to be expressed. Indeed, it is in the interests of efficiency, simplicity and clarity that they are not expressed.¹⁰⁹

The difficulty for French CJ’s suggestion is that, once again, it is not historically plausible that a constitutional guarantee of the independence of state courts was, in the 1890s, regarded as so obvious that it could be taken for granted and did not need to be expressed. If so, why did the independence of federal judges need to be explicitly protected in s 72? Why not leave that, also, to be taken for granted? And what about the examples mentioned previously, of judicial practices in 1900 that are inconsistent with modern sensibilities?¹¹⁰ French CJ’s approach involves elevating expectations about the judicial independence of colonial judges, which were at best constitutional conventions, into legal norms that the founders assumed the *Constitution* would protect without any need for an express provision to that effect. A historically more plausible view is that the founders did not think the *Constitution* needed to protect those expectations, because they were confident that conventional practices would be followed. At one point, French CJ quoted this statement of Geoffrey Saver: ‘The State Supreme Courts were of a very high and uniform calibre ... and there was no substantial ground for fearing that they

103 *Totani* (2010) 242 CLR 1, 20 [1], 21 [4], 50 [74].

104 *Ibid* 21 [4], 30 [31], 37 [47], 38 [50], 41 [58], 42–5 [61]–[65].

105 *Ibid* 37 [47]. See also at 38 [50], 49 [72].

106 *Ibid* 30 [31], 44 [64], 45 [66], 46 [68], 48 [70], 52–3 [83].

107 *Wainohu* (2011) 243 CLR 181, 228–9 [105]. See also discussion accompanying above nn 34–8.

108 See, eg, *ACTV* (1992) 177 CLR 106, 136 (Mason CJ).

109 Jeffrey Goldsworthy, ‘Implications in Language, Law and the Constitution’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150.

110 See also Appleby and Williams, above n 34, 16.

would be biased or parochial in their approach to federal questions'.¹¹¹ Precisely: the framers thought that there was no need for the *Constitution* to guarantee the independence of state judges because they had no fear that the judges would not act independently. Even if the framers were over-confident, or dangerously complacent, that does not change the plain fact that they deliberately chose to guarantee the independence of federal judges but not state ones.

E The Accumulation of Minor Infringements

In *International Finance Trust*, French CJ said:

It is not ... to the point to say that the particular intrusion upon the judicial function ... is confined in scope and limited in effect ... Such a calculus will not accord sufficient significance to the quality of the intrusion upon the judicial function. An accumulation of such intrusions, each 'minor' in practical terms, could amount over time to death of the judicial function by a thousand cuts.¹¹²

This raises an issue that has surfaced in other cases dealing with implied freedoms and immunities. In *Queensland Electricity Commission v Commonwealth*,¹¹³ for example, Gibbs CJ stated that:

the Court would not be justified in upholding the legislation on the ground that the interference with the State was of no great importance ... The integrity of a State could be destroyed as effectively by a succession of minor infringements as by one gross violation of the principle.¹¹⁴

This is an issue that I have discussed elsewhere.¹¹⁵

There would be great difficulty in adopting a policy of 'zero tolerance' of even minor infringements of the institutional integrity of state courts. One problem is that it would not be consistent with frequent statements that only 'substantial' impairments of institutional integrity, or repugnance to the traditional judicial process 'in a fundamental degree', are invalid.¹¹⁶ For example, it would cast doubt on Gleeson CJ's statement in *Forge* that, while it was 'possible to imagine extreme cases in which abuse of the power [to appoint acting judges] ... could so affect the character of the Supreme Court that it no longer answered the description of a court', this was not such a case.¹¹⁷ A second problem is that if a state law

111 *Totani* (2010) 242 CLR 1, 42 [61], quoting Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 20–1.

112 *International Finance Trust* (2009) 240 CLR 319, 355 [57].

113 (1985) 159 CLR 192.

114 *Ibid* 208–9 (Gibbs CJ). See also at 226 (Wilson J), 262 (Dawson J).

115 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 29–31.

116 *International Finance Trust* (2009) 240 CLR 319, 363 [87] (Gummow and Bell JJ); *Assistant Commissioner Michael James Condon v Pompano Pty Ltd* (2013) 295 ALR 638, 641 [4], 641 [6], 675 [131] (French CJ) ('*Pompano*'). See also above nn 64, 67 and 68.

117 *Forge* (2006) 228 CLR 45, 69 [46]. See also at 87 [97] (Gummow, Hayne and Crennan JJ).

applied by a state court in its exercise of state jurisdiction has no adverse effect whatsoever on its exercise of federal jurisdiction, then a succession of state laws that also have no such effect would make no difference. No matter how many zeroes are added up, the sum is still zero.

F Conclusion

The ‘institutional integrity’ of a state court has become the touchstone for validity, without any need to show an adverse effect on the court’s exercise of federal jurisdiction. Statements of the *Kable* doctrine now routinely recite or assume that a supposed detraction from integrity is ‘therefore’ incompatible with the exercise of federal jurisdiction, with no attempt to explain why.¹¹⁸ But consider the laws invalidated in *Kable*, *International Finance Trust*, *Totani* and *Wainohu*, and ask whether (a) they would have given rise to a reasonable apprehension that the state courts in question might not have exercised federal jurisdiction with independence and integrity, or (b) they would have made it impossible to call those courts ‘courts’. The answer to both questions is clearly ‘no’.

III THE KIRK CASE

A The Decision and Reasoning in Kirk

In *Kirk*,¹¹⁹ the High Court unanimously held that a state Parliament cannot validly enact what I will call a ‘strong’ privative or ouster clause, which removes from the state’s Supreme Court its jurisdiction to review the decisions of inferior courts or administrative bodies in order to prevent or remedy jurisdictional errors. For simplicity, I will refer to this as the Supreme Court’s ‘jurisdiction-enforcing jurisdiction’.

The case itself did not involve a strong privative clause. The clause in question, s 179 of the *Industrial Relations Act 1996* (NSW), merely required that an appeal be taken to the Full Bench of the Industrial Court before any application for judicial review could be entertained, and it permitted judicial review of Full Bench decisions for jurisdictional error.¹²⁰ Mr Kirk initially chose not to take that route, anticipating that it would be fruitless; he opted instead to seek redress through other avenues including immediate judicial review, but in doing so ran out of time to appeal to the Full Bench.¹²¹ So it appears not to be a case in which a strong privative clause prevented the superior courts from curing an injustice that

118 For a recent conflation of the two ideas, see *Pompano* (2013) 295 ALR 638, 673 [123] (Hayne, Crennan, Kiefel and Bell JJ).

119 (2010) 239 CLR 531.

120 See discussion in *Kirk Group Holdings Pty Ltd v Workcover Authority of New South Wales* (2006) 66 NSWLR 151, 157–9 [25]–[34] (Spigelman CJ), 182 [141], 185 [154] (Basten JA).

121 *Ibid* 157–8 [25] (Spigelman CJ).

in its absence they could have remedied. It seems to follow that the High Court's observations about privative clauses are unnecessary obiter dicta.¹²²

Until this decision, it had been universally assumed and sometimes judicially asserted that state Parliaments could validly enact strong privative clauses, and in many previous cases courts considered how to interpret them, without ever suggesting that they might be invalid.¹²³ The Court's reasoning for reaching the opposite conclusion is very brief; indeed, it is perfunctory.¹²⁴ There are two strands to the reasoning. The first concerns policy, and one commentator has described *Kirk* as 'primarily policy driven'.¹²⁵ The Court argued that it would be undesirable for 'islands of power' to be separated from the mainstream of Australian law by a strong privative clause that prevented jurisdictional errors being prevented or remedied either through appeal or judicial review.¹²⁶ There is much to be said for this policy consideration, although there is also something to be said against it.¹²⁷ But the most important point is that in legal reasoning, policy considerations do not trump law. Policy can be relevant or even decisive when the law is under-determinate, due to problems such as ambiguity, vagueness or inconsistency. If, for example, the law is ambiguous, it must count in favour of one of the alternative possible meanings that it would better serve the public interest, either because the legislature can reasonably be presumed to intend to advance the public interest, or as a tie-breaker if legislative intent is itself stubbornly ambiguous. But if the law is determinate, it cannot legally be overridden because judges, for reasons of policy, disapprove of it.

The second strand to the Court's reasoning, which constitutes the only strictly legal ground for its decision, was 'originalist'.¹²⁸ The Court fixed on s 73(ii) of the *Constitution*, which provides for appeals from state Supreme Courts to the High Court, and reasoned that in 1900, when the *Constitution* was enacted, it was a 'defining characteristic' of a state Supreme Court that it had jurisdiction-enforcing jurisdiction.¹²⁹ The Court's reasoning is therefore that any strong privative clause purporting to remove or restrict the Supreme Court's jurisdiction-enforcing jurisdiction would be inconsistent with the definition of the words 'Supreme Court' in s 73(ii) of the *Constitution*. In other words, any such privative clause would be inconsistent with the Supreme Court being a 'Supreme Court',

122 Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34 *Melbourne University Law Review* 870, 876; Justice John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 273–5.

123 See Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook Co, 5th ed, 2013) ch 17.

124 Justice John Basten wonders whether this was because this issue did not have to be decided, and therefore was not fully argued: Basten, above n 122, 273.

125 Gouliaditis, above n 122, 879.

126 *Kirk* (2010) 239 CLR 531, 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

127 See, eg, H W Arthurs, 'Rethinking Administrative Law: A Slightly Dicey Business' (1979) 17 *Osgoode Hall Law Journal* 1; Michael Sexton and Julia Quilter, 'Privative Clauses and State Constitutions' (2003) 5 *Constitutional Law and Policy Review* 69; Nicholas Bagley, 'The Puzzling Presumption of Reviewability' (2014) 127 *Harvard Law Review* 1285.

128 See Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1.

129 *Kirk* (2010) 239 CLR 531, 566–7 [55], 580–1 [98]–[99].

and therefore (after 1900) inconsistent with the constitutional requirement that there be a Supreme Court in every state.

When I first read this reasoning it immediately struck me as very implausible, and I said so in print.¹³⁰ Think about what it means to say that something was a ‘defining characteristic’ of some term in 1900. In 1900, it was a defining characteristic of the term ‘bachelor’ that it applied only to unmarried adult men. The term was universally used in this sense at the time, and if people had been asked whether a man could get married but still be a bachelor they would have replied ‘of course not’. But in the case of the term ‘Supreme Court’, no one before *Kirk* — neither around the time of federation, nor subsequently — adverted to the supposed conceptual truth that by definition such a court must have jurisdiction-enforcing jurisdiction. Even though numerous privative clauses had been enacted and judicially considered, no one had ever observed that if such a clause were effective, the state’s highest court would no longer be a ‘Supreme Court’. Indeed, as I will show, what they said in discussing privative clauses strongly suggests that they had the opposite understanding of the definition of that term. In *Kirk*, the High Court asked us to believe that all these privative clauses were inconsistent with the definition of a term central to the legal and constitutional thinking of legislators, lawyers and judges in and around the year 1900, although none of them said so and, indeed, their use of the term plainly assumed the opposite. In effect, the Court claimed that, 110 years later, it had suddenly arrived at a more accurate understanding of one of their concepts than they themselves possessed.

The High Court did cite one (and only one) authority in support of its conclusion: *Colonial Bank of Australasia v Willan*, in which the Privy Council held that a standard ‘no certiorari’ clause was ineffective to prevent judicial review for a manifest defect of jurisdiction or manifest fraud.¹³¹ According to the Court, the *Willan* decision proves that when the *Constitution* was framed, established legal doctrine had made it a defining characteristic of a colonial Supreme Court that it had jurisdiction-enforcing jurisdiction.

Oscar Roos has critically examined this aspect of the High Court’s reasoning in *Kirk*.¹³² He first asks what this reasoning really amounts to. Was the Court asserting that: (a) even before 1900, colonial Supreme Courts could not lawfully be divested of their jurisdiction-enforcing jurisdiction (which he calls the ‘pre-Federation entrenchment theory’) (this may seem far-fetched, but many other commentators have surmised that it is what the High Court meant);¹³³ or (b) by requiring the continuing existence of Supreme Courts, the *Constitution* entrenched their defining characteristics including their possession of jurisdiction-enforcing jurisdiction (which he calls the ‘on-Federation entrenchment theory’). Roos then

130 Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’, above n 8.

131 (1874) LR 5 PC 417 (‘*Willan*’).

132 Oscar I Roos, ‘Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*’ (2013) 35 *Sydney Law Review* 781.

133 *Ibid* 785.

shows that on either interpretation of the Court's reasoning, there is little that can be said in its support.¹³⁴

The pre-Federation entrenchment theory is easily disposed of. Roos reminds us that the undisputed constitutional position prior to 1900 was that colonial legislatures had plenary law-making power that extended to their own judiciatures. Section 5 of the *Colonial Laws Validity Act 1865* (UK) confirmed that they possessed 'full power ... to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof', a power subject only to a handful of limitations embodied in Imperial legislation, none of which protected the jurisdictions of colonial courts. Roos also provides examples of colonial legislation that made fundamental changes to the constitutions or jurisdictions of the local judicature.¹³⁵

According to the High Court, the Privy Council's judgment in *Willan* shows that 'accepted doctrine at the time of federation was that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision'.¹³⁶ But there are two major problems with this conclusion. First, as Gleeson CJ pointed out in *Plaintiff S157/2002 v Commonwealth*, the references in *Willan* to 'manifest defect of jurisdiction' and 'manifest fraud' are reminiscent of the *Hickman* provisos.¹³⁷ Therefore, as Nick Gouliaditis explains, far from *Willan* being authority for the conclusion reached in *Kirk*, it 'appears to be authority for the opposite — that a privative clause *could*, at federation, operate to prevent judicial review by a state supreme court on the grounds of jurisdictional error, subject only to limits equivalent to the *Hickman* provisos'.¹³⁸ The second problem is that, as Roos demonstrates, regardless of the scope of the decision in *Willan*, it always was, and can only be, understood to concern the interpretation of privative clauses, not the legislative power of colonial legislatures to enact them.¹³⁹ In other words, if before 1900 a 'statutory privative provision' explicitly denied jurisdiction to grant certiorari, using language that could not be read down by interpretation, then it simply could not have been 'accepted doctrine' that the provision was ineffective. Otherwise, the Privy Council's position in *Willan* would have flouted the *Colonial Laws Validity Act 1865* (UK) and other Imperial instruments that conferred plenary powers on colonial legislatures. That is why counsel for Mr Willan himself conceded in argument that a colonial legislature could, if it used sufficiently explicit language, divest its Supreme Court of jurisdiction to grant certiorari.¹⁴⁰

Gouliaditis and Roos also point out that in its judgment, the High Court curiously ignored an 1892 decision of the Victorian Supreme Court, in *Re Biel*,¹⁴¹ which

134 Ibid 785–807.

135 Ibid 788 n 40.

136 *Kirk* (2010) 239 CLR 531, 580 [97].

137 (2003) 211 CLR 476, 487 [18], quoted in Gouliaditis, above n 122, 877.

138 Gouliaditis, above n 122, 877–8 (emphasis in original).

139 Roos, above n 132, 788–91.

140 *Willan* (1874) LR 5 PC 417, 433, cited in Roos, above n 132, 790–1 n 57.

141 (1892) 18 VLR 456.

was raised in argument in *Kirk* and contradicted the High Court's subsequent published reasoning.¹⁴² As Roos notes, the Supreme Court in *Re Biel* did not purport to disagree with the Privy Council's judgment in *Willan*, but distinguished the privative clause before it on the ground that its wording was too explicit to be 'read down' in the same way as the clause in *Willan*. *Re Biel* cannot be discounted on the ground that it is inconsistent with the superior authority of the Privy Council in *Willan*. A decision interpreting one clause cannot be inconsistent with a decision interpreting a materially different clause. If the High Court in *Kirk* thought that the Victorian Supreme Court in *Re Biel* was wrong to regard its privative clause as materially distinguishable from the one in *Willan*, the High Court surely had an obligation to explain why. But even if it could have done so, the issue in *Willan* would still have been one of statutory interpretation, not legislative power. Either colonial legislatures could, in principle, prevent their Supreme Courts from issuing certiorari, or they could not. And as a matter of law, it is indisputable that they could. Indeed, they could have abolished their Supreme Courts, given the explicit wording of s 5 of the *Colonial Laws Validity Act 1865*.

Turning to what Roos calls the 'on-Federation entrenchment theory', it maintains that although every colonial legislature had lawmaking power to prevent its Supreme Court issuing certiorari, if that power had been exercised the court would no longer have been regarded as — and therefore, would no longer have been — a 'Supreme Court'. That would not have been a constitutional barrier to the enactment of a privative clause before 1900, when colonies were not constitutionally required to have a Supreme Court. But according to this theory, by impliedly mandating that every state must always have a Supreme Court, s 73(ii) of the *Constitution* had the effect of entrenching this definitional truth. In other words, because state Parliaments lost the power to abolish their Supreme Courts, they also lost their power to remove any of their Supreme Courts' defining characteristics, including their jurisdiction-enforcing jurisdiction.

The problem with this theory is that there is no evidence whatsoever for it, and strong evidence against it. If it were true that, during the relevant period before and after 1900, a privative clause depriving a Supreme Court of its jurisdiction-enforcing jurisdiction would have been regarded as depriving it of its identity as a 'Supreme Court', surely someone would have noticed this and said so. Yet no one ever did, not in *Willan*, or in *Re Biel*, or in cases in the early 1900s in which privative clauses were discussed. Indeed, counsel's submissions in *Willan* conceding that an explicit privative clause would be effective, and the decision in *Re Biel*, are direct evidence to the contrary. In *Re Biel*, the Victorian Supreme Court upheld the efficacy of an unusually explicit privative clause while apparently being blissfully unaware that, as a result, it was no longer entitled to be called a 'Supreme Court'.

142 For the argument in *Kirk*, see Transcript of Proceedings, *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 239 (1 October 2009). See also *Kirk* (2010) 239 CLR 531, 543–4, 548. *Re Biel* is discussed by Gouliaditis, above n 122, 878–9; Roos, above n 132, 791–2. See also Luke Beck, 'What is a "Supreme Court of a State"?' (2012) 34 *Sydney Law Review* 295, 302–3.

There is additional evidence against the theory. If it were correct, then one would expect High Court judges immediately after federation to use the term ‘Supreme Court’ consistently with this postulated meaning — unless its meaning abruptly changed just after 1900, which is not credible. For that reason, the interpretive maxim *contemporanea expositio* is relevant here. But Roos cites two early High Court decisions — *Clancy v Butchers’ Shop Employees Union*¹⁴³ in 1904, and *Baxter v New South Wales Clickers’ Association*¹⁴⁴ in 1909 — in which the earliest High Court judges expressed the opposite view, and indeed, referred to that view as ‘obvious’. In *Clancy*, Griffith CJ and Barton J assumed, and O’Connor J expressly asserted, that a state Parliament had power to enact a privative clause preventing its Supreme Court from issuing certiorari to correct jurisdictional errors.¹⁴⁵ In *Baxter*, Barton, O’Connor and Isaacs JJ expressly asserted the same thing, and Barton and O’Connor JJ in separate judgments both said that ‘of course’ this was true.¹⁴⁶ If the enactment of such a clause would have entailed that what was until then a ‘Supreme Court’ was no longer a ‘Supreme Court’, because it would have lost one of its defining characteristics (according to the contemporaneous understanding of that term), surely these Justices would have said so. Just like *Re Biel*, these two cases were raised in argument but strangely ignored (apart from one reference to *Baxter* on a different point) by the High Court in its judgment in *Kirk*.¹⁴⁷

There is also a statement of Griffith CJ, in *Holmes v Angwin*, that:

it is always competent for a legislature of plenary jurisdiction to create a new tribunal for any purpose it thinks fit, and to declare that its decision shall be final and without appeal; subject, of course, to the prerogative of the Sovereign and to any over-riding statutory right of appeal.¹⁴⁸

He was discussing jurisdiction conferred on the Western Australian Court of Disputed Returns by the *Electoral Act 1904* (WA), s 167 of which provided that ‘[a]ll decisions of the Court shall be final and conclusive without appeal, and shall not be questioned in any way’.

It might be claimed that the High Court was relying on the practice of courts before 1900, rather than on whatever they may have said about their practice. If their consistent practice was to refuse to give effect to no certiorari clauses (with the sole exception of *Re Biel*), then despite the practice being formally justified as an ‘interpretation’ of such clauses, it might be argued that the courts simply refused to allow Supreme Courts to be divested of their jurisdiction-enforcing jurisdiction, which should therefore be regarded as an ‘essential’ and therefore

143 (1904) 1 CLR 181 (*‘Clancy’*).

144 (1909) 10 CLR 114 (*‘Baxter’*).

145 (1904) 1 CLR 181, 196–7 (Griffith CJ), 203–4 (Barton J), 204–5 (O’Connor J), cited in Roos, above n 132, 796.

146 (1909) 10 CLR 114, 140 (Barton J), 146 (O’Connor J), 161 (Isaacs J), cited in Roos, above n 132, 796–7.

147 Transcript of Proceedings, *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 239 (1 October 2009), cited by Roos, above n 132, 797–8 n 106.

148 (1906) 4 CLR 297, 303–4.

‘defining’ characteristic of such a Court. In his submissions to the High Court in *Kirk*, Commonwealth Solicitor-General Stephen Gageler argued that:

with the one exception of *In re Biel* one can say, I think with some confidence, that such jurisdiction was *in fact* a characteristic of each Supreme Court inherited from the Court of Queen’s Bench as at 1900, added to by statute, never taken away and jealously guarded by the courts
 ...¹⁴⁹

The problem is that the courts’ need to formally justify their stance in terms of the interpretation rather than the validity of privative clauses — because of the indisputable constitutional authority of colonial legislatures to enact them — cannot be easily ignored. If at that time there was a judicial policy of staunch refusal to give effect to such clauses, whatever their wording, the policy could not have been openly acknowledged due to its being contrary to the *Colonial Laws Validity Act 1865* (UK). It could only have been a surreptitious, informal policy, kept strictly ‘off the books’. It is very hard to see how such a policy could have influenced the formal, public legal meaning of words in the *Constitution*. The policy would have been confined to the ‘subjective intentions’ of the judges, and the High Court does not allow the public meaning of a law to be determined by subjective intentions.¹⁵⁰

Roos also points out that the High Court in *Kirk* seems to have relied on what it describes as ‘established doctrine’ in 1900, to entrench the modern doctrine of jurisdictional error (insofar as there still is an intelligible doctrine), which is far broader both in content and scope than its predecessor in 1900.¹⁵¹ But if the meaning of ‘Supreme Court’ is determined by pre-federation doctrine, why is it not fixed by that doctrine, so that the subsequent expansion of the law of jurisdictional error, while unobjectionable as a matter of common law, does not alter the meaning of the constitutional term or the scope of the jurisdiction that it supposedly entrenches? The High Court ignored this obvious objection to its conclusion, an objection that logically follows from its own methodology.

B An Alternative Defence of Kirk

It could possibly be argued that I have attributed to the High Court too narrow an understanding of the words ‘defining characteristic’, by requiring that a ‘defining characteristic’ must be known by everyone who understands the meaning of the term in question. In some cases, a term might have defining characteristics — or, to use arguably more apt terminology, essential characteristics — that those who use the term are unaware of. For example, we now know that it is an essential

149 Transcript of Proceedings, *Kirk v Industrial Relations Commission of NSW* [2009] HCATrans 239 (1 October 2009) (emphasis added).

150 See Richard Ekins and Jeffrey Goldsworthy, ‘The Reality and Indispensability of Legislative Intentions’ (2014) 36 *Sydney Law Review* 39, 41 n 13, 46–51, 57–60.

151 Roos, above n 132, 799–805. See also Gouliaditis, above n 122, 878 n 51. Several states attempted to exploit this point in *Public Service Association of South Australia Inc v Industrial Relations Commission of South Australia* (2012) 249 CLR 398, but the High Court held the line it had laid down in *Kirk*.

characteristic of water that it is made of H₂O. This is a fact revealed by modern chemistry that was unknown to pre-scientific people — an essential characteristic that was inaccessible to them, although they were able to use the term ‘water’ correctly and to identify the liquid that it denotes. Could the same be true of some of the defining characteristics of the term ‘Supreme Court’ in 1900 — that they were hidden from those who used the term, but have been revealed for the first time by a kind of modern legal chemistry in *Kirk*?

I think not, for two reasons. First, the Court in *Kirk* did not rely on philosophical analysis of the metaphysical ‘essence’ of Supreme Courts (if such a thing even exists). As French CJ subsequently observed, ‘[t]he defining or essential characteristics of courts are not attributes plucked from a platonic universe of ideal forms’; they are inferred from ‘the common law, which carries with it historically developed concepts of courts and the judicial function’.¹⁵² That is why the Court in *Kirk* relied on legal authority — in particular, the Privy Council decision in *Willan* as representative of ‘accepted legal doctrine’ in 1900.

Secondly, water is an example of what philosophers call ‘natural kinds’, whose existence, identity and essential characteristics are independent of human beliefs, representations and practices. It is possible for people who are able correctly to use a term that refers to a natural kind, such as water, not to fully understand what its most essential characteristics are. People in the past may have believed that the only essential characteristics of water are (something like) ‘clear, odourless, tasteless drinkable liquid that falls from the sky and fills rivers and lakes’. But philosophers now say that this would have been a mistake, because we can imagine a ‘possible world’ in which some liquid has all these characteristics but is not ‘water’ because it is not made of H₂O.¹⁵³ Even in our actual world, unexpected developments can reveal that a criterion we previously thought essential to the meaning of a word never really was, such as when the discovery of black swans showed that swans need not be white (their most essential characteristic is, instead, a certain kind of DNA).¹⁵⁴ Consequently, many philosophers maintain that the meaning of a word that denotes a natural kind cannot consist of any set of descriptive criteria, because any suggested criterion is potentially erroneous and therefore not essential to the word’s meaning. They conclude that such a word simply denotes the natural kind in question, whose essential characteristics — which determine the word’s extension or reference — can be determined only through empirical or theoretical enquiry.¹⁵⁵

The High Court in *Kirk*, on the other hand, was concerned with a ‘social kind’ rather than a ‘natural kind’ term. Social kind terms are the main ingredients of legal texts, which refer to artifacts such as ‘vehicles’ and ‘firearms’, and institutions such as ‘corporations’, ‘marriage’ and ‘Supreme Court’. It is very

152 *Pompano* (2013) 295 ALR 638, 660 [68].

153 See the account of these arguments of S Kripke and H Putnam in William G Lycan, *Philosophy of Language: A Contemporary Introduction* (Routledge, 2nd ed, 2008) chs 2, 3.

154 Michael Devitt and Kim Sterelny, *Language and Reality: An Introduction to the Philosophy of Language* (Blackwell Publishers, 2nd ed, 1999) 92.

155 This so-called ‘causal’ theory of meaning and reference is also described in *ibid* chs 4, 5.

difficult to maintain that such terms merely denote certain kinds of things, whose essential characteristics might be hidden from us and discoverable only by something akin to scientific investigation of their inner nature. Social kinds are not constituted by essential characteristics, such as molecules or DNA, that are independent of human practices, purposes and intentions.¹⁵⁶ Their essential characteristics are surely determined, directly or indirectly, by our purposes in using the terms that refer to them.

This does not necessarily end the debate. It is possible that we might be confused or mistaken about our own purposes in using social kind terms, and that careful analysis can improve our understanding of them. It may be that, just as the discovery of black swans showed that swans need not be white, a better understanding of our purposes in using a social kind term might reveal that a criterion we thought was essential to its definition is not, or that a criterion we did not think essential to it really is. ‘Interpretivists’ deny that the meaning of social kind terms can be reduced to a fixed set of criteria, because conceptual analysis might show that any suggested criterion is vulnerable to correction in the light of a better understanding of the rationale that implicitly guides our conceptual discriminations. Arguably the entire community could be shown to be mistaken about one or more criteria associated with a social kind term, once the rationale underlying our actual applications of the term is clarified.¹⁵⁷ Ronald Dworkin insists that the meanings of social kind terms must be sought through ‘interpretation’ that aims to make the ‘best sense’ of their past usage, especially in cases taken to constitute paradigms or exemplars, some aspects of which might turn out to have been mistaken.¹⁵⁸

Interpretivists may be right that, in seeking the essential meaning of a constitutional term, we must rely on our understanding of its rationale — its purpose or function — rather than trying to identify some fixed set of definitional criteria. Consider, for example, the meaning of the term ‘trial by jury’ in s 80 of the *Constitution*. In deciding whether or not modern reforms to the jury system are consistent with the constitutional meaning of this term, the High Court has sensibly recognised that although it ‘is referable to that institution as understood at common law at the time of federation’, its ‘essential features are to be discerned with regard to

156 See, eg, Stephen P Schwartz, ‘Natural Kinds and Nominal Kinds’ (1980) 89 *Mind* 182; Amie L Thomasson, ‘Realism and Human Kinds’ (2003) 67 *Philosophy and Phenomenological Research* 580. For an argument to the contrary, see Hilary Kornblith, ‘How to Refer to Artifacts’ in Eric Margolis and Stephen Laurence (eds), *Creations of the Mind: Theories of Artifacts and Their Representation* (Oxford University Press, 2007) 138.

157 Sally Haslanger, ‘What Good Are Our Intuitions?’ in Sally Haslanger and Jennifer Saul, ‘Philosophical Analysis and Social Kinds’ (2006) 80 *The Aristotelian Society, Supplementary Volumes* 89.

158 Ronald Dworkin, *Law’s Empire* (Fontana, 1986) ch 2; Ronald Dworkin, *Justice in Robes* (Belknap Press, 2006) 10–12, 223–6.

the purpose which [it] ... was intended to serve'.¹⁵⁹ The word 'jury', philosophers would say, is (at least partly) a 'functional term'.¹⁶⁰

This shows that even according to interpretivists, there is still a crucial difference between natural kind and social kind terms. The former refers to kinds whose essential characteristics are independent of human practices, purposes and intentions; the latter does not. Could the 'interpretivist' theory of meaning be used to defend the High Court's claims in *Kirk* about the meaning of the term 'Supreme Court' in 1900? An argument based on the 'trial by jury' example might go as follows. The functions of a Supreme Court, as the word 'Supreme' suggests, include superintending the decisions of inferior courts, tribunals and administrative decision-makers, either by hearing appeals from, or by reviewing the legality of, those decisions. This is one of the defining functions (or characteristics) of a Supreme Court, just as reaching findings of guilt only by unanimity among a panel of lay-people who represent the community is a defining function of juries in criminal cases.

One problem is that this argument entails that the Victorian Supreme Court judges in *Re Biel*, and the High Court judges in *Clancy* and *Baxter*, were fundamentally mistaken in failing to perceive that this aspect of the functions of Supreme Courts was essential to their existence. It entails that these judges erroneously conceded that a privative clause could remove that function from a Supreme Court, because they failed to appreciate that this was an essential or defining function. These very experienced lawyers overlooked part of the essential nature of one of their own central legal institutions. This seems rather far-fetched.

A second problem is that in 1900, the functions of a Supreme Court were diverse, and included the application of legislation enacted by local legislatures with plenary law-making power that had been described by the Privy Council as similar in kind to that of the Imperial Parliament, which enjoyed unlimited, sovereign power.¹⁶¹ Within Britain itself, the doctrine of parliamentary sovereignty allowed Parliament to enact privative clauses to exclude judicial review, and the constitutions of British colonies conferred a similar plenary power on colonial and dominion legislatures.¹⁶² It is true that the perceived conflict between the principles of the rule of law, and of legislative supremacy, made judges uncomfortable, and was resolved by their interpreting privative clauses as narrowly as they possibly could — indeed, sometimes interpreting them almost out of existence. But it is not true that the Supreme Court function of supervising the decisions of inferior decision-makers was perceived as prevailing over its function of faithfully applying legislation, including legislation that interfered

159 *Ng v The Queen* (2003) 217 CLR 521, 526 [9]. See also *Brownlee v The Queen* (2001) 207 CLR 278, 298 [54] (Gaudron, Gummow and Hayne JJ).

160 'A word is a functional word if, in order to explain its meaning fully, we have to say what the object it refers to is for, or what it is supposed to do': R M Hare, *The Language of Morals* (Clarendon Press, 1952) 100 (emphasis in original). See also Michael S Moore, 'Law as a Functional Kind' in Robert P George (ed), *Natural Law Theory: Contemporary Essays* (Clarendon Press, 1992) 188, 206–8.

161 *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1; Carney, above n 88, 106–7.

162 See generally Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Clarendon Press, 1999); Carney, above n 88.

with that supervisory function. According to orthodox legal doctrine and theory, if not often in practice, the latter function necessarily prevailed over the former, in the event of any clash between them.

A third problem is that this mode of reasoning can be all too easily extended to other institutions, including ‘Parliaments’ and ‘laws’, by adopting a ‘perfectionist’ conception of their functions.¹⁶³ There is no doubt that the possession of some characteristics is essential to an assembly being a ‘Parliament’. In Australia today its members must, for example, be elected. But consider this argument: it is a function of Parliaments that they make laws for the good of their community, and therefore, a so-called ‘Parliament’ that passes a law which is bad for its community is not a genuine Parliament. This might seem so far-fetched as to be a straw man. But in *Durham Holdings Pty Ltd v New South Wales*, Kirby J said this:

In Australia, a State ... derives its constitutional status, as such, from the federal *Constitution*. It may be inferred, from that *Constitution*, that a State is a polity of a particular character. Thus s 107 of the *Constitution* provides, and requires, that each State should have a Parliament. Such Parliaments must be of a kind appropriate to a State of the Commonwealth and to a legislature that can fulfil functions envisaged for it by the *Constitution*. Ultimately, a ‘law of a State’, made by such a Parliament, could only be a ‘law’ of a kind envisaged by the Constitution. Certain ‘extreme’ laws might fall outside that constitutional presupposition.¹⁶⁴

Note that it is also a function of Parliaments, and not of courts, to decide whether or not statutes are good for their communities. It could just as easily — indeed, much more plausibly — be argued that any court which takes upon itself authority to decide such questions is not a genuine court.

My conclusion is that this possible alternative argument fails, partly because it unrealistically elevates one function of Supreme Courts over another, predominating function. But in any event, as previously noted, it is not an argument relied on by the High Court in *Kirk*.

C A Second Alternative Defence of Kirk

It might be possible to construct another, quite different, argument leading to the conclusion about state privative clauses in *Kirk*. McHugh J anticipated this argument in *Kable*, when he said:

An essential part of the machinery for implementing that supervision of the Australian legal system and maintaining the unity of the common law is the system of State courts under a Supreme Court with an appeal to the High Court under s 73 of the *Constitution*. ... [A] State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision

163 See Anne Twomey, ‘The Defining Characteristics of Constitutional Expressions and The Nationalisation of the State Court System’ (2013) 11 *The Judicial Review* 233, 242–4.

164 (2001) 205 CLR 399, 431 [74] (citations omitted).

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 [sic].¹⁶⁵

Whether the conferral on the High Court of jurisdiction to hear appeals from state Supreme Courts, by implication, limits the power of state Parliaments to prevent those Courts from hearing appeals from or reviewing the decisions of inferior courts, and perhaps tribunals and other administrative decision-makers as well, was the subject of argument in *Kirk*. This line of enquiry might possibly arrive at a more convincing basis for something like the conclusion in *Kirk*, than the reasoning the High Court chose to rely on.¹⁶⁶ But the implications of s 73(ii) require careful analysis, and may be much more complex and nuanced than the conclusion reached in *Kirk*. It is not feasible to attempt such an analysis here.

IV JUDICIAL STATESMANSHIP

It might be objected that my criticisms of the legal reasoning in the *Kable* line of cases, and in *Kirk*, exemplify a narrow and positivist form of legalism, which fails fully to accommodate fundamental legal values, such as the rule of law, that properly influence legal reasoning. But anyone tempted to make such an objection should carefully consider precisely what positive claim they are prepared to defend about the role of such values in legal reasoning. Any one of the following three different claims might be made:

Claim 1: Judicial reasoning properly informed by such values is capable of legally justifying the conclusions reached in *Kable* and *Kirk* consistently with current constitutional orthodoxy.

Claim 2: Judicial reasoning properly informed by such values is capable of legally justifying those conclusions, but only if current constitutional orthodoxy is repudiated on the ground that it is incompatible with the true nature of law, as disclosed by the correct, anti-positivist philosophy of law.

Claim 3: Judicial reasoning properly informed by such values is not capable of legally justifying those conclusions, but those values are capable of morally justifying them, and because judges' moral obligations override their legal ones, the conclusions are therefore justified all-things-considered.

If Claims 1 and 2 fail, then defenders of *Kable* and *Kirk* must retreat to Claim 3, which amounts to what I called at the outset 'judicial statesmanship'.

As for Claim 1, I have shown that the reasons given by the High Court in these cases fail *on their own terms*, given that the Court did not challenge orthodox constitutional doctrines. These doctrines include: first, the fundamental

¹⁶⁵ *Kable* (1996) 189 CLR 51, 114.

¹⁶⁶ See also Gouliaditis, above n 122, 879–80, quoting from an unpublished comment on *Kirk* by Leslie Zines.

premise that state Parliaments possess plenary legislative power that is subject only to limitations that can genuinely be found in the text or structure of the *Commonwealth Constitution*, entrenched provisions in state constitutions, or the *Australia Act 1986* (Cth); and secondly, the interpretive principle that structural implications must be logically or practically necessary to ensure the efficacy of the text or structure of one of these constitutional instruments. I have shown that the textual arguments in *Forge* and *Kirk*, concerning the meaning of the constitutional terms ‘court’ and ‘Supreme Court’, do not support the conclusions reached in the cases discussed, and that efforts to derive relevant structural implications in *Kable* and elsewhere do not satisfy the ‘necessity’ principle.

I am not a naïve legalist, who is ignorant of the occasionally necessary role of value judgments even in orthodox constitutional interpretation. As a legal philosopher, I am fully aware that laws, including constitutions, should be interpreted purposively, in the light of values that the lawmakers intended to pursue, and also that laws including constitutions are often under-determinate, due to problems such as ambiguity, vagueness, inconsistency, gaps, silence or uncertainty about arguable implications, in which case judges may have no alternative but to act creatively, guided by their own value judgments. But the reasoning in *Kable* and *Kirk* cannot be defended on either of these grounds. A genuinely purposive interpretation of a law must deal with purposes that can plausibly be attributed to the law’s makers. Interpreters must not foist their own purposes on the laws they interpret, and must respect not only the purposes that the law was evidently intended to achieve, but also the means by which it was intended to do so, which may have been carefully crafted to accommodate competing interests or values. As for legal under-determinacy, no relevant instance was present in the cases discussed.

It is, of course, always possible that some new line of argument will be devised that provides a more persuasive legal justification for the decisions in these cases. It has been suggested to me that an argument based on the notion of constitutional functions (in these cases, of the courts), rather than of constitutional structures, might do so. But I do not see how shifting from the language of structure to that of function would make much difference — surely the requirement of ‘necessity’ would have to be retained. It cannot be the case that the High Court is free to add to the *Constitution* (or as lawyers say, to ‘imply into’ or ‘read into’ it) any norm that would enhance the capacity of some institution to perform its constitutional functions. That would give the Court far too broad a power to amend the *Constitution* in order to improve it. Therefore, a requirement of necessity would still be required: any new norm would have to be shown to be necessary to enable that institution to perform its constitutional functions. That requirement is difficult to satisfy when it is taken seriously.

Turning to Claim 2, the conclusions in *Kable* and *Kirk* might be legally justified if legal values such as the rule of law could be given much greater independence and weight in legal reasoning than is currently consistent with constitutional orthodoxy. This might require adopting a normative or value-based philosophy of law that regards our legal system as resting ultimately not on the written

Constitution, but on deeper, unwritten constitutional principles including the rule of law. Professor Trevor Allan of Cambridge University has long advocated just such an approach.¹⁶⁷ He argues that all Western liberal democracies are implicitly committed to a non-positivist concept of law, embodied in a model of constitutionalism based on the rule of law. Within that model, an unwritten constitution that is more fundamental than any written constitution empowers an independent judiciary to invalidate legislation deemed to be inconsistent with various procedural and substantive rights. This unwritten constitution limits not only legislative power, but even the power to amend the written constitution, which cannot be used to infringe the rule of law so understood.¹⁶⁸ According to Allan, in British Commonwealth legal systems this unwritten constitution is part of the common law which therefore constitutes their ultimate foundation.

Allan takes *Kable's* case to 'provide an especially clear illustration' of his thesis.¹⁶⁹ He maintains that the High Court, 'despite doubtful reasoning, vindicated indirectly the fundamental character of the separation of powers as an aspect of the rule of law'.¹⁷⁰ This is an example of judges having:

reached correct legal conclusions — those indicated by a persuasive conception of the rule of law — which are none the less poorly supported by the reasons offered in their defence. A bolder, if less conventional, analysis, that frankly acknowledged the constraints on governmental decision-making inherent in the rule of law, would have strengthened these judicial opinions.¹⁷¹

Allan complains that the High Court's emphasis on 'speculative considerations of public confidence'¹⁷² were 'extremely weak as a basis for attributing the Act's invalidity to the ignominious role it accorded the court'.¹⁷³ Its conclusion should, instead, have rested on the challenged statute 'falling outside the concept of "law" envisaged by, or implicit in, the ideal of the rule of law'.¹⁷⁴ 'The primary purpose of the court's intervention in *Kable*, and its principal justification, must surely have been to uphold the dignity and independence of the citizen rather than the honour and integrity of the state courts'.¹⁷⁵ But this would require the Court to go much further, and invalidate any legislation authorising the preventive detention of a named individual, not only by order of a court, but also by order of an executive officer with no judicial involvement.¹⁷⁶ Allan's theory postulates the existence of common law rights that are invulnerable to legislative

167 T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press, 2001).

168 See my summary of his theory in Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010) 80–9.

169 Allan, above n 167, 5.

170 *Ibid* 4.

171 *Ibid* 5.

172 *Ibid* 275.

173 *Ibid* 235.

174 *Ibid* 236.

175 *Ibid* 237.

176 *Ibid* 235–6, 237–8, 246.

intrusion, which is incompatible with the currently orthodox proposition that state Parliaments possess plenary power subject only to limits entrenched in our written constitutions.¹⁷⁷ According to him:

The most persuasive interpretation of the New South Wales constitution, sensitive to the deeper structure of Australian constitutionalism, would ... deny the legislature the power to remove the basic protections that the principles of due process and equality provide. No formal entrenchment of the judicial power is needed because, *contrary to orthodox wisdom*, the State Parliament has no legal authority to pass legislation inconsistent with these fundamental common law rights ... [whose identity] depend on persuasive analysis of the common law, sensitive to its constitutional role in reflecting and preserving the rule of law.¹⁷⁸

This article cannot provide, or even summarise, the jurisprudential objections that in my opinion are fatal to Allan's theory.¹⁷⁹ For now, it must suffice to observe that his theory entails a radical change to currently orthodox constitutional doctrine, of a kind that has been repeatedly rejected in Australia.¹⁸⁰ In addition, it was not relied on by the High Court in either the *Kable* line of cases or in *Kirk*.

That leaves us with Claim 3, which raises the two questions I posed at the outset of this article. Assuming that the High Court was not guided by an incipient attraction to a radically new and unorthodox philosophy of law, such as Trevor Allan's, what explains its implausible reasoning in the cases in question? Have some judges pursued a pro-active agenda of expanding the scope of chapter III of the *Constitution*, and in doing so, applied what they believe the *Constitution* ought to be rather than what the *Constitution* actually is? If so, were they morally justified in departing from their legal obligation not to deliberately change the *Constitution*? Or to rephrase that question: was judicial statesmanship justified?

If even asking these questions seems rude or offensive, I plead in my defence that many distinguished commentators have surmised that the majority in *Kable* strayed from strict legal reasoning in order to change the *Constitution* in supposedly desirable ways.¹⁸¹ George Winterton derided the so-called “discover[y]”¹⁸² (his square quotes) of the proposition that the purity of state courts must be preserved ‘to render them worthy to receive the holy nectar

177 Ibid 238.

178 Ibid 239–40 (emphasis added).

179 For comprehensive discussion, see Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, above n 162, ch 10; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, above n 168, chs 2, 4.

180 See Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, above n 162, ch 10; Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates*, above n 168, chs 2, 4; George Winterton, ‘Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?’ in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 121.

181 Anne Twomey said ‘[t]he decision is unsatisfactory’: Anne Twomey, *The Constitution of New South Wales* (Federation Press, 2004) 194. See also Twomey, ‘The Limitation of State Legislative Power’, above n 21, 19.

182 Winterton, *State Constitutional Landmarks*, above n 26, 14.

of federal judicial power¹⁸³ as ‘an unconvincing implication in the already-overburdened Ch III’,¹⁸⁴ and expressed satisfaction with the Court’s apparent (but, as it turned out, short-lived) retreat in *Fardon* and *Baker*.¹⁸⁵ Elsewhere, he dismissed the reasoning in *Kable* as ‘barely plausible’.¹⁸⁶ Enid Campbell stated that ‘[t]he majority opinions in *Kable*’s case provide further evidence of the preparedness of some Justices of the High Court of Australia to discover within the ... *Constitution* implications not hitherto discerned, either by judges or learned students of matters constitutional’.¹⁸⁷ Geoffrey Lindell said that the Court’s reasoning was ‘imaginative and strained’, indicating ‘[t]he lengths that judges are now prepared to go’ in order to protect rights in the absence of a bill of rights.¹⁸⁸ Dan Meagher called it ‘seductive reasoning with a desirable outcome ... [that] represents a leap in legal logic that should be rejected’.¹⁸⁹ George Williams regarded it as not ‘adequately ground[ed] ... in the text and structure of the Australian Constitution’ and having ‘the appearance of being contrived’ in order ‘to protect fundamental freedoms’.¹⁹⁰ Tony Blackshield described it as ‘artificial’.¹⁹¹ Even Trevor Allan, who as we have seen praised the decision, agreed that ‘[t]he primary purpose of the court’s intervention in *Kable*, and its principal justification, must surely have been to uphold the dignity and independence of the citizen rather than the honour and integrity of the State courts’.¹⁹² Greg Taylor also surmised that the Court invalidated the legislation because it disapproved of its adverse impact on Mr Kable’s human rights.¹⁹³ He then observed that:

Judges who conduct themselves in that manner are themselves breaching the doctrine of separation of powers by invalidating laws on the basis that they do not like them, even if they do not admit doing so but rather clothe their dislike in the more neutral colours of a constitutional implication invented for the occasion.¹⁹⁴

183 Ibid 3.

184 Ibid 5. See also the scathing remarks by Heydon J about state courts ‘needing always to be scrutinised to prevent pollution of the snow-white purity of federal jurisdiction’: *The Public Service Association and Professional Officers’ Association of New South Wales v Director of Public Employment* (2012) 293 ALR 450, 468 [62].

185 Winterton, *State Constitutional Landmarks*, above n 26, 16.

186 Winterton, ‘Justice Kirby’s Coda in *Durham*’, above n 5, 168.

187 Enid Campbell, ‘Constitutional Protection of State Courts and Judges’ (1997) 23 *Monash University Law Review* 397, 421 (citations omitted).

188 Geoff Lindell, ‘The Australian *Constitution*: Growth, Adaptation and Conflict — Reflections About Some Major Cases and Events’ (1999) 25 *Monash University Law Review* 257, 277.

189 Dan Meagher, ‘Should the Victorian Constitution be Reformed to Strengthen the Separation of Judicial Power?’ (2000) 2 *Constitutional Law and Policy Review* 63, 69.

190 Williams, *Human Rights Under the Australian Constitution*, above n 21, 242–3, 246. See also George Williams, ‘Judicial Activism and Judicial Review in the High Court of Australia’ in Tom Campbell and Jeffrey Goldsworthy (eds), *Judicial Power, Democracy and Legal Positivism* (Ashgate Publishing, 2000) 413, 422–3.

191 Bernard Lane, ‘Separation of Powers for States Inevitable’, *The Australian* (Australia), 17 September 1996, 6.

192 Allan, above n 167, 237.

193 Taylor, above n 18, 449, 456.

194 Ibid 456.

There is much to be said for this view, given the novelty and implausibility of the majority's reasoning. Its novelty is relevant, because it is *prima facie* unlikely that four judges in 1996 were able to discern an important constitutional principle that, for almost a century, had escaped the notice of so many outstanding constitutional lawyers, in the judiciary, the profession and the academy. And its implausibility is relevant because it can be evidence that the reasoning was influenced by a desire, whether conscious or unconscious, to reach a particular conclusion.

But caution is required. Novelty is not always a sign of error, and new insights into the meaning, and particularly the implications, of a law are always possible.¹⁹⁵ *A fortiori*, so is a sincere belief that such an insight has been gained, even if it has not. As I once observed, 'reasoning regarded by a critic as obviously unsatisfactory, even incomplete and artificial, may actually have persuaded a judge committed to particular methods of legal analysis'.¹⁹⁶ The majority in *Kable*, may have been persuaded by what Stephen Gageler has called the 'constitutional vision' of Mr Kable's eloquent Chief Counsel, Sir Maurice Byers QC.¹⁹⁷ Gageler quoted from Byer's submissions to the Court in *ACTV*, 'for the beauty of its language and ... the grandeur of its vision'.¹⁹⁸ But lawyers beguiled by a grand 'vision' of the fundamental structure and function of the *Constitution*, which is shaped by contemporary ideals of constitutionalism and gives special prominence to values they hold dear, are likely to mistake that vision for the plan actually embodied in a *Constitution* designed by framers whose outlook was quite different. These lawyers are then prone to jump too quickly to conclusions, without taking sufficient care to ensure that their reasoning complies with established methodological requirements, such as that structural implications must be truly necessary ones. That is what happened in *ACTV*: just compare Byers' successful submissions with those of John Doyle QC to the contrary, which were adopted in Dawson J's dissent and clearly exposed the failure of Byers' vision to satisfy the 'necessity' requirement.¹⁹⁹ I suspect that this may also have happened in *Kable*, and may be a better explanation for the majority's reasoning than the statesmanship hypothesis.²⁰⁰

If the majority's reasoning in *Kable* is so implausible as to raise suspicions that it was contrived to reach a desired conclusion, then *a fortiori*, so is the reasoning about state privative clauses in *Kirk*.²⁰¹ It is so brief as to be perfunctory; cites a single case that does not support the proposition it is cited for; fails even to refer

195 See *Kable* (1996) 189 CLR 51, 68 (Brennan CJ).

196 Jeffrey Goldsworthy, 'Realism About the High Court' (1989) 18 *Federal Law Review* 27, 33.

197 Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' in Nye Perram and Rachel Pepper (eds), *The Byers Lectures 2000–2012* (Federation Press, 2012) 195.

198 *Ibid* 196, commenting on argument recorded in *ACTV* (1992) 177 CLR 106.

199 *ACTV* (1992) 177 CLR 106, 122. For a lengthy defence of this assessment, see Goldsworthy, 'Constitutional Implications Revisited', above n 115.

200 The failure of Byers' argument is obvious in *Kable*, but harder to detect in *ACTV*. I have never suggested that the majority judgments in *ACTV* were motivated by judicial statesmanship as defined in this article.

201 Ronald Sackville has pointed out the 'fragility' and doubtful quality of the reasoning in *Kirk*, in Ronald Sackville, 'The Constitutionalisation of State Administrative Law' (2012) 19 *Australian Journal of Administrative Law* 127, 130; Ronald Sackville, 'An Age of Judicial Hegemony' (2013) 87 *Australian Law Journal* 105, 111.

to several cases (including two of the Court's own previous decisions) discussed in argument before the bench that are fatal to that proposition; and silently slides from the strictly limited protection from no certiorari clauses provided by interpretive techniques in the 1890s, to constitutional protection of the much broader modern doctrine of jurisdictional error.

As Roos points out, the reasoning on this issue in *Kirk* is paltry compared with the lengthy and careful historical analysis in *Cheatle v The Queen* of the 'essential characteristic[s]' of 'trial by jury'.²⁰² The Court in *Kirk* does not appear to have made a serious effort to examine the issues carefully. I once said of some judgments of Justice Lionel Murphy:

When a judge reaches conclusions so radically new, and so inconsistent with orthodox legal premises and the opinions of his peers, one might expect that they would be based on very careful, substantial reasoning. But what is immediately striking about Murphy's discussions of the implied rights he claimed to discover is his casual, arguably even careless, attitude to the legal foundations on which they supposedly rested.²⁰³

Frankly, I think the same is true of *Kirk*, if 'peers' is taken to refer to almost all past state and federal judges who have discussed state privative clauses. It is a case seemingly driven by 'the desire to state the applicable law in a manner entirely unconstrained by the way in which it has been stated before because of a perception that it ought to be different', to quote Dyson Heydon in his controversial denunciation of judicial activism before his appointment to the High Court.²⁰⁴

Once again, I request indulgence for my frankness by pointing out that I am not the first to suggest that judges at the highest levels may have dissembled in order to evade privative clauses. For example, eminent scholars have claimed that in *Anisminic Ltd v Foreign Compensation Commission*²⁰⁵ the House of Lords used spurious reasoning to circumvent Parliament's command that decisions of a statutory authority were not to be judicially reviewed. Britain's then leading administrative lawyer, Sir William Wade, asserted in his famous textbook that the judges flouted their constitutional duty to obey Parliament's clearly stated intention, but concealed this 'behind a dense screen of technicalities about jurisdiction and nullity'.²⁰⁶ Elsewhere he observed that 'the judges have proved willing to turn a blind eye to constitutional impediments for the sake of their historic policy of refusing to tolerate uncontrollable power', and added that 'I support the judges in resorting to every possible argument, convincing or

202 Roos, above n 132, 798–9, citing *Cheatle v The Queen* (1993) 177 CLR 541.

203 Jeffrey Goldsworthy, 'Commentary' on Tony Blackshield, 'Lionel Murphy and Judicial Method' in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 259, 265.

204 Justice J D Heydon, 'Judicial Activism and the Death of the Rule of Law' (2003) 23 *Australian Bar Review* 110, 120.

205 [1969] 2 AC 147 ('*Anisminic*').

206 H W R Wade and C F Forsyth, *Administrative Law* (Oxford University Press, 10th ed, 2009) 617.

otherwise' in pursuing this policy.²⁰⁷ In his Hamlyn Lectures he referred to 'the logical contortions and evasions'²⁰⁸ to which judges were 'driven'²⁰⁹ by privative clauses, adding that their 'rebellious ... stand' should be condoned rather than criticised.²¹⁰ New Zealand Justice E W Thomas recommended that we candidly admit what judges do in such cases: 'I know of no rule of law or logic which would make judicial disobedience more palatable simply because it is done covertly'.²¹¹

Australian judges are widely believed to have used the same tactics as their British counterparts to evade privative clauses. Peter Cane and Leighton McDonald have observed that 'there is more to the privative clause cases than meets the doctrinally focused eye':²¹² they are 'best understood as a site of power struggles between courts and legislatures'.²¹³ The courts' purported use of orthodox interpretive techniques in this struggle has been described by Cheryl Saunders as 'an exercise in sophistry',²¹⁴ by John Basten as 'intellectual legerdemain'²¹⁵ and 'tortured reasoning',²¹⁶ and by Mark Aronson and Matthew Groves as 'thinly disguised disobedience' of the will of Parliament, which, like Wade, they endorse.²¹⁷ Aronson and Groves explain that in the absence of a constitutional remedy, 'the High Court had to resort to other means to blunt the effect of State privative clauses'; but as ever-tougher clauses were enacted, '[a] constitutional turn became necessary, a turn provided by *Kirk*',²¹⁸ in which 'a Constitutional work-around ... [was] devised'²¹⁹ making 'disguise ... no longer necessary'.²²⁰ This implies that in *Kirk*, the High Court relieved the judiciary of any further need to use interpretive gymnastics to conceal their evasion of privative clauses, by manufacturing a constitutional obstacle that solves the problem once and for all. On this view, the decision is best regarded as an act of judicial legislation rationalised by a legal fiction, a phenomenon with a venerable history in the common law.²²¹

207 Sir William Wade, 'Beyond the Law: A British Innovation in Judicial Review' (1991) 43 *Administrative Law Review* 559, 564, 566. See also Sir William Wade, *Constitutional Fundamentals* (Stevens & Sons, revised ed, 1989) 86.

208 Wade, *Constitutional Fundamentals*, above n 207, 86.

209 Ibid 98.

210 Ibid 83.

211 Justice E W Thomas, 'Centennial Lecture — The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium' (2000) 31 *Victoria University of Wellington Law Review* 5, 27.

212 Peter Cane and Leighton McDonald, *Principles of Administrative Law* (Oxford University Press, 2nd ed, 2012) 207.

213 Ibid 206.

214 Cheryl Saunders, 'Plaintiff S157/2002: A Case-Study in Common Law Constitutionalism' (2005) 12 *Australian Journal of Administrative Law* 115, 117 (Saunders actually says that 'at first glance' it is an exercise in sophistry, because it can be defended on two grounds, but then goes on to reject both of them).

215 Basten, above n 122, 275.

216 Ibid 283.

217 Aronson and Groves, above n 123, 940.

218 Ibid 941.

219 Ibid 943.

220 Ibid 940.

221 See Goldsworthy, 'The Limits of Judicial Fidelity to Law: The Coxford Lecture', above n 8.

It is surprising that the legal reasoning in *Kirk* has not provoked a similar critical response to that which *Kable* received.²²² This may be due to most commentators on *Kirk* being administrative lawyers who were not well attuned to the obvious flaws in its constitutional reasoning. Or it may be due to the result enjoying more enthusiastic support within academia and the legal profession. According to John Basten, the decision ‘has met with unqualified approval, although the supporting reasoning has been questioned’.²²³ Simon Young agrees: ‘the constitutional foundation of *Kirk* (in fact its reliance on both the history and constitutional text) has been questioned ... Yet ultimately, few seem to question the prospective worth of *Kirk*’.²²⁴ This is no doubt because, as Matthew Groves and Janina Boughey explain:

The reasoning in *Kirk* surprised most observers and is not supported by either the text or history of the *Constitution*, but it arguably represents a logical step in Australian law ... the step required to place State courts in the same constitutionally protected position [as federal courts] is a relatively small and arguably natural one.²²⁵

It may be logical in policy terms, just as it would be logical to extend the entire doctrine of the separation of powers to state courts despite the failure of the *Constitution* to do so. But it is not logical in legal terms for the Court to rectify the *Constitution* by extending the scope of constitutional principles that its framers deliberately confined.

To bend or stretch the law surreptitiously in order to improve it is not necessarily morally wrong. Arguably there are cases in which judicial dissembling in a noble cause is justified, because allegiance to certain fundamental values is more important than strict fidelity to the law as it is.²²⁶ This must be why Sir William Wade said of *Anisminic* that ‘[t]he judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic’ than the orthodox doctrine requiring their unwavering compliance with Parliament’s legislated commands.²²⁷ It is precisely this ‘deeper constitutional logic’ that motivates Trevor Allan’s radical break with constitutional orthodoxy.²²⁸ He argues, in effect, that the judiciary should explicitly declare that deep, unwritten constitutional principles mandate what has arguably been implicit in its long-standing resistance to strong privative clauses. But Wade never went that

222 With some exceptions, especially *Roos*, above n 132; *Gouliaditis*, above n 122; *Sackville*, ‘The Constitutionalisation of State Administrative Law’, above n 201; *Sackville*, ‘An Age of Judicial Hegemony’, above n 201; *Twomey*, ‘The Defining Characteristics of Constitutional Expressions and The Nationalisation of the State Court System’, above n 163.

223 Basten, above n 122, 273.

224 Simon Young, ‘Privative Clauses: Politics, Legality and the Constitutional Dimension’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 276, 287.

225 Matthew Groves and Janina Boughey, ‘Administrative Law in the Australian Environment’ in Matthew Groves (ed), *Modern Administrative Law in Australia: Concepts and Context* (Cambridge University Press, 2014) 3, 21.

226 See Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’, above n 8.

227 Wade and Forsyth, above n 206, 617.

228 See above nn 167–78 and accompanying text.

far. He did not say that the judges in *Anisminic* had enforced unwritten, latent or subterranean legal principles. Rather, he justified judicial resistance to strong privative clauses on the ground that they amounted to ‘abuse of legislative power, not indeed in the legal sense, but in a distinct constitutional sense’,²²⁹ referring to a long-standing distinction in British constitutionalism between legal limits to legislative power and limits of principle and custom.²³⁰ I take him to have claimed that in upholding limits of the latter kind, the judges had upheld something more important than the law itself (although without acknowledging this).²³¹

Constitutional adjudication is sometimes portrayed as far-sighted statesmanship, a branch of High Politics rather than humdrum legalism, in which legal requirements must be weighed against other important considerations, and the constitution boldly reshaped if justice or good governance so demands. The statesman (or woman) must take legal formalities, including the allocation of institutional authority to change the constitution, into account. But she is not bound by them, even if, as a matter of prudence, she must pretend to be.²³² This is an approach associated with certain decisions of the American Supreme Court that critics condemn as exemplifying ‘judicial activism’. Richard Latham once praised the ‘quasi-political decision, based on a far-sighted view of ultimate constitutional policy, of the type with which the Supreme Court of the United States in its greatest periods has made us familiar’.²³³

But how far should the High Court take this approach, if at all? If it is morally justified in using dubious reasoning to add new guarantees to the *Constitution*, in order to protect the rule of law, would it also be morally justified in doing the same thing to better protect human rights in general? To put this question another way: what is the difference between the dubious reasoning of the Court in *Kirk*, and that of Justice Lionel Murphy, who proposed a jumble of implied constitutional rights, sometimes on the flimsiest of grounds such as that we have a ‘*Constitution* for a free society’?²³⁴ Is it simply that the textual rationalisation proffered in *Kirk* is more specious? Is it that implied rights threaten a more sweeping intrusion into legislative policy-making? Or is it that privative clauses are exceptional, because by undermining the role of the judiciary in protecting

229 Wade, *Constitutional Fundamentals*, above n 207, 83.

230 See Goldsworthy, *The Sovereignty of Parliament: History and Philosophy*, above n 162, 188–92.

231 See David Dyzenhaus, *The Constitution of Law: Legality in a Time of Emergency* (Cambridge University Press, 2006) 105–6.

232 See the entertaining exchange between Larry Solum and Jack Balkin, in which Balkin defends a pragmatic ‘High Politics’, and Solum a neo-formalist, theory of constitutional adjudication: Lawrence B Solum, *Fear and Loathing in New Haven* (17, 18, 20 May 2003) Legal Theory Blog <<http://solum.typepad.com/legaltheory/2003/05/page/5/>>; Jack Balkin, *Good Judging and ‘Following the Rules Laid Down’* (18 May 2003) Balkinization <http://balkin.blogspot.com.au/2003_05_18_balkin_archive.html>.

233 Richard Thomas Edwin Latham, *The Law and the Commonwealth* (Oxford University Press, 1949) 564.

234 *R v Director-General of Social Welfare (Vic); Ex parte Henry* (1975) 133 CLR 369, 388; for discussion see Goldsworthy, ‘Commentary’ on Tony Blackshield, ‘Lionel Murphy and Judicial Method’, above n 203, 265–7. In the same volume, Justice Michael Kirby observed that Murphy would have been ‘delighted’ by the decision in *Kable*: Justice Michael Kirby, ‘Lionel Murphy’s Legacy’, in Michael Coper and George Williams (eds), *Justice Lionel Murphy: Influential or Merely Prescient?* (Federation Press, 1997) 275, 287–8.

the rule of law, they undermine something that is essential to protecting human rights of any kind?

My view is that the collective weight of the many moral reasons against judges deliberately but surreptitiously changing the *Constitution*, contrary to the prescribed amendment procedure, is so heavy that it can be overcome only by very powerful considerations that are unlikely to arise except in exceptional and extreme circumstances.²³⁵ Even this small concession to the attractions of judicial statesmanship might be criticised. George Winterton, whose work I greatly admire, wrote that:

Judicial concern to ensure that ‘extreme’ laws can be invalidated is understandable ... But constitutionalism and the rule of law are concerned not only with governmental outcomes, but also with the means by which they are achieved. The rule of law and the integrity of judicial interpretation of the *Constitution* should not be sacrificed for anything — even a result which, on a particular occasion, may promote human or civil rights. Indeed, twisting the exercise of judicial power to achieve a just outcome in a particular instance may so undermine the much-invoked public confidence upon which judicial authority rests, that far greater damage is inflicted upon rights than if the judiciary had conceded its inability to intervene.²³⁶

He then quoted Gleeson CJ’s statement that: ‘[t]he quality which sustains judicial legitimacy is not bravery, or creativity, but fidelity. ... [I]t is fidelity to the *Constitution* and to the techniques of legal methodology which is the hallmark of legitimacy’.²³⁷

Nevertheless, I stand by my concession in truly exceptional and extreme cases of legal injustice, which cry out for judicial as well as popular resistance. But I appreciate that this is a vague criterion, and its application in the eye of the beholder. While the privative clause in *Kirk* itself was not exceptional and extreme, what about the risk of more comprehensive clauses in the future? The history of judicial resistance to strong privative clauses certainly suggests that judges regard them as exceptional and extreme. What about the enactment of a sweeping ‘no invalidity’ clause? Consider the not yet resolved question of whether the *Constitution* should be interpreted as entrenching some minimal judicially enforceable limits to the jurisdiction of every governmental decision-maker.²³⁸ Should the answer depend on an objective legal analysis of what our (no doubt flawed) *Constitution* actually provides, by express provision and implications established by accepted interpretive methodology? Or should fanciful arguments be concocted in order to improve the *Constitution* by expanding its protection of a judicialised conception of the rule of law?

235 See Goldsworthy, ‘The Limits of Judicial Fidelity to Law: The Coxford Lecture’, above n 8.

236 Winterton, ‘Justice Kirby’s Coda in Durham’, above n 5, 170.

237 Chief Justice Murray Gleeson, ‘Judicial Legitimacy’ (2000) 20 *Australian Bar Review* 4, 11.

238 See, eg, Leighton McDonald, ‘The Entrenched Minimum Provision of Judicial Review and the Rule of Law’ (2001) 21 *Public Law Review* 14.