

## THE KABLE DOCTRINE, STATE LEGISLATIVE POWER AND THE TEXT AND STRUCTURE OF THE CONSTITUTION

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*The Kable doctrine is one of the most important doctrines derived from the Constitution. However, its legitimacy, scope and application continue to be disputed. This article disaggregates the doctrine into three implications which limit state legislative capacity: the first Kable implication which protects the existence and integrity of the 'State Supreme Courts'; the second Kable implication which protects the existence and integrity of 'Other State Courts'; and the third Kable implication which prevents the abolition of a state's 'system' of courts. It then argues that the first Kable implication is securely based in the text and structure of the Constitution, the second is not, and the third only to the extent that it prevents the abolition of all state courts, such that it is superfluous. The article concludes by advancing a working model of Chapter III which incorporates the first Kable implication, but not the second and third.*

Honorable members forget that this is a Constitution we are framing, and not a Judicature Act.

– Josiah Symon, Melbourne session of the Second Constitutional Convention, 4 March 1898<sup>1</sup>

### I INTRODUCTION

The *Kable* doctrine, as originating in 1996 with the High Court decision in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*'), is one of the most important and

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<sup>1</sup> Official Record of the Debates of the Australasian Federal Convention, Melbourne, 4 March 1898, 1893 (Josiah Symon).

novel doctrines derived from Ch III of the *Constitution*.<sup>2</sup> It ‘fundamentally recast the law governing state courts and judges’<sup>3</sup> by overturning the assumption that ‘there was no constitutional impediment to a state parliament legislating in a manner which would intrude upon the exercise of judicial power’,<sup>4</sup> and it indirectly extended an attenuated version of the judicially enforceable federal principle of separation of powers to the states.<sup>5</sup> In a constitutional system which prefers institutional checks and balances and ‘structural guarantees’<sup>6</sup> over the direct protection of rights, it expanded the constitutional protection of institutional integrity by setting a national minimum standard for all Australian courts, and it predicated the Court’s landmark decision in *Kirk v Industrial Court of New South Wales* (*‘Kirk’*) in 2010 which constitutionally revolutionised state administrative law.<sup>7</sup>

Insofar as the *Kable* doctrine applies to the judicial systems of the states,<sup>8</sup> it can be explicated as comprising three implied limitations on the plenitude of state legislative power under the *Constitution*. The current formulation<sup>9</sup> of these three

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- 2 (1996) 189 CLR 51. Justice Stephen Gageler and Will Bateman, ‘Comparative Constitutional Law’ in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 261, 275 <<https://doi.org/10.1093/law/9780198738435.003.0012>> (describing ‘[t]he development wrought in *Kable*’ as ‘momentous’); Michelle Foster, ‘The Separation of Judicial Power’ in Saunders and Stone (n 2) 672, 672–3, 689–90 <<https://doi.org/10.1093/law/9780198738435.003.0029>>; Gerard Carney, ‘State Constitutions’ in Saunders and Stone (n 2) 277, 289 <<https://doi.org/10.1093/law/9780198738435.003.0013>>; Robert French, ‘The *Kable* Legacy: Its Impact on the Australian Judicial System’ in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 209 (‘The *Kable* Legacy’); Patrick Emerton, ‘The Integrity of State Courts under the *Australian Constitution*’ (2019) 47(4) *Federal Law Review* 521, 522 <<https://doi.org/10.1177/0067205X19875008>> (‘Integrity of State Courts’). See generally Gabrielle Appleby et al, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021).
- 3 Fiona Wheeler, ‘Due Process’ in Saunders and Stone (n 2) 928, 942 <<https://doi.org/10.1093/law/9780198738435.003.0039>> (‘Due Process’). See generally Appleby et al (n 2) 72–6.
- 4 Geoffrey Lindell, *Cowen and Zines’s Federal Jurisdiction in Australia* (Federation Press, 4<sup>th</sup> ed, 2016) 321.
- 5 Cf *Assistant Commissioner Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 89–90 [124]–[126] (Hayne, Crennan, Kiefel and Bell JJ) (*‘Pompano’*).
- 6 See Appleby et al (n 2) 151.
- 7 (2010) 239 CLR 531; Wheeler, ‘Due Process’ (n 3) 945–6. See generally French, ‘The *Kable* Legacy’ (n 2) 209; Fiona Wheeler, ‘*Kable*, The *Communist Party Case* and the Rule of Law Commentary on Chapter 7’ in John Griffiths and James Stellios (eds), *Current Issues in Australian Constitutional Law: Tributes to Professor Leslie Zines* (Federation Press, 2020) 245 (‘Commentary on the *Kable* Legacy’); Lindell (n 4) 321–47; James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis, 2010) 408–47 (‘*The Federal Judicature*’); Appleby et al (n 2) 84–102.
- 8 The doctrine has also been held to apply to at least those Australian territories which have their own judicial systems: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (‘*Bradley*’). This article does not directly consider this aspect of the *Kable* doctrine. Given the fundamental differences between the states and territories under the *Constitution*, it would further complicate the article, and the application of the doctrine to the states is sufficiently important to justify the exclusion of the territories from the article’s scope.
- 9 *Kable v DPP (NSW)* (1996) 189 CLR 51 (‘*Kable*’) itself emphasised the need to maintain ‘public confidence in the impartial administration of the judicial functions of State courts’: at 118 (McHugh J); but the emphasis has since shifted from the maintenance of public confidence to institutional integrity: see Foster (n 2) 689–92; Wheeler, ‘Due Process’ (n 3) 943; Lindell (n 4) 326; Stellios, *The Federal Judicature* (n 7) 424–33; Appleby et al (n 2) 99–100. See also *Pompano* (n 5) 91 [128] (Hayne, Crennan, Kiefel and Bell JJ).

limitations (hereafter referred to as the first, second and third *Kable* implications) may be expressed concisely as follows:

1. No state parliament can abolish a ‘State Supreme Court’,<sup>10</sup> nor substantially impair its institutional integrity;<sup>11</sup>
2. No state parliament can substantially impair the institutional integrity of an ‘Other State Court’ (that is, a state court, whether inferior and superior, in a state judicial hierarchy, other than a state supreme court);<sup>12</sup> and
3. No state parliament can abolish a state’s system of courts.<sup>13</sup>

The *Kable* doctrine has been described as a ‘settled feature’<sup>14</sup> of the Australian constitutional landscape in the 25 years since the shock of its first recognition, and as ‘accepted doctrine of the Court’.<sup>15</sup> However, there is still considerable dissatisfaction with the complex legal reasoning behind it,<sup>16</sup> and its scope and application continue to be matters of debate, disagreement and case by case development.<sup>17</sup> This article seeks to contribute to our understanding of the doctrine

10 *Kable* (n 9) 111 (McHugh J), 141 (Gummow J); French, ‘The *Kable* Legacy’ (n 2) 210.

11 *Kable* (n 9) 110–11, 121 (McHugh J), 126–8 (Gummow J); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 67 [40]–[41] (Gleeson CJ) (‘*Forge*’).

12 See, eg, *Kable* (n 9) 118–19 (McHugh J); *South Australia v Totani* (2010) 242 CLR 1 (‘*Totani*’); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 (‘*K-Generation*’). See also Appleby et al (n 2) 107.

13 See *Kable* (n 9) 103 (Gaudron J), 110–11, 114 (McHugh J), 140 (Gummow J). See Nicholas Owens, ‘The Judicature’ in Saunders and Stone (n 2) 643, 658 <<https://doi.org/10.1093/law/9780198738435.003.0028>>.

14 It was so described as early as 2005: Dan Meagher, ‘The Status of the *Kable* Principle in Australian Constitutional Law’ (2005) 16(3) *Public Law Review* 182, 183. See also Lindell (n 4) 325.

15 *Pompano* (n 5) 89 [123] (Hayne, Crennan, Kiefel and Bell JJ).

16 Appleby et al (n 2) 144.

17 See, eg, *Garlett v Western Australia* (2022) 96 ALJR 888, 939–42 [239]–[247] (Edelman J) (‘*Garlett*’); Jeffrey Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (2014) 40(1) *Monash University Law Review* 75 (‘*Kable*, *Kirk* and Judicial Statesmanship’); Stellios, *The Federal Judicature* (n 7) 408–36, 439, 446; Justice Susan Kenny, ‘Evolution’ in Saunders and Stone (n 2) 119, 141–2 <<https://doi.org/10.1093/law/9780198738435.003.0006>>; Patrick Emerton, ‘Ideas’ in Saunders and Stone (n 2) 143, 162 <<https://doi.org/10.1093/law/9780198738435.003.0007>>; Brendan Gogarty and Benedict Bartl, ‘Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP (NSW)* and Why It Matters’ (2009) 32(1) *University of New South Wales Law Journal* 75; Peter Johnston and Rohan Hardcastle, ‘State Courts: The Limits of *Kable*’ (1998) 20(2) *Sydney Law Review* 216; James Stellios, *Zines’s The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 292–4, 305–6, 331 (‘*Zines*’); Sir Anthony Mason, ‘Foreword’ in Saunders and Stone (n 2) v, vii; Gabrielle Appleby, ‘Unwritten Rules’ in Saunders and Stone (n 2) 209, 213, 233 <<https://doi.org/10.1093/law/9780198738435.003.0010>>; Lisa Burton Crawford and Jeffrey Goldsworthy, ‘Constitutionalism’ in Saunders and Stone (n 2) 357, 373–4 <<https://doi.org/10.1093/law/9780198738435.003.0016>>; Adrienne Stone, ‘Judicial Reasoning’ in Saunders and Stone (n 2) 472, 483–4, 487 <<https://doi.org/10.1093/law/9780198738435.003.0021>>; Foster (n 2) 672–3, 689–95; James Stellios, ‘Federal Jurisdiction’ in Saunders and Stone (n 2) 879, 901–2 <<https://doi.org/10.1093/law/9780198738435.003.0037>>; Wheeler, ‘Due Process’ (n 3) 942–5, 948–51; Greg Taylor, *The Constitution of Victoria* (Federation Press, 2006) 445–60; Lindell (n 4) 325 n 29, 344–7, 449–50; Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 36–7, 171; French, ‘The *Kable* Legacy’ (n 2) 241–4. See also *Totani* (n 12) 94–7 (Heydon J); Emerton, ‘Integrity of State Courts’ (n 2) 521; Appleby et al (n 2) 103–4, 115, 118, 123–6, 128–42. Cf *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 379 [140] (Heydon J) (‘*International Finance Trust*’). See generally Lindell (n 4) 321–41.

by examining the High Court's own claim that it has 'constitutional roots',<sup>18</sup> and is a 'practical, if not logical necessity'<sup>19</sup> 'implicit in the terms of Chapter III of the *Constitution*, and necessary for the preservation of that structure'.<sup>20</sup> In order to do so this article makes four assumptions which should be elucidated at the outset to assist the reader in evaluating its arguments. These assumptions will not be defended in this article, although it is asserted that they are all defensible; they are also consistent with the commonplace orthodoxy that constitutional 'text and structure' grounds the interpretation of the *Constitution*.

The first assumption is that an implication cannot be inserted into the *Constitution* from 'extrinsic sources ... guided only by personal preconceptions of what the *Constitution* should, rather than does, contain'.<sup>21</sup> Rather, constitutional implications must be derived from the 'text and structure' of the *Constitution*.<sup>22</sup>

The second assumption is that there are two types of implications which can be derived from the text and structure of the *Constitution*, namely *genuine or textual implications* and *structural implications*.<sup>23</sup>

18 *Pompano* (n 5) 94 [137] (Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also *Garlett* (n 17) 928 [184] (Gordon J).

19 *Pompano* (n 5) 106 [183] (Gageler J).

20 *Bradley* (n 8) 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). See also *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, 430–1 (Kirby J) ('*Durham Holdings*'); *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 617 [119] (Gageler J) ('*NAAJA*'); *Garlett* (n 17) 914–15 [119]–[120] (Gageler J).

21 *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 194 (Dawson J) ('*Theophanous*'). See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 181 (Dawson J) ('*ACTV*'); *Theophanous* 198–9 (McHugh J); *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192, 231 (Brennan J).

22 See *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 145 (Knox CJ, Isaacs, Rich and Starke JJ) ('*Engineers Case*'); *ACTV* (n 21) 133–5 (Mason CJ); *McGinty v Western Australia* (1996) CLR 140, 168–9 (Brennan CJ) ('*McGinty*'); *Kruger v Commonwealth* (1997) 190 CLR 1, 152 (Gummow J); *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 452–4 [385]–[389] (Hayne J) ('*APLA*'); *Bennett v Commonwealth* (2007) 231 CLR 91, 137 [135] (Kirby J); Jonathan Crowe, 'The Narrative Model of Constitutional Implications: A Defence of *Roach v Electoral Commissioner*' (2019) 42(1) *University of New South Wales Law Journal* 91, 92 <<https://doi.org/10.53637/SFAQ6074>>; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28(3) *University of New South Wales Law Journal* 842, 842–3 ('Text and Structure Revisited'). See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 566–7 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ); *Durham Holdings* (n 20) 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 618 [20] (Gleeson CJ, Gummow and Hayne JJ); *Burns v Corbett* (2018) 265 CLR 304, 325 [2] (Kiefel CJ, Bell and Keane JJ), 372 [140] (Nettle J), 383 [175] (Gordon J) ('*Burns*').

23 See *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 42–5 (Brennan J) ('*Nationwide News*'); *ACTV* (n 21) 133–5 (Mason CJ); *McGinty v WA* (n 22) 168–9 (Brennan CJ); *Durham Holdings* (n 20) 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ); *APLA* (n 22) 452–4 [385]–[389] (Hayne J); *Burns* (n 22) 355 [94] (Gageler J), 383 [175] (Gordon J); Jeffrey Goldsworthy, 'Australia: Devotion to Legalism' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford University Press, 2006) 106, 128–9 <<https://doi.org/10.1093/acprof:oso/9780199226474.003.0004>>. See also Jeffrey Goldsworthy, 'Justice Windeyer on the *Engineers' Case*' (2009) 25 *Federal Law Review* 363, 368–74 <<https://doi.org/10.1177/0067205X0903700302>>; Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 18–22 <<https://doi.org/10.2139/ssrn.2142263>>; Stephen McLeish, 'Federal Implications under the Australian Constitution' (2014) 25 *Public Law Review* 172, 172–4.

Genuine implications are found in nearly all (if not all) legal instruments and are conventionally ascertained using ordinary techniques of statutory interpretation.<sup>24</sup> They are purely logical or so obvious and ‘compellingly clear’<sup>25</sup> to ‘a reasonable, legally informed person at the time of utterance’<sup>26</sup> that they were ‘already there’<sup>27</sup> ‘in the actual terms of the instrument’<sup>28</sup> and are part of its inherent, original ‘essential meaning’.<sup>29</sup> For the *Constitution* specifically, ‘the time of the utterance ... is the time of Federation’.<sup>30</sup>

Contrastingly, structural implications are not in ‘the actual terms of the *Constitution*’<sup>31</sup> and the judicial method employed to derive them from the *Constitution* is not a technique conventionally used in the interpretation of ordinary statutes. Rather, structural implications can be ‘derived from’ the *Constitution* if they are ‘logically or practically necessary for the preservation of the integrity of [the *Constitution*’s] structure’.<sup>32</sup> Consistently with the first assumption, this method confines attention to the specific institutions identifiable in the text of the *Constitution*, rather than more general or free standing principles,<sup>33</sup> and ‘invokes the concept of “necessity”’,<sup>34</sup> as opposed to what is merely desirable, or an improvement, or reasonable.<sup>35</sup>

The third assumption is that the first, second and third *Kable* implications are not genuine implications.<sup>36</sup>

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- 24 See generally Jeffrey Goldsworthy, ‘Implications in Language, Law and the *Constitution*’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150.
- 25 Jeremy Kirk, ‘Constitutional Implications (I): Nature, Legitimacy, Classification, Examples’ (2000) 24(3) *Melbourne University Law Review* 645, 649 (‘Constitutional Implications Pt 1’), quoting *B (A Minor) v DPP (UK)* [2000] 1 All ER 833, 839 (Lord Nicholls).
- 26 *Graham v Minister for Immigration* (2017) 263 CLR 1, 37 [76] (Edelman J) (‘*Graham*’).
- 27 *Victoria v Commonwealth* (1971) 122 CLR 353, 402 (Windeyer J) (‘*Payroll Tax Case*’).
- 28 *Engineers Case* (n 22) 155 (Knox CJ, Isaacs, Rich and Starke JJ). See also *ACTV* (n 21) 135 (Mason CJ). See generally Jeffrey Goldsworthy, ‘Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue’ (1997) 23(2) *Monash University Law Journal* 362, 366–7.
- 29 *Graham* (n 26) 37 [76] (Edelman J). See *ACTV* (n 21) 135 (Mason CJ). But see *APLA* (n 22) 409 [240]–[241] (Gummow J).
- 30 *Graham* (n 26) 37 [76] (Edelman J).
- 31 *ACTV* (n 21) 135 (Mason CJ).
- 32 Ibid. See Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (n 17) 77–82. See, eg, *Burns* (n 22) 325–6 [2]–[3], 337 [46] (Kiefel CJ, Bell and Keane JJ), 346 [68], 355 [94] (Gageler J). See also Jeremy Kirk, ‘Constitutional Interpretation and a Theory of Evolutionary Originalism’ (1999) 27(3) *Federal Law Review* 323, 353 <<https://doi.org/10.22145/flr.27.3.1>> (‘Evolutionary Originalism’); *Durham Holdings* (n 20) 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ); *APLA* (n 22) 352 [32]–[33] (Gleeson CJ and Heydon J); Jeffrey Goldsworthy, ‘Constitutional Implications Revisited’ (n 23) 26–31. Cf *Payroll Tax Case* (n 27) 401–2 (Windeyer J); *APLA* (n 22) 452–4 (Hayne J).
- 33 See *McGinty v WA* (n 22) 169–71 (Brennan CJ); *Kruger v Commonwealth* (n 22) 69 (Dawson J).
- 34 Stone, ‘Text and Structure Revisited’ (n 22) 843. See, eg, *Nationwide News* (n 23) 41 (Brennan J).
- 35 See *APLA* (n 22) 453–4 (Hayne J). See also at 352 (Gleeson CJ and Heydon J); *Bennett v Commonwealth* (n 22) 137 [135] (Kirby J); Goldsworthy, ‘Constitutional Implications Revisited’ (n 23) 26–31; Stone, ‘Text and Structure Revisited’ (n 22) 843, 847.
- 36 Jeffrey Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (n 17) 77–8, 107–9; George Winterton, ‘Introduction: Australian States: Cinderellas No Longer?’ in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 1, 14–16; George Winterton, ‘Justice Kirby’s Coda in *Durham*’ (2002) 13 *Public Law Review* 165, 167–8. See Enid Campbell, ‘Constitutional Protection of State Courts and Judges’ (1997) 23(2) *Monash University Law Review* 397, 421.

The fourth assumption is that there is only one avenue of appeal to the High Court in matters originating in *state* jurisdiction (as distinct from matters involving the exercise of federal jurisdiction), and that avenue of appeal runs via the State Supreme Courts.<sup>37</sup>

In accordance with those four assumptions this article is arranged as follows:

- Part II analyses the structure of Chapter III as comprised of two sets of rules, which it terms the establishing Chapter III structure and the enabling Chapter III structure.
- Part III assesses whether the first, second and third *Kable* implications are legitimate structural implications. It argues that (i) the first *Kable* implication can be legitimately derived from the establishing Chapter III structure, but only after a positive legal impediment to it was removed upon the commencement of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (collectively, the ‘*Australia Acts*’) in 1986; (ii) the second *Kable* implication is not a legitimate structural implication; and (iii) the third *Kable* implication is a legitimate structural implication only insofar as it prevents a state parliament abolishing *all* state courts.
- Following the arguments presented in Part III, Part IV argues for a working model of Chapter III with the first *Kable* implication, but without the second and third.

## II STRUCTURE OF CHAPTER III

Chapter III can be broadly described as envisaging ‘an integrated Australian judicial system’.<sup>38</sup> This system embraces state courts, and, in particular, the State Supreme Courts, and is supervised by the High Court. However, one must be cautious about drawing specific constitutional implications premised on an expansive constitutional ‘vision’,<sup>39</sup> the inchoate ‘principles that underlie Ch III’,<sup>40</sup> or ‘the modern purposive understanding of Ch III of the *Constitution*’.<sup>41</sup> Indeed, in *Kable*, the Court claimed that its reasoning was predicated on a ‘*proper* understanding of the integrated judicial system for which Ch III provides’.<sup>42</sup>

As will be the subject of discussion later in this article, the antiquity, enduring presence, and success of the *Judiciary Act 1903* (Cth) (*‘Judiciary Act’*) may

37 *R v Kirby; Ex parte Boilermakers’ Society of Australia* (1956) 94 CLR 254, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) (*‘Boilermakers’*). See also *Burns* (n 22) 350–1 [81] (Gageler J); John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis, 2015) 871, 888; Lindell (n 4) 341, 397–8, 409–10; Emerton, ‘Integrity of State Courts’ (n 2) 535–40. This assumption, although apparently universal, is probably inconsistent with the early High Court authority of *Parkin v James* (1905) 2 CLR 315. Although the correctness of *Parkin v James* was shortly thereafter doubted in *Kamarooka Gold Mining Co v Kerr* (1908) 6 CLR 255, it has never been overturned or overruled.

38 *Kable* (n 9) 102 (Gaudron J).

39 Stellios, *The Federal Judicature* (n 7) 495. See also *Kable* (n 9) 84 (Dawson J).

40 *Kable* (n 9) 116 (McHugh J).

41 *Magaming v The Queen* (2013) 252 CLR 381, 407 [81] (Gageler J).

42 *Kable* (n 9) 102–3 (Gaudron J) (emphasis added).

obscure the distinction between *constitutional* structure, and the structure of the judicial system which has been erected upon that Act's commencement in 1903. Yet the distinction is critical, and it is intimated in Gummow J's observation in *Kable* that '[t]he judicial power of the Commonwealth engages the Supreme Court at two stages or levels'.<sup>43</sup> With reference *only* to *constitutional* text and structure it can be discerned that Chapter III contains two distinct parts. One part, which this article terms the *establishing Chapter III structure*, entrenches a partially integrated federal judicial system (to adopt Sir George Reid's phrase) in the 'bedrock of the *Constitution*'<sup>44</sup> upon its commencement. The other part, which this article terms the *enabling Chapter III structure*, enables a higher level of integration after the commencement of the *Constitution*, that, importantly, must always fall short of full integration, or a unitary Australian judicature, unless the *Constitution* is amended in accordance with its section 128.

### A Establishing Chapter III Structure

The establishing Chapter III structure comprehends 'the judicial system brought into existence by Ch III of the *Constitution*'.<sup>45</sup> While it 'assumes two distinct sources of judicial power – federal and state'<sup>46</sup> it entrenches a *partially* integrated *federal* judicial system at the time of the commencement of the *Constitution* by means of the High Court's general appellate jurisdiction from the State Supreme Courts under section 73.<sup>47</sup> In an important and conscious departure from the United States Supreme Court model,<sup>48</sup> section 73 entrenches the High Court (subject to any continuation of appeals to the Privy Council) as the ultimate appellate court for Australia by providing for an avenue of appeal to the High Court from all courts exercising federal jurisdiction *and* state courts in matters of state jurisdiction. However, this avenue of appeal from state courts exercising state jurisdiction must run via the State Supreme Courts (*viz* the article's fourth assumption): the High Court only has an entrenched general appellate jurisdiction from the State Supreme Courts, not Other State Courts exercising state jurisdiction, and it would be constitutionally impermissible for the Commonwealth Parliament to provide an alternative, direct appellate route to the High Court from Other State Courts exercising state jurisdiction. Hence, the State Supreme Courts enjoy a constitutionally privileged position: the constitutional importance of the State Supreme Courts is elevated above that of Other State Courts.<sup>49</sup>

43 Ibid 126 (emphasis added).

44 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 23 February 1898, 1385 (Sir George Reid). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 343 (Josiah Symon).

45 *Kable* (n 9) 107 (Gaudron J).

46 Stelliios, *The Federal Judicature* (n 7) 2. See also Appleby et al (n 2) 53, 71.

47 See Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (n 17) 77; Taylor (n 17) 2.

48 Stelliios, *The Federal Judicature* (n 7) 495.

49 See *Kable* (n 9) 141 (Gummow J); *Pompano* (n 5) 88–9 [123] (Hayne, Crennan, Kiefel and Bell JJ).

## B Enabling Chapter III Structure

The enabling Chapter III structure enables a greater integration of the federal and state judicial systems *after* the commencement of the *Constitution*: sections 71 and 77(iii) give the Commonwealth Parliament ‘a very full and complete power’<sup>50</sup> to vest which state courts it chooses with federal jurisdiction (the famous ‘autochthonous expedient’);<sup>51</sup> section 76 gives the Commonwealth Parliament power to confer additional original jurisdiction on the High Court;<sup>52</sup> section 77(ii) gives the Commonwealth Parliament power to define ‘the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States’; section 77(iii) impliedly gives the Commonwealth Parliament power to ‘regulate the practice and procedure which the state court is to follow in exercising invested jurisdiction’;<sup>53</sup> section 78 gives the Commonwealth Parliament power to make laws conferring rights to proceed against a state in respect of matters within Commonwealth judicial power; and section 79 gives the Commonwealth Parliament power to prescribe the number of judges who may exercise federal jurisdiction in state courts.

However, while the enabling Chapter III structure ‘provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth’,<sup>54</sup> it does not permit the creation of a *unitary* Australian judicature; indeed, it protects against it: ‘One of the defining features of the Australian federal judicial system is that there are two sources of judicial power and jurisdiction: *federal and state*’.<sup>55</sup>

## III THE THREE *KABLE* IMPLICATIONS: TO WHAT EXTENT ARE THEY LEGITIMATE STRUCTURAL IMPLICATIONS?

### A First *Kable* Implication

It is argued that the first *Kable* implication (that is, no state parliament can abolish a State Supreme Court, nor substantially impair its institutional integrity) is a legitimate structural implication, albeit that the implication could only be inserted by the judiciary into the *Constitution* once the positive legal impediment to it, in the form of section 5 of the *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63 (*‘CLVA’*), was disappplied upon the commencement of the *Australia Acts* in 1986. This section will first set out its argument for the legitimacy of the

50 Quick and Garran (n 37) 973.

51 *Boilermakers* (n 37) 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Kable* (n 9) 67 (Brennan CJ); *ibid* 803–4; Goldsworthy, ‘*Kable, Kirk and Judicial Statesmanship*’ (n 17) 77.

52 See Quick and Garran (n 37) 955.

53 *Kable* (n 9) 82 (Dawson J).

54 *Ibid* 102 (Gaudron J).

55 Appleby et al (n 2) 71 (emphasis in original). See also *Kable* (n 9) 84 (Dawson J); *International Finance Trust* (n 17) 354 [53] (French CJ); *Fardon v A-G (Qld)* (2004) 223 CLR 575, 598 [36] (McHugh J) (*‘Fardon’*). See also *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 (*‘Wakim’*).



structural implication, before explaining how the *Australia Acts* are relevant to the timing of its derivation.

### 1 *Why the First Kable Implication is a Legitimate Structural Implication*

The establishing Chapter III structure comprises two integral elements which are fused together in the bedrock of the *Constitution*: the six state supreme courts (considered collectively as one element) and the High Court.<sup>56</sup> The State Supreme Courts (unlike, as will be argued later, Other State Courts) therefore enjoy a ‘special position’<sup>57</sup> and are ‘constitutionalised’<sup>58</sup> and constitutionally irreplaceable: there are no other state courts mentioned by name in section 73(ii) and no other institutions which can take on their unique constitutional function.<sup>59</sup> It is ‘an intrinsic characteristic of the judicial power of the Commonwealth established by Ch III of the Constitution that it is distinct and paramount over the judicial power of the States’<sup>60</sup> because the establishing Chapter III structure entrenches the High Court’s appellate jurisdiction over matters originating in state jurisdiction via the supreme courts of the states.<sup>61</sup> Thus, section 73 per se brings the State Supreme Courts ‘into a constitutional relationship with Commonwealth judicial power because their judgments presented “matters” for appeals to the High Court’.<sup>62</sup> Constitutionally speaking – to adopt the words of John Donne’s Meditation 17 – every State Supreme Court is ‘a peece of the Continent, a part of the maine’.<sup>63</sup> Hence, if the integrity of a State Supreme Court is substantially impaired, then the integrity of the Chapter III structure is necessarily substantially impaired.

The practical, constitutional necessity of the first *Kable* implication is illustrated by considering what might happen in its absence. If a state parliament could validly legislate substantially to impair the institutional integrity of that state’s supreme court (and thus, as argued immediately above, the integrity of the establishing Chapter III structure), the Commonwealth would be unable to restore that integrity or excise the impaired Supreme Court from the structure of Chapter III.<sup>64</sup>

### 2 *Why the Australia Acts Are Relevant*

Although, as observed by Brennan CJ (in dissent) in *Kable*, ‘novelty is not necessarily a badge of error’,<sup>65</sup> the sudden appearance of the first *Kable* implication

56 See *Kable* (n 9) 111 (McHugh J).

57 Ibid. See also at 114, 117 (McHugh J), 141 (Gummow J).

58 *APLA* (n 22) 484 [469] (Callinan J).

59 *Kable* (n 9) 109–11 (McHugh J), 137–9 (Gummow J). Cf Taylor (n 17) 454–5.

60 Ibid 126 (Gummow J) (emphasis added).

61 Ibid 139 (Gummow J).

62 Appleby et al (n 2) 92–3.

63 John Donne, ‘Devotions upon Emergent Occasions’, in Evelyn Simpson, Helen Gardener and TS Healy (eds), *John Donne: Selected Prose* (Oxford University Press, 1967) 101.

64 *Le Mesurier v Connor* (1929) 42 CLR 481, 495–6 (Knox CJ, Rich and Dixon JJ); Taylor (n 17) 456. See also Lindell (n 4) 264.

65 *Kable* (n 9) 68 (Brennan CJ). See also *New South Wales v Commonwealth* (2006) 229 CLR 1, 230 [561] (Kirby J) (‘*WorkChoices Case*’); *Al-Kateb v Godwin* (2004) 219 CLR 562, 625–6 [180], 629–30 [191] (Kirby J).

*deus ex machina* in 1996 almost 100 years after the *Constitution* commenced may give rise to considerable scepticism about the invocation of practical necessity to justify it.<sup>66</sup> However, there is a clear legal explanation for the timing of its judicial derivation.

Appropos the *Kable* ‘landmark constitutional moment of choice’,<sup>67</sup> Gabrielle Appleby et al have observed that ‘[r]elieved of the last vestiges of imperial judicial oversight with the passage of the *Australia Acts* in 1986, the High Court was able to develop an overtly Australian appreciation of the law and its consequences’.<sup>68</sup> To that observation it could be added that the abolition of appeals to the Privy Council in all matters of *state* jurisdiction by the *Australia Acts* may have attracted renewed attention to the significance of the appellate jurisdiction of the High Court in relation to matters originating in state jurisdiction,<sup>69</sup> as appeal to the High Court via the State Supreme Courts became the only avenue of appeal to an ultimate appellate court in such matters. However, of critical *legal* importance, section 3(1) of the *Australia Acts* disappplied the *CLVA* to the state parliaments and did not reproduce the first part of section 5 (which provided that every colonial legislature had ‘*full power* within its jurisdiction to establish courts of judicature, and to abolish and reconstitute the same, and to alter the constitution thereof, and to make provision for the administration of justice therein’),<sup>70</sup> thus removing the positive legal *statutory* prohibition on the *judicial* derivation of the first *Kable* implication, so as to permit its ‘discovery’ in 1996.

The *CLVA* was ‘[t]he only great statute of general imperial constitutional law passed in the nineteenth century’,<sup>71</sup> and, as described by Albert Venn Dicey in his highly influential *Introduction to the Study of the Law of the Constitution* first published in 1885, the ‘charter of colonial legislative independence’.<sup>72</sup> Section 5 emphatically secured one of the great ‘colonial achievements’<sup>73</sup> of the second half of the 19<sup>th</sup> century, that of ‘vesting control over colonial courts in colonial legislatures’<sup>74</sup> and it is axiomatic that prior to the commencement of the *Australia Acts* the *CLVA* applied to the states, and, of course, bound the Australian judiciary. Although the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64

66 See Taylor (n 17) 445. See generally Appleby et al (n 2) 53–4.

67 Appleby et al (n 2) 79.

68 Ibid 3. See also at 101–2.

69 See *Kable* (n 9) 111 (McHugh J).

70 *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 5 (emphasis added) (‘*CLVA*’). Cf the second part of section 5 concerning manner and form provisions, which was reproduced as section 6 of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (collectively, the ‘*Australia Acts*’): see generally *A-G (WA) v Marquet* (2003) 217 CLR 545.

71 RTE Latham, ‘The Law and the Commonwealth’ in WK Hancock, *Survey of British Commonwealth Affairs* (Oxford University Press, 1937) vol 1, 512, quoted in DB Swinfen, ‘The Genesis of the *Colonial Laws Validity Act*’ [1967] 1 *Juridical Review* 29, 30 (‘Genesis of *CLVA*’).

72 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Liberty Classics, 1982) 49. See Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2009) 71–3, 92–6 <<https://doi.org/10.1017/CBO9780511609671>> (‘*The Constitution of a Federal Commonwealth*’).

73 Appleby et al (n 2) 54.

74 Ibid.

Vict, c 12 (*Constitution Act*) (which included the *Constitution* in its section 9) was a subsequent Act of the Imperial Parliament which could have expressly or impliedly repealed section 5 in its application to the states and their judicial systems, it did not do so. Hence, the continued application of section 5 to the states (which, as an express grant of power could not be read down to prevent the possibility of its abuse)<sup>75</sup> foreclosed the judicial derivation of the first *Kable* implication until the commencement of the *Australia Acts* and the disapplication of that section to the states in 1986.

It is self-evident that the *Constitution Act* did not *expressly* repeal section 5 of the *CLVA* in its application to the states. Indeed, section 107 of the *Constitution*, which, in contrast to sections 106 and 108, was not expressed to be ‘subject to this *Constitution*’, saved ‘every power of the Parliament of a Colony which has become ... a State ... unless it is by this *Constitution* exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State’.<sup>76</sup> However, the proposition that the *Constitution Act* did not *impliedly* repeal section 5 of the *CLVA* in its application to the States and their judicial systems, requires a more elaborate defence.<sup>77</sup>

First, the proposition that the *Constitution Act* did not impliedly repeal section 5 of the *CLVA* in its application to the states and their judicial systems is consistent with the continued application generally of the *CLVA* after the *Constitution Act*’s commencement, in relation to the Commonwealth, until 1939 with the retrospective commencement of the *Statute of Westminster Adoption Act 1942* (Cth) and, in relation to the states, until 1986 with the commencement of the *Australia Acts*.<sup>78</sup>

Secondly, there is compelling extrinsic evidence that the Imperial Parliament did *not* intend that the *Constitution* ‘stand in the place of’<sup>79</sup> the *CLVA*. The stimulus for the *CLVA*’s enactment by the Imperial Parliament in 1865 was *Australian* – a notorious constitutional crisis in the Colony of South Australia in the late 1850s and early 1860s, fewer than thirty years before the commencement of the *Constitution*’s framing period – and the first limb of section 5 was included in the *CLVA* to deal firmly, and once and for all, with the South Australian Supreme Court’s explosive decisions in *Payne v Dench*<sup>80</sup> in 1861 and *Dawes v Quarrel*<sup>81</sup> in 1864 which had cast grave doubts upon the legality of the existing local courts<sup>82</sup> and the colonial legislature’s plenary powers over them. One of the ‘few essential federal principles’<sup>83</sup> governing the drafting of the *Constitution* was ‘[t]hat

75 *Nationwide News* (n 23) 43 (Brennan J).

76 See Nicholas Aroney, ‘A Seductive Plausibility: Freedom of Speech in the *Constitution*’ (1995) 18(2) *University of Queensland Law Journal* 249, 260.

77 See Oscar I Roos, ‘The *Kirk* Structural Constitutional Implication’ (2020) 44(1) *Melbourne University Law Review* 345, 375–9.

78 See Stellios, *Zines* (n 17) 463–4. See, eg, *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 150. See also Aroney, *The Constitution of a Federal Commonwealth* (n 72) 42.

79 *Mitchell v Scales* (1907) 5 CLR 405, 417 (Isaacs J).

80 House of Assembly, Parliament of South Australia (Parliamentary Paper No 100, 1863) 7.

81 *Dawes v Quarrel* (1865) 1 (Supreme Court Reports) Pelham 1 (18 July 1865).

82 Swinfen, ‘Genesis of *CLVA*’ (n 71).

83 Quick and Garran (n 37) 123.

the powers and privileges and territorial rights of the several existing colonies shall remain intact, except in respect to such surrenders as may be agreed upon as necessary and incidental to the power and authority of the National Federal Government'.<sup>84</sup> Given the critical constitutional, legal and political, imperial and Australian developments culminating in the enactment of the *CLVA* (contra the claim of Appleby et al that 'there was nothing from the colonial period or the Convention Debates that presented a clear answer'), the framers simply assumed that the *CLVA*, including its section 5, would continue to apply to the colonies when they become states upon the commencement of the *Constitution*.<sup>85</sup>

Moreover, the Imperial Parliament was also concerned to ensure that the *CLVA* continued to apply to the *Constitution* upon its commencement. The Colonial Office intended to include an express provision to that effect in the *Constitution Act* but was persuaded not to by the Australian delegates who travelled to the United Kingdom to negotiate the passage of the draft *Constitution* through the Imperial Parliament because the continued application of the *CLVA* to the *Constitution* was so obvious that it did not need to be expressly stated.<sup>86</sup>

## B Second *Kable* Implication

This part will first set out its primary argument that the second *Kable* implication (that is, no state parliament can substantially impair the institutional integrity of an Other State Court) is not a legitimate structural implication. It will then set out four arguments that it is and seek to demonstrate that each argument is unconvincing.

### 1 Why the Second *Kable* Implication Is Not a Legitimate Structural Implication

#### (a) Establishing Chapter III Structure

The second *Kable* implication cannot be justified as a structural implication by reference to the establishing Chapter III structure because, as set out in Part II, Other State Courts are not an integral element of that structure. It is a proleptic error to describe 'the State courts' – without differentiating between the State Supreme Courts and Other State Courts – as 'an *integral* and *equal* part of the judicial system set up by Chapter III'.<sup>87</sup> Other State Courts (in contrast to the State Supreme Courts) have no constitutionally mandated position in the Australian legal system beyond their 'constitutional designation ... as *potential* repositories of federal jurisdiction';<sup>88</sup>

84 Ibid. See also at 124–5, 127–8, 133–4, 138–9, 148–9, 163–4, 912–3; Aroney, *The Constitution of a Federal Commonwealth* (n 72) 42, 150, 152; *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 31–2 (Samuel Griffith).

85 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 281 (Henry Higgins). See also at Melbourne, 4 March 1898, 1878–9 (Josiah Symon), 1886–7 (Isaac Isaacs), 1887–9 (Patrick Glynn), 1889 (Bernhard Wise); Appleby et al (n 2) 43, 52–3.

86 See Quick and Garran (n 37) 223–5, 226–7, 229–30, 235–7; Stellios, *Zines* (n 17) 463.

87 *Kable* (n 9) 116 (McHugh J) (emphasis added). See also at 103, 107–8 (Gaudron J). Cf French, 'The *Kable* Legacy' (n 2) 233, 236.

88 French, 'The *Kable* Legacy' (n 2) 218.

they do not ‘*exis[t]* to exercise the judicial power of the Commonwealth’.<sup>89</sup> Apart from the reference in section 73(ii) to ‘any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council’ — added specifically at the motion of the South Australian delegate Josiah Simon to incorporate the ‘unusual’<sup>90</sup> South Australian Local Court of Appeals,<sup>91</sup> Chapter III only implicates Other State Courts *contingently* upon the exercise of the Commonwealth powers to invest federal jurisdiction in them (subsections 71, 73(ii), 77(ii), 77(iii)) and to exclude federal jurisdiction (section 77(ii)).

In matters originating in state jurisdiction, as previously emphasised (viz this article’s fourth assumption), it is only by the exercise of state jurisdiction *in the State Supreme Courts* that the High Court’s federal appellate jurisdiction can be exercised; the exercise of federal appellate jurisdiction is thus dependent upon, and immediately derives from, the exercise of state jurisdiction by the Supreme Courts of the states, *but not Other State Courts*.<sup>92</sup> Consequently, the institutional integrity of *an* Other State Court could be substantially impaired, without impairing the integrity of the establishing Chapter III structure. Thus, the second *Kable* implication is not practically necessary to preserve its integrity.

### (b) *Enabling Chapter III Structure*

The second *Kable* implication cannot be justified as a structural implication with reference to the enabling Chapter III structure because it gives effect to a contingency of that structure, as opposed to an intrinsic feature of it. As has already been argued, a judicial system featuring state courts exercising federal jurisdiction was not ‘brought into existence by Ch III of the *Constitution*’<sup>93</sup> nor imposed by ‘the *Constitution* by its own force’.<sup>94</sup> Rather, it was merely *enabled* by the *enabling* Chapter III structure: state courts did not exercise federal jurisdiction until, and only to the extent that, they were invested with federal jurisdiction, and nothing in the text and structure of the *Constitution* compels the Commonwealth Parliament to make such an investment, nor to maintain it thereafter.<sup>95</sup> Bluntly, the *Constitution* did not invest Other State Courts with federal jurisdiction; section 39 of the *Judiciary Act* does; and that investment will continue only so long as the section is not amended or repealed by the Commonwealth Parliament by means of its ordinary legislative procedures. Had the Parliament *not* enacted the *Judiciary Act*, and *never* invested those courts with federal jurisdiction, no constitutional provision would have been breached.<sup>96</sup> While

89 Cf *Kable* (n 9) 107 (Gaudron J) (emphasis added).

90 Stephen McDonald, “‘Defining Characteristics’ and the Forgotten “Court”” (2016) 38(2) *Sydney Law Review* 207, 213.

91 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 332 (Josiah Symon). See also at 343 (Josiah Symon); McDonald (n 90) 219–21.

92 Cf *Kable* (n 9) 142 (Gummow J); Foster (n 2) 690.

93 *Kable* (n 9) 107 (Gaudron J). See also at 108, 114 (McHugh J).

94 *Gould v Brown* (1998) 193 CLR 346, 444 [186] (Gummow J). See also *Burns* (n 22) 384 [177]–[179] (Gordon J). Cf Taylor (n 17) 450.

95 See *Kable* (n 9) 139 (Gummow J).

96 Cf *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1882 (Josiah Symon).

it is true that ‘[t]he judicial landscape in Australia was fundamentally altered with the enactment of the *Judiciary Act*,<sup>97</sup> it is also true that the *Constitution* remained fundamentally *unaltered* with its enactment.

It should be emphasised that the enabling Chapter III structure provides that Other State Courts can only be vested with federal jurisdiction *by means of Commonwealth legislation*, and that the paramountcy of Commonwealth legislation over inconsistent State legislation is indubitably part of the structure of the *Constitution* (viz section 109). Hence, *once* an Other State Court is validly conferred with federal jurisdiction (viz, presumably, the commencement of the *Judiciary Act* in 1903) *then* the structure of the *Constitution* provides a means to protect that investment. Hence the very text and structure of the *Constitution* forecloses the claim that the second *Kable* implication is necessary. The legal operation of a state law which would substantially impair the institutional integrity of an Other State Court *already* invested with federal jurisdiction (for example, a novel state law which incorporates an Other State Court already vested with federal jurisdiction ‘into [state] executive policing and “law and order” policies’)<sup>98</sup> may be temporarily suspended by section 109 because the operation of the (valid) state law ‘would alter, impair or detract from the operation of a law of the Commonwealth Parliament’<sup>99</sup> given ‘[t]he structural separation of the judicial power of the Commonwealth effected by Chapter III of the *Constitution*’.<sup>100</sup>

The exercise of federal jurisdiction by state courts invested by ordinary Commonwealth legislation does not therefore provide a secure foundation for a structural implication. At the risk of stating the obvious: constitutional implications must be derived from the *Constitution*, not legislation enacted pursuant to it, and the stream of *constitutional* implications cannot rise higher than their *constitutional* source. Although there exists ‘an integrated Australian court system which includes [Other] State Courts as repositories of federal jurisdiction’,<sup>101</sup> Other State Courts were so included by the enactment of the *Judiciary Act*, not the *Constitution*.

## **2 Four Alternative Arguments in Favour of the Second Kable Implication and Why Each Is Unconvincing**

### **(a) First Alternative Argument: ‘Constitution’s Plan of an Australian Judicial System’**

But what of ‘the *Constitution*’s plan of an Australian judicial system with State courts invested with federal jurisdiction’?<sup>102</sup> Can a ‘larger vision of the Australian judiciary as a unified institution’<sup>103</sup> which does not permit of different grades or

97 Appleby et al (n 2) 57.

98 Emerton, ‘Integrity of State Courts’ (n 2) 538.

99 *Victoria v Commonwealth* (1937) 58 CLR 618, 630 (Dixon J) (‘*Shipwrecks Case*’). See also *Dickson v The Queen* (2010) 241 CLR 491, 502 [13] (French CJ, Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ); *Kable* (n 9) 116–17 (McHugh J).

100 *Garlett* (n 17) 913 [112] (Gageler J).

101 *Ibid* 940 [241] (Edelman J).

102 *Kable* (n 9) 118 (McHugh J).

103 Stone, ‘Judicial Reasoning’ (n 17) 484.

qualities of justice within an integrated court system be invoked (as it was initially by Gaudron, McHugh and Gummow JJ in *Kable* and by others since)<sup>104</sup> to overcome the specific textual and structural impediments to the second *Kable* implication identified above?

It is argued here that it cannot. The drafting history of Chapter III will first be examined, followed by a response to the claims made by the majority justices in *Kable* concerning the text of Chapter III.

(i) *Drafting History*

The framers would probably have accepted Dicey's maxim that '[f]ederalism ... means legalism ... [and] the predominance of the judiciary in the constitution'.<sup>105</sup> But the famous description of section 77(iii) as the 'autochthonous *expedient*' in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*') in 1956<sup>106</sup> captures an important truth. Although section 77(iii) 'represents a deliberate departure from the strictly federal conception of American federal jurisdiction',<sup>107</sup> the historical record clearly indicates that the Commonwealth power to invest state courts with federal jurisdiction was inserted into Chapter III during a meeting of the Judiciary Committee at the Adelaide Session of the Second Convention on 1 April 1897<sup>108</sup> as 'a very convenient means of avoiding the multiplicity and expense of legal tribunals',<sup>109</sup> and an 'elegant and thrifty example of statecraft' which solved 'an immediate and practical problem for the framers'.<sup>110</sup> One may concede (for the sake of the argument) that the framers intended a separation of Commonwealth judicial power<sup>111</sup> and, as a general aspiration, did not intend 'the exercise of federal judicial power by State courts ... to be inferior to the exercise of that power by federal courts'.<sup>112</sup> But the framers must have contemplated that Commonwealth judicial power might be exercised by Other State Courts,<sup>113</sup> and that departed widely from the standards of institutional integrity which applied to the High Court and federal courts created by the Commonwealth Parliament under

104 *Kable* (n 9) 103 (Gaudron J), 115, 118 (McHugh J), 127–8 (Gummow J); *Pompano* (n 5) 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Garlett* (n 17) 913–14 [115] (Gageler J), 927 [181], 932–3 [199] (Gordon J). See also Kenny (n 17) 141–2; French, 'The *Kable* Legacy' (n 2) 209, 241; Appleby et al (n 2) 95, 150.

105 Dicey (n 72) 100.

106 *Boilermakers'* (n 37) 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

107 Appleby et al (n 2) 90. See also at 244–5.

108 *Ibid* 222, 225.

109 *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 90 (Isaacs and Rich JJ). See also Quick and Garran (n 37) 873; *ibid* 32, 39, 43–5, 52.

110 Appleby et al (n 2) 45. See also at 47, 189.

111 Cf *ibid* 53, 173. But see Oscar Roos, 'Justice Barton and the Demise of the Inter-State Commission in the *Wheat Case* (1915)' in Andrew Lynch, *Great Australian Dissents* (Cambridge University Press, 2016) 20 <<https://doi.org/10.1017/CBO9781316665824.002>>.

112 *Kable* (n 9) 115 (McHugh J). See also at 127 (Gummow J).

113 *Ibid* 127–8 (Gummow J). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2289 (Joseph Abbott); Appleby et al (n 2) 23, 27, 30, 98, 107. But see at 49–50.

Chapter III, including the standards of judicial tenure and remuneration which were entrenched by section 72 of the *Constitution* in relation to federal justices.<sup>114</sup>

Starting with the *First Charter of Justice 1787* in New South Wales ('NSW') and the establishment of the 'Civil Court', and continuing through the remainder of the colonial period (and indeed for decades after federation), generalist and specialist courts staffed by unpaid justices of the peace, and later paid stipendiary, special and police magistrates were an essential feature of the colonial (and later state) justice systems.<sup>115</sup> These courts commonly exercised judicial *and* non-judicial powers and their members did not enjoy judicial tenure: justices of the peace were honorary appointments at pleasure and not 'judicial officers',<sup>116</sup> and the stipendiary, special and police magistrates 'formed part of the ... public services' and were 'subject to disciplinary and like procedures applying to all public servants'.<sup>117</sup> Yet while these courts of summary jurisdiction were legally classified as 'inferior', they were unequivocally still *courts*, and it can be readily inferred that the framers envisaged that they would be vested with federal jurisdiction by the Commonwealth Parliament entirely consistently with Chapter III's enabling structure. Thus, the first Commonwealth Parliament – containing numerous framers who had participated in the Second Convention Debates on Chapter III<sup>118</sup> – enacted the *Post and Telegraph Act 1901* (Cth), the *Punishment of Offences Act 1901* (Cth), the *Pacific and Island Labourers Act 1901* (Cth) and the *Judiciary Act*, all vesting federal jurisdiction in state courts of summary jurisdiction exercisable by stipendiary, police and special magistrates, notwithstanding those magistrates' status as paid state public servants.<sup>119</sup>

In sum, the framers appreciated that the exercise of federal jurisdiction would require a high degree of integrity and impartiality.<sup>120</sup> They understood that there were federal interests at stake, both vertical (that is, involving the Commonwealth as a litigant) and horizontal (for example, in diversity proceedings).<sup>121</sup> The exercise of

114 *Kable* (n 9) 80–3, 86 (Dawson J); Goldsworthy, 'Kable, Kirk and Judicial Statesmanship' (n 17) 81–2. Cf *Kable* (n 9) 115 (McHugh J). See *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61 (Mason J). See also Lindell (n 4) 338; Appleby et al (n 2) 52.

115 Appleby et al (n 2) 13, 27–31; James Crawford and Brian Opeskin, *Australian Courts of Law* (Oxford University Press, 4<sup>th</sup> ed, 2004) 89, 91; John Willis, 'The Magistracy: The Undervalued Work-Horse of the Court System' (2000) 18(1) *Law in Context* 129, 129–32.

116 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1895–6 (Josiah Symon).

117 *Forge* (n 11) 82 (Gummow, Hayne and Crennan JJ). But see *Ex parte Duncan* (1904) 4 SR (NSW) 217.

118 Including Edmund Barton, Sir John Downer and Richard O'Connor, who all had been members of both the Constitutional and Drafting Committees; Alfred Deakin, Isaac Isaacs and John Quick, who all had been members of the Constitutional Committee; HB Higgins and Sir Josiah Symon, who had both been members of the Judiciary Committee; as well as Sir John Forrest, Charles Kingston, Simon Fraser, Sir William Zeal, Frederick Holder, Sir George Turner, Sir Philip Fysh, and Louis Solomon. See Aroney, *The Constitution of a Federal Commonwealth* (n 72) 173.

119 See, eg, *Judiciary Act 1903* (Cth) ss 38–40, 46, 64, 68, 72, 75, 78, 79, 81, 86(h), as enacted; *Post and Telegraph Act 1901* (Cth) ss 151–3, as enacted; *Punishment of Offences Act 1901* (Cth) ss 2–4, as enacted; *Pacific and Island Labourers Act 1901* (Cth) ss 8–10, as enacted.

120 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2291 (Joseph Abbott). See also Quick and Garran (n 37) 877–8, 882–3.

121 Appleby et al (n 2) 95.



federal jurisdiction would invalidate laws enacted ultra vires by the Commonwealth Parliament,<sup>122</sup> and resolve legal conflicts between the polities of the federation,<sup>123</sup> the residents of different states,<sup>124</sup> and a state and a resident of another state<sup>125</sup> – all tasks foreign to the exercise of judicial power in the *British Constitution*.<sup>126</sup> However, it is also indubitable that they sought to satisfy this requirement only partly by constitutional entrenchment, and that it was not the constitutional function of the autochthonous expedient to impose a minimum constitutional standard of Other State Court institutional integrity. To apply the well-known dictum of the High Court in *Cole v Whitfield* concerning the permissible use of the Convention Debates in interpreting the text of the *Constitution*, it is clear that the framers did *not* understand that the ‘scope and effect’ of the phrases ‘in such other courts’ in section 71 and ‘any court of a State’ in section 77(iii) would impliedly impose a minimum constitutionalised standard of institutional integrity on Other State Courts which would constrain the legislative capacities of the State Parliaments; nor can it be plausibly argued that ‘authorial intention and social convention’<sup>127</sup> gave those phrases that ‘function’.

Indeed, it is possible to go even further: contra Appleby et al on the autochthonous expedient, the framers were not indifferent ‘to any implication which might arise from this novel device’.<sup>128</sup> Rather, they would have positively and overwhelmingly repudiated any constitutional vision which embraced the second *Kable* implication and thus diminished the powers the colonial parliaments had secured fewer than 40 years earlier with the passage of section 5 of the *CLVA*. After all, they were colonial politicians who had enjoyed ‘the delights of parliamentary self-government’,<sup>129</sup> representing ‘what are really sovereign states – sovereign states in essence, if not

122 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 300 (William Trenwith), 312 (Isaac Isaacs); at Melbourne, 1 March 1898, 1686 (Bernhard Wise). See also *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 946 (Charles Kingston), 955 (Adey Douglas), 956 (John Downer), 962 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2329 (John Quick).

123 See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 953 (Henry Higgins), 962 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 301 (Charles Kingston); at Melbourne, 1 March 1898, 1686 (Bernhard Wise); at Melbourne, 4 March 1898, 1890 (Henry Higgins). See also *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 956 (John Downer); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2330 (Edmund Barton).

124 See Quick and Garran (n 37) 936–8, 969–70.

125 Ibid 939.

126 See, eg, *Official Report of the National Australasian Convention Debates*, Adelaide, 20 April 1897, 953 (Henry Higgins), 955 (Adey Douglas), 955 (John Downer), 962 (Edmund Barton). See also Quick and Garran (n 37) 914; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1665 (John Downer); at Melbourne, 4 March 1898, 1878 (Josiah Symon), but see at 1876–7 (Patrick Glynn), 1877 (Charles Kingston).

127 Crowe (n 22) 111 (emphasis added).

128 Appleby et al (n 2) 6. See also at 32–3. But see at 53.

129 JA La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 2.

in form',<sup>130</sup> to broker a federal compact which would emerge from the agreement of the peoples of the independent and pre-existing colonies.<sup>131</sup>

Moreover, 'while the formation of the Australian federation derived much of its legitimacy from its ratification in popular referendums, the process was legally overseen and controlled by the several colonial legislatures':<sup>132</sup> it was hardly likely that those colonial parliaments overseeing and controlling the framing of the *Constitution* would have been indifferent to an implication arising from a Commonwealth expedient curtailing each state parliament's 'full power ... to make provision for the administration of justice' in each state.

(ii) *Text*

Given the framers' intentions and assumptions are fundamentally at odds with the second *Kable* implication, it is perhaps unsurprising that the majority justices in *Kable* did not refer to the Convention Debates in their reasoning, notwithstanding the High Court's decision almost 10 years earlier in *Cole v Whitfield* which lifted the Court's self-imposed embargo on their use. Instead, the majority justices in *Kable* made the bold claim (in the absence of extrinsic evidence) that the text of Chapter III – specifically sections 71, 77(iii), 78, 79 and 80 – establishes that 'the *Constitution* intended'<sup>133</sup> a 'constitutional baseline'<sup>134</sup> standard of justice (viz '[t] here are not two grades of federal judicial power')<sup>135</sup> which would be violated in the absence of the second *Kable* implication.

Even if one accepts that, at least in a loose sense, the *Constitution* (an inanimate object) can be said to have intentions (a mental state) independent of the intentions of its authors, it is maintained that this claim is unconvincing.

In ignorance of the rich legal and non-legal context of the framing period, it might be conceded that it is *possible* (albeit *just* possible), to interpret the bare text of the provisions of the *Constitution* upon which the majority justices in *Kable* rely in making their claim about what 'the *Constitution* intended' – that is, sections 71, 77(iii), 78, 79 and 80 – as implying a constitutional baseline standard of justice in the exercise of federal jurisdiction which would be violated in the absence of the second *Kable* implication. But such a reading would be highly tendentious and require a strong, extraneous, antecedent bias to fill the constitutional silences in its favour. Why are only federal justices included in section 72 but not state judges, or at least state judges exercising Commonwealth judicial power?<sup>136</sup> Why can 'any

130 *Official Record of the Debates of the Australasian Federal Convention*, Sydney, 10 September 1897, 294 (Josiah Symon). See also *Official Record of the Proceedings and Debates of the Australasian Federation Conference*, Melbourne, 6 February 1890, 10 (Samuel Griffith).

131 Aroney, *The Constitution of a Federal Commonwealth* (n 72) 6, 61, 67–8, 134, 152, 156–7. See also Geoffrey Sawer, *The Australian Constitution* (Australian Government Publishing Service, 1975) 23, quoted in Aroney, *The Constitution of a Federal Commonwealth* (n 72) 155 (emphasis added). See also at 158, 165, 170–1.

132 Aroney, *The Constitution of a Federal Commonwealth* (n 72) 183.

133 *Kable* (n 9) 111 (McHugh J).

134 Appleby et al (n 2) 95.

135 *Kable* (n 9) 115 (McHugh J). See also at 103 (Gaudron J), 127 (Gummow J); *ibid* 90–3, 95.

136 *Kable* (n 9) 82 (Dawson J).

court of a State'<sup>137</sup> be invested with federal jurisdiction, as opposed, for example, to state courts constituted entirely by tenured state judicial officers? Why does section 79 appear to presume (in the absence of Commonwealth prescription) that invested federal jurisdiction exercised by state courts may be exercised by any number of state judges (and indeed no state judges at all)? It could hardly be claimed that such a reading of Chapter III gives effect to what is inherent in the text, let alone that sections 71 and 77(iii) 'make little sense unless interpreted in the light of some more general doctrine',<sup>138</sup> or that the language is intentionally open-ended.

Finally, in the absence of such a strong, extraneous normative bias towards a constitutionally entrenched guarantee of a baseline standard of institutional integrity, how is such an implication strictly necessary? Rather, a far more plausible inference to be drawn from the text of the *Constitution* (which includes, of course, section 107 which is not expressed to be 'subject to this *Constitution*') is that 'the *Constitution* intended' that any posited minimum standard of justice in the exercise of federal jurisdiction by state courts would be maintained *legally* by means of the entrenched High Court's appellate jurisdiction from 'any ... court exercising federal jurisdiction', as well as the guarantee of trial by jury for Commonwealth offences prosecuted on indictment.

(b) *Second Alternative Argument: 'Courts' as a 'Constitutional Expression'*

But what of Chapter III's references to 'courts'? As Adrienne Stone has observed, '[t]he text and structure method ... requires that we pay close attention to the specific institutions ... identifiable in the text and structure of the *Constitution*'.<sup>139</sup> Since *Forge v Australian Securities and Investments Commission* ('*Forge*') in 2006, the High Court has emphasised that the word 'court' in Chapter III provides the textual anchor for its *Kable* reasoning, including the standards by which incompatibility with institutional integrity may be assessed.<sup>140</sup> Building on Gummow J's assertion in *Kable* that '[f]ederal jurisdiction could not be invested in a State body which was not a "court" within the meaning of section 77(iii)'<sup>141</sup> can it convincingly be argued thus: because the word 'court' in Chapter III is a constitutional expression which has a minimum entrenched content, and federal jurisdiction pursuant to sections 71 and 77(iii) can only be invested in 'any *court* of a State',<sup>142</sup> the state parliaments must be constitutionally incapacitated from legislating to impair the institutional integrity of Other State Courts, such that they would cease to be a court in a Chapter III sense,

137 *Constitution* s 77(iii) (emphasis added).

138 Kirk, 'Constitutional Implications Pt 1' (n 25) 663.

139 Stone, 'Text and Structure Revisited' (n 22) 842.

140 *Forge* (n 11) 67–8 [41] (Gleeson CJ), 73–4 [57]–[58], 76 [63] (Gummow, Hayne and Crennan JJ), 121 [192]–[193] (Kirby J); *Garlett* (n 17) 913–14 [115]–[117] (Gageler J), 927–8 [182]–[184] (Gordon J), 940–1 [243]–[244] (Edelman J). See Crawford and Goldsworthy (n 17) 374; Foster (n 2) 691; French, 'The *Kable* Legacy' (n 2) 223, 233, 239–41. See also Lindell (n 4) 346–7; Appleby et al (n 2) 96–100, 107–8.

141 *Kable* (n 9) 140 (Gummow J). See also at 139 (Gummow J); Appleby et al (n 2) 92–3.

142 *Constitution* s 77(iii) (emphasis added).

and hence actual or potential repositories of federal jurisdiction as constitutionally permitted by sections 71 and 77(iii)?<sup>143</sup>

Recasting the word ‘court’ in Chapter III as a constitutional expression entices. The problem, however, lies in the premise of the argument (that is, that the word ‘court’ in Chapter III is a constitutional expression which has a minimum entrenched content). The condition that a structural implication can be derived only from the *Constitution* if it is ‘logically or practically necessary for the preservation of the integrity of [the *Constitution*’s] structure’<sup>144</sup> precludes the ‘piggy-backing’ derivation of one structural implication from another. So, for the premise to form the basis of a valid structural implication, it cannot itself be a structural implication; it must be a genuine one. But how can it be plausibly maintained that the requisite, entrenched meaning of the word ‘court’ in Chapter III is in the actual terms of its text? After all ‘the framers had a relaxed attitude ... as to what were the defining characteristics of a “court”’.<sup>145</sup> Apart from the multitude of inferior courts of summary jurisdiction in existence at federation composed exclusively of honorary justices of the peace and stipendiary, police and special magistrates referred to earlier, and ‘the historical lack of bright-line distinctions between tribunals and courts prior to federation’,<sup>146</sup> (i) both NSW and Victoria had, since 1787 and 1851 respectively, prerogative Courts of Vice-Admiralty consisting of judges appointed without judicial tenure by the British Admiralty (and by ‘Deputy Judges’ without judicial tenure appointed in turn by those judges appointed by the Admiralty)<sup>147</sup> exercising judicial powers in civil and criminal jurisdiction until 1911,<sup>148</sup> (ii) Western Australia from 1861 until 1912 provided that the ‘Governor in Executive Council shall, from Time to Time, hold a Court, to be called “The Court of Appeal of Western Australia”’<sup>149</sup> which had the power to receive and hear appeals from its Supreme Court in civil matters, with the assistance, at its discretion, of the Chief Justice;<sup>150</sup> and (iii) South Australia from 1837 to 1937 had a similar Court of Appeals comprising the Executive Council (with the exception of the Attorney- or Advocate-General and the Crown Solicitor) with jurisdiction to reverse any

143 See *Garlett* (n 17) 913–15 [115]–[120] (Gageler J), 940 [242] (Edelman J); *Foster* (n 2) 691–2; French, ‘The *Kable* Legacy’ (n 2) 223.

144 French, ‘The *Kable* Legacy’ (n 2) 223. See Goldsworthy, ‘*Kable*, *Kirk* and Judicial Statesmanship’ (n 17) 77–82. See, eg, *Burns* (n 22) 325–6 [2]–[3], 337 [46] (Kiefel CJ, Bell and Keane JJ), 346 [68], 355 [94] (Gageler J). See also Kirk, ‘Evolutionary Originalism’ (n 32) 353; *Durham Holdings* (n 20) 410 [14] (Gaudron, McHugh, Gummow and Hayne JJ); *APLA* (n 22) 352 [32]–[33] (Gleeson CJ and Heydon J) 452–4 (Hayne J); Goldsworthy, ‘Constitutional Implications Revisited’ (n 23) 26–31. Cf *Payroll Tax Case* (n 27) 401–2 (Windeyer J).

145 Appleby et al (n 2) 52.

146 *Ibid* 175. See also at 176, 181.

147 *Vice-Admiralty Courts Act Amendment Act 1867* (Imp) 30 & 31 Vict, c 45, ss 5, 6, 10, 13.

148 See Australian Law Reform Commission, *Civil Admiralty Jurisdiction* (Report No 33, December 1986) <<https://www.alrc.gov.au/publication/civil-admiralty-jurisdiction-alrc-report-33>>.

149 *Supreme Court Ordinance 1861* (WA) s 30.

150 *Ibid*; *Appellate Jurisdiction Act 1911* (WA) s 7.

judgments of the State Supreme Court<sup>151</sup> which was deliberately incorporated as a ‘court’ into the text of Chapter III without objection.<sup>152</sup>

The proposition that the constitutional expression ‘any court of a State’ in section 77(iii) imposes a limitation on the legislative capacity of the state parliaments (in addition to a limitation on those state institutions which the Commonwealth Parliament can vest with federal jurisdiction) is also irredeemably arbitrary in its application, given that the High Court has resolutely and simultaneously maintained that there is no formal separation of powers in the states.<sup>153</sup> How does one identify those state institutions to which the limitation applies? One is reminded of the statement concerning greatness in Maria’s prank letter to Malvolio in Act II, Scene V of Shakespeare’s *Twelfth Night*: ‘Some are born great, some achieve greatness, and some have greatness thrust upon ’em.’<sup>154</sup> Presumably the limitation is not ‘thrust upon’ all state institutions which a State chooses to label a ‘court’ (viz the South Australian Local Court of Appeals until its abolition in 1937 or, to supply a current example, the Queensland Civil and Administrative Appeals Tribunal which has been given the status of a court by Queensland legislation),<sup>155</sup> as there must be a viable distinction between, on the one hand, ‘courts’ in form but not in constitutionally-mandated substance (which cannot exercise federal jurisdiction) and, on the other hand, courts in constitutionally-mandated substance (which can). Nor can the limitation be imposed on all state institutions vested with state judicial power. But if the limitation only applies to state institutions which pass constitutional muster when they are established by a state (‘born great’), or when they are, by happenstance, reformed and reconstituted by a state to the mandated constitutional standard (‘achieve greatness’) – such that the constitutional status of those two posited categories of state courts cannot be subsequently diminished – then the imposition of the limitation is arbitrary.

Finally, even if one accepts the proposition that the expression ‘any court of a State’ in section 77(iii) is a constitutional expression which refers to an institution with ‘essential characteristics’ which include the *Kable* standard of Other State Court institutional integrity, on what basis is a structural implication in the form of the third *Kable* implication necessary? As the text of sections 77 (‘Power to define jurisdiction’) and 71 (‘in other such courts as [the Parliament] invests with federal jurisdiction’) expressly provides that the Commonwealth Parliament has the power to invest federal jurisdiction in a body which (it has been assumed) has the essential characteristics of a court of a state, the necessary, logical, obvious negative implication of that text is that the Parliament does *not* have the power to invest federal jurisdiction in a body which is *not* a court of a state.<sup>156</sup> The text

151 McDonald (n 90) 213.

152 See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 332 (Josiah Symon). See also at 343 (Josiah Symon); Appleby et al (n 2) 25–6, 50–2, 58, n 28; Taylor (n 17) 438; *ibid* 219–20.

153 See, eg, *Garlett* (n 17) 928 [184] (Gordon J).

154 William Shakespeare, *Twelfth Night* (Methuen, 2<sup>nd</sup> ed, 1975) 70.

155 See Appleby et al (n 2) 176.

156 *Waterside Workers’ Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 442 (Griffith CJ). See also *NAAJA* (n 20) 613 [104] (Gageler J); *Garlett* (n 17) 913 [112] (Gageler J), 928 [184] (Gordon J).

therefore has a definite, non-arbitrary binary effect. *Either* the Parliament has the power to invest the relevant state body with federal jurisdiction (because the body satisfies the constitutional characteristics of a court) *or* it does not: *if* an impugned state act removes one or more of those characteristics from a body which, prior to the commencement of the state act, had those characteristics and was a court of the state, *then* the necessary, obvious and logical implication is that the Parliament can no longer invest federal jurisdiction in it.<sup>157</sup> And, as has already been emphasised, if the Parliament has already vested an Other State Court with federal jurisdiction then the *Constitution* provides a mechanism to protect that investment in the form of section 109.

(c) *Third Alternative Argument: Yielding Matters for Federal Jurisdiction?*

The third alternative argument is that the second *Kable* implication is practically necessary to preserve the integrity of the establishing Chapter III structure because litigation originating in state jurisdiction in Other State Courts may found appeals to the High Court under section 73(ii) via the State Supreme Courts. This argument may be supported by a frequently cited passage in the judgment of Gummow J in *Kable*:

In any event, to say of s 77(iii) that it offers to the Commonwealth but a facility, so that the *Constitution* does not bring the courts of the States necessarily into any relationship with the federal judicial power, does not meet the appellant's case. Section 73(ii) indicates that the functions of the Supreme Courts of the States, at least, are intertwined with the exercise of the judicial power of the Commonwealth. This is because decisions of the State courts, whether or not given in the exercise of invested jurisdiction, yield 'matters' which found appeals to this Court under s 73(ii). By this means, the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States.<sup>158</sup>

However, the third alternative argument is unconvincing (hence, perhaps Gummow J's hedging qualification 'at least' in the passage above)<sup>159</sup> because it contains a non sequitur: there is no necessary connection, between (i) 'yielding matters' for the exercise of federal jurisdiction, whether in original or appellate jurisdiction and whether mediately or immediately, on the one hand; and (ii) institutional integrity on the other. Decisions of 'officers of the Commonwealth' (which term includes Commonwealth executive officers and all federal judicial officers except High Court justices) immediately yield matters for the exercise of federal jurisdiction (under section 75(v)), but it would be implausible to suggest that it is practically necessary for such officers (nearly all of whom are executive, rather than judicial, officers) to maintain institutional integrity (let alone court-like institutional integrity) in order to protect the integrity of the establishing Chapter III structure in so far as it embraces section 75(v).

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157 See also Appleby et al (n 2) 90.

158 *Kable* (n 9) 142 (Gummow J) (emphasis added).

159 See also Appleby et al (n 2) 92–3.

(d) *Fourth Alternative Argument: Concurrent State Jurisdiction upon Federation*

The fourth alternative argument can be presented thus:

1. As alluded to earlier in this Part, upon the commencement of the *Constitution*, Other State Courts (like the State Supreme Courts) exercised concurrent state jurisdiction over the matters listed in sections 75 and 76 ‘where, previous to the constitution, state tribunals possessed jurisdiction, independent of national authority’<sup>160</sup> *unless and until* any such jurisdiction was removed by the Commonwealth Parliament pursuant to section 77.<sup>161</sup> This concurrent state jurisdiction included ‘the duty of interpreting the *Constitution* ... in every case in which [state courts] have jurisdiction and in which rights or obligations arising under the *Constitution* are involved’.<sup>162</sup>
2. This concurrent state jurisdiction, like federal jurisdiction, and for the same reasons, had to be exercised with a high degree of integrity and impartiality.
3. Hence, irrespective of any *subsequent* conferral of federal jurisdiction by the Commonwealth Parliament pursuant to the enabling Chapter III structure, the second *Kable* implication is practically necessary for the preservation of the integrity of the *Constitution*’s establishing Chapter III structure.

The fourth alternative argument is unconvincing for two reasons.

First, the exercise of the concurrent state jurisdiction by Other State Courts upon the commencement of the *Constitution* described above is not inherent ‘in the actual terms’ of the *Constitution*. Rather the *Constitution* provides it can be removed, wholly or in part, from Other State Courts by the Commonwealth Parliament pursuant to section 77 – as was illustrated vividly upon the commencement of the *Judiciary Act*.<sup>163</sup> Moreover, upon removal, that concurrent state jurisdiction need not be replaced by the investment of analogous federal jurisdiction in Other State Courts. Although the *Judiciary Act* did so replace concurrent state jurisdiction with a grant of broad general federal jurisdiction, the *Constitution* permits its removal without replacement, such that federal courts alone could exercise federal jurisdiction, while state courts, including Other State Courts, would exercise no concurrent state jurisdiction.<sup>164</sup>

Second, the fourth alternative argument’s second proposition (that is, that this concurrent state jurisdiction, like federal jurisdiction, had to be exercised with a high degree of integrity and impartiality) is contradicted by history. As Nettle, Gordon and Edelman JJ (writing separately) each noted in *Burns v Corbett*, after

160 Joseph Story, *Commentaries on the Constitution of the United States* (Hilliard, Gray, and Company, 1833) vol 3, 622 § 1748, quoted in Quick and Garran (n 37) 948.

161 See Quick and Garran (n 37) 948, 971–3. See also at 956–7, 966–7; Appleby et al (n 2) 54–7, 61, 64, 189.

162 Quick and Garran (n 37) 956.

163 See also *ibid* 971–3. See generally Appleby et al (n 2) 57–61, 65, 175.

164 See Quick and Garran (n 37) 967–8, 971–3.

federation and before the commencement of the *Judiciary Act*, both state judicial and non-judicial bodies had exercised such concurrent state jurisdiction.<sup>165</sup>

### C Third Kable Implication

#### ***1 How Part of the Third Kable Implication Is a Legitimate Structural Implication: It Is Not Possible to Abolish All State Courts***

It is argued that the third *Kable* implication (that is, no state parliament can abolish a state's system of courts) is a legitimate structural implication only to the extent that a state parliament cannot abolish *all* state courts within a state. That limited implication is probably an intended implication which 'clearly emerges'<sup>166</sup> from the *Constitution's* text (contra the article's third assumption in so far as it encompasses that limited implication), including sections 51(xxiv), 51(xxv), 73, 77, 79 and 118, as well as covering clause 5.<sup>167</sup> However, even if it is not, it can be straightforwardly justified as a structural implication derived from the enabling Chapter III structure: no state parliament could abolish *all* the state courts within a state because the operation of the enabling Chapter III structure would be stymied.<sup>168</sup> A limited implication which prevents the abolition of *all* state courts within a state is therefore 'practically necessary for the preservation of the integrity of [the enabling Chapter III structure]',<sup>169</sup> and 'truly necessary to give effect to the express constitutional provisions'.<sup>170</sup> However, given that the first *Kable* implication already guarantees the existence (and institutional integrity) of the State Supreme Courts, that limited third *Kable* implication is superfluous: if each state must maintain a state supreme court then *ipso facto* it cannot abolish all state courts.

#### ***2 How Part of the Third Kable Implication Is Not a Legitimate Structural Implication: No Requirement to Maintain a System of State Courts***

The third *Kable* implication, of course, goes further than preventing the states from abolishing all their state courts: it purports to protect each state's *system* of state courts with a state supreme court at its head.<sup>171</sup> A system of state courts thus presumably signifies more than at least one tier of inferior Other State Courts below each state's supreme court and, to that extent, it is argued that the implication is not

165 *Burns* (n 22) 370–1 [134]–[137] (Nettle J), 388 [186]–[188] (Gordon J), 393 [206]–[207], 400–5 (Edelman J).

166 *Kable* (n 9) 103 (Gaudron J).

167 *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 5 ('*Constitution Act*'); *ibid* 110 (McHugh J), 140 (Gummow J). See also French, 'The *Kable* Legacy' (n 2) 223. But see Symon quoted in Appleby et al (n 2) 45.

168 See *Kable* (n 9) 103 (Gaudron J), 138 (Gummow J). See also at 111 (McHugh J).

169 *ACTV* (n 21) 135 (Mason CJ).

170 *MZXOT v Minister for Immigration and Border Protection* (n 22) 635 [83] (Kirby J). But see Taylor (n 17) 455.

171 See, eg, *Kable* (n 9) 110–11 (McHugh J).



a legitimate structural implication: as explained in Part III previously, Other State Courts are not an integral component of the Chapter III structure.

Even if one accepts Gaudron J's claim in *Kable* that 'one of the clearest features of [the] *Constitution* ... [is] that it provides for an integrated Australian judicial system for the exercise of the judicial power of the Commonwealth',<sup>172</sup> the integrated system *that is established by Chapter III for the exercise of the judicial power of the Commonwealth* does not require the existence of any state courts other than the State Supreme Courts. As already emphasised, a system of state courts exercising federal jurisdiction is a contingency of the enabling structure, not an intrinsic feature of it. Moreover, it is not plausible to maintain that the third *Kable* implication, insofar as it requires the existence of a system of state courts, is *necessary* to maintain the enabling structure: provided a state court exists, its operation is not stymied. Thus, Gaudron J's (probably unconsciously revealing) statement in *Kable* that 'although it is for the States to determine the organisation and structure of their court systems, they must each maintain courts, or, at least, a court for the exercise of the judicial power of the Commonwealth'.<sup>173</sup>

But what about constitutional text (contra this article's third assumption)? In *Kable* the High Court proffered sections 51(xxiv), 51(xxv), 73, 77, 79 of the *Constitution* in support of the third *Kable* implication;<sup>174</sup> it also proffered covering clause 5 of the *Constitution Act*.<sup>175</sup> However, the meanings of section 51(xxiv) ('courts of the States'), section 51(xxv) ('judicial proceedings of the States'), 73(ii) ('of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council'), section 77(iii) ('investing any court of a State with federal jurisdiction'), section 79 ('of any court') and section 118 ('judicial proceedings of any State') clearly do not imply a constitutional requirement of a plurality, let alone a system, of courts in each state. Only covering clause 5 arguably presupposes the existence of more than one state court in each state ('and all laws made by the Parliament of the Commonwealth under the Constitution, shall be binding on the courts, judges and people of every State'),<sup>176</sup> as 'courts' is plural and 'every State' is singular. However, a textual presupposition is not necessarily a genuine implication<sup>177</sup> and, in any event, any claim that covering clause 5 provides the textual anchor of the third *Kable* implication is trumped by legal meaning.<sup>178</sup> Since 1850 it has been an accepted rule of statutory construction that, unless the contrary intention appears, words in the

172 Ibid 102.

173 Ibid 103 (emphasis added). Cf ibid 111 (McHugh J).

174 Ibid 110 (McHugh J), 140 (Gummow J). See also French, 'The *Kable* Legacy' (n 2) 223. But see Symon (n 1), quoted in Appleby et al (n 2) 45, where Symon, the chair of the 1897 Judiciary Committee, appears to contemplate the possibility that a state could close its courts entirely without violating the *Constitution*.

175 *Kable* (n 9) 110 (McHugh), 140 (Gummow J).

176 *Constitution Act* (n 167) s 5 (emphasis added).

177 Goldsworthy, 'Constitutional Implications and Freedom of Political Speech: A Reply to Stephen Donaghue' (n 28) 369–71. See also *ACTV* (n 21) 135 (Mason CJ). Cf *Durham Holdings* (n 20) 431 [74] (Kirby J).

178 See generally *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 384 [78] (McHugh, Gummow, Kirby and Hayne JJ).

plural shall include the singular; in 1900, when the Imperial Parliament enacted the *Constitution Act*, that rule was codified in section 1(1) of the *Interpretation Act 1889*, 52 & 53 Vict, c 63.<sup>179</sup>

#### IV WORKING MODEL OF CHAPTER III WITH THE FIRST *KABLE* IMPLICATION BUT WITHOUT THE SECOND AND THIRD *KABLE* IMPLICATIONS

This Part describes a working model of Chapter III based on the arguments presented in Part III. The model is premised upon the jettisoning of the second and third *Kable* implication but not the *Kirk* doctrine, which the author has argued elsewhere has a separate and sustainable justification.<sup>180</sup>

At the working model's constitutional core is the High Court and the State Supreme Courts. The institutional integrity of the former is protected explicitly by Chapter III, and the institutional integrity of the latter is protected implicitly by Chapter III by virtue of the first *Kable* implication. In matters originating in federal jurisdiction, the High Court's status as Australia's ultimate court of appeal is secured explicitly by section 73, which gives it a direct appellate jurisdiction from all courts exercising federal jurisdiction. In matters originating in state jurisdiction, the High Court's status as Australia's ultimate court of appeal is also secured explicitly by section 73, which gives it a direct appellate jurisdiction from the State Supreme Courts, and implicitly by Chapter III, specifically (i) the first *Kable* implication which protects the institutional integrity of the State Supreme Courts as the constitutional conduit through which matters originating in state jurisdiction must proceed to the High Court; and (ii) the *Kirk* implication, which constitutionally entrenches the jurisdiction of those State Supreme Courts to review the decisions of state judicial and executive decision-makers, including Other State Courts, where it is alleged that they have exceeded their jurisdiction.<sup>181</sup>

To adopt the words of Heydon J in *Public Service Association and Professional Officers' Association of NSW v Director of Public Employment*,<sup>182</sup> the working model set out above cuts less deeply into the concepts of the Australian federation and representative parliamentary democracy than the version of Chapter III which retains all three *Kable* implications,<sup>183</sup> while offering the possibility that many of the *Kable* doctrine's 'extremely beneficial effects'<sup>184</sup> could be retained.

First, the working model not only retains, but enhances, the first *Kable* implication which is almost certainly the most important aspect of the *Kable* doctrine.<sup>185</sup> The emphasis on undifferentiated 'State Courts' as repositories of

179 See AB Kempe, *On the Interpretation of Statutes* (Sweet & Maxwell, 3<sup>rd</sup> ed, 1896) 485.

180 See Roos, 'The *Kirk* Structural Constitutional Implication' (n 77).

181 See *ibid*.

182 (2012) 250 CLR 343, 369 [62] (Heydon J).

183 See also French, 'The *Kable* Legacy' (n 2) 235.

184 *International Finance Trust* (n 17) 379 [140] (Heydon J). See Foster (n 2) 694.

185 See Wheeler, 'Commentary on the *Kable* Legacy' (n 7) 250.

federal jurisdiction in the current *Kable* jurisprudence has meant that insufficient attention has been paid to the special constitutional position of the State Supreme Courts in those *Kable* cases which have considered the impact of an impugned state act on the institutional integrity of a State Supreme Court specifically.<sup>186</sup> The High Court's recent 2022 *Kable* doctrine decision, *Garlett v Western Australia* ('*Garlett*'), illustrates this point.<sup>187</sup>

*Garlett* concerned the impact of a Western Australian Act<sup>188</sup> providing for judicially ordered preventative detention on the institutional integrity of the state's supreme court. Specifically, the Act required the state's supreme court to make a 'restriction order', which term included a 'continuing detention order',<sup>189</sup> on the application of the state if the Court found that an 'offender'<sup>190</sup> was a 'high risk serious offender',<sup>191</sup> where the categories of 'offender' and 'serious offender' under the Act were very broad.<sup>192</sup> Even though the *Kable* issue concerned the integrity of the state's supreme court only, all five judgments (that is, the plurality judgment of Kiefel CJ, Keane and Steward JJ, the two separate majority judgments of Gleeson and Edelman JJ, and the two dissenting judgments of Gordon and Gageler JJ in the minority) discussed the *Kable* doctrine in generic terms which did not draw any distinction between the doctrine's application to the State Supreme Courts in contrast to Other State Courts. Accordingly, no judgment seized the opportunity to determine the validity of the impugned Act to a higher constitutional standard than would apply if the Act conferred the same power on an Other State Court in contrast to the Supreme Court. It might be speculated that Edelman J, in particular – who laboured to interpret the impugned Act very narrowly and who described it as 'perilously close'<sup>193</sup> to invalidity – could have joined the minority had he embraced the clear constitutional distinction between the State Supreme Courts and Other State Courts advocated in this article. All state courts can be vested with federal jurisdiction under section 77(iii) and, as McHugh J observed in *Fardon v Attorney-General (Qld)*:

The bare fact that particular state legislation invests a State court with powers that are or jurisdiction that is repugnant to the traditional judicial processes 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.<sup>194</sup>

By contrast, the working model protects State Supreme Court integrity *specifically and directly* as an integral component of the established Chapter III structure and dispenses with the qualification (evident in McHugh J's observation above) that that integrity is protected *only to the extent that* an impugned state law

186 See, eg, *Fardon* (n 55); *Forge* (n 11) 68 (Gleeson CJ), 149 (Heydon J), 137 (Callinan J). Cf *Forge* (n 11) 76–7, 83 (Gummow, Hayne and Crennan JJ), 94 (Kirby J).

187 *Garlett* (n 17).

188 *High Risk Serious Offenders Act 2020* (WA).

189 *Ibid* ss 3, 26(1).

190 *Ibid* s 3.

191 *Ibid* s 7.

192 See *ibid* s 3.

193 *Garlett* (n 17) 934 [207] (Edelman J).

194 *Fardon* (n 55) 600–1 (McHugh J) (emphasis added).

adversely affects a State Supreme Court's capacity to exercise federal jurisdiction. The specific and direct protection of the integrity of the State Supreme Courts may even militate in favour of further constitutional protection of their jurisdiction beyond that which was protected by *Kirk*.

Secondly, while adhering to conventional techniques of constitutional interpretation, the working model may encourage greater 'democratic experimentalism'<sup>195</sup> and institutional innovation and diversity in the state judicial systems,<sup>196</sup> balanced by both the overarching safeguards of constitutionally entrenched Supreme Court supervision, which protects against 'serious', jurisdictional error,<sup>197</sup> and High Court appellate oversight.<sup>198</sup> Such experimentation and innovation may be precluded or stultified by the second *Kable* implication, or chilled by its 'applied unpredictability'.<sup>199</sup>

Thirdly, it is arguable that the second *Kable* implication *increases* the risk of abuse of public power by state parliaments and state executives.<sup>200</sup> The implication limits the powers that can be vested in Other State Courts but does not prevent (at least in its current operation) taking powers, including judicial powers, from Other State Courts and placing them outside of Chapter III's 'integrated judicial system' (in contrast to the limits on federal judicial power imposed by the *Boilermakers*' principle),<sup>201</sup> even if, in time, the implication is so extended, it will only do so to a degree.<sup>202</sup> The implication could therefore be characterised as a constitutional Maginot Line: it offers the semblance of protection against the abuse of public power, by elaborately securing the integrity of the Other State Courts, but that protection can be readily bypassed by the states as a consequence of their greater constitutional flexibility by expanding the powers given to persons and institutions which are not Other State Courts.<sup>203</sup>

Fourthly, and perhaps most significantly, the working model may shift the constitutional focus, in relation to Other State Courts, to section 109 of the *Constitution* and the antecedent operation of the limitations derived from the federal principle of the *Constitution* on (i) Commonwealth legislative power

195 Appleby et al (n 2) 147.

196 See also Scott Stephenson, 'Rights Protection in Australia' in Saunders and Stone (n 2) 905, 924–5 <<https://doi.org/10.1093/law/9780198738435.003.0038>>; *Totani* (n 12) 96 [246] (Heydon J); *ibid* 115–16, 146. Cf Foster (n 2) 694–5.

197 *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 569–83 (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

198 Cf Lindell (n 4) 347.

199 Appleby et al (n 2) 130. See *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 591 [162] (Crennan J); Lindell (n 4) 332, 347. Cf *Fardon* (n 55) 600–1 (McHugh J). See generally Appleby et al (n 2) 128–88.

200 See, eg, Jeremy Gans, 'News: High Court OKs a One-Person Law', *Opinions on High* (Blog Post, 17 August 2017) <<https://blogs.unimelb.edu.au/opinionsonhigh/2017/08/17/news-high-court-oks-a-one-person-law>>.

201 See generally *Boilermakers*' (n 37). See *K-Generation* (n 12) 544 [153] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); Stellios, *The Federal Judicature* (n 7) 439. See also Appleby et al (n 2) 124, 155–8, 168–70; *NAAJA* (n 20) 639 [187] (Keane J). Cf *NAAJA* (n 20) 618–21 (Gageler J).

202 Wheeler, 'Commentary on the *Kable* Legacy' (n 7) 249–50.

203 See Appleby et al (n 2) 106, 115–16, 155–8. See also *Totani* (n 12) 97 [247] (Heydon J); Stellios, *The Federal Judicature* (n 7) 432.

to interfere with the constitution and organisation of state courts;<sup>204</sup> and (ii) state legislative power to regulate federal jurisdiction.<sup>205</sup> Any limitation on state legislation conferring ‘powers or functions on State courts which are repugnant to or incompatible or inconsistent with their exercise of Commonwealth judicial power’<sup>206</sup> would, consistently with the arguments presented in this article, be imposed temporarily by the suspensive force of section 109 (section 109 does not invalidate state legislation which is inconsistent with *valid* Commonwealth legislation but temporarily suspends its legal operation to the extent of any existing inconsistency) rather than as a permanent, invalidating ‘incompatibility limitation’<sup>207</sup> impliedly derived from Chapter III. Given that the ‘several courts of the states’ have been vested with federal jurisdiction by section 39 of the *Judiciary Act*, it can be argued that a state provision which significantly undermines the institutional integrity of a state court vested with federal jurisdiction ‘would alter, impair or detract from the operation of a law of the Commonwealth Parliament’,<sup>208</sup> such that its legal operation is suspended. Thus, the question posed by Gaudron J in *Kable* concerning the NSW Act impugned in that case – ‘It remains to be considered whether the power purportedly conferred on the Supreme Court by section 5(1) of the Act is repugnant to or incompatible with the exercise of the judicial power of the Commonwealth’<sup>209</sup> – can be recast as a question arising from the operation of section 109, not from a Chapter III implication. Furthermore, the shift from a judicially created constitutional prohibition to section 109 may encourage remedial federal–state cooperation. For example, if state legislation in relation to a state court is at risk of section 109 inconsistency, it might be possible to enact Commonwealth legislation to remove that inconsistency (for example, by specifically excluding the controversial state court from the general investment of state courts with federal jurisdiction under the *Judiciary Act*) prospectively, if not retrospectively,<sup>210</sup> further illustrating the working model’s enhanced flexibility.

## V CONCLUSION

It is widely maintained that the ‘foundation of the [*Kable*] doctrine’<sup>211</sup> implied from ‘the *Commonwealth Constitution* itself’<sup>212</sup> is the role of state courts as repositories of federal judicial power.<sup>213</sup> That role is invoked in every subsequent

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204 See Taylor (n 17) 456.

205 See *Rizeq v Western Australia* (2017) 262 CLR 1; Appleby et al (n 2) 93. Cf *Kable* (n 9) 99 (Toohey J).

206 Appleby et al (n 2) 86.

207 Ibid.

208 *Shipwrecks Case* (n 99) 630 (Dixon J).

209 *Kable* (n 9) 104 (Gaudron J). See also at 109 (McHugh J).

210 *University of Wollongong v Metwally* (1985) 158 CLR 447.

211 Stone, ‘Judicial Reasoning’ (n 17) 483. See also *Kable* (n 9) 116 (McHugh J); *Baker v The Queen* (2004) 223 CLR 513, 534 [51] (McHugh, Gummow, Hayne and Heydon JJ) (‘*Baker*’).

212 French, ‘The *Kable* Legacy’ (n 2) 236.

213 See, eg, *ibid* 219–21. See also Lindell (n 4) 322–3. Cf Appleby et al (n 2) 150.

case which considers the *Kable* doctrine,<sup>214</sup> and it is the starting point of most of the voluminous *Kable* literature.<sup>215</sup> This article has argued, however, that that role cannot serve as a foundation of the doctrine.<sup>216</sup> Rather, this article has relied on the other ‘strand of the “integration” concept’,<sup>217</sup> namely ‘the effect of section 73’<sup>218</sup> in arguing for the first *Kable* implication which protects the State Supreme Courts, but not Other State Courts.

To the extent that this article has successfully demonstrated that the first *Kable* implication *can* convincingly be derived from the *Constitution* in accordance with the High Court’s text and structure orthodoxy, it may abate the persistent dissatisfaction with the *Kable* doctrine noted in Part I – at least in so far as the doctrine comprises the first *Kable* implication. If so, that is a significant advance, as the first *Kable* implication is probably the most important component of the doctrine. Any residual dissatisfaction with the first *Kable* implication which persists can then be diagnosed as originating in dissatisfaction with the structural implication method, rather than the substance of the implication itself. The risk of misdirected or misconceived attacks on the doctrine which fail to recognise that there is an orthodox method which may support its most significant implication may thus be mitigated. Those attacks would be presumably better directed towards the implication-deriving method: the quality of constitutional scholarship and the High Court’s constitutional jurisprudence can only benefit from informed criticism of it.

This author does not wish to call into question the bona fides of ‘integrationist’<sup>219</sup> judges who endorse a vision of a national judicial system with a constitutional baseline standard of justice, and who seek to realise that vision by reading Chapter III ‘purposively’ or functionally to mandate Other State Court institutional integrity. Indeed, their efforts may have had a positive effect: as Heydon J observed in *South Australia v Totani*, at the very least ‘[l]awyers commonly think that the

214 See, eg, *Bradley* (n 8) 163 [28] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *International Finance Trust* (n 17) 338 [3] (French CJ); *Baker* (n 211) 534 [51] (McHugh, Gummow, Hayne and Heydon JJ); *Fardon* (n 55) 591 [15] (Gleeson J), 594, 598, 600–1 (McHugh J); *Totani* (n 12) 157 [426]–[428] (Crennan and Bell JJ); *Forge* (n 11) 76 [63] (Gummow, Hayne and Crennan JJ); *Pompano* (n 5) 89 [123] (Hayne, Crennan, Kiefel and Bell JJ); *Garlett* (n 17) 897 [7], 905–6 [61], 912–13 [107] (Kiefel CJ, Keane and Steward JJ), 915 [122] (Gageler J), 927 [181], 932–3 [199] (Gordon J), 940 [241]–[242] (Edelman J), 949 [286] (Gleeson J).

215 See, eg, Gageler and Bateman (n 2) 275; Carney (n 2) 289, 295; Owens (n 13) 658–9; Justice Debbie Mortimer, ‘Constitutionalisation of Administrative Law’ in Saunders and Stone (n 2) 696, 718 <<https://doi.org/10.1093/law/9780198738435.003.0030>>; Stephenson (n 196) 923; Crawford (n 17) 36; Robert French, ‘The Globalisation of Public Law: A Quilting of Legalities’ in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 231, 240; Janina Boughey and Lisa Burton Crawford, ‘Jurisdictional Error: Do We Really Need It?’ in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 395, 409; Taylor (n 17) 445–6, 449–50, 452; French, ‘The *Kable* Legacy’ (n 2) 209–10. See also Crawford and Goldsworthy (n 17) 373; Lindell (n 4) 8, 18–19, 241, 258, 284, 322–5, 344–5; Stellios, *The Federal Judicature* (n 7) 2.

216 See Stone, ‘Judicial Reasoning’ (n 17) 484.

217 Lindell (n 4) 341.

218 *Ibid.*

219 Appleby et al (n 2) 101. See also at 128.

*Kable* doctrine has had a beneficial effect on some legislation'.<sup>220</sup> However, while 'the meanings that we now place on the *Constitution* may not *entirely coincide* with the meanings placed on it by those who drafted, approved or enacted that document',<sup>221</sup> the judicial realisation of such a 'high-level characterisation of the national judicial system',<sup>222</sup> or 'constitutional narrative',<sup>223</sup> is inconsistent with the more grounded text and structure method. Judges, as well as declaring the limits of official power, also exercise it, and Australian constitutionalism requires the subjugation of judicial review to the supremacy of the *Constitution*; the rule of law is also compromised when important and settled jurisprudence on constitutional interpretation does not cohere.

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220 (2010) 242 CLR 1, 95 [245] (Heydon J). See generally *ibid* 143–70. But see Gans (n 200).

221 *Wakim* (n 55) 553 [46] (McHugh J) (emphasis added).

222 French, 'The *Kable* Legacy' (n 2) 211.

223 See Crowe (n 22) 108–12.