ATTRIBUTES AND ATTRIBUTION OF STATE COURTS – FEDERALISM AND THE KABLE PRINCIPLE

Brendan Lim*

ABSTRACT

'State courts' can be understood in at least two ways. Their 'attributes' are the characteristics that define them as 'courts'. Their 'attribution' is the extent to which they are regarded as emanations of a 'state' in its constitutional conception as a constituent unit of the federation. The principle first articulated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 ensures the institutional integrity of state courts by protecting from legislative impairment their defining characteristics as 'courts'. It therefore understands state courts almost exclusively by their 'attributes'. This article examines the significance to the *Kable* principle of also understanding state courts by their 'attribution'. There are different conceptions of the proper attribution of state courts, coincident with different visions of how to accommodate simultaneous constitutional commitments to autonomous states and integrated courts. Those conceptions influence the content and application of the *Kable* principle in ways that are insufficiently appreciated. This insight permits a new perspective on the *Kable* principle as a doctrine of federalism, and its recent applications in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319; *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531; *South Australia v Totani* (2010) 242 CLR 1; and *Wainohu v New South Wales* (2011) 243 CLR 181. It also prompts an analysis of a contemporaneous evolution in the constitutional policy of the Commonwealth, whose Attorney-General typically intervened in *Kable* cases in support of the states, until recently seeking to extend to them certain Chapter III limitations.

---

* LLM (Yale), LLB(Hons), BMus(Hons), BMa&CompSc (Adel). I profited from opportunities to present earlier versions of this work, first in a public seminar for the Centre for International and Public Law (CIPL) at the Australian National University on 19 November 2010, and again to colleagues in the doctoral program at Yale Law School on 4 November 2011. I thank Professor Kim Rubenstein for the invitation to develop my work in the CIPL forum; those who attended my presentations, for the stimulating discussions; and the anonymous referee, and editors, for several helpful suggestions.

> DAWSON J: … There are Chapter III courts and there are State courts. They belong to different judicial institutions.
>
> SIR MAURICE: They are different in many respects.
>
> DAWSON J: They are different in fundamental respects.
>
> SIR MAURICE: They may be, but not in the fundamental respect I am seeking to submit to your Honours. How can they be different?
>
> DAWSON J: Because they are different institutions, that is why.[1]
>
> KIRBY J: *Kable* was already a big step for the Court to take, but once you enter upon the notion that Chapter III speaks to the State judiciary you have to have a theory of how the State judiciary operates within the aegis of the judicature, as it is called in the Constitution, and the whole nation.[2]

INTRODUCTION

The *Kable* principle is a doctrine of federalism. This deceptively simple truth has been obscured in the 15 years since the seminal decision in *Kable v Director of Public Prosecutions (NSW)*.[3] In that time, the constitutional imperative of the 'institutional integrity' of state courts has emerged as the touchstone of the principle and has come to be understood as a function of the 'defining characteristics' — or 'attributes' — of a court. The *Kable* principle now articulates what is and what is not court-like. Accordingly, the considerations it engages are cognate with conceptions of the *separation of powers* rather than conceptions of *federalism*. This article seeks to recover the understanding of the *Kable* principle as an expression of federalism conceptions: one that is as much about '*state*' courts as it is about state '*courts*'.

The principle should be stated at the outset. Attempts at neat formulation, however, risk being either over- or under-inclusive. For now, it suffices to say that the principle disables legislatures from impairing the 'institutional integrity' of non-federal courts capable of receiving federal jurisdiction,[4] whether impairment be inflicted by conferring an incompatible function,[5] removing an essential function,[6] altering impermissibly the court's composition,[7] modifying repugnantly the court's procedures

---

1 Transcript of Proceedings, *Kable v DPP (NSW)* (High Court of Australia, S114/1995, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 7 December 1995) <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/1995/430.html>.

2 Transcript of Proceedings, *Fardon v A–G (Qld)* [2004] HCATrans 039 (2 March 2004) 3318–21.

3 (1996) 189 CLR 51 ('*Kable*').

4 This includes state Supreme Courts: *Kable* (1996) 189 CLR 51; lower state courts: *South Australia v Totani* (2010) 242 CLR 1 ('*Totani*'); and territory courts: *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 ('*Bradley*'), 163 [27]–[29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ). The article focuses on state courts. Much of what is said can apply with appropriate modification to the territory context, although different considerations also arise.

5 *Kable* (1996) 189 CLR 51.

6 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531 ('*Kirk*').

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

or processes,[8] enlisting the court in service of political ends,[9] or using incompatibly members of the court acting as *personae designatae*.[10] The apparent reach of the principle so-stated should be tempered by recognition of the fact that, *Kable* itself aside, the High Court did not invalidate any statute on *Kable* grounds until 2009.[11] Since then, the principle has been revived in a number of cases.[12] The article seeks to understand not only the principle's substance, but also its waning and waxing over time.

It is uncontroversial that 'the source of [the *Kable* principle] is not the separation of powers',[13] which has no constitutional basis in the states.[14] As presently understood, however, the function of the principle is to protect from impairment those attributes of state courts that are said to be their 'defining characteristics',[15] including impartiality, decisional independence, adherence to the open court principle and observance of procedural fairness. Identifying those attributes and their impairment shades into separation-of-powers analysis because it engages efforts to 'mark a court apart from other decision-making bodies'.[16] The theory of the 'defining characteristics' of courts, I will argue, does not explain why some but not other attributes are 'defining' or 'essential', nor can it usefully inform the pivotal evaluative judgment involved in assessing a specific law against a protected attribute. Recognising that the *source* of the *Kable* principle is not the separation of powers, the *function* of the *Kable* principle ought now be examined more critically. The article contends that the function of the *Kable* principle is to give effect to incidents of the federal structure. The content of those incidents is, of course, deeply contested. But it is *that* contestation, and not contestation about attributes of courts, that in this context matters most. This is not to say that the 'defining characteristics' of a state court are unimportant. My claim is that the selection of those characteristics, and the assessment of their impairment in any given case, is secondary to and dependent upon contested federalism principles.

The *Kable* principle negotiates two conflicting commitments of the federal structure. The first commitment is to the continued existence of the states, endowed with the

---

8 *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319 ('*International Finance*').

9 *Totani* (2010) 242 CLR 1.

10 *Wainohu v New South Wales* (2011) 243 CLR 181 ('*Wainohu*').

11 See, eg, *H A Bachrach Pty Ltd v Queensland* (1998) 195 CLR 547 ('*Bachrach*'); *Silbert v DPP (WA)* (2004) 217 CLR 181; *Bradley* (2004) 218 CLR 146; *Baker v The Queen* (2004) 223 CLR 513 ('*Baker*'); *Fardon v A–G (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *Forge* (2006) 228 CLR 45; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*'); *K–Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K–Generation*').

12 *International Finance* (2009) 240 CLR 319; *Totani* (2010) 242 CLR 1; *Wainohu* (2011) 243 CLR 181. See also *Kirk* (2010) 239 CLR 531; *Momcilovic v The Queen* (2011) 85 ALJR 957 ('*Momcilovic*') (Gummow J, Hayne J and Heydon J).

13 *Wainohu* (2011) 243 CLR 181, 208 [43] (French CJ and Kiefel J); see also at 209–10 [45], citing *Totani* (2010) 242 CLR 1, 81 [201] (Hayne J).

14 *Totani* (2010) 242 CLR 1, 45 [66] (French CJ), citing: *Clyne v East* (1967) 68 SR (NSW) 385; *Building Construction Employees' and Building Labourers' Federation (NSW) v Minister for Industrial Relations* (1986) 7 NSWLR 372; *Nicholas v Western Australia* [1972] WAR 168; *Gilbertson v South Australia* (1976) 15 SASR 66; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652; Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (Cambridge University Press, 2006) 344–9.

15 *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

16 Ibid.

capacities to function as governments,[17] including the capacity to constitute and organise their own courts.[18] The second commitment is to the 'integrated' Australian judicial system — which is neither unitary nor categorically federal, but within a spectrum of intermediate possibilities — and to the 'role and existence [of state courts] which transcends their status as courts of the States'.[19] Reconciling these two commitments is an exercise in federalism. It raises a cluster of questions about the extent to which courts form a part of the constitutional conception of a state, how much power states should have over state courts and how much and in what respects diversity may be tolerated between the courts of the federation. Depending upon one's particular vision of the federal structure and the place of the courts within it, the answers to those and related questions differ, and the accommodation of the two conflicting commitments expresses differently. The article does not undertake the synthetic tasks of defending particular answers to the cluster of federalism questions, or advancing any one particular vision of the federal structure. It invites attention to those tasks, but is itself analytic, seeking to demonstrate why and how the questions and contested visions matter, in ways that are insufficiently appreciated.

To comprehend different visions of the federal structure, the article introduces a concept it calls the '*attribution*' of a court. As reflected in the title, a court's 'attribution' is to be distinguished from its 'attributes', the identification of which engages with separation-of-powers concerns. 'Attribution', developed in detail in due course, engages instead with federalism. It captures the sense in which an institution such as a court is recognised as an emanation of, or belonging to, an identifiable body politic. Stronger and weaker conceptions of the attribution of state courts to state bodies politic exist within Australian constitutional thought. Reconciling the contested conceptions, rather than defining the characteristics of courts — that is to say, theorising the attribution, rather than the attributes, of state courts — is the central, but virtually invisible, problematic of the *Kable* principle.

The article proceeds in four parts. Part I constructs the analytical framework, describing how twin commitments to autonomous states and integrated courts produce competing visions of the federal judicature; how conceptions of 'attribution' enhance the description and understanding of those competing visions; and how the *Kable* principle relates. Part II evaluates the ascendant account of the *Kable* principle, explaining the emergence of, and critiquing, the attributes-based understanding. Part III shows how conceptions of the attribution of state courts usefully supplement the ascendant account of the *Kable* principle and explain puzzling contours of the doctrine over time.

Part IV is somewhat discrete. It offers a novel explanation of *why* there has been relative inattention to conceptions of federalism. By examining the oral submissions made by the Commonwealth Attorney-General intervening in *Kable* cases,[20] I show how the Commonwealth's position enabled the suppression of federalism

---

17 See, eg, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 ('*Melbourne Corporation*'); *Austin v Commonwealth* (2003) 215 CLR 185 ('*Austin*'); *Clarke v Federal Commissioner of Taxation* (2009) 240 CLR 272 ('*Clarke*').

18 See especially *Austin* (2003) 215 CLR 185.

19 *Kable* (1996) 189 CLR 51, 103 (Gaudron J), quoting *Leeth v Commonwealth* (1992) 174 CLR 455, 498–9 (Gaudron J).

20 See *Judiciary Act 1903* (Cth) s 78A.

considerations and the rise of separation-of-powers analysis. After *Kable* itself, the Commonwealth, for reasons to be explained, came to side with the states rather than against them, thereby masking the federal complexion of the *Kable* principle. Since 2009, and coinciding with the *Kable* principle's revival (albeit imperfectly), the Commonwealth's position has been more nuanced and it has intervened in key cases contrary to state interests. This may be reversing the earlier suppression of federalism considerations. This part of the article illuminates s 78A[21] intervention positions as an under-utilised resource for the study of constitutional law, and particularly federalism issues, offering a rough template for other systematic evaluations of the influence upon evolving legal principles of the patterns in long-term governmental interests.

I CONFLICTING COMMITMENTS: AUTONOMOUS STATES AND INTEGRATED COURTS

A Constitutional framework

The *Constitution* contemplates the existence of both state and federal courts. Chapter III assumes the continuation, as 'State' courts, of the colonial judicial systems existing immediately prior to federation.[22] The *Constitution* also assigns to 'federal' jurisdiction nine enumerated classes of matter[23] and makes provision for the investment of that jurisdiction,[24] including by empowering the federal Parliament to define the jurisdiction of lower federal courts it may create.[25] The constitutional architecture has been described as 'draw[ing] the clearest distinction between federal Courts and State Courts'.[26] Comprised of apparently distinct state and federal institutions, the Australian judicial system is not unitary. The Commonwealth and states each possess power to create courts and are responsible for the maintenance of 'their own' judicial apparatus. Professor Saunders described Australia, in terms later adopted by the High Court, as a 'federation of a dualist kind'.[27]

---

21 *Judiciary Act 1903* (Cth).

22 Textual indications of the assumption are evident in the definition of the High Court's appellate jurisdiction (s 73) and in the conferral of power to define jurisdiction (s 77).

23 *Constitution* ss 75, 76.

24 Ibid s 77.

25 Ibid ss 71, 77(i). The provision for the investment of federal jurisdiction is four–fold: first, there is conferred directly on the High Court original jurisdiction in five classes of matter (s 75); secondly, the Parliament is authorised to confer on the High Court additional original jurisdiction in the remaining four classes of matter (s 76); thirdly, the Parliament is authorised to create lower federal courts and define their jurisdiction with respect to any of the nine classes of matter (ss 71, 77(i)); and fourthly, the Parliament is authorised to invest any court of a State with federal jurisdiction (s 77(iii)).

26 *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437, 452 (Isaacs J), quoted in *Le Mesurier v Connor* (1929) 42 CLR 481, 495 (Knox CJ, Rich and Dixon JJ), and in *Forge* (2006) 228 CLR 45, 67 [39] (Gleeson CJ). But see *Kable* (1996) 189 CLR 51, 100 (Gaudron J).

27 Cheryl Saunders, 'Administrative Law and Relations between Governments: Australia and Europe Compared' (2000) 28 *Federal Law Review* 263, 290, quoted in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 572 [12] (Gleeson CJ, Gaudron and Gummow JJ).

The 'dualist' theory of the federation resonates with 'the constitutional conception of the Commonwealth and states as constituent entities of the federal structure'.[28] There is an entrenched commitment to the continued existence of the states as bodies politic, possessed of the constitutional capacities necessary to function as governments.[29] State judicial institutions are understood to be components of the states in their constitutional conception, at least in the sense that a state's capacity to function as a government is understood to include the capacity to organise 'its own' courts and 'its own' judges.[30] The structural implication is well-understood to limit Commonwealth legislative power, which is granted 'subject to [the] Constitution'.[31] Less well-understood is its parallel effect, explored in this article, of confining the reach of implied limitations upon *state* legislative power.

There is a competing constitutional commitment in the integrated system of courts. Despite the 'dualist' federation, state and federal courts do not operate in exclusive spheres as discrete systems. Profound commonalities and shared objectives exist between state and federal courts, and are widely recognised. First, legislation giving effect to s 77(iii) of the *Constitution*,[32] invests federal jurisdiction in state courts. State courts are thereby empowered 'to act as the judicial agent[s] of the Commonwealth'[33] and for most of federated Australia's history were the primary repositories of federal jurisdiction.[34] Secondly, the courts of one state may exercise the jurisdiction of a different state under cross-vesting legislation.[35] Thirdly, although unable to receive non-federal jurisdiction,[36] a federal court may adjudicate the entirety of a 'matter' within jurisdiction, including any claims that form part of the matter though they arise under non-federal law.[37] Fourthly, s 80 of the *Judiciary Act 1903* (Cth) directs courts exercising federal jurisdiction to the common law when they identify the applicable

---

28 *Clarke* (2009) 240 CLR 272, 306 [65] (Gummow, Heydon, Kiefel and Bell JJ).

29 See, eg, *Melbourne Corporation* (1947) 74 CLR 31; *Austin* (2003) 215 CLR 185; *Clarke* (2009) 240 CLR 272.

30 See especially *Austin* (2003) 215 CLR 185.

31 *Constitution* ss 51, 52.

32 See, eg, *Judiciary Act 1903* (Cth) ss 39(2), 68(2).

33 *Lorenzo v Carey* (1921) 29 CLR 243, 252 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ).

34 There were no lower federal courts until the specialist Federal Court of Bankruptcy was created in 1930. The Federal Court of Australia, possessed of wide jurisdiction under many Commonwealth statutes, was not established until 1976: *Federal Court of Australia Act 1976* (Cth); as at June 2011, 184 principal Acts conferred jurisdiction on the Federal Court: Federal Court of Australia, *Acts which Confer Jurisdiction (June 2011)* <http://www.fedcourt.gov.au/aboutct/aboutct_jurisdiction_acts.html>. Federal and state courts share large tracts of concurrent federal jurisdiction, although federal courts, consistently with s 77(ii) of the Constitution, have exclusive jurisdiction under several important statutes: see, eg, *Administrative Decisions (Judicial Review) Act 1977* (Cth) s 9; *Competition and Consumer Act 2010* (Cth) s 86.

35 See complementary legislation in each state, eg, *Jurisdiction of Courts (Cross–Vesting) Act 1987* (NSW) s 4; *Re Wakim; Ex parte McNally* (1999) 198 CLR 511 ('*Wakim*').

36 *Wakim* (1999) 198 CLR 511.

37 See *Fencott v Muller* (1983) 152 CLR 570, 608 (Mason, Murphy, Brennan and Deane JJ); Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 137–48.

law in a matter,[38] while s 79, subject to contrary federal laws and in prescribed circumstances, causes state and territory laws to be picked up and applied 'as federal law'.[39] Thus, 'non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction.'[40] Fifthly, giving a national complexion to the judicial hierarchy, the High Court is possessed of appellate jurisdiction not only in federal matters but also in respect of all 'judgments, decrees, orders, and sentences … of the Supreme Court of any State'.[41] Since the abolition of all appeals to the Privy Council by 1986,[42] the High Court has stood at the apex of that national hierarchy. Sixthly, and relatedly, one intermediate appellate court is bound to follow another, unless 'plainly wrong', on a question of common law or on the interpretation of Commonwealth or uniform legislation.[43] A trial court is similarly bound by another jurisdiction's appellate court,[44] and perhaps its trial courts as well. Cultural commonalities may run even deeper than these strictly legal ones. They are reflected, for example, in the existence and missions of the Judicial Conference of Australia and National Judicial College of Australia, and in recent experimentation with 'exchange' programs between different courts.[45] Australia's non-unitary judicial system is not adequately described by the adjective 'federal', if that word is to be understood 'categorically' — that is, as though there are very clear demarcations between 'what is truly national and what is truly local'.[46]

The foregoing observations compel the conclusion that the judicial system is neither unitary nor categorically federal, but of an intermediate character. Commitment to the idea that a state's courts are 'its own' may conflict with, or be in tension with, commitment to the idea that those courts are part of an 'integrated' whole. It depends

---

38 *Blunden v Commonwealth* (2003) 218 CLR 330. See also Graeme Hill, 'The Common Law and Federal Jurisdiction — What Exactly Does Section 80 of the Judiciary Act Do?' (2006) 34 *Federal Law Review* 75.

39 *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134 [21] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ), quoting *Pedersen v Young* (1964) 110 CLR 162, 165 (Kitto J).

40 *Fencott v Muller* (1983) 152 CLR 570, 607 (Mason, Murphy, Brennan and Deane JJ).

41 *Constitution* s 73(ii).

42 *Australia Acts 1986*. See also *Privy Council (Limitation of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Viro v The Queen* (1978) 141 CLR 88, in which the High Court held that it was not bound by decisions of the Privy Council and that state courts should, if faced with conflicting authorities, follow the High Court rather than the Privy Council.

43 *Farah Constructions Pty Ltd v Say–Dee Pty Ltd* (2007) 230 CLR 89, 151–2 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

44 Ibid. See also Justice J D Heydon, 'How Far Can Trial Courts and Intermediate Appellate Courts Develop the Law?' (2009) 9 *Oxford University Commonwealth Law Journal* 1, 22–4.

45 See Justice Robert French, 'Judicial Exchange — Debalkanising the Courts' (Colloquium Paper, Judicial Conference of Australia, 4 September 2005) <http://www.jca.asn.au/attachments/2005–French_Paper.pdf>.

46 Judith Resnik, 'Categorical Federalism: Jurisdiction, Gender and the Globe' (2001) 111 *Yale Law Journal* 619 (reacting to the United States Supreme Court's statement that the Constitution 'requires a distinction between what is truly national and what is truly local': *United States v Morrison*, 529 US 598, 617–18 (Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ) (2000)).

on what 'integration' entails, and that is contestable: 'In a federation, references to a national legal or court system mean different things to different people.'[47] One of constitutional law's tasks, in mediating the contestation, is to envision and give effect to the nature and incidents of the 'integrated' judicial system, in the context of a federation committed to the continued existence of its states. This, I will explain, was the central insight of *Kable*.

Before coming to that decision, however, it is convenient to introduce the concept of the 'attribution' of a court. This will serve two purposes: it will aid description of the relationship between state courts and state bodies politic; and it will lend to the comprehension of an 'integrated' judicial system (neither unitary nor categorically federal) a vocabulary more apposite than the dichotomous language of 'state' and 'federal'.

B Attribution of courts

An ordinary meaning of 'attribution', according to the Shorter Oxford English Dictionary, is the 'ascription of a quality etc. as belonging or proper to a person or thing'.[48] The concept should be familiar enough: at some point, each of us has engaged, for example, in the attribution of blame to a wrongdoer, the attribution of a work to its author,[49] or the attribution of an effect to its cause. Attribution is an ordinary concept that arises in countless ordinary contexts.

Identifying courts as 'state' and 'federal' engages us analogously in an ordinary attribution of institutions to bodies politic. We say '*this* court is Tasmanian', or '*that* court is federal' and so attribute the court to one of the federation's constituent units. But to say '*this* court is Tasmanian', as though that were the whole truth, denies the integrated nature of the judiciary; it is to speak as though the judicial system were categorically federal. Equally, it is only partially true to describe the same court as simply 'Australian', for the judicial system is not unitary. When we attribute courts to polities in this loose way, we speak imprecisely. The proper attribution of a court is a matter of degree. Just as our attribution of blame to a wrongdoer, of a work to an author, or of an effect to a cause, may be stronger or weaker in the circumstances, so our attribution of a court to a polity may be stronger or weaker, depending upon our vision of the integrated judicial system. The more categorically federal our vision, the more strongly we will attribute courts to polities. Conversely, the more unitary our vision, the more weakly we will attribute courts. So-understood, the gradated concept of attribution captures something essential about the intermediate character of the integrated judicial system, which stands in some degree between unitary and federal ideal-types.

Stronger and weaker versions of attribution are different *conceptions* of the same concept. Those conceptions are, following the well-known distinction,[50] different

---

47 Chief Justice Murray Gleeson, 'The State of the Judicature' (2000) 74 *Australian Law Journal* 147, 148.

48 Angus Stevenson (ed), *Shorter Oxford English Dictionary* (Oxford University Press, 6th ed, 2007).

49 The word 'attribution' is used in this sense, for example, in the *Copyright Act 1968* (Cth) Pt IX.

50 See, eg, Ronald Dworkin, 'The Jurisprudence of Richard Nixon' (1972) 18(8) *New York Review of Books* 27, 28: 'When I appeal to the concept of fairness I appeal to what fairness

interpretations, at a lower level of abstraction, of the concept of attribution. A question arises: is the integrated Australian judicial system more accurately described by a stronger or weaker conception of the attribution of courts? This article does not defend any particular answer to that question. The argument is that the question matters. Normative commitments to a particular conception of the attribution of state courts, whatever that conception might be, affect the approach to some large questions of federalism. A central purpose of the article is to bring to light the possibilities such commitments might entail.

Although no particular conception of the attribution of courts is to be defended, five general observations may be made. The first observation is that conceptions of attribution enable a 'federalism perspective' on the constitutional expression 'court of a State'. In *Kable*, Gummow J described the reference to 'Supreme Court' in s 73 of the *Constitution* as a 'constitutional expression'.[51] With the extension of the *Kable* principle to lower state courts,[52] there is no reason to suppose that the reference in s 77(iii) to a 'court of a State' is any less a 'constitutional expression'. *Forge* emphasised the significance of continuing 'to meet the constitutional description'[53] and Chief Justice J J Spigelman recently described 'the concept of a "constitutional expression" as a textual foundation for imbuing many constitutional provisions with new substantive content'.[54] 'Attribution' is a useful tool for this interpretive task because, while separation-of-powers precepts grapple with what it means to be a '*court* of a State', constitutional law has, so far, had less to say about what it means to be a 'court *of a State*' within the federal structure.

The second observation is that conceptions of attribution are not themselves determined by the text and structure of the *Constitution*. Attribution engages simultaneous commitments to autonomous states and integrated courts, which, though having textual bases, are 'not embodied in textually specific prohibitions … [but] simply contain public values that must be given concrete meaning and harmonized with the general structure of the Constitution.'[55] For this reason, textualist objections to the utility of 'attribution' may be anticipated, but I proceed on an acceptance of the core of the critique of textual determinism.[56] Of course, consistency with text and structure

---

means, and I give my views on that issue no special standing. When I lay down a conception of fairness, I lay down what I mean by fairness, and my view is therefore the heart of the matter'; see also, eg, W B Gallie, 'Essentially Contested Concepts' (1956) 56 *Proceedings of the Aristotelian Society* 167; John Rawls, *A Theory of Justice* (Harvard University Press, 1971) 5; Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986) 70–2; Jeremy Waldron, 'Is the Rule of Law an Essentially Contested Concept (in Florida)?' (2002) 21 *Law and Philosophy* 137, 150–3.

51 *Kable* (1996) 189 CLR 51, 141.

52 *K–Generation* (2009) 237 CLR 501; *Totani* (2010) 242 CLR 1.

53 *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

54 Chief Justice J J Spigelman, 'The Centrality of Jurisdictional Error' (2010) 21 *Public Law Review* 77, 79.

55 Owen Fiss, 'The Forms of Justice' (1979) 93 *Harvard Law Review* 1, 11. Professor Fiss' theory of constitutional adjudication as giving meaning to public values was cited in *Gypsy Jokers* (2008) 234 CLR 532, 561 [46], 570 [74] (Kirby J); see also *Momcilovic* (2011) 85 ALJR 957, 996 [87] (French CJ) citing Owen Fiss, 'Against Settlement' (1984) 93 *Yale Law Journal* 1073, 1085.

56 See, eg, Adrienne Stone, 'The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication' (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited'

must attend any credible conception of attribution, but the text and structure leave open a spectrum of such conceptions, the choice between which is informed by other (contestable) factors.

The third observation is that a strong conception of attribution enjoys orthodoxy. The reasons for the orthodox understanding of state courts as institutions attributable to the states go beyond the superficial obviousness of state courts being 'state' courts. Judicial power is understood canonically as 'the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property'.[57] While imprecision is well-recognised in that part of the formulation dealing with 'deciding controversies',[58] the part of the formulation designating judicial power as something a 'sovereign' 'has' is deeply embedded. Thus, it is said that '[w]hat gives courts the authority to decide a matter is the law of the polity of the courts concerned … The authority to decide comes from the sovereign authority concerned, not from some other source.'[59]

The fourth observation is that the orthodox conception should not be thought to be beyond critique. After all, it is difficult to identify the constituent units of the federation with the 'sovereign authority', given that the High Court 'has not accepted for over 80 years' the 'view taken from time to time in the United States of distinct and dual sovereignty',[60] and given also that 'the Crown is not an element in the Judicature established by Ch III'.[61] Developments in twentieth-century jurisprudence point in the direction of an explanation. When Griffith CJ ventured his definition of judicial power, the prevailing Austinian theory of law took as its paradigm an identifiable sovereign, issuing commands backed by threats.[62] Within that paradigm, the commands of a court would not qualify as 'law' unless the court itself were understood to be an extension of (attributable to) the sovereign. This view is no longer widely held. In 1961, H L A Hart influentially re-conceptualised law as rule-based norms deriving from a conventional 'rule of recognition'.[63] In describing the rule of recognition for the United Kingdom, Hart accorded the courts independent

---

(2005) 28 *University of New South Wales Law Journal* 842; Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' (2009) 32 *Australian Bar Review* 138. Recognition of the relevance of theories of federalism is implicit in Leslie Zines, 'Sir Owen Dixon's Theory of Federalism' (1965) 1 *Federal Law Review* 221, in which the author identified in Sir Owen Dixon's decisions certain 'federal assumptions'.

57 *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

58 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ): 'Difficulty arises in attempting to formulate a comprehensive definition of judicial power not so much because it consists of a number of factors as because the combination is not always the same. It is hard to point to any essential or constant characteristic.'

59 *Wakim* (1999) 198 CLR 511, 573 [108] (Gummow and Hayne JJ, with whom Gleeson CJ and Gaudron J relevantly agreed).

60 *Betfair Pty Ltd v Western Australia* (2008) 234 CLR 418, 475–6 [97] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ) ('*Betfair*'); see also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

61 *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92 [20] (Gaudron and Gummow JJ).

62 H L A Hart, 'Introduction' in John Austin, *The Province of Jurisprudence Determined and the Uses of the Study of Jurisprudence* (Humanities Press, 1965 ed) x.

63 H L A Hart, *The Concept of Law* (Clarendon Press, 2nd ed, 1994) 100–10.

conventional status.[64] A similar view has been expressed in the United States,[65] and could be reached in Australia.[66] Properly describing the attribution of state courts is a complex task, requiring close attention to contested factors including their constitutional standing, their relationship with other branches of both state and federal governments, their legal, professional and cultural relationships with each other and with federal courts, the similarities and differences between all kinds of court in form and function, and in powers and liabilities. Proper description may also invite attention to the different dimensions of a 'court': its physical and administrative apparatus, as distinct from its judges, from its jurisdiction, from powers and functions it exercises, and so on. The proper attribution of the court as an institution may depend upon the emphases given to the different institutional components, and the conception of attribution might properly be stronger in some respects than in others.

The fifth observation is that there exist within constitutional thought weaker conceptions of attribution, which challenge or qualify the orthodoxy. In their strongest expression, these conceptions are aspirational rather than descriptive, and date back at least as far as Sir Owen Dixon's call for national courts, neither state nor federal, in his evidence to the Royal Commission on the Constitution.[67] Other expressions claim to be descriptive. They include Sir William Deane's overarching view of Australian law, described as a 'broad conception of "a unitary national system of law" within which the courts and judicial proceedings of every part of the Commonwealth should be seen as integral parts of one consistent and coherent whole';[68] the insistence upon a single, national common law (neither state nor federal) applied throughout Australia;[69] and the premises supporting the *Kable* principle. These weaker conceptions have developed only in recent decades. As such, strong conceptions are not only orthodox, but also traditional. This circumstance defines the dynamics of the relationship between strong and weak conceptions of attribution: in the absence of good reason to adopt a weaker conception, and equally in the absence of *attention* to the contestation between stronger and weaker conceptions of attribution, the strong conception, being the status quo, typically will prevail.

---

64 Ibid 101. Hart is said himself to have confirmed this interpretation in private correspondence with Professor Kent Greenawalt: see Kent Greenawalt, 'The Rule of Recognition and the Constitution' (1987) 85 *Michigan Law Review* 621, 631 n 30.

65 Greenawalt, above n 64, 648–54.

66 Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 557: 'There is of course no logical or legal reason why we need to have a "sovereign" at all, or to think or talk in those terms.' See also Leslie Zines, 'The Sovereignty of the People' in Michael Coper and George Williams (eds), *Power, Parliament and the People* (Federation Press, 1997) 91, 93.

67 Evidence to the Royal Commission on the Constitution, Melbourne, 13 December 1927, 776, 792 (Owen Dixon KC). See also Justice Owen Dixon, 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 607; Justice Rae Else-Mitchell, 'The Judicial System — The Myth of Perfection and the Need for Unity' (1970) 44 *Australian Law Journal* 516; Sir Francis Burt, 'An Australian Judicature' (1982) 56 *Australian Law Journal* 509; Sir Laurence Street, 'Towards an Australian Judicial System' (1982) 56 *Australian Law Journal* 515.

68 Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 651–2.

69 See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lipohar v The Queen* (1999) 200 CLR 485.

C Kable principle

Serving a term of imprisonment for the manslaughter of his wife, Gregory Kable wrote letters threatening to harm his children and their custodian. The New South Wales legislature responded with the *Community Protection Act 1994* (NSW) ('CPA'), which purported to confer upon the Supreme Court of New South Wales power to make in respect of a specified person a 'preventive detention order', on the application of the DPP, if satisfied upon reasonable grounds that the person was 'more likely than not to commit a serious act of violence' and that it was appropriate for the protection of a person, or the community generally, that the specified person be detained. Though expressed in general terms, the power was confined by another provision of the CPA to making orders in respect only of 'Gregory Wayne Kable', so-named in the legislation. Subjected to a preventive detention order, Mr Kable successfully challenged the validity of the CPA.

Sir Maurice Byers QC, a former Commonwealth Solicitor-General, appeared for Mr Kable and launched multiple fronts of attack on the extraordinary statute. Sir Maurice did not win the case by appeal to conceptions of the separation of powers. Although the power to order detention otherwise than as punishment following conviction for a criminal offence may not be judicial in character, its conferral upon the Supreme Court is not for that reason prohibited, in the absence of a constitutional separation of powers. Sir Maurice did not argue otherwise,[70] and his separate argument, that the CPA itself purported to be an exercise of judicial power, failed.[71] The challenge succeeded by an adaptation from the federal to the state context of the incompatibility doctrine recognised in *Grollo v Palmer*,[72] according to which a federal judge (who operates in a milieu respecting a strict separation of judicial power) may perform non-judicial functions as *persona designata*[73] provided those functions are not incompatible with judicial office.[74] The adaptation fixed upon the Court's capacity to exercise federal jurisdiction.[75] The CPA was invalid not because the power it conferred on the Supreme Court was non-judicial, but because the power was incompatible with or repugnant to the Supreme Court's federal constitutional position.

Stephen Gageler SC, the incumbent Commonwealth Solicitor-General, has written of Sir Maurice's vision of the Constitution's structure and function and its permeation of legal doctrine.[76] *Kable* is one illustration of the translation into law of part of that vision, specifically, a vision of the integrated character of the judicial system. Sir Maurice's core insight, succinctly captured in his exchange with Dawson J, reproduced

---

70 See *Kable* (1996) 189 CLR 51, 90 (Toohey J).

71 Ibid 65 (Brennan CJ), 77 (Dawson J), 92–4 (Toohey J), 109 (McHugh J).

72 (1995) 184 CLR 348.

73 *Hilton v Wells* (1985) 157 CLR 57.

74 *Kable* (1996) 189 CLR 51, 96 (Toohey J), 103–4 (Gaudron J), 132–4 (Gummow J).

75 Strictly, this formulation did not attract a majority in *Kable* itself, because Toohey J held that the *actual* exercise of the judicial power of the Commonwealth by the Supreme Court was crucial to the result: *Kable* (1996) 189 CLR 51, 95, 99. Later cases, including *International Finance* (2009) 240 CLR 319, 363 [86] (Gummow and Bell JJ), *Totani* (2010) 242 CLR 1 and *Wainohu* (2011) 243 CLR 181, illustrate that an actual engagement of federal jurisdiction is not necessary and that the imperative of institutional integrity flows at most from the court's capacity to exercise, and probably no more than the court's liability to be invested with, federal jurisdiction.

76 Gageler, above n 56, 138–40.

at the beginning of this article, was that state and federal courts are constitutionally equal repositories of the judicial power of the Commonwealth and, in that 'fundamental respect', not relevantly different from each other. This particular equality underpinned the translation of the incompatibility doctrine into the state sphere. In the reasons for judgment, the pithiest expression of the idea is Gaudron J's famous observation that 'there is nothing anywhere in the *Constitution* to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by State courts or federal courts'.[77] The insight in *Kable* that state courts, like federal judges, are subject to constitutional limitations on the kinds of functions they can perform qualified in a significant respect the earlier orthodoxy that since the investment of Commonwealth judicial power in state courts is at the option of Parliament, state courts must be taken as found.[78]

The Court was also deeply conscious of the recognition in the *Constitution* that state and federal courts are different institutions. That idea underpinned the dissenting opinions,[79] but was evident also in the majority reasons.[80] *Kable* exposed the fundamental tension within the idea of the attribution of state courts:

- state courts are 'creatures of the States';[81] but
- state courts 'have a role and existence which transcends their status as courts of the States'.[82]

The first part of the dichotomy reflects the commitment to autonomous states and pulls towards a categorically federal vision of the judicial system and a strong conception of the attribution of courts. The second part reflects the commitment to integrated courts and pulls towards a unitary vision and weak conception of attribution. Negotiating this tension is fundamental to the *Kable* principle and implicates directly the question of the proper attribution of state courts. Far from settling the attribution question, *Kable* was but the first step in taking it up.

Despite no shortage of *Kable* cases since 1996, the attribution question remains largely unexplored. Until the decision in *International Finance*,[83] the High Court did not invalidate any statute on *Kable* grounds.[84] As early as 2004, Kirby J plaintively declared the *Kable* principle 'a dead letter' because of the failure of the majority of the Court to apply it.[85] Other judges, on occasion, pointedly voiced doubts about *Kable*'s

---

77 *Kable* (1996) 189 CLR 51, 103; see also at 96 (Toohey J), 116 (McHugh J), 143 (Gummow J).

78 See, eg, *Leeth v Commonwealth* (1992) 174 CLR 455, 468–9 (Mason CJ, Dawson and McHugh JJ); *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49, 61 (Mason J); *Le Mesurier v Connor* (1929) 42 CLR 481, 495–6 (Knox CJ, Rich and Dixon JJ); *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ). See also *Totani* (2010) 242 CLR 1, 46 [67]–[68] (French CJ).

79 *Kable* (1996) 189 CLR 51, 67–8 (Brennan CJ), 81–2 (Dawson J).

80 See especially ibid 101–2 (Gaudron J).

81 Ibid 102 (Gaudron J).

82 Ibid 103 (Gaudron J), quoting *Leeth v Commonwealth* (1992) 174 CLR 455, 498–9 (Gaudron J).

83 (2009) 240 CLR 319.

84 Above n 11. But see *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40.

85 *Baker* (2004) 223 CLR 513, 561 [142]; *contra Fardon* (2004) 223 CLR 575, 618 [104] (Gummow J).

correctness, Callinan J describing the decision as having 'require[d] the drawing of a very long bow'[86] and Gleeson CJ suggesting in *Forge* that '[i]f the conclusion for which the appellants contend truly followed from the principle, then the principle would require reconsideration.'[87] But such remarks do not represent the overall tenor of the case-law, even in the pre-2009 period. The Court's apparent reluctance to invalidate legislation should be read together with its apparent enthusiasm for granting special leave and for reaffirming, refining and even extending the understanding of the *Kable* principle. The importance of the principle was repeatedly asserted, even though it became increasingly difficult to expect any kind of state legislation to be invalidated. Professor Wheeler described the principle in 2005 as 'under-performing' in 'clarity and predictability'.[88] The principle itself was not in retreat, but its application accumulated a kind of inertia. When, in 2009, *Kable* was revived in *International Finance*,[89] and when it was invoked again in *Kirk*,[90] *Totani*,[91] *Wainohu*,[92] and by three judges in *Momcilovic*,[93] the shift was, again, one in robustness of application. More will be said about the inertia of the *Kable* principle, and its nascent revival, when later I come to explain how changing conceptions of attribution account for the principle's waning and waxing periods.

II ATTRIBUTES OF STATE COURTS: THE ASCENDANT ACCOUNT

A Emergence of 'defining characteristics'

Kable held to be invalid the conferral upon the New South Wales Supreme Court of a function 'incompatible' with its status as a repository of the judicial power of the Commonwealth. The criteria for ascertaining 'incompatibility' were not immediately clear after *Kable* and two views emerged. On one view, incompatibility was to be identified in an impairment of 'public confidence' in the impartiality and independence of the state judiciary. This reflected a position most identifiable with the approach of McHugh J, who had held that since 'ordinary reasonable members of the public might reasonably have seen the [CPA] as making the Supreme Court a party to and responsible for implementing the political decision of the executive government … public confidence in the impartial administration of the judicial functions of the Supreme Court must inevitably be impaired.'[94] On a second view, identifying incompatibility depended not upon the mediating construct of the 'ordinary reasonable members of the public'[95] but upon direct consideration of the institutional

86 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 484 [469].
87 *Forge* (2006) 228 CLR 45, 67 [40]. See, more recently, *Totani* (2010) 242 CLR 1, 95–6 [245] (Heydon J): 'No counsel has ever sought leave to argue that *Kable*'*s* case be overruled. Hence it must be faithfully applied, whatever its meaning.'
88 Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power Over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 31.
89 (2009) 240 CLR 319.
90 (2010) 239 CLR 531; the impugned privative clause was not held invalid but construed not to oust review for jurisdictional error on the basis that such ousting would be invalid.
91 (2010) 242 CLR 1.
92 (2011) 243 CLR 181.
93 (2011) 85 ALJR 957 (Gummow J, Hayne J and Heydon J).
94 *Kable* (1996) 189 CLR 51, 124. See also *Grollo v Palmer* (1995) 184 CLR 348, 377 (McHugh J).
95 *Kable* (1996) 189 CLR 51, 124 (McHugh J).

requirements of an independent and impartial judiciary to exercise federal judicial power. For example, Gummow J described the CPA as 'repugnant to the judicial process in a fundamental degree'[96] and inflicting upon the judicial power of the Commonwealth 'institutional impairment'.[97]

These two views, and their representation in the literature, are identified in an early article by Hardcastle.[98] The persistence of both views is evident in *Bradley*,[99] in which the appellant's counsel put his submissions both in terms of the constitutionally required attributes of a court and in terms of 'the perception test in *Kable*'.[100] The plurality reasons also invoked both understandings of the principle.[101] Not four months later, in *Baker*[102] and *Fardon*,[103] 'institutional integrity' emerged explicitly as the true touchstone of the principle. Impaired public confidence was clarified to be but an indicator of impaired institutional integrity:

> although in some of the cases considering the application of *Kable*, institutional integrity and public confidence perhaps may have appeared as distinct and separately sufficient considerations, that is not so. Perception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity.[104]

The transformation of the *Kable* principle into its current expression as a protection of the attributes of a court was completed in *Forge*.[105] In that case, institutional integrity was explained in terms of the 'defining characteristics' of a court:

> the relevant principle is one which hinges upon maintenance of the defining characteristics of a 'court', or in cases concerning a Supreme Court, the defining characteristics of a State Supreme Court. It is to those characteristics that the reference to 'institutional integrity' alludes. That is, if the institutional integrity of a court is distorted, it is because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies.[106]

'Public confidence' was mentioned only in the reasons of Kirby J and Heydon J and then only to repeat that it was not the touchstone of invalidity.[107] Since *Forge*, references to 'public confidence' have been of a similar quality. Of course, the discredited criterion of public confidence should not be confused with considerations

---

96 Ibid 132.
97 Ibid 143.
98 Rohan Hardcastle, 'A Chapter III Implication for State Courts: *Kable v Director of Public Prosecutions*' (1998) 3 *Newcastle Law Review* 13, 24.
99 (2004) 218 CLR 146.
100 Transcript of Proceedings, *North Australian Aboriginal Legal Service v Bradley* [2003] HCATrans 408 (8 October 2003) 1969–70 (S J Gageler SC); see also at 1652–7 (S J Gageler SC); *Bradley* (2004) 218 CLR 146, 147–9 (S J Gageler SC) (during argument).
101 *Bradley* (2004) 218 CLR 146, 163–4 [30]–[32], 172 [65] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).
102 (2004) 223 CLR 513.
103 (2004) 223 CLR 575.
104 *Fardon* (2004) 223 CLR 575, 617–18 [102] (Gummow J); see also at 593 [23] (Gleeson CJ), 629–30 [144] (Kirby J); *Baker* (2004) 223 CLR 513, 519–20 [5]–[6] (Gleeson CJ), 534 [51] (McHugh, Gummow, Hayne and Heydon JJ) 542 [79] (Kirby J); but see *Fardon* (2004) 223 CLR 575, 598 [35] (McHugh J), 653 [213] (Callinan and Heydon JJ).
105 (2006) 228 CLR 45.
106 Ibid 76 [63] (Gummow, Hayne and Crennan JJ).
107 Ibid 122 [194] (Kirby J), 149 [274] (Heydon J).

of public *perception*, including apprehended dependence or bias, which may compromise institutional integrity and so remain relevant to *Kable* analysis.[108] *Forge* should be recognised as the point at which, quite explicitly, the task of marking courts 'apart from other decision-making bodies' emerged as the analytical key to the *Kable* principle.

This development of principle, by placing central importance on the 'defining characteristics' or attributes that distinguish courts from other institutions, has given prominence to separation-of-powers precepts — not in any sense of constitutional sequestration, but in a looser sense of articulating what makes courts and judicial powers identifiable as such. Conceptions of federalism and the attribution of courts, though central to *Kable* itself, have been rendered peripheral. This is problematic, because, as the next section contends, the account of *attributes* is insufficient to explain the *Kable* principle's operation.

B Explanatory insufficiency of 'defining characteristics'

Three points of critique are made in turn. First, statements of the defining characteristics of a court are statements of conclusion, not in themselves illuminating. Secondly, there are competing methodologies for the identification of 'defining characteristics' and the dominant historicist methodology suffers important limitations. Thirdly, the identification of a 'defining characteristic' does not answer the pivotal constitutional question in a *Kable* challenge, which requires evaluative judgment on whether the impugned statute's impairment of that characteristic is so substantial or repugnant as to cause invalidity.

1 Statements of conclusion

To understand the *Kable* principle as a theory of the *attributes* of a court is to understand only the results the principle dictates, rather than the reasons that engage it. To state that a particular attribute of a court is protected from legislative impairment — because it is an 'essential' or 'defining' attribute — is to state a conclusion, not a reason or justification. In diverse contexts has been exposed the inutility of conclusory statements previously thought to bear explanatory weight. For example, in *Project Blue Sky Inc v Australian Broadcasting Authority*,[109] it was said that the classification of statutory procedural requirements as 'mandatory' or 'directory' merely 'records a conclusion reached on other grounds' and 'is the end of the inquiry, not the beginning'.[110] The High Court has explained more recently that similar difficulties attend the classification of administrative decisions as 'invalid' or 'nullities',[111] and, in yet another context, led to the decline of 'proximity' as a useful concept in the law of negligence.[112] Most appositely for present purposes, it has been observed:

---

108 *Momcilovic* (2011) 85 ALJR 957, 1096 [598] (Crennan and Kiefel JJ); *Wainohu* (2011) 243 CLR 181, 219 [68] (French CJ and Kiefel J).

109 (1998) 194 CLR 355.

110 Ibid 390 [93] (McHugh, Gummow, Kirby and Hayne JJ); see also at 374 [38] (Brennan CJ).

111 *Berowra Holdings Pty Ltd v Gordon* (2006) 225 CLR 364, 369–70 [10] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 613 [46] (Gaudron and Gummow JJ), 643 [144]–[145] (Hayne J).

112 *Miller v Miller* (2011) 242 CLR 446, 469 [60] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

> In various fields of the law the actual process of decision is obscured rather than displayed by reference to the criterion of essential characteristics. So it was with the now outmoded learning in this Court which treated s 92 of the *Constitution* as engaged only where the restriction or burden in question was imposed in virtue of, or in reference to, one of 'the essential qualities' which were said to be connoted by the description 'trade, commerce, and intercourse among the States'. What in *Attorney-General (NSW) v Perpetual Trustee Co (Ltd)* Dixon and Evatt JJ referred to as 'the time-honoured distinction between essential and accidental characteristics' requires some care in its application.[113]

Although in fact addressed to the construction of the *Income Tax Assessment Act 1936* (Cth), the same could be said in relation to the ascendant understanding of the *Kable* principle. Courts have many characteristics, or as I have been calling them, attributes. Undoubtedly, some are properly considered to be 'essential' and others 'accidental'. But the identification of an attribute as 'essential', or 'defining', is the end of the inquiry, not the beginning. The inquiry itself must depend upon recourse to other sources of legal principle.

2 *History and theory*

What are legitimate sources of legal principle is a perennial theme of constitutional argument: apart from the primary sources of text and structure, other candidate sources, including history, theory, policy, community values, foreign law and international law all vie for attention with varying degrees of persuasiveness and success. This is not the occasion to engage widely with the sources debates. There is, however, an important cleft within the *Kable* cases between historicist and theoretical methodologies. The post-*Kable* rise of historicist methodology and the eschewal of theory is one reason why a theory of the attribution of state courts, though central to the decision in *Kable*, has since been marginalised while an account of the attributes of state courts has assumed prominence.

In 1998, Hardcastle described between and within the majority judgments in *Kable* a difference between 'purposive' and 'intentionalist' constructions of the relevant constitutional provisions.[114] According to Hardcastle, the purposive approach resembled what in 1993 the Solicitor-General (now Chief Justice) of South Australia had called the 'Grand Design' approach, which sought to find meaning in 'a very broad concept of the Australian federation'.[115] In this kind of approach, 'attribution', self-consciously theoretical and demanding a broad constitutional vision of the integrated judicature, would find space to operate. But since *Kable* was decided, an historicist (though not intentionalist) methodology has become dominant. For example, to deny the status of 'defining characteristic' to a putative attribute of a court, there has been invoked in *Baker* the 'long history … of recommendations by trial judges to the Executive'[116] and by some judges in *Forge* numerous federation-era examples of the

---

113 *Federal Commissioner of Taxation v Payne* (2001) 202 CLR 93, 111 [47] (Gaudron and Gummow JJ) (footnotes omitted), cited in *Federal Commissioner of Taxation v Day* (2008) 236 CLR 163, 179 [29] (Gummow, Hayne, Heydon and Kiefel JJ).

114 Hardcastle, above n 98, 16–20.

115 Ibid 18, quoting J J Doyle, 'Constitutional Law: "At the Eye of the Storm"' (1993) 23 *University of Western Australia Law Review* 15, 20.

116 *Baker* (2004) 223 CLR 513, 533–4 [47]–[48] (McHugh, Gummow, Hayne and Heydon JJ).

use of acting judges on colonial Supreme Courts.[117] Conversely, in order to accord 'defining' status to the supervisory jurisdiction of state Supreme Courts, the High Court in *Kirk* canonised as 'accepted doctrine at the time of federation'[118] the Privy Council's decision in *Colonial Bank of Australasia v Willan*,[119] to the effect that notwithstanding a privative clause the Queen's Bench could grant certiorari to correct a manifest defect of jurisdiction or manifest fraud.[120]

In *Totani*,[121] the Chief Justice wrote in favour of the historicist approach in *Kable* cases, in express contradistinction to theoretical methodology. After recording the fact that the constitutional provision for the investment of state courts with federal jurisdiction was borne out of economic concerns, rather than high constitutional theory,[122] his Honour concluded:

> One does not look first to overarching principles of constitutionalism as a source of the limitations on State legislative power which have been expounded under the general rubric of the '*Kable* doctrine'. Rather, it is necessary to focus upon the text and structure of Ch III and the underlying historically based assumptions about the courts, federal and State, upon which the judicial power of the Commonwealth can be conferred. It is in the need for consistency with those assumptions that the implied limitations find their source.[123]

His Honour is, with respect, clearly correct that the continuing institutional integrity of the state courts is an assumption upon which the *Constitution* is written. And historical inquiry is, with respect, an undoubtedly important component of legal analysis for what it teaches about the origins of institutions and principles, and the path of their development into current forms. There are, however, difficulties with privileging an historical approach to discerning the content of constitutional assumptions at the expense of theoretical approaches that look to 'overarching principles of constitutionalism'.

The main difficulties lie in the non-determinative quality, for legal purposes, of historical inquiry. More specifically, the conclusions about 'defining characteristics' that an historicist methodology may logically sustain are limited. First, historical circumstance does not identify the essentiality of an attribute of a court. Courts historically, as now, possessed many attributes. Adopting an historical inquiry merely shifts in time and does not answer the substantive question of which of the many attributes were essential and which were merely accidental. Secondly, historical

---

117 *Forge* (2006) 228 CLR 45, 60 [17] (Gleeson CJ), 136 [238] (Callinan J), 141–6 [256]–[267] (Heydon J); see also the observation that '[b]oth before and long after federation, courts of summary jurisdiction have been constituted by Justices of the Peace or by stipendiary magistrates who formed part of the colonial or State public services': at 82 [82] (Gummow, Hayne and Crennan JJ).

118 *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

119 (1874) LR 5 PC 417 ('*Willan*').

120 *Kirk* (2010) 239 CLR 531, 580–1 [97]–[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

121 (2010) 242 CLR 1.

122 Cf *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) famously describing the conferral of federal jurisdiction upon state courts as an 'autochthonous expedient'.

123 *Totani* (2010) 242 CLR 1, 38 [50].

circumstance does not identify the inessentiality of an attribute. Historical inquiry may show that some characteristic was not *at all* an attribute of courts at federation, such that it could not have been an *essential* attribute at that time. But the stronger conclusion that the characteristic is not an essential attribute *today* requires either a non-historicist reason or the additional premise that the essential attributes of state courts have not been added to since federation. Such a premise might be true within some versions of originalism, but is inconsistent with the Court's recognition that '[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court.'[124]

Yet another difficulty with privileging historicist methodology is that whatever use is sought to be made of legal history, its content can be ambiguous and require choices not themselves explicable on historical grounds. Take, for example, the High Court's endorsement in *Kirk*[125] of *Willan*.[126] A later, contrary decision 'of a strong Full Court in Victoria',[127] *In re Biel*,[128] was referred to during argument but not referred to in the reasons for judgment. *Biel* is surely explicable, but it is not explicable on simply historical grounds: only grounds of principle can say why the decision was wrong when it was decided, or why it should not govern the question in *Kirk*.[129] Without a principled explication of the kind advanced by counsel during the hearing, one could imagine an argument along the historicist line: 'The privative clause cases turn on the construction of particular statutes and *Biel* is evidence of the contemplation at the time of federation of a well-drafted privative clause effectively ousting certiorari for jurisdictional error; *ergo* the supervisory jurisdiction cannot be considered a defining characteristic of a state Supreme Court'. I do not assume the burden of this argument, but merely describe its form to illustrate the limitations of historicist methodology.

3 Evaluative judgment

A further reason why an account of attributes, still less an historical account, does not sufficiently explain the *Kable* principle is that the constitutional result in a *Kable* case is not determined by the identification of a defining characteristic, which will typically be expressed in highly general language. The constitutional result is reached 'by an evaluative process which may require consideration of a number of factors.'[130] The question is whether the impugned legislation *substantially impairs*, or is *incompatible with*, the particular characteristic, or is *repugnant* to it 'in a *fundamental degree*'.[131] In

---

124 *Forge* (2006) 228 CLR 45, 76 [64] (Gummow, Hayne and Crennan JJ). See also *Bradley* (2004) 218 CLR 146, 163 [30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ): 'No exhaustive statement of what constitutes that minimum [independence and impartiality] in all cases is possible'.

125 (2010) 239 CLR 531.

126 (1874) LR 5 PC 417.

127 Transcript of Proceedings, *Kirk v Industrial Court (NSW)*, [2009] HCATrans 239 (1 October 2009) 8087 (S J Gageler SC).

128 (1892) 18 VLR 456 ('*Biel*').

129 See Transcript of Proceedings, *Kirk v Industrial Court (NSW)*, [2009] HCATrans 239 (1 October 2009) 8086–116 (S J Gageler SC), 9072–85 (Gummow J and S G E McLeish SC); see also *Kirk* (2010) 239 CLR 531, 543 (S J Gageler SC) (during argument).

130 *K–Generation* (2009) 237 CLR 501, 530 [90] (French CJ); see also *Wainohu* (2011) 243 CLR 181, 201–2 [30] (French CJ and Kiefel J).

131 See, eg, *Kable* (1996) 189 CLR 51, 132 (Gummow J); *International Finance* (2009) 240 CLR 319, 379 [140] (Heydon J).

measuring a specific enactment against highly general and abstract descriptions of a court's defining characteristics, a degree of judgment is called for as to the substantiality of any impairment. As Gummow J said in *Fardon*, 'the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes'.[132] The identification of defining characteristics is disjoined from the real constitutional task.

Interestingly, French CJ has likened the evaluative process to 'that involved in deciding whether a body can be said to be exercising judicial power'[133] and, with Kiefel J, described its necessity as 'consistent with the imprecise scope of the judicial power, which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown.'[134] Their Honours continued:

> It is also consistent with the shifting characterisation of the so-called 'chameleon' functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a court. Assessments of constitutional compatibility between administrative and judicial functions are not to be answered by the application of a Montesquieuan fundamentalism.[135]

This very explicit linking of the *Kable* question with concepts drawn directly from separation-of-powers analysis is striking, and consistent with the rise of an attributes-based theory that I have been describing.

4 Summary

The emergence of the 'defining characteristics' of a court as the touchstone of 'institutional integrity' has masked the true basis of the *Kable* principle. We now theorise the attributes, rather than the attribution, of state courts, but in doing so cannot sufficiently account for the *Kable* principle, which from its inception demanded a theory of attribution. How conceptions of attribution can supplement the ascendant account is the subject of the next section.

III ATTRIBUTION OF STATE COURTS: SUPPLEMENTING THE ASCENDANT ACCOUNT

A Recovering Kable as a doctrine of federalism

Kable, as Part I explained, sought to negotiate conflicting commitments to autonomous states and integrated courts; to state courts as both 'creatures of the States' and 'hav[ing] a role and existence which transcends their status as courts of the States'.[136] In doing so, the decision identified the important question of the proper attribution of state courts, by substantially qualifying the prevailing orthodoxy that the Commonwealth must take state courts as it finds them and by signalling that the proper attribution of state courts to the states is not absolute. As the attributes-based account has gained ascendancy, this question of attribution has remained unanswered.

---

132 *Fardon* (2004) 223 CLR 575, 618 [104]; see also *Totani* (2010) 242 CLR 1, 47 [69] (French CJ), 82 [207] (Hayne J); *Wainohu* (2011) 243 CLR 181, 201–2 [30] (French CJ and Kiefel J).

133 *K–Generation* (2009) 237 CLR 501, 530 [90].

134 *Wainohu* (2011) 243 CLR 181, 202 [30].

135 Ibid.

136 *Kable* (1996) 189 CLR 51, 102–3 (Gaudron J); see above nn 81–2 and accompanying text.

Attention to this question, however, can remedy, in part, the deficiencies in the ascendant, attributes-based account. Part II identified three deficiencies, namely, the conclusory nature of statements of defining characteristics; the limitations of the dominant historicist methodology; and the disjunction from the pivotal 'evaluative judgment'.

1 Statements of conclusion

A conception of attribution, whether strong or weak, provides extrinsic reasons (though not necessarily the only ones) of the necessary kind to justify the identification of certain attributes as 'defining characteristics' or otherwise. For example, *Bradley*[137] and *Forge*[138] exemplify how a commitment to strong attribution, at least in respect of the constitution and organisation of courts, counsels against any imposition of a single national formula for the terms and conditions of judicial appointment. A more recent instance of a strong conception of attribution affecting the conclusion reached on a *Kable* question is found in the dissenting opinion in *Totani*.[139] Heydon J described a need to confine the scope of the *Kable* principle and to that end described the states as 'jurisdictions in which experiment may be conducted and variety may be observed'.[140] That expresses a particular theory of the place of the states within the federation and one that is consonant with a strong conception of the attribution of state courts. It illustrates the relationship, not widely recognised, between the commitment to autonomous states and the scope of implied limitations on state (not just Commonwealth) legislative power.

Commitments to weaker conceptions of attribution, on the other hand, would counsel more intrusive, or at least more detailed and specific, selection of 'defining characteristics' in aid of decreasing diversity between state judicial systems, and bridging the gap between state and federal limitations. The legitimacy, under such commitments, of 'experiment', as Heydon J called it, by states upon courts conceived to fulfill a national function would be questionable, to say the least. The extension to the states of a minimum standard of judicial review for jurisdictional error[141] and of a minimum standard of compatibility required of functions conferred on judicial officers as *personae designatae*[142] are recent examples. The invalidity, favoured by three judges, of conferring power to make 'declarations of inconsistent interpretation' based on the model of the *Human Rights Act 1998* (UK),[143] came close to being another example of a uniform national standard erected on a theory of weak attribution.

Whether strong or weak, conceptions of attribution *precede* the identification of the 'defining characteristics' of state courts. They offer at least partial reasons and justifications for what is otherwise a bare conclusion that a putative attribute is essential or inessential.

---

137 (2004) 218 CLR 146.
138 (2006) 228 CLR 45.
139 (2010) 242 CLR 1.
140 Ibid 96 [246]. See also *New State Ice Co v Liebmann*, 285 US 262, 311 (1932), in which Brandeis J (dissenting) famously described 'one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country'.
141 *Kirk* (2010) 239 CLR 531.
142 *Wainohu* (2011) 243 CLR 181.
143 *Momcilovic* (2011) 85 ALJR 957.

2 History and theory

Moreover, the *kinds* of reasons offered by conceptions of attribution are necessarily those grounded in legal principle and theory. The concept of 'attribution' demands a principled vision of the integrated judicial system, and its relation to the overall federal structure and the continued existence of that structure's constituent units. I have not sought to insist upon any particular vision — only that one is required. To the extent that historicist approaches to identifying the defining characteristics of courts are limited in the ways earlier described, an attribution-based analysis is a promising supplement.

It was not obviously inevitable that an attributes-based approach to the *Kable* principle be tethered to historicist methodology. After all, a theory of 'mark[ing] … court[s] apart from other decision-making bodies',[144] which references separation-of-powers principles, could pick up the functional concerns, entrenched values, and strong roots in legal theory that those principles engage. But because it is denied (correctly) that the separation of powers is the source of the *Kable* principle,[145] its rich theoretical resources remain largely inaccessible, at least openly. Coupled with the independent rise, more generally, of historicist forms of argument and something like a constitutional 'originalism', the attributes-based approach, disabled from drawing too explicitly on separation-of-powers theory, lends itself to preoccupation with historicism.

'Attribution', on the other hand, does not lend itself to purely historical analysis because it is itself a functional concept. And it engages a theoretical apparatus that is more satisfactory because it *does* constitute the normative foundation of the *Kable* principle — the nature of the federation, and the accommodation of autonomous states and integrated courts. The force of the concept may be seen, for example, in *Kirk*, where in addition to ascertaining the position at the time of federation, the Court justified entrenching the supervisory jurisdiction of the Supreme Courts by reference specifically to legal theory and functional considerations. The justification was expressed as a reassertion of the 'one common law of Australia' and the impermissibility of 'islands of power immune from supervision and restraint' and the 'development of "distorted positions"'.[146] The parallel historical and theoretical justifications in *Kirk* were articulated separately, in consecutive paragraphs,[147] and without much indication as to any specific relation between the two, suggesting that they were independent, but mutually reinforcing, reasons for the conclusion reached. The principled reasons clearly flowed from a vision of state courts in their 'transcendent' role, as parts of an integrated system. In other words, they flowed from an analysis of attribution, as I have been describing it.

3 Evaluative judgment

Finally, 'attribution', unlike 'attributes', engages with the real constitutional question in a *Kable* case. The gradient that is inherent within the concept of 'attribution' — strong

---

144 *Forge* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

145 See especially *Wainohu* (2011) 243 CLR 181, 208 [43], 209–10 [45], 212 [52] (French CJ and Kiefel J); *Totani* (2010) 242 CLR 1, 81 [201] (Hayne J).

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

147 Ibid 580–1 [97]–[99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

to weak — aligns with the evaluative judgment for which application of the *Kable* principle calls. Commitment to a stronger or weaker conception of attribution will nudge the evaluation of an impugned law against the *Kable* principle towards, respectively, permissive or robust review. Australian constitutional law does not employ the categorical standards of review known in some other jurisdictions (rational basis review, as distinct from strict scrutiny, for example).[148] Nevertheless, the idea is that the evaluative judgment central to the *Kable* principle, like all questions of judgment, is amenable to different standards of application, and will likely attract a more deferential, or permissive, application under a strong conception of attribution, and a more robust application under a weak conception. If that be correct, it illustrates the significance of confronting the question of attribution. It also shows how clarifying the underlying conceptions of attribution that necessarily subsist in *Kable* decisions will make the evaluative process more transparent and accessible to subjects of the law (including state governments and legislators), and more structured in its application by courts and counsel.

B Explaining the Kable principle's inertia and revival

The case for taking the concept of attribution seriously, and examining its interpretations and implications more closely, is strengthened by the ability of that concept to explain a particularly puzzling feature of the *Kable* principle: its remaining inert for 13 years, and its current revival. I argue that the period of inertia was produced by implicit commitment to the orthodox and traditional strong conception of attribution, which now, in a period of *Kable*'*s* revival, shows signs of weakening.

1 Inertia as strong attribution

The inertia that gathered around the application of the *Kable* principle manifested in three judicial techniques. First, *Kable* was distinguished as a truly exceptional case about truly exceptional legislation. Thus, in *Fardon*,[149] the preventive detention regime was upheld because of its differences from the CPA — not being directed at one particular person, and not in substance disguising a legislative or executive decision, for example. Gleeson CJ said: 'The minor premise of the successful argument in *Kable* was specific to the legislation there in question'[150] and McHugh J opined: '*Kable* is a decision of very limited application … the result of legislation that was almost unique in the history of Australia.'[151] Similarly, Gummow J described the result in *Kable* as flowing from 'a particular combination of features of [the CPA]'.[152] Secondly, when *Kable* challenges attacked the composition of state and territory courts,[153] as distinct from the functions conferred upon them, the High Court explicitly sanctioned diversity in the constitution and organisation of non-federal courts,[154] entrenching the view that no unique form of judicial organisation satisfies the requirements of independence and

148 See, eg, Richard Fallon, 'Strict Judicial Scrutiny' (2007) 54 *UCLA Law Review* 1267, 1273–5.
149 (2004) 223 CLR 575.
150 Ibid 591 [17].
151 Ibid 601 [43].
152 Ibid 617 [100].
153 See ibid 601–2 [43] (McHugh J): 'The *Kable* principle, if required to be applied in future, is more likely to be applied in respect of the terms, conditions and manner of appointment of State judges … than in the context of *Kable*–type legislation.'
154 See *Bradley* (2004) 218 CLR 146; *Forge* (2006) 228 CLR 45.

impartiality. French CJ recently reaffirmed leeway for diverse composition, observing that the *Kable* principle 'makes ample allowance for diversity in the constitution and organisation of courts'.[155] Thirdly, and coming to prominence in *Gypsy Jokers*[156] and *K-Generation*,[157] was the deployment of the interpretive principle that statutes should be construed to avoid where possible the result that the statute is invalid.[158] Each case concerned a legislative regime which appeared to require a court to depart from normal standards of procedural fairness. Broadly speaking, the legislation authorised a court to receive and act on material classified by an executive officer to be confidential (because its disclosure would prejudice criminal investigations, for example) and not to be disclosed to the affected party. In each case, the legislation was construed to permit the courts to satisfy themselves that the classification was properly made, and to permit the courts the usual discretion to 'mould their procedures'[159] concerning disclosure to parties and their legal representatives. The constructions placed a degree of strain upon the ordinary meaning of the provisions, adding to the statutes what later was labelled 'a counterintuitive judicial gloss'.[160]

This period of inertia coincided with the emergence of the attributes-based account. A strong conception of attribution prevailed throughout this period because, as explained in Part I, strong conceptions are orthodox and traditional and require novel arguments to displace them. Displacement did not occur because the emergence of the *attributes*-based account diverted attention from the question of *attribution*. The reluctance to invalidate state legislation on *Kable* grounds can be seen as a manifestation of a concern to permit the states wide freedom to regulate 'their own' courts. On the other hand, the repeated reaffirmation in broad terms of the *Kable* principle can be seen as recognition that the discretion and diversity contemplated was not unconfined.

The strong conception of attribution is discernible in *Austin v Commonwealth*,[161] which was decided during the period of *Kable's* inertia. Because *Austin* is not a *Kable* case, it is an important, independent confirmation of my thesis. *Austin* concerned a challenge to federal legislation imposing taxation upon the superannuation benefits of state judges. The challenge was successfully maintained on the basis of the commitment to autonomous states or, more precisely, the constitutional principle, identified with *Melbourne Corporation v Commonwealth*,[162] that the federal structure of the *Constitution* renders the Commonwealth Parliament incompetent to curtail the capacity of the states to function as governments. So the majority judges reasoned,

---

155 *Totani* (2010) 242 CLR 1, 46 [68]. See also *Wainohu* (2011) 243 CLR 181, 212 [52] (French CJ and Kiefel J).

156 (2008) 234 CLR 532.

157 (2009) 237 CLR 501; see also *Bradley* (2004) 218 CLR 146.

158 *New South Wales v Commonwealth* (2006) 229 CLR 1 ('*Work Choices Case*') 161 [355] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ); *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 644 [28] (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ); *A-G (Vic) v Commonwealth* (1945) 71 CLR 237, 267 (Dixon J).

159 *Applicant VEAL v Minister for Immigration and Multicultural and Indigenous Affairs* (2005) 225 CLR 88, 98 [24] (Gleeson CJ, Gummow, Kirby, Hayne and Heydon JJ), quoted in *Gypsy Jokers* (2008) 234 CLR 532, 596 [182] (Crennan J).

160 *International Finance* (2009) 240 CLR 319, 349 [42] (French CJ).

161 (2003) 215 CLR 185.

162 (1947) 74 CLR 31.

setting the conditions for appointment and remuneration of state judges is a function committed to the states and which the impugned federal legislation impaired. What is interesting for present purposes is the anxious qualification that whether 'it is critical to the constitutional integrity of the States that they alone have the capacity to give directions to their officials and determine what duties they perform … is a large proposition and best left for another day.'[163] In this pointed reservation, the Court left open the possibility of federal regulation of state courts and state judges, notwithstanding the placement of those courts and judges within state constitutional structures. The question was left open again in *O'Donoghue v Ireland*.[164] There is inherent in the reservation an instinct as to the significance of the national character of the judicial system. The instinct is tempered by the recognition that the states possess independent discretion in respect of state courts. Fundamentally, the issue in *Austin* is the same as the issue in all the *Kable* cases: how much autonomy do states have with respect to state courts? The outcome in *Austin* differed because *Commonwealth* legislation was challenged, but the attitude underlying the guarded qualification to the result is precisely the attitude underlying the *Kable* principle's period of inertia. Incidentally, this identification of the one, coherent conception of attribution underlying both the *Kable* cases and *Austin* is an answer to Kirby J's apparent suggestion that *Austin* was inconsistent with the narrow approach to the *Kable* principle in the pre-2009 period.[165]

2 Revival as weak attribution

Since 2009, the *Kable* principle has been applied to invalidate legislation in *International Finance*,[166] *Totani*[167] and *Wainohu*.[168] It should have been applied, in the opinions of three judges, in *Momcilovic*.[169] And it provided the basis for a successful appeal, falling short of invalidation, in *Kirk*.[170] It is significant to see how the revival may be explained on the basis of a changing conception of attribution.

(a) International Finance

The *Criminal Assets Recovery Act 1990* (NSW) ('CARA') purported to authorise a procedure by which the NSW Crime Commission could apply ex parte to the Supreme Court for an order restraining a person from dealing with specified property on suspicion of the person having engaged in serious crime related activities. The majority judgments differed in their reasons for finding the provision to be invalid. For French CJ, the direction that the court must consider the Commission's application ex parte substantially impaired the Supreme Court's institutional integrity by removing a normal discretion to consider whether or not to proceed ex parte.[171] For Gummow and Bell JJ and Heydon J, the vice was not in this curtailment of discretion but in the absence or preclusion of the normal facility by which a person, against whom an ex

---

163 *Austin* (2003) 215 CLR 185, 269 [181] (Gaudron, Gummow and Hayne JJ).
164 (2008) 234 CLR 599, 626 [57] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).
165 *Baker* (2004) 223 CLR 513, 544 [84] (Kirby J).
166 (2009) 240 CLR 319.
167 (2010) 242 CLR 1.
168 (2011) 243 CLR 181.
169 (2011) 85 ALJR 957.
170 (2010) 239 CLR 531.
171 *International Finance* (2009) 240 CLR 319, 354–5 [55].

parte restraining order is made, may apply for that order to be set aside at an inter partes hearing.[172] Hayne, Crennan and Kiefel JJ dissented, holding that the CARA, properly construed, did not preclude that normal facility.[173]

The approach to statutory construction distinguishes the majority and minority judgments. It also distinguishes the majority approach from preceding *Kable* cases, in particular, *Gypsy Jokers* and *K-Generation*. The interpretive principle favouring valid over invalid constructions guides, but cannot dictate, outcomes: there always falls to be made a judgment whether the words of the statute can reasonably bear the valid meaning. The exercise is always controlled by the *degree* of strain that the court is prepared to tolerate. Constructions may be more or less strained, more or less contrary to the literal or apparent meaning of the language. The minority in *International Finance*, consistent with the approach in *Gypsy Jokers* and *K-Generation*,[174] accepted a degree of strained construction that ensured validity but from which the majority recoiled. French CJ articulated the shift in approach and explained the limits to the principle of avoiding constitutional invalidity by strained, or non-literal, construction, referring to the need to respect Parliament's choices, even if the consequence is invalidity, and the entitlement of the community to rely on 'the ordinary sense of the words'.[175] His Honour then added in the critical passage:

> To the extent that a statutory provision has to be read subject to a counterintuitive judicial gloss … there is a real risk that, notwithstanding a judicial gloss which renders less draconian or saves from invalidity a provision of a statute, the provision will be administered according to its ordinary, apparent and draconian meaning.[176]

The Chief Justice's explanation illustrates the connection between the approaches to statutory construction and the concept of a court's attribution. In at least two ways, strained construction to avoid invalidity affords solicitude to the states and their perceived wide powers over 'their own' courts. First, as French CJ explained, strained construction countenances the possibility that the statute will be administered 'according to its ordinary, apparent and draconian meaning' and so countenances the possibility of in-practice transgressions of the *Kable* principle. Especially in contexts of sensitivity vis-à-vis procedural fairness — *ex parte* hearings and confidential evidence, for example — the risk that transgressions go undetected and unenforced is amplified. In this way, strained construction is a form of under-enforcement of the *Kable* norm.[177] Secondly, the avoidance (or not) of invalidity serves a symbolic as well as substantive function. Amelia Simpson has argued that 'it may be impossible to secure State

---

172 Ibid 366–7 [97] (Gummow and Bell JJ), 385 [155], 386 [160] (Heydon J).
173 Ibid 374 [126].
174 See above nn 156–60 and accompanying text.
175 *International Finance* (2009) 240 CLR 319, 349 [42].
176 Ibid.
177 The practice may be compared with the broader interpretive principle, sometimes employed in the United States, according to which a construction that avoids not only constitutional invalidity, but also constitutional *doubts*, should be preferred: see *Crowell v Benson*, 285 US 22, 62 (1932); *Ashwander v Tennessee Valley Authority*, 297 US 288, 348 (Brandeis J) (1936); *National Labor Relations Board v Catholic Bishop of Chicago*, 440 US 490, 500 (Burger CJ, Stewart, Powell, Rehnquist and Stevens JJ), 510 (Brennan, White, Marshall and Blackmun JJ dissenting) (1979); William Eskridge and Philip Frickey, 'Quasi–Constitutional Law: Clear Statement Rules as Constitutional Lawmaking' (1992) 45 *Vanderbilt Law Review* 593.

constitutional autonomy and integrity as a matter of substantive effect without also securing that autonomy and integrity as a matter of surface impression.'[178] The states' interest in strained construction is confirmed by submissions made for the state parties in *Gypsy Jokers*,[179] *K-Generation*[180] and *International Finance*.[181] In contrast, the constructional theory adopted in *International Finance*, which evinced less toleration for strained constructions, resonates with a weaker conception of attribution. It reinforces, symbolically and substantively, the reach of the *Kable* principle and expressly sets itself in opposition to the possibility of deviant administration of the law within the state.

(b) Kirk

Soon after *International Finance*, the High Court invoked the *Kable* principle again in *Kirk*. The case concerned the efficacy of a state privative clause and, while not invalidating the clause, the Court construed it as ineffective to oust review for jurisdictional error explicitly on the basis that it could not validly do so.[182] Considerations of federalism and the attribution of state courts, while arising only implicitly in the competing approaches to statutory construction in *International Finance*, were central to the Court's reasoning in *Kirk*. I have already described how the Court supplemented historical inquiry with reasoning based on theory and principle, referring to the single common law for Australia, and a functional objection to 'islands of power immune from supervision and restraint' within the federal structure. These considerations are sympathetic with a vision of the judicial system that is more unitary than federal and in which state courts are, accordingly, only weakly attributable.

(c) Totani and Wainohu

Subsequent cases continued to express the momentum, gathered in *International Finance* and *Kirk*, behind the weaker conception of attribution and a reinvigorated *Kable* principle. In *Totani*, the Court held invalid s 14(1) of the *Serious and Organised Crime (Control) Act 2008* (SA). That section required the Magistrates Court of South Australia, on the application of the Commissioner of Police, to make a control order against a person, if that person was found to be a member of a 'declared organisation', being an organisation declared by the Attorney-General under a separate provision. The Magistrates Court had to be satisfied that the person the subject of the Commissioner's application was, in fact, a 'member' (defined very expansively) of the organisation, but otherwise had no role in assessing whether the person had engaged in, or was likely to engage in, any particular conduct, nor in assessing the facts underpinning the

---

178 Amelia Simpson, 'State Immunity from Commonwealth Laws: *Austin v Commonwealth* and Dilemmas of Doctrinal Design' (2004) 32 *University of Western Australia Law Review* 44, 56.

179 (2008) 234 CLR 532, 537–8 (D F Jackson QC) (during argument).

180 (2009) 237 CLR 501, 504–5 (M J Hinton QC) (during argument).

181 (2009) 240 CLR 319, 349 [40] (French CJ), 378 [135] (Hayne, Crennan and Kiefel JJ), 387 [162] (Heydon J); see also at 330 (M G Sexton SC) (during argument).

182 *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). This is qualitatively different from the kind of strained construction employed in *Gypsy Jokers* (2008) 234 CLR 532, *K–Generation* (2009) 237 CLR 501 and *International Finance* (2009) 240 CLR 319 (Hayne, Crennan and Kiefel JJ) because the construction of privative clauses in this way has been familiar in the federal sphere at least since *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 ('*Plaintiff S157*'). *Kirk* is not so much about giving a strained construction as extending the federal principle to the state sphere.

Attorney-General's decision to declare the organisation. The dominance of the executive in the decision-making process leading to a control order was critical, though the reasons of the majority judges differed somewhat in emphasis. Constitutional infirmity was identified in the conscription of the court to 'implement decisions of the executive'[183] or 'effectuate … [the] political function [of declaring an organisation]'[184] or 'give effect to legislative and executive policy'.[185] Crennan and Bell JJ appeared to place additional emphasis on the 'depart[ure] … from the ordinary judicial processes' involved in making the control order.[186] Hayne J, with whom French CJ agreed,[187] emphasised the enlistment of the court to 'create new norms of conduct', backed by criminal sanction, 'upon the motion of the Executive', applicable to persons 'chosen by the Executive' and 'without inquiring about what the subject of that norm has done, or may do in the future'.[188]

Notwithstanding the different emphases, some commonalities, relevant to the present argument, may be identified. First, there was little disagreement about the construction of the statute and the mechanics of the process it prescribed. Consistent both with the parties' submissions and with the approach in *International Finance*, there was no appetite for attempting to strain the construction of the legislation to preserve its validity. Significantly in this respect, the dissenting judge criticised the respondents for 'construing [the provision] … adversely to constitutional validity [and] persistently ignor[ing] the contrary principles of statutory construction'.[189] Secondly, it was never doubted that the *Kable* principle requires that state courts retain the essential attributes of actual and perceived independence from the executive branch: the decision turned upon the 'evaluative process' of scrutinizing the legal and practical operation of the impugned provision against the *Kable* standard. The non-unanimity of the decision is an unremarkable instance of differing, but reasonable, views being taken on a question calling for judgment on matters of degree and substantiality. The robust approach of the majority is consistent with my earlier observations about the relationship between conceptions of attribution and the standard of review. Similarly, Heydon J's more permissive evaluation appeared to follow from premises rooted explicitly in a strong conception of attribution, as I explained previously.[190]

Wainohu is an even clearer manifestation of the implicitly weakening conception of attribution. The Court held invalid the *Crimes (Criminal Organisations Control) Act 2009* (NSW), which empowered the Supreme Court of New South Wales to make control orders against members of declared organisations. Unlike the scheme considered in *Totani*, an organisation would be 'declared' by an 'eligible judge' of the Supreme Court acting as *persona designata*. The judge was expressly not required to give reasons for a declaration. This feature was considered to be inconsistent with the 'essential incident[s] of the judicial function'.[191] The power was conferred, however, not on a

183 *Totani* (2010) 242 CLR 1, 52 [82] (French CJ).
184 Ibid 66 [142] (Gummow J).
185 Ibid 173 [481] (Kiefel J).
186 Ibid 160 [436].
187 Ibid 52 [82].
188 Ibid 88–9 [226].
189 Ibid 99 [251] (Heydon J).
190 Above n 140 and accompanying text.
191 *Wainohu* (2011) 243 CLR 181, 219 [67] (French CJ and Kiefel J). See also at 230 [109] (Gummow, Hayne, Crennan and Bell JJ).

court exercising 'the judicial function', but on an 'eligible judge': the crux of the decision is that the validity of the conferral of non-judicial functions upon state judges as *personae designatae* is contingent upon compatibility between the function conferred and the institutional integrity of the court of which the judge is a member.[192] For French CJ and Kiefel J, it appears this is so at least where the non-judicial function is 'integral to the exercise of jurisdiction by the Court' or there is 'a connection between the non-judicial function conferred … and the exercise of jurisdiction by the [court]'.[193] In effect, *Wainohu* extended to the states the limitation applied in the federal sphere in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*.[194] That unification of principle, like the unification of principle in *Kirk*, expresses a vision of the integrated judicial system that is closer to the unitary than to the federal ideal-type — a vision framed by a weaker-than-orthodox conception of attribution.

This assessment of the result in *Wainohu* is to be qualified by reading French CJ and Kiefel J's caution that 'the requirement of compatibility with the *Kable* doctrine, which is functionalist rather than formalist in character, be approached with restraint'[195] and their Honours' endorsement of Professor Campbell's claim that the incompatibility doctrine is capable of application in a manner 'insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform'.[196] In a mirror image of earlier *Kable* cases, the invalidity wrought in *Wainohu* was coupled with a guarded statement of restraint respecting the autonomy of the states. Clearly enough, the competing conceptions of attribution — the different accommodations of autonomous states and integrated courts — remain unsettled.

IV THE COMMONWEALTH'S CONSTITUTIONAL POLICY

A Introduction

Having explained *how* the *Kable* principle evolved into a theory of the 'attributes' of state courts, the next question is *why* it did so if, as I claim, the 'attributes'-based account is insufficient without supplementation by 'attribution' conceptions and if, as I also claim, *Kable* itself was self-consciously understood as a doctrine of federalism. One answer, to which I have already adverted, is that the rise of historicist methodology has come at the expense of theorising about the nature of the federation. A second answer is that Australian constitutional law resists appeals to pre-conceived notions of federalism. Certainly, in construing grants of legislative power, it is erroneous to read the text subject to exogenous considerations of 'federal balance'.[197] However, it is not unusual to appeal to theoretical conceptions of federal structure when elaborating restrictions upon legislative power. The *Melbourne Corporation* doctrine, for example,

---

192 Ibid 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).
193 Ibid 219 [68]; see also at 210 [47], 212 [51].
194 (1996) 189 CLR 1 ('*Wilson*'); see also *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.
195 *Wainohu* (2011) 243 CLR 181, 212 [52].
196 Ibid 213 [52], quoting Enid Campbell, 'Constitutional Protection of State Courts and Judges' (1997) 23 *Monash University Law Review* 397, 421.
197 *Work Choices Case* (2006) 229 CLR 1, 73–4 [54], 103 [141], 104 [145], 116 [183], 118 [189], 120–1 [195]–[196] (Gleeson CJ, Gummow, Hayne, Heydon and Crennan JJ).

relies upon a theory of the states as distinct, autonomous bodies politic,[198] and, similarly, *Betfair's*[199] exegesis of s 92 of the *Constitution* called in aid '[t]he creation and fostering of national markets [which] would further the plan of the *Constitution* for the creation of a new federal nation and would be expressive of national unity',[200] and 'the maintenance of a national economy'.[201] The *Kable* principle, whether in a robust or permissive form, relies upon some theory of state courts and their degree of 'integration' into a national judicial system. To confront the question of 'integration' as a structural, theoretical problem would not be to commit the 'federal balance' error.

A third answer, now explored in detail, is that the federalism concerns implicit in *Kable* cases have been suppressed by an absence of conflict between the Commonwealth and the states. Federal conflicts, when litigated, are typically characterised by an opposition of Commonwealth and state interests. Commonwealth and state interests in the *Kable* principle might have diverged, but until recently, for reasons I explain, they instead converged. Consequently, *Kable* cases typically presented, procedurally, as a united front of state and Commonwealth governments all defending together wide legislative power over courts. So-litigated, the *Kable* principle unsurprisingly took on its ascendant complexion as a principle concerned with the attributes of courts in general, and protecting them from governmental schemes in general, rather than a principle of federalism in which the Commonwealth and state governments might have opposing interests. I explain how this posture came to be typical by analysing the pattern of interventions by the Commonwealth Attorney-General in *Kable* litigation. In doing so, I also show how and why in recent cases, the Commonwealth has diverged from the states and how in significant instances this has coincided with the revival of the *Kable* principle.

The interests of the several governments come to be represented in constitutional matters through the *Judiciary Act 1903* (Cth), which confers on Commonwealth and state Attorneys-General a right to intervene in proceedings 'that relate to a matter arising under the Constitution or involving its interpretation'.[202] The statutory right to intervene is made effective by a duty on the courts not to proceed with the matter unless satisfied that the Attorneys-General have been notified with sufficient time to consider intervening.[203] Provision for governmental intervention reflects the wider public interests at stake in constitutional matters that private parties may not adequately address. Whether or not to intervene and what submissions to make are for an Attorney-General to decide in his or her discretion.[204]

---

198 See Zines, 'Sir Owen Dixon's Theory of Federalism', above n 56; Gageler, above n 56, 154; *Melbourne Corporation* (1947) 74 CLR 31.

199 (2008) 234 CLR 418.

200 Ibid 452 [12] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

201 Ibid 474 [88] (Gleeson CJ, Gummow, Kirby, Hayne, Crennan and Kiefel JJ).

202 *Judiciary Act 1903* (Cth) s 78A(1). 'States' in this context includes the mainland territories: s 78AA. Prior to the insertion of the statutory right by the *Judiciary Amendment Act 1976* (Cth), intervention required leave, which was readily granted as a practical matter. For convenience I will refer simply to interventions by the Commonwealth or a state, even though the right is that of the Attorney–General.

203 *Judiciary Act 1903* (Cth) s 78B.

204 See generally Enid Campbell, 'Intervention in Constitutional Cases' (1998) 9 *Public Law Review* 255. But see also *K–Generation* (2009) 237 CLR 501, 544 [155] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ) in which the High Court appeared somewhat critical of

Since the *Kable* principle is restrictive of state legislative power, state governments have an obvious interest in defending state laws. Even a state whose laws are not directly challenged in a particular proceeding will have an interest in the outcome, since an adverse decision may invite new challenges or, at least, curtail its own capacity to enact similar laws. The Commonwealth's policy interest is more nuanced. The *Kable* principle ensures the continued existence of fit receptacles for the conferral of the judicial power of the Commonwealth pursuant to s 77(iii) of the *Constitution* and, in this sense, exists for the benefit of Commonwealth interests. In the abstract, a Commonwealth that routinely intervened in *Kable* cases against the states and in favour of relative homogeneity, by detailed prescription of the minimum requirements for state courts, is eminently conceivable. How the Commonwealth came in fact to intervene in support of the states is an interesting development.

B 'Intervention' in Kable

The interventions in *Kable* itself were complicated by the fact that new constitutional issues arose before the High Court during argument. On the basis of the original notice, the Attorneys-General for Victoria, South Australia and Western Australia intervened. New South Wales' interests were represented because its Director of Public Prosecutions was the respondent to the appeal. The Commonwealth did not intervene, but availed itself of an opportunity to file written submissions when new arguments based on Chapter III were raised during the hearing.[205] The reported summary of those submissions indicates that the Commonwealth offered only qualified support for the impugned legislation. It submitted that 'the doctrine of the separation of judicial power forms no part of the entrenched constitutional framework of the States.'[206] But, the report continues:

> This does not mean that the *Constitution* contains no implications which limit the power of a State legislature to confer non-judicial powers or functions on State courts or judges or to regulate or control the exercise of judicial power by a State court. The *Constitution* creates an 'integrated system of law'.[207]

Thus, the Commonwealth's position in *Kable* itself aligned quite closely with the result. Its qualified nature foreshadowed the federal tensions at the heart of the *Kable* principle as originally articulated.

C Interventions after Kable and the logic of Bachrach

The Commonwealth's position immediately after *Kable* is difficult to discern, for it tended not to intervene in cases in which the *Kable* principle was raised unless the

---

Queensland and Western Australia for putting 'certain arguments not accepted by the immediate parties'. For a defence of intervention submissions not put by the parties, see Transcript of Proceedings, *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCATrans 107 (26 May 2009) 1999–2016 (S J Gageler SC); Pamela Tate SC, 'The High Court on Constitutional Law: The 2008 Term' (2009) 32(1) *University of New South Wales Law Journal* 169, 177.

205 Transcript of Proceedings, *Kable v DPP (NSW)* (High Court of Australia, S114/1995, Brennan CJ, Dawson, Toohey, Gaudron, McHugh and Gummow JJ, 7 December 1995) <http://www.austlii.edu.au/cgi-bin/sinodisp/au/other/HCATrans/1995/430.html>.

206 *Kable* (1996) 189 CLR 51, 61.

207 Ibid.

validity of a Commonwealth law was in question.[208] The vast majority of the cases were in lower courts, necessarily subject to review by the High Court, which probably explains sufficiently the Commonwealth's disinclination to intervene. *Bachrach*[209] is the crucial exception. A Queensland statute was challenged in the High Court on *Kable* grounds. South Australia, Victoria and New South Wales each intervened in support of Queensland. The Commonwealth did not intervene. A unanimous court published reasons that would profoundly shape the Commonwealth's subsequent policy:

> *Kable* took as a starting point the principles applicable to courts created by the Parliament under s 71 and to the exercise by them of the judicial power of the Commonwealth under Ch III. If the law in question here had been a law of the Commonwealth and it would not have offended those principles, then an occasion for the application of *Kable* does not arise.[210]

The court hypothesised a valid Commonwealth enactment, and concluded that state legislation in equivalent terms would not offend the *Kable* principle. It is the contrapositive proposition that is problematic for Commonwealth interests: if a state enactment is found to be *invalid* on *Kable* grounds, it must follow, according to *Bachrach*, that a Commonwealth enactment in equivalent terms would also breach Chapter III. *Bachrach* thus illuminated a Commonwealth interest in the validity of state legislation. By describing Commonwealth legislative power as *narrower* than state legislative power over analogous subject-matter, the Court gave the Commonwealth a reason to defend *wide* state legislative power. For the Commonwealth, this interest conflicts with that in maintaining the national judicial system through confining state legislative power over state courts.

The Commonwealth's common fate with the states in *Kable* cases is evident in its oral submissions made in *Baker*,[211] one of the next cases to reach the High Court.[212]

---

208 See *R v Moffatt* [1998] 2 VR 229; *Wynbyne v Marshall* (1997) 7 NTLR 97; *Felman v Law Institute of Victoria* [1998] 4 VR 324; *Lloyd v Snooks* (1997) 7 Tas R 18; *Hi–Fert Pty Ltd v Kuikiang Maritime Carriers Inc (No 2)* (1997) 75 FCR 583; *Bruce v Cole* (1998) 45 NSWLR 163; *Bachrach* (1998) 195 CLR 547. But see also *Comptroller–General of Customs v Kingswood Distillery Pty Ltd* (1996) 135 FLR 411 (in which the Comptroller–General was a party); *Cheesman v Waters* (1997) 77 FCR 221 (in which the Attorney–General was a party); *Laurance v Katter* [2000] 1 Qd R 147 (in which *Parliamentary Privileges Act 1987* (Cth) s 16(3) was challenged); *Nicholas v The Queen* (1998) 193 CLR 173 (in which *Crimes Act 1914* (Cth) s 15X was challenged); *Re Australasian Memory Pty Ltd* (1997) 149 ALR 393 (in which the Attorney–General intervened in support of the validity of the Corporations Law; it was disputed whether *Kable* applied, but it was conceded that the law would not be invalid on *Kable* grounds, at 428–9 (Santow J)).

209 (1998) 195 CLR 547.

210 Ibid 561–2 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

211 (2004) 223 CLR 513.

212 *Baker* (2004) 223 CLR 513 was argued on 4 February 2004. Earlier, on 8 October 2003, the High Court heard oral argument in *Bradley* (2004) 218 CLR 146, in which the Commonwealth Attorney–General's submissions did not invoke the logic of *Bachrach* (as to which see below n 245 and accompanying text): Transcript of Proceedings, *North Australian Aboriginal Legal Service v Bradley* [2003] HCATrans 408 (8 October 2003) 3115–561 (D M J Bennett QC); and on 9 December 2003 an enlarged Full Court dismissed an application for special leave without hearing argument from the interveners: *Silbert* (2004) 217 CLR 181, 184 (Gleeson CJ) (during argument); Transcript of Proceedings, *Silbert v DPP(WA)* [2003] HCATrans 515 (9 December 2003) 2467 (Gleeson CJ).

Whereas in *Kable*, the Commonwealth's support for the states was qualified, counsel for the Commonwealth Attorney-General in *Baker* began his address in these terms:

> The starting point in these types of cases, we would submit, is to ask the question whether the Commonwealth Parliament could have legislated in this particular form. In other words, would the law, if enacted by the Federal Parliament, be consistent with requirements imposed by Chapter III? If asking that question the answer is 'Yes, the Federal Parliament could have enacted this law', then there is no need to consider the separate *Kable* doctrine.[213]

Presented with a choice between opposing the states over the implications of the 'integrated' judicial system and joining the states to advocate for wide legislative power over courts, the Commonwealth adopted the latter course. Since *Baker*, the logic of *Bachrach* has remained pervasive. The basic structure of the Commonwealth's argument in *Baker* was explicitly repeated in *Fardon*,[214] *International Finance*,[215] and *Hogan v Hinch*.[216] It was implicit in its position in *Gypsy Jokers* and *K-Generation* and also in amendments, made to the *Proceeds of Crime Act 2002* (Cth), in response to *International Finance*.[217] It is an argument most recently affirmed in *Hogan v Hinch*.[218]

The consequences of this posture are profound. The policy ensures that in most *Kable* challenges, the several governments will be united in defending a broad understanding of legislative power over courts. It has followed naturally that conceptions cognate with the separation of powers have been emphasised in the development of the *Kable* principle because the intervening governments have treated the principle only at the level of the relationship between legislature and court. The dimension to the *Kable* principle that is about the relationship between states and Commonwealth has been suppressed. It has been suppressed in the sense that among the repeat litigators, the Commonwealth is the only party which could be expected to advocate a weak conception of the attribution of state courts, based upon its vision of the integrated judicial system. In the absence of the Commonwealth taking that position, reasons to depart from the orthodox and traditional strong conception of attribution remain largely unventilated.

D Interventions against the states

Since 2009, and roughly coinciding with the revival of the *Kable* principle in the High Court, the Commonwealth has displayed a willingness to depart from its typical

---

213 Transcript of Proceedings, *Baker v The Queen* [2004] HCATrans 3 (4 February 2004) 2545–51 (H C Burmester QC).

214 Transcript of Proceedings, *Fardon v A–G (Qld)* [2004] HCATrans 039 (2 March 2004) 3205–13 (H C Burmester QC); see also *Fardon* (2004) 223 CLR 575, 591 [18] (Gleeson CJ), 608 [68]–[69] (Gummow J), 631 [145] (Kirby J).

215 Transcript of Proceedings, *International Finance Trust Co Ltd v NSW Crime Commission* [2009] HCATrans 107 (26 May 2009) 2170–4 (Gummow J and S J Gageler SC).

216 Transcript of Proceedings, *Hogan v Hinch* [2010] HCATrans 285 (3 November 2010) 3913–31 (S J Gageler SC).

217 *Crimes Legislation Amendment (Serious and Organised Crime) Act 2010* (Cth) sch 2 items 106–7; see also *DPP (Cth) v Kamal* (2011) 248 FLR 64, 79 [44] (Martin CJ), 103 [161] (Buss JA).

218 (2011) 243 CLR 506, 554 [91] (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

position of support for the states. Departure has not occurred in all cases,[219] but there are sufficient instances to infer an emergent measure of nuance in the Commonwealth's intervention positions. The claim is not that a shift in Commonwealth policy *caused* the revival of the *Kable* principle. After all, the Commonwealth *did* support the states — unsuccessfully — in *International Finance*.[220] The claim is more subtle: just as the Commonwealth's support for the states after *Bachrach* enabled the ascendance of the attributes-based account of the *Kable* principle, and just as it enabled the reinforcement of the orthodox, strong conception of attribution, the Commonwealth's departures from that position of support are enabling a renewed federalism-based approach to the *Kable* principle and, perhaps, a weaker conception of attribution.

1 Extending Chapter III to the states

The Commonwealth's opposition to the states in *Kable* cases since 2009 has been most common in circumstances where, because the *Constitution* would undoubtedly preclude the Commonwealth from enacting legislation analogous to the impugned state law, the logic of *Bachrach* was inapplicable and any argument along *Bachrach*'s lines foreclosed. I explained previously the tension between the Commonwealth interests in preserving its own legislative power from an adverse *Kable* decision and in protecting, or even advancing, the integrated system of courts. Thus, when it has no relevant legislative power of its own at stake, the interest in defending state legislation diminishes and the interest in integrated courts augments. Three examples have manifested in the recent cases.

(a) Kirk

In *Kirk*, the Commonwealth intervened against the states and successfully argued that the supervisory jurisdiction to correct jurisdictional error by a lower court was a 'defining characteristic' of a state Supreme Court.[221] This 'in substance … equated State administrative law, in this respect, with the position under s 75(v) of the *Constitution*',[222] which entrenches the jurisdiction of the High Court to grant constitutional writs for jurisdictional error. Having lost its own battle over privative clauses in *Plaintiff S157*,[223] the Commonwealth was free in *Kirk* to advance its theory of integrated courts, premised on a weaker conception of attribution. In the resulting argument between the Commonwealth and states, the federal dimension to the *Kable* point was explicit, explaining in part the attention paid in *Kirk*, not characteristic of all the *Kable* cases, to federalism considerations.

(b) Wainohu

Similarly, and as explained previously, *Wainohu* extended to the states the principles in the federal sphere which limit the valid conferral of non-judicial functions on judges

---

219 See ibid; *Momcilovic* (2011) 85 ALJR 957 (in relation to the validity of s 36 of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), authorising the Supreme Court to make a declaration of inconsistent interpretation).

220 (2009) 240 CLR 319.

221 Transcript of Proceedings, *Kirk v Industrial Court (NSW)* [2009] HCATrans 239 (1 October 2009) 8180–277 (S J Gageler SC).

222 Spigelman, above n 54, 77.

223 (2003) 211 CLR 476.

acting as *personae designatae*. The Court expressly attributed the new convergence of principle to an acceptance of the submissions of the Commonwealth Attorney-General as intervener.[224] Although the Commonwealth, on the facts, 'support[ed] the New South Wales legislation in its totality',[225] it actively argued, against state interests, that the conferral of functions upon a state judge acting as *persona designata* is subject to the same limitations as the analogous conferral of functions on a federal judge, and expressly sought to identify a common constitutional foundation for both *Kable* and *Wilson*.[226] New South Wales conducted its defence on a consistent assumption, though it appeared not necessarily to concede the point,[227] while Victoria, as intervener, actively resisted the Commonwealth's submission, arguing unsuccessfully that *Wilson* had no application in the state sphere by reason of there being no separation of powers.[228] The dissenting judge's observation, that '[t]o take the step which the Commonwealth's submissions entail is not to apply the *Kable* doctrine, but to move a step beyond it',[229] highlights the significance to the development of the *Kable* principle of the Commonwealth electing to intervene against state interests to advance its vision of the integrated judicial system.

(c) Momcilovic

Momcilovic concerned the operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic). Although no party contended for the invalidity of any part of the Charter, the possible inconsistency with the *Kable* principle of two provisions arose at the application for special leave.[230] The first was the command that '[s]o far as it is possible to do so consistently with their purpose, all statutory provisions must be interpreted in a way that is compatible with human rights.'[231] The second was the power to make a declaration that a statutory provision cannot be interpreted consistently with a human right.[232] For the present purpose of analysing the Commonwealth's intervention position, only the first provision is of special interest.[233]

The perceived difficulty with s 32, the interpretive principle, was that it might have been construed to confer upon the court a power of a legislative character, insofar as it

---

224 *Wainohu* (2011) 243 CLR 181, 228–9 [105] (Gummow, Hayne, Crennan and Bell JJ).

225 Transcript of Proceedings, *Wainohu v NSW* [2010] HCATrans 319 (2 December 2010) 2823–4 (S J Gageler SC).

226 Ibid 2881–97 (S J Gageler SC).

227 Ibid 2069–77 (M G Sexton SC).

228 Ibid 3321–597 (P J Hanks QC).

229 *Wainohu* (2011) 243 CLR 181, 248 [172] (Heydon J).

230 Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 400–35 (French CJ, Crennan J and P M Tate SC), 476–88 (Crennan J and P M Tate SC).

231 *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 32(1).

232 Ibid s 36.

233 With respect to the declaration provision (s 36), the Commonwealth supported its validity: Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Momcilovic v The Queen*, M134/2010, 31 January 2011, [26]–[31]. The Commonwealth's interest in the validity of the power to make a declaration of inconsistent interpretation may be seen explicitly in its published legal advice on the topic: National Human Rights Consultation Committee, *National Human Rights Consultation Report* (2009), Appendix E 'The Solicitor–General's Advice', 1–13 <http://www.humanrightsconsultation.gov.au>.

may have authorised the court to engage in 'rewriting' statutes.[234] Consistent with the trend I have identified in *Kirk* and *Wainohu*, the Commonwealth, on this point, also sought to extend aspects of Chapter III to the states. Although ultimately supportive of the Charter's validity, the Commonwealth, as Heydon J noticed, 'seemed to hover on the brink of attack'.[235] In its written submissions, the Commonwealth argued that it would contravene the *Kable* principle to confer on a state court a legislative function that was 'inextricably intertwined or blended' with the court's judicial functions.[236] This attempted an obvious extension to state courts of an obvious Chapter III limitation on federal courts.

In oral submissions, the extension sought went further. The Commonwealth submitted that the interpretation of state legislation, in a matter, by state courts in the exercise of state jurisdiction 'is confined to the exercise of judicial power in a Commonwealth constitutional sense'.[237] Despite recognition that the 'judicial power of the Commonwealth' is narrower than 'judicial power' generally and that state courts may therefore exercise certain judicial powers denied to federal courts,[238] in interpreting state laws, a state court must, according to the Commonwealth's submission, remain within the limits of the judicial power of the Commonwealth. The Solicitor-General's development of the argument rested centrally upon a vision of the integrated system of courts with three critical aspects. First, he argued that the High Court in exercising its appellate jurisdiction to correct error in the judgment, decree, order or sentence of a state Supreme Court, 'must be able to do again and do properly what the Supreme Court itself should have done'.[239] Secondly, he argued that a state court must be able to interpret state statutes in the exercise of invested federal jurisdiction, precluding any state interpretive principle that would involve the court in an exercise of non-Chapter III judicial power.[240] Thirdly, he argued that federal courts must be able to interpret state statutes in federal jurisdiction and could not be disabled from that task by a state interpretive principle.[241] This vision of integrated courts rests also on the implicit premise that a state law has an objective construction and cannot be interpreted differently depending on whether federal or non-federal jurisdiction is exercised. But for that, the second and third aspects of the Solicitor-General's vision

---

234 Transcript of Proceedings, *Momcilovic v The Queen* [2010] HCATrans 227 (3 September 2010) 426 (French CJ).

235 *Momcilovic* (2011) 85 ALJR 957, 1050 [379].

236 Attorney-General (Cth), 'Submissions of the Attorney-General of the Commonwealth (Intervening)', Submission in *Momcilovic v The Queen*, M134/2010, 31 January 2011, [25].

237 Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 17 (10 February 2011) 8541–2 (S J Gageler SC).

238 See, eg, *In re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ): 'To make [an authoritative declaration of the law] clearly is a judicial function, and such a function is not competent to this Court unless its exercise is an exercise of part of the judicial power of the Commonwealth.'

239 Transcript of Proceedings, *Momcilovic v The Queen* [2011] HCATrans 17 (10 February 2011) 8572–3 (S J Gageler SC).

240 Ibid 8577–92 (S J Gageler SC).

241 Ibid 8594–609 (S J Gageler SC).

could be denied by s 79 of the *Judiciary Act 1903* (Cth) operating *not* to pick up the state interpretive principle.[242]

Ultimately, the Court did not need to decide the correctness of this submission. Section 32 was construed as a codification of ordinary interpretive principles.[243] But the submission itself is an important illustration of the Commonwealth's more nuanced intervention position in *Kable* cases since 2009, especially when opportunities arise to extend Chapter III principles to the states.

2 *Counter-examples?*

There are some cases where the Commonwealth's intervention position does not neatly align with the significance that I have attached to *Bachrach*.[244] In *Bradley*[245] and *Forge*,[246] the logic of *Bachrach* did not apply, because of s 72 of the *Constitution*, and yet the Commonwealth did not seek to extend the principles of s 72 to the states and territories. In the case of *Bradley*, that position may be explained by the Commonwealth's interest in preserving its wide power to make laws for the territories under s 122 of the *Constitution*. In the case of *Forge*, a position antagonistic to the states would also have undermined ASIC's case for validity, though the animating reason cannot be known. Conversely, *Totani* was a case in which the logic of *Bachrach* did apply. Indeed, specific Commonwealth laws were mooted as possible analogues of the impugned law.[247] Yet the Commonwealth did not adopt its usual supportive posture. Instead, it neither supported nor attacked the law, confining its submissions to a relatively contained point concerning the legislative scheme's privative clause.[248] It would be unprofitable to speculate on the reasons for that position, but given the result in *Totani*, the atypical posture is consistent with my claim that the Commonwealth's intervention positions enable, in the way described in this section, the development of the *Kable* principle.

CONCLUSION

State courts are critical actors in the Australian judicial system. An understanding of what it means to be a court '*of a State*' is no less important than an understanding of what it means to be a '*court*' of a State. The *Kable* principle, at its inception, began to elaborate the former understanding. The principle consciously sought to accommodate conflicting constitutional commitments to autonomous states and integrated courts by adjudicating competing conceptions of the proper attribution of state courts within the federal structure. Subsequently, separation-of-powers analysis has ascended to prominence as the High Court has sought to explain the *Kable* principle as a theory of

---

242 See *Solomons v District Court (NSW)* (2002) 211 CLR 119, 135 [24], 136 [28] (Gleeson CJ, Gaudron, Gummow, Hayne and Callinan JJ).

243 *Momcilovic* (2011) 85 ALJR 957, 987–8 [50]–[51] (French CJ), 1013–14 [168]–[171] (Gummow J, with whom Hayne J relevantly agreed), 1090 [565] (Crennan and Kiefel JJ), 1111 [684] (Bell J); *contra* at 1068 [450] (Heydon J).

244 (1998) 195 CLR 547.

245 (2004) 218 CLR 146.

246 (2006) 228 CLR 45.

247 *Totani* (2010) 242 CLR 1, 124–6 [328]–[330], 128–9 [337]–[339] (Heydon J).

248 Transcript of Proceedings, *South Australia v Totani* [2010] HCATrans 95 (20 April 2010) 2546–51 (S J Gageler SC).

the attributes of a court. A consequence of that ascendance has been relative inattention to federalism concerns, which explains in part the principle's 13-year hiatus. But the theory of attributes is, by itself, insufficient in critical respects. To understand the extrinsic reasons motivating the designation of some attributes, but not others, as 'defining characteristics', and to understand the factors that inform the evaluative judgment made at the point of decision in a *Kable* case, it is necessary to have a conception of the attribution of state courts. Orthodox conceptions of attribution place courts firmly within the state body politic. To displace or qualify those conceptions requires the kind of attention given in *Kable*, both during argument and in the reasons for judgment, to federalism concerns. The Commonwealth Attorney-General is the only repeat litigator with an interest in weak conceptions of the attribution of state courts. By siding with the states until 2009, the Attorney enabled the suppression of federalism concerns and, by default, the maintenance of strong conceptions of attribution. Recent cases suggest a renewed Commonwealth interest in pursuing positions against the states in *Kable* cases. When that occurs, the federal complexion of the *Kable* principle will be more prominent and the prevailing strong conceptions of attribution more likely to be displaced. There will be different views on the desirability of such displacement, coincident with different visions of the proper reconciliation of commitments to autonomous states and integrated courts. As this article has sought to demonstrate, those different visions — different conceptions of the attribution of state courts — matter a great deal and warrant closer attention and elaboration.