

Procedural Due Process under the Australian Constitution

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Abstract

Early attempts to establish a constitutional procedural due process principle have relied upon the separation of judicial power and operated within the doctrinal framework provided by *R v Kirby*; *Ex parte Boilermakers' Society of Australia*.¹ Such attempts focused on developing a concept of 'judicial power' that included a minimum standard of procedural fairness. Although this conception was adopted by several members of the High Court in the 1990s, notably Gaudron J, it has failed to gain significant doctrinal traction, and the status of procedural due process principles under the *Commonwealth Constitution* remains unsettled.

In this article I review the position of the current approach and assess the effect of certain seminal cases, particularly *Nicholas v The Queen* and *Thomas v Mowbray*,² on the development of a procedural due process principle. After concluding that the current doctrine is attended by fatal difficulties, I investigate an alternative constitutional grounding for procedural due process based on another limb of Chapter III case law, focusing on *Forge v Australian Securities and Investments Commission*.³ The proposed principle is accompanied by an interpretative framework for its application, that is developed by analogy with the High Court's 'trial by jury' jurisprudence.

1. Introduction

It is trite law to say that Chapter III of the *Constitution* imposes restrictions on the ability of the legislature fundamentally to alter the character, functions and powers of the various courts capable of being invested with Commonwealth judicial power. The outer limits, and conceptual underpinnings, of such restrictions are, however, strongly in dispute. One of the most fraught topics of dispute is the status of 'due process' limitations under Chapter III of the *Constitution*. Writing extrajudicially in 2001 McHugh J foreshadowed the extent of this dispute. His Honour queried:

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1 (1956) 94 CLR 254 ('*Boilermakers*').

2 *Nicholas v The Queen* (1998) 193 CLR 173 ('*Nicholas*'); *Thomas v Mowbray* (2007) 233 CLR 307 ('*Thomas*').

3 (2006) 228 CLR 45 ('*Forge*').

What of such procedural matters as discovery and interrogatories, the obtaining of particulars and the issuing of subpoenas? What of matters that straddle the borders of substance and procedure such as the right to a fair trial, the presumption of innocence, the right of an accused to refuse to give evidence, the onus and standard of proof in civil and criminal cases and the use of deeming provisions and presumptions of fact? Can the parliament abolish or change these rights and matters? Would legislation purporting to do so be an invalid attempt by parliament to dictate and control the manner of exercising the judicial power of the Commonwealth?⁴

McHugh J concluded that passage by observing that, '[g]iven statements made in cases decided in the last 15 years, the power of parliament to affect these procedural and quasi-substantive matters in significant ways is open to serious doubt'.⁵ This article investigates the 'doubt' mooted by McHugh J by inquiring into the development of procedural due process standards under the *Constitution*, particularly in regard to federal courts.

Part 2 begins by reviewing the historical development and contemporary expression of the due process principle — focusing on the gradual inclusion of due process principles within the constitutional definition of 'judicial power'. The currently accepted doctrinal basis for a procedural due process principle is a statement made in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs*⁶ — a law that 'requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power' is invalid.⁷ This principle turns on definitions of 'judicial power', and thus operates within the framework established in *Boilermakers*'. In an effort to tease out the doctrinal implications of connecting due process principles and 'judicial power', Part 2 examines the interface between the *Lim* principle and the separation of powers doctrine as expressed in *Boilermakers*'.⁸

Part 3 analyses current due process principles in application. This analysis focuses on the impact of *Nicholas* on the High Court's due process jurisprudence.⁹ It is argued that a number of statements made in *Nicholas* severely undercut the strength of the principle expressed in *Lim* and, thus, the efficacy of premising a due process principle on 'judicial power'. Most damaging is the suggestion that 'procedural' laws, like the rules of evidence, do 'not impair ... the end and purpose of the exercise of judicial power'.¹⁰ The effect of *Nicholas*'s truncation of due

4 Michael McHugh, 'Does Chapter III of the *Constitution* Protect Substantive as well as Procedural Rights?' (2001) 21 *Australian Bar Review* 235, 239.

5 *Ibid.*

6 (1992) 176 CLR 1 ('*Lim*').

7 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ). For convenience, this principle shall be referred to as the '*Lim* principle'. See the reliance on this principle in, eg, *Nicholas* (1998) 193 CLR 173; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; *Thomas* (2007) 233 CLR 307.

8 *Boilermakers*' (1956) 94 CLR 254.

9 *Nicholas* (1998) 193 CLR 173.

10 *Nicholas* (1998) 193 CLR 173, 189 (Brennan CJ).

process principles can be seen in its application by lower courts presented with due process issues.¹¹ Later cases, namely *Bass v Permanent Trustee Co Ltd*¹² and *Thomas*, signalled a possible revival of the principle expressed in *Lim*; however, they do not overcome the substance of the difficulties raised by *Nicholas*. Part 3 concludes by observing that, as the case law currently stands, an attempt to establish a due process principle premised on ‘infringements or usurpations of judicial power’ is attended by virtually insurmountable obstacles.

Part 4 moves away from the doctrinal analysis undertaken in Parts 2 and 3 and investigates the theoretical difficulties of relying on definitions of ‘judicial power’, and the *Boilermakers*’ doctrine, to secure due process standards. The analytical probity of including purely procedural standards, like cross-examination or service of originating processes, within a definition of ‘judicial power’ is critiqued. Similarly, the role of history in determining the key components of ‘judicial power’ is examined in order to demonstrate the obstacles that lie in the path of a due process principle that operates within the *Boilermakers*’ doctrine. At base, the objection to conceiving of a due process principle under the rubric of ‘judicial power’ is that the allocation of powers among the various arms of government, enforced by *Boilermakers*’, is an ill-suited framework for the protection of due process standards.

Part 5 offers a response to the various problems identified in the current doctrinal approach to due process by proposing an alternative constitutional basis for a due process principle. The proposed principle is an implication, drawn from the text of Chapter III, that focuses on the procedural characteristics of ‘courts’ and builds upon a line of cases that are directed towards maintaining the ‘institutional integrity’ of courts.¹³ The proposed principle is accompanied by an interpretative framework for its application, that addresses the concerns that dogged the *Lim* principle.

2. *The Separation of Powers and Procedural Due Process*

It is settled law that ‘[s]ections 1, 61 and 71 ... read with the general provisions of Chapter III’ of the *Constitution* establish the separation of powers doctrine.¹⁴ *Boilermakers*’ decided that two consequences flow from the *Constitution*’s

11 See, eg, *Oguzhan v Minister for Immigration and Multicultural Affairs* (2000) 99 FCR 285 (‘*Oguzhan*’); *R v Granger* (2004) 88 SASR 453 (‘*Granger*’); *Commissioner of Taxation v Price* [2006] 2 Qd R 316 (‘*Price*’); *Elbe Shipping SA v Giant Marine Shipping SA* (2007) 159 FCR 518 (‘*Elbe*’); *Lodhi v The Queen* (2007) 179 A Crim R 470 (‘*Lodhi*’).

12 (1999) 198 CLR 334 (‘*Bass*’).

13 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (‘*Kable*’); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146 (‘*Bradley*’); *Fardon v A-G (Qld)* (2004) 223 CLR 575 (‘*Fardon*’); *Forge* (2006) 228 CLR 45.

14 Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205, 207; see also Wendy Lacey, ‘Inherent Jurisdiction, Judicial Power and Implied Guarantees Under Chapter III of the *Constitution*’ (2003) 31 *Federal Law Review* 57, 62–3; *Boilermakers*’ (1956) 94 CLR 254, 274–5 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Lim* (1992) 176 CLR 1, 26 (Brennan, Deane and Dawson JJ).

exclusive vesting of judicial power in Chapter III courts. Parliament cannot confer:¹⁵

1. Commonwealth judicial power on a body that is not a court within the meaning of s 71;¹⁶ or
2. Non-judicial power on a Chapter III court, nor a court exercising federal jurisdiction.¹⁷

Notably, both limbs of the separation doctrine have, at their core, the notion of ‘federal judicial power’.¹⁸ As such, the vast majority of case law touching on the separation doctrine has concerned attempts to define the central characteristics of ‘judicial power’.¹⁹ Courts subsequently interpreting the phrase ‘judicial power’ have remained dutiful to *Boilermakers’s* command not to confine the concept of judicial power ‘in any narrow or pedantic manner’,²⁰ and have fixed upon a flexible definition capable of adaptation to various legislative policy initiatives.²¹ Several key, although non-exhaustive,²² *indicia* have emerged as indicative of judicial power:²³ the final and conclusive determination of a dispute;²⁴ the determination of past rights and liabilities — as opposed to the creation of new rights;²⁵ the determination of questions according to precise and definite legal standards;²⁶ and the power to issue binding and enforceable decisions.²⁷

As such, statutory provisions challenged as contrary to the separation doctrine have generally been part of legislative attempts to invest non-judicial bodies, or officials, with certain judicial powers,²⁸ or to invest judicial officers with administrative powers in their official,²⁹ or personal,³⁰ capacity. Hence, for the

15 Lacey, above n 14, 62; Wheeler, above n 14, 207.

16 *Boilermakers’* (1956) 94 CLR 254, 269–70 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

17 *Boilermakers’* (1956) 94 CLR 254, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), unless it is incidental to the exercise of Commonwealth judicial power.

18 See Peter Gerangelos, ‘Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes from the United States’ (2005) 33 *Federal Law Review* 389, 394–5.

19 See, eg, *Albarran v Companies Auditors and Liquidators Disciplinary Board* (2007) 231 CLR 350; *Visnic v Australian Securities and Investments Commission* (2007) 231 CLR 381; *A-G (Cth) v Alinta Ltd* (2008) 233 CLR 542 (*‘Alinta’*).

20 *Boilermakers’* (1956) 94 CLR 254, 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

21 *Alinta* (2008) 233 CLR 542, 561 (Kirby J).

22 *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167 (*‘Precision’*), 188–9.

23 Deriving from the early expression of the concept by Griffith CJ in *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357.

24 *Shell Co of Australia Ltd v Federal Commissioner of Taxation* (1930) 44 CLR 530.

25 *Boilermakers’* (1956) 94 CLR 254, 281–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

26 *Precision* (1991) 173 CLR 167, 189; *Thomas* (2007) 233 CLR 307, 344–5 (Gummow and Crennan JJ).

27 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245.

28 *New South Wales v Commonwealth* (1915) 20 CLR 54; *Precision* (1991) 173 CLR 167; *Al-Kateb v Godwin* (2004) 219 CLR 562.

29 *Yanner v Minister for Aboriginal and Torres Strait Islander Affairs* (2001) 108 FCR 543.

30 *Grollo v Palmer* (1995) 184 CLR 348; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1 (*‘Wilson’*).

most part, the separation doctrine has been analysed and developed in the context of challenges to certain ‘powers’ allocated to institutions and officers of the various arms of government — an ‘allocation of power’ function. This allocation function focuses on the ‘nature and subject matter of determinations made’³¹ in execution of a certain power — the ‘processes’ followed prior to exercising those powers do not occupy a position of primacy.³²

Before moving on, there are several definitional matters that should be addressed. First, I am concerned with *procedural*, as opposed to *substantive*, due process principles. Constitutional principles that touch on substantive due process, such as prohibitions on the unequal application of federal laws,³³ fall outside the scope of this article. In this context, the term ‘procedural’ is intended to refer to the processes followed by courts in resolving disputes.

Second, as Wheeler has noted, when the term ‘due process’ is employed in respect of Chapter III no analogy with US due process jurisprudence is intended.³⁴ The Australian *Constitution* contains no express guarantee of due process analogous to the Fifth and Fourteenth Amendments to the *US Constitution*.³⁵ A consequence of this contrasting constitutional arrangement is that Australian due process principles have developed primarily within the confines of the separation doctrine, and its focus on the key characteristics of judicial power. Hence, under the Australian *Constitution* due process principles apply most appropriately to judicial bodies, whereas the obligation to accord due process in the US context applies to both executive and judicial bodies.³⁶

Third, under the Australian *Constitution* the search for a due process principle in the terms — ‘does the impugned law undermine due process?’ — is unrealistic. Such a search should be directed towards implications drawn from the text and structure of the *Constitution*.³⁷

A. The Content of a Due Process Principle

The requirements of natural justice are often cited as a primary source of procedural due process standards.³⁸ These requirements are predominantly procedural in nature and, although flexible, are generally satisfied by a ‘fair

31 *Nicholas* (1998) 193 CLR 173, 208 (Gaudron J).

32 I am much indebted to Parker for her development of the ‘subject matter’ and ‘process’ terminology: Christine Parker, ‘Protection of Judicial Process as an Implied Constitutional Principle’ (1994) 16 *Adelaide Law Review* 341.

33 *Leeth v Commonwealth* (1992) 174 CLR 455 (‘Leeth’); *Kruger v Commonwealth* (1997) 190 CLR 1; *Cameron v The Queen* (2002) 209 CLR 339; *Putland v The Queen* (2004) 218 CLR 174; McHugh, above n 4, 249–51.

34 Wheeler, above n 14, 211.

35 George Winterton, ‘The Separation of Powers as an Implied Bill of Rights’ in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 185, 204–5; Michael Mathieson, ‘Section 117 of the *Constitution*: the Unfinished Rehabilitation’ (1999) 27 *Federal Law Review* 393, 395–6.

36 Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (2nd ed, 2002) ch 7; *Gilbert v Homar*, 520 US 924 (1997).

37 *McGinty v Western Australia* (1996) 186 CLR 140, 231–2 (McHugh J).

hearing' and 'lack of bias'.³⁹ As such, certain procedural features of the curial process — personal service of originating processes,⁴⁰ cross-examination,⁴¹ the leading of evidence,⁴² a public hearing,⁴³ legal representation,⁴⁴ and an absence of bias⁴⁵ — may be expressions of natural justice.

As Gaudron J has commented, 'the requirement that a trial be fair is not one that impinges on the substantive law governing the matter in issue' but, rather, 'on evidentiary and procedural rules'.⁴⁶ Thus, although apparently self-evident, a procedural due process principle that gives effect to standards of natural justice should provide a minimum standard of protection to certain purely procedural features of the curial process. The allocation function analysis flowing from *Boilermakers*', with its focus on subject-matter attributes, is largely unconcerned with these procedural facets of the judicial process.

B. *Boilermakers and Due Process*

That is not to say that the allocation function of *Boilermakers*' provides no protection to due process principles. The allocation of powers among the arms of government may have the consequential benefit of ensuring that certain governmental powers are exercised in accordance with existing due process standards. It is in this respect that Keyzer refers to the exclusive power of judicial bodies to judge and punish criminal guilt as a mechanism for ensuring due process.⁴⁷ Another allocation function limitation with due process ramifications was identified in *Polyukhovich v Commonwealth*.⁴⁸ There, the Court held that a statute rendering named individuals guilty of a crime would involve the legislature invalidly exercising the subject-matter judicial power to judge criminal guilt — a 'legislative judgment' limitation.⁴⁹ The difficulty, however, with relying on the allocation function of *Boilermakers*' to safeguard due process principles is that it

38 Wheeler, above n 14, 205, 211; Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248, 256–63; Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 274.

39 *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam* (2003) 214 CLR 1, 34 (McHugh and Gummow JJ); Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (2008) 128.

40 *Pino v Prosser* [1967] VR 835.

41 *Barrier Reef Broadcasting Pty Ltd v Minister for Post and Telecommunications* (1978) 19 ALR 425.

42 *Beckner v Minister for Immigration, Local Government and Ethnic Affairs* (1991) 30 FCR 49.

43 *John Fairfax Group Pty Ltd v Local Court of NSW* (1991) 26 NSWLR 131; *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344; *John Fairfax Publications Pty Ltd v Attorney-General (NSW)* (2000) 181 ALR 694 ('*John Fairfax*').

44 *Maksimovich v Walsh* (1985) 4 NSWLR 318, 329 (Kirby P).

45 *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337, 362–3 (Gaudron J), 372–3 (Kirby J).

46 *Dietrich v The Queen* (1992) 177 CLR 292, 362–3.

47 Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100; Stephen McDonald, 'Involuntary Detention and the Separation of Judicial Power' (2007) 35 *Federal Law Review* 25.

48 (1991) 172 CLR 501 ('*Polyukhovich*').

is silent about the processes that *must* be followed in exercising a subject-matter power following its allocation to the judiciary.

An alternative basis for due process protection might operate beyond the allocation function of *Boilermakers*'. Under such a principle, the inquiry would be directed towards the procedures followed in the exercise of a power that has already been allocated to the judicial branch of government. For example, where the subject matter of a power allocated to the judicial arm is uncontroversially *judicial* (such as the 'adjudgment and punishment of criminal guilt'),⁵⁰ but the *processes* followed prior to the exercise of that power breach due process standards (such as a reversal of the onus of proof or a prohibition on cross-examination).

C. *The Lim Principle*

The most likely candidate for such a due process principle is found in a statement by Brennan, Deane and Dawson JJ in *Lim*.⁵¹ Their Honours stated that the legislature could not make a law 'which requires or authorizes the courts in which the judicial power of the Commonwealth is exclusively vested to exercise judicial power in a manner which is inconsistent with the essential character of a court or with the nature of judicial power'.⁵²

The plaintiffs in *Lim* challenged a series of provisions that empowered the Commonwealth executive to detain certain unlawful immigrants and prevented any court, including the High Court, from ordering their release.⁵³ The Court held that Parliament could not prevent a court, including the High Court, from ordering the release of an unlawfully detained immigrant.⁵⁴ In the final result, *Lim* may be considered to be an expression of the allocation function of *Boilermakers*' — that the power to determine the validity of imprisonment is exclusively judicial, and, thus, legislation that empowers the executive to exercise such a power constitutes an unconstitutional misallocation of governmental power.

The *Lim* principle appears, however, to operate beyond the allocation function of *Boilermakers*'. Its plain terms assume that the power being exercised is *judicial* — the focus is upon the way that power is exercised. Thus, Wheeler describes the *Lim* principle as an application of the separation doctrine beyond 'its traditional operation'.⁵⁵

The origins of the *Lim* principle can be traced to *Polyukhovich*, where 'Deane, Toohey and Gaudron JJ ... each acknowledged the due process principle' in

49 *Polyukhovich v Commonwealth* (1991) 172 CLR 501 ('*Polyukhovich*'), 539 (Mason CJ), 612–4 (Deane J), 648–9 (Dawson J), 686 (Toohey J), 706 (Gaudron J), 721 (McHugh J); McHugh, above n 4, 247.

50 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

51 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

52 *Lim* (1992) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ).

53 *Migration Act 1958* (Cth) ss 54L, 54N, 54R.

54 *Lim* (1992) 176 CLR 1, 35–7 (Brennan, Deane and Dawson JJ), 58 (Gaudron J).

55 Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia', above n 38, 249.

similar terms to *Lim*.⁵⁶ Mason, Murphy, Brennan and Deane JJ had alluded to a similar connection between constitutional conceptions of judicial power and due process standards in *Fencott v Muller*⁵⁷ when they stated that '[t]he unique and essential function of the judicial power is the quelling of controversies by ascertainment of the facts, by application of the law and by exercise, where appropriate, of judicial discretion'.⁵⁸ Set against this background, litigants have adopted the *Lim* principle as the most viable doctrinal expression of a due process principle.⁵⁹

The precise interface between the *Lim* principle and the allocation function of *Boilermakers*' is unclear. It is, however, plain that the *Lim* principle operates within the rubric of 'judicial power' — and, thus, gives expression to a 'judicial power due process' principle.⁶⁰ This follows from the self-referentiality of the terms of the *Lim* principle — if the power to be exercised is already considered *judicial* then it is difficult to see how the manner of its exercise could be contrary to the *nature* of judicial power unless the judicial power is itself concerned with process principles.⁶¹ To this end, Gaudron J has expounded a definition of judicial power that includes considerations of the 'judicial process'.⁶²

In this vein, the *Lim* principle has been trumpeted as capable of providing protection to purely procedural aspects of the judicial process, particularly expressions of natural justice. Spigelman CJ commented that its reference to 'manner' renders the *Lim* principle 'capable of covering a broad range of aspects of practice and procedure'.⁶³ Similarly, Zines noted that 'it is clear that' the *Lim* principle 'may provide a substantial guarantee of procedural due process', as it may provide considerable protection to principles 'that relate to fairness or natural justice'.⁶⁴

D. Due Process and Judicial Power

It should, however, be acknowledged that the plain terms of the *Lim* principle do not *necessarily* extend beyond the allocation function of *Boilermakers*' — if the exercise of judicial power occurs only at the point of judgment, then there is no room for process considerations in the *Lim* principle. As such, the key phrase

56 Ibid 250 (citing *Polyukhovich* (1991) 172 CLR 501, 607 (Deane J), 689 (Toohey J), 703 (Gaudron J)).

57 (1983) 152 CLR 570.

58 (1983) 152 CLR 570, 608.

59 See, eg, *Nicholas* (1998) 193 CLR 173; *Campbells Cash and Carry Pty Ltd v Fostif Pty Ltd* (2006) 229 CLR 386; *Thomas* (2007) 233 CLR 307.

60 Wheeler suggests that a 'judicial power' due process principle operates within the second limb of *Boilermakers*'. Thus, an impeachment of process standards may result in the invalid investiture of a non-judicial power in a Chapter III court: Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', above n 14, 209–10.

61 The 'essential characteristics of a court' limb of the principle has been largely neglected in favour of the 'judicial power' analysis.

62 *Nicholas* (1998) 193 CLR 173, 207–8.

63 *John Fairfax* (2000) 181 ALR 694, 700.

64 Zines, above n 38, 274.

‘exercise judicial power in a manner which is inconsistent’⁶⁵ could be interpreted as concerned solely with limiting the misallocation of subject-matter powers, like the legislative-judgment limitation identified in *Polyukhovich*. An extension beyond this function is evident only if it is assumed that the phrase ‘exercise ... of judicial power’ is inclusive of the processes followed by a judicial body prior to handing down judgment. This assumption, in turn, discloses the central tension in the current approach to procedural due process — the extent to which constitutional notions of ‘judicial power’ incorporate ‘process’ considerations. Hence, whilst providing a potential hook for due process principles, the *Lim* principle is sufficiently broad to be interpreted as merely reflecting the allocation function of *Boilermakers*’ and, as will be demonstrated below, the Court has been quick to limit it to such a function. Part 3 is directed towards an analysis of the *Lim* principle in application — focusing particularly on the tension between ‘subject matter’ and ‘process’ conceptions of judicial power in *Nicholas*.

3. *The Lim Principle — Due Process — in Application*

The High Court’s most comprehensive examination of the *Lim* principle took place in *Nicholas*, where the Court was presented with the argument that Chapter III limited Parliament’s ability to affect the judicial discretion to exclude unlawfully obtained evidence.⁶⁶

In *Nicholas* the appellant challenged s 15X of the *Crimes Act 1914* (Cth), that directed a court, in deciding whether to exercise its discretion to exclude unlawfully obtained evidence, to disregard ‘the fact that a law enforcement officer committed an offence’ while collecting evidence against the accused. Section 15X was designed to circumvent *Ridgeway v The Queen* — where the Court held that in circumstances where a court’s decision to exercise its discretion to exclude unlawfully obtained evidence ‘led to the prosecution being unable to prove a necessary element of the offence’, a permanent stay should be ordered over the proceedings.⁶⁷ It was common ground between the parties that s 15X only applied to ‘five individuals’ whose trials were permanently stayed.⁶⁸

The appellant submitted that s 15X was invalid because it ‘infringes or usurps ... judicial power’.⁶⁹ Three arguments were advanced in support of this submission. First, that s 15X ‘invalidly ... direct[s] a court to exercise its

65 *Lim* (1998) 176 CLR 1, 27 (Brennan, Deane and Dawson JJ) (emphasis added).

66 See Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2nd ed, 2007) 171–2; Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’, above n 14, 212–14; Enid Campbell, ‘Rules of Evidence and the Constitution’ (2000) 26 *Monash University Law Review* 312, 318–19; Linda J Kirk, ‘Chapter III and Legislative Interference with the Judicial Process: *Abebe v Commonwealth* and *Nicholas v The Queen*’ in Adrienne Stone and George Williams (eds), *The High Court at the Crossroads: Essays in Constitutional Law* (2000) 119, 137–40.

67 *Ridgeway v The Queen* (1995) 184 CLR 19 (‘*Ridgeway*’), 19–20 (applying *Bunning v Cross* (1978) 141 CLR 54).

68 *Nicholas* (1998) 193 CLR 173, 250 (Kirby J).

69 *Nicholas* (1998) 193 CLR 173, 200 (Toohey J).

discretionary power in a manner or to produce an outcome which is inconsistent with the essential character of a court or with the nature of judicial power'.⁷⁰ Second, that s 15X 'invalidly undermines the integrity of the Court's processes and public confidence in the administration of justice'.⁷¹ The first argument was expressly premised on the *Lim* principle,⁷² while the second drew on principles developed in *Kable* and *Wilson*.⁷³

A third argument concerning the ostensibly *ad hominem* character of the legislation, premised on principles drawn from *Liyanage v The Queen*,⁷⁴ was rejected by all six judges who considered it.⁷⁵

By a 5:2 majority the Court held s 15X valid. Stated most broadly, the majority found that s 15X did not displace the court's discretion — it merely removed from the trial judge a discrete element in deciding whether to exercise that discretion: the illegality of actions undertaken by law enforcement officials.⁷⁶ Thus, the court's discretion and its power to find facts remained undisturbed. McHugh and Kirby JJ dissented on the ground that s 15X forced a court to admit evidence that constituted an abuse of process, resulting in an impermissible intrusion on a court's ability to protect the integrity of its processes and, thereby, maintain public confidence in the administration of justice.⁷⁷

A. *Difficulties of Terminology*

The arguments put before the Court in *Nicholas* were 'overlapping'.⁷⁸ Two difficulties flow from this. First, the judgments did not, in all cases, draw sharp distinctions between each argument.⁷⁹ Second, it is not immediately apparent which conclusions were premised on the *Lim* principle, as opposed to a traditional *Boilermakers*' allocation function, analysis. The conflation of the terms 'usurpation' and 'infringement' is an aggravating factor in this confusion.

McHugh J did, however, address the distinction between 'usurpations' and 'infringements' of judicial power. Usurpation occurs when 'the legislature has exercised judicial power on its own behalf'.⁸⁰ Such an analysis turns on a subject-matter conception of judicial power — a misallocation of power has occurred by virtue of the legislature exercising the judicial power itself, due to the pre-judgment of a case.⁸¹

70 *Nicholas* (1998) 193 CLR 173, 185 (Brennan CJ).

71 *Nicholas* (1998) 193 CLR 173, 185 (Brennan CJ).

72 *Nicholas* (1998) 193 CLR 173, 175 (Brennan CJ).

73 *Nicholas* (1998) 193 CLR 173, 257 (Kirby J) (citing *Wilson* (1996) 189 CLR 1, 16 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) and *Kable* (1996) 189 CLR 51, 98 (Toohey J), 119–24 (McHugh J)).

74 [1967] 1 AC 259 ('*Liyanage*').

75 *Nicholas* (1998) 193 CLR 173, 191–3 (Brennan CJ), 211–12 (Gaudron J), 221–2 (McHugh J), 232–3 (Gummow J), 260–4 (Kirby J), 277–9 (Hayne J).

76 Lacey, above n 14, 80.

77 *Nicholas* (1998) 193 CLR 173, 222, 225–6 (McHugh J), 265 (Kirby J).

78 Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', above n 14, 213.

79 See, eg, *Nicholas* (1998) 193 CLR 173, 202 (Toohey J).

80 *Nicholas* (1998) 193 CLR 173, 220 (McHugh J).

81 *Polyukhovich* (1991) 172 CLR 501, 536 (Mason CJ); Zines, above n 35, 282–5.

An infringement occurs ‘when the legislature has interfered with the exercise of judicial power by the courts’.⁸² An infringement is more likely to flow from the *Lim* principle — due to its concern with infringements on the ‘exercise’ of judicial power as opposed to the misallocation of power among the branches of government. Thus, rather than the legislature exercising judicial power, it alters the rules of procedure, forcing the judiciary to exercise the judicial power in a ‘manner’ inconsistent with its nature.⁸³ The majority, with the exception of Gaudron J,⁸⁴ limited its discussion of the *Lim* principle to usurpations, as opposed to infringements, of judicial power.

B. Interpreting ‘Judicial Power’

In interpreting ‘judicial power’ the Court in *Nicholas* split between the process-centric interpretation of Gaudron J and the subject-matter interpretation adopted by Brennan CJ.

Brennan CJ began his analysis by addressing the *Lim* principle as a discrete ground of invalidity,⁸⁵ stating that, to exercise judicial power validly, a court must execute the following procedural requirements: the ‘ascertainment of facts’, the ‘application of the law’ and the ‘exercise ... of judicial discretion’.⁸⁶ Legislation that directed a court to find that an ‘ultimate’ fact existed would reduce ‘the judicial *function of fact finding* to the merest formality’ and contravene Chapter III.⁸⁷ Brennan CJ, thus, focused on the ‘fact finding’ step in the exercise of judicial power — whether s 15X impeded the court’s ability to find facts. For Brennan CJ, so long as the legislature was not exercising the judicial power to find facts, there was no affront to constitutional notions of judicial power.

Gummow J adopted a similar analysis in respect of the *Lim* principle,⁸⁸ recognising that a law which deemed ‘to exist ... any *ultimate fact, being an element of the offences* ... might well usurp ... judicial power’.⁸⁹ Hayne J mooted the possibility that a law ‘so radical and so pointed in [its] application to identified or identifiable cases’ could ‘be seen, in substance, to deal with *ultimate issues of guilt or innocence*’ contrary to Chapter III.⁹⁰ In this respect Brennan CJ, Gummow

82 *Nicholas* (1998) 193 CLR 173, 220 (McHugh J).

83 Peter Gerangelos has analysed *Nicholas* as part of a broader investigation into Chapter III limitations on Parliament’s ability to legislatively interfere in pending cases: see ‘The Separation of Powers and Legislative Interference in Pending Cases’ (2008) 30 *Sydney Law Review* 61; ‘The Decisional Independence of Chapter III Courts and Constitutional Limitations on Legislative Power: Notes from the United States’ (2005) 33 *Federal Law Review* 391; ‘The Separation of Powers and Legislative Interference with Judicial Functions in Pending Cases’ (2002) 30 *Federal Law Review* 1.

84 *Nicholas* (1998) 193 CLR 173, 208–11.

85 *Nicholas* (1998) 193 CLR 173, 185.

86 *Nicholas* (1998) 193 CLR 173, 187 (Brennan CJ).

87 *Nicholas* (1998) 193 CLR 173, 190 (Brennan CJ) (considering *Williamson v Ah On* (1926) 39 CLR 95 (*‘Williamson’*)), 108 (Isaacs J) (emphasis added). A similar analysis was adopted by Gaudron, Gummow and Hayne JJ: at 208–9 (Gaudron J), 236 (Gummow J), 278 (Hayne J).

88 *Nicholas* (1998) 193 CLR 173, 232.

89 *Nicholas* (1998) 193 CLR 173, 236 (emphasis added).

90 *Nicholas* (1998) 193 CLR 173, 278 (emphasis added).

and Hayne JJ reasoned that a core function of judicial power is the ‘finding of facts’ and a law which directs a court as to ultimate facts will breach the *Lim* principle. This analysis of the majority judgments in *Nicholas* was recently endorsed by Gummow, Hayne, Heydon and Crennan JJ in *Commissioner of Taxation v Futuris Corporation Ltd*,⁹¹ where their Honours commented that ‘the principles which were considered in *Nicholas* ... respect usurpation of the judicial power by deeming to exist an ultimate fact’.⁹²

Significantly, this analysis relies on similar principles to the *Polyukhovich* legislative-judgment limitation — due to its focus on legislative pre-judgment, or direction, of the fact-finding function. As discussed above, the legislative-judgment limitation finds its roots in a traditional *Boilermakers*’ analysis, focusing on subject-matter features of judicial power. Hence, this approach indicates a preference for continuing to develop conceptions of judicial power within the allocation function of *Boilermakers*’. Further support for this analysis is found in the discussion by Brennan CJ, Toohey, McHugh and Hayne JJ in *Nicholas* concerning the interaction between procedural laws and judicial power.

C. *Procedural Laws, Judicial Power and Due Process*

Significant to Brennan CJ’s analysis was the fact that ‘rules of evidence have traditionally been recognised as being an appropriate subject of statutory prescription’, and, thus, ‘[a] law prescribing a rule of evidence does not impair the curial function of finding facts, applying the law or exercising any available discretion in making the judgment or order which is the end and purpose of the exercise of judicial power’.⁹³ In support of this contention, Brennan CJ cited the legislative reforms of the *Evidence Act 1843* (Imp) 6 & 7 Vict, c 85 and noted that ‘it would not have occurred to the Imperial Parliament that a legislative power to prescribe rules of evidence might be regarded as a usurpation of judicial power’.⁹⁴ McHugh J went further and concluded that ‘[n]o constitutional reason exists to prevent the Parliament from altering the common law rules of evidence or the rules of practice and procedure’.⁹⁵ Toohey and Hayne JJ echoed these sentiments.⁹⁶ This reasoning assumes that, as rules of evidence and procedure have historically been created, altered and abrogated by legislation, it is unlikely that Chapter III conceptions of judicial power prevent further legislative prescription of procedural rules.⁹⁷

91 (2008) 247 ALR 605 (*Futuris*).

92 *Futuris* (2008) 247 ALR 605, [65] (Gummow, Kirby, Hayne, Heydon and Crennan JJ).

93 *Nicholas* (1998) 193 CLR 173, 189.

94 *Nicholas* (1998) 193 CLR 173, 189.

95 *Nicholas* (1998) 193 CLR 173, 225 (McHugh J).

96 *Nicholas* (1998) 193 CLR 173, 202 (Toohey J), 274–5 (Hayne J).

97 *Nicholas* (1998) 193 CLR 173, 189 (Brennan CJ), 203 (Toohey J), 225 (McHugh J), 272–3 (Hayne J).

Brennan CJ enlisted *Melbourne Harbour*⁹⁸ and *Williamson*⁹⁹ in further support of this reasoning.¹⁰⁰ *Melbourne Harbour* and *Williamson* concerned the constitutional validity of rebuttable evidentiary presumptions that had the effect of reversing the onus of proof in civil¹⁰¹ and criminal¹⁰² proceedings. In both cases the Court rejected the argument that a reversed onus of proof usurped judicial power.¹⁰³

While *Melbourne Harbour* and *Williamson* undoubtedly support the reasoning in *Nicholas*, they fail to provide a principled ground upon which to exclude process standards from a definition of judicial power. Both cases were decided before *Boilermakers*' and, thus, before a more robust approach to the separation doctrine developed.¹⁰⁴ Notwithstanding these shortcomings, there is no indication that these decisions were incorrectly decided. In an attempt to invalidate a law reversing the criminal onus of proof the Court was asked to overrule *Williamson*, but declined to do so.¹⁰⁵ Significantly, both cases were argued under the rubric of 'usurpations' — the focus being upon whether the legislature was exercising judicial power. Their endorsement in *Nicholas* further indicates a preference for limiting the analysis of 'judicial power' to its subject-matter qualities.

The statements made by Toohey, McHugh and Hayne JJ concerning the relationship between procedural laws and Chapter III indicate that they favoured Brennan CJ's subject-matter conception of judicial power and, with Gummow J's adoption of the ultimate-fact analysis, these judges form an authoritative bloc in favour of a subject-matter conception of judicial power. This approach to the *Lim* principle ought to be contrasted with that adopted by Gaudron J.

D. Judicial Power as Process-Oriented

In considering the argument that s 15X interfered with judicial power in contravention of the *Lim* principle, Gaudron J explicitly adopted a process-oriented conception of judicial power, enumerating a number of process characteristics that were required by the *Lim* principle. Her Honour stated that the legislature could not abrogate

equality before the law, impartiality and the appearance of impartiality, the right of a party to meet the case made against him or her, the independent determination

98 (1922) 31 CLR 1 ('*Melbourne Harbour*').

99 *Williamson* (1926) 39 CLR 95.

100 *Nicholas* (1998) 193 CLR 173, 189; see also 225 (McHugh J). Gummow J (at 237) and Kirby J (at 260) acknowledged these authorities, but noted that simply labelling a law 'procedural' could not 'immunize' it from constitutional challenge.

101 *Melbourne Harbour* (1922) 31 CLR 1; *Customs Act 1901* (Cth) s 48.

102 *Williamson* (1926) 39 CLR 95; *Immigration Act 1901* (Cth) ss 5(3), (3A).

103 *Melbourne Harbour* (1922) 31 CLR 1, 12 (Knox CJ, Gavan Duffy and Starke JJ), 17–18 (Isaacs J) 20 (Higgins J); *Williamson* (1926) 39 CLR 95, 108–9 (Isaacs J), 122–3 (Higgins J), 127 (Powers J) 128 (Rich and Starke JJ).

104 This point is made by McHugh, above n 4, 244.

105 *Milicevic v Campbell* (1975) 132 CLR 307, 317 (Gibbs J), 319 (Mason J); compare 311 (McTiernan ACJ). See generally, Sir Anthony Mason, 'Comment' (2008) 30 *Sydney Law Review* 95, 96.

of the matter in controversy by application of the law to facts determined in accordance with rules and procedures which truly permit the facts to be ascertained and, in the case of criminal proceedings, the determination of guilt or innocence by means of a fair trial according to law.¹⁰⁶

This approach expands the definition of judicial power far beyond a subject-matter conception and encompasses the ‘public confidence’ limitation adopted by McHugh and Kirby JJ.¹⁰⁷ Hence, Gaudron J, in line with her Honour’s earlier statements,¹⁰⁸ advocates the development of a process-centric conception of judicial power.¹⁰⁹ Gaudron J’s process analysis of ‘judicial power’ is, however, not without its difficulty.

Gaudron J dismissed the appellant’s submission that s 15X usurped judicial power by drawing a distinction between ‘specific’ and ‘ancillary’ powers — the power to admit evidence being an ‘ancillary’ power — and stating that such ‘ancillary’ powers were ‘not properly identified as judicial power for the purposes of Ch III of the *Constitution*’.¹¹⁰ Thus, there was no offence caused to the separation doctrine by the Parliament ‘by itself deciding’ that evidence otherwise excluded by judicial discretion would be admissible in proceedings.¹¹¹

It will be recalled that Gaudron J included the resolution of controversies ‘in accordance with rules and procedures which truly permit the facts to be ascertained’¹¹² as one of the process features of judicial power. The ‘rules and procedures’ to which Gaudron J refers, surely, include those rules that authorise or control the power of a court to admit evidence — the same powers that were labelled ‘ancillary’ and were ‘not properly identified as judicial power for the purposes of Ch III of the *Constitution*’.¹¹³

As such, Gaudron J draws a distinction between ancillary and specific powers in the context of a usurpation argument, while including the power to find facts in accordance with procedural rules in the context of an infringement argument. The problem with this analysis is that both arguments, usurpation and infringement, turn on the meaning of the same words in s 71 of the *Constitution* — ‘judicial power’. Thus, Gaudron J’s reasons appear to be establishing a definition of judicial power that is process-centric in the context of the *Lim* principle, but is not in the context of a *Boilermakers*’ analysis.

106 *Nicholas* (1998) 193 CLR 173, 208–9.

107 *Nicholas* (1998) 193 CLR 173, 209 (Gaudron J).

108 Wheeler, ‘The Doctrine of the Separation of Powers and Constitutionally Entrenched Due Process in Australia’, above n 38, 250 and cases cited at fn 18.

109 Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’, above n 14, 213.

110 *Nicholas* (1998) 193 CLR 173, 208.

111 *Nicholas* (1998) 193 CLR 173, 207 (Gaudron J).

112 *Nicholas* (1998) 193 CLR 173, 208 (emphasis added).

113 Lacey makes a similar point about Gaudron J’s treatment of ‘ancillary’ powers: Lacey, above n 14, 78.

E. Public Confidence in the Administration of Justice

McHugh and Kirby JJ shared much common ground in dissent. Both invalidated s 15X on the ground that it forced a court ‘exercising federal jurisdiction to disregard a fact that is critical in exercising a discretion that is necessary to protect the integrity of Ch III courts and to maintain public confidence in the administration of criminal justice’.¹¹⁴ The fact that *Ridgeway* was directed towards preventing an abuse of process was significant to, if not determinative of, this analysis.¹¹⁵ Because the criminality of law enforcement officers’ actions was preserved under the impugned statutory system, ‘the spectacle of the courts being involved in apparently condoning by the judicial process seriously illegal conduct’ remained.¹¹⁶

Notably, this analysis was not reliant on the *Lim* principle. The seminal inquiry for McHugh and Kirby JJ was *not* whether s 15X directed a court to act contrary to *Lim* principle notions of judicial power, but, rather, whether s 15X removed the ability of a court to protect its processes from abuse. The overriding concern of the dissenters was not the process features of judicial power but, the maintenance of public confidence in the courts.¹¹⁷

As such, McHugh and Kirby JJ should not be interpreted as supporting a ‘process’ conception of judicial power — especially given McHugh J’s hostility to the suggestion that Chapter III imposes limitations on Parliament’s ability to alter procedural rules. Rather, McHugh and Kirby JJ’s reasoning expresses a freestanding implication concerned with protecting public confidence in the administration of justice, originating from *Kable*.¹¹⁸

Voicing strong opposition to this reasoning, Brennan CJ, Toohey, Gummow and Hayne JJ argued that ‘the voice of the Parliament’, not the Court, must declare ‘where the balance of the public interest lies’.¹¹⁹ Subsequent developments of *Kable* support this approach. In *Fardon*, Gummow J noted that ‘[p]erception as to the undermining of public confidence is an indicator, but not the touchstone, of invalidity; the touchstone concerns institutional integrity’.¹²⁰ Thus, despite limited lower court endorsement of McHugh and Kirby JJ,¹²¹ it is unlikely that the ‘public confidence’ principle their Honours expressed in *Nicholas* will continue to occupy a prominent position in Chapter III jurisprudence.

While commentators laud *Nicholas* as providing ‘wide support’ for the emergence of a due process principle,¹²² there remains much in the reasons of all

114 *Nicholas* (1998) 193 CLR 173, 222 (McHugh J), 265 (Kirby J).

115 *Nicholas* (1998) 193 CLR 173, 215–18, 224 (McHugh J), 258–9, 264–5 (Kirby J).

116 *Nicholas* (1998) 193 CLR 173, 264 (Kirby J), 223–4 (McHugh J).

117 *Nicholas* (1998) 193 CLR 173, 226 (McHugh J), 264–5 (Kirby J).

118 *Nicholas* (1998) 193 CLR 173, 220 (McHugh J), 256–7 (Kirby J).

119 *Nicholas* (1998) 193 CLR 173, 197–8 (Brennan CJ), 203 (Toohey J), 237–9 (Gummow J), 274 (Hayne J).

120 *Fardon* (2004) 223 CLR 575, 618; see also 593 (Gleeson CJ) see below text accompanying n 190.

121 *K-Generation Pty Ltd v Liquor Licensing Court* (2007) 99 SASR 58; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2007) 33 WAR 245 (‘*Gypsy Jokers*’); *Re Criminal Proceeds Confiscation Act 2002* [2004] 1 Qd R 40 (‘*Re Criminal Proceeds*’).

122 Lacey, above n 14, 77; Kirk, above n 66, 140.

judges to provoke suspicion concerning the extent to which *Nicholas* supports a due process conception of the *Lim* principle. The majority's treatment of the *Lim* principle in the context of usurpations of judicial power rendered there no material difference between that principle and a traditional *Boilermakers*' analysis.¹²³ Most importantly, *Nicholas* significantly undermines the *Lim* principle's role in protecting due process standards from infringement by procedural laws.¹²⁴

F. The *Lim* Principle Post-*Nicholas*

Notwithstanding the difficulty of distilling a *ratio* from *Nicholas*, the aspects of the judgment that present the weightiest obstacles to the development of a process conception of judicial power have enjoyed constant restatement and support by lower courts presented with constitutional due process challenges. Most often relied upon is the proposition that the alteration of procedural rules will not constitute an invalid direction to exercise judicial power in a manner inconsistent with the essential characteristics of a court, or with the nature of judicial power.¹²⁵

That proposition was relied upon to uphold: a provision that directed a court in a terrorism prosecution to give the 'greatest' regard to issues of national security in deciding whether to issue a certificate of non-disclosure to defence counsel;¹²⁶ a provision which prevented certain documents held by a Commonwealth statutory authority from being subject to discovery, subpoena and, in certain circumstances, consideration by a court;¹²⁷ and a provision that imposed a time limit on appeals in migration matters.¹²⁸ It was also relied upon to determine that a State law that had the effect of forcing a defendant to plead directly against every averment in prosecution pleadings could be picked up, pursuant to s 79 of the *Judiciary Act 1903* (Cth), in a federal revenue prosecution,¹²⁹ and to uphold a State provision that had the effect of reversing the onus of proof in a criminal prosecution.¹³⁰

G. Contrary Positions

Certain judicial statements in *Bass*¹³¹ and *Thomas*¹³² hinted at a revival of a process conception of judicial power. However, a reluctance to embrace a process conception remains identifiable.

123 Compare Kirk, above n 66, 140.

124 Given this conclusion, arguments that enlist *Nicholas* in support of a process conception of judicial power enjoy little support in the judgment: compare Lacey, above n 14, 79–85.

125 *Nicholas* (1998) 193 CLR 173, 189 (Brennan CJ).

126 *Lodhi* (2007) 179 A Crim R 470 [58]–[73] (Spigelman CJ), [121] (Barr J), [215] (Price J); *National Security Information (Criminal and Civil Proceedings) Act 2004* (Cth) s 31(8).

127 *Elbe* (2007) 159 FCR 518, 525–9 (Dowsett J); *Transport Safety Investigation Act 2003* (Cth) s 60.

128 *Oguzhan* (2000) 99 FCR 285, 292 (Carr J); *Migration Act 1958* (Cth) s 478(2).

129 *Price* [2006] 2 Qd R 316, 332 (Keane JA); *Uniform Civil Procedure Rules 1999* (Qld) r 166(4), (5).

130 *Granger* (2004) 88 SASR 453, 468–9 (Doyle CJ); *Controlled Substances Act 1984* (SA) s 32(3).

131 *Bass* (1999) 198 CLR 334.

132 *Thomas* (2007) 233 CLR 307.

Bass concerned an appeal against the decision of a trial judge in the Federal Court to refer questions of law to the Full Court, prior to any facts being found. The High Court overturned the answers given below to those questions on the basis that ‘the efficient administration’ of justice was incompatible with a court answering ‘hypothetical questions which frequently require considerable time and cause considerable expense ... which may be ... unnecessarily incurred’.¹³³ In arriving at this conclusion the joint judgment alluded to a process conception of judicial power when it noted, ‘[j]udicial power involves the application of the relevant law to facts as found in proceedings conducted in accordance with the judicial process’.¹³⁴

Two points should be made about this reasoning. First, *Bass* was not concerned with a constitutional challenge to legislation,¹³⁵ nor did it expressly acknowledge the *Lim* principle. Second, the objection to the Full Court’s practice was that a judicial body was being asked to make a determination in the absence of independent fact-finding — essentially, that the judicial power to make determinations of right can only be executed in the presence of a finding of facts.¹³⁶ This application does not extend an understanding of judicial power beyond the ‘ultimate fact’ analysis adopted by Brennan CJ, Gummow and Hayne JJ in *Nicholas*. Hence, while *Bass* may provide insight into a general definition of judicial power, it only possesses marginal relevance to a constitutional procedural due process limitation.

Several members of the Court in *Thomas* appeared to endorse a process conception of judicial power, this time in a constitutional context. In upholding the validity of the impugned legislation,¹³⁷ Gleeson CJ noted that application of ‘the rules of evidence’ indicated against inconsistency with the *Lim* principle.¹³⁸ Similarly, Callinan J included ‘evidence, the right to legal representation, cross-examination, a generally open hearing ... [and] evaluation of the evidence’ within ‘the usual *indicia* of the exercise of judicial power’.¹³⁹

Such statements should, however, be balanced against Gummow and Crennan JJ’s analysis in *Thomas*. After acknowledging the *Lim* principle,¹⁴⁰ their Honours proceeded to consider whether the Act’s *subject-matter* characteristics (imprisonment on a *quia timet* basis) violated Chapter III.¹⁴¹ As such, their

133 *Bass* (1999) 198 CLR 334, 355–7 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

134 *Bass* (1999) 198 CLR 334, 359 (citing *Nicholas* (1998) 193 CLR 173, 208–9 (Gaudron J)); Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’, above n 14, 213.

135 Only Kirby J expressly considered the constitutional point and he rejected the submission that Chapter III would not permit the referral of questions of law without a final determination of facts: *Bass* (1999) 198 CLR 334, 370.

136 *Bass* (1999) 198 CLR 334, 355 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

137 *Criminal Code* (Cth) Div 104.

138 *Thomas* (2007) 233 CLR 307, 335; see also 307 (Gleeson CJ).

139 *Thomas* (2007) 237 CLR 307, 508; see also *Alinta* (2008) 233 CLR 542, 550–1 (Gleeson CJ).

140 *Thomas* (2007) 237 CLR 307, 355.

141 *Thomas* (2007) 237 CLR 307, 355–8; see also 508–9 (Callinan J), 526 (Heydon J).

Honours' analysis of the *Lim* principle paid only nominal regard to the judicial process. Their Honours also noted that the 'decisions of this Court have not gone so far' as to draw a general 'due process requirement' from the 'remarks of Gaudron J in *Nicholas*'.¹⁴² Accordingly, these cases do not significantly advance the case for a process conception of 'judicial power'.

H. Process Standards and the *Lim* Principle

The injection of process standards into constitutional conceptions of judicial power, championed by Gaudron J, has failed to gain significant doctrinal traction and the dominant conception of 'judicial power' continues to focus on subject-matter characteristics. The Court has not, however, engaged in a detailed analysis of the appropriateness of excluding process standards from 'judicial power'. Rather, the exclusion appears largely arbitrary — *Melbourne Harbour, Williamson* and *Nicholas* simply assume, without providing cogent reasons, that constitutional conceptions of judicial power do not incorporate process standards. Given these shortcomings the question remains, whether judicial power should be limited to a subject-matter concept. In an effort to provide an answer to this question, Part 4 is a critical appraisal of the assumptions upon which the current jurisprudence is premised. The central inquiry is whether judicial power is an appropriate conduit for the protection of due process principles.

4. Judicial Power and Its Discontents

I propose three objections to relying on 'judicial power' to safeguard due process principles. The first and second objections focus on technical issues associated with defining judicial power. The third objection is broader — it questions the appropriateness of the *Boilermakers*' framework as an anchor for a due process principle. All three objections are motivated by a concern that utilising 'judicial power' as the primary constitutional basis for due process principles will only further encumber an already overburdened conceptual tool to the detriment of due process standards. An alternative model that seeks to accommodate these objections is proposed in Part 5.

A. Is Process a Power?

As noted above,¹⁴³ a procedural due process principle should be able to accommodate procedural characteristics of the judicial process, particularly those expressing natural justice requirements. The obvious difficulty with framing such procedural characteristics within a definition of judicial power is that they must take as their conceptual referent the concept of a *power* exercisable by a judicial body.

Certain procedural processes are adequately described by reference to a power — an alteration of the rules of evidence may be framed as an obstruction of the judicial power to make rulings on the admissibility of evidence.¹⁴⁴ Other features of the curial process cannot, however, be so neatly framed as a power. For instance, a

142 *Thomas* (2007) 237 CLR 307, 355 (citation omitted).

143 See above Part 2(A).

144 See *Nicholas* (1998) 193 CLR 173, 191 (Brennan CJ).

law preventing a litigant from cross-examining an opposing witness,¹⁴⁵ or a law that mandates proceedings *in camera*,¹⁴⁶ cannot be described as an impingement on a *power* of the court or judicial officer. To be sure, such a law may effect a fundamental alteration of the judicial process — but it cannot take as its conceptual referent the concept of a judicial power. Further difficulties are encountered when one compares such procedures against the established *indicia* of Commonwealth judicial power: it is difficult to characterise cross-examination as a ‘power’ to make final, conclusive, enforceable decisions about a party’s past rights and liabilities.

This point is further exemplified if the characteristics of natural justice are adopted as an indicator of due process standards. A bedrock principle of natural justice is that a party to proceedings must be given ‘a reasonable opportunity of appearing and presenting his case’.¹⁴⁷ In a curial context a person must be ‘personally’ served with notice of proceedings against them.¹⁴⁸ Thus, a failure to serve appropriately may constitute a failure to fulfil natural justice and a resultant failure to enliven a court’s jurisdiction.¹⁴⁹ A hypothetical law that permitted litigation to proceed to summary judgment in the absence of an obligation to serve may, thus, impeach principles of natural justice. Service is, however, not a process that can be feasibly connected to the notion of judicial power. It is an obligation incumbent on a party to litigation,¹⁵⁰ not upon the court.

In an administrative law context such procedural deficiencies are conceptualised as jurisdictional errors — errors that deprive a court of its jurisdiction.¹⁵¹ Although an uncritical borrowing of concepts should be avoided, it is suggested that the same conceptualisation should be adopted in a constitutional context.

In *Harris v Caladine*,¹⁵² Toohey J recognised that jurisdiction and judicial power, as employed constitutionally, are not equivalent concepts. As his Honour observed, ‘[t]he *Constitution* itself distinguishes between “jurisdiction” and “judicial power”’, they are ‘two distinct notions’ that invoke ‘different constitutional provisions and ... decisional law’.¹⁵³ The distinction between the two is that ‘[j]urisdiction is the authority which a court has to decide the range of matters ... before it’ and judicial power is the power executed ‘in the exercise of that jurisdiction’.¹⁵⁴ It is also well established that s 71 ‘confers no

145 See, eg, *Criminal Procedure Act 1986* (NSW) s 294A.

146 See, eg, *Criminal Procedure Act 1986* (NSW) s 291.

147 *Cameron v Cole* (1943) 68 CLR 571, 589 (Rich J).

148 *Pino v Prosser* [1967] VR 835, 839 (McInerney J).

149 *Owners of Strata Plan No 23007 v Cross* (2006) 153 FCR 398, 423 (Edmonds J).

150 See, eg, *Federal Court Rules* (Cth) O 7.

151 *Craig v South Australia* (1995) 186 CLR 416; *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476.

152 (1991) 172 CLR 84.

153 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J) (quoting P H Lane, *The Australian Federal System* (2nd ed, 1979) 446).

154 *Harris v Caladine* (1991) 172 CLR 84, 136 (Toohey J). Toohey J’s interpretation of the distinction between ‘power’ and ‘jurisdiction’ was cited with approval in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 590 (Gleeson CJ, Gaudron and Gummow JJ).

jurisdiction'.¹⁵⁵ The essence of this reasoning is that when s 71 refers to 'judicial power' it is referring to the powers exercisable by a court to adjudicate finally rights and obligations, once it has jurisdiction. Hence, deficiencies in the judicial process that would, in an administrative law context, deprive a court of jurisdiction have little to do with judicial power exercisable once that jurisdiction is properly activated. While it may be overstating the case to say that the distinction between jurisdiction and power necessarily entails the exclusion of a process conception of judicial power, it is clear that it represents an obstacle to the adoption of such an approach. Another serious obstacle to the integration of due process standards within a definition of judicial power is the historicist approach adopted by the Court in defining the central characteristics of 'judicial power'.

B. History and the Judicial Process

The *Constitution* 'does not define' the words 'judicial power', and the historical record of its drafting provides nominal assistance in arriving at a definition of the central characteristics of judicial power.¹⁵⁶ Judicial power is a creature of case law that has evolved through analogical common law reasoning, based upon a 'historical examination ... of what courts have done'.¹⁵⁷

The historical development of powers exercisable by courts has proved a weighty factor in the development of a definition of judicial power. The reliance on historical reasoning in *Thomas* evidences this position. The plaintiff challenged a division of the *Criminal Code* (Cth) that authorised federal courts to impose interim control orders: 'obligations, prohibitions and restrictions' over a person that are 'reasonably necessary, and reasonably appropriate and adapted, for the purpose of protecting the public from a terrorist act'.¹⁵⁸ It was argued that, as this standard was directed to the *future* conduct of a person, it conflicted with an *indicium* of judicial power — the determination of *past* rights and liabilities.¹⁵⁹

Significant to the rejection of this argument was that courts had historically exercised analogous powers, such as 'binding over orders'¹⁶⁰ and the 'writ of *supplicavit*'.¹⁶¹ Although noting that historical analogies were not determinative, Gummow and Crennan JJ held that 'matters of legal history ... do support a notion of protection of public peace by preventative measures imposed by court order'.¹⁶² Hence, the production of a pre-1901 analogy will be strong evidence that a particular function or power falls within a constitutional notion of judicial

155 *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd (No 1)* (1914) 18 CLR 54, 75 (Isaacs J).

156 John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 719–23; Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', above n 14, 210.

157 Zines, above n 38, 221.

158 s 104.4.

159 *Thomas* (2007) 233 CLR 307, 327–8 (Gleeson CJ).

160 *Thomas* (2007) 233 CLR 307, 329 (Gleeson CJ), 356 (Gummow and Crennan JJ).

161 *Thomas* (2007) 233 CLR 307, 356–7 (Gummow and Crennan JJ).

162 *Thomas* (2007) 233 CLR 307, 357 (Gummow and Crennan JJ), 507 (Callinan J), 526 (Heydon J); see also 329 (Gleeson CJ).

power.¹⁶³ As such, a definition of judicial power must accommodate the functions and power historically exercisable by courts.

The significance of historical factors to the task of defining judicial power presents a significant obstacle to a due process principle premised on ‘judicial power’. In this context, one historical truth cannot be avoided — procedural rules have been the subject of frequent and significant alteration. As Gummow J commented in *Nicholas*,

[m]any aspects of criminal procedure which ... would be considered as based in “the common law” are the result of extensive [statutory] changes made in ... the last century. ... [C]ounsel was not allowed to prisoners on charges of felony until as late as [1836] ... The accused only became a competent witness as a result of a series of statutes commencing in 1872 and culminating in [1898] ...¹⁶⁴

As a matter of history the rules of procedure applied in courts have been closely regulated by Parliament. To take one example, courts of common law and equity followed vastly different procedures until the advent of fundamental statutory procedural reform in 1875 in England and Wales and in the 1970s in NSW.¹⁶⁵ Thus, when the judicial mind turns to look at what ‘courts have done’ in terms of the procedures they have applied, it will be presented with a dynamic landscape of constant change. Indeed, the concern of the majority in *Nicholas* about the legislative alteration of procedural rules is evidence of the limiting effect of the analysis. Hence, a workable test of validity must accommodate the fact that procedural rules have been, and continue to be, the subject of extensive legislative reform. Wheeler alludes to this difficulty when she notes that as the term “‘judicial” must largely be defined by reference to historical and social practice ... it seems unwise to place further emphasis on the abstract meaning of judicial power’.¹⁶⁶

In this context, the problem is not that a historicist methodology is adopted — rather, that such a methodology appears to, *prima facie*, exclude process principles from the definition of judicial power. This problem is aggravated by the formalist interpretative technique adopted by the Court in defining ‘judicial power’ within the *Boilermakers’* framework.

C. Formalism and Boilermakers

The task required of a court in determining if a power is a ‘judicial power’ in the application of the *Boilermakers’* principle is, in large part, characterised by its formalism.¹⁶⁷ Barwick CJ commented that the *Boilermakers’* doctrine ‘leads to

163 Whether this methodology is ‘originalist’ is debatable, but beyond the scope of this article. On the relationship between historicism and originalism, see Bradley Selway, ‘The Use of History and Other Facts in the Reasoning of the High Court of Australia’ (2001) 20 *University of Tasmania Law Review* 129, 144–5; Jeffrey Goldsworthy, ‘Originalism in Constitutional Interpretation’ (1997) 25 *Federal Law Review* 1, 8–19.

164 *Nicholas* (1998) 193 CLR 173, 232 (citations omitted).

165 *Supreme Court of Judicature Act 1873* (36 & 37 Vict, c 66); *Supreme Court Act 1970* (NSW) ss 57–64; *Law Reform (Law and Equity) Act 1972* (NSW).

166 Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’, above n 14, 210.

167 Peter Gerangelos, ‘Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate’ (2005) 8 *Constitutional Law and Policy Review* 1, 3.

excessive subtlety and technicality in the operation of the *Constitution* without ... any compensating benefit'.¹⁶⁸ Zines further argues that, under the prevailing interpretative method, '[t]here is ... the danger of the *Boilermakers*' approach collapsing into formalism unless the High Court relies on the policy reasons for the *Boilermakers*' doctrine rather than the textual arguments upon which so much emphasis was placed'.¹⁶⁹

The rationale cited in *Boilermakers*' for the entrenchment of the separation doctrine was that the judicial institution is required to resolve federal division of powers disputes, which, in turn, required that courts be independent and impartial in the discharge of their functions.¹⁷⁰ An appreciation of these values is conspicuously absent in the trenchantly abstract inquiry as to whether a particular power endowed on a court should be considered judicial. Zines recognises this concern when he comments that '[t]he distinctions and differences relied on by the Court in many of the cases relating to judicial power ... have little to do with the great principles said to be behind the doctrine of separation of powers'.¹⁷¹

These concerns apply with equal force in the context of a due process principle premised on judicial power. Wheeler recognises as much when she records her preference against continuing to view due process considerations through the lens of judicial power.¹⁷² It, thus, appears unwise to attempt to enshrine due process standards within an interpretative framework that privileges 'strict and complete legalism',¹⁷³ at the expense of a consideration of the values which lie at the heart of the separation doctrine.

D. Judicial Power and Due Process: An Inopportune Analytical Framework

Due process principles are, at best, unstated assumptions in the *Boilermakers*' analysis — as the allocation of certain subject-matter powers to the judiciary may be premised on the assumption that the judicial process will complement the policy of entrusting the resolution of certain disputes to an independent and impartial tribunal. At worst, they are an obfuscation of the analysis.

As such, an efficacious due process principle, cognisant of the diversity of process standards, ought to operate independently of the allocation of powers function of *Boilermakers*'. Part 5 argues for an alternative grounding for the due process principle along these lines, focusing on the constitutional definition of 'court'.

168 *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90.

169 Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 214. This sentiment is echoed in Zines, *The High Court and the Constitution* (5th ed, 2008) 298–9. Compare Kristen Walker, 'Persona Designata, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 167.

170 *Boilermakers*' (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

171 Zines, above n 38, 261.

172 Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court', above n 14, 210.

173 Sir Owen Dixon, 'Swearing in of Sir Owen Dixon as Chief Justice' (1952) 85 CLR xi, xiv.

5. *Institutional Characteristics of Courts*

The *Lim* principle appears to encompass two possible grounds for invalidity, one concerning inconsistency with judicial power, the other concerning the ‘essential character of a court’. The final part of this article is directed towards investigating this arm of the principle, assessing its appropriateness as a basis for a due process principle and establishing a principled framework for its application.

The origins of this approach can be found in the jurisprudence of Deane and Toohey JJ in *Polyukhovich* and *Leeth*. In *Polyukhovich*, Deane J expressed a due process principle in terms of the essential characteristics of a court. His Honour noted that ‘the provisions of Ch III ... compel the conclusion that ... the judicial power ... be vested only in courts designated by Ch III ... [with] ... courts acting as courts with all that that notion essentially requires’.¹⁷⁴ Deane and Toohey JJ adopted the same analysis in *Leeth* to support an implied right to the equal application of federal laws.¹⁷⁵ Their Honours noted that, due to

Ch III’s exclusive vesting of ... judicial power ... in the “courts” which it designates, there is implicit a requirement that those “courts” exhibit the essential attributes of a court and observe in the exercise of that judicial power the essential requirements of the curial process ...¹⁷⁶

Thus, for Deane and Toohey JJ, the legislature cannot simply label an adjudicative body a ‘court’ without observing certain fundamental characteristics of the judicial process.¹⁷⁷ These statements suggest a degree of due process protection inherent in the constitutional conception of a ‘court’.

Intuitively, this analysis holds much appeal. *Australian Communist Party v Commonwealth* stipulates that basic principles of constitutionalism demand that the ‘stream cannot rise higher than its source’¹⁷⁸ — the legislature cannot conclusively define the terms of the *Constitution*. Thus, when Chapter III fixes ‘courts’ as the exclusive repositories of federal judicial power, it is referring to a governmental institution with a fixed series of characteristics which the legislature does not enjoy an untrammelled power to affect or undermine.¹⁷⁹

Deane and Toohey JJ’s statements were made in dissent and in the absence of a guiding principle to determine what characteristics define ‘courts’. As such, these statements may constitute a catalyst for the *development* of a due process principle but cannot alone *establish* such a principle. However, an analogous

174 *Polyukhovich* (1991) 172 CLR 501, 607.

175 *Leeth* (1992) 174 CLR 455.

176 *Leeth* (1992) 174 CLR 455, 487; see generally McHugh, above n 4, 249–51.

177 Wheeler, ‘The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia’, above n 38, 251–2.

178 (1950) 83 CLR 1, 258 (Fullagar J).

179 This reasoning aligns with the modern interpretation of ss 7 and 24 of the *Constitution* as establishing minimum standards of ‘representative government’ in regards to the institution of Parliament: *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v Power* (2004) 220 CLR 1.

principle, concerning the institutional characteristics of a court, coalesced in a suite of cases considering implied constitutional limitations on State and Territory legislative power.¹⁸⁰

A. Limitations on State Legislative Power

Kable established the principle that the *Constitution* imposes certain limitations on State legislative power with respect to the functions and powers that can be invested in State courts.¹⁸¹ The impugned Act empowered a State Supreme Court to order that a named individual remain imprisoned if it was reasonably likely that he would commit a ‘serious act of violence’ if released.¹⁸² In finding the Act invalid, Gaudron, McHugh and Gummow JJ held that ‘the provisions of Ch III ... postulate an integrated judicial system’¹⁸³ and, thus, prevent State legislatures from endowing a function on a State court that is incompatible with its status as a repository of federal judicial power,¹⁸⁴ that undermines its institutional integrity¹⁸⁵ or undermines public confidence in the judicial system.¹⁸⁶ The ‘bold’ reasoning of the majority in *Kable* has been criticised as insufficiently anchored in the text of the *Constitution*.¹⁸⁷ These criticisms were, in large part, addressed by a re-examination of the principle in *Fardon*, *Bradley* and *Forge*.

The *Kable* principle was refined in *Fardon*, where the Court considered the validity of Queensland legislation that provided for preventative detention of ‘dangerous sexual offenders’.¹⁸⁸ The reformulation of *Kable* fixed upon the institutional integrity of a ‘court’, as opposed to the maintenance of public confidence in the judicial system,¹⁸⁹ rendering public confidence a subsidiary indication of invalidity — with ‘the touchstone’ being the institutional integrity of a State court.¹⁹⁰ Further movement towards an institutional integrity principle is evident in *Bradley*, where the validity of a provision permitting the reduction of a Territory Chief Magistrate’s remuneration was considered and upheld.¹⁹¹

The rationalisation of *Kable* undertaken in *Fardon* and *Bradley* was consummated in *Forge*.

180 *Kable* (1996) 189 CLR 51; *Bradley* (2004) 218 CLR 146; *Fardon* (2004) 223 CLR 575; *Forge* (2006) 228 CLR 45.

181 See generally Peter Johnston and Rohan Hardcastle, ‘State Courts: The Limits of *Kable*’ (1998) 20 *Sydney Law Review* 216.

182 *Community Protection Act 1994* (NSW) s 5(1).

183 *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 111 (McHugh J), 140, 143 (Gummow J).

184 *Kable* (1996) 189 CLR 51, 103 (Gaudron J), 116 (McHugh J), 133–4, 135 (Gummow J); see also 94 (Toohey J).

185 *Kable* (1996) 189 CLR 51, 107 (Gaudron J), 121 (McHugh J), 133 (Gummow J).

186 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 107–8 (Gaudron J), 116, 118 (McHugh J).

187 Compare Fiona Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’ (2005) 20(2) *Australasian Parliamentary Review* 15, 20.

188 *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld) ss 5, 8, 13.

189 Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’, above n 187, 22.

190 *Fardon* (2004) 223 CLR 575, 593 (Gleeson CJ), 598 (McHugh J), 618 (Gummow J), 627 (Kirby J), 648 (Hayne J), 653 (Callinan and Heydon JJ).

191 *Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Magistrates Act* (NT) ss 4(3), 6, 7.

B. *Institutional Characteristics of ‘Courts’*

In *Forge* the Court upheld, 6:1, the validity of legislation providing for the appointment of ‘acting judges’¹⁹² to the NSW Supreme Court.¹⁹³ In responding to the submission that the impugned Act breached *Kable*, Gummow, Hayne and Crennan JJ held that ‘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’.¹⁹⁴ The constitutional basis for this principle was that the word ‘court’ in the various provisions of Chapter III (s 71, s 73(ii), s 77(ii), s 79) imported certain ‘minimum requirements’, ‘defining characteristics’ or ‘basic qualities’.¹⁹⁵ Recognising the interpretative dilemmas associated with defining judicial power, the joint judgment commented that ‘[i]t is neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court’.¹⁹⁶ However, five members of the Court considered that independence and impartiality were essential characteristics of a ‘court’.¹⁹⁷

C. *Federal Courts and Nomenclature*

Two salient observations should be made about this reasoning. First, although *Forge* was strictly concerned with the status of State courts, by grounding the *Kable* principle in the word ‘court’ the reasoning in *Forge* indicates that *Kable* can no longer be considered solely applicable to the State judiciary. The limitation identified in *Forge* turns on the use of one word in Chapter III: ‘court’. As Dziedzic

192 *Supreme Court Act 1970* (NSW) s 37.

193 See generally Anna Dziedzic, ‘*Forge v Australian Securities and Investments Commission: The Kable Principle and the Constitutional Validity of Acting Judges*’ (2007) 35 *Federal Law Review* 129.

194 *Forge* (2006) 228 CLR 45, 76. In the final result, their Honours held that it was possible to envisage a situation where the appointment of acting judges might breach the *Kable* principle, as they had interpreted it, but that the provision under examination in *Forge* did not give rise to such a situation: at 86–88. Ultimately, the joint judgment’s treatment of *Kable* was not dispositive of the matter because Gummow, Hayne and Crennan JJ interpreted s 37 to only give the NSW executive the power to appoint a person to ‘act as a judge’ (at 78 (emphasis in original)) if the Supreme Court was sufficiently composed of full-time judges: at 79. Gleeson CJ, with whom Callinan J agreed (at 136), acknowledged the potential applicability of *Kable* to appointments of acting judges, but noted that while it might be ‘possible to imagine extreme cases’ to which it would apply, no such extremity was presented in the circumstances before the Court: at 69. Heydon J did not re-examine the constitutional arguments presented by the appellants, preferring to decide the matter, after a detailed historical examination, on the basis that ‘the history of acting judges in the Colonies before federation points to the conclusion that Ch III contemplates the validity of State legislation permitting the appointment of acting judges’: at 149–150. Kirby J dissented on the basis that the increasing number of appointments of acting judges undermined the institutional impartiality of the Supreme Court, and, thus, in its application to the present case, s 37 fell foul of *Kable*: at 97–111, 134, 135.

195 *Forge* (2006) 228 CLR 45, 68 (Gleeson CJ), 76 (Gummow, Hayne and Crennan JJ), 121 (Kirby J).

196 *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

197 *Forge* (2006) 228 CLR 45, 67 (Gleeson CJ), 76 (Gummow, Hayne and Crennan JJ), 118 (Kirby J), 136 (Callinan J).

notes, '[f]ollowing *Forge* ... the relevant question is likely to be: is a function conferred on a Chapter III court ... consistent with the character of a 'court', constitutionally defined?'.¹⁹⁸ This system of reasoning draws no distinction between State courts, mentioned in ss 71, 73 and 77(iii), courts created *by* Chapter III, mentioned in ss 71–77 (High Court), or court created *under* Chapter III, mentioned in ss 71, 72, 73 and 77 (Federal Court, Federal Magistrates Court and Family Court).¹⁹⁹ The origins of this reasoning can be found in *Kable*, where Gummow J referred to limitations on the power to alter the characteristics of the curial 'possessors of invested federal jurisdiction'.²⁰⁰

Second, although argued in terms of the *Kable* principle, *Forge* does not rely on *Kable* chapter and verse — Gleeson CJ, Gummow, Hayne and Crennan JJ all presented their Chapter III reasoning in a manner that was not dependent on the open-textured reasoning employed in *Kable*. As such, *Forge* relegates *Kable* to simply 'one operation' of the general limitation,²⁰¹ as opposed to a governing principle. It is thus inappropriate, post-*Forge*, to continue to refer to the *Kable* principle by that title. Given that the primary inquiry is now focused on the characteristics of a court as an 'institution', a more appropriate appellation, which I adopt, is the 'institutional character principle'.

The next step in establishing a due process principle is to determine whether those institutional characteristics encompass process principles. A broad reading of certain statements in *Forge*, such as 'the institutional integrity of a court is distorted ... because the body no longer exhibits in some relevant respect those defining characteristics which mark a court apart from other decision-making bodies',²⁰² suggests that the institutional character principle *is* broad enough to encompass process considerations, as certain process standards, particularly those expressing the adversarial process, distinguish courts from tribunals.²⁰³ Further support for importing due process considerations into the definition of 'court' is found in *Kable* and *Fardon*.

D. Institutional Character Principle

Judges in both *Kable* and *Fardon* considered that an indicator of the institutional character of a court was the resolution of disputes in accordance with the judicial process. As such, the fact that a court follows a certain procedure may be seminally important in determining whether the alteration of that procedure may undermine its institutional characteristics.

198 Dziejdzic, above n 193, 141.

199 See *Forge* (2006) 228 CLR 45, 67 (Gleeson CJ), 74 (Gummow, Hayne and Crennan JJ), 118 (Kirby J).

200 *Kable* (1996) 189 CLR 51, 127.

201 *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

202 *Forge* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

203 *Mansfield v DPP (WA)* (2006) 226 CLR 486, 502–3 (Gleeson CJ, Gummow, Kirby, Hayne and Crennan JJ) (legal representation); *Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004* (2006) 231 CLR 1, 16–17 (Gummow ACJ, Callinan, Heydon and Crennan JJ) (onus of proof); *SZBEL v Minister for Immigration and Multicultural and Indigenous Affairs* (2006) 228 CLR 152, 164 (joinder of issues).

In *Kable*, McHugh J noted that the removal of the ‘ordinary protections inherent in the judicial process’, particularly the rules of evidence, was a factor contributing to the institutional integrity of the NSW Supreme Court being undermined.²⁰⁴ Similarly, in *Fardon*, four members of the Court considered that the presence of evidentiary rules in proceedings under the impugned legislation, indicated against an undermining of the institutional integrity of the Queensland Supreme Court.²⁰⁵

In *Gypsy Jokers* Steytler P held that ‘it will be at least a material consideration in considering invalidity whether the power conferred by the legislature is antithetical to the judicial process’.²⁰⁶ That the institutional character principle looks to the judicial process was also recognised by Kirby and Crennan JJ in the High Court on appeal.²⁰⁷ These cases indicate that the hostility towards process principles observed in *Nicholas* is absent in the context of an investigation of the institutional characteristics of a ‘court’. Thus, the institutional character principle provides a far stronger foundation for the protection of procedural due process than the *Lim* principle.

E. Process Standards in Federal Courts: Standard of Review

However, statements made regarding the application of *Kable* to State courts suggest that deficiencies in the ‘traditional judicial process [alone] will seldom, if ever, compromise the institutional integrity of that court’.²⁰⁸ Such deficiencies will only be one factor amongst many that must be weighed in determining whether the institutional integrity of a court is undermined. Steytler P evidenced this position in *Gypsy Jokers* when he held that legislation would not undermine the institutional integrity of a State Supreme Court notwithstanding that the court was required ‘to adjudicate in circumstances in which legislation ... gives to one party a distinct procedural ... advantage’.²⁰⁹ Something more is required to establish invalidity, namely an accompanying threat to the court’s independence and impartiality.²¹⁰

This reasoning is motivated, at least in part, by a concern that it is a ‘serious constitutional mistake’ to interpret ‘*Kable* or the *Constitution*’ as assimilating ‘State courts ... with federal courts’.²¹¹ This concern is an expression of the difficulty of reconciling the principle that the ‘Commonwealth must take State courts as it finds them’²¹² with Chapter III limitations on State legislative power

204 *Kable* (1996) 189 CLR 51, 122.

205 *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ), 596 (McHugh J), 656 (Callinan and Heydon JJ).

206 *Gypsy Jokers* (2007) 33 WAR 245, 270.

207 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 577–8 (Kirby J), 593–4 (Crennan J). Wheeler recognises that, following *Fardon*, State Parliaments may be prevented from forcing State courts to act ‘in a manner significantly at odds with traditional judicial procedure — such as contrary to the rules of natural justice’: Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’, above n 187, 24.

208 *Fardon* (2004) 223 CLR 575, 600–1 (McHugh J).

209 *Gypsy Jokers* (2007) 33 WAR 245, 278.

210 *Gypsy Jokers* (2007) 33 WAR 245, 277–8 (Steytler P).

211 *Fardon* (2004) 223 CLR 575, 598 (McHugh J); see also, 655–6 (Callinan and Heydon JJ).

212 *Kable* (1996) 189 CLR 51, 102 (Gaudron J); *Fardon* (2004) 223 CLR 575, 599 (McHugh J); *Federated Sawmill, Timberyard and General Woodworkers’ Employees’ Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308, 313 (Griffith CJ).

over State courts. Thus, the reluctance to give *Kable* an expansive operation is an expression of federalism concerns — permitting State legislatures liberty to affect the structure, procedure and jurisdiction of State courts.

Notably, these concerns about the proper place of procedural deficiencies were expressed in regard to due process standards in State courts. It is unlikely, for three reasons, that the same reluctance to protect process standards will prevail in applying the institutional character principle to federal courts.

First, as applied to federal courts, the institutional character principle does not have to accommodate the federalism concerns flagged by McHugh J in *Fardon*. Second, it is well established that the separation doctrine operates in a stricter manner in respect of federal courts than in respect of State courts.²¹³ As *Forge* recognises,²¹⁴ the institutional character principle is an expression of the separation doctrine. It would, thus, be most incongruous if the standards of independence and impartiality required of a State Supreme Court were directly analogous to a federal court. It is more likely that the independence and impartiality of the federal courts must be more robustly enforced.

Third, the principle in *H A Bachrach Pty Ltd v Queensland* provides strong authority for the stricter protection of process standards in federal courts.²¹⁵ *Bachrach* held that — in determining whether State legislation is invalid under *Kable* — a persuasive, although inconclusive,²¹⁶ guide will be whether the same legislation would be invalid had it been enacted as a Commonwealth Act: if the hypothetical Commonwealth Act would be valid, then there will be no offence to *Kable*.²¹⁷ This reasoning operates on the premise that the standards to be applied in determining invalidity are *less* demanding at a State level than they are at the Commonwealth level.²¹⁸

213 See *Kable* (1996) 189 CLR 51, 103–4 (Gaudron J).

214 *Forge* (2006) 228 CLR 45, 73 (Gummow, Hayne and Crennan JJ).

215 (1998) 195 CLR 547 (*'Bachrach'*).

216 *Fardon* (2004) 223 CLR 575, 630 (Kirby J), 655 (Callinan and Heydon JJ); *Baker v The Queen* (2004) 223 CLR 513, 544–5 (Kirby J).

217 *Bachrach* (1998) 195 CLR 547, 561–2 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ); *Silbert v Director of Public Prosecutions (WA)* (2004) 217 CLR 181, 186 (Gleeson CJ, McHugh, Gummow, Hayne, Callinan and Heydon JJ).

218 This reasoning was applied by Doyle CJ in *Granger* (2004) 88 SASR 453, 464. However, in *Granger*, Doyle CJ measured the hypothetical Commonwealth Act against *Lim*-principle conceptions of judicial power, rather than against the conception of a 'court' drawn from *Forge*, *Fardon* and *Kable*: at 465–8. Predictably, the Chief Justice found a procedural provision altering the onus of proof constitutionally valid. It is, respectfully, suggested that his Honour's reasoning, although not his conclusion, erred in assessing the hypothetical Commonwealth Act against the *Lim* principle. Rather, Doyle CJ should have analysed whether it would have undermined the institutional characteristics of a 'court', in light of the comments made concerning the importance of procedural aspects of the judicial process in *Fardon*. A necessary corollary of my argument is that different principles operate under the institutional character principle and the *Lim* principle. Under the *Lim* principle, procedural laws cannot be invalid under Chapter III because procedural laws cannot affect the exercise of 'judicial power'. By contrast, under the institutional character principle, procedural laws may infringe Chapter III because such procedural laws may affect the characteristics of 'courts'.

F. Interpretative Principle — A Functional Analysis

One of the key criticisms of *Kable* is that its scope is too uncertain both in principle and application.²¹⁹ This objection may apply with equal force to the institutional character principle unless it is applied within a principled framework. To this end, I propose the adoption of a ‘functional analysis’ within which to identify a court’s essential characteristics — drawing an analogy with the Court’s s 80 jurisprudence.²²⁰

Drawing an analogy between the institutional character principle and the Court’s ‘trial by jury’ jurisprudence is premised on a number of features common to both inquiries. The difficult task of giving a specific meaning to words of immense generality — ‘court’ and ‘jury’ — is a shared feature. Most importantly, both inquiries concern the character of a key governmental institution that exercises Commonwealth judicial power. Indeed, Hill draws on s 80 to argue that ‘the essential characteristics of a court would be determined “with regard to the purpose which [the constitutional separation of judicial power] was intended to serve and to the constant evolution, before and since federation, of the characteristics and incidents of a [court]”’.²²¹

In the context of s 80 a ‘functional approach involves ascertaining the function performed by a jury and, then, seeing which attributes are essential to the performance of that function’.²²² In determining the functions performed by a jury the Court will look predominantly to ‘the historical inception of that institution’.²²³ However, when assessing the essential functional characteristics of a jury, the court will look to ‘the contemporary context’.²²⁴ Thus, the functional inquiry involves a two-step process: first, determining the function performed by a jury; and second, determining which characteristics of the institution are essential to the performance of that function.

Notably, this mode of reasoning is evidenced in *Forge* where the Court recognised that the functions a court is designed to execute may be established by a historical, and textual, examination of the need for independent and impartial dispute-resolution bodies — while recognising that the characteristics that give effect to these functions were not fixed in 1901.²²⁵

219 Dan Meagher, ‘The Status of the *Kable* Principle in Australian Constitutional Law’ (2005) 16 *Public Law Review* 182.

220 ‘The trial on indictment of any offence against any law of the Commonwealth shall be by jury, and every such trial shall be held in the State where the offence was committed, and if the offence was not committed within any State the trial shall be held at such place or places as the Parliament prescribes.’

221 Graeme Hill, ‘State Administrative Tribunals and the Constitutional Definition of “Court”’ (2006) 13 *Australian Journal of Administrative Law* 103, 107 (n 16) (quoting *Ng v The Queen* (2003) 217 CLR 521, 526 (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ)) (editing in original; citations omitted).

222 James Stellios, ‘The High Court’s Recent Encounters with Section 80 Jury Trials’ (2005) 29 *Criminal Law Journal* 139, 149.

223 James Stellios, ‘*Brownlee v The Queen*: Method in the Madness’ (2001) 29 *Federal Law Review* 319, 327.

224 *Ibid.*

225 *Forge* (2006) 228 CLR 45, 60 (Gleeson CJ), 81–3 (Gummow, Hayne and Crennan JJ), 141–8 (Heydon J); Dziedzic, above n 193, 142–3.

G Possible Applications

Under the proposed principle, a law that removes a key characteristic of the judicial process may be invalid, particularly if that characteristic can be characterised as supporting the independence and impartiality of the judicial institution. A law that removes the ability of a party to plead its case, or, alternatively, a law which privileges one party over the other may meet such criteria — such a law could be characterised as infecting the judiciary with partiality towards a particular party. In this respect, *Re Criminal Proceeds* is instructive.²²⁶ The impugned provision directed that a court ‘must’ hear an application to place a ‘restraining order’ over property suspected to be the proceeds of crime in the absence of the party ‘whose property is the subject of the application’.²²⁷ Within the proposed interpretative framework, such a provision may be seen to align the court with one party by permitting them to be present, while shutting the other out of proceedings, thus undermining the impartiality of the court.

Less radical impingements on the judicial process may also infringe the proposed principle. So much was recognised by Steytler P in *Gypsy Jokers*.²²⁸ In discussing the alteration of *Kable* effected by *Fardon* and *Forge*, his Honour stated that:

a public hearing ... application of the rules of evidence ... the existence of a [judicial] discretion ... provisions with respect to the onus and standard of proof ... an obligation to afford natural justice ... an obligation to make proper disclosure ... [and] an obligation (and ability) to give reasons ...²²⁹

constituted aspects of the judicial process, relevant to the independence and impartiality of a court.

It would need to be demonstrated, however, that the process characteristics that an impugned law alters are directed towards maintaining the independence and impartiality of the judiciary. In the context of criminal proceedings it is suggested that procedural characteristics that are expressions of the presumption of innocence — proof beyond a reasonable doubt, the prosecution bearing the onus of proof and the accused right to silence — may all be protected, as to remove these safeguards may infringe the extent to which the presiding judge is independent and impartial towards the Crown’s case. Arguably, the same stringency ought to apply in any action to which the government is a party.²³⁰

In the civil context, a law permitting a party to obtain summary judgment without personally serving the defendant or that imposes rigid constraints on a

226 It should be acknowledged that the reasoning in this case does not incorporate *Forge* and, thus, should be approached with some caution: see *Gypsy Jokers* (2007) 33 WAR 245, 276–7 (Steytler P).

227 *Criminal Proceeds Confiscation Act 2002* (Qld) s 30(3)(a).

228 (2007) 33 WAR 245.

229 *Gypsy Jokers* (2007) 33 WAR 245, 271 (citations omitted).

230 See, eg, Cheryl Saunders, ‘The Separation of Powers’ in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 3, 10.

party's ability to lead evidence or to make submissions on the applicable law, may constitute a displacement of natural justice requirements that, in turn, may undermine the independence and impartiality of a court.

H. Benefits of the Institutional Character Analysis

As is clear from *Nicholas*, grounding a due process principle in a judicial power analysis risks neglecting seminal due process standards. By operating independently of the allocation function of the separation doctrine the institutional character principle avoids the limitations that dog the *Lim* principle.

The historicist reasoning in *Forge* raises the spectre of a reiteration of the reasoning in *Nicholas* — that process standards enshrined in procedural rules are not constitutionally entrenched due to their historically frequent legislative prescription. Alert to this concern, the functional analysis applied in respect of s 80 is not obtusely historicist, nor is it inflexible. Under that analysis, the attributes of a jury trial are divided into two camps, 'essential' and 'non-essential'.²³¹ This division is a recognition that 'the incidents of the procedure never have been immutable; they are constantly changing'.²³² The same observations apply to the procedural incidents of any judicial process. Thus, a functional analytical framework addresses one of the major shortcomings in the judicial power analysis — a failure to accommodate flexibility and changing standards of due process — by recognising that some process standards are constitutional imperatives while others are available for legislative alteration.

6. Conclusion

Attempts to establish a constitutional basis for the protection of due process standards, most prominently the *Lim* principle, have tended to operate within the vision of the separation doctrine expressed in *Boilermakers*'. There are, however, significant obstacles in the path of a due process principle premised upon the allocation of judicial power, most notably the focus of that inquiry on subject-matter powers. The proposed due process principle attempts to avoid such difficulties by shifting the focus of the inquiry away from 'judicial power' and towards the institutional characteristics of the curial bodies that exercise such power.

This method of 'constitutionalising' due process standards complements the allocation function of the separation doctrine by ensuring that if Parliament wants certain disputes decided judicially, it must vest them in independent and impartial courts with certain minimum standards of procedural due process. Applying the institutional character principle in a functionalist manner, as I have proposed, should further assist the germination of due process outcomes that are consistent with the policies underlying the separation doctrine.

²³¹ Stellios, '*Brownlee v The Queen: Method in the Madness*', above n 223, 326.

²³² *Brownlee v The Queen* (2001) 207 CLR 278, 286 (Gleeson CJ and McHugh J); Stellios, '*The High Court's Recent Encounters with Section 80 Jury Trials*', above n 222, 149.

In addition, attaching a due process principle to the institution of a ‘court’ suits the underlying goals of the separation doctrine — to provide independent and procedurally fair bodies to resolve disputes. Wheeler records her support for the reasoning of Deane J when she notes that his Honour’s view ‘explicitly invoke[s] the values served by vesting federal judicial power in Chapter III courts’.²³³ A functionalist interpretative principle explicitly draws upon these values — independence and impartiality — in assessing the validity of legislation.

In this respect, the proposed principle conforms to a number of different conceptions of the separation doctrine. From certain perspectives, the doctrine is moved by federal division of power concerns — attractive because an independent curial body is capable of arbitrating *inter se* disputes in a manner that would be deemed legitimate by most stakeholders.²³⁴ The doctrine can also be viewed as establishing a key liberty-protecting device — the division of governmental power.²³⁵ The common ground between these conceptions of the separation doctrine is a focus on judicial independence and impartiality.²³⁶ The proposed implication is, thus, justifiable on both conceptions of the separation doctrine, as it only seeks to safeguard those aspects of the judicial process that promote the independence and impartiality of the judiciary.

A possible objection to the proposed principle may be that the *Kable* principle has been considered an under-performing doctrine.²³⁷ In all fairness, this is not a true objection. When open-textured reasoning is required in the interpretation and application of constitutional implications there will always be an element of ‘interpretative disagreement’.²³⁸ Differing judicial opinions of the functional role an independent and impartial judiciary should perform, and the ‘public values’ that inform these functions,²³⁹ will undoubtedly influence the scope of the institutional character principle. But precisely the same difficulty is encountered in respect of the *Lim* principle with the attendant difficulty of a prima facie aversion to due process considerations.

233 Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’, above n 14, 210.

234 *Boilermakers*’ (1956) 94 CLR 254, 276–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

235 *Wilson* (1996) 189 CLR 1, 10–13 (Brennan CJ, Dawson, Toohey McHugh and Gummow JJ).

236 *Wilson* (1996) 189 CLR 1, 12–13 (Brennan CJ, Dawson, Toohey McHugh and Gummow JJ); *Boilermakers*’ (1956) 94 CLR 254, 267–8 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); Saunders, above n 220, 10.

237 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 563 (Kirby J) (citing Wheeler, ‘The *Kable* Doctrine and State Legislative Power over State Courts’, above n 187, 30).

238 Adrienne Stone, ‘Australia’s Constitutional Rights and the Problem of Interpretative Disagreement’ (2005) 27 *Sydney Law Review* 29.

239 *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 576 (Kirby J).