

# What is a 'Supreme Court of a State'?

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## Abstract

In *Kirk v Industrial Court of New South Wales* the High Court held that it is a 'defining characteristic' of a state Supreme Court that it possess a judicial review jurisdiction in respect of jurisdictional errors. The High Court considered that were a state Supreme Court not to possess such a jurisdiction it would fail to meet the constitutional description 'Supreme Court of a State' and that, accordingly, it is beyond the legislative competence of a state parliament to deprive a state Supreme Court of that jurisdiction. This article explores the idea that state Supreme Courts possess defining characteristics and considers what other defining characteristics might be possessed by state Supreme Courts.

## I Introduction

The High Court's recent decision in *Kirk v Industrial Court of New South Wales* ('*Kirk*')<sup>1</sup> is an important one in the ever growing body of Chapter III jurisprudence. In *Kirk*, the High Court considered that the constitutional expression 'Supreme Court of a State' has a substantive content that is immune from legislative abrogation. Specifically, the High Court held that possession of a judicial review jurisdiction is a 'defining characteristic' of a state Supreme Court.<sup>2</sup> This article explores the more general question brought to the fore by the decision in *Kirk*: what is a 'Supreme Court of a State'?

It is worth pointing out that ch III of the *Constitution* identifies and demands the continued existence of two types of Supreme Court: the state Supreme Courts<sup>3</sup> and 'a Federal Supreme Court to be called the High Court of Australia'.<sup>4</sup> It is plausible to suppose therefore that there may be a core element of the concept 'Supreme Court' common to both state Supreme Courts and the High Court. It therefore falls to be considered whether analogies, even if loose ones, with the characteristics of the High Court might be useful in understanding the constitutional expression 'Supreme Court of a State', and vice versa.

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<sup>1</sup> (2010) 239 CLR 531. For a thorough case note, see Wendy Lacey, '*Kirk v Industrial Court of New South Wales: Breathing Life into *Kable**' (2010) 34 *Melbourne University Law Review* 641.

<sup>2</sup> *Kirk* (2010) 239 CLR 531, 566.

<sup>3</sup> *Constitution* s 73.

<sup>4</sup> *Ibid* s 71. The High Court has noted this constitutional description of itself: *Kirk* (2010) 239 CLR 531, 581.

In attempting to understand the expression ‘Supreme Court of a State’, this article proceeds as follows. First, it considers how the notion that there must be a body fitting the constitutional description ‘Supreme Court of State’ might be justified. Second, the decision in *Kirk* that the possession of a judicial review jurisdiction is a defining characteristic of a state Supreme Court is analysed. Third, the article considers whether parts of the so-called ‘inherent jurisdiction’ of the state Supreme Courts might also be defining characteristics. Fourth, it is argued that it is a defining characteristic of a state Supreme Court that it possess a general appellate jurisdiction. Finally, the article considers why a state Supreme Court cannot be other than a single institution situated at the apex of the state judicial hierarchy.

## II The Notion that There Must Be a Body Fitting the Constitutional Description ‘Supreme Court of a State’

The notion that there must be a body fitting the constitutional description ‘Supreme Court of a State’ has been described by one commentator as one that ‘seems unexceptional’.<sup>5</sup> In *Forge v Australian Securities and Investments Commission*, Gummow, Hayne and Crennan JJ held:

Because Ch III requires that there be a body fitting the description ‘the Supreme Court of a State’, it is beyond the legislative power of a State so to alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.<sup>6</sup>

In *Kirk*, the High Court emphatically reaffirmed that proposition.<sup>7</sup> That the principle is correct may be unexceptional, but its proper meaning is not straightforward. Justice Gummow in *Kable* explained that the meaning of the expression ‘Supreme Court of a State’ must ‘be determined in the process of construction of the *Constitution* and is not to be governed merely by legislation of the relevant State. It is, in this sense, a constitutional expression.’<sup>8</sup>

Chief Justice Spigelman, noting a number of other important constitutional expressions, reflected that ‘[t]he idea that certain terms of the *Constitution* must be understood in a distinct constitutional sense has been an important development in recent High Court jurisprudence.’<sup>9</sup> An important issue arising out of this development is the determination of the substantive content of constitutional expressions.

Before turning to consider what some of the defining characteristics of a state Supreme Court within the meaning of the *Constitution* might be, it is worth considering the following question: why should it be the case that the use of an

<sup>5</sup> Chris Finn, ‘Constitutionalising Supervisory Review at State Level: The End of *Hickman*?’ (2010) 21 *Public Law Review* 92, 107.

<sup>6</sup> *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 (‘*Forge*’).

<sup>7</sup> (2010) 239 CLR 531, 566, 580.

<sup>8</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 141 (‘*Kable*’).

<sup>9</sup> Chief Justice James Spigelman, ‘The centrality of jurisdictional error’ (2010) 21 *Public Law Review* 77, 78. See also, *Trust Company of Australia v Skiwing* (2006) 66 NSWLR 77 (Spigelman CJ).

expression in the *Constitution* requires that there be and continue to be an entity or thing fitting that description? 'Lighthouses' and 'old-age pensions' are also constitutional expressions,<sup>10</sup> yet it could not sensibly be argued that the presence of those words in the *Constitution* thereby requires that there in fact be lighthouses or that the Commonwealth must establish a system of old-age pensions. Similarly, s 101 of the *Constitution* provides that '[t]here shall be an Inter-State Commission...' and 'Inter-State Commission' is just as much a constitutional expression as 'Supreme Court of a State'. Yet, there is no Inter-State Commission and no-one has seriously suggested that there must be one despite the fact that the *Constitution* in terms demands it.

One explanation for why there must be a body fitting the constitutional description 'Supreme Court of a State' is that such a body is an essential component of a fundamental feature of constitutional design: namely, an integrated Australian judicial system in which the Supreme Courts of the states may exercise the judicial power of the Commonwealth and whose decisions more generally may be the subject of appeal to the High Court.<sup>11</sup> This constitutional design is often described as the 'autochthonous expedient'.<sup>12</sup> In *Kable*, McHugh J held that the existence of state Supreme Courts is necessary for 'the working of the Constitution'.<sup>13</sup> In the same case, Gaudron J held that if a state were to abolish its Supreme Court 'the autochthonous expedient, more precisely the provisions of Ch III which postulate an integrated judicial system would be frustrated in their entirety'.<sup>14</sup> By contrast, it cannot be said that an Inter-State Commission is an essential component of a fundamental feature of constitutional design or is in anyway essential to the working of the *Constitution*. Nor could the same be said of lighthouses. Because it is 'axiomatic that neither the Commonwealth nor a State can legislate in a way that might alter or undermine the constitutional scheme set up by Ch III of the *Constitution*',<sup>15</sup> it follows that there must continue to be a Supreme Court in each state.

Quite apart from considerations concerning an integrated Australian judiciary, a second rationale for the constitutional requirement that there must continue to be state Supreme Courts might be posited. It should be uncontroversial that the *Constitution* transformed the various Australian colonies into states and that as states they are distinct bodies politic.<sup>16</sup> The 1988 Annual Report of the Supreme Court of Victoria reflected that, '[t]he existence and nature of the body politic of the State depend upon the capacity of the Supreme Court to exercise its function as the State's court of general jurisdiction.'<sup>17</sup>

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<sup>10</sup> *Constitution* s 51(vii), (xxii).

<sup>11</sup> *Ibid* s 73(ii).

<sup>12</sup> *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 ('Boilermakers').

<sup>13</sup> (1996) 189 CLR 51, 110–11.

<sup>14</sup> *Ibid* 103.

<sup>15</sup> *Ibid* 115.

<sup>16</sup> John Quick and Robert Garran, *Commentaries on the Constitution of the Commonwealth of Australia* (Angus & Robertson, 1901) 927ff; *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 81 (Dixon J) ('*Melbourne Corporation*').

<sup>17</sup> Supreme Court of Victoria (1998) *Annual Report*, 19.

Thus, it could be said that a necessary corollary to the constitutional requirement that a state exist *as a state* is that each state possess a Supreme Court. This would apply equally to new states, including those formed by the union of two or more states or parts of states.<sup>18</sup> ‘State’ is a constitutional expression<sup>19</sup> and states are essential components of an important constitutional design, namely federalism. Thus, Dixon J has said:

The foundation of the Constitution is the conception of a central government and a number of State governments separately organized. The Constitution predicates their continued existence as independent entities.<sup>20</sup>

Simply put, there is an argument to be made that possession of a Supreme Court is a defining characteristic of a state.<sup>21</sup> A state could not continue to exist or function as an independent entity — as a state — without one. There are dicta of Hayne JA in the Victorian Court of Appeal which provide support for this reasoning. His Honour considered that there is ‘a serious question whether Parliament may... so change the Constitution of this State as to remove as one element of its governance a superior court of record with the powers and jurisdiction inherent in such a court.’<sup>22</sup> In the same case, Phillips JA was:

attracted by the suggestion that some limitation on Parliament’s power may exist, at least if Parliament were to attempt to fetter [the Supreme Court] in a way which went to its very core as an institution within the overall framework of government in the widest sense.<sup>23</sup>

Moreover, the High Court’s decision in *Kirk* referred to ‘the position which the state Supreme Court has in the constitutional structure’ of a state.<sup>24</sup> To abolish a state Supreme Court would, to adopt a phrase used by Paul Finn, be ‘to reconstitute the general scheme of government in a way that denies its fundamental character’.<sup>25</sup> This the *Constitution* does not allow.

If possession of a Supreme Court is a defining characteristic of a state as an independent entity within the federation, then it should also be the case that possession of a Supreme Court is a defining characteristic of the Commonwealth as an independent entity within the federation. And, indeed the Commonwealth does possess a Supreme Court: ‘a Federal Supreme Court to be called the High Court of Australia’.

Accordingly, there are least two constitutional rationales for the proposition that there must continue to be in each state a body fitting the constitutional

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<sup>18</sup> *Constitution* s 124.

<sup>19</sup> ‘State’ appears repeatedly throughout the *Constitution*.

<sup>20</sup> *Melbourne Corporation* (1947) 74 CLR 31, 81.

<sup>21</sup> It is notable that the intergovernmental immunities doctrine is underpinned by the constitutional requirement that a ‘State ... continu[e] to exist and function as such’: *Melbourne Corporation* (1947) 74 CLR 31, 66 (emphasis added). That appears to be another way of saying that states, as states, have defining characteristics.

<sup>22</sup> *BHP v Dagi* [1996] 2 VR 117, 205.

<sup>23</sup> *Ibid* 190.

<sup>24</sup> *Kirk* (2010) 239 CLR 531, 583. See also at 586 (Heydon J).

<sup>25</sup> Paul Finn ‘Sovereign People, a Public Trust’ in P D Finn (ed), *Essays on Law and Government, Vol 1: Principles and Values*, (Law Book Company, 1995) 19–21 quoted in *BHP v Dagi* [1996] 2 VR 117, 204 (Hayne JA).

description 'Supreme Court of a State': Ch III is premised on that fact, and a state is not a state without one. The substantive content of that constitutional expression must now be considered.

### III A State Supreme Court Possesses Supervisory Jurisdiction

In *Kirk*, the High Court held that it is a 'defining characteristic' of a state Supreme Court that it possess the power to grant relief in the nature of the prerogative writs directed to inferior courts and tribunals on the grounds of jurisdictional error.<sup>26</sup> That is, a state Supreme Court possesses a constitutionally entrenched supervisory jurisdiction. Just as there is at the Commonwealth level, at the state level there is an entrenched 'minimum provision of judicial review'.<sup>27</sup>

The case concerned the criminal prosecution and convictions in the Industrial Court of New South Wales of Mr Kirk and his company for failing to provide a safe place of work contrary to the *Occupational Health and Safety Act 1983* (NSW). The High Court found that the convictions in the Industrial Court were tainted by two jurisdictional errors: first, Kirk, the defendant, was called as a witness for the prosecution contrary to the *Evidence Act 1995* (NSW) and, second, the Industrial Court misconstrued the relevant legislative provisions leading it to misapprehend the limits of its functions and powers and to make orders beyond power.<sup>28</sup> Ordinarily, relief in the nature of certiorari would be available to quash the convictions. However, s 179 of the *Industrial Relations Act 1996* (NSW) provided that a decision of the Industrial Court was final and could not be appealed against, reviewed, quashed or called into question by any court or tribunal, and extended to proceedings for relief in the nature of the prerogative writs. The question for the High Court was whether that privative provision was effective to preclude the Court of Appeal of the Supreme Court of New South Wales from granting relief in the nature of the prerogative writs directed to the Industrial Court.

The joint judgment of French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, with which the separate judgment of Heydon J agreed on all presently relevant points, said of state privative provisions that they are 'affected by constitutional considerations'.<sup>29</sup> Specifically, their Honours reflected that questions arise about the extent to which privative provisions can be given an operation according to their purpose and 'yet remain consistent with the constitutional framework for the Australian judicial system'.<sup>30</sup> As will be seen, the decision in *Kirk* appears to have fashioned an appropriate balance.

The joint judgment considered the history of the jurisdiction possessed by the Court of Queen's Bench at the time of Federation, noting that the colonial

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<sup>26</sup> *Kirk* (2010) 239 CLR 531, 566.

<sup>27</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513.

<sup>28</sup> *Kirk* (2010) 239 CLR 531, 574–5.

<sup>29</sup> *Ibid* 579.

<sup>30</sup> *Ibid* 579.

Supreme Courts possessed comparable jurisdiction.<sup>31</sup> Their Honours cited 19<sup>th</sup>-century Privy Council authority — *Colonial Bank of Australasia v Willan* — that held ‘notwithstanding the privative clause in a statute, the Court of Queen’s Bench will grant a certiorari’ and that the same principle applied to the colonial Supreme Courts.<sup>32</sup> Thus, the joint judgment concluded, it was ‘accepted doctrine at the time of Federation...that the jurisdiction of the colonial Supreme Courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision.’<sup>33</sup>

The joint judgment continued:

The supervisory jurisdiction of the Supreme Courts was at Federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. That supervisory role of the Supreme Courts exercised through the grant of prohibition, certiorari and mandamus (and habeas corpus) was, and is, a defining characteristic of those courts.<sup>34</sup>

Consistently with earlier High Court authority that the rule of law is an assumption against which the *Constitution* is framed,<sup>35</sup> the joint judgment considered:

To deprive a State Supreme Court of its supervisory jurisdiction enforcing the limits on the exercise of State executive and judicial power by persons and bodies other than that Court would be to create islands of power immune from supervision and restraint. It would permit what Jaffe described as the development of ‘distorted positions’. And as already demonstrated, it would remove from the relevant State Supreme Court one of its defining characteristics.<sup>36</sup>

The joint judgment did not, however, hold that all limitations hold that all limitations on the supervisory jurisdiction of a state Supreme Court would be impermissible. Their Honours remarked:

This is not to say that there can be no legislation affecting the availability of judicial review in the State Supreme Courts. It is not to say that no privative provision is valid. Rather, the observations made about the constitutional significance of the supervisory jurisdiction of the state Supreme Courts point to the continued need for, and utility of, the distinction between jurisdictional and non-jurisdictional error in the Australian constitutional context. The distinction marks the relevant limit on State legislative power. Legislation which would take from a State Supreme Court power to grant relief on account of jurisdictional error is beyond State legislative power. Legislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power.<sup>37</sup>

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<sup>31</sup> Ibid 580.

<sup>32</sup> *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442 (‘Willan’).

<sup>33</sup> *Kirk* (2010) 239 CLR 531, 580.

<sup>34</sup> Ibid 580–1.

<sup>35</sup> *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

<sup>36</sup> *Kirk* (2010) 239 CLR 531, 580–1 citing Louis L Jaffe ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70 *Harvard Law Review* 953, 963.

<sup>37</sup> *Kirk* (2010) 239 CLR 531, 581.

The reason why review of non-jurisdictional errors of law may be validly excluded lies in the nature of a state Supreme Court's supervisory jurisdiction. That jurisdiction is 'the mechanism for the determination and the enforcement of the *limits* on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court.'<sup>38</sup> Courts, and, in limited circumstances, other decision-makers,<sup>39</sup> have the authority to make a wrong decision on questions of law.<sup>40</sup> The relevant point is that a decision tainted by a non-jurisdictional error of law is therefore not one made outside the *limits* of a court's authority. Accordingly, the underlying rationale for supervisory jurisdiction is not engaged. In other words, an occasion for the enforcement of the limits of jurisdiction does not arise. It is the 'supervisory role' of a state Supreme Court that is one of its defining characteristics and not the availability of relief on all the grounds at common law for which certiorari lies. In this way, the High Court has attempted to give state privative provisions an operation that is consistent with the constitutional framework for the Australian judicial system.

These constitutional considerations were, of course, relevant in construing the privative provision in question in *Kirk*. The joint judgment held that on its proper construction the provision did not preclude the grant of relief in the nature of certiorari for jurisdictional error. Echoing the decision in *Plaintiff S157*,<sup>41</sup> the joint judgment continued that '[t]o grant certiorari on that ground is not to call into question a 'decision' of the Industrial Court as that term is used in s 179(1).'<sup>42</sup> It followed, therefore, that the Court of Appeal had the power to quash the convictions in the Industrial Court. This reasoning indicates that state privative provisions should be read down rather than be considered invalid.

The reasoning of the joint judgment did not confine itself simply to discussing the position of the state Supreme Courts. The joint judgment also noted the High Court's own stake in the extent of the supervisory jurisdiction of the state Supreme Courts:

And because, 'with such exceptions and subject to such regulations as the Parliament prescribes', s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of [a state Supreme Court's] supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the *Constitution* vests the judicial power of the Commonwealth.<sup>43</sup>

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<sup>38</sup> Ibid 580 (emphasis added).

<sup>39</sup> Ibid 572.

<sup>40</sup> *Craig v South Australia* (1995) 184 CLR 163, 179.

<sup>41</sup> *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 509. See also Steven Churches and Sue Milne 'Kable, K-Generation, Kirk and Totani: Validation of Criminal Intelligence at the Expense of Natural Justice in Ch III Courts' (2010) 18 *Australian Journal of Administrative Law* 29, 35: 'the High Court has effectively matched the reasoning in Plaintiff S157 at federal level to limitation on the constitutional validity of privative clauses at State level: see *Kirk*'.

<sup>42</sup> *Kirk* (2010) 239 CLR 531, 583.

<sup>43</sup> Ibid 581. See also, *Kable* (1996) 189 CLR 51, 114.

It follows that to deprive a state Supreme Court of any jurisdiction that is a defining characteristic would have the effect of impermissibly diminishing the appellate jurisdiction of the High Court.<sup>44</sup>

More interestingly, in articulating the extent of a state Supreme Court's supervisory jurisdiction, the joint judgment drew a more explicit parallel with the extent of the High Court's own supervisory jurisdiction. Their Honours held:

Just as the amenability of a judge of a federal court to a writ of prohibition does not depend upon the court of which the judge is a member being an 'inferior' court, but upon the jurisdiction of the court being limited, the amenability of the Industrial Court to the supervisory jurisdiction of the Supreme Court is a corollary of the Industrial Court being a court of limited power and the position which the State Supreme Court has in the constitutional structure.<sup>45</sup>

Two important implications may be drawn from these passages. First, as Finn has commented, '[t]he constitutional preservation of judicial review of Commonwealth decisions provided for by s 75(v) of the *Constitution* now finds its counterpart in s 73(ii)', where the expression 'Supreme Court of a State' appears.<sup>46</sup> Second, it is possible to use analogies with the position of the High Court as the 'Federal Supreme Court' to understand the meaning of the constitutional expression 'Supreme Court of a State'. Thus, it might be argued that the High Court's judicial review jurisdiction is not simply a product of s 75(v) but, rather, is a product of its existence as the 'Federal Supreme Court' with all that entails.<sup>47</sup> Section 75(v) might therefore be seen as an explicit setting out of what, at least in part, would otherwise flow from the constitutional fact that the High Court is the 'Federal Supreme Court'.

The High Court's reasoning in *Kirk*, especially the originalist element, has not been without criticism. Leslie Zines has noted that the reasoning is 'somewhat bare of authority' for the proposition that a supervisory jurisdiction was a defining characteristic of colonial Supreme Courts in 1900.<sup>48</sup> Basten JA has commented that it is 'surprising' that it has taken more than a century for this to have been noticed.<sup>49</sup> What might be more surprising is that the colonial Supreme Courts seem not to have noticed this characteristic.<sup>50</sup> Indeed, in 1892 the Supreme Court of

<sup>44</sup> Justice John Basten, 'The Supervisory Jurisdiction of the Supreme Courts' (2011) 85 *Australian Law Journal* 273, 276.

<sup>45</sup> *Kirk* (2010) 239 CLR 531, 583.

<sup>46</sup> Finn, above n 5, 102. See also, Spigelman, above n 9, 77, 91.

<sup>47</sup> This might provide a neat solution to the problem raised but not addressed in *Plaintiff M61/2010E v Commonwealth* 243 CLR 319, 345: 'whether a party identified as "an independent contractor" nevertheless may fall within the expression "an officer of the Commonwealth" in s 75(v) in circumstances where some aspect of the exercise of statutory or executive authority of the Commonwealth has been "contracted out".' For a brief discussion of the problem of 'contracting out' see Matthew Groves, 'Outsourcing and s 75(v) of the *Constitution*' (2011) 22 *Public Law Review* 3.

<sup>48</sup> Leslie Zines 'Recent Developments in Chapter III: *Kirk v Industrial Commission of NSW* and *South Australia v Totani*' (Paper presented at Centre for Comparative Constitutional Studies/Australian Association of Constitutional Law Seminar, Melbourne Law School, 26 November 2010).

<sup>49</sup> Basten, above n 44, 280.

<sup>50</sup> *Ibid* 284: 'In 1900, there was little suggestion of any common law limitation on the power of the legislature to remove part of the supervisory jurisdiction of a Supreme Court'.



Victoria held that a privative clause referring to jurisdictional error was effective to prevent the Supreme Court from issuing certiorari for jurisdictional error.<sup>51</sup> The decision in *Willan*<sup>52</sup> was distinguished because the privative clause in that case did not explicitly refer to jurisdictional error.<sup>53</sup>

While such criticisms are not necessarily without merit, they do not prove that the conclusion in *Kirk* is wrong. An alternative basis for the conclusion, and one consistent with the purposes demanding that each state possess a Supreme Court, might be proposed. For example, it could be suggested that the independent political entities created by the *Constitution* — the Commonwealth and the States — each require a mechanism for the determination and the enforcement of the limits on the exercise of the entity's executive and judicial power.<sup>54</sup> As one judge has said 'The power to judicially review is a facet of the judicial power of government.'<sup>55</sup> Without such a mechanism, it might be said that an independent political entity does not, in substance, exist.<sup>56</sup> That mechanism is the supervisory jurisdiction with respect to jurisdictional errors possessed by the Supreme Courts.<sup>57</sup> As noted above, s 75(v) could be said to set out, at least in part, what, in any event, flows from the High Court's position as the Federal Supreme Court.<sup>58</sup> In this regard, it is worth noting that s 75(v) was very nearly not included in the *Constitution*.<sup>59</sup>

In any case, the purpose of this article is not to critique the decision in *Kirk* or even to seek to justify it. Rather, the purpose is to consider what the defining characteristics of a state Supreme Court might include. The criticisms noted above do not negative the starting premise of this article that state Supreme Courts have defining characteristics and will probably not persuade the High Court to change its mind with respect to the characteristic identified in *Kirk*.

#### IV A State Supreme Court Possesses Further 'Inherent Jurisdiction'

From the decision in *Kirk*, it seems clear that a power, jurisdiction, or characteristic, of a state Supreme Court that is 'defining' must not and cannot be

<sup>51</sup> *Re Biel* (1892) 18 VLR 456. This case was noted during argument in *Kirk*: (2010) 239 CLR 531, 543, 548.

<sup>52</sup> (1874) LR 5 PC 417.

<sup>53</sup> *Re Biel* (1892) 18 VLR 456, 459.

<sup>54</sup> See *Kirk* (2010) 239 CLR 531, 580–1.

<sup>55</sup> Justice J Gilmour, 'Kirk: Newton's Apple Fell' (2011) 34 *Australian Bar Review* 155, 159.

<sup>56</sup> This argument is not necessarily transportable to the United Kingdom because it is made in the context of a federal state under a written constitution.

<sup>57</sup> The High Court appears to have actually said this: 'The supervisory jurisdiction of the Supreme Courts was at Federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court': *Kirk* (2010) 239 CLR 531 at 580–1. The passage takes as given that such a mechanism must exist.

<sup>58</sup> For a discussion of the purposes underlying s 75(v) see James Stellios 'Exploring the Purposes of Section 75(v) of the *Constitution*' (2011) 34 *University of New South Wales Law Journal* 70.

<sup>59</sup> See Quick and Garran, above n 15, 778: 'The Convention was in considerable doubt as to whether this sub-section was necessary or not.'

taken away. *Kirk* makes clear that supervisory jurisdiction is such a jurisdiction and characteristic. The supervisory jurisdiction of a state Supreme Court is often described as being located within a particular category: the court's inherent jurisdiction.<sup>60</sup> The High Court has considered that the state Supreme Courts, as superior courts of record of general jurisdiction,<sup>61</sup> possess inherent jurisdiction.<sup>62</sup> If judicial review is a defining characteristic of a state Supreme Court and if judicial review is one part of what is often called 'inherent jurisdiction' then, adopting inductive reasoning, it might be the case that certain other, perhaps even all, parts of what is often described as 'inherent jurisdiction' are also defining characteristics of a state Supreme Court.

It is worth briefly acknowledging that the expression 'inherent jurisdiction' may not be entirely apt in the Australian constitutional context. As Kirby J has explained:

In Australia, the concept of 'inherent jurisdiction' or 'inherent powers' has been borrowed from the reasoning of English judges, traceable to earlier times in English courts originally created out of the royal prerogative. The use of such expressions in Australia has not been subjected to an analysis appropriate to a country whose courts are not established out of the prerogative but provided for, or envisaged in, the federal and State constitutions and established by or under legislation enacted by Australian parliaments.

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Whatever the position in the United Kingdom, the additional jurisdiction and powers of Australian courts may not, therefore, truly be described as 'inherent'. It may be more accurate to describe any supplementary jurisdiction or powers of such courts, including superior courts, as 'implied', that is implied in the constitutional or legislative source. According to this approach, a reference to 'inherent jurisdiction' or 'inherent powers' is likely to mislead.<sup>63</sup>

It is also worth noting that Ch III arguments have been made about 'inherent jurisdiction' and 'inherent power' before. For example, Lacey has argued that the powers usually referred to as the 'inherent powers' of a court are protected from legislative abrogation by Ch III on the basis that they are a necessary part of 'the capacity of the federal courts to protect the integrity, efficiency and fairness of their own processes, as the most basic and fundamental aspect of the judicial process.'<sup>64</sup> Whereas Lacey bases her analysis on the nature of judicial power, the

<sup>60</sup> See, eg, Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57, 66; Rosara Joseph, 'Inherent Jurisdiction and Powers in New Zealand' (2005) 11 *Canterbury Law Review* 220, 225; *John Fairfax & Sons v McRae* (1955) 93 CLR 351, 363.

<sup>61</sup> State Supreme Courts do not, of course, necessarily possess unlimited jurisdiction. 'in the Australian constitutional context, no court really enjoys unlimited jurisdiction or powers. The jurisdiction and powers of every Australian court are limited by that court's constitutional and statutory competence': *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, 297.

<sup>62</sup> *Keramiakakis v Regional Publishers* (2009) 237 CLR 268, 280; *Grassby v The Queen* (1989) 168 CLR 1, 16 ('*Keramiakakis*').

<sup>63</sup> *Batistatos v Roads and Traffic Authority (NSW)* (2006) 226 CLR 256, at 295–6.

<sup>64</sup> Lacey, above n 60, 86. See also, Fiona Wheeler 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Fiona Wheeler 'The Doctrine of Separation

basis of the analysis in this paper is on the meaning of the expression 'Supreme Court of a State'.

The High Court's reasoning in *Kirk* lends support to the idea that a jurisdiction or power usually categorised as 'inherent' might be a defining characteristic of a state Supreme Court. *Kirk* described the judicial review jurisdiction as a 'defining characteristic' of a state Supreme Court. This is quite similar to the standard definitions of inherent jurisdiction. In *R v Forbes; Ex parte Bevan* 'inherent jurisdiction' was defined as the jurisdiction 'which a court has simply because it is a court of particular description.'<sup>65</sup> In other words, possession of that jurisdiction is necessary for a court to meet a particular description. More directly, the decision in *Kirk* noted that 'each of the Supreme Courts referred to in s 73 of the *Constitution* had jurisdiction that included such jurisdiction as the Court of Queen's Bench had in England'.<sup>66</sup> That jurisdiction included, according to the High Court, the power to grant certiorari for jurisdictional error even in the face of a privative provision and it included more broadly what is described as 'inherent jurisdiction'.<sup>67</sup>

Furthermore, the second rationale identified above for the constitutional requirement that there must continue to be state Supreme Courts also supports the conclusion that the 'inherent jurisdiction' of a state Supreme Court is a defining characteristic of such a court. As noted as part of that discussion, there is 'a serious question whether Parliament may...so change the *Constitution* of [a] State as to remove as one element of its governance a superior court of record with the powers and jurisdiction inherent in such a court.'<sup>68</sup>

It seems then that the 'inherent jurisdiction' and 'inherent power' possessed by the state Supreme Courts might well be a defining characteristic of those courts. The deprivation of such inherent jurisdiction or power by statute would therefore seem to alter the character of a state Supreme Court to such an extent that it ceases to meet the constitutional description 'Supreme Court of a State'. Of course, the key question is what, apart from supervisory jurisdiction, is included within that 'well of undefined powers' traditionally described as inherent.<sup>69</sup> That question requires consideration of the traditional inherent jurisdiction of the Courts of Common Law at Westminster,<sup>70</sup> and whether that jurisdiction is truly inherent, in the sense of being a defining characteristic. That consideration must also be informed by the demands of the Australian constitutional context.

It would be too overwhelming a task to attempt to consider here all components of inherent jurisdiction and power. Instead, this article will briefly

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of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248.

<sup>65</sup> *R v Forbes; Ex parte Bevan* (1972) 127 CLR 1, 7.

<sup>66</sup> (2010) 239 CLR 531, 580.

<sup>67</sup> *DJL v The Central Authority* (2006) 201 CLR 226, 240–1.

<sup>68</sup> *BHP v Dagi* [1996] 2 VR 117, 205 (emphasis added).

<sup>69</sup> *Grassby v The Queen* (1989) 168 CLR 1, 16; *DJL v The Central Authority* (2006) 201 CLR 226, 240; *Keramiyanakis* (2009) 237 CLR 268, 280.

<sup>70</sup> *DJL v The Central Authority* (2006) 201 CLR 226, 240; *Grassby v The Queen* (1989) 168 CLR 1, 16; *Keramiyanakis* (2009) 237 CLR 268, 280.

consider the reasons why two components of inherent jurisdiction — the power to punish contempts and the supervision of the legal profession — might be seen to be defining characteristics of a state Supreme Court and thus immune from legislative abrogation. These examples have been chosen because, as will be seen, they have a relationship to existing Ch III jurisprudence.

The power of a superior court to punish contempt, whether committed against itself or against inferior courts, has been described as ‘the most important inherent jurisdiction’.<sup>71</sup> Indeed, Latham CJ once described it as ‘*the distinguishing characteristic of a superior court*’.<sup>72</sup>

It appears that the decision in *Kirk* might reasonably be taken as authority for the constitutional entrenchment of a state Supreme Court’s contempt jurisdiction. This is because there is other authority for the proposition that the contempt jurisdiction is part and parcel of the supervisory jurisdiction with which *Kirk* was directly concerned. In *Porter v The King; Ex parte Yee*, Isaacs J described the power to deal with contempts as ‘incidental to the function of superintending the administration of justice.’<sup>73</sup> In another case, Dixon CJ, Fullagar, Kitto and Taylor JJ said:

it has been said again and again that the court punishes contempts not in order to protect courts or judges or juries but in order to safeguard and uphold the rights of suitors and ensure that justice be done. So regarded, the power to punish for contempt of inferior courts and the power to issue mandamus or certiorari to inferior courts are seen as in truth but different aspects of the same function — the traditional general supervisory function of the King’s Bench, the function of seeing that justice was administered and not impeded in lower tribunals.<sup>74</sup>

The more difficult issue is the precise scope of the protected contempt jurisdiction. Just as in *Kirk* it was held that the supervisory jurisdiction of a state Supreme Court may be abrogated with respect to non-jurisdictional errors of law appearing on the face of the record, it might also be the case that there is a part of the contempt jurisdiction which may be abrogated by statute. It may be, however, that very little or even none of that jurisdiction can be abrogated. It might be considered that if a state Supreme Court was unable effectively to deal with contempts committed against itself and against the courts below it then those courts would lack the institutional integrity required of ‘courts’ by the *Constitution*,<sup>75</sup> that institutional integrity also being a defining characteristic.

What appears reasonably clear is that a statute cannot operate to prevent a state Supreme Court itself prosecuting a contempt. Justice Hayne has remarked that the ‘interposition of a prosecuting authority...would deny the cardinal feature

<sup>71</sup> Enid Campbell ‘Inferior and Superior Courts and Courts of Record’ (1997) 6 *Journal of Judicial Administration* 249, 251.

<sup>72</sup> *R v Metal Trades Employers’ Association; Ex parte Amalgamated Engineering Union* (1951) 82 CLR 208, 242 (emphasis added).

<sup>73</sup> *Porter v The King; Ex parte Yee* (1926) 37 CLR 432, 443; cited with approval in *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 395, 428.

<sup>74</sup> *John Fairfax & Sons v McRae* (1955) 93 CLR 351, 363.

<sup>75</sup> *International Finance Trust Co v New South Wales Crime Commission* (2009) 240 CLR 319, 338, 355, 363, 368.

of the power to punish for contempt; that it is an exercise of judicial power *by the courts*, to protect the due administration of justice.<sup>76</sup>

Another component of inherent jurisdiction is the supervision and discipline of the legal profession. In *Wentworth v New South Wales Bar Association* it was considered that the

jurisdiction or, more accurately, the power to admit, suspend or strike off is one which, of necessity, attends a court system of the kind with which we are familiar in this country. That power ... [exists] as a matter of necessity in the interests of justice and its administration.<sup>77</sup>

While not necessarily determinative, as a matter of history it is a power that has existed in the Supreme Court of New South Wales since its creation. The *Charter of Justice 1823*<sup>78</sup> both established that Supreme Court and empowered it to admit 'fit and proper persons to appear and act as Barristers, Advocates, Proctors, Attornies and Solicitors ... according to such general rules and qualifications as the said Court shall for that purpose make and establish'.

There is a close relationship between the role of a state Supreme Court in 'seeing that justice [is] administered and not impeded in lower tribunals' as part of its supervisory jurisdiction<sup>79</sup> and its role in supervising the legal profession. The relationship exists since the admission of a person to the legal profession affects 'the future administration of justice in the Supreme Court and also in the other Courts of the State, inferior to that tribunal, and which are themselves powerless in the matter.'<sup>80</sup> Chief Justice Spigelman, in an extra-judicial address, has reflected on the reasons why admission to the legal profession affects the administration of justice in the courts noting that in the 'common law adversary system the profession and the judiciary have a symbiotic relationship. Judges rely on the integrity and competence of practitioners [in order to perform their judicial functions].'<sup>81</sup> This relationship tends to reinforce the suggestion that the supervision of the legal profession is a defining characteristic of a state Supreme Court.

Significantly, all the Chief Justices of Australia have emphasised that 'the independence of the legal profession is a corollary of the independence of the judiciary.'<sup>82</sup> It might, therefore, be argued that the total abrogation of a state Supreme Court's role in supervising the legal profession would tend to so diminish the independence of the legal profession, either in fact or appearance, that the

<sup>76</sup> *Re Colina; Ex parte Torney* (1999) 200 CLR 386, 429 (emphasis in original), see also at 395–7.

<sup>77</sup> *Wentworth v New South Wales Bar Association* (1992) 176 CLR 239, 251 citing *Weaver v Law Society of New South Wales* (1979) 142 CLR 201, 207.

<sup>78</sup> *Charter of Justice 1823* (UK) (18 October 1823), Documenting a Democracy, Museum of Australian Democracy and National Archives of Australia <[www.foundingdocs.gov.au/item.asp?sdID=71](http://www.foundingdocs.gov.au/item.asp?sdID=71)>.

<sup>79</sup> *John Fairfax & Sons v McRae* (1955) 93 CLR 351, 363.

<sup>80</sup> *Incorporated Law Institute of NSW v Meagher* (1909) 9 CLR 655, 679.

<sup>81</sup> Chief Justice James J Spigelman, 'Towards a National Judiciary and Profession' (Speech delivered at Opening of Law Term Dinner Address, Law Society of New South Wales, 1 February 2010) 23 <[www.lawlink.nsw.gov.au/lawlink/Supreme\\_Court/ll\\_sc.nsf/vwFiles/spigelman010210.pdf/\\$file/spigelman010210.pdf](http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/vwFiles/spigelman010210.pdf/$file/spigelman010210.pdf)>.

<sup>82</sup> *Ibid* 21–2.

institutional integrity of all the courts in which the legal professionals of that state are entitled to practice, including the Supreme Court and the High Court,<sup>83</sup> would be impermissibly impaired contrary to the *Kable* doctrine. If this is correct, then there is a very good reason to suppose that the supervision of the legal profession is a defining characteristic of a state Supreme Court. Of course, this also suggests that the requirements of *Kable* in respect of state Supreme Courts can be conceived of as defining characteristics.

This is not to suggest that statutory regulation of the legal profession, including in relation to admission and discipline, is not permissible. It is, however, to suggest that there are some limitations on the nature of such regulation. What those limitations are precisely will require determination by the High Court.

## V A State Supreme Court Possesses a General Appellate Jurisdiction

It is also arguable that a general appellate jurisdiction is a defining characteristic of a state Supreme Court. In *Kable*, McHugh J opined:

An essential part of the machinery for implementing [the] supervision [by the High Court] of the Australian legal system and maintaining the unity of the common law is the system of State courts under a Supreme Court with an appeal to the High Court under s 73 of the *Constitution*. The judgment of the High Court in such an appeal is 'final and conclusive'. Without the continued existence of a right of appeal from the Supreme Court of each State to the High Court, it would be difficult, indeed probably impossible, to have the unified system of common law that the *Constitution* intended should govern the people of Australia. Moreover, although it is not necessary to decide the point in the present case, *a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.*<sup>84</sup>

In the second part of the above passage, McHugh J suggests two jurisdictions of a state Supreme Court might be constitutionally entrenched. The first is an appellate jurisdiction and the second is a judicial review jurisdiction. His Honour was proved correct in *Kirk* so far as the judicial review jurisdiction is concerned and there are good reasons to believe that his Honour is also correct with respect to appellate jurisdiction.

One reason McHugh J gives for the entrenchment of these jurisdictions is the maintenance by the High Court of a unified common law in Australia, and he casts this reason in a similar way to the first ground identified above for why there must continue to be state Supreme Courts. While the High Court has a constitutionally entrenched jurisdiction to hear appeals from the state Supreme Courts, much common law work is performed by state courts other than the

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<sup>83</sup> *Judiciary Act 1903* (Cth) s 55B(1)(a).

<sup>84</sup> *Kable* (1996) 189 CLR 51, 114 (emphasis added) (citations omitted).

Supreme Court. If the decisions of those courts could not be the subject of an appeal to the Supreme Court then ultimately those decisions could not ever, unless made in the exercise of federal jurisdiction,<sup>85</sup> end up before the High Court for final consideration. The constitutional scheme identified by McHugh J would thereby be frustrated.

In *Kirk*, South Australia argued that the unity of the common law does not require the potential for all common law matters to reach the High Court.<sup>86</sup> South Australia made two related points. The first was that the decision of the court from which appeals cannot be taken is merely in error and that errors do not imperil the unity of the common law.<sup>87</sup> The second was that the situation is 'the same as two intermediate level appellate courts in two states deciding the same issue differently. There remains but one common law of Australia, but one is wrong.'<sup>88</sup> The argument is not persuasive. It loses any force when it is recognised that appeals can be taken to the High Court from decisions of intermediate appellate courts. It is by this mechanism and its result that the High Court provides an authoritative answer to the disputed issue that it can be known which, if either, of the intermediate appellate courts is correct. South Australia's argument, if accepted, would open the door to the creation of distorted positions and 'islands of jurisprudence',<sup>89</sup> something which the High Court in *Kirk* showed a particular disposition against.<sup>90</sup> Moreover, in *Kable Gummow J* doubted that it would be competent for a state to 'vest the judicial power of the State in bodies from which there could be no ultimate appeal to [the High Court].'<sup>91</sup>

The constitutional intendment that there be a unified common law in Australia therefore demands that a state Supreme Court possess a general appellate jurisdiction so as to provide the channel through which the High Court is able to exercise its constitutional role. That intendment cannot be frustrated by a state statute conferring jurisdiction on an inferior court and immunising its decisions from the possibility of appeal to the state Supreme Court. The unity of the common law requires the existence of an appellate route from inferior state courts to the High Court. Logically, that route can only exist through a general appellate jurisdiction in the state Supreme Courts. Moreover, other than in this way it is

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<sup>85</sup> See *Constitution* s 73(ii).

<sup>86</sup> Transcript of Proceedings: *Kirk v Industrial Court of NSW* [2009] HCATrans 239 (1 October 2009) (M G Hinton QC): 'Can I then take one brief moment to deal with the notion of the development of two common laws if you cannot get to this Court, in effect, from the Industrial Court of New South Wales? In my submission that is to mischaracterise the position.'

<sup>87</sup> *Ibid.*

<sup>88</sup> *Ibid.*

<sup>89</sup> Lacey, above n 1, 667.

<sup>90</sup> Lacey comments:

The decision in *Kirk* favours the proposition that a fundamentally flawed and oppressive construction of a statute must be susceptible to correction by the Supreme Court and, ultimately, by the High Court. At the heart of the Court's decision is a concern with maintaining the rule of law and ensuring that courts and tribunals are kept within the limits of their jurisdiction. An oppressive construction that is insusceptible of correction by a supervisory court is entirely inconsistent with both the rule of law and the tenor and substance of the judgment in *Kirk*.

*Ibid* 666.

<sup>91</sup> *Kable* (1996) 189 CLR 51, 139.

difficult to see how the *integrated* character of the Australian judicial system created by Ch III of the *Constitution* could be maintained. This argument casts doubt on the conventional wisdom that a state Parliament may grant judicial power to an inferior court from which an appeal cannot be taken. But *Kirk* also very much challenged conventional wisdom.

It is also possible for an analogy to be drawn here between the role of the High Court, which is the ‘Federal Supreme Court’, and the state Supreme Courts. Perhaps most significantly, the joint judgment in *Kirk* appears to have described the High Court’s appellate jurisdiction as an incident of its position as the ‘Federal Supreme Court’:

And because, ‘with such exceptions and subject to such regulations as the Parliament prescribes’, s 73 of the *Constitution* gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of [the state Supreme Courts’] supervisory jurisdiction is ultimately subject to the superintendence of this Court as the ‘Federal Supreme Court’...<sup>92</sup>

In *Kirk*, Heydon J remarked that ‘just as this Court sits at the pinnacle of a single integrated system of courts, the Court of Appeal (or, depending on the subject-matter, the Court of Criminal Appeal) sits at the pinnacle of the system of courts in New South Wales.’<sup>93</sup> Sitting at the pinnacle of a single integrated system of courts, the High Court exercises an appellate jurisdiction, including over other federal courts.<sup>94</sup> If that appellate jurisdiction is seen as a feature or characteristic of the High Court’s position as the Federal Supreme Court rather than merely as a product of s 73 of the *Constitution*, then it might be argued that it is a feature of a state Supreme Court that it possess an analogous appellate jurisdiction. That is, it might be said that possession of a general appellate jurisdiction is a core feature of a ‘Supreme Court’, whether that court be state or federal.

Another reason for the existence of an entrenched appellate jurisdiction in a state Supreme Court appears from the cases. In *Forge*, the High Court was concerned with the question whether the impartiality of a state Supreme Court was impermissibly impaired by the appointment of acting judges. The High Court held that impartiality was an essential feature of a court capable of exercising the judicial power of the Commonwealth and considered that impartiality could be achieved by a variety of means.<sup>95</sup> Gummow, Hayne and Crennan JJ said:

The independence and impartiality of inferior courts, particularly the courts of summary jurisdiction, was for many years sought to be achieved and enforced chiefly by the availability and application of the Supreme Court’s supervisory and appellate jurisdictions and the application of the apprehension of bias principle in particular cases.<sup>96</sup>

That passage seems to take as given that a state Supreme Court possesses both supervisory and appellate jurisdictions. However, their Honours’ point was

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<sup>92</sup> *Kirk* (2010) 239 CLR 531, 581.

<sup>93</sup> *Ibid* 589.

<sup>94</sup> *Constitution* s 73(ii).

<sup>95</sup> *Forge* (2006) 228 CLR 45, 76–7, 82.

<sup>96</sup> *Ibid* 82–3.



that the possession of an appellate jurisdiction along with a judicial review jurisdiction by a state Supreme Court allows for judicial appointments in the inferior courts to be on terms rather less than those prescribed for federal judges by s 72 of the *Constitution* or by the *Act of Settlement*, with which appointments to the state Supreme Courts are broadly consistent.<sup>97</sup> This thereby ensures that such courts remain 'courts'<sup>98</sup> and thus fit for the exercise of the judicial power of the Commonwealth. It should be plain that this reason is less compelling than the reason relating the maintenance of a unified common law in Australia. This is because the nature of judicial appointments to inferior courts has changed over the years such the terms of those appointments broadly resemble those prescribed for the state Supreme Courts.<sup>99</sup> However, an entrenched appellate jurisdiction in a state Supreme Court allows a state Parliament considerable flexibility should it wish to reorganise its system of inferior courts and the terms on which their judges hold office. Such an ability to organise inferior courts and the terms on which their judges hold office might well be a defining characteristic of a state.

One possible argument against the existence of an entrenched appellate jurisdiction is that the decision in *Kirk* held that it was constitutionally possible for a state Supreme Court's judicial review jurisdiction to be validly excluded so far as non-judicial error of law on the face of the record was concerned. Like that ground of judicial review, appeals are also concerned with non-judicial errors. If it is possible to exclude judicial review for non-judicial errors of law then why, it might be asked, should it not be equally possible to exclude appeals which by their nature involve non-judicial errors? The answer is that there is a major conceptual difference between a judicial review action and an appeal. Apart from the obvious distinction between each occurring respectively in the court's original and appellate jurisdictions, a successful judicial review action results, ordinarily, in the quashing of the decision impugned since it is in law no decision at all.<sup>100</sup> On the other hand, a successful appeal does not result in the quashing of any decision but rather in the correcting of that decision.<sup>101</sup> The distinction is between quashing a decision, which in law does not exist since it was made outside of the decision-maker's jurisdiction, and altering a valid decision made within jurisdiction to ensure that it is correct. This distinction is consonant with the authority of a court to make a wrong decision.<sup>102</sup> If a court has authority or jurisdiction to make a wrong decision, there can be no necessity in ensuring the availability of a mechanism by which it can be quashed. Thus, that an avenue for quashing a wrong decision need not exist says nothing as to whether an avenue for correcting such a decision need exist. A general appellate jurisdiction serves a different purpose to that served by a judicial review jurisdiction.

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<sup>97</sup> Ibid 79–80.

<sup>98</sup> Ibid 83.

<sup>99</sup> Ibid 82.

<sup>100</sup> *Minister for Immigration and Multicultural Affairs v Bhardwaj* (2002) 209 CLR 597, 614–15, 618, 646–7; *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 506; *Kirk* (2010) 239 CLR 531, 583.

<sup>101</sup> *Keramanakis* (2009) 237 CLR 268, 282; *Craig v South Australia* (1995) 184 CLR 163, 180; *Quilter v Mapleson* (1882) 9 QBD 672, 676.

<sup>102</sup> *Craig v South Australia* (1995) 184 CLR 163, 179.

It would therefore appear that there are persuasive constitutional reasons to suppose that a state Supreme Court possesses a constitutionally-entrenched general appellate jurisdiction. It follows therefore that in considering the meaning of the constitutional expression ‘Supreme Court of a State’, ‘the superior courts of record at Westminster can supply only a limited analogy [since] [t]hose courts did not exercise appellate jurisdiction as that term is now understood’.<sup>103</sup> Thus, despite what the English position might be, it is not correct to say in the Australian constitutional context that all appeals are statutory in origin<sup>104</sup> and that therefore any constitutional invalidity would have to attach to an attempt to confer jurisdiction without some right of appeal to a state Supreme Court.<sup>105</sup> As Gummow J has remarked, ‘the *Constitution* by its own force [has] imposed significant changes.’<sup>106</sup> Any constitutional invalidity attaches to a legislative attempt to impermissibly take away from the pre-existing appellate jurisdiction.<sup>107</sup>

The key question, then, is the nature of the constitutionally entrenched appellate jurisdiction and the extent to which it might be regulated or abrogated by statute. It is consistent with the position of the High Court to suppose that the nature of an appeal in the entrenched appellate jurisdiction of a state Supreme Court does not extend to an appeal by way of rehearing.<sup>108</sup> Of course, unlike with the High Court with respect to which the *Constitution* expressly draws a distinction between original and appellate jurisdiction, there could be no constitutional objection to a state Parliament *expanding* its Supreme Court’s appellate jurisdiction to allow it to determine an appeal by way of rehearing. Likewise, and again consistent with the High Court’s appellate jurisdiction, there could be no constitutional objection to a state Parliament requiring, for example, that an appeal from a decision of a magistrate be determined in the first instance by a District or County Court or that an appeal from a decision of a single judge of a specialist court be determined in the first instance by a full bench of that court, provided that an appeal lay to the Supreme Court from those decisions.<sup>109</sup>

Ultimately, ch III of the *Constitution* requires that all appellate roads lead to the High Court. It follows that the gateways to that destination from inferior state courts, the state Supreme Courts, cannot be closed. To adapt the opening words of the passage from McHugh J’s judgment in *Kable* extracted above, an essential part of the machinery for implementing the supervision of a state’s legal system and the unity of the common law is a system of state courts with an appeal to the state

<sup>103</sup> *DJL v The Central Authority* (2006) 201 CLR 226, 245.

<sup>104</sup> See, eg, *Builders Licensing Board v Sperway Constructions (Sydney)* (1976) 135 CLR 616, 619 (Mason J).

<sup>105</sup> See, eg, *Mitchforce v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 255 (Handley JA). See also the argument of South Australia in *Kirk* (2010) 239 CLR 531, 545: ‘For the *Constitution* to require there to be a right of appeal to the State Supreme Court from a decision of an inferior court would impose a positive obligation on a State to enact particular legislation’.

<sup>106</sup> *Gould v Brown* (1998) 193 CLR 346, 444.

<sup>107</sup> It is worth noting the words of McHugh J in *Kable* (1996) 189 CLR 51, 114 referring to ‘a State law that prevented a right of appeal to the Supreme Court’.

<sup>108</sup> *Victorian Stevedoring and General Contracting Co v Dignan* (1931) 46 CLR 73., 109–11, 112–13; *Builders Licensing Board v Sperway Constructions (Sydney)* (1976) 135 CLR 616, 619; *Quilter v Mapleson* (1882) 9 QBD 672, 676.

<sup>109</sup> See, eg, *Ah Yick v Lehmert* (1905) 2 CLR 593; *Cockle v Isaksen* (1957) 99 CLR 155.

Supreme Court.<sup>110</sup> However, it does not follow that a detour via another court cannot be imposed. Moreover, it is likely the case that the entrenched appellate jurisdiction of a state Supreme Court is of its nature discretionary requiring leave of the court. This would be consistent with the position of the High Court<sup>111</sup> and does not run contrary to the rationale for the existence of an entrenched appellate jurisdiction.

However, while an appeal lies to the High Court from all exercises of federal judicial power<sup>112</sup> it is unlikely that a state Supreme Court's entrenched appellate jurisdiction would encompass the ability to hear and determine an appeal from every possible exercise of state judicial power. This is because it is constitutionally permissible for a state Parliament itself to exercise state judicial power.<sup>113</sup> It would be going too far for a state Supreme Court to be considered competent to hear an appeal against a decision of Parliament, which would involve a determination as to the correctness of Parliament's decision, as opposed to a judicial review action to determine the validity of what Parliament has done. Other than this complicating factor, no other reason is immediately apparent why a state Supreme Court should not be able to hear and determine an appeal from all other exercises of state judicial power, whether those exercises be by a court or other body. Of course, any real answer to this difficult question requires proper consideration by the High Court.

## VI A State Supreme Court is a Single Institution Located at the Apex of the State Judicial Hierarchy

Thus far this article has considered the jurisdictions possessed by a state Supreme Court. A more fundamental issue is identifying that which is the Supreme Court of a State. In 1905, the High Court heard an argument that the Supreme Court of a State was not necessarily the state court which bore the name 'Supreme Court'. That argument was rejected. The High Court held that 'we cannot entertain any doubt that the term "Supreme Court" is used in the *Constitution* to designate the Courts which at the time of the establishment of the Commonwealth were known by that name.'<sup>114</sup> This position seems obvious enough.

There is, however, a comment by Mason J, in obiter, in which his Honour envisages that the Supreme Court of a State might not be a single institution. His Honour commented that in certain circumstances following a radical restructuring of a state's judiciary 'courts will be found in the particular State to answer the

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<sup>110</sup> Echoes can be heard here of the second basis posited above — about the defining characteristics of a state — for the continued existence of state Supreme Courts as Supreme Courts.

<sup>111</sup> See, eg, *Ah Yick v Lehmert* (1905) 2 CLR 593; *Cockle v Isaksen* (1957) 99 CLR 155.

<sup>112</sup> *Constitution*, s 73.

<sup>113</sup> *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372, 381 where Street CJ recognises that 'the New South Wales Parliament has judicial power'. See also *Kable* (1996) 189 CLR 51; *Clyne v East* (1967) 68 SR (NSW) 385.

<sup>114</sup> *Parkin v James* (1905) 2 CLR 315, 330. See also, *Kotsis v Kotsis* (1970) 122 CLR 69, 76.

constitutional description [‘Supreme Court of a State’].<sup>115</sup> This idea has been raised in argument by litigants on a number of subsequent occasions, suggesting, for instance, that the New South Wales Industrial Relations Commission in Court Session (now Industrial Court) could be considered to be part of the Supreme Court of that State, but has never been accepted.<sup>116</sup>

Chief Justice Spigelman has identified a number of difficulties with the idea that a state Supreme Court might be constituted by a number of different courts.<sup>117</sup> The first difficulty is that the *Constitution* uses the definite article in s 73(ii), ‘the Supreme Court of a State’. The constitutional language suggests a state Supreme Court to be a single institution. The second is that expressions such as ‘any Court of a State’ in s 77(iii) indicate that where the framers of the *Constitution* were intending to refer to more than one court they did so explicitly. The third is that the description of the High Court as the ‘Federal Supreme Court’ suggests that the notion of a ‘Supreme Court’ refers to a single institution; there being only one for each of the constitutional polities created by the *Constitution*. The final difficulty identified by Spigelman CJ is that the words ‘any other Court ... from which an appeal lies to the Queen in Council’ in s 73(ii) would have been unnecessary since such a court would be within the description ‘Supreme Court of a State’.

The idea that a state Supreme Court is anything but a single institution is inconsistent with the reasoning of the High Court in *Kirk*. The starting point for the decision in *Kirk* is that ‘Chapter III of the *Constitution* requires that there be a *body* fitting the description “the Supreme Court of a State”.’<sup>118</sup> That proposition evinces a clear view that a state Supreme Court is a single institution. A second premise for the decision in *Kirk* is that ‘[i]t is beyond the legislative power of a state to so alter the constitution or character of its Supreme Court that it ceases to meet the constitutional description.’<sup>119</sup> Since the colonial Supreme Courts, themselves single institutions, became at Federation the state Supreme Courts it appears to follow that were a state Supreme Court to be anything but a single institution its constitution and character would have been so radically altered that it ceases to meet the constitutional description. This conclusion follows, since the decision in *Kirk* suggests that the features of the colonial Supreme Courts are of importance in understanding the constitutional expression ‘Supreme Court of a State’.

Moreover, the character of the state Supreme Courts is informed by the constitutional reasons requiring that they continue to exist. One of those reasons, discussed above, is that the continued existence of the states as states requires that they each possess a court of general jurisdiction, being the Supreme Court. One of the roles of such a court is the superintendence of the limits of state judicial and executive power. It would be inconsistent with that characteristic for a state Supreme Court to be anything other than a single institution. Thus in *Kirk*, the amenability of the Industrial Court to the supervisory jurisdiction of the Supreme

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<sup>115</sup> *Commonwealth v Hospital Contribution Fund* (1980) 150 CLR 49, 63.

<sup>116</sup> See, eg, *Mitchforce v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 238; *Kirk* (2010) 239 CLR 531, 536.

<sup>117</sup> *Mitchforce v Industrial Relations Commission of New South Wales* (2003) 57 NSWLR 212, 239.

<sup>118</sup> *Kirk* (2010) 239 CLR 531, 566, 580 (emphasis added).

<sup>119</sup> *Ibid* 566, 580 (citations omitted).

Court was a corollary of the Industrial Court being a court of limited jurisdiction and 'the position which the state Supreme Court has in the constitutional structure.'<sup>120</sup> It is only because a state Supreme Court is located at 'the pinnacle' of the system of state courts<sup>121</sup> that it can properly exercise its role of confining other courts and decision-makers within the limits of their jurisdiction.<sup>122</sup> Similarly, the High Court is able to exercise its role as the federal Supreme Court from its position at 'the pinnacle'<sup>123</sup> of the judicial hierarchy. It follows that to Spigelman CJ's list of difficulties may be added the proposition that it is a defining characteristic of a state Supreme Court that it be a single institution located at the apex of the state judicial hierarchy. For this reason, the scenario posited by Mason J, and which prompted his suggestion, could not ever occur since no matter how radical a restructure of a state's judiciary might be that restructure could not touch the existence of the Supreme Court or alter its defining characteristics, which include its singular character.

It also follows from this discussion that in those states where there exist Courts of Appeal and Courts of Criminal Appeal that those designations are mere styling of the Supreme Court when exercising its appellate jurisdiction.<sup>124</sup>

## VII Conclusion

A Victorian parliamentary committee once asked 'what is the point of guaranteeing a court independence, without guaranteeing it a jurisdiction within which that independence is to be exercised?'<sup>125</sup> The answer is that there is no point. The *Constitution*, and in particular ch III, is not pointless. It guarantees the independence of the state Supreme Courts through the *Kable* doctrine and, as shown by the decision in *Kirk* and the further discussion in this article, also guarantees a number of jurisdictions of those courts.

*Kirk* makes it clear that ch III of the *Constitution* preserves the existence of the state Supreme Courts *as Supreme Courts* and not merely as institutions whose features are at the discretion of state Parliaments. It is a 'defining characteristic' of those courts that they continue to possess and be able to exercise a supervisory review jurisdiction in order to confine inferior courts and other decision-makers within the limits of their jurisdiction. This article has launched into the speculative task of considering what other constitutionally-protected 'defining characteristics' might be possessed by state Supreme Courts. The question 'what is a "Supreme Court of a State"?', and its relative 'what is a "Supreme Court"?', is one that will occupy commentators and courts alike for some time to come.

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<sup>120</sup> Ibid 583.

<sup>121</sup> Ibid 589 (Heydon J).

<sup>122</sup> Ibid 580–1.

<sup>123</sup> Ibid 589 (Heydon J).

<sup>124</sup> See *Byrnes v The Queen* (1999) 199 CLR 1, 12–13.

<sup>125</sup> Victoria, Legal and Constitutional Committee (1990) *Report to Parliament on the Constitution Act 1975*, 16.

