

‘Defining Characteristics’ and the Forgotten ‘Court’

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Abstract

This article outlines the High Court of Australia’s development of limitations on state legislative power to affect state courts and, in particular, the Court’s acceptance of the concept of ‘defining characteristics’ of a ‘court’ as a touchstone for constitutional validity. It then traces the history of one particular unusual colonial court, the Court of Appeals for the Province of South Australia, and discusses the impact of that court’s existence on the terms of ch III of the *Australian Constitution*. The characteristics of the historical Court of Appeals are contrasted with the modern idealised constitutional conception of a ‘court’. The article concludes with a critique of the failure of the ‘defining characteristics’ approach adequately to explain or to take into account the historical existence of the Court of Appeals, and identifies some ways in which it might be more satisfactorily accommodated within, and might influence, ch III jurisprudence.

I Introduction

Modern conceptions of a ‘court’ in the Australian constitutional context embrace the idea of an institution that is independent of the executive government and, in particular, beyond the control of the political executive. But for a century, from 1837 until 1937, there existed in South Australia a ‘court’ that defied those basic assumptions about the nature of such institutions. The Court of Appeals for the Province of South Australia (‘the Court of Appeals’) served as a final court of appeal for the colony of South Australia. Its membership comprised the members of the Executive Council, excluding the law officers of the state. The Court of Appeals was referred to in the Australasian Federal Convention debates and, perhaps surprisingly, the perceived need to accommodate its unique position in the South Australian judicial hierarchy actually helped to shape the provisions of ch III of the *Australian Constitution*. This article traces the history of the Court of Appeals and its influence on the drafting the *Constitution*, and reflects upon recent developments in Australian constitutional law in the light of that history. The article concludes by suggesting that the plausibility of the High Court’s ch III jurisprudence is diminished by its failure adequately to grapple with the historical reality of the Court of Appeals.

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II ‘Defining Characteristics’

A *Development of the ‘Defining Characteristics’ Jurisprudence*

In *Kable v Director of Public Prosecutions (NSW)*,¹ it was held that functions could not be conferred upon the Supreme Court of a state that were ‘incompatible’ with its being part of the integrated Australian judicial system: an independent and impartial tribunal capable of exercising ‘the judicial power of the Commonwealth’.² In later cases, these characteristics (and others not exhaustively identified) were grouped together and identified as aspects of courts’ ‘institutional integrity’.³

In *Bradley and Forge*, it was recognised that the *Kable* principle not only precluded state parliaments conferring incompatible *functions* on state courts: it also limited state legislative power with respect to the *constitution and composition* of state courts. In *Forge*, three Justices of the High Court of Australia said of the principle: ‘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’.⁴

In the same case, it was said that it was ‘neither possible nor profitable to attempt to make some single all-embracing statement of the defining characteristics of a court’.⁵ It was expressly acknowledged that those ‘constitutionally recognised and required’ courts — the supreme courts of the states — may have further ‘defining characteristics’ in addition to the ‘defining characteristics’ of state courts generally.⁶ The *Kable* principle was thus given a stronger textual foundation and was identified as flowing from the inherent meaning of particular expressions used in ch III of the *Australian Constitution*, namely ‘court of a State’ and ‘the Supreme Court of any State’.⁷ Maintenance of the ‘institutional integrity’ of a state court appears closely related to, if not synonymous with, maintenance of the ‘defining characteristics’ of such a court.⁸ Interestingly, the focus upon the constitutional expression ‘court’ and the consequent requirement that courts retain their ‘defining characteristics’ echoes an

¹ (1996) 189 CLR 51 (*‘Kable’*).

² *Ibid* 116–18 (McHugh J). See, eg, *Fardon v A-G (Qld)* (2004) 223 CLR 575, 601 [42] (McHugh J), 621 [116] (Gummow J), 656 [219] (Callinan and Heydon JJ); *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) (*‘Bradley’*).

³ See, eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 77 [66] (Gummow, Hayne and Crennan JJ) (*‘Forge’*); *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) (*‘Wainohu’*); *South Australia v Totani* (2010) 242 CLR 1, 47 [69] (French CJ) (*‘Totani’*); *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 103 [169] (Hayne, Crennan, Kiefel and Bell JJ) (*‘Pompano’*).
⁴ (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ).

⁵ *Ibid* 76 [64].

⁶ *Ibid* 83 [85].

⁷ *Ibid* 67–8 [41], 69 [46] (Gleeson CJ), 74–6 [58]–[63] (Gummow, Hayne and Crennan JJ), 122 [195] (Kirby J). See also Edward Fearis, ‘Kirk’s New Mission: Upholding the Rule of Law at the State Level’ (2012) 3 *Western Australian Jurist* 61, 90–1.

⁸ *Wainohu* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J).

aspect of the reasoning of Dawson J, one of the dissentients, in *Kable*, who said that 'State courts are not created by or under Ch III and, *provided they are courts within the meaning of s 77(iii)*, it matters not for the purposes of Ch III what functions they perform in exercising the jurisdiction vested in them by State legislation'.⁹ Evidently Dawson J would have given less substantive content to the constitutional conception of a 'court'.

In *Kirk v Industrial Court (NSW)*,¹⁰ the *Kable* principle was further extended. The High Court held that the power to enforce the limits on the statutory authority of other state courts was a 'defining characteristic' of state 'Supreme Courts', so that state parliaments could not validly enact a privative clause that would preclude review, by a state Supreme Court, for 'jurisdictional error'.¹¹

In *Kirk*, the High Court looked to history in order to identify the 'defining characteristics' of a state Supreme Court. Without acknowledging contrary authority to which it had been explicitly directed,¹² the Court held that 'accepted doctrine at the time of federation was that the jurisdiction of the colonial supreme courts to grant certiorari for jurisdictional error was not denied by a statutory privative provision'.¹³ Without further analysis, it was asserted that the supervisory role of state supreme courts 'was, and is, a defining characteristic of those courts'.¹⁴ The 'defining characteristics' (or, sometimes, 'essential characteristics'¹⁵) approach, although not explicitly referred to in every case to which it might be thought applicable, has now been applied in several cases.¹⁶ In *Totani*, French CJ said that:

Ch III of the *Constitution* rests upon assumptions about the continuing existence and essential characteristics of State courts as part of a national

⁹ (1996) 189 CLR 51, 83 (emphasis added).

¹⁰ (2010) 239 CLR 531 (*Kirk*).

¹¹ *Ibid* 566 [55], 580–1 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing).

¹² *In re Biel* (1892) 18 VLR 456. See *Kirk* (2010) 239 CLR 531, 543 (S J Gageler SC) (during argument), 548 (S G E McLeish SC) (during argument). The High Court's omission to address the case has not gone unnoticed by commentators: see Nicholas Gouliaditis, 'Privative Clauses: Epic Fail' (2010) 34(3) *Melbourne University Law Review* 870, 878–9; Brendan Lim, 'Attributes and Attribution of State Courts — Federalism and the Kable Principle' (2012) 40(1) *Federal Law Review* 31, 49; Oscar I Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35(4) *Sydney Law Review* 781, 791–2; Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40(1) *Monash University Law Review* 75, 96–7.

¹³ *Kirk* (2010) 239 CLR 531, 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing), citing *Colonial Bank of Australasia v Willan* (1874) LR 5 PC 417, 442.

¹⁴ *Kirk* (2010) 239 CLR 531, 581 [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing).

¹⁵ See, eg, *Totani* (2010) 242 CLR 1, 37 [47] (French CJ); *Pompano* (2013) 252 CLR 38, 47 [4]–[6], 63 [45]–[46], 71–2 [67]–[68] (French CJ).

¹⁶ *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532, 577 [102]–[103] (Kirby J dissenting); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 530 [89] (French CJ), 559 [204], 571 [253] (Kirby J); *Kirk* (2010) 239 CLR 531, 566 [55] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ, Heydon J agreeing); *Totani* (2010) 242 CLR 1, 30 [31], 43 [62], 44–5 [64]–[65], 48 [70] (French CJ), 157 [428] (Crennan and Bell JJ), 162 [443] (Kiefel J); *Wainohu* (2011) 243 CLR 181, 192 [7], 208–9 [44], 213–15 [54]–[59] (French CJ and Kiefel J); *Pompano* (2013) 252 CLR 38, 47 [4]–[6], 71–2 [67]–[68] (French CJ), 88 [119], 89 [125] (Hayne, Crennan, Kiefel and Bell JJ); *A-G (NT) v Emmerson* (2014) 253 CLR 393, 426 [44] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

judicial system and the implications that this Court has drawn from those assumptions. The assumptions are *historical realities* and not the product of judicial implication.¹⁷

B *A Functional Approach to Identifying 'Defining Characteristics'*

Although it seems clear that the 'defining characteristics' of state courts, and state supreme courts, are to be informed by a consideration of the characteristics of such courts around the time when the *Australian Constitution* was being debated, adopted and enacted, the High Court is yet to attempt any serious explanation as to why certain characteristics and not others are to be regarded as 'defining' or 'essential', to be entrenched in the very constitutional notion of 'courts', while other characteristics generally or universally shared by colonial courts plainly are not.

No doubt characteristics that serve a 'systemic end'¹⁸ and that are seen as playing a functional or structural role in the integrated Australian judiciary — particularly those characteristics of state courts that may rationally be thought to have informed their selection as potential recipients of 'the judicial power of the Commonwealth' — are strong candidates for constitutional entrenchment.¹⁹ As Gageler J has pointed out, the foundation for the implication concerning minimum standards for state courts is 'essentially structural and functional'.²⁰

C *'Federal Jurisdiction': A Distraction in this Context*

To date, attempts to ground the *Kable* doctrine in structural and functional considerations have tended to commence from the proposition that, because the Australian Parliament may invest state courts with 'federal jurisdiction',²¹ such courts must remain 'fit receptacles for the investing of federal jurisdiction'²² and thus a state court cannot be given functions 'incompatible with that court's role as a repository of federal jurisdiction'.²³ This focus upon the technical concept of 'federal jurisdiction', rather than the functional role played by institutions exercising the judicial power in a federation, is regrettable.

Concentrating on the exercise of (or capacity of courts to be invested with) 'federal jurisdiction' seems inapt when it is recalled that federal jurisdiction merely means 'authority to adjudicate derived from the Commonwealth *Constitution* and

¹⁷ (2010) 242 CLR 1, 37 [47] (emphasis added).

¹⁸ *TCL Air Conditioner (Zhongshan) Co Ltd v Federal Court of Australia* (2013) 251 CLR 533, 557 [39] (French CJ and Gageler J).

¹⁹ See also Rosalind Dixon, 'The Functional Constitution: Re-Reading the 2014 High Court Constitutional Term' (2015) 43(3) *Federal Law Review* 455, 472–6; Fiona Wheeler, 'Constitutional Limits on Extra-Judicial Activity by State Judges: *Wainohu* and Conundrums of Incompatibility' (2015) 37(3) *Sydney Law Review* 301, 303–5. In relation to the 'essential features' of trial by jury, cf *Ng v The Queen* (2003) 217 CLR 521, 526 [9] (Gleeson CJ, Gummow, Hayne, Callinan and Heydon JJ).

²⁰ *Pompano* (2013) 252 CLR 38, 106 [183].

²¹ *Australian Constitution* s 77(iii).

²² *Forge* (2006) 228 CLR 45, 82 [82] (Gummow, Hayne and Crennan JJ).

²³ *A-G (NT) v Emmerson* (2014) 253 CLR 393, 424 [40] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ).

laws',²⁴ and that the *Constitution* allows that state courts may potentially exercise jurisdiction in at least some 'federal' disputes (that is, in disputes of the kinds identified in ss 75 and 76 of the *Constitution*), exercising jurisdiction conferred upon them by state legislation.²⁵ To ask whether a function is 'compatible' with the exercise of federal jurisdiction appears to assume that there are special requirements that apply only to courts that do or may exercise jurisdiction conferred by the *Constitution* or a law of the Commonwealth. But surely it is considerations relating to the nature of the substantive function of adjudication for the Federation, and not merely the *source of the jurisdiction*, upon which the *Kable* principle must ultimately rest?

While it is true that the *Constitution* does speak of investing 'federal jurisdiction' in state courts, the real point from a *functional* perspective is that there are certain minimum requirements that should be preserved in any court that is to serve as a component of a judiciary charged with the judicial resolution of controversies that may involve conflicts between the states, the Commonwealth and other litigants. That is, it is the substantive function of judicially resolving disputes in the Federation, between politics and between politics and subjects, that best justifies the imposition of minimum standards for state, as well as federal, courts — irrespective of the source of their jurisdiction.²⁶ The point is not that functional considerations should be eschewed, but rather that the concept of 'federal jurisdiction' itself has limited functional utility.²⁷

In discussion of the *Kable* principle, the concept of 'federal jurisdiction' is commonly conflated with the functional role of courts exercising judicial power in the Federation. Discussion often proceeds on the assumption that the mere invocation of the concept of 'federal jurisdiction' is adequate to explain why certain courts must meet minimum constitutional requirements of 'institutional

²⁴ *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, 1142 (Isaacs J). See also *Lorenzo v Carey* (1921) 29 CLR 243, 252; *Lipohar v The Queen* (1999) 200 CLR 485, 516–17 [78] (Gaudron, Gummow and Hayne JJ); *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2001) 204 CLR 559, 570 [3] (Gleeson CJ, Gaudron and Gummow JJ); *Solomons v District Court (NSW)* (2002) 211 CLR 119, 144 [53] (McHugh J).

²⁵ Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 3rd ed, 2002) 196–8. State courts did in fact exercise non-federal jurisdiction in respect of 'federal' matters prior to the enactment of the *Judiciary Act 1903* (Cth): see, eg, *R v Bamford* (1901) 1 SR (NSW) 337; *A-G (NSW) v Collector of Customs (NSW)* (1903) 3 SR (NSW) 115; *Henningsen v Williams* (1901) 27 VLR 374; *McNamara v Miller* (1902) 28 VLR 327; *Re Income Tax Acts (No 4)*; *Wollaston's Case* (1902) 28 VLR 357; *Miller v The King* (1903) 28 VLR 530; *Adcock v Aarons* (1903) 5 WALR 140; *D & W Murray & Co Ltd v Collector of Customs* (1903) 6 WALR 50; *Pedder v D'Emden* (1903) 11 TLR 146; cf *Kingston v Gadd* (1901) 27 VLR 417, 422 (Irvine and Cussen) (during argument). That the state courts do not in fact exercise any residual non-federal jurisdiction over such matters is a product of ss 38, 39, 56 and 58 of the *Judiciary Act 1903* (Cth) and the operation of s 109 of the *Australian Constitution*: see *Frost v Stevenson* (1937) 58 CLR 528, 573 (Dixon J); *Felton v Mulligan* (1971) 124 CLR 367, 412–13 (Walsh J, Barwick CJ agreeing); Zines, *Federal Jurisdiction in Australia*, 236–8.

²⁶ That is, the *Kable* doctrine may be better justified as what Goldsworthy (perhaps unkindly) calls a 'spurious implication', rather than as a textual implication or as the asserted meaning of the very expressions 'court of a State' and 'the Supreme Court of any State': see Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 20ff.

²⁷ Cf *Totani* (2010) 242 CLR 1, 123 [323] (Heydon J dissenting) (emphasis in original): 'And how is the court's integrity as a repository of *federal* (as distinct from non-federal) jurisdiction affected?'

integrity': thus it is said that, *because they may exercise federal jurisdiction*, state, territory and federal courts must be 'fit receptacles' for such jurisdiction. But, when properly understood as merely identifying the *source* of the power to decide, the concept of federal jurisdiction actually lacks the explanatory power that is commonly assumed for it. It is suggested that clarity of thought will be promoted by avoiding reference to 'federal jurisdiction' in this area of discourse.

The court structure established by ch III, and in particular the establishment of an independent federal judicature, can be seen as a textual and structural indication of a broader constitutional assumption concerning the essentiality of independence and impartiality in the exercise of judicial power in the Federation. It is therefore suggested that if any importance is to be attached to the power of the Australian Parliament to invest state courts with 'federal jurisdiction', it is better seen not as the primary foundation for a requirement of state court integrity but as a textual reinforcement of the functional role of state courts in administering the whole body of Australian law, comprising the *Australian Constitution*, federal and state law, and the common law. That functional role is partially reflected in covering cl 5 of the *Constitution* insofar as it provides that the *Constitution* and laws of the Australian Parliament shall be binding on all courts and judges of every state and of every part of the Commonwealth of Australia.

The very barrenness of the concept of 'federal jurisdiction', when it comes to identifying the content of the minimum institutional requirements of Australian courts, may have stimulated the development of a parallel jurisprudence based upon identifying the 'essential characteristics' or 'defining characteristics' of state courts. It is ironic that it is by an ostensibly *textual* method — identifying the meaning or content of expressions such as 'court of a State' in ch III of the *Constitution* — that the High Court has sought to give effect to a policy that arises principally from structural and functional considerations.

The 'defining characteristics' approach appears to rest on the notion that 'constitutional expressions'²⁸ such as 'court of a State' and 'the Supreme Court of any State' are to be given substantive content, and that that content is to be derived, at least in part, from a consideration of the characteristics of the institutions to which those expressions referred at the time when the *Constitution* was debated, adopted and enacted.²⁹

If that is so, it is suggested that, logically, one might expect to gain some insight into the defining characteristics of state courts — or alternatively, a basis on which to critique the High Court's 'defining characteristics' jurisprudence — by considering which particular colonial institutions must have been understood to be encompassed by constitutional expressions such as 'court of a State', and by examining the nature and characteristics of those institutions.

²⁸ *Kable* (1996) 189 CLR 51, 141–2 (Gummow J).

²⁹ See, eg, *Kirk* (2010) 239 CLR 531, 580–1 [97]–[98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ); *Totani* (2010) 242 CLR 1, 41–5 [59]–[66], 49 [72] (French CJ). See also *Cheatle v The Queen* (1993) 177 CLR 541, 552.

III Historical Reality: The Court of Appeals for the Province of South Australia

The next two parts of this article focus upon one unusual, although not quite unique,³⁰ court that existed at Federation: the South Australian Court of Appeals — sometimes referred to as the Local Court of Appeals. It should be accepted immediately that the Court of Appeals was not by any means a typical Australasian colonial court. Nevertheless, as is shown in the next part of this article, the drafting history of the *Australian Constitution* demonstrates that it was manifestly contemplated that the Court of Appeals was a 'court of a State' within the meaning of that expression in ch III of the *Constitution*.³¹

The Supreme Court of South Australia was established in 1837 by Ordinance: namely, the *Supreme Court Act 1837* (SA).³² The Court was originally constituted of a single judge, Sir John Jeffcott, whose appointment by letters patent predated the establishment of the Supreme Court itself. In addition to establishing the Supreme Court, s XVI of the same Ordinance provided:

That the Governor for the time being and the Council of the said Province (with the exception of the Advocate-General and Crown Solicitor) shall constitute a Court to be called the Court of Appeals of the Province of South Australia which Court shall have power and authority to receive and hear appeals from the judgments decrees orders and sentences of the said Supreme Court in whole or in part in all cases where the sum or matter in issue shall amount to one hundred pounds and shall or may affirm alter or reverse the said judgments decrees orders or sentences in whole or in part or dismiss the said appeal with costs as may be just: Provided also that upon every appeal to be brought before the said Court of Appeals from any judgment of the Supreme Court founded upon the verdict of a jury of twelve men the said Court of Appeals shall not reverse alter or inquire into the said judgments except only for error of law apparent upon the record.

In short, the Court of Appeals was established to hear appeals from decisions of the Supreme Court, but was to be comprised of members of the executive government of the colony and presided over by the Governor. In almost all cases, its members were not legally trained. Such appeals might involve questions concerning the validity and interpretation of legislation implementing the policies of the executive government.

³⁰ A similar court of appeal for New South Wales and Van Diemen's Land, consisting of the Governor of New South Wales, was established by the *New South Wales Act 1823* (Imp) 4 Geo 4, c 96, but was abolished by the *Australian Courts Act 1828* (Imp) 9 Geo 4, c 83. The model of a Court of Appeals constituted by the Governor and his Council was one that had much earlier been 'set up in most of the American colonies': *Skewes v Veenhuizen* (1978) 20 SASR 109, 126 (Hogarth ACJ, Zelling and Legoe JJ); *Gilbertson v South Australia* (1976) 15 SASR 66, 111 (Zelling J). See also R M Hague, *Hague's History of the Law in South Australia 1837–1867* (University of Adelaide Barr Smith Press, 2005) vol 2, 605–6.

³¹ See below Pt IV.

³² 7 Wm 4, No 5.

On policy grounds, the appropriateness of the Court of Appeals was questioned from the very beginning. The first³³ attempt to invoke to the jurisdiction of the court, in 1841, involved an appeal by the collector of customs. The editors of the *South Australian Register* asserted in strong terms the impropriety of the Crown's effectively sitting in judgment on its own case and ridiculed the concept of a court composed of non-lawyers hearing an appeal on a point of law from the decision of a judge.³⁴ The local press would regularly criticise the composition of the court.³⁵ The Imperial Secretary of State for the Colonies favoured its abolition.³⁶ From time to time, even the members of the Court of Appeals itself would question its usefulness and propriety.³⁷

With the separation of the Legislative Council and the Executive Council in 1842,³⁸ it became necessary to clarify that 'Council' meant the Executive Council, and this was done in 1844.³⁹ In 1856, the Court of Appeals was effectively continued by s 18 of the *Supreme Court Act 1856* (SA),⁴⁰ which was in virtually identical terms to s XVI of the *Supreme Court Act 1837*, except that the Court of Appeals was henceforth to be constituted of 'the Governor for the time being, and the Executive Council of the said Province (with the exception of the Attorney or Advocate-General and Crown Solicitor)'.

Early in the Court's history, it interpreted its own jurisdiction narrowly, so that appeals could only be brought from final judgments and orders, and for error apparent on the face of the record.⁴¹ The latter restriction was overcome by the *Supreme Court Procedure Act 1856* (SA),⁴² which enabled an appeal to be brought by way of a case stated. The Court of Appeal further limited its own jurisdiction by holding that appeals lay to it only where the Supreme Court had been exercising original jurisdiction, so that a decision of the Supreme Court on appeal from the Court of Insolvency was regarded as final and not subject to further appeal to the Court of Appeals.⁴³ The Court never determined a criminal appeal, and in the

³³ An earlier attempt to appeal to the Court of Appeals in 1838 became unnecessary and was aborted after Acting Judge Jickling was 'overawed [by Governor Gawler] into reversing his decision', which had been to the effect that the English common law of arrest had not been received in South Australia: R M Hague, *The Court of Appeals* (Hassell Press, 1940) 3. Note that there is substantial overlap between this book and Hague, *History of the Law in South Australia*, above n 30. In general, where overlap exists only references to the latter work will be provided.

³⁴ 'Court of Appeals — The Customs Collector', *South Australian Register* (Adelaide), 14 August 1841, 2, quoted in part in Hague, *History of the Law in South Australia*, above n 30, vol 2, 611 and Hague, *The Court of Appeals*, above n 33, 7. See also 'Strange Notions of Justice — The "Ville de Bordeaux"', *Southern Australian* (Adelaide), 18 June 1841, 2.

³⁵ See, eg, 'Local News — Stocks v Clark', *South Australian* (Adelaide), 10 July 1849, 2; 'The Court of Appeal', *The South Australian Advertiser* (Adelaide), 27 July 1863, 3.

³⁶ Hague, *The Court of Appeals*, above n 33, 55–7 (The Duke of Newcastle).

³⁷ Ibid 12–13 (Governor Robe), 83–4 (Governor Daly). See, eg, 'House of Assembly', *Adelaide Observer* (Adelaide), 19 September 1868, 10 (Thomas Reynolds).

³⁸ *South Australia Act 1842* (Imp) 5 & 6 Vict, c 76.

³⁹ *Supreme Court Act 1844* (SA) 7 & 8 Vict, No 6, s III.

⁴⁰ 19 Vict, No 31.

⁴¹ 'Court of Appeals — Angas v Duff', *South Australian* (Adelaide), 26 November 1844, 3.

⁴² 19 Vict, No 24, ss 22–32.

⁴³ 'Court of Appeal — In re E C Longson', *The South Australian Advertiser* (Adelaide), 8 August 1859, 3; *Skewes v Veenhuizen* (1978) 20 SASR 109, 126 (Hogarth ACJ, Zelling and Legoe JJ).

1970s the Supreme Court of South Australia was to hold that its jurisdiction had never extended to criminal matters.⁴⁴

In 1861, in *Payne v Dench*,⁴⁵ the Supreme Court, by majority (Boothby and Gwynne JJ, Cooper CJ dissenting⁴⁶), struck out a notice of appeal against a decision of that Court on the ground that the Court of Appeals had ceased to exist upon the adoption of responsible government,⁴⁷ since the Executive Council was then constituted of Ministers drawn from the ranks of elected members of Parliament, rather than by persons appointed by or on the instructions of the Crown. Following that controversial decision, the Court was 'confirmed and made a court of record' by ss 1 and 2 of the *Court of Appeals Act 1861* (SA).⁴⁸

In 1865, in *Dawes v Quarrel*,⁴⁹ the Supreme Court held by majority (Boothby and Gwynne JJ; Hanson CJ dissenting) that the South Australian Legislative Council had, since 1842, lacked power to constitute additional courts, the specific power to do so having been omitted from the *South Australia Act 1842* and the *Australian Constitutions Act 1850* (Imp).⁵⁰ It followed that the *Local Courts Act 1861* (SA) was invalid and that the 30 local courts purportedly established in South Australia did not exist, throwing into doubt every previous decision of those courts, as well as the existence and decisions of the Court of Insolvency.

Although the Governor, Sir Dominick Daly, expressed his 'great reluctance individually to sit as President of the [Court of Appeals]',⁵¹ on 1 August 1865 the

The absence of a further right of appeal in such cases was later confirmed by legislation: *Insolvency Act 1860* (SA) 23 & 24 Vict, No 16, s 17.

⁴⁴ *Skewes v Veenhuizen* (1978) 20 SASR 109, 126 (Hogarth ACJ, Zelling and Legoe JJ).

⁴⁵ 'Supreme Court — in Banco: Payne v Dench', *The South Australian Advertiser* (Adelaide), 18 April 1861, 2–3. The reasons for decision are also described in some detail in Hague, *History of the Law in South Australia*, above n 30, vol 2, 630–6.

⁴⁶ Chief Justice Cooper agreed with much of the reasoning that led Boothby and Gwynne JJ to hold that the Court of Appeals no longer existed, but declined to strike out the notice of appeal, preferring to leave the question to the determination of the (purported) Court of Appeals itself. Chief Justice Cooper later resiled from this view, holding in *McEllister v Fenn* that the Court of Appeals did exist: 'Supreme Court — Civil Side: McEllister v Fenn', *Adelaide Observer* (Adelaide), 16 November 1861, 3.

⁴⁷ *Constitution Act 1856* (SA), 19 Vict, No 2.

⁴⁸ 24 & 25 Vict, No 5; *Miller v Teale* (1954) 92 CLR 406, 412 (Dixon CJ, McTiernan, Fullagar and Taylor JJ).

⁴⁹ (1865) Supreme Court Reports (Pelham) 1; 'Supreme Court in Banco — Dawes v Quarrell', *South Australian Register* (Adelaide), 26 July 1865, 6.

⁵⁰ 13 & 14 Vict, c 59. The earlier *South Australia Act 1834* (Imp), 4 & 5 Wm 4, c 95, and *South Australia Amendment Act 1838* (Imp) 1 & 2 Vict, c 60, had contained express provisions making it lawful to 'ordain and establish all such laws institutions or ordinances and to constitute such courts, and appoint such officers ... as may be necessary for the peace order and good government of his majesty's subjects and others within the said province or provinces'. The *South Australia Act 1842* authorised the Legislative Council 'to make laws for the peace order and good government of the said colony' and s XIV of the *Australian Constitutions Act 1850* provided that the Governors of Victoria, Van Diemen's Land, South Australia and Western Australia, with the advice of the respective legislative councils of those colonies, 'shall have Authority to make Laws for the Peace, Welfare, and good Government of the said Colonies respectively'. The omission of any specific power to establish courts in the latter two Acts meant that the reasoning of the majority in *Dawes v Quarrell* was plausible, even if not compelling.

⁵¹ Hague, *History of the Law in South Australia*, above n 30, vol 1, 409, vol 2, 650–2.

Court of Appeals Act 1865 (SA) was rushed through both Houses of the legislature, removing the £100 minimum requirement for the jurisdiction of the Court of Appeals in order that it might hear and determine an appeal from the decision in *Dawes v Quarrel*.⁵² Justice Boothby responded by again denying the existence of the Court of Appeals and threatening to remove from the rolls of the Supreme Court anyone who recognised the Court of Appeals by appearing before it.⁵³ The impasse was broken, and the looming contest between the Executive and the puisne judges averted, with the arrival in the colony of news of the passage of the *Colonial Laws Validity Act 1865* (Imp),⁵⁴ which sought to resolve doubts as to the validity of colonial legislation.

In *Murray v Ridpath*, a majority of the Supreme Court (Hanson CJ and Gwynne J, Boothby J dissenting) held that the *Colonial Laws Validity Act 1865* had been successful in placing beyond doubt the existence of the Court of Appeals.⁵⁵ *Dawes v Quarrel* itself was settled and so was never decided by the Court of Appeals, but the Court did reverse other judgments in which that decision had been applied.⁵⁶

The Court of Appeals was far from merely theoretical.⁵⁷ The following can be discerned regarding its practical operation. Despite its non-legal membership, it appears that the business of the Court of Appeals was conducted in much the same manner as other appellate courts. In practice, the Governor presided, and sat with at least two, and sometimes all, members of the Executive Council.⁵⁸ The Court sat in open hearings (often on Saturdays)⁵⁹ in the Council chamber or the Supreme Court courthouse. Counsel appeared before it and advanced submissions concerning the law. The Attorney-General frequently appeared as counsel in the

⁵² 28 & 29 Vict, No 15; Hague, *History of the Law in South Australia*, above n 30, vol 1, 409.

⁵³ 'Supreme Court — in Equity: Harrald v Carruthers', *South Australian Register* (Adelaide), 5 August 1865, 4; Hague, *History of the Law in South Australia*, above n 30, vol 1, 409–17. As regards Boothby J more generally, see John M Williams, 'Justice Boothby: A Disaster that Happened' in George Winterton (ed), *State Constitutional Landmarks* (Federation Press, 2006) 21; Alex C Castles, *An Australian Legal History* (Lawbook, 1982) 407–11; A J Hannan, 'Mr Justice Boothby' (1957) 58 *Proceedings of the Royal Geographical Society of Australasia: South Australian Branch* 72; Hague, *History of the Law in South Australia*, above n 30, ch 5; David Clark, 'The Struggle for Judicial Independence: The Motion and Suspension of Supreme Court Judges in 19th Century Australia' (2013) 12 *Macquarie Law Journal* 21, 35–46.

⁵⁴ 28 & 29 Vict, c 63.

⁵⁵ 'Supreme Court — in Banco: Murray v Ridpath', *South Australian Register* (Adelaide), 5 March 1866, 3. Justice Boothby held that the Order in Council of 9 June 1860, dealing with appeals to the Privy Council from colonial courts, was exhaustive and thus excluded any possibility of appeal to the Court of Appeals.

⁵⁶ *Gilbertson v South Australia* (1976) 15 SASR 66, 81 (Bray CJ); Hague, *History of the Law in South Australia*, above n 30, vol 2, 663; 'Court of Appeals: Varley v Murray' and 'Court of Appeals: Ridpath v Murray', *South Australian Register* (Adelaide), 13 November 1866, 3.

⁵⁷ See generally Hague, *History of the Law in South Australia*, above n 30, vol 2, 607–68.

⁵⁸ The legality of sitting only a 'quorum' of the Executive Council, rather than all its members, was challenged but upheld by the Court of Appeals in *Wood v Lowe*: 'Appeal Court — Wood v Lowe', *Adelaide Observer* (Adelaide), 4 February 1860, 3.

⁵⁹ See, eg, 'Appeal Court — Thome v Robin', *South Australian Register* (Adelaide), 30 January 1860, 3; 'Court of Appeals: Walsh v Goodall', *South Australian Register* (Adelaide), 5 March 1866, 3.

Court of Appeals,⁶⁰ which explains the exclusion of the law officers from the constituency of the Court.⁶¹ Its proceedings were reported in detail in the local newspapers, in similar fashion to the proceedings of the Supreme Court. It delivered decisions affirming, varying or reversing — usually affirming — decisions of the Supreme Court of South Australia. It generally provided brief reasons for doing so.⁶² Its decisions were ostensibly based upon legal, as opposed to overtly political, reasoning. Some of its decisions were recorded in the South Australia Law Reports in the same way as Privy Council appeals from decisions of the Supreme Court of South Australia.⁶³

The Court of Appeals was initially thought necessary to provide a relatively inexpensive local avenue of appeal in circumstances where the Supreme Court of South Australia had only one Judge,⁶⁴ and where the delay and expense associated with appeals to the Privy Council made them virtually prohibitive.⁶⁵ South Australia did not then have a system of responsible government and the members of the Executive Council, not being popularly elected, were in that sense apolitical.⁶⁶ Or, as Hague put it, 'it was unlikely that the fountains of justice would be poisoned by the pestilential breath of faction'.⁶⁷ However, by the end of the 1850s South Australia operated under a system of responsible government with two fully elected Houses of Parliament,⁶⁸ and the Supreme Court was constituted of three judges.⁶⁹

A Bill for the abolition of the Court of Appeals was introduced in the House of Assembly by the Attorney-General, Richard Bullock Andrews, in 1868, after the death of Boothby J.⁷⁰ Similar attempts had been made years earlier, but these had enjoyed limited prospects while the unpredictable Boothby J remained on the bench.⁷¹ The Court of Appeals, Andrews said, was 'hollow, rotten, unsatisfactory

⁶⁰ See, eg, 'Court of Appeal — Lloyd v Kelly', *Adelaide Observer* (Adelaide), 17 March 1860, 3; 'Court of Appeals — Payne v Dench', *The South Australian Advertiser* (Adelaide), 23 December 1861, 3; 'Walsh v Goodall', above n 59; 'Local Court of Appeals — Re Whittaker', *The South Australian Advertiser* (Adelaide), 29 November 1875, 6.

⁶¹ Hague, *History of the Law in South Australia*, above n 30, vol 2, 606.

⁶² See, eg, 'Court of Appeals — Angus v Duff', *South Australian* (Adelaide), 26 November 1844, 3; 'Court of Appeal — Wood v Lowe', *Adelaide Observer* (Adelaide), 17 March 1860, 3; 'Walsh v Goodall', above n 59; Hague, *The Court of Appeals*, above n 33, 10–11.

⁶³ See, eg, *Aldwell v Bunday* (1877) 10 SALR 248. See also *Walsh v Goodall* (1866) Supreme Court Reports (Pelham) 48.

⁶⁴ Until the appointment of Judge George John Crawford in 1849 and the enactment of the *Supreme Court Act 1849* (SA), 12 & 13 Vict, No 12.

⁶⁵ 'House of Assembly', *Adelaide Observer*, above n 37, 10 (Richard Chaffey Baker); Hague, *History of the Law in South Australia*, above n 30, vol 2, 604.

⁶⁶ 'House of Assembly', *South Australian Register* (Adelaide), 12 August 1868, 3 (Richard Bullock Andrews, Attorney-General).

⁶⁷ Hague, *The Court of Appeals*, above n 33, 2.

⁶⁸ *Constitution Act 1856* (SA), 19 Vict, No 2, s 1.

⁶⁹ With the enactment of the *Third Judge and District Courts Act 1858* (SA), 22 Vict, No 13, and the appointment of Edward Castres Gwynne as the third judge on 26 February 1859.

⁷⁰ 'House of Assembly', *South Australian Register*, above n 66.

⁷¹ 'House of Assembly', *South Australian Weekly Chronicle* (Adelaide), 22 August 1863, 6 (Augustine Stow); 'The Parliament — Legislative Council', *South Australian Register* (Adelaide), 12 December 1866, 2 (John Baker). The *South Australian Register* opposed both Bills and instead advocated for the creation of a general court of appeal for the Australian colonies to replace the Court of Appeals: 'Court of Appeal', *South Australian Register* (Adelaide), 25 May 1863, 2; 'Court

and useless'.⁷² Those supporting its abolition described it as an 'abominable anomaly',⁷³ an 'absurdity',⁷⁴ and 'worse than useless ... noxious'.⁷⁵ Invoking the separation of powers, they claimed that it allowed undesirable political interference with the independence of the judges,⁷⁶ and opposed the prospect of persons without legal training overturning the decisions of qualified judges with respect to 'nice points of law'.⁷⁷ The irony of the exclusion from the Court of the Attorney-General — 'the [only] one who was supposed to know anything of the subject brought forward'⁷⁸ — was not lost on the abolitionists.

The Government's Bill was defeated, with an 'overwhelming majority in favour of retaining the present local Court of Appeals until a better one can be substituted for it'.⁷⁹ Those who supported the retention of the Court of Appeals did so on the basis that the Court 'had done good service to the country',⁸⁰ that it had caused no harm, and that it was necessary to maintain a check over the judges.⁸¹ The reluctance of the Parliament to sweep away the Court of Appeals was undoubtedly due to the recent 'invalidity trouble' — that is, the peculiar South Australian experience of Boothby J, occasionally supported by Gwynne J, repeatedly holding local statutes and appointments invalid for reasons including, but not limited to, repugnancy with imperial legislation.⁸² The prevailing sentiment was summed up in an editorial published in the *South Australian Chronicle and Weekly Mail* upon the defeat of the Bill:

We admit that it is anomalous in its constitution — such a Court as no sensible man would now think of establishing except under the pressure of an overruling necessity. But it exists; it has done good service in the past; and its greatest enemies cannot say that it has ever done any harm. Even they who now advocate its abolition admit that there was a period in the history of the colony when the Court of Appeals saved us from anarchy and confusion; and no man can say with certainty that such a period may not return again.⁸³

The enduring survival of the anomalous Court of Appeals was, then, very much a product of the unique constitutional history of the province of South Australia.

of Appeal', *South Australian Register* (Adelaide), 1 August 1863, 2; 'Court of Appeals', *South Australian Register* (Adelaide), 12 December 1866, 2.

⁷² 'House of Assembly', *South Australian Register*, above n 66.

⁷³ 'The Parliament — Legislative Council', above n 71, 2 (John Baker).

⁷⁴ 'House of Assembly', *South Australian Register*, above n 66, 3 (Arthur Blyth); 'House of Assembly', *Adelaide Observer*, above n 37, 10 (Lavington Glyde).

⁷⁵ 'House of Assembly', *South Australian Register*, above n 66, 3 (Richard Chaffey Baker).

⁷⁶ 'House of Assembly', *Adelaide Observer*, above n 37, 10 (Lavington Glyde).

⁷⁷ *Ibid* 11 (Thomas Reynolds).

⁷⁸ 'House of Assembly', *South Australian Register*, above n 66, 3 (Arthur Blyth).

⁷⁹ 'The Local Court of Appeals — To the Editor', *South Australian Register* (Adelaide), 17 September 1868, 2.

⁸⁰ 'House of Assembly', *South Australian Register*, above n 66, 3 (Robert Cottrell).

⁸¹ 'House of Assembly', *The South Australian Advertiser* (Adelaide), 27 August 1868, 3 (James Penn Boucaut); 'House of Assembly', *Adelaide Observer*, above n 37, 10–11 (Henry Strangways, John Hart, John Bentham Neales, Alexander Hay, Henry Bright).

⁸² Hague, *History of the Law in South Australia*, above n 30, ch 5.

⁸³ 'The Court of Appeals', *South Australian Chronicle and Weekly Mail* (Adelaide), 19 September 1868, 6.

The use of the Court gradually waned, and its jurisdiction was last invoked in 1882.⁸⁴ At that time, it was reported that the Court of Appeals had 'been called on to adjudicate in twenty-three causes, in only three of which ha[d] the decision of the Full Court [of the Supreme Court] been reversed'.⁸⁵ The decline in the use of the Court of Appeals is probably explained by a combination of the low success rate of appeals, the availability of an appeal directly to the Privy Council, the absence of further cases in which the Supreme Court displayed hostility towards the constitutional powers of the local legislature such as to require urgent 'correction', and the dominance of Sir Samuel Way (who, being both Chief Justice of South Australia and a member of Executive Council, would sit on both the Supreme Court and the Court of Appeals).

IV The Court of Appeals in the Drafting of the *Australian Constitution*

Section 73 of the *Australian Constitution* provides for appeals from various decisions to the High Court. The first paragraph of s 73 provides:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:

- (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
 - (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State, *or of any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council*;
 - (iii) of the Inter-State Commission, but as to questions of law only;
- and the judgment of the High Court in all such cases shall be final and conclusive.⁸⁶

The drafting history of the clause that became s 73 is significant for what it reveals about the bodies that were contemplated as falling within the italicised words in s 73(ii).

Sir Josiah Symon QC, one of the South Australian delegates to the Melbourne Federal Convention of 1898, moved an amendment to the clause that would ultimately become s 73 of the *Constitution*. Prior to the amendment, the relevant part of the draft clause read:

The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament may from time to time prescribe, to hear

⁸⁴ 'Court of Appeals — H A Wood v National Mutual Life Assurance Association of Australia', *Adelaide Observer* (Adelaide), 9 December 1882, 11; 'Legal — Supreme Court of Appeals', *Supplement to the South Australian Register* (Adelaide), 9 December 1882, 1; 'Court of Appeals — Wood v National Mutual Life Assurance Association of Australia', *The South Australian Advertiser* (Adelaide), 6 December 1882, 6. The Court by majority ordered a new trial. Way CJ, as a member of the Executive Council, sat on the Court of Appeals.

⁸⁵ 'Legal — Supreme Court of Appeals', above n 84.

⁸⁶ Emphasis added.

and determine appeals from all judgments, decrees, orders, and sentences of any other Federal Court, or court exercising federal jurisdiction, or of the Supreme Court of any state, whether any such court is a court of appeal or of original jurisdiction; and the judgment of the High Court in all such cases shall be final and conclusive.⁸⁷

The amendment moved by Symon was to insert, after ‘the Supreme Court of any state’, the words ‘or of any other court of any state from which an appeal now lies to the Queen in Council’. In explanation of the proposed amendment, Symon said:

I propose this amendment merely because of the condition of things in our own colony, in which there is another Court of Appeal from which an appeal now lies to the Privy Council, an intermediate Court of Appeal which is seldom availed of, but which exists.⁸⁸

The colonial court to which Symon referred was the Court of Appeals.⁸⁹ From 1860, an appeal to the Queen in Council lay, as of course, from any judgment, decree, order or sentence of the Court of Appeals involving at least £500, or (at least so it appeared)⁹⁰ where the Court of Appeals had reversed, altered or varied a decision of the Supreme Court.⁹¹ Additionally, the Queen in Council retained an overarching power to grant special leave to appeal from the decision of any colonial court.⁹²

The proposed amendment was accepted without further debate regarding the position of the Court of Appeals or the need for the amendment to accommodate it.⁹³ The only explicit reason for the change was to accommodate that unique South Australian ‘court’. The drafting committee (of which Symon was a member) later changed the wording of the amended clause so that it read, ‘any

⁸⁷ *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 322.

⁸⁸ *Ibid* 332. Mr Symon QC had himself appeared as counsel in the final case heard by the Court of Appeals: ‘H A Wood v National Mutual Life Assurance Association of Australia’, *Adelaide Observer*, above n 84; ‘Legal — Supreme Court of Appeals’, above n 84.

⁸⁹ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901) 743; *Parkin v James* (1905) 2 CLR 315, 330; *Gould v Brown* (1998) 193 CLR 346, 425 n 317 (McHugh J), 446 n 388 (Gummow J).

⁹⁰ Cf *Lowe v Wood*, discussed in Hague, *History of the Law in South Australia*, above n 30, vol 2, 623–4.

⁹¹ *Supreme Court Act 1856* s 19; Order in Council of 9 June 1860, made pursuant to the *Judicial Committee Act 1844* (Imp) 7 & 8 Vict, c 69: see Frank Safford and George Wheeler, *The Practice of the Privy Council in Judicial Matters* (Sweet & Maxwell, 1901) 584–94. Some sources give the date of the Order in Council as 10 May 1860: see, eg, William Macpherson, *The Practice of the Judicial Committee of Her Majesty’s Most Honorable Privy Council* (Henry Sweet, 2nd revised ed, 1873) appendix, 115. In relation to the availability of appeals to the Privy Council from the Court of Appeals generally, see Hague, *History of the Law in South Australia*, above n 30, vol 2, 621–4.

⁹² *Judicial Committee Act 1833* (Imp) 3 & 4 Wm 4, c 41; *Parkin v James* (1905) 2 CLR 315, 330–1; Quick and Garran, above n 89, 750–3 §310.

⁹³ There was short debate involving Mr Dobson, Mr Higgins, Mr Isaacs and Mr O’Connor, but it was not directed to the Court of Appeals and Mr Dobson’s question appears to have missed the point of the amendment: *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 332–3.

other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council', but the meaning was unchanged.⁹⁴

It appears, then, that the purpose of including 'any other court of any State from which at the establishment of the Commonwealth an appeal lies to the Queen in Council' in s 73, among the classes of courts from which an appeal was to lie to the new High Court, was to continue the established avenue of appeal from the Court of Appeals to a higher court — prior to Federation, to the Judicial Committee of the Privy Council; after Federation, to either the Judicial Committee or the High Court (at the option of the prospective appellant). Had those words not been inserted into s 73, no appeal would have lain to the High Court from decisions of the Court of Appeals in cases where the Court of Appeals had heard an appeal from the Supreme Court of South Australia (except in cases where the Court of Appeals was exercising federal jurisdiction, assuming that it was a 'court of a State' invested with federal jurisdiction pursuant to s 77(iii) of the *Constitution*).

Not only did the framers of the *Constitution* appear to regard the Court of Appeals as a 'court' within the meaning of (at least) s 73; of far greater significance, having regard to the mischief to which the Symon amendment was directed, the very text of the *Constitution* itself was changed in a way that reflected the assumption that the Court of Appeals fell within the conception of a 'court of any State' as that expression was used in s 73(ii).

V How Might the Court of Appeals Influence Chapter III Jurisprudence?

It is suggested, then, that any construction of the words 'court of any State' in s 73 of the *Australian Constitution*, and other like expressions elsewhere in ch III of the *Constitution*⁹⁵ — particularly a construction that is claimed to rest on 'originalist' or 'historicist'⁹⁶ foundations — should take account of the place of the Court of Appeals both in the 'historical realities' of colonial judicial systems and in shaping the very words of the *Constitution* that are to be construed.

The South Australian Court of Appeals, and the basic difficulty that it posed for the premise of the *Kable* doctrine, was in fact referred to by Dawson J, in dissent in *Kable* itself:

⁹⁴ John M Williams, *The Australian Constitution: A Documentary History* (Melbourne University Press, 2005) 1039 (Bill as reconsidered by the Drafting Committee), 1094–5 (comparison between Bill as reported a fourth time, 12 March 1898, and Bill as proposed to be further amended by the Drafting Committee); *Official Report of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2453 (Drafting Committee's amendments agreed to).

⁹⁵ I have in mind the expressions 'such other courts as it invests with federal jurisdiction' in s 71 (insofar as this refers to courts established by States), 'the courts of the States' in s 77(ii), 'any court of a State' in s 77(iii), and 'any court' in s 79 (insofar as this refers to courts established by States). For one possible approach that would give the expression any 'court of a State' in s 73 a different and broader meaning than the expression 'any court of a State' in s 77(iii) and 'any court' in s 79, see below Part VA.

⁹⁶ Lim, above n 12, 47–9, 53.

Section 77(iii) speaks of existing institutions the characteristics of which did not necessarily and did not in fact satisfy those requirements. Indeed, in South Australia at federation an appeal lay from the Supreme Court to the Court of Appeals which comprised the Governor in Executive Council. Special provision had to be made in s 73 of the *Constitution* to include the Court of Appeals.⁹⁷

In light of this passage, it seems difficult to believe that the existence and basic features of the Court of Appeals could have been overlooked by the judges forming the majority in *Kable*. Yet, of those judges, only McHugh J engaged at all with the problem of the Court of Appeals. McHugh J observed: ‘At federation each Colony had courts. Each Colony had a Supreme Court from which an appeal could be taken to the Privy Council’.⁹⁸ Following that observation, McHugh J inserted a footnote that read:

In South Australia, a theoretical right of appeal existed from the State Supreme Court to a Local Court of Appeal which comprised the Governor in Executive Council (except the Attorney-General). But this ‘court’ does not seem to have exercised jurisdiction for many years.⁹⁹

The anomalous and inconvenient Court of Appeals having been relegated to a footnote, in the same judgment McHugh J felt able to assert:

It necessarily follows, therefore, that the *Constitution* has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system. That does not mean that a State cannot abolish or amend the constitutions of its existing courts. Leaving aside the special position of the Supreme Court of the States, the States can abolish or amend the structure of existing courts and create new ones. However, the *Constitution* requires a judicial system in and a Supreme Court for each State and, *if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system*. With the abolition of the right of appeal to the Privy Council, therefore, this Court is now the apex of an Australian judicial system.¹⁰⁰

It seems difficult to reconcile McHugh J’s assertion that ‘if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system’ with the historical existence of the Court of Appeals, which unequivocally placed the Supreme Court of South Australia elsewhere than at the ‘apex’ of the South Australian judicial system, at least as concerns some cases.

The precise significance of the fact that the Court of Appeals had not ‘exercised jurisdiction for many years’ is elusive. The course of the Convention Debates regarding s 73 of the *Constitution* suggests that the Court was not regarded as merely theoretical, or a ‘dead letter’. The ‘theoretical right of appeal’ remained available until 1937.¹⁰¹ Theory might easily have become practice, had the

⁹⁷ (1996) 189 CLR 51, 81 (citations omitted).

⁹⁸ *Ibid* 111.

⁹⁹ *Ibid* 111–12 n 216, citing Quick and Garran, above n 89, 742–3.

¹⁰⁰ *Ibid* 111 (emphasis added).

¹⁰¹ *Supreme Court Act 1935 (SA)* s 3, which commenced operation on 1 November 1937; Hague, *History of the Law in South Australia*, above n 30, vol 2, 668. Hague remarked that the Court of Appeals ‘has presumably ceased to exist’, but pointed out s 3 of the *Supreme Court Act 1935 (SA)*, which repealed the *Supreme Court Act 1856 (SA)*, providing that ‘the repeal shall not affect any

jurisdiction been invoked. The passage quoted from McHugh J's judgment in *Kable* involved an assertion about the meaning of the expression 'Supreme Court' in s 73 of the *Constitution* — the very provision that was drafted, in part, so as to accommodate the Court of Appeals within the appellate structure of an integrated national court system with the High Court at its apex.

McHugh J's judgment in *Kable* represents the most detailed attempt in any High Court judgment to address the 'historical realities' and possible implications of the Court of Appeals. In later cases concerning the *Kable* doctrine, in which the High Court has developed the 'defining characteristics' jurisprudence and expounded the requirements of 'institutional integrity' of state courts, there has been no reference to the Court of Appeals. When raised in argument in *Kirk*, it was dealt with dismissively¹⁰² and it was not mentioned in the judgments in that case.

Recognition that the 'courts' of the states contemplated by ch III encompassed a Court of Appeals constituted by the Governor and the Executive Council of a state surely raises questions as to the historical accuracy, and perhaps the legitimacy, of a doctrine that assumes that the constitutional expressions 'court' and 'court of any State' connote institutions that have, among their fundamental and immutable characteristics, institutional independence from the executive government.

My point is not that either the *Kable* doctrine or the 'defining characteristics' jurisprudence that has come to be associated with that doctrine is necessarily 'wrong' (although it might be), or that it should be abandoned. Rather, it is that, given its influence on the drafting of one of the very provisions that is said to support the doctrine, the historical existence of the Court of Appeals warrants more serious consideration and explanation than it has thus far received.

There are various ways in which the Court of Appeals might plausibly be accommodated alongside the defining characteristics jurisprudence. In what

principle or rule of law, or any established jurisdiction, notwithstanding that the same may have been affirmed by, or derived from, any of the repealed enactments'. Hague said:

It could hardly be denied that the Court of Appeals exercised an 'established jurisdiction', affirmed by and derived from the statutes repealed. ... It might possibly be contended, therefore, that the jurisdiction of the Court of Appeals — an 'established jurisdiction' — has been expressly saved by section 3(a) and that the Court still exists. It is not likely, however, that any dissatisfied suitor will wish to attempt to set in motion the rusty machinery of this anachronism.

After Hague wrote this in the 1930s, Dixon CJ, McTiernan, Fullagar and Taylor JJ held that 'no longer does the anomalous Court of Appeals exist': *Miller v Teale* (1954) 92 CLR 406, 413. The better view is that the *Supreme Court Act 1935* (SA) was indeed effective to abolish the Court. As a matter of construction, it is suggested that this conclusion can be reached by construing the expression in s 3(a), 'affect ... any established jurisdiction', as distinguishing between the institution of the 'court' itself and the jurisdiction conferred upon it. Section 3(a), while apt to preserve any established jurisdiction exercisable by institutions that continued in existence, did not preserve of the Court of Appeals as an institution. The lack of any mention whatsoever of the Court of Appeals in the *Supreme Court Act 1935* (SA), coupled with the fact that it had last exercised its jurisdiction some 53 years prior to its enactment, tend to reinforce that conclusion.

¹⁰² (2010) 239 CLR 531, 545 (Gummow J) (during argument); *Kirk v Industrial Court (NSW)* [2009] HCATrans 239 (1 October 2009), 193–4.

follows, I suggest, without any attempt to be exhaustive, a few issues that might usefully be considered in light of the historical existence of the Court of Appeals.

A *Possible Distinction between the State Courts Referred to in Section 73 and Those Referred to in Section 79*

The need for an impartial federal judicature to exercise jurisdiction in ‘matters of specially federal concern’¹⁰³ is recognised in the terms of s 72 of the *Constitution*. The ‘autochthonous expedient’¹⁰⁴ of enabling the Australian Parliament to invest state courts with jurisdiction over matters cognisable by the federal judicature was adopted in order to afford a measure of flexibility and to avoid the need for the immediate creation of a comprehensive and cumbersome federal judicial system. The capacity to invest federal jurisdiction in state courts was not, however, intended to undermine the independence and impartiality of the exercise of judicial power in the Federation. Thus Quick and Garran wrote:

Confidence in the integrity and impartiality of the Bench prevents any jealousy or distrust of this wide federal jurisdiction; and the same confidence makes it possible to contemplate without misgiving the exercise of federal jurisdiction by State courts — subject, of course, to the controlling power of the Federal Parliament.¹⁰⁵

The very purposes of creating a federal judicature would seem to be undermined by the possibility of the Executive Council of a state authoritatively determining matters of the kinds identified in ss 75 and 76 of the *Constitution*. If the Symon amendment is to achieve its purpose (enabling an appeal from the Court of Appeals of South Australia to the High Court), without undermining the broader purposes of ch III, then, it may be necessary to give the expression ‘any other court of any State’ in s 73 a broader construction than the similar expression ‘any court of a State’ in s 77(iii).

It might be argued that the reference to ‘judges’ in s 79 indicates that the Court of Appeals — which was constituted *not* by ‘judges’ properly so called, but by members of the Executive — was not within the purview of that provision. The use of the word ‘judges’ in s 79 might thus be taken as a textual indication that, even though the Court of Appeals *was* to be regarded as a ‘court of any State’ for the purposes of s 73 of the *Constitution*, so that an appeal would lie from it to the High Court, the class of state courts contemplated by ss 77(iii), 71 and 79 (and the ‘court[s] exercising federal jurisdiction’ in s 73) is limited to those courts that are constituted by ‘judges’; that is, ‘courts of judicature’ in a stricter sense. The question ‘[w]hether or not in the context of South Australia the Local Court of Appeals was or was not a court of judicature’ was left open by the Supreme Court of South Australia in *Gilbertson v South Australia*.¹⁰⁶ However, the reasoning of several justices in that case — reasoning that, interestingly, anticipates much of the *Kable* doctrine jurisprudence — suggests that they would not have regarded the

¹⁰³ Quick and Garran, above n 89, 724.

¹⁰⁴ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

¹⁰⁵ Quick and Garran, above n 89, 804.

¹⁰⁶ (1976) 15 SASR 66, 109, 111 (Zelling J). See also the reasons of Bray CJ at 76.

Court of Appeals as bearing the 'distinguishing features' of a 'court of judicature'.¹⁰⁷

It might thus be concluded that, notwithstanding the drafting history of s 73 of the *Constitution*, the better view is that the expression a 'court of a State', as used in ss 77 and 79, is to be understood as referring only to 'courts of judicature' in the strict sense, and as such does not extend to the South Australian Court of Appeals.¹⁰⁸ On this view, the South Australian Court of Appeals never was, and never could have been, invested with federal jurisdiction. Nor, despite its being a state court of sorts, would its existence and composition have much to say about the 'defining characteristics' of the kinds of state courts contemplated by ss 77 and 79, being courts of the kind constituted by 'judges', or courts of judicature in the strict sense.

This analysis may ultimately be persuasive, but it is not wholly satisfying, for at least two reasons. First, it gives two quite different meanings to what might appear, on their face, to be cognate expressions ('any other court of any State' in s 73 and 'any court of a State' in s 77(iii)). As explained, this could conceivably be justified by reference to the different objects of the Symon amendment, informing the construction of s 73, and of ch III more broadly, informing the construction of s 77(iii).

Second, the textual reference to 'judges' of courts, while reflecting the objective of ch III and an assumption of those who drafted s 79, seems a somewhat feeble basis for an implication that the state courts contemplated by ss 77 and 79 must possess *all* of the distinguishing features of a court of judicature (as opposed to, for instance, an implication merely that they must have 'judges').

B Possible Implications for State Tribunals

An alternative approach is to start from the premise that the Court of Appeals was a 'court of any State' within the meaning of s 73 and also a 'court of a State' for the purposes of s 77. The reference in s 79 to the 'judges' of state courts might then be understood in a broader and less technical sense, as simply referring to the officers comprising such courts. This might, in turn, lend support to a conclusion that a wider variety of state institutions that exercise judicial power, even if not comprised of 'judges' strictly so called, ought to be regarded as falling within the constitutional conception of 'State courts'.¹⁰⁹ Such a conclusion might itself serve valuable ends.

¹⁰⁷ Ibid 95–6 (Walters J), 111–13 (Zelling J dissenting), 120–1, 147 (Wells J; Jacobs J agreeing). For analogous reasoning about the established features of 'courts', see also *Kotsis v Kotsis* (1970) 122 CLR 69, 91 (Windeyer J); *Russell v Russell* (1976) 134 CLR 495, 520 (Gibbs J).

¹⁰⁸ The distinction between a 'court' (which would include the Court of Appeals) and a 'court of judicature' (which would not) seems implicit in the reasoning in *Parkin v James* (1905) 2 CLR 315, 329–30.

¹⁰⁹ Cf *Trust Company of Australia Ltd v Skiwing Pty Ltd* (2006) 66 NSWLR 77, 87 [52], 88–9 [55]–[65] (Spigelman CJ). It may be noted that a broader view of what is a 'judge' for the purpose of s 77(ii) might well be more consistent with the history of British and colonial courts: see *Forge* (2006) 228 CLR 45, 82–3 [82]–[85] (Gummow, Hayne and Crennan JJ).

A current problem in ch III jurisprudence relates to the role of state administrative tribunals. The High Court has insisted that there is no strict separation of judicial power at the state level.¹¹⁰ Consequently, state parliaments are free to create, and to confer judicial power upon, tribunals that are not ‘courts’ in the strict sense, and that need not conform to the strict requirements of independence and impartiality applicable to state courts.

It has been held that tribunals that are not ‘courts’ may not exercise judicial power with respect to matters of the kinds identified in ss 75 and 76 of the *Constitution*.¹¹¹ As a matter of principle this seems correct — for if they could do so, then the manifest purpose of s 77(ii) of the *Constitution* (namely, to enable the Australian Parliament exhaustively to define which tribunals should exercise judicial power in relation to matters of the kinds identified in ss 75 and 76 of the *Constitution*) would be undermined. If *all* state tribunals that exercise judicial power were to be regarded as ‘courts’, then they could determine matters of those kinds in the exercise of invested federal jurisdiction,¹¹² overcoming the technical difficulties associated with the exercise of judicial power by state ‘administrative’ tribunals in relation to matters of the kinds identified in ss 75 and 76 of the *Constitution*.¹¹³ A further consequence would be that appeals would lie from such ‘courts’ to the High Court under s 73 of the *Constitution*, and this would in turn prevent the establishment of ‘islands’ of jurisprudence and the development of ‘distorted positions’, which seems to have been an important motivation for the High Court in *Kirk*.¹¹⁴

C Possible Justification for Treating the Court of Appeals as an Anomaly and Putting it to One Side

Ultimately, it seems hard to dispute that, if state courts are adequately to perform the functional role envisaged for them by ch III (and covering cl 5) of the *Constitution* in perpetuity, then they must exhibit a minimum level of impartiality and independence from the executive government of the state that exceeds that of the historical South Australian Court of Appeals. Acceptance of the contrary would undermine ‘the constitutionally permissible investiture in [state courts] of the separated judicial power of the Commonwealth’.¹¹⁵ While it should be recognised

¹¹⁰ See, eg, *Totani* (2010) 242 CLR 1, 45 [66] (French CJ) and cases there cited.

¹¹¹ *Qantas Airways Ltd v Lustig* (2015) 228 FCR 148.

¹¹² Section 39 of the *Judiciary Act 1903* (Cth) invests ‘[t]he several Courts of the States’ with federal jurisdiction (except that federal jurisdiction that is exclusive to the High Court by virtue of s 38). If State tribunals were held to be ‘State courts’ for the purposes of ch III, presumably they would also meet that description for the purposes of s 39 of the *Judiciary Act*.

¹¹³ See *A-G (NSW) v 2UE Sydney Pty Ltd* (2006) 236 ALR 385; *Commonwealth v Anti-Discrimination Tribunal (Tas)* (2008) 169 FCR 85; *Sunol v Collier* (2012) 81 NSWLR 619; *Owen v Menzies* [2013] 2 Qd R 327; Geoffrey Kennett, ‘Fault Lines in the Autochthonous Expedient: The Problem of State Tribunals’ (2009) 20(2) *Public Law Review* 152; Gabrielle J Appleby, ‘Imperfection and Inconvenience: Boilermakers’ and the Separation of Judicial Power in Australia’ (2012) 31(2) *University of Queensland Law Journal* 265, 276–7.

¹¹⁴ (2010) 239 CLR 531, 570–1 [64], 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ), citing Louis L Jaffe, ‘Judicial Review: Constitutional and Jurisdictional Fact’ (1957) 70(6) *Harvard Law Review* 953, 962–3.

¹¹⁵ *Pompano* (2013) 252 CLR 38, 106 [183] (Gageler J).

that s 77(ii) and (iii) of the *Constitution* enable the Australian Parliament to ensure that only appropriately impartial and independent tribunals exercise judicial power with respect to matters of federal concern, there is nevertheless considerable force in the view that the maintenance of such important constitutional machinery should not be left solely to the vagaries of political winds. The Australian Parliament has shown no particular interest in scrutinising the composition of, or the 'non-federal' administrative and judicial functions conferred upon, the state courts that exercise judicial power in a wide range of 'federal' matters.

There are some parallels between the historical existence of the Court of Appeals and the exceptional case of *In re Biel*.¹¹⁶ In that decision — seemingly inconsistently with the holding in *Kirk* that the jurisdiction to correct jurisdictional error in all cases is a defining characteristic of a state supreme court — a single state privative clause was held to preclude judicial review even for jurisdictional error. In both instances, the difficulty may lie in explaining why statements that were *generally*, though not *universally*, descriptively true as a matter of historical fact, seem to have become translated into *universal* constitutional requirements.¹¹⁷ If judicial review for jurisdictional error by state supreme courts was *generally*, but not *universally*, available at and shortly before Federation, why should the relevant 'defining characteristic' of state supreme courts not be identified as a requirement that they retain *general* (but not universal) judicial oversight of inferior courts and tribunals, subject to specific and limited exceptions prescribed by state law?

Likewise, if colonial courts at and around the time of federation *generally*, though not *universally*, enjoyed a high degree of independence from the Executive, how are we to justify a requirement of independence and impartiality that admits of no exceptions?

In relation to the latter question, it may be possible for the High Court to acknowledge the existence of the Court of Appeals as a historical reality, but to point out that, even if it was a 'State court', it was truly exceptional and to explain why the extraordinary characteristics of this peculiar 'court' should not stand in the way of recognising independence from the political executive as an essential requirement of modern ch III courts. The fact that the Court of Appeals was widely acknowledged as anomalous and unsatisfactorily constituted, even in its heyday,¹¹⁸ might well be an important aspect of the explanation: despite its existence as a colonial institution, it was widely understood that it did not conform to the expected characteristics of a court of judicature. It might be said that purposive considerations regarding ch III as a whole effectively overwhelm the historical anomaly, even despite its influence on the drafting of s 73.

An advantage of revealing this kind of reasoning more explicitly would be that the Court would be seen to be acknowledging the choices that it is making,

¹¹⁶ (1892) 18 VLR 456.

¹¹⁷ It may be noted that *some* of the recognised requirements of the *Kable* principle do appear to admit of justified qualifications, such as the 'open court principle' and the requirement to afford procedural fairness: see, eg, *Pompano* (2013) 252 CLR 38, 72–3 [68]–[70] (French CJ).

¹¹⁸ See above nn 33–7 and accompanying text.

rather than appearing to pretend that the apparent tensions, and the choices themselves, do not exist.

VI Conclusion

Since the decision in *Forge*, the *Kable* doctrine has from time to time been explained, at least in part, as involving a search for ‘defining characteristics’ of state courts. The High Court’s ‘defining characteristics’ jurisprudence suggests that a critical basis on which such characteristics may be identified is by reference to the standards that prevailed in state courts at and around the time of federation. In particular, the High Court’s discussion of the ‘defining characteristics’ of state courts has often appeared to proceed from an assumption that ‘defining characteristics’ will be identifiable as characteristics shared by late 19th century Australian colonial courts. This does not necessarily deny that developments since Federation may also be relevant, particularly where such developments have involved the evolution of new forms that may be seen as specific applications of existing higher-level concepts (for example, judicial tenure even among lower courts, as a development of a recognised concept of judicial independence).

The exceptional Court of Appeals for the Province of South Australia challenges modern conceptions of what it means for a body to be a ‘court’. It was, manifestly, not independent from the executive government of the colony. Yet to all appearances, it functioned as a court of law and sat directly within the colony’s appellate hierarchy, between the Supreme Court and the Privy Council (albeit that it could be bypassed by litigants appealing directly from the Supreme Court to the Privy Council).

The drafting history of s 73 of the *Constitution* indicates both that the Court of Appeals was unequivocally one of the ‘court[s] of any State’ to which that provision refers and that the very mischief to which the provision was directed was the inclusion of that Court among the courts from which an appeal should lie to the High Court. This suggests that the Court of Appeals was also probably one of the state courts upon which the Australian Parliament was empowered, by s 77(iii) of the *Constitution*, to confer federal jurisdiction.¹¹⁹

As a matter of constitutional policy, there is broad appeal in an integrated judicial system comprising state and federal courts subject to entrenched minimum standards of independence and impartiality, with an ultimate appellate pathway from every such court to a High Court administering a unified Australian common law — perhaps even a unitary system of law¹²⁰ — with no other institution exercising state or federal judicial power outside that structure. Chapter III of the *Australian Constitution* hints, tantalisingly, at a coherent and functional conception of a federal judicial system of this kind, but seemingly falls just short of achieving it. At least when viewed through the lens of political and constitutional

¹¹⁹ And, consequently, one of the ‘several Courts of the States’ upon which s 39 of the *Judiciary Act 1903* (Cth), as originally enacted, purported to confer federal jurisdiction.

¹²⁰ *Breavington v Godleman* (1988) 169 CLR 41, 121–4 (Deane J); Sir Owen Dixon, ‘Sources of Legal Authority’ in Sir Owen Dixon, *Jesting Pilate and Other Papers and Addresses* (W S Hein, 2nd ed, 1997) 198, 199.

developments over the course of the 20th century, the ripples in its provisions seem to obscure a grand constitutional design that lurks just below their surface.

The legitimacy of the High Court's pursuit of this high constitutional purpose (or something akin to it) surely depends upon the Court's capacity both to articulate relevant aspects of its vision and plausibly to explain the process of reasoning by which the text and structure of the *Constitution* are held to support it. It is respectfully submitted that the perception of legitimacy is unlikely to be enhanced by an approach that is presented as following inexorably and uncontroversially from the historical situation at Federation, but that fails to confront and explain inconvenient aspects of that historical situation.

My purpose is not necessarily to suggest that overarching coherent constitutional theories ought not be explored or pursued, but rather to draw attention to the significant failure of the High Court to grapple with what would appear, on its own methodological approach, to be highly relevant considerations.

Selway observed that 'history, once used in legal reasoning, becomes part of the law — history becomes as fixed and unchangeable (or not) as is the law itself'.¹²¹ A corollary is that, if a legal doctrine appears to be based upon a particular view of history that is erroneous or debatable, it risks appearing implausible or incoherent unless tensions between the historical situation and the doctrine are acknowledged and, so far as possible, explained.

A convincing account of the integrated judicial system may require that the Court abandon the pretence that, in developing the *Kable* doctrine, it is merely uncovering the true meaning of 'constitutional expressions' by reference to clear historical facts. It may require that the Court squarely acknowledge historical facts, and even constitutional provisions, that seem to point in opposing directions, perhaps attempting to explain why the thrust of provisions that appear to coalesce upon fundamental constitutional ideals is to be given greater emphasis than matters that are, through modern eyes, better perceived as mere textual contraindications¹²² and historical anomalies. Failure to do so is apt to make the Court appear either ignorant or disingenuous, neither of which seems a desirable characteristic for the nation's supreme court.

¹²¹ Bradley Selway, 'The Use of History and Other Facts in the Reasoning of the High Court of Australia' (2001) 20(2) *University of Tasmania Law Review* 129, 153.

¹²² I am not here intending to suggest either that it is appropriate or that it is inappropriate ever to allow structural or functional considerations to prevail over apparent textual indications. See generally Stephen Gageler, 'Beyond the Text: A Vision of the Structure and Function of the *Constitution*' (2009) 32(2) *Australian Bar Review* 138. See also Selway, above n 121, 146.

