

# Constitutional Silences and Institutional Integrity

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## I Introduction

Constitutions speak. And when they speak, they speak in more ways than one. A constitution, like any document, leaves certain things unsaid. However, the existence of silence in the constitutional text does not necessarily result in a lack of meaning. The Australian Constitution, for example, is silent regarding the office of the Prime Minister, but this gap is filled by the conventions of the Westminster system of government. The Constitution likewise does not mention ‘the rule of law’, but as Dixon J held in the *Communist Party Case* that doctrine underpins the Constitution as a whole.<sup>1</sup> Constitutional silences may speak volumes. However, their meaning is often uncertain. They are therefore open to interpretation by judges and other officials in ways that leave their subjects vulnerable.

This chapter will engage with constitutional theory in order to explain what ought to – and does in fact – dwell in the constitutional silences. I argue that constitutional silences have the potential to draw their meaning from the fundamental norms that underpin the constitutional system as a whole. The rule of law, federalism and the separation of powers are examples of constitutional norms that serve to plug these silences. The significance of these underlying norms extends to both Commonwealth and State constitutions, forming the foundation of a unified system of government. The separation of judicial powers is a norm that is not explicitly mentioned in the text of the Commonwealth or State constitutions – it is a constitutional silence – yet it is and ought to be recognised and respected as a normative assumption of the constitutional system. The High Court’s development of the doctrine of institutional integrity of State courts in *Kable v Director of Public Prosecutions (NSW)*<sup>2</sup> and *Kirk v Industrial Court (NSW)*<sup>3</sup> represents attempts to explore and define the boundaries of this assumption. In this chapter, I consider these cases and argue that the High Court’s approach in *Kirk* exemplifies the most appropriate and effective interpretive method in resolving a constitutional silence.

1 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193.

2 *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51 (*Kable*).

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

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