A Chapter III Implication for State Courts: Kable v Director of Public Prosecutions

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Introduction

Traditionally, State Parliaments have not been inhibited by the separation of powers doctrine.[1] Indeed, State Parliaments have generally been considered to have plenary legislative power over State courts,[2] enabling them to confer non-judicial functions on such courts. Although State legislative power is granted by State constitutions, in *Kable v Director of Public Prosecutions (Kable)*,[3] a High Court majority held that power was limited by the Commonwealth Constitution.[4] *Kable* declared a New South Wales Act invalid because it conferred non-judicial functions on the NSW Supreme Court which were incompatible with Chapter III of the Commonwealth Constitution.[5] *Kable's* constraint represents a significant diminution of State legislative power. This paper examines the source and nature of the implication extrapolated from the Commonwealth Constitution in *Kable*. Different approaches of the *Kable* majority are outlined, common threads are discerned and *Kable's* consistency with established judicial authority is assessed. From this foundation, the scope of the Chapter III limitation extrapolated in *Kable* can be explored.

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1 See for example: *S (a child) v R* (1995) 12 WAR 392; *City of Collingwood v Victoria (No 2)* [1994] 1 VR 652; *Mabo v Queensland (No 1)* (1988) 166 CLR 186 at 202 per Wilson J; *Builders Construction Employees and Builders Labourers' Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372.

2 See for example: *Constitution Act* 1889 (WA), s2(1); *Constitution Act* 1902 (NSW), s5; *Constitution Act* 1975 (Vic), s16; *Constitution Act* 1934 (SA), s5; *Australia Constitutions Act* 1850, s14.

3 (1996) 138 ALR 577 (*Kable*).

4 *Kable*, above n 3, per Toohey, Gaudron, McHugh and Gummow JJ.

5 As above.

B. Traditional Position at State Constitutional Law

Structurally, but not explicitly, the Commonwealth Constitution incorporates the separation of powers doctrine.[6] However, this structural implication has not been judicially extrapolated from the State constitutions.[7] Indeed, judicial decisions indicate that the separation of powers doctrine is not expressly or structurally embodied in the *Constitution Act* 1902 (NSW),[8] the *Constitution Act* 1975 (Vic),[9] the *Constitution Act* 1889 (WA),[10] the *Constitution Act* 1867 (Qld)[11] or the *Constitution Act* 1934 (SA).[12] This principle was endorsed by the High Court in *Kable*.[13] On this basis, the recognition of a separation of powers at State level is conventional and political rather than constitutionally mandated.[14] Consequently, there is no State constitutional principle to prevent State legislatures conferring non-judicial functions on State courts.[15]

C. The *Kable* Decision

Kable concerned a challenge to the *Community Protection Act* 1994 (NSW), described by some justices as an 'extraordinary piece of legislation'.[16] The NSW Parliament passed the Act in response to the threat a convicted

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6 *Kruger v Commonwealth* (1997) 146 ALR 126 at 171 per Toohey J; *Kable*, above n 3, at 583 per Brennan CJ; *Leeth v Commonwealth* (1992) 174 CLR 455 at 485 per Deane and Toohey JJ; *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 at 274 per Dixon CJ, McTiernan, Fullager and Kitto JJ. Note, however, that based on analysis of the 1890's Convention debates, Wheeler has argued that the framers of the Commonwealth Constitution did not expressly intend to adopt the separation of powers doctrine as a Commonwealth constitutional principle: F Wheeler, "Original Intent and the Doctrine of Separation of Powers in Australia" (1996) 7 *Public Law Review* 96 at 103.

7 In fact, the trend of judicial decisions has been to refute the existence of such an implication. See, for example: *Kable*, above n 3; *S (a Child)*, above n 1; *City of Collingwood v Victoria (No 2)*, above n 1; *Mabo*, above n 1, at 202 per Wilson J; *Builders Construction Employees v Minister for Industrial Relations*, above n 1; *Gilbertson v South Australia* (1976) 15 SASR 66; *Nicholas v Western Australia* [1972] WAR 168; *Clyne v East* (1967) 68 SR(NSW) 385.

8 *Kable*, above n 3; *Building Construction Employees v Minister for Industrial Relations* above n 1; *Clyne v East*, above n 7.

9 *City of Collingwood v Victoria*, above n 1.

10 *S (a child)*, above n 1; *Nicholas v Western Australia*, above n 7.

11 *Mabo*, above n 1, at 202 per Wilson J, at 195 per Mason J, at 241 per Dawson J.

12 *R v Tilley* (1991) 53 A Crim R 180; *Gilbertson v South Australia*, above n 7.

13 *Kable*, above n 3, at 582 per Brennan CJ, at 591 per Dawson J, at 604 per Toohey J, at 617 per McHugh J. Gaudron and Gummow JJ found it unnecessary to decide the issue.

14 *Kable*, above n 3, at 593 per Dawson J; *Building Construction Employees v Minister for Industrial Relations*, above n 1; RD Lumb, *The Constitution of the Australian States*, 5th ed, St Lucia: University of Queensland Press, 1991 at 137; E Campbell, "The Choice Between Judicial and Administrative Tribunals and the Separation of Powers" (1981) 12 *Federal Law Review* 24 at 49.

15 *Kable*, above n 3, at 635 per Gummow J.

16 *Kable*, above n 3, at 608 per Gaudron J, at 636 per Gummow J.

murderer, Mr Kable, posed to the NSW community. Under the Act, the NSW Supreme Court was empowered to make an order detaining Mr Kable in custody after the expiry of his sentence for a period of six months.[17] Such an order was to be made where the Supreme Court was satisfied on reasonable grounds that Mr Kable was more likely than not to commit a serious act of violence or that it was appropriate for the protection of particular people that Mr Kable be held in custody.[18] As Toohey J observed, the '[NSW] Supreme Court is thereby required to participate in a process designed to bring about the detention of a person by reason of the court's assessment of what that person might do, not what the person had done'.[19] Similar *ad hominen* Australian legislation had only been enacted on one previous occasion.[20]

D. *Kable* Majority

The High Court, by majority, declared in *Kable* that non-judicial functions which the Community Protection Act 1994 (NSW) conferred on the NSW Supreme Court were incompatible with Chapter III of the Commonwealth Constitution and, hence, were invalid.[21] In separate judgments, Toohey, Gaudron, McHugh and Gummow JJ discussed the source and effect of this limitation on State legislative power. Despite variations, two general approaches emerge. Firstly, Toohey J adopted a narrow view, confining his discussion to the compatibility between State courts' non-judicial functions and Commonwealth judicial power. Conversely, Gaudron and McHugh JJ, and to some extent, Gummow J, adopted a broader 'integrated' approach, basing their enunciation of the Chapter III limitation on their vision of an integrated Australian judicial system which required State courts invested with federal jurisdiction to be capable of exercising Commonwealth judicial power.

Within the broader approach, common elements can be discerned. Firstly, the majority considered that Chapter III envisaged State courts as significant components of an integrated Australian judicial system.[22] Secondly, they considered that a Chapter III implication for State courts did not infringe the constitutional law principle, requiring the Commonwealth Parliament to take State courts as it finds them. Consequently, State courts are required to be compatible with Chapter III for the exercise of

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17 *Community Protection Act*, s3.

18 *Community Protection Act*, ss5(1)(a), (b).

19 *Kable*, above n 3, at 607 per Toohey J.

20 *Community Protection Act* 1990 (Vic). For academic commentary on the Victorian legislation see: D Wood, "A One Man Dangerous Offenders Statute - The Community Protection Act 1990 (Vic)" (1990) 17 *Melbourne University Law Review* 497.

21 *Kable*, above n 3, per Toohey, Gaudron, McHugh and Gummow JJ.

22 Note however, that in *Kable* Toohey J made no reference to an 'integrated Australian judicial system'.

Commonwealth judicial power. On this basis, the majority assessed the compatibility of non-judicial functions conferred on the NSW Supreme Court by the Community Protection Act with Chapter III of the Commonwealth Constitution. Although no common standard is apparent, the majority's underlying concern was to maintain public confidence in the independence of State courts invested with federal jurisdiction.

1. Chapter III and State Courts

In seeking to limit non-judicial functions exercised by State courts, the majority first had regard to the relationship between Chapter III of the Commonwealth Constitution and State courts. Of the majority, Toohey J gave the least attention to the role and status of State courts, simply referring to the constitutional scheme under Chapter III.[23] Gaudron, McHugh and Gummow JJ placed greater emphasis on the status of State courts in their vision of an integrated Australian judicial system.[24] For example, Gaudron J observed that the Commonwealth Constitution established an integrated judicial system for the exercise of Commonwealth judicial power.[25] Similarly, McHugh J asserted that there is an 'integrated system of State and federal courts'.[26] More specifically, Gummow J argued that, upon federation, the Commonwealth Constitution provided for 'one Australian judicial system which was unified in structure'[27] with all avenues of appeal initially leading to the Privy Council.[28] However, Gummow J observed that the result of Commonwealth legislation enacted between 1968 and 1986 was to place the High Court at the apex of the unified system.[29] On this basis he concluded that:

> "...since the coming into force of the Australia Acts [on 3 March 1986] and the removal by s11 thereof of the appeal from the Supreme Courts of the States to the Privy Council, s73 of the Constitution places this court in final superintendence over the whole of an integrated national court system."[30]

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[23] *Kable*, above n 3, at 605 per Toohey J.

[24] R French, "Parliament, the Executive, the Courts and the People" (1996) 3 *Deakin Law Review* 1 at 12.

[25] *Kable*, above n 3, at 611 per Gaudron J.

[26] *Kable*, above n 3, at 621 per McHugh J.

[27] *Kable*, above n 3, at 640 per Gummow J.

[28] *Caltex Oil (Australia) Pty Ltd v XL Petroleum (NSW) Pty Ltd* (1984) 155 CLR 72 at 95 per Deane J. However, note the remaining exception in section 74 of the Commonwealth Constitution which permits Privy Council appeals but requires leave of the High Court for these inter se constitutional matters.

[29] *Kable*, above n 3, at 619 per McHugh J, at 640 per Gummow J. For a different view, see: JA Thomson, "The Australia Acts 1986: A State Constitutional Law Perspective" (1990) *University of Western Australia Law Review* 409 at 426.

[30] *Kable*, above n 3, at 640 per Gummow J. But see section 74 of the Commonwealth Constitution and section 16 of the *Australia Acts* 1986 (Cth) & (UK) (providing the definition of 'Australian court'), which do not alter the section 74 Privy Council appeal.

Further, McHugh and Gummow JJ derived their vision of an integrated Australian judicial system, not only from the structure and provisions of Chapter III,[31] but from the existence of a unified common law.[32] In this regard, Gummow J referred to an observation by Mason, Murphy, Brennan and Deane JJ in *Fencott v Muller*:[33]

> "Subject to any contrary provision made by federal law and subject to the limitation upon the capacity of non-federal laws to affect federal courts, non-federal law is part of the single, composite body of law applicable alike to cases determined in the exercise of federal jurisdiction and to cases determined in the exercise of non-federal jurisdiction."[34]

Gummow J argued that the existence of an integrated Australian court system ensured the 'unity of the common law of Australia'.[35] McHugh J also referred to previous judicial authority[36] and extra-judicial statements by Sir Owen Dixon.[37] Based on these observations, McHugh J noted that the High Court has the constitutional duty of 'maintaining a unified system of common law'.[38]

Having set out their vision of Australia's integrated judicial system, Gaudron, McHugh and Gummow JJ examined the relationship between Chapter III of the Commonwealth Constitution and State courts. In this process, the justices utilised different interpretative techniques, placing emphasis on either Chapter III's text or the founders' intentions.

In part, McHugh and Gaudron JJ adopted a literalist method of interpretation,[39] focussing on Chapter III's specific provisions. This reliance on Chapter III's text is comparable to that of Toohey J, who specifically drew on Chapter III's constitutional scheme.[40] Within Chapter III, Toohey, Gaudron and McHugh JJ focussed in particular upon sections 71, 73(ii) and 77(iii).[41] Section 71 vests the exercise of Commonwealth judicial power in the High Court and such other courts as the Commonwealth Parliament creates, and in such other courts as it invests with federal jurisdiction. Section 73(ii) provides that decisions of State courts, whether or not

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31 For example, sections 73(ii) and 77(iii) of the Commonwealth Constitution.

32 *Kable*, above n 3, at 619 per McHugh J, at 640 per Gummow J.

33 *Kable*, above n 3, at 639 per Gummow J.

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

35 *Kable*, above n 3, at 640 per Gummow J.

36 *Mabo*, above n 1, at 15 per Mason CJ, McHugh J; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477 at 556 per McHugh J.

37 *Kable*, above n 3, at 619-620 per McHugh J.

38 As above.

39 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 at 142, 148-149 per Knox CJ, Rich and Starke JJ; G Craven, "The Crisis of Constitutional Literalism in Australia" in HP Lee and G Winterton (eds), *Australian Constitutional Perspectives*, Sydney: Law Book Company 1992 at 2.

40 *Kable*, above n 3, at 605 per Toohey J.

41 *Kable*, above n 3, at 605, 609-610 per Toohey J, at 610 per Gaudron J, at 621 per McHugh J. See also: Z Cowen and L Zines, *Federal Jurisdiction in Australia*, 2nd ed, Melbourne: Oxford University Press, 1978 at 174.

given in the exercise of Commonwealth judicial power, yield 'matters' from which appeals may lie to the High Court. Section 77(iii), the 'autochthonous expedient',[42] provides that the Commonwealth Parliament may, in respect of section 75 and 76 matters, vest federal jurisdiction in any State court. Accordingly, section 39 of the *Judiciary Act* 1903 (Cth) has vested federal jurisdiction in 'the several Courts of the States' with respect to those matters.

From this analysis, Gaudron and McHugh JJ concluded that State courts are significant components of the Australian judicial system. In particular, McHugh J noted the 'special position of the Supreme Courts of the States'.[43] He observed that 'State courts have a status and role that extends beyond their status and role as part of the State judicial system'.[44] Further, Gaudron J pointed out that various provisions of Chapter III made no distinction between federal courts and State courts.[45] In the same vein as McHugh J, Gaudron J concluded:

> "[A]s I pointed out in *Leeth v Commonwealth*, that State Courts, when exercising federal jurisdiction 'are part of the Australian judicial system created by Ch III of the Constitution and, in that sense and on that account, they have a role and existence which transcends their status as courts of the States.'"[46]

In this way, Gaudron and McHugh JJ's approach represents an application of what has been termed the 'Grand Design', in looking to the purpose of specific provisions of Chapter III 'as part of a very broad concept of the Australian federation'.[47]

On the other hand, Gummow J explored the status of State courts by explicitly adopting an intentionalist or originalist method of constitutional interpretation. This interpretative technique requires a construction of the Constitution's provisions that reflects the meaning intended by the founders.[48] Gummow J examined the founders' intention behind Chapter

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[42] *Commonwealth v Hospital Contribution Fund of Australia* (1982) 150 CLR 49 at 74 per Brennan J; *R v Kirby; Ex parte Boilermakers' Society of Australia*, above n 6, at 268 per Dixon CJ, McTiernan, Fullager and Kitto JJ; AJ Rogers, "State/Federal Court Relations" (1981) 55 *Australian Law Journal* 630 at 633; N Bowen, "Federal and State Court Relationships" (1979) 53 *Australian Law Journal* 806; Z Cowen and L Zines, above n 41, at 174; L Street, "The Consequences of a Dual System of State and Federal Courts" (1978) 52 *Australian Law Journal* 434; B O'Brien, "The Law Applicable in Federal Jurisdiction" (1975) 1 *University of New South Wales Law Journal* 327 at 330; R Else-Mitchell, "Burying the Autochthonous Expedient?" (1969) 3 *Federal Law Review* 187.

[43] *Kable*, above n 3, at 618 per McHugh J.

[44] *Kable*, above n 3, at 621.

[45] *Kable*, above n 3, at 609 per Gaudron J. See for example: ss71, 78 and 79.

[46] *Kable*, above n 3, at 612 per Gaudron J (footnote omitted).

[47] JJ Doyle, "Constitutional Law: 'At the Eye of the Storm'" (1993) 23 *University of Western Australia Law Review* 15 at 20. This notion was, in part, derived from the decision of Deane and Toohey JJ in *Leeth v Commonwealth*, above n 6. However, the basis of Deane and Toohey JJ's approach was rejected in *Kruger v Commonwealth*, above n 6, at 141 per Brennan CJ, at 155 per Dawson J, at 227 per Gummow J.

[48] *New South Wales v Commonwealth* (1990) 169 CLR 482; *Cole v Whitfield* (1988) 165 CLR 360. For academic support and commentary on this method of interpretation see: H Patapan,

III's inclusion of State courts and commented that:

> "...[o]ne of the reasons of the framers of the Constitution in providing provision for investment of State courts with federal jurisdiction was the saving of the expense then seen to have been involved in the immediate creation of a system of federal courts..."[49]

In support of this interpretation, Gummow J noted Sir Kenneth Bailey's observation that the original intention of Chapter III's provision for State courts:

> "...was clearly to place a State court exercising federal jurisdiction on the same general footing as the federal courts which should be created by the parliament. Their jurisdiction was in both cases to be fixed by [the Commonwealth] parliament; their decisions were alike to be subject to appeal to the High Court. For this similarity there was, of course, good reason. The State courts were to be used, at the discretion of the Commonwealth Parliament, instead of additional federal courts: as 'substitute tribunals', in the words of Starke J."[50]

Without making any conclusions about lower State courts, Gummow J also noted that section 73(ii) of the Commonwealth Constitution places Supreme Courts 'in a distinct position' because the High Court has appellate jurisdiction in appeals from Supreme Courts.[51]

McHugh J's opinion also shows traces of an intentionalist mode of constitutional interpretation. He noted, for example, that abolition of a State's court system would defeat the constitutional plan of investing State courts with federal jurisdiction.[52] Indeed, on this basis, McHugh J argued that it could not have been 'intended that a State could defeat the exercise of grants of power' conferred on the Commonwealth Parliament by abolishing its courts.[53]

Thus, the majority justices utilised different interpretative techniques

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"The Dead Hand of the Founders? Original Intent and the Constitutional Protection of Rights and Freedoms in Australia" (1997) 25 *Federal Law Review* 211 at 212; J Goldsworthy, "Originalism in Constitutional Interpretation" (1997) 25 *Federal Law Review* 1 at 19; PH Lane, *Lane's Commentary on the Australian Constitution*, 2nd ed, Sydney: LBC Information Services, 1997 at 24; G Craven, "The High Court of Australia: A Study in the Abuse of Power", *Alfred Deakin Lecture* 1997 at 14; S Donaghue, "The Clamour of Silent Constitutional Principles" (1996) 24 *Federal Law Review* 133 at 144; A Mason, "The Interpretation of a Constitution in a Modern Liberal Democracy" in C Sampford and K Preston, *Interpreting Constitutions: Theories, Principles and Institutions*, Sydney: Federation Press, 1996 at 15; J Goldsworthy, "Implications in Language, Law and the Constitution" in GJ Lindell (ed), *Future Directions in Australian Constitutional Law*, Sydney: Federation Press, 1994 at 179; G Craven, above n 39, at 20.

49 *Kable*, above n 3, at 641 per Gummow J.

50 KH Bailey, "The Federal Jurisdiction of State Courts" (1940) 2 *Res Judicatae* 109 at 109 (referring to *Commonwealth v Limerick Steamship Co Ltd* and *Kidman* (1924) 35 CLR 69 at 116 per Starke J).

51 *Kable*, above n 3, at 642 per Gummow J.

52 *Kable*, above n 3, at 618 per McHugh J.

53 As above.

with Gaudron and McHugh JJ focussing on the text and structure of Chapter III of the Commonwealth Constitution and Gummow J, and McHugh J in part, relying upon the founders' intention. Despite these varying approaches, Gaudron, McHugh and Gummow JJ all supported the proposition that State courts were necessary components of an integrated Australian judicial system.

2. 'Taking State Courts' Principle

A contentious obstacle for the *Kable* majority in implying the Chapter III limitation on State legislative power was the judicially established principle that the Commonwealth Parliament must take State Courts as it finds them.[54] This principle was central to the dissents of Brennan CJ and Dawson J.[55]

Sections 71 and 77 of the Commonwealth Constitution draw a clear distinction between federal courts and State courts invested with federal jurisdiction.[56] For example, under section 77(i), the Commonwealth Parliament may define the jurisdiction of federal courts, while under section 77(iii) it may invest State courts with federal jurisdiction. State courts invested with federal jurisdiction cannot be described as federal courts.[57]

Nevertheless, the High Court has examined the question of the 'character'[58] of State courts invested with federal jurisdiction.[59] Previous cases have found that while the constitution and organisation of federal courts is a matter for the Commonwealth Parliament,[60] the constitution and organisation of State courts is a matter for State Parliaments. For example,

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[54] *Leeth v Commonwealth*, above n 6, at 469 per Mason CJ, Dawson and McHugh JJ; *Brown v R* (1986) 160 CLR 171 at 198-199 per Brennan J, at 218-219 per Dawson J; *Commonwealth v Hospital Contribution Fund of Australia*, above n 42, at 61 per Mason J; *Russell v Russell* (1976) 134 CLR 495 at 516-517 per Gibbs J, at 530 per Stephen J, at 535 per Mason J, at 554 per Jacobs J; *Kotsis v Kotsis* (1970) 122 CLR 69 at 109 per Gibbs J; *Peacock v Newtown Marrickville and General Co-operative Building Society No 4 Ltd* (1943) 67 CLR 25 at 37 per Latham CJ; *Adams v Chas S Watson Pty Ltd* (1938) 60 CLR 545 at 554-555; *Le Mesurier v Connor* (1929) 42 CLR 481 at 496, 498 per Knox CJ, Rich and Dixon JJ; *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander* (1912) 15 CLR 308 at 313 per Griffith CJ; PH Lane, above n 48, at 463; Z Cowen and L Zines, above n 41, at 184-186; WA Wynes, *Legislative, Executive and Judicial Powers*, 5th ed, Sydney: Law Book Company, 1976 at 494; KH Bailey, above n 50, at 109.

[55] *Kable*, above n 3, at 583 per Brennan CJ, at 596 per Dawson J.

[56] *Kable*, above n 3, at 595 per Dawson J; *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437 at 452 per Isaacs J; C Enright *Constitutional Law*, Sydney: Law Book Company, 1977 at 248-250; WA Wynes, above n 54, at 488.

[57] *R v Murray* and *Cormie*, above n 56, at 452 per Isaacs J; Z Cowen and L Zines, above n 41, at 179; WA Wynes, above n 54, at 497. For a different view, see: *Le Mesurier v Connor*, above n 54, at 514 per Isaacs J.

[58] Z Cowen and L Zines, above n 41, at 178.

[59] See for example: *Russell v Russell*, above n 54; *Kotsis v Kotsis*, above n 54; *Peacock v Newtown Marrickville*, above n 54; *Adams v Chas S Watson Pty Ltd*, above n 54; *Le Mesurier v Connor*, above n 54.

[60] Commonwealth Constitution, Chapter III.

criteria for the appointment, tenure and remuneration of federal[61] judges are found in section 72 of the Commonwealth Constitution. Conversely, the appointment, tenure and remuneration of State court judges are determined by State Parliaments.[62] Based on this division of power with respect to federal and State courts, the High Court has held that the Commonwealth Parliament must take State courts as it finds them.

In *Federated Sawmill, Timberyard and General Woodworkers' Employees' Association (Adelaide Branch) v Alexander*[63] it was held that where Commonwealth legislation confers federal jurisdiction upon a State court, that court must be taken as it is found, including any jurisdictional limits.[64] Similarly, *Le Mesurier v Connor*[65] held that State courts are 'the judicial organs' of the States. The effect of this principle enables a State court to exercise non-judicial functions under State law which, if 'judged according to federal constitutional standards, would not be regarded as pertaining to judicial power'.[66]

The *Kable* majority took two distinct approaches to this principle. Toohey J, whose concern lay with the compatibility of non-judicial functions with Commonwealth judicial power, considered that the question in *Kable* was not resolved by previous cases establishing the 'taking State courts' principle.[67] He observed that the NSW Supreme Court was exercising federal jurisdiction under section 77(iii) of the Commonwealth Constitution and section 39 of the *Judiciary Act* 1903 (Cth).[68] On this basis, Toohey J concluded that it was not the investing of jurisdiction that was in issue, but the exercise of federal jurisdiction by the Supreme Court.[69] Gummow J also distinguished judicial authority in support of the principle on the basis that the NSW Supreme Court was exercising federal jurisdiction pursuant to sections 76(i) and 77(ii) of the Commonwealth Constitution and section 39 of the *Judiciary Act* 1903 (Cth).[70] Consequently, he found that no question of investing a State court with federal jurisdiction arose.[71]

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61 'Federal' refers to the High Court and other courts created by the Commonwealth Parliament.

62 *Kable*, above n 3, at 594 per Dawson J, at 611 per Gaudron J, at 621 per McHugh J; PH Lane, "Constitutional Aspects of Judicial Independence" in H Cunningham (ed), *Fragile Bastion Judicial Independence in the Nineties and Beyond*, Sydney: Judicial Commission of New South Wales, 1997 at 66; MD Kirby, "The Independence of the Judiciary" [1996] *Prima Facie* 3 at 5; G Brennan, "Courts for the People – Not People's Courts" (1995) 2 *Deakin Law Review* 1 at 11; MD Kirby, "Judicial Independence in Australia Reaches a Moment of Truth" (1990) 13 *University of New South Wales Law Journal* 187; G Green, "The Rationale and Some Aspects of Judicial Independence" (1985) 59 *Australian Law Journal* 134 at 139-141.

63 (1912) 15 CLR 308.

64 *Federated Sawmill, Timberyard v Alexander*, above n 54, at 313 per Griffith CJ.

65 (1929) 42 CLR 481.

66 E Campbell, above n 14, at 53.

67 *Kable*, above n 3, at 606 per Toohey J.

68 *Kable*, above n 3, at 605 per Toohey J.

69 *Kable*, above n 3, at 606 per Toohey J.

70 *Kable*, above n 3, at 638 per Gummow J.

71 As above.

Conversely, McHugh and Gaudron JJ incorporated a qualified form of the 'taking State courts' principle into their broader 'integrated' approach. Gaudron J recognised that State courts are creatures of State legislation,[72] but questioned whether previous cases established the unqualified proposition that the Commonwealth Parliament must take a State court in every respect as it finds it.[73] Indeed, drawing on her vision of an integrated Australian judicial system, Gaudron J argued that State legislative power was limited with respect to State courts.[74] It was for State Parliaments to determine the State courts' constitutions and their organisation. However, the Commonwealth Constitution required that State courts be maintained in a way such that they remained capable of exercising Commonwealth judicial power.[75] Gaudron J observed that the Commonwealth Constitution did not permit different 'qualities of justice, depending upon whether judicial power is exercised by State courts or federal courts'.[76] Therefore, from Gaudron J's reasoning it followed that if Chapter III required State courts not to exercise incompatible non-judicial functions in order to fulfil their role as repositories of federal jurisdiction, State legislatures were prohibited by the Commonwealth Constitution from conferring those functions.

Similarly, McHugh J asserted that judicial authority establishing that the Commonwealth must take State courts as it finds them did not prevent Chapter III implications preventing State Parliaments investing State courts with incompatible non-judicial functions.[77] For McHugh J, such implications arose from the nature of the integrated Australian judicial system established by Chapter III.

It is relevant to draw a parallel between this 'integrated' approach and Isaacs J's dissenting judgment in *Le Mesurier v Connor*, which stated that once a State court has been invested with federal jurisdiction:

> "...[t]he State court becomes *ipso facto* one of the Courts described in s71 of the [Commonwealth] Constitution, and, *pro hac vice*, a component part of the Federal Judicature. True, it is and always remains a State Court, but by virtue of s71 it becomes an integral part of the 'Judicature,' that is, that portion of the political organism called the Commonwealth of Australia..."[78]

On Isaacs J's approach, State courts invested with federal jurisdiction remain State courts but, once invested with federal jurisdiction, are an 'integral part' of the Australian judicial system. Essentially, the 'integrated' approach of Gaudron and McHugh JJ in *Kable* adopts this reasoning, but goes one step further in deriving a Commonwealth constitutional limitation based on the

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72 *Kable*, above n 3, at 611 per Gaudron J.
73 As above.
74 As above.
75 *Kable*, above n 3, at 612 per Gaudron J.
76 As above.
77 *Kable*, above n 3, at 611 per Gaudron J.
78 Above n 54, at 514.

integral role of Supreme Courts in the Australian judicial system.

Therefore, out of the majority in *Kable*, two differing approaches emerge to the 'taking State courts' principle. Toohey and Gummow JJ considered the principle irrelevant because in *Kable* the Supreme Court was exercising federal jurisdiction. On the other hand, Gaudron and McHugh JJ qualified established judicial authority and on this basis held that, although State courts invested with federal jurisdiction remain State courts, they are part of an integrated judicial system and must conform with Chapter III implications. On Gaudron and McHugh JJ's interpretation, the Commonwealth Parliament can unilaterally bring State courts into this integrated judicial system and subject them to its requirements by investing State courts with federal jurisdiction.[79]

3. Incompatibility

Next, the majority considered the content of the Chapter III implication for State courts. Specifically, they assessed whether the non-judicial functions of the NSW Supreme Court were incompatible with Chapter III. Ultimately, Toohey, Gaudron, McHugh and Gummow JJ found the NSW Act incompatible with Chapter III of the Commonwealth Constitution. However, the majority again diverged in its reasoning.[80]

The fact that the NSW legislation gave the Supreme Court a non-judicial function was not sufficient to establish its incompatibility.[81] As Gaudron J stated, the 'prohibition on State legislative power...is not at all comparable with the limitation on the legislative power of the Commonwealth enunciated in *R v Kirby; Ex parte Boilermakers' Society of Australia*'.[82] McHugh J observed that a State Act could invest its Supreme Court with jurisdiction similar to that exercised in 'the federal sphere by the Administrative Appeals Tribunal'.[83] Similarly, State laws investing mining

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[79] Under section 77 (iii) of the Commonwealth Constitution there is no requirement for the Commonwealth Parliament to obtain the consent of State Parliaments for the investing of federal jurisdiction in State courts. See: E Campbell, above n 14, at 53.

[80] For example, in considering this point Hayne JA stated: "I do not find it easy to identify the principle that underlies *Kable*": *R v Moffatt* (1997) 9 A Crim R 557 at 577 per Hayne JA; RJ Brender, "Polluting the Stream of Justice" (1997) March *Law Society Journal* 56 at 58; K Walker, "Persona Designata, Incompatibility and the Separation of Powers" (1997) 8 *Public Law Review* 153. However, it has been suggested that "the gist of what will not be tolerated is clear": J Miller, "Criminal Cases in the High Court of Australia" (1997) 21 *Criminal Law Review* 92 at 99.

[81] *Re Australasian Memory and Corporations Law; Brien v Australasian Memory* (1997) 149 ALR 393 at 432 per Santow J; *R v Moffatt*, above n 80, at 577-578 per Hayne JA; *Kable*, above n 3, at 606 per Toohey J, at 615 per Gaudron J, at 617 per McHugh J, at 643 per Gummow J; J Miller, above n 80, at 98.

[82] *Kable*, above n 3, at 612 per Gaudron J (footnote omitted). This point was made by Santow J in *Re Australasian Memory and Corporations Law; Brien v Australasian Memory*, above n 81, at 432 per Santow J.

[83] *Kable*, above n 3, at 623 per McHugh J. See also: PW Young, "Current Issues" (1996) 70 *Australian Law Journal* 865 at 866.

warden's courts, licensing courts and planning courts with administrative powers would also be valid.[84]

Various interpretations of *Kable's* incompatibility standard have emerged. On one view the *Kable* majority may be seen as centring on the aspect of incompatibility with Commonwealth judicial power.[85] For example, Toohey J and, to a lesser extent, Gaudron J explicitly relied on the *Grollo v Palmer*[86] incompatibility test.[87] However, Toohey and Gaudron JJ's application of the incompatibility doctrine is unclear.[88] Further, McHugh and Gummow JJ made no reference to *Grollo* incompatibility.[89] Other academic opinion has argued that *Kable* was premised on public confidence in the State court system.[90]

Despite this uncertainty, the tenor of the majority judgments reveals a concern in maintaining public confidence in the independence of State courts exercising Commonwealth judicial power.[91] All members of the *Kable* majority considered that public confidence in those courts would be jeopardised if they were vested with non-judicial functions incompatible with independent adjudication.

Toohey J explicitly adopted the notion of incompatibility[92] enunciated in *Grollo v Palmer*[93] and *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,[94] which concerned the validity of federal judges exercising Commonwealth legislative or executive power as *persona designata*. These cases discussed the principle that federal judges may exercise non-judicial power provided that the exercise of such powers is not incompatible with the judge's exercise of Commonwealth judicial power.[95] In particular, *Grollo* recognised three limbs to the incompatibility doctrine.[96]

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84 *Kable*, above n 3, at 583 per Brennan CJ.

85 *Laurance v Katter* (1996) 141 ALR 447 at 445 per Fitzgerald P. For academic commentary see: PH Lane, above n 48, at 463; E Campbell, "Constitutional Protection of State Courts and Judges" (1997) 23 *Monash University Law Review* 397 at 409; E Handsley, "Do Hard Laws Make Bad Cases? – The High Court's Decision in *Kable v Director of Public Prosecutions*" (1997) 25 *Federal Law Review* 171 at 175.

86 (1995) 184 CLR 348 (*Grollo*).

87 *Kable*, above n 3, at 608 per Toohey J, at 612 per Gaudron J.

88 K Walker, above n 80, at 165-166.

89 For a different interpretation of the application of the *Grollo* incompatibility doctrine see: E Handsley, above n 85, at 175.

90 R Sackville, "Continuity and Judicial Creativity – Some Observations" (1997) 20 *University of New South Wales Law Journal* 145 at 167; R Roberts, "Retrospective Criminal Laws and the Separation of Judicial Power" (1997) 8 *Public Law Review* 170 at 179; M Smith, "Recent Cases" (1996) 70 *Australian Law Journal* 963 at 969.

91 This was recognised by Kirby J in *Nicholas v R* (1998) 151 ALR 312 at para 201 per Kirby J. See also: *Hi-Fert Pty Ltd v Kiukiang Maritime Carriers Inc* (1997) 145 ALR 500 at 507 per Tamberlin J.

92 *Western Australia v Ward* (1997) 145 ALR 512 at 517 per Hill and Sundberg JJ.

93 (1995) 184 CLR 348.

94 (1996) 138 ALR 220. See: *Western Australia v Ward*, above n 92, at 517 per Hill and Sundberg JJ.

95 See also: *Western Australia v Ward*, above n 92, at 517 per Hill and Sundberg JJ; *Hilton v Wells* (1985) 157 CLR 57; PH Lane, above n 48, at 482.

96 *Grollo v Palmer* (1995) 184 CLR 348 at 365 per Brennan CJ, Deane, Dawson and Toohey JJ.

In dissent, Dawson J criticised reliance on the notion of 'incompatibility', arguing that different degrees of incompatibility may exist at State and Commonwealth levels.[97] Toohey J acknowledged this point, but nevertheless found the incompatibility doctrine applicable and asserted:

> "It is true that the proposition was enunciated in the context of the power to confer non-judicial functions on judges as designated persons but in my view it holds good whenever Ch III of the Constitution is operative."[98]

Although Toohey J did not identify the species of incompatibility he applied, logic suggests it was the third limb identified in *Grollo*.[99] The third limb recognises that incompatibility arises where the nature of the non-judicial functions undermines public confidence in the integrity of the court or judge in his, or her, individual capacity.[100] Toohey J asserted the *Grollo* incompatibility test was applicable as the NSW Act required:

> "...the performance of non-judicial functions of such a nature that public confidence in the integrity of the judiciary as an institution...is diminished."[101]

In this case, Toohey J concluded that the Act '[r]equired the Supreme Court to exercise the judicial power of the Commonwealth in a manner which is inconsistent with traditional judicial process'.[102] Therefore, although Toohey J utilised the *Grollo* incompatibility doctrine, his underlying concern was the maintenance of public confidence in the integrity of the judiciary. Of interest is that the *Grollo* incompatibility doctrine was, at least in part, adopted from judicial authority in the United States, in particular *Mistretta v United States*.[103] Reliance on the notion of incompatible functions has been the subject of increasing criticism in both Australia and the United States.[104]

In comparison, McHugh J adopted a broader approach, looking to the maintenance of public confidence in the 'impartial administration of the

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97 *Kable*, above n 3, at 598 per Dawson J.

98 *Kable*, above n 3, at 606 per Toohey J.

99 *Kable*, above n 3, at 608 per Toohey J 608; K Walker, above n 80, at 166.

100 *Grollo v Palmer*, above n 96, at 365 per Brennan CJ, Deane, Dawson and Toohey JJ.

101 *Kable*, above n 3, at 608 per Toohey J (footnote omitted).

102 As above.

103 (1989) 488 US 361. For earlier applications of this doctrine see: *Hobson v Hansen* (1967) 265 F Supp 902 at 923 per Wright J (dissenting); *Re Application of the President's Commission on Organized Crime* (1985) 763 F 2d 1191 at 1197-1198 per Fay and Johnson JJ; *Gubienski-Ortiz v Kanahele* (1988) 857 F 2d 1245 at 1260-1263 per Kozinski J.

104 See for example: K Walker, above n 80; E Handsley, above n 85, at 178; I Bloom, "The Aftermath of *Mistretta*: The Demonstrated Incompatibility of the United States Sentencing Commission and Separation of Powers Principles" (1996) 24 *American Journal of Criminal Law* 1 at 11-27; MH Redish, "Separation of Powers, Judicial Authority and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*" (1989) 39 *DePaul Law Review* 299. For a discussion of the advantages of the incompatibility doctrine see: A Mason, "A New Perspective on Separation of Powers" *Reshaping Australian Institutions*: ANU Public Lecture 1 Canberra 25 July 1996. For judicial discussion of Sir Anthony Mason's paper see: *Re Australasian Memory and Corporations Law; Brien v Australasian Memory*, above n 81, at 435 per Santow J.

judicial power of State courts'.[105] In this regard, McHugh J stated that non-judicial functions could not be conferred upon the Supreme Court 'that might lead an ordinary reasonable member of the public to conclude that the court was not independent of the executive government of that State'.[106] On this basis, McHugh J found that the NSW Act was invalid because it was 'far removed from ordinary incidents of the judicial process'.[107]

Similarly, Gaudron J stated that the Commonwealth constitutional limitation flows from the 'necessity to ensure the integrity of the judicial process and the integrity of the courts specified in section 71 of the Constitution'.[108] This test was, at least in part, derived from the *Grollo* incompatibility.[109] Gaudron J drew on the underlying concern in *Grollo*; namely that the judiciary's integrity is dependent upon its operation in accordance with the judicial process and the 'maintenance of public confidence in that process'.[110] Applying this standard, Gaudron J found that the NSW Act compromised the Supreme Court's integrity because it contemplated proceedings that 'are not proceedings otherwise known to the law' and 'do not in any way partake of the nature of legal proceedings'.[111]

For Gummow J, the Chapter III implication ensured the institutional impartiality of State courts.[112] Accordingly, Gummow J accepted the appellant's broad submission that the 'institutional impairment of the judicial power of the Commonwealth' was sapped to an impermissible degree by *ad hominem* legislation of the nature in the NSW Act.[113]

This variation illustrates *Kable* applied a high threshold of invalidation for non-judicial functions exercised by State courts.[114] Although not all members of the majority explicitly referred to *Grollo* incompatibility, the content of this doctrine was used to determine when public confidence in the integrity of State courts would be diminished.[115]

In effect, *Kable's* limitation on non-judicial functions represents an application of an aspect of the separation of powers doctrine embodied in the Commonwealth Constitution.[116] Indeed, McHugh J noted 'in some situations the effect of Ch III of the Constitution may lead to the same result as if the State had an enforceable doctrine of separation of

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[105] *Kable*, above n 3, at 624 per McHugh J.
[106] *Kable*, above n 3, at 623 per McHugh J.
[107] *Kable*, above n 3, at 627 per McHugh J.
[108] *Kable*, above n 3, at 612 per Gaudron J. See also: *Western Australia v Ward* above n 92, at 517 per Hill and Sundberg JJ.
[109] *Kable*, above n 3, at 612 per Gaudron J.
[110] *Kable*, above n 3, at 615 per Gaudron J.
[111] *Kable*, above n 3, at 614 per Gaudron J.
[112] *Kable*, above n 3, at 644 per Gummow J.
[113] *Kable*, above n 3, at 636, 644 per Gummow J.
[114] *Re Australasian Memory and Corporations Law; Brien v Australasian Memory* above n 81, at 432 per Santow J.
[115] A similar point was made by Santow J in *Re Australasian Memory and Corporations Law; Brien v Australasian Memory*, above n 81, at 428 per Santow J.
[116] In dissent, Dawson J made this point, stating that under the majority approach 'a quasi-separation of power' will be established at the State level: *Kable*, above n 3, at 599 per Dawson J.

powers'.[117] On this basis, *Kable* imposes a Commonwealth constitutional doctrinal limitation on State Parliaments and State courts.

Academic commentary has relied on two models, formalism and functionalism in analysing judicial interpretation of the separation of powers doctrine.[118] The formalist model requires the judiciary to abstain from exercising non-judicial power and proscribes the exercise of judicial power by the executive and legislature.[119] The functionalist model is more flexible,[120] permitting a 'degree of overlap' between the functions of three branches of government.[121] However, where the overlap would undermine one branch's successful performance of its essential function 'the overlap will be disallowed because it violates the separation of powers'.[122] *Kable* arguably adopts a functionalist approach[123] because it allows State courts to exercise non-judicial functions so long as they do not diminish public confidence in the independence of State courts.

4. The Constitutional Source of Limiting State Legislative Power

Significantly, there is also divergence among the *Kable* majority regarding the way in which State legislative power is limited by Chapter III of the Commonwealth Constitution.

Toohey J held that the NSW Act was invalid because of its incompatibility with Commonwealth judicial power, providing no analysis of the reasons why State legislative power was limited. In contrast, McHugh J derived the limitation on State legislative power from the principle that 'a State cannot legislate in a way that has the effect of violating 'the principles that underlie Chapter III'.[124] In support McHugh J[125] cited Gibbs J in *Commonwealth v Queensland*.[126] However, there are several difficulties with this approach. Firstly, it is not clear whether Gibbs J was espousing a general principle that States cannot violate the principles underlying Chapter III. Gibbs J simply stated that it was implicit in Chapter III that State legislation could provide a procedure to appeal directly to the Judicial Committee of the Privy Council, in effect bypassing the High Court.[127]

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[117] *Kable*, above n 3, at 624 per McHugh J.
[118] For a good comparison between the functionalist and formalist approach see: MH Redish, above n 104, at 304.
[119] K Walker, above n 80, at 163; MH Redish, above n 104, at 304-305.
[120] For a discussion of the functionalist approach see: MT Tully, "The Supreme Court's Pragmatic and Flexible Approach to Federal Judicial Separation of Powers Issues: *Mistretta v United States*" (1990) 39 *DePaul Law Review* 405 at 441; K Walker, above n 80, at 163.
[121] MH Redish, above n 104, at 304-305.
[122] A Mason, above n 104, at 26; MH Redish, above n 104, at 306.
[123] K Walker above n 80, at 166.
[124] *Kable*, above n 3, at 622 per McHugh J.
[125] As above.
[126] (1975) 134 CLR 298, 314-315 per Gibbs J.
[127] *Commonwealth v Queensland* (1975) 134 CLR 298 at 314-315 per Gibbs J.

Secondly, there is no suggestion within Gibbs J's judgment as to what principles underlie Chapter III. McHugh J claimed that one principle underlying Chapter III required State courts invested with federal jurisdiction to be independent of the State legislature and executive. However, with respect, it would seem that there is no prior High Court authority supporting this assertion. Therefore, this part of McHugh J's reasoning is at best, tenuous.

On the other hand, Gaudron and Gummow JJ argued that while the requirement of compatibility is contained in Chapter III, the limit on State legislative power flows from covering cl 5 and section 106 of the Commonwealth Constitution.[128] Covering cl 5 provides that the Constitution is 'binding upon the courts, judges, and people of every State and of every part of the Commonwealth, notwithstanding anything in the laws of any State'. Section 106 provides that the Constitution of each State is made subject to the Australian Constitution.

Although only Gaudron and Gummow JJ explicitly referred to these provisions,[129] they provide the most logical means by which State legislative power can be subject to an implied limitation extrapolated from the Commonwealth Constitution.

Even though the status of covering cl 5 has been questioned,[130] it provides that State legislation is subject to the Commonwealth Constitution.[131] As Quick and Garran noted, 'by this [covering cl 5], coupled with sections 106 to 109, all the laws of the State...will be in effect repealed so far as they are repugnant to the supreme law [Commonwealth Constitution]'.[132] In *Kruger v Commonwealth*, Brennan CJ observed that:

> "...[t]he [Commonwealth] Constitution...by ss106 and 107, conferred upon the States their constitutions and powers subject to the [Commonwealth] Constitution."[133]

Therefore, because State constitutions are subject to the Commonwealth

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[128] *Kable*, above n 3, at 611 per Gaudron J, at 642 per Gummow J.

[129] As above.

[130] See for example: C Howard, *Australian Federal Constitutional Law* 2nd edn, Sydney: Law Book Company, 1972 at 2-3. However, for suggestions of its importance see: L Harvey and JA Thomson, "Some Aspects of State and Federal Jurisdiction Under the Australian Constitution" (1979) 5 *Monash University Law Review* 228 at 229.

[131] *Kable*, above n 3, at 611 per Gaudron J, at 642 per Gummow J; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141 per Brennan J; *Flaherty v Girgis* (1987) 162 CLR 574 at 601 per Brennan J; *Federated Saw Mill Timberyard and General Woodworkers' Employees' Association Australasia v James Moore*, above n 54, at 535 per Isaacs J; PH Lane, above n 48, at 13; L Harvey and JA Thomson, above n 130, at 229; J Quick, *The Legislative Powers of the Commonwealth and the States of Australia with Proposed Amendments*, Melbourne: Maxwell, 1919 at 159. For a discussion of the relationship between covering clauses and the Commonwealth Constitution, see: JA Thomson, "Altering the Constitution: Some Aspects of Section 128" (1983) 13 *Federal Law Review* 323 at 331-335.

[132] J Quick and RR Garran, *The Annotated Constitution of the Australian Commonwealth*, London: Angus & Robertson, 1901 at 353.

[133] *Kruger v Commonwealth*, above n 6, at 139 per Brennan CJ.

Constitution, State legislative power may be limited by Commonwealth constitutional implications. Indeed, in *Theophanous v Herald & Weekly Times Ltd*[134] there were suggestions that the implied freedom of political communication limits State legislative power.[135] For example, Deane J argued that reading sections 106 and 107 together make State legislative power subject to the Commonwealth Constitution.[136] This point, was also acknowledged by Brennan CJ in *McGinty v Western Australia*:

> "The Constitutions of the several States are, by force of s106, subject to the Commonwealth Constitution, the provisions of which may be either expressed in its text or implied in its text and structure."[137]

However, a majority in *McGinty v Western Australia* rejected section 106 as the source of transmission for a Commonwealth constitutional implication to the State level.[138] In dissent, Toohey J also rejected this argument.[139] The underlying reason for this refusal to rely on section 106 was the fact that the guarantee of voting equality in section 24 of the Commonwealth Constitution related to Commonwealth elections. As the 'conduct of State elections would not undermine Commonwealth elections',[140] the Commonwealth constitutional guarantee could not be translated into a State guarantee of voting equality.[141] Therefore, *McGinty v Western Australia* represents a rejection of one specific Commonwealth constitutional implication sought to be transmitted to the State level and thus does not undermine the general effect of section 106. In contrast, the *Kable* Commonwealth constitutional implication is based on Chapter III's structure and specific provisions, including section 77 (iii), which provides for the investing of Commonwealth judicial power in State courts.

Therefore, covering cl 5 and sections 106 and 107 of the Commonwealth Constitution provide the most appropriate means by which State legislative power is subject to a structural implication from Chapter III of the Commonwealth Constitution.

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[134] Above n 131.

[135] *Theophanous v Herald & Weekly Times Ltd*, above n 131, at 156 per Brennan J, at 164-166 per Deane J; G Carney, "The Implied Freedom of Political Discussion – Its Impact on State Constitutions" (1995) 23 *Federal Law Review* 180 at 200.

[136] *Theophanous v Herald & Weekly Times Ltd*, above n 131, at 165 per Deane J.

[137] *McGinty v Western Australia* (1996) 134 ALR 289 at 298 per Brennan CJ, at 326 per Toohey J.

[138] *McGinty v Western Australia*, above n 137, at 300 per Brennan J, at 311 per Dawson J, at 360 per McHugh J, at 375 per Gummow J; G Carne, "Representing Democracy or Reinforcing Inequality?: Electoral Distribution and *McGinty v Western Australia*" (1997) 25 *Federal Law Review* 351 at 373-374.

[139] *McGinty v Western Australia*, above n 137, at 328 per Toohey J.

[140] As above.

[141] G Carne, above n 138, at 374. Similarly, Professor Zines has argued that section 106 does not transfer fundamental principles of the Commonwealth Constitution to State constitutions: L Zines, "A Judicially Created Bill of Rights?" (1994) 16 *Sydney Law Review* 166 at 179-180.

E. Dissenting Judgments

In dissent, Brennan CJ and Dawson J rejected the proposition that Chapter III of the Commonwealth Constitution precluded State legislatures from conferring non-judicial functions upon State courts. Brennan CJ found that this argument had no textual or structural foundation in the Commonwealth Constitution.[142] Similarly, Dawson J held that no limitation could be extrapolated from Chapter III because this would carve out an inviolable realm of State judicial power establishing a 'quasi-separation of powers' at the State level.[143]

1. State Courts Are Creatures of State Parliaments

Confronted by the proposition that Chapter III limits State legislative power, the dissenting judgments observed that the Commonwealth Constitution did not provide for a unified judicial system in Australia.[144] In this regard, Dawson J stated:

> "...[O]ur legal system, though integrated, is not a unitary system...The system is a federal system and, while the framers of the [Commonwealth] Constitution might have established a judicial system which was neither State nor federal but simply Australian, they did not do so."[145]

By dismissing the proposition that the Commonwealth Constitution did not provide for a unitary judicial system, Brennan CJ endorsed and utilised the accepted 'taking the State courts' principle.[146] In contrast to Gummow J, Brennan CJ observed that no support for a Chapter III limitation on State legislative power over State courts could be discerned from the founders' intent.[147] Brennan CJ argued that if this intent existed it would have been contained in the 1890's Convention debates, but was not.[148] Therefore, because of previous cases and lack of evidence of original intent, Brennan CJ concluded that the *Kable* majority's limitation gave Chapter III an unwarranted 'novel operation'.[149]

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[142] *Kable*, above n 3, at 584 per Brennan CJ.
[143] *Kable*, above n 3, at 643 per Dawson J.
[144] J Miller, above n 80, at 96.
[145] *Kable*, above n 3, at 596-597 per Dawson J. Note, that in a more recent article Sir Gerard Brennan emphasises public confidence in Australian courts: G Brennan, above n 52, at 2-3.
[146] *Kable*, above n 3, at 583 per Brennan CJ; J Miller, above n 80, at 96.
[147] *Kable*, above n 3, at 584 per Brennan CJ.
[148] As above. This raises questions as to constitutional interpretative technique. For example, in determining the founders' intent should the court be guided by the 1890's Convention debates? For a discussion of the difficulties associated with ascertaining the founders' intent see: D Dawson, "Intention and the Constitution – Whose Intention?" (1990) 6 *Australian Bar Review* 93.
[149] *Kable*, above n 3, at 583 per Brennan CJ.

Similarly, Dawson J referred to the 'taking State courts' principle[150] and observed that the appellant's argument simply denied this proposition.[151] Further, Dawson J, in drawing on an intentionalist method of interpretation, emphasised Mason J's statement in *Commonwealth v Hospital Contribution Fund* that the framers intended to give the Commonwealth Parliament a power to invest federal jurisdiction in State courts as they were constituted at that time.[152] On the basis of this judicial authority, Dawson J concluded that so long as State courts are, in fact, courts, no limitation can be derived from Chapter III, because the Commonwealth Constitution 'is not concerned with whether State courts comply with' Chapter III's requirements.[153]

2. Misapplication of the Incompatibility Doctrine

The dissenting judgments also discussed the majority's application of the *Grollo* incompatibility doctrine. Brennan CJ argued that reliance on the incompatibility qualification, as applied to the *persona designata* doctrine, is inappropriate because there is no counterpart in the context of limitations on State legislative power.[154] Dawson J noted that *Grollo* concerned the Commonwealth judicial power exercised by a federal court created under Chapter III, which is premised on a separation of powers.[155] On this basis, Dawson J distinguished State courts, observing that what is incompatible with the exercise of Commonwealth judicial power by a Chapter III court may not be incompatible with the exercise of such power by a court not restricted by the separation of powers.[156]

F. Critique

Despite divergence between the majority justices, *Kable* establishes that State Parliaments cannot confer incompatible non-judicial functions on State courts. The apparent strength of the dissenting judgments lies in their reliance on judicial authority that the Commonwealth Parliament must take State courts as it finds them and hence in its consistency with previous case law.

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[150] *Kable*, above n 3, at 596 per Dawson J.
[151] As above.
[152] *Commonwealth v Hospital Contribution Fund*, above n 42, at 61 per Mason J.
[153] *Kable*, above n 3, at 596 per Dawson J.
[154] *Kable*, above n 3, at 584 per Brennan CJ.
[155] *Kable*, above n 3, at 598 per Dawson J.
[156] As above.

However, Gaudron and McHugh JJ's 'integrated' approach[157] largely addresses the difficulties identified by Brennan CJ and Dawson J.[158] In confronting the 'taking State courts' principle, Gaudron and McHugh JJ establish two propositions. Firstly, that the Commonwealth Constitution provides for an integrated Australian judicial system, with the High Court as the apex.[159] Secondly, State courts, as necessary components of that judicial system, must be compatible with Chapter III of the Commonwealth Constitution for the exercise of Commonwealth judicial power. In this way, the 'integrated' approach refutes the dissenting judgments. That is, as a preliminary matter, while the Commonwealth Parliament must take State courts as it finds them, State courts are required to conform with, and fulfil, their intended role under Chapter III.

Prior to *Kable*, Chapter III's relationship with State courts had not been subjected to extensive analysis.[160] However, Gaudron and McHugh JJ's approach raises questions as to the fundamental nature of the Australian judicial system. The real question is whether the Australian judicial system is either unified, national, federal or dual.

Several factors undermine the proposition that the Commonwealth Constitution provides for an integrated Australian judicial system. Firstly, central to the vision of an integrated Australian judicial system is the role of the High Court as the 'final court of appeal'.[161] However, a theoretical avenue for appeal from State courts to the Privy Council exists under section 74 of the Commonwealth Constitution.[162] The definition of 'Australian court' in the Australia Act 1986 (Cth) does not alter Privy Council appeals from the High Court.[163] On this basis, the Privy Council may determine *inter se* questions upon the High Court granting a section 74

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[157] Although Gummow J held that the Commonwealth Constitution provided for an integrated Australian judicial system, he did not use this proposition to address judicial authority establishing that the Commonwealth Parliament must take State courts as it finds them.

[158] In this regard, one academic commentator has observed 'the majority approach is surely to be preferred', although not specifying which members of the majority: J Miller, above n 80. For a different view, see: E Handsley, above n 85, at 175, 179.

[159] However, see n 161, and 162 and accompanying text.

[160] See: JA Thomson, "State Constitutional Law: The Quiet Revolution" (1990) 20 *University of Western Australia Law Review* 311 at 322. Academic commentary prior to *Kable* includes: M Byers, "Federal/State Judicatures" (1984) 58 *The Australian Law Journal* 590; CD Gilbert, "Federal Constitutional Guarantees of the States: Section 106 and Appeals to the Privy Council from State Supreme Courts" (1978) 9 *Federal Law Review* 348; O Dixon, "The Common Law as an Ultimate Constitutional Foundation" (1957) 31 *Australian Law Journal* 240; KH Bailey, above n 50.

[161] In *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194 at 208, Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ referred to the High Court as the 'final court of appeal'.

[162] JA Thomson, above n 29, at 426; HE Renfree, *The Federal Judicial System of Australia*, Sydney: Legal Books, 1984 at 783-795; CD Gilbert, above n 160, at 348. For a different view, see: J Goldring, "The Australia Act and the Formal Independence of Australia" [1986] *Public Law* 192 at 202.

[163] *Australia Act* 1986 (Cth), s16; JA Thomson, above n 29, at 426.

certificate.[164] While McHugh J in *Kable* noted the existence of this avenue of appeal prior to the Australia Acts, he made no reference to the continued possibility of such an appeal.[165] However, the High Court has granted only one section 74 certificate,[166] and it is unlikely to grant another.[167] As Dixon J stated in *Nelungaloo Pty Ltd v Commonwealth* 'nothing but some very exceptional element in a case should lead it [the High Court] to grant a certificate'.[168] Further, even assuming a theoretical 'right' of appeal under section 74, the High Court remains the 'controlling' court with respect to the disposition of an appeal.

Secondly, judicial authority[169] and academic commentary[170] have questioned whether there is a common law of Australia. Even if there was an Australian common law, it is arguable that the abolishment of the common law and replacement by legislation[171] would undermine the vision of an integrated Australian judicial system.[172]

Thirdly, based on Chapter III's language and the Commonwealth Constitution's scheme for a federal judicial system,[173] there is support for the dissenting judgments that State courts should not be regarded as part of the federal judicature.[174] Indeed, it may be that a 'unitary judicial system' is only created where State court judges are appointed by the Federal Parliament.[175]

However, widespread academic opinion[176] and more recent judicial

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[164] See: *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth*, above n 161, at 208 per Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ; JA Thomson, above n 29, at 426; CD Gilbert, above n 160, at 348.

[165] *Kable*, above n 3, at 619-620 per McHugh J.

[166] *Attorney-General (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644; Z Cowen, "Inter Se Questions and Commonwealth Exclusive Powers" (1961) 35 *Australian Law Journal* 239 at 239.

[167] PH Lane, above n 48, at 550-551; JA Thomson, above n 29, at 426.

[168] *Nelungaloo v Commonwealth* (1952) 85 CLR 545 at 570 per Dixon J.

[169] *Anderson v Eric Anderson Radio & TV Pty Ltd* (1965) 114 CLR 20; *Washington v Commonwealth* (1939) 39 SR (NSW) 133 at 139 per Jordan CJ.

[170] LJ Priestley, "A Federal Common Law in Australia?" (1995) 6 *Public Law Review* 221 at 232; Z Cowen, "Diversity Jurisdiction: The Australian Experience" (1955) 7 *Res Judicatae* 1 at 29.

[171] In *Kruger v Commonwealth*, above n 6, at 158, Dawson J observed that the common law can be amended by the Commonwealth Parliament: '[T]he supremacy of parliament, which is itself a principle of the common law, necessarily leaves the common law subject to alteration'. Further, academic commentary has noted the fragility of the common law: J Beatson, "Has the Common Law a Future?" (1997) 56 *Cambridge Law Journal* 291 at 292-293.

[172] Note, however, that Gaudron, McHugh and Gummow JJ's vision of an integrated Australian judicial system also rests on Chapter III's provisions.

[173] Compared to a 'unitary' judicial system.

[174] *Kable*, above n 3, at 596-597 per Dawson J; J Crawford, "The New Structure of Australian Courts" (1978) 6 *Adelaide Law Review* 201 at 233; WA Wynes, above n 54, at 179.

[175] *Reference re Remuneration of Judges of the Provincial Courts of Prince Edward Island* (1997) 150 DLR 577 at para 88 per Lamer CJ.

[176] L Zines, "The Nature of the Commonwealth" (1997) (unpublished paper) at 7; J Miller, above n 80, at 100; G Nicholson, "The Concept of 'One Australia' in Constitutional Law and the Place of Territories" (1997) 25 *Federal Law Review* 281 at 283; M Crock and R McCallum, "The Chapter III Courts: The Evolution of Australia's Federal Judiciary" (1995) 6 *Public Law Review* 187 at 190; RD Lumb and GA Moens, *The Constitution of the Commonwealth of Australia* 5th ed, Sydney: Butterworths, 1995 at 544; R Else-Mitchell, above n 42, at 187.

statements[177] support the existence of an integrated Australian judicial system. This support rests on two factors. Firstly, that Chapter III of the Commonwealth Constitution provides the High Court with supervision of the Australian judicial system as the expositor of a national common law.[178] Secondly, State courts are integrated into the Australian judicial system by Chapter III's provision for the investing of federal jurisdiction in them.[179]

The High Court's supervision is premised on section 73 of the Commonwealth Constitution which provides the High Court with appellate jurisdiction over 'judgements, decrees, orders and sentences' of any justice of the High Court exercising original jurisdiction, any other federal court or court exercising federal jurisdiction, or of the Supreme Court[180] of any State.[181] Based on this supervisory role, Quick and Garran observed that the High Court would engage in a process of shaping an Australian common law:

> "Throughout the Commonwealth of Australia, the unlimited appellate jurisdiction of the High Court will make it – subject to review by the Privy Council – the final arbiter of the common law in all the States; and thus the rules of common law will be – as they have always been – the same in all the States. In this sense, that the common law in all the States is the same, it may certainly be said that there is a common law of the Commonwealth."[182]

In this regard, Sir Owen Dixon also noted that Australian common law can be regarded as 'a unit'.[183] However, emphasis on the existence of a unified common law is to be distinguished from a 'federal common

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[177] *Gould v Brown* (1998) 151 ALR 395 at paras 125-127 per McHugh J, paras 192-194 per Gummow J, paras 275, 312 per Kirby J; *Lange v Australian Broadcasting Corporation* (1997) 145 ALR 96 at 108-109 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ; *Kruger v Commonwealth*, above n 6, at 244 per Gummow J; *Western Australia v Commonwealth (Native Title Act Case)* (1995) 183 CLR 373 at 487 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ; *Environment Protection Authority v Caltex Refining* above n 36, at 556 per McHugh J.

[178] Commonwealth Constitution, s73.

[179] Commonwealth Constitution, s77 (iii).

[180] For a discussion of appeals to the High Court from State courts exercising federal and state jurisdiction see: E Campbell, above n 14, at 55-57.

[181] Commonwealth Constitution, ss73 (i), (ii) and (iii). Although the High Court has appellate jurisdiction under these constitutional provisions, it is arguable that this jurisdiction is based on Commonwealth legislation given the exceptions clause in section 73 of the Commonwealth Constitution. Section 73 provides that '[t]he High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals'. The constitutional validity of Commonwealth legislation (*Judiciary Act* 1903 (Cth), s35 & *Federal Court of Australia Act* 1976 (Cth), s33) requiring special leave to appeal to the High Court was upheld in *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth*, above n 161. For a discussion of this case see: A Mason, "The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal" (1996) 15 *University of Tasmania Law Review* 1.

[182] J Quick and RR Garran, above n 132, at 785.

[183] O Dixon, "Address by the Hon. Sir Owen Dixon" (1943) 17 *Australian Law Journal* 138 at 139.

law'.[184] Judicial authority prior to *Kable* is also supportive of the notion of a uniform common law. For example, in *Western Australia v Commonwealth (Native Title Act Case)*,[185] the majority stated:

> "But the laws of the Commonwealth [Parliament] operate in the milieu of the common law. As Sir Owen Dixon observed '[w]e act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute'."[186]

More recently, in *Kruger v Commonwealth*, Gummow J referred to the 'entrusting by Ch III, in particular by s 73, to [the High Court] of the superintendence of the whole of the Australian judicial structure [and] its position as ultimate interpreter of the common law of Australia'.[187]

The relationship between the common law and the Commonwealth Constitution was most recently examined in *Lange v Australian Broadcasting Commission*. In this case, the High Court supported the existence of a unitary system of common law, stating that 'there is but one common law in Australia which is declared by this court as the final court of appeal'.[188] More specifically, the court stated:

> "[T]hat one common law operates in the federal system established [*sic*] by the [Commonwealth] Constitution. The [Commonwealth] Constitution displaced, or rendered inapplicable, the English common law doctrine of the general competence and unqualified sovereignty of the legislature. It placed upon the federal judicature the responsibility for deciding the limits of the respective powers of State and Commonwealth governments. The Constitution, the federal, State and territorial laws, and the common law in Australia together constitute the law of this country and form 'one system of jurisprudence'."[189]

Therefore, analysis indicates that the notion of a unified common law,

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[184] Judicial authority has acknowledged the existence of a United States 'federal common law'. The federal common law exists in the 'gaps' of the federal statutory scheme and is distinct from state common law. See for example: *FDIC v Myer* (1994) 510 US 471; *Erie Railroad v Tompkins* (1938) 304 US 64; *Hinderlider v La Plata River & Cherry Creek Ditch Co.* (1938) 304 US 92; P Lund, "The Decline of Federal Common Law" (1996) 76 *Boston University Law Review* 895; L Kramer, "The Lawmaking Power of the Federal Courts" (1992) 12 *Pace Law Review* 263; PM Bator, DJ Meltzer, PJ Mishkin and DL Shapiro *Hart and Wechsler's The Federal Courts and the Federal System* 3rd ed, New York: Foundation Press, 1988 at 849-959; TW Merrill, "The Common Law Powers of Federal Courts" (1985) 52 *University of Chicago Law Review* 1; MA Field, "Sources of Law: The Scope of Federal Common Law" (1986) 99 *Harvard Law Review* 883.

[185] (1995) 183 CLR 373.

[186] *Western Australia v Commonwealth*, above n 177, at 487 per Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ (footnote omitted).

[187] *Kruger v Commonwealth*, above n 6, at 244 per Gummow J (footnotes omitted).

[188] *Lange v Australian Broadcasting Corporation*, above n 177, at 108-109 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ.

[189] *Lange v Australian Broadcasting Corporation*, above n 177, at 109 per Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ (footnotes omitted). The Full Court cited *McArthur v Williams* (1936) 55 CLR 324 at 347 in support of this proposition.

based on the High Court's appellate jurisdiction, has increasing potency. Integration in the Australian court system also stems from Chapter III's provision for federal and State courts to be invested with federal jurisdiction.[190] In this way, the integrated Australian judicial system, established by Chapter III to include federal and State courts, may be seen as applying a unified common law. Thus, there appears to be a 'symbiotic' relationship developing between two unified systems: a national common law and an integrated Australian court system. *Kable* demonstrates one consequence is the emergence of a Commonwealth constitutional constraint on State Parliaments and courts.[191]

Gaudron and McHugh JJ's second proposition placed State courts as significant components of the integrated Australian judicial system. However, the separate nature of State court systems was recognised by Mason CJ, Dawson and McHugh JJ in *Leeth v Commonwealth*:

> "The Constitution plainly envisages the continuation of separate State legal systems and, by empowering [the Commonwealth] Parliament under s 77(iii) to invest any court of a State with federal jurisdiction, provides a means whereby the Commonwealth may participate in those systems. In investing State courts with federal jurisdiction, the Commonwealth must take the courts as it finds them, notwithstanding the differences that exist from State to State."[192]

Although Gaudron and McHugh JJ acknowledged this principle they embraced the elevated role of State courts under Chapter III of the Commonwealth Constitution to confront it. Under an 'integrated' interpretation, States determine the constitution and organisation of State courts, provided that they remain courts compatible with Chapter III for the exercise of Commonwealth judicial power.[193] Indeed, it has been suggested that '[a]s Federation wrote a fresh institutional basis for politics, government and law on a national level, the notion that State courts negotiated that part of history and remained unaffected is implausible'.[194]

In contrast, Toohey and Gummow JJ dismissed the principle on the basis that in *Kable* the NSW Supreme Court was exercising federal jurisdiction, rather than a case dealing with the validity of Commonwealth legislation investing federal jurisdiction in a State court. However, it would seem that this approach does not adequately deal with judicial authority establishing that State courts are creatures of the States. The tenor of these previous cases is that Chapter III does not seek to regulate the composition, structure or organisation of State Courts as vehicles for the exercise

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[190] Commonwealth Constitution, Chapter III, ss 71 and 77(iii).

[191] Although *Kable* did not concern Territory courts, Professor Zines has argued that failure to extend the *Kable* limitation to Territory courts undermines Gaudron and McHugh JJ's approach: L Zines, above n 176, at 7.

[192] *Leeth v Commonwealth*, above n 6, at 468-469 per Mason CJ, Dawson and McHugh JJ.

[193] *Kable*, above n 3, at 617 per McHugh J.

[194] J Miller, above n 80, at 100-101.

of invested federal jurisdiction.[195] As Dawson J argued in dissent, Chapter III 'accepts those courts as existing institutions'.[196]

Although in *Kable* the Supreme Court may have been exercising federal jurisdiction, the limitation imposed by the majority encroaches on the 'taking State courts' principle. Therefore, it is not sufficient to distinguish this judicial authority because *Kable*, unlike for example, *Russell v Russell*, was not a case concerning the Commonwealth Parliament investing a State court with federal jurisdiction.

According to Gaudron and McHugh JJ's interpretation, State courts invested with federal jurisdiction remain State courts, but are regarded as part of the Australian judicial system, and consequently must be courts capable of exercising Commonwealth judicial power. In *Re Australasian Memory and Corporations Law Brien v Australasian Memory*,Santow J concurred with this approach, observing that:

> "...while the court as a State court is not subject to division of powers and "must be taken as exists", it is also a court which exists to exercise the judicial power of the Commonwealth. In doing so it must not contaminate that power by having imposed upon it incompatible functions as weaken public confidence in the court's independence."[197]

In this way, the doctrine that the Commonwealth Parliament must take State courts as it finds them is preserved, subject to limitations derived from the integrated judicial system under Chapter III.[198]

What is not preserved is plenary State legislative power over State courts. Although State courts are not Chapter III courts,[199] when invested with federal jurisdiction, State courts must be capable of exercising Commonwealth judicial power. Thus, under *Kable*, State Parliaments cannot confer on State courts non-judicial functions that undermine public confidence in their independence. Despite the apparent variation within the *Kable* majority, the retirement of Brennan CJ and Dawson J coupled with Kirby J's endorsement of the 'integrated' approach[200] suggests that State legislative power will remain subject to the *Kable* Chapter III implication. Nevertheless, the scope and content of this limitation remains an elusive subject warranting and enticing further judicial exploration.

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[195] See for example: *Commonwealth v Hospital Contribution Fund of Australia*, above n 42, at 61 per Mason J; N Bowen, above n 42, at 815.

[196] *Kable*, above n 3, at 597 per Dawson J.

[197] *Re Australasian Memory and Corporations Law; Brien v Australasian Memory*, above n 81, at 429 per Santow J.

[198] For a different view see: E Handsley, above n 85, at 175.

[199] *Kable*, above n 3, at 611 per Gaudron J, at 617 per McHugh J.

[200] *Gould v Brown*, above n 177, at 485-486 per Kirby J.