DIVERGENCE AND CONVERGENCE IN THE FEDERAL JUDICIAL SYSTEM

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March 2012

A thesis submitted for the degree of Doctor of Philosophy of

The Australian National University

STATEMENT OF ORIGINALITY

This thesis contains my original work.

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ACKNOWLEDGEMENTS

My sincerest gratitude goes to Professor Peter Cane for his incredible insight and excellent guidance. For everything else, I thank Marita and Elesa.

ABSTRACT

This thesis ties together my previously published work on Chapter III of the *Constitution*, and seeks to place that work within a broader constitutional context. It seeks to explain that Ch III principles have developed along two pathways: the first views Ch III as primarily setting out part of the federal architecture of the constitutional system; the second sees Ch III as primarily prescribing a constitutional relationship between the federal body politic and the individual, whereby the state is limited in the exercise of its power to protect the interests of the individual.

The thesis then plots these divergent pathways alongside other areas of constitutional law to show: first, that the rights protective view of Ch III has broadly followed the same trajectory as other rights protective constitutional provisions and implications; and, secondly, that the federal aspects of Ch III have been developed in a way that produces a highly centralised and integrated picture of Australian federalism with close similarities to the way in which other federal constitutional controversies have played out. As part of this exercise in reinvigorating the federal dimensions of Ch III, it will also be seen that key Ch III provisions can take on very different complexions if seen through a federal lens, rather than a rights protecting framework.

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INTRODUCTORY CHAPTER

I. INTRODUCTION

(i). Background

It is beyond dispute that federalism is a central organising principle of the *Constitution*. In various ways it pervades the structures and institutions of government, and the allocation of power across the tiers of government. The competing tensions of uniformity and diversity inherent in any federal system have been well documented in the way that Australian federalism was conceived,[1] and how the High Court has shaped the contours of the federal system.[2]

However, these efforts largely have been directed to legislative, executive and fiscal federalism. The extent to which the federal legislative power has expansively intruded into areas traditionally regulated by the States has been the subject of extensive comment and debate. So too has the fiscal dominance of the federal government and its capacity to control State policy agendas through the use of tied grants. The more subtle growth of Commonwealth executive power, and its potential impact on the federal balance, is also receiving increased attention.

Judicial federalism, however, has not generally been the subject of sustained academic consideration. Yet, the federal project is reflected throughout the structure and terms of Ch III of the *Constitution*: the provisions of which create the 'Federal Judicature'. Sections 71 to 80 vest the 'judicial power of the Commonwealth', identify the areas of federal jurisdiction, and establish the federal structures through which it is exercised. In various ways, federalism is at the core of Ch III.

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1 Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2009).

2 See the references in the footnotes in Part IV.A.(i) below.

Despite the centrality of federalism to Ch III, Ch III thinking has largely taken a divergent path. For the most part, a conception of Ch III as defining the relationship between the Commonwealth body politic (that is, the state in its federal capacity) and the individual has dominated our thinking about Ch III. This is a view of Ch III that sees it as protecting the interests of the individual. That conception of Ch III has pervaded the interpretation of key Ch III provisions and assisted in shaping the implications that have been drawn from them.

(ii). The goals of this thesis

The primary goals of this thesis (this Introductory Chapter and the five selected published articles) are as follows:

- First, to identify the divergent understandings of Ch III jurisprudence. As will be explained, Ch III principles have developed along two pathways. The first views Ch III as primarily setting out part of the federal architecture of the constitutional system. The second sees Ch III as primarily prescribing a constitutional relationship between the federal body politic and the individual, whereby the state is limited in the exercise of its power to protect the interests of the individual.

- Secondly, to plot these divergent pathways alongside other areas of constitutional law. As will be explained, the principles that reflect an understanding of Ch III as conditioning the constitutional relationship between the state and the individual (ie, a rights protective view of Ch III) have broadly followed the same trajectory as other constitutional provisions and implications that have been seen as rights protective. Furthermore, the federal aspects of Ch III have been developed in a way that produces a highly

centralised and integrated picture of Australian federalism. Again, there are close similarities to the way in which other federal controversies have played out elsewhere in the *Constitution*. As part of this exercise in reinvigorating the federal dimensions of Ch III, it will also be seen that key Ch III provisions can take on very different complexions if seen through a federal lens, rather than a rights protecting framework.

It will not be suggested in this thesis that one view of Ch III should be adopted and the other discarded. Given that the *Constitution* was the product of a compromise of the varying expectations of the colonies and their delegates to the Constitutional Conventions of the 1890s, a consistent vision of the *Constitution* that has cohesive explanatory force is a difficult position to maintain. However, there is a similar constitutional narrative about Ch III to that which we see elsewhere: a narrative that displays caution about rights protective understandings of the *Constitution* and the development of constitutional principles that produce a highly centralised and integrated federal system.

(iii). Structure of this Introductory Chapter

This Introductory Chapter of the thesis will turn first to explore the federal features of Ch III (Parts II and III), before turning to consider the divergent rights protective conception that has dominated Ch III thinking (Part IV). It will then plot those divergent pathways alongside the development of other constitutional principles. Part V will identify the similarities between the rights protective picture of Ch III and other constitutional provisions and implications that are protective of rights. Part VI will identify the similarities between the highly integrated vision of Ch III presented by the case-law and the development of other federal principles. Part VI will also consider what happens to the interpretation of key Ch III provisions if we apply a

federal – rather than a rights protective – lens to them. Part VII will then provide brief concluding observations.

(iv). What this introductory chapter adds to the articles

This thesis program is designed to reflect previously published work. Thus, the articles selected for this thesis were not written in a cohesive way as chapters of a thesis. Much of the background material within this Introductory Chapter is contained in either the articles selected for inclusion in the thesis or in my book, *The Federal Judicature – Chapter III of the Constitution: Commentary and Cases* (2010). Additionally, some of the core arguments in this Introductory Chapter are included in the selected articles. For example, the alternative federal interpretations of ss 75(v) and 80 of the *Constitution* are found in the fourth and fifth articles selected for this thesis. So too are the integrating features of the federal judicial system, which are explored in articles two (integrated judicial system) and three (choice of law principles).

This Introductory Chapter puts forward an overarching thesis about Ch III, tying together the background material and arguments presented in the selected articles. Thus, the identification of divergent Ch III pathways and their comparison with other constitutional law areas are new to this Introductory Chapter – although the material referred to in support is largely drawn from my previous work.

II. THE CORE FEDERAL FEATURES OF CHAPTER III

It is clear that federalism is a central organising principle in Ch III, and that federal features can be seen as operating at various levels. Four core features will be introduced in this Part. The next Part (Part III) will explain how those core features

have been extended by the High Court.

(i). Federal vs state judicial power

First, and most obviously, as is the case in relation to the legislative power under Ch I and the executive power under Ch II, Ch III assumes two distinct sources of power and jurisdiction – federal and State. As French CJ and Gummow J said in *Lane v Morrison*,[3] '[t]he judicial power identified in Ch III is that of a body politic, namely the Commonwealth, which is distinct from that of the States ...'. The contrasting concepts of State and federal jurisdiction were explained by Gleeson CJ, Gaudron and Gummow JJ in the following way in *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd*:[4] State jurisdiction is 'the authority which State Courts possess to adjudicate under the State Constitution and laws' and federal jurisdiction is 'the authority to adjudicate derived from the Commonwealth Constitution and laws'.

This federal feature was designed to mirror the federal character of the judicial provisions in the United States Constitution. Consistently with that model, and with the conferral of legislative power on the federal Parliament, federal judicial power was to be limited to certain enumerated heads of jurisdiction that were appropriate to a federal level of government. The nine heads of federal jurisdiction, as set out in ss 75 and 76 of the *Constitution*, had appeared in the drafts presented to the 1891 Convention by Andrew Inglis Clark and Charles Kingston[5] and largely remained unchanged throughout the debates. That the content of federal jurisdiction reflected the subjects assigned to the federal judiciary in art III of the United States

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3 (2009) 239 CLR 230, 237. See also *Re Wakim; ex parte McNally* (1999) 198 CLR 511, 574 (Gummow and Hayne JJ).

4 (2001) 204 CLR 559, 570, quoting from *Baxter v Commissioner of Taxation (NSW)* (1907) 4 CLR 1087.

5 See J M Williams, *The Australian Constitution: A Documentary History* (2005) 88, 127.

Constitution was made clear by Inglis Clark when he explained his draft clauses in the following way: 'The Matters I have placed under the jurisdiction of the Federal Judicatory are the same as those placed by the Constitution of the United States under the jurisdiction of the Supreme Court of the American union'.[6]

Thus, the first important federal feature in Ch III can be identified as the existence of two sources of judicial power and jurisdiction: Commonwealth and State.

(ii). Federal structure of the federal judiciary – the 'federalization' of State courts

Secondly, the structure of the institution through which Commonwealth judicial power is exercised (that is, the federal judicature) is also federal in character. Unlike the other two federal arms of government, the federal judicial structure is complicated by the provision for the exercise of federal judicial power and jurisdiction by State courts – the so-called 'autochthonous expedient'.[7] Until the Adelaide session of the 1897-8 Constitutional Convention, the institutional design of the federal judicature matched the United States model in art III of the US Constitution: only federal courts were to exercise federal judicial power.

However, the establishment of a complete set of lower federal courts would be an expensive proposition and, at least for Western Australia, the extra expense was creating apprehension.[8] The 'federalization'[9] of State courts provided the answer, and the investiture of State courts with federal jurisdiction to exercise Commonwealth judicial power was accepted from that point forward. Thus, the

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6 Ibid 69.

7 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268. While the federal Parliament through the Senate is structured in a way to reflect State interests, the federal judicature is unique among the arms of government for allowing State institutions to exercise federal power.

8 See J A La Nauze, *The Making of the Australian Constitution* (1974) 130-1; Kenneth H Bailey, 'The Federal Jurisdiction of State Courts' (1939-1941) 2 *Res Judicatae* 109.

9 An expression used by Deakin during the Australasian Federation Conference, Melbourne, 1890, 26.

second federal feature of Ch III can be seen in its structural design of the federal judicature. While the US model of federalism dictated a complete separation of courts, recognition of the practical difficulties of such a model in Australian conditions resulted in a unique federal model of institutional integration for the exercise of federal judicial power.

Before moving to the third federal feature, it should be emphasised that the design of a judicial system to have these first two federal features was not a necessary incident of a federal system of government. As Gleeson CJ, Gaudron and Gummow JJ said in *Australian Securities and Investment Commission v Edensor Nominees Pty Ltd*,[10] '[t]his division between courts and jurisdictions may not be essential for a system of government properly to be identified as "federal" in nature.' As their Honours highlighted, Sir Owen Dixon considered that 'the greatest departure from English principle was the establishment of a new jurisdiction, called "federal jurisdiction" '. In his view:

> [n]either from the point of juristic principle nor from that of practical and efficient administration of justice can the division of the Courts into state and federal be regarded as sound.[11]

Instead, Sir Owen thought that independent organs which were neither federal nor State could be established to administer the total content of the law. This, however, was not the federal design adopted. Judicial federalism – in the separate identification of federal jurisdiction but with an integration of institutions for its exercise – was considered by the framers as an important feature of Australia's federal model.

(iii). High Court as a general court of appeal

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10 (2001) 204 CLR 559, 572.

11 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 607.

While the first federal feature reflects a federal policy objective of separateness or distinctiveness of the sovereign power of the federal and State levels of government, the second feature reflects, to a large extent, a federal policy of uniformity or integration: at least where the Parliament chose to take up the option, State courts can exercise federal judicial power alongside federal courts.

The third federal feature also reflects a federal policy objective of uniformity or integration and marks a second point of departure from the US model of federalism. Whereas the US Supreme Court only exercises appellate jurisdiction from State courts in relation to federal matters, under s 73 of the *Constitution*, the High Court operates as a general court of appeal from State Supreme Courts irrespective of whether the issue is federal or non-federal.

The establishment of a general court of appeal had long been on the agenda before the Constitutional Conventions of the 1890s.[12] Furthermore, as Quick and Garran noted, the drafters were 'accustomed to a common court of appeal in the shape of the Privy Council', and 'the advantages of having one uniform Australian tribunal of final resort outweighe[d] all feelings of localism'.[13] That the High Court was to have this general appellate jurisdiction was not in question, and the main debates surrounding s 73 concerned proposals to sever Australian appeals to the Privy Council.[14] Although the retention of Privy Council appeals from State Supreme Courts probably settled any concerns about a general appellate jurisdiction being given to the High Court, the existence of that jurisdiction is an important feature of federalism that finds its place in Ch III.

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12 See J M Bennett, *Keystone of the Federal Arch* (1980) 3-6.

13 John Quick and Robert Garran, *The Annotated Constitution of the Australian Constitution* (1901) 725.

14 See James Stellios, *The Federal Judicature – Chapter III of the Constitution: Commentary and Cases* (2010) 9-33.

(iv). Independent judiciary essential to federal system

The fourth and final feature of federalism to be introduced at this stage is the very existence of an independent federal judiciary. The clearest textual indication of the need for judicial independence can be seen in the tenure and remuneration safeguards for High Court and lower federal court judges in s 72 of the *Constitution*. And, for Isaacs and Rich JJ in *The Waterside Workers' Federation of Australia v J W Alexander Ltd*,[15] these safeguards were key guarantees of the federal system: as their Honours said, 's 72 is one of the strongest guarantees in the Constitution for the security of the States'.

Despite the paucity of textual support, the requirement of an independent judiciary, and its link to the federal character of the *Constitution*, are clear from the Convention Debates. It was intended that the judiciary would have the constitutional role of policing the terms of the federal compact,[16] and there needed to be an independent tribunal to perform that function.[17] Thus, the federal judiciary and federalism are symbiotically linked within Australia's form of federalism.

(v). Summary

Federalism is a defining feature of Ch III at multiple levels: in the separate identification of federal judicial power in contrast to State judicial power and in the enumeration of topics or heads of federal jurisdiction; in the structural integration of the federal judicature to include State courts when required by the federal Parliament; in the integration of the judicial system through a general appellate

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15 (1915) 20 CLR 54, 469.

16 See, eg, Brian Galligan, 'Judicial Review in the Australian Federal System: Its Origin and Function' (1979) 10 *Federal Law Review* 367; Helen Irving, '*Its First and Highest Function:* The Framers' Vision of the High Court as Interpreter of the Constitution' in Peter Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 17.

17 See Stellios, above n 14, 69-72.

jurisdiction and through the very existence of the federal judiciary as the arbiter of federal disputes. As will be seen, these features are not exhaustive: there are others that can be seen if a federal lens is applied to Ch III. Furthermore, these features have provided the platform for the development of further constitutional features and, as will be explained later in this chapter, an application of a federal framework to these developments tells us quite a bit about the type of federal system Australia has.

III. FIRST PHASE EXTENSION OF CHAPTER III FEATURES – DEFINING THE CONTOURS OF JUDICIAL FEDERALISM

The previous Part introduced four key federal features of Ch III. This Part and the next will explain how these features have been extended by the High Court. Importantly, the extensions in this Part have remained faithful to the federal architecture of Ch III. However, the extensions outlined in the next Part exhibit a departure from that architecture, instead drawing from a conception of Ch III as defining the relationship between the state and the individual.

(i). Separation of judicial power – maintaining independence of the federal judiciary to protect the federal system

The first important doctrinal development has been the recognition of a separation of judicial power. Modern ideas of a separation of government powers find their origins in the writings of the French philosopher, Baron de Montesquieu.[18] These ideas were adapted to an English constitutional tradition by William Blackstone[19] and endorsed by the American federalists – Alexander Hamilton and James Madison[20] – when writing in support of the federal cause in the United States. Despite these rich theoretical accounts of the reasons for a separation of judicial

18 Charles-Louis de Secondat, Baron De Montesquieu, *The Spirit of Laws* (1748).
19 William Blackstone, *Commentaries on the Laws of England* (1765).
20 *Federalist Papers Nos 47, 51 and 7* (1788).

power, it seems reasonably clear from the historical record that the framers did not seek to incorporate Montesquieu's ideas into the Australian *Constitution*.[21] The most that we can say is that the framers intended to create an independent and impartial federal judiciary.[22]

Nevertheless, as explored in more detail in the first of the articles selected for this thesis,[23] the High Court has developed stringent separation of judicial power principles at the federal level.[24] Commonwealth judicial power is to be exercised only by courts referred to in s 71 of the *Constitution* (the *Alexander* principle[25]), and courts exercising Commonwealth judicial power can only exercise judicial power or incidental non-judicial power (the *Boilermakers* principle[26]).

As explained in more detail in the first article selected for this thesis, the *Boilermakers* principle was effectively established in the earlier case of *In Re Judiciary and*

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21 Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 152; J M Finnis, 'Separation of Powers in the Australian Constitution' (1968) 3 *Adelaide Law Review* 159; Fiona Wheeler, 'Original Intent and the Doctrine of Separation of Powers in Australia' (1996) 7 *Public Law Review* 96. As was recognised by French CJ in *South Australia v Totani* (2010) 242 CLR 1, 44, '[t]he historical record does not indicate that the members of the Convention expressly adverted to the broader concept of the separation of judicial power in their debates'.

22 Stellios, above n 14, 69-72.

23 James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113.

24 There are various qualifications to these principles and a degree of flexibility to the identification of judicial power that have operated to ease the rigidity of the principles and help make the system work. The High Court has accepted that federal judicial officers can exercise non-judicial powers in their personal capacity (*Grollo v Palmer* (1995) 184 CLR 348, *Hilton v Wells* (1985) 157 CLR 57, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1) and that non-judicial officers of a court can exercise federal judicial power (*Harris v Caladine* (1991) 172 CLR 84; *Commonwealth v Hospital Contribution Fund* (1982) 150 CLR 49). In defining the content of judicial power, the High Court has accepted the idea that powers might be innominate, that the character of power might depend upon the body that exercises it (the chameleon principle), that provisions might have a dual function, and that historical exercises might determine the character of a power. The use of these techniques has allowed the Parliament multiple avenues to avoid the separation of judicial power principles (see generally the discussion of these techniques in Stellios, above n 14, Ch 4).

25 *The Waterside Workers' Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434.

26 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

Navigation Acts,[27] when the Court invalidated provisions of the *Judiciary Act 1903* (Cth) conferring jurisdiction on the High Court to determine the constitutional validity of legislation that had been referred to the High Court by the Governor-General. Such jurisdiction, the High Court said, would not involve the resolution of a 'matter' as required by s 76 of the *Constitution*. Whether a court exercising federal jurisdiction could generally exercise non-judicial power was a question left open by the Court,[28] but the invocation of 'matter' to produce the conclusion in the case conflated power and jurisdiction, effectively precluding courts exercising federal jurisdiction from exercising non-judicial power.[29]

In the absence of strong historical support for the adoption of broad separation of power principles, the High Court has relied heavily on the rule of interpretation, *expressio unius est exclusio alterius*; that is, Ch III exclusively sets out the repositories of Commonwealth judicial power and is the exclusive source of power that can be exercised by courts exercising Commonwealth judicial power.[30] Consequently, the *Alexander* and *Boilermakers* (and *Re Judiciary Act*[31]) principles arise as negative implications from the text of the *Constitution*.

However, the early acceptance of these principles was built firmly on federal foundations: specifically, on the need for an independent and impartial judiciary to protect the federal system. As indicated above, the safeguards for judicial tenure and remuneration in s 72 of the *Constitution* were designed to protect judicial independence to police the federal system and, thus, Commonwealth judicial power could only be exercised within the federal judicature.

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27 (1921) 29 CLR 257.
28 Ibid 264.
29 Stellios, above n 23, 117-119.
30 See, eg, *Boilermakers* (1956) 94 CLR 254, 270.
31 (1921) 29 CLR 257, 264.

Federalism also supported the *Boilermakers* side of the separation equation. Dixon CJ, McTiernan, Fullagar and Kitto JJ said that

> the position and constitution of the judicature could not be considered accidental to the institution of federalism: for upon the judicature rested the ultimate responsibility for the maintenance and enforcement of the boundaries within which governmental power might be exercised and upon that the whole system was constructed.[32]

Thus, while the executive and the legislative power might commingle, judicial power has to be separated because its full separation helps to maintain the federal system. On appeal, the Privy Council put it in even clearer terms: 'in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard'.[33] This rationale has continued to find reflection in more recent decisions.[34]

(ii). Separation of judicial power at the State level – Kable principles

These federal separation of judicial powers principles apply as limitations on the federal Parliament only. Reliance upon the textual division of powers in the *Constitution* to ground the federal separation principles presents difficulties for the principles to be applied at the State level. State constitutions are generally not entrenched, and so it is difficult to derive similar implications from any textual division of powers at the State level.

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32 *Boilermakers* (1956) 94 CLR 254, 276.

33 *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540-541. The first article selected for this thesis critiques the need for a *Boilermakers* separation to achieve the desired objective. See Stellios, above n 23, 127-129.

34 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 73 (Gummow, Hayne and Crennan JJ); *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 648 (Dawson J).

However, State courts are deeply embedded within the federal judicature: they are authorised by federal jurisdiction to exercise Commonwealth judicial power, and appeals are guaranteed from State Supreme Courts.[35] These degrees of integration within a federal judicial system have been seen to have consequences for what State Parliaments can do with their courts. These potential implications for State legislative power are not necessarily a recent invention. When commenting on the use of State courts to exercise federal jurisdiction in s 77(iii), the leading constitutional commentators at federation, Quick and Garran, said: 'Confidence in the integrity and impartiality of the [High Court] prevents any jealousy or distrust of this wide federal jurisdiction: and the same confidence makes it possible to contemplate without misgivings the exercise of federal jurisdiction by State courts'.[36]

The High Court has given constitutional significance to these assumptions of State court institutional integrity by imposing the requirement of institutional integrity on State courts through the *Kable* line of cases. State courts exercise federal jurisdiction and, thus, the Court has said, their institutional integrity must be protected. Importantly, one main strand of justification is to rely upon the role of the federal judiciary to protect the federal system. This point can be found in the judgments in *Kable* and subsequent cases, but is most clearly captured in the judgment of Gummow, Hayne and Crennan JJ in *Forge v Australian Securities and Investments Commission*. In concluding that the *Constitution* protected the independence and impartiality of the State courts, their Honours reasoned in the following way:[37]

> The general considerations which inform Ch III of the Constitution were identified in *R v Kirby; Ex parte Boilermakers' Society of Australia*. Central among those considerations is the role which the judicature must play within a federal form of government. The ultimate responsibility of deciding upon the limits of the respective powers of the integers of the federation must be

35 Subject to valid exceptions and regulations.
36 Quick and Garran, above n 13, 804.
37 (2006) 228 CLR 45, 73.

> the responsibility of the federal judicature. That is why, as was pointed out in *Boilermakers*, '[t]he demarcation of the powers of the [federal] judicature, the constitution of the courts of which it consists and the maintenance of its distinct function become … a consideration of equal importance to the States and the Commonwealth'. But it also follows that '[t]he organs to which federal judicial power may be entrusted must be defined, the manner in which they may be constituted must be prescribed and the content of their jurisdiction ascertained'.

The constitutional protection of a court's institutional integrity initially was thought to arise by implication, but has since been tied back to the meaning of 'State court' in ss 73 and 77(iii).[38] However, the main point for present purposes is that the *Kable* principle is built upon the federal features of Ch III and has been justified according to federal purposes. Although State courts are creatures of the States, they transcend their State-based status because of their inclusion within the federal judicial system. Their role within that system qualifies the separateness and distinctiveness of State courts and, importantly, a leading justification for those accommodations is the role of the federal judiciary to protect the federal system.

(iii). Separation of judicial power at the State level – when State courts are exercising federal jurisdiction

Leaving aside the *Kable* principles, there are other developments of Ch III principles by the High Court which have impacted upon the exercise of non-judicial powers by State courts. As explained in the first article selected for this thesis, and elaborated upon in more detail in the second selected article,[39] the indications from the High Court are that the Commonwealth Parliament has the exclusive power to regulate the law to be applied when a court – including a State court – is exercising federal jurisdiction. As Gummow J said in *APLA Ltd v Legal Services Commissioner (NSW)*:

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

39 James Stellios, 'State/Territory Human Rights Legislation in a Federal Judicial System' (2008) 19 *Public Law Review* 52.

> the exclusivity of the powers of the Parliament with respect to the conferring, defining and investing of federal jurisdiction (found in s 77 and supported by ss 78, 79 and 80) has the consequence, well recognised in the authorities that the laws of a State with respect to limitation of actions and other matters of substantive and procedural law which are 'picked up' by s 79 of the *Judiciary Act*, could not directly and of their own force operate in the exercise of federal jurisdiction. This generally results from an absence of State legislative power rather than the operation of s 109 of the Constitution with respect to the exercise of concurrent powers.[40]

Thus, State laws cannot apply in federal jurisdiction of their own force, and must be picked up and applied as surrogate federal law by a Commonwealth provision.[41] The primary – although not only – vehicles for picking up State laws in federal jurisdiction are ss 68(1) and 79(1) of the *Judiciary Act 1903* (Cth). However, as federal laws, these provisions that pick up State provisions must comply with the separation of judicial power principles and, thus, will not operate to pick up functions that are 'insusceptible of exercise as part of the judicial power of the Commonwealth'.[42]

This has been highlighted most dramatically by the High Court's recent decision in *Momcilovic v The Queen*;[43] a decision that has unsettled the operation of the 'dialogue' model of rights protection in the Victorian *Charter of Human Rights and Responsibilities Act 2006* and the ACT *Human Rights Act 2004*. The second paper selected for this thesis explained that the power of the respective Supreme Courts to make a declaration of inconsistency was not an exercise of Commonwealth judicial power (nor incidental thereto) and, thus, could not be picked up by s 79 of the *Judiciary Act*

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40 *APLA Ltd v Legal Services Commissioner (NSW)* (2005) 224 CLR 322, 406, citing *Northern Territory v GPAO* (1999) 196 CLR 553, 575, 628; *Residual Assco Group Ltd v Spalvins* (2000) 202 CLR 629, 642; *Solomons v District Court (NSW)* (2002) 211 CLR 119, 134; referring also to s 68 of the *Judiciary Act 1903* (Cth) and *R v Gee* (2003) 212 CLR 230, 255-256.

41 There may be some dispute about Commonwealth power to regulate substantive rights and duties within federal jurisdiction, but it is clear that powers used in the exercise of federal jurisdiction can be prescribed or picked up by Commonwealth law: see Graeme Hill and Andrew Beech, '"Picking up" State and Territory Laws under s 79 of the Judiciary Act – Three Questions' (2005) 27 *Australian Bar Review* 25, 31-35.

42 *Solomons v District Court (NSW)* (2002) 211 CLR 119, 135.

43 [2011] HCA 34.

where those courts were exercising federal jurisdiction. In *Momcilovic,* the High Court reached the same view.[44]

As will be seen in Part V, in working out the mechanics of the federal judicature, the High Court has laid the foundations for a convergence of federal and state judicial systems.

(iv). Expanding federal jurisdiction – offering a real choice to Parliament for the exercise of federal jurisdiction

With the creation of a federal judicial system comes the possibility that a dispute or set of disputes might give rise to both federal and State legal controversies. Sir Owen Dixon recognised that the division of courts into federal and State would create difficulties for the 'practical and efficient administration of justice.'[45] Great inconvenience and expense would result if litigants were forced to go to separate courts to determine their disputes. However, if courts exercising federal jurisdiction are able to determine, what otherwise would be, a purely State-based claim, there is potential for impact upon the workload and status of State courts which would otherwise exercise that jurisdiction.[46]

The High Court has responded to these underlying policy considerations by expanding the scope of federal jurisdiction through the use of the word 'matter' in ss 75, 76 and 77. The 'matter' has been read by the Court to refer to the underlying 'justiciable controversy, identifiable independently of the proceedings which are brought for its determination and encompassing all claims made within the scope of

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44 For a detailed explanation of the High Court's decision in *Momcilovic*, see William Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36 *Melbourne University Law Review* 1 in Appendix 2 to this thesis.

45 Owen Dixon 'The Law and the Constitution' (1935) 51 *Law Quarterly Review* 590, 607.

46 Brian Opeskin, 'Cross-vesting of jurisdiction in the Federal Judicial System' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 299.

the controversy',[47] whether federal or State-based. Furthermore, the Court has taken a relaxed approach for determining whether federal and State claims form part of the same 'matter': if they are non-severable, in the sense that they arise from the same substratum of facts, then the State court will hear the State claim in 'accrued' federal jurisdiction.[48]

As these principles were developed, the High Court was alert to the competing policy considerations of the interests of the litigants and the interests of the States. The expansive view of the word 'matter' was adopted initially by a majority of the Court to preference the interests of the litigants over those of the States.[49] However, perhaps in response to claims that the majority was relying on policy – rather than legal or constitutional – analysis,[50] the majority shifted its justification for a broad conception of the federal justiciable controversy from the interests of the litigants to the demands of an effective federal judicial system:

> A central element in this design for the exercise of the judicial power of the Commonwealth is the power given to Parliament to make a choice between conferring federal jurisdiction on federal courts which it creates and investing federal jurisdiction in state courts. There is no indication in Ch III that the making of this choice was to be strongly weighted against the creation of federal courts in favour of investing federal jurisdiction in state courts, as it would be if the Constitution were to deny power to give authority to federal courts to decide the whole of a single justiciable controversy of which a federal issue forms an integral part. …
>
> It would … restrict Parliament to the creation of federal courts lacking jurisdiction to determine such claims, thereby inhibiting their capacity as effective elements in the court system for which Ch III makes provision. The preferable approach from the viewpoint of principle is that established by authority, namely, to regard Ch III as empowering the Parliament to make

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47 *Fencott v Muller* (1983) 152 CLR 570, 603 (Mason, Murphy, Brennan and Deane JJ).

48 See, eg *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 585 (Gummow and Hayne JJ); *Fencott v Muller* (1983) 152 CLR 570, 607-608.

49 See, eg, *Philip Morris Incorporated v Adam P Brown Male Fashions Pty Ltd* (1981) 148 CLR 457, 513. Contrast the dissenting view of Wilson J favouring a narrower reading of the word 'matter' to preference the position of State courts (at 548). See the discussion of these cases in Stellios, above n 14, 357-368.

50 See *Fencott v Muller* (1983) 152 CLR 570, 629 (Dawson J).

> sensible and practical dispositions for determination of justiciable controversies by either of the two means for which Ch III makes provision.[51]

Thus, the recognition and expansion of the concept of accrued federal jurisdiction in this way was designed to enhance the effectiveness of the choice available to the federal Parliament under s 77(i) and (iii) of the *Constitution* for the exercise of Commonwealth judicial power.[52] While favouring the interests of the litigants, this explanation is grounded firmly in the federal architecture of Ch III.

(v). The law to be applied within the federal judicial system

The discussion so far in this section has shown how federalism has been instrumental in the design of government institutions, in demarcating the kind of powers that they exercise and the expansive scope of federal power. The core federal features of Ch III have also had significant implications for the legal rules that are applied by courts within the federal system. This can be seen in two ways.

First, largely because of the place of the High Court at the apex of the integrated judicial hierarchy, it has been accepted that there is one common law throughout Australia.[53] Thus within our federal system, there is no possibility for divergent common law principles across federal and State courts.

Secondly, the choice of law rules applicable within the federal system are designed to achieve uniformity of outcome across Australian courts. Thus, for example, the *lex loci delicti* has been favoured as the choice of law rule to decide intra-national tort cases.[54] As explained in more detail in the third article selected for this thesis,[55] the

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51 *Stack v Coast Securities (No 9)* (1983) 154 CLR 261, 293-4.

52 See, eg, *Fencott v Muller* (1983) 152 CLR 570, 609; *Stack v Coast Securities (No 9)* (1983) 154 CLR 261, 293.

53 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 518; Leslie Zines, 'The Common Law in Australia: Its Nature and Constitutional Significance' (2004) 32 *Federal Law Review* 337.

54 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503.

federal features of Ch III have been seen by the High Court as requiring that result. In deciding upon the *lex loci delicti* in *John Pfeiffer Pty Ltd v Rogerson*, the High Court took account of the following Ch III features: 'the existence and scope of federal jurisdiction, including the investment of State courts with federal jurisdiction pursuant to s 77(iii) of the Constitution' and the position of the High Court 'as the ultimate court of appeal, not only in respect of decisions made in the exercise of federal jurisdiction'. [56] As will be explored further below, this exhibits a preference for a certain type of federalism – one that preferences uniformity of outcome over the separateness and distinctiveness of State judicial systems – but it is an outcome informed by Ch III's federal features.

IV. SECOND PHASE EXTENSION OF CHAPTER III FEATURES – RECOGNISING THE RELATIONSHIP BETWEEN THE STATE AND THE INDIVIDUAL

The previous Part explained ways in which the High Court has fleshed out the contours of judicial federalism in Australia. Importantly, those features were developed within a federal paradigm and relied upon the core federal features of Ch III. As will be explained in Part VI, these developments tell us quite a bit about Australian federalism in general. However, before making those assessments, this Part will consider understandings of Ch III that diverge from this federal paradigm. Specifically, the High Court has seen Ch III as directed to the relationship between the state and the individual, and it is this conception of Ch III that has dominated our thinking about the development of Ch III principles.

(i). Separation of powers, rights protection and accountability

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55 James Stellios, 'Choice of Law and the Australian Constitution: Locating the Debate' (2005) 33 *Federal Law Review* 7.

56 *John Pfeiffer Pty Ltd v Rogerson* (2000) 203 CLR 503, 535.

It is useful to start this section by revisiting the federal separation of judicial power principles: Commonwealth judicial power can only be exercised by courts referred to in s 71, and courts exercising Commonwealth judicial power can only exercise judicial power and incidental non-judicial power. As explained earlier, while both sides of the equation have been drawn primarily as negative implications from the text of the *Constitution*, their establishment has been supported by federal considerations. However, there have been attempts to justify these principles in other ways. Specifically, the High Court has drawn from conceptions of rights protection, and from accountability justifications of checking government power, to underpin the acceptance of separation of judicial power principles.

Rights protection

The liberty or rights protecting benefits of a separation of judicial power find their clearest expression in the judgment of five judges in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*:[57]

> The separation of the judicial function from the other functions of government advances two constitutional objectives: the guarantee of liberty and, to that end, the independence of Ch III judges.

As recognised by their Honours, this was not the first time that High Court judges had linked the separation of judicial power with theories of rights protection. In particular, there had been statements in previous cases connecting the separation of judicial power to Montesquieu and Blackstone.[58]

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57 (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

58 *Victorian Stevedoring & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 89 (Dixon J); 114 (Evatt J); *Attorney-General (Cth) v The Queen* (1957) 95 CLR 529, 540 (PC); *R v Davison* (1954) 90 CLR 353, 98 (Kitto J); *Harris v Caladine* (1991) 172 CLR 84, 161 (McHugh J); *Grollo* (1995) 184 CLR 348, 392 (Gummow J); *The Queen v Quinn; Ex parte Consolidated Food Corp* (1977) 138 CLR 1, 11 (Jacobs J).

As explained in more detail in the first paper selected for this thesis[59] and in my book,[60] there are a number of difficulties with connecting the separation of judicial power principles with rights protection in this way. First, it is quite clear that the framers did not seek to incorporate Montesquieu's vision into the *Constitution*. As Sawer noted, '[t]here is no evidence that the Federal Fathers in general had the slightest desire to imitate the French theory of separation of powers, which was based upon a misrepresentation of English practice, nor the American theory which was based upon a misrepresentation of the French'.[61]

Secondly, the invocation of such theories potentially presents varying (and possibly incompatible) understandings of how liberty is protected. Montesquieu's principal concern was with *arbitrary* exercises of power, and a separation of powers across different decision makers helped to minimise such arbitrary exercises. However, this connection between government power and the liberty of the individual might be informed by very different theories about how liberty is protected or advanced. On one view, Montesquieu's separation might operate to slow down the exercise of government power and minimise intrusions into the private sphere.[62] On another view, dispersing government power might operate to prevent a consolidation of power in the hands of one decision maker and, thus, assist in controlling the exercise of arbitrary power.[63] On yet another view, separation might allow for functions to be allocated to the best decision makers, and these best-equipped decision makers might make optimal decisions promoting liberty.[64] To complicate matters further, Blackstone's understanding of the liberty enhancing benefits of separation may well

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59 See Stellios, above n 23.
60 Stellios, above n 14, 98-102.
61 Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 152.
62 See, eg, N W Barber, 'Prelude to the Separation of Powers' (2001) 60 *Cambridge Law Journal* 59, 60-61.
63 See, eg, Philip Pettit, *Republicanism: A Theory of Freedom and Government* (1999) 177.
64 See, eg, Barber, above n 62, 65.

be very different to that put forward by Montesquieu. For Blackstone, certain liberty protecting functions were exclusively reserved for the judiciary.

The point for present purposes is not to resolve these uncertainties. Instead, it is to emphasise the thread of High Court cases that have sought to explain the separation of judicial power by reference to liberty-enhancing rationales. This thread of cases supports the separation of judicial power principles within a divergent constitutional paradigm: that is, it does not draw support from the federal features of Ch III, rather it finds support in the perceived constitutional relationship between the state and the individual.

Checks and balances

A separate, yet related, theme in some High Court judgments is the checks and balances accountability function performed by the judiciary. In the writings of Montesquieu, and those of the American federalists Madison and Hamilton, the separation of powers principle was combined with a checks and balances theory of how government should be organised.[65] The checks and balances theory, it was said, operates to control arbitrary exercises of power.

Although the separation of powers principle and the checks and balances theory are often combined in practice, they are different concepts. As Sawer said, 'the principle of separation of powers has always been closely associated in practice with a theory of checks and balances, but the two ideas are analytically distinct'.[66] Indeed, Claus has noted that it is the checks and balances theory, and not the separation principle, that protects liberty: '[t]he critical liberty-promoting criterion for separation is not

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65 See, eg, M J C Vile, *Constitutionalism and the Separation of Powers* (1967) 95.

66 Geoffrey Sawer, 'The Separation of Powers in Australian Federalism' (1961) 25 *Australian Law Journal* 177, 178.

whether powers differ in kind, but whether apportionment will prevent actors from conclusively determining the reach of their own powers' .[67]

This checks and balances idea finds reflection in the judgment of Toohey J in *Polyukhovich v Commonwealth*,[68] where his Honour described Ch III's operation to, in part, 'ensure the institutional separation of the site of judicial power from those of the executive and legislative powers so that the courts may operate as a check, through review, on the other arms of government.' These comments were endorsed by Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ in *Wilson*[69] and Gummow J in *Kruger v Commonwealth*.[70]

Of course, a checks and balances function is entirely consistent with a federalism rationale for the separation of judicial power. Indeed, the role of the judiciary to police the federal compact is, in every sense, a checks and balances exercise. However, like Montesquieu, Madison and Hamilton before them, High Court judges, at least in *Wilson*, linked the checks and balances function to the liberty protecting force of the separation of judicial power.

(ii). Viewing Ch III as a statement about the state and the individual

The impact of this conception of Ch III can be seen in at least four key areas of Ch III jurisprudence: first, in the development of 'due process' protections; secondly, in the view adopted by many judges that the protection of liberty involves an exclusive exercise of judicial power; thirdly, in some explanations of the *Kable* line of cases;

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67 L Claus, 'Montesquieu's Mistakes and the True Meaning of Separation' (2005) 25 *Oxford Journal of Legal Studies* 419, 420.

68 (1991) 172 CLR 501, 684-5.

69 (1996) 189 CLR 1, 11.

70 (1997) 190 CLR 1, 167.

and, fourthly, in the way in which ss 75(v) and 80 of the *Constitution* have been interpreted. These points will now be outlined to demonstrate a picture of Ch III of the *Constitution* that draws, not from the federal architecture of Ch III, but instead from constitutional understandings of the relationship between the state and the individual.

Due process

It is clear that the High Court has recognised that Ch III offers protection for certain aspects of the judicial process.[71] Much is unclear about the basis for, and scope of, due process protections,[72] but it can be said with some confidence that it was the liberty enhancing view of the separation of judicial power that drove the initial development of these principles.[73] Certainly, the height of enthusiasm for due process protections coincided with the High Court's interest in the protection of rights.[74] For example, in one of the early statements about Ch III protections for due process, Deane J in *Re Tracey; Ex parte Ryan*[75] expressly linked due process protections to Blackstone's reasons for separating judicial power.[76]

Despite the continuing recognition of these principles, they have not been applied robustly at the federal level,[77] and there has been caution expressed more recently about generalised 'due process' protections. In *Thomas v Mowbray*, Gummow and

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71 Fiona Wheeler, 'The Doctrine of Separation of Powers and Constitutionally Entrenched Due Process in Australia' (1997) 23 *Monash University Law Review* 248; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Stellios, above n 14, Ch 6.

72 See, generally, Stellios, above n 14, Ch 6.

73 See, eg, C Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16 *Adelaide Law Review* 242.

74 Wheeler (1997), above n 71.

75 (1989) 166 CLR 518, 580.

76 See also Deane J in *Polyukhovich* (1991) 172 CLR 501, 607.

77 William Bateman, 'Procedural Due Process under the Australian Constitution' (2009) 31 *Sydney Law Review* 411.

Crennan JJ said that the decisions of the Court have not gone so far as to support a 'due process' requirement from the text and structure of Ch III.[78]

There are two primary examples of the lack of robust application of Ch III principles in the area of due process. The first is the decision in *Polyukhovich*,[79] concerning the constitutional validity of retrospective Commonwealth criminal provisions. Having been enacted in 1988, the relevant provisions criminalised certain acts done during World War II. For Deane J in dissent, Blackstone's understanding of the judicial process for the enforcement of criminal law was protected by the separation of judicial power. Criminal guilt, Deane J said, 'means being guilty of a contravention of the requirements of a then existing and applicable penal law'.[80] Gaudron J also saw the legislation as a breach of judicial process requirements.[81] Three of the four majority judges upholding the validity of the legislation disagreed: Blackstonian understandings of the judicial process were not constitutionally entrenched by separation of judicial power principles.[82]

The second is the example of military discipline. It is well accepted by the High Court that military tribunals can exercise disciplinary jurisdiction over members of the military. However, the High Court has had tremendous difficulty identifying the dividing line between *military* justice and *civilian* justice under Ch III of the *Constitution*.[83] One of the approaches to locating that dividing line was suggested by Deane J in *Re Tracey; Ex parte Ryan*[84] as being informed by the Blackstonian liberty protecting force of the separation of judicial power and due process principles. On

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78 (2007) 333 CLR 207, 355. French CJ gave the same caution in *International Finance Trust Co Ltd v NSW Crime Commission* (2009) 240 CLR 319, 353 ('*International Finance Trust*').

79 (1991) 172 CLR 501.

80 Ibid 632.

81 Ibid 708.

82 Ibid 535 (Mason CJ), 647 (Dawson J), 721 (McHugh J). For a more detailed discussion of this case, see Stellios, above n 14, 214-221.

83 See the discussion of the cases in Stellios, above n 14, 233-259.

84 (1989) 166 CLR 518.

this view, military tribunals would be limited to offences which were 'exclusively disciplinary'[85] in nature, and would not extend to 'the vindication of the ordinary law'.[86] Although this view was maintained by his Honour in *Re Nolan; Ex parte Young*[87] and *Re Tyler; Ex parte Foley*,[88] and gained the support of McHugh J in those cases, and Kirby J in subsequent cases,[89] it has never been accepted by a majority of the Court.

Judicial power and protecting liberty

The Blackstonian tradition can also be seen as underpinning the view that the deprivation of liberty involves an exclusive exercise of judicial power. In *Chu Kheng Lim v Minister for Immigration,*[90] Deane J joined with Brennan and Dawson JJ to say that, leaving exceptional cases aside

> … the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.[91]

In forming this view of the exclusivity of judicial power in this respect, their Honours relied upon statements to similar effect by Blackstone.

However, this *Lim* proposition has proved to be controversial. Reservations about such a proposition were expressed in *Lim* by Gaudron J and in *Kruger v The Commonwealth* by Gaudron and Gummow JJ.[92] Furthermore, in a series of cases in

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85 Ibid 591.
86 Ibid 583.
87 (1990) 172 CLR 460.
88 (1994) 181 CLR 18.
89 *Re Aird; Ex parte Alpert* (2004) 220 CLR 308, 339; *White v Director of Military Prosecutions* (2007) 231 CLR 570, 630.
90 (1992) 176 CLR 1.
91 Ibid 27.
92 (1997) 190 CLR 1, 110 (Gaudron J), 162 (Gummow J).

2004,[93] the High Court was divided on the continuing force of the *Lim* proposition. On the one hand, it seemed to be rejected by at least three judges,[94] with McHugh J directly commenting that it 'cannot stand'.[95]

On the other hand, Gummow and Kirby JJ strongly defended the position in *Lim*, with Gummow J reformulating the proposition 'in terms that, leaving the "exceptional cases" aside, the involuntary detention of the citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts'.[96] His Honour supported this defence by reference to the following statement by Scalia J in *Hamdi v Rumsfield*, made (as acknowledged by Gummow J) with reference to Blackstone and Alexander Hamilton:

> The very core of liberty secured by our Anglo-Saxon system of separated powers has been freedom from indefinite imprisonment at the will of the Executive.[97]

The position of Gummow J was subsequently endorsed by Gummow and Crennan JJ in *Thomas v Mowbray*[98] and by Gummow and Hayne JJ in *Vasiljkovic v The Commonwealth*.[99] In *South Australia v Totani*, Hayne J referred to the Gummow J reformulation,[100] but without expressly endorsing it, and Kiefel J expressly declined to engage with the reformulation.[101] Given the various combinations in different cases and the change in the Court's composition, it is unclear whether the *Lim*

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93 *Re Woolley; Ex parte Applicants M276/2000* (2004) 225 CLR 1; *Al Kateb v Godwin* (2004) 219 CLR 562; *Behrooz v Secretary Department of Immigration and Multicultural and Indigenous Affairs* (2004) 219 CLR 486; *Minister for Immigration and Multicultural and Indigenous Affairs v Al Khafaji* (2004) 219 CLR 664; *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

94 *Re Woolley; Ex parte Applicants M276/2000* (2004) 225 CLR 1, 24 (McHugh J); *Al Kateb v Godwin* (2004) 219 CLR 562, 649 (Hayne J, with Heydon J agreeing).

95 *Re Woolley; Ex parte Applicants M276/2000* (2004) 225 CLR 1, 24.

96 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 612.

97 *Al Kateb v Godwin* (2004) 219 CLR 1, 612.

98 (2007) 233 CLR 307, 356.

99 (2006) 227 CLR 614, 648. Heydon J agreed with that judgment, and Gleeson CJ appeared to accept the general *Lim* proposition.

100 (2010) 242 CLR 1, 83.

101 Ibid 170.

proposition enjoys majority support. However, if it does, it is clear that it is driven by a Blackstonian liberty protecting view of the separation of judicial power.

Alternative explanations for Kable

As explained earlier, one of the leading understandings of the *Kable* principle is that of an independent and impartial federal judiciary to police the federal system. However, from the very beginning, these Ch III limitations on State Parliaments and State courts were explained by reference to a conception of judicial power protecting the individual from the other arms of government. In *Kable*, where a majority of the Court held invalid NSW provisions that conferred power on the NSW Supreme Court to order the detention of a person likely to commit an act of violence, Gaudron J reasoned that:

> [p]ublic confidence cannot be maintained in the courts and their criminal processes if … the courts are required to deprive persons of their liberty, not on the basis that they have breached any law, but on the basis that an opinion is formed … that on the balance of probabilities, they may do so.[102]

Similarly, Gummow J said that '[t]he Act requires the Supreme Court to inflict punishment without any anterior finding of criminal guilt by application of the law to past events, being the facts as found'. His Honour agreed with the appellant's submission that such an activity 'is repugnant to the judicial process'.[103]

In *Fardon v Attorney-General (Qld)*, [104] in upholding Queensland provisions authorising the Queensland Supreme Court to order the continuing detention of a sexual offender to protect the community, the High Court appeared to retreat from broader statements about the *Kable* principle to focus on institutional integrity. The features of the Queensland legislation were thought to be sufficiently different from

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102 (1996) 189 CLR 51, 107.
103 Ibid 134.
104 (2004) 223 CLR 575.

the features of the *Kable* legislation to justify the conclusion that the institutional integrity of the Supreme Court had been preserved and, thus, the Queensland legislation was held to be valid. Since detention was authorised, it seemed that deprivation of liberty without the usual curial process was not a determinative criterion of invalidity. Gummow J, however, preserved to the idea of the judicial power protecting liberty:

> … the factum upon which the attraction of the Act turns is the status of the appellant to an application by the Attorney-General as a 'prisoner' … who is presently detained in custody upon conviction for an offence of the character of those offences of which there is said to be an unacceptable risk of commission if the appellant be released from custody. To this degree there remains a connection between the operation of the Act and anterior conviction by the usual judicial processes. A legislative choice of a factum of some other character may well have imperilled … validity.[105]

For Gummow J, one of the reasons for the difference in outcome between *Kable* and *Fardon* was that the detention provision in *Fardon* retained a connection to a previous exercise of judicial power. While this incident of the legislative scheme may have reflected on the question of whether the Court retained its institutional integrity, it also suggested that his Honour's conception of the *Kable* limitation was influenced by an understanding of the content of judicial power as much as the institutional integrity of the Court.

The concern to protect liberty through judicial intervention continues to creep into the High Court's application of *Kable* principles. In *Totani*,[106] where the Court struck down South Australian provisions requiring the South Australian Magistrates Court to impose control orders on members of organisations declared to be unlawful by the South Australian Attorney-General, the fact that the order involved 'a serious imposition upon the personal liberty of the individual'[107] was an important factor

105 Ibid 618.
106 (2010) 242 CLR 1.
107 Ibid 52 (French CJ).

taken into account by some judges when concluding that the Magistrates Court's institutional integrity had been undermined. French CJ said that the control order dealt with an area 'going to personal liberty and the liability to criminal sanctions which lie at the heart of the judicial function'.[108] Crennan and Bell JJ too emphasised the 'significant restriction on personal liberty' and the liberty protecting objectives of the constitutional separation of judicial functions.[109]

The problem for the Court has always been to bring these rights protective ideas about judicial power within the *Kable* framework without overworking the separation of judicial power principles which are not directly applicable at the State level. This was particularly the case after the *Kable* principles were grounded in the meaning of the word 'court' in *Forge*. If we are looking for functional institutional characteristics to constitutionally protect through the word 'court', as was done in *Forge,* it is very difficult to see the protection of liberty as one of them unless we draw inspiration from the separation of judicial power.

However, recent extensions of the *Kable* principle have provided a new platform for the further development of these ideas. In *Kirk v Industrial Relations Commission of New South Wales*,[110] the High Court held that Ch III protected, from legislative alteration by State Parliaments, the essential characteristics of State 'courts'. While the institutional integrity of a State court had been identified by the High Court's decision in *Forge* as a constitutionally entrenched characteristic, thereby providing a textual anchor for the *Kable* principles, the Court in *Kirk* expanded the category of constitutionally protected characteristics to include the power to review the jurisdictional errors of lower courts. Rather than drawing from functional

108 Ibid.
109 Ibid 156.
110 (2010) 239 CLR 531.

characteristics as the Court did in *Forge*, the High Court looked to see what attributes characterised State courts in 1900.

This reasoning opens the door for the recognition that the protection of liberty requires an exclusive exercise of judicial power by courts – even at the State level. Indeed, the step appears to have been taken by Gummow J in *Totani*, at least in relation to the enforcement of the criminal law. In response to an argument that State Parliaments could take the administration of criminal law away from State courts, Gummow J replied:

> State legislatures may confer judicial powers on a body that is not a 'court of a State' within the meaning of s 77(iii) of the Constitution. But that does not involve acceptance of the corollary respecting enforcement of the criminal law.[111]

Given that there is no entrenched separation of judicial power principles at the State level, it is hard to explain this view other than on a Blackstonian conception of the liberty protecting content of judicial power that, in the absence of an entrenched separation at the State level, has become constitutionally entrenched as a defining characteristic of State courts.

Interpretation of ss 75(v) and 80 of the Constitution

Conceptions of Ch III as reflecting a relationship between the state and the individual are also found in the way in which ss 75(v) and 80 have been interpreted by the High Court. The interpretation of these provisions is the subject of extensive treatment in the fourth (s 75(v))[112] and fifth (s 80)[113] articles selected for inclusion in this thesis, and will only be outlined here.

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111 (2010) 242 CLR 1, 67. The Chief Justice agreed at 50-51.

112 James Stellios, 'Exploring the Purposes of Section 75(v) of the Constitution' (2011) 34 *University of New South Wales Law Journal Law Journal* 70.

Central to the interpretation of s 75(v) has been an understanding of its purpose as effecting accountability of Commonwealth executive action. Immediately prior to its adoption by the delegates at the 1897-8 Convention, Barton explained the purpose of the provision in the following terms:

> This provision is applicable to those three special classes of cases in which public officers can be dealt with, and in which it is necessary that they should be dealt with, so that *the High Court may exercise its function of protecting the subject* against any violation of the Constitution, or of any law made under the Constitution.[114]

This view of the purpose of s 75(v) has found favour with the High Court. In *Bank of New South Wales v Commonwealth*, Dixon J said that the inclusion of section 75(v) was 'to make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power.'[115] More recently, in *Plaintiff S157/2002 v Commonwealth*, having referred to Justice Dixon's statement, five members of the Court said:

> The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth *is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them*. The centrality, and *protective purpose*, of the jurisdiction of this Court in that regard places significant barriers in the way of legislative attempts (by privative clauses or otherwise) to impair judicial review of administrative action. Such jurisdiction exists to maintain the federal compact by ensuring that propounded laws are constitutionally valid and ministerial or other official action lawful and within jurisdiction.[116]

It can be seen that the court here appealed to the idea of monitoring the federal compact as an underlying justification for the accountability view advanced. However, it is equally clear that their Honours conceived the federal compact as an

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113 James Stellios, 'The Constitutional Jury – "A Bulwark of Liberty"?' (2005) 27 *Sydney Law Review* 113.

114 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885 (emphasis added).

115 (1948) 76 CLR 1, 363.

116 (2003) 211 CLR 467, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ) (emphasis added).

agreement among the people of Australia,[117] and that the Court relies on an accountability understanding that is *protective* of the people from excessive executive decision making. A conception of s 75(v) as directed to the relationship between the state and the individual can be seen clearly in this accountability understanding of s 75(v).

A consequence of this accountability view, the Court said, is that s 75(v) introduced 'into the Constitution of the Commonwealth an entrenched minimum provision of judicial review'.[118] However, as the fourth selected article explains in more detail, the High Court has had tremendous difficulty in explaining what follows from 'an entrenched minimum provision of judicial review'. In particular, it is unclear whether the grounds of review that attract relief under s 75(v) are constitutionally protected and, if so, which ones and to what extent.

The dominant view of the purpose of s 80 is that it protects the right of the accused to have a jury trial. This rights protective view of s 80 is best captured in the dissenting judgment of Dixon and Evatt JJ in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*:[119]

> The Commonwealth Constitution contains no guarantee against deprivation of life, liberty or property without due process of law, like the fifth and fourteenth amendments of the United States Constitution. To establish personal liberty by constitutional restrictions upon the exercise of government power was not a guiding purpose in framing the Australian instrument, which in this respect departs widely from the American model. It is true that checks against legislative encroachment on individual freedom are not completely absent from the Australian Constitution. There

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117 A similar understanding of the federal compact is expressed in *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198-199 (Gummow, Kirby and Crennan JJ).

118 (2003) 211 CLR 467, 513. Six members of the Court then adopted these passages in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). See also *Plaintiff M61/2010E v Commonwealth* (2010) 272 ALR 14, 27; *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 614 (Gleeson CJ, Gummow and Hayne JJ).

119 (1938) 59 CLR 556, 580.

> are two or three; and one of them, that contained in sec 80 relating to trial by jury, cannot be dismissed from consideration.

On the basis of that view of the purpose of s 80, their Honours held, in dissent, that s 80 could not be avoided by Parliament simply prescribing that an offence be tried summarily, rather than 'on indictment'. As I explain in more detail in the fifth article selected for this thesis, this rights-protective view of s 80 has continued to be a key feature of s 80 discourse.[120]

Ironically, however, this rights-protective view is not reflected in the development of s 80 legal principles. On critical s 80 issues, a majority of the High Court has marginalised the interests of the accused. Thus, a majority of the High Court has consistently held that Parliament can avoid the jury trial requirement in s 80 by prescribing that the offence should be a summary one, and can define for itself the substantive elements of the offence that are to be left to the jury rather than the trial judge. Furthermore, a majority of the Court has held that the accused cannot waive the jury requirement in s 80.

As has been widely recognised, these are conclusions that sit uncomfortably with a view of s 80 as a constitutional protection for the accused,[121] and have more recently been adopted to give effect to an understanding of the intention of the framers.[122] This discordance of perceived purpose on the one hand, and history and interpretation on the other, along with the strong dissenting judgments on key s 80 issues, has presented an incoherent picture of s 80. These matters will be taken up further below.

(iii). Summary

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120 See Stellios, above n 113, 128-131.
121 For more detailed analysis, see Stellios above n 113.
122 See Stellios, above n 14, 518-523.

This section has explored the development by the High Court of a range of Ch III principles that reflect an understanding of Ch III as directed to the relationship between the state and the individual. The starting point for this vision of Ch III is the idea that a separation of judicial power serves a liberty protecting purpose and, thus, implicates the relationship between the state and the individual. This conception of Ch III finds reflection in the development of 'due process' protections, in the view that the protection of liberty involves an exclusive exercise of judicial power, in some explanations of the *Kable* principles and in the interpretations adopted of ss 75(v) and 80 of the *Constitution*. It is this conception of Ch III that has dominated our thinking about Ch III. The important point, however, for the purpose of this Introductory Chapter, is that it is an understanding of Ch III that diverges significantly from the federal contours of Ch III explored in the previous two sections.

V. PLOTTING THE TRAJECTORY OF THE RIGHTS PROTECTIVE VISION OF CH III

Having identified the divergent visions of Ch III, this Introductory Chapter will now seek to locate these principles alongside the development of principles in other areas of constitutional law. This Part will start by plotting the rights protective picture of Ch III alongside the constitutional landscape of rights protective provisions and implications. This exercise will show a similarity in the High Court's reluctance to see the *Constitution* as a rights protective document, or to translate a rights protective provision or implication into rigorous constitutional principles.

(i). The constitutional protection of rights

It is well accepted that the framers of the *Constitution* understood that rights would be protected and advanced through a traditional British constitutional framework.

Diceyan faith in the common law (in contrast to a constitutionally entrenched bill of rights) and the political process as the mechanisms for protecting liberty were characteristic of the framers' colonial experiences. One consequence of this constitutional understanding was that, for the large part, competing claims of rights were to be resolved through the political process.[123] As Dawson J said in *ACTV*:

> [t]hose responsible for the drafting of the *Constitution* saw constitutional guarantees of freedoms as exhibiting a distrust of the democratic process. They preferred to place their trust in Parliament to preserve the nature of our society and regarded as undemocratic guarantees which fettered its powers. Their model in this respect was, not the *United States Constitution,* but the British Parliament, the supremacy of which was by then settled constitutional doctrine.[124]

Similarly, in contrasting Australian and American constitutionalism to the American Bar Association, Sir Owen Dixon said:

> The framers of the Australian Constitution were not prepared to place fetters upon legislative action, except and in so far as it might be necessary for the purpose of distributing between the States and the central government the full content of legislative power. The history of their country had not taught them the need of provisions directed to the control of the legislature itself.[125]

Thus, rather than exhibiting a distrust of government, the framers demonstrated a faith in the capacity of representative democracy to produce 'a more just and prosperous future',[126] and the political mechanisms through which government was controlled. As Gageler has emphasised, '[f]ar from being something to be feared and contained, ordinary politics was seen as the primary means by which people exerted real, tangible and ongoing control of government'.[127]

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123 Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151, 151-8.

124 (1992) 177 CLR 106, 186.

125 Owen Dixon, *Jesting Pilate* (1965) 102.

126 Jeffrey Goldsworthy, 'Implications in Language, Law and the *Constitution*' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law: Essays in Honour of Professor Leslie Zines* (1994) 150, 153.

127 Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17 *Federal Law Review* 162, 173.

There are, nevertheless, a handful of provisions scattered through the *Constitution* that are generally regarded as having a rights protective character. In other words, they are seen as having rights protection as their primary purpose. The strongest claim for such a character is made for ss 80 (trial by jury), 116 (limitations on power in relation to religion) and 117 (non-discrimination on basis of State residence), although others too have been identified with such a character including s 75(v) (jurisdiction for constitutional writs). Section 92 (free trade, commerce and intercourse) was also once considered a rights protective provision, until the decision of the High Court in *Cole v Whitfield* preferred to view its trade and commerce limb as having a federal purpose.[128]

It is not the primary purpose of this Introductory Chapter to give a detailed account of how these provisions were conceived and debated by the framers, or how the High Court has interpreted them. In relation to s 80, that exercise is undertaken in the fifth article selected for this thesis. In relation to the other scattered rights, that exercise has been undertaken comprehensively by others.[129] The primary intention in this chapter is to highlight some of the well-accepted features of those provisions, and to emphasise that there is substantial commonality between the interpretive experience of those provisions and the interpretive experience of the rights protective view of Ch III.

(ii). Drafting history

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128 Although the Court left open the character of the intercourse limb of s 92, I have argued elsewhere that it too can (and should) be seen as having a federal purpose (James Stellios, 'The Intercourse Limb of section 92 and the High Court's decision in APLA Ltd v Legal Services Commissioner (NSW)' (2006) 17 *Public Law Review* 10).

129 See George Williams, *Human Rights under the Australian Constitution* (1999); Peter Bailey, *The Human Rights Enterprise in Australia and Internationally* (2009); Hilary Charlesworth, *Writing in Rights – Australian and the Protection of Human Rights* (2002).

As indicated earlier, there was little enthusiasm within the Constitutional Conventions for the protection of rights by constitutional limitation on legislative power. To the contrary, as George Williams demonstrates in his comprehensive study of rights and the Convention Debates, the framers rejected the inclusion of an equal protection clause for the very reason that it would prevent democratic processes across the federation from implementing racially discriminatory laws.[130]

An indifference to rights, or a reluctance to constrain the legislative process to protect rights, is evident in the convention history of the scattered constitutional rights. The protection of the individual interest of non-discrimination on the basis of state residence, and the interests underlying the exercise or non-exercise of religion, were not the driving forces behind the inclusion of ss 117 and 116. Both provisions seemed to be inspired by federalism considerations – although they take their place within the federal architecture in different ways. Section 116 was seen by the framers as a provision designed to preserve the subject area of religion to the State. In response to a concern that the Commonwealth would have legislative power in relation to religion, s 116 was included 'to ensure that the power to legislate about religious matters remained with the state Parliaments. … Accordingly, the primary object of s 116 was not to protect human rights'.[131] Thus, on this understanding, it was to serve as a power allocation device within the federal system. Just as excise taxes were not to be imposed by the States (s 90 of the *Constitution*), religion was not to become a subject matter of federal power. Rather than dividing power, s 117 was intended to constrain Australian governments from undermining national unity of

130 Williams, above n 129, 41-2.
131 Ibid 110.

the federal system.[132] Along with s 92 and other provisions like s 118, its inclusion in the *Constitution* was federation-reinforcing.

Although the rights of the accused were raised in the debates on s 80, the exchange of the framers and the acceptance of the final form of the provision pushed those interests to the margins of the provision. I have considered the drafting history of s 80 in more detail in my book.[133] In summary, as Simpson and Wood have recognised, it is unclear what the debates reveal about the nature of s 80.[134] At best, they are unclear: at worst, they reject any concern for the rights of the accused.

(iii). Patchy interpretations

Adding to the paucity of historical support is the 'disappointing' interpretations given to these provisions when viewed from a rights perspective.[135] As already mentioned, and as I explain in detail in the fifth article selected for this thesis, the High Court's interpretation of s 80 has robbed it of much of its protective force for the accused. The Parliament can avoid the requirements of s 80 by providing that trials are not to be on indictment and can define an offence in such a way that allocates important fact finding tasks to the trial judge and not the jury. The right to waive a jury, a necessary correlative of an individual privilege, has also been denied by the Court. Although a persistent minority of judges have considered s 80 to be protective of the accused, that view has never found the support of a High Court majority.

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132 See Amelia Simpson, 'The (Limited) Significance of the Individual in Section 117 State Residence Discrimination' (2008) 32 *Melbourne University Law Review* 639.

133 Stellios, above n 14, 518-23.

134 Amelia Simpson and Mary Wood, '"A Puny Thing Indeed": *Cheng v The Queen* and the Constitutional Right to Trial by Jury' (2001) 29 *Federal Law Review* 95.

135 Adrienne Stone, 'Australia's Constitutional Rights and the Problem of Interpretive Disagreement' (2005) 27 *Sydney Law Review* 29, 32.

The rights protective view of s 116 has not been expressly endorsed by a majority of the Court. In fact, in the most recent cases, the federalism view seems to have found favour. In *Kruger v The Commonwealth,* Dawson J said:[136]

> The appearance of s 116 in a chapter headed 'The States' has often been regarded as anomalous, but in fact the section deals with the division of legislative power between the Commonwealth and the States within the federation.

Even Gaudron J, who was at the frontline of constitutional rights development, conceded:[137]

> By its terms, s 116 does no more than effect a restriction or limitation on the legislative power of the Commonwealth. It is not, 'in form, a constitutional guarantee of the rights of individuals'. It does not bind the States: they are completely free to enact laws imposing religious observances, prohibiting the free exercise of religion or otherwise intruding into the area which s 116 denies to the Commonwealth. It makes no sense to speak of a constitutional right to religious freedom in a context in which the Constitution clearly postulates that the States may enact laws in derogation of that right. It follows, in my view, that s 116 must be construed as no more than a limitation on Commonwealth legislative power.

Unsurprisingly, then, the cases on s 116 have largely failed to provide robust protections for religious interests. In *Attorney-General (Vic) (Ex rel Black) v Commonwealth*,[138] it was held that a law will only establish a religion if it has the express purpose of constituting a religion as a state religion. A similarly narrow view has been applied to the free exercise limb of the clause: a law will only prohibit the free exercise of any religion when it has the purpose of doing so.[139]

It is well known that, until *Street*, the Court gave s 117 a formalistic interpretation, denying the limitation of much of its force. The *Street* Court revitalised the provision with a substantive interpretation. However, there remains, lurking below the

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136 (1997) 190 CLR 1, 60.
137 Ibid 124-5.
138 (1981) 146 CLR 559.
139 *Kruger v The Commonwealth* (1997) 190 CLR 1, 60. For a discussion of the s 116 cases, see Williams, above n 129, 110-119.

unanimous revision in *Street,* a deep – albeit unconscious – division in the Court on the operative purpose of s 117. As Simpson has said:[140]

> … the major fault line is the underlying division between two alternate conceptions of the purpose and value of s 117. On the one hand, there are those judges who prefer to understand s 117 as a right to be valued, instrumentally, for its securing federal-structural objectives. On the other hand, there are the judges for whom s 117 declares a right with intrinsic value and is principally about the individuals that it protects. The decision in *Street* strikes, at best, an uneasy truce between the demands of s 117's textual focus upon individuals, and the traces of a federal-structural purpose in the provision's context and history.

Thus, on one view, s 117, like ss 92 and 118, is seen by the High Court as part of the federal architecture - designed to enhance national unity. Thus, on that view, the more substantive *Street* interpretation of s 117 may not in fact be attributed to a concern for human rights protection.

(iv). Implied freedoms from representative government

The recognition and development of the implied freedom of political communication has been controversial. There has been uncertainty about the foundation for, and the nature and extent of, the limitation. Recognition of the freedom has not always attracted the support of all High Court judges. As to the extent of protection provided by the freedom, there has been uncertainty about the test to be applied, and the degree to which the judiciary should defer to legislative judgments about the regulation of political communication. Some judges have been prepared to defer substantially to the policy balance struck by the legislature, and most have been reluctant to identify with precision the factors to be considered when applying the tests for validity. There has been reluctance by a number of judges to expand the category of protected communication to include, for example, political insults, satire or communication about the judiciary. Furthermore, the question of whether the

140 Simpson, above n 132, 648.

limitation operates on communication solely about state government and politics remains unclear. I have elsewhere considered these points in more detail.[141]

It is only when the unanimous High Court in *Lange* anchored the implied freedom to the text of the *Constitution* and the preservation of the democratic institutions of representative and responsible government, that the limitation was firmly established. Nevertheless, the case law both preceding and following that judgment paints a picture of an unsettled constitutional doctrine. This controversial development of the implied freedom has been well recognised in the literature.[142]

An implication protecting voting has been embraced more recently by a majority of the High Court. It has been used to invalidate Commonwealth provisions imposing a blanket ban on prisoners voting[143] and provisions closing off voter enrolment too soon after the calling of an election.[144] Although the limitation has been described by some judges as protecting a 'right to vote',[145] other judges have relied upon the institutional protections that the limitation provides for representative and responsible government.[146] As with the implied freedom, its recognition, scope and

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141 See the article included in Appendix 1: James Stellios, 'Using Federalism to Protect Political Communication: Implications from Federal Representative Government' (2007) 31 *Melbourne University Law Review* 239 (in which I argued that federalism principles can provide alternative bases for the protection of communication).

142 See, eg, Jeffrey Goldsworthy, 'Originalism in Constitutional Interpretation' (1997) 25 *Federal Law Review* 1; Nicholas Aroney, 'A Seductive Plausibility: Freedom of Speech in the *Constitution*' (1995) 18 *University of Queensland Law Journal* 249; Leighton McDonald, 'The Denizens of Democracy: The High Court and the "Free Speech Cases"' (1994) 5 *Public Law Review* 160; Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

143 *Roach v Electoral Commissioner* (2007) 233 CLR 162.

144 *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

145 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 174 (Gleeson CJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 19 (French CJ), 107 (Crennan J).

146 *Roach v Electoral Commissioner* (2007) 233 CLR 162, 198-199 (Gummow, Kirby and Crennan JJ); *Rowe v Electoral Commissioner* (2010) 243 CLR 1, 59 (Gummow and Bell JJ).

application have created divisions in the Court, and there have been strong dissents.[147]

(v). Plotting the parallels

This constitutional landscape is well understood: rights protection was not at the forefront of the framers' minds; there is a lack of historical support for seeing the scattered constitutional provisions as rights; and there has been considerable uncertainty in the High Court about how these provisions should be conceived and interpreted, with less than robust interpretations being adopted in most cases. Furthermore, the implications from representative government have had a troubled development, with common ground most identifiable when the limitations are portrayed as institutional protections. In short, the *Constitution* is 'a weak institution for the protection of rights'.[148] As Adrienne Stone has astutely recognised, these uncertainties and hesitations probably find their source in disagreements about interpretive technique.[149]

Part IV of this Introductory Chapter explained a vision of Ch III that sees it as speaking to the relationship between the Commonwealth body politic and the individual. It is a vision that sees the *Constitution* as protecting the individual against government action. In that explanation, we see broadly similar patterns to those that appear in other areas of constitutional rights discourse. In summary, there is an absence of concern during the Convention Debates for a separation of powers to protect liberty; there is hesitation within the High Court to recognise a liberty

147 Hayne and Heydon JJ dissented in *Roach v Electoral Commissioner* (2007) 233 CLR 162; Hayne, Heydon and Kiefel JJ dissented in *Rowe v Electoral Commissioner* (2010) 243 CLR 1.

148 Stone, above n 135, 46.

149 Ibid 41-43.

protecting principle of a separation of powers; and there has been deep division, disagreement and uncertainty about how such a vision can be translated into Ch III principles and interpretation. This is most evident in the uncertainty about the trajectory of *Kable* principles and their extension in *Kirk*; in the disagreements about the idea that the function of depriving liberty is exclusively judicial; in the gaps in the s 75(v) case law and, as has already been highlighted, in the blunt interpretation of s 80 as a protection for the accused.

Having plotted the rights protective picture of Ch III alongside the constitutional landscape of rights protective provisions and implications, the final part of this chapter will return to the federal contours of Ch III.

VI. REINVORATING THE FEDERAL ARCHITECTURE OF CHAPTER III

As explained in Part IV, much of the current thinking about Ch III principles focuses on a rights protective understanding of Ch III. This last part of the Introductory Chapter will seek to reinvigorate the federal features of Ch III. Drawing from the analysis in Parts II, III and IV, it has two purposes: first, to explain that a recalibration of Ch III thinking can tell us a lot about the kind of federal system Australia has, identifying commonalities with other areas of federal jurisprudence; and, secondly, that a federal framework for Ch III can provide alternative (perhaps competing) interpretations of ss 75(v) and 80.

A. Understanding the federal architecture – an integrated judicial system

While Ch III was designed in a way to accommodate the competing federal tensions of uniformity/integration vs diversity/separateness, the High Court has largely developed Ch III principles that reflect centripetal forces. Thus, we have a federal judicial system that is characterised by a centralisation of judicial power, a

convergence of institutional design and uniformity of outcome across judicial systems.

(i). Centralisation of judicial power

The expansion of federal jurisdiction to take in non-severable state claims has already been noted above. In broadly defining the scope of the federal 'matter', the provision of State courts as a real option for the exercise of federal judicial power outweighed any concern for the separateness of State courts and the preservation of State judicial power. This preeminence of Commonwealth judicial power within the federal system has been protected from legislative dilution, with the striking down of attempts to cross-vest State judicial power into federal courts.[150]

The centralising forces are also reflected in the extent to which State judicial power, when exercised by State courts, gives way to federal judicial power in circumstances that also give rise to federal matters under ss 75 and 76 of the *Constitution*. With some exceptions, Parliament has used its power in s 77(iii) to broadly vest federal jurisdiction in State courts in relation to matters described in ss 75 and 76. At least in relation to s 75(v), the High Court has held that no State judicial power ever existed to order mandamus or prohibition against an officer of the Commonwealth.[151] The same conclusion probably follows in relation to matters 'in which the

150 *Re Wakim; ex parte McNally* (1999) 198 CLR 511.

151 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601. See the extended discussion of this point in the fourth article selected for this thesis, Stellios, above n 112, 86-90.

Commonwealth, or a person suing or being sued on behalf of the Commonwealth, is a party'.[152]

More significantly, the High Court has held that State judicial power has not survived the vesting of State courts with federal jurisdiction in relation to matters set out in ss 75 and 76. The power in s 77(ii) of the *Constitution* (exercised through ss 38 and 39 of the *Judiciary Act 1903* (Cth)) to define 'the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is invested in the courts of the States' has been read by the Court to allow Parliament to strip State courts of State jurisdiction and invest them with federal jurisdiction under s 77(iii) to resolve the same matters.[153] And, even when the federal provisions did not operate to strip State courts of State jurisdiction in relation to a head of federal jurisdiction (for example, s 76(ii)), the survival of that remaining State jurisdiction was held to be inconsistent with the investiture of federal jurisdiction over that matter and, thus had to give way.[154]

Accordingly, as can be seen from these developments, the High Court has expanded the scope of federal judicial power, and accorded it a preeminent position within the Australian judicial system.

(ii). Convergence of institutional design

As explained earlier in this Introductory Chapter, the separation of judicial power principles have been drawn as implications from the exclusive treatment of the federal judicature within Ch III. Despite their inapplicability at the State level, and

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152 The joint judgment in *MZXOT* left open the question of whether there is exclusive federal jurisdiction in relation to matters arising under s 75(iii): (2008) 233 CLR 601, 621.

153 *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601; *Felton v Mulligan* (1971) 124 CLR 367.

154 Ibid.

the absence of an entrenched separation at the State level, the High Court has imposed *Kable* limitations on State Parliaments. As explained in the first article selected for inclusion in this thesis, the *Kable* principles were largely seen as imposing a limited form of the *Boilermakers* principle on State courts. However, the decision of the High Court in *Kirk*, to protect certain judicial functions characteristic of a court at 1900, operates to impose a limited form of the *Alexander* principle on State Parliaments through the constitutional meaning of a 'State court'. If a power can be identified as characteristic of a State court, then State Parliaments are prevented from divesting State courts of those powers.

The *Boilermakers* principle penetrates even more deeply into the State level when State courts exercise federal jurisdiction. As explained earlier, the Commonwealth Parliament has the exclusive power to decide what laws are applied in federal jurisdiction and, as has been demonstrated most recently by the decision on *Momcilovic*, State laws that would give State courts non-judicial functions (that are not incidental to judicial functions) will not be picked up and applied in federal jurisdiction. These accommodations made at the federal/State interface are centripetal in nature.

This institutional design convergence has also been reflected in other developments of the *Kable* principles. First, the *Kable* standards not only include the requirement of institutional integrity, but fundamental departures from the judicial process might also establish incompatibility with the exercise of Commonwealth judicial power warranting invalidity.[155] Thus, in *International Finance Trust*, where NSW legislation prevented an affected party from challenging the making of a court order, the High Court held that incompatibility with Commonwealth judicial power arose. The

155 *International Finance Trust* (2009) 240 CLR 319, 367 (Gummow and Bell JJ), 385 (Heydon J).

combination of an institutional integrity test and a repugnancy to the judicial process test, brings these dimensions of the *Kable* principle into much closer alignment with the federal 'due process' standards that are applied to federal legislation.

Secondly, at the federal level, the High Court has accepted that federal court judges can exercise non-judicial powers, thereby departing from the *Boilermakers* principle, when those non-judicial powers are exercised in a personal capacity (ie, as *persona designata*).[156] Because of the dangers in undermining *Boilermakers*, the High Court has imposed strict conditions for the use of federal judges in this way. Thus, a non-judicial power can only be exercised if compatible with an exercise of judicial power. This incompatibility approach at the federal level has now been aligned with the incompatibility condition enlivening the *Kable* principle at the State level, with the High Court in *Wainohu v New South Wales*[157] considering that a non-judicial function cannot be given to a State court judge in a personal capacity if to do so would utilise the reputation of the judiciary.[158]

This extension of the *Kable* principle gives rise to further opportunities for convergence. For example, in *Lane v Morrison*,[159] the High Court struck down the Australian Military Court as contrary to Ch III. Although not intended to be a Ch III Court, it was given many characteristics of a Ch III court and, at least for French CJ and Gummow J, the reason for invalidity was that the federal Parliament was borrowing the reputation of the judiciary.[160] There is potential for this line of reasoning to apply at the State level as well through *Wainohu*. If a State Parliament were to vest a power in a non-judicial body in a way that blurred the line between

156 *Grollo v Palmer* (1995) 184 CLR 348, *Hilton v Wells* (1985) 157 CLR 57, *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1.
157 (2011) 243 CLR 181.
158 *Wainohu v New South Wales* (2011) 243 CLR 181, 230 (Gummow, Hayne, Crennan and Bell JJ).
159 (2009) 239 CLR 230.
160 Ibid 237.

courts and the executive, it may well be said that the State Parliament is impermissibly borrowing the reputation of the judiciary and, thus, falling short of the *Kable* institutional integrity standard.

Thirdly, there have been distinct tendencies in the recent cases to reach conclusions on the application of *Kable* principles by analogising to federal separation of judicial power cases. Of course, it has been well accepted that a law that would survive the federal separation of judicial powers principles would also survive the *Kable* principles.[161] However, the recent tendency apparent in High Court decisions is to reason directly from the federal cases to conclusions about the application of *Kable* standards. For example, in *International Finance Trust*, the Chief Justice spent considerable time analysing the federal 'due process' principles, before concluding in terms of 'institutional integrity'. In *Totani*, there was a general tendency for judges to shift between a discussion of federal separation of powers cases and the *Kable* line of cases.[162] There was also a return to the *Kable* concerns about adjudging and punishing criminal guilt and the deprivation of liberty requiring an exercise of judicial power.[163] These are principles deriving from a separation of federal judicial power.

Furthermore, in *Hogan v Hinch*,[164] six members of the Court assessed institutional integrity by asking whether the statutory criterion for the exercise of power was so indefinite as to be insusceptible of judicial application.[165] This test is a federal separation of judicial power standard which had not, until then, been suggested as

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161 *Baker v The Queen* (2004) 223 CLR 513; *Silbert v DPP (WA)* (2004) 217 CLR 181; *HA Bachrach Pty Limited v Queensland* (1998) 195 CLR 547.

162 *South Australia v Totani* (2010) 242 CLR 1, 63-65 (Gummow J); 82-90 (Hayne J); 155-159 (Crennan and Bell JJ); 162-163, 170 (Kiefel J).

163 Ibid 20, 50 (French CJ); 156 (Crennan and Bell JJ).

164 (2011) 243 CLR 506.

165 Ibid 551 (Gummow, Hayne, Heydon, Crennan, Kiefel and Bell JJ).

being an indicator of institutional integrity.[166] And, finally, in *Momcilovic*, the Court considered whether the power of the Victorian Supreme Court to make a declaration of inconsistency satisfied *Kable* requirements. A majority considered that the *Kable* standard was not breached. However, the three dissenting judges considered that the provision breached *Kable* and, in doing so, came very close to concluding that *Kable* was breached because the provision involved an exercise of non-judicial power.[167]

It should also be acknowledged that the High Court has recognised the distinctiveness of State courts in some contexts. In deciding whether non-judicial officers of State courts could exercise the judicial power of the Commonwealth when vested in the relevant State court, the High Court initially took an a approach protective of Commonwealth judicial power. The State 'court' that could exercise Commonwealth judicial power was said to be composed of judicial officers, and only judicial officers could exercise that power.[168]

However, in *Commonwealth v Hospital Contribution Fund,*[169] the High Court rejected this earlier approach, instead preferring the dissenting view of Gibbs J in *Kotsis* that the expression State 'courts' is 'meant to refer to State courts with the organization and structure provided by State law', including non-judicial officers.[170] In explaining the adoption of the new approach, Mason J referred to the 'great inconvenience to the States and their courts if the structure and composition of a State court for the exercise of federal jurisdiction is to differ from that selected by the State for the

166 See, eg, *The Queen v Spicer; Ex parte Australian Builders' Federation* (1957) 100 CLR 299; *The Queen v Commonwealth Industrial Court; Ex parte the Amalgamated Engineering Union, Australian Section* (196) 103 CLR 368.

167 *Momcilovic v The Queen* (2011) [181]-[182] (Gummow J, with Hayne J agreeing); [457] (Heydon J).

168 *Kotsis v Kotsis* (1970) 122 CLR 69; *Knight v Knight* (1971) 122 CLR 114.

169 (1982) 150 CLR 49.

170 *Kotsis v Kotsis* (1970) 122 CLR 69, 110.

exercise of its similar non-federal jurisdiction'.[171] Requiring State courts to be structured to satisfy federal separation of judicial power principles when exercising federal jurisdiction would place considerable pressure on State Parliaments to design State courts in the image of federal courts. This, for Mason J, would 'constrain the States' freedom of action in the organization of their courts'.[172]

However, even here, there is convergence with the design of federal courts. In *Harris v Caladine*,[173] the Mason Court held that non-judicial officers of federal courts could exercise the judicial power of the Commonwealth, and in supporting that view, a majority of the Court drew support from the *Hospital Contribution Fund* case allowing non-judicial officers of State courts to exercise Commonwealth judicial power.[174]

It is often said that the federal Parliament 'must take the State court as it finds it.'[175] This general proposition suggests that, despite their inclusion in Ch III, there is a constitutional distinctiveness about State courts. Certainly, it is still constitutional orthodoxy that the constitution and organisation of State courts are matters for State Parliaments.[176] However, *Kable* fundamentally qualified that distinctiveness and, as explained in this section, there is increasing convergence of institutional identity between federal and State courts.

(iii). Uniformity of outcome

This third centripetal force was introduced earlier. The High Court has developed a single common law and has favoured uniformity of outcomes across Australian

171 (1982) 150 CLR 49, 62.
172 Ibid.
173 (1991) 172 CLR 84.
174 Ibid 93 (Mason CJ and Deane J); 122 (Dawson J); 151 (Gaudron J). While generally supportive of the majority view, McHugh J disapproved of the analogy (at 157).
175 *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 75 (Gummow, Hayne and Crennan JJ).
176 See, eg, *Russell v Russell* (1976) 134 CLR 495.

courts when developing choice of law rules. The choice of law context, in particular, has demonstrated the competing tensions of uniformity vs diversity, with the Court favouring a federal judicial system reflecting the former at the expense of the latter.

As explained in more detail in the third article selected for inclusion in this thesis,[177] the High Court in *John Pfeiffer Pty Ltd v Rogerson*[178] adopted the *lex loci delicti* as the choice of law rule to apply to intra-national tort cases. The decision in *Pfeiffer* resolved the division in the Court, that had appeared in previous cases, about the nature of the federal legal system. Some judges viewed the legal system as a unitary one, while others viewed the federal system as a collection of legally independent States. This division reflected the familiar federal tension between the pursuit of uniform outcomes across State courts, and the preservation of the capacity of States to prescribe diverging legal standards to be applied in forum courts.

Prior to *Pfeiffer*, the view favoured by a majority in *McKain v R W Miller & Company (SA) Pty Ltd*[179] and *Stevens v Head*[180] was the mutual legal independence of the States. To preserve the capacity of States to determine the law to be applied in State courts, the majority adopted the double actionability rule as the appropriate choice of law rule. The Court in *Pfeiffer*, however, rejected that position, and in doing so favoured a unitary understanding of the federal legal system. The Court pointed to the *integrating* features of Ch III that privileged uniformity of outcome and, for the Court, required the application of the *lex loci delicti*.

The third article in this thesis critiques the Court's reliance on these Ch III features to justify its conclusions, and goes on to suggest a different constitutional platform for these choice of law issues to be resolved. However, what is important for present

177 Stellios, above n 55.
178 (2000) 203 CLR 503.
179 (1991) 174 CLR 1.
180 (1993) 176 CLR 433.

purposes is that the choice of law context is another that tells us a lot about the type of federal legal system we have.

(iv). Plotting the parallels

The previous sections have shown that Ch III principles have been designed in a way to expand federal judicial power at the expense of State judicial power; to achieve uniform outcomes across the Australian judicial systems at the expense of State forum diversity; and to minimise the distinctiveness of State courts. This centralisation and integration of Australian judicial systems broadly matches the experiences in other federal constitutional contexts.

The expansion of federal legislative power is well known. The High Court has developed characterisation principles[181] and other rules of interpretation[182] that allow expansive readings of federal heads of legislative power.[183] The federal Parliament can reach into areas traditionally regulated by the States, and achieve purposes and pursue policies that are not obviously federal in nature. Examples frequently given include the regulation of the environment,[184] industrial relations[185] and human rights.[186] The federal Parliament can use taxation as a regulatory tool: not just as a

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181 *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

182 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers Case)* (1920) 28 CLR 129.

183 See generally Leslie Zines, 'Changing Attitudes to Federalism and its Purpose', in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86; James Allan and Nicholas Aroney, 'An Uncommon Court: How the High Court of Australia has Undermined Australian Federalism' (2008) 20 *Sydney Law Review* 245; Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine' (2008) 32 *Melbourne University Law Review* 1; Senate Select Committee on the Reform of the Australian Federation, *Australia's Federation: An Agenda for Reform* (2011).

184 *Commonwealth v Tasmania (Tasmanian Dam Case)* (1983) 158 CLR 1; *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.

185 *New South Wales v Commonwealth (Workchoices)* (2006) 229 CLR 1; *Actors and Announcers Equity Association v Fontana Films Pty Ltd* (1982) 150 CLR 169.

186 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168.

means to fill the public purse.[187] Furthermore, the Commonwealth can, pursuant to s 96 of the *Constitution*, grant money to the States under wide reaching and controlling conditions, that require States to achieve federal policy agendas and, indeed, reduce States to instruments for the achievement of federal policy priorities.[188] The control of education and the health system are common examples referred to in this context.[189]

The High Court's broad interpretations of the Commonwealth's revenue raising power,[190] the facilitation of a federal income tax monopoly,[191] and the narrowing (under s 90) of State power to impose taxes on goods, have all contributed to a vertical imbalance in federal fiscal relations, and provides the potential for federal policy domination through the use of tied grants under s 96.[192] Additionally, the expansive reach of federal executive power has provided a further foothold for the growth in federal power.[193] These characteristics of the federal system have been the subject of extensive commentary.

Judicial federalism, on the other hand, has not been the subject of systematic consideration.[194] Indeed, in a recent collection of 19 essays on the future of Australian

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187 *Fairfax v Federal Commissioner of Taxation* (1965) 114 CLR 1; *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

188 See Anne Twomey, 'The Future of Australian Federalism – following the money' (2009) 24 *Australasian Parliamentary Review* 11.

189 See, eg, the discussion of these areas by Vijaya L Ramamurthy, 'Tied Grants and Policy Reform in Public Hospitals and Schools' in Paul Kildea, Andrew Lynch and George Williams (eds), *Tomorrow's Federation: Reforming Australian Government* (2012) 114.

190 *Northern Suburbs General Cemetery Reserve Trust v Commonwealth* (1993) 176 CLR 555.

191 *South Australia v Commonwealth (First Uniform Tax Case)* (1942) 65 CLR 373; *Victoria v Commonwealth (Second Uniform Tax Case)* (1957) 99 CLR 575.

192 Anne Twomey, above n 188; Alan Fenna, 'Commonwealth Fiscal Powers and Australian Federalism' (2008) 31 *University of New South Wales Law Journal* 509.

193 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1; Cheryl Saunders, 'The Sources and Scope of Commonwealth Power to Spend - Case Note; *Pape v Federal Commissioner of Taxation*' (2009) 20 *Public Law Review* 256; Anne Twomey, 'Pushing the Boundaries of Executive Power – Pape, The Prerogative and Nationhood Powers' (2010) 34 *Melbourne University Law Review* 313; Andrew McLeod, 'The Executive and Financial Powers of the Commonwealth: *Pape v Commissioner of Taxation*' (2010) 32 *Sydney Law Review* 123.

194 During the inquiry by the Senate Select Committee on the Reform of the Australian Federation, the Attorney-General for Western Australia highlighted the centralisation of judicial power, but the matter was not explored by the Committee nor made the

federalism,[195] not one contribution reflected on the federal dynamics of the Australian judicial system. This Part of the Introductory Chapter has shown that Ch III principles have broadly developed along similar pathways, exhibiting broadly similar federal characteristics of centralisation, uniformity and closer integration.

B. Reinterpretations of ss 75(v) and 80

Seeing Ch III through a federalism lens also allows us to reconsider the way in which Ch III provisions have been interpreted. As discussed above, two key provisions – ss 75(v) and 80 – have been seen as regulating the relationship between the Commonwealth and the individual. The accepted understanding of s 75(v) is that Commonwealth judicial power protects the individual from excessive exercises of Commonwealth executive power. In the context of s 80, the predominant view sees the jury as the vehicle through which Commonwealth judicial power protects the accused from the Commonwealth government (whether legislative, executive or judicial). That understanding reflects a commitment to a constitutional framework that protects the individual from the state.

The fourth and fifth articles selected for inclusion in this thesis demonstrate in detail how alternative understandings of those provisions emerge if we see them within a federalism framework. In that light, s 75(v) may be seen as a provision that guarantees to the federal executive a federal judicial forum in which it can be pursued. On this view, the jurisdiction conferred by s 75(v) remains a protective one – but it operates to protect the federal executive from the exercise of State judicial power rather than being protective of the individual against excessive exercises of federal executive power. If such an understanding of s 75(v) were adopted, the

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subject of a specific recommendation (see Senate Select Committee on the Reform of the Australian Federation, above n 183, para 1.49).

195 Paul Kildea, Andrew Lynch and George Williams, *Tomorrow's Federation: Reforming Australian Government* (2012).

frustrating search for the minimum content of judicial review can be called off as the individual's interest is no longer of primary concern. As explained in more detail in the fourth article selected for this thesis, such an understanding of s 75(v) finds clear reflection in the Convention Debates and in some of the case law on its companion provision, s 75(iii).

Section 80 might alternatively be seen as a federal structural provision that facilitates the exercise of Commonwealth judicial power where there is an indictable offence against the laws of the Commonwealth. The detail of this view is set out in the fifth article selected for this thesis. It is sufficient to say for present purposes that once the federal structural features of that provision are appreciated, s 80 need not be seen as a provision that protects the individual. Section 80 already performs important federal functions and, contrary to the mainstream commentary, rights protective interpretations are not necessary to give s 80 life. As the fifth article explains in more detail,[196] this federal understanding of s 80 provides a better explanation for the cases that have been decided.

VII. CONCLUSION

Federalism is central to the architecture of Ch III. Yet, most of the thinking about Ch III has occurred within a divergent view of Ch III – a statement about the relationship between the federal body politic and the people. In some ways, this is not surprising given the rise of human rights discourse and the strong rights-oriented Blackstonian traditions within common law systems of government. The identification of a separate chapter in the *Constitution* dealing with the judiciary naturally suggests separation of judicial powers principles, and their accommodation

[196] And further in Stellios, above n 14, 566-7.

within the Ch III framework has presented opportunities for seeing Ch III in rights protective ways.

The difficulty, however, is that the *Constitution* has a poor track-record as an instrument for rights protection. History and application have not provided a solid basis for seeing this vision through. Like other areas of constitutional rights discourse, the protection of rights through Ch III has proved to be challenging, highly contested and, ultimately, disappointing. This thesis has sought to identify these divergent developments and place them within a broadly consistent historical and interpretive experience.

This thesis has also sought to reinvigorate the federal dimensions of Ch III. The federal dimensions of Ch III have a strong textual and historical foundation, and tracing the development of Ch III jurisprudence through a federal lens tells us quite a bit about the federal system that we have. While the centralisation of legislative, fiscal and executive power in the federal system has been well documented, the centralised and integrated federal judicial system has not. This thesis has sought to explore these centralising and integrating elements of Ch III principles, and to plot them against the general centralising constitutional experience. Finally, this thesis has identified different interpretations that might be applied to Ch III provisions if viewed as part of a federal framework. While ss 75(v) and 80 have been primarily viewed as provisions protecting of the individual, federal understandings of those provisions are certainly possible.

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