CONCEIVED IN SIN, SHAPED IN INIQUITY[1] – THE *KABLE* PRINCIPLE AS BREACH OF THE RULE OF LAW

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I INTRODUCTION

Recently Professor Jeffrey Goldsworthy, in an article in the 'University of Queensland Law Journal', has affirmed two propositions: first, that the reasoning in *Kable v Director of Public Prosecutions (New South Wales)*[2] was 'barely even plausible', and secondly that the decision has strengthened the rule of law from a policy perspective.[3] Professor Goldsworthy's juxtaposition throws into sharp focus a question I have often asked myself : is *Kable* consistent with three basic constitutional principles – not only the rule of law, but also parliamentary sovereignty[4] and the separation of powers? How can a decision based on reasoning which is 'barely even plausible' strengthen the rule of law? As Professor Goldsworthy may be suggesting, the clue is in distinguishing between the reasoning in *Kable* and the outcomes that it supports – some of which have clearly strengthened various aspects of that highly disputed and uncertain concept, the rule of law, in the Australian States, particularly in the 'thick' sense of that concept.[5]

However, as Professor George Winterton remarked:

> constitutionalism and the rule of law are concerned not only with governmental outcomes, but also with the means by which they are achieved. The rule of law and the integrity of judicial interpretation of the Constitution should not be sacrificed for anything – even a result which, on a particular occasion, may promote human or civil rights.[6]

What sort of a mess is created when that sacrifice is made will be the subject of this article.

Dr Gabrielle Appleby has already drawn attention to the difficulties that the *Kable* doctrine poses for federal diversity and democratic discourse about the proper balance between community protection and human rights.[7] This is merely an example of a regrettable tendency that is all too familiar in countries practising judicial review, namely the belief that anything that is held constitutional must therefore also be

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1 Adapted from the fifth verse of Psalm 51 – which played such a role in legal history.

2 (1996) 189 CLR 51.

3 Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30 *University of Queensland Law Journal* 9, 10; the 'barely even plausible' quotation is itself stated to be from George Winterton, 'Justice Kirby's Coda in Durham Holdings' (2002) 13 *Public Law Review* 165, 168.

4 See generally Ivor Jennings, *Law and the Constitution* (University of London Press, 5th ed, 1964).

5 For an account of 'thick' versus 'thin' concepts of the rule of law see James Allan, 'Reasonable Disagreement and the Diminution of Democracy: Joseph's Morally Laden Understanding of "The Rule of Law"' in Richard Ekins (ed) *Modern Challenges to the Rule of Law* (LexisNexis, 2011), 79-92.

6 Winterton, above n 3, 170.

7 'The High Court and *Kable*: A Study in Federalism and Rights Protection' (2014) 40 *Monash University Law Review* 673; and see Brendan Lim, 'Laboratory Federalism and the *Kable* Principle' (2014) 42 *Federal Law Review* 519.

unobjectionable. That is bad enough, and also may be problematic for the rule of law over the long term, but the difficulty to be dealt with here is that using inadequate reasoning to reach what are generally (although not always) widely lauded goals leaves a gap which affects the fidelity of the Judges to the three constitutional principles of the rule of law, parliamentary sovereignty and the separation of powers.

Inadequate reasoning – reasoning that contains substantial gaps, contradictions or simple implausibilities – may well not be an adequate guide to what Judges will do in the future, and thus leave too much room for judicial invalidation of statutes on spurious grounds that are inconsistent with the separation of powers and parliamentary sovereignty; and the uncertainty that that engenders also raises questions relating to the certainty aspect of the rule of law. It is admittedly not necessarily the case that poor reasoning will have such consequences. Another example of recent judicial reasoning that has been generally deprecated is that in *Kirk* v. *Industrial Relations Commission (New South Wales)*;[8] but the reasoning in that case, however gossamer thin it may be, has at least produced a tolerably clear rule (at least at present; although if further attempts to extend *Kirk* are made, that may no longer be the case). Indeed, the *Engineers' Case*[9] may be thought another example of inadequate reasoning producing tolerably clear rules. There is no necessary connexion between the reasoning behind, and the clarity of, the resulting rule. But one may very well affect the other, for clearly the considerations which lie behind a rule will affect what it is taken to mean and how it is applied in later cases, particularly if it is vague and open-ended and its aims need to be considered purposively as part of applying it. It is the thesis of this article that the *Kable* doctrine, as currently applied, does infringe the three constitutional principles just mentioned for the reasons indicated, and the question to be asked in the conclusion is what should be done about this.

It is not coincidental that the *Kable* doctrine has this problematic character: it was conceived in sin. The sin was the Judges' dislike – understandable, but irrelevant – of the legislation in question in that case, which was the real ground behind their decision. No better demonstration can be given of this, or is needed, than the falsification of the proposition that the Act in question amounted to making 'the Supreme Court the instrument of a legislative plan, initiated by the executive government, to imprison'[10] Mr Kable by the decision of the Supreme Court of New South Wales that Mr Kable should be released under the prescribed statutory criteria after one additional period of six months' imprisonment: clearly the legislation did not amount to a statutory direction to the Courts to come to only one conclusion, that unfavourable to Mr Kable. It could not plausibly be read in that way given that criteria were provided for allowing his release; they were not by any means bad-faith, virtually unattainable criteria; and he was in fact released.

If we concede what seems to me to be obvious, namely that the decision in *Kable* was based largely on understandable but irrelevant judicial distaste for the legislation in question there, with the reasoning, such as it was, dictated only by the need for the desired conclusion to be reached, then the outcome in the case clearly contradicts the doctrines of parliamentary sovereignty and the separation of powers, by which questions relating to the wisdom and desirability of legislation are not for the Judiciary. By allowing judicial distaste for legislation to determine the outcome of cases, with the corollary that the case provided insufficient substantive legal criteria by which the

8 (2010) 239 CLR 531.
9 (1920) 28 CLR 129.
10 (1996) 189 CLR 51, 122.

constitutionality of legislation could be judged, the certainty aspect of the rule of law was also called into question.

There could be no better post-*Kable* illustration of these propositions than three decisions of Heydon J. In *Public Service Association and Professional Officers' Association Amalgamated of New South Wales* v. *Director of Public Employment (New South Wales)*,[11] his Honour thought that, perhaps, a 'harsh critic' might ask whether the *Kable* rules are 'inconsistent with the rule of law because they are so uncertain that they make prediction impossible and give too much space within which the whims of the individual Judge can take effect without constraint'. On the other hand, in applying that very same set of rules to invalidate legislation in *International Finance Trust* v. *New South Wales Crime Commission*,[12] his Honour, while admitting that the *Kable* doctrine had its critics, stated that there was 'no doubt that the decision has had extremely beneficial effects' (a clear reference to outcomes rather than reasoning). In *Momcilovic* v. *R*[13] his Honour again relied in part on the *Kable* principle to invalidate legislation (an outcome), vaulting from the conclusion that *Kable* invalidated one key provision to the conclusion that it invalidated the whole statute. It is not out of place to suggest that his Honour's own distaste for that statute lay behind that decision, and I should not wish it to be thought that no disrespect to his Honour's judgment is intended by that observation.

This is a vivid demonstration that *Kable*'s birth defects have not been corrected by later cases, and that there is an intolerable tension between the *Kable* doctrine as currently applied and the three constitutional principles mentioned. I now turn to analyse these propositions in detail. It is hardly necessary for me to say that in so doing I am not putting forward any naive proposition such as that the law must always be wholly determinate or that Judges' personal views never influence their decisions. Rather, I accept that such things do occur, but also suggest that doctrines of constitutional law and the expectation of plausible reasoning are designed to keep that sort of thing to an acceptable minimum and thus ensure respect for the powers of the other branches of government and adherence to the principles of the rule of law. My case is that *Kable* goes beyond what is acceptable as 'play' in the interaction of judicial review with the doctrines of the rule of law, parliamentary sovereignty and the separation of powers; that this is unsurprising given that the reasoning underlying it has never been strong enough to support the conclusions it supposedly justifies; and that the pay-off from *Kable* in strengthening other aspects of the rule of law is far too small to justify that sacrifice.

II THE RULE OF LAW

It is only with trepidation that the subject of the rule of law can be approached, for it is a notorious battleground of competing theories and conceptions. There are 'deep disagreements about what the rule of law is' and 'robust dispute as to the very core of the concept'.[14] It is not possible to resolve or even to review such controversies

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11 (2012) 250 CLR 343, 370.
12 (2009) 240 CLR 319, 379.
13 (2011) 245 CLR 1, 174.
14 Peter Shane, 'The Rule of Law and the Inevitability of Discretion' (2013) 36 *Harvard Journal of Law and Public Policy* 21, 21f.

here.[15] And, as has already been noted, at the level of outcomes *Kable* has certainly had positive effects on the rule-of-law front in securing, in the words of Dr James Stellios, 'uniform outcomes disciplined by central constitutional requirements'.[16] However, the rule of law is not just about outcomes, as we have seen Professor Winterton pointing out. It is also about process and reasoning. Furthermore, there is no sharp dividing line between outcomes and process, for the outcome in one case will feed into the process in the next *via* the doctrine of precedent. The outcomes in past *Kable* cases have been produced by reasoning that is so uncertain, both within individual cases and in the collection of *Kable* precedents that now exist, that it exceeds the tolerable degree of uncertainty and vagueness which are the price of any constitutional order.

Scholars of all ideological colours and of none have emphasised that a reasonable degree of certainty is an important component of the rule of law. Thus, Professor F.A. Hayek, in *The Road to Serfdom*,[17] stated that '[s]tripped of all technicalities' the rule of law required 'rules fixed and announced beforehand',[18] while admitting that this goal could 'never be perfectly achieved'.[19] If rules with those qualities did not exist, he wrote, there was a risk of 'increasing arbitrariness and uncertainty of, and the consequent disrespect for, the law and the Judicature, which in these circumstances could not but become an instrument of policy'.[20] (At the same time, in an illustration of the tensions within the concept of the rule of law Hayek slipped into talking about outcomes, and could have had the *Kable* case in mind, in deprecating, as contrary to the rule of law, 'legislation either directly aimed at particular people, or at enabling anybody to use the coercive power of the state for the purpose of such discrimination'.)[21] For his part, Professor Roberto Unger points out that vagueness and open-endedness in the law can 'undermine the relative generality and the autonomy that distinguish the legal order from other kinds of law, and in the course of so doing they help discredit the political ideals represented by the rule of law'.[22] Professor Brian Tamanaha states that the rule of law 'entails public, prospective laws, with the qualities of generality, equality of application and certainty'.[23] In his celebrated lecture on 'Judicial Activism and the Rule of Law',[24] Justice Heydon also referred to the rule of law requiring 'principles which are known or readily discoverable and hence do not change erratically or without notice [and] which are reasonably clear'.

Given that this is not an essay on the rule of law as such, that suffices to establish that a reasonable degree of certainty is probably one of the rule of law's core components, and *Kable* can be tested against that. One further explanation is

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15 Nor do I wish to survey the very limited extent to which the rule of law might be a part not of constitutionalism in general, but of formal Australian constitutional law in particular, or suggestions to incorporate into the latter more of the rule of law; there is a useful overview in Natalie Skead & Sarah Murray, 'The Politics of Proceeds-of-Crime Legislation' (2015) 38 *University of New South Wales Law Journal* 455, 479f.

16 'The Centralisation of Judicial Power within the Australian Federal System' (2014) 42 *Federal Law Review* 357, 385.

17 F.A. Hayek, *The Road to Serfdom* (Routledge, 1944).

18 Ibid 75.

19 Ibid 76.

20 Ibid 81.

21 Ibid 87.

22 Roberto Unger, *Law in Modern Society: Towards a Criticism of Social Theory* (Free Press, 1976) 197.

23 Brian Tamanaha, *On the Rule of Law: History, Politics, Theory* (Cambridge University Press, 2004) 119.

24 (2003) 23 *Australian Bar Review* 110, 112.

nevertheless in order before doing so. It is certainly true that the reasons generally given for the need for a reasonable degree of certainty as a component of the rule of law do not refer immediately to the province of constitutional law. In his recent but now classic treatment of the subject, Lord Bingham refers to three reasons supporting this need: the deterrent effect of the criminal law, which requires its commands to be known; the citizen's need to be able to claim rights secured by the law and consequent requirement for information about what the law is; and the needs of commerce to be able to conduct its affairs on the basis of reliable and known rules.[25] Similar points are made by Professor Jeremy Waldron in his recent thought-provoking treatment of the subject.[26] Given these reasons, we should expect in the first instance that the certainty aspect of the rule of law would be applicable to the rules of contract law and so on that are directly applicable to the populace in its daily life. However, a little thought will show that the certainty aspect of the rule of law should apply not only in that way, but also to the rules about making rules themselves (rules of recognition, in the famous phrase). This is, first, because those rules are themselves rules. Secondly, those rules are also addressed to persons and institutions that have to apply them, such as Parliaments, legislative drafters and inferior Judges, and they will find it difficult to impossible to apply and obey rules that are not sufficiently clear.[27] (This is to say nothing of others 'whose lot it is to explain the elliptical and expound the unexpressed',[28] the teachers of the law, and also their students.)[29] As a majority of the Court has very recently said, 'members of the legislative branch want to know, should know, and are entitled to know, the limits of their legislative powers'.[30]

Thirdly, finally and perhaps most importantly, citizens will also need to make use of the rules of constitutional law in determining their own rights and obligations. Does the 'bikie' have to obey the control order for which legislation provides and which has been issued in accordance with its provisions? If the answer to this question depends on the constitutional validity of the legislation, then the motorcycle club member should, in an ideal world, be able to discover the answer to that question, or, in the real world in which we actually do live, should at least be able to obtain a reasonably accurate idea of the likely answer from 'public norm-detectors',[31] that is lawyers. Who can say that a legal adviser could now be reasonably confident in stating whether State law now passes the *Kable* test?

From time to time, Judges of the High Court of Australia have been honest enough to admit openly that the *Kable* principle has a long way to go in terms of

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25 Thomas Bingham, *The Rule of Law* (Allen Lane, 2010) 37f.

26 Jeremy Waldron, 'The Concept and the Rule of Law' (2008) 43 *Georgia Law Review* 1, 6f.

27 Appleby, above n 7 at 690; Brendan Gogarty & Benedict Bartl, 'Tying *Kable* Down: the Uncertainty about the Independence and Impartiality of State Courts Following *Kable* v *DPP (NSW)* and Why it Matters' (2009) 32 *University of New South Wales Law Journal* 75, 76, 99, 101; Scott Guy, 'The Constitutionality of the Queensland *Criminal Organisation Act*: *Kable*, Procedural Due Process and State Constitutionalism' (2013) 32 *University of Queensland Law Journal* 265, 271.

28 *James* v. *Cowan* (1930) 43 CLR 386, 422.

29 Chris Steytler/Iain Field, 'The "Institutional Integrity" Principle: Where are We Now, and Where are We Headed?' (2011) 35 *University of Western Australia Law Journal* 227, 228.

30 *McCloy* v. *New South Wales* [2015] HCA 34, [74], quoting Aharon Barak, *Proportionality: Constitutional Rights and their Limitations* (C.U.P., 2012) 379.

31 Waldron, above n 26 at 26.

certainty. In *Kuczborski* v. *Queensland*[32] French C.J. in the majority and Hayne J. in dissent were united in stating that there could be no 'single, let alone comprehensive, statement' of the *Kable* rule. In *Fardon* v. *Attorney-General (Queensland)*,[33] Gummow J. stated that 'the critical notions of repugnancy and incompatibility are insusceptible of further definition in terms which necessarily dictate future outcomes'. These words received the imprimatur of a majority of the Court in *Condon* v. *Pompano*.[34] And in *South Australia* v. *Totani*,[35] French C.J. stated that

> [t]he principles underlying the majority judgments in *Kable* and further expounded in the decisions of this Court which have followed after *Kable* do not constitute a codification of the limits of State legislative power with respect to State Courts. Each case in which the *Kable* doctrine is invoked will require consideration of the impugned legislation.

It is a truism that each case will require the consideration of the legislation involved in it; this *dictum* can hardly be thought to be saying something so trivial and suggests, rather, embarrassment at the mess that the precedents are in – a matter to be taken up shortly.

Perhaps not only embarrassed, but also uneasy about the implications of suggesting such things, French C.J. and Kiefel J. drew an analogy in *Wainohu* v. *New South Wales*:[36]

> with the imprecise scope of the judicial power, which historically was not limited to the determination of existing rights and liabilities in the resolution of controversies between subject and subject, or between subject and the Crown. It is also consistent with the shifting characterisation of the so-called 'chameleon' functions as administrative or judicial according to whether they are conferred upon an authority acting administratively or upon a Court.

And we can all agree that it would be totally unrealistic to expect to find a 'codification' of many things in constitutional law, to use the word chosen in the *Totani* quotation. While we might find little room for manoeuvre in relation to the rule that the six States must have the same number of Senators, for example, judicial power is only one of a variety of areas in which no 'codification' can be expected – least of all would one expect to find such a thing in relation to an implication.

The 'codification' remark therefore seems to be something of a straw man. In fact, there is no proper analogy between the uncertainties surrounding the *Kable* principle and the federal rules around judicial power. While it is certainly true that the federal rules on judicial power may be of uncertain application in particular cases, largely because of the huge variety of possible powers which must be classified as either judicial or non-judicial, the rules themselves are remarkably certain and can be stated in a few words : only Courts may exercise federal judicial power; and federal Courts may exercise only federal judicial power, and not other types of power. There are various explanations and exceptions, such as a brief explanation of what a Court is along with the *persona designata* doctrine, and, as stated, the classification of powers as judicial or non-judicial can sometimes be a matter on which fine judgment is called

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32 (2014) 254 CLR 51, 73, 90 (per Hayne J).
33 (2004) 223 CLR 575, 618
34 (2013) 252 CLR 38, 89.
35 (2010) 242 CLR 1, 47.
36 (2011) 243 CLR 181, 202.

for, but the basic rules are clear enough. It is mostly the vast array of factual situations to which they must be applied that causes serious difficulties. (For this reason, this article does not suggest that the federal rules must be also condemned, even though *Wainohu* marks some degree of convergence between the federal and State views on incompatibility[37] – in the end almost all federal cases are disposed of long before the incompatibility principle is reached on the basis of reasonably certain rules, but the States have only the incompatibility principle.)

The *Kable* doctrine, by contrast, involves no clear major premiss. As we have just seen, the Court itself admits that it cannot be reduced to a statement, but in fact it cannot be clearly stated at all. Perhaps the only candidate for a *Kable* one-liner would be something along these lines: the State Courts must remain fit receptacles for federal jurisdiction. However, that would be a reason for a rule, not a rule itself. It would be comparable to saying: the federal Courts must remain fit receptacles for federal jurisdiction. If we ask how this desideratum is assured, the answer is given in the form of rules that the Courts actually apply: for example, the federal Courts must not be tainted by non-judicial power. The same criticism must be made of the recent proclamation in *Condon*[38] by Hayne, Crennan, Kiefel and Bell JJ. that 'the principle established in *Kable* is to be understood as founded on the notions of repugnancy to and incompatibility with institutional integrity': that is a backgrounder, not a rule, as the words 'founded on' make clear. In other words, the uncertainty of the federal rules relates largely to the application of rules to the myriad possible situations thrown up by reality; in the case of *Kable*, though, the rule itself is uncertain.

If we ask how it is that, under the *Kable* rule, effect is given to the reason behind the rule – in other words, what the rule is – we see a bewildering variety of suggestions. It is certainly true that some attempts have been made – by scholars, not the Courts – to come up with a reasonably clear statement of the *Kable* principle. Perhaps the most promising is that of Professor Ratnapala and Dr Crowe:

> A State Parliament may not make any law that negates a 'defining characteristic' of the State Supreme Court. These defining characteristics include appropriate security of judicial tenure, independence from legislative and executive judgments, the power to make orders for the correction of jurisdictional errors of Courts and statutory authorities and appropriate respect for procedural guarantees, such as the open Court principle. More generally, State Parliament may not vest in a State Supreme Court (or in a Judge as *persona designata*) a power or function that is 'incompatible with the court's essential and defining characteristics as a Court and thereby with its place in the national integrated judicial system for which Ch. III of the Constitution provides'.[39]

This gets us some of the way – but, I suggest, not far enough, as the authors just quoted themselves recognise by stating shortly afterwards that 'the limits of non-judicial power that may constitutionally be vested in a State Court (or a Judge acting as

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[37] For a short but useful discussion of this, see Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38 *University of New South Wales Law Journal* 756, 762f.

[38] (2013) 252 CLR 38, 91.

[39] 'Broadening the Reach of Chapter III: The Institutional Integrity of State Courts and the Constitutional Limits of State Legislative Power' (2012) 36 *Melbourne University Law Review* 175, 200; the concluding quotation is from *Wainohu*, (2011) 243 CLR 181, 192.

persona designata) remain to be progressively defined'.[40] There are three reasons why this attempt is not sufficient, none of them to be attributed to those two authors. The first is that the passage quoted necessarily employs words of little to no semantic content such as the all-purpose modern term of approval 'appropriate' (twice), 'incompatible', 'essential' and 'defining'. We receive no guidance about what is inappropriate or incompatible, and, indeed, 'incompatible' simply repeats in the explanation one of the terms that was to be defined or at least rendered more certain.[41]

Secondly, this explanation says nothing about whether the *Kable* principle includes any consideration of the public perception of the integrity of the Court in which the power under question is vested. Long thought to be dead and buried, the idea that public perception might be a *Kable* criterion has recently been revived in *Wainohu*[42] and was repeated in all the judgments in *Condon.*[43] The reasoning behind it, what its role is in the broader *Kable* scheme and its future are all uncertain. Most recently, in *North Australian Aboriginal Justice Agency* v. *Northern Territory*,[44] the plurality made matters not a whit better by saying that:

> public confidence is an indicator, but not the touchstone of invalidity; the touchstone of invalidity concerns institutional integrity. That touchstone extends to maintaining the appearance as well as the realities of impartiality and independence of the Courts from the executive. Those criteria may be seen as necessary to the maintenance of public confidence in the judicial system. That is not the same as saying that it is necessary or appropriate to use an imputed effect upon "public confidence" to infer that a law impairs the institutional integrity of a court.

It is not necessary to elaborate on the point any further; the quotation illustrates it clearly enough.The third and final reason why Professor Ratnapala and Dr Crowe's explanation is insufficient in terms of certainty is that the precedents, vital explanatory tools for any rule, are, in relation to the *Kable* principle, all over the place. This will require some explanation.

To my mind one basic distinction is between those cases that apply what I call in class, after the old Elvis Presley song, the 'suspicious minds' principle[45] and those that do not. The 'suspicious minds' principle appears to start from the presupposition that we cannot trust Judges to carry out statutory tasks with integrity (or even *appropriate* integrity) and that therefore any discretion or loophole may be used to defeat the basic nature of Courts – *Wainohu* is the best example.[46] On other occasions the Court completely ignores the 'suspicious minds' principle and assumes what is certainly the

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40 Ratnapala and Crowe, above n 39, 201.

41 Gabrielle Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 6.

42 See also *Totani* (2010) 242 CLR 1, 47, 53; Tarsha Gavin, 'Extending the Reach of *Kable*: *Wainohu v New South Wales*' (2012) 34 *Sydney Law Review* 395, 396, 407; Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2014) 40 *Monash University Law Review* 75, 80; Guy, above n 27, 270; Steytler and Field, above n 29, 232, 262f.

43 (2013) 252 CLR 38, 67, 106, 115.

44 (2015) 90 ALJR 38, [40].

45 This principle first appeared in *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (Commonwealth)* (1996) 189 CLR 1, where it was assumed that Matthews J might act merely as a ministerial adviser unless her Honour were specifically told to conduct an arm's-length enquiry.

46 Compare also Simon Kozlinas and Francois Brun, 'Limits to State Parliamentary Power and the Protection of Judicial Integrity: A Principled Approach' (2011) 15 *University of Western Sydney Law Journal* 129, 136f.

truth in almost every case, namely that Judges are capable of running matters with (appropriate) integrity even without having every move in the dance prescribed by statute in advance and even in circumstances when they must exercise a discretion. Thus, as in *K-Generation* or *Condon*[47] for example, it is not fatal that guarantees of due process and procedural fairness are not included in legislation – it is assumed, as it should be, that Judges will know what such basic principles mandate under the circumstances presented to them, and this deficiency is supplied. Indeed, if it were otherwise would Parliament need to insert a code of civil procedure and natural justice into every statute to be sure of its ground?

In *Condon*[48] French C.J. stated that '[w]here […] a statute requires the Supreme Court to undertake an *ex parte* inquisitorial process, the Supreme Court, unless and to the extent precluded by the statute, will retain its inherent power to control that process in order to avoid its abuse and to avoid injustice' – why, according to the four majority Judges, had similar considerations not saved the statute in *International Finance Trust*, as the three dissenters thought they did?[49] What lessons can Parliaments, lower Courts and legislative drafters take from the different results in those two cases to guide them in the future? In *Hogan* v. *Hinch*,[50] moreover, one of the most basic characteristics of Courts, namely that their proceedings are usually public, was dismissed as only 'a means to an end, not an end in itself' (could that not be said of any guarantee of procedural fairness?); and we learnt that the term 'in the public interest' must be read against the background of its meaning in other unrelated fields of law and that '[t]he Court is not free to apply idiosyncratic notions of public interest'.

Sometimes, again, discretions are used to save, and sometimes to condemn legislation. The extraordinary and inexplicable decision in *Wainohu* is the best example of both the 'suspicious minds' principle and the equivocal treatment of discretions. Faced with a statute that gave Judges a discretion not to give reasons, the High Court of Australia saw that as a reason to condemn the legislation – rather than trusting that Judges would be able to decide for themselves when natural justice required the giving of reasons, and as if the statute created not a discretion, but some sort of rule against the giving of reasons. But other cases go the other way. Indeed, before *Wainohu* one commentator stated that the principal requirement of *Kable* was 'that Courts retain a degree of judicial discretion'![51] And as Dr Appleby has pointed out,[52] a power vested in federal Judges had been upheld in *Grollo* v. *Palmer*[53] despite the fact that the judgments in that case noted that reasons are not given for the issuing of telephone interception warrants. One commentator[54] suggests that the message of *Wainohu* must therefore be that such powers can be exercised only behind closed doors! That would certainly ensure that the strictly inaccurate appearance of a Court in session did not arise in *persona designata* cases, but is hardly a step forward.

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47 Compare Guy, above n 27, 289.
48 (2013) 252 CLR 38, 62; his Honour makes similar comments at 75 and 80.
49 See also Guy, above n 27, 289.
50 (2011) 243 CLR 506, 530, 536.
51 Gogarty and Bartl, above n 27, 92.
52 Appleby n 7, 688; see also Appleby and Williams, above n 56, 24.
53 (1995) 184 CLR 348.
54 Ananian-Welsh, above n 37, 767.

In *Hogan*,[55] French C.J. suddenly informs us that '[t]he Act does not expressly require the Court making a suppression order to give reasons for doing so. Not every judicial decision attracts a duty to give reasons.' Why were the Courts to be trusted to know when to do it in this case, but not in *Wainohu*? Indeed, if we generalised the point and the 'suspicious minds' principle any statute would be invalid if it did not positively require the giving of reasons, but this would contradict the statement from *Hogan* just quoted and, as Dr Appleby and Professor Williams point out,[56] the challenge to the suppression order scheme in *Hogan* was dismissed in the very same year as *Wainohu* with observations that reasons generally 'should' 'ordinarily' or 'in the ordinary course'[57] be granted.

In other cases, such as *K-Generation* v. *Liquor Licensing Court (South Australia)*,[58] it was, furthermore, the presence, not the absence of a discretion that was utterly crucial in saving the law – and Judges were trusted to exercise the discretion in the usual manner; there was no *Wainohu*-like assumption that they might not know when proper judicial process required them to do something. It is only natural to uphold such legislation, given that a discretion shows that there is still some element of judicial power, not a mere conscription of the Court to announce a predetermined result. But in *Wainohu* discretion suddenly becomes a reason for invalidation! But then again, in *New South Wales Public Service Association*,[59] where Judges in the same *persona designata* setting as *Wainohu* were required (no discretion!) to apply government policy – the policy of the executive – not just adjectivally, in deciding whether to give reasons or not, but in determining substantive rights, the challenge to that was dismissed in a majority judgment of only three pages.

Many further puzzling inconsistencies exist. As Dr Appleby also points out[60] :

> The outcome in *Totani* stands in contrast to the High Court's decision in *Baker* v. *The Queen*.[61] In that case, Gleeson C.J. rejected the argument that the Court was being used to mask a 'legislative decree'. He asked whether discretion given to the Court is 'devoid of content, so that it is impossible for any case to satisfy [its exercise]'.

According to the more recent judgment in *Attorney-General (Northern Territory) v Emmerson*,[62] the *Kable* principle is breached if the Court 'is essentially directed or required to implement a political decision or a government policy without following ordinary judicial processes'. This implies that such a direction is in order if 'ordinary judicial processes' are followed, which is true given that the Courts are required, as part of the doctrine of separation of powers, to apply valid legislation.[63] Why, however, was it not an example of 'ordinary judicial processes' for the Supreme Court of South Australia to determine, by evidence and against statutory criteria, whether someone was a member of a particular organisation within the rather complicated meaning given to that phrase by the legislation in issue in *Totani*, and by dealing with the difficult questions of the truthfulness of evidence and its probative

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55 (2011) 243 CLR 506, 540.
56 Appleby and Williams, above n 41, 24.
57 (2011) 243 CLR 506, 540, 551.
58 (2009) 237 CLR 501.
59 (2012) 250 CLR 343.
60 Appleby, above n 7, 690.
61 (2004) 223 CLR 513.
62 (2014) 253 CLR 393, 426.
63 See below, n 92.

value if accepted that arise in every contested case in the day-to-day work of the first-instance Courts? As the Court said in *Emmerson* :

> The Supreme Court is authorised to determine whether the statutory criteria set out are satisfied and, if they are, the Court must make the declaration sought. The *Forfeiture Act* provides the consequences which follow from the Supreme Court's declaration. Together, these steps are an unremarkable example of conferring jurisdiction on a Court to determine a controversy between parties which, when determined, will engage stated statutory consequences.[64]

With a change in the name of the Act, exactly the same could have been said of the statute that was in issue in *Totani*.

Why did the possibility of judicial review of the Attorney-General's declaration of an organisation not save the statute in *Totani* as it did when available in relation to the classification of material as criminal intelligence in *K-Generation*?[65] Given that the law in question in that case was so similar to that which passed the stricter tests on federal legislation in *Thomas* v. *Mowbray*,[66] why, as Heydon J. asks, was the *Totani* law not upheld also? The answer given by, for example, Crennan and Bell JJ. was that the *Thomas* legislation required the Court to decide whether the person subjected to it posed a risk of serious crime. But that has got nothing to do with the division of responsibilities between the Courts and the executive; it simply means that the South Australian Parliament had decided to set the precautionary bar lower and was wary of the difficulties of proof involved in showing that someone posed such a risk;[67] it was still necessary for the Courts to decide, on an application under the *Totani* legislation, whether the person was a member of a declared organisation – no easy task given that the statute had an extended definition of membership and evidence might be contradictory or lacking in probative value. In *Condon*,[68] indeed, French C.J. referred to the usual fact-finding tasks of those Courts and held that '[t]he provisions relating to information provided by informants place a respondent at a forensic disadvantage. However, the Supreme Court has the discretion to accept or reject or to give little weight to information provided by an informant.'

Then again, in *Kuczborski*,[69] similar membership-based provisions were upheld; the proscribed organisations were declared by regulation, which – especially in a unicameral jurisdiction where disallowance of delegated legislation is highly unlikely – scarcely differs from proscription by declaration of a Cabinet minister. According to the majority judgment, *Kuczborski* was different from *Totani* because it did not require a Court 'to proceed otherwise than in accordance with the processes which are understood to characterise the exercise of judicial power'[70] – but how *Totani* interfered with *processes* is not apparent. It is certainly true that the legislation in issue in *Kuczborski* related to the ingredients of an offence rather than, as the majority judgment also said, 'establish[ing] new norms of conduct for the plaintiff or other

64 (2014) 253 CLR 393, 431.
65 (2009) 237 CLR 501, 542.
66 (2007) 233 CLR 307.
67 Appleby and Williams, above n 41, 5.
68 (2013) 252 CLR 38, 81.
69 (2014) 254 CLR 51.
70 Ibid 565.

members of any association',[71] but this, first, seems to import federal rules on the nature of judicial power as the enforcement of existing rights into a sphere where it does not belong, and, secondly, given that breach of the control order in *Totani* was an offence is a distinction without a difference. Rebecca Ananian-Welsh has thus rightly said that after *Kuczborski* 'the already broad notion of institutional integrity has become further clouded'.[72]

In some cases, such as *Wainohu*, the Court bends over backwards to invalidate a law, or ignores important fields for solely judicial decision-making as in *Totani*, while in others, such as *K-Generation*,[73] we learn that, if only a law is 'properly construed' and discretions are created or talked up a law can be saved.[74] '[P]rocedural fairness and the related concern of perceived impartiality is emphasised in some cases but given short shrift in others.'[75] In American terms, we can see the Court oscillating, from case to case, between strict scrutiny and rational basis review without even noticing, let alone explaining what it is doing, and regularly contradicting itself.

Enough has been said to show that under the *Kable* principle precedents do not explain and illuminate a rule; there is no such rule, and as a result precedents separated by only a few years confuse, contradict and obscure rather than illuminate. The Court has itself said almost as much in *Condon*:[76]

> [I]t is readily possible to take statements made in previous cases in explaining why the legislation under consideration in each was invalid and, by joining them together in a logical sequence, argue that the relevant provisions of the CO Act are invalid. But the constitutional validity of one law cannot be decided simply by taking what has been said in earlier decisions of the Court about the validity of other laws and assuming, without examination, that what is said in the earlier decisions can be applied to the legislation now under consideration. The critical questions are whether and why what has been said can be applied. […] Care must be exercised lest taking what has been said in explanation of the decisions in other cases about other legislation to its apparently logical end sever the applicable principle from its constitutional roots.

We are all familiar with the idea that the life of the law is not logic, but it is hard to credit that logical analysis is actually to be deprecated in such a way. It is however easy to grasp that, where there is no certain rule, logical analysis will not assist.

It is paradoxical indeed that, if we accept that rule-of-law principles include the need for the law to be reasonably certain, there is no certain measuring-stick of when this aspect of the principles is breached. All will concede that the law cannot be wholly certain, and also that flexibility is both inevitable and beneficial within limits,[77] but nor should the law be anything like wholly indeterminate and partly self-contradictory – in fact, it would not be logically possible to apply something that is wholly indeterminate. Although the *Kable* principles are partly self-contradictory, or at least the precedents applying them are, it could not be said that the *Kable* principle is wholly indeterminate. However, the bar cannot be set so high, at meaninglessness.

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71 Ibid 565.

72 "*Kuczborski* v. *Queensland* and the Scope of the *Kable* Doctrine" (2015) 34 *University of Queensland Law Journal* 47, 68.

73 (2009) 237 CLR 501, 512, 521, 526, 580; also *Hogan*, (2011) 243 CLR 506, 539 (twice!), 542.

74 *Condon*, (2013) 252 CLR 38, 80; Appleby and Williams, above n 41, 8, 25; Gavin, above n42, 406f.

75 Ananian-Welsh, above n 37, 787.

76 (2013) 252 CLR 38, 94.

77 Rebecca Welsh, 'A Path to Purposive Formalism : Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39 *Monash University Law Review* 66, 88.

Kable is, we should also note, a poor substitute for those favouring a bill of rights – for, as has been pointed out on numerous occasions,[78] all it requires is that the Courts be kept out of any process; it does not require any process to cease, merely that it should not involve the Courts. It is no doubt true that a rich conception of the rule of law will involve the promotion of many values, some of which will inevitably compete with each other at times – any reflective undergraduate can see that certainty and justice, for example, are often uneasy allies. But the very limited protection afforded to human rights by *Kable* in the face of a Parliament that is determined upon circumventing it greatly reduces the amount of uncertainty that we should be prepared to accept as a price of maintaining it for its promotion of other aspects of the 'thick' rule of law.

Now, many will agree that, as Professor Jeremy Waldron points out:[79]

> No conception of law will be adequate if it fails to accord a central role to institutions like Courts, and to their distinctive procedures and practices, such as legal argumentation. Conceptual accounts of law that only emphasise rules and say nothing more about legal institutions than that some institutions make rules and some apply them are too casual in their understanding of what a legal system is; they are like understandings of democracy that neglect the central role of elections. A philosophy of law is impoverished as a general theory if it pays no attention to the formalised procedural aspects of Courts and hearings or to more elementary features of natural justice like offering both sides an opportunity to be heard. Failing to capture this in abstract terms, or regarding it as just a contingent feature of some legal systems and not others – and therefore beneath the notice of general jurisprudence – can make conceptual analysis in jurisprudence seem empty and irrelevant.

There is a great deal indeed in this, but it does not mean, nor is Professor Waldron suggesting, that other aspects of the rule of law such as certainty can be sacrificed wholesale in our project of running the rule-of-law state. The confusion in the basis of the *Kable* principle is only amplified by the precedents and produces such a great degree of uncertainty that *Kable*, as it has developed, is now seriously deficient in a rule-of-law state in which both officials and citizens should be able to have some reasonable idea of what the law is and what they are allowed to do. This is so even though – without, again, seeking to turn this essay into a dissertation on the nature of the rule of law, which would far exceed what could be done in a single short essay and my aims – the rule of law may well protect some other values, such as justice, procedural fairness and equal treatment, which cannot exist without a certain degree of indeterminacy. For when there is no reasonably clear statement of a rule, nor even of the basis for it, and the precedents are of negative, not positive value in making up for those deficiencies, and this must be so because the doctrine is intellectually incoherent – then we must face the fact that the price paid for the very limited gain that *Kable* gives us on those other fronts is too great.

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78 Ananian-Welsh, above n 72 at 62-67.

79 Waldron, above n 26, 55f.

III PARLIAMENTARY SOVEREIGNTY AND THE SEPARATION OF POWERS

In this section of this paper I take as my text the remark of French C.J. in *Totani*[80] that the lack of definition in the *Kable* principle which I demonstrated in the last section may require legislatures to take 'a prudential approach to the enactment of laws directing Courts on how judicial power is to be exercised, particularly in areas central to the judicial function such as the provision of procedural fairness'.

It need hardly be explained that 'sovereignty' is used in this section in the same sense as Sir Ivor Jennings Q.C. used it:

> [I]n modern constitutional law it is frequently said that a legislature is 'sovereign within its powers'. This is, of course, pure nonsense if sovereignty is supreme power, for there are no 'powers' of a sovereign body; there is only the unlimited power which sovereignty implies. But if sovereignty is merely a legal phrase for legal authority to pass any sort of laws, it is not entirely ridiculous to say that a legislature is sovereign in respect of certain subjects, for it may then pass any sort of laws on those subjects, but not on any other subjects.[81]

It is also true that there may be a special class of acts 'so fundamentally abhorrent to the principles of the common law'[82] that they may be excluded from parliamentary sovereignty on essentially moral grounds,[83] but none of the statutes so far invalidated under *Kable* was of anything like that extreme variety: it may be recalled that in *Durham Holdings* v. *New South Wales*[84] expropriation without just compensation was said not to fall under any such principle.

Subject to these well-known exceptions and qualifications, it is therefore true to say that State Parliaments remain sovereign, ὁ νόμος οὗτος διατελέει ἐὼν ὅμοιος μέχρι ἐμεῦ τῷ ἀπ᾽ ἀρχῆς.[85]

The difficulty posed by the *Kable* principle for parliamentary sovereignty is perhaps already apparent from the previous section: if Parliament has no sufficient means of knowing what the limitations on its powers are, how can it be said to be sovereign within what powers it does have? At the very least, its exercise of its sovereignty will be greatly hampered, and a limit on power that is unknown and unknowable is barely a true limit at all. The quotation from French C.J. which began this section throws the difficulty into sharp focus: how can it be said to a sovereign Parliament that it must exercise its powers using 'a prudential approach'? It needs to be able to exercise all its sovereign powers as it thinks fit, not subject to any rule of prudence. The ability to exercise one's powers as one wishes is of the essence of sovereignty. While over-deterrence may play a legitimate role in the criminal law and even in some areas of civil liability in order to promote the avoidance of harm or risk, a

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80 (2010) 242 CLR 1, 47.

81 Jennings, above n 4, 151. It is interesting to compare this with the statement by Sir Samuel Griffith CJ in a speech leading up to the federation referendum in Queensland that a federal parliament's 'powers must be limited, although within those limits its power is absolute': *Brisbane Courier*, 27 May 1899, 9.

82 *Kruger v Commonwealth* (1997) 190 CLR 1, 107.

83 Though of course this is a debatable claim. See the discussion in Jeffrey Goldsworthy, *The Sovereignty of Parliament: History and Philosophy* (Oxford University Press, Oxford, 1999) 259-272.

84 (2001) 205 CLR 399, 410, 425.

85 'and this law has continued the same to my own time from the beginning' – Herodotus, *Histories*, Book 2, para. 113.

State Parliament is not a malefactor and it is odd, to say the least, to learn that 'there is some utility in having opaqueness in the boundaries of the principle as this is likely to keep Parliaments in check'[86] or that legislation has been enacted by 'emboldened State legislatures'.[87] Sovereign legislatures should be bold and not kept in check. And although the statement of French C.J. is not a majority decree of the Court, the need to exercise prudence certainly represents the lesson that State legislative drafters and Parliaments will draw from the recent series of cases (although it may be speculated that politicians may not always be unhappy about having their legislation declared incredibly tough by the Courts).

The 'prudence' quotation might well be seen as the sort of thing that could legitimately be said within Parliament as part of its consideration of how its sovereign powers should be exercised. An upper House with the function of reviewing government legislation might demand prudence. But that would not be a restriction on Parliament's sovereignty, because it would come from within Parliament itself. Nor is it the function of the Courts to engage in a dialogue with the sovereign Parliament in this field (as mechanisms such as the 'notwithstanding' clause in Canada might arguably appear to authorise, in a different country and field) or to act in accordance 'with the laws of Newtonian physics [by providing] an equal and opposite reaction to the States' legislative initiatives'.[88]

By demanding prudence, the Court would be setting itself up not as the administrator of the recognised limits on parliamentary sovereignty, but rather as a sort of guardian of the wisdom with which Parliament exercises its sovereign powers – as if it were an unelected supervisory body of the nature of an upper House. Rebecca Welsh observes that in recent *Kable* cases 'the Court has been unusually explicit about how the provisions in question could be amended to remedy the incompatibility'.[89]

This in turn raises the point that was mentioned in the introduction: ever since its inception the *Kable* doctrine has been very difficult to square with the value that *Kable* is itself claimed to promote, namely the separation of powers. The recent jurisprudence has descended to such levels of detail in analysing statutes that it has set itself up not as guardian of the institutional integrity of State Courts, which is what it claims to be doing, but rather as the final word on the wisdom of State statutes on matters of policy and process, some of which are quite minor. This is indefensible from the separation-of-powers point of view. The extremely low level of detail to which the High Court of Australia descended in *Wainohu*, for example, itself demonstrates that the *Kable* principle has gone totally off the rails and, instead of being a final check for extreme cases in which the integrity of the Courts truly is threatened, has rather the nature of an upper House's or committee-stage review of the detail of legislation. The very detail of the analysis shows that *Kable* has gone astray – minor adjustments and distinctions cannot possibly affect State Courts' integrity.

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86 Gavin, above n 42, 409.

87 Appleby and Williams, above n 41, 6.

88 Appleby and Williams, above n 41, 11 – I am not suggesting that those writers claimed that it was the Court's function to do that, but am merely reproducing their description of what the Court seems to have done.

89 Welsh, above n 77, 92. But note that this is in sharp contrast to the majority opinion in *Momcilovic v The Queen* (2011) 245 CLR1 which denied the propriety of judges issuing a declaration of incompatibility under the Victorian Charter of Rights on the ground that it would amount to judicial participation in the legislative process.

The true view is that set out by Professor Goldsworthy:

> It is hard enough to accept that a state Court could not accurately be called a 'Court' if and when it exercised the kinds of functions held invalid in those [*Kable*] cases. It is even harder to accept that it would lose its character as a Court for all purposes, including the exercise of federal jurisdiction. A clock does not cease to be a clock when it no longer tells the time accurately; it becomes a defective clock. *A fortiori*, when the clock functions perfectly well except on isolated occasions, such as when it is held under water. Even if it would not deserve to be called a clock when not working while under water, it would unquestionably be a clock when, upon being returned to normal conditions, it again begins to work properly. In an extreme case, it might become so permanently defective that it would cease to be a clock — if, for example, all its numbers and hands fell off, or its mechanism completely failed. [… But w]hen the alleged defect affects only the exercise of powers under a particular statute in State jurisdiction, it cannot possibly deprive the Court of its identity as a Court for all purposes, including its exercise of federal jurisdiction (just as the malfunctioning of a clock when held under water cannot deprive it of its identity as a clock when it is functioning normally).[90]

By declaring that functions which form a trivial proportion of a State Court's work damage its institutional integrity or would even render it unworthy of the moniker of 'Court', the High Court of Australia not merely grossly exaggerates the significance of such functions, but also mistakes its role under the separation-of-powers principle, which leaves the wisdom of laws for Parliament to judge.

In an important respect, the doctrine of separation of powers requires the Courts to be subordinate, as part of their respect for parliamentary sovereignty. As Gleeson C.J. pointed out in *Fardon* v. *Attorney-General (Queensland)*[91] :

> The political process is the mechanism by which representative democracy functions. It does not compromise the integrity of Courts to give effect to valid legislation. That is their duty. Courts do not operate in a politically sterile environment. They administer the law, and much law is the outcome of political action.[92]

The danger to the proper observance of the separation of powers is acute when we appreciate that there can be no logical limit to the laws that must pass the *Kable* test of prudence; every State law that requires action in the Courts must do so. Thus, the legislative choice to criminalise the personal use of certain drugs, while leaving tobacco (which is more harmful than many proscribed drugs) and perhaps alcohol out of the proscriptions for solely historical reasons, must pass the test to ensure that it does not compromise the institutional integrity of the Courts. Now, many people, although not the present author, strongly urge that laws against personal drug use are counterproductive, and call upon the legislature to treat the problem as a solely health-related one, not a criminal one. May State Parliaments maintain and even extend criminal prohibitions on the possession and use of certain drugs, but not those used mainly by middle-class, middle-aged people – or are the Courts, by enforcing those prohibitions, engaging in work that is not only counterproductive, and indeed harmful, but also a distortion of the purposes for which the criminal law exists (which may be

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90 Goldsworthy, above n 42, 88.

91 (2004) 223 CLR 575, 593.

92 Similar statements may also be found in *New South Wales Public Service Association*, (2012) 250 CLR 343, 365, 368; *Kuczborski*, (2014) 254 CLR 51, 73, 91f, 117; *Attorney-General (Northern Territory) v Emmerson* (2014) 253 CLR 393, 434.

said compendiously to be the avoidance of harm to others)[93] and thus the infliction of a legislative policy on the Courts that is incompatible with their institutional integrity? Why is it not a diminution of the Courts' institutional integrity to require them to participate in, to quote the words of Crennan and Bell JJ. in *Totani*,[94] 'the implementation of the legislative policy' in question, which in the view of many is an abuse of the proper purposes of the criminal law and contains two logically very dubious exceptions for alcohol and tobacco, and thus constitutes borrowing the authority of the Courts to give effect to a political decision of dubious merit that discriminates indirectly against non-middle-class or young people?

Furthermore, in many jurisdictions the prohibition of possessing drugs involves conscripting the Courts to implement not merely a legislative choice to treat the use of certain drugs as a criminal offence, but also a choice by the executive given that the list of proscribed drugs is set out wholly or partly in delegated legislation.[95] At the very least these points should be arguable under the *Kable* principle, but I suspect that a statement of claim making those claims would be struck out summarily – as it should be; but it is much harder to explain why this is so after *Totani*. In that case the Courts had to determine certain factual matters, but this did not save the law – why should trivial fact-finding enterprises such as determining whether the accused was actually in possession of the proscribed drug suffice to save the drug laws when all the major decisions – to treat the matter as criminal in the first place and what particular drugs to proscribe – have already been made by the legislature or the executive? This illustrates vividly how the *Kable* principle, taken to its logical conclusion, invades Parliament's law-making prerogatives.

But, it may be objected, French C.J. did not refer to prudence in the abstract or across the board, but rather to the need for it to be applied 'particularly in areas central to the judicial function such as the provision of procedural fairness'. The idea of special protection for procedural fairness cannot be dismissed as foolish. It may well be true that the Judiciary will be better judges of what procedural fairness requires than, for example, of the wisdom of treating drug use as a matter for the criminal law. Procedural fairness is also, at least on its face, a content-neutral category which does not usurp Parliament's responsibility for the substantive law.

However, there are four answers to this contention. The first is that prudence remains the wrong word to direct to a sovereign Parliament – or, perhaps more to the point, to require prudence does not reflect the right frame of mind for Judges approaching the task of judicial review of the enactments of a sovereign Parliament. It is for them and not for Parliament to exercise prudence as part of the respect that they show to the enactments of the sovereign, particularly given that they are not applying the clear command of the Constitution limiting its powers, but an implication dubiously extorted from a single word. Secondly, it may be the case that, in some circumstances, the requirements of procedural fairness do need to be adjusted to take account, for example, of the need for sensitive sources of information to be protected –

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93 Again it is not possible to stop and notice a series of long-running discussions on this idea. The sort of thing I mean is illustrated by Ronald Dworkin, *A Matter of Principle* (Clarendon, 1985) 335-359.

94 (2010) 242 CLR 1, 160.

95 As indeed is pointed out in *Totani* (2010) 242 CLR 1, 124. Drugs are also mentioned at 130, but my point is broader: that the whole enterprise is a conscription of the Courts from the point of view of the desirability in the first place of outlawing the use of some drugs.

indeed, *K-Generation* is an example of this which did pass the *Kable* test. The prudence quotation masks the reality that, in our complicated world, few if any absolutes exist. Thirdly, Judges do not necessarily have all the tools that they need to determine whether procedural fairness does need some type of adjustment or restriction in particular circumstances. They are not necessarily well informed, for example, about the methods of investigation adopted by the police and the complicated and conflicting pressures that they can produce.

Fourthly, and most importantly, it is clear that prudence is not merely required by *Kable* in relation to procedural fairness, but also must be exercised on substantive matters. *Totani* itself, the very case in which French C.J. made the 'prudential approach' observation,[96] is an illustration : there South Australian legislation was held invalid because it required the Courts to accept the conclusion of the executive that an organisation was involved in serious criminal activity, although it remained for the Courts to determine whether a person against whom a control order was made was a member of that organisation – which, as we have seen, would often involve difficult questions of the truthfulness and probative value of evidence. Hayne J. said in *Totani*:[97]

> The Courts are not to be used as an arm of the executive to make unlawful the association between individuals when their associating together is not otherwise a crime, where such prohibition is to be imposed without any determination that the association of the *particular* individuals has been, will be, or even may be, for criminal purposes.

How is this extraordinarily involved, statute-like reasoning different from requiring the Courts to accept that the possession of certain prescribed drugs (although not others, such as tobacco and alcohol) should be punishable when otherwise it would not be, and confiding to them only the question whether a person actually possessed drugs for personal use? It would of course be circular to reply that the possession is for criminal purposes, if for personal use only.

IV WHAT IS TO BE DONE?

If we accept the propositions put forward so far in this article, the *Kable* doctrine is not at all an example of 'judicial statesmanship',[98] of judicial improvement of a deficient Constitution by the use of implausible reasoning to fill a gap and protect the rule of law more securely. Rather, *Kable* itself is a breach of the rule of law's certainty aspect and, because it causes the Court to exceed its own judicial remit, involves the Court in breaches of two other major constitutional principles in a way that will, over time, wreak damage on its own integrity and the integrity of Australian constitutionalism of the sort that the doctrine itself claims to be preventing – because sooner or later people will realise that the Court has little guide beyond its own

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96 Immediately after the quoted passage relating to the need for particular prudence on the topic of procedural fairness, his Honour did state that it 'may also be' necessary to exercise 'a prudential approach' in cases involving partial determination of issues by the executive (2010) 242 CLR 1, 47).

97 (2010) 242 CLR 1, 89f (emphasis in original).

98 Goldsworthy, above n 42, 75.

personal opinion, as a quasi-legislator. Applying the *Kable* principle is itself incompatible with being a Court.[99]

What should be done about this? One solution in accordance with common-law method would be the sort of thing that has largely succeeded in *Lange* v. *Australian Broadcasting Commission*:[100] a concerted effort to identify the true basis of a rule *via* precedent, in the case of *Kable* perhaps a short series of precedents rather than a single case, and then, building on that, to distil a rule that is reasonably certain and can be applied without the endless inconsistencies that have plagued the field so far.[101]

However, that is barely possible in this case. The reason for this is that *Kable* was conceived in sin. There was, in fact, no direction of the Court by the executive there, except through the standard means of an Act of Parliament – Mr Kable's release by Court order showed that the Courts remained free. Therefore, *Kable* is itself not a good example of the *Kable* principle, and the argument that triumphed in that case was mistaken. As we saw in the introduction, it is sometimes possible to convert a poor argument into a reasonably understandable rule – but sometimes it is not, and the course of precedents since *Kable* was decided has shown that it is one of those latter cases.

This must first be recognised if there is to be any progress. It is not possible simply to attempt to refine the expressions used in *Kable* and subsequent decisions and give further details about their meaning, for the whole analysis is faulty. The idea that the Courts are irremediably polluted by isolated, minor functions or by (gasp!) carrying out legislation is not plausible; indeed, the idea that Courts should not have to carry out decrees of the legislature or the executive is absurd given that that is their constitutional function. Just as it is possible to construct an abstract mathematical system on the basis that one plus one equals three but not to build roads or bridges on the basis of it, it is not possible to take the faulty logic of *Kable* and apply it to cases that actually come before Courts in a judicial way.

Kirby J. (dissenting) went a long way towards noticing these facts in *Gypsy Jokers*.[102]

> The basic error of the majority in the Court of Appeal lay in their conclusion that, to find offence to the *Kable* principle, the appellant had to show that the impugned legislation rendered the Supreme Court 'no longer a Court of the kind contemplated by Ch. III'. If that were indeed the criterion to be applied, it would be rare, if ever, that constitutional incompatibility could be shown. *Kable*'s constitutional toothlessness would then be revealed for all to see. The fact is that, whatever the outcome of this case, the Supreme Court would continue to discharge its regular functions. Overwhelmingly, it would do so as the Constitution requires. A particular provision […] will rarely be such as to poison the entire character and performance by a Supreme Court of its constitutional mandate as such or alone to result in a complete re-characterisation of the Court.

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99 Compare Gogarty and Bartl, above n 27, 98, who consider it contradictory to say that a rule embodies the absolute minimum standard but cannot be expressed.

100 (1997) 189 CLR 520.

101 Compare Gogarty and Bartl, above n 27, 104; Welsh, above n 77, 90.

102 (2008) 234 CLR 532, 578. On this passage, see also the comments in Goldsworthy, above n 42, 90.

> Adoption of such an approach would, in effect, define the *Kable* doctrine out of existence. This should not be done. *Kable* recognised an important principle arising from the unique features of the Judicature of Australia. Such features necessitate vigilant protection of the State courts and their processes.

Why should it not be done? It is not merely the case that no reason is given here for not doing so; this passage seems almost to scorn reasoning by saying: whatever we conclude, it musn't be the wrong answer.[103] The exquisite paradox again arises: fidelity to the rule of law being defended by infidelity to it. In the end, people will see through this.

If protections against laws that are unjust either in process or outcome are to be introduced, intellectual honesty requires that they should come from elsewhere. McHugh J. has already pointed out the direction that should be taken: 'If Australia is to have a bill of rights, it must be done in the constitutional way – hard though its achievement may be – by persuading the people to amend the Constitution by inserting such a bill'.[104] It may be added that one of the prime weapons in the campaign against inserting such a bill will be the propensity of Judges to play fast and loose with constitutional principles, of which *Kable* is an example. If their Honours can make so much out of virtually nothing, how much could they do with something?

In order to restore order in this field, it may not be necessary to overrule *Kable*, although that might be the better course to enable a fresh start to be made and because of the unlikelihood that any principle based on it that is defensible will ever actually be needed. Even so, there is a kernel of truth in what *Kable* stands for, although, as Kirby J. (dissenting) clearly perceived in *Gypsy Jokers* but was unwilling to decide, it is a very small kernel. It may be right to say that the references in Chapter III to the Courts of the States in general and their Supreme Courts in particular imply that such bodies must exist, although it was once held that the reference in the pre-1977 version of s 15 to 'the Houses of Parliament of the State' did not imply that more than one was constitutionally required; Dixon C.J., McTiernan, Taylor and Windeyer JJ. said : 'The supposition that there will be two Houses implies no intention legislatively to provide that the constitutional power of the State to change to a unicameral system, if the power existed, should cease'.[105]

At any rate, if this point is waived *Kable* could conceivably be applied in extreme cases. If a State Parliament ever decreed, for example, that the Judges of its higher Courts might be appointed without legal training, or could be dismissed for no cause by the State Premier, or were subject to re-appointment every three months by a committee of Parliament,[106] the *Kable* principle might be needed – always assuming that whatever bacillus had infected the State Parliaments and caused that mutation had not also infected the rest of the governmental system including the Judiciary and neutered it also. In such a case it could legitimately be argued either that State Courts, within the meaning of that word in Chapter III of the Constitution, had ceased to exist, or that their institutional integrity was so greatly compromised that they were indeed no longer fit receptacles for federal jurisdiction under s 77 (iii).

This analysis would probably require acceptance of the idea that, even if State legislation went so far as to require the Courts to come to a particular conclusion in an

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[103] Goldsworthy, above n 42, 90.

[104] *Alkateb v Godwin* (2004) 219 CLR 562, 595.

[105] *Clayton v Heffron* (1960) 105 CLR 214, 248.

[106] Judicial elections might perhaps be the most obvious of such possible cases, but American experience shows that there are a variety of systems of election; I also do not want to be side-tracked here by considering a borderline case, but rather make the point with extreme ones.

individual case and pronounce orders, verdicts or punishments set out in legislation, it would not infringe any provision of the federal Constitution. An isolated case of such action – a true *Kable*, it might be said[107] – would not, by itself, result in the Courts losing their identity as such, just as Professor Goldsworthy's clock does not cease to be a clock just because it is temporarily submerged. This conclusion need not disturb us unduly when the unlikelihood of such a proceeding is remembered, coupled with the principle that legal protections against extremely unlikely events are not usually thought necessary – in the words of the joint judgment in the *Engineers' Case*,[108] that 'possible abuse of powers is no reason […] for limiting the natural force of the language creating them', because 'the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts'. Furthermore, it is certainly true that such legislation, if it ever eventuated, would be an attempt by the legislature 'to cloak their work in the neutral colo[u]rs of judicial action',[109] but it would hardly be a very thick cloak – it would be abundantly clear to all where the real responsibility lay – and such protection as does exist against such proceedings at federal level results only from the full doctrine of separation of powers,[110] which is not in effect at State level.

V CONCLUDING REMARKS

Professor George Winterton points out that 'Courts have always shown exceptional sensitivity to infringement on their domain'.[111] The *Kable* mess certainly demonstrates the truth of that proposition. Indeed, given the elaborateness of the rules around judicial power, federal as well as State, coupled with the extreme poverty of jurisprudence surrounding the limitation on federal heads of power under s 51 since 1920, it is tempting to think that a historian, rather than a lawyer, seeking to describe the Court's achievements over its history might say that it has virtually, if not wholly abandoned the task it was primarily intended to do, namely enforce federal limits on power, while devoting itself narcissistically to the policing of the boundary between itself and other Courts, on the one hand, and the rest of the governmental apparatus on the other. Looking at *Kable* from a similarly long perspective, and even assuming (as is likely) that the emphasis on judicial power doctrines just described will not be reversed completely in the future, I wonder whether, in seventy years' time, people will look on the *Kable* doctrine in the same way as we now look on the *Bank Nationalisation*

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[107] Perhaps the closest analogy is, in fact, the well-known situation that arose in *Building Construction Employees & Builders' Labourers Federation (New South Wales) v Minister for Industrial Relations (New South Wales)* (1986) 7 NSWLR 372. Although this was before the *Kable* principle had been created, it shows that no constitutional objection exists to legislative determination of curial proceedings, although the legislature did not put words in the Court's mouth so much as change or confirm the law which the Court applied.

[108] (1920) 28 CLR 129, 151.

[109] *Mistretta v United States* (1989) 488 US 361, 407.

[110] *Lim v Minister for Immigration (Commonwealth)* (1992) 176 CLR 1, 69f.

[111] George Winterton, 'The Communist Party Case' in H.P. Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 133.

Case,[112] for example – an interesting document of the thinking and preoccupations of its times, but in the end a blind alley doctrinally that we are glad to have exited.

Dr James Stellios, for his part, has pointed out the numerous ways in which the rules about State judicial power have been assimilated to federal rules on the same topic.[113] Another thought that is prompted by *Kable* is that the federal Constitution, originally intended to set the rules not for State governments, but for the federal level only – subject to some obvious, but in the end also federally based exceptions, such as s 92 – is, before our eyes, turning into the Constitution of Australia, of the whole country rather than just one government within it. The move to recognise Aborigines in the federal Constitution might well be another item on this list, as would be the decree that the implied freedom of political communication now extends to State matters[114] – but that is a topic for another day.

[112] *Commonwealth v Bank of New South Wales* (1948) 76 CLR 1; [1950] AC 235.
[113] Above n 16, 371.
[114] *Unions NSW v New South Wales* (2013) 252 CLR 530, [25].