The High Court and Kable: 
A study in federalism and rights protection

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Abstract

This article explores the impact of the High Court’s uncertain formulation and application of the Kable doctrine on Australia’s federal system and the democratic protection of rights. The definitional difficulties inherent in the doctrine have created a deleterious effect on the federation, unnecessarily undermining federal diversity. Further, while the Kable doctrine has achieved some important incidental rights-protection benefits in the curial context, in political discourse it has been used as a substitute for deeper public conversations about the role of the State in community protection, criminal punishment and acceptable incursions into human liberties. This ‘buck-passing’ is dangerous in systems that rely substantially on legislative protection of rights and lack express and enforceable judicial rights protections. Implied structural principles such as the Kable doctrine have an inherently limited capacity to operate as a rights-protective mechanism.

Introduction

The Australian High Court’s Chapter III jurisprudence protects minimum characteristics of judicial institutional integrity across the federation, in Commonwealth, State and Territory courts. The jurisprudence, particularly as it relates to State courts, remains unsettled. Alternating periods of expansion and dormancy have defined its judicial application. From 2009, the High Court started to apply the Kable doctrine with renewed vigour after a long period of retraction.1 This vigour is now fading;2 the States have responded to the doctrine’s expansion and would appear to have groped their way back within its limits. This article explores the potential impact of these trends in the High Court’s Kable jurisprudence on the operation of Australia’s federal system and the democratic protection of individual rights.3

In Australia, law and order initiatives have remained, by and large, within the legislative autonomy of the States.4 This, according to federal theory, ought to allow for local diversity

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1 See International Finance Trust Co Ltd v New South Wales Crime Commission (2009) 240 CLR 319; South Australia v Totani (2010) 242 CLR 1; Wainohu v New South Wales (2011) 243 CLR 181. Note also the application of the Kable doctrine in Kirk v Industrial Court of New South Wales (2010) 239 CLR 531; and Momcilovic v The Queen (2011) 245 CLR 1; and see also New South Wales v Kable (2013) 87 ALJR 737.


3 I must thank those who piqued my interest in considering the impact of the Kable doctrine through a federalist lens, my colleagues, James Stellios and John Williams, and Brendan Lim for his excellent piece, ‘Attributes and Attribution of State Courts – Federalism and the Kable Principle’ (2012) 40 Federal Law Review 31.

4 And Territories. Although these exist in a different constitutional position in the federation, they are subject to the Kable principle.

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to flourish. It ought to facilitate sub-national governments’ experimentation with institutional design to accommodate evolving community conceptions of justice, for example through the employment of therapeutical and restorative justice in the criminal and family law spheres, and expectations of government in the face of threats to community safety, for example against terrorism, organised crime and sexual predators.\(^5\) The first part of this article maps the States’ law and order responses to organised crime, analysing how this case study reflects federalism theory.

Next, I consider how constitutional limits derived from State courts’ position within the federal judicial structure in Chapter III provide a theoretical limit to diversity and local responsiveness in the name of maintaining minimum standards of judicial impartiality, independence and, in a word, integrity.

However, I will argue that, rather than an inherent conceptual incompatibility between the \textit{Kable} principle and federalism, it is the definitional difficulties in the High Court’s approach to the scope and content of the \textit{Kable} principle that have contributed to a harmonisation-effect that unnecessarily undermines federal diversity.\(^6\) The inexactness of the constitutional requirements has encouraged State governments to replicate known-to-be-valid constitutional provisions, at the price of developing new, locally tailored, regimes.

I will also argue that, rather than a wholly positive outcome in a jurisdiction that lacks a bill of rights instrument, this effect can undermine important democratic safeguards for the protection of human rights.\(^7\) In many instances there is evidence that the constitutionality of measures under the \textit{Kable} principle is presented by governments in place of deeper conversations about the role of the State in community protection and acceptable incursions into individual liberties. The uncertainty of \textit{Kable} has thus created a danger of ‘buck-passing’ by parliamentarians to the courts, who are inadequately equipped to protect human rights.

\textbf{Law and Order in the States}

In Australia, the government’s fundamental ‘duty of protecting … every member of … society from the injustice or oppression of every other member of it’\(^8\) falls, by and large, within the constitutional authority of the States. Commonwealth movement into previously State spheres – including the regulation and provision of health care, education and even local government – was buoyed for almost a century\(^9\) by the High Court’s expansive reading of Commonwealth legislative power,\(^10\) and its disinclination to attach limits to the federal

\(^5\) See also Sarah Murray, \textit{The Remaking of the Courts: Less-Adversarial Practice and the Constitutional Role of the Judiciary in Australia}\ (Federation Press, 2014) 10 and 17.


\(^7\) This article is not considering the direct impact of the \textit{Kable} principle on the implementation of human rights protections by the States, demonstrated, for example, in Momcilovic v The Queen (2011) 245 CLR 1.


\(^9\) A trend that started with \textit{Amalgamated Society of Engineers v Adelaide Steamship Company Ltd} (1920) 28 CLR 129.

\(^10\) Which hit somewhat of a high water mark in the \textit{New South Wales v Commonwealth (Work Choices case)} (2006) 229 CLR 1. Although note some indication that this approach is changing in the remarkably constrained approach of
Thus, the States have been forced to make political hay in those areas that the Court and the Commonwealth has left to them. Law and order is an attractive area for the States to do this in. Politically, it is relatively easy for governments to convince their constituents of the importance of law and order policies. Law and order policies are also relatively cost-neutral or low-cost, at least compared to grand promises to build infrastructure or improve health care delivery.

States’ law and order policies provide an interesting study in federalism. This paper will focus on State responses to organised crime in the course of the last five years. Relative State autonomy over organised crime has been maintained in this period, even in the face of federal takeover attempts. The case study has been chosen both because it is an area in which there has been a large amount of law reform in the time period, but also because much of that law reform has involved the State judiciary and therefore raises questions about the application of the Kable doctrine and its impact on federalism.

State Law and Order Regimes and Federalism

State responsibility for law and order policies allows for customisation and tailoring of policies to the needs of particular States and in accordance with the expectations of the community within those States. Local communities have a louder ‘voice’ when speaking to their State governments than if responsibility lay with the central government. Individuals are able to ‘exit’ those States in favour of others where policies are implemented that fail to reflect their views, or, in their opinion, inappropriately derogate from their rights. State governments are more responsible to, and therefore must be more responsive to the concerns and wishes of, a greater number of their citizens. Diversity across a federation arises around differing regional expectations around government’s responsibility to provide a safe environment and its relationship to the government’s obligations to protect the rights of individuals. In these areas, there are many contested political questions that reflect different

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11 See, eg, Victoria v Commonwealth and Hayden ('AAP Case') (1975) 134 CLR 338. Contrast the Court’s more recent approach, see the majority positions in Pape v Commissioner of Taxation (2009) 238 CLR 1 and Williams v Commonwealth (2012) 248 CLR 156.


15 Ibid.

attitudes to the values of security, privacy and liberty. Diversity of responses across the States gives rise to the possibility of innovation and competition.\(^\text{17}\)

In the law and order sphere, George Williams has argued that anti-organised crime measures, such as control orders, should be left as a matter for individual States. This allows for targeting and tailoring ‘to the individual circumstances of the state’. He argued that ‘Making the laws at the lower level of the Federation ensures that their harm is minimised and that they are limited only to the justified need.’\(^\text{18}\)

State reforms targeting organised crime, and specifically bikie-related violence, are wide-ranging and diverse.\(^\text{19}\) Their adoption and design reflect the level of threat posed in particular States and community expectations within that State. Reforms have included increased police powers to bring down fortifications around bikie clubhouses,\(^\text{20}\) increased police investigative powers,\(^\text{21}\) increased powers to freeze and confiscate unexplained wealth and proceeds of crime,\(^\text{22}\) new powers to obtain control orders against members of declared organisations,\(^\text{23}\) new offences for being a member of, recruiting members or associating with members of a criminal organisation,\(^\text{24}\) the re-enactment of historical consorting laws,\(^\text{25}\) tightened regulation of firearms\(^\text{26}\) and industries such as liquor, gambling and security,\(^\text{27}\) and tattoo parlours,\(^\text{28}\) and


\(^{18}\) Evidence to the Parliamentary Joint Committee on the Australian Crime Commission, Parliament of Australia, Canberra (Professor George Williams), extracted in Parliamentary Joint Committee on the Australian Crime Commission, Inquiry into the Legislative Arrangements to Outlaw Serious and Organised Crime Groups (August 2009) 37.

\(^{19}\) For a more complete overview up to 2010, see Lorana Bartels, ‘The Status of Laws on Outlaw Motorcycle Gangs in Australia’ (Australian Institute of Criminology, 2010).


\(^{21}\) For example, legislation that has allowed ‘controlled operations’, that is, undercover operations where assumed identities are adopted: Crimes (Controlled Operations) Act 2008 (ACT); Law Enforcement (Controlled Operations) Act 1997 (NSW); Police Powers and Responsibilities Act 2000 (Qld) Chapter 11; Police Powers (Controlled Operations) Act 2006 (Tas); Crimes (Controlled Operations) Act 2004 (Vic); Corruption and Crime Commission Act 2003 (WA) Part 4, Division 5; Criminal Investigation (Covert Powers) Act 2012 (WA).

\(^{22}\) See Serious and Organised Crime (Unexplained Wealth) Act 2009 (SA); Criminal Assets Confiscation Act 2005 (SA); Confiscation of Proceeds of Crime Act 1989 (NSW); Criminal Assets Recovery Act 1990 (NSW); Confiscation Act 1997 (Vic); Confiscation of Criminal Assets Act 2003 (ACT); Criminal Proceeds Confiscation Act 2002 (Qld); Criminal Property Forfeiture Act 2002 (NT); Criminal Property Forfeiture Act 2000 (WA). Tasmania has the Crime (Confiscation of Profits) Act 1993 (Tas), but this only applies to property after a person has been convicted or has absconded.

\(^{23}\) See Serious and Organised Crime (Control) Act 2008 (SA); Crimes (Criminal Organisations Control) Act 2012 (NSW); Serious Crime Control Act 2009 (NT); Criminal Organisations Control Act 2012 (WA) (not yet in force); Criminal Organisations Control Act 2012 (Vic); Criminal Organisation Act 2009 (Qld). The ACT and Tasmania are the only two jurisdictions without legislation of this nature.

\(^{24}\) See, eg, Crimes Legislation Amendment (Gangs) Act 2006 (NSW); Criminal Organisations Legislation Amendment Act 2009 (NSW); Justicie Legislation (Group Criminal Activities) Act 2006 (NT); Crimes (Sentencing) Act 2005 (ACT); Serious and Organised Crime (Control) Act 2008 (SA) s 35; Criminal Organisation Act 2009 (Qld) s 100; Criminal Organisations Control Act 2012 (WA) (not yet in force) s 106.

\(^{25}\) Crimes Act 1900 (NSW) s 93X; Summary Offences 1953 (SA) s 13; Summary Offences Act (NT) s 55A; Summary Offences Act 1966 (Vic) s 49F. See further discussion in Andrew McLeod, ‘On the Origins of Consorting Laws’ (2013) 37 Melbourne University Law Review 103.

\(^{26}\) See, eg, amendments to the Firearms Act 1977 (SA) by the Firearms (Firearms Prohibition Orders) Amendment Act 2008 (SA).
restricting the display of bikie-colours and insignia. 29 Alongside many of these reforms has been the introduction of ‘criminal intelligence’ provisions in legislation that allow the police to gain executive and court orders based on information not provided to the respondent. 30

Some of these reforms have been adopted across a number of State and Territory jurisdictions and there is thus a level of similarity and uniformity. However, even within this uniformity, jurisdictions have tailored the measures to meet local needs and expectations. Some jurisdictions have prided themselves on taking the ‘toughest stand’ in the country on organised crime. 31 Some jurisdictions have introduced ‘safeguards’ into the schemes to balance the goals of community safety with the protection of individual liberties. 32 Some have migrated the reforms into other fields. 33 Others have refrained entirely from implementing some of the more extreme measures. 34

The gradual spread of preventive regimes across the Commonwealth and the States could be seen to be illustrative of one of Brandeis J’s ‘happy incidents of the federal system’, that ‘a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country’. 35

However, closer inspection of their adoption reveals problems with labelling these reforms a successful incident of laboratory federalism in practice. Indeed, the reality of organised crime

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28 See, eg, Tattoo Parlours Act 2012 (NSW).
29 See, eg, the effect of wearing insignia in Criminal Law Consolidation Act 1935 (SA) ss 5AA and 83E; Serious and Organised Crime (Control) Act 2008 (SA) s 39Z; and the possibility of a prohibition on wearing insignia in Criminal Organisations Control Act 2012 (Vic) ss 45 and 47.
30 This type of provision was unsuccessfully challenged in Gypsy Jokers Motorcycle Club Inc v Commissioner of Police (2008) 234 CLR 532 and K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, and now occurs in many of the anti-organised crime statutes.
31 See, eg, Western Australia, Parliamentary Debates, Legislative Assembly, 6 November 2001, 5038 (Geoff Gallop); See also Tony Barrass, ‘Toughest New Laws for Bikies’ The Australian, 18 June 2009. In 2013, the Newman LNP Government introduced measures that it claimed were the toughest in the country: see Caitlyn Gribbin, ‘Bikies heading to WA to escape tough new Qld laws’, The World Today, ABC, 30 October 2013, <http://www.abc.net.au/worldtoday/content/2013/s3880028.htm>.
32 For example, in Queensland and Victoria, the control order legislation adopted a system of special counsel to test material relied upon under the criminal intelligence regimes. While not alleviating all of the unfairness the criminal intelligence provisions create, they alleviate some of it.
33 See, eg, the use of ‘criminal intelligence’ provisions in Child Sex Offenders Registration (Miscellaneous) Amendment Act 2013 (SA).
34 The Bracks Labor Government in Victoria, for example, resisted the introduction of control order legislation, instead opting for a suite of legislation that strengthened police investigatory powers (Rob Hulls, ‘Victoria’s tough laws best for dealing with bikie gangs, Media Release 15 April 2009; Tasmanian Premier Lara Giddings has indicated that there is not the same problem with organised crime in Tasmania so as to warrant the introduction of control order legislation, but the State is working together with the other States to ensure it does not become a haven for bikie violence (Lara Giddings, ‘Government moves on organised crime’ Media Release, 16 April 2009). More recently, there have been indications that Tasmania will act and was only waiting to see the outcome of constitutional challenges to other States’ laws: Calla Wahlquist, ‘State Keeping Watch on New Anti-bikie Laws’ The Examiner (16 November 2012) <http://www.examiner.com.au/story/1125343/state-keeping-watch-on-new-anti-bikie-laws/>. The ACT Attorney-General, Simon Corbell, has said that the ACT government would not accept the ‘extreme approach’ taken in the other states (D Stockman, ‘Police union urges tougher bikie laws’, The Canberra Times, 1 July 2009). See further Lorana Bartels (Australian Institute of Criminology, Criminology Research Council), Research in Practice Report 2 (2010): The Status of Laws on Outlaw Motorcycle Gangs in Australia (2010, 2nd ed).
responses in the Australian States demonstrates the complexities of federation in practice, and its ability to produce positive as well as deleterious effects.

Many of these reforms were not introduced after novel ideas had been tested in one jurisdiction, in the sense of tested in their practical operation. This leads to a conclusion that adoption of measures across the different States is politically motivated, often occurring even before the initial measures have commenced operation. Jim McGinty, Attorney-General at the time when the first Western Australian anti-organised crime legislation was introduced in 2003, said:

[T]oughening the law is fine at a political, rhetorical level … [but] our experience in Western Australia has shown that [the laws] haven’t been used and therefore have not been effective.36

The federal anti-terror control orders were largely modelled on those in the United Kingdom.37 The measures were passed through the Commonwealth Parliament with little debate about how successfully they had been employed in the UK or whether they would work to combat the terrorist threat posed to Australia and its community. Rather, they were used part of an urgent political reaction to the London bombings.38 When the United Kingdom modified its response,39 and subsequently repealed its control order legislation on the basis it was no longer required, Australia did not follow suit.40

The adoption of control orders by the States as a tool against organised crime was done after the High Court had confirmed their constitutionality at the federal level in Thomas v Mowbray. The judgment in Thomas was handed down on 2 August 2007;41 South Australia introduced its control order legislation on 21 November 2007. At that time, the only person who had been the subject of a control order under the federal legislation was Jack Thomas. The interim control order that he had challenged was lifted on 23 August 2007 and replaced with a signed undertaking by Mr Thomas that included similar conditions to those contained in the control order.42 At the time South Australia introduced its system of control orders, it was certainly not based on keen observation of successful experimentation with the system by the Commonwealth.

The next State to act was New South Wales. It introduced its control order regime after a violent bikie-related incident on 22 March 2009 in the Sydney airport in which a brawl between members of the Commanchero motorcycle club and the Hells Angels motorcycle

39 For example with the introduction of special advocates after the European Court of Human Rights decision in Chahal v United Kingdom (1996) 23 EHRR 413.
40 Walker, above n 37.
41 Constitutionality as one of the driving reasons as to why particular regimes are adopted across the States is returned to below.
club resulted in the death of an associate of the Hells Angels. The New South Wales Police Minister explained the genesis for the law’s system of declarations was the South Australian model, albeit some changes had been made to it.\(^43\) In early 2009, the South Australian legislation had never been successfully applied. The first time it was applied it was challenged and at the time New South Wales introduced its legislation, less than two weeks after the brawl on 2 April 2009, the constitutionality of the South Australia legislation was still under consideration by the Full Court of the South Australian Supreme Court. South Australian Magistrates had refused to consider any control order applications until they had the Supreme Court’s ruling. By 2009, the Commonwealth legislation had been applied on only one further occasion – against David Hicks for a 12-month period from December 2007 after his release from serving time in Adelaide’s Yatala prison for convictions before a US Military Commission. During the confirmation hearing of the interim control order, upon an application that the reporting requirements be reduced from three times a week, the AFP conceded that they had the ‘means available to know whether the Respondent is present within the specified premises and also that during any day the Applicant has the ability to ascertain the whereabouts of the Respondent at some point’, making the stricter reporting requirements unnecessary.\(^44\) Again, it would be difficult for New South Wales to argue that, in response to an increased threat of organised crime in the State, it was adopting proven successful experiments from other jurisdictions. Rather, it could be surmised that it was adopting measures and rhetoric for political ends.

The law and order arena provides an example of the complexity of federal theory in practice. It illustrates experimentation with innovative and novel measures and the tailoring of measures to local needs and community expectations. However, it also illustrates that local needs and community expectations may be but one reason why States adopt new policies. Successful political rhetoric is also ripe for adoption from State to State within the federation. This observed tendency in the law and order sphere is returned to when we consider the impact of the High Court’s complex \textit{Kable} jurisprudence, as it manifests as a tendency for State governments to adopt ‘easy’, known-to-be \textit{Kable}-proof regimes in favour of tailoring those regimes to local circumstances and expectations.

\textbf{Diversity in an Integrated Court System: An Oxymoron?}

While the limitation first enunciated in \textit{Kable v DPP (NSW)} can been criticised as in search of secure constitutional foundations, each of the judgments in the majority, Gaudron, McHugh, Gummow and Toohey JJ, emphasised the importance of the integrated court system created by Chapter III.\(^45\) State Courts became part of a larger whole. Gummow J also found that by referring to ‘State courts’, and ‘State Supreme Courts’, in Chapter III of the Constitution, the framers created a ‘constitutional expression’.\(^46\) States must maintain a system of courts that

\(^{43}\) New South Wales, \textit{Parliamentary Debates}, Legislative Council, 2 April 2009, 14341.

\(^{44}\) \textit{Jabbour v Hicks} [2008] FMCA 178 (19 February 2008) [47].

\(^{45}\) \textit{Kable v DPP (NSW)} (1996) 189 CLR 51, 96 (Toohey J); 102-3 (Gaudron J); 114-16 (McHugh J; 127-8 (Gummow J).

\(^{46}\) Ibid 141 (Gummow J).
meets the constitutional requirements of this expression in order to maintain the proper operation of the integrated court system created by Chapter III.47

The very idea of an integrated court system, the unification of parts to make a whole, tends towards harmonisation. It is theoretically difficult to reconcile the idea of diversity and experimentation in State judicial systems with the concept of an integrated court system and maintaining the institutional integrity of courts across Australia by reference to a set of minimum or essential characteristics. Nonetheless, the Court has repeatedly, even during times of expansion of the Kable doctrine, confirmed that there remains space for sub-national diversity. It would appear, in theory, that this is correct. However, the Court’s reluctant approach to the enunciation of the Kable doctrine with any clarity has greatly undermined this space.

As a threshold point it is necessary to question whether federalist concerns around the Kable principle are fundamentally complaints about the harmonisation that is inherent in the idea of minimum guarantees of rights and liberties. The Kable principle protects institutions and their integrity and is not a direct form of rights protection. When federal experimentation yields because of the minimum protections that must be afforded individual rights within a community (such as the right to a fair trial), this is generally greeted not as a tragedy of federalism, but as a triumph of universal human rights protection. I argue that there are two major conceptual difficulties for the continuation of a vibrant federal system that are associated with the Kable principle that are not posed by measures designed to protect human rights. First is its formulation. Respecting the rights of individuals who might come into contact with the judicial institution sets down no institutional minimums, dictates no institutional design. Rather any institutional arrangements and processes must not affect the protected individual sphere. Second is the sophistication of human rights jurisprudence in comparison to the Kable jurisprudence, at least in so far as the former includes a well-establishing proportionality test. This usually provides for a level of deference (at least with respect to most rights) to the democratic legislatures to pursue, in a reasonably proportionate way, legitimate government objectives even where there are some incursions on individual rights. This jurisprudence therefore accommodates the democratic mandate of the legislatures and therefore their superior understanding of local community values and expectations. With the exception of some exploratory statements in the more recent cases,48 the proportionality concept has been missing from the Court’s application of the Kable principle. The following discussion demonstrates that while the court has emphasised that the Kable principle ought not to apply to the detriment of State autonomy, it has not established a consistent jurisprudence to weigh these competing values.

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47 See adoption of this aspect of the Kable principle as the guiding rule in, eg, North Australian Aboriginal Legal Aid Service Inc v Bradley (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

An integrated court system, achieved through the ‘autochthonous expedient’ captured in ss 71 and 77(iii), and the general appellate jurisdiction of the High Court in s 73, was a departure from the Constitution’s otherwise almost wholesale adoption of Chapter III of the US Constitution. That meant that the repercussions of its adoption on the State courts were unknown. There was some indication that the framers expected the States to retain control over their jurisdictions despite these changes. Andrew Inglis Clark, for example, explained:

What we want is a separate federal judiciary, allowing the state judiciaries to remain under their own governments. If you have your various governments moving in their respective orbits, each must be complete, each must have its independence. You must have an independent legislature, an independent executive, and an independent judiciary, and you can have only a mutilated government if you deprive it of any one of these branches.

There has been little academic commentary on the extent to which the Kable doctrine can stifle diversity in the States. Rather, commentary has been focussed on other areas, including the basis and uncertain content of the principle, or its ability to provide a minimum level of protection for individual liberty and procedural safeguards in the judicial process through the protection of judicial independence and impartiality. Its impact on the operation of the federal system has, however, not gone unnoticed, particularly in the immediate aftermath of Kable. Relying on the warnings of Robert Orr, a senior legal practitioner in the Attorney-General’s Department, Enid Campbell explained:

While the incompatibility doctrine is meant to be protective of judicial institutions, it has the potential of being applied by courts in ways that some might regard as over-protective of those institutions and insufficiently attentive to the assessments of elected parliaments about what functions are appropriate for courts to perform.

For over a decade, these warnings might have been thought to overstate the threat. Harmonisation is not the inevitable consequence of an integrated court system. As Brendan Lim has described it, this will depend upon whether, in its application of the Kable doctrine, the Court emphasises the attribution of courts as State courts or the attributes of State courts as State courts. The High Court has consistently argued that the two concepts – diversity and institutional integrity – are, in fact, compatible.

In the years after the Kable decision, the High Court’s jurisprudence supported this assertion. For instance, in considering the constitutionality of the remuneration arrangements of the Chief Magistrate in the Northern Territory, which would not have met the requirements for a federal judicial officer in s 72 of the Constitution, Gleeson CJ explained that differences in structural arrangement for courts did not breach the Kable principle:

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

See a good analysis of this history in *South Australia v Totani* (2010) 242 CLR 1 [48] (French CJ).


Lim, above n 3.
The differences exist because there is no single ideal model of judicial independence, personal or institutional. There is room for legislative choice in this area; and there are differences in constitutional requirements.54

At least with respect to the structural guarantees of independence, the High Court emphasised that there was still significant room for diversity and experimentation.55 During this period, there was also a general feeling that there was even a large amount of latitude for States to vest courts with non-judicial functions. McHugh J explained in Fardon that ‘The content of a State’s legal system and the structure, organisation and jurisdiction of its courts are matters for each State,’ and that, for example, ‘nothing in Ch III prevents a State, if it wishes, from implementing an inquisitorial, rather than an adversarial, system of justice for State courts.’56

The Court’s approach to applying the Kable principle was certainly consistent with this position until the decision in International Finance Trust Co in 2009.57 Since the principle’s reinvigoration in this case, the Court has happily expanded our understanding of what the essential or defining characteristics of courts might be, noting that an exhaustive definition is impossible.58 Independence and impartiality is the standard formulation that was prominent in the immediate post-Kable period,59 but more recently procedural fairness,60 adherence to the open court principle,61 the giving of reasons,62 and a minimum supervisory jurisdiction to correct jurisdical error have been added.63 Even accepting that essential or defining characteristics are generally malleable, the more that emerge, the less scope for State diversity.

Further, the Court has approached the determination of what measures may intrude on the institutional integrity of courts by reference to historical powers.64 This was perhaps the most dramatically demonstrated by the High Court’s decision in Kirk, where the court determined that the supervisory jurisdiction of State Supreme Courts was an essential characteristic of

55 See also comments in Forge v Australian Securities and Investments Commission (2006) 228 CLR 45, 65-6 (Gleeson CJ).
56 Fardon v Attorney-General (Qld) (2004) 223 CLR 575, [40]. See also at [41]. See also K-Generation Pty Ltd v Liquor Licensing Court (2009) 237 CLR 501, 529-30, [88] (French CJ).
57 See discussion in Appleby and Williams, above n 48, 8-11.
61 South Australia v Totani (2010) 242 CLR 1, 43 (French CJ).
63 Kirk v Industrial Court of New South Wales (2010) 239 CLR 531.
64 See, eg, Wilson v Minister for Aboriginal and Torres Strait Islander Affairs (‘Hindmarsh Island Bridge Case’) (1996) 189 CLR 1, 25-6 (Gaudron J) who says that there may be functions that may give rise to the appearance of an unacceptable relationship between the judiciary and the other branches of government but because of their historical pedigree do not risk public confidence. ‘However’, she goes on, ‘history cannot justify the conferment of new functions on judges in their capacity as individuals if their performance would diminish public confidence in the particular judges concerned or in the judiciary generally.’ See also South Australia v Totani (2010) 242 CLR 1, [60]-[62] (French CJ); [72] [134] (Gummow J); Wainohu v New South Wales (2011) 243 CLR 181 [52] (French CJ and Kiefel J); Condon v Pompano (2013) 295 ALR 638, [126] (Hayne, Crennan, Kiefel and Bell JJ) although cf at [138].
those courts by reference to a case decided in 1874. While this has on occasion been used to justify the conferral of powers not strictly judicial on the courts, other times it has been used to strike down novel schemes. In this way, the doctrine is an inherently conservative and unifying force.

In articulating the content of these essential or defining characteristics in the post-2009 period, another identifiable trend is the Court’s use of federal separation of powers jurisprudence, producing greater harmony as the previously distinct doctrines converge. For example, in *Kirk* the High Court implied a limitation on the use of privative clauses at the State level that largely mimics the express limit in s 75(v) of the Constitution that applies at the federal level. In *Wainohu*, the Court relied heavily on federal *persona designata* cases in creating and applying similar limits to State judges.

This trend is also notable in that line of cases considering the minimum requirements of judicial process. In *Thomas*, the High Court explained that the Chapter III requirement that federal jurisdiction is exercised in accordance with ‘the methods and standards which have characterised judicial activities in the past’ applies to any ‘court exercising federal jurisdiction’. In *International Finance Trust Co*, French CJ relied heavily on federal judicial process cases. French CJ acknowledged that these cases were concerned with courts exercising federal jurisdiction, but quoted with approval McHugh J’s statement in *Kable* that ‘in some situations the effect of Ch III of the Constitution may lead to the same results as if the State had an enforceable doctrine of separation of powers.’ In *Pompano*, the Court relied heavily on *Thomas* to reject arguments that the Supreme Court of Queensland’s involvement in making a declaration against organisations on the basis of the unacceptable risk posed by the group to the safety, welfare or order of the community was unconstitutional. In many of these cases, the use of federal cases as a guide can be explained on the basis of the *Bachrach*...
principle,\textsuperscript{74} that is, if the legislation does not breach the federal separation of powers doctrine, it does not breach the \textit{Kable} doctrine. However, as Stephen McLeish has observed, this:

is the beginning of a conceptual convergence whereby two different but parallel principles … inform each other’s application and thereby, potentially at least, start to resemble each other.\textsuperscript{75}

Even after the High Court’s new-found vigour in applying the \textit{Kable} principle to strike down State legislation and its harmonisation with some aspects of the federal limitations, in theory the States retained their autonomy and ability to diversify and innovate. In \textit{South Australia v Totani}, French CJ noted the ‘undoubted power of State Parliaments to determine the constitution and organisation of State courts’, explaining that this does not:

detract from the continuation of those essential characteristics. It is possible to have organisational diversity across the Federation without compromising the fundamental requirements of a judicial system.\textsuperscript{76}

In \textit{Pompano}, Hayne, Crennan, Kiefel and Bell JJ made similar statements to those of the US Supreme Court in \textit{Mistretta},\textsuperscript{77} noting the novelty of the criminal intelligence scheme created by the Queensland \textit{Criminal Organisation Act 2009} (Qld), and that ‘it is no doubt possible to say of them that they depart from hitherto established judicial processes.’ Importantly, however, they went on:

The fact that the procedures prescribed by the Act are novel presents the question. Novelty does not, without more, supply the answer to that question. More detailed analysis is necessary.\textsuperscript{78}

\textit{Kable} and integration today: stifling diversity in practice

While the \textit{Kable} principle has the capacity to allow for State diversity in theory, diversity in practice has been greatly reduced as an \textit{indirect} result of the High Court’s approach to the \textit{Kable} principle. In this part, I explore the extent to which, as a result of the uncertainty of the \textit{Kable} principle, State Governments and Legislatures are likely to exercise prudence in involving courts in innovative schemes.\textsuperscript{79} The effect of the Court’s uncertain jurisprudence has been noted by others. Sarah Murray, in her exploration of constitutional impediments on less-adversarial judicial structures and techniques, argues that constitutional requirements ought to be clear and not overly restrictive so as to unnecessarily impede institutional change.\textsuperscript{80}

\textsuperscript{74} \textit{H A Bachrach Pty Ltd v Queensland} (1998) 195 CLR 547, 561-2 (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

\textsuperscript{75} McLeish, above 6, 5-6. While it is beyond the scope of this paper, it will be interesting to see whether this is part of trend in which the courts no longer consider the application of the \textit{Boilermakers’} principle as against the \textit{Kable} principle in the federal/state contexts respectively, but rather use a single test of whether a federal or state court continues to meet the constitutional requirements of a federal or state court respectively; see, eg, \textit{Condon v Pompano} (2013) 295 ALR 638, [177] (Gageler J) and \textit{TCL Air Conditioner (ZhongShan) Co Ltd v Judges of the Federal Court of Australia} [2013] HCA 5, [27] (French CJ and Gageler J).


\textsuperscript{77} The US Supreme Court indicated that: ‘Our constitutional principles of separated powers are not violated, however, by mere anomaly or innovation’. \textit{Mistretta v United States} 388 US 361 (1989) 385.

\textsuperscript{78} \textit{Condon v Pompano} (2013) 295 ALR 638, [138].


\textsuperscript{80} Murray, above n 5, 2.
The Court’s approach to the Kable principle has operated to promote State adoption of constitutionally safe, known-to-be valid law and order measures to the detriment of experimentation and diversification. This has also emerged to the detriment of democratic engagement and participation in a conversation about the sufficiency and appropriateness of community protection measures, which is explored in the final part of this article.

During the immediate post-Kable era, the Kable doctrine was applied by the High Court in a way that operated as a cue to the States that, despite initial concerns the Kable doctrine would stifle diversity, the States ought to be confident in continuing to use State courts in innovative crime-prevention regimes. The trends in the Court’s jurisprudence commencing with IFTC in 2009, however, must have left the States reeling and uncertain about the limits of their own powers. In Public Service Association and Professional Officers’ Association Amalgamated (NSW) v Director of Public Employment Heydon J asked:

Has the basis of the decision changed over time? Does [Kable] lack a ratio decidendi? Are the Kable statements, being ‘insusceptible of further definition in terms which necessarily dictate future outcomes’, 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? ‘As law becomes more abstract and more generously endowed with doctrinal axioms and categories, the doctrines themselves seem to become emptied of real significance; they become compatible with more or less any conclusion in concrete cases.’ Cheryl Saunders has described the recent jurisprudence on Kable as ‘messy’, ‘in which different judges relied on different features of the challenged legislation to draw what sometimes appeared to be fine lines between what was acceptable and what was not.’ In the circumstances, it is of more than passing curiosity that States continue to use their courts in these regimes at all. As was pointed out in Fardon v Attorney-General (Qld), the States are free to take these powers away from the courts and give them to non-judicial bodies, such as a panel of psychiatrists. It would appear that the desire to cloak their policies in the legitimacy of the courts has been the stronger allure for governments for many years. However, this restraint should not be taken for granted. More recently States have started to turn away from the courts and towards non-judicial bodies, including the Governor or parole board, to take on these roles.

81 See analysis of this period in Appleby and Williams, above n 48, 8-11.
84 South Australia v Totani (2010) 242 CLR 1, 591 (Gleeson CJ); McHugh J also references this. Although note more recent comments of Gummow J in South Australia v Totani (2010) 242 CLR 1, throwing some doubt onto this.
85 Fardon v Attorney-General (Qld) (2004) 223 CLR 575, 591 (Gleeson CJ); McHugh J also references this. Although note more recent comments of Gummow J in South Australia v Totani (2010) 242 CLR 1, throwing some doubt onto this.
87 See Criminal Law Amendment (Public Interest Declarations) Amendment Act 2013 (Qld), which was struck down by the Court of Appeal on Kable grounds because the Governor’s power to order the continuing detention of a serious sexual offender interfered with the Court’s decision to refuse this order: Attorney-General (Qld) v Lawrence [2013] QCA 364; and Corrections Amendment (Parole) Act 2014 (Vic).
It could be asked whether the *Kable* principle is any more uncertain than other constitutional doctrines. It is certainly the case that a level of ambiguity and uncertainty is necessary, and indeed beneficial, in constitutional tests. But the uncertain dimensions of the High Court’s positions in recent *Kable* cases are many and demonstrate uncertainty in both the basis, formulation and content of the doctrine. The divisions across the Court in *Momcilovic*, on almost every aspect of the constitutional arguments around the validity of the *Charter of Human Rights and Responsibilities Act* (Vic), is perhaps the best illustration of divisions within the Court as to the principle’s modern application.

Other cases also provide illustrations of uncertainties and evolution with respect to formulation, content and application. In *Kirk*, despite previous indications to the contrary, the High Court found that one of the defining characteristics of a Supreme Court was its supervisory jurisdiction to review the decisions of inferior courts and tribunals for jurisdictional error. In *Wainohu*, despite some statements to the effect that the *Kable* doctrine applied to the court and not judges, the Court held that State appointment of judges *persona designata* would attract similar limitations that applied to federal court judges. The Court then found that the absence of a legislative requirement for State judges to give reasons would breach this limitation, even though a similar absence in an earlier federal decision had not.

In *International Finance Trust*, a four judge majority took an approach to the interpretation of the impugned provision that is hard to reconcile with the Court’s previous approach to interpretation to avoid constitutionality in *Gypsy Jokers* and *K-Generation*, an approach that three judges in *International Finance Trust* continued to adhere to.

*Condon v Pompano* aggravated the uncertainty and caused resultant difficulties for the States in a number of ways, not least the joint judgment’s statement that:

> [T]he 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 quote serves as a warning against taking general statements about the scope of the *Kable* principle out of the factual context in which they were made. Such an approach makes it difficult for States to move away from the exact factual circumstances previously considered.

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88 *Momcilovic v The Queen* (2011) 245 CLR 1.
89 Section 36 empowered the Victorian Supreme Court to issue a ‘declaration of inconsistent interpretation’ in circumstances where the Court believed there was no way to interpret the legislation in a way that was consistent with the human rights in the Charter and with the purpose of the legislation.
90 French CJ, Bell, Crennan and Kiefel JJ held s 36 valid; Gummow, Hayne and Heydon JJ held s 36 invalid.
95 See also discussion in Lim, above n 3, 55–57.
96 *Condon v Pompano* (2013) 295 ALR 638, [137], references omitted. See similar commentary in Saunders, above n 83.
by the High Court when drafting law and order schemes. This provides little guidance to the States. It is indicative of a judicial move away from the crafting of implied limitations in the form of tests for future use, in favour of deciding narrowly the questions posed by the factual circumstances. Sir Anthony Mason once explained that the role of a constitutional court is to expound the former. He explained that judges should aim to provide reasons that deal fairly and impartially with the competing considerations, resting wherever possible on a principle of appropriate generality, even though the full reach of the principle must be left for later examination.

In Totani, the High Court was confronted by legislation that relied on a number of known-to-be-valid type provisions – including those that allowed for the use of criminal intelligence, and the issuing of control orders by Chapter III courts. Nonetheless, the High Court found invalid the provision that required the South Australian Magistrates Court to make a control order against a person if the Court is satisfied that the person is a member of a declared organisation. The majority of the Court found the legislation invalid on the basis that the limited role given to the Magistrate Court in the scheme in contrast to that of the Attorney, demonstrated that it was, in fact, rendered an instrument of the Executive. The outcome in Totani stands in contrast to the High Court’s decision in Baker v The Queen. In that case, Gleeson CJ rejected the argument that the Court was being used to mask a ‘legislative decree’. He asked whether discretion given in the court is ‘devoid of content, so that it is impossible for any case to satisfy [its exercise]’.

Together, these uncertainties and divergent precedents create an almost unmanageable position for the State Executive or Legislature in determining the constitutional scope of their own power when considering new and innovative curial measures. As Murray explains: ‘The State constitutional criteria do not provide sufficient clarity or transparency for accurate constitutional assessment to be made in the face of curial reform.’

Consequences of uncertainty on federalism and rights protection

In Totani, French CJ explained the indefinable nature of the principle and any resulting uncertainty in a positive light:

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97 As we saw, for example, during the Mason and Brennan eras of the Court.
101 Serious and Organised Crime (Control) Act 2008 (SA) s 14(1).
102 South Australia v Totani (2010) 242 CLR 1, [4], [82]-[83] (French CJ; [142] [149] (Gummow J; [436] (Crennan and Bell JJ); [479] (Kiefel J). Contrast to the reasoning employed by Hayne J, which focussed more on whether the power conferred on the Court was properly classified as judicial power.
104 Ibid 523 (Gleeson CJ).
105 Ibid 524. See also at 525.
106 Murray, above n 5, 199. See also at 202 and 2.
For legislators this may require 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 and the conduct of proceedings in open court. It may also require a prudential approach to the enactment of laws authorising the executive government or its authorities effectively to dictate the process or outcome of judicial proceedings.  

It is certainly the case that the current articulation of the *Kable* principle and its application by the High Court as well as intermediate courts makes it difficult for government legal advisers to provide constitutional advice on law and order schemes involving the courts. This may mean States, as French CJ indicates they should, approach the use of State judiciaries cautiously. Should this be greeted enthusiastically, perhaps particularly so in a system that has no constitutional protection for individual rights? Heydon J has noted that ‘Lawyers commonly think that the *Kable* doctrine has had a beneficial effect on some legislation.’

Two questions must be asked about this state of constitutional affairs. First, if we accept, as we must, that the Australian Constitution gives prominence to representative and responsible government as the key protectors of human rights, is it appropriate that the Court should be using the *Kable* principle to warn governments and Parliaments away from the limits of their constitutional powers? Helen Irving has argued (in the context of whether the High Court should provide advisory opinions) that ‘engender[ing] timidity in governments’ is not a preferable state of constitutional affairs. She argued:

> Progressive legislation in Australia has often proceeded by constitutional ‘adventures’ undertaken by governments who are prepared to test the established constitutional limits and to make new constitutional arguments in support of their legislative programs. Persuasive new arguments, made in concrete cases concerning new legislative initiatives, advance the law. … Those … who promote the view that the Constitution should adapt to current needs and values, should particularly value the opportunity to advance fresh perspectives in constitutional interpretation.

There are questions about whether this justification should apply with equal force to legislation involving State judiciaries as opposed to other areas, for example, the legislative exploration of the boundaries of the division of legislative power. Certainly in the law and order sphere certain experimentation risks undermining fundamental constitutional principles including the independence of the judiciary and the rule of law. However, that is not to say that all innovative legislative arrangements involving the courts must be viewed as necessarily undermining these principles. In recent times Australia has seen important innovations in the restorative justice arena, including the introduction of ‘problem-solving courts’, such as mental health courts, drug courts and Indigenous sentencing courts. It is important that in

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107 South Australia v Totani (2010) 242 CLR 1, [69](4).
108 Orr, above n 52, 16.
109 South Australia v Totani (2010) 242 CLR 1, [245].
112 Ibid. See also discussion of Parliament’s role in constitutional interpretation, and what should guide its action where constitutional power is uncertain, in Gabrielle Appleby and Adam Webster, ‘Parliament’s Role in Constitutional Interpretation’ (2013) 37 *Melbourne University Law Review* 255.
exercising ‘prudence’ the States are not turned away from pushing ahead with these novel schemes.113

French CJ’s call for the exercise of ‘prudence’ appears as an elaborate game of bluffing. However, it is a game of bluffing with potentially dangerous consequences. For decades, despite the emergence of the Kable doctrine, the States continued in their attempts to include the courts in their new law and order schemes.114 This was despite the constitutional possibility that they could simply take these schemes away from the courts altogether,115 the resultant reduction in judicial scrutiny to the detriment of individual liberties.116 This danger is not new. It was mooted when the Kable principle was first enunciated. But the Court’s more stringent approach to the Kable principle since 2009 again raised the possibility of the States moving in this direction. In 2013 and 2014, the States started to make this change.

In 2013, in a very high profile law and order crackdown, the Newman LNP government introduced a suite of new laws targeting organised crime as well as serious sex offenders. The Criminal Law Amendment (Public Interest Declaration) Amendment Act 2013 (Qld) vested the power in the Governor in Council, on the advice of the Attorney-General, to make a public interest declaration against an individual (ordering their continued detention) who has previously been the subject of an order by a court under the Dangerous Prisoners (Sexual Offenders) Act 2003 (Qld). The Dangerous Prisoners (Sexual Offenders) Act was the legislation that was upheld in Fardon v Attorney-General (Qld).117 The Queensland Court of Appeal struck the legislation down on the basis of its interference with the exercise of the court’s power,118 and the Attorney did not appeal the case to the High Court.

In 2014, the Victorian Parliament passed the Corrections Amendment (Parole) Act 2014 (Vic). This Act inserted s 74AA into the Corrections Act 1986 (Vic). This provision was stated to apply to ‘the prisoner Julian Knight’ only. Mr Knight had been convicted of seven counts of murder and sentenced to life imprisonment. He became eligible for parole on 8 May 2014. Section 74AA provided that the Parole Board may only make an order for parole if satisfied that the prisoner is in imminent danger of dying, or is seriously incapacitated, and as a result he no longer has the physical ability to do harm to any person and has demonstrated that he does not pose a risk to the community. The legislation mirrors, in many important respects, that struck down in Kable, with a notable departure the vesting of the power of continued detention in the parole board and not the courts.119

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113 See also Murray, above n 5, 2.
115 Although note recently the comments of Gummow J in Totani that this may be unavailable at least in relation to the power to detain individuals after the determination of criminal guilt.
118 Attorney-General (Qld) v Lawrence [2013] QCA 364.
119 This was based largely on legislation upheld by the Court in Crump v New South Wales (2012) 247 CLR 1.
Second, it ought to be accepted that the High Court has been able to protect important judicial process guarantees and secure resultant benefits for individuals under the *Kable* principle. It also ought to be accepted that the uncertainty and judicial bluffing around the principle may have assisted in this. However, it has started to become apparent that in this uncertain environment, the States will become so fixated on securing compliance with the *Kable* principle, this will be substituted for a discussion about the appropriateness of the particular law and order scheme. That is, States may stop engaging in a dialogue about community protection (or criminal enforcement and appropriate punishment of crime) and the costs that can be borne in its name in terms of incursions into individual liberties and instead, when a definite ruling is given on the constitutionality of a law and order scheme under the *Kable* principle, the States hold this out as sufficient to achieve any necessary balancing between community protection and individual liberties. This is dangerous in the Australian context, where legislatures retain the primary role in protecting rights through their representative nature and deliberative processes.  

There is already evidence that States are waiting for the High Court’s imprimatur for constitutionally contentious schemes before adopting these into their own jurisdictions. After *Totani*, South Australia waited for the decision in *Wainohu* before amending its control order legislation to reflect that decision. When Western Australian Attorney-General Christian Porter introduced that State’s control order legislation, he said:

> Western Australia has the advantage of the High Court decisions [*Totani* and *Wainohu*] providing us here in Western Australia with guidance about the most constitutionally valid approach.  

This has implications for the operation of the federal system. When they adopt laws simply because they have been given the High Court’s stamp of constitutional approval, State legislatures may stop responding to the voices of their citizens in developing these measures, engaging in deliberative debate over the most appropriate response to the perceived level of threat in their jurisdictions. Experimentation and innovation within the federation becomes less about the adoption of effective and appropriate measures, than it is about the adoption of constitutionally valid measures. The Court, by declaring legislation constitutionally valid, performs a public legitimising process. The potential for federalism to flourish in the law and order arena is being undermined not by the constitutional principle itself, but by the judicial uncertainty around it and Parliament’s unwillingness (and perhaps inability) to engage with the complexity of this jurisprudence.

There is evidence that State and Territory governments have often used compliance with the *Kable* principle as a substitute for debate about whether law and order measures are appropriate to combat the particular threat, with as little incursion into individual liberties as necessary. But passing muster under the *Kable* principle is not the same as satisfying

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120 This is true even in Victoria and the Australian Capital Territory, where statutory bills of rights exist (*Charter of Human Rights and Responsibilities Act 2006* (Vic) and *Human Rights Act 2004* (ACT)). These statutory instruments retain primary responsibility for rights protection with the legislature, albeit they provide an important role for the judiciary and establish mechanisms to enhance the deliberative process within the legislature.

121 Western Australia, Parliamentary Debates, Legislative Assembly, 23 November 2011, 9678 (Christian Porter).

Australia’s international obligations to protect and uphold universal human rights. McHugh J in *Fardon* explained that:

State legislation may require State courts to exercise powers and take away substantive rights on grounds that judges think are foolish, unwise, or even patently unjust. Nevertheless, it does not follow that, because State legislation requires State courts to make orders that could not be countenanced in a society with a Bill or Rights, the institutional integrity of those courts is compromised.\(^{123}\)

And as Bret Walker SC explained in his review of the federal counter-terrorism legislation:

The constitutional validity of the [Control Order] legislation has been upheld. This does not foreclose the possibility of an adverse opinion on the part of the [Independent National Security Legislation Monitor] concerning any of the effectiveness, appropriateness (including compliance with international obligations) and necessity of the [Counter Terror] Laws in this regard.\(^{124}\)

Even if one accepts that there have been benefits achieved through the Court’s use of the *Kable* principle,\(^{125}\) and that the High Court has been able to use it against some legislation that can only be described as possessing draconian features, the substitution of the *Kable* principle for a bill of rights should be viewed with a level of concern.\(^{126}\)

These concerns can be illustrated with two examples. In *Pompano*, the High Court considered the Queensland control order scheme and specifically the part of the scheme by which information was declared to be criminal intelligence. While the respondent was excluded from the hearing on this matter (and parts of the substantive hearings at which criminal intelligence was used), a Public Interest Monitor (‘PIM’) was permitted to be present and make submissions. The PIM’s functions are described as follows:

(a) to monitor each application to the court for a criminal organisation order or the variation or revocation of a criminal organisation order; and

(b) to monitor each criminal intelligence application; and

(c) to test, and make submissions to the court about, the appropriateness and validity of the monitored application.\(^{127}\)

French CJ was the only judge who treated the existence of the PIM as relevant to the constitutionality of the legislation as one of a number of factors that led to that outcome.\(^{128}\) The joint judgment of Hayne, Crennan, Kiefel and Bell JJ made no mention of the PIM in the course of their reasoning. Gageler J considered, but rejected, the argument that the PIM could add to the fairness of the scheme:

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\(^{123}\) *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, [41].

\(^{124}\) Walker, above n 31, 38.

\(^{125}\) See also Wheeler, above n 4, 29-30.

\(^{126}\) This concern is not shared by all commentators, see, eg, Mirko Bagaric, ‘The Revived Kable Doctrine as a Constitutional Protector of Rights?’ (2011) 35 *Criminal Law Journal* 197.

\(^{127}\) *Criminal Organisation Act 2009* (Qld) s 86.

\(^{128}\) *Condon v Pompano* (2013) 295 ALR 638, [65].
The COPIM does not act as an advocate for a respondent to a substantive application. The COPIM is not required to act in the interests of a respondent. The presence of the COPIM doubtless adds to the integrity of the process. But it cannot cure a want of procedural fairness.\textsuperscript{129}

In the wake of \textit{Pompano}, both New South Wales and South Australia passed new amendments to their control order regimes.\textsuperscript{130} These amendments transferred the power to make declarations from individual judges to courts, mirroring the Queensland scheme upheld in \textit{Pompano}. New South Wales introduced a Criminal Intelligence Monitor,\textsuperscript{131} akin to the Public Interest Monitor. The importance of the High Court’s brief comments on the relevance of this feature to the constitutionality of the scheme is expressed by the Attorney-General in the second reading speech:

\begin{quote}
While the High Court’s decision on the Queensland legislation did not focus on the existence of the Criminal Organisations Public Interest Monitor, as the position is known under the Queensland Act, the monitor's role was described as one aspect which tended to support the validity of the Act. Consequently the bill proposes to adopt this mechanism in New South Wales.\textsuperscript{132}
\end{quote}

Notably, in New South Wales the introduction of a public interest monitor was not seen as appropriate to remedy unfairness in the established criminal intelligence scheme, but because it may be relevant to support the constitutionality of the Act.

In contrast, South Australia did not introduce a system akin to that of the PIM. South Australia has demonstrated little inclination to go any further than has been constitutionally mandated by the High Court. The protections of the Court in applying the \textit{Kable} doctrine were perceived as wholly adequate. In the second reading speech to the amendment Bill, the Attorney-General explained that the amendments are to respond \textit{only} to direct constitutional questions:

\begin{quote}
[T]he constitutionally safe course is to replace ‘eligible judges’ with the Supreme Court and to make consequential amendments to the Act. The Northern Territory did so in 2011 (\textit{Serious Crime Control Amendment Act 2011}). After Pompano was decided, New South Wales amended a Bill already in Parliament to do so (\textit{Crimes (Criminal Organisations Control) Amendment Bill 2013}). Victoria legislated using the Supreme Court in the \textit{Criminal Organisations Control Act 2012}. The trend is clear. South Australia must now stand with the others, and with that legislative model that has been definitively ruled to be valid.\textsuperscript{133}
\end{quote}

The second example concerns the decision of the South Australian Government, during its post-\textit{Totani} overhaul of its legislation, to confer the power to make declarations against organisations on individual judges, \textit{persona designata}, rather than on the Supreme Court. Following \textit{Totani} and \textit{Wainohu}, South Australia had released a draft Bill proposing that the Supreme Court make these declarations.\textsuperscript{134} After the release of the initial exposure draft the Bill was amended so that this power was given to Supreme Court judges \textit{persona designata}.

\begin{flushright}
\textsuperscript{129} \textit{Ibid} [208]. \\
\textsuperscript{130} \textit{Crimes (Criminal Organisations Control) Amendment Act 2013 (NSW)}; \textit{Serious and Organised Crime (Control) (Declared Organisations) Amendment Act 2013 (SA)}. \\
\textsuperscript{131} \textit{Crimes (Criminal Organisations Control) Act 2012 (NSW)} Part 3B, Division 2 \\
\textsuperscript{132} \textit{New South Wales, Parliamentary Debates}, Legislative Assembly, 21 March 2013, 19116 (Greg Smith). \\
\textsuperscript{133} \textit{South Australia, Parliamentary Debates}, House of Assembly, 6421 (John Rau). \\
\textsuperscript{134} \textit{See Serious and Organised Crime (Control) (Miscellaneous) Amendment Bill 2011 (Draft for Consultation)}. 
\end{flushright}
The change followed the receipt of a letter by the South Australian Attorney-General, John Rau, from the Western Australian Attorney-General, Christian Porter, to the following effect:

In WA we have maintained the use of the ‘eligible judge’ … In so doing we noted that the High Court in its Wainohu decision … said nothing adverse in respect of the powers to make a declaration being vested in a single designated authority. Our advice is that having the declaration made in the Supreme Court opens the declaration process to appeal compared to what we are proposing which are simple avenues for the respondent to seek variation to, or revocation of, the declaration.135

This candid advice between State Attorneys-General reveals again the focus on whether provisions will pass constitutional muster, as opposed to engaging in a conversation about when individual rights and liberties ought to be sacrificed for the objective of community protection. The South Australian Parliament would eventually transfer this power back to the Supreme Court after Pompano to secure its constitutionality.

To clarify, this phenomenon is not the fault of the Court. But while the High Court’s role in the constitutional framework may be theoretically separated from the political spheres of government, the manner by which it carries out its function undoubtedly has a very important political effect. There is a failure of democratic engagement and participation in the policy and law-making process. This may be occurring as a consequence of the High Court’s approach to the Kable principle. Of course, it is only speculation that if politicians were not able to use the Kable principle as a smokescreen for a discussion about a bill of rights, that discussion would otherwise occur. But it may be that there would be greater political pressure to address rights directly if lip service could not be paid to constitutionality and compliance with Kable.

Conclusion

The minimum guarantees for the institutional integrity of State courts and through that the protection of individual rights achieved by the Kable principle are generally perceived positively. While not detracting from some of the positive effects of the principle, I have asked in this paper what might be the costs associated with it. In an area in which federal experimentation and diversity remain possible, stultification has occurred for a number of reasons. One is that adoption of regimes is often motivated by political objectives to the detriment of federal diversity and experimentation. Of course this is not the result of the Kable principle. But the Kable principle’s current conception, as a set of minimum characteristics that must be shared across all Australian jurisdictions, is inherently harmonising. When the uncertain nature of these characteristics is added to the mix, States start to legislate in constitutionally prudent ways, adopting known-to-be valid provisions rather than exploring their constitutional powers.

This development, despite its federal costs, has potentially important human rights benefits. However, there is evidence that democratic protection of human rights may have been impoverished because of the Kable principle. The Kable principle has created an environment where constitutional validity can be substituted by the States for a full conversation with the

electorate about the desirability of incursions into civil liberties in the name of community protection.

I have argued that these issues do not arise to the same extent in systems with constitutional protection of human rights. At least in those systems, if the politicians pass the buck to the Court, the deeper analysis is not avoided. Courts are equipped with a more complete set of tools to determine whether individual rights are appropriately protected. If our system is supposed to provide protection of individual rights through representative and responsible government, politicians need to engage in a dialogue about this. Passing the buck to the courts is insufficient. Equipped only with implications from Chapter III, the courts do not have the tools to look at these schemes through the prism of human rights. They have been relying on uncertainty together with bluff and bluster, an unsustainable and potentially damaging long-term tactic.