THE *KIRK* STRUCTURAL CONSTITUTIONAL IMPLICATION

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In the landmark case of Kirk v Industrial Court (NSW) *(2010) 239 CLR 531 (*'Kirk'*), the High Court held that under the* Constitution*, the state Parliaments could not remove the state Supreme Courts' power to grant relief for jurisdictional error when lower state courts and state executive decision-makers exceed their jurisdiction. Although many commentators have lauded the decision, residual uncertainty about the legitimacy of the* Kirk *doctrine persists. This article is an attempt to place that doctrine on a surer legal footing. It takes a strand of the High Court's reasoning in* Kirk *and seeks to braid it to the Court's existing jurisprudence concerning 'securely based' structural constitutional implications, to construct a stronger legal justification for the doctrine. It argues, first, that the* Kirk *implication can be inserted into the* Constitution *on the basis that it is practically necessary to preserve the integrity of the High Court's federal appellate jurisdiction under s 73; and second, that the implication is confined to jurisdictional error in order to comply with an abiding constitutional norm that was first stipulated in the* Colonial Laws Validity Act 1865 *(Imp) 28 & 29 Vict, c 63 and which is now found in relation to state legislation in s 3(2) of the* Australia Act 1986 *(Cth) and* Australia Act 1986 *(UK).*

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I Introduction

Until the High Court's decision in 2010 in *Kirk v Industrial Court (NSW)* ('*Kirk*')[1] it was almost universally accepted that state Parliaments could validly enact a 'strong' privative clause which ousted the jurisdiction of the state Supreme Courts to review a decision of an inferior state court or state executive decision-maker on the grounds that the decision-maker lacked jurisdiction.[2] The High Court had supported that view,[3] and it seemed to flow naturally from the recognition that there was no formal separation of powers in the Australian

[1] (2010) 239 CLR 531 ('*Kirk*').

[2] Jeffrey Goldsworthy, '*Kable*, *Kirk* and Judicial Statesmanship' (2015) 40(1) *Monash University Law Review* 75, 94 ('Judicial Statesmanship'). See generally James Stellios, *Zines's the High Court and the Constitution* (Federation Press, 6th ed, 2015) 294–9 ('*Zines*'). This was subject to the '*Hickman* principle', derived from *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, although the *Hickman* principle was a principle of interpretation, rather than a constitutional principle: Jeremy Kirk, 'The Entrenched Minimum Provision of Judicial Review' (2004) 12(1) *Australian Journal of Administrative Law* 64, 66.

[3] See Oscar I Roos, 'Accepted Doctrine at the Time of Federation and *Kirk v Industrial Court of New South Wales*' (2013) 35(4) *Sydney Law Review* 781, 797 n 105.

states.[4] However, in *Kirk*, the orthodoxy was upended when the High Court unanimously held that under the *Constitution*, the state Parliaments could not remove the state Supreme Courts' power to grant relief for jurisdictional error when state courts other than the state Supreme Courts ('Lower State Courts') and state executive decision-makers exceed their jurisdiction.[5] By contrast, '[l]egislation which denies the availability of relief for non-jurisdictional error of law appearing on the face of the record is not beyond power'.[6]

The doctrine thus established in *Kirk* has been greeted with a degree of scepticism by commentators who are inclined, or committed, to a historicist approach to constitutional interpretation.[7] This scepticism has probably been heightened by the High Court's attempt in *Kirk* to justify the doctrine by empirical, 'originalist' reasoning[8] — notably its reference to 'accepted doctrine at the time of federation'[9] — to fix the 'defining characteristics' of state Supreme Courts.[10] Many commentators have lauded the doctrine on the policy grounds articulated by the Court in *Kirk* — the need to prevent the emergence of 'islands of power immune from supervision and restraint',[11] and 'distorted positions'[12] isolated from the mainstream of Australian law — and for the symmetry it brings to Australian administrative law after *Plaintiff S157/2002 v Commonwealth*.[13] There is now an 'entrenched minimum provision of judicial review'[14] across federal and state jurisdictions with jurisdictional error as its touchstone. However, judicial authority depends on judicial restraint and, in accordance

[4] *Kable v DPP (NSW)* (1996) 189 CLR 51, 66–7 (Brennan CJ), 77 (Dawson J), 92 (Toohey J), 109 (McHugh J), 137 (Gummow J) ('*Kable*').

[5] *Kirk* (n 1) 581 [100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See also Janina Boughey and Lisa Burton Crawford, 'Jurisdictional Error: Do We Really Need It?' in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark (eds), *The Unity of Public Law?: Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) 395, 411–12; Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook, 6th ed, 2017) 11.

[6] *Kirk* (n 1) 581 [100].

[7] Goldsworthy, 'Judicial Statesmanship' (n 2) 93–103. See also Geoffrey Lindell, *Cowen and Zines's Federal Jurisdiction in Australia* (Federation Press, 4th ed, 2016) 344; Boughey and Crawford (n 5) 412; Stellios, *Zines* (n 2) 296–7; Roos (n 3).

[8] See Goldsworthy, 'Judicial Statesmanship' (n 2) 94–9. See also Lindell (n 7) 449, describing the *Kirk* (n 1) decision as being 'accompanied by a good deal of uncertainty'.

[9] *Kirk* (n 1) 580 [97].

[10] See generally Stellios, *Zines* (n 2) 294–9.

[11] *Kirk* (n 1) 581 [99].

[12] Ibid, quoting Louis L Jaffe, 'Judicial Review: Constitutional and Jurisdictional Fact' (1957) 70(6) *Harvard Law Review* 953, 963.

[13] (2003) 211 CLR 476.

[14] Ibid 513 [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

with the principles of constitutional interpretation accepted in Australian law, 'the judiciary has no power to amend or modernise the *Constitution* to give effect to what the judges think is in the public interest';[15] nor, to adopt the words of Hayne J in *APLA Ltd v Legal Services Commissioner (NSW)* ('*APLA*'), can the doctrine be justified merely because it is 'reasonable … judged against some … a priori assumption of what would be a desirable state of affairs'.[16] Although it is probably safe to assume that *Kirk* is unlikely to be reversed,[17] considerable dissatisfaction with its 'perfunctory'[18] legal reasoning, and residual uncertainty about the legitimacy, integrity and ramifications of the *Kirk* doctrine persists.[19]

Several commentators have suggested that the entrenchment of the High Court's appellate jurisdiction under s 73 of the *Constitution* (as opposed to the implied content of the 'sparse phrase'[20] of 'Supreme Court of any State' in the text of the section) provides a stronger foundation for the *Kirk* doctrine as a structural implication.[21] Hitherto, however, that suggestion has remained undeveloped,[22] and the link between the *Kirk* doctrine as a specific example of a structural implication, and the Court's established jurisprudence on such implications generally, has neither been fully explicated nor demonstrated in the 'dense, grinding judicial style'[23] that is characteristic of Australian public law

[15] *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 549 [35] (McHugh J) ('*Wakim*'). See Lisa Burton Crawford, *The Rule of Law and the Australian Constitution* (Federation Press, 2017) 162–3, 170–1.

[16] (2005) 224 CLR 322, 453 [389] ('*APLA*'). See also *Graham v Minister for Immigration and Border Protection* (2017) 263 CLR 1, 49–50 [108] (Edelman J); George Winterton, 'Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?' in Charles Sampford and Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (Federation Press, 1996) 121, 121–2; Crawford (n 15) 193–4, 202.

[17] Lindell (n 7) 344. See also Mark Leeming, *Authority to Decide: The Law of Jurisdiction in Australia* (Federation Press, 2012) 23 ('*Authority to Decide*').

[18] Goldsworthy, 'Judicial Statesmanship' (n 2) 94.

[19] See Lindell (n 7) 449; Patrick Emerton, 'The Integrity of State Courts under the *Australian Constitution*' (2019) 47(4) *Federal Law Review* 521, 539–40; Stellios, *Zines* (n 2) 294–7, 299.

[20] Boughey and Crawford (n 5) 412.

[21] See, eg, ibid 411–12; Leslie Zines, 'Recent Developments in Chapter III: *Kirk v Industrial Relations Commission of NSW* and *SA v Totani*' (Speech, Centre for Comparative Constitutional Studies and Australian Association of Constitutional Law Seminar, 26 November 2010); Goldsworthy, 'Judicial Statesmanship' (n 2) 103–4; Emerton (n 19) 536–40; Stellios, *Zines* (n 2) 294–9.

[22] But see Stellios, *Zines* (n 2) 297–8. However, in the author's opinion, Stellios's argument is flawed because it is 'bootstrapped' onto the existence of a national common law, as discussed in the explication of this article's fourth assumption: see below Part I(A).

[23] Michael Taggart, '"Australian Exceptionalism" in Judicial Review' (2008) 36(1) *Federal Law Review* 1, 7, quoting Sir Anthony Mason, 'Justice of the High Court' in Timothy LH McCormack and Cheryl Saunders (eds), *Sir Ninian Stephen: A Tribute* (Miegunyah Press, 2007) 3, 5.

judgments. This article is an attempt to perform that task and place the *Kirk* doctrine on a surer legal footing, at least insofar as it relates to the decisions of state executive decision-makers and Lower State Courts regulated by state statute, which constitute the overwhelming majority of decisions which are judicially reviewed. This article does not consider the application of the doctrine to decisions which are made purely as an exercise of state prerogative power. In Part II, it takes a strand of the High Court's reasoning in *Kirk* and seeks to braid it to the Court's existing jurisprudence concerning 'securely based'[24] structural constitutional implications, which the Court developed in relation to the implied freedom of political communication, to develop an argument for the entrenchment of the state Supreme Courts' judicial review jurisdiction. Part III then identifies several High Court judgments which support the argument developed in Part II. Part IV turns its attention to the limitation of the *Kirk* doctrine to jurisdictional error only, and argues that the doctrine can be so limited by reference to the great imperial constitutional settlement of the 19th century effected by the *Colonial Laws Validity Act 1865* (Imp) 28 and 29 Vic, c 63 ('*CLVA*'), which is reproduced in s 3(2) of the *Australia Act 1986* (Cth) and *Australia Act 1986* (UK) (collectively, '*Australia Acts*').

A *Six Assumptions*

This article makes six assumptions which should be identified at the outset in order to assist the reader in evaluating its arguments.

The first assumption is that the *Kirk* doctrine is derived from a constitutional implication ('*Kirk* implication').

The second assumption is that the *Kirk* implication cannot be justified as a 'genuine' constitutional implication which inhered in the meaning of the words 'Supreme Court of a State' and 'court' in s 73(ii) at the time the *Constitution* was enacted in 1900.[25] In other words, it cannot plausibly be argued that the implication was so obvious to the framers and relevant contemporaneous audience of the *Constitution*, that it did not need to be stated expressly in the *Constitution*. Accordingly, it is assumed the High Court's chief proffered

[24] *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 134 (Mason CJ) ('*ACTV*').

[25] See *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63]–[64] (Gummow, Hayne and Crennan JJ); Goldsworthy, 'Judicial Statesmanship' (n 2) 86–91. See also Emerton (n 19) 525–6.

justification for the *Kirk* doctrine in *Kirk* itself (viz 'accepted doctrine at the time of federation')[26] is unpersuasive.[27]

The third assumption is that, consistently with High Court jurisprudence, it is legitimate for the Court to insert 'structural'[28] implications into the *Constitution* (in contrast to 'textual' implications which are manifested in its text)[29] by judicial interpretation if the implication is 'logically or practically necessary for the preservation of the integrity of [the *Constitution*'s] structure',[30] provided that the implication 'extend[s] only so far as is necessary … to give effect only to what is inherent in the text and structure of the *Constitution*'.[31]

The fourth (controversial) assumption is that the *Constitution* does not necessitate a uniform common law throughout Australia. The High Court can validly declare that 'there is a common law of Australia as opposed to a common law of individual States';[32] and the *Constitution* enables and facilitates the laying down of a uniform national common law by making Australia's ultimate court of appeal the High Court in relation to matters originating in both federal and state jurisdiction.[33] However, consistently with the fourth assumption, there is no 'constitutional duty' to do so:[34] it would not be *incompatible* with any *requirement* of the *Constitution* (as opposed to undesirable) for there to be several subsets of state common law, such that the High Court could recognise, consistently with the *Constitution*, a common law

[26] *Kirk* (n 1) 580 [97] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

[27] See Roos (n 3).

[28] See, eg, *Burns v Corbett* (2018) 265 CLR 304, 346 [68] (Gageler J) ('*Burns*').

[29] *ACTV* (n 24) 135 (Mason CJ). But see *APLA* (n 16) 409 [240]–[242] (Gummow J).

[30] *ACTV* (n 24) 135. See Goldsworthy, 'Judicial Statesmanship' (n 2) 78–82; *Burns* (n 28) 337 [46] (Kiefel CJ, Bell and Keane JJ), 346 [68], 355 [94] (Gageler J).

[31] *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 567 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ) ('*Lange*'). See also *Theophanous v The Herald & Weekly Times Ltd* (1994) 182 CLR 104, 197–9 (McHugh J); *MZXOT v Minister for Immigration and Citizenship* (2008) 233 CLR 601, 623 [39] (Gleeson CJ, Gummow and Hayne JJ), 635 [83] (Kirby J), 656 [171] (Heydon, Crennan and Kiefel JJ) ('*MZXOT*'); *APLA* (n 16) 358 [56], 361–2 [66], [68] (McHugh J), 452–4 [385]–[389], 454 [393] (Hayne J). But see Jeffrey Goldsworthy, 'Implications in Language, Law and the Constitution' in Geoffrey Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994) 150, 168–70 ('Implications'); Jeffrey Goldsworthy, 'Constitutional Implications Revisited' (2011) 30(1) *University of Queensland Law Journal* 9, 18–31 ('Implications Revisited').

[32] *Kable* (n 4) 113 (McHugh J).

[33] See Crawford (n 15) 49, 166. See also James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 495–6 [10.1] ('*The Federal Judicature*'); *Kable* (n 4) 113–14.

[34] Cf *Kable* (n 4) 113–14.

of New South Wales ('NSW') that is different from the common law of Victoria.[35]

This fourth assumption is likely to be resisted because it runs counter to recent High Court authority,[36] and because in *Kirk* itself the Court referred to the maintenance of a uniform national common law to justify its holding.[37] Yet it stretches credulity to assert that a national uniform common law was 'envisaged' by the *Constitution*, let alone required by it. As Leeming has persuasively argued, 'a conception of the Australian legal system, grounded in the *Constitution* and especially s 73 and s 75(v), as a coherent and unified legal system … is a very modern notion'.[38] Indeed, if the fourth assumption holds (and the author's view is that it does, although it is beyond the scope of this article fully to explore or defend it) then a justification for the *Kirk* implication which appeals to the 'settled doctrine'[39] of national common law uniformity amounts to constitutional bootstrapping. That is, *because* the Court has, only recently, declared that there is a uniform Australian common law, *therefore* the *Kirk* implication is necessary to ensure that the Court can maintain it.[40] Yet the Court exercises its power *under* the *Constitution*, and if the *Constitution* itself does not necessitate common law uniformity throughout Australia, then it cannot be invoked as a justification for a constitutional implication, however much the Court might find such uniformity desirable. Moreover (and importantly for the reader who resists the fourth assumption), *even if* the assumption is wrong and the uniformity of the common law is a constitutional requirement, the justification for the *Kirk* implication presented in this article is augmented and strengthened, *not* undermined nor weakened. Hence the assumption is made here to see whether it is possible to proffer a plausible justification for the implication without relying upon any claim that national common law uniformity is *inherent* in the text or structure of the *Constitution*, or that the text and structure *necessitates* such uniformity in order to justify the *Kirk* implication.

[35] See Justice LJ Priestley, 'A Federal Common Law in Australia?' (1995) 6(3) *Public Law Review* 221, 232–3.

[36] See, eg, *Wakim* (n 15) 574 [110] (Gummow and Hayne JJ); *Burns* (n 28) 330 [20] (Kiefel CJ, Bell and Keane JJ); *Kable* (n 4) 113–14 (McHugh J), 137–9 (Gummow J). See also *Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89, 152 [135] (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ).

[37] *Kirk* (n 1) 581 [99] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ). See Leeming, *Authority to Decide* (n 17) 74; Lindell (n 7) 341–2.

[38] Leeming, *Authority to Decide* (n 17) 74. See generally at 21, 75–82; Lindell (n 7) 356–7, 365–8, 392.

[39] Stellios, *Zines* (n 2) 299.

[40] See, eg, ibid 298.

The fifth assumption is that a jurisdictional error is an error which the decision-maker is not authorised by statute to make.[41]

The sixth assumption (which complements the fifth) is that a non-jurisdictional error is an error which the decision-maker is authorised by statute to make.[42]

II The Basic Structural Argument

Consistently with the third assumption, the basic structural argument presented in this Part refers to constitutional text and structure, before explaining why the entrenchment of the judicial review jurisdiction of the state Supreme Courts is practically necessary for the preservation of the integrity of that structure.

A *Text*

Section 73 relevantly provides:

> Appellate jurisdiction of High Court
>
> The High Court shall have jurisdiction, with such exceptions and subject to such regulations as the Parliament prescribes, to hear and determine appeals from all judgments, decrees, orders, and sentences:
>
> (i) of any Justice or Justices exercising the original jurisdiction of the High Court;
>
> (ii) of any other federal court, or court exercising federal jurisdiction; or of the Supreme Court of any State …
>
> (iii) of the Inter-State Commission, but as to questions of law only;
>
> and the judgment of the High Court in all such cases shall be final and conclusive.
>
> But no exception or regulation prescribed by the Parliament shall prevent the High Court from hearing and determining any appeal from the Supreme Court of a State in any matter in which at the establishment of the Commonwealth an appeal lies from such Supreme Court to the Queen in Council.

[41] See generally Leeming, *Authority to Decide* (n 17) 1–3, 45–70, 82–3. See also Boughey and Crawford (n 5) 413–14; Aronson, Groves and Weeks (n 5) 11.

[42] See Crawford (n 15) 113.

> Until the Parliament otherwise provides, the conditions of and restrictions on appeals to the Queen in Council from the Supreme Courts of the several States shall be applicable to appeals from them to the High Court.[43]

The 'strong language'[44] of s 73 gives the High Court a 'self-executing'[45] 'constitutionally guaranteed appellate jurisdiction'[46] and cements its role as the final court of appeal of Australia in matters originating in both state and federal jurisdiction.[47] Section 73 was inserted into the *Constitution* to establish Australia's own final court of appeal which would oversee an entire Australian judicial hierarchy (not just the exercise of Commonwealth jurisdiction) subject only to the limited preservation of appeals to the Privy Council.[48] Moreover, it expressly gives the *Commonwealth* Parliament (not the state Parliaments) the power to prescribe exceptions and regulations in relation to that jurisdiction (viz the first paragraph of s 73), and assumes that the Commonwealth Parliament (not the state Parliaments) has the power to provide for conditions and restrictions on appeals from the state Supreme Courts to the High Court (viz the final paragraph of s 73).[49]

It is a well-settled principle that the text of ch III is exhaustive and that consequently negative implications, in accordance with the maxim *expressio unius est exclusio alterius*, may arise from it.[50] Although the text of ch III does not expressly prevent a state Parliament from legislating to curtail or usurp the High Court's appellate jurisdiction, it would be entirely consistent with that well-settled principle, and the constitutional status of the Court's appellate jurisdiction, for such a negative implication to be drawn from the express grant of power to the Commonwealth Parliament to prescribe exceptions and regulations in the first paragraph of s 73.

43 *Constitution* s 73.

44 *Wall v The King; Ex parte King Won [No 1]* (1927) 39 CLR 245, 261 (Higgins J) ('*Wall*').

45 Lindell (n 7) 397.

46 *Burns* (n 28) 330 [20] (Kiefel CJ, Bell and Keane JJ). See also Stellios, *The Federal Judicature* (n 33) 497.

47 See Lindell (n 7) 396–7.

48 See *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 208 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ) ('*Smith Kline*').

49 *Cockle v Isaksen* (1957) 99 CLR 155, 165–6 (Dixon CJ, McTiernan and Kitto JJ) ('*Cockle*'). See *Smith Kline* (n 48) 210–11; Lindell (n 7) 434–5; Stellios, *The Federal Judicature* (n 33) 507.

50 See, eg, *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ) ('*Boilermakers' Case*'); *Wakim* (n 15) 555 [52] (McHugh J), 575 [111], 581 [123] (Gummow and Hayne JJ), 626 [263] (Callinan J); *Burns* (n 28) 325–6 [2]–[3], 335–7 [41]–[46], 342 [58]–[59] (Kiefel CJ, Bell and Keane JJ), 349 [77], 359–60 [104] (Gageler J); *APLA* (n 16) 405 [227], 409 [241] (Gummow J), 452 [386] (Hayne J); Leeming, *Authority to Decide* (n 17) 22.

The second paragraph of s 73 reinforces that negative implication. First, it elevates the constitutional importance of appeals from the state Supreme Courts to the High Court by singling those appeals out for special treatment.[51] Second, although it applies any colonial regulations regarding appeals from the (colonial) Supreme Courts to the Privy Council[52] in operation 'at the establishment of the Commonwealth' to appeals from the state Supreme Courts to the High Court, it is silent about any powers that the state Parliaments might have *after* the establishment of the Commonwealth to regulate appeals from the (state) Supreme Courts to the High Court. From this silence, consistently with the maxim *expressio unius est exclusio alterius*, an absence of power can be inferred.

B *Structure*

The relevant features of the structure of ch III of the *Constitution* can be described thus:

1 Chapter III is exhaustive of federal judicial power.[53]

2 The High Court's jurisdiction comprises its original jurisdiction and its appellate jurisdiction.[54]

3 The High Court's original jurisdiction is partly conferred directly by the *Constitution* itself under s 75 ('Original jurisdiction of High Court'), and partly by the Commonwealth Parliament pursuant to powers vested in it by s 76 ('Additional original jurisdiction').

4 The High Court's appellate jurisdiction is conferred directly by the *Constitution* itself in s 73. The Court is a general court of appeal for the Commonwealth, with authority to decide, inter alia, matters in appeals from state courts exercising state and federal jurisdiction, and from inferior federal courts.[55]

5 There is only one avenue of appeal to the High Court in matters originating in *state* jurisdiction (as distinct from matters involving the exercise of

[51] See *Smith Kline* (n 48) 208–10, discussed in Stellios, *The Federal Judicature* (n 33) 510 [10.30].

[52] See Stellios, *The Federal Judicature* (n 33) 497 [10.6].

[53] *Boilermakers' Case* (n 50) 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[54] *Commonwealth v Limerick Steamship Co Ltd* (1924) 35 CLR 69, 114 (Starke J); Leeming, *Authority to Decide* (n 17) 5, 26.

[55] See Lindell (n 7) 20, 28, 392; Stellios, *The Federal Judicature* (n 33) 495 [10.1].

federal jurisdiction), and that avenue of appeal runs via the state Supreme Courts.[56]

6 The High Court can only exercise federal jurisdiction, so that when the High Court hears an appeal from a state Supreme Court the matter is determined in *federal* jurisdiction, not state jurisdiction.[57]

C *Necessity*

In *Kirk*, the High Court stated:

> [A]lthough a privative provision demonstrates a legislative purpose favouring finality, questions arise about the extent to which the provision can be given an operation that immunises the decisions of an inferior court or tribunal from judicial review, *yet remain consistent with the constitutional framework for the Australian judicial system*.
>
> …
>
> The supervisory jurisdiction of the Supreme Courts was at federation, and remains, the mechanism for the determination and the enforcement of the limits on the exercise of State executive and judicial power by persons and bodies other than the Supreme Court. … *And because … s 73 of the* Constitution *gives this Court appellate jurisdiction to hear and determine appeals from all judgments, decrees, orders and sentences of the Supreme Courts, the exercise of that supervisory jurisdiction is ultimately subject to the superintendence of this Court as the 'Federal Supreme Court' in which s 71 of the* Constitution *vests the judicial power of the Commonwealth*.[58]

The basic structural argument takes the strand of the High Court's reasoning italicised above and braids it to the Court's established jurisprudence on structural constitutional implications described in the article's third assumption. It can be expressed thus: the *Kirk* implication is practically necessary to preserve the integrity (that is, 'the state of being whole, entire, or undiminished')[59] of the ch III structure because a privative clause enacted by a state parliament to limit the jurisdiction of a state Supreme Court to review the

[56] Lindell (n 7) 341, 397–8, 409–10. See *Boilermakers' Case* (n 50) 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). See also *Burns* (n 28) 350–1 [81] (Gageler J); Emerton (n 19) 535.

[57] *Gould v Brown* (1998) 193 CLR 346, 452–3 [211]–[212] (Gummow J). See also *Burns* (n 28) 347 [71] (Gageler J).

[58] *Kirk* (n 1) 579–81 [93], [98] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ) (emphasis added). See also Boughey and Crawford (n 5) 411.

[59] *Macquarie Dictionary* (online at 7 August 2020) 'integrity' (def 2).

decisions of a state executive decision-maker, or Lower State Court, would (if effective) undermine the appellate jurisdiction vested in the High Court by s 73 of the *Constitution*, and curtail the effective exercise of the Court's federal appellate judicial power (Item 4 in the list above).[60] It would deny what the *Constitution*, subject to the limited powers of the *Commonwealth* Parliament to prescribe regulations and exceptions, guarantees and 'impose a condition precedent to the invocation of that jurisdiction'.[61]

The practical necessity of the *Kirk* structural implication can be most powerfully demonstrated by positing a *strong state privative clause* which purports comprehensively to immunise the decisions of a state executive decision-maker, or Lower State Court, from judicial review in relation to all errors, both jurisdictional and non-jurisdictional, by ousting the Supreme Court's original jurisdiction entirely. Such a privative clause undermines the integrity of the appellate jurisdiction vested in the High Court by s 73 by curtailing the effective exercise of the Court's federal appellate judicial power. Consistently with Item 5 above, the state Supreme Courts provide the only avenue by which federal appellate jurisdiction can be exercised in relation to matters originating in state jurisdiction and the clause, if valid, removes the constitutional rung on the ladder to the High Court's constitutionally entrenched appellate jurisdiction.[62]

A strong state privative clause would thus leave the High Court with only the 'first duty' of all courts 'to exercise their jurisdiction to determine whether they have jurisdiction'.[63] On the assumption that the privative clause is valid, the answer to the question of whether the Court has jurisdiction would be no, with the result that the Court would order a stay, or dismiss the proceedings.[64] However, this implied, preliminary authority necessarily common to all courts 'is conceptually distinct from, and anterior to',[65] the Court's appellate jurisdiction under s 73 of the *Constitution*. Hence, a 'targeted structural'[66] implication, expressed in terms of the *Kirk* implication, can legitimately be inserted into the *Constitution* to deny the state Parliaments power to frustrate the exercise of the High Court's federal appellate jurisdiction by means of a strong state privative clause. Like the implied limitations on the conferral of

[60] See Emerton (n 19) 538–9.

[61] In the context of the *Constitution* s 75(v): *Wei v Minister for Immigration and Border Protection* (2015) 257 CLR 22, 37 [41] (Nettle J).

[62] Lindell (n 7) 341.

[63] *Hazeldell Ltd v Commonwealth* (1924) 34 CLR 442, 446 (Isaacs ACJ) ('*Hazeldell*'); Leeming, *Authority to Decide* (n 17) 17. See also at 3, 33–5, 41–4, 132–3.

[64] See ibid 43.

[65] Ibid 34. See also at 36, 41.

[66] *Burns* (n 28) 363 [115] (Gageler J).

non-judicial functions on federal justices as *personae designatae* identified in *Grollo v Palmer*,[67] '[t]he objective of the doctrine is to forestall the undermining of the efficacy of the exercise of the judicial power of the Commonwealth'.[68]

The constitutional necessity for the *Kirk* implication is highlighted when one considers the High Court's jurisdiction in matters involving the interpretation of Commonwealth laws. The Court has original jurisdiction in such matters, but the structure of ch III (see Item 3 above) locates that original jurisdiction under *potential* '[a]dditional original jurisdiction' (ss 76(i), (ii) of the *Constitution*), which may be conferred by the Commonwealth Parliament, and not *actual* '[o]riginal jurisdiction of High Court' (s 75 of the *Constitution*), which is conferred by the *Constitution* itself. Lower State Courts and state executive decision-makers are bound by Commonwealth legislation and hence, presumably, must from time to time, have to interpret such legislation. Yet, '[a]bsent the authority to decide such matters under other parts of the *Constitution* or a law of the Commonwealth, this is … part of the obligation to interpret and decide the law applicable in the exercise of *State* jurisdiction'.[69] Consequently, in the absence of a relevant Commonwealth law — and there is nothing in the structure of ch III to *compel* the Commonwealth Parliament to enact such a law — a Lower State Court or state executive decision-maker immunised from state Supreme Court judicial review by an (effective) strong state privative clause could decide matters involving the interpretation of Commonwealth laws without the possibility of High Court superintendence, as neither the High Court's original nor appellate jurisdiction could be invoked (Item 5 above). The insertion of the *Kirk* implication prevents this from happening by ensuring that such decisions are superintended in the High Court's appellate jurisdiction via the state Supreme Courts' supervisory jurisdiction.

Importantly, the necessity of the *Kirk* implication is not denied by s 109 of the *Constitution*. The operation of s 109 is predicated on the validity of Commonwealth legislation, but the Commonwealth Parliament 'lacks any power to enter the field of non-federal jurisdiction'.[70] Thus, interference with the relationship — in state jurisdiction — between the state Supreme Courts on the one hand, and Lower State Courts and state executive decision-makers on the other, is beyond the 'permissible reach of the legal operation of … Commonwealth law'.[71] The 'extent of the field available for Commonwealth

[67] (1995) 184 CLR 348.

[68] *Kable* (n 4) 132 (Gummow J).

[69] Lindell (n 7) 6 (emphasis added). See also at 289; Leeming, *Authority to Decide* (n 17) 144.

[70] *Wakim* (n 15) 561 [67] (McHugh J). See also *Burns* (n 28) 349–55 [78], [80]–[93] (Gageler J); Lindell (n 7) 319.

[71] *Burns* (n 28) 353 [88].

occupation',[72] and the necessity of the implication, therefore 'falls to be considered against the background of an absence of Commonwealth legislative power to achieve the same result'.[73]

Furthermore, *even if* the Commonwealth Parliament could legislate, such that a state privative clause purportedly excluding a state Supreme Court's jurisdiction over a Lower State Court or state executive decision-maker, in matters originating in state jurisdiction, could be rendered legally ineffective because of inconsistency with a valid Commonwealth law by operation of s 109, the *Kirk* implication would still be *constitutionally* necessary. The source of the High Court's appellate jurisdiction is the *Constitution* itself (Item 4 above) and, as observed in *Burns v Corbett* ('*Burns*'), '[t]he constitutional guarantee of an appeal contained in s 73 is … peremptory in its operation'.[74] Hence, responsibility for protecting the 'constitutional grant of appellate jurisdiction'[75] from interference is a matter of constitutional guardianship exercised by the High Court in inserting the implication into the *Constitution*, and cannot be left to the vagaries of legislative whim.

In sum, a state privative clause (if effective) *collides* with the structure of ch III and must be modified — by being read down to the extent that it is possible to do so to preserve judicial review in the state Supreme Courts — or invalidated — to the extent that it cannot be so read down — to avoid such a collision; warding off this collision pre-empts any question of s 109 inconsistency between valid state and Commonwealth laws.

D *Two Anticipated Objections to the Basic Structural Argument*

Finally, the explication of the basic structural argument in this Part finishes by anticipating and addressing two objections to it. For ease of reference, the first objection is termed the *mere jurisdiction objection* and the second, the *practical necessity objection*.

1 *Mere Jurisdiction Objection*

The mere jurisdiction objection can be expressed thus: the basic structural argument presumes that s 73 of the *Constitution* is more than a mere conferral of appellate jurisdiction on the High Court and this presumption is wrong. Rather, s 73 was originally conceived as a source of jurisdiction only, such that

[72] *Airlines of New South Wales Pty Ltd v New South Wales [No 2]* (1965) 113 CLR 54, 156 (Windeyer J). See also Lindell (n 7) 306.

[73] *Burns* (n 28) 355 [95].

[74] Ibid 340 [53] (Kiefel CJ, Bell and Keane JJ).

[75] Lindell (n 7) 395.

it appears in the *Constitution* solely to provide a conduit to the High Court. Once the erroneous, ahistorical presumption that s 73 is more than a mere source of jurisdiction is corrected, the integrity of the ch III structure cannot be affected by a state privative clause which confines the High Court to the 'first duty'[76] of all courts 'to exercise their jurisdiction to determine whether they have jurisdiction',[77] and prevents the exercise of the Court's conceptually distinct and posterior appellate jurisdiction;[78] to use a prosaic analogy, the integrity of a water pipe is not adversely affected by limiting the flow of water through it.

This article will not explore the historical basis for the mere jurisdiction objection, let alone evaluate the *Kirk* implication by reference to an explicit originalist methodology. Such an endeavour would be complex and merits treatment in a separate article, and it has been discussed, albeit not exhaustively, elsewhere.[79] It would be also beyond the limited ambition of this article which is to justify the *Kirk* implication by reference to the High Court's existing jurisprudence on structural implications and ch III. However, it should be noted that while the narrow conception of s 73 underpinning the mere jurisdiction objection is probably consistent with how the section was originally conceived, the evidence remains equivocal.[80] The most powerful evidence *against* such a conception as the *original* conception of s 73 is probably the very early decision of the first High Court comprising three important framers (Griffith CJ, Barton and O'Connor JJ) in *Peterswald v Bartley* ('*Peterswald*').[81]

At the commencement of the appeal to the High Court in *Peterswald*, the respondent submitted that the Court had no jurisdiction under s 73 to hear an appeal from the Supreme Court of New South Wales because s 106 of the *Justices Act 1902* (NSW) provided that the order of the Supreme Court was 'final and conclusive'.[82] In taking the jurisdictional point, the respondent relied explicitly on the same narrow conception of s 73 as that which underpins the mere jurisdiction objection:

> The State, by its Act, has taken away the right of appeal to the High Court or any Court. This is within the power of the legislature of the State … *Section 73 of the* Constitution *merely gives this Court jurisdiction to hear appeals*, but that applies

[76] *Hazeldell* (n 63) 446 (Isaacs ACJ).

[77] Leeming, *Authority to Decide* (n 17) 17. See also at 3, 33–5, 41–4, 132–3.

[78] See Emerton (n 19) 537.

[79] See, eg, Goldsworthy, 'Judicial Statesmanship' (n 2) 94–9.

[80] See, eg, Stellios, *The Federal Judicature* (n 33) 496–7 [10.3]–[10.5].

[81] (1904) 1 CLR 497 ('*Peterswald*').

[82] Ibid 498 (Lamb) (during argument).

> only to cases where an appeal exists, whether of right or by special leave; it does not say that there shall be a right of appeal, where, by State law, there is none.[83]

Notably, the High Court emphatically rejected this submission without hearing from the appellant, and its reasoning foreshadows the basic structural argument presented in this article:

> There is, in our opinion, nothing in the point. Indeed, we are somewhat surprised that it should have been raised. … It is said that the State Act provides that, in such cases as this, the decision of the Supreme Court shall be 'final and conclusive'. Whatever the effect of that provision may be, if it is in conflict with any provision in the *Constitution* … it is inoperative. *The construction that is sought to be put upon the section of the* Justices Act *in question is directly in conflict with s 73, and therefore either some other meaning must be given to it, or else it is inoperative*.
>
> It may be remarked that it has always been held that the prerogative right of the Sovereign to entertain appeals from colonial Courts could not be taken away except by express words. This absolute right of appeal to the High Court from all decisions of the State Supreme Courts, corresponds, under the *Constitution*, with the prerogative right of the Sovereign, and it cannot be taken away, even by an Imperial Act, without express words. *But, under the* Constitution*, no State legislature can take it away even by express words …*[84]

2 *Practical Necessity Objection*

The practical necessity objection is that the basic structural argument presented above sets the bar for practical necessity too low: the *Kirk* implication may be highly desirable, but it is not, in truth, necessary (that is, truly imperative, indispensable or unavoidable). This Part will briefly essay a response to that objection.

If the bar for practical necessity is set too high it would foreclose (by now) the insertion of almost any 'novel' judicial implications into the *Constitution*, given that the *Constitution* has been functioning effectively (or at least effectively *enough*) and with very slight formal alteration since 1901. To refer specifically to the *Kirk* implication: how can it be argued that the implication is imperative, indispensable or unavoidable in *sensu stricto* when it was only first fully articulated in 2010? However, while the foreclosure of novel implications might be a desideratum for those who are committed, for example, to constitutional originalism, it is also unworldly, given the contingency of much of the

[83] Ibid (Lamb) (during argument) (emphasis added) (citations omitted).

[84] Ibid 498–9 (Griffith CJ) (during argument) (emphasis added).

High Court's constitutional reasoning. As Brennan CJ pithily put it in *Kable v Director of Public Prosecutions (NSW)* ('*Kable*') (albeit in dissent), 'novelty is not necessarily a badge of error'.[85] Moreover, and more importantly given the aim of this article, the practical necessity objection is inconsistent with the Court's own jurisprudence which has applied the practical necessity test to find a broad implied freedom of political communication in ss 7, 24, 64 and 128 of the *Constitution*, which extends to communication about *federal, state and local* government politics,[86] notwithstanding that (i) ss 7, 24 and 128 refer only to the *Commonwealth* Parliament; and (ii) s 64 refers only to the *Commonwealth* executive.

III Supporting High Court Authorities

Apart from the passages in *Kirk* and *Peterswald* extracted above, the basic structural argument presented in Part II is supported by the Court's general declaration in *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers' Case*'), that '[t]he judicial power, like all other constitutional powers, extends to every authority or capacity which is necessary or proper to render it effective',[87] and its more specific declaration in *United Mexican States v Cabal* that the 'Court has authority to do all that is necessary to effectuate the grant of appellate jurisdiction conferred by s 73 of the *Constitution*'.[88] The basic structural argument is also consistent with (i) the general proposition, supported by a 'weighty line of case law',[89] that 'an Act of a State Parliament concerning how a court exercises power, on its face, cannot have anything to say about how a court (whether state or Commonwealth) exercises federal jurisdiction. That jurisdiction is of another polity, the Commonwealth';[90] and (ii) the related, but more specific proposition, that normally 'a State legislature may not expand or contract the scope of the appellate jurisdiction of the Court conferred by s 73'.[91]

[85] *Kable* (n 4) 68.

[86] *Lange* (n 31) 567, 571–2 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ). See also *Hogan v Hinch* (2011) 243 CLR 506, 543–4 [49] (French CJ); *McCloy v New South Wales* (2015) 257 CLR 178, 201 [23] (French CJ, Kiefel, Bell and Keane JJ).

[87] *Boilermakers' Case* (n 50) 278 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

[88] (2001) 209 CLR 165, 180 [37] (Gleeson CJ, McHugh and Gummow JJ).

[89] Will Bateman and James Stellios, 'Chapter III of the *Constitution*, Federal Jurisdiction and Dialogue Charters of Human Rights' (2012) 36(1) *Melbourne University Law Review* 1, 39. See, eg, *Wall* (n 44) 262 (Higgins J); *Commonwealth v Queensland* (1975) 134 CLR 298, 327–8 (Jacobs J), 330–1 (Murphy J); *D & H Investments Pty Ltd v Wagner* (2005) 91 SASR 27, 41 [59] (Besanko J), 51 [115] (White J). See also Lindell (n 7) 350, 361, 374–5.

[90] *R v Todoroski* (2010) 267 ALR 593, 595 [8] (Allsop P), quoted in Lindell (n 7) 361.

[91] *MZXOT* (n 31) 618 [20] (Gleeson CJ, Gummow and Hayne JJ). See also Lindell (n 7) 428.

The basic structural argument is also supported by the majority judgments of Gummow J and McHugh J in *Kable*, the High Court's decision in *Re Wakim; Ex parte McNally* ('*Wakim*'), the judgments of Gummow J and McHugh J in *APLA*, and the High Court's decision in *Burns*. The rest of this Part will seek to explain those specific claims, by identifying and analysing the relevant passages in those four cases.

A Kable

In 1996, in *Kable*, the High Court was called upon to consider the constitutional validity of the *Community Protection Act 1994* (NSW). The Act empowered the Supreme Court of New South Wales to make a preventative detention order against a single, named individual, Gregory Wayne Kable, if the Court was reasonably satisfied that Kable posed a serious danger to the community.[92] The High Court, by majority, found the Act constitutionally invalid because it compelled the Supreme Court of New South Wales to act in a manner which was incompatible with its ch III status as a potential repository of federal judicial power under s 77(iii) of the *Constitution*.[93] However, the majority judgments of Gummow J and McHugh J also relied on s 73 and contain several passages which can be used to support the basic structural argument presented above in Part II.

1 *Justice Gummow*

The first relevant passage in the judgment of Gummow J is:

> Upon federation it had become plausible … to speak of one Australian judicial system which was a unified structure … s 73 of the *Constitution* places this Court in final superintendence over the whole of an integrated national court system. … The … terms of s 73 itself necessarily imply that there be in each State a body answering the constitutional description of the Supreme Court of that State. … [I]t would not be open to the legislature of that State to abolish the Supreme Court and to vest the judicial power of the State in bodies from which there could be no ultimate appeal to this Court.[94]

This passage can be used to support the basic argument presented above at least in so far as the implication extends to Lower State Courts and state executive decision-makers, when they exercise judicial power. If that structure

[92] *Community Protection Act 1994* (NSW) ss 3, 5.

[93] *Kable* (n 4) 107 (Gaudron J), 109 (McHugh J), 137 (Gummow J).

[94] Ibid 138–9 (citations omitted).

necessarily implies that it is not open to the state Parliaments to abolish the Supreme Courts of the states and invest judicial power in bodies from which there could be no ultimate appeal to the High Court, then it also necessarily implies, by analogy, that it is not open to the state Parliaments to invest judicial power in bodies which are immunised from the supervisory jurisdiction of the state Supreme Courts by a strong state privative clause, and hence from which there could be no ultimate appeal to the High Court (Item 5 above in Part II(B)).

The second relevant passage in Gummow J's judgment in *Kable* is:

> [Section] 73(ii) puts the Supreme Courts in a distinct position. Section 73(ii) states that the High Court 'shall have' appellate jurisdiction in appeals from 'the Supreme Court of any State'. … The phrase identifies the highest court for the time being in the judicial hierarchy of the State and entrenches a right of appeal from that court to this Court. … Section 73(ii) indicates that the functions of the Supreme Courts of the States, at least, are intertwined with the exercise of the judicial power of the Commonwealth. This is because decisions of the State courts, whether or not given in the exercise of invested jurisdiction, yield 'matters' which found appeals to this Court under s 73(ii). By this means, the judicial power of the Commonwealth is engaged, at least prospectively, across the range of litigation pursued in the courts of the States. … [A]s both a practical consideration and as a conclusion drawn from the structure of the *Constitution*, the submissions for the appellant accurately emphasise that the institutional impairment of the judicial power of the Commonwealth inflicted by a statute such as the Act upon the judicial power of the Commonwealth is not to be confessed and avoided by an attempt at segregation of the courts of the States into a distinct and self-contained stratum within the Australian judicature. Rather, there is an integrated Australian legal system, with, at its apex, the exercise by this Court of the judicial power of the Commonwealth.[95]

This passage can be cited in support of the basic argument presented above because it (i) highlights the constitutional importance ('distinct position')[96] of the state Supreme Courts (Item 5 above), (ii) reinforces the constitutional necessity of the implication by stressing that the right of appeal from the state Supreme Courts to the High Court is entrenched, and (iii) describes the 'intertwined' relationship between the exercise of state judicial power in the

[95] Ibid 141–3 (citations omitted).

[96] Ibid 141.

state Supreme Courts and the exercise of the judicial power of the Commonwealth in the High Court.[97]

2 *Justice McHugh*

The first passage in the judgment of McHugh J that can be cited in support of the basic structural argument is:

> [Section] 73 of the *Constitution implies* the continued existence of the State Supreme Courts by giving *a right of appeal from the Supreme Court of each State to the High Court*, subject only to such exceptions as the Commonwealth Parliament enacts. … The right of appeal from a State Supreme Court to this Court, conferred by that section, would be rendered nugatory if the *Constitution* permitted a State to abolish its Supreme Court.
>
> *It necessarily follows, therefore*, that the *Constitution* has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system. That does not mean that a State cannot abolish or amend the constitutions of its existing courts. *Leaving aside the special position of the Supreme Court of the States*, the States can abolish or amend the structure of existing courts and create new ones. However, the *Constitution* requires a judicial system in and a Supreme Court for each State and, *if there is a system of State courts in addition to the Supreme Court, the Supreme Court must be at the apex of the system*.[98]

This passage can be cited in support of the basic structural argument presented above in the following three ways.

First, and similarly to the second passage in Gummow J's judgment in *Kable*, McHugh J's reference to the 'special position of the Supreme Court of the States' and his statement that 'the Supreme Court must be at the apex of the system' highlights the constitutional importance of the state Supreme Courts (Item 5 in Part II above).

Second, and similarly to the first passage in Gummow J's judgment in *Kable*, if the state Supreme Courts must be at the apex of each state judicial system, then it can be argued that it is practically necessary to insert a *Kirk* implication into ch III — at least in so far as the implication extends to Lower State Courts and state executive decision-makers, when they exercise judicial power and are part of that state judicial system — to ensure that the state Supreme Courts are at that apex.

[97] See Emerton (n 19) 535–7.

[98] *Kable* (n 4) 111 (emphasis added).

Third, on the premise that McHugh J is referring to a structural implication of the type identified in the third assumption of this article,[99] *if* it is permissible to insert a structural implication into the *Constitution* that the state Parliaments cannot legislate to abolish the state Supreme Courts (because, otherwise, 'the right of appeal from a State Supreme Court to this Court, conferred by [s 73], would be rendered nugatory'), *then* it can be argued by analogy that it is also permissible to insert a structural implication into the *Constitution* that the state Parliaments cannot legislate to remove the state Supreme Courts' judicial review jurisdiction. Otherwise, the right of appeal from a State Supreme Court to the High Court, conferred by s 73, would similarly be rendered nugatory. While it is conceded that the analogy is imperfect because, in the first case concerning the posited abolition of a state Supreme Court, the impact upon the right of appeal to the High Court under s 73 in matters of state jurisdiction is obliteration, whereas in the second case of Supreme Court jurisdictional limitation, the impact is diminution or derogation from the right to appeal, the two paragraphs in McHugh J's judgment clear a doctrinal path for a *Kirk* structural implication.

The second passage in the judgment of McHugh J which can be cited in support of the basic structural argument requires no further analysis. It is:

> [T]he High Court of Australia has the constitutional duty of supervising the nation's legal system. … An essential part of the machinery for implementing that supervision of the Australian legal system … is the system of State courts under a Supreme Court with an appeal to the High Court under s 73 of the *Constitution*. … [A]lthough it is not necessary to decide the point in the present case, *a State law that prevented a right of appeal to the Supreme Court from, or a review of, a decision of an inferior State court, however described, would seem inconsistent with the principle expressed in s 73 and the integrated system of State and federal courts that covering cl 5 and Ch III envisages.*[100]

B Wakim

In *Wakim*, the High Court stated that one of the 'fundamental propositions' of Australian constitutional law was that 'the subject of the judicial power of the Commonwealth is dealt with in the *Constitution* as a subject that is different and distinct from the judicial power of the States'.[101] Accordingly, the Court determined that the Commonwealth Parliament is unable to confer state

[99] See above Part I(A).

[100] Ibid 113–14 (emphasis added) (citations omitted).

[101] *Wakim* (n 15) 574 [110] (Gummow and Hayne JJ). See also at 625 [258] (Callinan J).

jurisdiction on a federal court;[102] and, notwithstanding the saving and continuance of the general powers of the states under ss 106 and 107 of the *Constitution*, state Parliaments (i) are unable to confer jurisdiction on federal courts,[103] and (ii) do not have any power in respect to matters identified in ss 75 and 76 of the *Constitution*.[104]

Consistently with *Wakim* it can be inferred that state Parliaments, by negative implication, also lack the power to curtail the High Court's federal appellate jurisdiction under s 73 viz (i) if the state Parliaments cannot confer jurisdiction on federal courts, then presumably they are also unable to curtail the jurisdiction of such courts, including the High Court; and (ii) if the state Parliaments do not have any power with respect to the matters identified in ss 75 and 76 (that is, federal original jurisdiction), then the state Parliaments also do not have any power in respect to matters identified in s 73 (that is, the High Court's federal appellate jurisdiction) — a fortiori as that jurisdiction (in contrast to the original federal jurisdiction of other courts which the Federal Parliament may create) is conferred on the High Court and comes from the *Constitution* alone.[105] Although federal *original* jurisdiction and federal *appellate* jurisdiction are different, both have an equally entrenched constitutional footing.

C *Justice Gummow and McHugh J in* APLA

In *APLA*, the High Court had to determine whether NSW regulations which prohibited lawyers from advertising personal injury legal services infringed the *Constitution*, including — as expressed in the special case — 'the requirements of Ch III of the *Constitution* and the principle of the rule of law as given effect by the *Constitution*'.[106] Chief Justice Gleeson and Heydon J, Gummow J, Hayne J and Callinan J found that they did not, with McHugh J and Kirby J dissenting. The judgments of Gummow J and McHugh J both contain passages which support the basic structural argument propounded in this article.

[102] Ibid 579–81 [118]–[122]. See also *APLA* (n 16) 408 [235] (Gummow J).

[103] *Wakim* (n 15) 573 [107], 575 [111].

[104] Ibid 558 [58] (McHugh J).

[105] See *Cockle* (n 49) 162–3 (Dixon CJ, McTiernan and Kitto JJ); *Wakim* (n 15) 555 [51]–[52] (McHugh J).

[106] *APLA* (n 16) 345 [14] (Gleeson CJ and Heydon J), 449 [375] (Hayne J). See generally Lindell (n 7) 29–36.

The passages in the judgment of Gummow J, although significant, require no further analysis.[107] However, the passage in the judgment of McHugh J requires some explication and contextualisation because it is detailed, and he was in dissent. The passage is:

> Just as the particular provisions of Chs I, II and VIII give rise to certain implications, so too does Ch III … In Ch III, those implications provide a shield against any legislative forays that would harm or impair the nature, quality and effects of federal jurisdiction and the exercise of federal judicial power conferred or invested by the *Constitution* … It follows irresistibly from the separation of legislative, executive and judicial functions and powers and the vesting of judicial power in the s 71 courts, for example, that the Parliament of the Commonwealth cannot usurp the judicial power of the Commonwealth by itself exercising that power. Nor can it legislate in any manner that would impair the investiture of judicial power in the courts specified in s 71 of the *Constitution*. … It need hardly be said that, if the *Constitution* prohibits the federal Parliament from usurping or interfering with the judicial power of the Commonwealth, it necessarily prohibits the States from doing so. Thus, the States … cannot invest federal courts with jurisdiction. Nor can the States enact legislation that attempts to alter or interfere with the working of the federal judicial system set up by Ch III.[108]

This passage evidently supports the basic structural argument, and its significance is only marginally diminished because McHugh J was in dissent.[109] The impugned NSW regulations in *APLA* survived challenge not because the majority disagreed with the principles articulated by McHugh J in the passage extracted immediately above, but because of the 'wide gap'[110] between, on the one hand, the regulation of advertising for personal injury legal services, and, on the other hand, 'the exercise, or potential exercise, of federal judicial

[107] They are (i) 'no State legislature may deny the operation of any of the provisions of Ch III. Thus, a State law which curtailed (or expanded) the scope of the appellate jurisdiction conferred on this Court by s 73 of the *Constitution* would be invalid': *APLA* (n 16) 405 [227] (citations omitted); and (ii) 'the [Commonwealth] Parliament is authorised by provisions in Ch III … to prescribe exceptions and regulations to appellate jurisdiction (s 73) … [These] powers of the Parliament … are necessarily exclusively of those of the legislatures of the States': at 405–6 [228]–[229] (citations omitted).

[108] Ibid 363–4 [73], [77]–[78] (citations omitted).

[109] See Lindell (n 7) 29 n 158.

[110] *APLA* (n 16) 454 [391] (Hayne J).

power'[111] and the 'text or structure of the *Constitution*'.[112] By contrast, the federal appellate jurisdiction of the High Court is one of 'the matters with which Ch III of the *Constitution* deals'[113] and part of 'the subject matter of Ch III';[114] and a state privative clause interferes with the exercise of that jurisdiction more directly than the impugned regulations in *APLA*. Moreover, as explained above in Part II, a state privative clause does so in a manner which goes directly to the *text and structure* of ch III.

D Burns

In *Burns*, the High Court found that a ch III constitutional implication precludes a state parliament from conferring jurisdiction with respect to any of the matters in ss 75 or 76 of the *Constitution* on a tribunal that is not one of the 'courts of the States' referred to in s 77.[115] In so doing, Kiefel CJ, Bell and Keane JJ affirmed that:

> Chapter III … is not concerned solely with the conferral of the judicial power of the Commonwealth and the limits on the conferral of that power. In the working out of the ramifications of the negative implications in Ch III of the *Constitution*, it is not the case 'that Ch III has nothing to say … concerning judicial power other than the judicial power of the Commonwealth'.[116]

Accordingly, the holding in *Kirk* can be characterised as a 'working out' of one of the ramifications of the negative implications of ch III concerning the

[111] Ibid 348 [23] (Gleeson CJ and Heydon J). Their Honours identified that '[t]he regulations in question are not directed towards the providing by lawyers of services to their clients. They are directed towards the marketing of their services by lawyers to people who, by hypothesis, are not their clients': at 351–2 [29]. The plaintiffs' argument was 'that a constitutional implication should be recognised to the effect that the States' legislative powers do not enable the States to make a law impinging upon the freedom of persons to receive advice or information *which may lead those persons to engage the judicial power of the Commonwealth*': at 452 [384] (Hayne J) (emphasis added).Justice Hayne concluded that this implication was not a 'necessary consequence of constitutional text or structure … by pointing to what the impugned regulations do *not* do. The impugned regulations do not preclude the seeking of advice or information about whether to invoke the judicial power of the Commonwealth. They concern only a prior step of conveying information … which may provoke a recipient to seek advice or information': at 454–5 [393]–[394] (emphasis in original).

[112] Ibid 352 [33] (Gleeson CJ and Heydon J). See also Lindell (n 7) 30.

[113] *APLA* (n 16) 454 [391] (Hayne J).

[114] Ibid 455 [396] (Hayne J).

[115] *Burns* (n 28) 325–6 [2], 339 [50] (Kiefel CJ, Bell and Keane JJ), 352 [84] (Gageler J).

[116] Ibid 337 [47] (citations omitted).

judicial powers of the state Supreme Courts.[117] Specifically, *if* the *Constitution* impliedly denies state legislative capacity with respect to the matters enumerated in ss 75 and 76 of the *Constitution*, as the High Court held in *Burns*, *then* it can be inferred that the *Constitution* also impliedly denies state legislative capacity with respect to the matters enumerated in s 73.

IV Why Jurisdictional Error Only?

A *Problem*

The problem with the basic structural argument presented above in Part II is that it does not explain why the *Kirk* implication is confined to jurisdictional error only. A *weak state privative clause*, which purports to oust judicial review on the grounds of non-jurisdictional error, but not jurisdictional error, also arguably undermines the integrity of s 73.[118] An appeal under s 73 in matters originating in state jurisdiction is an appeal *from all judgments, decrees, orders and sentences of the Supreme Court* (Item 4 above in Part II), and hence is limited to errors *made by the Supreme Court itself* in the exercise of its *judicial* powers.[119] A weak state privative clause limits the range of legal errors that can be dealt with by the state Supreme Court (that is, it prohibits the Supreme Court from dealing with non-jurisdictional errors), and therefore limits the range of legal errors that can be dealt with by the High Court in matters on appeal. The High Court, under s 73, has no jurisdiction to go behind the judgments, decrees, orders and sentences of the Supreme Court to consider the full range of legal errors made by the relevant State executive decision-maker,[120] a fortiori when the decision-maker is exercising non-judicial power. As Dixon J noted in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan*, in conferring appellate jurisdiction on the High Court, s 73 contains nothing to suggest that the Court is 'to go beyond the jurisdiction or capacity of the Court appealed from'.[121] On the assumption that federal judicial power has the capacity to deal with *all* errors of law on appeal — an assumption that is safe, given the absence of any express restriction on the range of legal errors that

[117] See generally *Wakim* (n 15) 553 [46] (McHugh J); Emerton (n 19) 537–8.

[118] See Emerton (n 19) 540.

[119] See Lindell (n 7) 417; *Kable* (n 4) 142–3 (Gummow J). But see *Burns* (n 28) 357 [98] (Gageler J).

[120] See, eg, Lindell (n 7) 429–30.

[121] (1931) 46 CLR 73, 109. See also *Mickelberg v The Queen* (1989) 167 CLR 259, 269 (Mason CJ): 'by differentiating between original and appellate jurisdiction and by making different provisions for their exercise, Ch III of the *Constitution* reinforces the notion that, when it refers to the appellate jurisdiction, it is speaking of appeals in their true or proper sense'. Cf Lindell (n 7) 401–2 n 53, 407–8.

may be appealed to the High Court in s 73[122] — then a weak state privative clause also impairs the Court's exercise of that power.

B *Proposed Solution*

The proposed solution is based on the account of the distinction between jurisdictional and non-jurisdictional error developed by Boughey and Crawford ('Boughey–Crawford account')[123] and an abiding constitutional norm of conduct which was first stipulated in the *CLVA* in 1865, and which has endured through the drafting of the *Constitution* to the present day ('*CLVA* norm'). This Part will first explain the *CLVA* norm before introducing the Boughey–Crawford account. It will then explain why, on the Boughey–Crawford account, the *Kirk* implication cannot be extended to embrace non-jurisdictional errors without transgressing the *CLVA* norm. Finally, this Part will address an anticipated objection to its proposed solution based on the doctrine of implied repeal.

1 *The* CLVA *Norm*

The *CLVA* norm originated in the imperial constitutional settlement of 1865 and was first authoritatively stipulated[124] in s 3 of the *CLVA*. It is now reproduced in s 2(2) of the *Statute of Westminster 1931* (Imp) 22 Geo 5, c 4 ('*Statute of Westminster*'), as adopted by s 3 of the *Statute of Westminster Adoption Act 1942* (Cth) in its application to Commonwealth legislation, and by s 3(2) of the *Australia Acts* in its application to state legislation. In order to understand the *CLVA* norm and how it limits the *Kirk* structural constitutional implication, one must revisit the mid-19th century constitutional crisis in the Colony of South Australia[125] which triggered the enactment of the *CLVA*. That crisis, notoriously known as the Boothby affair, was 'one of the most bitter feuds between the Bench and Parliament ever experienced in Australian constitutional history',[126] and it was, at very least, on the fringes of the living memory of most of the *Constitution*'s framers.

[122] See Lindell (n 7) 395, 398.

[123] Boughey and Crawford (n 5).

[124] On the text of the *Constitution* being stipulation, see generally Emerton (n 19) 526–7.

[125] See generally DB Swinfen, 'The Genesis of the Colonial Laws Validity Act' [1967] *Juridical Review* 29.

[126] Enid Campbell, 'Colonial Legislation and the Laws of England' (1965) 2(2) *University of Tasmania Law Review* 148, 173.

(a) The CLVA

The *CLVA* is largely remembered now as, in Dicey's famous phrase, a 'charter of colonial legislative independence',[127] which freed the colonial legislatures from any fetters placed on their legislative powers by inconsistent British laws, except where imperial legislation extended to the colonies by express words or necessary intendment.[128] However, the mischief that the *CLVA* suppressed was not *legislative* interference by the Imperial Parliament with colonial lawmaking; rather, it was *judicial* interference by colonial judges with colonial lawmaking.[129] The doctrine of repugnancy, prior to the *CLVA*, provided that colonial legislation was invalid to the extent that it was in conflict with 'fundamental principles of English Law',[130] 'the Laws of England',[131] or 'the spirit of the English law',[132] terms which had been understood to comprehend some, if not all, of the common law.[133] The obscurity and vagueness of the doctrine entrusted colonial judges with wide discretion and great power, vis-a-vis the local legislatures;[134] that power remained largely latent until Boothby J tried to erect severe restrictions on local legislative competence.[135]

Justice Boothby maintained that repugnancy embraced 'not only direct conflict with an imperial statute applying to the colony, but also any alteration to the common law of England as deemed to apply to the colony';[136] as he bluntly declared in 1861 in *Liebelt v Hunt*, 'the Parliament of this province had no power to override the common law of England'.[137] The remedy the *CLVA* advanced to suppress this mischief, in ss 2 and 3, was to stipulate a new constitutional norm of conduct.[138] This norm restricted the exercise of judicial power, by deeming that repugnancy was limited to conflicts between British and colonial *statute* law (not the *common law* and colonial statute law), and only to such conflicts where an imperial statute, or subordinate legislation made

127 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 5th ed, 1897) 99.

128 See ibid 99–102.

129 See especially Swinfen (n 125) 34, 46.

130 Campbell (n 126) 148.

131 Ibid 157, 162.

132 Ibid 159.

133 Ibid 148, 151, 154–5, 165, 174.

134 See Campbell (n 126) 154–5; *Union Steamship Co of New Zealand Ltd v Commonwealth* (1925) 36 CLR 130, 149 (Isaacs J), 155 (Higgins J) ('*Union Steamship*').

135 Swinfen (n 125) 59.

136 Ibid 51. See generally at 31–2, 54–5; Campbell (n 126) 173.

137 (Supreme Court of South Australia, Boothby J, 13 June 1861) 3.

138 See generally Emerton (n 19) 527–8.

thereunder, expressly, or by necessary implication, extended to the colony.[139] Section 3 of the *CLVA* declared:

> No colonial law *shall be or be deemed to have been* void or inoperative on the ground of repugnancy to the law of England, unless the same shall be repugnant to the provisions of some such Act of Parliament, order, or regulation as aforesaid.[140]

Indeed, if the *CLVA* had left any residual doubt about the supremacy of colonial statute law over the common law, it would not have warranted Dicey's emancipatory label: the common law, both by operation of the doctrine of precedent, and by operation of Privy Council appeals, was ultimately determined 'at home', not in the colonies.

The *CLVA* was '[t]he only great statute of general imperial constitutional law passed in the nineteenth century'[141] and it brought about 'a fundamental constitutional change'.[142] Its general application to the Commonwealth, as well as to the newly minted Australian states at Federation, was taken for granted and considered so obvious that a British suggestion that a reference to it be included in the covering clauses of the *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12 ('*Constitution Act*') was abandoned on the ground that any such reference was unnecessary.[143] To apply the words of the High Court in *Kirk*, at Federation the *CLVA* formed part of 'the constitutional framework for the Australian judicial system'.[144]

(b) The Australia Acts and the Statute of Westminster

The *Australia Acts* disapplied the *CLVA* to laws made after the commencement of the *Australia Acts* by the State Parliaments.[145] Yet, like the application of s 2(2) of the *Statute of Westminster* to Commonwealth legislation, s 3(2) of the *Australia Acts* also reproduced the *CLVA* norm in its application to state legislation. The dismantling of the imperial constitutional framework within which the *Constitution* was drafted and operated at Federation, and the fact of Australia's subsequent legal independence mean that, in the words of the High

139 Swinfen (n 125) 56. See also *Union Steamship* (n 134) 149 (Isaacs J), 155 (Higgins J).

140 *Colonial Laws Validity Act 1865* (Imp) 28 & 29 Vict, c 63, s 3 (emphasis added) ('*CLVA*').

141 RTE Latham, 'The Law and the Commonwealth' in WK Hancock, *Survey of British Commonwealth Affairs* (Oxford University Press, 1937) vol 1, 512, quoted in Swinfen (n 125) 30.

142 Campbell (n 126) 148.

143 See Sir John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths, 2015) 229–30, 232, 235–6, 241–3; Stellios, *Zines* (n 2) 463.

144 *Kirk* (n 1) 579 [93] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

145 *Australia Act 1986* (Cth) s 3(1); *Australia Act 1986* (UK) s 3(1).

Court in *Attorney-General (WA) v Marquet*, 'constitutional norms, whatever may be their historical origins, are now to be traced to Australian sources'.[146] In this instance, the historical origin of the relevant, abiding constitutional norm is the great imperial constitutional settlement of the 19th century; its contemporary Australian sources are the *Australia Act 1986* (Cth) and the *Statute of Westminster* as adopted by the *Statute of Westminster Adoption Act 1942* (Cth), which are entrenched 'as elements in Australia's *grundnorm*':[147] they are 'constitutional instruments … that inform the scope of Australian governmental power' which are 'intimately linked to the *Constitution*'.[148]

2 *The Boughey–Crawford Account*

According to Boughey and Crawford, 'the distinction between jurisdictional and non-jurisdictional errors of law … rests upon the principle of parliamentary supremacy'.[149] It 'is a device for distinguishing between what Parliament has authorised and what Parliament has not':[150] '[a] jurisdictional error is one that takes a decision-maker beyond the boundaries of the power conferred by Parliament'.[151] Hence, the distinction is a manifestation of the working constitutional relationship between the parliament, the courts and the executive:

> Parliament remains ultimately responsible for defining the scope of the powers it grants to the executive — whether expressly or by acquiescing to the application of common law constraints by legislating with presumed knowledge of such constraints — and courts must respect the clearly articulated wishes of the Parliament in this respect. In short, a court would act unconstitutionally, if it were to invalidate an exercise of statutory executive power that Parliament has validly authorised.[152]

Furthermore:

> [The] *Constitution* … does not impose significant constraints on the ability of state or federal Parliaments to define the scope of executive power as they think fit. … [N]one of the substantive principles of judicial review that constrain

146 (2003) 217 CLR 545, 570 [66] (Gleeson CJ, Gummow, Hayne and Heydon JJ).

147 Dan Meagher et al, *Hanks Australian Constitutional Law: Materials and Commentary* (LexisNexis Butterworths, 10th ed, 2016) 36.

148 Crawford (n 15) 169.

149 Boughey and Crawford (n 5) 416.

150 Ibid 413. Cf Leeming, *Authority to Decide* (n 17) 65, 82–3.

151 Boughey and Crawford (n 5) 418.

152 Ibid 415. Cf Leeming, *Authority to Decide* (n 17) 51.

> statutory executive power are said to have constitutional force. … [T]he High Court has not yet identified any limitations on statutory executive power that are necessarily essential to validity — or indeed, that federal or state Parliaments cannot remove altogether.[153]

3 *Why, on the Boughey–Crawford Account, the* Kirk *Implication Is Confined to Jurisdictional Error*

The *Kirk* implication is confined to jurisdictional error, because, on the Boughey–Crawford account, if the *Kirk* implication were to extend to non-jurisdictional error, the *CLVA* norm would be transgressed. In order to explain why, one must understand the significance of non-jurisdictional error.

Since a non-jurisdictional error is an error which the decision-maker is authorised by statute to make, a decision infected by non-jurisdictional error has full legal effect *unless and until* it is *set aside* by certiorari on the basis that the non-jurisdictional error is manifest on the face of the record.[154] This is illustrated by the writ of mandamus. While mandamus will issue *without* certiorari where a decision is infected by jurisdictional error (because the relevant duty is constructively unfulfilled), mandamus will only issue *with* certiorari where the record of the decision manifests non-jurisdictional error only: the relevant duty has been fulfilled *until certiorari quashes the decision*. And in the state jurisdiction (if not, arguably, in the Commonwealth jurisdiction) the writ (or an order 'in the nature of certiorari')[155] sought in the state Supreme Courts remains, in essence, a *prerogative* writ. Hence the remedy of certiorari for non-jurisdictional error on the face of the record is fundamentally a *supervening exercise of judicial power under the common law* which removes the legal effect of a valid decision; that is, a decision which the decision-maker had the authority *under statute* to make.

This supervening exercise of judicial power does not violate the *CLVA* norm because the *CLVA* norm is only a norm of conduct in relation to the *invalidation*, or setting aside ('shall be void or inoperative') of legislation. However, if the High Court were to insert a broader structural *Kirk*-type implication into the *Constitution* to invalidate a weak state privative clause, it would transgress the *CLVA* norm. Akin to Boothbyism, it would arrogate to itself the power to *invalidate a legislative provision* on the basis that it was repugnant to the

[153] Boughey and Crawford (n 5) 414. See also Kirk, 'The Entrenched Minimum Provision of Judicial Review' (n 2) 66–8; *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 142 [166] (Hayne J).

[154] *Craig v South Australia* (1995) 184 CLR 163, 175–6, 179–80 (Brennan, Deane, Toohey, Gaudron and McHugh JJ).

[155] See, eg, *Supreme Court (General Civil Procedure) Rules 2015* (Vic) r 56.01(1).

common law, that is, that the weak state privative clause prevented *supervening* judicial review *under the common law* to set aside a decision which is valid and which *the relevant state Parliament had authorised the decision-maker to make*. This would disrespect 'the legislative supremacy of Parliament, and its power to define the scope of statutory power as it thinks fit'[156] which is based on '[t]he premise … that Parliament can restrict or even preclude review for non-jurisdictional legal errors'.[157]

4 *An Anticipated Objection to the Proposed Solution: Implied Repeal*

Lastly, this Part considers an objection to the proposed solution based on the doctrine of implied repeal, that is, that later Acts may *pro tanto* repeal, displace, supersede, alter or derogate from earlier inconsistent Acts by implication, as encapsulated in the maxim *leges posteriores priores contrarias abrogant*.[158] The objection can be expressed thus:

1 The implication that state privative clauses cannot remove the jurisdiction of the state Supreme Courts to review the decisions of Lower State Courts and state executive decision-makers on grounds of non-jurisdictional error, as well as jurisdictional error, arises, as a matter of practical necessity from the structure of ch III of the *Constitution*.

2 The *Constitution* was enacted later than the *CLVA*.

3 Therefore, consistently with the doctrine of implied repeal, the posited insertion of a structural implication into s 73 was not regulated by the *CLVA* norm as the proposed solution erroneously maintains.

This Part argues that the implied repeal objection fails because step (3) above is false. It is false because the doctrine of implied repeal did not apply to subordinate the *CLVA* norm to ch III of the *Constitution* at Federation, and hence does not operate to subordinate the *CLVA* norm as now stipulated in s 3(2) of the *Australia Acts* in relation to state legislation and s 2(2) of the *Statute of Westminster* in relation to Commonwealth legislation.

First, Australian courts after Federation assumed that the *Constitution* did not derogate from, displace or supersede s 3 of the *CLVA*. There is no record of any Australian court or the Privy Council holding that a state or federal

156 Boughey and Crawford (n 5) 414.

157 Aronson, Groves and Weeks (n 5) 21.

158 See Dennis C Pearce and Robert S Geddes, *Statutory Interpretation in Australia* (LexisNexis Butterworths, 8th ed, 2014) 328; *Saraswati v The Queen* (1991) 172 CLR 1, 17 (Gaudron J) ('*Saraswati*').

legislative provision was invalid because it was repugnant to the common law.[159]

Second, the notion that ch III was not regulated by s 3 of the *CLVA* at Federation is inconsistent with the jurisprudence of the High Court which clearly held that the provisions of the *Constitution* conferring plenary legislative power on the Commonwealth with respect to an array of matters, most notably under s 51, did not displace or supersede the restrictions imposed by s 2 of the *CLVA* (that is, that a Commonwealth law was invalid if it was repugnant to the provisions of an Act of the Imperial Parliament, or regulations made thereunder, extending to Australia).[160] If s 2 of the *CLVA* applied to the exercise of Commonwealth legislative powers, notwithstanding their plenary character, then, by analogy, s 3 of the *CLVA* should apply to the exercise of the Commonwealth judicial power, particularly as s 2 ('Colonial laws, when void for repugnancy') and s 3 ('Colonial laws, when not void for repugnancy') are complementary. Indeed, if the *CLVA* had not applied to the exercise of judicial power by the Commonwealth under s 71 of the *Constitution*, the framers' grand aspiration to expand the powers of Australian self-government would have been hampered, as 'the intended boon of self-government'[161] had been hampered in South Australia by Boothby J. Only statute law, not the common law, could be truly Australian until the High Court disavowed the binding authority of decisions of the House of Lords in 1963 and the Privy Council in 1978.[162]

Third, courts do not readily accept that a later Act has displaced an earlier Act.[163] It is 'a large step'[164] and a 'comparatively rare phenomenon'.[165] Accordingly, the person asserting that the earlier provision has been impliedly repealed bears a 'heavy onus'[166] to rebut a presumption *against* the application of the doctrine, which is a corollary of the principle 'that the text of a statute is ordinarily to be read as speaking continuously in the present'[167] — a principle which finds specific textual reinforcement in s 3 of the *CLVA* itself ('No colonial

[159] See Crawford (n 15) 159, 163–9.

[160] See Stellios, *Zines* (n 2) 463–4. See, eg, *Union Steamship* (n 134).

[161] Campbell (n 126) 174.

[162] *Parker v The Queen* (1963) 111 CLR 610, see especially at 632 (Dixon CJ); *Viro v The Queen* (1978) 141 CLR 88.

[163] Pearce and Geddes (n 158) 328.

[164] *Minister for Immigration and Multicultural and Indigenous Affairs v Nystrom* (2006) 228 CLR 566, 585 [51] (Gummow and Hayne JJ) ('*Nystrom*').

[165] *Butler v A-G (Vic)* (1961) 106 CLR 268, 275 (Fullagar J) ('*Butler*'). See also *McNeill v The Queen* (2008) 168 FCR 198, 210 [63] (Black CJ, Lander and Besanko JJ) ('*McNeill*'); *Dossett v TKJ Nominees Pty Ltd* (2003) 218 CLR 1, 14 [43] (Gummow, Hayne and Heydon JJ) ('*Dossett*').

[166] Pearce and Geddes (n 158) 330.

[167] *Commissioner of Police (NSW) v Eaton* (2013) 252 CLR 1, 32 [97] (Gageler J) ('*Eaton*').

law *shall be* …').[168] This presumption becomes even stronger where the two Acts emanate from the same source,[169] as is the case with the *CLVA* and the *Constitution*: 'it must be shown that the legislature did intend to contradict itself'.[170]

Fourth, the doctrine applies only if its application is intended by the legislature that enacted the later Act,[171] and, consistently with the presumption against implied repeal, one of the 'cardinal considerations'[172] is that '[t]here must be very strong grounds to support [the] implication' that the legislature intended to displace the 'general presumption that the legislature intended that both provisions should operate and that, to the extent that they would otherwise overlap, one should be read as subject to the other'.[173] Here, there is compelling extrinsic evidence that the Imperial Parliament did *not* intend that the *Constitution* 'stand in the place of'[174] the *CLVA*. Rather, as mentioned earlier, the Imperial Parliament was concerned to ensure that the *CLVA* continued to apply to the *Constitution* upon its commencement, and the Colonial Office intended to include an express provision to that effect in the *Constitution Act*, but was persuaded not to because the continued application of the *CLVA* to the *Constitution* was considered to be so obvious that it did not need to be expressly stated.[175]

Fifth, '[t]he doctrine [of implied repeal] requires that actual contrariety be clearly apparent'.[176] As the High Court explicated in *Rose v Hvric* ('*Rose*') in 1963:

> [E]ven before *Dr Foster's Case* [in 1614] it was settled law that a later affirmative enactment does not repeal an earlier affirmative enactment *unless the words of the later are 'such as by their necessity to import a contradiction'*. … There must be *in* the later provision *an actual negation* of the earlier. … there must be a negation

168 *CLVA* (n 140) s 3 (emphasis added). See also *Union Steamship* (n 134) 141 (Knox CJ), 152 (Isaacs J), 153–4 (Higgins J), 164 (Starke J).

169 See *Butler* (n 165) 276 (Fullagar J); *Eaton* (n 167) 33 [98].

170 Pearce and Geddes (n 158) 330.

171 *Mitchell v Scales* (1907) 5 CLR 405, 417 (Isaacs J) ('*Mitchell*'); *R v Chalak* (1983) 1 NSWLR 282, 284 (Street CJ); *Saraswati* (n 158) 17 (Gaudron J); *Butler* (n 165) 275–6. See also *Union Steamship* (n 134) 150 (Isaacs J), 156 (Higgins J).

172 *Ferdinands v Commissioner for Public Employment* (2006) 225 CLR 130, 138 [18] (Gummow and Hayne JJ).

173 *Saraswati* (n 158) 17 (Gaudron J). See also *Eaton* (n 167) 33 [98]; *McNeill* (n 165) 210 [64] (Black CJ, Lander and Besanko JJ).

174 *Mitchell* (n 171) 417 (Isaacs J).

175 See Quick and Garran (n 143) 229–30, 232, 235–6, 241–3; Stellios, *Zines* (n 2) 463.

176 *Nystrom* (n 164) 585 [48] (Gummow and Hayne JJ). See also *Butler* (n 165) 275; *Dossett* (n 165) 14 [43] (Gummow, Hayne and Heydon JJ).

> *as a matter of meaning*. Lord Chief Baron Comyns expressed the point by saying that affirmative words do not take away a former statute but where they '*in sense contain a negative*'.[177]

However, as has been set out in the second and third assumptions identified above in Part I(A), this article does not argue that the *Kirk* implication is a genuine implication, that is, that the implication is part of the inherent, implied meaning, or 'sense', of the words of s 73.[178] With reference to the quoted passage in *Rose*, the 'words' of ch III do not necessarily 'import a contradiction' with s 3 of the *CLVA*, and there is no 'actual negation' of s 3 of the *CLVA* 'in' ch III as a 'matter of meaning' or 'in sense'.[179] Rather, this article argues that the implycation is a *structural* implication *which can be justifiably inserted into ch III by judges exercising judicial power*, as conferred on them by s 71 of the *Constitution*, and as regulated by the *CLVA* norm.

Sixth, and again consistently with the strength of the presumption against implied repeal, 'the contrariety between the earlier and later enactments must be such that "effect *cannot* be given to both at the same time"'.[180] As stated by Barton J in 1908:

> 'The Court must … be satisfied that the two enactments are so inconsistent or repugnant that they cannot stand together before they can from the language of the later imply the repeal of an express prior enactment … .' If, therefore, there is fairly open on the words of the later Act, a construction by adopting which the earlier Act is to be saved from repeal, that construction is to be adopted.[181]

The proposed solution establishes that it *is* possible to give 'a harmonious legal meaning to the provisions claimed to conflict',[182] and 'sensible concurrent operation'[183] to *both* s 3 of the *CLVA* and s 73 of the *Constitution*; and such a

[177] (1963) 108 CLR 353, 360 (Kitto, Taylor and Owen JJ) (emphasis added) (citations omitted) ('*Rose*'). See also *Goodwin v Phillips* (1908) 7 CLR 1, 10 (Barton J) ('*Goodwin*'); *Hack v Minister for Lands (NSW)* (1905) 3 CLR 10, 24 (O'Connor J) ('*Hack*'); *Union Steamship* (n 134) 156.

[178] See generally Goldsworthy, 'Implications' (n 31) 162–84; Goldsworthy, 'Implications Revisited' (n 31).

[179] *Rose* (n 177) 360 (Kitto, Taylor and Owen JJ).

[180] Ibid (emphasis added) (citations omitted). See also *McNeill* (n 165) 210 [63] (Black CJ, Lander and Besanko J); *Union Steamship* (n 134) 149–50 (Isaacs J), 156 (Higgins J).

[181] *Goodwin* (n 177) 10, quoting William Feilden Craies, *A Treatise on Statute Law* (Stevens & Haynes, 1907) 303. See also *Hack* (n 177) 23–4.

[182] *Construction, Forestry, Mining and Energy Union v Director, Fair Work Building Industry Inspectorate [No 2]* (2013) 209 FCR 464, 484 [61] (North, Logan and Robertson JJ), quoting Mark Leeming, *Resolving Conflicts of Laws* (Federation Press, 2011) 45.

[183] *Nystrom* (n 164) 585 [48] (Gummow and Hayne JJ). See also *Saraswati* (n 158) 17–18 (Gaudron J).

construction is 'fairly open on the words'[184] of ch III. The *Kirk* structural constitutional implication invalidates state privative clauses which purport to oust state Supreme Court judicial review on the grounds of jurisdictional error in order to protect the integrity of the High Court's appellate jurisdiction under s 73 of the *Constitution*, while simultaneously adhering to the *CLVA* norm by limiting the implication by reference to jurisdictional error only.

V Conclusion

It could be argued that the *Kirk* doctrine is a settled, predictable and desirable development in Australian public law and further theorising about that development is esoteric, tiresome and unnecessary. Such criticism, however, would fail fully to grasp the doctrine's constitutional dimensions. Given that Australia has a written constitution, it is impossible to constitutionalise Australian administrative law without constitutional interpretation; given Australia's *entrenched* written constitution, constitutionalisation and constitutional interpretation are deeply and densely entangled.

This article argues that the *Kirk* doctrine can be recast in conventional interpretative terms constrained by constitutional text and structure and positive law, without reference to the notion that Australian constitutionalism embraces an extraneous body of normative principles which have direct legal force. It also grounds the subordination of common law to statute in the Australian constitutional order, and explains how that subordination limits the *Kirk* implication to jurisdictional error only. It thus reinforces the orthodox principle that, ultimately, the Australian Parliaments, including the state Parliaments, can control what is, and is not, jurisdictional error when powers are conferred by statute.[185]

[184] *Goodwin* (n 177) 10 (Barton J).

[185] Aronson, Groves and Weeks (n 5) 1056; Boughey and Crawford (n 5) 416–17. See also Crawford (n 15) 125–6, 131, 201. See generally Stephen Gageler, 'The Legitimate Scope of Judicial Review' (2001) 21 *Australian Bar Review* 279, 284–8.