‘Liberty’, Judicial Independence, and the Separation of Judicial Power Doctrine: A Uniquely Australian Approach

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

Brennan CJ, Dawson, Toohey, McHugh, Gummow JJ articulating ‘the Wilson proposition’ in *Wilson v Minister for Aboriginal and Torres Strait Island Affairs*¹

Abstract

The nature of the Australian *Constitution* means that it provides only for a separation of powers between the legislature and executive working as one in the Westminster Parliament and the unelected judiciary. This paper considers whether this doctrine of separation of (judicial) powers achieves, as argued by the High Court, the ‘constitutional objectives’ of an independent judiciary and, in consequence, ‘the guarantee of liberty’. After analysing the nuances of political terms such as “liberty” and the dynamic rationales of Australian federalism, this paper submits that the doctrine does advance a practical degree of judicial independence which facilitates a species of individual liberty under the Constitution. However the paper concludes by critiquing recent High Court decisions that have increasingly curtailed this ‘liberty’ through narrow judicial methodology, weakened notions of ‘judicial power’ and overt deference to parliament.

¹ (1996) 189 CLR 1, 11 (‘Wilson’).

Introduction

This paper submits that the separation of judicial power principles advance a practical degree of judicial independence which facilitates a limited but increasingly curtailed 'guarantee' of republican 'liberty' for individuals under the Australian Constitution.²

Section I will articulate the Constitution's 'liberty' to clarify and focus the analysis. Section II will demonstrate positivist-textual constitutionalism buttressed by political philosophy and historical practice as the bases of the Wilson proposition. Section III will detail the prevailing institutional, legal and socio-political factors that limit judicial independence and the scope of republican liberalism for individuals, despite the principled judicial separation doctrine.

I – Ideology and Wilson

Ideological ambiguity

Being a political ideology, 'liberty' is inevitably ambiguous and amorphous. Conceptions of 'liberty' vary in their appreciation and justification of public power,³ while still maintaining consistency with the separation of powers doctrine. 'Liberty' can also be achieved in varied means: federated states pursue institutional 'liberty' through jurisdictional allocations of public power; functional 'liberty' can prosper in the individual endowment of rights/freedoms.

This paper considers the *Wilson* proposition in the context of institutional 'liberty' and specifically its understanding in the form of three alternatives. The first, 'negative liberalism', aims to minimise the state's interference with individual liberty by impeding the exercise of government power.⁴ A developed model of the first, 'republican liberalism', disperses government authority to minimise arbitrary exercises of power.⁵ The third vision, 'efficient liberalism', assigns the state's various powers to those most skilled in its exercise.⁶

2 *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 ('*Alexander's Case*'); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*').

3 N.W. Barber, 'Prelude to the Separation of Powers' (2001) 60(1) *Cambridge Law Journal* 59; James Stellios, *Federal Judicial System* (LexisNexis Butterworths, 2009); I. Berlin, *Liberty* (Oxford University Press, 2002) and P. Pettitt, *Republicanism: a Theory of Freedom and Government* (Clarendon Press, 1997) cited in Adam Tomkins, *Our Republican Constitution* (Hart Publishing, 2005), 49.

4 Barber, above n 3, 60–61.

5 James Stellios, *Federal Judicial System* (LexisNexis Butterworths, 2009), 62, citing Pettit (1999) 177.

6 Barber, above n 4, 65.

In Australian constitutionalism the 'guarantee' is most aptly understood as one of republican liberalism, supplemented by efficient liberalism.⁷ The Constitution limits exercises of power by diffusing power amongst jurisdictions and separate branches of federal government. It approves federal legislative power pursuant solely to explicit 'heads of power,' 'subject to [the] Constitution'. Judicial review of public power is 'axiomatic'.⁸ The Constitution strives for efficient liberalism also by specialising the judicial function to federal courts.⁹

Notably, judicial separation *advances* the 'two constitutional objectives' by supplementing other institutional mechanisms including, *inter alia*, responsible government in the House of Representatives, the Senate and Senate Committees.¹⁰

Wilson's 'liberty'

As the illuminating rationale of judicial separation, the ends of republican liberalism have changed paradigms since 1901. At Federation, the Constitution brought together six colonies by placing heavy emphasis on the security of each jurisdiction's 'liberty'.¹¹ Following WWII, international and domestic efforts to protect individual 'liberty' coalesced around the human rights movement. Municipal antipodean jurisprudence conceived of this movement as the confinement of an individual's liberty solely by law before an independent judiciary.¹² Where it had previously protected institutional federalism, republican liberalism now operated functionally to protect the people of those States.¹³ As similar international jurisdictions enacted forms of entrenched human rights,¹⁴ the Chapter III implied rights jurisprudence portended to similar effect in the mid-1990s.¹⁵ The *Wilson* proposition in its reference to 'liberty' is thus correctly contextualised as emphasising the attainment of *individual* freedoms through republican liberalism.¹⁶

7 Fiona Wheeler, *The Separation of Federal Judicial Power: a purposive analysis* (PhD Thesis, The Australian National University, 1999) 74; Russell Blackford, 'Judicial Power, Political Liberty and the Post-industrial State' (1997) 71(4) *Australian Law Journal* 267, 269.

8 *Australian Communist Party v Commonwealth* (1950) 83 CLR 1, 263 (Fullagar J).

9 *Re Judiciary Act 1903–1920 & In re Navigation Act 1912–1920* (1921) 29 CLR 257; see Barber, above n 3, 63.

10 See, for example, Senate Standing Committees on Finance and Public Administration, Parliament of Australia, *National Health Reform Amendment (Administrator and National Health Funding Body) Bill 2012* (2012); Senate Committees, Parliament of Australia, *Joint Select Committee on Gambling Reform* (2012).

11 Cheryl Saunders, 'Protecting Rights in Common Law Constitutional System: A Framework for a Comparative Study' (2002) 33 *Victoria University Wellington Law Review* 63, 80.

12 Mary Gaudron, 'Some Reflections on the Boilermakers Case' (1995) 37 *Journal of Industrial Relations* 306, 309; *R v Davison* (1954) 90 CLR 353 (Kitto J); *R v Quinn* (1977) 138 CLR 1, 11 (Jacobs J); see also *Liverside v Anderson* [1941] AC 206, 261 (Wright LJ) as an example of similar UK development.

13 *Leeth v Commonwealth* (1992) 174 CLR 455, 484 (Deane and Toohey JJ); see also Christine Parker, 'Protection of Judicial Process as an Implied Constitutional Principle' (1994) 16(2) *Adelaide Law Review* 341.

14 *Constitution of the Republic of South Africa Act 1996* (South Africa), ch 2; *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*'); *Human Rights Act 1988* (UK); *New Zealand Bill of Rights Act 1990* (NZ).

15 Leslie Zines, 'A Judicial Created Bill of Rights?' (1994) 16 *Sydney Law Review* 166.

16 George Winterton, 'The Separation of Judicial Power as an Implied Bill of Rights' in Lindell (ed), *Future Directions in Australian Constitutional Law* (Federation Press, 1994), 185–208; Leslie Zines, above n 12; Patrick

II – Legalism and philosophy

Positivist-textual constitutionalism

The ‘mutated’¹⁷ Australian separation of powers flows from textual and structural implications in a written constitution.¹⁸ The separation of *judicial* powers doctrine is also elucidated through this method of positivist-textual constitutionalism, or legal constitutionalism.¹⁹ Its two ‘fundamental’²⁰ principles quarantine Commonwealth ‘judicial power’ to s71 courts and exclusively confine exercises of judicial power to them, alongside non-exclusive incidental non-judicial power.²¹

Chapter III courts are exclusively charged with the responsibility of determining the parties’ pre-existing (statutory, common law or constitutional) rights and liabilities and exercising judicial review.²² Republican liberalism is achieved through this positivist-textual reasoning by limiting the exercise of public power based on the legal scrutiny by an independent judiciary.²³ This analysis has been repeatedly upheld despite weaknesses in the textual support for judicial review and succinct criticism of these conclusions as being grounded in merely a “draftsman’s neat arrangement”.²⁴

Incongruence of ideas

Judicial independence is the ‘bulwark of the Constitution’²⁵ but the judicial separation doctrine does not necessarily behove its existence. The former aims for the impartial administration of justice; the latter insulates judicial function from

Keyzer, ‘Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?’ (2008) 30 *Sydney Law Review* 100; Helen Roberts, ‘Retrospective criminal law and the separation of judicial power’ (1997) 8(3) *Public Law Review* 170.

17 Haigh Patapan, ‘Separation of Powers in Australia’ (1999) 34(3) *Australian Journal of Political Science* 391, 391.

18 *Constitution of Australia Constitution Act*, Chapter I is headed ‘The Parliament’ and vests legislative power of the Commonwealth in a ‘Federal Parliament (s. 1). Chapter II is headed ‘The Executive Government’ and vests the ‘executive power of the Commonwealth’ in ‘the Queen’, ‘exercisable by the Governor General as the Queen’s representative’ (s. 61). Chapter III is headed ‘The Judicature’ and vests the judicial power of the Commonwealth in a ‘Federal Supreme Court’ (s71); see *United States Constitution* art I, s1; art II, s1, 3; art III.

19 Adam Tomkins, above n 3, 10.

20 *New South Wales v Commonwealth* (1915) 20 CLR 54, 88 (Isaacs J).

21 *Alexander’s Case* (1918) 25 CLR 434; *Boilermakers* (1956) 94 CLR 254.

22 See *Huddart, Parker and Co. Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 347 (Griffith CJ); *Wheeler*, above n 4, 174.

23 *Thomas v Mowbray* (2007) 237 ALR 194, 211 (Gummow and Crennan JJ). *Wheeler*, above n 4, 3.

24 Robert Garran, *Prosper the Commonwealth* (Angus & Robertson, 1968) 194, cited in H.P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003).

25 *Wheeler*, ‘Original Intent and the Doctrine of Separation of Powers in Australia’ (1996) 7 *Public Law Review* 96, 105, citing *Official Record of the Debates of the Australasian Federal Convention Melbourne 1898* (Legal Books, 1986), *Cons Debs*, Adelaide, 1897, Barton, 952.

other government branches. The High Court has rationalised this incongruence by emphasising that the separation of powers concerns both the allocation and exercise of government functions which, in Chapter III, implies that judicial power be exercised independently and impartially.²⁶ Therefore, while the two ideas are not 'coterminous',²⁷ their constitutional intersection allows judicial independence to illuminate the objects and purpose of the separation doctrine.

Multiple political philosophies

This illustration belies the logical weaknesses in the flow of abstract ideas and the Court's reliance on normative political ideology to smooth such disruptions. Consistent implementation of these ideologies, however, presents further challenges; for example, the separation of powers is itself vitiated by delegated legislation in a Westminster Parliament. Recognising responsible government in the British-Australian parliamentary tradition and re-doubling focus on judicial separation has upheld this normative inconsistency.²⁸ Holistically, this circularity of logic demonstrates that: i) positivist-textual constitutionalism, normative political philosophies and historical tradition have variously informed justifications of the judicial separation principles; and ii) the judicial separation doctrine exhibits significant variation in theoretical approaches, including, *inter alia*, federalism and checks and balances.²⁹ As illustrated above however, many species of ideology can be achieved through republican liberalism. The restraining of public power by an independent judiciary can achieve the terms of the federal compact, guard against the executive 'over-balancing' the legislature and, as demonstrated below, also protect individual freedoms. The ability of republican liberalism to achieve this bewildering array of constitutive ambitions consolidates its aptness as the correct conception of 'liberty' in Australian constitutionalism.

Grounding 'liberty'

The philosophical fathers of the various Anglo-sphere constitutions emphasised the need to guarantee individual liberty, but with crucially different foci. The *Federalist Papers'* authors focussed on human fallibility, which necessitated the political solution of dispersing power in a limited constitution to create checks

26 *Grollo v Palmer* (1995) 184 CLR 348 (Gummow J); *South Australia v Totani* (2010) 242 CLR 1; *Thomas v Mowbray* (2007) 237 ALR 194, 211 (Gummow and Crennan JJ).

27 Wheeler, above n 4, 105.

28 *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254; *Dignan v Australian Steamships Pty Ltd* (1931) 45 CLR 188; Gibbs, Harry, 'The Separation of Powers – A Comparison' (1987) 17 *Federal Law Review* 160, 162.

29 *Wilson* (1996) CLR 1, 10 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ): commenting on checks and balances as the key rationale; see also *Alexander's Case* (1918) 25 CLR 434 (Rich, Isaacs JJ) noting states' security and prevention of Commonwealth interference.

and balances that were regulated by an independent judiciary functioning in a strict separation of powers.³⁰ In contrast, Blackstone conceived of a subject's 'life, liberty and property' being protected by an independent judiciary extolling of the common law in an unwritten British constitution.³¹ Delegates to the conferences debating the Australian 'Westminster'³² Constitution did not appreciate these nuances of political philosophy,³³ being instead focussed simply on the ends achieved by an independent and impartial judiciary.³⁴

The Constitution's amalgamated founding and opaque philosophy thus empowered the High Court with the responsibility of articulating this document's functional operation.³⁵ Its elucidation has struggled to win persuasive appeal, however, due to a reticence in choosing and communicating the philosophical choices that buttress the primary positivist-textual constitutional methodology.³⁶ This paper submits that despite this ambiguity, the political philosophy of the *Federalist*, rather than Blackstone, is more consistently and convincingly reflected in High Court jurisprudence. The Australian separation of powers limits public power in a written, federated constitution and emboldens the judicature with judicial review. Despite a pragmatic focus on judicial separation in light of its Westminster heritage, the Court has shied away from Blackstonian conceptions of 'judicial power' to enliven the common law. It is this constitutional paradigm that informs the scope for protection of individual freedoms through republican liberalism in Australia, which is analysed below.

III – 'Guarantees' and compromises

A limited attainment of individual freedoms through republican liberalism, facilitated by judicial independence, is possible. The *scope*, however, for republican liberalism to achieve this outcome is increasingly curtailed in Australian constitutionalism, alongside a lowered standard of independence.

30 Patapan, above n 14, 393.

31 Ibid, 394.

32 Elaine Thompson, 'The Constitution and the Australian System of Limited Government, Responsible Government and Representative Democracy' (2001) 24(3) *University of New South Wales Law Journal* 657.

33 Patapan, above n 14, 397.

34 See above: 'Wilson's 'liberty''.

35 Patapan, above n 14, 397.

36 Wheeler, above n 22, 104.

Delivering the 'guarantee'

As demonstrated above, public power can only be exercised subject to the Constitution's diffusions of power.³⁷ The specialised and independent constitutional interpreter advances republican liberalism by ensuring individuals' freedom from unlawful federal³⁸ and State legislative power³⁹ within the federal diffusion of power.⁴⁰

The conceptions of triadic government power also hold relevance for individual freedoms. Legislative Bills of Attainder and orders against release from detention are invalid as usurpations of judicial power.⁴¹ 'Judicial power' jurisprudence endows individuals with rights of procedural due process.⁴² As beneficiaries of a developing conception of 'judicial standard',⁴³ citizens can only be subject to Commonwealth 'judicial power' by s71 courts immune from political interference and governed by judicial process.⁴⁴

Positivist-textual constitutionalism has also privileged Australian citizenship⁴⁵ and implied political communication freedoms.⁴⁶ The strict interpretative methodology also regulates exercises of public power through numerous other provisions: s80; s116; s117 and s75(v).⁴⁷ With appeals from State courts to the High Court, these liberties are nationalised through one Australian 'common law'.⁴⁸

Therefore the *Federalist* desire for courts to act as 'bulwarks of a limited Constitution against legislative encroachment'⁴⁹ is meaningfully achieved in the individual paradigm. Although Tomkins persuasively notes British

37 *Constitution of Australian Constitution Act* (Imp) 1900, covering clause 5: Constitution is fundamental law so all public action must comply with it.

38 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 – invalidation of legislation disbanding Communist Party based on key element of federal division of power; *Kartinyeri v Commonwealth* (1998) 195 CLR 337, 378 – concerning 'race' power in s51.26; *Commonwealth v Tasmania* (1983) 158 CLR 1 – s51.31; Saunders, above n 8, 83.

39 *Davis v Commonwealth* (1988) 166 CLR 79; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

40 *Dickson v The Queen* (2010) 241 CLR 491; *Momcilovic v The Queen* [2011] HCA 34.

41 *Nicholas v R* (1998) 193 CLR 173; *Liyange v R* [1965] UKPC 1.

42 *Leeth v Commonwealth* (1992) 174 CLR 455, 470 (Mason CJ, Dawson and McHugh JJ).

43 *Thomas v Mowbray* (2007) 233 CLR 307.

44 *Street v Queensland Bar Association* (1989) 168 CLR 461, 521 (Deane J); Denise Meyerson, 'Rethinking the constitutionality of delegated legislation' (2003) 11 *Australian Journal of Administrative Law* 45, 53.

45 *Constitution of Australian Constitution Act*, s 44. See *Sykes v Cleary* (1992) 176 CLR 77; *Sue v Hill*.

46 Sections s 7 and s 24, *Constitution of Australian Constitution Act*; e.g. *McGinty v Western Australia* (1996) 186 CLR 140; *Roach v The Queen* (2007) 233 CLR 162; *Rowe & Another v Electoral Commissioner & Another* (2010) 243 CLR 1.

47 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, [342] (Dixon J); James Stellios, 'Reconceiving the separation of judicial power' (2011) 22 *Public Law Review* 113.

48 *Constitution of Australian Constitution Act*, s73.

49 Alexander Hamilton, *Federalist No 78*, 1788.

Parliamentary means to these outcomes, the Australian Constitution intends and so endows the courts with tools to better perform this function than their English counterparts.⁵⁰

‘Guarantee’ compromised

While a society governed according to law is a firm guarantee of individual security,⁵¹ these constitutional protections are patchy and arbitrary.⁵² The limited scope of individualised constitutional freedoms is explained by the intertwined effects of a philosophical reliance on parliamentary sovereignty to protect individual rights,⁵³ ideologically vitiating legislative rights entrenchment,⁵⁴ and the High Court’s conservative jurisprudence. The Court has hollowed-out the scope for individual freedoms in this paradigm through: i) narrow interpretative and conservative judicial methodology; ii) weakened ‘judicial power’ concepts; and iii) deference to Parliament, particularly during the age of ‘securitisation’.

Legal constitutionalism is the Court’s basal interpretative methodology.⁵⁵ The resulting strict constitutional interpretation⁵⁶ is divorced of the rich common law history upon which the ‘Washminster’ Constitution rests.⁵⁷ Common law constitutionalism, which urges interpretative outcomes based on deeper values of constitutionalism, has enriched British jurisprudence but received little notice in Australia. Setting aside such substantive ‘rule of law’ doctrines,⁵⁸ even the basic common law ‘principle of legality’ has only received sporadic support.⁵⁹ This demonstrates a conservative rejection of a rich common law and the suffocating influence of narrow positivist-textual legalism in Australian constitutional jurisprudence.

50 Cf. Tomkins, above n 4.

51 George Winterton in ‘The Separation of Judicial Power as an Implied Bill of Rights’ in Lindell (ed), *Future Direction in Australian Constitutional Law* (Federation Press, Sydney, 1994), p 188 quoting Harrison Moore, *The constitution of the commonwealth of Australia* (2nd ed, Maxwell, Melbourne, 1910), p 22; see also Huddart, *Parker and Co. Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 383–383 (Isaacs J)

52 Saunders, above n 8, 88; Anika Gauja and Katherine Gelber, ‘High Court Review 2010: the resurgence of rights?’ 46(4) *Australian Journal of Political Science* 683.

53 E.g. *Racial Discrimination Act 1975* (Cth); *Sex Discrimination Act 1984* (Cth); *Human Rights (Sexual Conduct) Act 1994* (Cth); *Disability Discrimination Act 1992* (Cth).

54 Rt Hon Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell Australia, 1967) 54 cited by Saunders, above n 8, 97.

55 Paula Fairall and Wendy Lacy, ‘Preventative detention and control orders under federal law: the case for a Bill of Rights’ (2007) 31 *Melbourne University Law Review* 1072; Matthew Zagor, ‘Uncertainty and Exclusion: Detention of Aliens and the High Court’ (2006) 34(1) *Federal Law Review* 127.

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

57 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1 (Dixon J).

58 Wheeler, above n 4, 108.

59 *Kruger v Commonwealth* (1997) 190 CLR 1; *Al-Kateb v Godwin* (2004) 219 CLR 562, 567 (Gleeson CJ), *Momcilovic v R* (2011) 280 ALR 221, [42] (French CJ); *Liverside v Anderson* [1941] AC 206 (Atkin LJ).

Moreover, 'judicial power' has been almost holistically rinsed of deeper value. Blackstonian 'judicial power' 'immunities'⁶⁰ that portended a 'great reservoir of rights'⁶¹ have been swept away,⁶² carrying with them even rights firmly rooted in the curial process and thus more amenable to legal constitutionalism.⁶³ The remaining vestiges of the Blackstonian jurisprudence are mere 'procedural rights'.⁶⁴ Furthermore, the modern regulatory state has also threatened to engulf the 'judicial power' concept by arguably scuppering the conclusive 'rights creation/determination' distinction.⁶⁵

The Court's attitude that Parliamentary will should prevail subject to explicit Constitutional limits⁶⁶ has morphed into a dangerous degree of deference that misplaces the substance of constitutional republican liberalism. This is especially so in the present age of 'securitisation', a term that describes the political act of successfully enacting extraordinary police measures in the defence of security.⁶⁷ The substantive expansion of particular 'heads of power'⁶⁸ and validation of retrospective deeming and criminal legislation⁶⁹ illustrates a misplaced responsibility, even within a framework explained by parliamentary sovereignty.⁷⁰

The abdication has only heightened in the years following the tumultuous events of September 11, 2001, which precipitated two global conflicts in the Middle East and created an increase in maritime asylum-seekers from these conflicts.⁷¹ 'Securitisation' was initially upheld in *Fardon* when the High Court validated state legislation that allowed the continued detention of persons who had completed prison sentences for serious sexual offences if there was an 'unacceptable risk' the prisoner might commit a serious sexual offence in the future. It was then gleefully re-legislated as detention orders in *Thomas* without the requirement of criminal conviction and absent procedural safeguards.⁷² Encouraged by this deference, State Parliaments legislated for control orders beyond 'anti-terror' purposes which have been substantially upheld.⁷³ As

60 *Chu Khen Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

61 Zines, above n 12, 176.

62 *Polyukhovich v Commonwealth* (1991) 172 CLR 501.

63 Privilege against self incrimination: *R v Sorby* (1983) 152 CLR 281.

64 *R v Quinn* (1977) 138 CLR – e.g. trial for determination of criminal guilt, also certain basic procedures of courts for judicial proceedings; *Dietrich v The Queen* (1992) 177 CLR 292.

65 *Huddart, Parker and Co. Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 347 (Griffith CJ).

66 Saunders, above n 4.

67 Barry Buzan, Ole Wæver, and Jaap de Wilde, *Security: A New Framework for Analysis* (Boulder, Lynne Rienner Publishers, 1998), p. 25.

68 *Commonwealth v Tasmania* (1983) 158 CLR 1 – 'external affairs'.

69 *Polyukhovich v Commonwealth* (1991) 172 CLR 501; *Kruger v Commonwealth* (1997) 190 CLR 1.

70 *Lane v Morrison* (2009) 239 CLR 230; *Re Macks; Ex parte Saint* (2000) 204 CLR 158.

71 *Refugees* (2011) *The Economist* <<http://www.economist.com/node/18867622>> at 27 September 2012.

72 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575; *Thomas v Mowbray* (2007) 233 CLR 307.

73 *Serious and Organised Crime (Control) Act 2008* (NSW), *Crimes (Criminal Organisations Control) Act 2009* (SA); see also *Criminal Organisational Act 2009* (Qld).

asylum-seeker numbers from war-torn countries increased, the Court backed away from precedent and continued its deference to Parliamentary purpose. This was acutely reflected in a series of cases in 2004–2005 where the High Court cast doubt on its previous authority. In *Lim*, the High Court had articulated a ‘constitutional immunity’ that prohibited the punitive detention of citizens by the executive.⁷⁴ More importantly, the Court identified limits on the non-punitive executive detention of aliens. However, in *Al-Kateb* and *Re Woolley* the Court’s validation of indefinite detention and the detention of children (respectively) was based not on the nature of the detention, but on its purpose.⁷⁵ Justice Gummow pointed out in a persuasive dissent that the legislation’s stated purpose of exclusion from the Australian community was punitive. His Honour noted that it also potentially breached the hallowed *Communist Party Case* principle that the Parliament cannot determine the very facts upon which the existence of its exercise of power depends.⁷⁶

The lower-level Federal Court followed this approach when it validated indefinite detention without conviction in the ‘Tampa-litigation.’ This was based on an expansive interpretation of the ‘aliens’ power and despite the Constitution’s republican foundations, broadened the executive power.⁷⁷ In uncertain times, parliamentary supremacy and legal constitutionalism have been heartily re-adopted amidst a ‘moral panic’ engulfing the judiciary.⁷⁸ Given this abnegation, these instances cumulatively give rise to uneasy questions about the threat to individual freedom from government rather than militants.⁷⁹

Fractured independence

Despite widespread dynamism in Australian society and government since Federation, federal judicial independence has remained a reassuring touchstone for the Court,⁸⁰ befitting extension to State courts exercising federal judicial power.⁸¹ That the strict judicial separation achieved judicial independence, with assistance from s73, is reflected in the attempts legislatures have made to

74 *Chu Khen Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1.

75 *Al-Kateb v Godwin* (2004) 219 CLR 562; *Re Woolley* (2004) 225 CLR 1.

76 *Al-Kateb v Godwin* (2004) 219 CLR 562, [272] (Gummow J) made in reference to Callinan J’s judgment.

77 *Ruddock v Vadarlis* (2001) 110 FCR 491.

78 *Thomas v Mowbray* (2007) 233 CLR 307, 329–330 (Hayne J).

79 Laura K Donohue, ‘In the Name of national Security: Counterterrorist Measures, 1960–2000’ (Discussion Paper 2001–6, John F Kennedy School of Government, Harvard University, 2001) 29, cited in Fairall and Lacy, above n 52, 1098.

80 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1; *Thomas v Mowbray* (2007) 233 CLR 307.

81 *Kable v Director of Public Prosecutions* (1996) 189 CLR 575; *Kirk v Industrial Relations Commission of New South Wales* (2010) 239 CLR 531; *International Finance Trust Co Ltd v NSW Crime Commission* (2010) 240 CLR 319.

share the cloak of legitimacy.⁸² In accommodation of these ungainly attempts, the doctrine has proven an uncompromising bar in the modern regulatory state which has led to its lowering through institutional and functional means.

Highlighting the artificiality of functionally dividing government powers,⁸³ the doctrine was relaxed for practical purposes with technical ideas such as double-function provisions and the 'chameleon doctrine', which allows the nature of the body exercising the power (e.g. court or tribunal) to define its definition as 'judicial' or 'non-judicial'.⁸⁴ These Kafkaesque devices question the very existence of the judicial power's core characteristic in their exercise by courts and threaten to swallow the distinctions between government powers. Further, public confidence in the judiciary was exploited by Parliament through the use of judges in executive functions in their personal capacity.⁸⁵ The cloak was shared and justified with an undefined and unclear test of 'incompatibility' that beguilingly distinguished between courts and their constituent members.⁸⁶ Although limits were duly recognised,⁸⁷ the valuable institutional separation had been tampered. Various other situations also demonstrated the flexibility of the judicial separation doctrine,⁸⁸ raising questions about whether judicial participation in executive function allowed courts to satisfactorily safeguard individuals against state abuses.⁸⁹

In the age of 'securitisation' this fear was realised through court involvement in the authorisation of control/detention orders. *Thomas v Mowbray* considered court-approved control orders for suspected terrorists.⁹⁰ Gleeson CJ's troubling remarks that the courts were better placed to determine detention than the executive risked the 'efficiency' rationale of the separation of powers.⁹¹ The detention order legislation called on courts to consider matters outside their competence (i.e. national security), apply arguably non-judicial standards and created issues of polycentricism, thus compromising, at least, the *appearance* of independence.⁹²

82 *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 9 (Brennan CJ, Dawson, Toohey, McHugh, Gummow JJ), quoting *Mistretta v United States* 488 US 361 at 404 (1989).

83 Anthony Mason, 'A New Perspective on the Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 5.

84 *Attorney-General (Cth) v Alinta Ltd* (2008) 233 CLR 542, 552 (Gummow J).

85 *Mistretta v United States* (1989) 488 V.S. 361, 407; cf. *Wilson* (1996) 189 CLR 1 (Kirby J); George Winterton, Judges as Royal Commissioners, (1987) 10 *University of New South Wales Law Journal* 108.

86 *Grollo v Palmer* (1995) 184 CLR 348 (McHugh J); Fiona Wheeler, 'The use of federal court judges to discharge executive functions' (1996) 82 *Canberra Bulletin of Public Administration* 10.

87 *Wilson v Minister for Aboriginal & Torres Strait Islander Affairs* (1996) 189 CLR 1.

88 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146; *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45.

89 Mason, above n 74, 7.

90 *Thomas v Mowbray* (2007) 233 CLR 307.

91 *Ibid* [19].

92 Meyerson, above n 41, 229.

Thankfully, the Court has returned to more principled grounds by invalidating state legislation that removed judicial discretion and disallowed the publication of reasons for control orders, respectively.⁹³ The impetus behind these developments in the recent line of cases in the *Kable* doctrine has been the subject of academic conjecture.⁹⁴ It is briefly submitted that the *Kable* doctrine realises an implied separation of powers at the state level. The doctrine's development of notions centring on 'institutional integrity' and 'defining characteristics' of state courts can be explained by the judicial branch trying to retain its own independence.⁹⁵ The overall focus of the doctrine, belied by its examination of legislative interferences with state judicial power, is the preservation of the state judiciary.⁹⁶ In this vein, it fits 'hand in glove' with the legal constitutionalism of the High Court, which focuses on the three branches of government in the absence of any direct individual rights.

Conclusion

A pyramid of positivist-textual constitutionalism, multiple political philosophies and historical practice supports the specialised antipodean judicial separation doctrine. An independent judiciary impartially extols the 'Washminster' Constitution to achieve the numerous underlying constitutive ambitions: federalism, checks and balances, individual freedom. The adjudication upon the Constitution towards these ends advances a 'guarantee' of republican liberalism—the supremacy of law over public power. The guarantee, however, is limited in its pursuit of individual freedoms by the Constitution's institutional frameworks. The independent judiciary is able to prevent only certain infringements of freedom and uphold particular constitutional rights. The scope, however, for republican liberalism to protect individual freedoms has been further hollowed out by the High Court's methodological and philosophical choices. The Court has been unwilling to move beyond the positivist-textual constitutionalism, which grounds the separation doctrine to embrace wider common law, constitutional or 'judicial power' jurisprudence. This reticence is particularly alarming in the age of 'securitisation' when governments seek to increasingly curb individual

93 *South Australia v Totani* (2010) 242 CLR 1; *Wainohu v New South Wales* (2011) 243 CLR 181.

94 See Gabrielle J Appleby and John Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40(1) *Federal Law Review* 1; Brendam Lim, 'Attributes and Attribution of State Courts – Federalism and the *Kable* Principle' (2012) 40(1) *Federal Law Review* 31.

95 *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 593 (Gleeson CJ), 617 (McHugh J), 617 (Gummow J), 629 (Kirby J), 652 (Callinan and Heydon JJ); *Forgev Australian Securities and Investment Commission* (2006) 228 CLR 45, 76 (Gummow, Hayne and Crennan JJ).

96 Elizabeth Handsley, 'Do Hard Laws Make Bad Bases? The High Court's Decision in *Kable v Director of Public Prosecutions (NSW)*' (1997) 25 *Federal Law Review* 171, 183; and George Winterton, 'The Communist Party Cast' in HP Lee and G Winterton (eds), *Australian Constitutional Landmarks* (Oxford: Cambridge University Press, 2003) 108, 133.

freedoms. Furthermore, the facilitator of this 'liberty', judicial independence, has also been reduced in efforts to accommodate governmental functions and enhance the credibility of 'securitisation' methods. In 2012, the guarantee of republican liberalism for individuals under the Australian Constitution, as advanced by the judicial separation principles through an independent and impartial judiciary, is limited and increasingly curtailed.

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