

# THE IMPOSSIBILITY OF NON-CRIMINAL PUNISHMENT BY COURTS IN THE AUSTRALIAN FEDERATION

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*Garlett v Western Australia [2022] 96 ALJR 888 ('Garlett')* was a missed opportunity for the High Court of Australia to confirm a simple proposition: the scheme for the exercise of separated judicial power laid down in Ch III of the Constitution precludes any non-criminal punishment by courts. In *Garlett*, all but one Justice rejected or doubted that Ch III has this effect. This article identifies and resolves two points of contention that have impeded recognition that Ch III categorically precludes non-criminal punishment by courts. In doing so, it demonstrates that Ch III's exclusive vesting of separated judicial power in courts supports a more 'joined up' way of thinking about permissible court functions across the Australian federation than was seen in *Garlett*.

## I INTRODUCTION

This article addresses whether, as a matter of constitutional doctrine, it is permissible for an Australian court to administer measures that are 'punishments' by the accepted legal definition, on the basis of a predictive risk criterion and not a person's breach of the law by past acts. Coercive preventive justice regimes are an increasingly prominent feature of law-making in Australia and are becoming more far-reaching and intrusive.<sup>1</sup> *Fardon v Attorney-General (Qld)* ('*Fardon*')<sup>2</sup> and *Minister for Home Affairs v Benbrika* ('*Benbrika [No 1]*')<sup>3</sup> upheld laws authorising judicial orders for preventive detention in respect of specified forms of criminal offending that pose a significant and serious risk to public safety. More recently, *Garlett v Western Australia* ('*Garlett*')<sup>4</sup> upheld a Western Australian law authorising judicial orders for preventive detention in respect of

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<sup>1</sup> *Garlett v Western Australia* (2022) 96 ALJR 888, 921–3 [165]–[167] (Gordon J) ('*Garlett*').

<sup>2</sup> *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575 ('*Fardon*').

<sup>3</sup> *Minister for Home Affairs v Benbrika* (2021) 272 CLR 68 ('*Benbrika [No 1]*').

<sup>4</sup> *Garlett* (n 1).

an extremely wide variety of criminal offences including robbery. The fate of constitutional challenges to coercive preventive justice regimes might appear to indicate that the judiciary chapter of the *Constitution* imposes no substantive restriction on courts' involvement in coercive preventive justice. But this is not correct. As this article will show, there is a solid doctrinal foundation for recognition that Ch III entrenches a national prohibition on courts administering punishment on a basis other than breach of the law by past acts ('non-criminal punishment'). For reasons elaborated later, this restriction on court functions under Commonwealth and state laws alike preserves the integrity of Ch III's primary separation rule — vesting judicial power exclusively in courts.<sup>5</sup> Clear judicial recognition of a categorical national prohibition on courts administering non-criminal punishment would declutter analysis of the constitutionality of preventive justice regimes. Of course, such recognition would not pre-empt the necessary evaluative judgments on whether an involuntary hardship imposed by court order is properly characterised as a punishment. And since this question of characterisation involves an evaluative judgment on which judicial views may well differ, recognition of the categorical prohibition may not produce different outcomes in Ch III challenges to preventive justice regimes. Nonetheless, clear recognition of the starting point for analysis will allow for a more principled 'joined up' way of thinking about the issues across the national integrated court system than has been established in the cases to date.

In *Garlett*, only Gageler J (as his Honour then was) recognised that Ch III entrenches a categorical prohibition on courts administering non-criminal punishment. The six other members of the Court demurred, for two quite distinct reasons. In one camp, Edelman J and possibly Gordon J considered that there is no necessary antagonism between the nature of separated judicial power and non-criminal punishment. For Edelman J most clearly, separated judicial power extends to non-criminal punishment if there is sufficient justification.<sup>6</sup> In another camp, Kiefel CJ, Keane, Steward and Gleeson JJ recognised that separated *Commonwealth* judicial power cannot be applied to impose punishment on a basis other than breach of the law by past acts. However, their Honours rejected,<sup>7</sup> or doubted,<sup>8</sup> that Ch III denies *state* capacity to authorise courts to administer non-criminal punishment.

This article will address and resolve the two distinct points of contention, evident in *Garlett*, that have impeded wider judicial recognition that Ch III categorically invalidates any law (Commonwealth or state) that purports to

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<sup>5</sup> The article's argument for a prohibition on state power to legislate non-criminal punishment by courts (Part IV below) would apply with equal force to the Australian territories with their own courts: see generally James Stellios, *The Federal Judicature: Chapter III of the Constitution* (2<sup>nd</sup> ed, LexisNexis, 2020) 596–9 ('*The Federal Judicature*').

<sup>6</sup> See discussion in Part II(D) below.

<sup>7</sup> *Garlett* (n 1) 902 [40] (Kiefel CJ, Keane and Steward JJ).

<sup>8</sup> *Ibid* 950–4 [293]–[309] (Gleeson J).

authorise courts to dispense non-criminal punishment. On the first point of contention, raised most clearly by Edelman J, the article argues it should now be regarded as settled that Commonwealth judicial power does not extend to non-criminal punishment. This reflects the prevailing judicial understanding of the nature of separated judicial power, as applied by majorities in a succession of cases including *Garlett*.

This leaves the second point of contention seen in *Garlett*: can a limitation on the nature of separated Commonwealth judicial power generate an identical restriction on the capacity of *all* Australian polities to legislate court functions? This touches on the complex interaction of federalism and separation of judicial power in Ch III doctrine.<sup>9</sup> As is well-known, Ch III imposes distinct restrictions on Commonwealth and state legislative power. There are two key restrictions on the Commonwealth:

- The Commonwealth cannot confer judicial power on non-courts ('the primary separation rule').<sup>10</sup>
- The Commonwealth cannot confer any non-judicial powers on federal courts, beyond what is strictly ancillary to the exercise of judicial power ('the *Boilermakers* restriction', arising from *R v Kirby; Ex parte Boilermakers' Society of Australia* ('*Boilermakers*')).<sup>11</sup>

Ch III does not expressly restrict the functions that states can confer on their courts, or state authority to confer judicial power on non-courts. However, the iterative evolution of Ch III doctrine has identified two restrictions on state legislative power:

- States cannot confer functions on their courts that are incompatible with their status as repositories for separated Commonwealth judicial

<sup>9</sup> See further discussion in Parts III–V below. Competing themes of federalism and judicial power are contextualised and critiqued in Gabrielle Appleby, Anna Olijnyk, James Stellios and John Williams, *Judicial Federalism in Australia: History, Theory, Doctrine and Practice* (Federation Press, 2021). For analysis favouring a stronger federal orientation in Ch III doctrine see, eg, Brendan Lim, 'Attributes and Attribution of State Courts: Federalism and the Kable Principle' (2012) 40(1) *Federal Law Review* 31. For critique of the foundations for integration see, eg, Stephen McLeish, 'The Nationalisation of the State Court System' (2013) 24(4) *Public Law Review* 252.

<sup>10</sup> As established in *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434 ('*JW Alexander*'). See also *Huddart Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 355 (Griffith CJ); *New South Wales v Commonwealth* (1915) 20 CLR 54, 62 (Griffith CJ), 88–90 (Isaacs J); *British Imperial Oil Co v Federal Commissioner of Taxation* (1925) 35 CLR 422; *Victorian Stevedoring & General Contracting Co Pty Ltd & Meakes v Dignan* (1931) 46 CLR 73, 96–8 (Dixon J).

<sup>11</sup> (1956) 94 CLR 254 ('*Boilermakers*'); affirmed *Attorney-General of the Commonwealth v The Queen* (1957) 95 CLR 529 (Privy Council) ('*Boilermakers PC*'). 'Bare' non-judicial functions are 'functions which are not in themselves part of the judicial power and are not auxiliary or incidental thereto': *Boilermakers*, 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

power ('the *Kable* restriction', arising from *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')).<sup>12</sup>

- States cannot confer judicial power in federal subject-matters on non-courts ('the *Burns* restriction', arising from *Burns v Corbett* ('*Burns*')).<sup>13</sup>

The emphasis given to federal dimensions of Ch III doctrine gives rise to the contention, seen in *Garlett*, as to whether, and if so by what rationale, Ch III implies the same limits on Commonwealth and state authority to confer functions on courts. It is conspicuous in the position of the four *Garlett* judges who recognise that the Commonwealth cannot legislate for non-criminal punishment by courts (because that lies outside the realm of separated judicial power) but do not recognise this restriction applies to the states (because states can invest their courts with functions that go beyond the realm of separated judicial power). This reflects a way of thinking about Ch III doctrine that centres federal distinctions, including that between the *Boilermakers* restriction on Commonwealth laws and the *Kable* restriction on state laws. To this point, the article proposes shifting focus, when analysing laws concerning court functions, to Ch III's primary separation rule, which makes separated judicial power exclusive to courts. It proposes recognition that this primary separation rule generates an overarching constraint on Commonwealth and state capacity to legislate court functions.<sup>14</sup> That constraint can be expressed this way: the primary separation rule precludes courts<sup>15</sup> engaging in any functions incompatible with the essential characteristics of separated judicial power. This is an evaluative restriction on functions courts can perform (because the essential characteristics of separated judicial power are derived from a purposive understanding of the primary separation rule, and not all of those essential characteristics are absolutes). But it is *not* subject to calibration by reference to whether the function is conferred by the Commonwealth or a state. Simply put, Ch III's vesting of judicial power exclusively in courts would be undermined if those courts performed any functions incompatible with the essential characteristics of separated judicial power. Non-criminal punishment is one such function, being antithetical to the

<sup>12</sup> (1996) 189 CLR 51 ('*Kable*').

<sup>13</sup> (2018) 265 CLR 304 ('*Burns*'). Specifically, the majority view that this is a limitation derived from Ch III's exhaustive scheme for the exercise of judicial power on the field described by ss 75 and 76 (and *not* an effect of *Judiciary Act 1903* (Cth) provisions overriding inconsistent State laws conferring State jurisdiction on non-court tribunals).

<sup>14</sup> This is *not* proposed to the exclusion of the separate, secondary *Boilermakers* restriction on Commonwealth power. That restriction has a separate and distinct role that supplements, but does not sustain, the implication drawn of practical necessity from the first separation rule. See below Part V(B).

<sup>15</sup> While it is not something I can address in detail in the constraints of this article, I see no reason why the article's arguments would not also inform the operation of well-established Ch III constraints on Commonwealth and State capacity to confer functions on judges in their personal capacity. See generally, Rebecca Ananian-Welsh, 'Preventative Detention Orders and the Separation of Judicial Power' (2015) 38(2) *University of New South Wales Law Journal* 756.

nature of separated judicial power. As the article will show, centring the integrity of Ch III's primary separation rule in thinking about the Ch III scheme can support a more coherent and integrated understanding of that scheme's implications for Commonwealth and state capacity to legislate court functions.

The article proceeds as follows. Part II addresses the state of authority on whether the *Constitution* permits non-criminal punishment by courts. Specifically, it shows that it has been recognised by majorities in a succession of cases that the Commonwealth cannot authorise non-criminal punishment by courts. This resolves one point of contention in *Garlett*, raised by Edelman J's recognition of a permissible category of court-administered 'protective or preventive punishment'. Parts III and IV address the second area of contention seen in *Garlett*, arising from differing judicial views on whether the same incapacity to legislate for non-criminal punishment by courts applies to the Commonwealth and states. Part III argues that Commonwealth incapacity to so legislate derives from Ch III's primary separation rule, vesting judicial power exclusively in courts. The crux of the argument is that the integrity of the primary separation rule would be undermined if courts undertook Commonwealth functions incompatible with the essential characteristics of separated judicial power. Part IV argues that the same incapacity applies to the states by reason of the well-established '*Kable* restriction' on state legislative power. Finally, Part V frames the resolution of the points of contention about non-criminal punishment as an opportunity to drive a more integrated way of thinking about Ch III restrictions on the functions that Australian parliaments can validly confer on courts.

As will become evident, the article relies on Gageler J's (dissenting) reasons in *Garlett* for an account of the bearing of anterior common law thought about state power to punish on the constitutional nature of separated judicial power. It also supports Gageler J's conclusion that Ch III denies both the Commonwealth and states power to legislate for non-criminal punishment by courts. But it diverges from Gageler J's explanation of the foundation in Ch III for the restriction on the Commonwealth. Gageler J derives this from the *Boilermakers* restriction (which precludes the Commonwealth vesting non-judicial power on courts, other than for performance of functions strictly incidental to their exercise of judicial power). His Honour explains that the *Boilermakers* restriction has an overlapping operation to the *Kable* restriction when it comes to non-criminal punishment. The article's argument more emphatically centres Ch III's primary separation rule (separated judicial power is exclusive to courts) as the source of the national prohibition.

## II COMMONWEALTH JUDICIAL POWER DOES NOT EXTEND TO NON-CRIMINAL PUNISHMENT

This Part argues that Commonwealth judicial power does not extend to non-criminal punishment.<sup>16</sup> This is the predominant<sup>17</sup> judicial understanding, as seen in a succession of cases on Commonwealth power to authorise detention (which is by default characterised as a punishment) on a non-criminal basis. There would not seem to be any obvious compelling reason to revisit this categorical limit on Commonwealth judicial power.

### A ‘Non-Criminal Punishment’

‘Non-criminal punishment’ is here used in the sense associated with a specific anterior common law principle regarding state power over subjects. The principle is one that denies state power to impose punishment on a basis other than breach of the law by past acts. Australian authorities cite AV Dicey in support of this traditional common law principle: every subject ‘may with us be punished for a breach of law, but he can be punished for nothing else’.<sup>18</sup>

Reflecting this Diceyan rejection of state power to impose ‘non-criminal punishment’, any measure that is properly characterised as a ‘punishment’ can only be imposed by the state for breach of a legislated general norm of conduct by past acts. Importantly, the binary criminal/non-criminal, when used in this context, does not incorporate the entire disciplinary distinction between criminal and civil law and process. The Diceyan principle of concern here does not imply that the state can only punish through an adjudicative process that meets what may be thought of as the standard or minimum incidents of criminal process.<sup>19</sup> Rather, it denies state power to punish on any basis other than an adjudicative determination of breach, by past acts, of a generally-applicable norm of conduct prescribed by law.<sup>20</sup>

This Diceyan rejection of non-criminal punishment applies to any state power to impose involuntary hardship on the subject that is properly

<sup>16</sup> To be clear, this Part outlines judicial authority for this as a bare proposition, deferring analysis of its foundation in Ch III to Part III; and analysis of its significance for the states, and broader institutional integrity jurisprudence in Parts IV and V respectively.

<sup>17</sup> As mentioned in Part II(D) below, Edelman J rejects this understanding and Gordon J’s position is ambiguous.

<sup>18</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, (Liberty Classics, 10<sup>th</sup> ed, 1959) 202 cited in *Chu Kheng Lim v Minister for Immigration* (1992) 176 CLR 1, 27–8 (Brennan, Deane and Dawson JJ) (‘Lim’); *Benbrika [No 1]* (n 3) 91 [19] (Kiefel CJ Bell, Keane and Steward JJ); *Garlett* (n 1) 916 [129] (Gageler J).

<sup>19</sup> Compare Stephen McDonald, ‘Involuntary Detention and the Separation of Judicial Power’ (2007) 35(1) *Federal Law Review* 25, 27–8.

<sup>20</sup> Of course, this substantive limit works congruently with procedural safeguards arising from the vesting of judicial power exclusively in courts. See, eg, *Garlett* (n 1) 917 [132]–[133] (Gageler J).

characterised as punishment according to established constitutional doctrine. As recent cases have confirmed, constitutional doctrine on this point is concerned with substance and not mere form. This characterisation is apt if the statutory purpose is itself punitive, in that it seeks to denounce and deter crime.<sup>21</sup> But it may also be apt even if there is no punitive statutory purpose evident. Specifically, if the hardship imposed is one that is traditionally viewed as a punishment, this default characterisation will apply unless the law is reasonably capable of being seen as necessary for a legitimate non-punitive purpose.<sup>22</sup> For present purposes, it suffices to note that the Diceyan rejection of non-criminal punishment applies to any hardship that falls within this comprehensive constitutional conception of punishment. As will now be discussed, there is broad and long-standing authority that the Diceyan rejection of non-criminal punishment is embedded as an essential characteristic of separated Commonwealth judicial power.

### **B Lim and the Inherited Conception of Punishment as an Exclusive Judicial Function**

To locate the prevailing understanding, it is necessary to start with the influential observations on the nature of punishment as an exclusively judicial function by Brennan, Deane and Dawson JJ (Mason CJ agreeing) in *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* ('*Lim*').<sup>23</sup> *Lim* upheld a Commonwealth law authorising detention without judicial order, of persons falling within a statutory criterion for liability to detention. The validity of the law rested, critically, on the Court's determination that the detention it authorised was non-punitive, being reasonably capable of being seen as necessary for a legitimate non-punitive migration purpose (preventing admission of non-citizens into Australian territory pending the making of a decision as to whether or not they will be allowed entry).<sup>24</sup> Relevant to the present discussion, the joint judgment observed:

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<sup>21</sup> See *Alexander v Minister for Home Affairs* (2022) 401 ALR 438 463–4 [106]–[111] (Gageler J), cf 456–7 [80]–[84] (Kiefel CJ, Keane and Gleeson JJ) ('*Alexander*'). This sense of punishment is consistent with that applied by Edelman J: at 498–9 [238]–[246]; *Benbrika [No 1]* (n 3) 158 [204]; *Garlett* (n 1) 942–3 [250]–[251].

<sup>22</sup> This reflects that Ch III is concerned with substance and recognises that certain hardships of themselves ordinarily constitute punishment unless that default characterisation is, exceptionally, displaced. In relation to detention, see *NZYQ v Minister for Immigration, Citizenship and Multicultural Affairs* (2023) 97 ALJR 1005, especially at 1013 [28], 1015 [39]–[40] (the Court) ('*NZYQ*'); and in relation to citizenship-stripping, see *Jones v Commonwealth of Australia* (2023) 97 ALJR 936, 946 [39] (Kiefel CJ, Gageler, Gleeson and Jagot JJ), 952–3 [76]–[77], 956–7 [95] (Gordon J) ('*Jones*'). Corporal and capital punishments would likely also attract a default punitive characterisation, see *Alexander* (n 21) 454 [72] (Kiefel CJ, Keane and Gleeson JJ).

<sup>23</sup> *Lim* (n 18).

<sup>24</sup> *Ibid* 33–4 (Brennan, Dawson and Deane JJ; Mason CJ agreeing), 46 (Toohey J), 65, 71 (McHugh J). See now *NZYQ* (n 22) 1013–14 [30]–[33], 1016–17 [48]–[49].

[P]utting to one side ... exceptional cases ... the involuntary detention of a citizen in custody by the State is penal or punitive in character and, under our system of government, exists only as an incident of the exclusively judicial function of adjudging and punishing criminal guilt.<sup>25</sup>

This observation — by conventional shorthand, ‘the *Lim* principle’ — comprises three interlocking claims about state power under ‘our system of government’:

- (i) Adjudication and punishment of criminal guilt is an exclusively judicial function.
- (ii) Detention is ordinarily penal or punitive (a default characterisation of detention).
- (iii) Punishment is permissible only for criminal guilt.<sup>26</sup>

As the *Lim* joint judgment recognises, this anterior common law conception of state power is brought to bear on judicial interpretation of the *Constitution*. It bears emphasising that this is well-established in relation to the first-mentioned claim — that adjudication and punishment of criminal guilt is an exclusively judicial function. The influence of this anterior common law understanding on the conception of Commonwealth judicial power is well-established.<sup>27</sup> There is no dispute that it informs the meaning of ‘judicial power’ as a constitutional term in the Australian *Constitution*.<sup>28</sup> In this regard, the *Constitution* allocates powers ‘whose character is determined by traditional British conceptions’ and the distribution of governmental functions as between those powers follows established British constitutional practice.<sup>29</sup>

What of the second and third-mentioned claims about state power nested in the *Lim* principle? Are these, too, integrated into the conception of punishment as an exclusive judicial function that informs interpretation of the *Constitution*? The

<sup>25</sup> *Lim* (n 18) 27 (Brennan, Dawson and Deane JJ; Mason CJ agreeing).

<sup>26</sup> As is made clear in context, this proposition goes to the nature of judicial power, and is distinct from Ch III provisions making judicial power exclusive to courts.

<sup>27</sup> Authorities include: *JW Alexander* (n 10) 444 (Griffith CJ); *Federal Commissioner of Taxation v Munro* (1926) 38 CLR 153, 175 (Isaacs J); *Re Nolan; Ex parte Young* (1991) 172 CLR 460, 497 (Gaudron J); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 258 (Mason CJ); *Falzon v Minister for Immigration and Border Protection* (2018) 262 CLR 333, 340–1 [14]–[16] (Kiefel CJ, Bell, Keane and Edelman JJ); *Alexander* (n 21) 453–4 [70]–[71] (Kiefel CJ, Keane and Gleeson JJ), 476 [158] (Gordon J), 497 [235]–[237] (Edelman J). There are two recognised historical exceptions for punishment of offences to maintain discipline in the armed forces, and punishment of contempt of parliament. Neither of these exceptions involves any departure from what is of present interest, namely the Diceyan rejection of non-criminal punishment.

<sup>28</sup> Relevantly, this is accepted by the two judges who do not expressly recognise that the Diceyan rejection of non-criminal punishment is embedded in the nature of judicial power, Edelman J and Gordon J: see *Benbrika [No 1]* (n 3) 130–1 [134], 141 [160] (Gordon J), 148 [181], 159–61 [205]–[209] (Edelman J). See also *Benbrika v Minister for Home Affairs* (2023) 97 ALJR 899, 914 [60] (Gordon J), 920 [89]–[90] (Edelman J) (‘*Benbrika [No 2]*’).

<sup>29</sup> *Boilermakers* (n 11) 276–7 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).



doctrine that detention is ordinarily penal or punitive is secure, as is the general principle that this default characterisation is displaced only if detention is reasonably capable of being seen as necessary for a legitimate non-punitive purpose.<sup>30</sup> Judicial application of the default characterisation has been contested, but its existence and salience to the operation of Ch III has not.<sup>31</sup> As *Lim* and later cases on Commonwealth administrative detention make clear, a default punitive characterisation of detention is so closely associated with the inherited conception of punishment as an exclusively judicial function that it too is drawn into the application of Ch III's strict institutional separation of Commonwealth judicial power. This is not a strict logical or analytical necessity. Rather, the default punitive character carries forward because the anterior common law evolved in such a way that this limit on state power to detain is hardwired into the inherited conception of punishment as an exclusive judicial function.<sup>32</sup>

This indicates something important about the conception of punishment as an exclusive judicial function referenced in *Lim*. Namely, that it embeds at least one of the related understandings of state power articulated in the *Lim* joint judgment. It stands to reason that the same dynamic could embed the Diceyan rejection of non-criminal punishment in the constitutional conception of punishment as an exclusive judicial function referenced in *Lim*. And it stands to reason that, as such, it too could be hardwired in the conception of punishment that informs the nature of Commonwealth judicial power. Yet it was not until *Benbrika [No 1]* that the Court had cause to squarely address this point.

### **C *Benbrika [No 1]* and *Garlett as Authority that Commonwealth Judicial Power Does Not Extend to Non-Criminal Punishment***

*Benbrika [No 1]* is significant at the level of principle because it clarifies that the totality of the inherited common law conception of state power to punish referenced in *Lim* — and specifically, the Diceyan rejection of non-criminal punishment — informs the scope of Commonwealth judicial power. This understanding of the relevant limit on Commonwealth judicial power was

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<sup>30</sup> See *Benbrika [No 1]* (n 3); *NZYQ* (n 22).

<sup>31</sup> The judicial method of evaluating non-criminal detention has been subject to extensive comment and critique, see for example Jeffrey Gordon, 'Imprisonment and the Separation of Judicial Power: A Defence of a Categorical Immunity from Noncriminal Detention' (2012) 36(1) *Melbourne University Law Review* 41; McDonald (n 19); Andrew Foster, 'The Judiciary and Liberty: Assessing Competing Rationales for the Lim Principle' (2022) 33(3) *Public Law Review* 226 ('The Judiciary and Liberty') and the other commentary mentioned therein.

<sup>32</sup> Cf *Benbrika [No 1]* (n 3) 108 [66]–[67] (Gageler J).

subsequently endorsed by a majority in *Garlett*, albeit as a step in the analysis of an impugned State law.<sup>33</sup>

## 1 *Benbrika [No 1] and Garlett*

*Benbrika [No 1]* and *Garlett* upheld the validity of laws authorising courts to impose non-criminal detention — that is, detention imposed on a basis other than breach of the law by past acts. In both cases, the regimes in question authorised a court to order a period of post-sentence detention if satisfied of an unacceptable risk that a prisoner would commit a specified kind of criminal offence if released at the conclusion of their custodial sentence. And in both cases, a majority of the High Court held that the regime in question was appropriately tailored to a non-punitive purpose.

*Benbrika [No 1]* considered div 105A of the *Criminal Code Act 1995* (Cth), which empowers a court to make an order that a terrorist offender,<sup>34</sup> nearing the completion of a term of imprisonment for a terrorist offence, be detained for a further period after the expiration of their sentence.<sup>35</sup> Five judges held that div 105A was wholly valid (Kiefel CJ, Bell, Keane, Steward JJ; Edelman J writing separately). Gageler J held that the law was valid only to the extent that the offences to be prevented by the making of an order involve doing or supporting or facilitating a terrorist act.<sup>36</sup> Gordon J held that the regime was wholly invalid.<sup>37</sup>

*Garlett* considered the *High Risk Serious Offenders Act 2020* (WA) ('*HRSO Act*'). Under this Act, the Supreme Court of Western Australia may order that a 'serious offender under custodial sentence' be detained post-sentence for an indefinite term for control, care or treatment.<sup>38</sup> Five members of the Court held that the impugned law was valid (Kiefel CJ, Keane, Steward JJ in joint reasons; Edelman J and Gleeson J giving separate reasons). Gageler J and Gordon J again dissented.

The constitutional challenges in *Benbrika [No 1]* and *Garlett* failed for a simple reason. The respective majorities held that div 105A and the *HRSO Act* are

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<sup>33</sup> Further judicial authority for this perspective on separated judicial power can be found in the late 2023 cases concerning Commonwealth executive power to detain and remove citizenship: see *Benbrika [No 2]* (n 28) 909 [35]–[36] (Kiefel CJ, Gageler, Gleeson and Jagot JJ); *NZYQ* (n 22) 1013 [28] (the Court).

<sup>34</sup> A person convicted of offences referred to in s 105A.3(1)(a), who has been in continuously in custody since being convicted, and will be at least 18 years old at the expiration of their sentence.

<sup>35</sup> *Criminal Code Act 1995* (Cth) s 105A.7. The government party who applies for the order (the Australian Federal Police Minister) bears the onus of satisfying the Court of these and other matters. Section 105A.8 mandates that the Court have regard to matters including expert reports in relation to the prisoner, the risk they pose, and the scope for managing the risk in the relevant state or territory corrective services. Section 105A.13 prescribes the civil evidence and procedure rules for continuing detention order proceedings.

<sup>36</sup> *Benbrika [No 1]* (n 3) 108 [64], 120–1 [100]–[102].

<sup>37</sup> *Ibid* 122 [109], 147 [177]–[178].

<sup>38</sup> *High Risk Serious Offenders Act 2020* (WA) s 7(1), see *Garlett* (n 1) 898 [17] (Kiefel CJ, Keane and Steward JJ).

appropriately tailored to a legitimate protective purpose.<sup>39</sup> That the majorities characterised these impugned laws as non-punitive might suggest some weakening in the default punitive characterisation of detention, at least as it applies to detention by courts exercising judicial power.<sup>40</sup> Whether this is the case, and with what implications for the design of preventive justice regimes, are important questions.<sup>41</sup> For present purposes, however, the salient aspect of *Benbrika [No 1]* and *Garlett* is unaffected by the strength of the default characterisation of detention. That salient aspect is the crystallisation of a predominant judicial perspective that Ch III denies the Commonwealth authority to legislate for non-criminal punishment by courts. All judges sitting on these cases considered that the Commonwealth cannot validly legislate for courts to administer non-criminal *detention* unless that detention is appropriately tailored to a protective purpose.<sup>42</sup> Moreover, a majority of Justices considered that this is because non-criminal *punishment* is incompatible with the essential nature of separated Commonwealth judicial power. In fact, six of the eight judges who sat on *Benbrika [No 1]* and *Garlett*<sup>43</sup> recognised that the relevant substantive entrenched limit on Commonwealth preventive justice regimes is that Commonwealth judicial power does not extend to non-criminal punishment. In other words, the constitutional conception of separated Commonwealth judicial power incorporates the Diceyan rejection of non-criminal punishment referenced in *Lim*.

## 2 *Kiefel CJ, Bell, Keane and Steward JJ*

In a helpful clarification, the *Benbrika [No 1]* plurality, comprising Kiefel CJ, Bell, Keane and Steward JJ, differentiate ‘the *Lim* principle’<sup>44</sup> from what their Honours’ label the ‘*Lim* general proposition’ — that detention under Commonwealth authority is ordinarily entrusted to Ch III courts.<sup>45</sup> This is an important reminder that the constitutional understanding of state power to punish expressed in *Lim*

<sup>39</sup> *Benbrika [No 1]* (n 3) 97–104 [36]–[48] (Kiefel CJ, Bell, Keane and Steward JJ), 168–72 [224]–[231] (Edelman J); *Garlett* (n 1) 902–5 [45]–[56] (Kiefel CJ, Keane and Steward JJ), 944–8 [260]–[281] (Edelman J), 954–5 [310]–[314] (Gleeson J).

<sup>40</sup> Cf *Garlett* (n 1) 913 [110], 919 [150] (Gageler J).

<sup>41</sup> Questions about the threshold for detention to escape its default punitive characterisation; and the rationale for the default characterisation, have been explored extensively in commentary on the constitutionality of Commonwealth immigration detention: see above n 31. The more recent judicial application of the reasonable necessity test to immigration detention in *NZYQ* (n 22) and to citizenship stripping in *Jones* (n 22) must also now be factored in.

<sup>42</sup> *Benbrika [No 1]* (n 3) 97 [36] (Kiefel CJ, Bell, Keane and Steward JJ), 112–13 [76]–[78] (Gageler J), 147 [177] (Gordon J), 169 [226] (Edelman J); *Garlett* (n 1) 950 [292], 950–1 [294] (Gleeson J). See also 919–20 [151]–[152] (Gageler J).

<sup>43</sup> There was a change of composition of the Court between *Benbrika [No 1]* and *Garlett*, with Bell J’s retirement and Gleeson J’s appointment.

<sup>44</sup> *Benbrika [No 1]* (n 3) 90–1 [18] (Kiefel CJ, Bell, Keane and Steward JJ).

<sup>45</sup> *Ibid.*

is anterior to Ch III's strict institutional separation of judicial power. As the *Benbrika [No 1]* plurality states, a doctrinal understanding of adjudicating criminal guilt as an exclusive judicial function is not unique to Ch III but rather has 'a long pedigree under our inherited common law tradition', going back to William Blackstone and Sir Edward Coke.<sup>46</sup> Building on this distinction, their Honours emphasise that the core of the *Lim* principle is the rejection of state power to punish other than for breach of the law. This is traced, as it was in *Lim*, to 'Dicey's celebrated statement that every citizen is "ruled by the law, and by the law alone"' and "may with us be punished for a breach of the law, but he can be punished for nothing else".<sup>47</sup>

In the result, the *Benbrika [No 1]* plurality upheld the impugned law. They therefore did not apply as ratio, a principle that non-criminal punishment lies outside the scope of Commonwealth judicial power. Nonetheless, the Diceyan rejection of non-criminal punishment is given effect in the *Benbrika [No 1]* plurality's reasons at two key points. The first is in their Honours' rejection of a Commonwealth submission that the only concern of the *Lim* principle is to ensure that detention consequent on adjudication of criminal guilt is exclusively judicial.<sup>48</sup> The plurality warn that it would be a mistake to think that the only constitutional concern is to allocate criminal detention powers: this would imply that there are no constitutional constraints on state power to impose non-criminal detention. As the plurality state, that would be a 'radical reworking' of established principle.<sup>49</sup>

The *Benbrika [No 1]* plurality also emphasise the Diceyan rejection of non-criminal punishment in rejecting Gummow J's proposed reformulation of the *Lim* principle in *Fardon*. In *Fardon*, Gummow J (with whom Kirby J agreed) proposed a reformulation of the *Lim* principle in terms that 'the "exceptional cases" aside, the involuntary detention of a citizen in custody by the State is permissible only as a consequential step in the adjudication of criminal guilt of that citizen for past acts'.<sup>50</sup> This formulation 'eschews the phrase "is penal or punitive in character"' so as to emphasise that 'the concern is with the deprivation of liberty without adjudication of guilt rather than with the further question whether the deprivation is for a punitive purpose'.<sup>51</sup> The *Benbrika [No 1]* plurality reject this reformulation, precisely because it shifts focus from punishment. On the plurality's approach, the *Lim* principle is centrally concerned with the specific inherited conception of punishment as an exclusive judicial function. To expunge reference to 'punitive' detention might be seen to unmoor analysis from its basis

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<sup>46</sup> *Benbrika [No 1]* (n 3) 91 [19].

<sup>47</sup> *Ibid.*

<sup>48</sup> *Ibid* 90 [17], 94 [26].

<sup>49</sup> *Ibid* 95 [27].

<sup>50</sup> *Fardon* (n 2) 612 [80] (Gummow J).

<sup>51</sup> *Ibid* 612–13 [81] (Gummow J). See also *Al-Kateb v Godwin* (2004) 219 CLR 562, 612–13 [136]–[137].

in anterior common law constitutionalism, which includes the Diceyan rejection of non-criminal punishment.<sup>52</sup>

### 3 Gageler J

Justice Gageler also recognises that the Diceyan rejection of non-criminal punishment referenced in the *Lim* principle describes an entrenched limit on Commonwealth judicial power. His Honour explains that the *Lim* principle is a reflection of ‘traditional practices within historical institutional structures’ that necessarily inform the contemporary nature of judicial power within Ch III.<sup>53</sup> Specifically, within ‘our inherited conception of the rule of law’ and ‘at the heart of our system of government’<sup>54</sup> lies a relationship between the individual and the state,

within which freedom of the individual from involuntary detention by the state, other than as a penal consequence prescribed by law for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct, is the norm.<sup>55</sup>

It is clear that Gageler J’s dissents in *Benbrika [No 1]* and *Garlett* rest most directly on the view he takes of the ‘centrality of personal liberty to the functioning of government within our 800 year old inherited tradition’,<sup>56</sup> and his insistence upon a high threshold for detention to escape its default characterisation as a punishment.<sup>57</sup> But what is relevant for present purposes is a distinct point, namely Gageler J’s enunciation that penal measures are, in the common law system of government, prescribed by law ‘for an existing criminal liability determined to have arisen from the operation of positive law on past events or conduct’.<sup>58</sup> Reflecting on what was said in the *Lim* joint judgment, Gageler J comments:

The opening part of that observation, that detention in custody is to be characterised as ‘penal or punitive’ other than in ‘exceptional cases’ is inextricably linked to the concluding part of the observations concerning the limited means by which involuntary detention of that character is constitutionally permitted to occur.<sup>59</sup>

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<sup>52</sup> It should be noted that despite Gummow J’s reformulation, His Honour accepted that the purpose of detention provides the criterion upon which constitutional validity is assessed: compare *Benbrika [No 1]* (n 3) 115 [84] (Gageler J) and see McDonald (n 19) 35. Cf Foster (n 31) 243.

<sup>53</sup> *Benbrika [No 1]* (n 3) 108 [67] (Gageler J).

<sup>54</sup> *Garlett* (n 1) 917 [133] (Gageler J).

<sup>55</sup> *Ibid* 917 [134] (Gageler J).

<sup>56</sup> *North Australian Aboriginal Justice Agency Ltd v Northern Territory* (2015) 256 CLR 569, 610 [95] (Gageler J) (‘NAAJA’).

<sup>57</sup> *Garlett* (n 1) 919 [150] (Gageler J). See generally Foster (n 31).

<sup>58</sup> *Benbrika [No 1]* (n 3) 111 [73] (Gageler J).

<sup>59</sup> *Ibid* 110 [71] (Gageler J).

Gageler J could not be clearer that the conception of punishment as an exclusive judicial function referenced in *Lim* incorporates the Diceyan rejection of non-criminal punishment:

Limiting the permissible means of inflicting state sanctioned punishment underlies the traditional assignment of detention in custody to the exclusive exercise of judicial power involving adjudication and punishment of criminal guilt.<sup>60</sup>

#### 4 *Gleeson J*

Gleeson J sat on *Garlett*, having joined the Court after *Benbrika [No 1]*. Her Honour articulates that the essential concern in testing a Commonwealth law for non-criminal detention against the *Lim* principle is whether the law imposes punishment on a basis other than breach of the law.<sup>61</sup> Her Honours approach is consistent with the plurality view in *Benbrika [No 1]*, that a law authorising non-criminal detention can only be consistent with separated judicial power if the detention is, in substance, non-punitive.<sup>62</sup>

### **D *The Minority Judicial Perspectives on Non-Criminal Detention***

The above discussion shows that six of the eight judges who sat in *Benbrika [No 1]* and *Garlett* consider that Commonwealth judicial power cannot be applied to administer non-criminal punishment. Mention should be made of the alternate approaches taken by Edelman J and Gordon J.

#### 1 *Edelman J*

Edelman J unequivocally affirms Commonwealth judicial power to impose non-criminal punishment, that is, punishment on a basis other than breach of the law by past acts.<sup>63</sup> His Honour considers that the only principle recognised in *Lim* with a firm foundation in Ch III is the principle that punishment is an exclusively judicial function.<sup>64</sup> Relevant to the present argument, Edelman J considers that the exclusive judicial function extends to ‘protective or preventive punishment’, that is, involuntary hardship imposed by the state as a sanction to enforce a norm of behaviour on a purely forward-looking basis.<sup>65</sup> Edelman J proposes that such

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<sup>60</sup> Ibid 115 [84] (Gageler J).

<sup>61</sup> *Garlett* (n 1) 950 [292] (Gleeson J).

<sup>62</sup> Ibid. See also 954–5 [310]–[313] (Gleeson J).

<sup>63</sup> *Benbrika [No 1]* (n 3) 164–6 [215]–[219]; Ibid 942–3 [251].

<sup>64</sup> *Benbrika [No 1]* (n 3) 160 [208].

<sup>65</sup> Ibid 148–9 [182], 149–50 [185] (Edelman J). See also *Garlett* (n 1) 942–3 [251] (Edelman J); *Alexander* (n 21) 498 [238] (Edelman J).

punishment, which does not treat the subject as a responsible moral agent,<sup>66</sup> is ‘unjust’, but may be administered by a Ch III court so long as it does not unjustifiably compromise the court’s institutional integrity.<sup>67</sup>

Edelman J’s conclusion in *Benbrika [No 1]* that the detention authorised by Div 105A is a ‘punishment’ has been welcomed by some commentators, for two reasons.<sup>68</sup> First, Edelman J’s approach resonates with the view that safeguards on ‘punishment’ under criminal and human rights law should apply to at least some coercive measures that are imposed on a criterion of predictive risk. Second, it is considered that Edelman J’s approach avoids an ‘absurd’ notion that detention which has a protective purpose is not punishment.<sup>69</sup> But neither of these outcomes provides a compelling reason for recognising Commonwealth judicial power to dispense non-criminal punishment.<sup>70</sup> As to the first, it is important to appreciate that a categorical constitutional rejection of non-criminal punishment by courts would not preclude applying protections in criminal and human rights law to measures which are permissible on a basis other than breach of the law by past acts. The conception of ‘punishment’ for the purpose of Ch III analysis does not preclude adopting a wider conception for the purpose of engaging incidents of criminal process or human rights law.<sup>71</sup> As to the second, Edelman J is not the only member of the Court who appreciates that detention which has a protective purpose can still be a punishment. The categorical prohibition on Commonwealth non-criminal punishment supported by majorities in *Lim*, *Benbrika [No 1]* and *Garlett* is engaged unless detention is, in substance, imposed for an independent protective purpose.<sup>72</sup> Those majorities are clearly cognisant that detention can be a ‘punishment’ in the constitutional sense, while pursuing a combination of protective and punitive objectives. The critical point made by these majorities is that detention can only be imposed on a basis other than criminal guilt if the protective purpose is independent, in a way that the protective purpose of a criminal sentence is not.<sup>73</sup>

For these reasons, it is not evident that any compelling advantage is secured by recognising Commonwealth judicial power to dispense non-criminal

<sup>66</sup> *Benbrika [No 1]* (n 3) 167–8 [222]; *Garlett* (n 1) 933 [203].

<sup>67</sup> *Benbrika [No 1]* (n 3) 167–9 [222]–[227]; *Garlett* (n 1) 943–4 [256]–[259].

<sup>68</sup> See generally Andrew Dyer and Josh Pallas, ‘Why Div 105A of the Criminal Code 1995 (Cth) Is Incompatible with Human Rights’ (2022) 33(1) *Public Law Review* 61; Andrew Dyer, ‘Minister for Home Affairs v *Benbrika* and the Capacity of Chapter III of the Commonwealth Constitution to Protect Prisoners’ Rights’ (2022) 45(1) *UNSW Law Journal* 209.

<sup>69</sup> Dyer (n 68) 212, 236. Cf *Benbrika [No 1]* (n 3) 149 [183], 155 [196] (Edelman J); *Garlett* (n 1) 942 [249] (Edelman J).

<sup>70</sup> Cf Dyer (n 68) 248–9.

<sup>71</sup> Cf *ibid* 248.

<sup>72</sup> See *Benbrika [No 1]* (n 3) 97–104 [36]–[48] (Kiefel CJ, Bell, Keane and Steward JJ), 111–120 [73]–[100] (Gageler J); *Garlett* (n 1) 902 [40], 903–5 [49]–[56] (Kiefel CJ, Keane and Steward JJ), 918–21 [140]–[159] (Gageler J), 950 [292], 954 [310]–[313] (Gleeson J).

<sup>73</sup> *Garlett* (n 1) 903–4 [52]–[55] (Kiefel CJ, Keane and Steward JJ).

punishment. It increases complexity.<sup>74</sup> It does not secure a stronger protection for individual liberty.<sup>75</sup> It is not the only route to a more robust method of evaluating Commonwealth non-criminal detention.<sup>76</sup> Nor is it apparent why the conception of Commonwealth judicial power should *not* embed traditional understandings of state power associated with the identification of punishment as an exclusively judicial function. It is unclear why in Edelman J's view those traditional understandings, expressed in *Lim*, lack sufficient foundation in Ch III to inform the conception of Commonwealth judicial power, but that an understanding of 'protective punishment' as an injustice can legitimately inform the conception of a court.

## 2 *Gordon J*

It is not entirely clear whether Gordon J considers that Commonwealth judicial power extends to non-criminal punishment. On the one hand, there is ample evidence that her Honour recognises that the *Lim* principle is grounded in a claim about state power to punish on a basis other than criminal guilt.<sup>77</sup> On the other hand, her Honour appears to contemplate that the relevant principle is that punishment can only be imposed without criminal guilt in exceptional cases.<sup>78</sup> This suggests that her Honour does, like Edelman J, recognise the possibility of non-criminal punishment by courts under Commonwealth laws, with sufficient justification. In any event, Gordon J's ultimate evaluation of the non-criminal detention regimes in *Benbrika [No 1]* and *Garlett* pivots away from a Diceyan rejection of non-criminal punishment. Her Honour's evaluation rests instead on a more general proposition that some special or compelling feature is required for judicial power to encompass a function that raises no question of antecedent right

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<sup>74</sup> Instead of a one-step classification exercise that engages a categorical rule with a strong foundation in authority (is a measure 'punishment?'), Edelman J's approach requires a three-step classification exercise that engages an evaluative task unfamiliar in the Ch III context: (i) is a measure 'punishment' and so exclusively judicial (see, eg, *Benbrika [No 1]* (n 3) 157–9 [200]–[204]); (ii) is it 'preventive or protective punishment' and so 'unjust' (at 162–3 [214]); and if so, (iii) is the court's performance of this unjust function justified (at 169–72 [226]–[231])?

<sup>75</sup> Indeed, Edelman J does not consider that there is sufficient foundation in Ch III for implications specifically concerned with involuntary detention in custody of the state: *Benbrika [No 1]* (n 3) 164–6 [215]–[219]. Edelman J's approach does preclude Commonwealth *executive* 'protective or preventive punishment', but that same result is achieved on the conventional understanding described above, that punishment is exclusively judicial and can only be dispensed on the basis of criminal guilt arising from past conduct.

<sup>76</sup> See the fact that Gageler J dissented in *Benbrika [No 1]* and *Garlett*. While Edelman J's approach does incorporate a form of proportionality testing, that can also be accommodated on the conventional approach, at the stage of determining whether detention escapes its default punitive character: see, eg, McDonald (n 19) 39–52.

<sup>77</sup> *Benbrika [No 1]* (n 3) 130–1 [134], 131–3 [137]–[140] (Gordon J); *Garlett* (n 1) 925–6 [175]–[178] (Gordon J). See also Falzon (n 27) 355–6 [82].

<sup>78</sup> *Garlett* (n 1) 925 [175]. See also *Benbrika [No 1]* (n 3) 321 [140]; and the endorsement of Gummow J's reformulation in *Fardon* (n 2) by Gordon J in *Benbrika [No 1]* (n 3) 131 [135].



or obligation.<sup>79</sup> Thus, her Honour's analysis does not critically rely on any principle regarding judicial power *to punish* as such.<sup>80</sup>

If Gordon J considers that Commonwealth judicial power extends to non-criminal punishment, this attracts the same comments made earlier on Edelman J's approach. If Gordon J considers that there is a Ch III prohibition on non-criminal punishment by courts, but that it is better viewed as a specific application of a more general rule that judicial power is exercised to determine existing rights or liabilities, this is contestable.<sup>81</sup> The general rule invoked by Gordon J has weakened over time, as the involvement of courts in imposing new liabilities has expanded.<sup>82</sup> And if the general rule admits exceptions, this requires some independent principled guidance for determining when exceptions are justifiable. As Gordon J has stated, this is not a matter of abstract reasoning but rather draws on 'deeply rooted notions of the relationship of the individual to the state going to the character of the national polity'.<sup>83</sup> One such notion is the Diceyan rejection of non-criminal punishment embedded in the conception of punishment as an exclusive judicial function referenced in *Lim*.<sup>84</sup>

### E Summary

The preceding discussion shows that the majority judges in *Lim*, *Benbrika [No 1]* and *Garlett* recognise that the Commonwealth cannot authorise non-criminal punishment by courts. Put another way, it is an essential characteristic of Commonwealth judicial power that it cannot be applied to dispense non-criminal punishment. This resolves one point of contention seen in *Garlett*, arising from the different approaches taken by Edelman J and Gordon J in *Benbrika [No 1]*.

<sup>79</sup> See *Benbrika [No 1]* (n 3) 137–9 [150]–[152], 141 [160]; *Garlett* (n 1) 926–7 [180], 932 [198], 932–3 [199]. To be clear, other judges also recognise the general proposition concerning judicial power, see especially *Garlett* (n 1) 918 [142] (Gageler J); *Vella v Commissioner of Police (NSW)* (2019) 269 CLR 219, 287 [171] (Gageler J). But Gordon J is the only judge who centres this as the source of a requirement to justify non-criminal detention. A similar approach is proposed in McDonald (n 19) 65–74.

<sup>80</sup> *Benbrika [No 1]* (n 3) 137–8 [150] (Gordon J) refers to *Lim* as a 'reflection' of the essential characteristic that judicial power is, as a general rule, concerned with existing rights.

<sup>81</sup> One possibility is that Gordon J considers the more general lens emphasises a point of principle with respect to *all* coercive control measures and not just detention. But the Diceyan rejection of non-criminal punishment is flexible enough to address punishments beyond detention: see above n 39 for the caselaw developments concerning citizenship stripping.

<sup>82</sup> The proposition that judicial power is generally exercised to determine existing rights or liabilities is supported by authority but there are multiple ways in which more recent case-law sidesteps or qualifies the 'rights determination' conception of judicial power: see generally James Stellios, 'The Masking of Judicial Power Values: Historical Analogies and Double Function Provisions' (2017) 28(2) *Public Law Review* 138; Stellios, *The Federal Judicature* (n 5) 131–52.

<sup>83</sup> *Garlett* (n 1) 923–4 [171], 924 [173] (Gordon J).

<sup>84</sup> *Ibid* 924 [173], 925 [175], 926 [178] (Gordon J).

### III CH III AND COMMONWEALTH INCAPACITY TO LEGISLATE FOR NON-CRIMINAL PUNISHMENT BY COURTS

Analysis can now turn to the second point of contention in *Garlett* that impedes recognition of a national prohibition on courts undertaking non-criminal punishment: whether the incapacity to authorise non-criminal punishment by courts, recognised for the Commonwealth in *Benbrika [No 1]*, extends to the states. This point of contention is seen in the position of four judges (Kiefel CJ, Keane and Steward JJ, and Gleeson J) who recognise that Commonwealth judicial power does not extend to non-criminal punishment, but do not consider that there is a corresponding limit on state laws authorising state courts to engage in non-criminal punishment.<sup>85</sup> As will be shown, the root of this contention is a lack of clarity about the precise basis in Ch III for the Commonwealth's incapacity to authorise non-criminal court-ordered punishment. Thus, to resolve this contention, it is necessary to first clarify the basis in Ch III for the Commonwealth's incapacity to legislate non-criminal court-ordered punishment (Part III), before considering the implications for the states (Part IV) and coherence with federal dimensions of Ch III doctrine (Part V).

This Part argues that Commonwealth incapacity to legislate court-ordered non-criminal punishment derives from the primary separation rule for Commonwealth judicial power. Put another way, this incapacity is not contingent on the *Boilermakers* restriction, which precludes courts exercising Commonwealth non-judicial powers (except for the performance of strictly incidental functions). Rather, the incapacity is necessary to safeguard the values that the Ch III scheme seeks to preserve by making judicial power exclusive to courts.

#### **A *The Primary Separation Rule and Permissible Court Functions***

The first step in the argument is to highlight that Ch III's primary separation rule — making Commonwealth judicial power exclusive to courts — is a potent source of limits on Commonwealth power to legislate court functions. Specifically, it precludes conferral of court functions that are incompatible with the essential characteristics of separated judicial power. Analysis of the Commonwealth functions permissible for courts often centres on the *Boilermakers* restriction, which prevents the Commonwealth conferring non-ancillary functions on federal courts that involve an exercise of Commonwealth non-judicial power. That approach can deflect attention from restrictions on Commonwealth court functions required by the distinct primary separation rule, identified well-before *Boilermakers*. By making Commonwealth judicial power exclusive to courts, Ch III

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<sup>85</sup> See above nn 7–8.

requires a constitutional conception of courts as the repositories of Commonwealth judicial power. Understood purposively, this denies the Commonwealth power to confer any functions on courts that are incompatible with the essential characteristics of separated judicial power.

### 1 *The Primary Separation Rule and Limits on the Functions Permitted to Courts*

Section 71 of the *Constitution* states that the judicial power of Commonwealth is to be vested in courts — the High Court, other federal courts, and state courts.<sup>86</sup> By 1918, High Court authorities established that this was an exhaustive and exclusive provision for the conferral of Commonwealth judicial power, such that Commonwealth judicial power could only be exercised by the courts identified in Ch III.<sup>87</sup> In 1956, the Court spoke of this first separation rule as ‘a proposition which has been repeatedly affirmed and acted upon by this Court’.<sup>88</sup> Recognition that Ch III makes exhaustive provision for the conferral and exercise of Commonwealth judicial power was the lynchpin for the Court’s 1921 ruling that the Commonwealth cannot confer judicial power on a court other than in a ‘matter’.<sup>89</sup>

From the early decades of the Australian federation, the Court recognised that the first separation principle for Commonwealth judicial power required a conception of the functions that are compatible with the essential nature of ‘judicial power’ and a conception of ‘courts’ as distinctive institutions of government entrusted to exercise separated judicial power. In a 1938 judgment, members of the Court held that Ch III denies Commonwealth legislative power to vest courts with functions ‘inconsistent with the co-existence of judicial power’;<sup>90</sup> ‘inconsistent with the due exercise of its judicial power’;<sup>91</sup> or ‘at variance with the conception of judicial power’.<sup>92</sup> Relatedly, the integrity of the primary rule requires purposive criteria for identifying whether an institution is a court *in substance* and not mere name.<sup>93</sup> Important for the present argument, it was also

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<sup>86</sup> *Australian Constitution* ss 71, 76–7.

<sup>87</sup> See above n 10. Cf *Burns* (n 13) 344 [63] (Kiefel CJ, Bell and Keane JJ) where their Honours incorrectly state that ‘until this Court’s decision in the *Boilermakers Case*, it was commonly, but erroneously, understood that an administrative body, such as the Inter-State Commission or the Commonwealth Court of Conciliation and Arbitration, was capable of exercising the judicial power of the Commonwealth.’

<sup>88</sup> *Boilermakers* (n 11) 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>89</sup> *Re Judiciary and Navigation Acts* (1921) 29 CLR 257; *Boilermakers* (n 11) 272–5.

<sup>90</sup> *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 567 (Latham CJ; Rich J agreeing) (‘*Lowenstein*’).

<sup>91</sup> *Ibid* 591 (McTiernan J).

<sup>92</sup> *Ibid* 588 (Dixon and Evatt JJ).

<sup>93</sup> *JW Alexander* (n 10) 442 (Griffith CJ), 451 (Barton J).

recognised that this necessity operates at the institutional level — meaning that it must be observed in all functions performed by the court, and its judges.<sup>94</sup>

The insight that limits on Commonwealth capacity to legislate court functions are necessary to preserve the integrity of the primary separation rule has to some extent been downplayed in post-1956 caselaw, but it maintains a discernible presence.<sup>95</sup> Notably, Deane J applied this understanding to analysis of due process protections derived from Ch III:

[I]n insisting that the judicial power of the Commonwealth be vested only in the courts designated by Ch. III, the *Constitution's* intent and meaning were that that judicial power would be exercised by those courts acting as courts with all that that notion essentially requires. Accordingly, the Parliament cannot, consistently with Ch. III of the Constitution, usurp the judicial power of the Commonwealth by itself purporting to exercise judicial power in the form of legislation. Nor can it infringe the vesting of that judicial power in the judicature by requiring that it be exercised in a manner which is inconsistent with the essential requirements of a court or with the nature of judicial power.<sup>96</sup>

The point of present significance is not Deane J's views on the content of a Ch III due process protection, but his Honour's clear articulation that such protection derives from the primary separation rule for Commonwealth judicial power. That is, 'the guarantee involved in vesting of judicial power exclusively in Ch III courts' is that an individual's guilt of a criminal offence or liability to another or the state under Commonwealth laws 'can be conclusively determined only by a Ch III court acting as such, that is to say, acting judicially'.<sup>97</sup> As Fiona Wheeler observed, Deane J's explanation

goes to the heart of the matter by explicitly invoking the values served by vesting federal judicial power in Chapter III courts. It ... is a modest and persuasive implication, insisting that the separation doctrine is concerned with 'who' is given judicial power because of an ultimate concern with 'how' that power is exercised<sup>98</sup>

Deane J's understanding was endorsed in *Lim*, where it was recognised that Commonwealth legislative power does not extend to making laws authorising courts to perform functions inconsistent with the essential character of a court or the nature of judicial power.<sup>99</sup> In *Lim*, this implication was applied to invalidate a

<sup>94</sup> *Lowenstein* (n 90) 566–7 (Latham CJ, Rich J agreeing).

<sup>95</sup> For a teaching text that centres the primary separation rule see, eg, Nicholas Aroney, Sarah Murray, Peter Gerangelos, Patrick Emerton, Joel Harrison and Adrienne Stone, *Winterton's Australian Federal Constitutional Law: Commentary and Materials* (Lawbook Co, 5<sup>th</sup> ed, 2022) 1140–2, 1219–26.

<sup>96</sup> *Polyukhovich v Commonwealth* (1991) 172 CLR 501, 606–7 (Deane J) ('*Polyukhovich*').

<sup>97</sup> *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518, 580–1 (Deane J).

<sup>98</sup> Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32(2) *Federal Law Review* 205, 210–11.

<sup>99</sup> *Lim* (n 18) 27 (Brennan, Deane and Dawson JJ). See also *Lim* (n 18) 10 (Mason CJ), 50–1 (Toohey J), 53 (Gaudron J), 67–8 (McHugh J). I note Fiona Wheeler concludes it is 'unclear' whether Deane J's theory for deriving the due process principle had prevailed in authorities to 2004: *ibid* 210.

statutory provision that purported to prevent collateral challenge or review of an executive determination of liability to detention under Commonwealth law.<sup>100</sup> The provision ‘purported to direct the courts as to the manner and outcome of the exercise of their jurisdiction’,<sup>101</sup> which was regarded as an impermissible ‘intrusion on the judicial power which Ch III vests exclusively in the courts it designates’.<sup>102</sup> The understanding that such constraints are necessary for the integrity of the primary separation rule is not foreclosed by any more recent authority.<sup>103</sup>

## 2 *The Boilermakers Restriction as a Distinct Principle in Service of the Federal Compact*

Some mention should be made of the *Boilermakers* restriction, or the ‘second limb’ of the Commonwealth separation doctrine, which prevents federal courts exercising non-incidental functions that involve an exercise of Commonwealth non-judicial power.<sup>104</sup> Important to the present argument, this new and distinct restriction on Commonwealth power was not intended to disturb pre-1956 understandings of the primary separation rule, its basis in Ch III, or its necessary implication of Commonwealth incapacity to confer court functions incompatible with the nature of separated judicial power. Rather, the *Boilermakers* restriction supplemented the well-established doctrine, with a distinct limitation on Commonwealth power serving a distinct constitutional purpose. The *Boilermakers* restriction protects the federal compact, by assuring the states that the Commonwealth cannot, by exercising its legislative powers to control the venue for litigation of federal disputes, direct adjudication of federal disputes to a

<sup>100</sup> The section (*Migration Act 1958* (Cth) s 54R), which provided that a court was not to order the release of any person who had been administratively designated as a person whom the Commonwealth law required to be detained, was construed by the majority (Brennan, Deane and Dawson JJ, Gaudron J agreeing) as directing a court *not* to give effect to substantive rights to liberty while exercising federal judicial power. The minority (Mason CJ, Toohey and McHugh JJ) considered the section could be read down, being a direction not to release a person who is *lawfully* in custody.

<sup>101</sup> *Lim* (n 18) 37 (Brennan, Deane and Dawson JJ, Gaudron J agreeing).

<sup>102</sup> *Ibid.*

<sup>103</sup> This understanding is expressly endorsed and applied by Gordon J in *SDCV v Director of General of Security* (2022) 96 ALJR 1002, 1041–3 [171]–[175] (*‘SDCV’*). Edelman J (at 1053 [225]) implicitly references the primary separation rule in reasoning that there is a requirement that all ‘Australian courts, including federal and State courts recognised in Ch III of the *Constitution* and possessing, or capable of possessing, federal jurisdiction, remain institutions of justice’. The majority justices in that case refer more generally to ‘Ch III’ as the source of the requirement that all courts observe procedural fairness in all their functions (at 1019 [50]–[51], 1061 [269]). Gageler J states (at 1030–1 [106]) that observance of procedural fairness is *both* ‘essential to the exercise of the judicial power of the Commonwealth’ and ‘an essential characteristic of any “court” capable of being invested by the Commonwealth Parliament with the judicial power of the Commonwealth’.

<sup>104</sup> *Boilermakers* (n 11) 271–2 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

federal judiciary exposed to influence by the political branches of the Commonwealth government.<sup>105</sup>

As is well-known, *Boilermakers* held invalid a purported conferral of non-judicial arbitration powers on the ‘Arbitration Court’ — a body given the status of a superior court of record, appointments to which complied with s 72 of the *Constitution*. Despite these features, it was evident that the ‘Court’ was overwhelmingly engaged in non-judicial functions, settling inter-state industrial disputes through conciliation and arbitration. As such, the Privy Council noted that the arrangement was, in substance, contrary to Ch III’s vesting of Commonwealth judicial power in ‘courts’.<sup>106</sup> To allow the conferral of judicial power on what was in substance an executive tribunal would make a ‘mockery’ of the first separation principle.<sup>107</sup>

In the High Court judgment affirmed by the Privy Council, however, the fatal flaw in the legislation flowed from a different source. The ‘basal reason’ for invalidity was that Ch III is the sole and exclusive source of Commonwealth power to confer functions on courts.<sup>108</sup> The *Boilermakers* restriction by design went further than strictly necessary to safeguard the primary separation rule. So much was recognised by the *Boilermakers* High Court majority, who understood that the first separation rule — ‘a proposition which has been repeatedly affirmed and acted upon by this Court’<sup>109</sup> — rested on a view that Ch III was exhaustive in relation to Commonwealth *judicial power*; while the new second restriction views Ch III as exhaustive in relation to Commonwealth *court functions*.<sup>110</sup>

In *Boilermakers*, the majority Justices considered this new and additional restriction on Commonwealth power was necessary to ensure the practical working of the federal compact. The majority were mindful that, under the terms of Ch III,<sup>111</sup> the Commonwealth holds paramount power over the venue for litigation of disputes in which the Commonwealth and states have different, and possibly contradictory, interests. This explains the emphasis that the majority placed on the position of the federal judicature in the resolution of matters about the federal division of powers between Commonwealth and states.<sup>112</sup> The *Boilermakers* implication can be understood as an insurance against the prospect of the Commonwealth legislating so that the only venues for resolution of federal disputes are federal courts, and then sapping the independence of those federal courts by requiring them to exercise Commonwealth non-judicial powers. That

<sup>105</sup> Cf *NAAJA* (n 56) 636 [177] (Keane J).

<sup>106</sup> *Boilermakers PC* (n 11) 535 (Viscount Simonds for the Court).

<sup>107</sup> *Ibid* 539 (Viscount Simonds for the Court).

<sup>108</sup> *Boilermakers* (n 11) 289 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>109</sup> *Ibid* 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

<sup>110</sup> *Ibid*.

<sup>111</sup> *Australian Constitution* s 77 gives the Commonwealth power to legislate to make jurisdiction in the subject-matters described in ss 75–6 exclusive to federal courts. And see the provision made in *Judiciary Act 1903* (Cth) s 38.

<sup>112</sup> *Boilermakers* (n 11) 276; see also 267–8, 272 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

outcome would undermine the federal compact itself, which depends critically on the state governments' confidence that the terms of the federation can be enforced by a judicature that is independent and impartial as between the Commonwealth and states.<sup>113</sup>

Relevantly for present purposes, *Boilermakers* established a restriction on Commonwealth power to legislate court functions that was understood by its authors as an *addition* to the limitations that had already been recognised as necessary to safeguard the integrity of the primary separation rule. The intervention in 1956 was not intended to disturb the well-established understandings that: first, Ch III makes exhaustive provision for the conferral of Commonwealth judicial power (contrast, for the conferral of Commonwealth functions on federal courts); and, second, that this exhaustive scheme implies a constitutional understanding of the essential characteristics of separated judicial power that must be upheld at the institutional level, across all Commonwealth court functions.

### **B Ch III and Commonwealth Judicial Power to Punish**

The next point is that the Commonwealth incapacity to authorise courts to administer non-criminal punishment, recognised in *Benbrika [No 1]*, derives from the primary separation rule. The rationale, put simply, is this: it is a core purpose of that rule to ensure that Commonwealth-sanctioned punishment is administered consistently with the traditional understanding referred to in the *Lim* judgment. That purpose would be defeated if that separated judicial power could be used to administer non-criminal punishment.

To fully articulate this rationale, we should first notice a nuance in the doctrine concerning the scope of judicial power. Considered in the abstract, as one of the three powers of government, 'judicial power' is state power to render a conclusive determination of rights or liabilities which may be binding and enforceable (unless and until set aside) even if the determination is invalid.<sup>114</sup> Commonwealth judicial power can be applied to perform exclusively judicial functions and so-called innominate functions — functions that are neither exclusively judicial nor exclusively non-judicial — provided that the specific conferral of statutory jurisdiction to perform the innominate function is apt for the exercise of judicial power.<sup>115</sup> Because of this doctrinal nuance, defining the

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<sup>113</sup> Cf NAAJA (n 56).

<sup>114</sup> *New South Wales v Kable* (2013) 252 CLR 118, 133–4 [33]–[34], 135–6 [38]–[41] (French CJ, Hayne, Crennan, Kiefel, Bell and Keane JJ), 141–2 [59]–[60] (Gageler J). The point is that this finality lies exclusively within judicial power. That point stands even if the finality is not conferred on the judicial orders of inferior courts, see 139–140 [53]–[56] (Gageler J). See also *Benbrika [No 1]* (n 3) 117 [89] (Gageler J).

<sup>115</sup> An example being jurisdiction to make an adjudicative determination of new rights or liabilities: see generally Stellios, *The Federal Judicature* (n 5) 152–65, 198–222.

nature of an *exclusive* judicial function is analytically distinct from identifying the parameters of separated judicial power. So, for instance, consider the *Lim* observations on the traditional conception of punishment as an exclusive judicial function. As has been discussed, that conception embeds the anterior common law's default characterisation of detention as punitive and its rejection of non-criminal punishment. But to the present point, there is a gap between recognising that anterior common law conceptions are carried forward in the Ch III conception of punishment *as an exclusively judicial function* (on the one hand) and concluding that they inform the scope of judicial power to punish (on the other hand). In that gap is the logical possibility that there are innominate punitive functions which are not controlled by the same anterior British conceptions that operate on the exclusively judicial punitive functions.

In the predominant way of thinking about Commonwealth judicial power to punish, the logical possibility of an innominate function to punish on a non-criminal basis barely registers. It is, as it were, implicitly discounted.<sup>116</sup> This is telling. Why is this logical possibility so readily sidelined in the prevailing judicial account? The most plausible answer is the most obvious: it is considered axiomatic that preserving the anterior common law conception of punishment is a core value or purpose that is advanced by strictly allocating Commonwealth judicial power to courts.

### **1 *A Purposive Understanding of Separated Judicial Power Embeds the Diceyan Rejection of Non-Criminal Punishment***

Gageler J's reasons in *Garlett* explain why the essential characteristics of punishment *as an exclusively judicial function* translate into essential characteristics *of separated judicial power*. The reason, in essence, is that safeguarding the anterior common law's conception of state power to punish is a core purpose of entrusting Commonwealth judicial power exclusively to courts.

Gageler J outlines the rationale this way. The limits on state power embedded in the *Lim* conception of state power to punish speak to 'deeply rooted notions of the relationship of the individual to the state going to the character of the national polity created and sustained by the *Constitution*'.<sup>117</sup> They go to 'the essence of the relationship between the individual and state under our system of government'.<sup>118</sup> Although 'rarely articulated, and all too readily overlooked', that conception of the relationship between the individual and state 'lies at the heart of our system of

<sup>116</sup> Cf James Stellios, 'Liberty as a Constitutional Value: The Difficulty of Differing Conceptions of "the Relationship of the Individual to the State"' in Rosalind Dixon (ed) *Australian Constitutional Values* (Hart Publishing, 2018) 177; *Garlett* (n 1) 916 [127] (Gageler J).

<sup>117</sup> *Benbrika [No 1]* (n 3) 110 [70]; *Garlett* (n 1) 917 [127] quoting *Magaming v The Queen* (2013) 252 CLR 381, 400 [63].

<sup>118</sup> *Garlett* (n 1) 916 [129].



government'.<sup>119</sup> Maintaining that 'relationship between the individual and the state within our inherited conception of the rule of law' supplies the 'substantive constitutional significance of consigning the function of adjudging and punishing criminal guilt exclusively to the judicial branch of government'.<sup>120</sup>

As such, it would undermine integrity of Ch III's primary separation rule if separated judicial power were exercised to impose punishment on a basis other than criminal guilt by past acts. The existence of an innominate power to dispense non-criminal punishment is logically possible, but normatively incoherent. It would undermine a core purpose of entrusting criminal punishment exclusively to courts. It would 'alter in a fundamental respect the nature of the relationship conventionally understood to exist between the individual and the state under our inherited conception of the rule of law'.<sup>121</sup>

The point of significance to the present argument is the link that Gageler J elucidates between: (i) the understanding of state power to punish expressed in *Lim*; and (ii) the constitutional conception of separated judicial power. That link is made on the basis that a purpose of vesting judicial power exclusively in courts is to preserve that anterior common law understanding of state power to punish which is hardwired into the conception of punishment as an exclusive judicial function. The link can be made, for the reasons Gageler J gives, irrespective of whether other members of the Court are in complete agreement with Gageler J on every aspect of the anterior conception of state power to punish. It may be correct to say that other members of the Court do not share Gageler J's view on the strength of the default characterisation of detention as a punishment and the importance of protecting the subject's liberty from detention, for example. But this does not negate a consensus that the Diceyan rejection of non-criminal punishment informs the conception of separated judicial power. As discussed earlier, six of the eight judges who sat on *Benbrika [No 1]* or *Garlett* recognised that Commonwealth judicial power does not extend to non-criminal punishment, invoking the Diceyan rejection of non-criminal punishment and its recognition in *Lim* as authority.<sup>122</sup> In taking that step, those judges implicitly recognised that a purposive conception of separated judicial power embeds those traditional understandings associated with the conception of punishment as an exclusively judicial function. This is hardly contentious. It is in keeping with many canonical judicial observations on the character of the powers allocated by the *Constitution*.<sup>123</sup>

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<sup>119</sup> Ibid 917 [133] (Gageler J).

<sup>120</sup> Ibid.

<sup>121</sup> Ibid 919 [150] (Gageler J).

<sup>122</sup> See Part III(C).

<sup>123</sup> See, eg, n 29 above.

## 2 Commonwealth Incapacity to Legislate Non-Criminal Punishment by Courts is Necessary for the Integrity of the Primary Separation Rule

Gageler J's reasons in *Garlett* demonstrate why the traditional understandings expressed in *Lim* are considered essential characteristics of separated judicial power. But they also cast light on the Ch III foundation for Commonwealth incapacity to legislate for non-criminal punishment by courts. While Gageler J does not put it in precisely these terms,<sup>124</sup> his argument shows that Commonwealth incapacity to authorise non-criminal punishment by courts can be derived from the primary separation rule.

The derivation from the primary separation rule can be explained this way: the implied limit on Commonwealth power upholds the integrity of the primary rule by safeguarding the essential characteristics of separated judicial power from institutional impairment. Preserving the constitutional conception of state power to punish is a core purpose of the primary separation rule. Thus, a core purpose of making judicial power exclusive to courts would be undermined if that separated judicial power were able to be exercised on a basis that flouts fundamental values underlying the identification of punishment as an exclusive judicial function: 'Conferral of such a function is antithetical to the very conception of justice which it is the responsibility of courts to administer.'<sup>125</sup>

To this we can add a further point: Commonwealth incapacity to legislate court-ordered non-criminal punishment can be demonstrated without invoking the *Boilermakers* restriction on Commonwealth legislative power.<sup>126</sup> The incapacity is sufficiently explained on the view that non-criminal punishment requires a court to perform a function inconsistent with the nature of separated judicial power, thereby undermining the integrity of the primary separation rule.

Indeed, there would seem to be a particularly strong case that the Commonwealth incapacity identified in *Benbrika [No 1]* does not rest on the second separation rule. As has been discussed earlier, the prevailing judicial view is that the constitutional nature of separated Commonwealth judicial power incorporates the totality of the inherited conception of punishment as an exclusive judicial function referenced in *Lim*. Specifically, it incorporates the Diceyan rejection of state power to punish on a basis other than criminal guilt.<sup>127</sup> As such, the predominant understanding does not recognise non-criminal punishment as a *permitted non-judicial function*. This can be too readily overlooked if the issue is viewed through the lens of the *Boilermakers* restriction on Commonwealth power. Doing so confuses matters by suggesting that non-criminal punishment lies within Commonwealth non-judicial power.

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<sup>124</sup> A point I return to later. See below n 153 and accompanying text.

<sup>125</sup> *Garlett* (n 1) 917 [135] (Gageler J).

<sup>126</sup> Cf, on this point only, *ibid* 913–15 [111]–[123] (Gageler J).

<sup>127</sup> Cf *Benbrika [No 1]* (n 3) 164 [215] (Edelman J).

### C Summary

This Part has addressed the Ch III foundation for the Commonwealth incapacity to legislate for non-criminal punishment by courts. It has argued that the Commonwealth incapacity is implied to uphold the purpose, or practical integrity, of the Ch III prescription that Commonwealth judicial power is exclusive to courts. The argument relies on Gageler J's explanation that non-criminal punishment is antithetical to the nature of separated judicial power. This conclusion rests on the understanding, outlined by His Honour, that a core purpose of Ch III's separation of judicial power is to ensure that the deeply rooted notions of state power embedded in the conception of punishment as an exclusive judicial function are upheld. The argument of this Part has diverged from Gageler J's account only in more insistently identifying that the Commonwealth's incapacity to legislate for non-criminal punishment derives from Ch III's primary separation rule.

## IV CH III AND STATE INCAPACITY TO LEGISLATE FOR NON-CRIMINAL PUNISHMENT BY COURTS

This Part addresses the basis in Ch III for an entrenched categorical prohibition on non-criminal punishment by courts under state laws.<sup>128</sup> For the reasons given in Part III, a prohibition on non-criminal punishment by courts is necessary for the integrity of the primary separation rule. What remains to be demonstrated is that the necessity so identified engages the *Kable* restriction on state legislative power.

### A *The Kable Restriction on State Legislative Power*

In *Kable*, the Court first recognised that the integrity of the primary separation rule for Commonwealth judicial power required limits on the functions state courts could perform under state laws. The implication for state legislative power was drawn from the premise that state courts are 'neither less worthy recipients of federal jurisdiction than federal courts nor "substitute tribunals"' and 'there is nothing anywhere in the *Constitution* to suggest that it permits of different grades or qualities of justice, depending on whether judicial power is exercised by state courts or federal courts'.<sup>129</sup> As such, states may not legislate court functions that 'are repugnant to or incompatible with' their exercise of separated Commonwealth judicial power.<sup>130</sup> The performance of any such function would

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<sup>128</sup> As noted earlier at n 5, the argument in this Part would apply with equal force to territory authority to legislate court functions.

<sup>129</sup> *Kable* (n 12) 103 (Gaudron J).

<sup>130</sup> *Ibid.*

invalidly ‘inflict an institutional impairment of the judicial power of the Commonwealth’.<sup>131</sup>

It is said that the *Kable* limit denies state legislative power to substantially impair the institutional integrity of a state court.<sup>132</sup> A state court is said to have institutional integrity if it maintains, throughout all its operations as a court, the essential or defining characteristics of a court as a repository for separated judicial power. These characteristics include institutional and decisional independence, the reality and appearance of impartiality, procedural fairness, transparency and reason-giving.<sup>133</sup> The relevant question is not whether a law affecting the functions of a court means that it, as an institution, desists from being a court.<sup>134</sup> In relation to institutional independence, the question might arguably be posed in this way.<sup>135</sup> But other essential characteristics (decisional independence, procedural fairness and reason-giving) must be complied with in all the courts’ operations.<sup>136</sup> Derogation from those minimum standards in the exercise of any jurisdiction conferred on a state court is viewed as an institutional impairment on separated Commonwealth judicial power.

Importantly, ‘institutional integrity’ also refers to the integrity of courts as *repositories of separated judicial power*. The *Kable* restriction is a matter of practical necessity to safeguard the integrity of the primary separation rule by ensuring that the essential characteristics of separated judicial power are protected from institutional impairment. The *Kable* restriction is not concerned with courts in the abstract, or to demarcate court and non-court tribunals as a purely analytical exercise.<sup>137</sup> The *Kable* restriction cannot be severed from the allocative function of

<sup>131</sup> *Ibid* 143 (Gummow J). See also *South Australia v Totani* (2010) 242 CLR 1, 48 [70] (French CJ); *Kuczborski v Queensland* (2014) 254 CLR 1, 119 [228] (Crennan, Kiefel, Gageler and Keane JJ).

<sup>132</sup> This language came to the fore in and following *Fardon* (n 2) and *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45: see William Bateman, ‘Procedural Due Process under the Australian Constitution’ (2009) 31(3) *Sydney Law Review* 411, 434–6; Lim (n 9) 44–6.

<sup>133</sup> *NAAJA* (n 56) 594–5 [39]–[40] (French CJ, Kiefel and Bell JJ).

<sup>134</sup> *Cf K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501, 544 [153]–[154] (Gummow, Hayne, Heydon, Crennan and Kiefel JJ). This is not to ignore the complexity of interpreting ‘court’ as a constitutional expression, see generally Rebecca Ananian-Welsh, ‘CATs, Courts and the Constitution: The Place of Super-Tribunals in the National Judicial System’ (2020) 43(3) *Melbourne University Law Review* 852 (‘CATs, Courts and the Constitution’).

<sup>135</sup> *Cf* the observation in *Forge* (n 132) 86 [93] (Gummow, Hayne and Crennan JJ) that the institutional integrity of State courts ‘is not inevitably compromised by the appointment of an acting judge’, but ‘may be distorted’ ‘if a significant element of the court’s membership stood to gain or lose from the way in which the duties of office were executed’.

<sup>136</sup> This does not mean that the essential decisional and process characteristics prescribe an immutable minimum rule of court operation, but it does mean that each characteristic (evaluative and flexible as it may be) is required to be observed in the exercise of any jurisdiction conferred on the court: see, eg, *SDCV* (n 103) 1019–24 [50]–[68] (Kiefel CJ, Keane and Gleeson JJ), 1034 [129], 1035 [137] (Gageler J), 1048 [194] (Gordon J), 1069 [307] (Steward J). *Cf* 1052 [218], 1054–5 [231] (Edelman J).

<sup>137</sup> *Cf* Graeme Hill, ‘State Administrative Tribunals and the Constitutional Definition of “Court”’ (2006) 13(2) *Australian Journal of Administrative Law* 103, 107–12; Ananian-Welsh, ‘CATs, Courts and the Constitution’ (n 134).

the primary separation rule.<sup>138</sup> Its application ensures that the values served by the primary separation rule are realised by ensuring that state courts maintain, at an institutional level, the qualities necessary to ‘render [them] able to be vested with the separated judicial power of the Commonwealth’.<sup>139</sup>

## B *Separating Lim and Kable is Untenable*

Against this background of established principle, it is surprising to see judicial statements in *Garlett* that the *Lim* principle ‘has no application to establish the invalidity’<sup>140</sup> of a state law; and that there is ‘reason to doubt its significance for the principle stated in *Kable*, at least for the purpose of a conclusion that the *Lim* principle is germane to the institutional integrity of a State court’.<sup>141</sup> It is particularly surprising that these statements come from judges who recognise that the *Lim* principle describes an essential characteristic of Commonwealth judicial power. Kiefel CJ, Keane and Steward JJ appear to say that the *Lim* principle has no application at the state level precisely because it defines the scope of Commonwealth judicial power.<sup>142</sup> Gleeson J writes that a ‘strict separation’ is required between standards of institutional integrity and the *Lim* principle *because* that principle ‘was articulated as a constitutive part of the doctrine of the separation of Commonwealth judicial power’.<sup>143</sup>

This aspect of *Garlett* highlights continuing ambivalence as to when, and why, Ch III implies the same limits on Commonwealth and state capacity to legislate court functions. It is well-understood that the *Kable* restriction on the states cannot *simply* reflect everything Ch III requires in relation to the exercise of Commonwealth judicial power. Ch III does not assimilate state courts with federal courts, and state courts can do things that federal courts cannot.<sup>144</sup> Nonetheless, in the light of *Benbrika [No 1]* it is impossible to ‘strictly separate’ *Lim* and *Kable*. If the argument in Part III is sound, then non-criminal punishment is antithetical

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<sup>138</sup> I note Bateman’s argument that due process principles are ‘at best unstated assumptions’ of the separation doctrine, and therefore find stronger support in an institutional character principle drawn from a constitutional definition of ‘court’ operating independently of the separation doctrine’s allocation function: Bateman (n 132) 432, 441. To the extent that Bateman is here referring to the *second* limb of the *Boilermakers* doctrine, I agree. I do not, however, think that an institutional character principle should be separated from the primary separation rule. I note Bateman proposes a ‘functional analysis’ within which to identify the essential features of a court that allows regard to be had for the purposes served by separating judicial power (at 439) and concludes that ‘attaching a due process principle to the institution of a ‘court’ suits the underlying goals of the separation doctrine’ (at 442).

<sup>139</sup> *Condon v Pompano Pty Ltd* (2013) 252 CLR 38, 106 [183] (Gageler J).

<sup>140</sup> *Garlett* (n 1) 902 [40] (Kiefel CJ, Keane and Steward JJ).

<sup>141</sup> *Ibid* 953 [306] (Gleeson J).

<sup>142</sup> *Ibid* 902 [39] (Kiefel CJ, Keane and Steward JJ).

<sup>143</sup> *Ibid* 950–1 [293]–[296] (Gleeson J).

<sup>144</sup> See generally *Lim* (n 9).

to the essential nature of separated Commonwealth judicial power. So understood, the *Lim* principle must inform the *Kable* restriction.

Two methods of justifying a separation between *Lim* and *Kable* can be ruled out. One method would be to posit that the *Kable* restriction does not protect all essential characteristics of Commonwealth judicial power. This is contrary to authority and the fundamental purpose of the *Kable* restriction. The *Kable* restriction operates to ensure against institutional impairment of *the judicial power of the Commonwealth*.<sup>145</sup> When it is said that the *Kable* restriction precludes states legislating court functions that are incompatible with ‘the very nature of judicial power’ or ‘the essence of judicial power’,<sup>146</sup> the reference is to the judicial power that Ch III makes exclusive to courts. It is not a reference to judicial power as exercised in the Australian states, nor to some ‘lowest common denominator’ conception that operates for the judicial power in every Australian polity. It is a reference to the essential characteristics of the separated judicial power entrusted to the courts referred to in s 71.

A second method of ‘strictly separating’ *Lim* and *Kable* would be to recognise that *Kable* protects all essential characteristics of separated judicial power, but to posit that the *Lim* principle does not describe any such characteristic. This reading must also be ruled out. It is contrary to the prevailing views in *Benbrika [No 1]* and other judicial statements of Kiefel CJ, Keane and Steward JJ, and Gleeson J.<sup>147</sup> There is no good reason to downgrade the characteristic of Commonwealth judicial power identified in *Benbrika [No 1]* to ‘entrenched but not essential’ — even supposing such a category of attributes of separated judicial power exists. On the contrary, there is a compelling case that protecting subjects from non-criminal punishment is a core purpose of vesting Commonwealth judicial power exclusively in Ch III courts.<sup>148</sup>

Thus, in the light of the earlier analysis in Part III, it is untenable to separate the *Lim* principle from the *Kable* restriction on the states. The *Kable* principle protects all essential characteristics of separated Commonwealth judicial power, and the *Lim* principle describes an essential characteristic of separated Commonwealth judicial power.

### **C Separating *Lim* from the Boilermakers Restriction is the Answer**

A simple step can be taken to clarify that the essential characteristic of separated judicial power identified in the *Lim* principle informs the *Kable* restriction. That step is to more clearly identify that the essential characteristic of Commonwealth judicial power recognised in *Lim*, *Benbrika [No 1]* and *Garlett* derives from the

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<sup>145</sup> See above n 131.

<sup>146</sup> *Kable* (n 12) 96 (Toohey J).

<sup>147</sup> See authorities cited in *Garlett* (n 1) 950 [292] (Gleeson J).

<sup>148</sup> See Gageler J’s account, discussed above in Part III(B)(1).

primary separation rule — vesting separated judicial power exclusively in courts — and is in no way contingent on the distinct secondary *Boilermakers* restriction on Commonwealth powers.

Taking this step would be justified for the reasons given in Part III. As has been argued, the Commonwealth incapacity recognised in *Benbrika [No 1]* (namely, to legislate for non-criminal punishment by courts) derives from that part of the Ch III scheme which makes Commonwealth judicial power exclusive to courts. Non-criminal punishment is antithetical to ‘the very nature of’ or ‘the essence of’ separated Commonwealth judicial power. Accordingly, any involvement of any Ch III court in non-criminal punishment amounts to an institutional impairment of an essential characteristic of separated Commonwealth judicial power.

### D Summary

Once the source of the Commonwealth incapacity recognised in *Benbrika [No 1]* is correctly identified, it is uncontroversial to recognise that it should also inform the *Kable* restriction on the states. The incapacity is necessary to safeguard something that is an essential characteristic of Commonwealth judicial power because it embodies a core value served by the exclusive vesting of Commonwealth judicial power in courts. It is precisely the purpose of the *Kable* principle to ensure that such characteristics are protected from institutional impairment in every Ch III court.

## V A MORE INTEGRATED WAY OF THINKING ABOUT PERMITTED COURT FUNCTIONS?

Addressing the constitutionality of non-criminal punishment by state courts throws up difficult questions about the impact of federalism on Ch III doctrine. But as the arguments in Parts III and IV have shown, it also presents an opportunity to revisit certain ingrained habits of thinking about the implications of the Ch III scheme for the functions permitted to courts under Commonwealth and state laws. In particular, it may stimulate clearer recognition that the primary separation rule precludes courts exercising functions (whether under Commonwealth or state laws) that are incompatible with the essential characteristics of separated judicial power. This Part sketches out, in broad terms, what this recognition would entail, and its coherence with the Ch III scheme.

### **A What it Means to Recognise a National Restriction on Court Functions Derived from the Primary Separation Rule**

To repeat a point made earlier, it is quite clear that Ch III imposes restrictions on Commonwealth-legislated court functions that do not apply to the states. For example, Ch III denies the Commonwealth *any* latitude to confer non-incidental functions on courts that involve Commonwealth non-judicial power but imposes no equivalent limit on the states. Nothing said in this Part should be taken to imply that Ch III imposes the exact same limits on Commonwealth and state-legislated functions in all respects. Additionally, this proposal concerns court functions, not matters bearing on institutional independence (judicial appointments, tenure and remuneration).

What is being suggested is simply this: Ch III's vesting of judicial power exclusively in courts denies all polities, the Commonwealth and states alike, capacity to legislate court functions that are incompatible with the essential characteristics of separated judicial power. The integrity of the Ch III scheme requires that those essential characteristics of separated judicial power be protected from any institutional impairment, whether by Commonwealth or state laws.

As such, two categories of Ch III restrictions on Commonwealth and state capacity to legislate functions for courts can be identified:

- (i) Restrictions that derive from the primary separation rule, in the sense that they are necessary to prevent institutional impairment of those core features of judicial power that the exclusive vesting in courts seeks to protect. These restrictions apply to Commonwealth and state-legislated court functions alike.
- (ii) Restrictions attributable solely to the *second* separation rule first recognised in *Boilermakers*. These restrictions apply only to Commonwealth capacity to legislate court functions.

It is beyond the scope of this article to work through a detailed implementation of the boundary between these two categories of restriction.<sup>149</sup> However, some brief observations can be made. First, making this distinction would not disrupt established doctrine regarding *state* power to confer functions on state courts. The only restrictions applicable to the states on this approach would be those that find support in the rationale for the *Kable* restriction on state laws. Second, adopting this approach would require a small adjustment in thinking about restrictions on *Commonwealth* powers. Specifically, it would require a more precise articulation

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<sup>149</sup> Cf more developed proposals made in, eg, Sarah Murray, 'Giving Chapter III Back Its Constitutional Mojo? — Lessons from State Courts and Beyond' (2014) 40(1) *Monash University Law Review* 18; Rebecca Welsh, 'A Path to Purposeful Formalism: Interpreting Chapter III for Judicial Independence and Impartiality' (2013) 39(1) *Monash University Law Review* 66 ('Purposeful Formalism').



of restrictions that operate on Commonwealth-legislated court functions by reason of the primary separation rule. This would draw on the foundation provided in authority and scholarship discussed earlier (Part III). Third, the second category of restriction is important. It recognises the existence of separate and distinct restrictions at the Commonwealth level,<sup>150</sup> namely those that rest *entirely* on the Commonwealth's inability to confer non-judicial power on courts (outside the performance of strictly incidental functions). As such, the proposed approach contemplates that the *Boilermakers* restriction may impose limits on Commonwealth capacity to legislate court functions that do not apply to the states. For instance, the *Boilermakers* restriction would invalidate any Commonwealth law purporting to authorise federal courts to make orders that lack the dispositive effect on rights, or the intrinsic legal efficacy, that is present in an exercise of judicial power.<sup>151</sup>

This way of thinking would not produce a uniform institutional integrity jurisprudence (because it applies to the evaluation of *functions* and does not consider institutional independence), and nor would it produce a single test for permissible court functions (because the separate and additional role of the *Boilermakers* restriction is maintained for Commonwealth functions). But it would support a unified jurisprudence in relation to those restrictions on court functions that are drawn to prevent institutional impairment of those core features of separated judicial power that the exclusive vesting in courts seeks to protect. Within this unified jurisprudence on court functions, attention can better focus on the important work of articulating and protecting the values served by vesting judicial power exclusively in courts.<sup>152</sup>

### **B Clarifying the Separate and Distinct Purpose of the Boilermakers Restriction**

Recognising that a uniform national restriction on court functions flows from the primary separation rule is not an attack on the *Boilermakers* restriction. Rather, it requires a small adjustment in thinking about Ch III restrictions on the Commonwealth, which creates space to register the distinct purpose and effect of the *Boilermakers* restriction.

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<sup>150</sup> Cf the two-tiered approach for Commonwealth functions proposed in Welsh, 'Purposive Formalism' (n 149), in which a compatibility criterion is applied only if the nature of a function is unclear. That approach situates compatibility as one factor assisting in defining judicial power. See also Rebecca Welsh, 'Incompatibility Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22(4) *Public Law Review* 251, 263.

<sup>151</sup> See, eg, the function of making a 'declaration of incompatibility' with a statutory bill of rights considered in *Momcilovic v The Queen* (2011) 245 CLR 1.

<sup>152</sup> An outcome with broad support in the scholarship, see especially Wheeler (n 98) above. See also Zines (n 24) 298–9; Welsh, 'Purposive Formalism' (n 149) 5–105.

As evidence that the change is minimal, consider that Gageler J has in substance recognised that it is the primary separation rule which prohibits Ch III courts dispensing non-criminal punishment. In *Garlett*, his Honour presented the *Boilermakers* and *Kable* restrictions as ‘complementary’ secondary implications necessary to preserve Ch III’s primary separation rule:

The restriction on Commonwealth legislative power associated with *Boilermakers* and the restriction on State and Territory legislative powers associated with *Kable* are ... complementary implications from Ch III’s separation of the judicial power of the Commonwealth. Each is a structural implication implicit in, and directed to the preservation of, the distinctive nature of the separated judicial power of the Commonwealth. Each serves ultimately to maintain the integrity of the exercise of that judicial power ...

The *Kable* restriction on State and Territory legislative power and the *Boilermakers* restriction on Commonwealth legislative power have a common purpose and complementary operation.<sup>153</sup>

This leads Gageler J to observe that there is an overlap between *Kable* and *Boilermakers* restrictions on legislative power:

[I]f a function is non-judicial for the reason that having that function would impair the institutional integrity of a court, legislative conferral of that function must be offensive to the *Kable* restriction on State and Territory legislative power in the same way as it is offensive to the *Boilermakers* restriction on Commonwealth legislative power. In respect of a non-judicial function of that nature, the *Boilermakers* restriction and the *Kable* restriction are indistinguishable.<sup>154</sup>

This helpfully identifies that convergent restrictions on Commonwealth and state court functions derive from the primary separation rule. It would be a very small, incremental adjustment to give more overt recognition that what is being described here is a singular implication from the primary separation rule, precluding any court functions that are incompatible with the nature of separated judicial power.

Taking this step can avoid unnecessary debate regarding Gageler J’s portrayal of the *Boilermakers* restriction as one that has a ‘common purpose’ with the *Kable* restriction. This is not a widely shared view of the *Boilermakers* restriction.<sup>155</sup> Some might ask why, if the *Boilermakers* and *Kable* restrictions do

<sup>153</sup> *Garlett* (n 1) 914–15 [119]–[122] (Gageler J).

<sup>154</sup> *Ibid* 915 [123] (Gageler J). Cf *SDCV* (n 103) 1030–1 [106] (Gageler J).

<sup>155</sup> Criticisms of the second limb of *Boilermakers* are widespread. See generally Murray (n 149) 200–5. A more radical critique, encompassing both limbs of the *Boilermakers* doctrine, is made in Gabrielle Appleby, ‘Imperfection and Inconvenience: *Boilermakers* and the Separation of Judicial Power in Australia’ (2012) 31(2) *University of Queensland Law Journal* 265.

have the same rationale, should the additional strictures of the *Boilermakers* restriction on Commonwealth court functions be maintained?<sup>156</sup>

The approach proposed in this article allows for the distinct purpose and effect of the *Boilermakers* restriction, operating independently of a national restriction on court functions drawn directly from the primary separation rule.<sup>157</sup> Recognising that the primary separation rule generates important restrictions on Commonwealth court functions (as this article proposes) clarifies the conceptual underpinning of a values-driven approach that is, in substance, implied by judicial accounts such as Gageler J's in *Garlett*.<sup>158</sup> And in doing so, it creates space for Ch III doctrine to better register the distinct rationale and effect of the *Boilermakers* restriction, which can be seen to supplement (but not sustain) the core constraints that the primary separation rule imposes on Commonwealth and state-legislated court functions alike.

### **C Coherence with Ch III's Primary Separation Rule for State Judicial Power**

There is another aspect of recent Ch III doctrine that supports the emergence of a more integrated way of thinking about the courts as repositories of separated judicial power. This arises from the ruling in *Burns*<sup>159</sup> that Ch III makes *state* judicial power in federal subject-matters exclusive to state courts.<sup>160</sup> It is not suggested that *Burns* establishes an integrated institutional integrity jurisprudence. Rather, it is conducive to a more 'joined up' way of thinking about permissible court functions.

The *Burns* majority (Kiefel CJ, Bell and Keane JJ in joint reasons; Gageler J writing separately) drew on the premise for the primary separation rule for *Commonwealth* judicial power, that Ch III is the only source of Commonwealth power to confer or invest judicial power in the subject-matters identified in ss 75 and 76.<sup>161</sup> On the assumption that Commonwealth legislative power in relation to adjudication of these matters is both paramount and limited, their Honours concluded that Ch III impliedly denies *state* legislative power to outflank the choices given to Commonwealth parliament in relation to adjudication of those

<sup>156</sup> See arguments favouring the replacement of *Boilermakers*' second limb with a general or structured incompatibility criterion that operates on all Ch III courts, eg, Murray (n 149) 211–27; Appleby (n 155) 280–6; James Stelliios, 'Reconceiving the Separation of Judicial Power' (2011) 22(2) *Public Law Review* 113, 135–6; McLeish (n 9) 265.

<sup>157</sup> As discussed in Part III(A)(2) above.

<sup>158</sup> Cf Wheeler (n 98) explaining her preference for the approach of Deane J over Gaudron J in relation to the derivation of 'due process' protections from the *first* rather than *second* limb of the *Boilermakers* doctrine.

<sup>159</sup> *Burns* (n 13).

<sup>160</sup> For an argument that the *Burns* restriction would apply to the territories, see Stelliios, *The Federal Judicature* (n 5) 606–8.

<sup>161</sup> *Burns* (n 13) 335 [43], 341 [55], 345 [64] (Kiefel CJ, Keane and Bell JJ), 346 [68], 364 [119] (Gageler J).

subject-matters.<sup>162</sup> Specifically, Ch III necessarily denies Australian states the constitutional option of vesting judicial power in federal subject-matters in non-courts.

Relevantly to the present discussion, the ruling in *Burns* implicitly advances a new insight into the constitutional conception of those state institutions that are ‘courts’ for the purpose of Ch III. Specifically, *Burns* makes clear that Ch III requires a conception of state courts as repositories of separated state judicial power. Even though Ch III does not make *all* state judicial power exclusive to courts, it does, nonetheless, require a conception of state courts as the only state institutions competent to exercise state judicial power in relation to federal subject-matters.<sup>163</sup> In the light of *Burns*, the ‘attribution’ of courts as state courts is not antithetical to a conception of them as repositories of separated judicial power.<sup>164</sup>

More than this, the rationale for the *Burns* restriction on state legislative power lends conceptual support to a more integrated way of thinking about the functions permitted to courts as repositories of separated judicial power. *Burns* recognised that the states cannot have any wider legislative power in relation to the adjudication of federal subject-matters than the Commonwealth.<sup>165</sup> This means, for instance, that the states cannot confer judicial power on courts in federal subject-matters other than in ‘matters’.<sup>166</sup> One way of expressing this is that Ch III contains an exhaustive statement of the kind of judicial power which may be conferred or exercised in respect of the subject-matters set out in ss 75 and 76.<sup>167</sup> *Burns* recognises that there is a uniformity to the nature of separated judicial power throughout the Australian federation. All of the judicial power that Ch III vests exclusively in courts is of like nature, whether it be Commonwealth judicial power or state judicial power in federal subject-matters.

Viewing state courts as repositories of separated state judicial power will not have any practical effect on state *court* operations. This is because longstanding Commonwealth legislation ensures that all jurisdiction exercised by state courts on federal subject-matters is federal jurisdiction.<sup>168</sup> But the point of present relevance concerns the Ch III scheme underlying that Commonwealth legislation.

<sup>162</sup> Ch III empowers the Commonwealth parliament to replace a state court’s *state* jurisdiction with *federal* jurisdiction, so that appeals lie directly to the High Court; or to make a federal court’s jurisdiction exclusive of that which belongs to or is invested in state courts: see *ibid* 356–7 [96]–[99] (Gageler J) and, to similar effect, 335–7 [43]–[45] (Kiefel CJ, Keane and Bell JJ).

<sup>163</sup> For a contrary view, see Foster (n 31) 240.

<sup>164</sup> On the attribution of State courts, compare Lim (n 9) writing before *Burns* (n 13) was handed down. See especially *Burns* (n 13), 358–60 [101]–[106] (Gageler J).

<sup>165</sup> *Commonwealth v Queensland (Queen of Queensland Case)* (1975) 134 CLR 298. See *ibid*, 358–60 [101]–[106] (Gageler J).

<sup>166</sup> *Ibid* 328 (Jacobs J, McTiernan J agreeing); *Burns* (n 13) 360 [106] (Gageler J). See to similar effect 338–9 [49] (Kiefel CJ, Keane and Bell JJ), ‘the exercise of adjudicative authority in respect of the matters listed in ss 75 and 76 in accordance with Ch III, and not otherwise, ensures that adjudication of all such matters occurs consistently and coherently throughout the federation.’

<sup>168</sup> *Judiciary Act 1903* (Cth) ss 39, 39A. See *Burns* (n 13) 331 [26] (Kiefel CJ, Keane and Bell JJ).

The *Burns* perspective on Ch III offers conceptual support for a more integrated way of thinking about the nature of courts as repositories for separated judicial power. At the very least, *Burns* clarifies that *some* state judicial power is exclusive to courts.<sup>169</sup> In a more general sense, *Burns* offers a rejoinder to rhetoric portraying the *Kable* restriction as something imposed on states from ‘outside’ their own constitutional arrangements, serving the Commonwealth’s interests. Because Ch III makes some state judicial power exclusive to courts, and so requires a conception of state courts as repositories for separated state judicial power, each autonomous state political community has an interest in courts maintaining the standards of institutional integrity required by Ch III’s vesting of judicial power exclusively in courts. Developing a strand of institutional integrity jurisprudence grounded in Ch III’s primary separation of judicial power is, therefore, significant to the constitutional structure of every polity in the Australian federation.

## VI CONCLUSION

This article has argued that Ch III supports a national prohibition on non-criminal punishment by courts. It has addressed two points of contention in *Garlett* that are impeding recognition that Ch III has this effect, and offered two corresponding solutions: first, recognising as settled that separated judicial power cannot be exercised to dispense non-criminal punishment and, second, recognising that this prohibition is implied to uphold the integrity of the primary separation rule at the centre of the Ch III scheme. The integrity of the primary separation rule requires that courts do not exercise any functions (whether under Commonwealth or state laws) antithetical to the nature of separated judicial power, such as non-criminal punishment. In making this argument, the article has proposed a more integrated way of thinking about permissible court functions throughout the Australian federation. This involves more clearly recognising that Ch III’s primary separation rule implies a national prohibition on court functions that are incompatible with the essential nature of separated judicial power. As the article has argued, this is a viable step, consistent with authority. Taking this step will significantly clarify a difficult area of Ch III doctrine by pinpointing where, and why, Ch III generates identical limits on Commonwealth and state power to legislate court functions.

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<sup>169</sup> For example, following *Burns* (n 13), it can no longer be said that State legislative power to entrust adjudication and punishment of criminal guilt to non-courts is ‘as plenary as that of the Imperial Parliament’: cf *Garlett* (n 1) 952 [301] (Gleeson J), quoting *Fardon* (n 2) 600 [40] (McHugh J).