A PATH TO PURPOSIVE FORMALISM: INTERPRETING CHAPTER III FOR JUDICIAL INDEPENDENCE AND IMPARTIALITY

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The interpretation of the separation of federal judicial power derived from Chapter III of the Constitution *is as hotly debated as it is fundamentally important. Two key viewpoints have emerged in this debate, formalism and functionalism. A formalist test focusing on definitional characteristics governs the permissible powers of federal courts. A functionalist test looking to whether a power is incompatible with institutional independence and integrity limits the powers of State courts and of judges* personae designatae. *A rare point of consensus between the two viewpoints, and the central pillar of my critique, is that Chapter III is purposive and should be interpreted to achieve judicial independence and impartiality. This paper queries which method of interpretation can best achieve the independence and impartiality of the federal judicature. The analysis highlights the inherent strengths and weaknesses of each approach and ultimately leads to the identification of a preferred approach I call 'purposive formalism'. Purposive formalism is a two-tiered method harnessing the strict formalist framework and a compatibility test. It is proposed as a legitimate and significant step forward in the interpretation of Chapter III to achieve the independence and impartiality of the federal judicature.*

I INTRODUCTION

This article investigates which method of interpreting Chapter III of the *Constitution* best achieves judicial independence and impartiality. From its earliest stages, the *Australian Constitution* was intended to create and maintain an independent and impartial federal judicature.[1] It is through judicial independence and impartiality that fundamental constitutional aims are achieved. These aims

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1 James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths, 2010) 69–72, 96–102. See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 950 (Josiah Symon); *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 382 (Isaacs J) ('*Huddart Parker*'); *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434, 469–70 (Isaacs and Rich JJ) ('*Alexander's Case*').

include: providing a judicial check and balance on government power through robust judicial review;[2] preserving representative and responsible government by preventing unrepresentative judges from exercising political functions;[3] maintaining equality between citizens and polities in the federation;[4] maintaining the federal compact;[5] and upholding the rights and liberties of citizens.[6] As Professor Ralf Dahrendorf observes, judicial independence 'may indeed be regarded as the very definition of the "rule of law"; it is certainly an important part of it. … [T]he partisan administration of law is in fact the perversion of law, and the denial of the rule of law'.[7] To adopt the words of the New Zealand Law Commission, judicial independence and impartiality 'are the pillars on which justice according to the law stands'.[8]

It is not merely the actuality of independence and impartiality that the separation of powers is designed to achieve, but the *perception* of it.[9] This much has been acknowledged by the High Court in its references to the need to maintain 'public confidence' in the independent judicature.[10] Public confidence in this context must be understood as an objectively assessable standard. Some emphasise the centrality of fair process to perceived independence and impartiality, observing that the powers of courts to protect their own processes maintain public confidence

2 H P Lee and Enid Campbell, *The Australian Judiciary* (Cambridge University Press, 2nd ed, 2012) 3; *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1 (Privy Council).

3 Sir Anthony Mason, 'A New Perspective on Separation of Powers' (1996) 82 *Canberra Bulletin of Public Administration* 1, 2; Peter Gerangelos, 'Interpretational Methodology in Separation of Powers Jurisprudence: The Formalist/Functionalist Debate' (2005) 8 *Constitutional Law and Policy Review* 1, 3.

4 Lee and Campbell, above n 2, 3; *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs* (1996) 189 CLR 1, 11 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ) ('*Wilson*').

5 Stellios, *The Federal Judicature*, above n 1, 69–72.

6 See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 950 (Josiah Symon); *R v Davison* (1954) 90 CLR 353, 381 (Kitto J); *R v Quinn; Ex parte Consolidated Food Corporation* (1977) 138 CLR 1, 11 (Jacobs J) ('*Quinn*'); *Thomas v Mowbray* (2007) 233 CLR 307, 414–5 (Kirby J) ('*Thomas*'); *Nicholas v The Queen* (1998) 193 CLR 173, 201 (Kirby J) ('*Nicholas*'); *Wilson* (1996) 189 CLR 1, 14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); Martin H Redish, 'Separation of Powers, Judicial Authority, and the Scope of Article III: The Troubling Cases of *Morrison* and *Mistretta*' (1989) 39 *DePaul Law Review* 299, 302; Sir John Laws, 'The Good Constitution' (2012) 71 *Cambridge Law Journal* 567, 574–5.

7 Ralf Dahrendorf, 'A Confusion of Powers: Politics and the Rule of Law' (1977) 40 *Modern Law Review* 1, 9. As Professor Cheryl Saunders and Katherine Le Roy observe, 'perhaps the central purpose [of judicial independence] — is the maintenance of the rule of law, *however defined*': Cheryl Saunders and Katherine Le Roy, 'Perspectives on the Rule of Law' in Cheryl Saunders and Katherine Le Roy (eds), *The Rule of Law* (Federation Press, 2003) 1, 2 (emphasis added).

8 New Zealand Law Commission, *Towards a New Courts Act — A Register of Judges' Pecuniary Interests?*, Issues Paper No 21 (2011) 4.

9 Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 62, 63.

10 *Nicholas* (1998) 193 CLR 173, 254 [201] (Kirby J); *Kable v DPP (NSW)* (1996) 189 CLR 51, 116 (McHugh J) ('*Kable*'); *International Finance Trust Co Ltd v New South Wales Crime Commission* (2009) 240 CLR 319, 354 (French CJ) ('*International Finance Trust*'); *Grollo v Palmer* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ) ('*Grollo*').

in the administration of justice and are central to the constitutional conception of judicial power.[11]

The framers of the *Constitution* discussed the importance of judicial independence and impartiality, and ensured fundamental protections for judicial tenure and remuneration were constitutionally enshrined. However, they shed little light on the degree of separation required between judicial and non-judicial powers under the *Constitution*.[12] The text of the *Constitution* does little to clarify this ambiguity.[13] From these uncertain foundations, the High Court has interpreted Chapter III to require a particularly strict separation of federal judicial powers, forbidding judicial and non-judicial powers from being vested in the same institution except in strictly limited circumstances.[14]

The separation of judicial power has now evolved as one of the most litigated aspects of Australian constitutional law. The interpretation of Chapter III in light of the text, structure, objects and purposes of the *Constitution* has been hotly debated for a substantial part of Australia's constitutional history. The growing appreciation of Chapter III as a source of implied protections has only served to heighten this debate.[15] Today, calls for the strict approach to the separation of federal judicial power to be overruled and replaced with a more flexible test continue to gather ground.

The primary aim of this article is to determine a preferred method of interpreting Chapter III in light of its core purpose of achieving judicial independence and impartiality. The widely acknowledged purposive nature of Chapter III presents a rare point of convergence between the main interpretational viewpoints.[16] The purposive element of the separation of judicial power may be clear when that element was clearly emphasised by the framers, or when the separation of powers is forms a part of an unwritten constitutional system. However, the purposive nature of the separation of powers is not diminished when the doctrine is implied from the text of a written constitution; rather it 'follows with it'.[17] Likewise, this purposive nature does not fall by the wayside when a formalistic separation is adopted, despite formalism's apparently narrow focus on definitional

11 *Nicholas* (1998) 193 CLR 173, 209 (Gaudron J), 224, 226 (McHugh J), 258 (Kirby J); Wendy Lacey, 'Inherent Jurisdiction, Judicial Power and Implied Guarantees under Chapter III of the *Constitution*' (2003) 31 *Federal Law Review* 57, 76; *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44] (French CJ and Kiefel J) ('*Wainohu*'); Chris Steytler and Iain Field, 'The "Institutional Integrity" Principle: Where Are We Now, and Where Are We Headed?' (2011) 35 *University of Western Australia Law Review* 227, 231–2.

12 Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96; Fiona Wheeler, 'The *Boilermakers* Case' in H P Lee and George Winterton, *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 160, 161–2; Stellios, *The Federal Judicature*, above n 1, 69–72.

13 *Constitution* ss 1, 61, 71. Cf *Constitution* ss 64, 101.

14 *Constitution* s 64; Cheryl Saunders, 'The Separation of Powers' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (Melbourne University Press, 2000) 3, 8.

15 Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254 ('*Boilermakers*").

16 Gerangelos, 'Interpretational Methodology', above n 3, 10.

17 M J C Vile, *Constitutionalism and the Separation of Powers* (Liberty Fund, 2nd ed, 1998) 2.

characteristics discussed below.[18] As the separation of judicial power is designed to achieve judicial independence and impartiality, a method of constitutional interpretation should be adopted that best achieves this aim.

Formalism and functionalism are the two key schools that have emerged to analyse the interpretation of the constitutional separation of judicial power and they frame the present analysis.[19] Formalism advocates the strict separation of functions based on their identification as judicial, legislative or executive in nature. In Australia the formalist approach is embodied in the primary interpretation of Chapter III which rests upon two rules, which I refer to as the two 'separation rules'. The first separation rule is that judicial power be vested only in courts. The second rule holds that federal courts are limited to the exercise of judicial and incidental powers. Functionalism is more flexible and therefore more difficult to define at large. Essentially functionalism permits the conferral of powers on institutions regardless of questions of definition, unless the conferral infringes some other standard. In Australia the functionalist approach is embodied in the adoption of an 'incompatibility test' whereby the judiciary is prevented only from exercising powers that undermine its independence or integrity. The incompatibility test limits the permissible functions of state courts and of federal judges acting in a personal capacity ('*personae designatae*'). Many of Australia's leading constitutionalists have called for a functionalist incompatibility test to replace the formalist separation rule preventing federal courts from exercising non-judicial powers.[20]

In Parts II and III, I critique the success of the formalist separation rules and functionalist incompatibility test in achieving judicial independence and impartiality, respectively. The critique of formalism and functionalism in their separate contexts underpins the identification of a preferred approach of 'purposive formalism' in Part IV. Purposive formalism harnesses some of the functionalist test's strengths to overcome key weaknesses in the formalist separation rules. In doing so, purposive formalism also addresses the weaknesses inherent in the functionalist test. The proposed approach is presented not as an ideal method, but as a step forward in the development of Chapter III jurisprudence and in the achievement of the independence and impartiality of federal courts.

This article has a fairly narrow focus. The scope of this analysis is limited to the separation of the judicial branch, a prime concern in the Australian constitutional

18 See, eg, Redish's defence of formalism: Redish, above n 6. As Gerangelos notes, 'to neglect the purposive element in the separation of powers doctrine in any attempt at definition of functions would be clearly repugnant to the doctrine's history, development and application in many polities': Gerangelos, 'Interpretational Methodology', above n 3, 8.

19 Rohan Hardcastle, 'A Chapter III Implication for State Courts: *Kable v Director of Public Prosecutions*' (1998) 3(1) *Newcastle Law Review* 13, 27.

20 James Stellios, 'Reconceiving the Separation of Judicial Power' (2011) 22 *Public Law Review* 113; Mason, above n 3; George Winterton, *Parliament, the Executive and the Governor-General* (Melbourne University Press, 1983) 60, 62–3; Leslie Zines, *The High Court and the Constitution* (Federation Press, 5th ed, 2008) 299, though Gerangelos notes that despite Zines 'appear[ing] to favour a purposive functionalist approach ... it would be inaccurate to locate Zines within any precise "school"': Gerangelos, 'Interpretational Methodology', above n 3, 5; Fiona Dowling Wheeler, *The Separation of Federal Judicial Power: A Purposive Analysis* (PhD Thesis, Australian National University, 1999) 156.

context where the overlap between the legislative and executive branches has heightened attention to the necessary independence of the federal judicature. Moreover, the article focuses on the federal sphere. Although jurisprudence regarding state powers plays a significant role in my analysis, the independence of federal courts is protected for similar but nonetheless distinct reasons to the independence of their state counterparts or of judges in their personal capacities. The arguments developed in this article would require separate and involved reconsideration if they were to be extended to state courts or to judges *personae designatae*. Lastly, judicial independence and impartiality are protected by a range of mechanisms, most importantly by the protections afforded to judicial tenure and remuneration.[21] This article considers but one mechanism which has become the epicentre for Chapter III litigation and for debates around the interpretation of Chapter III: the limits on the powers that may be permissibly conferred on the judicature and the allocation of judicial functions.

II FORMALISM: THE SEPARATION RULES

> Long live formalism. It is what makes a government a government of laws and not of men.[22]
>
> — Justice Antonin Scalia

Formalist approaches to the separation of powers contend that functions are capable of sufficiently precise definition as legislative, executive or judicial to enable them to be assigned on that basis, and that powers ought to be allocated according to their definition.[23] Compromises or exceptions to the formalist allocation of powers based on public policy concerns such as government efficiency are rejected. Thus, formalists propose a system by which a strict separation of functions and personnel can be achieved, building 'high walls' between the branches of government.[24]

Formalism is often supported by textualist approaches, drawing attention to a written constitution's creation and allocation of power based on definition.[25] As Professor John F Manning identifies, 'formalists *also* assume that the *Constitution* embodies a freestanding separation of powers doctrine'.[26] This aspect of formalism is reflected in its purposive nature. Formalism is grounded

21 *Constitution* s 72.

22 Justice Antonin Scalia, 'Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the *Constitution* and Laws' in Amy Gutmann (ed), *A Matter of Interpretation: Federal Courts and the Law* (Princeton University Press, 1997) 3, 25.

23 For a concise definition of formalism's key traits, see: Redish, above n 6, 304–5; John F Manning, 'Separation of Powers as Ordinary Interpretation' (2011) 124 *Harvard Law Review* 1939, 1943–4.

24 This phrase comes from *Plaut v Spendthrift*, 514 US 211, 239 (1995) (Scalia J). For the full quotation, see below n 29.

25 See, eg, Manning, above n 23, 1943; *Boilermakers'* (1956) 94 CLR 254, 288, affd *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540 (Privy Council).

26 Manning, above n 23, 1944 (emphasis in original).

in the rationale that only a strict separation of functions can achieve judicial independence and impartiality.

Formalism's inflexible nature reflects its underlying supposition that the greatest danger facing the separation of powers is presented by minor threats of incremental erosion. By restricting the judicature to judicial powers and the political branches to their own powers, formalists claim to guard against the gradual 'attrition of the structural integrity … through minor incursions' and the 'erosion of previously accepted barriers to legislative and executive interference'.[27] In this vein, Justice Scalia has claimed that '[t]he rule of law is *about* form'[28] and, in *Plaut v Spendthrift*, his Honour said:

> the doctrine of separation of powers is a *structural safeguard* ... it is a prophylactic device, establishing high walls and clear distinctions because low walls and vague distinctions will not be judicially defensible in the heat of interbranch conflict.[29]

In even more illustrative language, formalism claims to avoid a 'creeping tyranny' and the 'death by a thousand cuts' of the separation of powers.[30]

Formalism is characterised by caution and presumes that a function may not be vested in a particular branch of government unless it is demonstrated to have the necessary defining characteristics. The formalist rejection of more flexible approaches to determining the allocation of government powers is grounded in the view that flexibility and permissiveness facilitate the feared incremental erosion of branch independence. As Gerangelos surmises:

> If the rigours of this [formalist] approach are ameliorated, even for the best of policy reasons, these values will be threatened by the gradual yet inexorable erosion of the essential boundaries, even though this may not be apparent in a particular case.[31]

Formalism's rigid approach to the separation of powers is also argued to enhance the potential for predictability and consistency, assisting separation principles in becoming more susceptible to precedent and objective application.[32]

The primary approach to interpreting Chapter III in Australia is quintessentially formalist. The maintenance of the independence of the federal judicature stands upon two rules drawn from Chapter III. The first 'separation rule' is that the

27 Brendan Gogarty and Benedict Bartl, 'Tying *Kable* Down: The Uncertainty about the Independence and Impartiality of State Courts Following *Kable v DPP (NSW)* and Why it Matters' (2009) 32 *University of New South Wales Law Journal* 75, 98, 84; Kristen Walker, '*Persona Designata*, Incompatibility and the Separation of Powers' (1997) 8 *Public Law Review* 153, 161; Redish, above n 6, 303.

28 Scalia, above n 22, 25 (emphasis in original).

29 514 US 211, 239 (1995) (Scalia J) (emphasis in original). For a discussion of this case as a classic instance of formalist reasoning, see Peter A Gerangelos, *The Separation of Powers and Legislative Interference in Judicial Process* (Hart Publishing, 2009) 17.

30 Martin H Redish and Elizabeth J Cisar, '"If Angels Were to Govern": The Need for Pragmatic Formalism in Separation of Powers Theory' (1991) 41 *Duke Law Journal* 449, 453; Gerangelos, 'Interpretational Methodology', above n 3, 3.

31 Gerangelos, 'Interpretational Methodology', above n 3, 3.

32 See, eg, Redish, above n 6.

judicial power of the Commonwealth is vested exclusively in federal courts. This rule was suggested in some of the High Court's earliest cases,[33] but was first given authority in the 1918 decision of *Alexander's Case*.[34] This rule reflects a fairly straightforward reading of s 71's conferral of judicial power on courts.[35] As James Stellios, an advocate of the functionalist method, observes:

> the rationale for the … [first separation rule] is readily apparent, and no-one has suggested that it should be revisited. Judicial power must be exercised by courts with the Ch III protections, otherwise independence and impartiality in the exercise of those functions or powers would be clearly undermined.[36]

The second separation rule arises from the 1956 case of *Boilermakers'*.[37] The second rule has proved far more problematic than the first.[38] The second separation rule elevates the negative implications of s 71's conferral of judicial powers on federal courts by restricting those courts to the exercise of judicial power and incidental or ancillary non-judicial functions.[39] The second separation rule has been controversial since its inception,[40] but has also been applied in a multitude of matters and has given rise to a number of implied doctrines. As Professor Cheryl Saunders contends, for these reasons the second separation rule is 'now firmly entrenched'.[41]

The result of the two separation rules is that there may be no mingling of judicial and non-judicial powers in the same body, except in strictly limited circumstances.[42] In this way the separation rules embody the formalist position, separating branch functions strictly according to their definition as judicial or non-judicial. Although primarily resting their conclusions on the text and structure of the *Constitution*, the High Court in *Boilermakers'* referred to the role of the judiciary in maintaining the federal compact as supporting the existence of the

33 *Huddart Parker* (1909) 8 CLR 330; *R v Commonwealth Court of Conciliation and Arbitration; Ex parte Brisbane Tramways Co Ltd [No 1]* (1914) 18 CLR 54; *New South Wales v Commonwealth* (1915) 20 CLR 54.

34 (1918) 25 CLR 434.

35 *Alexander's Case* (1918) 25 CLR 434, 442 (Griffith CJ); *Boilermakers'* (1956) 94 CLR 254, 270 (Dixon CJ, McTiernan, Fullagar and Kitto JJ). *Constitution* s 71 provides: 'The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as Parliament creates, and in such other courts as it invests with federal jurisdiction. The High Court shall consist of a Chief Justice, and so many other Justices, not less than two, as the Parliament prescribes'.

36 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 120–1.

37 (1956) 94 CLR 254.

38 See *R v Joske; Ex parte Australian Building Construction Employees and Builders' Labourers' Federation* (1974) 130 CLR 87, 90 (Barwick CJ) ('*Joske [No 1]*'). More recently, some have suggested that the second limb of *Boilermakers'* be 'reconceived' as an incompatibility test: Stellios, 'Reconceiving the Separation of Judicial Power', above n 20; Mason, above n 3.

39 *Boilermakers'* (1956) 94 CLR 254, 296 (Dixon CJ, McTiernan, Fullagar and Kitto JJ), affd *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1 (Privy Council).

40 See discussion below at Part III.

41 Saunders, 'The Separation of Powers', above n 14, 13.

42 Such as in the case of ancillary or incidental functions mentioned above and certain historical functions. See Zines, *The High Court and the Constitution*, above n 20, 272–3.

second separation rule.[43] The Privy Council on appeal was more explicit in basing its support for the second separation rule on purposive considerations, saying:

> in a federal system the absolute independence of the judiciary is the bulwark of the constitution against encroachment whether by the legislature or by the executive. To vest in the same body executive and judicial power is to remove a vital constitutional safeguard.[44]

The perception of the separation rules as providing a 'vital constitutional safeguard' has been reinforced by the High Court in subsequent Chapter III cases.[45]

The success of the formalist separation rules in achieving judicial independence and impartiality hinges on the validity of their underlying assumptions: first, that branch functions are capable of precise and enforceable definition and, second, that the adoption of a rigid separation of functions is sufficient to achieve judicial independence and impartiality. If the first assumption is flawed then the separation of branch functions will not be capable of predictable, consistent or objective enforcement. In this case the separation rules risk losing legitimacy and becoming a mere façade for the actual bases on which Chapter III decisions are reached. The second assumption may also be flawed. If the separation rules are divorced from purposive considerations, they risk developing in a formalistic manner at odds with the values underlying Chapter III, including judicial independence and impartiality.[46] A further criticism often levelled at the separation rules is that they pose an unnecessary obstacle to proper and efficient government functioning. Considering the development of the separation rules in Australia reveals the formalist approach has significant — but perhaps not insurmountable — limitations.

A *Defining Judicial Power*

As Sir Anthony Mason observed in the year following his retirement as Chief Justice of the High Court:

> The lesson of history is that the separation of powers doctrine serves a valuable purpose in providing safeguards against the emergence of arbitrary or totalitarian power. The lesson of experience is that the division of powers is artificial and confusing because the three powers of government do not lend themselves to definition in a way that leads readily to a classification of functions.[47]

43 Wheeler, *The Separation of Federal Judicial Power*, above n 20, 127–9.

44 *A-G (Cth) v The Queen* (1957) 95 CLR 529, 540–1.

45 See, eg, *R v Davison* (1954) 90 CLR 353, 381 (Kitto J); *Quinn* (1977) 138 CLR 1, 11 (Jacobs J); *Thomas* (2007) 233 CLR 307, 413 (Kirby J); *Nicholas* (1998) 193 CLR 173, 201 (Kirby J); *Wilson* (1996) 189 CLR 1, 14 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

46 Mason, above n 3, 2.

47 Ibid.

The potential for the separation rules to provide a strong, even unyielding, protection for judicial independence and impartiality depends primarily upon whether functions are capable of being defined as judicial or non-judicial with sufficient and enforceable precision.[48]

The 'classic' starting point for defining the meaning of judicial power in the *Constitution* is Griffith CJ's definition in the 1908 case of *Huddart Parker*:

> [Judicial power means] the power which every sovereign must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.[49]

As Griffith CJ's definition suggests, judicial power is indicated essentially by the conclusive determination of a controversy about existing rights.[50] The presence of these characteristics indicates a function is exclusively judicial. The absence of any or all of these characteristics may indicate a power is non-judicial.

At this point judicial power appears to be a reasonably clear concept, identifiable by a series of characteristics. However, these characteristics are not considered to be determinative. Ultimately a determination of whether a function is judicial or not will take the form of an often unpredictable balancing exercise, weighing present indicia against absent and contrary indicia and incorporating references to principled and historical considerations.[51] For example, functions that lack the characteristics of judicial power — such as the power to issue bankruptcy sequestration orders — may nonetheless be 'judicial' if they are of a kind traditionally exercised by courts.[52]

The High Court has repeatedly acknowledged the difficulty in defining judicial power with predictability and precision,[53] observing that the concept defies and

48 Manning, above n 23, 1943.

49 (1909) 8 CLR 330, 357. See also *R v Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361, 374–5 (Kitto J) ('*Tasmanian Breweries*').

50 Zines, *The High Court and the Constitution*, above n 20, 220.

51 Dominique Dalla-Pozza and George Williams, 'The Constitutional Validity of Declarations of Incompatibility in Australian Charters of Rights' (2007) 12(1) *Deakin Law Review* 1, 9–10; *Quinn* (1977) 138 CLR 1, 15 (Aitkin J); *R v Davison* (1954) 90 CLR 353, 366–7 (Dixon CJ and McTiernan J); Tony Blackshield and George Williams, *Australian Constitutional Law and Theory* (Federation Press, 5th ed, 2010) 608.

52 *R v Davison* (1954) 90 CLR 353, 368 (Dixon CJ and McTiernan J); Zines, *The High Court and the Constitution*, above n 20, 256; Stellios, *The Federal Judicature*, above n 1, 138–41.

53 See *R v Davison* (1954) 90 CLR 353, 366 (Dixon CJ and McTiernan J); *Tasmanian Breweries* (1970) 123 CLR 361, 373 (Kitto J); *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 188–9 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 257 (Mason CJ, Brennan and Toohey JJ), 267 (Deane, Dawson, Gaudron and McHugh JJ).

'transcend[s]' abstract conceptual analysis.[54] The ambiguity and unpredictability in defining a function as judicial or non-judicial is enhanced by regularly invoked categories of exceptions, attributable to what Professor Geoffrey Sawer poetically described as courts' 'general power of ignoring definitions'.[55] The regular use of the qualifier 'quasi' and distinctions between 'core' and 'primary' functions, and 'incidental' and 'secondary' functions, demonstrate the substantial grey areas between judicial and non-judicial powers.[56] Some functions are even capable of being vested in multiple branches of government. These classes of functions include 'innominate' powers, dependent on Parliament for their ultimate characterisation, and 'chameleon' powers, which take their character from the body in which they are vested.[57] Indeed, in argument before the High Court in 2007, then Commonwealth Solicitor General David Bennett QC argued that the recognition of chameleon powers had 'removed much of [the second separation rule's] rigidity so that it does not matter much anymore'.[58]

As Professor H L A Hart famously observed, concepts have 'a core of settled meaning, but there will be, as well, a penumbra of debatable cases'.[59] Hart's acknowledgment of difficult 'penumbral' cases applies aptly in the Chapter III context.[60] Formalism's first underlying assumption — that powers are capable of precise definition — is valid with respect to the core of judicial power. For example, the conduct and determination of a criminal trial and the authoritative adjudication of disputes arising under tort or contract law are of a clearly judicial nature. The assumption is also valid with respect to the exteriority of non-judicial functions, such as the undertaking of criminal investigations or policy development. Formalism's basic assumption runs into difficulty when the function lies in the considerable penumbra of uncertainty, for example the issuing of control orders (involving the creation of rights and obligations according to predictive criteria)[61] or in the adjudication of disputes arising from industrial

54 See *Tasmanian Breweries* (1970) 123 CLR 361, 394 (Windeyer J); *Nicholas* (1998) 193 CLR 173, 207 (Gaudron J), 219 (McHugh J); *Precision Data Holdings Ltd v Willis* (1991) 173 CLR 167, 188 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ); Gerangelos, 'Interpretational Methodology', above n 3; Denise Meyerson, 'The Independence of the Judiciary in Australia and South Africa: Comparative Lessons' in Penelope E Andrews and Susan Bazilli (eds), *Law and Rights: Global Perspectives on Constitutionalism and Governance* (Vandeplas Publishing, 2008) 79.

55 Geoffrey Sawer, 'Judicial Power under the *Constitution*' in Justice Else-Mitchell (ed), *Essays on the Australian Constitution* (Law Book, 1961) 71, 76.

56 Gerangelos, 'Interpretational Methodology', above n 3, 1.

57 For a valuable discussion of these two classes of functions, see Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (Oxford University Press, 2007) 136–43.

58 *Thomas* (2007) 233 CLR 307, 316. This was an argument given short shrift by the dissenting members of the Court: at 426 (Kirby J), 467 (Hayne J).

59 H L A Hart, 'Positivism and the Separation of Law and Morals' (1958) 71 *Harvard Law Review* 593, 607.

60 Ratnapala, above n 57, 124.

61 See *Thomas* (2007) 233 CLR 307, and the subsequent critique of the majority's decision to uphold the issuance of control orders as a valid exercise the judicial power in, eg, Andrew Lynch, '*Thomas v Mowbray*: Australia's "War on Terror" Reaches the High Court' (2008) 32 *Melbourne University Law Review* 1182; Denise Meyerson, 'Using Judges to Manage Risk: The Case of *Thomas v Mowbray*' (2008) 36 *Federal Law Review* 209.

awards (which may involve broad, highly discretionary standards).[62] In these penumbral cases the characteristics that distinguish judicial from non-judicial functions are simply inadequate to produce a clear result, and risk being stretched and contorted to resolve the constitutional question at hand. These kinds of cases make clear that something more, beyond the accepted list of characteristics, is needed to determine whether the function may be conferred on the judiciary in keeping with Chapter III. Two factors to which the court has looked to provide this additional determinative criterion are the historical functions of courts and the will of Parliament.

The fact that a function has been traditionally exercised by courts will generally indicate it is judicial and that its vesture in courts is in keeping with broader notions of judicial independence and impartiality.[63] This is clear enough when the function has been exercised by the judicature for an extended period, such as in the abovementioned example of bankruptcy sequestration notices.[64] However, when the function is novel the court may rely on reasoning by analogy to establish the power is 'of a kind' traditionally exercised by courts.[65] Reasoning by analogy is a familiar and valuable judicial approach, but the method is far from ideal in determining Chapter III cases. As Sawer observed, to define judicial power as the power exercised by courts and take its meaning from 'what courts do and the way in which they do it' is circular and ultimately unconvincing.[66]

Reasoning by analogy also risks becoming a 'cherry-picking' exercise if imprecise or inappropriate analogues may be relied upon to determine a power's definition. For example, analogues may be drawn from different jurisdictional contexts such as the United Kingdom or the Australian states, each subject to much more flexible separation of powers rules permitting courts to exercise non-judicial functions. References to the powers of courts in those jurisdictions would not necessarily demonstrate the judicial nature of a function. Functions vested in federal courts on the basis that they are ancillary or incidental to an exercise of judicial power also risk being harnessed as judicial power analogues simply because they are exercised by courts, notwithstanding their non-judicial and exceptional nature.[67] Reliance on loose analogy in this context opens the way to a broadening of the strict separation and enables the kind of incremental erosion that formalism is designed to prevent. Ultimately it serves to highlight the challenging position a decision-maker is placed in when determining a Chapter III case according to the

62 See *R v Spicer; Ex parte Australian Builders' Labourers' Federation* (1957) 100 CLR 277; *R v Commonwealth Industrial Court; Ex parte Amalgamated Engineering Union, Australian Section* (1960) 103 CLR 368.

63 Though care must be taken in drawing such conclusions: P H Lane, *Lane's Commentary on the Australian Constitution* (Law Book, 2nd ed, 1997) 467; *Quinn* (1977) 138 CLR 1, 11 (Jacobs J).

64 *R v Davison* (1954) 90 CLR 353.

65 Ibid 368 (Dixon CJ and McTiernan J); Zines, *The High Court and the Constitution*, above n 20, 256.

66 G Sawer, 'The Separation of Powers in Australian Federalism' (1961) 35 *Australian Law Journal* 177, 179–80. See also *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245, 267 (Deane, Dawson, Gaudron and McHugh JJ).

67 See Kirby J's dissenting critique of Gleeson CJ's majority decision in *Thomas* (2007) 233 CLR 307, 422–3, 425.

separation rules, and the inadequacy of the characteristics of judicial power in defining a function with enforceable precision.

The court has also relied upon legislative intention to fulfil the task of defining a power as judicial or non-judicial.[68] Parliamentary intent has an important place in any exercise of statutory interpretation.[69] In deciding whether a power is judicial or otherwise, the intention behind the relevant Act ought to play some part. However, reliance on legislative intent to determine the definition of a power risks the independence and impartiality of the judiciary by introducing an avenue for judicial deference into the analysis. Deference is appropriate in many scenarios, but it must be constrained.[70] Excessive deference signals that a court may not be appropriately performing its role as an independent check on government power; minimal deference indicates that a court may be exercising functions belonging to the representative, political arms of government.[71]

In Chapter III cases deference is particularly worrying. Utilising parliamentary intent to define governmental powers risks enabling parliament to determine the outer limits of judicial power and, in turn, the limits on legislative power too. Moreover, functions that do not conform to the characteristics of judicial power may compromise rights or process protections or achieve particularly controversial government policies.[72] In these contexts there is a particular need for robust judicial review.[73] The purposes of the separation of judicial power drive at the necessity for the individualistic, rights-focused 'morality' of law to counterbalance the majoritarian nature of politics, and emphasise the need for robust judicial oversight to provide an avenue for individual rights and liberties to be upheld.[74] Thus, harnessing parliamentary intent as the determinative factor in Chapter III cases presents a real risk of handing ultimate responsibility for the boundaries of the penumbra of judicial power to Parliament, rather than maintaining the strong sense of judicial oversight required to prevent the erosion of constitutional limits. Parliamentary intent ought to play some role in determining Chapter III questions, but judicial independence and impartiality is placed at risk if it provides the determinative criterion in penumbral cases.

The basic formalist assumption that judicial power is capable of judicially enforceable definition is subject to serious limitations.[75] Judicial power *is* capable

68 See discussion in Zines, *The High Court and the Constitution*, above n 20, 258–61.

69 See, eg, *Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355, 381 (McHugh, Gummow, Kirby and Hayne JJ).

70 Jonathan Sumption, 'Judicial and Political Decision-Making: The Uncertain Boundary' (Speech delivered at the F A Mann Lecture, Lincoln's Inn, 9 November 2011) 19–20.

71 See Redish's attack on the 'total deferential' model of interpreting the separation of powers: Redish, above n 6, 307.

72 See, eg, Australia's anti-terror control orders and preventative detention orders in, respectively, the *Criminal Code Act 1995* (Cth) divs 104–5, critiqued in Andrew Lynch and Alexander Reilly, 'The Constitutional Validity of Terrorism Orders of Control and Preventative Detention' (2007) 10 *Flinders Journal of Law Reform* 105. See also the Chapter III challenge to aspects of the fair criminal trial in *Nicholas* (1998) 193 CLR 173, discussed in Lacey, above n 11, 72–7.

73 Laws, above n 6, 576.

74 Ibid; Redish, above n 6, 307.

75 See Mason, above n 3, 5–6.

of definition but in many cases concentrating on definitional characteristics alone is not sufficient to provide the rigidity, predictability, consistency or certainty that formalism claims as its strengths. The separation rules fail to indicate which characteristics outweigh others, how heavily historical analogy and legislative intent play into the equation, or the extent to which the purposes of the separation rules may become determinative. The overall lack of clarity in the definition of judicial power has caused the separation rules to become unpredictable. Unpredictability gives judicial power the appearance of being a malleable concept, susceptible to wildly different interpretations. This in turn affects the perception of the judiciary as administering objective legal standards. In this vein, Sawer's 1961 observation that 'the law is full of bad logic serving to cloak the exercise of a judicial discretion' continues to reflect a reasonable impression of the interpretation of Chapter III.[76]

The proper method of resolving cases in which the characteristics of judicial power are insufficient to produce a clear result is itself unresolved. If a means of determining those cases in a manner that does not risk actual or perceived judicial independence or impartiality was adopted, the limits of formalism's basic assumption could be addressed and the separation rules could find renewed legitimacy.

B *Is Formalism too Formalistic?*

A second criticism made of formalism is that the narrow focus of the separation rules on definitional characteristics produces technical decisions that do nothing to achieve the purposes of Chapter III. As Sir Anthony Mason warns, 'if taken too far, the identification of those characteristics [of judicial power] may inhibit the development of judicial process'.[77]

The formalist approach is built upon the view that the allocation of functions based on definition will naturally produce outcomes that maintain judicial independence and impartiality, in the longer term if not in the immediate case. The rules outline the entire role of a court in deciding a Chapter III challenge as being to define the function at hand; they do not suggest a need to engage with purposive arguments. As a result, robust engagement with considerations outside the list of definitional criteria becomes difficult or appears tangential for a court applying the separation rules.

Fair judicial process is closely connected to the independence and impartiality of federal courts.[78] Gaudron J provided the following description of fair process in *Re Nolan; Ex parte Young*:

76 Sawer, 'Judicial Power under the *Constitution*', above n 55, 75.

77 Mason, above n 3, 2.

78 Sir Gerard Brennan, 'Lessons from a Life in the Law' (Speech delivered at the Annual Hal Wootten Lecture, University of New South Wales, 23 August 2012) 16–18.

> open and public enquiry (subject to limited exceptions), the application of the rules of natural justice, the ascertainment of the facts as they are and as they bear on the right or liability in issue and the identification of the applicable law, followed by an application of that law to those facts.[79]

These features go to the equality and objectivity of judicial proceedings and thus form integral aspects of the independence and impartiality of courts.[80] Thus, one measure of whether the formal separation rules achieve judicial independence and impartiality is the extent to which they are capable of protecting fair process from legislative incursion.

The High Court has acknowledged that Chapter III requires the exercise of functions in a manner not repugnant to judicial independence and impartiality.[81] That said, fair process fits awkwardly within the formalist framework created by the separation rules.[82] Some justices have envisaged process protections within the second separation rule even though fair process is not mentioned in the classic characteristics of judicial power.[83] Gaudron J suggests that '[a]n essential feature of judicial power is that it be exercised in accordance with the judicial process'.[84] Other justices, such as Deane J, place due process protections within the first separation rule by including them within the essential features of a court.[85] These two conceptions may exist alongside one another — fair process may inform the essential characteristics of both judicial power and of courts.[86]

There are weaknesses in both Gaudron and Deane JJ's approaches to protecting fair process within the separation rules framework.[87] Both have received varied authoritative support, and have therefore failed to produce a consistent set of principles but rather determine in an ad hoc manner whether one feature or another is a defining characteristic.[88] By focusing on singular defining or essential features, both approaches conceive of process protections in a minimalist fashion. In order to qualify for constitutional protection the feature must qualify as a defining feature of judicial power or of what it is to be a court. This sets a high bar. The giving of reasons, for example, may be an essential feature of a

79 (1991) 172 CLR 460, 496 (Gaudron J) ('*Nolan*'), quoted in *Fardon v A-G (Qld)* (2004) 223 CLR 575, 615 (Gummow J) ('*Fardon*').

80 See Wheeler, 'Due Process' above n 15, 211; *Kable* (1996) 189 CLR 51, 106–7 (Gaudron J); *Nolan* (1991) 172 CLR 460, 496–7 (Gaudron J); *Leeth v Commonwealth* (1992) 174 CLR 455, 487–8 (Deane and Toohey JJ); *Polyukovich v Commonwealth* (1991) 172 CLR 501, 703–4 (Gaudron J) ('*Polyukovich*'); Steytler and Field, above n 11, 255–9.

81 See above n 80. See also Will Bateman, 'Procedural Due Process under the *Australian Constitution*' (2009) 31 *Sydney Law Review* 411.

82 Bateman, above n 81, 432.

83 Wheeler, 'Due Process', above n 15, 209–10.

84 *Polyukovich* (1991) 172 CLR 501, 703. For a critique of this approach, see Wheeler, 'Due Process', above n 15, 210–11; Bateman, above n 81, 432.

85 Bateman, above n 81, 433–41; Wheeler, 'Due Process', above n 15, 209.

86 Wheeler, 'Due Process', above n 15, 211. Though this may have consequences in the context of state courts, capable of exercising non-judicial powers but requiring the defining characteristics of courts. See discussion of the principles concerning state courts below in Part III.

87 For a critique of the approach conceiving of due process as within the second separation rule, see Bateman, above n 81, 433–41; Wheeler, 'Due Process', above n 15, 209.

88 Bateman, above n 81.

court.[89] Reliance on secret evidence and ex parte hearings, each of which severely impacts the equality and openness of proceedings by withholding important material from a party, have an accepted place in some judicial proceedings. Thus these mechanisms may not be defining features, even where they are used in unusual contexts and result in severe impositions on the rights and liberties of a citizen.[90] The 'essential features' approach to protecting fair process lends itself to allowing cumulative compromises to the fairness and equality of proceedings, when each individual compromise fails to qualify as a defining feature of judicial power or a court.[91] Hence, the risk of incremental damage to the integrity of judicial proceedings feared by formalists is enhanced by the indirect way in which the separation rules protect fair process.

This weakness in the capacity of the separation rules to achieve judicial independence and impartiality is serious, but perhaps not insurmountable. If the formalist separation rules were to accommodate a direct avenue whereby the manner in which a function is exercised could be taken into account, process protections would no longer need to be conceptualised through the prism of the essential defining features of judicial power or of courts.

C *The Enemy of Innovation*

In 1974, Barwick CJ famously criticised the second separation rule as leading to 'excessive subtlety and technicality in the operation of the *Constitution* without, in my opinion, any compensating benefit'.[92] The Chief Justice's views on the second separation rule have been reiterated by others, often coupled with the general rebuke that the rules unnecessarily impede the development of administrative, industrial and other areas of law.[93]

The efficiency and effectiveness of a number of areas of law and government action would undoubtedly benefit from the mixing of judicial and non-judicial functions in institutions. This is increasingly the case as government broadens the scope of administrative powers, develops the so-called 'integrity branch' responsible for oversight of executive action, and further desires to utilise judicial expertise in non-judicial contexts.[94] Similar arguments have arisen in the human

89 *Wainohu* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J), 229–30 [109] (Gummow, Hayne, Crennan and Bell JJ).

90 See *Thomas* (2007) 233 CLR 307; *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy Jokers*'); *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*').

91 See Meyerson's critique of the High Court's decision in *Thomas* on this basis, amongst others, in Meyerson, 'Using Judges to Manage Risk', above n 61, 224–5.

92 *Joske [No 1]* (1974) 130 CLR 87, 90. Stephen and Mason JJ agreed with Barwick CJ. Mason J said that 'a serious question arises as to the course which this Court should adopt in relation to the principle conclusion reached in [*Boilermakers'*]': at 102.

93 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 124; Mason, above n 3, 5.

94 Mason, above n 3, 6; Chief Justice James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. See also, on the development of government beyond the traditional tripartite conception of government power, Eoin Carolan, *The New Separation of Powers: A Theory for the Modern State* (Oxford University Press, 2009).

rights context.[95] The essential thrust of these arguments is that the formalist separation of judicial powers has impeded the development of mechanisms by which executive and legislative power may be overseen and subject to challenge.

The separation of functions along strict formalist lines indisputably impedes government efficiency and innovation. But, if one accepts the prophylactic justification for the strictness of the formalist approach, these innovations must be seen for their ability to ultimately undermine institutional independence and impartiality, even if their immediate consequence is to provide an additional check on the political branches.

Administrative and industrial tribunals determine policy issues; they are intrinsically bound up in the interpretation of the political aspects of government action. Tribunal decision-makers even 'stand in the shoes' of government agents. To couple judicial power with such tribunals would be tantamount to doing away with the separation of powers entirely. This is particularly the case in Australia where the legislature and executive are already so entwined. The conferral of judicial power on executive bodies may present a vast improvement in efficiency, but in certain contexts it would permit a single entity to interpret policy, exercise executive discretion and make binding orders for remedies with respect to political and rights-based subject matters. The perceived impartiality and integrity of judicial decision-making would be challenged to its core by such an allowance.

In *Momcilovic v The Queen*,[96] the High Court unanimously determined (in obiter dicta) that the power to issue declarations of incompatibility under the *Charter of Human Rights and Responsibilities Act 2006* (Vic) is non-judicial on the basis that it had no impact on the resolution of the justiciable controversy between the parties to the dispute.[97] This decision effectively rules out the option of human rights protection at the national level based on the dialogue model adopted in the United Kingdom, New Zealand, the Australian Capital Territory and Victoria. Counter arguments exist to the Court's conclusion that the power is non-judicial.[98]

It may appear absurd that the power to declare legislation to be incompatible with express human rights protections under the dialogue model could violate

95 Dalla-Pozza and Williams, above n 51. Cf Michael McHugh, 'A Human Rights Act, the Courts and the *Constitution*' (2009) 11 *Constitutional Law and Policy Review* 86; Jim South, 'The Campaign for a National Bill of Rights: Would "Declarations of Incompatibility" be Compatible with the *Constitution*?' (2007) 10 *Constitutional Law and Policy Review* 2.

96 (2011) 245 CLR 1 ('*Momcilovic*').

97 Ibid 60–1 [80]–[81], 65 [89] (French CJ), 94 [178] (Gummow J), 123 [280] (Hayne J), 185 [457] (Heydon J), 222 [584] (Crennan and Kiefel JJ), 241 [661] (Bell J). Only Crennan and Kiefel JJ held the power to be incidental to the judicial task of determining the primary controversy concerning legal rights: at 227 [600].

98 See, eg, Dalla-Pozza and Williams, above n 51, 9–27, who argue that the dialogue model of human rights protection complies with relatively expansive interpretations of each characteristic of judicial power. For instance, the authors adopt Lacey and Wright's 'more expansive understanding' of enforcability as requiring the power to be '*conclusive* of the controversy regarding consistency': at 17. See further Wendy Lacey and David Wright, 'Highlighting Inconsistency: The Declaration as a Remedy in Administrative Law and International Human Rights Standards' in Chris Finn (ed), *Shaping Administrative Law for the Next Generation: Fresh Perspectives* (Australian Institute of Administrative Law, 2005) 32, 55.

the proper place of courts and present a threat to Australian constitutionalism. That said, declarations of incompatibility compromise key features of judicial power and are not of a kind traditionally exercised by courts. A finding that declarations are in keeping with Chapter III would risk setting a precedent that the powers of courts do not necessarily need to be binding, authoritative, or result in any right or remedy, gutting the core of judicial power and enabling legislative compromises to these integral features of judicial decisions. In this vein, former Justice of the High Court Michael McHugh argued, prior to *Momcilovic*, that the dialogue model of human rights protection is not in keeping with the *Constitution*, is 'suboptimal' and should be rejected.[99] In essence, McHugh argues that bringing the model into line with accepted notions of judicial power by empowering the court to issue a binding and enforceable remedial order following a finding of incompatibility would help align the power with the core characteristics of judicial power and present an improvement in human rights protection.[100] This is a compelling argument.

It is notable that the High Court's analysis of declarations of incompatibility under the incompatibility test was by no means exemplary of clear, concise or accessible decision-making. The ratio of the decision is disparate between the judgments and it is ultimately unclear whether the power is incompatible or not. Others have engaged expertly with the complicated issues around human rights instruments in Australia and their impact on constitutional values, and I do not explore these questions further in the present article.[101]

The formalist separation rules acknowledge the slippery slope that follows if courts are permitted to re-make government decisions, interpret policy or exercise functions lacking fundamental characteristics of judicial power. Efficiency is no excuse for undermining judicial independence or impartiality, as the ends achieved by the separation of judicial power are fundamental to the maintenance of core aspects of Australian constitutionalism. It is entirely justified, even crucial, that judicial independence and impartiality present a considerable obstacle to government innovation and efficiency.

D *Does the Formalist Approach Achieve Judicial Independence and Impartiality?*

There is no straightforward answer to the question: 'do the formalist separation rules achieve judicial independence and impartiality?' The strict approach has much to commend it as a means of achieving the purposes of Chapter III. The separation rules would be greatly assisted by a candid acknowledgment that not all functions are susceptible to precise definition and in those cases some other

99 McHugh, above n 95, 95.

100 See McHugh's proposed 'preferred model': ibid 96.

101 See, eg, Dalla-Pozza and Williams, above n 51; McHugh, above n 95, 97; James Stellios, 'Federal Dimensions to the ACT *Human Rights Act*' (2005) 47 *AIAL Forum* 33; Geoffrey Lindell, 'The Statutory Protection of Rights and Parliamentary Sovereignty: Guidance from the United Kingdom?' (2006) 17 *Public Law Review* 188, 204–7.

standard or factor is required to determine the allocation of power. Admittedly this concession goes against the formalist grain. Of course this additional factor would need to accord with the maintenance of judicial independence and impartiality, which I submit historical analogies and parliamentary intent fail to do. Likewise, if a clear avenue for the development of fair process jurisprudence were opened within the strictures of the separation rules, the rules may evolve in a manner more clearly and accountably engaged with the purposes of Chapter III.

The argument remains that rather than seeking to iron-out the weaknesses in the capacity of the separation rules to achieve independence and impartiality, the approach ought simply be rejected and replaced with a wholly substantive test; one not plagued by the problems of definitional imprecision and formalistic technicality discussed.

III FUNCTIONALISM: THE INCOMPATIBILITY TEST

> [W]hat possible reason can there be for invalidating conferral of a particular non-judicial function on a judge when the function is not a threat to these values? Would this not involve what Peter Strauss calls 'technical positivism' — elevating form above substance, or making a fetish of a rule for the sake of doctrinal purity?[102]
>
> — Professor Denise Meyerson

Functionalists advocate a more dynamic approach to the separation of powers than formalists, contending that considerations beyond mere definition ought to determine the allocation of government powers. Functionalism is susceptible to many variations. In Australia the prevailing functionalist approach is characterised by an incompatibility test, by which the branches of government may exercise any powers except those demonstrably incompatible with the maintenance of institutional independence and integrity. In the Chapter III context the incompatibility test elevates the core purpose of the separation of judicial power — judicial independence and impartiality — to a determinative level. This focuses attention on the nature of the powers themselves and the manner of their exercise, and avoids the technical and arguably distracting focus on definitional characteristics which has proved so problematic for the separation rules.[103] Advocates of the incompatibility test claim this direct engagement with the concepts of judicial independence and impartiality offers the ideal mechanism for their achievement, and that this test is 'flexible enough, at least in theory, to suggest a wide range of limitations on … legislative power'.[104]

102 Meyerson, 'The Independence of the Judiciary in Australia and South Africa', above n 54, 82, quoting Peter L Strauss, 'Formal and Functional Approaches to Separation-of-Powers Questions — A Foolish Inconsistency?' (1987) 72 *Cornell Law Review* 488, 512.

103 Fiona Wheeler, 'The Rise and Rise of Judicial Power under Chapter III of the *Constitution*: A Decade in Overview' (2000) 20 *Australian Bar Review* 282, 287; Mason, above n 3, 2, 5.

104 Fiona Wheeler, 'The *Kable* Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 22. See also Mason, above n 3, 2.

Functionalist criticisms of the formalist separation rules are substantially limited to the second rule, limiting the permissible powers of courts. The first separation rule restricting judicial powers to the judiciary has been applied uncontentiously on 'numerous occasions and never questioned'.[105] The adoption of an incompatibility test to replace the second separation rule is by no means a new proposition. Prior to *Boilermakers'* there had been some indication that a functionalist approach would determine the permissible functions of federal courts. A functionalist style inconsistency test was suggested in the opinions of four justices in the 1938 case of *R v Federal Court of Bankruptcy; Ex parte Lowenstein*.[106] Changes to the composition of the High Court meant that when *Boilermakers'* came before it in 1956 the second separation rule had gained majority support.[107]

Despite the authoritative adoption of the second separation rule and the unanimous validation of the decision by the Privy Council on appeal, the High Court and academic community remained divided as to whether an alternative test ought to govern the permissible functions of federal courts. The popular alternative proposition was the incompatibility (or inconsistency) test suggested in *Lowenstein*[108] and advocated cogently by Williams J in dissent in *Boilermakers'*.[109] The test found favour with the High Court in the 1990s when questions arose concerning Chapter III limits on the permissible functions of state courts and of federal judges acting *personae designatae*. It was in respect of this period of the 'Mason Court' that Professor Leslie Zines says: 'In constitutional law an assault was made on what was seen as one aspect of legalism, namely formalism'.[110]

The *persona designata* doctrine is an important and long-standing exception to the second separation rule. This doctrine asserts that Chapter III does not bind federal judges in their personal capacity and so non-judicial functions may be conferred on judges individually. Despite the artificial flavour of the doctrine,[111] it has been extensively used and upheld as in keeping with the *Constitution*.[112] In order to prevent the exception from overwhelming the rule, an exception *to the exception* was proposed. In 1995, the High Court in *Grollo* gave authority to the existence of an incompatibility limit on the non-judicial functions capable of

105 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 114.

106 (1938) 59 CLR 556 ('*Lowenstein*'); Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 115; Wheeler, 'The *Boilermakers* Case', above n 12, 163. Dixon and Evatt JJ dissented in *Lowenstein*, Dixon J already having revealed his formalist leaning in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, as well as later in extrajudicial speeches, such as Sir Owen Dixon, 'The Separation of Powers in the *Australian Constitution*' (Speech delivered at the Lawyers' Club, New York City, 3 December 1942) 1, 5.

107 Wheeler, 'The *Boilermakers* Case', above n 12, 163–4.

108 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 115.

109 (1956) 94 CLR 254, 313–15.

110 Leslie Zines, '2002 Sir Maurice Byers Lecture: Legalism, Realism and Judicial Rhetoric in Constitutional Law' [2002–2003] (Summer) *Bar News* 13, 15.

111 *Hilton v Wells* (1985) 157 CLR 57, 84 ('*Hilton*'); *Medical Board (Vic) v Meyer* (1937) 58 CLR 62, 97; *Grollo* (1995) 184 CLR 348, 377 (McHugh J); *Wilson* (1996) 189 CLR 1, 12–13 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ); Mason, above n 3, 5.

112 *Hilton* (1985) 157 CLR 57; *Wilson* (1996) 189 CLR 1, 43 (Kirby J); *Grollo* (1995) 184 CLR 348, 376 (McHugh J). For a history of this practice and its controversy, see A J Brown, 'The Wig or the Sword? Separation of Powers and the Plight of the Australian Judge' (1992) 21 *Federal Law Review* 48.

being vested in judges *personae designatae*.[113] The incompatibility limit prohibits non-judicial powers from being conferred on a judge *persona designata* if the power is incompatible with the independence or integrity of the judge or the judicial institution.

Grollo concerned a challenge to provisions enabling telecommunication interception warrants to be issued by judges *personae designatae*. Despite the intrusive nature of the warrants, the secretive in camera nature of the proceedings in which they are issued and the fact this administrative power is exercised in furtherance of a police investigation, a majority of the High Court upheld the provisions as compatible with judicial independence and integrity.[114] The incompatibility limit was applied to invalidate a conferral of power on a federal judge for the first (and to date only) time the following year in *Wilson*.[115] In *Wilson*, the appointment of Justice Jane Mathews as 'reporter' to the Minister on whether certain areas should be classified as Aboriginal heritage sites was held to be invalid on the basis that the appointment gave 'the appearance that the judge is acting, not in any independent way, but as a servant or agent of the Minister' and thus diminished confidence in the judicial institution as a whole.[116]

Six days following *Wilson*, the High Court introduced a second field of application for the incompatibility test. In *Kable*, the High Court invalidated state legislation providing for the New South Wales Supreme Court to order the preventive incarceration of a named individual at the completion of his sentence for serious offences.[117] The decision was grounded in the ad hominem nature of the Act and in the various ways in which the Supreme Court proceedings departed from fair process.[118] *Kable* ought to be considered in light of the High Court's later decision in *Fardon*.[119] In *Fardon*, the Court upheld the capacity of the Queensland Supreme Court to issue preventive detention orders almost identical to those considered in *Kable*. Compatibility in *Fardon* rested primarily on the general application of the Act in contrast to the incompatible ad hominem *Kable* Act.

The revolutionary aspect of *Kable* is that it determined Chapter III limits on the permissible functions of state courts. State courts are outside the direct ambit of the federal separation of powers. Prior to *Kable* it had been generally accepted that there were few restrictions on the Parliaments' powers with respect to state courts.[120] A majority of the High Court in *Kable* found that to the extent state

113 (1995) 184 CLR 348, 376 (McHugh J), 365 (Brennan CJ, Deane, Dawson and Toohey JJ); *Wilson* (1996) 189 CLR 1, 43 (Kirby J); *Hussain v Minister for Foreign Affairs* (2008) 169 FCR 241, 261 ('*Hussain*').

114 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

115 (1996) 189 CLR 1.

116 Ibid 26 (Gaudron J).

117 *Kable* (1996) 189 CLR 51.

118 Ibid 98 (Toohey J), 106–8 (Gaudron J), 122–3 (McHugh J), 131–2 (Gummow J); *Fardon* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ).

119 (2004) 223 CLR 575.

120 See, eg, *S (a Child) v The Queen* (1995) 12 WAR 392; *Building Construction Employees and Builders' Labourers Federation of New South Wales v Minister for Industrial Relations* (1986) 7 NSWLR 372; *City of Collingwood v Victoria [No 2]* [1994] 1 VR 652; *Mabo v Queensland* (1988) 166 CLR 186, 202 (Wilson J); Steytler and Field, above n 11, 230; Hardcastle, above n 19, 13.

courts are vested with limited federal jurisdiction and form part of an integrated national court system their independence and integrity are entitled to constitutional protection under Chapter III.[121] Accordingly, state courts may not be vested with functions that are incompatible with the independence or integrity of the judicial institution. Subsequent case law has clarified that the *Kable* incompatibility test is aligned with that introduced in *Grollo*, as the rulings 'share a common foundation in constitutional principle' which 'has as its touchstone protection against legislative or executive intrusion upon the institutional integrity of the courts, whether federal or State'.[122]

The functionalist incompatibility test has thus been subject to substantial jurisprudential development in Australia, despite the predominance of the formalist separation rules in determining Chapter III challenges with respect to federal courts. At first blush it may seem incontrovertible that elevating the purposes of the separation of judicial powers to a determinative level presents the ideal means of achieving those purposes. Critics of the incompatibility test suggest it fails to provide a workable or predictable standard and its underlying permissiveness and flexibility have facilitated the test's development into a grievously insubstantial limit on legislative power.[123] By considering how the notion of incompatibility has been developed in the *Grollo* and *Kable* lines of cases, one may assess the strength of these criticisms and the success of the functionalist incompatibility test in achieving judicial independence and impartiality.

A *Defining Incompatibility*

Just as the definition of judicial power lies at the heart of the separation rules, the meaning of incompatibility is central to the success of the functionalist incompatibility test. In upholding the High Court's decision in *Boilermakers'*, the Privy Council described the incompatibility standard as 'vague and unsatisfactory'.[124] The development of the incompatibility test since *Grollo* suggests incompatibility may be inapt for exhaustive definition and hold deliberately to its characteristic flexibility, but is as precise and enforceable a standard as judicial power.[125]

121 *Kable* (1996) 189 CLR 51, 82 (Dawson J), 103 (Toohey J). See also *Fardon* (2004) 223 CLR 575, 591 (Gleeson CJ), 655 (Callinan and Heydon JJ); *K-Generation* (2009) 237 CLR 501, 529 [88] (French CJ); *Kirk v Industrial Relations Commission (NSW)* (2010) 239 CLR 531, 579–81 [95]–[100] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ).

122 *Wainohu* (2011) 243 CLR 181, 228 (Gummow, Hayne, Crennan and Bell JJ); Rebecca Welsh, '"Incompatibility" Rising? Some Potential Consequences of *Wainohu v New South Wales*' (2011) 22 *Public Law Review* 259. See also the application of the *Wilson* test in *Momcilovic* (2011) 245 CLR 1, 95–6 [183]–[184] (Gummow J).

123 Redish, above n 6, 306; Walker, above n 27, 161.

124 *A-G (Cth) v The Queen* (1957) 95 CLR 529, 542. See also Dan Meagher, 'The Status of the *Kable* Principle in Australian Constitutional Law' (2005) 16 *Public Law Review* 182; Gogarty and Bartl, above n 27.

125 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20.

In *Grollo* the majority justices described three ways in which incompatibility may arise. First, the actual performance of the judge's judicial functions may be significantly compromised as a result of a non-judicial function.[126] Second, the personal integrity of the judge may be compromised or impaired by the non-judicial function.[127] Neither of the first two bases of incompatibility identified in *Grollo* have been applied in the cases to date. On the basis of his actions *persona designata* the trial judge was required to excuse himself from the trial of Bruno Grollo without giving reasons to the parties. Whilst this scenario presents clear arguments for personal integrity incompatibility, a majority of the High Court upheld the provisions on the basis that the conflict could hypothetically have been avoided by 'the adoption of an appropriate practice'.[128] In consequence, the first two grounds of incompatibility will only arise in rare cases where conflict is incapable of being avoided.

The third form of incompatibility described in *Grollo* is 'public confidence incompatibility'. Public confidence incompatibility arises where the conferral of the non-judicial function diminishes public confidence in the independence and integrity of the judicial institution as a whole.[129] Despite varying judicial acceptance of public confidence as an enforceable consideration,[130] it is this form of incompatibility that has supported the findings of incompatibility discussed above and has come to characterise incompatibility jurisprudence. The Court in *Wilson* suggested a three-stage process focusing on independence to assist a determination of public confidence incompatibility.

First, incompatible functions are 'an integral part of, or closely connected with, the functions of the Legislature or the Executive government'.[131] This was present in *Wilson*, but in *Grollo* incompatibility was avoided by the judge maintaining an arms-length distance from the executive, despite issuing the warrant in secretive, ex parte proceedings.[132] In addition to this characteristic, incompatibility is indicated by either reliance upon 'non-judicial instruction, advice or wish' or the exercise of discretion 'on political grounds — that is, on grounds not expressly or impliedly confined by law'.[133] *Grollo* suggests, and subsequent cases have confirmed, that these criteria are also interpreted narrowly.[134] The exercise of discretion on political grounds must be an express requirement of the role and is not established where the judge's decision is simply unrestrained and may

126 *Grollo* (1995) 184 CLR 348, 365 (Brennan CJ, Deane, Dawson and Toohey JJ).

127 Ibid.

128 Ibid 366.

129 Ibid 365.

130 *Nicholas* (1998) 193 CLR 173, 209–10 (Gaudron J), 224, 226 (McHugh J), 258 (Kirby J); Lacey, above n 11, 76; *Wainohu* (2011) 243 CLR 181, 208–9 [44] (French CJ and Kiefel J); Steytler and Field, above n 11, 231–2.

131 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

132 See McHugh J's compelling dissent emphasising these aspects of the procedure in *Grollo* (1995) 184 CLR 348, 369–84 [26]–[40] (McHugh J).

133 *Wilson* (1996) 189 CLR 1, 17 (Brennan CJ, Dawson, Toohey, McHugh and Gummow JJ).

134 See discussion below at Part III.B.

involve administrative concerns.[135] Reliance on executive instruction must also be an express requirement and is not indicated by the condition that a decision is based only on information received from the executive, or the withholding of executive evidence from the other party so it may not be tested.[136] The key to compatibility again appears to lie in the judge's capacity to exercise an arms-length independent review of the information presented.[137]

The High Court's guidance in *Grollo* and *Wilson* provided the foundations for the development of an enforceable notion of incompatibility.[138] As recently as 2011, Stellios argued that an incompatibility test 'similar to that developed in *Wilson*' ought to be adopted in the federal sphere to replace the second separation rule.[139] In keeping with the inherent flexibility of this functionalist approach, the guidance in *Grollo* and *Wilson* was not intended to provide a 'test' as such but merely to assist the development of this new standard. At the core of the meaning of incompatibility lies the test's functionalist dedication to flexibility. In contrast to the emphasis placed on discernible characteristics by the formalist separation rules, the High Court has described determining incompatibility as an 'evaluative process',[140] ultimately considering whether the function infringes the 'minimum requirement' that the judiciary be independent and impartial.[141]

Gummow J described the incompatibility test's flexibility as a 'strength rather than a weakness' enabling it to respond to 'complex and varied statutory schemes'.[142] Defining incompatibility rigidly by a strict set of criteria would carry the risk that parliaments could avoid invalidity by careful drafting, rendering this functionalist standard susceptible to formalistic application. Indeed, the formalist attempt to settle a core definition of branch powers has caused much of the controversy surrounding the separation rules outlined above.[143] In interpreting the incompatibility test courts have been careful to confine their decisions to the facts presented. It can only be said that 'this' or 'that' kind of provision

135 See *International Finance Trust* (2009) 240 CLR 319, 338 [4] (French CJ), 366–7 [96]–[98] (Gummow and Bell JJ), 384 [152], 385 [155], 386 [160] (Heydon J); *Gypsy Jokers* (2008) 234 CLR 532, 551 [7] (Gleeson CJ), referring to the judgment of Crennan J and the joint judgment of Gummow, Hayne, Heydon and Kiefel JJ. See also discussion in *Hussain* (2008) 169 FCR 241, 268–9 [104]–[109]; *South Australia v Totani* (2010) 242 CLR 1, 56 [100], 66 [142] (Gummow J) ('*Totani*'); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 76 [63] (Gummow, Hayne and Crennan JJ) ('*Forge*').

136 *Grollo* (1995) 184 CLR 348; *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.

137 *Gypsy Jokers* (2008) 234 CLR 532, 560 (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation* (2009) 237 CLR 501, 542–3 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Wainohu* (2011) 243 CLR 181, 225 (Gummow, Hayne, Crennan and Bell JJ).

138 See, eg, *Wainohu* (2011) 243 CLR 181, 196–208 [21]–[43], particularly 206 [39] (French CJ and Kiefel J), 225–6 [94] (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic* (2011) 245 CLR 1, 95–6 [183]–[184] (Gummow J).

139 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 135.

140 *K-Generation* (2009) 237 CLR 501, 530 [90] (French CJ).

141 *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 [29]–[30] (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ) ('*Bradley*'); *Forge* (2006) 228 CLR 45, 67–8 [41] (Gleeson CJ); *K-Generation* (2009) 237 CLR 501, 544 [157] (Kirby J).

142 *Fardon* (2004) 223 CLR 575, 618 [105] (Gummow J).

143 Bateman, above n 81, 441.

produces incompatibility whilst a general conception remains elusive.[144] As the Federal Court observed in 2008, 'while the idea of incompatibility is familiar, its application to different factual situations is not'.[145]

Acknowledging the court's dedication to maintaining a flexible standard, the development of a core meaning of incompatibility may be observed. Recent incompatibility cases suggest incompatibility is established by the usurpation or control of a feature of the courts' decisional independence.[146] The applications of the incompatibility test in *International Finance Trust* and *Totani* each hinged upon provisions purporting to direct the court as to the manner and outcome of the exercise of its powers. *International Finance Trust* concerned legislation allowing the New South Wales Crime Commission to dictate to the Supreme Court whether restraining order proceedings would take place ex parte and without notice to the respondent.[147] Similarly, *Totani* concerned South Australian control order legislation that obliged the Magistrates' Court to issue an order upon finding an individual was a member of a 'declared organisation', the latter classification having been determined solely by the executive.[148]

International Finance Trust and *Totani* align with precedent indicating that the maintenance of the court's discretion and capacity to independently review the relevant executive direction would have avoided incompatibility.[149] In *K-Generation* and *Gypsy Jokers* the High Court upheld the use of secret evidence in judicial proceedings on the basis that the court was able to independently review the secret classification of the information.[150]

A recent case highlights both the flexibility and continuity of the incompatibility test. *Wainohu* concerned a challenge to the New South Wales control order legislation.[151] The provisions compromised fair process in a number of respects. An organisation could be 'declared' by a judge on the basis of undisclosed information in administrative proceedings not governed by the rules of evidence.[152] Subsequent Supreme Court control order proceedings hinged upon

144 See *Nicholas* (1998) 193 CLR 173, 256*; Forge* (2006) 228 CLR 45, 76*; Bradley* (2004) 218 CLR 146, 163; *Fardon* (2004) 223 CLR 575, 618–9; *K-Generation* (2009) 237 CLR 501, 530; Steytler and Field, above n 11, 235; Hardcastle, above n 19, 37. The same has been acknowledged of judicial power: see generally above nn 53–4.

145 *Hussain* (2008) 169 FCR 241, 261 [71].

146 See, eg, *Totani* (2010) 242 CLR 1, 43 [62] (French CJ).

147 *Criminal Assets Recovery Act 1990* (NSW); *International Finance Trust* (2009) 240 CLR 319, 355 (French CJ), 364, 366–7 (Gummow and Bell JJ), 385–6 (Heydon J). Hayne, Crennan and Kiefel JJ dissented, adopting a different interpretation of the *Criminal Assets Recovery Act 1990* (NSW): at 375.

148 *Serious and Organised Crime Control Act 2008* (SA) s 14(1); *Totani* (2010) 242 CLR 1, 21 (French CJ), 55–7 (Gummow J), 153, 159–60 (Crennan and Bell JJ), 171–2 (Kiefel J). The Court suggested that replacing the obligation with a discretion would have remedied the incompatibility: at 56–7 (Gummow J), 88–9 [226]–[228] (Hayne J), 160 [435]–[436] (Kiefel J).

149 *International Finance Trust* (2009) 240 CLR 319, 354–5 (French CJ); *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.

150 *Gypsy Jokers* (2008) 234 CLR 532, 560 (Gummow, Hayne, Heydon and Kiefel JJ); *K-Generation* (2009) 237 CLR 501, 542–3 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ).

151 (2011) 243 CLR 181; *Crimes (Criminal Organisations Control) Act 2009* (NSW). See generally Welsh, above n 122.

152 *Crimes (Criminal Organisations Control) Act 2009* (NSW) ss 8, 13(1), 28–9.

this declaration. Incompatibility was established, this time based solely on a provision removing the judge's duty to give reasons for his or her decision to declare an organisation.[153] However, under the *Wainohu* scheme the judge could have avoided incompatibility by providing reasons nonetheless. For a majority of the Court the giving of reasons was so fundamental to the judge's actual and perceived decisional independence that the removal of the obligation was sufficient to create incompatibility.[154] Crucial to the Court's reasons in *Wainohu* was the fact that the declaration was issued by a judge acting *persona designata* in proceedings with the appearance of open court. The judge's decision to declare an organisation involved important determinations of fact and enlivened the Supreme Court's jurisdiction to issue control orders in relation to the declared organisation and those associated with it.[155] It is not clear whether removing the appearance of open court from the declaration proceedings and allowing the judge to issue the declaration behind closed doors (as in *Grollo*) would have avoided incompatibility.[156]

The incompatibility cases demonstrate that the concept is certainly flexible, context specific and inapt for exhaustive definition or tests. This presents a conceptual challenge. Heydon J noted that 'intermediate appellate courts have found [the incompatibility test] difficult to understand'.[157] Professor Chris Steytler and Iain Field likewise observe that 'practitioners, lawmakers, students and teachers of constitutional law alike have struggled to make sense of' the concept of incompatibility.[158] This lack of clarity around incompatibility does not necessarily mean the standard is unworkable. The cases show that refinement of the meaning of incompatibility has been possible: incompatibility appears to require that the essential characteristics of an independent court are retained, and that the court is not required to make a political decision or act at the whim of the executive.

B *Is Incompatibility Insubstantial?*

The incompatibility test's functionalist dedication to flexibility gives a court considerable room to manoeuvre in its interpretations while preserving the substantive nature of the test. Incompatibility may be interpreted widely, giving substantive protection to fair process and equality considerations and taking

153 Ibid s 13(2); *Wainohu* (2011) 243 CLR 181, 192 [7] (French CJ and Kiefel J), 229–30 [109] (Gummow, Hayne, Crennan and Bell JJ).

154 *Wainohu* (2011) 243 CLR 181, 192 [7], 213 [53], 215 [58]–[59], 219–20 [69] (French CJ and Kiefel J). Cf Heydon J's dissenting views: at 238–41 [147]–[154].

155 *Wainohu* (2011) 243 CLR 181, 192 [7], 215 [58]–[59], 218–20 [66]–[69] (French CJ and Kiefel J). It was on this basis that the Court concluded s 13(2) effectively rendered the entire *Crimes (Criminal Organisations Control) Act 2009* (NSW) invalid: at 220 [71] (French CJ and Kiefel J), 231 [115] (Heydon J).

156 Welsh, above n 122, 264.

157 *Totani* (2010) 242 CLR 1, 95 (Heydon J).

158 Steytler and Field, above n 11, 228.

public confidence in courts and changing community values into account.[159] Incompatibility may also be interpreted narrowly, preventing only clear usurpations of judicial independence and aligning institutional integrity with a minimalist conception of the essential or defining features of courts.[160] Despite commentators emphasising the doctrine's potential breadth,[161] High Court decisions have tended to lean strongly towards the latter approach.[162]

The Court in *Kable* indicated that incompatibility may be established by circumstances in which the rights and liberties of citizens were severely affected by judicial proceedings lacking the hallmarks of fair process.[163] This substantive conception of the incompatibility test, in which fair process values found clear articulation, was not born out in the cases that followed. In fact the incompatibility test was not applied again until *International Finance Trust* in 2010, despite a string of attempts to rely on the rule. In an oft-quoted statement Kirby J suggested the *Kable* rule may be 'a constitutional guard dog that would bark but once'[164] and Gageler J, prior to his elevation to the High Court bench, later put to Kirby J in argument that any furtherance of the *Kable* rule was like asking the dog 'to turn on the family'.[165]

The minimal scope of *Kable* incompatibility was confirmed in 2004 when the High Court in *Fardon* upheld a substantially similar preventive detention regime.[166] As noted above, a key point of distinction relied upon to support the different outcomes in the two cases was that the New South Wales Act invalidated in *Kable* was ad hominem,[167] whereas the Queensland Act in *Fardon* was of general application.[168] The substantial overlap in the facts of *Fardon* and *Kable* indicated, for McHugh J, that *Kable* was a decision of 'very limited application' and the combination of circumstances that gave rise to incompatibility in that case was 'unlikely to be repeated'.[169] The distinctions between *Kable* and *Fardon* were relatively minor, and demonstrated that incompatibility was indeed reserved

159 Mason, above n 3, 8; Bateman, above n 81, 440–1; Wheeler, 'Due Process', above n 15, 220–4.

160 Steytler and Field, above n 11, 233–4.

161 Mason, above n 3, 8; Bateman, above n 81, 440–1; Wheeler, 'Due Process', above n 15, 220–4.

162 See the Federal Court's lengthy description of the development of the incompatibility test in *Hussain* (2008) 169 FCR 241, 261–73.

163 *Kable* (1996) 189 CLR 51, 98 (Toohey J), 106–7 (Gaudron J), 122–3 (McHugh J), 131–2 (Gummow J); *Fardon* (2004) 223 CLR 575, 655 (Callinan and Heydon JJ).

164 *Baker v The Queen* (2004) 233 CLR 513, 535 (Kirby J).

165 Transcript of Proceedings, *Forge v Australian Securities and Investments Commission* [2006] HCATrans 25 (8 February 2006).

166 *Fardon* (2004) 223 CLR 575; *Dangerous Prisoners (Sexual Offenders) Act 2003* (Qld).

167 *Community Protection Act 1994* (NSW) s 3(3).

168 *Fardon* (2004) 223 CLR 575, 591 [16] (Gleeson CJ), 595–6 [33] (McHugh J), 658 [233] (Callinan and Heydon JJ). Kirby J also acknowledged this distinction, referring to the Queensland Act as 'one of apparently general application', but commented that it was 'unthinkable' that *Kable* was a 'stand-alone decision … limited to one case': at 629 [144].

169 Ibid 601 (McHugh J). See also *Hussain* (2008) 169 FCR 241, 267.

for extreme cases, such as the judicial implementation of ad hominem legislation or the appointment of a judge as Ministerial advisor.[170]

Following *Fardon*, cases reinforced the narrowness of the incompatibility test.[171] By 2009 the incompatibility test had only been applied in *Wilson* and *Kable* and it appeared as though nothing but the most egregious affront to judicial independence would qualify as incompatible. *K-Generation*, *Gypsy Jokers, International Finance Trust* and *Totani* confirmed that preserving an arms-length degree of decisional independence is sufficient to overcome potential incompatibility. Later cases reinforced the suggestion in *Grollo* and *Wilson* that maintaining a relatively formal sense of independence — by which the judge is not forced into an unavoidable conflict, integrated into the political branches or instructed to make political decisions — will avoid incompatibility. Intrusions into openness, fairness and equality by, for example, ex parte proceedings, secret evidence and decisions based on information not governed by the rules of evidence have all been tolerated under the test, even where the power results in severe incursions on rights or liberties.[172] This led Heydon J to observe in *Totani* that the due process implications of the test were 'apparently dormant'[173] and Kirby J to state in *Gypsy Jokers* that the incompatibility test has been 'under-performing' in this respect.[174]

In those cases where incompatibility was established, the decision rested on a single provision, in *Totani* a single word. In recent cases the Court has been unusually explicit about how the provisions in question could be amended to remedy the incompatibility.[175] None of the Court's suggested changes alter the schemes in a substantive manner; they merely reinstate the minimum standard of judicial control over proceedings or, in *Wainohu*, the giving of reasons for a decision made with the appearance of open court.

It is difficult to say whether *Wainohu* presents a slight widening of the incompatibility standard or simply a decision based on particular, rare, contextual considerations (such as the exercise of functions by a judge in the appearance of open court as a precursor to Supreme Court proceedings). In any case incompatibility in *Wainohu* also rested on a single provision compromising an essential feature of the court's independence. Ultimately the case law demonstrates that only clear

170 For a critique of *Fardon*, see generally Anthony Gray, 'Standard of Proof, Unpredictable Behaviour and the High Court of Australia's Verdict on Preventative Detention Laws' (2005) 10 *Deakin Law Review* 177; Patrick Keyzer, 'Preserving Due Process or Warehousing the Undesirables: To What End the Separation of Judicial Power of the Commonwealth?' (2008) 30 *Sydney Law Review* 100.

171 For discussion, see Gabrielle J Appleby and John M Williams, 'A New Coat of Paint: Law and Order and the Refurbishment of *Kable*' (2012) 40 *Federal Law Review* 1, 8.

172 *Grollo* (1995) 184 CLR 348; *Hilton* (1985) 157 CLR 57; *Hussain* (2008) 169 FCR 241, 268; *Totani* (2010) 242 CLR 1.

173 *Totani* (2010) 242 CLR 1, 95 (Heydon J).

174 *Gypsy Jokers* (2008) 234 CLR 532, 563 (Kirby J), quoting Wheeler, 'The *Kable* Doctrine', above n 104, 30.

175 *International Finance Trust* (2009) 240 CLR 319, 355 (French CJ), 364 (Gummow and Bell JJ), 385 (Heydon J); *Totani* (2010) 242 CLR 1, 56 [100] (Gummow J), 88–90 [226]–[229] (Hayne J), 160 [435]–[436] (Crennan and Bell JJ); *Wainohu* (2011) 243 CLR 181, 220 [70] (French CJ and Kiefel J).

usurpations or severe intrusions into the independence of the judiciary will cause incompatibility.[176]

Despite rousing dissents in *Grollo* and *Fardon* advocating a broader interpretation of the test, case after case has reinforced its narrowness. This narrow interpretation permits the incremental attrition of the separation of judicial power, and also arguably poses little obstacle to clear affronts to judicial independence and impartiality.[177]

When applying the test in recent cases, the High Court has not revisited previous authorities and continues to apply the narrow standard.[178] There is nothing to suggest that if an incompatibility test was adopted to replace the second separation rule it would be freed from the prevailing narrow interpretation. Indeed, some commentators advocate the explicit adoption of the same test.[179] Both the Court's reticence to revisit past cases and its willingness to identify incompatibility as a singular concept[180] indicate that a functionalist incompatibility test to replace the second separation rule would be the same test developed in the *Kable* and *Grollo* lines of cases.[181] The flexibility of the incompatibility test would ensure that the different contextual features applying to federal courts would play a role in any incompatibility analysis. However, it can be confidently surmised that if an incompatibility test replaced the second separation rule this 'under-performing'[182] test 'of very limited application'[183] would provide a weak protection to constitutional values and present a clear danger to the separation of judicial power and its purposes.

It is possible that the narrowness that characterises the incompatibility test may simply be the result of particular styles of judging and not actually indicate this functionalist test is less apt than the existing formalist test to achieve the purposes of Chapter III. However, in the next section I argue that the inherent functionalist foundations of the incompatibility test have facilitated its development into an insubstantial protection for constitutional values.

176 Steytler and Field, above n 11, 238.

177 See, eg, the critique of *Fardon* in Gray, above n 170; Keyzer, above n 170. Cf *Fardon* (2004) 223 CLR 575, 592 (Gleeson CJ), 600–1 (McHugh J), 658 (Callinan and Heydon JJ).

178 Steytler and Field, above n 11, 238. Cf Appleby and Williams, above n 171, 28 in which the authors assert that the High Court has 'reinvigorated' the *Kable* doctrine, acknowledging the recent cases 'have done little to settle the debates as to its basis or scope'; Brendan Lim, 'Attributes and Attribution of State Courts — Federalism and the *Kable* Principle' (2012) 40 *Federal Law Review* 31, in which the author asserts that the recent applications of the incompatibility test reflect a shifting emphasis in the test's theoretical underpinnings.

179 Stellios, 'Reconceiving the Separation of Judicial Power', above n 20, 129–130.

180 *Wainohu* (2011) 243 CLR 181, 228 (Gummow, Hayne, Crennan and Bell JJ); Welsh, above n 122, 259; Steytler and Field, above n 11, 244. See also the application of the *Wilson* test in *Momcilovic* (2011) 245 CLR 1, 95–6 [183]–[184] (Gummow J).

181 Welsh, above n 122, 263. See, eg, *Wainohu* (2011) 243 CLR 181, 217–18 (French CJ and Kiefel J), 225–6 (Gummow, Hayne, Crennan and Bell JJ); *Momcilovic* (2011) 245 CLR 1, 95–6 [183]–[184] (Gummow J).

182 *Gypsy Jokers* (2008) 234 CLR 532, 563 (Kirby J), quoting Wheeler, 'The *Kable* Doctrine', above n 104, 30.

183 *Fardon* (2004) 223 CLR 575, 601 (McHugh J); *Hussain* (2008) 169 FCR 241, 267.

C *Can the Functionalist Approach Achieve Independence and Impartiality?*

At the core of the functionalist incompatibility test is the rationale that powers may be conferred on multiple branches of government unless the conferral is demonstrated to impede institutional independence or integrity. Unlike formalist tests which seek proof of particular characteristics before permitting a function to be conferred on the judicature, a functionalist test allows the conferral before looking for offending characteristics. Thus, the functionalist starting point is one of permissiveness; its guiding ethos is flexibility.

The permissiveness underpinning the functionalist approach undermines the prophylactic nature of the separation of judicial powers.[184] Small affronts to the judicial independence and impartiality that fail to reach the considerable standard of 'incompatible with judicial independence and integrity' are permitted under the functionalist incompatibility test. The legitimisation of these small affronts creates the potential for a snowball effect and the incremental erosion of the separation of powers.[185]

The potential breadth of the test indicated in *Wilson* and *Kable* narrowed with each unsuccessful attempt to argue incompatibility that followed. The limited scope of the test is now reflected in the incredibly narrow bases on which the recent incompatibility decisions rest. Each case not only interpreted the incompatible characteristics of power, but legitimised other characteristics as compatible. Thus the use of risk assessment-based preventive detention, secret evidence and closed proceedings resulting in intrusive orders are highly unlikely to feature weightily in determinations of incompatibility following their legitimisation as 'compatible' in *Fardon*, *Gypsy Jokers* and *Grollo* respectively. The ambit of the range of functions exercisable by the judicature, and the range of ways in which Parliament may control the exercise of those functions, increases but is not easily contracted, as to do so would be inconsistent with pre-existing authorities. The result has been the evolution of a relatively ineffective protection for judicial independence and impartiality under which even the basic fair process and equality of proceedings is difficult to protect from legislative interference.

It is the inherent permissiveness of the functionalist test that facilitates the legitimisation of relatively minor affronts to judicial independence and impartiality and enables the separation of judicial power to be steadily undermined.[186] Judicial enforcement of a robust conception of incompatibility may succeed in achieving the purposes of Chapter III but, nonetheless, will continue to adhere to flexibility and permissiveness rather than rigidity and caution. It is highly likely such an approach will evolve in a manner that gradually narrows the concept of incompatibility into eventual insignificance — as witnessed in the post-*Kable* incompatibility cases — and permits greater and greater compromises to judicial

184 Redish, above n 6, 306.

185 Ibid; Walker, above n 27, 161.

186 Redish, above n 6, 100.

independence and impartiality. The risk that this will occur is a severe and inherent weakness of the functionalist approach.

It is clear enough that the High Court imbues flexibility into almost any test it determines, preserving a degree of discretion to enable adaptability in the long term. When fundamental constitutional values are at stake the development of the incompatibility test demonstrates that an inherently permissive test interpreted flexibly is apt to become so permissive it provides barely any protection at all in the longer term. This is a primary formalist criticism of functionalist approaches, and it describes the development of the incompatibility test in Australia. Undoubtedly the incompatibility test's direct engagement with the purposes of Chapter III is an important advantage in achieving judicial independence and impartiality. The challenge becomes coupling this direct engagement with a strong and less flexible approach, so this strength is not whittled down over time.

IV PURPOSIVE FORMALISM: A TWO-TIERED APPROACH

Thus far I have discussed the strengths and weaknesses of the prevailing formalist and functionalist tests in their potential to achieve the purposes of Chapter III. The formalist separation rules are far from ideal, but they have been more successful than the functionalist incompatibility test in providing an appropriately strong and reliable protection for judicial independence and impartiality. The criticisms of formalism are well-founded but perhaps not insurmountable, whereas the weaknesses in the incompatibility test arise from its functionalist nature and are unavoidable. Is there a workable framework that accommodates the strengths of each approach without compounding their weaknesses? This Part of the article proposes such an approach, a two-tiered method of 'purposive formalism'.

In essence purposive formalism adopts the formalist separation rules, with the addition of a purposive inquiry interrogating whether a power is compatible with judicial independence and impartiality. The design of the method is outlined below. First, however, it is helpful to briefly explain the logic behind the label 'purposive formalism'. All formalism is of course purposive, in that no formalist claims the separation of functions ought to occur for its own sake.[187] That said, formalist approaches to Chapter III may be appreciated as existing on a spectrum. At one end of the spectrum exists a passive approach to the purposive nature of Chapter III, assuming definition alone will achieve judicial independence and impartiality and that engagement directly with those concepts is unnecessary. A decision-maker adopting this approach will begin and end their reasoning by seeking to define the function at hand. The success of this formalist approach is thus entirely dependent on the susceptibility of judicial power to precise and enforceable definition. At this end of the formalism spectrum the weaknesses of the separation rules are apparent. Limitations in the definition of judicial power become weaknesses in the capacity of the rules to achieve their purposes

187 Gerangelos, 'Interpretational Methodology', above n 3, 9.

and a formalistic neglect of principled considerations places the rules at risk of developing in a technical manner at odds with the core aims of Chapter III. At the other end of the formalism spectrum lies an actively purposive approach: 'purposive formalism'. Purposive formalism acknowledges that defining a function is not apt to form the entire task of the separation rules, as functions are not always susceptible to precise definition. It also acknowledges the purposive nature of Chapter III by introducing a mechanism through which purposive considerations may play a clear and significant role in the analysis.

The basic purposive formalist framework is as follows. Two questions are posed in order to determine Chapter III validity.

1. *Is the function judicial or non-judicial?* —The first 'definition' limb.

Then, if the power is not susceptible to clear definition:

2. *Is the conferral of the function compatible with the independence and impartiality of the judicial institution?* —The second 'compatibility' limb.

Purposive formalism is fundamentally formalist. First and foremost purposive formalism contends that powers ought *not* be vested in courts *unless* they contain the defining characteristics of judicial power, as developed in the extensive body of case law. A clear answer to this first question according to the accepted characteristics of judicial power will determine the allocation of power conclusively. This retains the prophylactic potential of the formalist separation rules by ensuring that functions capable of clear definition are assigned on that basis, and that other considerations are not invoked to vary or confuse that determination. By being grounded in formalism's caution and fundamental rigidity, purposive formalism avoids the incremental erosion of judicial independence and impartiality caused by functionalism's inherent permissiveness and flexibility.

Purposive formalism still faces the considerable challenge of accounting for the limitations of the formalist separation rules: first, the resolution of cases concerning penumbral powers and, second, the rules' failure to provide a clear avenue for considering the impact of a conferral of power on judicial independence and impartiality. In order to address these weaknesses purposive formalism engages a second tier of inquiry beyond considering the definition of a power. Only if the nature of the function remains unclear is the second question engaged: 'is the conferral of the function compatible with the independence and impartiality of the judicial institution?' The two-tiered framework assists purposive formalism to go further than merely determining the allocation of judicial and non-judicial functions. It acknowledges and allocates functions in Zines' third category of powers insusceptible to definition as either judicial or non-judicial, that is, penumbral powers.[188]

The second 'compatibility limb' of purposive formalism is clearly an adaptation of the functionalist incompatibility test. Crucially, the compatibility question is phrased in the positive: is the function compatible, rather than is it incompatible.

188 Zines, *The High Court and the Constitution*, above n 20, 221–2; Ratnapala, above n 57, 124.

This is an important distinction. It places a positive burden on the identification of compatible features of the power, upon which validity depends. The incompatibility test works in the opposite way. That test calls for the identification of incompatible features and presumes the power is otherwise valid. The existing *Grollo* and *Kable* lines of authority may guide the court as to the outer-limits of compatibility, but purposive formalism's second limb calls for the evolution of a jurisprudence of compatibility centred on more comprehensive understandings of the constitutional concepts of judicial independence and impartiality.

Purposive formalism compels courts to engage openly, accountably and consistently with the principled aspect of Chapter III. In incompatibility cases this substantive open engagement is clouded (even overwhelmed) by a focus on indicators of incompatibility, such as usurpation, the essential nature of a feature or whether the judge is obligated to act in a political manner. In cases applying the separation rules there has simply been no requirement that courts engage openly or consistently with the purposes of Chapter III. By requiring courts to resolve difficult questions as to the allocation of powers by clear reference to the core constitutional values of judicial independence and impartiality, purposive formalism holds potential as an advancement in the accountability and reasoning of the court and in the achievement of those values.

Purposive formalism presents a significant development, but one that builds upon existing authorities. Various decisions of Kirby, Gaudron and Deane JJ reflect aspects of the purposive formalist approach to the separation rules insofar as each justice has displayed an active engagement with the purposes of Chapter III in their reasons, at times drawing on these purposes to determine the issue at hand.[189] That said, approaches to the purposive aspect of Chapter III have been inconsistent. Purposive formalism is proposed as a new framework to encourage consistency in the interpretation of Chapter III and to legitimise constrained, clear and direct engagement with the purposive aspect of Chapter III in the determination of separation of judicial power cases.

By coupling the strictness of the separation rules with the principled engagement of a compatibility test, purposive formalism may provide a mechanism for better achieving the purposes of Chapter III. There are three potential criticisms of purposive formalism that deserve particular consideration and provide an opportunity to elaborate the approach in more detail. Firstly, it may be said that engaging both concepts of judicial power and compatibility risks compounding the ambiguities inherent in each concept and supporting unpredictable, highly discretionary or unguided decisions. Secondly, purposive formalism may simply incorporate the insubstantial and narrow concept of incompatibility arising from the *Kable* and *Grollo* lines of cases to govern the second 'compatibility' limb. Thirdly, as neither the separation rules nor the incompatibility test have been

189 Wheeler, 'Due Process', above n 15. See, eg, *Nicholas* (1998) 193 CLR 173, 208–9 (Gaudron J); *Polyukovich* (1991) 172 CLR 501, 607 (Deane J); *Thomas* (2007) 233 CLR 307, 433–6 (Kirby J). Cf the judgment of Gleeson CJ in *Thomas* (2007) 233 CLR 307, 335, where his Honour dealt with the question of whether the provisions authorised the exercise of judicial power in a manner contrary to Chapter III briefly.

particularly successful at protecting fair process in judicial proceedings, how could purposive formalism possibly succeed in doing so simply by harnessing both tests?

A *Compounding Imprecision?*

Purposive formalism combines the separation rules with a compatibility test; does this not simply compound the weaknesses of each approach? In particular, neither judicial power nor (in)compatibility is susceptible to precise or exhaustive definition — won't a test that invokes both these concepts suffer from compounded imprecision?

The strength of the purposive formalist approach lies in the tiered nature of its analysis. The compatibility limb is only engaged to resolve cases that cannot be resolved at the definition limb. If a power is capable of definition as exclusively judicial or non-judicial by recourse to the characteristics of judicial power, this will resolve the constitutional question entirely. However, as the foregoing discussion reveals, powers are not always susceptible to sufficiently precise definition. In such cases some other, additional factor is required to determine the proper allocation of the power. Otherwise the decision maker may be compelled to stretch the characteristics of judicial power or seek some other ad hoc consideration to determine the issue. Under a purposive formalist approach the compatibility limb provides this additional factor.

As the compatibility limb has a secondary status it acts only as a refining element, helping to resolve ambiguities. It does not provide an alternative element by which the ambiguities and weaknesses of each standard may be compounded. Each of the concepts employed remains broad and will be subject to differing interpretations, but will be guided by existing authorities. In this way, the standards are structured to enable one to limit the other. Specifically, it enables the standard of compatibility to limit the scope of penumbral powers exercisable by courts. By utilising the compatibility standard to refine ambiguities as to definition, purposive formalism goes some way to addressing the weaknesses of imprecision existing under the formalist separation rules and functionalist incompatibility test. This does not create a perfect method, but certainly a preferable one.

B *Overcoming the Narrowness of Incompatibility*

The compatibility element of purposive formalism is adapted from the incompatibility test, so won't it suffer the same weaknesses as the incompatibility test in the state court and *persona designata* contexts? Will the compatibility limb permit all but the most extreme affronts to independence and impartiality, leading to the incremental erosion of the separation of judicial powers?

The meaning of compatibility in the purposive formalist test is difficult to address in the abstract. It might be said that compatibility with judicial independence and impartiality would require that a power aligns with the rule of law and

other basic aims of the separation of federal judicial power discussed in Part III. However, one cannot predict just how a court adopting the purposive formalist approach would interpret compatibility. It would certainly be open to a court to interpret compatibility to mean not-incompatibility, and draw upon the *Grollo* and *Kable* lines of cases to inform that understanding. This would, in effect, permit all but grossly incompatible functions to come within the ambit of judicial power, broadening the penumbra of judicial power and bringing about the kind of incremental erosion seen in those contexts where the incompatibility test governs the conferral of powers. Such an approach would not advance purposive formalism's capacity to achieve judicial independence and impartiality. Arguably it would pose no greater threat to these values than the replacement of the second separation rule with an incompatibility test; or reliance on parliamentary intent or imperfect analogies to determine difficult cases.[190] Nonetheless, the compatibility limb is not designed to mimic the incompatibility test, and there are good reasons why a more substantial concept of compatibility would be developed in the purposive formalism context.

Crucially the starting point in the compatibility limb is not one of permissiveness, but of caution. The compatibility limb determines the allocation of powers not established as judicial. As this is a formalist test such powers may not be conferred on courts. The rationale behind the compatibility limb is that uncertain, penumbral powers may *not* be conferred on courts *unless* they are demonstrably compatible with judicial independence and impartiality. In this way it is opposite to the incompatibility test's presumption of validity in the absence of demonstrated incompatibility. Unlike the incompatibility test, the compatibility limb is *not* an exception to an exception, as has been cumbersomely adopted in the *persona designata* context. Nor is it an exception to a rule, as in the state court context. Due to its exceptional nature and its underlying functionalist permissiveness the incompatibility test presumes a function is validly conferred and then seeks proof of incompatibility. On the other hand, the compatibility limb presumes the function may *not* be conferred on the judiciary *unless* it is proved to be compatible with judicial independence and impartiality. Thus it requires substantive development of the meaning of compatibility.

The incompatibility cases may guide the development of the compatibility limb by indicating the characteristics of functions that are incompatible, such as usurpation of an element of decisional independence, executive control of a power or its exercise, or the integration of a judge into the non-judicial branches. However, in interpreting the compatibility limb of purposive formalism the court would need to look beyond this relatively narrow set of criteria and develop a jurisprudence of compatibility.

Considering the aims of the separation of judicial power outlined in the Introduction to this article, compatible functions would preserve equality, justice and confidence in the legal system as well as upholding the constitutional compact more broadly by, for example, ensuring political functions are vested in the

190 As argued above in Part II.A.

representative branches. Thus, the compatibility limb has the capacity to support a more complete, substantive development of the notions of judicial independence and impartiality. This fresh conception of independence and impartiality could facilitate a renewed focus on the role an independent and impartial federal judicature serves in achieving fundamental constitutional aims such as the rule of law, equality and the preservation of liberty. The concept of compatibility could conceivably develop more freely and substantively within its limited role of patrolling the grey-areas of judicial power. Its presence would also give history and parliamentary intent a clearer, more appropriate place in the reasoning process. These considerations would play a part in the analysis whilst remaining secondary to the ultimately determinative compatibility standard. Thus purposive formalism provides the court with an opportunity to meaningfully engage with the purposes of Chapter III within the formalist framework. To simply adopt the existing incompatibility test to determine the second tier of the purposive formalist test would be at odds with the role and nature of the compatibility limb, and neglect an opportunity to develop a substantive, purposive Chapter III jurisprudence.

C *Protecting Fair Process*

Neither the separation rules nor the incompatibility test have been particularly successful at protecting substantive fair process in judicial proceedings. The separation rules accommodate fair process awkwardly. The incompatibility test has maintained a narrow focus on independence rather than on more substantial notions of impartiality and fairness. How then might purposive formalism fare in protecting fair process in federal court proceedings?

The compatibility limb of purposive formalism provides the clear avenue for addressing fair process protections that is lacking in the separation rules. Moreover, the compatibility limb is designed to facilitate more substantive consideration of the impact of a power on judicial independence and impartiality than the present incompatibility test. Through this clear avenue for substantive analysis, the compatibility limb incorporates attentiveness to the impact of the function on the perceived impartiality of the proceedings, in the sense that this perception equates to the court's capacity to protect its processes.[191] If the equality or fairness of judicial proceedings is compromised, the independence and impartiality of courts may be challenged and faith in courts as impartial arbiters of justice diminished.[192] Through the application of the compatibility limb, functions that are questionably judicial *and* are exercised in a manner that compromises equality, fairness, or otherwise impacts the perception of judicial independence and impartiality will not pass constitutional muster.

Fair process will also continue to play a role in Chapter III cases concerning functions that do not reach the compatibility limb of analysis. The existing

191 Lacey, above n 11, 76.

192 Brennan, above n 78, 16–18.

precedent indicating that fundamental aspects of fair process may form essential features of 'courts' or of 'judicial power' would not be undermined. A clearly non-judicial power could not be conferred on a court. A questionably judicial power would face the more substantive test of whether its exercise compromised broader notions of judicial independence and impartiality. Placing the compatibility inquiry in a second tier acknowledges that penumbral powers present the greatest risk of eroding judicial independence and impartiality and deserve particular interrogation for their potential impact on fair and proper processes. Compromises to fair process — such as ex parte hearings without notice or the use of secret evidence — may be in keeping with the independence and impartiality of courts in the context of, for example, a criminal trial. After all, such trials attract the wealth of associated protections for the rights of the accused. When a function is unusual — such as where it involves the creation of rights absent a controversy or incarceration outside the trial process — the compatibility element calls for more comprehensive compliance with accepted standards of fair process and natural justice if that function is to be exercisable by courts.

Exactly what kinds of fair process protections might arise under the compatibility limb of purposive formalism cannot be foreseen with any precision. Gaudron J describes fair judicial process as incorporating openness, natural justice and the application of law to ascertainable facts.[193] Jurisprudence regarding constitutional fair process protections in Australia remains sparse. There is a great, unrealised potential for the development of an Australian conception of fair process. That said, it must be acknowledged that any fair process protections derived from Chapter III will focus on the independence of the court, rather than on the rights of individual parties.[194] For example, in cases upholding the use of secret evidence in judicial proceedings the decisive issue was whether the court was able to independently assess the classification of the material, not on the impact of secrecy on the party from whom the evidence was withheld.[195] In many cases the concerns of judicial independence and party rights may overlap, but there is limited capacity for a comprehensive set of fair process rights, of the kind seen in nations such as the United States that have constitutional due process clauses, to evolve from Chapter III.[196] Notwithstanding this, Chapter III remains the only avenue for the constitutional protection of fair judicial process and, as such, it is imperative that it is interpreted to enable courts to give clarity to this area as well as substantive consideration and weight to preserving the fairness, openness and equality of their proceedings.[197] Purposive formalism presents a clear avenue through which the jurisprudence of fair process, as it relates to judicial independence and impartiality, can evolve.

193 *Nolan* (1991) 172 CLR 460, 496 (Gaudron J), quoted in *Fardon* (2004) 223 CLR 575, 615 [92] (Gummow J).

194 Lacey, above n 11, 60.

195 *Gypsy Jokers* (2008) 234 CLR 532; *K-Generation* (2009) 237 CLR 501.

196 For discussion of Chapter III's limited capacity to protect 'rights', see Lacey, above n 11, 60.

197 Ibid.

D *Does Purposive Formalism Achieve Independence and Impartiality?*

Purposive formalism is by no means an infallible mechanism for achieving judicial independence and impartiality. The foregoing discussion leaves many questions unanswered. How will the court interpret compatibility? What exactly is required by judicial independence and impartiality? How might the purposive formalist approach apply to many examples of controversial powers? There are risks in the approach and it undoubtedly has its weaknesses as a mechanism for the achievement of judicial independence and impartiality. At a broader level, the natural widening effect of judicial interpretation and government innovation means it will always be easier for the penumbra of judicial power to grow than shrink, as this requires a more radical step. Nonetheless purposive formalism has two key advantages that together render it a preferred method of achieving judicial independence and impartiality.

First, the risks of purposive formalism are less than those presented by the formalist separation rules or the functionalist incompatibility test. The two-tiered framework avoids the incremental erosion stemming from the functionalist incompatibility test's underlying permissiveness. It also enables direct engagement with judicial independence and impartiality to address the weaknesses in the separation rules, without compounding the imprecision of each set of standards. Purposive formalism addresses the inadequacy of the definition of judicial power by engaging a compatibility test to determine the allocation of functions insusceptible to precise definition. The approach also addresses the risk of the separation rules developing in a manner at odds with constitutional values by providing for direct consideration of those values in the second compatibility limb of the analysis.

Second, purposive formalism clarifies the role of principled considerations in Chapter III analyses and compels courts to engage openly, accountably and consistently with the core purpose of Chapter III. Purposive formalism requires a fresh jurisprudence of compatibility, positively framed to propel engagement with the meaning and aims of independence and impartiality, rather than focusing upon offensive incompatible features. The compatibility limb thus has the capacity to be more substantive and therefore more capable of achieving judicial independence and impartiality than the existing incompatibility test. The two-tiered framework facilitates this principled, purposive engagement without undermining the basic prophylactic strength of the separation rules. In this way purposive formalism presents a clear picture of the role of each separate consideration in determining Chapter III validity. The definition of the power is of prime importance, principled engagement with the purposive aspect of Chapter III is secondary, and of lesser weight are further factors such as historic analogy and parliamentary intent.

Purposive formalism is simply proposed as a preferred approach, one that offers a better chance of achieving the fundamental purposes of Chapter III than either the formalist separation rules or functionalist incompatibility test. The analysis

of purposive formalism has been theoretical, speaking broadly and at the point of abstraction. As to how purposive formalism may play out with respect to specific functions, this is a task for further research. A few points may be made in the abstract however. Firstly, the purposive formalist approach is proposed to offer the best means of achieving judicial independence and impartiality in the longer term. As such it may appear to produce unexpected results in particular cases. This stems from its fundamentally formalist nature, which has been justified in the course of this article. Secondly, purposive formalism leaves the decision-maker with room to manoeuvre. Reasonable minds may, and do, differ as to the meaning of judicial power and judicial independence and impartiality. Whilst this ambiguity creates a risk of concepts being interpreted in a way that may prevent purposive formalism from achieving the purposes of Chapter III, the existence of some flexibility is important to preserve. The powers of government evolve over time and must be allowed to do so. Constraining the court too much in its interpretation of the separation of judicial power may stunt this evolution or, critically, enable parliaments to avoid Chapter III limits on their powers by employing formalistic drafting tricks and techniques. Purposive formalism acknowledges that constraining the court further may not be the way forward in achieving judicial independence and impartiality under Chapter III. Requiring the court to openly and directly engage with the purposes of Chapter III in a clear and constrained fashion may well be a step in the right direction.

The adoption of purposive formalism would present a significant development built upon existing doctrine. Purposive formalism is a reconceptualisation and rebuilding of the formalist approach to the separation of federal judicial power, harnessing the strengths of the existing formalist and functionalist tests to ameliorate their respective weaknesses. In this way purposive formalism presents a preferred method by which judicial independence and impartiality may be best achieved.

V CONCLUSION

This article has considered how Chapter III may be interpreted to best achieve the independence and impartiality of the federal judiciary. The Australian context supports this kind of assessment for a number of reasons. Firstly, the lack of clear guidance from the framers of the *Constitution* leaves the High Court with considerable room for discretion in its interpretations of Chapter III. Secondly, there remains a general consensus that the separation of judicial power derived from Chapter III is designed to achieve judicial independence and impartiality through which a range of other constitutional values may be attained. Thirdly, Australia is in the intriguing position of having parallel streams of formalist and functionalist separation of judicial powers jurisprudence.

Building on these observations, this article assessed the success of the formalist separation rules and functionalist incompatibility test in achieving judicial independence and impartiality. In undertaking this analysis, some — perhaps

unexpected — truths have been faced. Despite elevating judicial independence and integrity to a determinative level, the functionalist incompatibility test has proved an inadequate mechanism for achieving the core aims of Chapter III. The failure of the incompatibility test to live up to its potential is argued not to simply reflect the idiosyncratic approaches of justices interpreting the test, as may be alleged.[198] Rather, the rapid weakening of the incompatibility standard demonstrates the incremental erosion of the separation of powers that formalists regularly attribute to functionalist approaches. This erosion stems from the permissiveness and flexibility that characterises all functionalist tests.

The considerable deficiencies in the formalist separation rules have also been discussed. Formalism's primary assertion that judicial power is susceptible to precise definition is fundamentally flawed. It is true some powers are capable of definition as judicial or non-judicial, but many are not. In these latter cases the High Court has adopted an inconsistent range of techniques to resolve the Chapter III issue. In doing so, it has been constrained by the separation rules' blinkered focus on definitional characteristics. Thus to resolve Chapter III questions courts have problematically stretched and contorted the characteristics of judicial power, drawn inconsistently upon history, loose analogies and parliamentary intent, and created controversial classes of exceptional powers capable of being vested in multiple branches of government. Moreover, formalism's implicit assertion that the allocation of powers according to definition will naturally achieve judicial independence and impartiality is unsound. This is demonstrated by the awkward, inconsistent and ultimately unsatisfactory place of basic fair process protections within the separation rules framework.

These critical observations underpin a proposed way forward in the interpretation of Chapter III, beginning with a pragmatic acknowledgment of the weaknesses in both the formalist and functionalist approaches. This proposed solution is purposive formalism. Purposive formalism is a two-tiered test that harnesses the strengths of the formalist separation rules and the functionalist incompatibility test to ameliorate the weaknesses inherent in each approach.

By grounding itself in the formalist approach and giving primacy to definitional factors in determining the allocation of powers, purposive formalism avoids the permissiveness and flexibility of the functionalist method and the incremental erosion of judicial independence resulting from these traits. But purposive formalism accepts that over-estimating the precision with which functions may be defined undermines the efficacy and ultimate utility of the formalist rules. In cases in which the characteristics of judicial power are simply insufficient to fulfil the task of definition purposive formalism only permits a power to be vested in courts if it is demonstrably compatible with judicial independence and impartiality. Importantly this 'compatibility limb' is a secondary tier of the inquiry and presumes a power may not be conferred until demonstrated to be compatible. This distinguishes purposive formalism from the functionalist

198 Bateman, above n 81, 442.

incompatibility test, which permits the conferral of a power in the absence of demonstrated incompatibility.

The purposive formalist approach is a significant development in the interpretation of Chapter III to achieve judicial independence and impartiality. It at once harnesses the strengths and addresses the weaknesses of the existing tests in their capacities to achieve the core aim of Chapter III. To some extent this analysis fits within a far broader literature dealing with the complex relationship between rules and their justifications.[199] The approach acknowledges the need for a strict yet principled mechanism for allocating the powers of government. It attempts to address the tension between rules and their purposes, albeit in the very limited context of the allocation of powers on Australian federal courts. By elevating a purposive compatibility inquiry to a clear position within the Chapter III validity test, purposive formalism clarifies the place and relevance of other considerations, such as historic analogy and parliamentary intent. Perhaps most importantly, purposive formalism compels courts to be more open and accountable about their approach, in particular with respect to the principled purposive considerations that do and should play a part in Chapter III reasoning.

There is no panacea for the ills that plague the interpretation of Chapter III. Every approach will suffer some frailty. Despite the risks, purposive formalism has much to commend it, not as an ideal but certainly as a preferred approach. By combining the strengths of the separation rules and incompatibility test in a tiered design it ameliorates the weaknesses of each approach. In doing so purposive formalism delivers a more robust protection for judicial independence and impartiality and presents a significant step forward in interpreting Chapter III in a manner that is consistent with its objects and purposes. By reconceptualising the interpretation of Chapter III, purposive formalism calls for a re-examination of earlier cases and a reinvigorated Chapter III jurisprudence more clearly concerned with achieving core constitutional aims within the strong formalist framework.

199 See Frederick Schauer, *Playing by the Rules: A Philosophical Examination of Rule-Based Decision-Making in Law and in Life* (Clarendon Press, 1991) 73–85; Hart, above n 59; Lon L Fuller, 'Positivism and Fidelity to Law — A Reply to Professor Hart' (1958) 71 *Harvard Law Review* 630; P S Atiyah and R S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Clarendon Press, 1987).