
James A. Thomson
ARTICLES

AMERICAN AND AUSTRALIAN CONSTITUTIONS: CONTINUING ADVENTURES IN COMPARATIVE CONSTITUTIONAL LAW

JAMES A. THOMSON*

The chief virtue of a comparative study... is [not]... in generalisations that emerge from it, but in the deeper insight that it offers [all participants] into their own systems. The features of each system, seen in relief against the other, stand out more sharply than they do when either is viewed in isolation. Students of each system may thus acquire enhanced understanding of the problems and prospects of their own system and, perhaps, the potential for achieving beneficial change within it.¹

[A] glimpse into the households of our neighbors serves the better to illuminate our own, as when by pressing hard against the pane we see not only the objects on the other side but our own features reflected in the glass.²

Does [the existence of contingent variables such as a given society's history and traditions, the particular demands and aspirations of that society, its political structures and processes, and the kind of judges it has produced] mean that there is no place for comparative analysis of a kind that, by focusing on other societies' problems and solutions, developments, and trends, enlightens our comprehension of problems, solutions, developments and trends in our own society?³

Isaacs was quick to argue that [a proposal to include in the Austra-

* LL.B (Hons) 1971, B.A. 1974, University of Western Australia; LL.M 1975, S.J.D. 1981, Harvard University.

1. Potter Stewart, Foreword to 1 COURTS AND FREE MARKETS: PERSPECTIVES FROM THE UNITED STATES AND EUROPE at viii (Terrance Sandalow & Eric Stein eds., 1982).


ian Constitution a privileges and immunities, due process, and equal protection clause] was an inappropriate transcription from the United States constitution. He pointed out that while the words sounded well and were deceptively clear, they had given rise to all manner of legal complexity. He developed this point with an elaborate analysis of the American civil war and its consequences, including the Fourteenth Amendment to the United States constitution, for it was that Amendment which had inspired the proposed clause. In Australia, Isaacs said, there were not the social and political factors which demanded a copying of the Fourteenth Amendment.4

The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books . . . which undertook to expound it.

In most . . . respects [Australia's] constitution makers followed with remarkable fidelity the model of the American . . . [Constitution]. Indeed . . . roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions.5


5. OWEN DIXON, Two Constitutions Compared, in JESTING PILATE AND OTHER PAPERS AND ADDRESSES 100-02 (1965), reprinted in 28 A.B.A. J. 733, 734 (1942) and 16 AUSTL. L.J. 192, 193-94 (1942). See also infra note 66 (dampening of Australian framers’ originality).
I. INTRODUCTION

Frolicking - chaotically⁴ or carefully⁷ - in comparative constitutional law⁴ is an intellectually alluring enterprise.⁹ Reasons are obvious. Intriguing similarities and differences¹⁰ continue¹¹ to be easily enticed. Prominent are examples,¹² from American¹³ and Australian¹⁴ constitutions.¹⁵ Added to other comparative themes,¹⁶


7. For example, by constructing large, complex intricate constitutional law theories. See Mark Tushnet, Red, White, and Blue: A Critical Analysis of Constitutional Law 1-187 (1988) (describing and critiquing "grand" or "comprehensive normative theories of constitutional law").


11. Previous examples are listed in Thomson, supra note 8, at 46-53 (bibliography of USA-Australian-Canadian comparative constitutional law scholarship).

12. In addition to Thomson, supra note 8 (citing comparative constitutional law scholarship), see supra note 9 and infra Appendices A-D.


14. Australia is a federation consisting of the Commonwealth of Australia,
Constitutional law can, with varying specificity, elucidate constit-


17. See, e.g., Thomson, supra note 8, at 25-32 (referencing comparative constitutional law casebooks, treatises, essays, symposia, articles, scholars, thematic issues - judicial review, rights, federalism, separation of powers,
tutions' texts; institutional - legislative, executive, and judicial - arrangements; structural - federalism and separation of powers - predicates; governmental powers' contents, scope, and limits; substantive issues, including doctrinal developments; procedural and process requirements; and financial arrangements. Exposure of alternative possibilities is inevitable. Whether new insights and novel perspectives also emerge will depend upon how that diverse terrain, emanating from a variety of past, present, and future state, provincial, territorial, national, and multi-national con-


19. See Thomson, supra note 8, at 24 n.4 (containing a bibliography of compilations of constitutions).


stitions, is traversed.

Possibilities include comparative juxtaposition of individual judicial decisions, particular provisions in different constitutions, interpretative strategies, theories of judicial review, and


24. See, e.g., the U.S. Constitution. The Australian Constitution is in § 9 of the Commonwealth of Australia Constitution Act, 63 & 64 Vict., ch. 12 (1900) (U.K.). Sections 1-8 of that Act are commonly known as “covering clauses.” See also supra note 19 (discussing the constitutions).


26. For other possibilities, see Thomson, supra note 8, at 28-39.


III. PERSONAL CONTOURS

Sojourns, letters, and dialogues have already created firm


29. See infra notes 200-01 (discussing U.S. and Australian original intent theories of constitutional interpretation).


31. See Thomson, supra note 8, at 46-49 (discussing Australian-U.S. comparisons); see also infra Appendix A.

32. For comparative scholarship see Thomson, supra note 8, at 46-49 (references); see also infra Appendix A.

33. See, e.g., supra note 16 (listing general comparative U.S.-Australian surveys).

34. See Thomson, supra note 8 at 46-49 (listing a bibliography of Australian-U.S. comparative constitutional law scholarship); infra Appendix A.


36. Compare Thomson, State Constitutional Law, supra note 15 ("American Lessons for Australian Adventures").

37. See Thomson, Executive Power, supra note 15, at 559-60 n.3 (noting scholars and resulting scholarship from Australian visits to the United States and American visits to Australia). More recently Australian Chief Justices have visited the United States. See, e.g., Harry Gibbs, The Separation of Powers - A Comparison, 17 FED. L. REV. 151 (1987); Mason, supra note 28. See also text accompanying infra notes 49-50 (Dixon), 95 (Griffith). Some Australian High Court Justices have obtained LL.M degrees from American Law Schools, for example, Justices Wilson (Pennsylvania) and Dawson (Yale). U.S. Supreme Court Justices who have visited Australia include Chief Justice Rehnquist, and Justices Harlan, Breyer and O'Connor. See John Marshall Harlan, Some Aspects of the Judicial Process in the Supreme Court of the United States, 33 AUSTL. L.J. 108 (1959); Gerard Brennan, Judicial Qualities of a Different Kind, 60 LAW INST. J. 654 (Vict. 1986) (noting that Justice O'Connor presented a paper to the 23rd Australian Legal Convention in 1985).
and friendly relations between constitutional law aficionados - judges, lawyers, and scholars - in America and Australia. At least on two occasions, Justice Felix Frankfurter included in the United States Reports citations to the Australian Constitution. Although not as famous as footnote 4 in *United States v. Carolene Products Co.*, footnote 5 of the Supreme Court’s opinion, delivered


39. *See*, e.g., Thomson, *supra* note 8, at 46-49 (containing references); *see also infra Appendix A.*


42. For citations to Australian High Court decisions in American books see Paul A. Freund, *et al., Constitutional Law Cases and Other Problems* 124, 239, 283, 307, 831 (3d ed. 1987); *see also id.* at 240, 273, 607-08 (4th ed. 1977).

by Justice Frankfurter, in *New York v. United States*44 may have had some influence. "Indeed," it has been suggested that "Mr. Justice Dixon, who was on a mission to America, literally carried back with him the views of the Justices in the Saratoga Springs case."45 Thus, Sir Owen Dixon46 reciprocated by placing in the Commonwealth Law Reports references to U.S. Supreme Court cases,47 including *New York v. United States.*48 Why did this ex-

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45. Freund, supra note 2, at 615 (footnote omitted citing *New York v. United States*, 326 U.S. 572 (1946)).


change occur? From 1942 to October, 1944 Dixon, while remaining an Associate Justice of the High Court of Australia, was the Australian Envoy Extraordinary and Minister Plenipotentiary at Washington D.C. Frankfurter, and Dixon kept diaries. With a good deal of mutual admiration and respect, they became and remained friends. Undoubtedly, even if only occasionally, during meetings and dinners in Washington their conversations must


50. See WATT, supra note 46; see also Merralls, The Rt Hon. Sir Owen Dixon, supra note 46, at 433.


52. "Dixon kept a daily diary for more than 30 years... So sharp are the comments that there is a strong temptation for the biographer to sit back and let the subject speak for himself." Merralls, Biography, supra note 46, at 28. Small extracts are in I A.W. MARTIN, ROBERT MENZIES: A LIFE: 1894-1943 at 267, 288-99, 365, 387 (1993).

53. See, e.g., STEPHEN, supra note 46, at 21 ("Justice Frankfurter ... was [Dixon's] friend, his admirer and his correspondent"); Owen Dixon, The Honourable Mr. Justice Felix Frankfurter - A Tribute from Australia, 67 YALE L.J. 179 (1957), reprinted in DIXON, supra note 5, at 160-87.
have touched upon constitutional law and its comparative dimensions. Perhaps, for example, they discussed Dixon's speeches which juxtaposed the American and Australian constitutions. Frankfurter's federalism is, of course, amply documented and analyzed. Dixon, soon after “returning to Australia in November, 1944,” led the High Court in the development of an Australian intergovernmental immunities doctrine and persuaded other justices to declare federal legislation unconstitutional. Subse-


56. DIXON, supra note 5, at i.


59. See generally Zines, supra note 46 (discussing Dixon's theory of federalism).

60. No internal or draft documents have been published. Dixon's diary (supra note 52) is not publicly accessible. However, Dixon was “a very great Chief Justice, who . . . transformed the whole style of the High Court.” STEPHEN, supra note 46, at 34. “Sir Owen Dixon developed the most coherent theory and was most influential in expounding a new doctrine of intergovernmental immunities” in Australia. ZINES, supra note 14, at 319. Compare James A. Thomson, Inside the Supreme Court: A Sanctum Sanctorum?, 66 MISS L.J 177, 183-86 nn.12-15, 20-22 (1996) (reviewing BERNARD SCHWARTZ, THE UNPUBLISHED OPINIONS OF THE REHNQUIST COURT (1996)) (regarding the availability and analysis of internal U.S. Supreme Court documents, memos,
quently, the High Court, despite infrequent invocations,\textsuperscript{62} has refused to abandon this doctrine\textsuperscript{63} and continues to look at U.S. Supreme Court decisions.\textsuperscript{64}

Extracting such comparisons is easy. The reasons are obvious. Australia, like the United States, has a written\textsuperscript{65} federal constitution. Particularly, in its federal division of legislative power,

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63. \textit{Compare} the suggestion that the High Court should abandon the implied constitutional limitation on state legislative power to bind or effect the Commonwealth. That is, the Commonwealth should not have federal constitutional immunity from state laws. \textit{See ZINES, supra} note 14, at 354, 361-66 (suggesting that Commonwealth legislation suffices to exempt the Commonwealth from state law).


65. Do written documents constitute the totality of a Constitution? \textit{See} Thomson, \textit{supra} note 8, at 33 n.33, 43 n.80 (containing references to debates on this question).
the Australian Constitution was deliberately modeled on the American Constitution. In addition to these legislative powers, the first version of the Australian Constitution, drafted under Andrew Inglis Clark's direction and supervision in February 1891, followed the American Constitution even more closely than the 1901 Australian Constitution. What motivated this similarity? One answer - a causal link - might be the friendship of Oliver Wendell Holmes, Jr., and Andrew Inglis Clark. They corre-

66. "The framers of... [the Australian] Federal Commonwealth Constitution (who were for the most part lawyers) found the American... [Constitution] an incomparable model. They could not escape from its fascination. Its contemplation damped the smouldering fires of their originality," Owen Dixon, The Law and the Constitution, 51 L.Q. REV. 590, 597 (1935). See also text accompanying supra note 5. But see ZINES & LINDELL, supra note 14, at 9-10 (containing reasons, including responsible government (see infra note 186), why US and Australia Constitutions are different). See also infra notes 116-20 (U.K. statutory basis of Australian Constitution). For specific contexts see Australasian Temperance & General Mut. Life Assur. Soc. v. Howe, 31 C.L.R. 290, 330 (Austl. 1922) (suggesting that section 75(iv) of the Australian Constitution might be characterized as a "pedantic imitation" of the U.S. Constitution) (Higgins, J.); Richard Lucy, How American is the Australian Division of Powers, 6 LEGISLATIVE STUD. 25, 33 (Winter 1991) (concluding that section 51 of the Australian Constitution "can[not] accurately be described as American"); Thomson, State Constitutional Law, supra note 15, at 1249-51 (claims for and against Australia's Constitution's judiciary provisions being modeled on U.S. Constitution) (partially reproduced infra notes 246-47). Generally on the drafting of the Australian Constitution see LA NAUZE, supra note 14.

67. A Bill for the Federation of the Australasian Colonies of New South Wales, Queensland, Tasmania, Victoria, Western Australia, and the Province of South Australia, and the Government thereof; and for purposes connected therewith. This 1891 Bill is reproduced in SAMUEL WALKER GRIFFITH, SUCCESSIVE STAGES OF THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA 26-44 (1891) (unpub. collection of draft Australian constitutions) (Griffith papers, Dixon Library, N.S.W., Ms. Q. 198, CY Reel 221); 32 AUST. L. J. 67-75 (1958).

68. Clark was the Tasmanian Attorney-General. See infra note 71 (references).

69. This 1891 Federation Bill was drafted by Walter O. Wise (Tasmanian parliamentary draftsman). See Thomson, supra note 38, at 239 n.12.


71. Feb. 24, 1848 - Nov. 14, 1907; delegate to 1890 Federal Conference and 1891 Australasian Federal Convention; Chairman of Convention's Judiciary Committee 1891; Member of Convention's Constitution drafting Committee 1891; Tasmanian Attorney General 1887-1892, 1894-1897; Tasmanian Supreme Court Justice 1898-1907. See, e.g., AN AUSTRALIAN DEMOCRAT, supra
responded.  When Clark went to America in 1890, 1897-98, and 1902-03 he visited Holmes in Boston and Washington. Indeed, so strong was the tie, at least from Clark's side, that "Clark had the study window from Holmes's house in Boston shipped and installed into the study window of his own house, 'Rosebank,' in Hobart [Tasmania]." Going in the other direction, Clark sent to Holmes both editions of his *Studies in Australian Constitutional Law* which were reviewed in the Harvard and Columbia Law Reviews. In fact, Clark's empathy with America and Americans was even wider and deeper. With the addition of two other factors - Clark's venerable position as an Australian Founding Father and the inexorable transformation of Clark's draft 1891 Constitution into the 1901 Australian Constitution - it is not surprising that Australia's constitution provides for three branches of government. First, "a Federal Parliament . . . consisting of the Queen, a Senate, and a House of Representatives" known colloquially as the Commonwealth Parliament. Secondly, "[t]he Executive Government" comprising the

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Note 72: See supra note 38 (Holmes-Clark correspondence).

Note 73: Williams, supra note 71, at 162 (footnote omitted).


Note 77: See supra note 71.


Note 79: AUSTL. CONST. § 1. See also James A. Thomson, *The Australia Acts 1986: A State Constitutional Perspective*, 20 U. W. AUSTL. L. REV. 409, 413 n.12 (1990) (noting the debate over whether the Queen is acting as Queen of Australia or as Queen of the United Kingdom).

Note 80: See generally AUSTL. CONST. §§ 1, 7-50. For commentary see R.D. LUMB & G.A. MOENS, *THE CONSTITUTION OF THE COMMONWEALTH OF
Queen, the Governor-General, and ministers of the Crown, including the Prime Minister. Thirdly, a federal judiciary consisting of "the High Court of Australia, and . . . such other courts as the [Commonwealth] Parliament creates, and . . . such other courts as [that Parliament] invests with federal jurisdiction." Interestingly, there remains a theoretical possibility of appeals from the High Court to the Judicial Committee of the Privy Council in London.

Like Clark, other Australian Founding Fathers sojourned in America. Prominent examples include Henry Parkes, Samuel Walker Griffith, and William McMillan. Parkes’ 1882 visit to America and his sojourn in Ireland influenced his advocacy of a constitutional monarchy. William McMillan, on the other hand, was a strong advocate for a republic and wrote extensively on the subject.


81. AUSTL. CONST. Ch. II, §§ 61-70. See also LUMB & MOENS, supra note 80, at 334-51. See also infra note 176 (references).

82. See supra note 79 (Queen) and text accompanying infra notes 233-40 (Republic).


84. AUSTL. CONST. § 64 (“Ministers of State”). Note especially id. § 64 para. 3 ("[a]fter the first general election [held on March 29, 1901] no Minister of State shall hold office for a longer period than three months unless he is or becomes a senator or member of the House of Representatives") (emphasis added). See LUMB & MOENS, supra note 80, at 344-47 (suggesting that section 64 “is the cornerstone” of Ch. II - The Executive Government - of the Australian Constitution). See also infra note 208 (use of three month period).


87. Under section 74 of the Australian Constitution, the High Court could grant a certificate permitting the Privy Council to determine “inter se” questions. This is a “theoretical possibility” despite High Court decisions never again to grant section 74 certificates. LANE, supra note 14, at 386-87.


90. See generally P.M. GUNNAR, GOOD IRON MAC: THE LIFE OF AUSTRALIAN FEDERATION FATHER SIR WILLIAM MCMILLAN, K.C.M.G. (1995); James A.
the United States included meetings with President Arthur and Justice Stephen Field. As a result, two conundrums remain. First, what was said at the Parkes-Field dinner? Secondly, given the linkage between Parkes' 1891 Australasian Convention Resolutions, the text of section 92 of the Australian Constitution and \textit{laissez-faire} constitutionalism, is there, via that dinner, any Field impetus to or impact or influence on these developments? Griffith traveled across - from New York to San Francisco - America during May-June 1887.

Griffith was aware of the relevance of the American experience to Australia, particularly the development of its federal system, and he welcomed an opportunity of obtaining first-hand information about [America].

Besides making his own observations on this east-west journey, Griffith discussed mutual problems with Americans. His observations were to be especially significant in applying United States precedents to Australian law and federalism. Griffith was already deeply involved... in moves towards Australian federation, and was acutely aware of intercolonial jealousies. American attempts to


91. See \textit{Martin}, supra note 88, at 321-23 (Parkes' visit).
92. See id. at 322 (Parkes "met president Arthur ... at a dinner given early in his visit to Washington by Justice Field"). Given the immense importance of section 92 of the Australian Constitution to Australian constitutional law, \textit{(see infra} note 286), the Parkes-Field conversation[s], if any, and, if recorded or summarized, might assist in interpreting and applying section 92. \textit{See generally} Cole v. Whitfield, 165 C.L.R. 360 (Austl. 1988) (formulating a discriminatory burden of a protectionist kind test); MICHAEL COPER, \textit{FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION} (1983); LUMB & MOENS, \textit{supra} note 80, at 453-76, 573-98.
93. For this linkage, see LA NAUZE, \textit{supra} note 14, at 35-38; \textit{infra} note 286 (presenting an analogy between individual rights theory and due process references).
minimize interstate rivalries and correlate state and federal jurisdictions were therefore highly pertinent. . . . The justices of the United States Supreme Court were continually facing the kinds of problems that were to concern Griffith in the future. He was acquainted with one Supreme Court judge, Stephen Field, the uncle of Lucinda Musgrave, the wife of Queensland's governor. In New York, Griffith lunched with Field's brother, David Dudley, a constitutional lawyer. His American experience supplemented Griffith's own extensive reading, and was to be applied four years later in his contribution to the framing of the Australian constitution. 95

Finally, McMillan, who visited the USA in 1876 and 1922, was, like Isaacs, a voracious reader of American constitutional law and politics. 97 Undoubtedly, that American influence was at least partially responsible for McMillan's role, possibly of crucial importance, in erecting a strong Australian Senate with equal power, vis-à-vis the House of Representatives, over the deferral and rejection of annual supply or appropriation Bills. 98 Subsequent developments, including the emergence of strong cohesive political parties, 100 a proportional voting system for Senate elections, 101 and territorial senators, 102 have not overborne the simi-

95. Joyce, supra note 89, at 142. Griffith was the principal drafter of the Constitution Bill approved by the 1891 Australasian Constitutional Convention. The Lucinda was the name of the Queensland government's yacht on which the 1891 drafting committee drafted the Constitution Bill. See La Nauze, supra note 14, at 35-86. Griffith was also the Queensland Premier, Chief Justice of the Queensland Supreme Court (1893-1903) and Chief Justice of the High Court of Australia (1903-1919). See Joyce, supra note 89, at 157 (a photo of Jeanie Lucinda Musgrave), 194 (a photo of the Lucinda).

96. See supra note 4 (Isaacs thorough knowledge of U.S. constitutional law).

97. See Gunnar, supra note 90, at 71, 80, 102 (indicating that McMillan had, for example, read 1-3 Joseph Story, Commentaries on the Constitution of the United States (5th ed. 1891)).

98. See Gunnar, supra note 90; Thomson, supra note 90. See also Austl. Const. § 53 para. 2 ("proposed laws appropriating revenue or moneys for the ordinary annual services of the Government"); Geoffrey Sawer, Federation Under Strain: Australia 1972-1975 107-40 (1977) ("[t]he Senate and the Deferral of Supply").

99. See also 1977 amendment to section 15 of the Australian Constitution requiring a member of a "political party" to be appointed to a casual senate vacancy. See James A. Thomson, Casual Senate Vacancies: Section 15's Continuing Conundrums, 3 Pub. L. Rev. 149 (1992).

100. Was this development anticipated by the Constitution's framers? What is its effect on the (constitutional) notion of the Senate as a States', not party political, house? See Thomson, supra note 90, at nn.59,60. The Senate can be and has been "controlled" by independent and third party senators who are not members of the two main - Labor and Liberal - political parties. See Campbell Sharman, The Senate, Small Parties and the Balance of Power 21 Politics 20 (1986). On Australian political parties see Dean Jaensch, Power Politics: Australia's Party System (1994); Parties and Federalism in Australia and Canada (Campbell Sharman ed. 1994).

101. See Ogders' Australian Senate Practice 1-26 (Harry Evans ed., 7th
larities,\textsuperscript{103} especially equal state representation,\textsuperscript{104} between the American and Australian Senates.\textsuperscript{105}

III. FOUNDATIONS

Movement towards the \textit{sine qua non} of American constitutionalism - sovereignty of the people\textsuperscript{106} - is also evident in Australia's constitutional evolution.\textsuperscript{107} For example, in marked contrast to the 1891 National Australasian Convention, almost a uniform prerequisite to being a delegate to the 1897-98 Convention\textsuperscript{108} was election,\textsuperscript{109} not appointment.\textsuperscript{110} Draft Constitution Bills,\textsuperscript{111} emanat-

\textsuperscript{102} See Western Australia v. Commonwealth, 134 C.L.R. 201 (Austl. 1975) (Commonwealth legislation providing for territorial senators equivalent to state senators constitutional under section 122 of the Australian Constitution); Queensland v. Commonwealth, 139 C.L.R. 585 (Austl. 1977) (same); LUMB & MOENS, \textit{supra} note 80, at 558; ZINES, \textit{supra} note 14, at 467-70.

\textsuperscript{103} However, there are differences such as the U.S. Senate's "power to try all impeachments," \textit{U.S. CONST.} art. I, \S 3, cl. 6., and advice and consent functions for treaties and presidential appointments of ambassadors and federal and Supreme Court judges. \textit{U.S. CONST.} art. III, \S 2, cl. 3.

\textsuperscript{104} Compare, e.g., \textit{AUSTL. CONST.} \S 7 ("The Senate shall be composed of [an equal number, not less than six] senators for each State, directly chosen by the people of the State . . . for a term of six years"), \textit{with U.S. CONST.} art. I, \S 3 & amend. XVII ("The Senate of the United States shall be composed of two Senators from each State, elected by the people thereof, for six years"). \textit{See also} Thomson, \textit{supra} note 38, at 69, 254 n.98 (noting that the 1890 original proposal was for Australian senators to be appointed by state Parliaments); Todd J. Zywicki, \textit{Senators and Special Interests: A Public Choice Analysis of the Seventeenth Amendment,} 73 OR. L. REV. 1007 (1994) (discussing change from state legislatures' appointment to direct election of U.S. senators).


\textsuperscript{107} \textit{See generally} \textit{supra} note 14 (containing references).


\textsuperscript{109} Delegates to the 1891 Convention were appointed by colonial parliaments. However, except for parliamentary appointed Western Australians, 1897-1898 Convention delegates were elected. \textit{See} LA NAUZE, \textit{supra} note 14,
ing from those Conventions were debated and amendments proposed in colonial parliaments by elected representatives. Reinforcement of these democratic credentials was achieved by 1898 and 1899 referendums which approved a Constitution for Australia.

Opposing this Americanization was United Kingdom parliamentary sovereignty. In 1900, the British Parliament

at 22, 91-92; QUICK & GARRAN, supra note 14, at 122-23, 163-65.

110. In addition to Western Australian delegates, some prominent “participants,” such as Robert Garran (secretary to the drafting committee), were not delegates. On Garran’s important Convention role, including drafting some of the Constitution, see LA NAUZE, supra note 14, at 135.

111. See LA NAUZE, supra note 14, at 289-91 (providing a chronological 1891-1900 listing of “successive printed versions of a Bill to constitute the Commonwealth of Australia, 1890-1900”).

112. See LA NAUZE, supra note 14, at 87-90 (summarizing parliamentary discussion of 1891 Constitution Bill) and 161-66 (summarizing parliamentary discussion of 1897 Bill adopted by Adelaide session of the Convention); QUICK & GARRAN, supra note 14, at 143-50 (1891 Bill) and 182-87 (summarizing parliamentary discussion of 1897 Bill). For public discussions see LA NAUZE, supra note 14, at 168-68.


114. See LA NAUZE, supra note 14, at 239-41 (1898 referendum) and 247 (1899 referendum); QUICK & GARRAN, supra note 14, at 206-13 (1898 referendum) and 222-26, 249-50 (1899 referendum). See also supra note 113 (providing scholarship indicating and analyzing democratic consequences of restricted referenda suffrage).


116. See supra note 24 (referring to 1900). However, the Australian Consti-
amended and enacted "the Commonwealth of Australia Constitution Act." Consequently, as a matter of traditional orthodox legal doctrine the Australian Constitution - starkly contrasting with the American colonists' revolutionary repudiation of links to the British Empire and creation of autochthonous constitutions - derived force and effect from the United Kingdom Parliament's paramount legislative power. The British-Australian umbilical cord remained intact.

The Constitution came into operation on Jan. 1, 1901. See 5 Commonwealth Statutory Rules 5300 (1901-56); LANE, supra note 14, at 4-5.


118. Commonwealth of Australia Constitution Act, 63 & 64 Vict., ch. 12 (1900) (U.K.) § 1. See also supra note 24.


120. The Constitution is contained in an Act of the Imperial Parliament... Notwithstanding that this Act was preceded by the agreement of the people... the legal foundation of the Constitution is the Act itself which was passed and came into force in accordance with antecedent law... It does not purport to obtain its force from any power residing in the people to constitute a government, nor does it involve any notion of the delegation of power by the people such as forms part of American constitutional doctrine... The legal foundation of the Australian Constitution is an exercise of sovereign power by the Imperial Parliament.


121. For British settlement in 1788 in Australia (and its legal and other consequences) see Mabo v. Queensland (No 2), 175 C.L.R. 1 (Austl. 1992). See also supra note 14 (references).
A new Australian *grundnorm* - re-aligning the American and Australian constitutions - may now, however, have emerged. Four factors are primarily responsible for this tranquil, rather than violent, revolution. First, Australia's historical evolution from a British penal settlement to colonial self-government to dominion status and to an independent nation-state. Within these general parameters are pertinent issues: pre-1900 referenda; post-1901 section 128 referendum amendments to the Australian Constitution; and Australians continuing acceptance of their Constitution. Secondly, legislative severance - operative from 5.00 am Greenwich meantime on March 3, 1986 - of residual Australia-United Kingdom constitutional links. Thirdly, ju-

122. See generally H. Kelsen, *The Pure Theory of Law*, 51 LAW Q. REV. 517 (1935) (discussing "the basic norm of a legal order"). See also Winterton, supra note 115 (discussing the United Kingdom's *grundnorm*).


126. *Compare* the "Whig interpretation of history, which would see all previous epochs as being links in a chain leading inevitably to some contemporary (benign) set of institutions ... [and which considers] the liberal constitutional order as both the best that human evolution can produce and the final resting place of that evolution." Laurence Lustgarten, Book Review, 1996 PUB. L. 549 (reviewing R. C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW (1995)).


128. See supra note 14 (1898 and 1899 referenda and suffrage).

129. See infra notes 282 (noting 1944 and 1988 referenda) and 295 (AUSTL. CONST. § 128). See also BLACKSHIELD ET AL., supra note 14, at 964-75 (containing referenda and statistics and noting that eight out of forty-two proposals have passed). A section 128 referendum does not directly involve the U.K. Parliament. However, because it is in the Australian Constitution, section 128 may draw its legal sustenance from that Parliament. See supra note 120.

130. See Thomson, supra note 79, at 411 n.6 (citing statutory instruments).

131. See ZINES, supra note 14, at 303-08 ("The Termination of Constitutional
dicial pronouncements that “ultimate sovereignty reside[s] in the Australian people.” Fourthly, words - purveyors of power - in the Australian Constitution. Electors direct participation, by voting in referenda, in amending the Constitution is expressly mandated by section 128’s terminology. Perhaps even more important in pushing Australia towards American popular sovereignty notions is the remarkable opening textual similarity. The first three words - “We the People” - in the American Constitution and “Whereas the People” - in the Australian Constitution convey the same factual and juridical premise: peoples’ sovereignty.

Immense consequences might ensue for Australian constitutional law. Popular, not parliamentary, authority will sustain and legitimize the Constitution. Power will flow in a reverse direction: from, not to, the people. In theory and practice, it will become the peoples’ (not the Queen’s, the Prime Ministers, or Parliament’s) government. As agents, the latters’ authority will more clearly be perceived as constitutionally circumscribed. Traditional

Links with the United Kingdom”); Thomson, supra note 79 (discussing Australia Acts).

132. “[T]he Australia Act 1986 (UK) marked the end of the legal sovereignty of the Imperial Parliament and recognized that ultimate sovereignty resided in the Australian people.” Australian Capital Television Pty Ltd. v. Commonwealth, 177 C.L.R. 106, 138 (Austl. 1992) (Mason, C.J.). See also McGinty v. Western Australia, 134 AUSTL. L.R. 289, 343-44 (“notwithstanding some considerable theoretical difficulties, the political and legal sovereignty of Australia now resides in the people of Australia”) (McHugh, J.) (footnotes omitted); see also id. at 379 (indicating that “[b]road statements as to the reposition of ‘sovereignty’ in ‘the people’ of Australia, if they are to be given legal rather than popular or political meaning, must be understood in the light of the federal considerations contained in § 128”) (Gummow, J.) (1996). See also ZINES, supra note 14, at 393-97 (discussing and explaining consequences of popular sovereignty in an Australian context and suggesting that it is different from and not a substitute for U.K. parliamentary sovereignty); Leslie Zines, The Sovereignty of the People, in POWER, PARLIAMENT AND THE PEOPLE 91-107 (Michael Coper & George Williams eds., 1997); Thomson, Executive Power, supra note 15, at 575-76 n.95 (citing judicial opinions and scholarship). Contra note 120 (parliamentary, not peoples’, sovereignty).

133. See supra note 129. But see infra note 301 (impugning the democratic credentials of section 128).

134. See supra note 106 (sovereignty of the people).


Australian deference may dissipate into a more robust American posture towards authority. Greater focus on limiting governmental authority may change the Constitution's character to a rights generating, rather than a power conferring, document. At an interpretative level, this transformation, from British statute to indigenous constitution, will promote the impetus to abandon rules and principles of statutory interpretation and head Chief Justice Marshall's admonition that "we must never forget that it is a constitution we are expounding." One result is obvious: an increasing American resemblance typifies Australia's constitutionalism.

IV. LEGISLATIVE POWER

Institutionally, stark contrasts differentiate the U.S. Congress - "which shall consist of a Senate and House of Representatives" - and the Commonwealth Parliament - "which shall consist of the Queen, a Senate and a House of Representatives . . . ." Occasionally, the Queen visits Australia and opens a session of Parliament. However, not only is the President, unlike the Queen, not a structural component of Congress, but also members of the executive, including the President's Cabinet, are expressly excluded from being a member of Congress. Virtually

137. Compare the perspective of viewing the 1787 U.S. Constitution as a Bill of Rights. See infra note 279 (viewing the Constitution as a Bill of Rights).
139. U.S. CONST. art. 1 § 1.
140. AUSTL. CONST. § 1.
142. But compare the President's role and powers vis-à-vis Congress. See U.S. CONST. art. I, § 7, cl. 3 (President's veto power over Congress' orders, resolutions, and votes); U.S. CONST. art. II, § 3 (President's "State of the Union" address to Congress). See also AUSTL. CONST. § 59, 60 (Queen's power to disallow Commonwealth legislation or refuse to assent to Commonwealth Bills).
143. U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any office under the United States, shall be a Member of either House during his continuance in office"). See text and accompanying infra notes 226-32 (discussing the possibility of an American Cabinet consisting of members of Congress).
the reverse - a constitutional requirement for Ministers of the Crown to be members of Parliament - applies in Australia.\(^{144}\) Separation of powers implications and differences in theory and practice are, of course, immense.\(^{145}\)

Much greater institutional similarity, except for territorial senators,\(^{146}\) characterizes the U.S. and Australian Senates.\(^{147}\) Equality of state representation, six year senate terms, and statewide elections are examples.\(^{148}\) Commonalities between the Australian and U.S. House of Representatives can also be extrapolated.\(^{149}\) However, three contrasts are more revealing. First, by constitutional requirement\(^{150}\) and convention,\(^{151}\) Australian Prime Ministers, but not U.S. Presidents, are members of the House of Representatives. Secondly, Australian Governor-Generals, but not U.S. Presidents, can "dissolve the House of Representatives.\(^{152}\)"

\(^{144}\) See supra note 84 and infra note 208.

\(^{145}\) See ZINES, supra note 14, at 154–61 (comparing the separation of legislative and executive power under the Australian and U.S. Constitutions and concluding that, unlike the restriction on Congress delegating legislative power, in Australia "separation of powers had little or no impact on the question of delegation of legislative power to the executive.").

\(^{146}\) For Commonwealth legislation under section 122 of the Australian Constitution creating two senators for the Northern Territory and two senators for the Australian Capital Territory, see Western Australia v Commonwealth, 134 C.L.R. 201 (1975) (holding Commonwealth legislation constitutional); Queensland v. Commonwealth, 139 C.L.R. 585 (1977) (same). Other differences include the Australian Senate - House of Representatives nexus. See AUSTL. CONST. § 24 (House of Representatives "shall be, as nearly as practicable, twice the number of Senators"); A.G. (N.S.W.) ex rel. McKellar v. Commonwealth, 139 C.L.R. 527 (Austl. 1977) (discussing nexus). See also AUSTL. CONST. § 57 (Governor-General can dissolve the Senate).

\(^{147}\) See supra note 105 (Australian and U.S. Senates).

\(^{148}\) See supra note 104.


\(^{150}\) See AUSTL. CONST. § 64 para. 3 (partially reproduced in supra note 84). Compare U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any office under the United States, shall be a Member of either House during his continuance in office"). See text and accompanying infra notes 226–32 (discussing the possibility of an American Cabinet consisting of members of Congress).

\(^{151}\) But see text accompanying infra notes 207–12 (noting circumstances when ministers have been or need not be senators or House of representatives members).

\(^{152}\) AUSTL. CONST. § 5. See also id. at § 28 (House of Representatives "may be ... dissolved by the Governor-General"); AUSTL. CONST. § 57 ("Governor-General may dissolve the Senate and the House of Representatives simulta-
Thirdly, there is no Australian constitutional one vote, one value requirement.\textsuperscript{153} \textit{Wesberry v. Sanders}\textsuperscript{154} has not been followed in Australia.

Lists of carefully enumerated concurrent legislative powers—eighteen items in the U.S. Constitution\textsuperscript{155} and forty items in the Australian Constitution\textsuperscript{156}—together with express recognition that the general residue remains with the States\textsuperscript{157} are pivotal in establishing governance.
lishing the American and Australian federal systems. Without entering the quagmire of American and Australian framers' intentions, it can be suggested that they intended, at least relative to the States, to create weak central or federal powers and institutions. Canada's framers, by enumerating legislative powers in


158. On Australia see AUSTRALIAN FEDERATION: TOWARDS THE SECOND CENTURY (Gregory Craven ed. 1992); AUSTRALIAN FEDERALISM (Brian Galligan ed. 1988); see supra note 14 (references). On America see LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 297-546 (2d ed. 1988).

159. See infra notes 200, 201 (American and Australian original intent debates).

the British North America Act, 1867,\textsuperscript{162} intended an opposite result: strong central and weak provincial governments.\textsuperscript{163} Subsequent developments - constitutional amendments, judicial review, and political realities - have, in all three federations, reversed those intentions.\textsuperscript{164}

and used new sources of power, rather than merely transferring power between states and the nation, and, in several respects, enhanced states' power, for example in state legislative' appointment of senators and in the Article V amendment process); Jack N. Rakove, The First Phases of American Federalism, in COMPARATIVE CONSTITUTIONAL FEDERALISM 1-19 (Mark Tushnet ed. 1990).

161. Two types of power - exclusive and concurrent - are conferred on provincial legislatures by the Canadian Constitution. \textit{See} CAN. CONST. §§ 92, 92A(1), 93 (exclusive powers), 92A(2), 94A, 95 (concurrent powers). The Canadian Parliament has a designated list of enumerated exclusive powers (CAN. CONST. § 91) and all residual legislative power; namely, all legislative power (except for example matters within the Charter of Rights and Freedoms and amendment of the Canadian Constitution) which is not within exclusive provincial legislative power. \textit{See id.} (Canadian Parliament has power "to make laws for the Peace, Order, and good government of Canada"). \textit{See} PETER HOGG, CONSTITUTIONAL LAW OF CANADA 435-66 (3d ed. 1992); Thomson, \textit{State Constitutional Law Some Comparative Perspectives, supra note 15}, at 1083.

162. British North America Act, 1867, 30 & 31 Vict. ch. 3 (U.K) was renamed in 1982 the Constitution Act 1867. \textit{See} CAN. CONST. § 2.

163. The residuary nature of the federal power in Canada is in contrast to the distribution of legislative powers in . . . [America and Australia were] the federal Congress or Parliament has only enumerated powers and legislatures of the States have the residue. There are reasons for supposing that this difference between the Constitution Act, 1867 and . . . [the 1787 U.S. Constitution] was part of a design to create a stronger central government in Canada than existed in the United States.

HOGG, supra note 161, at 436 (footnotes omitted). \textit{See also id.} at 109-10 (similar); Thomson, \textit{State Constitutional Law: Some Comparative Perspectives, supra note 15}, at 1069 n.35 (references on movement towards 1867 Canadian Confederation).

164. Behind the Australian Constitution's distribution of legislative power was a general intent to limit or curtail the Commonwealth Parliament's power. \textit{See supra note 160}. However, "this common understanding [in the 1890s] held by all or almost all those who discussed the effect of this distribution has proved to be wrong." Crawford, supra note 160 at 120. For an elaboration and explanation of this disjuncture between the framers' intention and actual results see \textit{id}. at 113-25; James Warden, Federal Theory and the Formation of the Australian Constitution (1990) (Ph.D. thesis, Austl. Nat. U.).

For America see TRIBE, supra note 158, at 297-98 (noting that theoretically and textually "Congress is . . . a legislative body possessing only limited powers" but questioning "how well the theory of limited congressional powers corresponds with constitutional practice") (emphasis in original); Michael W. McConnell, Federalism: Evaluating the Founders' Design, 54 U. CHI. L. REV. 1484, 1485 (1987) (reviewing BERGER, supra note 160) (suggesting that there is "more than sufficient [evidence] to show that what the people ratified [in 1788] is something quite different from what they ultimately got").

For Canada see HOGG, supra note 161, at 110 (asserting that "[o]ver the
In America expansion of federal power is particularly attributable to the commerce clause. Despite its textual plagiarism, the Australian commerce clause, perhaps because of the High Court's refusal to follow U.S. Supreme Court commerce clause decisions, has had a much less expansionist role. Instead, especially post-1970, the "corporations" and "external affairs" powers have sustained the Commonwealth Parliament's wide ranging...
legislation. When financial powers - revenue raising\textsuperscript{171} and conditional controlled expenditure grants\textsuperscript{172} - are added, the resulting fiscal dominance and consequential central control ensures that American and Australian states are, as a matter of constitutional law and practical reality, subordinate.\textsuperscript{173}

V. EXECUTIVE POWER\textsuperscript{174}

Word usage in American and Australian\textsuperscript{175} constitutional texts appertaining to the Executive exhibit marked similarities.\textsuperscript{176} For example, whereas “[t]he Executive power shall be vested in a President of the United States of America,”\textsuperscript{177} in Australia “[t]he executive power of the Commonwealth is vested in the Queen and is exercisable by the Governor-General as the Queen’s representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth.”\textsuperscript{178} The President is required to “take” an “Oath or Affirmation” to “faithfully execute the Office of President” and “preserve, protect, and defend the Constitution of the United States” and is enjoined to “take Care that the Laws be faithfully executed.”\textsuperscript{179} “The command in chief of the naval and military forces of the Commonwealth is vested in

\begin{itemize}
\item \textsuperscript{171} \textit{Austl. Const.} \S 51(2) (“Taxation” power); \textit{U.S. Const.} art I, \S 8, cl. 1 (Congress’ “[p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises.”).
\item \textsuperscript{172} On Australia see \textit{Austl. Const.} \S 81 (“revenues or monies... [in the] Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth.”), \S 96 (“Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit.”); \textit{Lumb & Moens, supra} note 80, at 425-30, 479-83; \textit{Zines, supra} note 14, at 259-62, 349-53, 452-53, 472. On America see \textit{U.S. Const.} art. I, \S 8, cl. 1 (Congress’ “[p]ower [t]o... provide for the common Defense and general Welfare of the United States.”); \textit{Baker, supra} note 157 (debate over Congress’ conditional spending power).
\item \textsuperscript{173} For Australia see \textit{Zines, supra} note 14, at 352 (concluding that the Commonwealth’s “financial dominance... is very great” as a result of High Court decisions but “mainly... [due to] political and economic forces.”). \textit{See also id.} at 353-54 (noting that despite Commonwealth legislative and financial powers “Australia remains a federal state... [where] federalism... is alive and reasonably well.”). On America see \textit{supra} notes 58, 157, 158, 164, 165 (contrasting views of Framers’ intent and subsequent developments, including Garcia and Lopez cases).
\item \textsuperscript{174} Part V draws upon \textit{Thomson, Executive Power, supra} note 15.
\item \textsuperscript{175} \textit{See supra} note 24 (Australian Constitution).
\item \textsuperscript{176} For comparative scholarship, see \textit{Winterston, supra} note 14; \textit{Thomson, Executive Power, supra} note 15. For other scholarship on Australian executive power, \textit{see id.} at 560-61 n.5. For general comparisons, \textit{see supra} note 15 (references).
\item \textsuperscript{177} \textit{U.S. Const.} art. II, \S 1, cl. 1.
\item \textsuperscript{178} \textit{Austl. Const.} \S 61.
\item \textsuperscript{179} \textit{U.S. Const.} art II, \S\S 3, 1, cl. 8. \textit{See also Thomson, supra} note 85, at 305 n.100 (reproducing the Governor General’s oaths of office and allegiance to the Queen).
\end{itemize}
the Governor-General as the Queen's representative, while the
"Commander-in-Chief of the Army and Navy of the United States"
is the President. Both have constitutional power to appoint fed-
eral judges and executive officers, to veto federal legislation, and
to convene and adjourn proceedings of the federal legislature.

There is one stark difference. Having adopted these specific
provisions and borrowed notions of federalism and separation of
powers from the American context, the Australian Founding Fa-
thers turned to the British institution of responsible government.
The "core of the British principle of responsible government" is
that "when the government loses a vote of confidence in the House
of Commons it must advise a general election or resign." Thus,
the executive must be able to command a majority of votes in the
legislature. If that central element "is clear," the tenets, princi-

180. AUSTL. CONST. § 68. See LUMB & MOENS, supra note 80, at 349;
Ninian Stephen, The Governor-General as Commander-in-Chief, 14 MELB. U.
182. U.S. CONST. art. II, § 2, cl. 2; id. art. I, § 7, cls. 2 & 3; id. art. II, § 3;
AUSTL. CONST. §§ 72(i), 67, 58. Compare §§ 55, 56 and 90 of the Constitution
Acts, 1867 to 1981 (Canada) (Canadian Governor-General's power to disallow
provincial and veto federal legislation).
183. See, e.g., WINTERTON, supra note 14, at 1, 53.
184. See generally Gordon Reid, Responsible Government and Ministerial
Responsibility: A Select Bibliography, in RESPONSIBLE GOVERNMENT IN
AUSTRALIA 264 (Patrick Weller & Dean Jaensch eds. 1980). The institution of
responsible government did not spring full blown from the pen of any drafts-
man but evolved with time. For Australia, prior to Federation in 1901, see,
e.g., McMinn, A CONSTITUTIONAL HISTORY, supra note 14 at 40-91;
WINTERTON, supra note 14, at 199-200, 266-68.
185. WINTERTON, supra note 14, at 2.
186. In the United Kingdom responsible government entails responsibility of
Ministers of the Crown to the House of Commons. Only by rejecting Supply
or Appropriation Bills could the House of Lords attempt to displace the gov-
ernment from office. That power of the House of Lords was removed in 1911.
But in 1901 the Australian colonies were to become a federation under a writ-
ten constitution. Therefore, the problem was to reconcile and combine Ameri-
can federalism, in which both Houses of Congress have approximately equal
powers, with British responsible government, in which the power of one
House is predominant.

A system in which the government or executive is responsible to both
Houses is unworkable because they may contain majorities of differing politi-
cal complexion. If the Senate has power to deny Supply to the government -
which power is "the ultimate sanction of ministerial responsibility" (WINTERTON, supra note 14, at 6) - a majority of Senators will possess the
means to make the government responsible to the Senate. The Australian
Founding Fathers adopted federalism and responsible government but did not
reconcile them. See generally id. at 2, 5-6, 74-80. In 1975, the Senate de-
ferred Supply and the Governor-General dismissed the Prime Minister. Min-
isterial commissions were withdrawn by the Governor-General, who pur-
ported to act under section 64 of the Australian Constitution, at about 1 p.m.
on Nov 1975. Despite initial post-1975 uncertainty, it appears that in Aus-
pies, and conventions that constitute the notion of responsible government become “steadily less clear” until “the edges are fuzzy and ill-defined.” Indeed, most of the elements of responsible government are not written into the Australian Constitution. For several reasons, “[t]he task of spelling out the details of responsible government” was not undertaken by the draftsmen. Nevertheless, despite a thoroughly documented and reasoned case for constitutionalizing responsible government in Australia, some countervailing suggestions can be advanced. All involve an element of American constitutional law.

Clearly evident from the Australian Constitution’s text is an express demarcation among provisions that vest executive power. Some confer power by reference to the “Governor-General in Council,” an expression defined to mean “the Governor-General acting with the advice of the Federal Executive Council.” Members of that Council are appointed by the Governor-General, “hold office during his pleasure,” and cannot “hold office for a longer period than three months unless” they are, or become, a “senator or a member of the House of Representatives.”

Australia federalism has not killed responsible government. WINTERTON, supra note 14, especially at 144-60 can be viewed as an effort to reconcile responsible government and federalism within the existing constitutional framework. On the 1975 constitutional crises (Senate deferral of Supply and Prime Minister’s dismissal) see PAUL KELLY, NOVEMBER 1975: THE INSIDE STORY OF AUSTRALIA’S GREATEST POLITICAL CRISIS (1995); GEOFFREY SAWER, FEDERATION UNDER STRAIN: AUSTRALIA 1972-1975 (1977). See also infra note 214 (elements of responsible government).

187. WINTERTON, supra note 14, at 2. “Responsible government involves many conventions and practices besides the core principle . . . .” Id. at 80. “[U]ncertainty regarding the actual content of the conventions of responsible government” still exists. Id. at 2.

188. Id. at 4. Winterton, however, argues that even if unexpressed, these principles are implied. See infra note 190.

189. WINTERTON, supra note 14, at 72. See also id. at 2. Even where details were enunciated it was only in referring to the Governor-General in Council as opposed to just the Governor-General. Winterton concludes that this “decision to express the theoretical, rather than the actual, position of the Crown may have lightened the draftsmen’s task, but it was a serious and dangerous mistake, which sowed the seeds for future constitutional conflict.” Id. at 3-4. See also George Winterton, The Concept of Extra-Constitutional Executive Power in Domestic Affairs, 7 HASTINGS CONST. L.Q. 1, 19 n.130 (1979).

190. Winterton concludes that Australian Constitutional sections 44(iv), 53, 56, 62, 63 and 64 “enshrined” or “imply” responsible government. WINTERTON, supra note 14 at 3-4, 198 n.20. Winterton’s arguments on this aspect pervade his text and footnotes. See, e.g., id. at 3-7, 13-17, 22-26, 71-85.

191. AUSTL. CONST. §§ 32, 33, 64, 67, 70, 72, 83, 85(i), 103.

192. Id. at § 63.

193. Id. at § 64. Senators need not be elected. They can be appointed to fill casual vacancies. Id. at § 15. See James A Thomson, Casual Senate Vacancies: Section 16’s Continuing Conundrums, 3 PUB. L. REV. 149 (1992). On the “three months” see supra note 84 and infra note 208.
Other constitutional provisions contain no textual reference to the need to act on advice. Executive power is merely required to be exercised by "the Governor-General" or occasionally provisions specify that the Governor-General shall act "according to his discretion," "as he thinks fit," or "during his pleasure." Such language, describing executive power in a manner "that even James I might have applauded" was, it has been argued, never intended by Australia's Founding Fathers "to be taken literally."

Even if correct, as a matter of history, the premise upon which the argument bases the conclusion that "the Governor-General has no independent discretion and may act only on the government's advice" is open to question. First, whether to treat Framers' intentions as determinative of constitutional interpretation is the subject of intense debate. Secondly, Australian judges have been more reluctant than their United States brethren to permit history to have some role in judicial resolution of controversies as to the content and meaning of words and phrases in the Constitution.

195. Id. at § 58.
196. Id. at § 5, para. 1.
197. Id. § 62; see also id. at § 64, para. 3. As to "he" see § 1(1)(a) Interpretation Act, 1889 (Ch. 63) (UK) ("words importing the masculine gender shall include females") and text accompanying supra notes 117-20 (Austl. Const. is a U.K. statute).
198. Winterton, supra note 14, at 3. Similarly, 1 The Report of the Advisory Committee, An Australian Republic: The Options 35, 83 (1993) (arguing that except for 'reserve powers' (see infra note 202) "it has always been understood" that, despite the textual position, even here Governors-General would only act on ministerial advice). See also 2 id. at 273 (comparative tabulation of "in Council" and other Governor-General powers).
199. Winterton, supra note 24, at 2. Winterton qualifies this conclusion by indicating that it only operates "in 'normal times', when Parliament has granted adequate Supply and the government commands a majority in the Lower House of Parliament . . . ." Id. On other occasions it is unclear whether, under Winterton's view, the Governor-General can exercise reserve powers without advice. See infra note 202. Neither Winterton nor the Constitution's text defines "normal times."
201. See, e.g., Zines, supra note 14, at 480 n.23; Gregory Craven, Original Intent and the Australian Constitution Coming Soon to a Court Near You, 1 Pub. L. Ref. 166 (1990); Daryl Dawson, Intention and the Constitution - Whose Intent?, 6 Austl. B. Rev. 93 (1990); Paul Schoff, The High Court and
On some occasions, even proponents of a constitutionalized system of responsible government, concede the text must be taken literally. A Governor-General can, and in some circumstances perhaps should, act without ministerial advice and support for his actions by those who constitute a majority of the members of the House of Representatives. At this juncture, references to the Governor-General without the qualifying phrase “in Council” constitutionalize the Executive’s reserve powers. Those are the occasions when the Governor-General can constitutionally act alone. Here, an Australian Governor-General comes closest to being President.202

The pivotal provision in Australia’s Constitution that secures responsible government is a requirement that Ministers of the Crown, whose advice the Governor-General is to follow, be members of the Commonwealth legislature.203 Even so, some uncertainty surrounded the adoption of this section.204 In 1891 the draft Constitution Bill left open “a choice between the British and American systems or some combination of them.”205 The

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202. Winterton, supra note 14, at 2, 196-97 n.12; see also id. at 16-17. “The only powers in respect of which the Governor-General may, arguably, have a ‘reserve power’ to act without receiving, or contrary to, ministerial advice are his powers to dissolve the House of Representatives, to dissolve both Houses of Parliament under § 57, to appoint the Prime Minister, and - even more dubiously - to dismiss the government.” Id. (emphasis added) (footnotes omitted). Winterton thoroughly documents and comments upon each instance. Id. at 212-15 nn.154-58. He also notes that “in Australia, these are not ‘reserve powers’ in the strict sense, but are expressly conferred by the Constitution: §§ 5, 28, 57 (dissolution of Parliament), 62, 64 (dismissal of Ministers).” Id. at 197. He concludes “that these powers of the Governor-General are exercisable on his own initiative only in the exceptional circumstances in which the ‘reserve powers’ would be exercisable by the Queen.” Id. (emphasis added). There are differing views as to when such circumstances exist (id. at 153-54), and no criteria are specified in the Australian Constitution. Other discussions of the Governor-General’s powers, including ‘reserve powers,’ include 1 AN AUSTRALIAN REPUBLIC, supra note 198, at 83, 88-116; 2 id. at 241-73; 1 FINAL REPORT supra note 86, at 340-46; REPORT OF THE ADVISORY COMMITTEE TO THE CONSTITUTIONAL COMMISSION 37-43 (1987).

203. AUSTL. CONST. § 64, para. 3. See supra note 84 (quoting id.). Note the title to § 64 para 3 is “Members to sit in Parliament.”


205. LA NAUZE, supra note 14, at 54. Clause 4 of Chapter II of the 1891 Bill required that officers appointed to administer Departments of States be members of the Federal Executive Council and that such officers “shall be capable of being chosen and of sitting as Members of either House of the Par-
“fundamental addition” to require ministers to be members of the legislature was made by the 1897 Constitutional Committee without recording any explanations or reasons.\textsuperscript{206} This constitutional injunction was not, however, made absolute.

\textquote{Three months\textsuperscript{207}} is expressly specified as a period during which a Minister can “hold office” without being a Senator or a member of the House of Representatives.\textsuperscript{208} This exemption may apply in several situations. Initially, it enabled all of the first Commonwealth ministry to be appointed following the January 1, 1901 commencement of the Constitution prior to the March 29, 1901 election. Secondly, there have been numerous occasions when Commonwealth Ministers, including Prime Ministers, were not simultaneously Commonwealth parliamentarians. Indeed, such a “period of grace,” enabling persons who are not Senators or House of Representatives members to be a minister or Prime Minister, might seem to have advantages in three obvious circumstances.\textsuperscript{209} First, Ministers, including Prime Ministers, can be appointed by the Governor-General in the period following a House of Representatives or Senate election and before the Commonwealth Parliament has convened and they have taken the requisite oath or affirmation.\textsuperscript{210} Secondly, former parliamentarians can continue as ministers, obtain another ministerial appointment, for example, becoming Prime Minister,\textsuperscript{211} or obtain a ministerial appointment in the period following their resignation as a member of one legislative chamber and while seeking election to the other chamber.\textsuperscript{212} Thirdly, ministers continue in office after their mem-

\textsuperscript{206} \textsc{La Nauze, supra} note 14, at 127; \textit{see also id.} at 137, 152. For the Framers’ reasons, see \textsc{Winterton, supra} note 14, at 71-72, 75-76; Galligan, \textit{supra} note 204.

\textsuperscript{207} The three months period was taken from section 32 of the Constitution Act 1855-1856 (South Australia), which “served as a model for § 64 of the [Australian] Constitution.” \textsc{Winterton, supra} note 14, at 75. \textit{See also La Nauze, supra} note 14, at 127, 342 n.12; \textsc{Quick & Garran, supra} note 14, at 711.

\textsuperscript{208} \textit{See supra} note 84 (quoting \textsc{Austl. Const.} § 64 para. 3). For examples, see \textsc{Lumb & Moens, supra} note 80 at 344 (referring to 1968 when John Gorton was Prime Minister while not a Senator or House of Representatives member); \textit{1 Final Report, supra} note 86, at 320-21 (indicating “several advantages” of this “three month period of grace”).

\textsuperscript{209} \textit{1 Final Report, supra} note 86, at 320.

\textsuperscript{210} \textit{Id.} at 321.


\textsuperscript{212} \textit{See 1 Final Report, supra} note 86, at 321, 323. \textit{See also id.} at 321, 322 (continuation of ministerial term after 3 year House of Representatives term expires (under \textsc{Austl. Const.} § 28) or is sooner dissolved (under \textit{id.} at §
bership of Parliament has ceased, for example, because the House of Representatives or Senate has been dissolved.

Outside those circumstances, a more obvious possibility pushes towards the 1891 position where the Constitution contemplates, authorizes or permits but does not, as a matter of constitutional law, mandate or require responsible government. For example, the appointment as a minister or Prime Minister, of a candidate for election to the Commonwealth Parliament, where that person is a member of the political party which possesses a majority in the House of Representatives. Even further removed, in degree and kind, from the above circumstances is the possibility that, by a contrived system of three monthly appointments, dismissals or resignation, and reappointments, the Australian Constitution could sanction a completely non-parliamentary executive. That is, without any constitutional amendment, the Australian executive could be forced into the American presidential mold.

American and Australian Constitutions contain somewhat analogous provisions on eligibility to be a member of the Commonwealth Parliament or Congress. Holding office under the executive government is specified in both documents to be constitutionally inconsistent with being a legislator. The Australian Constitution, however, creates an exception for Ministers of the Crown, who are required within three months of assuming execu-

5 or § 57).

213. But compare supra note 190 (arguing that responsible government is constitutionalized). However, the 1988 Constitutional Commission recommended that a 90 day “period of grace should continue to be allowed” and that the Constitution be amended to “reflect the established convention that the Prime Minister must be or become a member of the House of Representatives.” 1 FINAL REPORT, supra note 86, at 322-23 (emphasis added).

214. Responsible government is the system of government “whereby the ministers are individually and collectively answerable to the Parliament and can retain office [as a minister] only while they have the ‘confidence’ of the Power house, that is the House of representatives in ... the Commonwealth [Parliament]” and where the person appointed, by the Governor General under AUSTL. CONST. § 64, para. 1, “is the leader of the party (or one of a coalition of parties) which obtained a majority of seats in the House of representatives.” Id. at 84. See also LUMB & MOENS, supra note 80, at 345 (“[s]ection 64 ... does not explicitly recognize a central tenet of the doctrine of responsible government, namely that the ministry must have the support of the majority of members of the House of Representatives”). “[T]he three-month rule does introduce a measure of flexibility into the system of responsible parliamentary government without compromising the basic principle that the Ministry should be drawn [from] the membership of the Parliament ... It also provides scope for the introduction into the Ministry ... of persons who have yet to be chosen for parliamentary office.” 1 FINAL REPORT, supra note 86, at 323.

215. AUSTL. CONST. § 64, para. 3 (quoted supra note 84); U.S. CONST. art I, § 6, cl. 2 (“no Person holding any office under the United States, shall be a member of either House during his Continuance in Office”).
tive office to attain that status.\footnote{216}{This divergence may be attributable merely to age. The older United States Constitution in this instance drew its inspiration from the venerable Act of Settlement of 1701 which disqualified persons holding an office of profit under the King from membership of the House of Commons.\footnote{217}{In 1787 the principle of ministerial or executive responsibility to the House of Commons had not developed,\footnote{218}{and concern remained focused on the possibility of undue and undesirable executive influence on individual members of Congress.\footnote{219}{By erecting the eighteenth century English precedent into a constitutional prohibition, the way was seemingly\footnote{220}{foreclosed under the United States Constitution}}}}. In 1787 the principle of ministerial or executive responsibility to the House of Commons had not developed,\footnote{218}{and concern remained focused on the possibility of undue and undesirable executive influence on individual members of Congress.\footnote{219}{By erecting the eighteenth century English precedent into a constitutional prohibition, the way was seemingly\footnote{220}{foreclosed under the United States Constitution}}}}.
When Australians debated and drafted a Constitution in the 1890s, the new British institution of responsible government had been established and was flourishing in Canadian and Australian colonies. Australians were also familiar with the American presidential system. Therefore, two models were available. By incorporation, as a constitutional requirement, of an exception to the principle embodied in the Act of Settlement, the English model of executive government has predominated in Australia.

Absolutes, however, do not prevail in politics. Movement in opposite directions has occurred in America and Australia. In practice, Presidents consult with senators and members of the House of Representatives. The strength and nature of this aspect of the relationship between President and Congress varies and fluctuates. Suggestions to formalize executive-legislative relations have been subjected to constitutional scrutiny. A leading executive power scholar concluded that "the creation of a Cabinet

The second [part of U.S. Const. art. I, § 6, cl. 2] derives from an act of Parliament passed in 1701, which sought to reduce the royal influence by excluding all placement from the House of Commons. The act, however, so cut the Commons off from direct knowledge of the business of government that it was largely repealed within a few years; and so the way was paved for the British "Cabinet System", wherein the power of the realm is placed in the hands of the leaders of the House of Commons. Conversely, the revival of the provision in the Constitution, in conformity with the doctrine of the Separation of Powers, lies at the basis of the American Presidential System, in which the business of legislation and that of administration proceed largely informal, though not actual, independence of each other.


"Unlike the American framers, the farmers of the Australian and Canadian constitutions had the advantage of witnessing and studying the evolution and development of English constitutional arrangements in the nineteenth century." John Peter Giraudo, Judicial Review and Comparative Politics: An Explanation for the Extensiveness of American Judicial Review Offered from the Perspective of Comparative Government, 6 Hastings Const. L.Q. 1137, 1158 (1979) (footnote omitted). See also supra notes 184, 218 (references).

See text accompanying supra note 5 (noting that framers of the Australian Constitution "studied [the U.S. Constitution] with care"). See also supra note 66 (suggesting that the U.S. Constitution diminished the Australian Constitution's originality).

Other aspects are formalized by the Constitution. See, e.g., U.S. Const. art. II, § 2, cl. 2 (making treaties; appointment of ambassadors, Supreme Court judges and other officers); id. at art. II § 3 (State of the Union address).

with legislative members would not encounter constitutional difficulties.\footnote{226} The U.S. Constitution's prohibition on the simultaneous holding of legislative and executive office\footnote{227} does not present an insuperable difficulty . . . . In the face of this provision the President might still constitute a cabinet council out of the chairmen of the principal congressional committees and then put his own powers and those of the heads of departments at the disposal of this council.\footnote{228}

There have been other proposals.\footnote{229} One, which does not raise any "constitutional difficulties" and "has the countenance of early practice under the Constitution," is to give the heads of the Executive Departments - the Cabinet members\footnote{230} - a right of attendance, not to vote, but to participate in congressional debate.\footnote{231} For some, however, these proposals are an inadequate response to executive dominance and power. They advocate a constitutional amendment to repeal the office-holding prohibition, so that a

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\footnotetext{227}{U.S. CONST. art. I, § 6, cl. 2.}

\footnotetext{228}{CORWIN, supra note 218, at 14.}

\footnotetext{229}{[This] more radical proposal: simply that the President should construct his Cabinet from a joint Legislative Council to be created by the two houses of Congress and to contain its leading members . . . . [This proposal would not] amount to supplanting forthwith the "presidential system" with the "Cabinet system." The President would not become a prime minister bound to resign when outvoted by Congress, although circumstances might arise in which it might be expedient for him to do so . . . .}

\footnotetext{230}{CORWIN, supra note 218, at 296. Justice Story's views on this proposal are reproduced, \textit{ibid.} at 1184 n.281.}

\footnotetext{231}{"Suggestions for [institutional reforms which duplicate the effect of cabinet government] abound." Giraudo, \textit{supra} note 222, at 1184 n.281. See also \textit{id.} at 489 (noting suggestions that would encounter constitutional obstacles).}

\footnotetext{229}{"Suggestions for [institutional reforms which duplicate the effect of cabinet government] abound." Giraudo, \textit{supra} note 222, at 1184 n.281. See also \textit{id.} at 489 (noting suggestions that would encounter constitutional obstacles).}


\footnotetext{231}{CORWIN, supra note 218, at 296. Justice Story's views on this proposal are reproduced, \textit{id.} at 486. See also \textit{Edward S. Corwin, \textit{Presidential Power and the Constitution: Essays} 171-72} (Richard Loss ed. 1976).}

Although responsible government on the British model was constitutionally excluded, had Washington, Hamilton and the first Congress desired it, the President could possibly have become a mere figure-head, with actual power vested in the hands of ministers politically responsible to, but not members of, the legislature. The United States would then have had a system of congressional government.

British cabinet system of responsible government can be instituted in the United States. Almost inevitably, Australia is evolving from a constitutional monarchy to a republic. Again, this includes some impetus for an Australian presidential republic analogous to the American Constitution. Discussion of an Australian republic encompasses much more than constitutional law. Republicanism, like other comparative issues, for example, the substantive


234. See supra notes 14 and 127 (references). For the tension between enlargement (as illustrated by the Governor-General's 1975 dismissal of the Prime Minister) and diminution or curtailment (as illustrated by post-1975 scholarship and proposals) of reserve powers see infra note 236 (references).

235. See Thomson, supra note 79 (Queen).


237. See supra note 236 (references).


239. See supra notes 233-34, 236 (references).


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scope and limits of executive power and their susceptibility to judicial review can also enliven and sustain the American-Australian dialogue.

VI. JUDICIAL POWER

Australian fascination with the American judicial system was demonstrable during the 1890s debate on and drafting of Australia’s Constitution. Textual comparison of judiciary provisions in the United States and Australian Constitutions confirms that much of Australia’s present discontent in this area of federal jurisdiction arises from unintelligent and uncritical copying of the provisions of the United States Constitution. It is from that Constitution that Australia gleaned the notion of federal jurisdiction. From that source Australia also copied many of the subject-matters of federal jurisdiction and then on a frolic of its own, assigned a formidable burden of original jurisdiction with respect to such matters to the High Court. . . . Their presence can only be explained in terms of a hypnotic fascination with the American Judicature Article. It is easy to be wise after the event and to charge the Founding Fathers with a stronger disposition to copy than to

241. See Thomson, Executive Power, supra note 15, at 572-78. See also supra note 176 (comparative scholarship).
think, but there can be little doubt that much of the wider interest in the study of federal jurisdiction in Australia lies in an examination of what results from inapposite transcription of another federal model.\textsuperscript{246}

Reproduction of the United States' text was, however, not precise. Deviations are evident.\textsuperscript{247} Three major departures, concerning judicial federalism, provide examples. First, the Australian High Court\textsuperscript{248} is a general appellate court.\textsuperscript{249} It is required\textsuperscript{250} to

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\item ZELMAN COWEN & LESLIE ZINES, FEDERAL JURISDICTION IN AUSTRALIA xiv-xv (2d ed. 1978). "The influence of American precedents on Australian constitution making was considerable. In no area, probably, was that influence stronger than on the judicature chapter of the [Australian] Constitution." Id. at 1 (footnote omitted). See also Geoffrey Sawer, Judicial Power Under the Constitution, in ESSAYS ON THE AUSTRALIAN CONSTITUTION, supra note 120, at 71 ("The Founders of the Commonwealth Constitution were influenced by the experience of the United States of America in the provision they made for the place of judicial power in the constitutional structure"). \textit{But see infra} note 247 (opposing view).
\item "The copying of the American judicature provisions was not slavish . . . ." COWEN & ZINES, supra note 246, at 1. "[T]he [Australian] Founders deliberately departed from the American example in many respects - so many as to make it very doubtful whether specific American authorities should ever be used in this connection, excepting by way of warning or contrast." Sawer, \textit{supra} note 246, at 71. See also Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd., 148 C.L.R. 457, 476 (Austl. 1981) (Barwick, C.J.) ("whereas [the Australian] Constitution and [Australian] doctrine is expressed in relation to a 'matter,' the American Constitution and therefore its doctrine is expressed in relation to a 'case' or 'controversy'"); Felton v. Mulligan, 124 C.L.R. 367, 393 (Austl. 1971) (Windeyer, J.) ("The contrasts of our judicial arrangements with those of the United States are as striking as their similarities"); Rogers, \textit{supra} note 244, at 644 ("except as a frightening example of the complexities which may attend a dual State/federal court system, the American experience has nothing helpful to offer").
\item See \textit{supra} note 85 (references).
\item \textit{See supra} notes 86-87 (Privy Council appeals from High Court).
\item \textit{But see AUSTL. CONST.} § 73 ("with such exceptions and subject to such regulations as the [Commonwealth] Parliament prescribes"). See \textit{generally} Smith Kline & French Laboratories (Austl.) Ltd. v. Commonwealth, 173 C.L.R. 194 (Austl. 1991) (special leave required from High Court to appeal was a "regulation" of High Court's appellate jurisdiction); LUMB & MOENS, supra note 80, at 378-81; DAVID O'BRIEN, SPECIAL LEAVE TO APPEAL: THE LAW AND PRACTICE OF APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO THE HIGH COURT OF AUSTRALIA 1-27 (1996); Anthony Mason, The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal, 15 U. TAS. L. REV. 1 (1996). \textit{Compare} U.S. CONST. art. III, § 2, cl. 2 ("with such Exceptions, and under such regulations as the Congress shall make"). See \textit{generally} Gerald Gunther, \textit{Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate}, 36 STAN. L. REV. 895 (1984); Lawrence Gene Sager, \textit{The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts}, 95 HARV. L. REV. 17 (1981); \textit{The Supreme Court, 1995 Term - Leading Cases - Federal Jurisdiction and Procedure: Exceptions Clause}, 110 HARV. L. REV. 277 (1996) (preferring a literal interpretation to give Congress expansive power over U.S. Supreme Court's
determine appeals from its original jurisdiction and federal courts.^{251} Also, appeals can be taken from state courts exercising state or federal jurisdiction.^{252} This express general appellate jurisdiction over state law is in marked contrast to the United States Supreme Court.^{253} One federalism ramification protrudes: state constitutional law is ultimately^{254} expounded by the High Court of Australia.^{255} Australian state supreme courts, despite interpreting state constitutions,^{256} are not the final judicial authority on state law questions. Secondly, is the Australian - "autochtonous expedient"^{257} - variation. The Commonwealth Parliament is expressly

jurisdiction, rather than a limiting structural approach).

251. AUSTL. CONST. § 73(i)-(ii).
252. Id. at § 73(ii) ("appeals from all judgments, decrees, orders, and sentences ... of any ... court exercising federal jurisdiction; or of the Supreme Court of any State, or of any other court of any State from which ... [at Jan. 1, 1901] an appeal lies to the Queen in Council"). See LUMB & MOENS, supra note 80, at 382-83; O'BRIEN, supra note 250.

254. The Judicial Committee of the Privy Council has (on appeal from the High Court) determined state constitutional law questions. See, e.g., Attorney-General of N.S.W. v. Tretethowan, 1932 A.C. 526 (P.C.) (U.K.). See also supra notes 86-87 (Privy Council appeals).
257. Ex parte Boilermakers Soc'y of Austl., 94 C.L.R. 254, 268 (Austl. 1956). However, it has been suggested that "[i]t is a mistake to suppose that investing State courts with federal jurisdiction is an unprecedented home-grown Australian arrangement. The United States Congress at an early dated invested State courts with jurisdiction to enforce some federal laws. Then came a period during which this practice was abandoned. Then it was revived." Felton v. Mulligan, 124 C.L.R. 367, 393 (Austl. 1971) (Windley, J.). For the U.S. see, e.g., John J. Gibbons Federal Law and State Courts 1790-1860, 56 RUTGERS L.J. 399 (1984). But compare Michael G. Collins, Article III Cases, State Court Duties, and the Madisonian Compromise, 1995 WIS. L. REV. 39 (questioning whether Congress was authorized to confer jurisdiction on state courts).
empowered to invest state courts with federal jurisdiction. No express provision in the U.S. Constitution authorizes Congress to make state courts repositories of federal jurisdiction. However, different views confront two questions: Can Congress achieve the Australian position? If so, what, if any, constitutional limits exist? Thirdly, the reverse situation prevails on creating federal courts. No express power or empowering provision authorizes the creation of Australian federal courts. Utilization of implied constitutional power is required. A much more express and secure constitutional foundation supports U.S. federal courts.

Descending from constitutional texts to practicalities exposes different attitudes about state courts in Australia and America. Different sentiments - from implicit trust in state courts as capable and neutral forums to enforce and vindicate federal laws and rights to fears of hostile treatment, perhaps resulting from local sentiments and pressures - have pervaded the background and influenced congressional decisions allocating jurisdiction between American state and federal courts. In Australia, almost un-

258. AUSTL. CONST. § 77(iii) (“Parliament may make laws . . . investing any court of a State with federal jurisdiction.”). Investiture of federal jurisdiction in Australian state courts has not encountered constitutional conundrums about the extent to which investing Commonwealth legislation can compel state courts to provide a forum for federal claims. However, such legislation cannot alter state courts’ constitution and implied federalism prohibitions could be invoked. See generally COWEN & ZINES, supra note 246, at 105, 174-233; RENFREE, supra note 245, at 531-678; Thomson, State Constitutional Law: American Lessons, supra note 14, at 1254-255.

259. See generally REDISH, supra note 253, at 125-38.

260. See, e.g., COWEN & ZINES, supra note 246, at 104-05, 130-32.

261. U.S. CONST. art. III, § 1 (“such inferior courts as the Congress may from time to time ordain and establish”). See, e.g., Martin v. Hunter’s Lessee, 14 U.S. (1 Wheat.) 304, 327-29 (1816) (Story, J.); Clinton, supra note 244. But see supra note 244 (debate over history and implications of Article III and Judiciary Act of 1789 for federal courts’ jurisdiction).

262. See, e.g., REDISH, supra note 253, at 8, 24 (belief held by many framers); id. at 3 (Supreme Court in 1980 considered state and federal courts equally competent to protect federal interests). See also Richard H. Fallon, Jr., The Ideologies of Federal Courts Law, 74 VA. L. REV. 1141 (1988) (utilizing two models - “federalist” and “nationalist” - to compare capacity and constitutional premises of federal and state courts); Skelly J. Wright, In Praise of State Courts: Confessions of a Federal Judge, 11 HASTINGS CONST. L.Q. 165, 184-85 (1984) (state courts and civil rights); infra note 264 (parity debate).

263. See, e.g., REDISH, supra note 253, at 2. See also id. (suggesting “state court ability or willingness to protect federal rights cannot be absolutely measured by the realities present over a hundred years ago” and that in 1980 federal courts had greater expertise than state courts, in federal law); infra note 264 (parity debate).

qualified approval of state courts has been characteristic. Consequently, during the first seventy-five years of federation (1901-1975), Australian state courts were the major, but not the only, forum for litigating federal issues. With the advent of the Federal Court of Australia that relative calm ceased and jurisdictional controversies emerged. Realization of the constitutional vulnerability of state court jurisdiction and perceived problems of jurisdictional conflict in a dual - state and federal - court system engendered reform proposals including the creation of a single unified Australian court system. As a result, a Commonwealth - state legislative cross-vesting scheme was enacted. Therefore,

concurrent federal and state jurisdiction vests in federal and state courts with each court able to remit cases to other courts.\footnote{278}

Despite this perceptible Australian movement away from America, reaping benefits from comparative analysis remains possible. Vacillation on a primary conundrum is an example: Are jurisdictional issues merely arid, technical, and unrewarding legalistic pursuits\footnote{274} or an elusive, but real, basis of constitutional and political power?\footnote{275} Australian judges, politicians, and scholars are realizing that jurisdictional maneuvers have vast consequences for federal-state relations.\footnote{276} Fortunately, this phenomenon has been identified and analyzed in American constitutional law.\footnote{277} For Australians the benefit is clear: assistance in acquiring a more informed understanding of comparative constitutional competencies and institutional relationships between federal and state courts.

\section*{VII. Bills of Rights}

No formal Bill of Rights is expressly adumbrated within,\footnote{278}
structurally implicated in," 9 or appended to the Australian Constitution. 279  Australia's rejection of the American position 280 is stark. 281 Of course, where similarities might exist - property ac-


282. Rejections occurred in the 1890s, 1944, and 1988. As to the Australian Founding Fathers' 1890s rejection of a Bill of Rights and the Fourteenth


and commerce; religious freedom, and out-of-state rights -


286. Compare AUSTL. CONST. § 92 ("trade, commerce . . . among the States . . . shall be absolutely free"), with the negative implications of U.S. CONST. art. I, § 8, cl. 3 (Congress' power "[t]o regulate Commerce . . . among the several states") and amend. XIV ("due process" clause). On § 92's individual right theory and due process analogy see ZINES, supra note 14, at 109-14, 118-35 (discussing the "individual right" theory); Thomson, supra note 280, at 1054 n.220 (references). On the US see United States v. Lopez, 115 S. Ct. 1624, 1640 (1995) (discussing dormant commerce clause and stating that the U.S. Supreme Court's "dormant Commerce Clause jurisprudence . . . includes the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses." (Kennedy, J., concurring)); Earl Maltz, The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause - A Case Study in the Decline of State Autonomy, 19 HARV. J. L. & PUB. POLY 121 (1995); Thomas Reed Powell, The Still Small Voice of the Commerce Clause, in SELECTED ESSAYS ON CONSTITUTIONAL LAW 31-32 (1938); Sullivan, supra note 165, at 107 (noting that some Justices would abandon judicial review under dormant commerce clause jurisprudence and permit states to regulate areas not regu-
American comparisons and contrasts have been utilized to explore the Australian Constitution.288

Despite this textual dichotomy, Australian constitutional law continues to look at the normative and empirical dimensions of the U.S. Bill of Rights and Fourteenth amendment290 for guidance into
the future. At least one ongoing debate mandates such inquisitiveness: should Australia have - whether legislatively or constitutionally entrenched - a Bill of Rights? Of course, emergence of answer should, like Canada, stimulate, not end, the dialogue.

VIII. AMENDMENT

Questions of constitutional law pervade the power and process of amending the American and Australian Constitutions. Express amendment powers and procedures pose an initial normative debates) (forthcoming 1997).

291. See, e.g., Thomson, supra note 280.


293. For U.S. Bill of Rights and Fourteenth amendment comparisons with the Canadian Charter of Rights and Freedoms see Thomson, supra note 8, at 51-53; infra Appendix C.


AUSTL. CONST. § 128, unlike Article V, does not provide for a Convention. However, would Article V's convention process be assisted by consideration of
problem: Can these constitutions be amended without conforming to textual stipulations?\textsuperscript{296} Other than the United Kingdom Parliament\textsuperscript{297} or a revolution establishing an autochthonous constitution,\textsuperscript{298} a vigorous Australian debate is yet to ignite. Is this context, American discussion denigrating the exclusivity of Article V amendments and postulating alternative procedures and sources of power - popular, majoritarian sovereignty\textsuperscript{299} and constitutional

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\item[296] Textual possibilities, other than AUSTL. CONST. § 128, include id. at § 51(36), (37), and (38). See McGinty v. Western Australia, 134 AUSTL. L.R. 289, 382-86 (1996) (Gummow, J.) (discussing § 51(36)); Thomson, supra note 295, at 323-24 n.4.
\item[297] As to whether the United Kingdom Parliament can and has amended the Australian Constitution see WINTERTON, supra note 236, at 138-40, 189 (discussing Australian request and U.K. parliamentary response to facilitate creation of state republican governments); ZINES, supra note 14, at 306-08 (discussing whether the Australia Act 1986 (U.K.) § 15 amended AUSTL. CONST. § 128); James A. Thomson, supra note 79 (same); Thomson, supra 295, at 342-44 (discussing U.K. Parliament's power). See also Gregory J. Craven, The Kirmani Case - Could the Commonwealth Parliament Amend the Constitution Without a Referendum?, 11 SYDNEY L. REV. 64 (1986) (discussing the Statute of Westminster 1931 (U.K.) § 2(2) as a source of power to amend the AUSTL. CONST.).
\item[298] See generally Thomson, supra note 79, at 410 n.3 (revolutionary autochtony); Thomson, supra note 295, at 344-45 (general discussion). See also Thomson, supra note 290, at n.170 (revolution in constitutional law).
\item[299] See Akhil Reed Amar, Philadelphia Revisited: Amending the Constitution Outside Article V, 55 U. CHI. L. REV. 1043 (1988) (arguing that "a majority of voters" possess "an unenumerated right to amend [the U.S.] Constitution in ways not explicitly set out in Article V"); Akhil Reed Amar, The Consent of the Governed: Constitutional Amendment Outside Article V, 94 COLUM. L. REV. 457 (1994) (arguing for a non-exclusive Article V amendment process so that the U.S. Constitution can be amended "via a majoritarian and populist mechanism akin to a national referendum"); Akhil Reed Amar, Popular Sovereignty and Constitutional Amendment, in RESPONDING TO IMPERFECTION, supra note 295, at 89-115. Would this national referendum proposal be assisted by consideration of the AUSTL. CONST. § 128 referendum (supra note 295)? But see supra note 301 (democratic and majoritarian defects in Section 128).
\end{enumerate}
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moments—ought to be invoked.


300. See BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (suggesting that the American people during “constitutional moments”—such as the Reconstruction and New Deal eras—structurally amend the U.S. Constitution outside Article V’s purview); Bruce Ackerman & Neal Katyal, Our Unconventional Founding, 82 U. CHI. L. REV. 475 (1995) (suggesting three transformative constitutional moments: 1787 Founding, Reconstruction, and New Deal).


301. Is an AUSTL. CONST. § 128 referendum (see supra note 295) an example or evidence of popular sovereignty? Despite referenda’s normative democratic credentials, a negative response may be required because of § 128’s pre-1901 history (see Thomson, supra note 295, at 326 n.19); requirements (for example, double majorities and Governor-General’s assent as indicated in supra note 295); and limitations (see infra notes 303, 308, 309). See also McGinty v. Western Australia, 134 AUSTL. L.R. 289, 379 (1996) (Gummow, J.) (noting “that, in significant respects, § 128 does not provide for an equality of voting power at referendums. A negative power . . . may be exercised by a minority of the total electors of the Commonwealth if that minority is geographically distributed such as to constitute a majority in a majority of States”).
If that occurs, Australian constitutional law offers little guidance on judicial review of constitutional amendments. Would exceeding the amending power's limits and defects in process or procedure be subject to judicial review? What, if any, role does the political question doctrine have in precluding judicial in-

302. Perhaps, the only example is Boland v. Hughes, 83 AUSTL. L.R. 673, 675 (1988) (Mason, C.J.) ("The validity of the proposed amendment to the [Austl.] Constitution . . . if . . . carried at the [1988] referendum . . . could subsequently be determined by a court. If . . . there is a defect in the form and content of the proposed law and that defect goes to the validity of the amendment, the issue of validity will nevertheless then be susceptible of determination by the court"). More frequent is judicial review of amendments to Australian state constitutions. See Attorney-General of N.S.W. v. Trethowan, 1982 A.C. 526 (P.C.) (U.K.) (N.S.W. Constitution); W. Austl. v. Wilsmore, 149 C.L.R. 79 (Austl. 1982) (W. Austl. Constitution). See also infra notes 306 (America), 307 (India and Canada).

303. In the Australian context, for example, are amendments to the Constitution's preamble and covering clauses (supra note 24) beyond the scope of AUSTL. CONST. § 128? See 1 AN AUSTRALIAN REPUBLIC, supra note 195, at 8, 117-22 (affirmative response); 2 id. at 296-311 (same); LUMB & MOENS, supra note 80, 571 (same); Thomson, supra note 295, at 334-35 (differing views).

In the American context, for example, is the 1787 U.S. CONST. illegal, unconstitutional, or inconsistent with the Articles of Confederation? See Ackerman & Katyal, supra note 300 (arguing that despite Constitution's illegality, it was reform, not total, revolution); Amar, Philadelphia Revisited, supra note 299, at 1047-60 (negative response); Amar, The Consent of the Governed, supra note 299, at 462-508 (negative response); Richard S. Kay, The Illegality of the Constitution, 4 CONST. COMM. 57 (1987); Lessig, supra note 299, at 852-60 (discussing Amar's thesis and conclusion that the Constitution is legal because the people retain their unalienable right to alter or abolish governments). Similar debates pervade U.S. Const. amend. XIII-XIV. See Forrest McDonald, Was the Fourteenth Amendment Constitutionally Adopted?, 1 S. LEGAL HIST. 1 (1991); Walter F. Murphy, Slaughter-House, Civil Rights, and Limits on Constitutional Change, 32 AM. J. JURIS. 1, 8-22 (1987) (concluding that Fourteenth amendment is not, on the basis of contravening fundamental federalism principles, unconstitutional); James A. Thomson, Using the Constitution: Separation of Powers and Damages for Constitutional Violations, 6 TOURO L. REV. 177, 183 n.20 (1990) (references); Tribe, supra note 300, at 1292-94 (concluding that "speculation that Article V alone may not provide for the legitimacy of the Fourteenth Amendment does not seem altogether unwarranted"); Michael P. Zuckert, Completing the Constitution: The Thirteenth Amendment, 4 CONST. COMM. 259 (1987) (discussing Thirteenth amendment's constitutionality).


volvement, including declarations of invalidity? For example, amendments to the Indian Constitution have been judicially nullified. Of course, these questions might become more obvious, if


some provisions in or aspects of the American or Australian constitutions were unamendable.10

Vincinal constitutions must conform to the Canadian Constitution).

308. For Australia see supra note 303 (preamble and covering clauses). See also infra note 310 (U.S. CONST. art. V).

309. For Australia see R.D. Lumb, Fundamental Law and the Processes of Constitutional Change in Australia, 9 FED. L. REV. 148, 160-61 (1978) (alluding to the possibility of non-textual restrictions on the § 128 amendment process but concluding that § 128 could be used "to achieve radical changes such as the transformation of the federal system of government into a unitary system, the abolition of judicial review of legislative acts, the conversion of the bicameral into a unicameral system, and the replacement of the monarchical system by a republican system") (footnote omitted). But see id. at 175-79 (suggesting that there may be inherent limitations on the ability of State Parliaments to amend State constitutions).

For America see Murphy, supra note 306, at 754-57 (arguing that some 'constitutional' fundamental values, such as elections, democracy, and human dignity, cannot be abrogated by constitutional amendment); Murphy, supra note 303, at 8-22 (suggesting that some basic principles, such as federalism, cannot be repudiated by constitutional amendments); Walter F. Murphy, The Right to Privacy and Legitimate Constitutional Change, in THE CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 213-14, 218-35 (Shlomo Slonim ed. 1990) (arguing that an Article V amendment removing the right of privacy would be unconstitutional); Walter F. Murphy, Merlin's Memory: The Past and Future Imperfect of the Once and Future Polity, in RESPONDING TO IMPERFECTION, supra note 295, at 163, 172-90 (postulating normative and other limitations on Article V's amendment power); Jeff Rosen, Was the Flag Burning Amendment Unconstitutional?, 100 YALE L.J. 1073 (1991) (postulating natural rights limitations on Article V). Compare supra notes 299, 300 (constitutional amendments, by virtue of "constitutional moments" or popular sovereignty, can be valid even if beyond Article V's scope).

310. See, e.g., U.S. CONST. art. V ("no Amendment which may be made prior to [1808] shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article" dealing with the importation of slaves). On this provision, which endeavors textually to make specified provisions unamendable from 1787 to 1808 - at least through the Article V amendment process - see Amar, Philadelphia Revisited, supra note 299, at 1066-69 (concluding that Article V prohibits use of its amendment procedures to abolish slave importation but left intact peoples' right (outside of Article V) to change slave importation). See also Douglas Linder, What in the Constitution Cannot be Amended?, 23 ARIZ. L. REV. 717 (1981) (general discussion). Compare the 1861 proposed "unamendable" thirteenth amendment (called the Corwin amendment): "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or to interfere with, with any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of the said State." See Mark E. Brandon, The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change, in RESPONDING TO IMPERFECTION, supra note 295, at 215-36 (concluding that Corwin amendment would not have been unconstitutional and that rarely will any amendment be unconstitutional); Linder, supra, at 728-33 (similar conclusion on validity of 'unamendable' amendments).
Comparative constitutional law thrives on such conundrums. Given an abundance of similarities - written constitutions, federalism, and judicial review - and differences - responsible government, Bill of Rights and a High Court possessing state law appellate jurisdiction - embarkation from America and Australia on comparative constitutional law sojourns ought to be frequent and enjoyable. Consequently, movement in both directions should continue. Converting a constitutional monarchy into a republic and shifting from United Kingdom parliamentary sovereignty towards popular sovereignty as the constitutional foundation exemplify Australia's journey toward America. Proposals for constitutional amendments by popular electoral majorities outside the article V process and resolution of rights issues through political processes, rather than expansive judicial interpretation of the Bill of Rights, indicate some susceptibility of American constitutional law to Australia's Constitution. Obviating differences and diversity need not, however, be the objective. Simply, touring through foreign constitutions may suffice. If that assists constitutional law, the experience in and lessons derived from comparative analysis will carry their own rewards.
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