

THE OXFORD HANDBOOK OF

**THE AUSTRALIAN
CONSTITUTION**

Edited by

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CHAPTER 11

COMPARATIVE CONSTITUTIONAL LAW

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WILL BATEMAN

THERE is much curiosity, and more than a little controversy, about the topic of comparative constitutional law. Most is within the academy; some is within the judiciary. What qualifies as comparative constitutional law is controversial; the legitimacy and methodology of comparative constitutional analysis even more so. Temperatures rise when there is a belief that comparative constitutional analysis is inappropriately deployed or inappropriately ignored; temperatures spike when there is a suspicion that it is deployed opportunistically. This contribution is not intended to fan the flames.

Founded on the understanding that '[c]omparative experience is legally irrelevant unless it can connect to arguments already available within the domestic legal system',¹ the burden of this contribution is limited to pointing out the orthodoxy in Australia of 'consulting foreign law' as an 'ordinary part' of the interpretation and application of 'constitutional provisions with a common genetic or genealogical root'.² Australian constitutional experience has demonstrated for more than

¹ Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1307.

² Vicki C Jackson, 'Comparative Constitutional Law: Methodologies' in Michel Rosenfeld and Andrés Sajó (eds), *The Oxford Handbook of Comparative Constitutional Law* (OUP 2012) 68.

a century how comparative constitutional analysis can illuminate the resolution of constitutional issues arising within a domestic legal system, provided that the particular comparative analysis that is undertaken is closely calibrated to the domestic constitutional tradition.

A. THE DOMAIN OF COMPARATIVE CONSTITUTIONAL LAW

Much of the contemporary interest and concomitant controversy about the topic of comparative constitutional law has been generated by analyses and critiques of the migration or borrowing of exogenous constitutional values through the appropriation and adaptation by courts within one constitutional system of ideas and techniques observed to have been employed by courts within one or more other constitutional systems. An impressive array of analytical frameworks has been assembled, each directed towards capturing a spectrum of judicial practice. Voluminous and intense debate has concentrated on related issues of legitimacy and methodology.

There are reasons to pause before importing the full thrust of that comparative constitutional law debate into the Australian context. Those reasons stem from the peculiar character of the Australian Constitution, when compared with other written constitutions which might be selected as comparators.

The omission of a list of civil and political rights from the text of the Australian Constitution removes the contextual foundation for much of the controversy about the migration or borrowing of exogenous values. Concern about the conformity of comparative constitutional law with the notion that constitutional norms are 'expressions of a particular nation's self-understanding',³ which lies at the heart of much of the debate elsewhere, has for that reason relatively limited scope to be triggered within the Australian context.⁴

The further and more general reason to pause before importing the full thrust of the comparative constitutional law debate into the Australian context is that comparative constitutional analysis so much contributed to the design of the Australian Constitution, that appropriating and adapting to its interpretation and application

³ Mark Tushnet, 'Some Reflections on Method in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 68.

⁴ But see, Adrienne Stone, 'Comparativism in Constitutional Interpretation' [2009] NZ Law Review 45; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37.

ideas and techniques employed by courts within constitutional systems which inspired it, or which were similarly inspired, can hardly be described as engaging in an exogenous process. Now to import scepticism about comparativism (as distinct from finding reason to be sceptical or critical of the appropriateness and utility of particular comparisons) would be deeply ironic.

In deference to the classificatory customs of the discipline, the significance of comparative constitutional analysis to the Australian Constitution can be explained in terms of inspiration, exposition, and development.

1. Inspiration

No constitution is cut from whole cloth. Written constitutions are invariably pastiches: partly old, partly new, partly borrowed from other written constitutions and adjusted to fit local conditions. Designing a written constitution invariably involves an element of transplanting institutional forms and constraints over space and time: that is to say, an element of comparativism. The designing of the Australian Constitution, principally the work of a relatively small group of able and well-informed popularly elected colonial delegates to two Conventions held during the last decade of the nineteenth century, was no exception. Comparativism predominated.

The importance of comparative analysis to the framing of the Australian Constitution was highlighted in the commentary of a close observer of the federation process, and prototypical scholar of comparative constitutional law, James Bryce.⁵ When allowance is made for a modicum of late-Victorian hyperbole, Bryce's contemporaneous description can be treated for present purposes as a fair summation of the nature and quality of the process that was undertaken.⁶

Like America in 1787, Australia was fortunate in having a group of able statesman, most of whom were also lawyers, and so doubly qualified for the task of preparing a constitution. Their learning, their acuteness, and their mastery of constitutional principles can best be appreciated by any one of who will peruse the interesting debates in the two Conventions. They used the experience of the mother country and of their predecessors in the work of the federation-making, but they did so in no slavish spirit, choosing from the doctrines of England and from the rules of America, Switzerland, and Canada those which seemed best fitted to the special conditions of their country. And like the founders of the American and Canadian Unions, they were not only guided by a clear practical sense, but were animated by a spirit of reasonable compromise, a spirit which promises well for the conduct of government under the instrument which they have framed.

⁵ See generally, Stephen Gageler, 'James Bryce and the *Australian Constitution*' (2015) 43 *Federal Law Review* 177.

⁶ James Bryce, *Studies in History and Jurisprudence*, vol 1 (Clarendon Press 1901) 482.

In the same commentary, Bryce went on to compare the structure of the Australian Constitution with its American and Canadian predecessors and to engage in a comparative assessment of the '[m]odern and [d]emocratic [c]haracter' of the Constitution.⁷ As to the former, he noted by way of summary that 'the Australian scheme of Federal Government stands intermediate between that of the United States and that of Canada.'⁸ As to the latter, he opined that 'this Constitution is at least abreast of European and American theory, and ahead of European or American practice.'⁹

The framers of the Australian Constitution were not isolationists. Nor were they dull followers of imported ideas. Their creation—fairly described by Bryce as the product of 'constructive statesmanship'¹⁰—was not inspired by a single constitutional model and does not give voice to a single philosophy of politics, government, or society. It was not drafted in ignorance of the structure and operation of other constitutional systems, and aspects of its design gave concrete expression to approaches to constitutionalism which were not wholly endogenous.

Inspiration came in a set of two related pairs: federalism was paired with written and entrenched constitutionalism; and responsible government was paired with the separation of powers. Each comprised understandings drawn from constitutional experience in America, Britain, Europe, and the Australian colonies, and each was extensively modified to fit the circumstances of the envisaged Australian federation. The distinctive 'attachment to interests rather than ideas in Australian politics',¹¹ meant that the attention of the framers focused more on practice than on theory, resulting in close attention being given by the framers to what was known about the actual operation of those domestic and foreign constitutional institutions which were seen to be comparators.

The domestic comparators were not insignificant. Written constitutions were a feature of the political organization of each Australian colony which was to become a State within the new federation, but none was entrenched and none purported to establish an enduring and comprehensive structure of government. There had been proto-federal experimentations in the colonial phase,¹² but none provided workable material for inspiration. Responsible government was extant in the colonies. Indeed, it had been hard-won and was not about to be relinquished by those who now had it. But it was relatively new and was still evolving.

To bridge the gap between the experience of colonial responsible government and the aspiration to a form of national federal government, comparators from North America, Europe, and Britain were appraised. Models of written federal

⁷ *ibid* 535. ⁸ *ibid* 530. ⁹ *ibid* 536. ¹⁰ *ibid* 476.

¹¹ Hugh Collins, 'Political Ideology in Australia: The Distinctiveness of a Benthamite Society' (1985) 114 *Daedalus* 147, 155, citing James Bryce, *Modern Democracies*, vol II (Macmillan 1921) 275.

¹² Edward Jenks, *A History of the Australasian Colonies: From Their Foundation to the Year 1893* (CUP 1895) 294–98.

constitutions from the United States, Switzerland, and Canada were pored over during the Conventions and compared with the more familiar British and colonial templates. Spirited debate ensured that no single voice attained the status of the framers' mouthpiece. The exhortation of Sir Josiah Symon in 1897 could nevertheless fairly be said to capture their attitude to the use of comparative constitutional law:¹³

I do not pretend that this convention is bound by precedents. We all represent what are really sovereign states—sovereign states in essence, if not in form—and we can strike out, if we please, an entirely new line . . . But it is instructive to have examples of other federations, and to fairly follow them, if we fulfil the federal theory, unless, of course, it can be shown that experience condemns them.

From those comparative examples were framed the Australian Constitution's basic system of government. At the highest level, a prominent fusion of concepts and institutions occurred in the conferral of legislative, executive, and judicial powers, in imitation of North American styles of constitutional thought, on institutions derived from the British tradition of a parliamentary monarchy. The triadic separation of powers came in that way to be fused with responsible government to create a novel and enduring hybrid: an 'indissoluble Federal Commonwealth under the Crown'.¹⁴

The 'Parliament' of that new national polity, in which was to be invested its 'legislative power', was to consist of the monarch and of two Houses. Each of those Houses was to be comprised of representatives 'directly chosen by the people'. One—the House of Representatives—was to be so chosen by 'the people of the Commonwealth' in the tradition of the British House of Commons.¹⁵ The other—the Senate—was to be so chosen by 'the people of [each] State' according to the template of the United States institution from which it derived its name.¹⁶ But while the Australian Senate was to derive its core identity from its American namesake, it was to be given quite limited powers,¹⁷ very much akin to those possessed by upper houses in the British parliamentary constitutional tradition.¹⁸

Formally vested in the Governor-General, as representative of the monarch,¹⁹ the 'executive power' of the polity was to be reposed in practice in elected representatives of the people who collectively maintained the confidence of the Parliament in accordance with the British and colonial parliamentary tradition. That was achieved through the conferral of a formal capacity, amounting obviously to a practical imperative, for

¹³ Official Record of the Debates of the Australasian Federal Convention (Sydney, 10 September 1897) 294 (Sir Josiah Symon).

¹⁴ *Commonwealth Constitution*, Preamble.

¹⁵ *Commonwealth Constitution*, s 24.

¹⁶ *Commonwealth Constitution*, s 7.

¹⁷ Compare ss 53–56 of the *Commonwealth Constitution* with art I, ss 7–8 and art II, s 2 of the United States Constitution.

¹⁸ John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (LexisNexis Butterworths 2002) 667.

¹⁹ *Commonwealth Constitution*, s 61.

the Governor-General to appoint Ministers to administer such departments of State and to be members of a Federal Executive Council to advise the Governor-General, in combination with a requirement that after the first general election no Minister was to hold office for a longer period than three months unless a senator or a member of the House of Representatives.²⁰ The single constitutional reference to 'executive power'²¹ derived from article II of the United States Constitution. The repeated constitutional references to the 'Executive Government' and to the 'Government'²² reflected a colonial approach to responsible government which marked a subtle but significant divergence from the British constitutional order.²³

As has been very well explained by others,²⁴ the 'Judicature' of the new polity was similarly the product of constitutional comparativism. '[J]udicial power' was to be vested in a 'Federal Supreme Court, to be called the High Court of Australia' and in other 'federal courts' which were to be created by the Parliament.²⁵ That federal structure, essentially copied from article III of the United States Constitution, was then supplemented in Chapter III of the Australian Constitution by the conferral of a broad constitutionally entrenched general appellate jurisdiction on the High Court²⁶ and by the grant of permission to the Parliament to take up the 'autochthonous expedient'²⁷ of 'investing any court of a State with federal jurisdiction.'²⁸ The monarch was to have no formal role in the operation of the federal judicature: orders made in the exercise of judicial power were not to be her orders.²⁹ There was nevertheless to be kept alive 'any right which the Queen may be pleased to exercise by virtue of Her Royal prerogative to grant special leave of appeal from the High Court to Her Majesty in Council', subject to the sole but significant exception that an appeal was not to be brought from a decision of the High Court 'as to the limits inter se of the Constitutional powers of the Commonwealth and those of any State or States' unless the High Court chose to certify that the question was one which ought to be determined by Her Majesty in Council.³⁰ The Judicial Committee of the Privy Council, to which such an avenue of appeal was to lie, had a generation earlier laid down the policy, which was to be maintained for almost a century afterwards, that it was 'of the utmost importance that in all parts of the empire where English law prevails, the interpretation of that law by the Courts should be as nearly as possible the same.'³¹

²⁰ *Commonwealth Constitution*, s 64.

²¹ *Commonwealth Constitution*, s 61.

²² *Commonwealth Constitution*, ss 4, 51(xxxix), 52(ii), 67, 70, 81, 84, 86, and 125.

²³ Paul Finn, *Law and Government in Colonial Australia* (OUP 1987) 4.

²⁴ James Stellios, *The Federal Judicature: Chapter III of the Constitution* (LexisNexis Butterworths 2010) 51–105; William G Buss, 'Andrew Inglis Clark's Draft Constitution, Chapter III of the *Australian Constitution*, and the Assist from Article III of the *Constitution of the United States*' (2009) 33 *Melbourne University Law Review* 718.

²⁵ *Commonwealth Constitution*, s 71.

²⁶ *Commonwealth Constitution*, s 73.

²⁷ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 268.

²⁸ *Commonwealth Constitution*, s 77(iii).

²⁹ *Re Refugee Tribunal; Ex parte Aala* (2000) 204 CLR 82, 92, 103.

³⁰ *Commonwealth Constitution*, s 74.

³¹ *Trimble v Hill* (1879) 5 App Cas 342, 345.

The structure of the judicature established by Chapter III holds the key to understanding why comparative constitutional analysis was from the beginning profoundly uncontroversial in the judicial exposition and development of the Australian Constitution. There was never the slightest doubt that it was to fall within the exclusive role of the judiciary to expound the meaning of the constitutional text and, as a necessary incident of performing that exclusive role, to reconsider its own prior exposition where persuaded that reconsideration was warranted. There was equally never the slightest doubt that the judicial exposition and development of constitutional law was to occur as part of the administration of the general law and according to the accepted methodology of the general law. The High Court, standing at the apex of the Australian system of courts, subject to appeals to the Privy Council for so long and to the extent that avenue of appeal was to remain, was never to be a specialist constitutional court and constitutional law was never to form anything other than a part—albeit a critically important part—of the general law.

The general law, which constitutional law was thenceforth to include, had a number of components. It included the common law which had already been imported from England with local adaptations, Imperial statutes applicable in the Australian colonies which were in many instances applicable also in other colonies, and local statutes the texts of many of which were drawn from statutes earlier enacted in England or elsewhere. The methodology by which each of the components of the general law had always been administered by colonial courts, and by which it could confidently be expected to continue to be administered by courts of the judicature established by Chapter III of the Australian Constitution, was the methodology of the common law: a methodology attuned to engaging with judicial precedent in a 'distinctive, institutionalised form' of analogical reasoning.³²

Common law methodology accommodates the appraisal of precedents as comparators. Legal controversies are resolved by invoking such assistance as might be able to be derived from a consideration of earlier applications of comparable law to comparable fact-patterns. Precedent might be binding. But non-binding precedent might also be persuasive. And even if not persuasive, the experience of the common law has long been that non-binding precedent might at the very least be helpful in generating and testing legal ideas: by exposing potential lines of reasoning and by showing the real-life benefits or pitfalls of choosing one line of reasoning over another.

Predicating the integrated Australian judicature on the inherited common law tradition therefore allowed for the employment of comparative legal analysis as an ordinary part of the intellectual framework within which constitutional adjudication was to occur. To look in the absence of binding precedent to the judicial

³² Gerald J Postema, 'A *Similibus ad Similia*: Analogical Thinking in Law' in Douglas E Edlin (ed), *Common Law Theory* (CUP 2007).

precedent of another constitutional system, for such guidance or inspiration as it might on examination provide, might be doing comparative law. First and foremost, it is doing constitutional law according to the methodology of the common law. Done well, it necessitates taking a wide survey and subjecting what is found to an exacting scrutiny. Done badly, it has the potential to lead to lazy and derivative decision-making³³ carrying with it the potential for the unwitting importation of ideas and techniques ill-adapted to fit local conditions: of its nature, non-binding precedent can never be a substitute for reason. But the risk that it might be done badly has never been thought to be a reason why it should not be done at all.

2. Exposition

The importance, the unquestioned acceptance, and even the banality, of comparative constitutional analysis in the exposition of the Australian Constitution can all be seen in the structure and content of Quick and Garran's highly influential commentary published very soon after the proclamation of the Australian Constitution in 1901.³⁴ After an historical introduction of some 250 pages, the commentary sets out over some 700 pages detailed annotations to the constitutional text. Each annotation commences with quotations, to the extent applicable, from equivalent or near-equivalent provisions of the Constitutions of each of the United States, Canada, Switzerland, and Germany. There follows an historical note referring to the relevant parts of the Convention debates. There then follows an exposition of the constitutional terminology containing extensive citation to and quotation of foreign precedents and texts. In all, some 900 cases are cited. More than half are decisions of American courts, some 400 of decisions of the United States Supreme Court. About thirty are decisions of the Judicial Committee of the Privy Council on appeal from courts of various parts of the British Empire. Most of the rest are decisions of courts of the United Kingdom and of Canada.

In a report made in his capacity as Secretary of the Commonwealth Attorney-General's Department, a couple of years after that publication and just months before the establishment of the High Court in 1903, Garran put that mass of foreign precedent in appropriate perspective when he presciently explained:³⁵

The Federal relation involves a most intricate apportionment of constitutional powers and duties between the Commonwealth and State Governments; and in the administration of the Federal Departments, no less than in the drafting of legislative measures, questions of the

³³ Sir Anthony Mason, 'The Use and Abuse of Precedent' (1988) 4 *Australian Bar Review* 93, 108.

³⁴ Quick and Garran (n 18).

³⁵ See Patrick Brazil and Bevan Mitchell (eds), *Opinions of Attorneys-General of the Commonwealth of Australia*, vol 1 (Australian Government Publishing Service 1981) v (foreword by Peter Durack, Attorney-General of the Commonwealth of Australia).

utmost nicety and importance, of a kind which have never before had to be dealt with in the separate colonies, will continually arise ... A vast mass of American and Canadian authorities bear upon these questions, but the Constitution of the Commonwealth is so different, in principle and details, from the Constitution of the United States, or of the Dominion of Canada, that a code of interpretation for the Constitution must inevitably arise.

The High Court, for its part, from the beginning had foreign precedents cited to it in argument and made use of those precedents in its own reasoning. The first judges of the High Court plainly saw no need to explain, much less to offer an apology, for that practice. They did, however, find early occasion to berate the Privy Council for seeming to ignore it.³⁶ Speaking in 1907 for himself and for the first two other members of the High Court, Griffith CJ pointedly explained that:

[t]he framers of a Constitution at the end of the nineteenth century may be supposed to have known that there have been in this world many forms of Government, that the various incidents and attributes of those several forms had been the subject of intelligent discussion for more than 2,000 years, and that some doctrines were generally accepted as applicable to them respectively.³⁷

After referring to pertinent aspects of Australian colonial history, Griffith CJ continued:³⁸

But in regarding the birth of a new State we are not obliged to limit our view to the cradle. In fashioning the Constitution of a Federated Commonwealth the framers might assuredly be expected to consider the constitution and history of other federations, old and new. According to the recognized canons of construction they must be taken to have been familiar with them, and the application of this doctrine is not excluded or weakened by its notorious historical truth as to the members of the Convention. Now, at the end of the nineteenth century there were in actual operation three great federal systems of Government—the two great English-speaking federations of the United States of America and Canada, and the Swiss Confederation. We may assume that the relative advantages and disadvantages of these several systems were weighed by the framers of the Constitution. If it is suggested that the Constitution is to be construed merely by the aid of a dictionary, as by an astral intelligence, and as a mere decree of the Imperial Parliament without reference to history, we answer that that argument, if relevant, is negatived by the preamble to the Act itself, which has been already quoted. That is to say, the Imperial legislature expressly declares that the Constitution has been framed and agreed to by the people of the Colonies mentioned, who ... had practically unlimited powers of self-government through their legislatures. How, then, can the facts known by all to have been present to the minds of the parties to the agreement be left out of consideration?

Thus, in so far as it seemed necessary at that early stage to explain the deployment of comparative analysis for the enlightenment of those thought ignorant of, or insufficiently attentive to, the origins and structure of the Australian Constitution, the

³⁶ *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087, reaffirming *D'Emden v Pedder* (1904) 1 CLR 91 after *Webb v Outtrim* [1907] AC 81.

³⁷ *Baxter* (n 36), 1106.

³⁸ *ibid* 1109.

explanation came to this: consideration of the judicial precedents emanating from comparable constitutional systems is warranted on orthodox principles of construction because the existence of those comparable constitutional systems formed part of the context in which the Australian Constitution was brought into existence and against the background of which its meaning is to be understood. Recognition of the large and enduring nature of the issues at stake and of the inherently dynamic nature of constitutional interpretation (itself well-enough illustrated by the course of United States and Canadian case law in the nineteenth century) meant that no rigid temporal distinction was then or thereafter to be drawn in point of principle between judicial precedents which emanated from comparable constitutional systems in and before the nineteenth century and judicial precedents which were to emanate from those same comparable constitutional systems after the Australian Constitution came into existence.

In some prominent instances, such precedents would be examined to resolve difficulties caused by the fusion in the Australian Constitution of American and British models of government. Such a difficulty arose in relation to the practice of delegating legislative power to the executive government, which was well established in British-derived constitutional systems and conformable with principles of responsible government. The thorny issue was how that practice could be explained in light of the textual separation of legislative, executive, and judicial power in the Australian Constitution. Justice Dixon grasped the nettle in *Victorian Stevedoring and General Contracting Co Pty Ltd v Dignan* with a frank recognition that the separation of powers in the Australian Constitution's three chapters, which 'both in substance and in arrangement, closely follow the American model upon which they were framed', could be productive of difficult 'practical and political consequences' if inflexibly applied.³⁹ Quotation and discussion of authoritative and dissenting statements of the United States Supreme Court and the writings of American legal scholars from the nineteenth and early twentieth centuries exposed the problem as one of accommodating high constitution theory with the practical imperatives of governing and explained how doctrine which provided 'latitude of application' ameliorated that problem in America.⁴⁰ The solution to the same problem arising in Australia would not be American, but rooted in British constitutional practice:

³⁹ (1931) 46 CLR 73, 89, 91.

⁴⁰ *ibid* 92–94, discussing *Wayman v Southard* 23 US (10 Wheat) 1 (1825); *Mutual Film Corporation v Industrial Commission of Ohio* 236 US 230 (1915); *Hampton and Co v United States* 276 US 394 (1928); Holmes J in dissent in *Springer v Government of the Philippine Islands* 277 US 189 (1928); Westel Willoughby, *The Constitutional Law of the United States* (2nd edn, Baker, Voorhis and Company 1910), Ernst Freund, *Administrative Powers over Persons and Property* (University of Chicago Press 1928); and James Hart, *The Ordinance Making Powers of the President of the United States* (The Johns Hopkins Press 1925). Such use may be an example of comparative law 'clarifying the nature of the problem or any aspect of it': Cheryl Saunders, 'Judicial Engagement with Comparative Law' in Rosalind Dixon and Tom Ginsburg (eds), *Comparative Constitutional Law* (Edward Elgar 2011) 583.

It may be acknowledged that the manner in which the Constitution accomplished the separation of powers does logically or theoretically make the Parliament the exclusive repository of the legislative power of the Commonwealth. The existence in Parliament of power to authorize subordinate legislation may be ascribed to a conception of that legislative power which depends less upon juristic analysis and perhaps more upon the history and usages of British legislation and the theories of English law. In English law much weight has been given to the dependence of subordinate legislation for its efficacy, not only on the enactment, but upon the continuing operation of the statute by which it is so authorized. The statute is conceived to be the source of obligation and the expression of the continuing will of the Legislature.⁴¹

‘Minor consequences’ of that conception were seen by Dixon J in the outcome of two twentieth-century English precedents concerning the relationship between primary and delegated legislation.⁴² ‘Major consequences’ were seen in the ‘emphasis laid’ by the Privy Council in two nineteenth century cases on appeal from New South Wales and Ontario on ‘the retention by the Legislature of the whole of its power of control and of its capacity to take the matter back into its own hands.’⁴³ Those consequences compelled the conclusion that the modern practice of responsible parliamentary government, observed through the prism of the judicial treatment of the law of three different constitutional systems and expressed by the Australian Constitution, ‘does not forbid the statutory authorization of the Executive to make a law’.⁴⁴

Without anyone ever raising a question about the legitimacy of the methodology, it would later unfold that the High Court would routinely make reference to judicial precedents emanating from constitutional systems (or even quasi-constitutional systems) where those systems themselves only came into existence after the Australian Constitution had come into existence but where those systems were nevertheless seen to have features sufficiently in common with, or analogous to, features of the Australian Constitution to make that comparison at least potentially useful. Perhaps as a carry-over of attitudes borne of the position which the Privy Council occupied within the Australian judicial hierarchy, or perhaps in recognition of the ordinarily high quality of its reasoning, decisions of the Privy Council came often to be treated as presumptively persuasive irrespective of the constitutional system from which they emanated and despite the issues considered in them being only very broadly analogous to those raised by the Australian Constitution.⁴⁵ Occasionally, that attitude would lead to difficulties. Privy Council decisions on the distinction drawn within the Canadian constitutional context between ‘direct’ and ‘indirect’ taxes, for

⁴¹ *Victorian Stevedoring* (n 39) 101–02.

⁴² *ibid* 102, citing *Willingale v Norris* [1909] 1 KB 57 and *Watson v Winch* [1916] 1 KB 688.

⁴³ *ibid*, citing *Hodge v The Queen* (1883) 9 App Cas 117 and *Powell v Apollo Candle Company* (1885) 10 App Cas 282.

⁴⁴ *Victorian Stevedoring* (n 39).

⁴⁵ For example, *R v Humby; Ex parte Rooney* (1973) 129 CLR 231 and *Polyukhovich v Commonwealth* (1991) 172 CLR 501, both considering *Liyanage v The Queen* [1967] 1 AC 259 and *Kariapper v Wijesinha* [1968] AC 717.

example, having been found at one stage to illuminate consideration of the meaning of ‘excise’ within the Australian Constitution,⁴⁶ led to later Australian judicial analysis becoming ‘clouded’⁴⁷ by a perceived need to adjust prior analysis in light of the Canadian distinction.⁴⁸

Naturally enough, attention has tended to focus on precedents emanating from systems with which Australians have been more familiar. Typically, but not exclusively, they have been other common law systems. The ordinary incidents of the adversarial process, which provides the procedural context for the application of common law methodology to adjudication, has meant that those who have sought to make use of precedents from less familiar systems have in practice borne the onus of demonstrating the utility of doing so. Occasional attempts by counsel to gain support for arguments by reference to precedents from unfamiliar systems have failed to gain traction where the assistance to be gained from those precedents has been unable to be explained at the outset. But no judicial precedent emanating from any other constitutional system appears ever to have been ruled out on ideological or methodological grounds as presumptively incapable of providing assistance.

As Garran predicted before the establishment of the High Court, precedents emanating from other constitutional systems have tended in practice to assume less prominence as Australian precedent on any given subject matter of constitutional law has come into existence and has grown. Conversely, comparative analysis has tended in practice to resurge in importance when novel constitutional issues have been thrown up for consideration and when well-worn but problematic aspects of established constitutional doctrine have been opened up to reappraisal. That brings us to development.

3. Development

It is a constitutional cliché to point out that *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers’ Case)*⁴⁹ was a turning-point in Australian constitutional law. As a very broad generalization, it is not inaccurate to observe that the High Court tended before that case to emphasize those features of the Australian Constitution which derived their inspiration from the constitutional understanding and practices of the post-bellum United States, and that the High Court tended after that case to emphasize those features of the Australian Constitution which derived

⁴⁶ *Matthews v Chicory Marketing Board (Vic)* (1938) 60 CLR 263, 300–03.

⁴⁷ *Dennis Hotels Pty Ltd v Victoria* (1960) 104 CLR 529, 553.

⁴⁸ *Parton v Milk Board (Vic)* (1949) 80 CLR 229, 261, referring to *Atlantic Smoke Shops Pty Ltd v Conlon* [1943] AC 550.

⁴⁹ (1920) 28 CLR 129.

their inspiration from the institutions and practices of British parliamentary democracy. Correspondingly, and again as a very broad generalization, it is not inaccurate to observe that the High Court tended to give greater attention to American precedent before that case than after it.

Generalizations are, of course, just that. The truth is that, after the *Engineers' Case*, American precedent continued to be highly influential, although often much more subtly deployed. In the first half of the twentieth century immediately following on from the *Engineers' Case*, American precedent greatly influenced: the development of judicial tests for determining the 'inconsistency' of State laws with Commonwealth laws (drawing inspiration from the American doctrine of 'pre-emption'),⁵⁰ the general approach to the construction of grants of Commonwealth legislative power;⁵¹ and the renewed implication of State immunities from Commonwealth legislation based on the federal nature of the Australian Constitution.⁵² American precedent also had some, more muted, influence on the construction of two particular grants of Commonwealth legislative power. One was the interstate trade and commerce power,⁵³ in respect of which the High Court was to adopt the approach mapped out in early American decisions on the commerce clause of the United States Constitution,⁵⁴ but drew back from importing the full effect of the New Deal re-interpretation of that clause.⁵⁵ The other was the acquisitions power,⁵⁶ in respect of which the High Court's interpretation drew on similarities with, while recognizing divergences from, the takings clause of the United States Constitution.⁵⁷

In the second half of the twentieth century, American precedent would prove again to be highly influential in the reconceptualization of the constitutional guarantee of freedom of interstate trade and commerce (drawing inspiration from the American understanding of the 'negative' operation of the 'commerce clause')⁵⁸ and in the implication of the constitutional guarantee of freedom of political communication (drawing inspiration from one of a number of streams of First Amendment

⁵⁰ cf *Stock Motor Ploughs Ltd v Forsyth* (1932) 48 CLR 128, 136 and *Victoria v Commonwealth* (1937) 58 CLR 618, 630 with *McCulloch v Maryland* 17 US (4 Wheat) 316, 436 (1819) and *Davis v Elmira Savings Bank* 61 US 275, 283 (1896).

⁵¹ cf *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 81 with *McCulloch v Maryland* 17 US (4 Wheat) 316, 407–08 (1819).

⁵² cf *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31 with *New York v United States* 326 US 572 (1946).

⁵³ *Commonwealth Constitution*, s 51(i).

⁵⁴ *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29, 57, 76, 82, referring to *Gibbons v Ogden* 22 US 1 (1824).

⁵⁵ *Field Peas Marketing Board (Tas) v Clements and Marshall Pty Ltd* (1948) 76 CLR 414, 426–29.

⁵⁶ *Commonwealth Constitution*, s 51(xxxi).

⁵⁷ *Andrews v Howell* (1941) 65 CLR 255, 268, 281–83; *Johnston Fear & Kingham & Offset Printing Co Pty Ltd v Commonwealth* (1943) 67 CLR 315, 322, 326, 328; *Minister of State for the Army v Dalziel* (1944) 68 CLR 261, 289, 291, 294.

⁵⁸ *Cole v Whitfield* (1988) 165 CLR 360, 405–06; *Castlemaine Tooheys Ltd v South Australia* (1990) 169 CLR 436, 468–72.

jurisprudence).⁵⁹ On the other hand, sufficient differences of constitutional language, structure, and history were found to exist for ambitious interpretations based on American precedents to be rejected in respect of the Australian Constitution's guarantees of trial by jury⁶⁰ and non-establishment of religion⁶¹ and in respect of its requirements for the Senate and the House of Representatives to be comprised of representatives directly chosen by the people.⁶²

In some areas where American precedent initially proved highly influential, subsequent development of Australian constitutional doctrine has continued by drawing inspiration from elsewhere. While a number of illustrations of that general observation could be given, it is sufficient to refer to the development of the doctrine which has come to be associated with *Kable v Director of Public Prosecutions (NSW)*.⁶³

Historically, *Kable* can only be understood in the context of *Wilson v Minister for Aboriginal and Torres Strait Islander Affairs*,⁶⁴ decided in the same month in 1996. *Wilson* and *Kable* together can only be understood against the background of the decision of the Supreme Court of the United States five years earlier in *Mistretta v United States*.⁶⁵

Mistretta concerned the validity of the establishment of the United States Sentencing Commission: an agency established by federal statute, expressly reposed in the 'judicial branch', and staffed with federal judges, given the chief tasks of setting presumptively binding sentence ranges for federal offences and overseeing the federal parole system. The Supreme Court, deciding in favour of validity, recognized the existence of 'a "twilight area" in which the activities of the separate Branches merge',⁶⁶ and sought to identify open-textured tests of validity based on functional compatibility with article III of the United States Constitution, expressing its 'vigilance against two dangers: first, that the Judicial Branch neither be assigned nor allowed "tasks that are more properly accomplished by [other] branches,"... and, second, that no provision of law "impermissibly threatens the institutional integrity of the Judicial Branch."⁶⁷ The Supreme Court opined:⁶⁸

That the Constitution does not absolutely prohibit a federal judge from assuming extrajudicial duties does not mean that every extrajudicial service would be compatible with, or appropriate to, continuing service on the bench; nor does it mean that Congress may require

⁵⁹ *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143–44; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 133–36; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 563–64, 567; *Levy v Victoria* (1997) 189 CLR 579, 594–95, 623, 638–42.

⁶⁰ *Brown v The Queen* (1986) 160 CLR 171, 194–95, 203–04, 209–14.

⁶¹ *Attorney-General (Vict); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 598–603, 613–16.

⁶² *Attorney-General (Cth); Ex rel McKinlay v Commonwealth* (1975) 135 CLR 1, 46–47, 62–63; *McGinty v Western Australia* (1996) 186 CLR 140, 187–88, 227–29, 263–68.

⁶³ (1996) 189 CLR 51. ⁶⁴ (1996) 189 CLR 1. ⁶⁵ 488 US 361 (1989).

⁶⁶ *ibid* 386.

⁶⁷ *ibid* 383, quoting *Commodity Futures Trading Comm'n v Schor* 478 US 833, 851 (1986).

⁶⁸ 488 US 361, 404 (1989).

a federal judge to assume extrajudicial duties as long as the judge is assigned those duties in an individual, not judicial, capacity. The ultimate inquiry remains whether a particular extrajudicial assignment undermines the integrity of the Judicial Branch.

The Supreme Court went on to state:⁶⁹

The legitimacy of the Judicial Branch ultimately depends on its reputation for impartiality and nonpartisanship. That reputation may not be borrowed by the political Branches to cloak their work in the neutral colors of judicial action.

Wilson concerned the validity of the appointment of a judge of the Federal Court of Australia in her personal capacity to prepare a report to a Commonwealth Minister. *Kable* concerned the validity of a State law that provided for the Supreme Court of that State to make an order extending the imprisonment of an identified individual. The questions of constitutional law raised in *Wilson* had a firm grounding in existing constitutional doctrine,⁷⁰ while those raised in *Kable* were entirely novel.

In *Wilson*, the High Court held that the principles expounded in *Mistretta* were 'equally relevant to the interpretation of Ch III of the Constitution of this country',⁷¹ and held that the challenged appointment was prohibited because it placed 'the judge firmly in the echelons of administration, liable to removal by the Minister before the report is made and shorn of the usual judicial protections, in a position equivalent to that of a ministerial adviser'⁷² and required the judge to make decisions which were 'political in character.'⁷³ That holding represented a development of Australian constitutional law, affected by developments in American constitutional law, but remaining within the rubric of Chapter III of the Australian Constitution.

The development wrought in *Kable* was momentous and, like *Wilson*, was significantly influenced by *Mistretta*. *Kable* turned on the proposition that Chapter III of the *Australian Constitution* prohibits a State Parliament from conferring a power on a State court in State jurisdiction which undermines the institutional integrity of that court as an actual or potential repository of such federal jurisdiction as might be vested in it by the national Parliament. With the adoption of that proposition, the efficacy of the Australian Constitution's 'autochthonous expedient' of 'investing any court of a State with federal jurisdiction' came to be protected by the operation of a doctrine which all of the inaugurating members of the High Court at some level linked to *Mistretta*.⁷⁴ Thereafter the *Mistretta* metaphor, deprecating the cloaking of political work in the colours of judicial neutrality, entered the Australian constitutional phrase-book.⁷⁵ Subsequent decisions came to build on

⁶⁹ *ibid* 407.

⁷⁰ *cf* *Hilton v Wells* (1985) 157 CLR 57; *Grollo v Palmer* (1995) 184 CLR 348.

⁷¹ (1996) 189 CLR 1, 9. ⁷² *ibid* 18–19. ⁷³ *ibid* 19.

⁷⁴ For example, *Kable* (n 63) 107–08, 116, 133.

⁷⁵ *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575, 615 [91].

the American-inspired Australian foundations of the *Kable* doctrine by drawing on Canadian and European case law focusing on ‘essential characteristics’ of a ‘court’.⁷⁶

B. CONCLUSION

In a world market for legal ideas, Australia has always been a small open economy. In its exposition and development, no less than in its inspiration, Australian constitutional law has benefited from the consideration of foreign precedent. Constitutional ideas which have found expression in foreign judicial pronouncements have been appropriated and adapted when found to shed light on domestic constitutional issues, and discarded when not. That approach to the evaluation and utilization of foreign constitutional precedent has been nothing more than an aspect of the application of common law methodology to constitutional interpretation.

The challenge to the continued application of that traditional Australian common law methodology will increasingly become one of management and discernment. The benefit of comparativism is the benefit to analogical reasoning of having more information. The burden of comparativism is the burden of critically evaluating more information, carrying with it risks of cognitive overload and cognitive loafing. That burden can only increase as the volume of foreign precedents multiplies, as information technology makes foreign precedents more accessible, as constitutional discourse world-wide becomes increasingly ‘generic’,⁷⁷ and as constitutional adjudication and scholarship becomes increasingly ‘cosmopolitan’.⁷⁸ Between rejection without sufficient assessment and acceptance without sufficient discernment, there is a balance to be struck.

⁷⁶ *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 152 [3], 172 [65]; *South Australia v Totani* (2010) 242 CLR 1, 37 [47]; *Wainohu v New South Wales* (2011) 243 CLR 181, 208 [44].

⁷⁷ Mark Tushnet, ‘Comparative Constitutional Law’ in Mathias Reimann and Reinhard Zimmerman (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 1249.

⁷⁸ Jeffrey Goldsworthy, ‘Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence’ in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (CUP 2006) 115.