

**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**

WILLIAM G BUSS*

[Andrew Inglis Clark came to the Australasian Constitutional Convention in Sydney in 1891 with a complete Constitution acknowledged by him to be largely based on the United States Constitution. Particularly in respect of Chapter III, the Australian Constitution was significantly influenced by Clark’s American-based Constitution. This article analyses the way American constitutional law concerning the judiciary was inextricably woven into the Convention Debates about federal courts, federal judicial power and federal jurisdiction by the Australian framers, in 1897 and 1898 as well as 1891. Starting with a focus on the American art III incorporated in Clark’s Constitution, the article considers the framers’ arguments in the Convention Debates that produced the similarities and differences in the provisions adopted in the Australian Chapter III. The article, then, selectively discusses some instances in which the Clark–American background continues to be relevant to Australian constitutional law.]

CONTENTS

I	Introduction	719
II	Overview: The Australasian Constitutional Conventions and the Evolution of Clark’s Constitution — A Concise Summary	724
	A The Australasian Constitutional Conventions.....	724
	B From Clark’s Draft to the <i>Australian Constitution</i>	726
III	The Vesting of Federal Judicial Power.....	728
	A One Supreme Court	729
	B Other Federal Courts.....	733
	C Other Courts Vested with Federal Jurisdiction	734
	1 <i>Kable v Director of Public Prosecutions (NSW)</i>	739
	2 Mandated State Courts	741
IV	Structuring the Federal Judiciary.....	745
	A The Number of High Court Justices	745
	B Appointment, Salary and Tenure of Federal Judges	748
	1 Appointments	748

* BA (Yale), LLB (Harvard); O K Patton Professor of Law, College of Law, The University of Iowa. I owe thanks to more people than a reasonable footnote will accommodate: to the two anonymous referees; to my Iowa colleagues for their feedback on my workshop; to law colleagues at Victoria University of Wellington (NZ), at the Australian National University and at the University of Melbourne, for comments and encouragement in various forms responding to my presentations on a piece of this article at each place and to my nagging questions about Australian constitutional law; to the thoughtful readers who have critiqued instalments; to the *MULR* editors for taking on and patiently editing such a large project; to an unbelievably talented and wonderful group of research assistants; to a secretary who does the impossible. I am especially grateful to University of Iowa Law Dean Carolyn Jones, University of Melbourne Law Professor Adrienne Stone, and Australian National University Law Professor Kim Rubenstein for the rewarding working time I have spent in Australia.

2	Salary and Tenure	751
	(a) Salary	751
	(b) Tenure and Removal	752
3	Grounds for Removal	753
4	Parliamentary Process: Adding 'Proved'	758
5	An Aside: The Governor-General's Role	760
6	Deleting 'During Good Behaviour'	761
7	The Murphy Affair	762
	C A Comparative Question from Beginning to End	767
V	Federal Court Jurisdiction: From the <i>United States Constitution</i> to the Clark Constitution to the <i>Australian Constitution</i>	768
	A Matters, Cases and Controversies	771
	B Convention Debates and Effects over Selected Jurisdictional Matters	774
	1 Sovereign Immunity	774
	2 Writs of Mandamus	779
	(a) <i>Marbury v Madison</i>	781
	(b) The Australian Framers' Use of <i>Marbury</i>	783
	3 Legislative Allocation of Original and Appellate Jurisdiction	788
VI	Coda: Clark, the Privy Council and the American Supreme Court	794
VII	Conclusion	799

I INTRODUCTION

Anyone who cares about constitutional law and constitutional rights, about individual liberty and the rule of law, would be drawn powerfully to Andrew Inglis Clark. Clark was a romantic¹ and sometimes a poet.² He was also a man of the world who got things done — as a politician,³ as the Attorney-General of

¹ See Alfred Deakin, *The Federal Story: The Inner History of the Federal Cause, 1880–1900* (1944) 32; John Reynolds, 'A I Clark's American Sympathies and His Influence on Australian Federation' (1958) 32 *Australian Law Journal* 62; Michael Roe, 'The Federation Divide among Australia's Liberal Idealists: Contexts for Clark' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 88; Michael Denholm, 'Motto: Moral, Social, Scientific and Artistic — Andrew Inglis Clark and Quadrilateral' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 119, 119–20; John Williamson, 'Andrew Inglis Clark — Liberal and Nationalist' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 125, 126. See especially Andrew Inglis Clark, 'Why I Am a Democrat' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 29, 29–35. Clark's heroes included an Italian patriot (Mazzini) and a martyr of the English Commonwealth (Algernon Sydney, but not Cromwell): see, eg, Deakin, *The Federal Story*, above n 1, 32; John Hirst, *The Sentimental Nation: The Making of the Australian Commonwealth* (2000) 11. Clark's indictment of Oliver Cromwell for betraying the Commonwealth in the 17th century was not romantic: see Michael Bennett, 'Clark's "The Commonwealth versus Cromwell": Clark, Cromwell, and the English Republic' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 208, 208–9.

² Richard Ely, 'The Poetry of Inglis Clark' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 185.

³ Michael Roe, 'Reviewing Clarkiana and Clark at Federation's Centenary' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 1, 8–9; Marcus Haward and James Warden, 'An Australian Democrat: The Life and Legacy of Andrew Inglis Clark' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 1, 3;

Tasmania,⁴ as a Justice of the Tasmanian Supreme Court,⁵ as a significant force in the founding, and later as the Vice-Chancellor, of the University of Tasmania,⁶ and as an intellectual and a writer.⁷ Australians should be especially drawn to Clark because he was one of the great framers of the *Australian Constitution*.⁸ He was also a loyal British subject who believed the Empire would be best served by an Australia which was fundamentally independent, though technically part, of the Empire.⁹ Americans might be especially drawn to Clark because Clark was especially drawn to what, at times, is genuinely exceptional in the American experience.¹⁰ He saw¹¹ a continuity between the English Revolution of 1688 and its resulting *Bill of Rights*¹² and the American Revolution of 1775 and the consequent *United States Constitution* and *Bill of Rights*.¹³ In a speech on 4 July 1876, Clark celebrated the principles the Australians shared with the American revolutionaries and concluded with a toast: 'I give you the Declaration of Independence of the Thirteen North American British Colonies.'¹⁴

Clark was a dedicated 'federalist',¹⁵ joining with others who wanted to form a single Australian nation combining the then six separate English colonies on the Australian continent under one constitutional system. In 1890, Clark was one of the 14 conferees participating in the preparation for a constitutional convention, and he was a delegate to the first Australasian Constitutional Convention at

Denholm, above n 1, 119–20; Williamson, above n 1, 127–8; Clark, 'Why I Am a Democrat', above n 1, 30–1.

⁴ Stefan Petrow, 'Andrew Inglis Clark as Attorney-General' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 36.

⁵ Sir Guy Green, 'Mr Justice Clark' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 286.

⁶ Richard Davis, 'Inglis Clark and the Foundation of the University of Tasmania' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 169.

⁷ Denholm, above n 1, 120. See, eg. A Inglis Clark, *Studies in Australian Constitutional Law* (1901).

⁸ Peter Botsman, 'Commentary on the Draft Constitution by Andrew Inglis Clark' in Michael White and Aladin Rahemtula (eds), *Sir Samuel Griffith: The Law and the Constitution* (2002) 125, 126; J A La Nauze, *The Making of the Australian Constitution* (1972) 13, 24–6, 81, 278; J A La Nauze, 'Who Are the Fathers?' in Helen Irving and Stuart Macintyre (eds), *No Ordinary Act: Essays on Federation and the Constitution by J A La Nauze* (2001) 86, 89–90; F M Neasey and L J Neasey, *Andrew Inglis Clark* (2001) 1, 126, 176–7, 226–7, 230–1.

⁹ Inglis Clark, 'The Future of the Australian Commonwealth: A Province or a Nation?' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 240.

¹⁰ Reynolds, above n 1. See generally John M Williams, "'With Eyes Open": Andrew Inglis Clark and Our Republican Tradition' (1995) 23 *Federal Law Review* 149; James Warden, 'Calculating Happiness: Andrew Inglis Clark and Thomas Jefferson in Pursuit of the Republic' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 133.

¹¹ Clark, *Studies in Australian Constitutional Law*, above n 7, 368.

¹² *Bill of Rights Act 1689*, 1 Wm & M sess 2, c 2.

¹³ *United States Constitution* amends I–X.

¹⁴ Reynolds, above n 1, 63.

¹⁵ Marcus Haward, 'Andrew Inglis Clark and Australian Federalism' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 45, 45.

Sydney in 1891.¹⁶ For reasons never entirely clear, Clark chose not to be a delegate to the second Australasian Constitutional Convention in 1897–98 and chose not to take an active role in supporting the referendum to ratify the *Constitution* drafted by that Convention.¹⁷ In 1897, he participated actively in the Tasmanian Parliament's consideration of the Adelaide draft Bill, and he participated in the Melbourne Debates from outside the Convention in 1898.¹⁸ After its approval in an Australian referendum and subsequent enactment as a British statute, Clark gave the new *Constitution* his enthusiastic support.¹⁹

Clark went to the 1891 Convention with a complete draft Constitution.²⁰ In substantial parts, Clark's Constitution was based on the *United States Constitution* (though within the framework of a constitutional monarchy under England's 'unwritten' constitution), and he was unambiguous in attributing his proposed Constitution to its American source.²¹ After briefly discussing three existing models of federalism (Canada, Switzerland, and the United States) and explaining why the American model was particularly suitable for Australia,²² Clark wrote, 'I have, therefore, drafted the accompanying Bill in accordance with the distinctive feature of the *American Constitution* as contrasted with the *Constitution of the Canadian Dominion*'; with respect to most of the content of his Constitution, Clark continued, 'I have followed very closely the *Constitution of the United States*'.²³

¹⁶ La Nauze, *The Making of the Australian Constitution*, above n 8, 13, 31.

¹⁷ F M Neasey, 'Andrew Inglis Clark and Federation after 1891' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 37, 37; Roe, 'The Federation Divide', above n 1, 97 (Clark's 'contrariness in this can never be altogether resolved'); Peter Still, *Andrew Inglis Clark and the Evolution of the Australian Commonwealth* (BA Honours Thesis, The Australian National University, 1998) 27, 34–7.

¹⁸ Neasey and Neasey, above n 8, 190–7.

¹⁹ See generally Clark, *Studies in Australian Constitutional Law*, above n 7, and see especially (at 358) his continuing identification of the *Australian Constitution* with its American predecessor. See also above n 17.

²⁰ See La Nauze, *The Making of the Australian Constitution*, above n 8, 24 (Clark's Constitution was sent to Sir Henry Parkes, Edmund Barton and others, and was 'known at least to the leading delegates' as the Convention began); John M Williams, *The Australian Constitution: A Documentary History* (2005) 63–5 (sent to Parkes, Barton, Sir George Higinbotham, and 'perhaps others'); Alex C Castles, 'Two Colonial Democrats: Clark and Kingston and the Draft Constitution of 1891' in Marcus Haward and James Warden (eds), *An Australian Democrat: The Life, Work and Consequences of Andrew Inglis Clark* (1995) 19, 22 ('circulated to selected delegates'). Charles Kingston also provided a pre-Convention constitutional draft. Kingston was an important Australian constitutional framer, and the contributions of his draft and his drafting ability are carefully discussed in Alex C Castles, 'Clark, Kingston and the Draft Constitution of 1891' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 261.

²¹ Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2009) 109.

²² Because the *United States Constitution* created a true federal system with significant power left to the states: 'Inglis Clark's Memorandum to Delegates' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 65, 66–7. See *ibid* 108–11 (summarising Clark's federalist views and noting his positive view of Swiss federalism). A summary of sources for each provision in Clark's Constitution makes it clear that substantial content is also drawn from the *Canadian Constitution (British North American Act 1867 (Imp), 30 & 31 Vict, c 3)*: Neasey and Neasey, above n 8, 283–90.

²³ 'Inglis Clark's Memorandum to Delegates', above n 22, 67.

This article was inspired by Clark's extremely important contribution in bringing much of art III of the *United States Constitution* into Chapter III of the *Australian Constitution*, and I intend to underline the important influence of Clark and the *United States Constitution*. But although Clark stood first in admiring the *United States Constitution* and the United States Supreme Court, he did not stand alone.²⁴ This article stresses the Australian framers' citation and discussion of American constitutional sources. This means that considerable attention is given to the words the framers used and to what they said about the words which they adopted and considered adopting in the *Australian Constitution*. Unavoidably, such a focus could raise questions about apparent departures from what the framers thought they were doing. But the article does not attempt to pin down the framers' 'original intent' nor, as a matter of principle, to critique the propriety of departures from what the framers intended.²⁵ Nor am I suggesting that this aspect of the *Australian Constitution* is or should be the *United States Constitution* in form or substance. Clark and other framers of the *Australian Constitution* were impressed with and wanted to emulate the *United States Constitution when it fitted their continent and their unique needs*. But not otherwise.²⁶

What this article strives to capture is a complex interaction.²⁷ Starting with Clark's draft Constitution, for every issue concerning the judiciary that became the focus of significant debate at the Australian Constitutional Conventions sitting in 1891, 1897 and 1898, the *United States Constitution* and American constitutional law were part of the debate, and often a very central part. So, if one starts to look for the significant parts of the Convention Debates on the 'judicature', one ends up noticing what the Australian framers had to say about

²⁴ See, eg. *Official Report of the National Australasian Convention Debates*, Sydney, 4 March 1891, 24 (Sir Henry Parkes) ('that great country to which we must constantly look, the United States of America'); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 936 (Josiah Symon) ('where the system is most perfect, in the United States'); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 272 (Sir George Reid) ('the *Constitution of the United States*, which we would do well to follow'). See also Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31 *Federal Law Review* 87, 98 ('virtually all of the "progressivist" contributions from the Debates bear the very obvious mark of Lord Bryce and his near adulation of the Supreme Court of the United States and its great Chief Justice John Marshall').

²⁵ United States Supreme Court Justice Antonin Scalia's strong criticism of citation of foreign law by American courts interpreting the *United States Constitution* is partly based on the fact that those foreign views could not have been in the minds of the framers of the *United States Constitution: Sosa v Alvarez-Machain*, 542 US 692, 750 (Scalia J for Rehnquist CJ, Scalia and Thomas JJ) (2004). However strong or weak that line of argument, it is patently not available — not automatically and always available — for the purpose of challenging the invocation of American constitutional law in interpreting the *Australian Constitution*.

²⁶ Sir Owen Dixon famously said, '[t]he framers of our own federal *Commonwealth Constitution*' could not escape from the fascination with the 'incomparable model' of the *United States Constitution*. 'Its contemplation damped the smouldering fires of their originality': Sir Owen Dixon, *Jesting Pilate: And Other Papers and Addresses* (1965) 44. Whenever American precedents form part of the Australian constitutional debate, Sir Owen's statement raises the question whether, and with what effect, that fascination was operating.

²⁷ It goes without saying that any attempt to look at an American influence on the *Australian Constitution* owes much to the scholarship of others, whether cited or not, and that neither complete nor adequate recognition would be possible.

the *United States Constitution* on that subject. In the same way, if one starts by looking for what the framers said about American constitutional law concerning the judiciary, one ends up studying all of the important issues concerning the judiciary that arose at the several sittings of the Convention.

In the analysis in this article, I try to demonstrate the nature of the debate about the judiciary issues that concerned the framers, how Clark's Constitution and the *United States Constitution* were relevant to those issues and how the issues were resolved. Part II begins with a very concise overview of the constitution-making process at the Constitutional Conventions of 1891, 1897 and 1898, and of Clark's role in the drafting of what became Chapter III of the *Australian Constitution*. Part III discusses the vesting of federal jurisdiction in the High Court, other federal courts and other (non-federal) courts. Part IV deals with the structure of the High Court of Australia specifically and of Australian federal courts generally. Part V looks at the subject 'matters' over which federal judicial power can be exercised. Part VI acknowledges Clark's departure from the American precedent in giving the High Court a general jurisdiction as a court of appeal and stresses his consistent hostility to Privy Council appeals.

Each Part after the overview starts with Clark's draft Constitution and the *United States Constitution* and provides detailed coverage of the Convention Debates of 1891, 1897 and 1898 affecting the federal courts and federal jurisdiction. On a selective basis, then, each Part of the article analyses problems and issues that occurred in or emerge from those Debates. It is a selectivity that grows out of what was debated and adopted by the Australian framers and subsequently has become relevant to the development of Australian constitutional law. In Part III, the selected problem given special attention concerns the Australian framers' intention to follow the *United States Constitution's* use of state courts in deciding federal law and to perfect that use. The discussion of this problem culminates with consideration of the unique case of *Kable v Director of Public Prosecutions (NSW)* ('*Kable*')²⁸ and its remarkably far-reaching rationale. In Part IV, the problem analysed concerns the parallel but different means adopted in the *Australian* and *United States Constitutions* to protect the independence of federal judges. This problem considers the implications of the Australian provisions governing the removal of federal judges that received attention when charges were made against Justice Lionel Murphy. Part V analyses three distinct aspects of federal jurisdiction: the first concerning sovereign immunity where the two constitutional systems have taken surprisingly contrasting approaches; the second concerning a lesson confusingly learned by the framers from the important American case of *Marbury v Madison* ('*Marbury*');²⁹ and the third concerning the continuing ambiguity of the 'exceptions and regulations' power of the national legislature in each country over the appellate jurisdiction of its Supreme Court. Finally, Part VI provides a coda which highlights the preceding Parts through a sharp contrast: a claim of a deep, though largely silent, American influence on Clark and on the framers'

²⁸ (1996) 189 CLR 51.

²⁹ 5 US (1 Cranch) 137 (1803).

debate concerning Privy Council appeals. But, to repeat, the discussion throughout is focused *selectively* on the dimensions of the areas for which, largely through Clark's Constitution, there is a significant American ingredient. This work is in no sense a treatise on Australian constitutional law.

II OVERVIEW: THE AUSTRALASIAN CONSTITUTIONAL CONVENTIONS³⁰ AND THE EVOLUTION OF CLARK'S CONSTITUTION — A CONCISE SUMMARY³¹

In the pages that follow, I will give special attention to the debates among the framers at the Conventions³² and to the sequential drafts through which the *Australian Constitution* evolved.³³ To understand better the discussion in this article, it is helpful to have a broad outline of the process through which the *Australian Constitution* was made and to have a concise overview of the gradual evolution from Clark's 1891 draft to the current Chapter III.

A *The Australasian Constitutional Conventions*

Although there were earlier efforts to bring together the several colonies on the Australian continent,³⁴ the activity most directly leading to the creation of the *Australian Constitution* occurred during the last decade of the 19th century. That 10-year stretch started with a conference in Melbourne in 1890,³⁵ designed to prepare the way for a national constitutional convention,³⁶ and ended with an

³⁰ 'Australasian' contemplated New Zealand and Fiji participation; New Zealand stayed involved on the edge of the process and tried to keep its options open, but did not seriously consider being a member: La Nauze, *The Making of the Australian Constitution*, above n 8, 10, 20–1.

³¹ This summary relies primarily on the incomparable history of the constitution-making process by John La Nauze (ibid) and the magnificent collection of the constituent documents in John M Williams, *A Documentary History*, above n 20.

³² Unlike the secret American convention in Philadelphia in 1787, a verbatim record was kept of the 1890s Convention Debates, following a decision to conduct Convention proceedings in public and keep verbatim transcript of proceedings: see, eg, *Official Report of the National Australasian Convention Debates*, Sydney, 3 March 1891, 9. The *Official Report of the National Australasian Convention Debates* is the official report of the first Convention (Sydney, vol I, 1891); the *Official Record of the Debates of the Australasian Federal Convention* is the official report of the second Convention (with sittings in Adelaide, vol III, 1897; Sydney, vol II, 1897; Melbourne, vols IV and V, 1898). Although the Adelaide session met from 22 March to 23 April (or, officially, 5 May) 1897 and the Sydney session met from 2 to 24 September 1897, a printer's error in the 1986 reprinting resulted in labelling the earlier Adelaide volume as III and the later Sydney volume as II.

³³ These drafts (with only rare omissions from the sequence) are collected in John M Williams, *A Documentary History*, above n 20.

³⁴ For a discussion of earlier relevant material, see La Nauze, *The Making of the Australian Constitution*, above n 8, 1–5; John M Williams, *A Documentary History*, above n 20, 3–21; John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) 79–123.

³⁵ See generally *Debates and Proceedings of the Australasian Federation Conference*, Melbourne, 6–14 February 1890.

³⁶ See generally La Nauze, *The Making of the Australian Constitution*, above n 8, 6–19; John M Williams, *A Documentary History*, above n 20, 22–5; Alfred Deakin, 'And Be One People': *Alfred Deakin's Federal Story* (1995) 26–32.

Australian Constitution, effective 1 January 1901.³⁷ The actual deliberative constitution-making process occurred at two 'Australasian Constitutional Conventions'³⁸ — one meeting in Sydney in 1891, the other meeting in separate sittings in Adelaide and Sydney in 1897 and Melbourne in 1898.

At each Convention, much of the work was done by the 'framers' through three committees (Finance, Judiciary, Constitutional) and a three-person Drafting Committee (drawn from the Constitutional Committee).³⁹ Sir Samuel Walker Griffith was chair of the Drafting Committee and the principal draftsman of the Constitution Bill adopted by the Sydney Convention in 1891. A significant part of the drafting occurred over the Easter weekend during the working voyage of the steamship yacht *Lucinda* from Port Jackson to the Hawkesbury River, 20 miles north of Sydney.⁴⁰ Griffith later collected and published, as the 'Successive Stages of the *Constitution of the Commonwealth of Australia*',⁴¹ the documents which he regarded as showing the evolution of the 1891 Bill.⁴²

Following the adjournment of the Sydney Convention in 1891, a hiatus of several years intervened before the second Convention was assembled in Adelaide in 1897.⁴³ Neither Griffith nor Clark attended the second Convention.

³⁷ See La Nauze, *The Making of the Australian Constitution*, above n 8, 1, 269. According to *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, ss 3–4, the *Australian Constitution* was to take effect on a day appointed by Proclamation of the Queen (which was 1 January 1901).

³⁸ See above n 30. Although the Convention deliberations were recorded, the committee meetings and informal discussions among the framers were not: see Alex C Castles, 'The Voyage of the "Lucinda" and the Drafting of the *Australian Constitution* in 1891' (1991) 65 *Australian Law Journal* 277, 279–81 (stressing the consciously secret drafting process in 1891); La Nauze, *The Making of the Australian Constitution*, above n 8, 144 (reporting possible importance of after-hours discussion); La Nauze, 'Who Are the Fathers?', above n 8, 106–9 (offering speculative analysis suggesting that the recorded in-convention participation does not misrepresent actual contributions of framers).

³⁹ See La Nauze, *The Making of the Australian Constitution*, above n 8, 122–38; John M Williams, *A Documentary History*, above n 20, 61–2, 481–6, 493–5. At the first Convention, the members of the Drafting Committee were Griffith (chair), Clark and Kingston (and sometimes Barton); at the second, Barton (chair), O'Connor and Downer.

⁴⁰ See La Nauze, *The Making of the Australian Constitution*, above n 8, 64–8; Neasey and Neasey, above n 8, 169, 171–2.

⁴¹ Given the fact that 'Successive Stages of the *Constitution of the Commonwealth of Australia*' in Griffith's collection ends with the Bill adopted in 1891 and includes nothing relating to the subsequent 1897–98 Convention, Sir Samuel cannot be accused of undue modesty. Yet, giving him his due, much later, Williams said that Griffith's collection of '*Successive Stages of the Constitution* is the centrepiece in any collection of the working documents related to the drafting of the *Australian Constitution*': John M Williams, *A Documentary History*, above n 20, 31. See also La Nauze, *The Making of the Australian Constitution*, above n 8, 78, who said '[t]he draft of 1891 is the *Constitution* of 1900, not its father or grandfather.'

⁴² All of which are reproduced as part of Williams's collection, John M Williams, *A Documentary History*, above n 20. The 'Successive Stages' collect 14 numbered documents, including the Clark draft Constitution (at 94) and Kingston's draft Constitution (at 116). The relationship of the Clark and Kingston drafts and the role the Kingston draft played at the Convention are unclear, but the Kingston draft is sometimes thought, itself, to be derived from Clark's (see at 114), and it has not been regarded as a rival in importance to the Clark draft (see La Nauze, *The Making of the Australian Constitution*, above n 8, 49, 75). See generally Castles, 'Two Colonial Democrats', above n 20.

⁴³ The reasons for the hiatus are described by La Nauze in a chapter tellingly entitled "'Put By", 1891–1897': La Nauze, *The Making of the Australian Constitution*, above n 8, ch 6.

Formally, the Adelaide Convention voted to start from scratch,⁴⁴ but, as a practical matter, the Bill approved in 1891 was constantly before the 1897–98 framers;⁴⁵ and Chapter III as proposed by the Drafting Committee in 1897 was very similar in substance and in form to the Chapter III adopted by the 1891 Convention.⁴⁶ Under the terms that reinvigorated the federation process between 1891 and 1897, the Bill approved by the Convention in Adelaide was submitted to all the colonial Parliaments for suggested revisions,⁴⁷ the Convention's consideration of which began in Sydney later in 1897 and was completed in Melbourne in 1898.⁴⁸ After a narrowly failed referendum in 1898⁴⁹ and some changes at a Premiers' Conference, a modified Constitution Bill was ratified in a second national referendum in 1899.⁵⁰ The Constitution having been written and approved in Australia by Australians, it then had to be enacted as an Imperial statute by the British Parliament in London, which, with some modifications, it was in July of 1900.⁵¹

B *From Clark's Draft to the Australian Constitution*

The evidence is very strong that the drafting process concerning the judiciary was built on the Constitution which Clark brought to Sydney in 1891. Clark's Constitution is the first of the documents in the form of a full constitution listed by Griffith in the 'Successive Stages'.⁵² Griffith described it as 'Mr Clark's Draft of a Constitution Bill prepared before the Convention (*with alterations of clauses made use of in preparation of the Constitution*).'⁵³ Professor La Nauze writes that, on 23 March 1891, Griffith 'went right through Clark's draft, marking the clauses' for future use, 'and that meant nearly all of them.'⁵⁴ On 23 March 1891,

⁴⁴ Ibid 108–9; John M Williams, *A Documentary History*, above n 20, 476–8.

⁴⁵ John M Williams, *A Documentary History*, above n 20, 483.

⁴⁶ Compare 'Draft Constitution Adopted by the Convention, 9 April 1891' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 435, 450–2, with 'Draft Bill, 12 April 1897' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 499, 515–17.

⁴⁷ See La Nauze, *The Making of the Australian Constitution*, above n 8, 90; John M Williams, *A Documentary History*, above n 20, 612, 666–8; 'Tabular Statement of Amendments Made by Colonial Parliaments, 8 September 1897' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 669. The Colonial Office and the Legal Office in London also submitted extensive comments on the Adelaide Constitution Bill: John M Williams, *A Documentary History*, above n 20, ch 29.

⁴⁸ See La Nauze, *The Making of the Australian Constitution*, above n 8, 177–95, 202–23. The judicature provisions were considered by the Convention in Melbourne, but not in Sydney: at 219.

⁴⁹ Only because New South Wales did not reach the supermajority it set for itself: *ibid* 240.

⁵⁰ See *ibid* 241–6.

⁵¹ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, which received the Royal Assent of Queen Victoria on 9 July 1900. See *ibid* 248–69.

⁵² John M Williams, *A Documentary History*, above n 20, 32.

⁵³ 'Inglis Clark's Bill with Griffith's Annotations' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 94 (emphasis added).

⁵⁴ La Nauze, *The Making of the Australian Constitution*, above n 8, 49–50. See also John M Williams, *A Documentary History*, above n 20, 61. For the 'Federal Judicatory' part of Clark's Constitution, every clause was so marked, and no alterations were indicated in this first go-through: *ibid* 106–7.

when Griffith (alone) took his first drafting step, he was evidently using Clark's Constitution as the foundation for the judiciary part of his draft, not the somewhat different Judiciary Committee draft,⁵⁵ which had not yet been delivered.⁵⁶

Griffith, still working alone the next day (24 March), prepared a draft, which he labelled 'First Proof' and which, he noted, was sent to the printer on 24 March.⁵⁷ In *The Australian Constitution: A Documentary History* this appears as a printed document with substantial handwritten editing, but there is no explanation of the precise source of the printed version of this document.⁵⁸ La Nauze speculates plausibly that the copy sent to the printer 'comprised a mixture of manuscript pages and sheets on which cuttings from a copy of Clark's draft were pasted'.⁵⁹ Those 'cuttings', with respect to the judiciary at least, must have comprised the core of what went to the printer. The printed version of the judicature part of 'First Proof' was not itself the Clark Constitution, but the bulk of the document sent to the printer from which the judiciary part of 'First Proof' directly evolved is plainly derived from Clark's Constitution.⁶⁰

It seems likely that the process started with a printed version of the judicature part of Clark's Constitution.⁶¹ Griffith would have made editing notes on that

⁵⁵ 'Judiciary Committee Report, 24 March 1891' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 358, 359–62.

⁵⁶ Clark's statement to the Convention on the morning of 24 March indicated that the report was not then complete (*Official Report of the National Australasian Convention Debates*, Sydney, 24 March 1891, 513 (Andrew Inglis Clark)), and the last (and most contentious) committee meeting was not held until sometime on 24 March. According to Professor Castles, however, the report was 'available' to Griffith as he began drafting: Castles, 'Clark, Kingston and the Draft Constitution of 1891', above n 20, 273. Although Castles cites no source for this conclusion, it is possible that a partial draft of the Judiciary Committee report was made 'available' to Griffith in advance of the formal report or that Clark communicated some of the substance of the report to Griffith.

⁵⁷ 'First Proof, 24 March 1891' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 135, 135.

⁵⁸ Castles, 'Clark, Kingston and the Draft Constitution of 1891', above n 20, 275.

⁵⁹ La Nauze, *The Making of the Australian Constitution*, above n 8, 50.

⁶⁰ The provisions in this printed version concerning the judicial branch were numbered ss 56–69 ('First Proof, 24 March 1891', above n 57, 151–2) and they contain the substance of Clark's ss 59–65 ('Inglis Clark's Bill for the Federation of the Australasian Colonies' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 80, 88–9), albeit with a fair amount of detailed editing. This is particularly easy to see with respect to Griffith's ss 56–61 (incorporating most of Clark's ss 59–64). For example, in the beginning of the judiciary provision of the two drafts, Clark's s 59 reads, 'The Judicial power of the Federal Dominion of Australasia shall be vested in one Supreme Court, and in such Inferior Courts as the Federal Parliament may from time to time create and establish' and Griffith's s 56 is identical except for changing the country and court names. Similarly, Griffith's ss 57–9, dealing with appointment, tenure and jurisdiction of the federal courts, closely parallel Clark's ss 60–2. Furthermore, Griffith's s 64 parallels the second paragraph of Clark's s 64; Griffith's ss 65–6 replace Clark's similar ss 65–6. For virtually all of these items, no-one carefully reading the two texts would doubt the source of Griffith's draft. One small exception that really proves the point is the apparent substitution of Kingston's jurisdictional category number eight for Clark's number eight: see Castles, 'Clark, Kingston and the Draft Constitution of 1891', above n 20, 275. Griffith's primary substantive contributions to the judiciary provisions in the draft that became the printed version of 'First Proof' empowered Parliament to add to the High Court's original jurisdiction (s 63), which probably came from Clark's 'Judiciary Committee Report, 24 March 1891', above n 55, 360–1, and his qualification of Clark's elimination of Privy Council appeals (s 67).

⁶¹ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88.

copy and sent that edited document (now missing) back to the printer. He would have received a revised clean printed version back from the printer, and that version would have been edited to produce the 'First Proof'. The Francis Neasey and Lawrence Neasey biography on Clark questions La Nauze's dating of the beginning of the drafting process, suggesting that there were two or three missing stages prior to the step of 23 March.⁶²

After further editing, a newly printed version (labelled 'First Proof No 2')⁶³ was used by the Drafting Committee in its famous Easter weekend working cruise on the steam yacht *Lucinda*,⁶⁴ when further editing was done on the judiciary section.⁶⁵ Very little additional editing was done to Chapter III after the voyage of the *Lucinda*, and this part of the Constitution Bill adopted by the 1891 Convention bears an unmistakable resemblance to the Clark Constitution in most respects.⁶⁶ Despite further revisions in the 1897–98 Convention, the finished product concerning the judiciary adopted by the framers and that now forms part of the *Australian Constitution* continues to reflect the Clark Constitution.⁶⁷ Thus, through Clark's 1891 Constitution, a considerable portion of art III of the *United States Constitution* can be seen today in Chapter III of the *Australian Constitution*.⁶⁸

III THE VESTING OF FEDERAL JUDICIAL POWER

The common ground of Chapter III and art III starts at the beginning and starts with what is most fundamental. Anyone familiar with the *United States Constitution* would immediately recognise the critical (italicised) words in the first sentence of Chapter III of the *Australian Constitution*:

*The judicial power of the [nation] shall be vested in [a] ... Supreme Court, ... and in such [other federal] courts as the [national legislature] creates ...*⁶⁹

By filling in the specific parallel Australian and American words to this foundational part of the first sentence and completing the sentence, the identical and comparative language, as well as what is different, can be seen:

The judicial power of the *Commonwealth* [United States,] shall be vested in a *Federal* [one] Supreme Court, *to be called the High Court of Australia*, and in such *other federal* [inferior] courts as the *Parliament* [Congress] *creates* [may

⁶² Neasey and Neasey, above n 8, 163–5.

⁶³ 'First Proof Submitted to the Constitutional Committee, 26 March 1891' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 166.

⁶⁴ John M Williams, *A Documentary History*, above n 20, 164.

⁶⁵ See below nn 68–78 and accompanying text.

⁶⁶ Compare 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88–9, with 'Draft Constitution Adopted by the Convention, 9 April 1891', above n 46, 450–2.

⁶⁷ Compare 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88–9, with *Australian Constitution* ss 71–80.

⁶⁸ Compare 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88–9, with *Australian Constitution* ss 71–80 and *United States Constitution* art III.

⁶⁹ See *Australian Constitution* s 71 (critical words italicised and generic words in brackets).

from time to time ordain and establish], *and in such other courts as it invests with federal jurisdiction*.⁷⁰

With the exception of the last phrase, for which there is no close counterpart in the *United States Constitution*,⁷¹ there is no difference of substance between the two sentences, which provide for the judicial branch of the two national governments. A close Australian–American parallel is even more striking when the beginning of art III of the *United States Constitution* is compared with the beginning of the ‘Federal Judiciary’ part of the Constitution which Clark proposed for Australia in 1891:

The judicial power of the *Federal Dominion of Australasia* [United States,] shall be vested in one Supreme Court, and in such Inferior Courts as the *Federal Parliament* [Congress] may from time to time *create* [ordain] and establish.⁷²

A One Supreme Court

In effect, Clark proposed that the essence of the first sentence of art III of the *United States Constitution* should be the first sentence of what would become Chapter III of the *Australian Constitution*. That essence ultimately appeared as the beginning of the *Australian Constitution*’s Chapter III, ‘The Judiciary’.⁷³ But the American language in Clark’s starting place travelled a circuitous route to arrive in the *Australian Constitution*.

When the *Lucinda* steamed off for the drafting weekend over Easter, Clark was left behind, suffering from influenza (and was temporarily replaced by Edmund Barton).⁷⁴ Before the *Lucinda*’s departure, the critical vesting language still included most of Clark’s words: ‘The Judicial power’ of the Commonwealth ‘shall be vested in one’ Supreme Court.⁷⁵ By the time the *Lucinda* picked up Clark on Easter Sunday, Chapter III had been given a fundamentally different beginning: ‘The Parliament of the Commonwealth shall have power to establish a Court, which shall be called the Supreme Court of Australia.’⁷⁶

⁷⁰ *Australian Constitution* s 71 (italicised); *United States Constitution* art III § 1 (in brackets). The critical words, common to both, remain unaltered. Differences in capitalisation have been ignored.

⁷¹ But see below n 111.

⁷² ‘Inglis Clark’s Bill for the Federation of the Australasian Colonies’, above n 60, 88 (s 59) (italicised); *United States Constitution* art III § 1 (in brackets). The critical words, common to both, remain unaltered. Differences in capitalisation have been ignored. See also ‘Inglis Clark’s Bill with Griffith’s Annotations’, above n 53, 106.

⁷³ The end of that first sentence, added in Adelaide in 1897, does not change the substance of what preceded the addition.

⁷⁴ La Nauze, *The Making of the Australian Constitution*, above n 8, 64; John M Williams, *A Documentary History*, above n 20, 162–4.

⁷⁵ ‘First Proof, 24 March 1891’, above n 57, 151 (s 56). Griffith’s ‘First Proof Submitted to the Constitutional Committee, 26 March 1891’, above n 63, 178 (ch III s 1) (emphasis added), showed handwritten editing, never adopted, changing the first sentence to say that the federal judicial power ‘shall be exercised by’ one Supreme Court.

⁷⁶ ‘Proof Revised for Printer, 28 March 1891’ in John M Williams, *The Australian Constitution: A Documentary History* (2005) 187, 199 (emphasis added).

According to the story frequently told,⁷⁷ Clark complained that the *Lucinda* participants ‘messed it’ during his flu-based absence. Evidently, as has been consistently assumed, his complaint was exclusively or particularly about this shift in the manner of vesting judicial power — from something mandated by the *Constitution* to something left to the discretion of Parliament.⁷⁸ I have seen no explanation indicating who supported the change,⁷⁹ why it was made, or whether Clark (who returned before the *Lucinda* voyage ended)⁸⁰ tried but was unable to persuade other framers that his (and the American) approach was preferable.⁸¹ Given Griffith’s dominating leadership and general command of the drafting process,⁸² and his later disparaging comment regarding the American (and Clark) language,⁸³ it is easy to speculate that he was the initiator of the change and held fast to it.⁸⁴ There are no detailed minutes of the debates in the Convention committees, and, remarkably, no discussion of any kind on this issue was recorded in the transcript of the Convention Debates at the Sydney Convention in 1891.

If the 1891 framers were oblivious of or indifferent to the pregnant substance of this linguistic change, the framers who went to Adelaide in 1897 were not. Before any draft constitution was put before the Adelaide Convention, the representatives, elected from five colonies,⁸⁵ spent seven days debating⁸⁶ and eventually approving the resolutions proposed by Barton, the Convention leader and chair of the Drafting Committee in the 1897–98 Convention.⁸⁷ A theme of

⁷⁷ See, eg, Botsman, above n 8, 125, 131; Neasey and Neasey, above n 8, 169–71; La Nauze, *The Making of the Australian Constitution*, above n 8, 66–7; John M Williams, *A Documentary History*, above n 20, 164; Castles, ‘Two Colonial Democrats’, above n 20, 31. See also Haward, ‘Andrew Inglis Clark and Australian Federalism’, above n 15, 56–7.

⁷⁸ Haward, ‘Andrew Inglis Clark and Australian Federalism’, above n 15, 57.

⁷⁹ Kingston, a working member of the Drafting Committee on the *Lucinda*, had used virtually the same vesting language in the draft Constitution that he brought to Sydney as Clark used in his Constitution: see ‘Kingston’s Draft of a Constitution Bill’ in John M Williams, *The Australian Constitution: A Documentary History* (2005) 116, 127.

⁸⁰ Neasey and Neasey, above n 8, 170; La Nauze, *The Making of the Australian Constitution*, above n 8, 65.

⁸¹ Clark’s explanation did not come until more than six years later when he was acknowledging that the Constitutional Convention sitting in Adelaide had restored his original wording. As reported in 1897, ‘they altered all the clauses relating to the judicature. He found that he had to let it go as they had altered it’: Neasey and Neasey, above n 8, 170, quoting a report of Clark’s speech in the Parliament of Tasmania: ‘House of Assembly: Wednesday, July 28, 1897’, *The Mercury: Supplement* (Hobart), 29 July 1897, 2.

⁸² Deakin, ‘*And Be One People*’, above n 36, 33; see also at 12, 48, 50, 83, 149; La Nauze, *The Making of the Australian Constitution*, above n 8, 13, 39, 50, 70, 90–1, 276.

⁸³ See below n 98 and text accompanying below nn 98–103.

⁸⁴ From the distance of over 100 years and half a globe, the imagination conjures up a different confrontation between a different ‘Captain’ (Ahab) and a different ‘First Mate’ (Starbuck) on the deck of the *Pequod*: see Herman Melville, *Moby Dick: Or, the Whale* (1851) ch CXX (‘The Deck towards the End of the First Night Watch’); see also at chs CIX (‘Ahab and Starbuck in the Cabin’), CXXIII (‘The Musket’).

⁸⁵ Because of matters related to its internal political situation, Queensland was not represented at any of the three sittings of the 1897–98 Convention: see La Nauze, *The Making of the Australian Constitution*, above n 8, 91, 242.

⁸⁶ *Ibid* 112.

⁸⁷ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 31 March 1897, 395–6.

the resolutions and the related speeches was the vital importance of an independent judiciary and the American Supreme Court's model for that independence. One of Barton's resolutions specifically provided that 'this Convention approves of the framing of a Federal Constitution which shall establish ... [a] Supreme Federal Court'.⁸⁸ As Barton explained, '[t]he last portion of the resolution says: There shall be a Supreme Federal Court ... I take [that] as an essential.'⁸⁹

A speech by Sir George Reid, the Premier of New South Wales, spelt out this theme and its American connection most completely:

With reference to this matter of a Federal Judicature, there is one criticism which is not a verbal one, I think, that I wish to make. There is one example in the *Constitution of the United States*, which we would do well to follow. The Supreme Court of the United States is not a court created by Parliament, as the [1891] draft Bill proposed our Federal Court should be. It is a court embedded in the *Constitution* itself, and it is essential to the just exercise of federal powers that this Supreme Court shall be strong enough to do what is right — strong enough to act as the guardian of all the rights and liberties of the States and people of Australia. I am glad that Mr Barton agrees with me in this respect. It is almost a verbal criticism, but there is more behind it than a verbal criticism.⁹⁰

The first draft of the 1897 Judiciary Committee Report⁹¹ and the first draft of the Constitution Bill presented to the 1897 Adelaide Convention⁹² both generally embraced the 1891 Constitution Bill's provisions on the judiciary. But, contrary to the 1891 Constitution Bill, the report and the Bill returned in those first drafts to the Clark (and American) approach to vesting judicial power directly in and by the *Constitution*.⁹³ From that point on, there is no record of any effort in the Convention to reject the Clark approach or to leave the existence of the High Court to the discretion of Parliament.⁹⁴

Neither Clark nor Griffith was a framer at the linked Convention sittings held in 1897 and 1898, but both expressed views about the Convention's work at Adelaide. In discussing the Adelaide Bill in the Tasmanian Parliament, Clark expressed his general approval of the 1897 Bill reported out of Adelaide and his pleasure that his view had prevailed there.⁹⁵ As a 'most friendly critic' of the

⁸⁸ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 17 (emphasis added).

⁸⁹ *Ibid.* 24.

⁹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 272. See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 25 March 1897, 115–16 (Bernard Wise), 126–9 (Josiah Symon); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 307 (M J Clarke).

⁹¹ 'Judiciary Committee Report, 8 April 1897' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 491.

⁹² 'Draft Bill, 12 April 1897', above n 46, 515.

⁹³ *Ibid.*; 'Judiciary Committee Report, 8 April 1897', above n 91, 491.

⁹⁴ But see below n 103, summarising the Parliamentary resistance to bringing the High Court into existence.

⁹⁵ Neasey and Neasey, above n 8, 191. See also La Nauze, *The Making of the Australian Constitution*, above n 8, 76, 164–5. See also 'Inglis Clark's Memorandum of the Proposed

Adelaide Constitution Bill,⁹⁶ Griffith expressed a preference for the version of which he had been the acknowledged primary draftsman in 1891.⁹⁷ Griffith simultaneously characterised this distinction as '[t]he most important formal change'⁹⁸ and minimised it as 'of no practical importance'.⁹⁹ '[S]ubstituting the formula of the *United States Constitution*', he said, lacked practical importance because, 'until Parliament provides salaries for the Judges and the necessary machinery for the exercise of their jurisdiction, the judicial power will necessarily remain in abeyance.'¹⁰⁰ As a practical matter, Griffith was correct. As Edmund Barton, Josiah Symon and others fully realised, parliamentary action would be necessary to create the framework for the judicial branch.¹⁰¹ Therefore, Parliament could, in effect, exercise discretion that the *Constitution* did not intend to give it by failing to create the Supreme Court that the *Australian Constitution* mandated.¹⁰² But there is a difference between exercising a granted power and subverting the *Constitution*. The framers evidently thought that Parliament could be trusted not to undermine its constitutional duty to provide the legislative framework for what the *Constitution* required.¹⁰³

The framers' determination to have judicial power vested by the *Constitution* in 'a Supreme Court, to be called the High Court of Australia', was motivated primarily by their commitment to judicial independence from Parliament in order

Amendments' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 705.

⁹⁶ 'Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 616, 617 (undated but described as '[n]ot long after the Adelaide Convention concluded on 23 April 1897': John M Williams, *A Documentary History*, above n 20, 614).

⁹⁷ See generally 'Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897', above n 96; John M Williams, *A Documentary History*, above n 20, 614–15.

⁹⁸ 'Notes on the Draft Federal Constitution Framed by the Adelaide Convention of 1897', above n 96, 622. As to the implicitly less important changes between the 1891 and 1897 drafts concerning the federal judicature, Griffith had harsh criticism. The change to a 'Catalogue style of drafting' was a 'serious blemish', considered by the draftsmen of 1891 as not 'compatible with the dignity of a great instrument of government': at 621.

⁹⁹ *Ibid* 622.

¹⁰⁰ *Ibid*.

¹⁰¹ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 295–6 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1656, 1659 (Josiah Symon).

¹⁰² In a comment on this section, Quick and Garran, above n 34, 723, conclude, '[t]hese words are imperative, ... and are mandatory on the Parliament to carry the vesting into effect'. The comment (at 723–4, citing Joseph Story, *Commentaries on the Constitution of the United States* (3rd ed, 1858) vol II, 444–5) notes that this was questionable at one time in the United States, but it goes on (at 724, quoting *Martin v Hunter's Lessee*, 14 US (1 Wheat) 304, 328 (Story J for the Court); John W Burgess, *Political Science and Comparative Constitutional Law* (1891) vol II, 321; James Kent, *Commentaries on American Law* (4th ed, 1840) vol I, 290–1) to observe that Congress has no discretion.

¹⁰³ If so, the framers were only partly justified in their trust. The Parliament established by the *Australian Constitution* first met in 1901. Not until 1903 was the legislative framework provided to enable the High Court to exercise the Commonwealth's judicial power as vested in it by the *Constitution*; and, even then, the legislation had to overcome the strong resistance of some Members of Parliament who were also framers (including Glynn, Quick and Higgins) and who made arguments, among others, that had been rejected at the Constitutional Conventions: Commonwealth, *Parliamentary Debates*, House of Representatives, 9 June 1903, 617, 622–3, 629 (Patrick Glynn), 644 (Sir John Quick), 638 (Henry Higgins).

to keep Parliament within its granted legislative bounds.¹⁰⁴ This constitutional imperative has come to shape the nature of the separation of judicial from executive and legislative power in the *Australian Constitution*. The High Court has interpreted federal judicial power established in Chapter III to require that federal courts perform only judicial functions and that judicial functions are performed only by federal courts.¹⁰⁵ Accordingly, Parliament has no power to assign non-judicial functions to the federal courts nor, with one significant express exception,¹⁰⁶ to assign federal judicial functions to entities other than federal courts.¹⁰⁷ Moreover, through s 71 of the *Australian Constitution* and separation of powers principles, the High Court has derived protections of individual rights.¹⁰⁸

B Other Federal Courts

Using almost precisely the same language as art III of the *United States Constitution*,¹⁰⁹ the Clark Constitution left the creation¹¹⁰ of federal courts below the Supreme Court to the discretion of the national legislature.¹¹¹ In the United States Constitutional Convention of 1787, this provision, commonly known as the 'Madisonian Compromise', was the resolution of a dispute between the advocates of mandating lower federal courts and the advocates of leaving all federal judicial business below the Supreme Court to be done by state courts.¹¹²

¹⁰⁴ See *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 23 March 1897, 25 (Edmund Barton); *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 30 March 1897, 272 (Sir George Reid). See also below nn 220, 222–35 and accompanying text.

¹⁰⁵ *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254.

¹⁰⁶ See below nn 121–2 and accompanying text.

¹⁰⁷ Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006) 649–60; Fiona Wheeler, 'The Boilermakers Case' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 160; Fiona Wheeler, 'Original Intent and the Doctrine of the Separation of Powers in Australia' (1996) 7 *Public Law Review* 96. For a discussion of developments permitting individual federal judges to perform non-judicial functions, see Blackshield and Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (4th ed, 2006), above n 107, 673–89; Fiona Wheeler, 'Federal Judges as Holders of Non-Judicial Office' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 442.

¹⁰⁸ See below n 156 and accompanying text.

¹⁰⁹ See above n 72 and accompanying text.

¹¹⁰ In both countries, the discretion included the power to abolish as well as create: Quick and Garran, above n 34, 726. See Enid Campbell and H P Lee, *The Australian Judiciary* (2001) 63; Erwin Chemerinsky, *Federal Jurisdiction* (3rd ed, 1999) 4; Laurence H Tribe, *American Constitutional Law* (3rd ed, 2000) vol 1, 268.

¹¹¹ The power to create (and abolish) lower federal courts is not express but exists by necessary implication from s 71 and related sections: Leslie Zines, *Cowen and Zines's Federal Jurisdiction in Australia* (3rd ed, 2002) 106; Jennifer Clarke, Patrick Keyzer and James Stellios, *Hank's Australian Constitutional Law: Materials and Commentary* (8th ed, 2009) 1111. Under *United States Constitution* art I § 8 cl 9, Congress has express power '[t]o constitute Tribunals inferior to the supreme Court', but these inferior tribunals are not 'Article III courts' — that is, not inferior federal courts exercising the 'judicial power of the United States': see James E Pfander, 'Federal Supremacy, State Court Inferiority, and the Constitutionality of Jurisdiction-Stripping Legislation' (2007) 101 *Northwestern University Law Review* 191, 197–201; Tribe, *American Constitutional Law* (3rd ed, 2000), above n 110, vol 1, 285.

¹¹² Chemerinsky, *Federal Jurisdiction*, above n 110, 4.

The Australian framers adopted the policy reflected in the Madisonian Compromise, though without any evident controversy¹¹³ and without any debate recorded in any of the Australian Convention sittings. In instances such as this, when a provision went straight from the *United States Constitution*, to Clark's Constitution, through every sequential Constitution draft until enacted in the *Australian Constitution*, without change and without any recorded debate, it is impossible to know whether the result is based on a strong consensus, off-the-record deliberations or simply a lack of attention.

In the United States,¹¹⁴ but not Australia,¹¹⁵ general jurisdiction lower federal courts were created from the very beginning.¹¹⁶ From the early days of the Commonwealth, specialty courts have been created from time to time under Parliament's discretionary power to create 'other federal courts',¹¹⁷ but it was not until 1977 that the Federal Court of Australia, a general federal court below the High Court, was brought into existence.¹¹⁸ Since that time, the Federal Court has played an increasingly important role in implementing federal law in Australia.¹¹⁹

C Other Courts Vested with Federal Jurisdiction

In the last part of the first sentence of Chapter III of the *Australian Constitution*, s 71 includes a third possible locus of federal judicial power for which there is no close equivalent in either the Clark 1891 draft Constitution or the *United States Constitution*.¹²⁰ 'The judicial power of the Commonwealth shall be vested [also] ... in such other [than federal] courts as it [Parliament] invests with federal jurisdiction.'¹²¹ This provision must be read with s 77(iii), under which Parliament has power to make laws 'investing any court of a State with federal jurisdiction.'¹²² Both of these provisions were included with the 1897 Judiciary Committee's proposal to the 1897–98 Convention and initially provoked no comment or discussion in the Convention Debates.¹²³

¹¹³ The American concerns about costs and the role of state courts (see, eg, *ibid* 3) were reflected in the debate among Australian framers concerning the number and identity of judges who would sit on the High Court: see below nn 218–29 and accompanying text.

¹¹⁴ Chemerinsky, *Federal Jurisdiction*, above n 110, 4.

¹¹⁵ See P H Lane, *The Australian Federal System* (2nd ed, 1979) 512–13.

¹¹⁶ *Federal Court of Australia Act 1976* (Cth); Commonwealth, *Gazette: Special*, No S 3, 18 January 1977, 1. See Zines, *Federal Jurisdiction*, above n 111, 107–15, summarising the different history and experience of the Australian and American federal courts.

¹¹⁷ See Lane, *The Australian Federal System*, above n 115, 512–16; *ibid* 108–13.

¹¹⁸ See Lane, *The Australian Federal System*, above n 115, 516–19; Zines, *Federal Jurisdiction*, above n 111, 111–15.

¹¹⁹ See Zines, *Federal Jurisdiction*, above n 111, 112–14.

¹²⁰ But see Pfander, 'Federal Supremacy, State Court Inferiority', above n 111, describing Congress's power '[t]o constitute Tribunals inferior to the supreme Court', albeit not arguing that these courts are federal courts under art III.

¹²¹ *Australian Constitution* s 71 (emphasis added).

¹²² *Australian Constitution* s 77(iii) (emphasis added).

¹²³ The animated debate that was provoked by the provision that became s 71 focused entirely on the number of Justices to comprise the High Court: see below Part IV(A).

Plainly, these provisions were not following any specific language in the *United States Constitution*. On the contrary, the Convention Debates suggest that their inclusion was prompted by something that was missing from the *United States Constitution*. In the Melbourne sitting of the Convention, Patrick Glynn argued that what are now ss 77(ii) and (iii) should be eliminated because they were unnecessary in view of that last phrase in the first sentence of s 71.¹²⁴ Bernhard Wise, a member of the Judiciary Committee, responded: 'This gets rid of the doubt that was raised in the United States.'¹²⁵ There is nothing further in the Convention transcript to clarify the American 'doubt', and there is no record of what discussion might have occurred in the Judiciary Committee to explain Wise's reference.

A clue to the 'doubt' which Wise attributed to the United States may be provided, however, by the post-Convention analysis of John Quick and Robert Garran.¹²⁶ To unravel the mystery for which the Quick and Garran treatise may provide the critical clue, it will help to start with the so-called Madisonian Compromise already discussed and, in effect, incorporated in s 71.¹²⁷ Under that compromise, the national legislature has the power to create or not to create lower federal courts. The framers of the *United States Constitution* assumed the constitutional judicial scheme, including the vesting of the Supreme Court's appellate jurisdiction, could and would have been carried out through state courts deciding federal questions if Congress exercised its constitutional discretion not to create lower federal courts. In fact, Congress created lower federal courts. But it left much of the federal law to be decided by state courts,¹²⁸ and a question

¹²⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 348. Glynn's argument, in part, was that adding s 77(iii) to s 71 would have the unintended and undesirable consequence of limiting the last clause of the first sentence of s 71 to *only* state courts. What 'other courts' were contemplated is unclear. The possibility that the Inter-State Commission, mentioned in ss 74 and 101-4 of the *Australian Constitution*, might have been thought to be a non-federal 'court' invested with federal jurisdiction was disfavoured by Clark (Clark, *Studies in Australian Constitutional Law*, above n 7, 186) and rejected by the High Court in *New South Wales v Commonwealth* (1915) 20 CLR 54 ('*Wheat Case*'). Whether the Commonwealth Parliament has invested (or has power to invest) federal judicial power of the Commonwealth in Australian territorial courts has long seemed to be an open question: see Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 268-82, 673; Lane, *The Australian Federal System*, above n 115, 941-4; Zines, *Federal Jurisdiction*, above n 111, 177-86, 194. But it now seems to be settled that territorial courts may be such 'other courts': see *North Australian Aboriginal Legal Aid Service Inc v Bradley* (2004) 218 CLR 146, 163 (McHugh, Gummow, Kirby, Hayne and Heydon JJ) ('*Bradley*'); Leslie Zines, *The High Court and the Constitution* (5th ed, 2008) 271 fn 124. Cf Pfander, 'Federal Supremacy, State Court Inferiority', above n 111, 205 (listing courts martial and territorial courts in the United States as tribunals that Congress might 'constitute' as inferior 'Tribunals' under art I § 8 cl 9).

¹²⁵ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 348.

¹²⁶ See Quick and Garran, above n 34, 802-3.

¹²⁷ See above n 112 and accompanying text.

¹²⁸ Henry J Bourguignon, 'The Federal Key to the Judiciary Act of 1789' (1995) 46 *South Carolina Law Review* 647, 651-9, 665-7, 678-95. It was even suggested that Congress could 'ordain and establish' state courts as 'inferior Federal Courts': at 688.

arose in the United States about the relationship between the jurisdiction of state and federal courts.¹²⁹

In the *Australian Constitution*, that question was avoided through s 77(ii), which gives Parliament the power to make laws ‘defining the extent to which the jurisdiction of any federal court shall be exclusive of that which belongs to or is vested in the courts of the States.’¹³⁰ Commenting on s 77(ii), Quick and Garran say that state and federal courts would have concurrent jurisdiction when state courts are invested with federal jurisdiction, unless the federal jurisdiction, ‘in its nature’ or by legislative act, is exclusive in federal courts.¹³¹ They go on to say that in the comparable situation in the United States, it is ‘definitely settled’ that Congress has the power to make the federal jurisdiction exclusive.¹³² As it is true under the *United States Constitution*,¹³³ they add, in order to avoid subverting the High Court’s appellate jurisdiction, either state courts must be invested with federal jurisdiction or Parliament must establish lower federal court jurisdiction.¹³⁴ Section 77(ii), Quick and Garran conclude, merely makes the availability of this choice explicit whereas it was left to be implied under the *United States Constitution*.¹³⁵

When Quick and Garran turn to a specific discussion of s 77(iii), the following passage seems to speak most directly to the ‘doubt’ that, according to Wise, had been ‘raised in the United States’:

Under the *Constitution of the United States*, the Congress cannot vest federal jurisdiction in any courts except those of its own creation — or at least, it cannot compel those courts to entertain such jurisdiction; and acts of Congress purporting to vest such jurisdiction have been held unconstitutional. This [*Australian*] *Constitution* supplies the omission by giving the Federal Parliament a very full and complete power to invest the State Courts with jurisdiction in any or all of the matters enumerated in secs 75 and 76.¹³⁶

¹²⁹ See *Martin v Hunter’s Lessee*, 14 US (1 Wheat) 304, 327–8, 330–1, 339–40 (Story J for the Court) (1816); Story, above n 102, vol II, 543, 550–6; James McClellan, *Joseph Story and the American Constitution: A Study in Political and Legal Thought* (1971) 244–5; Michael G Collins, ‘Article III Cases, State Court Duties, and the Madisonian Compromise’ [1995] *Wisconsin Law Review* 39, 54; Michael G Collins, ‘The Federal Courts, the First Congress, and the Non-Settlement of 1789’ (2005) 91 *Virginia Law Review* 1515, 1530–1. See also ‘A Further View of the Judicial Department, in Relation to the Distribution of Its Authority’ in *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787* (1788) vol II, 310 (attributed to Alexander Hamilton) (*‘The Federalist No 81’*).

¹³⁰ *Australian Constitution* s 77(ii) (emphasis added).

¹³¹ Quick and Garran, above n 34, 802–3.

¹³² *Ibid* 802.

¹³³ See *Martin v Hunter’s Lessee*, 14 US (1 Wheat) 304, 340–2 (Story J for the Court) (1816); Story, above n 102, vol II, 552–5.

¹³⁴ Quick and Garran, above n 34, 802–3.

¹³⁵ *Ibid* 802.

¹³⁶ *Ibid* 803 (citations omitted). Quick and Garran cited no American cases, but they did cite Kent, above n 102, vol I, 400–4. Kent relies on discussions in state (but not federal) court cases for his conclusion that ‘[t]he doctrine seems to be admitted, that congress cannot compel a state court to entertain jurisdiction in any case’: at vol I, 402.

The quoted statement is probably correct with respect to Congress's lack of authority to vest federal jurisdiction in state courts,¹³⁷ but misleading with respect to Congress's lack of authority to 'compel those courts to entertain such jurisdiction'. In the United States, a state court can be required to decide federal claims on a non-discriminatory basis, but in doing so state courts are exercising jurisdiction conferred on them by the state.¹³⁸ If state courts are open for business and generally exercise the kind of jurisdiction appropriate for adjudicating the federal question involved, they are required to exercise their jurisdiction to decide the federal question.¹³⁹ By adding s 77(iii), therefore, the *Australian Constitution* expressly authorised Parliament to 'invest' state courts with *federal jurisdiction* and *implicitly* to mandate state courts to exercise the invested jurisdiction, whereas in the United States it was only by *implication* that state courts could be required *not to discriminate* in exercising *state jurisdiction* to decide federal questions. Furthermore, the American state courts' duty to decide federal questions on a non-discriminatory basis may not have been clearly established in the United States at the time the Australian framers were acting.¹⁴⁰

For all these reasons, it is easy to see the source of the 'doubt' about which Wise spoke. It was certainly quite reasonable for the framers who were writing the *Australian Constitution* to want to avoid a doubtful situation. Moreover, a constitutional rule based on express language is inherently less vulnerable to reinterpretation than a rule based on implication.¹⁴¹ What Quick and Garran said

¹³⁷ But see Pfander, 'Federal Supremacy, State Court Inferiority', above n 111, 231, arguing that Congress can 'constitute' state courts as 'Tribunals inferior to the supreme Court' (which are not art III courts) under art I § 8 cl 9.

¹³⁸ Chemerinsky, *Federal Jurisdiction*, above n 110, 211–13; *Alden v Maine*, 527 US 706, 752 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ) (1999).

¹³⁹ *Howlett v Rose*, 496 US 356, 367 (Stevens J for the Court) (1990); *Testa v Katt*, 330 US 386, 387 (Black J for Vinson CJ, Black, Reed, Frankfurter, Douglas, Murphy, Jackson, Rutledge and Burton JJ) (1947) ('*Testa*'); *United States v Bank of New York & Trust Co*, 296 US 463, 479 (Hughes CJ for the Court) (1936); *McKnett v St Louis & S F Railway Co*, 292 US 230, 233–4 (Brandeis J for the Court) (1934); *Mondou v New York, New Haven & Hartford Railroad Co*, 223 US 1, 59 (Van Devanter J for the Court) (1911).

¹⁴⁰ See Collins, 'Article III Cases', above n 129, 159–61: there was no state court duty to decide federal matters until 'well into' the 20th century. But see *Clafin v Houseman*, 93 US 130, 136–7 (Bradley J for the Court) (1876).

¹⁴¹ Assuming a model of constitutional law which is dynamic and always partly unsettled (see Suri Ratnapala, *Australian Constitutional Law: Foundations and Theory* (2nd ed, 2007) 1–22), it is certainly easier to open up an issue resolved on the basis of an implication than to do so for one decided on the basis of express language. In the United States, *Testa*, 330 US 386 (1947) and its predecessors and successors (see above n 139) would seem to have settled the law just described — that state courts cannot discriminate against federal issues. But the 'anti-commandeering' principle established under *New York v United States*, 505 US 144 (1992) and *Printz v United States*, 521 US 898 (1997) ('*Printz*') has invited arguments that that principle is inconsistent with the *Testa* reasoning. Compare Saikrishna Bangalore Prakash, 'Field Office Federalism' (1993) 79 *Virginia Law Review* 1957, 2007–32, with Collins, 'Article III Cases', above n 129, 166–94. See generally Evan H Caminker, 'State Sovereignty and Subordinacy: May Congress Commandeer State Officers to Implement Federal Law?' (1995) 95 *Columbia Law Review* 1001, 1022–8. See also *Printz*, 521 US 898, 928–9 (Scalia J for Rehnquist CJ, O'Connor, Scalia, Kennedy, Thomas JJ), 967–70 (Stevens J for Stevens, Souter, and Ginsburg JJ) (1997). The use of the anti-commandeering argument to overturn *Testa* has not yet carried the day in the United States (see, eg, *Alden v Maine*, 527 US 706, 740, 744, 752, 754 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ) (1999)) and the anti-commandeering principle has not been viewed favourably in Australia (see generally Matthew Moorhead,

with respect to s 77(ii) could also be said as to s 77(iii): the *Australian Constitution* made explicit what, at best, could only be implied in the United States.¹⁴²

The American ‘doubt’ which stimulated s 77(iii) may provide a counter-example to Sir Owen Dixon’s famous statement about the fascinating American constitutional model causing the Australian framers to be too complacently content to copy.¹⁴³ The contemplation of the defective American model, in this case, may have *kindled* (rather than ‘damped’) ‘the smouldering fires of [the framers’] originality.’¹⁴⁴ That possibility invites a comparison to evaluate how big a gap was filled. The Australian–American difference brought about by s 77(iii) may at first seem quite modest.

The use of state courts to enforce federal law in the United States has been extensive¹⁴⁵ and was especially so in the early days of the American Republic. Initially, even without the legislative power of ss 71 and 77(iii), American state courts were given jurisdiction over all federal questions concerning the *Constitution*, laws and treaties of the United States.¹⁴⁶ From the beginning, the assumption that state courts would exercise judicial power over art III cases and controversies in the United States was underlined by the statutory provision of Supreme Court appellate jurisdiction to review state court judgments in federal cases.¹⁴⁷ Moreover, when state courts decide federal matters, the Commonwealth Parliament, like the American Congress, ‘must take the State court[s] as it finds [them].’¹⁴⁸ In carrying out that requirement under Australian constitutional law, according to Professor Lane, the state was ‘to supply the courts’¹⁴⁹ and ‘there

‘Prohibiting the Conscription of State Officers for Commonwealth Purposes: An American Future for the State Immunity Doctrine?’ (2007) 35 *Federal Law Review* 399). But even if the anti-commandeering principle gained a foothold under Australian federalism, the express *vesting* power in s 77(iii) would make it difficult to extend the principle from the legislative and executive branches to the judicial branch.

¹⁴² Of course, being very explicit may entail the problem of unintended consequences. Particular cross-vesting legislation, designed to simplify the treatment of overlapping state and federal litigation in Australia, was held unconstitutional in *Re Wakim; Ex parte McNally* (1999) 198 CLR 511: see Zines, *Federal Jurisdiction*, above n 111, 154–5 and the authorities cited therein. In his judgment, McHugh J was influenced negatively by the express constitutional authorisation in s 77(iii): *Re Wakim; Ex parte McNally* (1999) 198 CLR 511, 557–8. He reasoned that s 77(iii)’s express grant of authority to the Commonwealth Parliament to vest federal jurisdiction in state courts implied the denial of authority to grant state jurisdiction to federal courts. No other Justice in the majority relied on this *expressio unius est exclusio alterius* reasoning, and Kirby J, in dissent, thought that s 77(iii) supported a broad cooperative federalism through reciprocal laws and jurisdictions: at 600–5.

¹⁴³ See above n 26.

¹⁴⁴ Dixon, above n 26, 44.

¹⁴⁵ See above n 128 and accompanying text.

¹⁴⁶ Bourguignon, above n 128, 684–5, 694–5. See also *Judiciary Act of 1789*, c 20, § 11, 1 Stat 73, 78–9.

¹⁴⁷ Bourguignon, above n 128, 695–700.

¹⁴⁸ Zines, *Federal Jurisdiction*, above n 111, 242. Cf ‘Congress may avail itself of state courts for the enforcement of federal rights, but it *must take the state courts as it finds them*’: *Brown v Gerdes*, 321 US 178, 190 (Frankfurter J for Frankfurter and Jackson JJ) (1944) (emphasis added).

¹⁴⁹ Lane, *The Australian Federal System*, above n 115, 695.

cannot be ... Commonwealth intrusion into the creation of a State court'.¹⁵⁰ Specifically, state court judges in whom federal jurisdiction has been vested are not required to be protected by constitutional provisions concerning security of tenure guaranteed to federal judges.¹⁵¹ In addition, it has been understood that state courts and state judges are not restricted by the full separation of powers principles, derived from s 71, which govern the federal judiciary.¹⁵²

In one important respect, in filling the gap left in art III of the *United States Constitution*, s 77(iii) has been especially valuable in also filling what could be regarded as a gap in the *Australian Constitution*.¹⁵³ The *United States Constitution* expressly prohibits the enactment of a bill of attainder by both state and federal governments¹⁵⁴ and prohibits the deprivation of any person's 'life, liberty, or property, without due process of law' by both state and federal government.¹⁵⁵ There are no such express prohibitions in the *Australian Constitution*. But, under interpretations of ss 71 and 77(iii) derived from the principle of separation of powers, courts exercising federal judicial power are empowered to protect individuals from bills of attainder and the denial of procedural due process.¹⁵⁶

1 Kable v Director of Public Prosecutions (NSW)

More directly speaking to the gap in American constitutional law, s 77(iii) may have significantly changed Australian constitutional law in the unique and interesting case of *Kable*.¹⁵⁷ A statute of New South Wales provided that a court could order the detention of a 'specified person' if it is 'satisfied, on reasonable grounds', that the person is 'more likely than not to commit a serious act of violence', whether or not there are other grounds for holding the person in lawful custody.¹⁵⁸ The statute went on to say: 'This Act authorises the making of a detention order against Gregory Wayne Kable and does not authorise the making of a detention order against any other person.'¹⁵⁹ Kable was in jail for the manslaughter of his wife and had written letters threatening his children and his

¹⁵⁰ Ibid 699.

¹⁵¹ Zines, *Federal Jurisdiction*, above n 111, 242. See below Parts IV(B)(2)(b)–(4).

¹⁵² Zines, *Federal Jurisdiction*, above n 111, 242. See above nn 105–7 and accompanying text.

¹⁵³ See generally George Williams, *A Charter of Rights for Australia* (2007); Tom Campbell, Jeffrey Goldsworthy and Adrienne Stone (eds), *Protecting Rights without a Bill of Rights: Institutional Performance and Reform in Australia* (2006); Murray R Wilcox, *An Australian Charter of Rights?* (1993).

¹⁵⁴ *United States Constitution* arts I § 10 cl 1 (state), § 9 cl 3 (federal).

¹⁵⁵ *United States Constitution* amends XIV § 1 (state), V (federal).

¹⁵⁶ See Zines, *The High Court and the Constitution*, above n 124, 273–95; Fiona Wheeler, 'Due Process, Judicial Power and Chapter III in the New High Court' (2004) 32 *Federal Law Review* 205; Fiona Wheeler, 'The Kable Doctrine and State Legislative Power over State Courts' (2005) 20(2) *Australasian Parliamentary Review* 15, 28–30. See generally Wheeler, 'Original Intent', above n 107, 96–7.

¹⁵⁷ (1996) 189 CLR 51.

¹⁵⁸ *Community Protection Act 1994* (NSW) s 5.

¹⁵⁹ *Community Protection Act 1994* (NSW) s 3.

wife's sister. The defendant raised certain federal defences,¹⁶⁰ invoking federal jurisdiction and thus triggering the state court's obligation to exercise federal judicial power.¹⁶¹ But, as already noted, state courts exercising federal jurisdiction under s 77(iii) must be taken as they are found.¹⁶² In giving their reasons for their judgments in *Kable*, the four Justices forming a majority on the High Court expressly acknowledged that this difference between state and federal courts exercising the 'judicial power of the Commonwealth' continued to apply.¹⁶³

Notwithstanding this recognised difference between federal and state courts exercising federal jurisdiction, the High Court held that the New South Wales statute was unconstitutional because its enforcement by state judges would require those judges, impermissibly, to perform functions *incompatible* with their exercise of federal judicial power in the integrated judicial system.¹⁶⁴ As stated in McHugh J's separate judgment, the New South Wales statute would 'undermine the constitutional scheme set up by Ch III of the *Constitution*',¹⁶⁵ since Chapter III gives a 'central role' to state court judges.¹⁶⁶

Public confidence in the impartial exercise of federal judicial power would soon be lost if federal or State courts exercising federal jurisdiction were not, or were not perceived to be, independent of the legislature or the executive government.¹⁶⁷

Although *Kable* seems to be a landmark change in Australian constitutional law,¹⁶⁸ its scope and application remain to be seen.¹⁶⁹ The High Court has treated *Kable* as an established principle of Australian constitutional law in several cases,¹⁷⁰ but in no case since *Kable* itself has the Court determined a state statute

¹⁶⁰ The defendant challenged the New South Wales statute because it was directed against a particular individual (relying on an implication from the *Australian Constitution*) and because it did not provide for a jury trial (relying on s 80 of the *Australian Constitution*).

¹⁶¹ *Kable* (1996) 189 CLR 51, 95 (Toohey J).

¹⁶² See above nn 148–52 and accompanying text.

¹⁶³ (1996) 189 CLR 51, 95–6 (Toohey J), 101 (Gaudron J), 110 (McHugh J), 135–6 (Gummow J).

¹⁶⁴ *Ibid* 99 (Toohey J), 102–3 (Gaudron J), 112, 114–15 (McHugh J), 137–9 (Gummow J).

¹⁶⁵ *Ibid* 115.

¹⁶⁶ *Ibid* 116.

¹⁶⁷ *Ibid*. As indicated by McHugh J (at 116) and Gummow J (at 134), and possibly Gaudron J (see at 103, noting that 'State courts, when exercising federal jurisdiction', transcended their status as state courts), it now seems to be established that the critical link is that the state court judges are part of the integrated system of enforcing federal law even if they are not exercising federal jurisdiction in the case under adjudication: see Zines, *The High Court and the Constitution*, above n 124, 270–1; Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 758. See also Wheeler, 'The *Kable* Doctrine', above n 156, 20–1. See generally Zines, *Federal Jurisdiction*, above n 111, 245.

¹⁶⁸ See Zines, *Federal Jurisdiction*, above n 111, 243 (where a 'long-standing view of the largely unrestricted power of State Parliaments in relation to their courts was greatly changed' by *Kable*); Wheeler, 'The *Kable* Doctrine', above n 156, 20–1 ('transforms longstanding assumptions', and clearly alters historical patterns, 'bringing state courts and their functions within the control of the *Australian Constitution*' to an extent not anticipated).

¹⁶⁹ Wheeler, 'The *Kable* Doctrine', above n 156, 22–8, summarising questions about the future application and scope of *Kable*.

¹⁷⁰ See, eg, *K-Generation Pty Ltd v Liquor Licensing Court* (2009) 237 CLR 501 ('*K-Generation*'); *Gypsy Jokers Motorcycle Club Inc v Commissioner of Police* (2008) 234 CLR 532 ('*Gypsy*');

to be unconstitutional under that principle.¹⁷¹ In *Fardon v Attorney-General (Qld)*, involving a protective detention statute, the Court distinguished *Kable* on the ground that a particular individual was not singled out and the statute required the court to perform functions characteristic of a traditional exercise of judicial power.¹⁷² In two of the cases considered by the High Court, a challenge was made on the basis of the withholding of evidence from a litigant to protect important state interests,¹⁷³ and the Court rejected the claim of a denial of a fair hearing¹⁷⁴ (a claim which might have been made under s 71 even before the advent of *Kable*). Two cases involved statutes that would have been unconstitutional under s 72 had a federal court been affected — in one case because of the use of acting judges,¹⁷⁵ and in the other because of the lack of a fixed compensation.¹⁷⁶ In both of these cases, the policies governed by s 72 for federal judges were considered relevant but not controlling.¹⁷⁷

The judgments in these cases repeatedly stressed the significance of institutional integrity through judicial independence from executive control, which the High Court had found lacking in *Kable* but present in all of the other cases.¹⁷⁸ Although conceding that the requirement of taking state courts as they are found had been affected by *Kable*, the High Court Justices continue to treat that requirement as relevant.¹⁷⁹ By what these cases say as well as what they have done, the High Court consistently maintains that *Kable* is governed by a principle that will rarely be invoked to invalidate a state statute.¹⁸⁰

2 Mandated State Courts

According to the *Kable* principle, the nature of the Commonwealth judicial system assumed the existence of state courts which would exercise federal jurisdiction when empowered to do so by Parliament and would do so in a

Jokers); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45 ('*Forge*'); *Fardon v A-G (Qld)* (2004) 223 CLR 575 ('*Fardon*'); *Bradley* (2004) 218 CLR 146. See also *Thomas v Mowbray* (2007) 233 CLR 307.

¹⁷¹ But see Clarke, Keyzer, and Stellios, above n 111, 1156.

¹⁷² (2004) 223 CLR 575, 591–2 (Gleeson CJ); see also at 595–7 (McHugh J), 658 (Callinan and Heydon JJ).

¹⁷³ *K-Generation* (2009) 237 CLR 501; *Gypsy Jokers* (2008) 234 CLR 532.

¹⁷⁴ *K-Generation* (2009) 237 CLR 501, 531–2 (French CJ), 542–4 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ); *Gypsy Jokers* (2008) 234 CLR 532, 549–50 (Gleeson CJ), 558–61 (Gummow, Hayne, Heydon and Kiefel JJ), 594–8 (Crennan J).

¹⁷⁵ *Forge* (2006) 228 CLR 45. See below Parts IV(B)(2)(b)–(3), (6), discussing appointment and removal of federal judges.

¹⁷⁶ *Bradley* (2004) 218 CLR 146. See below Part IV(B)(2)(a), discussing compensation of federal judges.

¹⁷⁷ See *Forge* (2006) 228 CLR 45, 66–9 (Gleeson CJ), 73, 76–7 (Gummow, Hayne and Crennan JJ); *Bradley* (2004) 218 CLR 146, 152 (Gleeson CJ), 163, 165–6, 170–2 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ).

¹⁷⁸ See *K-Generation* (2009) 237 CLR 501, 532 (French CJ); *Gypsy Jokers* (2008) 234 CLR 532, 553 (Gummow, Hayne, Heydon and Kiefel JJ); *Bradley* (2004) 218 CLR 146, 172 (McHugh, Gummow, Kirby, Hayne, Callinan and Heydon JJ); *Forge* (2006) 228 CLR 45, 69 (Gleeson CJ), 94 (Kirby J); *Fardon* (2004) 223 CLR 575, 592–3 (Gleeson CJ).

¹⁷⁹ See, eg, *K-Generation* (2009) 237 CLR 501, 530 (French CJ).

¹⁸⁰ *Ibid* 575 (Kirby J). See also *Fardon* (2004) 223 CLR 575, 601 (McHugh J), 618 (Gummow J).

manner consistent with the exercise of federal judicial power.¹⁸¹ McHugh J concluded, with the concurrence of Gaudron and Gummow JJ, that ‘the *Constitution* has withdrawn from each State the power to abolish its Supreme Courts or to leave its people without the protection of a judicial system.’¹⁸² McHugh J relied upon several Australian constitutional provisions:¹⁸³ the supremacy clause, declaring that the *Constitution* and federal laws were ‘binding on the courts, judges, and people of every State’;¹⁸⁴ the requirement that ‘[f]ull faith and credit’ be given to ‘judicial proceedings of every State’;¹⁸⁵ and the grant to Parliament of power to make laws with respect to ‘service and execution ... of ... judgments of the courts of the States’¹⁸⁶ and with respect to ‘the recognition throughout the Commonwealth of ... the judicial proceedings of the States’.¹⁸⁷ He added: ‘Section 77 of the *Constitution* also necessarily implies the existence of a court system in each State.’¹⁸⁸

This aspect of the *Kable* principle seems to suggest that s 77(iii) has filled a very large gap identified by the ‘doubt’ raised in the United States. Although the question has not been squarely faced,¹⁸⁹ it seems most unlikely that states could be forced to maintain state courts under the *United States Constitution*.¹⁹⁰ Before *Kable*, that might have been said about Australia as well. In appraising the significance of the mandate to provide state courts, there is much common ground in identifying the ‘constitutional scheme’ characterising Chapter III and

¹⁸¹ (1996) 189 CLR 51, 94–6 (Toohey J), 102–4 (Gaudron J), 110–11, 115–16 (McHugh J), 139, 143 (Gummow J).

¹⁸² *Ibid* 111; see also at 103 (Gaudron J), 140 (Gummow J). Toohey J’s judgment, in not joining the other three majority Justices in this aspect of the case, may suggest that this reasoning is not central to the *Kable* ratio; but it is certainly not treated as dictum by the other Justices in the majority nor by the reasons given in subsequent decisions: see, eg, *K-Generation* (2009) 237 CLR 501, 543–4 (Gummow, Hayne, Heydon, Crennan and Kiefel JJ), 567–8 (Kirby J).

¹⁸³ *Kable* (1996) 189 CLR 51, 110 (McHugh J).

¹⁸⁴ *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 5.

¹⁸⁵ *Australian Constitution* s 118.

¹⁸⁶ *Australian Constitution* s 51(xxiv).

¹⁸⁷ *Australian Constitution* s 51(xxv). Section 51(xxxix) was not cited, although it empowers Parliament to make laws with respect to ‘matters incidental to the execution of any power vested by this Constitution in the Parliament or ... in the Federal Judicature’ (emphasis added): see Zines, *Federal Jurisdiction*, above n 111, 199, noting that state courts invested with federal jurisdiction, though they are not federal courts, are part of the federal judicature and that s 51(xxxix), in some circumstances, operates ‘upon the exercise of the legislative power which s 77(iii) itself confers.’

¹⁸⁸ *Kable* (1996) 189 CLR 51, 110 (citations omitted). The explanation of the states’ obligation to maintain state courts has also been based on s 73 by some Justices: see, eg, at 111 (McHugh J), 139 (Gummow J); *Forge* (2006) 228 CLR 45, 73–4 (Gummow, Hayne and Crennan JJ).

¹⁸⁹ ‘The requirement that a state court of competent jurisdiction treat federal law as the law of the land does not necessarily include within it a requirement that the State create a court competent to hear the case in which the federal claim is presented’: *Howlett v Rose*, 496 US 356, 372 (Stevens J for the Court) (1990) (emphasis added).

¹⁹⁰ See Collins, ‘Article III Cases’, above n 129, 196–7, indicating that coercive power of Congress to enlist state courts in the implementation of federal law is not likely to go beyond the present power to require non-discrimination. But see below n 204 (noting the possible implication of the guarantee clause of the *United States Constitution*).

the 'constitutional scheme' that could be said to characterise art III of the *United States Constitution*.¹⁹¹

Parliament (like Congress) had (and has) the power to create federal courts and thus to be able to maintain a federal judicial system without investing federal jurisdiction in state courts. As Mason J said:

Although the Commonwealth Parliament has no power to alter the structure or organization of State courts, its freedom of action is completely preserved. It has the choice of investing State courts with federal jurisdiction or of establishing appropriate federal courts.¹⁹²

The *Australian Constitution* (like the *United States Constitution*) plainly assumes that Parliament could choose *not* to rely upon state courts. While there may have been an expectation in 1897 and 1898 that Parliament would not rely upon the creation of federal courts below the High Court,¹⁹³ what the framers thought likely to happen does not convert the occurrence of that event into a constitutional fact. Consistent with several of the reasons advanced by McHugh J, the *United States Constitution* has a supremacy clause,¹⁹⁴ a full faith and credit clause,¹⁹⁵ and a clause giving Congress power to make laws that are 'necessary and proper for carrying into Execution the ... Powers vested ... in any Department or Officer' of the government of the United States.¹⁹⁶

Federalism concerns, too, are relevantly shared by the two *Constitutions*. By the express terms of Chapter III, the Commonwealth Parliament (like Congress under art III) has discretion to create or abolish federal courts, but by *Kable's* implication state Parliaments are denied such discretion in order to enhance the Commonwealth's choices. The justification of the implication must, on balance, discount the importance of the autonomy of state Parliaments¹⁹⁷ and augment the value of an integrated judicial system, including state and federal courts. To reach that balance, it was necessary for the High Court to conceptualise a 'constitutional scheme' and to include within that conception the assignment of a strong value to the use of state courts to enforce federal law. Nothing would prevent an American court from conceptualising a 'constitutional scheme' and striking the same balance, and that might be the correct balance for the United States as well as Australia. The Australian framers did not write their *Constitu-*

¹⁹¹ In exploring the Australian–American parallels, it is important to remember Clark's argument against the unity-of-the-law reason for preserving Privy Council appeals: the law in England and Australia is not like mathematics that can be learned 'without any personal experiential knowledge ... of the multiform structure and internal relations of the community in the midst of which ... judgments are to be enforced': Clark, *Studies in Australian Constitutional Law*, above n 7, 356.

¹⁹² *Commonwealth v The Hospital Contribution Fund of Australia* (1982) 150 CLR 49, 61.

¹⁹³ See Zines, *Federal Jurisdiction*, above n 111, 108.

¹⁹⁴ *United States Constitution* art VI cl 2. Cf *Commonwealth of Australia Constitution Act 1900* (Imp) 63 & 64 Vict, c 12, s 5.

¹⁹⁵ *United States Constitution* art IV § 1. Cf *Australian Constitution* s 118.

¹⁹⁶ *United States Constitution* art I § 8 cl 18. Cf *Australian Constitution* ss 51(xxiv)–(xxv).

¹⁹⁷ See *Kable* (1996) 189 CLR 51, 67–8 (Brennan J), 84–5 (Dawson J). Both Brennan and Dawson JJ dissented as to the outcome of the case.

tion to say, expressly, that those state courts must exist.¹⁹⁸ But they did write their *Constitution*, unlike their American counterparts, to say, expressly, that Parliament could invest state courts with federal jurisdiction. Clearly, in defining the determinative ‘constitutional scheme’, the inclusion of s 77(iii) does shift the federalism balance in the national direction. Whether that shift is marginal or large is a judgement call.

Inglis Clark may or may not have known about the American ‘doubt’ in 1891 when he submitted his draft Constitution based on the American model. He certainly did not attempt to fill any gap that the doubt may have identified. And, in discussing Chapter III in his 1901 treatise, he said little about s 77(iii).¹⁹⁹ Developing a ‘constitutional scheme’ to inform the meaning of the *Constitution* seems generally consistent with Clark’s ‘living force’ jurisprudence, but Clark’s opposition to reading a constitution simply to further the ‘intentions of men long since dead’ was related to the relevance of changing ‘social conditions’ and the freeing of future generations to solve unanticipated problems.²⁰⁰ The question for Clark, therefore, would be whether *Kable* was dealing with such changing conditions. In so far as *Kable* can be thought to be a protector of individual rights, Clark’s personal convictions would seem to favour that result.²⁰¹ On the other hand, Clark was a federalist who believed in protecting the interests of the several states and the members of their separate communities by preserving the states’ decision-making autonomy.²⁰² As a student of American constitutional law, Clark might have noted or anticipated the argument that the guarantee clause of the *United States Constitution*²⁰³ makes state courts obligatory and concluded that s 77(iii) was an appropriate means of achieving that same end.²⁰⁴

¹⁹⁸ Wheeler, ‘The *Kable* Doctrine’, above n 156, 15, 20; the *Kable* doctrine ‘was the result of a broad, purposive reading’ not an ‘examination of the meaning of specific constitutional language.’

¹⁹⁹ Clark, *Studies in Australian Constitutional Law*, above n 7, 153–84. In his discussion of s 77 (at 175–8), he contrasted American law in noting that the Commonwealth Parliament had power to compel state courts to entertain cases within federal jurisdiction (see at 178).

²⁰⁰ *Ibid* 21.

²⁰¹ See John M Williams, ‘Andrew Inglis Clark and Our Republican Tradition’, above n 10.

²⁰² See Clark, *Studies in Australian Constitutional Law*, above n 7, 4–13. Clark believed that federalism’s preservation of separate communities was also a protection against government abuse of power: at 8–13.

²⁰³ *United States Constitution* art IV § 4.

²⁰⁴ It has been argued that a state without courts cannot be considered to have a ‘republican form of government’ guaranteed by art IV § 4 of the *United States Constitution*: see *Minor v Happersett*, 88 US (21 Wall) 162, 175–6 (Waite CJ for the Court) (1874) (a republican form of government means the kind of government characteristic of states existing when the *Constitution* was adopted); David P Currie, ‘The Civil War Congress’ (2006) 73 *University of Chicago Law Review* 1131, 1201–11; David S Schwartz, ‘The Federal *Arbitration Act* and the Power of Congress over State Courts’ (2004) 83 *Oregon Law Review* 541, 575 fn 134; Donald L Burnett Jr, ‘A Cancer on the Republic: The Assault upon Impartiality of State Courts and the Challenge to Judicial Selection’ (2007) 34 *Fordham Urban Law Journal* 265, 271; Luke Bierman, ‘Comment on Paper by Cheek and Champagne: The Judiciary as a “Republican” Institution’ (2003) 39 *Willamette Law Review* 1385; A Benjamin Spencer, ‘Anti-Federalist Procedure’ (2007) 64 *Washington and Lee Law Review* 233, 269.

IV STRUCTURING THE FEDERAL JUDICIARY

Without regard to what might turn out to be the High Court's jurisprudence in the late 20th century, the late 19th century framers had strong views about the Court's need for independence in making judicial decisions. As we have seen, the framers of 1897 and 1898, unlike their 1891 predecessors, thought it imperative that the *Constitution* itself should vest judicial power in a federal Supreme Court²⁰⁵ — following Clark and the *United States Constitution* — in order to have a federal judiciary that could stand up to Parliament.²⁰⁶ This strong level of consensus about the importance of judicial independence, however, did not always prevent strong disagreement about what that required in establishing the constitutional structure for the High Court and for federal courts generally.²⁰⁷ The 1897–98 framers addressed themselves to issues relating to the number of High Court Justices and to the appointment, salary, and removal of all federal judges.²⁰⁸ Just as the American experience contributed to the consensus that federal judicial power should stem directly from the *Constitution*, it was frequently invoked in support of an argument concerning the way the judiciary should be structured by the *Constitution*.²⁰⁹ The lofty rhetoric with which the Supreme Court of the United States and the *United States Constitution* were often described in the debate over the structure of the federal courts is captured nicely by Josiah Symon's characterisation of the United States as the place 'where the system is most perfect'.²¹⁰

A *The Number of High Court Justices*

It is well known that Viscount James Bryce's then recently published book, *The American Commonwealth*,²¹¹ was a significant source of information and influence on the Australian framers.²¹² Bryce, like Inglis Clark, had particular admiration for the American judicial system:²¹³

No feature in the government of the United States has awakened so much curiosity in the European mind, caused so much discussion, received so much admiration, and been more frequently misunderstood, than the duties assigned

²⁰⁵ See above nn 86–94 and accompanying text.

²⁰⁶ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 934–5.

²⁰⁷ *Ibid.*

²⁰⁸ *Ibid.* 936–9.

²⁰⁹ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 946–60.

²¹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 936. The repeated invocation of the American experience occasionally tried the patience of some of the Convention representatives: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 303 (Vaiben Solomon) ('[w]e have heard too much about the example of the United States all through the meetings of this Convention').

²¹¹ James Bryce, *The American Commonwealth* (2nd revised ed, 1891).

²¹² See La Nauze, *The Making of the Australian Constitution*, above n 8, 18–20, 273.

²¹³ See Bryce, above n 211, vol 1, chs xxiii ('The Courts and the *Constitution*'), xxiv ('The Working of the Courts').

to the Supreme Court and the functions which it discharges in guarding the ark of the *Constitution*.²¹⁴ ...

[T]here is no part of the American system which reflects more credit on its authors or has worked better in practice.²¹⁵

Bryce mentioned one reservation, however, based on the *United States Constitution*'s failure to specify the number of judges who should sit on the Supreme Court:

One thing only was either forgotten or deemed undesirable, because highly inconvenient, to determine — the number of judges in the Supreme court. Here was a weak point, a joint in the court's armour through which a weapon might some day penetrate.²¹⁶

In the Constitution he submitted at Sydney in 1891, Clark made no attempt to strengthen this weak joint in the Court's armour.²¹⁷ His Constitution, like the American, was silent on the size of the High Court. But one of Sir Samuel Griffith's very first modifications of Clark's draft covering the judicial branch was an addition providing that the High Court of Australia 'shall consist of one Chief Justice and so many Associate Justices not less than four as the Federal Parliament may from time to time prescribe by law.'²¹⁸ The specification of a minimum number of Justices became a fixture of the Bills leading to the adoption of the *Australian Constitution*. The main focus of the debate concerned the relationship between the number of Justices and related cost, on the one hand, and the dignity, independence, and competence of the High Court, on the other.²¹⁹

Speaking for the Judiciary Committee, Bernhard Wise stressed the 'very great distinction between the provisions' in the 1891 Bill and the current proposal to 'vest' the High Court's judicial power in the *Constitution* itself. Wise then made the connection between independence, dignity, competence and numbers:

We cannot close our eyes to the fact that in the future controversies may arise between Parliament and the court, and it is therefore desirable that there should be no power left to reduce the efficiency of the court by reducing its numbers below what should be sufficient to inspire respect.²²⁰

In a similar vein, William McMillan invoked the 'friction of human intellect':

Of course, if you get a [John] Marshall as a Chief Justice, and two other men of equal calibre, that might be sufficient, but taking things according to ordinary

²¹⁴ Ibid vol I, 237.

²¹⁵ Ibid vol I, 250.

²¹⁶ Ibid vol I, 269.

²¹⁷ Much later, when the *Constitution* was being implemented, Clark advocated a High Court of at least five Justices: Michael Roe, 'Clark's "Reasons Why the High Court of the Commonwealth Should Consist of Not Less than Five Judges"' in Richard Ely, Marcus Howard and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 346.

²¹⁸ 'First Proof, 24 March 1891', above n 57, 151.

²¹⁹ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 934–43.

²²⁰ Ibid 935–6.

chances it seems to me that we should require a tribunal of at least five Judges to give complete satisfaction.²²¹

Contrasts and similarities to the United States featured in the debate: conceding the need to keep down expenses, Henry Dobson said that that did not apply to the High Court, which must protect 'the rights ... of the citizens. ... If America is to be any guide, the High Court there gives decisions on the most vital and important questions between the States and the Commonwealth'.²²² William Trenwith, noting that some people might be concerned by the possible elimination of Privy Council appeals (being considered in the draft then before the Convention), argued that it was essential to be able to point out that the *Constitution* would substitute a High Court 'worthy of respect', 'strong ... and dignified', 'strong in numbers, strong in intellect, and dignified in its character'.²²³

Patrick Glynn argued that the different number of states (13 versus 6) would have given rise to more opportunity for interstate antagonisms in the United States;²²⁴ it was countered that the Australian legislature was given more powers and thus could provoke more legal issues to be litigated;²²⁵ it was then argued back by Glynn that the Australian legislative powers were broader and thus would provide less occasion to draw the national legislature's action into question.²²⁶ Those wanting a High Court of at least five Justices pointed out that more litigation would occur in Australia because of disputes concerning interstate railways and canals, which were entirely missing or rare in the United States in 1787.²²⁷ Glynn gave a statistical summary of the number of United States Supreme Court cases before 1830.²²⁸ Henry Higgins pointed to the greater need for a strong judiciary in Australia than in the United States because responsible government in Australia would encourage the intertwined legislature and executive to 'pull together' to undermine the Court's independence.²²⁹

Bryce's concern about the *United States Constitution's* failure to fix the size of the Supreme Court did not depend on achieving some critical size to achieve quality or dignity but on the risk of political manipulation by the elected legislature changing the resolution of constitutional issues by changing the number of Justices on the Court and thus eroding the integrity of the judicial

²²¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 292.

²²² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 19 April 1897, 937; see also at 938 (Sir John Downer) (relating numbers of Justices to a 'very strong bench', an ability to 'resist popular pressure'), 939–40 (Alexander Peacock) (asserting that Victorian electors want a 'strong, powerful court' and pointing out that the United States Supreme Court had to say direct taxation was ultra vires).

²²³ *Ibid* 940.

²²⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 266.

²²⁵ *Ibid* (Henry Higgins).

²²⁶ *Ibid* 266–7.

²²⁷ *Ibid* 279 (Henry Higgins).

²²⁸ *Ibid* 266.

²²⁹ *Ibid* 279.

process.²³⁰ Bryce cited specific examples of such manipulation,²³¹ some of which were repeated by framers in the Convention Debates.²³²

In the end, the framers did not significantly limit either the threat that concerned Bryce or the worry about an insufficiently weighty Court. The Melbourne sitting of the Convention reduced the minimum number of puisne High Court Justices from four to two²³³ and rejected a proposal to set a maximum number,²³⁴ thus leaving Parliament the power to increase the Court's size as much as it liked and to reduce the Court to three. Sir George Reid warned the framers that they were naive to think that the abuses that occurred in the United States 'will never happen here.'²³⁵

Influenced by the goal of keeping costs down, the High Court of Australia began its operation in 1903 with the specified minimum of one Chief and two puisne Justices.²³⁶ Parliament exercised its discretion to increase the size of the High Court in two short steps, from three Justices to five in 1906 and then to seven in 1912;²³⁷ subsequently it was reduced to six and then again increased to seven.²³⁸ I know of no evidence indicating that any of the changes was itself an action designed to alter a politically disfavoured decision or judicial philosophy. But, just as Sir George Reid said in 1898, the legal authority to manipulate the size of the Court to achieve political goals remains in 2009.

B Appointment, Salary and Tenure of Federal Judges

1 Appointments

Clark's Constitution was explicitly modelled after the *United States Constitution* in most respects affecting the judiciary, but there is no reason to think that is true with respect to the appointment process. There is a superficial similarity.

²³⁰ Bryce, above n 211, vol I, 268–70.

²³¹ *Ibid* vol I, 269.

²³² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 283–4 (Isaac Isaacs), 279 (Henry Higgins). The much later, and most famous, attempt to manipulate constitutional law in the United States by changing the number of Justices was President Franklin Roosevelt's failed attempt to 'pack' the Supreme Court which was invalidating 'New Deal' legislation in the 1930s: see generally Jeff Shesol, *Supreme Power: Franklin Roosevelt vs the Supreme Court* (2010).

²³³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 306.

²³⁴ *Ibid* 308.

²³⁵ *Ibid* 307–8.

²³⁶ *Judiciary Act 1903* (Cth) s 4, later amended by *Judiciary Act 1906* (Cth) s 2. See also James Popple, 'Number of Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 505, 505. Starting with this minimal number meant that Clark's advocacy (see Andrew Inglis Clark, 'Reasons Why the High Court of the Commonwealth Should Consist of Not Less than Five Judges' in Richard Ely, Marcus Haward and James Warden (eds), *A Living Force: Andrew Inglis Clark and the Ideal of Commonwealth* (2001) 352, 352–4) and his ambition for a seat on the Court (see Hirst, *The Sentimental Nation*, above n 1, 291–2) both fell short.

²³⁷ *Judiciary Act 1906* (Cth) s 2; *Judiciary Act 1912* (Cth) s 2. See also Tony Blackshield and George Williams, *Australian Constitutional Law and Theory: Commentary and Materials* (3rd ed, 2002) 550.

²³⁸ *Judiciary Act 1933* (Cth) s 2; *Judiciary Act 1946* (Cth) s 2. Popple, above n 236, 506.

Clark's proposed Constitution provides for appointment of federal judges by 'the Governor-General by and with the advice of the Federal Executive Council'.²³⁹ That sounds a little like the American provision under which the appointment of 'Judges of the supreme Court' is by the President, 'by and with the Advice and Consent of the Senate'.²⁴⁰ But the parallel is mainly coincidental and misleading.²⁴¹

Unlike the President of the United States, the Governor-General (the Queen's representative in Australia)²⁴² is the chief executive officer in the *Constitution* in form only; the Governor-General's decisions are taken on the advice of the government through the Federal Executive Council or the Prime Minister.²⁴³ That the appointment in Clark's Constitution is 'by and with the advice of the Federal Executive Council' (and later, in the *Australian Constitution*, by the Governor-General 'in Council') means that the real power in making the appointment is in the Prime Minister, and other ministers of government, all of whom are Members of and are, at least technically, responsible to Parliament.²⁴⁴ Thus, unlike the required 'advice and consent' of the United States Senate, the approval of the 'Council' is not an approval of — and thus not a significant check by — a separate and independently elected branch of government. All of this is simply to say that the appointment processes in the Australian and American systems of government are inherently different. As Clark anticipated and as the Australian framers determined, the *Australian Constitution* adopted a responsible government system following the British or 'Westminster' model rather than the American form of government with its separation of executive and legislative power.²⁴⁵

Clark's proposal and its sequel in the *Australian Constitution* adopted in 1900 were like the *United States Constitution* in not spelling out any qualifications that restrict eligibility for appointment to the federal courts, including the highest

²³⁹ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88 (s 61).

²⁴⁰ *United States Constitution* art II § 2 cl 2.

²⁴¹ See A R Blackshield, 'The Appointment and Removal of Federal Judges' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 400, 400–3, 406–9, 426–37 (analysing the Australian appointment provisions and comparing them to the American provisions).

²⁴² *Australian Constitution* ss 2, 61.

²⁴³ See Ratnapala, above n 141, 30–8, 46–8; Cheryl Saunders, *The Australian Constitution (Annotated)* (3rd ed, 2000) 69–72. But see Michael Coper, *Encounters with the Australian Constitution* (1987) ch 6 ('Apocalypse 1975'), analysing the constitutional crisis created by the dismissal of Prime Minister Gough Whitlam by Governor-General Sir John Kerr.

²⁴⁴ By tradition — and now by statute (*High Court of Australia Act 1979* (Cth) s 6) — the Attorney-General has a significant role in the process of selecting the appointee: see Gerard Carney, 'Attorney-General, Role of' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 38, 38; Simon Evans, 'Appointment of Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 19, 21.

²⁴⁵ See Saunders, above n 243, 69–70. The adoption of responsible government was not an entirely foregone conclusion. Clark argued for 'thorough consideration of the American alternative to "cabinet government" or "responsible government"' (La Nauze, *The Making of the Australian Constitution*, above n 8, 28), and Griffith raised the question whether federalism and responsible government were compatible (at 39–40). Clark was, in fact, quite hostile to responsible government: see, eg, Neasey and Neasey, above n 8, 157.

federal court. There was no age requirement;²⁴⁶ no required law degree; no requirement of prior judicial experience; in fact, no requirement of legal experience at all.²⁴⁷

The Australian and American systems are also alike in exposing the selection of judges to political influence. Under both *Constitutions*, the men and women who are chosen to be appointed will be chosen in part because of the political associations and views of potential appointees on important policy issues.²⁴⁸ In Australia, there are the well-known cases of A B Piddington, whose politically indiscrete comments precipitated his resignation before he started,²⁴⁹ and Lionel Murphy, whose appointment triggered a hostile reaction and proposals to change the system.²⁵⁰ In the United States, since Robert Bork's nomination for a seat on the Supreme Court was rejected, the abortion rights 'litmus test' and other politically charged issues have dominated the Supreme Court appointment process and have often figured prominently in presidential election campaigns.²⁵¹ In either system, the extent to which the views (or likely views) of potential appointees on politically controversial issues determine who is appointed has depended on the culture that has developed. At the present time, the American system has been more destructively shaped by political influence than has the Australian system. That result is not as directly attributable to the legal provisions governing the appointment process in the two constitutional systems as it at first appears to be. Certainly, the highly public ratification process in the United States combined with the many controversial issues decided by the federal courts and especially the Supreme Court significantly accounts for the politicisation of the American appointment process. But there have been times when those aspects did not dominate federal judicial appoint-

²⁴⁶ A maximum age of 70 for High Court Justices and 70 (or lower if so specified by Parliament) for other federal judges was adopted in a constitutional amendment in 1977: see *Constitution Alteration (Retirement of Judges) Act 1977* (Cth). See also Saunders, above n 243, 79–80.

²⁴⁷ Simon Evans, above n 244, 21. An 1897 proposal by the Victorian Legislative Assembly to revise the Adelaide Constitution Bill and give Parliament power to prescribe qualifications was rejected in part on the ground that 'of course Parliament will have the power' to determine judicial qualifications (*Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 309 (Richard O'Connor)); and *Judiciary Act 1903* (Cth) s 5 (repealed by *Judiciary Amendment Act (No 2) 1979* (Cth) s 4) did in fact prescribe qualifications.

²⁴⁸ See Blackshield and Williams, *Australian Constitutional Law and Theory* (3rd ed, 2002), above n 237, 548 ('[a]ppointments to the High Court have often been "political"'); Campbell and Lee, above n 110, 76–9; Geoffrey Sawer, *Australian Federalism in the Courts* (1967) 64–7; James A Thomson, 'Appointing Australian High Court Justices: Some Constitutional Conundrums' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 251, 266–9.

²⁴⁹ See Campbell and Lee, above n 110, 77; Geoffrey Bolton, *Edmund Barton* (2000) 313. See also Troy Simpson, 'Appointments That Might Have Been' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 23.

²⁵⁰ Campbell and Lee, above n 110, 79; Jenny Hocking, *Lionel Murphy: A Political Biography* (1997) 221–6; Garry Sturgess and Philip Chubb, *Judging the World: Law and Politics in the World's Leading Courts* (1988) 232–3.

²⁵¹ Jeffrey Toobin, *The Nine: Inside the Secret World of the Supreme Court* (2007) 18–20, 26–7; see especially at 266 (emphasis in original) ('Bork couldn't be confirmed because he opposed *Roe v Wade* [410 US 113 (1973)]; in 2005, a nominee couldn't be selected unless he or she opposed *Roe v Wade*'), 287–96 (discussing how Harriet Miers withdrew from the appointment process in the face of conservative opposition not convinced of her opposition to *Roe v Wade*).

ments in the United States.²⁵² Without changing the *Australian Constitution*, a more open process and more divisive issues on the High Court's docket could skew the Australian process in the American direction.²⁵³

2 *Salary and Tenure*

Despite differences in the appointment processes and their potential political dimensions under the *Australian* and *United States Constitutions*, both *Constitutions* are designed to ensure independence of federal judges once appointed. The similarities (and differences) of the Australian and American constitutional provisions governing the tenure and security of federal judges are, once again, traceable to the provisions of the Clark Constitution, the substance of which was retained throughout the Australian constitution-making process and into the *Australian Constitution*. The second sentence of both the *United States Constitution* and Clark's Constitution provides that federal judges serve 'during good behaviour' and with salary that 'shall not be diminished' while serving.²⁵⁴ Despite this common beginning and much common ground, there are also significant differences.

(a) *Salary*

Security to serve 'during good behaviour' is designed to give federal judges independence from political control. The prohibition of salary reductions reinforces that independence, protecting the judiciary from a pay cheque sanction when a decision (or decisions) does not comply with the wishes of the political branches of government.²⁵⁵ Neither the provision directly protecting job security nor the provision guarding against the indirect threat stemming from salary reduction was challenged or even discussed on the floor of any of the Australian Convention sittings. Indeed, it was argued in Adelaide, and specifically by Kingston, O'Connor, and Barton (the latter two being members of the 1897–98 Drafting Committee, Kingston having been one of the draftsmen of 1891), that

²⁵² See, eg. Laurence H Tribe, *God Save This Honorable Court: How the Choice of Supreme Court Justices Shapes Our History* (1985) 129, 136–7.

²⁵³ See Constitutional Commission, *Final Report* (1988) vol 1, 398–9 ('*Final Report of the Constitutional Commission*') (recommending against any such politicisation of the process). But see James McConvill, 'The Appointment and Removal of Federal Judges: Time for Reconsideration' (2006) 1 *High Court Quarterly Review* 199, 200–3, suggesting that a system more politically accountable like the American appointment process would be desirable for Australia.

²⁵⁴ The substantial common ground of the American and Clark provisions is shown by the italicised identical words in the following parallel provisions:

The Judges, both of the supreme and inferior Courts, shall hold their Offices during good Behaviour; and shall at stated Times, receive for their Services, a Compensation, which shall not be diminished during their Continuance in Office.

United States Constitution art III § 1.

The Judges of both the Supreme and Inferior Courts shall hold their offices during good behaviour; and shall receive such salaries as shall from time to time be fixed by the Federal Parliament; but the salary paid to any such Judge shall not be diminished during his continuance in office.

'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88 (s 60).

²⁵⁵ See Stephen Parker, 'The Independence of the Judiciary' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 62 (discussing other means of compromising judicial independence).

the *Constitution* should also prevent salary *increases* during a judge's term in office. The argument supporting the prohibition of salary increases for sitting federal judges was that one could be tempted and influenced by the hope for a reward as well as by the fear of punishment.²⁵⁶ Kingston pointed out that the Bill then being discussed prohibited increases as well as decreases of the salary of the *Governor-General*.²⁵⁷ To counter this argument, Josiah Symon, chair of the Judiciary Committee, drew upon Alexander Hamilton's position in *The Federalist*.²⁵⁸

Symon began with the observation, seconded by Sir John Downer, that it was 'a singular thing how little alteration there has been in the points which have been raised on this judiciary question, and indeed on many other[s]', and 'how little the objections have changed in the last 120 years'.²⁵⁹ Symon was specifically referring to the fact that, parallel to the provision governing the Australian Governor-General's salary noted by Kingston, the *United States Constitution* prohibited increasing or decreasing an American *President's* salary during his time in office.²⁶⁰ In the paragraph from *The Federalist* that Symon quoted, Hamilton pointed out the different implications of a bar on salary increases for judges serving for life and for a President serving a short term of four years.²⁶¹ The discussion about banning salary increases did not come to a vote, and no change was made in the pending Bill. To this day, both *Constitutions* prohibit salary decreases of federal judges during their 'continuance in office', but permit increases.²⁶²

(b) *Tenure and Removal*

As long understood under English law, judicial office during good behaviour²⁶³ meant for life (or until voluntary retirement), as long as good behaviour was maintained:²⁶⁴ that is what it meant in the *United States Constitution* as

²⁵⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 961–2. O'Connor and Barton argued that a judge should have nothing to 'hope for' as a result of any decision: at 961 (Richard O'Connor), 962 (Edmund Barton). Part of Barton's argument conveyed a certain subtle depth; he expressed concern that a judge not be tempted 'to act upon an unexpected weakness — for we do not know exactly what they are when appointed': at 962.

²⁵⁷ *Ibid* 961.

²⁵⁸ *Ibid*.

²⁵⁹ *Ibid*. Though 110 years would seem to have been better arithmetic, Symon was plainly talking about the debates over the *United States Constitution* in 1787.

²⁶⁰ The President's '[c]ompensation ... shall *neither be increased nor diminished* during the Period for which he shall have been elected': *United States Constitution* art II § 1 cl 7 (emphasis added).

²⁶¹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 961, quoting 'A View of the Constitution of the Judicial Department, in Relation to the Tenure of Good Behaviour' in *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787* (1788) vol II, 290, 295–6 (attributed to Alexander Hamilton) ('*The Federalist No 78*').

²⁶² Discussing the fundamental status in Australia and the United States of the ban on judicial salary reductions, Winterton pointed out that England's failure to honour this principle was named in the *Declaration of Independence* as one of the reasons for the American Revolution: see George Winterton, *Judicial Remuneration in Australia* (1995) 20.

²⁶³ As it was traditionally expressed, '*quamdiu se bene gesserit*'.

²⁶⁴ See Alpheus Todd and Spencer Walpole, *Parliamentary Government in England: Its Origin, Development, and Practical Operation* (revised ed, 1892) vol I, 191; Note, 'Judicial Disability

well²⁶⁵ and apparently what the framers of the *Australian Constitution*, from the beginning, thought it would and should mean.²⁶⁶ In dealing with the removal of federal judges who failed to satisfy the 'good behaviour' standard, the Clark Constitution followed the British model, as it had in providing for their appointment.²⁶⁷ It provided that removal shall be by the Governor-General 'by and with the advice of the Federal Executive Council' but not 'without an Address from both Houses of the Federal Parliament recommending such removal'.²⁶⁸ With little change²⁶⁹ and no challenge, this basic approach was adopted by the 1891 Sydney Convention²⁷⁰ and then included in the draft submitted by the Drafting Committee to the Adelaide Convention.²⁷¹

3 Grounds for Removal

That easy consensus began to change, however, when the relevant section of the draft Bill came up for discussion at the Adelaide Convention. Patrick Glynn began the discussion and immediately turned his attention to the *United States Constitution*.²⁷² He quoted at length from *Congressional Government* by future

and the Good Behavior Clause' (1976) 85 *Yale Law Journal* 706, 710; William Edward Hearn, *The Government of England: Its Structure and Its Development* (2nd ed, 1886) 83 (citations omitted) ('[t]he legal effect of such a grant is the creation of an estate for life in the office, conditional upon the good behaviour therein of the grantee').

²⁶⁵ 'A Further View of the Judicial Department, in Relation to the Provisions for the Support and Responsibility of the Judges' in *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787* (1788) vol II, 299 (attributed to Alexander Hamilton) ('*The Federalist No 79*'); Tribe, *American Constitutional Law* (3rd ed, 2000), above n 110, vol 1, 166; Philip B Kurland, 'The Constitution and the Tenure of Federal Judges: Some Notes from History' (1969) 36 *University of Chicago Law Review* 665, 669; Raoul Berger, *Impeachment: The Constitutional Problems* (1973) 127–88. At times, there have been disagreements in the United States as to whether 'good behaviour' poses a different (and higher) standard of judicial behaviour for federal judges than the general standard for impeachment of any civil officer of the United States of 'Treason, Bribery, or other high Crimes and Misdemeanors' (*United States Constitution* art II § 4) and, if so, what procedure could be used to enforce that different standard: see Berger, above n 265, 122–80; Kurland, above n 265, 665; Blackshield, 'The Appointment and Removal of Federal Judges', above n 241, 401.

²⁶⁶ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 949 (Isaac Isaacs) (conceding 'judges should hold their offices for life'), 950, 961 (Josiah Symon), 952 (Edmund Barton). See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 312 (Isaac Isaacs).

²⁶⁷ See above nn 239–45 and accompanying text.

²⁶⁸ 'Inglis Clark's Bill for the Federation of the Australasian Colonies' above n 60, 88 (s 61). Although 'an Address from both Houses' might seem a bit ambiguous, the relevant British common law tradition, the Convention Debates, and the later addition of the words 'in the same session' all indicate that separate addresses from the two Houses are required.

²⁶⁹ In its report to the Committee on Constitutional Machinery, Functions, and Powers, the Judiciary Committee (although chaired by Clark) departed from the Clark Constitution to require two-thirds approval of the address from each House (which was then promptly omitted in Samuel Griffith's First Proof of the 1891 Constitution Bill: 'First Proof, 24 March 1891', above n 57, 151), to substitute 'other courts of the Commonwealth' for 'Inferior Courts', and to delete the Clark Constitution's separate provision for suspensions: 'Judiciary Committee Report, 24 March 1891', above n 55, 359. Other minor wording changes are summarised in James A Thomson, 'Some Notes on the History of Section 72(ii) of the *Australian Constitution*' (Occasional Paper No 2, Parliamentary Library, Parliament of Australia, 1984) 5.

²⁷⁰ 'Draft Constitution Adopted by the Convention, 9 April 1891', above n 46, 450.

²⁷¹ 'Draft Bill, 12 April 1897', above n 46, 515.

²⁷² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 944–5.

American President Woodrow Wilson²⁷³ and observed that *The Federalist* showed ‘the necessity of having the Court secure above popular clamor and political influence.’²⁷⁴ He urged that the provision calling for removal on the basis of a parliamentary address ‘be struck out with the object of rendering judges irremovable except on impeachment.’²⁷⁵ Bernhard Wise responded:

we have no provision for conducting impeachments ... In the United States the Senate is expressly given power to hear impeachments. ... [R]emoving upon an address from both Houses for misbehavior is a power well understood by all English colonies ... but we are not familiar with impeachment.²⁷⁶

Without specifically embracing Glynn’s proposal to adopt an American impeachment provision or directly responding to Wise’s resistance to doing so, Charles Kingston picked up Glynn’s concern that judicial independence was not adequately protected by the draft Bill then before the Convention. Kingston urged ‘great pains to secure the absolute independence of the Judges of the Federal Court’ and argued that ‘we should be very careful lest we introduce any provision which may have the effect of limiting [this].’²⁷⁷ The draft then before the Convention provided:

The Justices of the High Court and of the other courts created by the Parliament:

I Shall hold their offices during good behavior ...

III May be removed by the Governor-General ... with [the] advice [of the Federal Executive Council], but only upon an Address from both Houses of the Parliament in the same Session praying for such removal ...²⁷⁸

Despite the ‘good behavior’ clause, Kingston argued, para III could ‘have the effect of allowing a judge to be removed although his behavior is everything that could be desired.’²⁷⁹ Wise, Symon and Barton, although agreeing that such a result would be undesirable, insisted that the proposed language before the Convention could not be so interpreted.²⁸⁰

At first blush, the Kingston interpretation seems strained. But, in fact, the basis of his concern was the position most consistent with the English common law tradition. Isaac Isaacs promptly pointed out and defended that tradition: ‘I wish

²⁷³ Woodrow Wilson, *Congressional Government: A Study in American Politics* (2nd ed, 1885) 37–8.

²⁷⁴ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 944.

²⁷⁵ *Ibid.*

²⁷⁶ *Ibid.* 945. Evidently referring to the draft of the part of the proposed Constitution that had been prepared and submitted by the Judiciary Committee (of which he was a member) and amended by the Drafting Committee to insert the words ‘in the same Session’ in sub-s (iii) of the then s 70 (and eventually s 72 of the *Australian Constitution*): see John M Williams, *A Documentary History*, above n 20, 491, 493 (indicating that the Judiciary Committee Report was dated 8 April 1897, the same date on which the Constitutional Committee completed its work and turned over the drafting process to the Drafting Committee).

²⁷⁷ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 946.

²⁷⁸ *Ibid.* 944.

²⁷⁹ *Ibid.* 946.

²⁸⁰ *Ibid.*

to point out,' he said, 'that there is some danger of confusion in this matter.'²⁸¹ Up until 1688, he noted, English judges served at the mercy of the Crown, but that changed after the *Act of Settlement 1700*,²⁸² which limited the power to remove judges for political reasons.²⁸³ Relying extensively on the work of Alpheus Todd,²⁸⁴ Isaacs continued:

I want to point out to the Convention that [judges] held their office under two conditions, which are preserved down to the present time. If they are guilty of judicial misbehavior²⁸⁵ in regard to their office, they may be removed without any vote of the Houses of Parliament at all; but if Parliament comes to the conclusion that, for reasons good and sufficient for Parliament, these judges ought to be removed, they may, without any judicial determination on the question of misbehavior, ask the Crown to remove them, and the Crown has power so to do.²⁸⁶

Isaacs asserted that 'any alteration from the present British practice' would be 'a very great mistake,' allowing a judge 'not guilty technically of misbehavior' to 'defy the Parliament, the Crown, and the nation.'²⁸⁷

Josiah Symon responded, in effect, that reliance on the English practice was misplaced because the courts in Australia under a federal system would have a role very different from that of the courts in England.²⁸⁸ Symon quoted from Alexander Hamilton in *The Federalist*, supporting the 'strong argument for the permanent tenure of judicial offices'.²⁸⁹ Drawing upon Hamilton's position, Symon pointed out that, in a federal system, the independence of the judiciary is the 'keystone to the federal arch' in a way that it is not in England, because in England the court is never called upon to say that the Parliament has exceeded its authority.²⁹⁰ Kingston had initially proposed 'misconduct, unfitness, or incapacity' as the standard of removal,²⁹¹ but 'misbehavior' was substituted for

²⁸¹ Ibid 947.

²⁸² 12 & 13 Wm 3, c 2.

²⁸³ See Wayne Morrison (ed), *Blackstone's Commentaries on the Laws of England* (2001) vol 1, 203–4; Mark A Thomson, *A Constitutional History of England, 1642 to 1801* (1938) 282.

²⁸⁴ Todd and Walpole, above n 264, vol I, 191.

²⁸⁵ According to Todd (ibid 190–2, quoted in *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 948 (Isaac Isaacs)), misbehaviour had to be based on one of three reasons: (1) 'improper exercise of judicial functions', (2) 'wilful neglect of duty, or non-attendance', or (3) 'conviction for any infamous offence'.

²⁸⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 947.

²⁸⁷ Ibid 948.

²⁸⁸ Ibid 950.

²⁸⁹ Ibid, quoting Hamilton, *The Federalist No 78*, above n 261, 295.

²⁹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 950. See J M Bennett, *Keystone of the Federal Arch: A Historical Memoir of the High Court of Australia to 1980* (1980) 1 (emphasis added), attributing the phrase 'keystone of the federal arch' to a speech by Alfred Deakin in the debate over the failed Judiciary Bill 1901 (Cth) (Commonwealth, *Parliamentary Debates*, House of Representatives, 18 March 1902, 10 967).

²⁹¹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 946.

‘misconduct’²⁹² and ‘unfitness’ was eliminated as too broad.²⁹³ In its final form for the vote at Adelaide, the Kingston amendment, as it had evolved through the debate, provided that federal court Justices:

Shall not be removed except for misbehavior or incapacity, and then only by the Governor-General in Council upon an address from both Houses of the Parliament in the same Session, praying for such removal.²⁹⁴

The vote passed without a division.²⁹⁵ Significant further debate and amendment of the removal provision occurred at Melbourne, but there was no further attempt to modify or define the ‘misbehaviour or incapacity’ standard.²⁹⁶

When the removal issue came up again for consideration at Melbourne in January 1898, the debate began with an amendment suggested by the Legislative Assembly of Victoria (perhaps influenced by Isaacs, the Victorian Attorney-General). As it had been approved at Adelaide, the provision dealing with removal included (in sub-s (i)) that federal Justices ‘[s]hall hold their offices during good behaviour.’²⁹⁷ The Victorian Legislative Assembly’s amendment proposed the addition, after ‘behaviour’ of the words:

but may be removed by the Governor-General in Council upon an address from both Houses of the Parliament in the same session praying for such removal.²⁹⁸

This proposal appeared to be a return to Isaacs’s advocacy of the two-pronged British approach, under which a judge could be removed *either* for misbehaviour *or, apart from misbehaviour*, on the basis of Parliament’s unqualified discretion to remove pursuant to a parliamentary address.²⁹⁹ In the debate on Victoria’s proposal, Isaacs began a long speech with a discussion of the American impeachment process,³⁰⁰ concluding that a conviction by the United States Senate of an impeached federal judge had finality and precluded any appeal.³⁰¹

²⁹² Ibid 951 (Sir John Downer): ‘I think misbehavior has always been the word, and is all that is necessary.’

²⁹³ Ibid (Josiah Symon).

²⁹⁴ Ibid 960.

²⁹⁵ Ibid 961.

²⁹⁶ Although Isaacs seemed to have acquiesced and, at one point, even agreed with the Kingston amendment, he complained at the very end of the Adelaide discussion that abandonment of the traditional form of British removal power meant that ‘there are no means whatever of dealing with a judge, no matter what he may do’: *ibid* 960.

²⁹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 308.

²⁹⁸ *Ibid* 311.

²⁹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 947–9 (Isaac Isaacs).

³⁰⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 311. The most relevant provisions in the *United States Constitution* are arts I § 3 cl 6 (‘[t]he Senate shall have the sole Power to try all Impeachments’ and conviction requires ‘the Concurrence of two thirds of the Members present’), § 2 cl 5 (‘[t]he House of Representatives ... shall have the sole Power of Impeachment’), § 3 cl 7 (‘[j]udgment in Cases of Impeachment shall not extend further than to removal from Office’). Isaacs accurately noted that federal judges in the United States were subject to the removal provisions dealing with ‘civil Officers of the United States’: art II § 4.

³⁰¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 311. In fact, although the *United States Constitution* does not say that in so many words,

By contrast, the proposal under consideration by the Convention, as interpreted by Isaacs, did not achieve such finality.³⁰²

Isaacs's interpretive reasoning was not clear. He may have read the last part of sub-s (iii) referring to an address 'praying for such removal' as not restricted by the earlier language of that subsection limiting the grounds of removal to 'misbehaviour' or 'incapacity'. More likely, or at least more importantly, Isaacs was reading the removal provision in sub-s (iii) as not controlling sub-s (i)'s provision that federal Justices would serve 'during good behaviour'.³⁰³ Isaacs seemed to envision that a Justice removed by the Governor-General in Council pursuant to an address would be able to say that Parliament was wrong and that he had not been removed for bad behaviour. Consequently, under this interpretation, a judge removed pursuant to a parliamentary address might challenge the removal; indeed, he might challenge it in court, and might challenge it before his 'brethren' judges sitting on the same court on which he continued to sit.³⁰⁴

Plainly, the framers shared a consensus that favoured achieving the right balance of total protection of judicial independence (so that 'Judges shall have an absolutely safe position as long as they carry out their duties')³⁰⁵ without eliminating the possibility of removing judges whose conduct indicated they should not be sitting.³⁰⁶ There was wide agreement among the framers who spoke at Melbourne that judicial review, especially (but not only) by brother judges, was quite unacceptable.³⁰⁷ Despite the clamour raised over Isaacs's position and the concern it attracted in the Convention Debates,³⁰⁸ the issue was suddenly solved by the simple expedient of adding an express reference back at

Isaacs's 1898 assumption of no appeal of the Senate's conviction of a federal judge is consistent with what is generally assumed today in the United States: see *Nixon v United States*, 506 US 224, 234–5 (Rehnquist CJ for Rehnquist CJ, Stevens, O'Connor, Scalia, Kennedy and Thomas JJ) (1993) ('*Nixon*'); Akhil Reed Amar, 'On Impeaching Presidents' (1999) 28 *Hofstra Law Review* 291, 295. But see *Nixon*, 506 US 224, 247 fn 3 (White J for White and Blackmun JJ), 253–4 (Souter J) (1993). For the assumptions at the time of the Australasian Constitutional Convention, see 'A Further View of the Constitution of the Senate, in Relation to Its Capacity as a Court for the Trial of Impeachment' in *The Federalist: A Collection of Essays, Written in Favour of the New Constitution, as Agreed upon by the Federal Convention, September 17, 1787* (1788) vol II, 208, 210 (attributed to Alexander Hamilton) ('*The Federalist No 65*') ('[i]n Great Britain, it is the province of the house of commons to prefer the impeachment; and of the house of lords to decide upon it. ... Where else, than in the Senate, could have been found a tribunal sufficiently dignified, or sufficiently independent?'); Story, above n 102, vol I, 542 ('[t]he Senate has been found a safe and effective depository of the trial of impeachments'), 543 ('[n]o reproach has ever reached the Senate for its unfaithful discharge of these high functions').

³⁰² See *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 308, setting forth the text of the relevant section of the Bill as it had been approved in Adelaide. The text is also set forth above: see above n 294 and accompanying text.

³⁰³ Given that the proposal before the Convention was an amendment to what was then s 72(i) and the discussion focused on what was then s 72(iii), there was some confusion and the chair had to remind the Convention repeatedly that it was the former subsection that was on the floor by reason of the proposed Victorian amendment: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 313 (Sir Richard Baker).

³⁰⁴ *Ibid* 312.

³⁰⁵ *Ibid* 317 (Sir George Turner).

³⁰⁶ See, eg, *ibid* 313–18 (Simon Fraser, Charles Kingston, Josiah Symon and Sir George Turner).

³⁰⁷ *Ibid* 312 (Isaac Isaacs), 313–14 (Charles Kingston), 313, 315 (Edmund Barton), 315 (Sir George Reid).

³⁰⁸ See *ibid* 313 (Simon Fraser), 314 (Edmund Barton).

the end of sub-s (iii), so that the amended subsection would permit removal pursuant only to an address that prayed expressly ‘for such removal ... *upon the ground of misbehaviour or incapacity*’.³⁰⁹ This proposed revision was offered by Sir George Reid and immediately (and surprisingly) accepted by Isaacs.³¹⁰ Following the adoption of Reid’s proposed language, there was little more debate and only two further changes were made to the constitutional provision concerning the removal of federal judges: adding the word ‘proved’ and deleting the words ‘during good behaviour’.³¹¹

4 *Parliamentary Process: Adding ‘Proved’*

The first of these two changes grew out of a concern that federal judges threatened with removal should have some procedural means to defend themselves against charges. In the Adelaide session, Downer argued at length that only the American impeachment model provided sufficient protection.³¹² He suggested the adoption of the American impeachment provisions, including a requirement of a two-thirds vote in the Senate for conviction.³¹³ Downer’s proposal drew immediate criticism³¹⁴ and was dropped.³¹⁵ Kingston then acknowledged that the absence of a procedure for removal was troublesome but still deliberately chose to trust Parliament to provide one.³¹⁶ In fact, comments by a number of other framers expressed great confidence that trust could be placed in Parliament to provide for a fair hearing.³¹⁷ Comments such as these,³¹⁸ left unqualified, would have supported an interpretation that the fair procedure expected from Parliament with great confidence fell short of a legal duty.

³⁰⁹ Ibid 313 (Sir George Reid) (emphasis added).

³¹⁰ Ibid 318. Surprisingly, given that Isaacs’s fundamental concern was that a distinct guarantee of judicial office ‘during good behaviour’ always provided a possible basis for a challenge to Parliament’s decision calling for removal: see above nn 303–4 and accompanying text. The proposed amendment submitted by the Victorian Legislative Assembly (that a federal judge’s right to hold office during good behaviour (in sub-s (i)) be expressly limited by Parliament’s discretionary address power) would have eliminated the possibility that the good behaviour provision would enable a judge to escape the consequences of a misbehaviour or incapacity determination. The language added to sub-s (iii) by Reid’s amendment did not do so. Although the adoption of Reid’s amendment was followed by switching sub-s (i) (serving ‘during good behaviour’) and sub-s (ii) (the appointment provision), the arguably independent role of the clause guaranteeing service during good behaviour was left unchanged.

³¹¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 318.

³¹² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 956.

³¹³ Ibid 956–7.

³¹⁴ Ibid 957–8 (Sir William Zeal), 958 (Joseph Carruthers).

³¹⁵ Sir John Downer expressly chose not to press his motion for the American system in the absence of support: ibid 960. He indicated that he would renew his motion at a later time but did not do so. Contrary to Downer’s sharp distinction of the American model, Higgins saw a basic similarity in the British and American approaches to removing judges, stating (at 953): ‘There is no difference of principle.’ Both systems, he observed, entail decisions by both Houses of the legislative branch.

³¹⁶ Ibid 959.

³¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 315 (Edmund Barton), 316 (Sir George Turner), 318 (Josiah Symon).

³¹⁸ In addition to Kingston, Downer and Barton, Fraser repeatedly expressed concern for the lack of any specified procedural protections: ibid 313–16.

But Barton's position and the final approved version of the tenure and removal section argues persuasively to the contrary. During the Adelaide sitting, with no effect, Barton had expressed the wish that 'it be made so plain that some proceeding must be gone through which would give a judge the opportunity of being heard in his own behalf and of indicating his own defence before he can be removed from office.'³¹⁹ Returning in Melbourne to that concern, Barton asked Turner and Isaacs whether the required address 'should state on its face' that removal was required 'because his misbehaviour or incapacity has been proved?'³²⁰ He continued: 'That would insure the Judge having a hearing. It seems to me that the introduction of those words might be a greater safeguard to the Judge, while it would prevent Parliament from lapsing into any mis-trial of the matter.'³²¹ A short time later, Barton moved expressly: 'That the words "upon the grounds of *proved* misbehaviour or incapacity" be added to the subsection.'³²² Some opposition and no obvious support followed Barton's motion, and Isaacs then made a statement about his understanding of the responsibility of the Drafting Committee, of which Barton was the chair. The Drafting Committee, Isaacs said,

will not be bound by the form of words adopted by us now, and ... if the amendment is carried they will frame the clause using such language as they think will meet our intention, and insuring that the addresses shall not be passed except because of what Parliament believes to be misbehaviour or incapacity, and that the finding of the two Houses shall be unchallengeable.³²³

Immediately following this statement, Symon said, 'Hear, hear'.³²⁴ Without any further clarification or discussion at this point, the official record of the Convention Debates reports simply: 'The amendment was agreed to.'³²⁵ When this section later appeared in the revised Bill, it included Barton's 'proved' language.³²⁶ There was no further discussion or amendment, and that language is in the version of the *Constitution* adopted by the Convention and approved by the Australian people and by the British Parliament.³²⁷

It is impossible to read Barton's addition of 'proved' as other than a requirement of procedural safeguards for a federal judge charged with 'misbehaviour or incapacity'. Of course, that falls short of saying what, precisely, those procedures are; but there are ample precedents for natural justice under Australian

³¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 953.

³²⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 317.

³²¹ *Ibid.*

³²² *Ibid.* 318 (emphasis added).

³²³ *Ibid.*

³²⁴ *Ibid.*

³²⁵ *Ibid.*

³²⁶ 'Comparison of Sydney Draft with Melbourne Draft to 1 March 1898' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 849, 887.

³²⁷ 'Bill as Adopted by the Convention, 16 March 1898' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 1118, 1132; *Australian Constitution* s 72.

constitutional law.³²⁸ It is hard to quarrel with the conclusion of Quick and Garran. They reasoned that, because '[n]o mode is prescribed for the proof of misbehaviour or incapacity', the Parliament is 'free to prescribe its own procedure', but

the procedure ought to partake as far as possible of the formal nature of a criminal trial; ... the charges should be definitely formulated, the accused allowed full opportunities of defence, and the proof established by evidence taken at the Bar of each House.³²⁹

5 *An Aside: The Governor-General's Role*

As the preceding discussion shows, the two Houses of Parliament were expected to provide the procedure and determine whether the proof of 'misbehaviour or incapacity' justified the removal of a federal judge. To specific questions about who gets to decide whether a judge has engaged in misbehaviour, Barton,³³⁰ Symon,³³¹ and Kingston³³² all answered unambiguously: 'Parliament'.³³³ But other, perhaps more careful, statements embraced the entire decision-making mechanism, including the role of the Governor-General.³³⁴ Moreover, from beginning to end, starting with the Clark Constitution, the actual language considered and approved to be in the *Australian Constitution* gave the power of removal (like the power of appointment) to the Governor-General 'in Council'.³³⁵ When Isaacs described Parliament's power under English common law, he spoke in terms of Parliament's asking the Crown to remove a judge and, he said, 'the Crown has power so to do.'³³⁶ While fully acknowledging the

³²⁸ See John McMillan, 'Natural Justice' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 498, 498; Tony Blackshield, 'Removal of Justices' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 594 (discussing procedures claimed in connection with the 'Murphy Affair'); Harry Evans, 'Parliament and the Judges: The Removal of Federal Judges under Section 72 of the Constitution' (1987) 2(2) *Legislative Studies* 17, 21-4.

³²⁹ Quick and Garran, above n 34, 732.

³³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 952.

³³¹ *Ibid* 953.

³³² *Ibid* 959.

³³³ Also, according to the Convention transcript, 'Hon Members' agreed that it is 'The Parliament': *ibid* 952.

³³⁴ For example, Sir George Turner said that a proposed amendment then being considered would 'make it perfectly clear and certain that if the two Houses of Parliament and the Governor-General in Council come to the conclusion' that misbehaviour or incapacity has arisen that would 'finally determine the matter': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 317. On another occasion, Josiah Symon said (at 318):

The only point is whether the final decision of the question should be left to the body described in the clause, namely, the Senate and the House of Representatives, followed by the Governor-General in Council. ... Therefore, I am perfectly content to leave the final decision to them.

³³⁵ Or equivalent language, for an example of which see above n 268 and accompanying text.

³³⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 947. See above n 286 and accompanying text.

reality of executive–legislative merger under responsible government,³³⁷ Quick and Garran nevertheless concluded:

the members of the Executive Council are the keepers of their own consciences, and the advice which they give to the Governor-General cannot be dictated to them by the Houses of Parliament. For whatever action they take or refuse to take they will be responsible in the ordinary way both to the Parliament and to the people.³³⁸

6 *Deleting 'During Good Behaviour'*

The last change in the removal provision by the 1897–98 Convention appeared to come in the form of a stylistic revision. In the version approved and now a part of the current *Australian Constitution* what was then sub-s (ii), providing that federal judges serve ‘during good behaviour’, was deleted. There was no discussion or explanation of the deletion. This revision of s 72 was presented to the Convention in its waning moments in Melbourne along with many other revisions as ‘merely questions of drafting’.³³⁹ As chair of the Drafting Committee, Edmund Barton said that amendments, including this one, which were presented in huge quantities as the Convention was ending, did not alter ‘the sense’ of any provision ‘except where the Convention has practically directed it to be done.’³⁴⁰ No such directions were or are apparent.³⁴¹

It is possible that the Drafting Committee had Isaacs’s words ringing in its ears,³⁴² enjoining the Committee to meet the intention that the ‘verdicts of these

³³⁷ See Harry Evans, above n 328, 21–4. Evans notes that the question is ‘somewhat academic’ in that House of Representatives agreement to an address would require government agreement because ‘that House [is] controlled by the government under the modern version of responsible government’: at 20. See also Barton’s comment in response to Reid’s concern that the *Constitution* ‘leaves it open to the Executive to appoint any number of Judges’: ‘It is not the Executive, but the Parliament, who appoints the Judges’: *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 28 January 1898, 290.

³³⁸ Quick and Garran, above n 34, 733. See also Enid Campbell, ‘Judicial Review of Proceedings for Removal of Judges from Office’ (1999) 22 *University of New South Wales Law Review* 325, 339; A R Blackshield, ‘The “Murphy Affair”’ in Jocelyne A Scutt (ed), *Lionel Murphy: A Radical Judge* (1987) 230, 254 (emphasis added) (‘if Parliament did present an address by both Houses to the Governor-General, and if in response to that address the Governor-General did in fact remove a judge from office’).

³³⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1914 (Edmund Barton). See La Nauze, *The Making of the Australian Constitution*, above n 8, 232: ‘on the last business day [Wednesday 16 March 1898] in Melbourne’, the Convention accepted ‘some four hundred verbal amendments proposed by the Drafting Committee.’ See also James A Thomson, ‘The Founding Father? Edmund Barton and the *Australian Constitution* — Geoffrey Bolton, *Edmund Barton* (Allen & Unwin, 2000)’ (2002) 30 *Federal Law Review* 407, 424.

³⁴⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1915.

³⁴¹ Suggestions were made on at least two occasions to merge what were then sub-ss (i) (tenure during good behaviour) and (iii) (removal): see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 313 (Richard O’Connor); see also at 316 (Patrick Glynn), who, after the Convention had switched the order of sub-ss (i) and (ii), proposed to merge what were the new ss 72(ii) and 72(iii) but not to eliminate the ‘during good behaviour’ language.

³⁴² See text accompanying above n 323.

two Houses [shall] be ... unchallengeable.³⁴³ The revision, then, possibly reflected an attempt by the Drafting Committee to head off future concern (such as that which Kingston had had in Adelaide and Isaacs had in Melbourne) stemming from the tension between an unqualified statement that federal judges serve ‘during good behaviour’ and an unqualified statement that removal is based on an address by two Houses of Parliament which have found ‘proved misbehaviour or incapacity.’³⁴⁴ Whether or not this explanation is correct, the change marked a departure from a long tradition in England, throughout the English-speaking colonies and in the United States (and preserved in the Clark Constitution) of guaranteeing *in words* that judges served ‘during good behaviour’.³⁴⁵ The change also eliminated a specific textual basis for the conclusion that federal judges had life appointments.³⁴⁶

7 *The Murphy Affair*

In more than 100 years of the *Australian Constitution* there has been no application of s 72(ii). Extensive consideration was given to this subsection, however, in connection with the so-called ‘Murphy Affair’. Lionel Murphy did not fit the conventional pattern for High Court appointments, and his tenure on the Court was unconventional and often controversial.³⁴⁷ In the years 1983–86, in a number of sequentially interrelated criminal proceedings, Senate hearings and special tribunals,³⁴⁸ charges of wrongdoing against Justice Murphy were considered; in none of the instances was a charge ultimately proved to be true, but Justice Murphy was not fully exonerated either.³⁴⁹ At the time of his death, a Parliamentary Commission of Inquiry investigating some aspects of these charges had not completed its work. Understandably, the Murphy Affair

³⁴³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 313.

³⁴⁴ See above n 265 for authorities indicating a comparable dilemma under the *United States Constitution* resulting from alternative standards.

³⁴⁵ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 948–9 (Isaac Isaacs).

³⁴⁶ Given this change in language, Sawyer, above n 248, 154, correctly noted that ‘no word’ in ch III provided a basis for the High Court’s conclusion that federal judges served for life. But, given the clarity in the Convention Debates that a change in substance was not intended by this change in language, Sawyer’s related comment that ‘only by the self-regarding act of judicial legislation’ was ch III interpreted ‘as requiring appointment for life’ seems unwarranted. That Barton’s opinion (as a member of the High Court, in *Waterside Workers’ Federation of Australia v J W Alexander Ltd* (1918) 25 CLR 434, 457) supporting the conclusion that federal judges have life tenure could be described as ‘[d]ogmatic’ (Zines, *Federal Jurisdiction*, above n 111, 116) is not surprising in view of Barton’s role in changing the language of s 72. With the 1977 constitutional amendment (see above n 246) the implied life tenure has been replaced by tenure until the attainment of 70 years of age.

³⁴⁷ See Sawyer, above n 248, 64–7; Campbell and Lee, above n 110, 77–9.

³⁴⁸ See, eg, Tony Blackshield, ‘Murphy Affair’ in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 486, summarising the litigation and the work of two Senate Committees and a Parliamentary Commission of Inquiry. See also Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 584–6; Sturgess and Chubb, above n 250, 234–49.

³⁴⁹ There was one jury conviction, later reversed on appeal, and the Commission of Inquiry had 14 allegations pending at the time its action became irrelevant with Murphy’s anticipated death: Blackshield, ‘Murphy Affair’, above n 348, 488–9.

produced a general feeling of dissatisfaction and has prompted reconsideration of the tenure and removal of federal judges.³⁵⁰ As in the 19th century debate, the American impeachment approach was once again a persistent presence on the periphery of that reconsideration.³⁵¹

One particular focus of attention in the wake of the unfinished Murphy case was the meaning of 'misbehaviour or incapacity' — especially 'misbehaviour' — in s 72(ii). A subset of that focus was the question whether Alpheus Todd's three-part test for misbehaviour³⁵² had been written into the *Australian Constitution*. The arguments against such a limiting interpretation of s 72(ii) included both a claim that Todd's test was not an accurate statement of English law when it was written³⁵³ and a claim that the English practice, correctly understood, had been accepted by the framers. Neither line of argument seems persuasive in light of the debates at the Australasian Constitutional Conventions and the resolution of the debate in s 72(ii).

For purposes of determining the meaning of 'misbehaviour' in s 72(ii), the relevance of Todd's position does not depend on the correctness of his scholarship but only on the framers' understanding that it was correct.³⁵⁴ Todd's scholarship on judicial removal was cited repeatedly during the Debates,³⁵⁵ and it was particularly relied upon by Isaac Isaacs, whose summary of the relative precedents on removal in England went unchallenged.³⁵⁶ None of the framers questioned Todd's definition of 'misbehaviour' or his characterisation of the English practice. But, whereas the framers evidently accepted Todd's definition

³⁵⁰ See Advisory Committee to the Constitutional Commission, *Australian Judicial System Advisory Committee Report* (1987) 76–83; *Final Report of the Constitutional Commission*, above n 253, vol 1, 402–6; Blackshield, 'The "Murphy Affair"', above n 338, 585–6; Blackshield, 'The Appointment and Removal of Federal Judges', above n 241, 410–22; Campbell, above n 338, 327–32; Campbell and Lee, above n 110, ch 5; Harry Evans, above n 328; Geoffrey Lindell, 'The Justiciability of Political Questions: Recent Developments' in H P Lee and George Winterton (eds), *Australian Constitutional Perspectives* (1992) 180, 236–7; Geoffrey Lindell, 'The Murphy Affair in Retrospect' in H P Lee and George Winterton (eds), *Australian Constitutional Landmarks* (2003) 280; James A Thomson, 'Some Notes on the History of Section 72(ii)', above n 269.

³⁵¹ See Blackshield, 'The Appointment and Removal of Federal Judges', above n 241, 417–20; Harry Evans, above n 328, 28–9; Lindell, 'The Justiciability of Political Questions', above n 350, 234.

³⁵² Todd and Walpole, above n 264, 191–2 (improper exercise of judicial functions, wilful neglect of duty, or conviction for any infamous offence). See above nn 284–6 and accompanying text.

³⁵³ See, eg, Blackshield, 'Removal of Justices', above n 328, 595; Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 585.

³⁵⁴ Admittedly, my position makes no allowance for the fact that the High Court had not yet abandoned its restricted use of the record of the Convention Debates: see Michael Coper, 'The Place of History in Constitutional Interpretation' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (1986) vol VI, 5–6, correctly predicting that, because the republication of the Australasian Constitutional Debates in 1986

will supply an abundance of the forbidden fruit, together with a new serpent in the form of an index to facilitate the plundering, the temptation to partake will surely increase well beyond the capacity of any reasonable High Court Justice or constitutional counsel to resist.

See also *Cole v Whitfield* (1988) 165 CLR 360; see especially at 385 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

³⁵⁵ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 948–9 (Isaac Isaacs).

³⁵⁶ *Ibid* 947–9.

of ‘misbehaviour’, they unambiguously rejected the English practice for Australia.³⁵⁷

One striking example demonstrates how the Debates could be misunderstood in dealing with the Murphy Affair. C W Pincus QC (later Justice Pincus of the Federal Court of Australia and the Queensland Court of Appeal) was the legal advisor to a Senate Select Committee. In his opinion for the Committee,³⁵⁸ Pincus wrote:

- (1) If the draftsmen of our *Constitution* knew of the practice of the English Parliament with respect to removal of judges, and intended to depart from it so significantly, it is remarkable that they made that intention so unclear.³⁵⁹
- (2) It is more probable that what our constitutional draftsmen had in mind, as to the law about removal of judges, was English practice, or that with respect to colonial judges, in the 19th century.³⁶⁰
- (3) At one stage ..., Isaacs implied that the word ‘misbehaviour’ ... is absolutely limited to misbehaviour as a judge, but ... he seemed to commend ... a power of removal ... summarized [with respect to the *Victorian Constitution*]:

so that a judge holds office subject to removal for two reasons — first, if he is guilty of misbehaviour, and, secondly, if the Parliament thinks there is good cause to remove him, when they may petition the Crown to do so.³⁶¹

In these quoted passages, Pincus has Isaacs’s position in the Debates precisely correct. And the *Victoria Constitution Act* incorporated the English practice,³⁶² as had the pre-Federation Australian colonies in general.³⁶³ What Pincus seems to have ignored is that the framers rejected Isaacs’s position at Adelaide,³⁶⁴ and again at Melbourne.³⁶⁵ Perhaps we cannot know what those framers who did not speak ‘had in mind’, but we know that those who were paying attention would have realised that Isaacs was arguing hard for the English practice but did not succeed. This was clear from what those who did participate in the debate said, and it is clear from what they wrote into the *Australian Constitution*.³⁶⁶ Indeed, they made their intention to depart from the English practice very clear. As accurately described by Quick and Garran, the framers recognised the

³⁵⁷ Ibid 960–1.

³⁵⁸ Senate Select Committee on the Conduct of a Judge, Parliament of Australia, *Report to the Senate*, Parl Paper No 168 (1984) appendix A, 17.

³⁵⁹ Ibid.

³⁶⁰ Ibid appendix A, 19.

³⁶¹ Ibid.

³⁶² *Victoria Constitution Act 1855* (Imp) 18 & 19 Vict, c 55, s 38. But see *Constitution Act 1975* (Vic) s 77(1), as amended by *Courts Legislation (Judicial Conduct) Act 2005* (Vic) s 5(1).

³⁶³ See, eg, *New South Wales Constitution Act 1855* (Imp) 18 & 19 Vict, c 54, ss 38–9.

³⁶⁴ See above nn 281–95 and accompanying text.

³⁶⁵ See above nn 298–311 and accompanying text.

³⁶⁶ But see Professor Lindell’s argument, pointing out that ‘explicit reference is not made in s 72(ii) to the body or place in which proof of the misbehaviour must take place’: Lindell, ‘The Murphy Affair in Retrospect’, above n 350, 290 (emphasis in original).

considerable distinction between the tenures of British and Australian judges. For the British judge,

tenure is determinable on two conditions; *either* (1) misbehaviour, *or* (2) an address from both Houses; whilst under this [*Australian*] *Constitution* the tenure is only determinable on one condition — that of misbehaviour or incapacity — *and* the address from both Houses is prescribed as the only method by which forfeiture for breach of the condition may be ascertained.³⁶⁷

The fact that the framers rejected the English practice and treated Todd's test for 'misbehaviour' as accurate does not prove that Todd's three reasons exhaust the meaning of 'misbehaviour', and it does not go very far toward eliminating the irreducible vagueness of that term. Still, the word 'misbehaviour' is the word in the *Constitution*, and that word came straight out of the scholarship of Todd reporting on the use of that word and its meaning.³⁶⁸ Without being restricted to Todd's definition, it is a starting place and it is a relatively narrow starting place. The treatment of that word by the framers indicated that the word would be satisfied only on the basis of very serious forms of misconduct. At the point in the Melbourne Debates when the framers were closing in on the vote that fixed the substance of what is now s 72(ii), the examples and words used suggest a stringent requirement for removal. In talking about 'misbehaviour', Sir George Turner, then Premier of Victoria, characterised it as 'gross misbehaviour'³⁶⁹ and then 'some misbehaviour — reckless behaviour'.³⁷⁰ Just as care must be taken not to attribute an artificially broad meaning to the word 'misbehaviour', which the framers adopted, care should be taken not to write into the *Constitution* a broad word like 'unfitness', which the framers expressly excluded from the *Constitution* because of its open-endedness.³⁷¹

Although recognising that the Australian framers intended to leave the removal decision to the two Houses of Parliament, Professor Lindell has argued for a limited form of judicial review under s 72(ii) for the purpose of confining the legislative decision-makers to a constitutionally prescribed standard.³⁷² Professor

³⁶⁷ Quick and Garran, above n 34, 731 (emphasis added).

³⁶⁸ As Downer said at the time that word was being chosen as the Australian standard, 'I think misbehavior has always been the word, and is all that is necessary': *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 951.

³⁶⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 317.

³⁷⁰ *Ibid.* The debate, in also suggesting a restrictive meaning of incapacity, fastened onto an extreme case put by Sir George Turner for illustrating its meaning, supposing 'a Judge had lost his brain altogether'. See also *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 946 (Charles Kingston), 948 (Isaac Isaacs).

³⁷¹ See above n 293 and accompanying text. In rejecting 'unfitness', Josiah Symon said it was a 'wide and rather uncertain expression' and 'it would be introducing an element of great uncertainty': *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 951.

³⁷² Lindell, 'The Justiciability of Political Questions', above n 350, 237–8. Professor Lindell (at 234) found some support in the American case *Powell v McCormack*, 395 US 486 (1969) ('*Powell*') and, in a subsequent essay, Lindell recognised that a later American authority, *Nixon v United States*, 506 US 224 (1993), may have weakened the authority of *Powell* in its application to Senate impeachment trials (Lindell, 'The Murphy Affair in Retrospect', above n 350, 296). Although the availability of judicial review of impeachments in the United

Blackshield has expressed doubt that any procedure is available to make s 72(ii) work,³⁷³ but he has argued against any qualification of Parliament's decision-making in the form of a prior delegation to a committee or subsequent judicial review.³⁷⁴ Professor Blackshield's argument against judicial review also influenced his conclusion that the misbehaviour standard must be a political, not a legal, standard.³⁷⁵ That nexus does not seem inevitable.

According to *Australian Constitutional Law and Theory*, '[t]he American doctrine that "political questions" are not justiciable ... has not played any similarly prominent role in High Court jurisprudence, though distant echoes of it may sometimes be detected.'³⁷⁶ One strand of the American political question doctrine is known as a 'textually demonstrable constitutional commitment'.³⁷⁷ As this phrase suggests, the *United States Constitution* sometimes takes a particular legal question of a kind that a court would ordinarily answer and commits that question to a political branch of government. The classic example of such a political question, in American constitutional law, is the provision that '[t]he Senate shall have the sole power to try all Impeachments'³⁷⁸ of judges and other 'officers of the United States'.³⁷⁹ Convictions for impeachment resulting from the Senate trial are based on the constitutional standard: 'Treason, Bribery, or other high Crimes and Misdemeanors.'³⁸⁰ There is a great deal of controversy about exactly what those words mean, but most of the controversy proceeds on the assumption that those words mean something and should be interpreted consistently.³⁸¹

States is very unlikely (see above n 301), *Powell's* support for limited judicial review may survive *Nixon*. In *Powell*, 395 US 486, 521–2 (Warren CJ for the Court), 551–2 (Douglas J) (1969), the United States Supreme Court said that discretionary power of the United States House of Representatives to judge the 'Qualifications of its own Members' under *United States Constitution* art I § 5 cl 1 must be exercised within the limits of the standing requirements (age, residence, citizenship) specified in art I § 2 cl 2. In *Nixon*, the Court distinguished *Powell*, finding 'there is no separate provision of the *Constitution* that could be defeated by allowing the Senate final authority to determine the meaning of the word "try" in the Impeachment Trial Clause': *Nixon*, 506 US 224, 237 (Rehnquist CJ for Rehnquist CJ, Stevens, O'Connor, Scalia, Kennedy and Thomas JJ) (1993).

³⁷³ Blackshield, 'Removal of Justices', above n 328, 595.

³⁷⁴ *Ibid* 596. In fact, despite the apparent consensus of the Australian framers that they had precluded judicial review (see text accompanying above nn 307–10; Harry Evans, above n 328, 20), that possibility continued to be considered when the question arose much later: see, eg, *ibid*, describing the proposal of Commissioner Wells, member of the Parliamentary Commission of Inquiry.

³⁷⁵ See Blackshield, 'Removal of Justices', above n 328, 595.

³⁷⁶ Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 628, citing *Baker v Carr*, 369 US 186 (1962). See also Lindell, 'The Justiciability of Political Questions', above n 350.

³⁷⁷ *Baker v Carr*, 369 US 186, 217 (Brennan J for the Court) (1962); Erwin Chemerinsky, *Constitutional Law: Principles and Policies* (4th ed, 2008) 119; Tribe, *American Constitutional Law* (3rd ed, 2000), above n 110, vol 1, 365–6; Lindell, 'The Justiciability of Political Questions', above n 350, 201, citing *R v Governor of South Australia* (1907) 4 CLR 1497.

³⁷⁸ *United States Constitution* art I § 3 cl 6.

³⁷⁹ *United States Constitution* art II § 4.

³⁸⁰ *United States Constitution* art II § 4. But see above n 265.

³⁸¹ See Berger, above n 265, ch II; Charles L Black Jr, *Impeachment: A Handbook* (1974) 25–33.

Whether or not Australian constitutional law generally recognises a political question doctrine, s 72(ii) seems to present a 'textually demonstrable constitutional commitment'. The text gives power to the two Houses of Parliament to determine whether 'misbehaviour or incapacity' has been 'proved'.³⁸² Quick and Garran stressed the unique adjudicatory role of the Australian House of Representatives and the Senate in making this determination.³⁸³ My suggestion that the decision of the two Houses of Parliament under s 72(ii) is a legal decision, not a political one, is making a very fine distinction. But it does inform the House of Representatives and Senate of how their decision is to be understood, how it is to be undertaken, and how it is to be critiqued. Saying that it is a legal decision means that the decision-makers to which the *Australian Constitution* has ceded the question must proceed on the assumption that their power is limited, that their power must be exercised consistently in interpreting the constitutional standard in question and that the interpretation must be based on the language, history and structure of the *Constitution* appropriate for all such similarly situated cases.

C A Comparative Question from Beginning to End

As fate would have it, there has been one — and only one — formal attempt to remove a Supreme Court Justice in the United States and one — and only one — inchoate attempt to remove a Justice of the High Court of Australia. In the United States, the attempt to impeach and remove Supreme Court Justice Samuel Chase occurred early under the *United States Constitution* and long before the Australian framers began writing their *Constitution*.³⁸⁴ Justice Chase was impeached for both his official and personal conduct on the bench, and his impeachment trial was an aspect of the bitter political strife between the Federalists of John Adams and the Republicans of Thomas Jefferson.³⁸⁵ Chase narrowly escaped conviction, and that narrow escape probably contributed significantly to the elimination of the impeachment process as a means of political control of Supreme Court judges in the United States.³⁸⁶ The Australian framers would have known about the failed Chase impeachment.³⁸⁷

³⁸² See above nn 328–9 and accompanying text. But see above n 338 and accompanying text.

³⁸³ Quick and Garran, above n 34, 731–3. '[T]he duty of Parliament is practically indistinguishable from a strictly judicial duty' (at 741); 'the enquiry is therefore in its nature more strictly judicial than in England' (at 732), but the procedure is 'substantially a judicial one' (at 733).

³⁸⁴ See generally R W Carrington, 'The Impeachment Trial of Samuel Chase' (1923) 9 *Virginia Law Review* 485; Jane Sheffer Elsmere, *Justice Samuel Chase* (1980); William H Rehnquist, *Grand Inquests: The Historic Impeachments of Justice Samuel Chase and President Andrew Johnson* (1992); Samuel H Smith and Thomas Lloyd, *Trial of Samuel Chase, an Associate Justice of the Supreme Court of the United States, Impeached by the House of Representatives, for High Crimes and Misdemeanors, before the Senate of the United States* (1805) vol 1.

³⁸⁵ Jerry W Knudson, 'The Jeffersonian Assault on the Federalist Judiciary, 1802–1805; Political Forces and Press Reaction' (1970) 14 *American Journal of Legal History* 55, 62.

³⁸⁶ See, eg, Joseph Hopkinson's closing argument: Smith and Lloyd, above n 384, vol 2, 20–1. See also Blackshield, 'The Appointment and Removal of Federal Judges', above n 241, 404–5.

³⁸⁷ 'There was only one case in America where an attempt has been made to remove a judge, and that was in the case of Judge Chase in 1803': *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 945 (Patrick Glynn).

In the frustration of failing to convict United States Supreme Court Justice Chase, one of the managers prosecuting the House of Representatives' impeachment of Chase before the Senate expressed the view that the American impeachment process should be replaced by the traditional British practice of the legislative address.³⁸⁸ Of course, that expressed wish has never been acted upon in the United States, and one wonders whether the wish was known by any of the Australian framers.

Referring to Harry Evans's article on the removal of federal judges in Australia, Professor Blackshield wrote, '[f]or Evans, the final lesson of the Murphy affair was that in 1897, Downer may have been right: the American impeachment model may deserve further consideration.'³⁸⁹ Both Evans and Blackshield evidently assumed that Australia's strict party discipline and resulting partisanship were serious impediments to impartial judgement by the Australian legislative bodies and that a contrary situation may make the American impeachment process more workable in the United States. But, they agree, the goal of such impartiality should not be abandoned.³⁹⁰ Whether the American political system is so different or the American impeachment model superior in achieving impartiality may be debatable. But that the lofty goal for both *Constitutions* should be, in Professor Blackshield's words, to instil a 'sobering consciousness of solemn constitutional duty and the need for impartial judgment',³⁹¹ seems undebatable.

V FEDERAL COURT JURISDICTION: FROM THE *UNITED STATES CONSTITUTION* TO THE CLARK CONSTITUTION TO THE *AUSTRALIAN CONSTITUTION*

Whereas Clark's declared reliance on the *United States Constitution* as the model of his 1891 Constitution was modified by his following English traditions in structuring the federal judiciary, it was unqualifiedly American in its specification of areas of federal jurisdiction. The *United States Constitution* includes an inclusive list of categories within the jurisdiction of the federal courts³⁹² and allocates the listed items between separate lists of Supreme Court original and appellate jurisdiction,³⁹³ subject to 'such Exceptions, and under such Regulations as the Congress shall make.'³⁹⁴ Sections 62–4 of Clark's Constitution did precisely the same thing.³⁹⁵ In his accompanying memorandum, Clark explained: 'The matters I have placed under the jurisdiction of the Federal

³⁸⁸ Alexander Pope Humphrey, 'The Impeachment of Samuel Chase' (1899) 5 *Virginia Law Register (Old Series)* 281, 292.

³⁸⁹ Blackshield, 'Removal of Justices', above n 328, 596, citing Harry Evans, above n 328. Downer had argued strongly for an approach modelled on the American impeachment provisions: see above nn 312–15 and accompanying text.

³⁹⁰ Blackshield, 'Removal of Justices', above n 328, 596; Harry Evans, above n 328, 28–9.

³⁹¹ Blackshield, 'Removal of Justices', above n 328, 596.

³⁹² *United States Constitution* art III § 2 cl 1.

³⁹³ *United States Constitution* art III § 2 cl 2.

³⁹⁴ *United States Constitution* art III § 2 cl 2.

³⁹⁵ 'Ingllis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88–9.

Judiciary are the same as those placed by the *Constitution of the United States* under the jurisdiction of the Supreme Court of the American Union'.³⁹⁶ Here is Clark's list of federal jurisdictional categories, all introduced, like their American equivalents, with the phrase, '[t]he Judicial power ... shall extend':

- I To all cases in Law and Equity arising under this Act:
- II To all cases arising under any Laws made by the Federal Parliament, or under any Treaty made by the Federal Dominion of Australasia with any other Country:
- III To all cases of Admiralty and Maritime jurisdiction:
- IV To all cases affecting the Public Ministers, or other accredited representatives of other Countries, and Consuls:
- V To all cases in which the Federal Dominion of Australasia shall be a party:
- VI To disputes or controversies between two or more Provinces:
- VII To disputes or controversies between residents of different Provinces:
- VIII To disputes and controversies relating to land or other property claimed under the laws of different Provinces, or any right, franchise, or privilege so claimed.³⁹⁷

Apart from minor variations in wording, most of which simply reflect the difference in country names and terminology, Clark's list reproduces the American list but has one basic omission and one important addition. Omitted from the parallel list of cases or controversies in American federal jurisdiction are two related categories in which the state is a party,³⁹⁸ evidently meaning to incorporate the effect of the American Eleventh Amendment³⁹⁹ and the principle

³⁹⁶ 'Inglis Clark's Memorandum to Delegates', above n 22, 69. Clark added an innovation, not involving sources of federal jurisdiction and with no American parallel, giving the Australian Supreme Court general appellate jurisdiction over all Australian legal issues arising under state law. Clark said this addition would 'be substituted for the appeal which now lies from the judgment of the Supreme Courts of the several colonies to the Privy Council.' The replacement of the Privy Council turned out to be controversial and, for almost a century, incomplete: see below nn 607–16 and accompanying text.

³⁹⁷ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 88 (s 62). The corresponding American categories, unnumbered in *United States Constitution* art III § 2 but identified here with the numbering used by Clark, are as follows:

The judicial Power shall extend to all Cases, in Law and Equity, [I] arising under this Constitution, [II] the Laws of the United States, and Treaties made, or which shall be made, under their Authority; [IV] to all Cases affecting Ambassadors, other public Ministers and Consuls; [III] to all Cases of admiralty and maritime Jurisdiction; [V] to Controversies to which the United States shall be a Party; [VI] to Controversies between two or more States; ... [VII] between Citizens of different States; [VIII] between Citizens of the same State claiming Lands under Grants of different States ...

The differently worded item VIII is probably attributable to Kingston's draft Constitution: see above n 60.

³⁹⁸ The omitted American categories are: 'Controversies ... between a State and Citizens of another State ... and between a State or the Citizens thereof; and foreign States, Citizens or Subjects': *United States Constitution* art III § 2 cl 1. The *United States Constitution* also describes one of the two categories in the Supreme Court's original jurisdiction as cases 'in which a State shall be [a] Party' (art III § 2 cl 2), thus covering several categories on the general list.

³⁹⁹ *United States Constitution* amend XI. See below n 438.

of sovereign immunity.⁴⁰⁰ Clark's addition does not show up on the parallel list in his 1891 Constitution. In the specification of categories in the Supreme Court's original jurisdiction, otherwise following the American allocation, Clark added cases 'in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the Federal Dominion of Australasia'.⁴⁰¹

These parallel lists are based on what Clark proposed in 1891, at the very beginning of the constitution-making process. In 1901, in his treatise on Australian constitutional law, Clark drew up a very similar set of parallel lists, comparing 11 categories of federal jurisdiction listed in ss 75–6 of the then recently adopted *Australian Constitution* with 11 American categories listed in art III § 2 cl 1.⁴⁰² Clark noted that the substance of 10 of the 11 are virtually identical and then explained the 2 that are not matched: they are directly traceable to the categories that Clark omitted from or added to the American list back in 1891.⁴⁰³ Along with the basic continuity of the inclusive list of categories within the federal jurisdiction, changes were made in the original–appellate allocation, starting with the 1897–98 Judiciary Committee. Matters involving treaties and matters in which the Commonwealth is a party were moved to the High Court's original jurisdiction,⁴⁰⁴ and this higher proportion of matters entrenched in the High Court's original jurisdiction was adopted in the *Australian Constitution*.⁴⁰⁵

As the evolutionary development of Chapter III proceeded over the Convention decade, many relatively minor changes in the provisions governing Australian federal jurisdiction occurred with relatively little discussion at the Australasian Constitutional Conventions. Since 1901 the litigation and scholarship over the meaning of these provisions has been voluminous, complex and ongoing⁴⁰⁶ — that broad subject is entirely beyond the scope of this article.

⁴⁰⁰ See below Part V(B)(1).

⁴⁰¹ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 89 (s 63). The lack of symmetry between the general list and its allocation was soon remedied in the drafting process when the category of these specified mandamus cases was added to the general list: see 'Proof Revised for Printer, 28 March 1891', above n 76, 199.

⁴⁰² Clark, *Studies in Australian Constitutional Law*, above n 7, 180–2. Clark's 1901 list of 11 rather than 8 or 9 is a result of different ways of aggregating related items.

⁴⁰³ In fact, the more significant part of what Clark had omitted in order to bring his categories into line with the Eleventh Amendment in 1891 had been restored after the Australian framers rejected sovereign immunity: see 'Bill as Reported a Second Time, 4 March 1898' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 910, 930; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885 (Edmund Barton).

⁴⁰⁴ See 'Judiciary Committee Report, 8 April 1897', above n 91, 492.

⁴⁰⁵ See Zines, *Federal Jurisdiction*, above n 111, 3, for his concededly speculative explanation for Australia's greater allocation of original jurisdiction to its highest court than was true in the United States. See Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 589, quoting *The Australasian Temperance & General Mutual Life Assurance Society Ltd v Howe* (1922) 31 CLR 290, 306, for Isaacs J's theory of what determined which categories were placed in the High Court's original jurisdiction.

⁴⁰⁶ See, eg, Zines, *Federal Jurisdiction*, above n 111; Leslie Zines, 'Federal, Associated and Accrued Jurisdiction' in Brian Opeskin and Fiona Wheeler (eds), *The Australian Federal Judicial System* (2000) 265. See generally Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, chs 6, 13; see especially at 586–639; Lane, *The Australian Federal*

The following sections will focus on selected issues and problems concerning federal jurisdiction that attracted Convention debate and that were accompanied by discussion of art III of the *United States Constitution* — which Clark, in effect, had placed on the Convention's agenda: first, a brief consideration of the switch from 'cases and controversies' to 'matters'; then, a more extensive treatment of sovereign immunity, the mandamus clause and the parliamentary discretion to control the allocation of the High Court's original and appellate jurisdiction.

A Matters, Cases and Controversies

Following the American use of 'Cases' or 'Controversies', Clark used the terms 'cases' or 'controversies' or, sometimes, 'disputes' to characterise the categories of federal jurisdiction.⁴⁰⁷ These were the terms used throughout the 1891 drafting process and in the Constitution Bill adopted by the 1891 Sydney Convention.⁴⁰⁸ In 1897, these terms were initially combined with a different term, 'matters',⁴⁰⁹ and then passed over in favour of 'matters' alone.⁴¹⁰ That characterisation stuck, and 'matters' is the term used in the *Australian Constitution* today.⁴¹¹

When the section containing the list of specified categories to which the federal judicial power 'shall extend' came before the Adelaide Convention,⁴¹² Patrick Glynn proposed that Parliament be given the power to add '[a]ny matters' to the list.⁴¹³ As his argument in support of his motion made clear, his purpose was to avoid the American practice limiting the jurisdiction of the federal courts to live controversies between real parties.⁴¹⁴ In support of his position, he noted that some American *state* constitutions permitted references of constitutional questions for advisory opinions to the courts of the state in anticipation of

System, above n 115, 509–716; PH Lane, *A Manual of Australian Constitutional Law* (6th ed, 1995) 221–310.

⁴⁰⁷ See above n 397 and accompanying text.

⁴⁰⁸ See, eg, 'First Proof Submitted to the Constitutional Committee, 26 March 1891', above n 63, 178 (used on the *Lucinda*, 28 March 1891); 'Copy Used by Griffith in the Constitutional Committee, 30 March 1891' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 262, 279 (used in Constitutional Committee, 28 March 1891); 'Draft Constitution Adopted by the Convention, 9 April 1891', above n 46, 451 (Bill approved by Sydney Convention, 9 April 1891).

⁴⁰⁹ See 'Judiciary Committee Report, 8 April 1897', above n 91, 491: 'all cases, controversies, and matters'.

⁴¹⁰ See 'Draft Bill, 12 April 1897', above n 46, 515. In the drafting that was used throughout the 1897–98 Convention, 'all matters' was placed in a prefatory clause before listing the string of specific jurisdictional categories. This led Quick and Garran to point out a contrast with the *United States Constitution* (in which a repetition of the word 'all' precedes various categories of 'cases' but does not precede the categories listed as 'controversies'); and that led to an observation that this selective use of 'all' had been treated by some American authorities as significant: Quick and Garran, above n 34, 765. See also Akhil Reed Amar, *America's Constitution: A Biography* (2005) 228, 228 fn 46.

⁴¹¹ *Australian Constitution* ss 75–7.

⁴¹² *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 962.

⁴¹³ *Ibid.*

⁴¹⁴ *Ibid.*

traditional litigation.⁴¹⁵ He quoted from James Bryce's *The American Commonwealth*, where Bryce, in a rare passage critical of American constitutional law, noted 'the inconveniences of a system under which the citizens cannot tell whether their obedience is or is not due to a statute'.⁴¹⁶ Josiah Symon, chair of the Judiciary Committee at the 1897–98 Convention, met Glynn's argument by a further quotation from Bryce, pointing out that had Glynn 'followed his own quotation from Bryce he would have seen the encomiums which the writer passed upon the United States [judicial] system'.⁴¹⁷ Bryce, as quoted by Symon, praises the courts under the *United States Constitution* for refusing to issue advisory opinions.⁴¹⁸ As Bryce put it, '[t]he court does not go to meet the question; it waits for the question to come to it'.⁴¹⁹

Later, in the Debates at Melbourne, a question was raised about the scope of the word 'matters', compared to the American 'cases' and 'controversies', and its possible reach beyond judicial to political matters.⁴²⁰ Isaacs and Quick conceded the appropriateness of a wide term but were concerned that the term not be too wide. Isaacs questioned whether the word 'matters' would reach 'matters which are strictly political'.⁴²¹ In his answer, Symon said:

We want the very widest word we can procure in order to embrace everything which can possibly arise within the ambit of what are comprised under the subsection. As my honorable and learned friend [Isaacs] will see, it would be of no use to adopt the word 'case' or 'controversy'.⁴²²

But no explanation of what Isaacs was supposed to have seen was ever provided. Later, Symon said: 'no matter can be dealt with until it comes before the authorities in the form of a *case* or some judicial process which will be regulated by the *Judiciary Acts*'.⁴²³ When Quick worried that the word would permit *ex parte* matters which the American wording precludes, and thus give the Court 'jurisdiction in matters which were not cases',⁴²⁴ Symon answered: 'It could not'.⁴²⁵

Having failed at Adelaide to get an amendment that would expressly authorise advisory opinions,⁴²⁶ at Melbourne, Glynn took up the defence of the Judiciary Committee's proposed wording, mentioning that it was proposed 'after a long

⁴¹⁵ Ibid 963.

⁴¹⁶ Ibid, quoting Bryce, above n 211, vol I, 432.

⁴¹⁷ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 965.

⁴¹⁸ Ibid, quoting Bryce, above n 211, vol I, 250–2.

⁴¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 965, quoting Bryce, above n 211, vol I, 252.

⁴²⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 319 (John Quick), 319–20 (Isaac Isaacs).

⁴²¹ Ibid 319.

⁴²² Ibid.

⁴²³ Ibid (emphasis added).

⁴²⁴ Ibid.

⁴²⁵ Ibid.

⁴²⁶ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 967.

discussion' in the Committee.⁴²⁷ This certainly suggests that the Committee had made a deliberate choice of 'matters' over 'cases or controversies'.⁴²⁸ But the debate never explains what the substance of that Committee discussion was; just as there is nothing in the debate that demonstrates why it would be 'of no use' to adopt 'case' or 'controversy'. Barton abruptly, and perhaps unhelpfully, ended the ambiguous discussion with the statement: 'I think the word "matters" means such matters as can arise for judicial determination.'⁴²⁹

Glynn's attempt to write explicit authority to issue advisory opinions into the *Australian Constitution* was rejected by the framers at Adelaide,⁴³⁰ and the High Court of Australia eventually held that 'matters' in Chapter III of the *Australian Constitution*, like 'Cases' and 'Controversies' in art III of the *United States Constitution*, did not encompass advisory opinions.⁴³¹ The Court has taken the position that 'matters' is similar to but different from the American 'Cases' and 'Controversies'.⁴³²

⁴²⁷ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320.

⁴²⁸ But, a short time before in the Convention Debates (ibid 319), Symon had noted that the *United States Constitution* used the words 'cases and controversies' and then asked: 'Is the word "matters" used there?' Isaacs told him it was not.

⁴²⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320. Quick and Garran, above n 34, 765–8, raised the question of the possible difference between the American 'cases and controversies' and the Australian 'matters', pointing out the greater latitude of the English judiciary in answering questions put to them outside litigation; but they concluded that the Australian judiciary would be more narrowly confined like the American courts.

⁴³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 967.

⁴³¹ *Re Judiciary and Navigation Acts* (1921) 29 CLR 257. See also Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 605.

⁴³² See Zines, *Federal Jurisdiction*, above n 111, 15–21; *Re McBain; Ex parte Australian Catholic Bishops Conference* (2002) 209 CLR 372 ('*Re McBain*'); *Truth about Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 200 CLR 591 ('*Truth about Motorways*'). In *Truth about Motorways* Kirby J observed (at 650) that, '[f]rom the start, it was intended to use a word of wider meaning than the words "cases and controversies"', but, like the American federal courts, 'the sole function of [Australian] federal courts is the determination of "justiciable controversies" or "legal controversies". ... Nor may [such courts] give advisory opinions or answer questions divorced from concrete cases' (at 655) (emphasis added) (citations omitted). See Dan Meagher, 'Guided by Voices? — Constitutional Interpretation on the Gleeson Court' (2002) 7 *Deakin Law Review* 261, 274–8, pointing out the strong consensus about definition of 'matters' (quoting *Re Judiciary and Navigation Acts* (1921) 29 CLR 257) as well as the difficulty of determining what the word 'matters' requires (citing *Truth about Motorways* (2000) 200 CLR 591; *Re McBain* (1999) 209 CLR 372; *Abebe v Commonwealth* (1999) 197 CLR 510)).

B Convention Debates and Effects over Selected Jurisdictional Matters

1 Sovereign Immunity⁴³³

In setting out the part of the *Australian Constitution* that became Chapter III, Andrew Inglis Clark was quite unambiguous in stating that his categories of federal jurisdiction were taken directly from art III of the *United States Constitution*.⁴³⁴ Originally, art III § 2 cl 1 of the *United States Constitution* included federal judicial power extending to controversies ‘between a State and Citizens of another State’. In *Chisholm v Georgia* (*‘Chisholm’*),⁴³⁵ the United States Supreme Court relied on this jurisdictional grant to uphold a suit by two citizens of South Carolina against the state of Georgia to recover a debt owed to a private estate. According to a significant part of the reasoning of Justices in the majority in *Chisholm*, the constitutional authorisation of suits ‘between a State and Citizens of another State’ embodied a concept of popular sovereignty and thus had rejected Georgia’s sovereign immunity defence.⁴³⁶ The *Chisholm* result caused an uproar⁴³⁷ and led to its rapid reversal by the adoption of the Eleventh Amendment.⁴³⁸

For Clark to follow the *United States Constitution* as it existed in 1891, a careful modification of the 1787 *United States Constitution* was required. Clark had to eliminate the language on which the *Chisholm* Court relied as the basis of its decision;⁴³⁹ and, for good measure, he added a section substantially echoing the Eleventh Amendment. But, whereas the Eleventh Amendment sticks close to the constitutional source of the disfavoured *Chisholm* case, in withdrawing the ‘Judicial power of the United States’ only from suits against a state by ‘Citizens of another State, or ... of any Foreign State’,⁴⁴⁰ Clark’s Constitution withdrew judicial power from such suits by ‘any person whatsoever’.⁴⁴¹ Despite his

⁴³³ State and national governments in the American federal system are often considered dual ‘sovereigns’; under the *Australian Constitution* at its creation, state and Commonwealth governments had a kind of derivative sovereignty as part of the British Empire. But see Clark, ‘The Future of the Australian Commonwealth’, above n 9, 240, 247 (arguing for fuller sovereignty).

⁴³⁴ See text accompanying above n 396.

⁴³⁵ 2 US (2 Dallas) 419 (1793).

⁴³⁶ *Ibid* 454–5, 457 (Wilson J), 470–1, 477 (Jay CJ) (1793).

⁴³⁷ See Laurence H Tribe, *American Constitutional Law* (2nd ed, 1988) 174; Chemerinsky, *Federal Jurisdiction*, above n 110, 395.

⁴³⁸ *United States Constitution* amend XI:

The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

In fact, the words of the Eleventh Amendment did not preclude all suits against a state and were narrower than those in Clark’s Constitution: see below n 441.

⁴³⁹ Those words had not, literally, been erased from the *United States Constitution*, because Amendments to the *United States Constitution* always take the form of separate numbered provisions, not deletions or modifications of the original text.

⁴⁴⁰ *United States Constitution* amend XI.

⁴⁴¹ ‘Inglis Clark’s Bill for the Federation of the Australasian Colonies’ above n 60, 89 (s 62) (emphasis added):

impeccable republican credentials,⁴⁴² Clark seemed to go beyond the young American republic — which had so recently revolted against King George III — in lurching back to the precept that ‘the King can do no wrong’. Clark’s apparent policy choice was never questioned on the floor of the 1891 Sydney Convention, which adopted a still broader version.⁴⁴³

But then things changed. Edmund Barton, the leader of the 1897–98 Convention and chair of the Drafting Committee, explained to the Convention sitting in Adelaide that this Eleventh Amendment-like clause had been in the Commonwealth Bill of 1891.⁴⁴⁴ Barton continued: ‘The Judiciary Committee decided to send this clause on, and therefore the Drafting Committee thought they had no alternative but to embody it here.’⁴⁴⁵ But if the clause is not defended now, Barton then said, ‘let us strike it out.’⁴⁴⁶ Downer enthusiastically favoured deletion;⁴⁴⁷ Wise was for leaving the clause in, but offered no defence.⁴⁴⁸ Sir Joseph Abbott asked whether its deletion would mean that an individual could sue the state.⁴⁴⁹ Barton answered: ‘Why not? This *Constitution* binds the Crown.’⁴⁵⁰ With very little discussion, the clause was deleted.⁴⁵¹ In short, from the post-Eleventh Amendment jurisdictional structure adopted by Inglis Clark and the Sydney Convention in 1891, the Adelaide framers had drastically shifted in 1897 to the original 1787 American structure relied upon in *Chisholm*. At that point, in agreement with the reasoning of the *Chisholm* majority, the Australian framers of a constitutional monarchy were concluding that, indeed, the Queen (Victoria, as she now was) could do wrong (through her agents) and should be legally accountable when she did.

This seemingly simple sanctioning of the *Chisholm* reasoning for Australia turned out to be short-lived. By the time the Australasian Constitutional Convention had moved to Melbourne in 1898, the sovereign immunity issue resurfaced in different form. With the strong support of the Drafting Committee (Barton, Downer and O’Connor), Glynn introduced an amendment to create a

But nothing hereinbefore contained shall be construed to extend the judicial power of the Federal Dominion of Australasia to any suit in law or equity commenced or prosecuted against any Province by *any person whatsoever*.

⁴⁴² See generally John M Williams, ‘Andrew Inglis Clark and Our Republican Tradition’, above n 10; Williamson, above n 1; Warden, above n 10; Clark, ‘Why I Am a Democrat’, above n 1.

⁴⁴³ Extending the immunity to the Commonwealth, the 1891 Bill provided:

Nothing in this Constitution shall be construed to authorize any suit in law or equity against the Commonwealth, or any person sued on behalf of the Commonwealth, or against a State, or any person sued on behalf of a State, by any individual person or corporation, except by the consent of the Commonwealth, or of the State, as the case may be.

‘Draft Constitution Adopted by the Convention, 9 April 1891’, above n 46, 451 (s 9).

⁴⁴⁴ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 989.

⁴⁴⁵ *Ibid.*

⁴⁴⁶ *Ibid.*

⁴⁴⁷ *Ibid.* 990.

⁴⁴⁸ *Ibid.* 989.

⁴⁴⁹ *Ibid.*

⁴⁵⁰ *Ibid.*

⁴⁵¹ *Ibid.* 990.

positive right to sue a state or the Commonwealth.⁴⁵² In explaining his proposal, he said that the action of the Adelaide sitting of the Convention merely took away the denial of jurisdiction over suits against a state or the Commonwealth.⁴⁵³ But that did not change the maxim that the ‘Queen can do no wrong’. The existence of jurisdiction to sue the Crown did not deny the Crown’s sovereign immunity defence and, thus, such a suit against the Crown could be met with a defence that there was jurisdiction but no substantive right to sue the Crown in right of a state or the Commonwealth.⁴⁵⁴ At least as applied to Australia and its future states, this view (reflecting and anticipating later American decisions) suggested that *Chisholm* was wrong.

The Melbourne Debates plainly proceeded in a climate of wide agreement in favour of curtailing the sovereign immunity defence for states or the Commonwealth.⁴⁵⁵ Still, the delegates disagreed about whether the jurisdictional grant abrogated sovereign immunity; and, if it did not, whether the *Constitution* itself should expressly abrogate it; and, if it did not, whether Parliament under the *Constitution* being created had the power to abrogate it. The debate came to focus on the question whether such parliamentary power should be expressly provided. Josiah Symon, chair of the Judiciary Committee, opposed the addition of a provision empowering Parliament to eliminate sovereign immunity because he believed the power already existed.⁴⁵⁶ On this latter point, Symon explicitly disagreed with Barton,⁴⁵⁷ who agreed with Glynn. Symon received support from Isaacs.

Both sides of the argument tried to draw upon American materials.⁴⁵⁸ Glynn cited the treatise of the American scholar John Burgess for the proposition that the American courts had interpreted the Eleventh Amendment narrowly because the sovereign immunity defence was considered ‘impolitic’ in the United

⁴⁵² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1653.

⁴⁵³ *Ibid* 1654.

⁴⁵⁴ *Ibid* 1653–4 (Patrick Glynn), 1676 (Edmund Barton).

⁴⁵⁵ *Ibid* 1653–79. Among the Australian framers the focus was on abrogating immunity, without always making a distinction between state and Commonwealth immunity: see, eg. at 1669–70 (exchange between Richard O’Connor and Simon Fraser). In the United States, the focus was on state immunity, starting with *Chisholm*, 2 US (2 Dallas) 419, 470 (Jay CJ) (1793). The Australian framers recognised that some of the colonies had already significantly limited the immunity defence: New South Wales (at 1657 (Josiah Symon), 1662 (Sir John Downer)), Tasmania (at 1656 (Sir Edward Braddon)), South Australia (at 1658 (Josiah Symon)). See generally Paul Finn, *Law and Government in Colonial Australia* (1987) ch 6. Several of the framers who spoke revealed a strong hostility to sovereign immunity: *ibid* 1676 (Edmund Barton) (‘I do hold a strong opinion’), 1667 (Richard O’Connor) (calling it a ‘barbarism’), 1661 (Sir John Downer) (asserting that there was ‘no earthly reason’ for it), 1675 (Patrick Glynn) (who said that the effect of sovereign immunity defence would be ‘monstrous’ and ‘stupid’), 1665 (Henry Dobson) (who stated that the abrogation of the immunity was necessary ‘to keep pace with the march of the times’).

⁴⁵⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1656–9. Symon was also opposed to a constitutionally specified right to sue because he thought such a provision would be too gross. A constitutionally established right, he said, ‘would enable any disagreeable or troublesome person to harass not only the Commonwealth but a state in any way he pretty well pleased’: at 1659.

⁴⁵⁷ *Ibid* 1656–9.

⁴⁵⁸ *Ibid* 1675. Isaacs referred to the *Chisholm* case by name, impressing Glynn.

States.⁴⁵⁹ Glynn said that the American ‘*Constitution* continues the old English law’,⁴⁶⁰ evidently meaning the *United States Constitution* after the adoption of the Eleventh Amendment. But he specifically asserted that the doctrine of sovereign immunity did not depend on the distinction between ‘a monarch and a republic.’⁴⁶¹ Elaborating on this point, Isaacs argued that, as to subjects over which the Commonwealth is given constitutional authority to legislate — and without any specific constitutional authorisation to repeal sovereign immunity — ‘we are in exactly the same position as the Congress of the United States. The Federal Parliament is supreme within these limits.’⁴⁶² Isaacs suggested that the parallel Australian provision to the American ‘necessary and proper’ clause granted sufficient authority for Parliament to act.⁴⁶³

Barton’s reasons for disagreeing with Symon and Isaacs involved an explanation of the difference between ‘a Constitution of this kind’ and ‘the *American Constitution*’.⁴⁶⁴ According to Barton’s analysis, ‘[t]he *American Constitution* has been framed in that way because it was an independent Constitution. It has been read always to express the grant of power by the people, independent of all statutory authority.’⁴⁶⁵ Barton here seems to be talking about the concept of popular sovereignty,⁴⁶⁶ evidently adopting a line of reasoning similar to that of the Supreme Court majority in *Chisholm* and evidently assuming that it was correctly decided for the United States.⁴⁶⁷ But he also assumed that the *Australian Constitution* would be subject to ‘the canons of the ... English statutes’⁴⁶⁸ and so could not be characterised as a nation founded on popular sovereignty. In his treatise on the newly adopted *Australian Constitution*, Clark’s analysis concluded that *Chisholm* was correct, evidently agreeing with Barton;

⁴⁵⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1654, citing Burgess, above n 102. Glynn later quoted the Burgess passage relied upon: *ibid* 1675, quoting Burgess, above n 102, vol II, 331.

⁴⁶⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1655.

⁴⁶¹ *Ibid*.

⁴⁶² *Ibid* 1672 (implicitly comparing the Commonwealth Parliament’s limited but specified legislative authority, now under s 51, with Congress’s limited but specified legislative authority under art I § 8).

⁴⁶³ *Ibid* 1671–2. His comparison seems apt, although it did not fully anticipate the unexpected development of the American law: see below n 484 and accompanying text. See also *United States Constitution* art I § 8 cl 18.

⁴⁶⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1677.

⁴⁶⁵ *Ibid*.

⁴⁶⁶ In a recent essay, Professor Randy Barnett developed a position (about the art III provisions relied upon in *Chisholm*) that seems congruent with Barton’s: Randy E Barnett, ‘The People or the State?: *Chisholm v Georgia* and Popular Sovereignty’ (2007) 93 *Virginia Law Review* 1729, 1756.

⁴⁶⁷ To reach this conclusion, Barton had to be unaware of *Hans v Louisiana*, 134 US 1 (1890) — a case decided just before the Australasian Constitutional Conventions — or to think *Hans* was wrong: cf below n 482 and accompanying text.

⁴⁶⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1677 (Edmund Barton).

but, evidently disagreeing, also concluded that the interpretation of the parallel Australian provisions should be consistent with the American interpretation.⁴⁶⁹

The debate at Melbourne over what to do about sovereign immunity was eventually settled by an amendment proposed by O'Connor: 'The Parliament may make laws conferring rights to proceed against the Commonwealth or a state in respect of matters within the limits of the judicial power.'⁴⁷⁰ That amendment was adopted⁴⁷¹ and its language now appears in s 78 of the *Australian Constitution*. The parliamentary power it created was exercised in the first *Judiciary Act*.⁴⁷²

As the two *Constitutions* have evolved over 100 years, the Australian–American difference identified by Barton has not proven to be so clear on either side. On the Australian side, changes in culture and law have supported a reconceptualisation of the fundamental nature of Australian constitutionalism in a way that is more compatible with popular sovereignty.⁴⁷³ After considerable vacillation⁴⁷⁴ (and no specific reconsideration of Barton's rationale), the High Court seems to have concluded that s 78 was not necessary after all.⁴⁷⁵ The constitutional grant of federal jurisdiction is sufficient to abrogate both Commonwealth⁴⁷⁶ and state immunity⁴⁷⁷ in Australia. So Clark's conclusions were apparently correct. In the analysis in his 1901 treatise,⁴⁷⁸ Clark did not mention the Convention Debates at Melbourne (in which he was not a

⁴⁶⁹ Clark, *Studies in Australian Constitutional Law*, above n 7, 167–70. Harvard Law School's James B Thayer, reviewing Clark's treatise, generally with high praise, said that Clark did not understand the Eleventh Amendment: 'Books and Periodicals' (1901) 15 *Harvard Law Review* 416, 420. By that, it seems, Thayer meant that Clark did not agree with Thayer's view that *Chisholm* was wrongly decided and that the Eleventh Amendment restored the correct constitutional interpretation: see below nn 482–3 and accompanying text.

⁴⁷⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 1 March 1898, 1678.

⁴⁷¹ *Ibid* 1679.

⁴⁷² *Judiciary Act 1903* (Cth) s 64. See *Commonwealth v Evans Deakin Industries Ltd* (1986) 161 CLR 254.

⁴⁷³ See George Winterton (ed), *We, The People: Australian Republican Government* (1994); George Winterton, 'The Acquisition of Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 31; Geoff Lindell, 'Further Reflections on the Date of the Acquisition of Australia's Independence' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 51; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26 *Federal Law Review* 1; G J Lindell, 'Why Is Australia's Constitution Binding? — The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29. See generally Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003).

⁴⁷⁴ See Australian Law Reform Commission, *The Judicial Power of the Commonwealth: A Review of the Judiciary Act 1903 and Related Legislation*, Discussion Paper No 64 (2000) 308–13.

⁴⁷⁵ See Graeme Hill, 'Private Law Actions against the Government — Removing the Government's Immunity from Suit in Federal Cases' (Pt 1) (2006) 30 *Melbourne University Law Review* 716; Mark Leeming, 'The Liabilities of Commonwealth and State Governments under the Constitution' (2006) 27 *Australian Bar Review* 217, 222–7.

⁴⁷⁶ *Smith v ANL Ltd* (2000) 204 CLR 493, 502 (Gleeson CJ), citing *Commonwealth v Mewett* (1997) 191 CLR 471, 491 (Brennan CJ), 550–1 (Gummow and Kirby JJ), 531 (Gaudron J).

⁴⁷⁷ *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30.

⁴⁷⁸ See above n 469 and accompanying text.

participant),⁴⁷⁹ but his analysis discussed s 78 and seemed to conclude that legislation under that section was not required to abrogate immunity.⁴⁸⁰

On the American side — without any constitutional authority like s 78 (and only the linguistically challenged Eleventh Amendment⁴⁸¹ to go on) — the now prevailing American view is that *Chisholm* was a mistake.⁴⁸² According to this view,⁴⁸³ it should have been understood in the beginning, as Glynn suggested for Australia, that in a federal system the immunity of states as well as the nation is implicitly incorporated in the *Constitution* absent some explicit negation. Lacking any constitutional authority like Australia's s 78, and notwithstanding the general principle that statutes can modify the common law, Congress's power to abrogate *state* sovereign immunity has been held to be very limited.⁴⁸⁴ So, at least for now, under each country's current jurisprudence, *Chisholm* was wrong in the United States but would have been right for Australia. It appears, after all, that for the constitutional monarchists the Queen — through her agents — can do wrong, but for the American small 'r' republicans the monarch's state-government sovereign substitutes presumptively cannot.

2 *Writs of Mandamus*

Whereas Clark's attempt to follow the *United States Constitution's* embrace of sovereign immunity did not survive the second Australasian Constitutional Convention — though, perhaps, in the end with Clark's approval —, his attempt to adopt for Australia a lesson from American constitutional law concerning the Supreme Court jurisdiction to issue writs of mandamus did prevail — though, perhaps, with a collective confusion about just what the lesson was.⁴⁸⁵ The starting point in Clark's Constitution provided that the Australian Supreme Court's original jurisdiction should include all cases 'in which a Writ of Mandamus or Prohibition shall be sought against a Minister of the Crown for the

⁴⁷⁹ But Clark evidently was closely following the Convention from Tasmania: see below nn 499–500 and accompanying text.

⁴⁸⁰ His analysis was directly focused on state immunity: Clark, *Studies in Australian Constitutional Law*, above n 7, 168–72. In his own 1891 draft Constitution, Clark had followed the post-Eleventh Amendment *United States Constitution*, seemingly rejecting *Chisholm* (see above nn 439–41 and accompanying text), but his treatise argued that *Chisholm* was legally correct (at 167–70): see above n 469 and accompanying text. For Clark, perhaps, that was simply conceding that both the post-Eleventh Amendment *United States Constitution* and the American Supreme Court were correct.

⁴⁸¹ See Barnett, above n 466, 1737–8, 1741–8.

⁴⁸² *Alden v Maine*, 527 US 706, 716–21 (Kennedy J for Rehnquist CJ, O'Connor, Scalia, Kennedy and Thomas JJ) (1999), quoting Hamilton, *The Federalist No 81*, above n 129, 318–19; *Hans v Louisiana*, 134 US 1, 16 (Bradley J) (1890).

⁴⁸³ The 5:4 vote and strong dissent in *Alden* makes it clear that the consensus continues to be challenged: see *Alden v Maine*, 527 US 706, 778 (Souter J for Stevens, Souter, Ginsburg and Breyer JJ) (1999). See also Barnett, above n 466, 1731–6.

⁴⁸⁴ The sovereign immunity defence for a state in the United States may be abrogated by Congress, but only if the abrogation intention is 'unmistakably clear' (*Atascadero State Hospital v Scanlon*, 473 US 234, 242 (Powell J for Burger CJ, Powell, White, Rehnquist and O'Connor JJ) (1985)) and only if it is based on a legislative power other than a power found in art I § 8 (see *Fitzpatrick v Bitzer*, 427 US 445 (1976), upholding abrogation power under amend XIV § 5; *Seminole Tribe of Florida v Florida*, 517 US 44 (1996), rejecting abrogation power under the commerce clause (art I § 8 cl 3)).

⁴⁸⁵ John M Williams, *A Documentary History*, above n 20, 798.

Federal Dominion of Australasia'.⁴⁸⁶ This provision was unique not only in having no American parallel but also in being directed to a procedure or remedy when all of the other categories on both the American and Clark's lists of federal jurisdiction are identified on the basis of a specified party to litigation or a specified subject of a controversy.⁴⁸⁷ Given Clark's close and explicit hewing to the American model, surely there must have been some explanation for Clark to have introduced such a strikingly aberrational variation. And there was.

But attention did not focus on this mandamus category until 31 January 1898. On that date, in Melbourne, the Convention was working its way through the list of categories of federal jurisdiction in what was then s 73.⁴⁸⁸ Barton began the discussion tentatively and indirectly:

The doubt I had about this sub-section has been increased by what Mr Isaacs has just said to me.⁴⁸⁹ The question is whether the words 'a writ of mandamus or prohibition' are not rather words of limitation that might be held to exclude other proceedings which might become equally necessary on behalf of or against the Commonwealth, such, for instance, as an injunction or a writ of habeas corpus.⁴⁹⁰

Symon, chair of the Judiciary Committee, was for leaving the clause in, but he offered no resistance to its removal.⁴⁹¹ Immediately after Isaacs expressed his opinion that 'it would be better to omit the sub-section',⁴⁹² the transcript records: 'The sub-section was struck out.'⁴⁹³ The total discussion on this day took less than one full page of the Convention Debates transcript.

One odd part of this brief dialogue foreshadowed confusion to come. At the end of his initial statement, Barton said, for no apparent reason: 'The bulk of the words of this clause come from the *American Constitution*.'⁴⁹⁴ Isaacs questioned that — looking at art III § 2 of the *United States Constitution* 'hurriedly' as he said, 'I do not see the same provision there.'⁴⁹⁵ Barton responded, 'I fancy it is in some part of the *American Constitution*.'⁴⁹⁶ Isaacs said he did 'not know where else it would be.'⁴⁹⁷ Higgins then said it was in the 1891 Bill, 'and I thought it

⁴⁸⁶ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 89 (s 63).

⁴⁸⁷ See above n 401 and accompanying text. Note also that this was the one item on Clark's list of original jurisdiction that he did not place in the inclusive list of federal jurisdiction categories.

⁴⁸⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 318.

⁴⁸⁹ The doubt had not surfaced at Sydney in 1891 or at Adelaide or Sydney in 1897; the particular comment of Isaacs was not identified.

⁴⁹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320.

⁴⁹¹ *Ibid* 321.

⁴⁹² *Ibid*.

⁴⁹³ *Ibid*. Although probably unintended, this deletion took the mandamus category off the general list of matters of federal jurisdiction but left it on the original jurisdiction list, the way Clark had placed it in 1891.

⁴⁹⁴ *Ibid*.

⁴⁹⁵ *Ibid*.

⁴⁹⁶ *Ibid*.

⁴⁹⁷ *Ibid*.

was taken from the *American Constitution*,⁴⁹⁸ a reasonable inference since it was taken from Clark's Constitution and most of that (relating to the judiciary) was taken from the *United States Constitution*.

What followed this deletion is an oft-repeated story.⁴⁹⁹ Inglis Clark, closely following the events in Melbourne from Hobart, Tasmania, fired off a telegram when he learned of the Convention's deletion of the mandamus clause that he had put in the Constitution Bill in 1891. Clark's telegram evidently informed Barton that this deletion was problematic — seriously so — because of an American case by the name of *Marbury v Madison*.⁵⁰⁰ Barton, in turn, wrote back to Clark, thanking him profusely for his help and mentioning that he was not familiar with that case.⁵⁰¹ That, of course, is the knee-slapping part of the story: Barton is the butt of the joke. The leader of the Convention! Not know about *Marbury v Madison*!

It is worth pausing a moment to see just what triggered Clark's telegram. What was the problem, how was *Marbury* implicated, and how was the great significance of *Marbury* relevant? *Marbury* is important in American constitutional law because it was the first case in which the United States Supreme Court (in an opinion by Chief Justice John Marshall) held that the courts under the *United States Constitution* have the power of 'judicial review' — the power of courts to decide that an Act of Congress is 'unconstitutional'.⁵⁰² But to link the possible importance of this case to the mandamus category of federal jurisdiction in Australia one needs to look more carefully at just how the American Supreme Court reached the groundbreaking judicial review issue in *Marbury* and how the Australian framers may have understood its significance for the mandamus category in 1898.⁵⁰³

(a) *Marbury v Madison*

William Marbury was claiming an appointment to one of the several judicial positions created by the administration of President John Adams as it was about to be replaced by the administration of President Thomas Jefferson in 1801. Marbury's commission had been signed by Adams and given the Presidential Seal; but the commission had not been delivered before Adams went out of

⁴⁹⁸ Ibid.

⁴⁹⁹ See, eg, Neasey and Neasey, above n 8, 195; John M Williams, *A Documentary History*, above n 20, 798; La Nauze, *The Making of the Australian Constitution*, above n 8, 234; John M Williams, 'Andrew Inglis Clark and Our Republican Tradition', above n 10, 72 fn 163. The story comes with variations: see, eg, Zines, *Federal Jurisdiction*, above n 111, 21–2, 47.

⁵⁰⁰ 5 US (1 Cranch) 137 (1803).

⁵⁰¹ John M Williams, *A Documentary History*, above n 20, 798; La Nauze, *The Making of the Australian Constitution*, above n 8, 234.

⁵⁰² 5 US (1 Cranch) 137, 138 (Marshall CJ for the Court) (1803).

⁵⁰³ The fascination of the *Marbury* episode in history and constitutional law continues in Australia as well as in the United States: compare M R L Kelly, '*Marbury v Madison* — An Analysis' (2005) 1 *High Court Quarterly Review* 58 (severely critical of the episode, particularly Marshall's part in it, and denigrating the case as a precedent for Australia) with Michael W McConnell, 'The Story of *Marbury v Madison*: Making Defeat Look like Victory' in Michael C Dorf (ed), *Constitutional Law Stories* (2004) 13 (also critical of Marshall's jurisprudence while admiring his political maneuvering).

office. Marbury brought an action directly in the Supreme Court requesting that the Court issue a writ of mandamus to James Madison, Jefferson's Secretary of State, ordering Madison to deliver the commission. The case was properly in a federal court under art III § 2 cl 1, because it was a case 'arising under the laws of the United States' (the federal law creating the Justice of the Peace office that Marbury claimed).⁵⁰⁴ Marshall CJ, in *Marbury*, went out of his way to point out that mandamus was the correct remedy in a case of this kind, stressing that this was a case calling for ministerial action, not executive discretion, and therefore not interfering with President Jefferson's executive prerogatives.⁵⁰⁵ But cases like this one, within the jurisdiction of the federal courts because they arose 'under the laws of the United States', were in the Supreme Court's appellate, not original, jurisdiction according to art III § 2 cl 2.⁵⁰⁶

If one stopped there, the problem which makes *Marbury* such a salient American case would not have come into existence. For, if William Marbury was attempting to invoke the Supreme Court's original jurisdiction and if the *Constitution* said that the Supreme Court had only appellate jurisdiction over cases arising 'under the laws of the United States', then the answer would be simple: the Court would have no jurisdiction to issue the writ. Case dismissed. What made *Marbury* a groundbreaking decision was the fact that Congress, according to Marshall CJ's opinion, had authorised the Supreme Court in the relevant jurisdictional statute to issue writs of mandamus to a person 'holding office, under the authority of the United States'.⁵⁰⁷ This Act of Congress, according to Marshall CJ's opinion, was impermissibly trying to add to the Court's constitutionally limited original jurisdiction.⁵⁰⁸ That created a conflict between an Act of Congress (giving the Court original jurisdiction) and the *United States Constitution* (giving the Court only appellate jurisdiction). The Court, relying on the superior authority of the *Constitution*, refused to enforce the statute and so refused to order Madison to give Marbury his commission.⁵⁰⁹ The Supreme Court's power of judicial review over Acts of Congress was born.

The controlling language of § 13 of the *Judiciary Act of 1789* provided: 'The Supreme Court ... shall have power to issue ... writs of *mandamus* ... to ... persons holding office, under the authority of the United States.'⁵¹⁰ But why did this statutory language authorising the issuance of a writ of mandamus to an officer of the United States intrinsically and exclusively confer original

⁵⁰⁴ *Marbury*, 5 US (1 Cranch) 137, 173–4 (Marshall CJ for the Court) (1803).

⁵⁰⁵ *Ibid* 167–8.

⁵⁰⁶ *Ibid* 174.

⁵⁰⁷ *Judiciary Act of 1789*, c 20, § 13, 1 Stat 73, 80–1.

⁵⁰⁸ *Marbury*, 5 US (1 Cranch) 137, 175–6 (Marshall CJ for the Court) (1803).

⁵⁰⁹ *Ibid* 179–80.

⁵¹⁰ *Judiciary Act of 1789*, c 20, § 13, 1 Stat 73, 80–1. Section 13 starts with a long sentence describing the Supreme Court's original jurisdiction and, in a second sentence, says:

The Supreme Court shall also have appellate jurisdiction ... in the cases herein after specially provided for; and shall have power to issue writs of prohibition ..., and writs of *mandamus*, in cases warranted by the principles and usages of law, to any courts appointed, or persons holding office, under the authority of the United States.

jurisdiction? Plainly, the statute did not expressly say that. Here is Marshall CJ's reasoning:

It has been stated at the bar that the appellate jurisdiction may be exercised in a variety of forms, and that if it be the will of the legislature that a mandamus should be used for that purpose, that will must be obeyed. This is true, yet the jurisdiction must be appellate, not original.⁵¹¹

It is the essential criterion of appellate jurisdiction, that it revises and corrects the proceedings in a cause already instituted, and does not create that cause. Although, therefore, a mandamus may be directed to courts, *yet to issue such a writ to an officer for the delivery of a paper, is in effect the same as to sustain an original action for that paper*, and therefore seems not to belong to appellate, but to original jurisdiction.⁵¹²

Marshall CJ thus appeared to assume that it would never be possible for an appellate court, reversing and correcting a lower court's erroneous refusal to issue a writ of mandamus, to grant the writ itself rather than to remand with orders to grant the writ. Why that should be so was not explained and is not clear.⁵¹³

(b) *The Australian Framers' Use of Marbury*

Now what is there in all this that would have caused Inglis Clark to rush to the telegraph office?⁵¹⁴ I have never seen his telegram and I do not know its contents.⁵¹⁵ It evidently cited *Marbury* and must have said something to indicate that that was a very important American case. In moving that the mandamus clause should be reinserted, Barton did not mention that he was doing so in response to Clark's strong urging,⁵¹⁶ nor (consequently) did he explain what Clark had said. So, we have to rely upon what Barton offered in his effort to put the mandamus clause back in the Constitution Bill under consideration, and we have to try to understand that as part of an energetic debate reported in 10 pages of the Convention transcript.

⁵¹¹ Whatever deference to Congress was offered in the first of these two sentences was taken away, without explanation, in the second.

⁵¹² *Marbury*, 5 US (1 Cranch) 137, 175–6 (1803) (emphasis added).

⁵¹³ That conclusion was by no means inevitable under the then current law (see James E Pfander, 'Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers' (2001) 101 *Columbia Law Review* 1515, 1523–31, 1567–74, 1578–80, 1591–2) and it is possible that Marshall CJ reached his conclusion on this issue for political reasons (see at 1580–2).

⁵¹⁴ In his treatise written on the *Australian Constitution* published in 1901, Clark said simply that, in *Marbury*, 'it was declared that the Supreme Court had not original jurisdiction in the matter': Clark, *Studies in Australian Constitutional Law*, above n 7, 182.

⁵¹⁵ According to Thomson, the 'telegram has not been found': James A Thomson, 'Constitutional Authority for Judicial Review: A Contribution from the Framers of the *Australian Constitution*' in Gregory Craven (ed), *The Convention Debates 1891–1898: Commentaries, Indices and Guide* (1986) 173, 179. See also Mark Leeming, *Standing to Seek Injunctions against Officers of the Commonwealth* (Legal Studies Research Paper No 07/67, Sydney Law School, November 2007) 5.

⁵¹⁶ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875: 'I am under the impression that we came to rather a hasty conclusion upon that matter, and that it would be advisable to restore these cases of judicial power.'

It is often difficult to sort out a clear line of reasoned argument in the Convention Debates as there are often multiple voices, multiple concerns and multiple positions, which are not expressed in a tightly structured fashion with each speaker carefully addressing the point of the previous speaker. When the point of departure for the debate is an opinion as convoluted and often unpersuasive as Marshall CJ's opinion in *Marbury*, the cacophony grows. And, when it is unlikely that any of the participants in the debate have had the opportunity for careful study of that opinion, as surely must have been the case when Barton moved for the restoration of the mandamus clause, confusion abounds. Some clarity can be introduced by separating three different threads that weave themselves through the debate on Barton's motion.

First, there are comments that seem to be calling attention to differences between the Australian Constitution Bill being considered by the framers in 1898 and the *United States Constitution* considered by Marshall CJ. These comments are arguing, in effect, that *Marbury* should be regarded as irrelevant to a decision on Barton's motion. Isaacs pointed out that in *Marbury* the Supreme Court's relevant federal jurisdiction was assigned by the *United States Constitution* to the Court's appellate jurisdiction, according to Marshall CJ's opinion; by contrast, Australia was putting matters in which the Commonwealth was a party in the Supreme Court's original jurisdiction.⁵¹⁷ Barton responded that it was not at all clear that that category would also cover a matter in which mandamus was sought against an officer of the Commonwealth. Barton's argument, in part, was that cases against an officer of the Commonwealth were different from cases in which the Commonwealth was the real party.⁵¹⁸ Isaacs further argued, on two occasions, that the United States analogy did not apply because, unlike art III of the *United States Constitution*, the Constitution Bill then being debated in the Melbourne Convention (like the *Australian Constitution* eventually adopted) gave Parliament power to add to the Court's original jurisdiction.⁵¹⁹ That power in Congress would have totally changed *Marbury*. Barton never responded directly to this argument, and it is not clear from the responses that he did give that he ever understood Isaacs's point.⁵²⁰

A second group of comments seems to be based on a misreading of Marshall CJ's *Marbury* opinion and thus to be supporting Barton's motion on erroneous grounds. The two most significant examples of this misplaced reasoning are provided by Barton himself. For instance, particularly in his earlier arguments, Barton appeared to be saying that the Supreme Court of the United States had no power at all to issue writs of mandamus even though this was

⁵¹⁷ Ibid 1883. At least at times, both Barton and Isaacs confused the basis of the *Marbury* Court's federal jurisdiction, Barton thinking it was a case 'arising under the *Constitution*' and Isaacs thinking it was a case in which the United States was a party.

⁵¹⁸ Ibid 1884. See Zines, 'Federal, Associated and Accrued Jurisdiction', above n 406, 268–80, discussing at length the developing law and the close affinity concerning cases involving the Commonwealth as a party under s 75(iii) and suits petitioning for mandamus or other remedies against 'an officer of the Commonwealth' under s 75(v).

⁵¹⁹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1883, 1885.

⁵²⁰ See *ibid*.

clearly inconsistent with the *Marbury* opinion: ‘The question would be this: Whether without an express authority given in the *Constitution* to entertain such cases the High Court could grant a writ of mandamus ... against an officer of the Commonwealth?’⁵²¹ He explained: ‘What happened in that case [*Marbury*] was that the United States Congress, without having this right of entertaining cases of mandamus ... against an officer of the United States, had passed an Act upon the subject’.⁵²² At that point in the debate, the provision under discussion by the Convention concerned the general list of categories within federal jurisdiction but said nothing about the original–appellate allocation of the Supreme Court’s jurisdiction.⁵²³

An even starker error on Barton’s part was his conclusion that the problem in *Marbury* was that a petition for a writ of mandamus to an officer of the national government, under the *United States Constitution*, was constitutionally assigned to the Court’s appellate jurisdiction, albeit by default. Barton undertook to explain his position by quoting from art III § 2 cls 1–2 of the *United States Constitution*.⁵²⁴ Clause 2 specifies two categories in the Supreme Court’s original jurisdiction (cases ‘affecting Ambassadors, other public Ministers and Consuls’ and cases ‘in which a State shall be Party’) and then says: ‘In all the other Cases before mentioned [the full list of cases within federal jurisdiction listed in § 2 cl 1], the supreme Court shall have appellate Jurisdiction’. Barton concluded: ‘Jurisdiction was not given in any express terms as to writs of mandamus, prohibition, or injunction. Therefore there was only an appellate jurisdiction.’⁵²⁵ Stressing ‘[i]n all the other cases’ and ignoring ‘before mentioned’, Barton treated the ‘all the other cases’ language as a catch-all category that included everything not specified.⁵²⁶

So, in one sense, he got the right answer for the wrong reason: Barton incorrectly concluded that *Marbury* was in the Supreme Court’s appellate jurisdiction because a writ of mandamus was an ‘other’ case. Marshall CJ placed *Marbury* in the Supreme Court’s appellate jurisdiction, not because it involved a writ of mandamus,⁵²⁷ but because it was based on a law ‘of the United States’, the law creating judicial offices. In fact, the correct explanation of *Marbury* was consistent with Isaacs’s argument that a writ of mandamus, like other remedies,

⁵²¹ Ibid 1875. Barton cited *Board of Liquidation v McComb*, 92 US (2 Otto) 531 (1875), for the proposition that mandamus is not a proper remedy to enforce a discretionary exercise of official duty, a proposition made irrelevant by Marshall CJ’s opinion: see above n 505 and accompanying text.

⁵²² *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875.

⁵²³ Much later in the discussion, Barton announced that his intention had been to get the mandamus clause added to the general list, then add it to the part of that list calling for original jurisdiction: *ibid* 1885.

⁵²⁴ *Ibid* 1883.

⁵²⁵ *Ibid*.

⁵²⁶ See *ibid*.

⁵²⁷ Marshall CJ did conclude, however, that the *nature* of a writ of mandamus *to an officer of the national government* made it inappropriate for appellate jurisdiction: see above nn 511–12 and accompanying text.

would be available when otherwise appropriate, as an incidental aspect of any matter otherwise within the High Court's jurisdiction.⁵²⁸

Finally, there were comments in the debate which were really based on policy considerations that are persuasive or not for the *Australian Constitution* entirely independent of what the American Supreme Court did in *Marbury*. Not surprisingly, Barton's proposal to reinsert the mandamus clause immediately provoked the argument that Barton had earlier used to get rid of the clause. John Quick argued that the express inclusion of authority for one remedy would imply the lack of authority for other remedies, such as a writ of habeas corpus.⁵²⁹ Although this was precisely the argument Barton had earlier made in support of deleting the clause,⁵³⁰ Barton now countered that habeas corpus was different.⁵³¹ Putting to one side the merits of either of Barton's inconsistent arguments, it is clear that the strength or weakness of these arguments was not affected by the intervening appearance of Inglis Clark's telegram calling attention to *Marbury*.

In evaluating the justification for inclusion, in the High Court's original jurisdiction, of matters in which a writ of mandamus or prohibition or an injunction is sought against an officer of the Commonwealth (now s 75(v) of the *Australian Constitution*),⁵³² special attention should be drawn to the speech Barton made just before the successful vote on his motion to restore the clause:

What we want here in the case of these three writs, which are specially in their nature addressed to persons who may be carrying out the provisions of the statute law, is to enable proceedings against those persons to be taken directly in the High Court, instead of its being necessary to go first to another court and then to proceed on appeal to the High Court.⁵³³

⁵²⁸ Isaacs added what was in effect a policy argument: 'you cannot put within the judicial power a mere remedy where there is no right': *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1882–3. But that is just what the Convention chose to do.

⁵²⁹ *Ibid* 1876, 1879–81.

⁵³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320.

⁵³¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1876:

It is well determined that there is power to issue a writ of habeas corpus independently of words of this kind. That has been decided in America. It was decided that the right of a citizen to have the cause of his detention inquired into was clear; that the right of habeas corpus existed under the common law of England, and did not need any provision with regard to it whatever.

When Quick pointed out that there was a specific provision in the *United States Constitution* on habeas corpus (referring to art I § 9 cl 2), Barton responded: 'That does not provide for the writ of habeas corpus. It recognises an existing writ, and it only says that it shall not be suspended': *ibid* 1880. See also *Boumediene v Bush*, 171 L Ed 2d 41, 56 (headnote), 57, 61–5, 80–1, 90, 93–4 (Kennedy J for Stevens, Kennedy, Souter, Ginsburg and Breyer JJ) (2008), holding that aliens outside American sovereign territory were entitled to the privilege of the writ of habeas corpus and that suspension of the writ was not justified in the circumstances of the case.

⁵³² In the process of deletion and reinsertion, injunctions had been added to writs of mandamus and prohibition. Compare *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 320, with *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1875.

⁵³³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885.

Barton is clearly saying that it is important that suits against officers of the Commonwealth be able to go 'directly' to the High Court. But he does not say why that is so, and nothing in the debate seems to focus on the urgency of all cases seeking 'these three writs' having this priority on the Court's time and work or why lower federal courts or state courts should be avoided.⁵³⁴ Nor did the debate address the reason for concluding that Parliament would not use its broad discretion to provide original jurisdiction when urgency truly required it.⁵³⁵ Plainly, whether this was an important original jurisdiction to place in the High Court was for the framers to decide.⁵³⁶ But that judgement had little or nothing to do with what makes *Marbury* the paramount case in American constitutional law; indeed, it has little to do with how the *Marbury* decision was decided as it was.

Clark's telegram and Barton's response were successful in placing s 75(v) in the *Australian Constitution* and in the High Court's mandatory original jurisdiction. Current developments in Australian constitutional law appear to be giving great significance to the effect of this successful action of Clark and Barton in 1898. Recent High Court decisions have recognised s 75(v) as a source — if not *the* source⁵³⁷ — of access to the High Court for the protection of judicial review and the preservation of the rule of law.⁵³⁸ There is not the slightest suggestion from the Byzantine debates in Melbourne in 1898 on this issue that the framers or any of them anticipated parliamentary use of privative clauses to prevent judicial review of executive action,⁵³⁹ or the inscrutable *Hickman* doctrine⁵⁴⁰ to avoid or to uphold the effect of such clauses,⁵⁴¹ or the eventual empowerment of the High Court's enforcement of the rule of law under

⁵³⁴ This choice may simply be an example of the framers' general pattern of loading federal jurisdiction on the High Court's original jurisdiction: see Zines, *Federal Jurisdiction*, above n 111, ix, 3–6, 112, discussing the arguably unwise, comparatively large proportion of federal jurisdiction placed in the High Court's original jurisdiction.

⁵³⁵ The reluctance to rely on Parliament's eventual creation of original jurisdiction where needed through legislation contrasts with the framers' resolution of the sovereign immunity issue not in the *Constitution* itself but by authorising Parliament to confer 'rights to proceed against' the national or state sovereign through legislation: see above nn 470–1 and accompanying text.

⁵³⁶ Although little noticed in American constitutional scholarship, Pfander has recently called attention to the important role in *American politics* of 1803, and thus arguably in the *Marbury* opinion, of the power of federal courts to issue writs of mandamus to executive officials: see Pfander, 'Marbury, Original Jurisdiction, and the Supreme Court's Supervisory Powers', above n 513, 1580–8. See also above n 514 for Clark's only explanation of the importance of s 75(v).

⁵³⁷ Blackshield and Williams, *Australian Constitutional Law and Theory* (4th ed, 2006), above n 107, 590, characterising s 75(v) as 'the only jurisdiction of practical significance secured to the Court by s 75'. But see Zines, *Federal Jurisdiction*, above n 111, 48–51, discussing the overlapping jurisdiction of ss 75(iii) and (v).

⁵³⁸ See *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668–9 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ); *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513–14 (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

⁵³⁹ See Zines, *Federal Jurisdiction*, above n 111, 62–5.

⁵⁴⁰ See *R v Hickman; Ex parte Fox* (1945) 70 CLR 598, 614–15 (Dixon J).

⁵⁴¹ Zines, *Federal Jurisdiction*, above n 111, 63–4; Duncan Kerr and George Williams, 'Review of Executive Action and the Rule of Law under the *Australian Constitution*' (2003) 14 *Public Law Review* 219, 222–3.

s 75(v).⁵⁴² This is a benign and fortuitous consequence such as the wheel of fortune sometimes delivers. Of course, this result is not entirely a matter of blind luck. Clark and Barton may have produced more than they could have anticipated,⁵⁴³ but they (and, at least derivatively, the framers who voted to restore s 75(v)) were motivated by a determination to ensure that executive action would be subject to judicial review.

Barton may not have recognised the name *Marbury v Madison* and he never quite seemed to understand how Marshall CJ reached his conclusion in *Marbury*⁵⁴⁴ — a truly elusive case — but he certainly did know that the power of judicial review was an essential dimension of American constitutional law and that that fundamental principle was being adopted by the framers of the *Australian Constitution*.⁵⁴⁵

3 Legislative Allocation of Original and Appellate Jurisdiction

A critical part of Marshall CJ's reasoning in *Marbury* was that the allocation of the United States Supreme Court's original and appellate jurisdiction was fixed by the *Constitution* and unchangeable by Congress.⁵⁴⁶ It has turned out that Marshall CJ was only half right, as he himself partly conceded in *Cohens v Virginia*⁵⁴⁷ and as a later Supreme Court held in *Bors v Preston*,⁵⁴⁸ decided well before the Australasian Constitutional Conventions. The half right part is that Congress may not add to the Court's original jurisdiction, so this half did not affect the *Marbury* result. The half wrong part is that, contrary to what Marshall CJ said in *Marbury*, cases placed by the *United States Constitution* under the Supreme Court's original jurisdiction may also come to the Court on appeal after originating in federal or state court.

Very possibly, some of the Australian framers who were generally familiar with American constitutional law would have known about the *Cohens v Virginia* and *Bors v Preston* cases. But these cases and their implications were not mentioned in any of the Convention Debates. Although Inglis Clark knew about

⁵⁴² See generally Sally Dawkins, 'Constitutionalising Judicial Review: One Step at a Time' (2007) 18 *Public Law Review* 153; Enid Campbell and Matthew Groves, 'Privative Clauses and the *Australian Constitution*' (2004) 4 *Oxford University Commonwealth Law Journal* 51; Kerr and Williams, above n 541.

⁵⁴³ Constitutionally entrenched original jurisdiction under s 75 cannot be taken away by Parliament (Zines, *Federal Jurisdiction*, above n 111, 14), but it is concurrent, not exclusive, jurisdiction (at 8), which may be shared or transferred by the High Court's remitter (at 81–4); s 75(v) can be put to good use only by a willing and enlightened Court.

⁵⁴⁴ It is not clear whether anyone, including Clark, understood that; but in the course of the Melbourne Debates, Isaacs seemed to have figured it out.

⁵⁴⁵ There is also a bit of irony in all of this. If the *United States Constitution* had been changed in the way Barton successfully urged the *Australian Constitution* to be changed, there would have been no *Marbury* (at least not at that time by that name): a constitutional provision giving the Supreme Court original jurisdiction to issue the writ of mandamus would have been consistent with the reading Marshall CJ gave *Judiciary Act of 1789*, c 20, § 13, 1 Stat 73, 80–1, and thus would have provided no basis for making 'the principle of *Marbury v Madison* ... axiomatic' for Australia: *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262 (Fullagar J).

⁵⁴⁶ See above n 508 and accompanying text.

⁵⁴⁷ 19 US (6 Wheat) 264, 394–6, 399–402 (Marshall CJ for the Court) (1821).

⁵⁴⁸ 111 US 252, 258–60 (Harlan J for the Court) (1884).

Marshall CJ's reasoning and its partial qualification by *Bors v Preston*, at least by 1901,⁵⁴⁹ his 1891 draft Constitution followed the American pattern without modification. This Clark–American pattern was changed at the 1891 Convention, however, to permit the Commonwealth Parliament to add to both the High Court's original⁵⁵⁰ and appellate⁵⁵¹ jurisdiction.⁵⁵²

Clark also followed the American pattern of concluding the jurisdictional allocation with the phrase 'with such Exceptions, and under such Regulation as the Congress shall make.'⁵⁵³ This exceptions and regulations clause remained as part of Chapter III throughout both Conventions and is part of the *Australian Constitution* today. The power to *add*, respectively, to the High Court's appellate and original jurisdiction does not entail any power to *subtract*. The exceptions and regulations clause, however, surely does speak to subtraction of some sort.

But exactly what subtraction is not spelled out in either the *United States* or the *Australian Constitution*. In the United States, there are three basic theories on the meaning of the exceptions and regulations clause:

- 1 Congress has plenary power to eliminate all or as much of the Supreme Court's appellate jurisdiction as it chooses;⁵⁵⁴
- 2 Congress's power to eliminate the Court's appellate jurisdiction is limited by a general principle, such as preserving the 'essential role of the Supreme Court in the constitutional plan';⁵⁵⁵ and

⁵⁴⁹ Clark, *Studies in Australian Constitutional Law*, above n 7, 174–6.

⁵⁵⁰ 'Judiciary Committee Report, 24 March 1891', above n 55, 360. Comparable language was inserted by Griffith in the document that he called the 'First Proof Submitted to the Constitutional Committee, 26 March 1891', above n 63, 179. Presumably this language came from the Judiciary Committee Report, which was dated 24 March 1891. Shortly after it was added, during the *Lucinda* voyage over the Easter weekend of 28–29 March, this provision was deleted ('Proof Revised for Printer, 28 March 1891', above n 76, 200), possibly inadvertently, but then restored shortly after the cruise on 30 March 1891 ('Copy Used by Griffith in the Constitutional Committee, 30 March 1891', above n 408, 278).

⁵⁵¹ See 'Proof Revised for Printer, 28 March 1891', above n 76, 200. See also 'Revision with Additions Separately Numbered' in John M Williams, *The Australian Constitution: A Documentary History* (2005) 213, 228 (ch III s 9) (emphasis added), describing matters previously in the High Court's original jurisdiction as in the Court's 'original as well as appellate jurisdiction'.

⁵⁵² The Australian framers also eventually changed the form of the relevant provision by eliminating the inclusive list of all matters within the Commonwealth jurisdiction and substituting 'matters' over which 'the High Court shall have original jurisdiction' (see *Australian Constitution* s 75) and 'in any matter[s]' over which '[t]he Parliament may make laws conferring original jurisdiction on the High Court' (*Australian Constitution* s 76): see *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2456 (adopting ss 75–80); 'Bill as Adopted by the Convention, 16 March 1898', above n 327, 1132–3. For a description of the process, see La Nauze, *The Making of the Australian Constitution*, above n 8, 232–7.

⁵⁵³ *United States Constitution* art III § 2. Clark's Constitution actually included two exceptions and regulations clauses; the second one applied to the High Court's function as a general court of appeals to review all aspects of state law ('Inglis Clark's Bill with Griffith's Annotations', above n 53, 107 (s 64)) but the two clauses were merged early in the drafting process ('Revision with Additions Separately Numbered', above n 551, 227 (ch III s 4)).

⁵⁵⁴ Herbert Wechsler, 'The Courts and the Constitution' (1965) 65 *Columbia Law Review* 1001; Paul M Bator, 'Congressional Power over the Jurisdiction of the Federal Courts' (1982) 27 *Villanova Law Review* 1030, 1038–41; John Harrison, 'The Power of Congress to Limit the Jurisdiction of Federal Courts and the Text of Article III' (1997) 64 *University of Chicago Law Review* 203, 248.

⁵⁵⁵ Henry M Hart Jr, 'The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic' (1953) 66 *Harvard Law Review* 1362, 1365. See also Barry Friedman, 'A

- 3 Congress has no power to eliminate any of the Supreme Court's appellate jurisdiction categories but only power to reassign cases in the Court's constitutionally identified appellate jurisdiction to its original jurisdiction.⁵⁵⁶

Although this third theory seems quite consistent with the wording of the clause,⁵⁵⁷ and it has been powerfully argued recently by Laurence Claus,⁵⁵⁸ it is clearly a minority view and seemingly goes against the established law in the United States.⁵⁵⁹

As is true of many provisions that Clark took from the *United States Constitution*, we have no basis for knowing just why this clause was borrowed wholesale. Nor is there any explanation for why this clause was copied and recopied in sequential draft Constitution Bills. Like much in Chapter III, there was no debate on the subject whatsoever in Sydney in 1891. At Adelaide in 1897, however, Patrick Glynn moved to strike the words 'with such exceptions and', thus leaving legislative power only to 'regulate' the Court's jurisdiction.⁵⁶⁰ His argument was that the words he wanted deleted were 'exceedingly wide, and [gave] power to the Parliament to cut down the powers to practically nothing.'⁵⁶¹ His proposed amendment provoked no discussion and a negative vote.⁵⁶²

Glynn renewed his position at Melbourne. He noted that his effort in Adelaide 'was scarcely considered.'⁵⁶³ The term '[e]xceptions', he said,

means a deduction from the powers of the court ... In America, time after time, demands were made to emasculate the jurisdiction of the courts when the decisions were against the opinions of the construction of the *Constitution* that were dominant at the time. ... In my opinion, the retention of the words 'with such exceptions and' would allow too great an interference with the appellate jurisdiction.⁵⁶⁴

Henry Higgins opposed Glynn's amendment. He noted that these words are in art III § 2 of the *United States Constitution* (though, he said, there dealing 'only with federal matters'):⁵⁶⁵

If they were willing in the United States to allow exceptions even with regard to appeals in federal matters, then a fortiori I think the Federal Parliament ought

Different Dialogue: The Supreme Court, Congress and Federal Jurisdiction' (1990) 85 *Northwestern University Law Review* 1.

⁵⁵⁶ See Laurence Claus, 'The One Court That Congress Cannot Take Away: Singularity, Supremacy, and Article III' (2007) 96 *Georgetown Law Journal* 59.

⁵⁵⁷ See McConnell, above n 503, 29.

⁵⁵⁸ Claus, above n 556.

⁵⁵⁹ *Ibid* 61, 88–109, 116–19.

⁵⁶⁰ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 945, 967.

⁵⁶¹ *Ibid* 967.

⁵⁶² *Ibid*.

⁵⁶³ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 331.

⁵⁶⁴ *Ibid*.

⁵⁶⁵ *Ibid*.

to be allowed to make exceptions in connexion with the High Court, which is to deal with appeals in matters of all sorts ...⁵⁶⁶

Concerned with the possibility of appeals in the 'most trumpery case',⁵⁶⁷ Higgins argued that '[i]n this, as in other matters, we must trust the Federal Parliament to a very large extent.'⁵⁶⁸ And again the proposed amendment was rejected.⁵⁶⁹

The exceptions and regulations clause finally got a more serious hearing later in Melbourne when Edmund Barton, leader of the Convention and chair of the Drafting Committee, proposed an amendment comparable to what Glynn had been pressing. Barton moved '[t]hat the words, "with such exceptions and subject to such regulations" ... be omitted, with the view to the insertion of the words "subject to such conditions."⁵⁷⁰ Barton argued that Parliament could use the power to make exceptions 'in such a way that, little by little, the High Court may become the mere shadow of a Court of Appeal.'⁵⁷¹ His amendment, he said, would allow Parliament 'to prescribe regulations for the hearing of these appeals, but it will be unable to take away the appellate power of the court.'⁵⁷² Parliament's power to impose conditions of appeal, like conditions imposed by Orders in Council, 'would limit the right of appeal so as to exclude minor or trumpery cases.'⁵⁷³

Glynn, supporting Barton,⁵⁷⁴ cited one (not very relevant) American case⁵⁷⁵ and two American scholars — John Burgess⁵⁷⁶ and the then future American President Woodrow Wilson.⁵⁷⁷ These authorities were cited for the proposition that giving Congress control of the Supreme Court's jurisdiction was subject to abuse and risked inhibiting the Court from opposing 'the principles of the ruling political party.'⁵⁷⁸ Wilson believed that Congress had in fact abused its power, though Burgess believed that the abuse was threatened but had not occurred.⁵⁷⁹

⁵⁶⁶ Ibid 331–2.

⁵⁶⁷ Ibid 332. For which Higgins gave as examples very minimal prison sentences and, agreeing with O'Connor, very small amounts of controversy.

⁵⁶⁸ Ibid. Henry Dobson also expressed a willingness to give Parliament power to limit jurisdiction on the basis of the amount in controversy, but wondered about a broader parliamentary power, noting that 'it is of no use saying that we should trust the Federal Parliament, and then in every other sentence show that we distrust them'.

⁵⁶⁹ Ibid.

⁵⁷⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1885.

⁵⁷¹ Ibid.

⁵⁷² Ibid 1886.

⁵⁷³ Ibid (Edmund Barton).

⁵⁷⁴ Ibid 1886 (Edmund Barton), 1887–8 (Patrick Glynn).

⁵⁷⁵ *Turner v Bank of North America*, 4 US (4 Dall) 8 (1799), cited in *ibid* 1888.

⁵⁷⁶ Burgess, above n 102.

⁵⁷⁷ Wilson, above n 273.

⁵⁷⁸ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1887 (Patrick Glynn), quoting *ibid* 38 and citing Burgess, above n 102.

⁵⁷⁹ Wilson, above n 273, 37–9; Burgess, above n 102, vol II, 331–2. See also *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1888 (Patrick Glynn).

Barton and Glynn were supported by O'Connor;⁵⁸⁰ Higgins' opposition was joined by Isaacs⁵⁸¹ and Symon,⁵⁸² both expressing concern about inappropriate appeals and urging that Parliament should be trusted. When Wise argued that '[o]n two occasions the power of the United States Parliament [Congress] was invoked to destroy the authority of the High Court [the United States Supreme Court]',⁵⁸³ Symon replied, 'I cannot conceive it possible that the Federal Parliament or any other Parliament of an English speaking people will do anything to degrade or improperly interfere with the administration of justice'.⁵⁸⁴ Higgins argued that:

it is only fair for us to trust the Federal Parliament to lay down some general rule, which is not applicable to a particular case, but to all cases, and to say that, inasmuch as the power has not been abused in America, it will not be abused here.⁵⁸⁵

Higgins also argued that Barton's alternative proposal would not eliminate the risk of abuse.⁵⁸⁶ Barton's proposed amendment failed.⁵⁸⁷

No doubt there is room for disagreement about what 'abuse' means in this context. Symon evidently thought it meant 'degrade or improperly interfere with the administration of justice'. In *Ex parte McCardle* ('*McCardle*'), an Act of Congress excluding jurisdiction had as its purpose and effect the denial of the Supreme Court's appellate forum to a federal prisoner claiming a right to a writ of habeas corpus through which to challenge an allegedly illegal detention.⁵⁸⁸ In *United States v Klein* ('*Klein*'), an Act of Congress attempted to exclude jurisdiction to challenge a right to claim the intended benefit of a presidential pardon.⁵⁸⁹ Both of those cases would seem to be examples of statutes which tend 'to degrade or improperly interfere with the administration of justice'.⁵⁹⁰

Some of the arguments favouring the adoption of the American words seemed to reason that the American Congress had not abused its power, *therefore* the Australian Parliament would not do so either.⁵⁹¹ Of course, it does not follow that, if the American Congress had abused its power, *therefore* the Australian Parliament would do so also. But it does seem to follow that the experience of

⁵⁸⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1890-1.

⁵⁸¹ *Ibid* 1886-7, 1891.

⁵⁸² *Ibid* 1887, 1892-3.

⁵⁸³ *Ibid* 1892. Wise did not cite any cases, but could have done so and perhaps had in mind the cases that are discussed below: see below nn 588-9 and accompanying text.

⁵⁸⁴ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898.

⁵⁸⁵ *Ibid* 1890.

⁵⁸⁶ *Ibid*.

⁵⁸⁷ *Ibid* 1893.

⁵⁸⁸ 74 US (7 Wall) 506 (1868).

⁵⁸⁹ 80 US (13 Wall) 128 (1871).

⁵⁹⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1892 (Josiah Symon).

⁵⁹¹ See above nn 584-5 and accompanying text.

actual or attempted abuse in the United States should at least be relevant to the way this power should be interpreted.

In their treatise, Quick and Garran asserted that Parliament's power under s 73 is plenary:

Except as regards appeals from the Supreme Courts of the States in the matters defined in the second paragraph of the section,⁵⁹² the power to except and regulate is — as it is in the United States — absolute and unlimited.⁵⁹³

This confident statement about the United States considerably overstated the American law, then and now. As already indicated, the meaning of the exceptions and regulations clause in the United States is controversial.⁵⁹⁴ Prior to the Australasian Constitutional Conventions, the American cases and dicta giving rise to this uncertainty were already on the books. In the *McCardle* case, the United States Supreme Court dismissed a case (after argument and while the Court's decision was pending) for lack of jurisdiction on the basis of a federal statute (the *Act of 27 March 1868*)⁵⁹⁵ expressly withdrawing federal jurisdiction to issue a writ of habeas corpus. The Court said: 'Without jurisdiction the court cannot proceed at all in any cause. ... [W]hen [jurisdiction] ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause.'⁵⁹⁶ In that same case, however, the Court also said:

Counsel seem to have supposed, if effect be given to the repealing act in question, that the whole appellate power of the court, in cases of habeas corpus, is denied. But this is an error. The act of 1868 does not except from that jurisdiction any cases but appeals from Circuit Courts under the act of 1867 [under which the case had been brought]. It does not affect the jurisdiction which was previously exercised.⁵⁹⁷

Shortly after the *McCardle* decision, the Court upheld the issuance of a writ of habeas corpus in *Ex parte Yerger* in a similar factual situation,⁵⁹⁸ explaining that, in *McCardle*, Congress had taken away some but not all sources of the Supreme Court's jurisdiction.⁵⁹⁹ Three years later, in the *Klein* case, the Court held unconstitutional a statute purporting to withdraw jurisdiction from the Supreme Court to decide a case for which an appeal was pending and to reverse the lower court decision.⁶⁰⁰ The Court said this statute, which purported to withdraw the

⁵⁹² This limitation on Parliament's power applied only to appeals on state law questions for which there was no American analogy, and it applied specifically to those appeals for which the Australian High Court would replace the Privy Council: Quick and Garran, above n 34, 739. See below nn 607–10 and accompanying text. As noted earlier, there was at one time a separate exceptions and regulations clause in the early Constitution Bills applicable to these appeals from state court decisions concerning state law: see above n 553.

⁵⁹³ Quick and Garran, above n 34, 738.

⁵⁹⁴ See above nn 554–9 and accompanying text.

⁵⁹⁵ *Act of 27 March 1868*, c 34, 15 Stat 44.

⁵⁹⁶ *McCardle*, 74 US (7 Wall) 506, 514 (Chase CJ for the Court) (1868).

⁵⁹⁷ *Ibid* 515.

⁵⁹⁸ 75 US (8 Wall) 85 (1868).

⁵⁹⁹ *Ibid* 106 (Chase CJ for the Court).

⁶⁰⁰ 80 US (13 Wall) 128, 143–4 (Chase CJ for the Court) (1871).

Court's jurisdiction, was using jurisdictional language as a means to an impermissible end, prescribing a rule of decision for the judiciary.⁶⁰¹ The lack of certainty concerning the scope of congressional power under the exceptions and regulations clause has more recently been reinforced.⁶⁰²

The High Court of Australia has had several occasions in which it approved parliamentary exceptions or regulatory limitations,⁶⁰³ but it has decided no case approaching a draconian withdrawal of federal jurisdiction. Moreover, some High Court Justices, in dicta, have reasoned that an exception is an 'exception' and should not be permitted to swallow the rule.⁶⁰⁴ Given the Court's reliance on the 'constitutional scheme' in the *Kable* case,⁶⁰⁵ it would seem that the High Court of Australia might adopt a theory such as that advocated by Henry Hart Jr for the *United States Constitution*, denying Congress power to deprive the Supreme Court of appellate jurisdiction when that would undermine the Court's 'essential role' in the constitutional system.⁶⁰⁶ Based on either the propriety of inference to be drawn from constitutional language or the significance of the structural issue at stake, it would seem that the case for preventing Parliament from destroying High Court appellate jurisdiction under the 'constitutional scheme' of ss 71, 73 and 75–6 is at least as strong as the case for mandating state courts to exist under ss 71 and 77(iii).

VI CODA: CLARK, THE PRIVY COUNCIL AND THE AMERICAN SUPREME COURT

In the memorandum that Inglis Clark wrote to explain his 1891 draft Constitution, he said he had drafted the Constitution Bill 'in accordance with the

⁶⁰¹ Ibid 145–6 (Chase CJ for the Court).

⁶⁰² See *Felker v Turpin*, 518 US 651, 667 (1996), where Stevens J, joined by Souter and Breyer JJ concurring, explained that, if no statutory avenues for review were available, 'the question whether the statute exceeded Congress's Exceptions Clause power would be open'; see also at 667 fn 2.

⁶⁰³ *R v Murray and Cormie; Ex parte Commonwealth* (1916) 22 CLR 437; *The Federated Engine Drivers' and Firemen's Association of Australasia v The Colonial Sugar Refining Co Ltd* (1916) 22 CLR 103; *Australian Steamships Pty Ltd v Abbott* (1927) 39 CLR 148; *Watson v Federal Commissioner of Taxation* (1953) 87 CLR 353; *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529; *Cockle v Isaksen* (1957) 99 CLR 155. The High Court has distinguished 'exceptions' and 'regulations' in *Smith Kline & French Laboratories (Australia) Ltd v Commonwealth* (1991) 173 CLR 194, 210 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

⁶⁰⁴ *Collins v Charles Marshall Pty Ltd* (1955) 92 CLR 529, 544 (Dixon CJ, McTiernan, Williams, Webb, Fullagar and Kitto JJ) (referring to tribunals exercising jurisdiction described in s 73 and observing: 'after all it is only a power of making exceptions. Such a power is not susceptible of any very precise definition but it would be surprising if it extended to excluding altogether one of the heads specifically mentioned by s 73'); *Cockle v Isaksen* (1957) 99 CLR 155, 165 (Dixon CJ, McTiernan and Kitto JJ) (stating 'the intention of s 73 doubtless is that the general rule shall be that the High Court has jurisdiction to hear and determine appeals from its judgments decrees orders or sentences'; in this case, the exception was not an 'attempt to use the power to prescribe exceptions so as to destroy the general rule'). See also Zines, 'Federal, Associated and Accrued Jurisdiction', above n 406, 270, citing *Re McJannet; Ex parte Minister for Employment, Training and Industrial Relations (Qld)* (1995) 184 CLR 620, 651 (Toohey, McHugh and Gummow JJ); W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (5th ed, 1976) 506–7.

⁶⁰⁵ See above nn 165–7 and accompanying text.

⁶⁰⁶ Hart, above n 555, 1365.

distinctive feature of the *American Constitution*.⁶⁰⁷ But he qualified this with the words: 'with such alterations and additions as the local circumstances of the Colonies and the political history of the United States seemed to indicate to me as being desirable.'⁶⁰⁸ Under the heading of the 'Federal Judiciary', Clark said he was following the 'American model with an innovation', described as the 'additional jurisdiction' of an Australian Supreme (High) Court to hear appeals in non-federal matters from 'all final judgments' of state supreme courts.⁶⁰⁹ This general supervisory jurisdiction over questions of state law was uncontroversial and became a part of the *Australian Constitution* that was eventually adopted.⁶¹⁰

As so stated, this innovation was an exception from Clark's usual approach of following the American model. It is widely understood that this general 'non-federal' appellate jurisdiction of Australia's High Court is a feature of Australian constitutional law that sharply separates it from American constitutional law.⁶¹¹ Part of Clark's explanation of his innovation, however, is that the final jurisdiction of state court appeals in a new Australian supreme court is 'to be substituted for the appeal which now lies ... to the Privy Council.'⁶¹² Although there were appeals from the American colonies to the Privy Council before American independence, one could not really call the termination of Privy Council appeals a 'feature based on the American model', in the sense of anything to which one could point in art III of the *United States Constitution*. There is no doubt, though, that the Supreme Court of the United States is the model for Clark's proposed supreme national court that would have the last word, *in Australia*, on all legal issues arising in the Australian nation-to-be. And that, too, is a significant innovation.

Plainly, a fundamental part of Clark's objective was to prevent sending Australian legal issues out of Australia for final decision by a non-Australian court. As we have seen, Clark proposed to begin the *Australian Constitution*'s treatment of the judiciary by a virtually verbatim copy of the first words of art III of the *United States Constitution*: 'The Judicial power of the Federal Dominion of Australia shall be vested in one Supreme Court'.⁶¹³ Just as clearly, Clark proposed language that would have wiped out Privy Council appeals for all federal issues as well as from state court judgments:

[N]o appeal shall be brought from any Judgment or Order of the [newly created Australian] Supreme Court to any Court of appeal established by the Parlia-

⁶⁰⁷ 'Inglis Clark's Memorandum to Delegates', above n 22, 67.

⁶⁰⁸ Ibid.

⁶⁰⁹ Ibid 69.

⁶¹⁰ See *Australian Constitution* s 73(ii), differentiating appeals from state courts 'exercising federal jurisdiction' (under ss 71 and 77(iii)) and appeals from 'the Supreme Court of any State'.

⁶¹¹ Dixon, above n 26, 198–202; William G Buss, 'Alexander Meiklejohn, American Constitutional Law, and Australia's Implied Freedom of Political Communication' (2006) 34 *Federal Law Review* 421, 432–3.

⁶¹² 'Inglis Clark's Memorandum to Delegates', above n 22, 619.

⁶¹³ See above nn 72–3 and accompanying text.

ment of Great Britain and Ireland by which appeals or petitions to Her Majesty in Council may be ordered to be heard.⁶¹⁴ ...

[A]ll appeals which by any Law are now allowed from any judgment, decree, order, or sentence of the Supreme Court of any of the said Colonies to the Queen's Privy Council shall be heard and determined by the said Supreme Court of the Federal Dominion of Australasia; and the Judgment of the last-mentioned Court shall in all such appeals be final and conclusive.⁶¹⁵

Of course, Clark's recommendation for an Australian High Court that would totally replace Privy Council appeals was not realised in the *Australian Constitution* of 1 January 1901. Indeed, it was not fully realised until 1986.⁶¹⁶ The Clark draft Constitution proposing termination of Privy Council appeals received only approving ticks from Griffith's first perusal.⁶¹⁷ But in the printed revision of Clark's draft (Griffith's 'First Proof'),⁶¹⁸ Clark's vision of Australian law being finally decided by an Australian court had been compromised by a paragraph beginning: 'Notwithstanding the provisions of [the sections eliminating Privy Council appeals]'.⁶¹⁹ That was the beginning of making Privy Council appeals part of the *Australian Constitution*. From that point to the final compromise with the Colonial Office in London in the English summer of 1900,⁶²⁰ the battle raged between those framers who generally endorsed Clark's position and those who were intent on preserving Privy Council appeals.⁶²¹

Many framers agreed with Clark in not wanting to yield substantial final decision-making power on Australian legal issues to the Privy Council. They wanted Australian courts to have the last word in interpreting the *Australian Constitution* (at least most of the time).⁶²² On the other hand, those framers who

⁶¹⁴ 'Inglis Clark's Bill for the Federation of the Australasian Colonies', above n 60, 89 (s 64).

⁶¹⁵ *Ibid* (s 66).

⁶¹⁶ *Australia Act 1986* (Cth) s 11; *Australia Act 1986* (UK) c 2, s 11 (terminating all Privy Council appeals from Australia).

⁶¹⁷ 'Inglis Clark's Bill with Griffith's Annotations', above n 53, 107 (s 66).

⁶¹⁸ See above nn 57–62 and accompanying text.

⁶¹⁹ 'First Proof, 24 March 1891', above n 57, 152.

⁶²⁰ See La Nauze, *The Making of the Australian Constitution*, above n 8, 260–8. La Nauze collected several versions of the provision ultimately adopted in s 74 of the *Australian Constitution*: at 303–4.

⁶²¹ A very substantial amount of debate time was spent on this issue: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 968–89; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 31 January 1898, 322–31; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2286–323; *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 12 March 1898, 2405–13, 2415–22.

⁶²² Most of the debate concerned more or less rather than either/or. Although hoping that the Australian Supreme Court would take the place of the Privy Council, on the Convention floor Clark conceded a right of appeal to the Privy Council in cases 'affecting imperial interests': see *Official Report of the National Australasian Convention Debates*, Sydney, 11 March 1891, 253. The debate raged over 'rights' of appeal and discretionary appeals and over public and private law issues; and there was a lack of clarity and many changes of view over the precise issue of particular votes as indicated by both outright acknowledgment of confusion and unconcealed demonstrations of confusion: see, eg, *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 15 March 1898, 2438 (Patrick Glynn); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 16 March 1898, 2453–4 (Patrick Glynn); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 12 March

supported a significant continuing role for the Privy Council were also strongly committed to their opposing views: they argued that the Privy Council had more quality than an Australian court could have; that an appeal to the Privy Council was a traditional right of all Englishmen; and that such an appeal was necessary to assure English businesses that their Australian investments would be safe from parochial judicial prejudice.⁶²³ But the most persistent argument for retaining significant Privy Council appeals was the symbolic importance of such appeals as a tie, maybe the last tie, that kept Australia as an important part of the British Empire. It was the 'painter' connecting Australia to the British ship of state.⁶²⁴

The arguments against the Privy Council, in addition to rebutting the opposing arguments, were cost, delay, and unfairness to poor litigants.⁶²⁵ But the most deeply felt argument against a significant continuing Australian role for the Privy Council was the felt need for Australia to be independent. Not technically or legally independent. This was no Fourth of July declaration. The identity with the British Empire was strong and virtually unquestioned. But there was a way to be connected, yet independent.⁶²⁶

In the extensive and repeated debate in the Constitutional Conventions, the American Supreme Court was rarely invoked directly in opposition to an expansive Privy Council role. *But it was the elephant in the room.* Always in the background were the extensive praise and pervasive references to the Supreme Court of the United States. It was unambiguously the model which the High Court of Australia was expected, inevitably, to follow.⁶²⁷ A court could not be a 'supreme' court or a 'high' court if its decision were subject to reversal by a non-Australian court on the other side of the world. In some respects, this silent and elusive form of American influence on the framers' constitution-making is a much deeper mark of what the *United States Constitution* meant to the framers than the more overt adoptions or modifications of particular American constitutional provisions.

Inseparable from the heated debate about the Privy Council was the ambiguous status of the nation that was being created by the adoption of a federating constitution within the British Empire.⁶²⁸ The many comparisons to the United States and the United States Supreme Court were not just about constitutional

1898, 2418 (William Trenwith); *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2309 (Richard O'Connor). See also La Nauze, *The Making of the Australian Constitution*, above n 8, 25, 42, 218–23.

⁶²³ See, eg. *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 970–5 (Sir Joseph Abbott), 979–80 (Joseph Carruthers), 981 (Simon Fraser).

⁶²⁴ See, eg. *Official Report of the National Australasian Convention Debates*, Sydney, 5 March 1891, 52 (George Dibbs); *ibid* 975 (Simon Fraser).

⁶²⁵ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 977 (Sir George Reid).

⁶²⁶ See Clark, 'The Future of the Australian Commonwealth', above n 9, 208. See also Hirst, *The Sentimental Nation*, above n 1, ch 1; John Hirst, *Sense and Nonsense in Australian History* (2005) 197–205; Helen Irving, *To Constitute a Nation: A Cultural History of Australia's Constitution* (1997) 25–34.

⁶²⁷ See, eg. above nn 211–29 and accompanying text, discussing the debates relating to the size of the High Court.

⁶²⁸ See Clark, 'The Future of the Australian Commonwealth', above n 9.

law. They were discussions about Australia's future. The influence of Bryce's *The American Commonwealth* was not simply about the *United States Constitution*. The framers were thinking about the *Australian Commonwealth*. There was a wish to be emancipated. In one exchange, Downer acknowledged his sympathy with the appeal of the connection to the mother country, but asked, in return, 'whether we are ever to get out of our swaddling clothes?'⁶²⁹ In his passionate opposition to Privy Council appeals, Josiah Symon asserted that, without an Australian High Court that is supreme, '[w]e are not fit for the first duty of a nation, the duty of dispensing final justice among our citizens.'⁶³⁰ John Forrest answered: 'We are not a nation, we are only a part of it.'⁶³¹

Clark's personal experience in observing the Privy Council in action — '[o]nly one of the judges was awake and the other three were all dozing' — was not such as to give him a high opinion of that august body.⁶³² But his writing provides a deeper and far more philosophical foundation for his position. In his essay on the Privy Council in an appendix to his treatise on Australian constitutional law, Clark emphasised the inevitable uniqueness of Australia's *Constitution* and resulting law;⁶³³ and, as he did generally in discussing constitutional interpretation, he stressed the relevance of knowledge of social conditions and local culture.⁶³⁴ In his concluding passage in that essay, Clark quoted the famous statement of the then future Supreme Court Justice, Oliver Wendell Holmes Jr, that the 'life of the law ... has been experience.'⁶³⁵ Clark then added his own reinforcing conclusion, that 'judicial independence of the Commonwealth' will lead to a 'growth and expansion of its national consciousness and ... the growth and development of its capacity to make a distinctive contribution to the jurisprudence and civilization of the world.'⁶³⁶

On 27 August 1903, Inglis Clark wrote a letter to Alfred Deakin, then the Attorney-General of Australia, informing Deakin that he (Clark) would accept an

⁶²⁹ *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 974. The ultimate answer was: 'That is just it. We are not becoming a nation': at 975 (Joseph Carruthers).

⁶³⁰ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2303. See also Irving, above n 626, 51: 'This section of Clark's constitution [eliminating Privy Council appeals] is a miniature declaration of independence, and the other delegates liked it.'

⁶³¹ *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 11 March 1898, 2303. See also J A La Nauze, 'The Name of the Commonwealth of Australia' in Helen Irving and Stuart Macintyre (eds), *No Ordinary Act: Essays on Federation and the Constitution by J A La Nauze* (2001) 158.

⁶³² Neasey and Neasey, above n 8, 114, quoting a report of Clark's comments in the Parliament of Tasmania regarding the Privy Council appeals provided for in the Adelaide Convention's draft Constitution Bill: 'House of Assembly: Wednesday, August 11, 1897', *The Mercury* (Hobart), 12 August 1897, 4.

⁶³³ See Clark, *Studies in Australian Constitutional Law*, above n 7, 355–9.

⁶³⁴ *Ibid* 20–1.

⁶³⁵ *Ibid* 356, quoting O W Homes Jr, *The Common Law* (1881) 1.

⁶³⁶ Clark, *Studies in Australian Constitutional Law*, above n 7, 357. See also Clark, 'The Future of the Australian Commonwealth', above n 9.

appointment to the High Court if offered.⁶³⁷ In his letter, Clark expressed the hope that the first High Court judges, whoever is appointed, would do for the supremacy of Australian federal law what the American Supreme Court did for the United States; and he added the hope that, 'above all', those judges would not be guided by Privy Council decisions on the 'totally inapplicable' *Canadian Constitution*.⁶³⁸ For many of the framers, Privy Council appeals stood in the way of getting qualities and results that they wanted — in the way of being the people and the nation they wanted to be. And they were right. Whatever criteria one uses for identifying Australia's transition from a British 'possession' to an autonomous nation, it is clear that the gradual reduction and ultimate termination of Privy Council appeals has been an integral part of that process. That was part of Clark's creation that waited a long time to overcome the erosion which began with Griffith's first revision of the Clark Constitution.

VII CONCLUSION

As this article has shown, Andrew Inglis Clark's proposed 1891 Constitution provided the foundation and much of the content of Chapter III of the *Australian Constitution*: 'The Judicature'. The article also shows that much of this part of Clark's proposed Constitution came straight out of art III of the *United States Constitution*. This article has not shown or attempted to show that the Australian framers adopted substantial parts of art III simply because they were American. There are some provisions that, without debate on the Convention floor, went more or less directly from the American art III through Clark's 1891 Constitution into the *Australian Constitution*. As to them, it is impossible to know the level of deliberation outside the Convention halls that produced that result or to what extent the resulting constitutional provision was produced by limited debate time and competing priorities. Where debate about Chapter III issues is recorded, it is safe to say that a generally positive view about American constitutional law and the American Supreme Court broadly influenced the Australian framers toward serious consideration of particular American provisions for their own *Constitution*. But the transcript of the Debates shows that that favourable view provided a nudge; it was not a 19th century Xerox machine.

For the framers, this was not copying work. This was a matter for debate. The debates show that the framers only wanted what fit their situation. That was what the debate was about: Here is a problem. Here is the American solution. What is right about it? What is wrong? Will that work here? There were usually two sides to the discussion. The debate was often vigorous. The debate was often about what the American provision meant; it was always about what it should mean to Australia. The American provisions, usually through Clark's draft, often served to set an agenda for Chapter III, not to control the results.

⁶³⁷ Letter from Andrew Inglis Clark to Alfred Deakin, 27 August 1903 in *Papers of Alfred Deakin* (National Library of Australia, MS 1540/14/638) 1–2. Clark was responding to a letter from Deakin.

⁶³⁸ *Ibid* 2–3.

The votes were sometimes close;⁶³⁹ sometimes not.⁶⁴⁰ Some American things were deliberately adopted without change (vesting High Court jurisdiction);⁶⁴¹ some were rejected (sovereign immunity).⁶⁴² There were some inspired innovation (s 77(iii) authorising federal jurisdiction to be invested in state courts);⁶⁴³ and some apparent departures that were left a bit ambiguous ('matter' versus 'cases and controversies').⁶⁴⁴ Sometimes the 19th century debate about the American precedent has recurred in a 20th century debate (as in the case of the provisions governing tenure and removal of federal judges).⁶⁴⁵ Sometimes the focus of invoking American precedent was blurred (mandamus suits against government officials).⁶⁴⁶ Sometimes an enigmatic provision in the *United States Constitution* has remained enigmatic in the *Australian Constitution* (the exceptions and regulations clause).⁶⁴⁷

The Australian framers certainly thought of themselves as Australians and British subjects. They did not want to be Americans. Nor did they want a *United States Constitution* or an American Supreme Court. They wanted some of the qualities and results that, they perceived, were accomplished through the *United States Constitution* and the American Supreme Court. Very often, the way to think about getting those qualities and those results started with the words and structure of the *United States Constitution* and the opinions of the Supreme Court of the United States.

About many issues that were debated concerning the federal judiciary and the judicial power of the Commonwealth it is hard to argue that the American precedent or the debate about and around that precedent is irrelevant. Clearly, what came from the United States and from Clark outlines an overlapping area of constitutional law. With respect to many constitutional provisions for which there is a substantial shared base, what Australian courts say about Australian constitutional law in interpreting Chapter III should be relevant to American courts; and what American courts say about art III should be of interest to Australian courts. But what American constitutional law was in the 1890s (or is now) is never determinative.

In his magisterial history on *The Making of the Australian Constitution*, John La Nauze observed: 'For the Convention of 1891 there is no question that Griffith and Clark were the main shapers of the structure and language of the Draft Constitution, though they were considerably indebted to their predecessors of 1787 and 1867.'⁶⁴⁸ In the judgement of La Nauze, '[t]he draft of 1891 is the

⁶³⁹ See, eg, *Official Record of the Debates of the Australasian Federal Convention*, Adelaide, 20 April 1897, 968.

⁶⁴⁰ See, eg, *ibid* 1019.

⁶⁴¹ See above Part III(A).

⁶⁴² See above Part V(B)(1).

⁶⁴³ See above Part III(C).

⁶⁴⁴ See above Part V(A).

⁶⁴⁵ See above Parts IV(B)(3)–(7).

⁶⁴⁶ See above Part V(B)(2).

⁶⁴⁷ See above Part V(B)(3).

⁶⁴⁸ La Nauze, *The Making of the Australian Constitution*, above n 8, 81.

Constitution of 1900, not its father or grandfather.⁶⁴⁹ Great as Griffith's contributions to the 1891 draft and to securing its adoption undoubtedly were, his work on Chapter III was primarily the work of a draftsman — albeit a superb draftsman —; the original work was Clark's.⁶⁵⁰ Thus, in so far as Chapter III of the *Australian Constitution* of 1900 is concerned, Clark was the 'main shaper' and the primary debt of the shapers was owed to the 1787 'predecessors'.

⁶⁴⁹ Ibid 78.

⁶⁵⁰ See Castles, 'Clark, Kingston and the Draft Constitution of 1891', above n 20, 285.