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# American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law, 30 J. Marshall L. Rev. 627 (1997)

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# ARTICLES

# AMERICAN AND AUSTRALIAN CONSTITUTIONS: CONTINUING ADVENTURES IN COMPARATIVE CONSTITUTIONAL LAW

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

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

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

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

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

2. Paul A. Freund, *A Supreme Court in a Federation: Some Lessons from Legal History*, 53 COLUM. L. REV. 597 (1953).

3. Mauro Cappelletti, *The "Mighty Problem" of Judicial Review and the Contribution of Comparative Analysis*, 53 S. CAL. L. REV. 409, 412 (1980).

> lian Constitution a privileges and immunities, due process, and equal protection clause] was an inappropriate transcription from the United States constitution. He pointed out that while the words sounded well and were deceptively clear, they had given rise to all manner of legal complexity. He developed this point with an elaborate analysis of the American civil war and its consequences, including the Fourteenth Amendment to the United States constitution, for it was that Amendment which had inspired the proposed clause. In Australia, Isaacs said, there were not the social and political factors which demanded a copying of the Fourteenth Amendment.[4]
>
> The men who drew up the Australian Constitution had the American document before them; they studied it with care; they even read the standard books . . . which undertook to expound it.
>
> . . . .
>
> [I]n most . . . respects [Australia's] constitution makers followed with remarkable fidelity the model of the American . . . [Constitution]. Indeed . . . roughly speaking, the Australian Constitution is a redraft of the American Constitution of 1787 with modifications found suitable for the more characteristic British institutions and for Australian conditions.[5]

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4. ZELMAN COWEN, ISAAC ISAACS' 56 (1967) (summarizing Isaacs speech to the 1898 Melbourne session of the Australasian Federal Convention). *See also id.* at 55-73 (discussing Isaacs' thorough knowledge of U.S. constitutional law and his role in and views at the 1898 session); 1 OFFICIAL RECORD OF THE DEBATES OF THE AUSTRALASIAN CONVENTION: THIRD SESSION: MELBOURNE, 20TH JANUARY TO 17TH MARCH 1898 at 687-88 (1898) (Isaacs' anti-XIV amend. speech). On Isaacs (Aug. 6, 1855 - Feb. 11, 1948; delegate to 1897-98 Australasian Federal Convention; Federal Attorney General, July 1905 - Oct. 1906; Justice of Australian High Court Oct. 15, 1906 - April 1, 1930; Chief Justice April 2, 1930 - Jan. 21, 1931; Governor-General Jan. 22, 1931 - Jan. 23, 1936) see generally COWEN, *supra*; L.F. CRISP, FEDERATION FATHERS 186-271 (1990); James A. Thomson, *Judicial Biography: Some Tentative Observations on the Australian Enterprise*, 8 U. NEW SOUTH WALES L.J. 380, 393-94 (1985) (bibliography of Isaacs biographies). On the rejection of an "Australian" XIV amend. *see infra* note 282. *Compare* GRANVILLE AUSTIN, THE INDIAN CONSTITUTION: CORNERSTONE OF A NATION 101-12 (1966) (indicating American influence, including Justice Felix Frankfurter, in ensuring the Indian Constitution did not contain a due process clause); Soli J. Sorabjee, *Equality in the United States and India, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 94, 96-7 (Louis Henkin & Albert J. Rosenthal eds., 1990) (same); Andzrej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad*, in *id.* at 405, 449-50 (same). Similarly *see* Nobushige Ukai & Nathaniel L. Nathanson, *Protection of Property Rights and Due Process of Law in the Japanese Constitution, in* THE CONSTITUTION OF JAPAN: ITS FIRST TWENTY YEARS, 1947-67 at 239, 239-43 (Dan Fenno Henderson ed., 1968) (similar U.S. influence).

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

## I. INTRODUCTION

Frolicking - chaotically[6] or carefully[7] - in comparative constitutional law[8] is an intellectually alluring enterprise.[9] Reasons are obvious. Intriguing similarities and differences[10] continue[11] to be easily enticed. Prominent are examples,[12] from American[13] and Australian[14] constitutions.[15] Added to other comparative themes,[16]

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6. Of course, chaos might involve or be dissolvable into systematic patterns and systems and, therefore, assist in evaluating apparent contradictions, inconsistencies or tensions. *See* Robert E. Scott, *Chaos Theory and the Justice Paradox,* 35 WM. & MARY L. REV. 329 (1993); Andrew W. Hayes, *An Introduction to Chaos and Law,* 60 UMKC L. REV. 751 (1992).

7. For example, by constructing large, complex intricate constitutional law theories. *See* MARK TUSHNET, RED, WHITE, AND BLUE: A CRITICAL ANALYSIS OF CONSTITUTIONAL LAW 1-187 (1988) (describing and critiquing "grand" or "comprehensive normative theories of constitutional law").

8. *See generally* James A. Thomson, *Comparative Constitutional Law: Entering the Quagmire,* 6 ARIZ. J. INT'L & COMP. L. 22 (1989) (providing an analysis of and extensive bibliography on comparative constitutional law).

9. Post-Thomson, *supra* note 8, illustrations include R.C. VAN CAENEGEM, AN HISTORICAL INTRODUCTION TO WESTERN CONSTITUTIONAL LAW (1995); David Beatty, *Comparative Constitutional Law, in* CONSTITUTIONAL LAW IN THEORY AND PRACTICE 103 (1995); CONSTITUTIONALISM AND DEMOCRACY: TRANSITIONS IN THE CONTEMPORARY WORLD: THE AMERICAN COUNCIL OF LEARNED SOCIETIES COMPARATIVE CONSTITUTIONALISM PAPERS (Douglas Greenberg et al. eds., 1993); *International Conference on Comparative Constitutional Law,* 17 CARDOZO L. REV. 191-297 (1995); *Symposium: Constitutionalism in the Post-Cold War Era,* 19 YALE J. INT'L L. 187-254 (1994); *Comparative Constitutionalism: Theoretical Perspectives on the Role of Constitutions in the Interplay Between Identity and Diversity,* 14 CARDOZO L. REV. 497-956 (1993); *Perspectives in Comparative Law,* 21 CAP. U. L. REV. 1-224 (1992); *The Randolph W. Thrower Symposium: Comparative Constitutionalism,* 40 EMORY L.J. 723-942 (1991); *Symposium on Judicial Review and Public Policy in Comparative Perspective,* 19 POL'Y STUD. J. 76-206 (1990); Martin Loughlin, *The Importance of Elsewhere,* 4 PUB. L. REV. 44 (1993) (reviewing P. P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA (1990));

10. On the creatively important and stimulating role of difference and diversity, see generally W.M.C. Gummow, *Full Faith and Credit in Three Federations,* 46 S.C. L. REV. 979 (1995); Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritan Difficulty,* 94 MICH. L. REV. 245 (1995).

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

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

13. The United States is a federation consisting of fifty states and two U.S. territories. *See generally* THE OXFORD HISTORY OF THE UNITED STATES (C. Vann Woodward gen. ed.) (projected 11 volumes). Volumes published thus far: ROBERT MIDDLEKAUFF, THE GLORIOUS CAUSE: THE AMERICAN REVOLUTION, 1763-1789 (1982); MCPHERSON, BATTLE CRY OF FREEDOM (1988); JAMES T. PATTERSON, GRAND EXPECTATIONS: THE UNITED STATES, 1945-1974 (1996).

14. Australia is a federation consisting of the Commonwealth of Australia,

constitutional law can, with varying specificity,[17] elucidate consti-

six states - Queensland, New South Wales, Victoria, South Australia, Western Australia, and Tasmania - and territories (internal territories - Australian Capital Territory and the Northern Territory - and external territories - Ashmore and Cartier Islands, Australian Antarctic Territory, Christmas Island, Heard Island, McDonald Islands and Norfolk Island). *See generally* 1-6 C.M.H. CLARK, A HISTORY OF AUSTRALIA (1962-87); ALEC C. CASTLES, AN AUSTRALIAN LEGAL HISTORY (1982); BRIAN GALLIGAN, POLITICS OF THE HIGH COURT: A STUDY OF THE JUDICIAL BRANCH OF GOVERNMENT IN AUSTRALIA (1987); PETER HANKS, CONSTITUTIONAL LAW IN AUSTRALIA (2d ed., 1996); P.H. LANE, LANE'S COMMENTARY ON THE AUSTRALIAN CONSTITUTION (1986); J.A. LA NAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION (1972); P.H. LANE, THE AUSTRALIAN FEDERAL SYSTEM WITH UNITED STATES ANALOGUES (1972); R.D. LUMB & G.A. MOENS, THE CONSTITUTION OF THE COMMONWEALTH OF AUSTRALIA: ANNOTATED (5th ed., 1995); R.D. LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES (5th ed., 1991); R.D. LUMB, AUSTRALIAN CONSTITUTIONALISM (1983); W.G. MCMINN, NATIONALISM AND FEDERALISM IN AUSTRALIA (1994); W.G.MCMINN, A CONSTITUTIONAL HISTORY OF AUSTRALIA (1979); A.C.V. MELBOURNE, EARLY CONSTITUTIONAL DEVELOPMENT IN AUSTRALIA (1963); JOHN QUICK & ROBERT GARRAN, THE ANNOTATED CONSTITUTION OF THE AUSTRALIAN COMMONWEALTH (1901 Rep. 1995); GEORGE WINTERTON, PARLIAMENT, THE EXECUTIVE AND THE GOVERNOR-GENERAL: A CONSTITUTIONAL ANALYSIS (1983); LESLIE ZINES, THE HIGH COURT AND THE CONSTITUTION (4th ed, 1997). *See also* TONY BLACKSHIELD ET AL., AUSTRALIAN CONSTITUTIONAL LAW AND THEORY: COMMENTARY AND MATERIALS (1996); PETER HANKS, AUSTRALIAN CONSTITUTIONAL LAW: MATERIALS AND COMMENTARY (5th ed. 1994); LESLIE ZINES & G.J. LINDELL, SAWER'S AUSTRALIAN CONSTITUTIONAL CASES (4th ed. 1982).

15. There are federal, state, and territorial constitutions. Comparative overviews are in P.H. LANE, THE AUSTRALIAN FEDERAL SYSTEM WITH UNITED STATES ANALOGUES (1972); James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059 (1989); James A. Thomson, *State Constitutional Law: American Lessons for Australian Adventures*, 63 TEX. L. REV. 1225 (1985); James A. Thomson, *Executive Power, Scope and Limitations: Some Notes from a Comparative Perspective*, 62 TEX. L. REV. 559 (1983) (reviewing WINTERTON, *supra* note 14). *See also* Thomson, *supra* note 8, at 46-49 (bibliography of Australia-United States comparative constitutional law); *infra* Appendix A (same).

16. For general comparative U.S.-Australian surveys, see, e.g., NORMAN BARTLETT, 1776-1976: AUSTRALIA AND AMERICA THROUGH 200 YEARS (1976); L.G. CHURCHWARD, AUSTRALIA & AMERICA 1788-1972: AN ALTERNATIVE HISTORY (1979); GORDON GREENWOOD, EARLY AMERICAN-AUSTRALIAN RELATIONS FROM THE ARRIVAL OF THE SPANIARDS IN AMERICA TO THE CLOSE OF 1830 (1944); WERNER LEVI, AMERICAN-AUSTRALIAN RELATIONS (1947). For more general comparative topics, see, e.g., DAVID BRION DAVIS, REVOLUTIONS: REFLECTIONS ON AMERICAN EQUALITY AND FOREIGN LIBERATIONS (1990); DAVID BRION DAVIS, SLAVERY AND HUMAN PROGRESS (1984); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN THE AGE OF REVOLUTION 1770-1823 (1975); DAVID BRION DAVIS, THE PROBLEM OF SLAVERY IN WESTERN CULTURE (1966); GEORGE M. FREDRICKSON, WHITE SUPREMACY: A COMPARATIVE STUDY IN AMERICAN AND SOUTH AFRICAN HISTORY (1981); SLAVERY IN THE NEW WORLD: A READER IN COMPARATIVE HISTORY (Laura Foner & Eugene D. Genovese eds., 1969).

17. *See, e.g.*, Thomson, *supra* note 8, at 25-32 (referencing comparative constitutional law casebooks, treatises, essays, symposia, articles, scholars, thematic issues - judicial review, rights, federalism, separation of powers,

tutions' texts; institutional - legislative, executive, and judicial - arrangements; structural - federalism and separation of powers - predicates; governmental powers' contents, scope, and limits; substantive issues, including doctrinal developments; procedural and process requirements; and financial arrangements. Exposure of alternative possibilities is inevitable. Whether new insights and novel perspectives also emerge will depend upon how that diverse terrain, emanating from a variety of past,[18] present,[19] and future[20] state,[21] provincial,[22] territorial,[23] national,[24] and multi-national con-

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constitutional amendments, courts and jurimetrics).

18. *See, e.g.*, Declaration of Independence (U.S. 1776); Articles of Confederation (U.S. 1781); Northwest Ordinance (U.S. 1787); Colonial Charters and State Constitutions. For a discussion of these documents, see, e.g., JAY FLIEGELMAN, DECLARING INDEPENDENCE: JEFFERSON, NATURAL LANGUAGE, & THE CULTURE OF PERFORMANCE (1993); HAROLD M. HYMAN, AMERICAN SINGULARITY: THE 1787 NORTHWEST ORDINANCE, THE 1862 HOMESTEAD AND MORRILL ACTS AND THE 1944 G.I. BILL (1986); PETER S. ONUF, STATEHOOD AND UNION: A HISTORY OF THE NORTHWEST ORDINANCE (1987); GARRY WILLS, INVENTING AMERICA: JEFFERSON'S DECLARATION OF INDEPENDENCE (1979); Denis P. Duffey, *The Northwest Ordinance as a Constitutional Document*, 95 COLUM. L. REV. 929 (1995); Eric M. Freedman, *Why Constitutional Lawyers and Historians Should Take a Fresh Look at the Emergence of the Constitution from the Confederation Period: The Case of the Drafting of the Articles of Confederation*, 60 TENN. L. REV. 783 (1993); Samuel B. Payne, Jr., *The Iroquois League, the Articles of Confederation, and the Constitution*, 53 WM. & MARY Q 605 (3rd series) (1996); Thomson, *State Constitutional Law, supra* note 15, at 1230 n.25 (collections of colonial charters and state constitutions).

For a discussion of the 1861 Confederate Constitution, see, e.g., WILLIAM C. DAVIS, "A GOVERNMENT OF OUR OWN:" THE MAKING OF THE CONFEDERACY (1994); MARSHALL L. DEROSA, THE 1861 CONFEDERATE CONSTITUTION: AN INQUIRY INTO AMERICAN CONSTITUTIONALISM (1991); DON E. FEHRENBACHER, CONSTITUTIONS AND CONSTITUTIONALISM IN THE SLAVEHOLDING SOUTH 57-81, 101-06 (1989); CHARLES ROBERT LEE, JR., THE CONFEDERATE CONSTITUTION (1963 REP. 1974); Donald Niemann, *Republicanism, the Confederate Constitution, and the American Constitutional Tradition, in* AN UNCERTAIN TRADITION: CONSTITUTIONALISM AND THE HISTORY OF THE SOUTH 201-24 (Kermit L. Hall & James W. Ely, Jr., eds., 1989).

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

20. *See, e.g.*, BERNARD H. SIEGAN, DRAFTING A CONSTITUTION FOR A NATION OR REPUBLIC EMERGING INTO FREEDOM (1992) (indicating, by use of existing constitutions, how to draft future constitutions together with a model constitution); Mark S. Pullman, Book Review, 22 SW. U. L. REV. 1127 (1993) (reviewing SIEGAN). For examples and commentary note see issues of the *Eastern European Constitutional Review* (published by University of Chicago Law School and Central European University).

21. For a discussion of states in the United States, see, e.g., BERNARD D. REAM JR., & STUART O. YOAK, THE CONSTITUTIONS OF THE STATES: STATE BY STATE GUIDE AND BIBLIOGRAPHY TO CURRENT SCHOLARLY RESEARCH (1988); ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS (2d ed., 1993); *The New Judicial Federalism: A New Generation: Symposium Issue*, 30 VAL. U.L. REV. xiii-xxxiii, 421-620 (1996); *see also* 52 volume publication project on State Constitutions of the United States (G. Alan Tarr gen. ed.) (Greenwood Press). For a discussion of Australian States, see, e.g.,

stitutions,[25] is traversed.

Possibilities include[26] comparative juxtaposition of individual judicial decisions,[27] particular provisions in different constitutions,[28] interpretative strategies,[29] theories of judicial review,[30] and

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HANKS, *supra* note 14; LUMB, THE CONSTITUTIONS OF THE AUSTRALIAN STATES, *supra* note 14; James A. Thomson, *State Constitutional Law: The Quiet Revolution*, 20 U.W.A. L. REV. 311 (1990).

22. For a discussion of Canadian provinces, see, e.g., CONSTITUTIONS OF CANADA: FEDERAL AND PROVINCIAL (Christian L. Wiktor & Guy Tanguay eds., 1978-87) (4 looseleaf binders); Thomson, *State Constitutional Law, supra* note 15; Nelson Wiseman, *Clarifying Provincial Constitutions*, 6 NAT'L J. CONST. L. 269 (1996).

23. *See* Thomson, *State Constitutional Law, supra* note 15, at 1065-66 n.20 (referencing U.S., Australian, Canadian, and Indian territories).

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

25. *See, e.g.*, Maastricht Treaty on European Union, J.H.H. Weiler, *The Transformation of Europe*, 100 YALE L.J. 2403 (1991) (describing evolution of the European Community). *See also id.* at 2485-536 (commentaries).

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

27. For example, comparisons with Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803) (U.S. Supreme Court's assertion and exercise of power of judicial review). *See, e.g.*, ALEX STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE AND AMERICA: A STUDY OF CONSTITUTIONAL GOVERNANCE 66-9 (1995); George D. Haimbaugh, Jr., *Was it France's Marbury v. Madison*, 35 OHIO ST. L. REV. 910 (1974); Anirudh Prasad, *Imprints of Marshallian Judicial Statesmanship*, 22 J. INDIAN L. INST. 240, 247-51 (1980) (comparing Golak Nath v. State of Punjab, 1973 A.I.R. (S.C.) 1461 (establishing judicial review of constitutional amendments to the Indian Constitution) with Marbury). For example, comparisons with Roe v. Wade, 410 U.S. 113 (1973) (constitutional right to abortion). *See, e.g.*, Daniel O. Conkle, *Canada's* Roe: *The Canadian Abortion Decision and Its Implications for American Constitutional Law and Theory*, 6 CONST. COMM. 299 (1989); Mary Ann Glendon, A Beau Mentir Vent De Lion: *The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569 (1989); Donald P. Kommers, *The Constitutional Law of Abortion in Germany: Should Americans Pay Attention?*, 10 J. CONT. HEALTH L & POL'Y 1 (1994); Thomson, *supra* note 8, at 22 (references).

28. For example, the U.S. and Australian commerce clauses (reproduced *infra* notes 165-66). *See, e.g.*, LANE, THE AUSTRALIAN FEDERAL SYSTEM, *supra* note 14, at 9-44; Patrick Lane, *Trade and Commerce: Definition and Degree*, 35 AUSTL. L.J. 278 (1961); Anthony Mason, *The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience*, 16 FED. L. REV. 1, 15-17 (1986); Peter Nygh, *An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States*, 5 SYDNEY L. REV. 353 (1967); Patrick Lane, Trade and Commerce in Constitutional Law (United States and Australia) (S.J.D. thesis, Harvard Law School, 1964); Peter Edward Nygh, Economic Fact and Constitutional Theory in Australia and the United States: Being a Comparative Study of the Method of Judicial Adjustment in the Interpretation of the Constitutional Arrangements relating to Commerce to the Increasing Integration of the National Economy (S.J.D. thesis, University of Michigan, 1966). On the U.S. and Australian full faith and credit clauses, see, e.g., MICHAEL PRYLES & PETER HANKS, FEDERAL CONFLICT OF LAWS (1974); W.M.C. Gummow, *Full*

conjectures - normative and empirical - about constitutionalism.[31] American and Australian constitutions are an exemplary example of this ambiguous mixture of homogeneity and heterogeneity, within and between nations, from which comparative constitutional law derives sustenance and momentum.[32] Of course, given their beguiling relationship,[33] that is not surprising. One consequence, therefore, ensues: quantitatively and qualitatively more, not less, comparative American-Australian law[34] should be extrapolated. Undertaken with careful alacrity,[35] this will ensure a plethora of exhilarating adventures and stimulating lessons.[36]

## II. PERSONAL CONTOURS

Sojourns,[37] letters,[38] and dialogues[39] have already created firm

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*Faith and Credit in Three Federations,* 46 S.C. L. REV. 979 (1995); Brunson MacChesney, *Full Faith and Credit - A Comparative Study,* 44 ILL. L. REV. 298 (1949); Michael Pryles, *International Jurisdiction and Full Faith and Credit,* 7 U. QUEENSL. L.J. 339 (1972); Michael Pryles, Full Faith and Credit: A Comparative Study (D.S.L. thesis, Southern Methodist University, 1970).

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

30. *See* James A. Thomson, *Principles and Theories of Constitutional Interpretation and Adjudication,* 13 MELB. U. L. REV. 597 (1982); David Tucker, *Representation - Reinforcing Review: Arguments about Political Advertising in Australia and the United States, in* FREEDOM OF COMMUNICATION 161-77 (Tom Campbell & Wojciech Sadurski eds., 1994).

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

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

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

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

35. *Compare* Brown v. Board of Education, 349 U.S. 294, 301 (1955). *See generally* Alwin Thaler, *With All Deliberate Speed,* 27 TENN. L. REV. 510 (1960) (tracing the phrase's origins).

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

37. *See* Thomson, *Executive Power, supra* note 15, at 559-60 n.3 (noting scholars and resulting scholarship from Australian visits to the United States and American visits to Australia). More recently Australian Chief Justices have visited the United States. *See, e.g.,* Harry Gibbs, *The Separation of Powers - A Comparison,* 17 FED. L. REV. 151 (1987); Mason, *supra* note 28. *See also* text accompanying *infra* notes 49-50 (Dixon), 95 (Griffith). Some Australian High Court Justices have obtained LL.M degrees from American Law Schools, for example, Justices Wilson (Pennsylvania) and Dawson (Yale). U.S. Supreme Court Justices who have visited Australia include Chief Justice Rehnquist, and Justices Harlan, Breyer and O'Connor. *See* John Marshall Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States,* 33 AUSTL. L.J. 108 (1959); Gerard Brennan, *Judicial Qualities of a Different Kind,* 60 LAW INST. J. 654 (Vict. 1986) (noting that Justice O'Connor presented a paper to the 23rd Australian Legal Convention in 1985).

and friendly relations between constitutional law aficionados - judges, lawyers, and scholars - in America and Australia. At least on two occasions,[40] Justice Felix Frankfurter[41] included in the United States Reports citations to the Australian Constitution.[42] Although not as famous as footnote 4 in *United States v. Carolene Products Co.*,[43] footnote 5 of the Supreme Court's opinion, delivered

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38. For example, Oliver Wendell Holmes, Jr., - Andrew Inglis Clark correspondence. *See* James A Thomson, *Andrew Inglis Clark and Australian Constitutional Law, in* AN AUSTRALIAN DEMOCRAT: THE LIFE, WORK, AND CONSEQUENCES OF ANDREW INGLIS CLARK 59, 78 (Marcus Haward & James Warden eds., 1995) (listing Clark-Holmes letters); American Legal Manuscripts, *The Oliver Wendell Holmes, Jr., Papers* (University Publications of America, 1985) (Microfilm Project, 72 reels and Printed Guide) (reel 29, serial numbers 0576-0621). *See also* Felix Frankfurter - Owen Dixon correspondence. *See, e.g.*, BERNARD SCHWARTZ, DECISION: HOW THE SUPREME COURT DECIDES CASES 261 (1996) (quoting 1963 Dixon letter to Frankfurter) (this Dixon quotation is contained in Frankfurter's May 27, 1963 letter to Potter Stewart) (Frankfurter Papers Series 3, Reel 3). *See generally* text accompanying *infra* notes 49-54 (Frankfurter-Dixon friendship).

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

40. Graves v. New York *ex rel.* O'Keefe, 306 U.S. 466, 491 (1939) (Frankfurter, J.) (citing the Australian Constitution and Australasian Temperance & General Mut. Life Assur. Soc. v Howe, 31 C.L.R. 290 (Austl. 1922)); New York v. United States, 326 U.S. 572, 583 n.5 (1946) (citing the Australian Constitution and references).

41. *See generally* LIVA BAKER, FELIX FRANKFURTER: A BIOGRAPHY (1969); ROBERT A. BURT, TWO JEWISH JUSTICES: OUTCASTS IN THE PROMISED LAND (1988); H.N. HIRSCH, THE ENIGMA OF FELIX FRANKFURTER (1981); JEFFREY D. HOCKETT, NEW DEAL JUSTICE: THE CONSTITUTIONAL JURISPRUDENCE OF HUGO L. BLACK, FELIX FRANKFURTER, AND ROBERT H. JACKSON (1996); CLYDE E. JACOBS, JUSTICE FRANKFURTER AND CIVIL LIBERTIES (1961); PHILIP B. KURLAND, MR. JUSTICE FRANKFURTER AND THE CONSTITUTION (1971); MICHAEL E. PARRISH, FELIX FRANKFURTER AND HIS TIMES: THE REFORM YEARS (1982); JAMES F. SIMON, THE ANTAGONISTS: HUGO BLACK, FELIX FRANKFURTER AND CIVIL LIBERTIES IN MODERN AMERICA (1989); HELEN SHIRLEY THOMAS, FELIX FRANKFURTER: SCHOLAR ON THE BENCH (1960); Michael E Parrish, *Felix Frankfurter, The Progressive Tradition, and the Warren Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 51-63, 174-77 (Bernard Schwartz ed., 1996); Michael E. Parrish, *Felix Frankfurter, in* THE SUPREME COURT JUSTICES: A BIOGRAPHICAL DICTIONARY 171-81 (Melvin I. Urofsky ed., 1994); Michael E. Parrish, *Justice Felix Frankfurter and the Supreme Court, in* THE JEWISH JUSTICES OF THE SUPREME COURT REVISITED: BRANDEIS TO FORTAS 61-80 (Jennifer M. Lowe ed., 1994) (special ed. of J. SUP. CT. HIST.); ROOSEVELT AND FRANKFURTER: THEIR CORRESPONDENCE 1928-1945 (Max Freedman ed. 1967); HOLMES AND FRANKFURTER: THEIR CORRESPONDENCE, 1912-1934 (Robert M. Mennel & Christine L. Compston eds., 1996).

42. For citations to Australian High Court decisions in American books see PAUL A. FREUND, ET AL., CONSTITUTIONAL LAW CASES AND OTHER PROBLEMS 124, 239, 283, 307, 831 (3d ed. 1967); *see also id.* at 240, 273, 607-08 (4th ed. 1977).

43. 304 U.S. 144, 152-53 n.4 (1938). *See generally* JOHN HART ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 75-77 (1980) (discussing footnote 4 as a political participation theory); LOUIS LUSKY, OUR

by Justice Frankfurter, in *New York v. United States*[44] may have had some influence. "Indeed," it has been suggested that "Mr. Justice Dixon, who was on a mission to America, literally carried back with him the views of the Justices in the *Saratoga Springs* case."[45] Thus, Sir Owen Dixon[46] reciprocated by placing in the Commonwealth Law Reports references to U.S. Supreme Court cases,[47] including *New York v. United States*.[48] Why did this ex-

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NINE TRIBUNES: THE SUPREME COURT IN MODERN AMERICA 119-32, 177-90 (1993) (explanations and drafts of footnote 4); J.M. Balkin, *The Footnote*, 83 NW. U. L. REV. 275 (1989) (noting footnote 4's importance and victory over the text of its opinion).

44. 326 U.S. at 583 n.5 (1946) (holding that the United States could collect non-discriminatory taxes on soft drink sales from New York state's sales of bottled mineral water). *See generally* LAURENCE TRIBE, AMERICAN CONSTITUTIONAL LAW 383-84 (2d ed. 1988) (analyzing New York v. United States in the context of discriminatory and non-discriminatory congressional taxation legislation). *Compare* New York v. United States, 326 U.S. at 587-88 (suggesting that general non-discriminatory congressional real-estate or income tax applying to "State's capitol, its State-house, its public school houses, public parks, or its revenues from taxes or school lands" would be unconstitutional) (Stone, C.J., concurring), *with* State Chamber of Com. and Indust. v. Commonwealth, 163 C.L.R. 329, 362 (Austl. 1987) (suggesting Commonwealth non-discriminatory fringe benefit unconstitutionally applied to state Governors, parliamentarians, ministers, and judges) (Brennan, J., dissenting).

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

46. Born April 28, 1886; died July 7, 1972; Associate Justice of the High Court of Australia Feb. 4, 1929-April 17, 1952; Chief Justice April 18, 1952-April 13, 1964. Felix Frankfurter "regarded" Owen Dixon "even in the lifetime of Learned Hand and Cardozo . . . as the greatest judge in the English-speaking world . . . ." Frankfurter to Potter Stewart (May 27, 1963) (Frankfurter Papers Series 3, Reel 3). Frankfurter continued to "express [his] admiration for Chief Justice Dixon of the High Court of Australia. For learning and subtlety of mind, I place him second to no English-speaking judge." Frankfurter to John Harlan (Oct. 23, 1956) (Frankfurter Papers Series 3, Reel 1). There is no Dixon biography. *See generally* ROBERT G. MENZIES, THE MEASURE OF THE YEARS 229-44 (1970); NINIAN STEPHEN, SIR OWEN DIXON: A CELEBRATION (1986); ALLAN WATT, AUSTRALIAN DIPLOMAT 51-58 (1972) (discussing Dixon's work in Washington, D.C.); Daryl Dawson, *Sir Owen Dixon and Judicial Method*, 15 MELB. U. L. REV. 543 (1986); H.A. Finlay, *In Search of the Unstated Premise: An Essay in Constitutional Interpretation*, 56 AUSTL. L.J. 465 (1982); Colin Howard, *Sir Owen Dixon and the Constitution*, 9 MELB. U. L. REV. 5 (1973); Frank Kitto, *Some Recollections of Sir Owen Dixon*, 15 MELB. U. L. REV 577 (1986); R.P. Meagher & W.M.C. Gummow, *Sir Owen Dixon's Heresy*, 54 AUSTL. L. J. 25 (1980); J.D. Merralls, *Biography of a Professional: Sir Owen Dixon*, 99 VICTORIAN B. NEWS 26 (Summer 1996); J.D. Merralls, *The Rt. Hon. Sir Owen Dixon, O.M., G.C.M.G., 1886-1972*, 46 AUSTL. L.J. 429 (1972); Leslie Zines, *Sir Owen Dixon's Theory of Federalism*, 1 FED. L. REV. 221 (1965).

47. *See generally* Paul E. von Nessen, *The Use of American Precedents by the High Court of Australia*, 114 ADEL L. REV. 181 (1992); Geoffrey Sawer, *The Supreme Court and the High Court of Australia*, 6 J. PUB. L. 482 (1957).

48. *See, e.g.*, Melbourne Corp. v. Commonwealth, 74 C.L.R. 31, 81, 83 (Austl. 1947) (citing and commending New York v. United States, 326 U.S.

change occur? From 1942 to October, 1944 Dixon, while remaining an Associate Justice of the High Court of Australia,[49] was the Australian Envoy Extraordinary and Minister Plenipotentiary at Washington D.C.[50] Frankfurter[51] and Dixon[52] kept diaries. With a good deal of mutual admiration and respect, they became and remained friends.[53] Undoubtedly, even if only occasionally, during meetings and dinners in Washington their conversations must

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572 (1946)). *See generally* ZINES, *supra* note 14, at 319-23 (discussing Melbourne Corporation's invalidation of Commonwealth legislation which discriminated against or placed a particular burden or disability on states). Frankfurter continues to appear in Australian High Court opinions. *See, e.g.*, Brown v. R., 160 C.L.R. 171, 178-79, 204 (Austl. 1986) (citing Adams v. United States *ex rel.* McCann, 317 U.S. 269, 279-80 (1942)); Kingswell v. R., 159 C.L.R. 264, 307 (Austl. 1985) (citing Felix Frankfurter & Thomas G. Corcoran, *Petty Federal Offenses and the Constitutional Guarantee of Trial by Jury*, 39 HARV. L. REV. 923 (1926)); McGinty v. Western Australia, 134 AUSTL. L. R. 289, 375 (Austl. 1996) (referring to "the celebrated dissenting judgment[ ] of Frankfurter J. in *Baker v. Carr* . . . ." 369 U.S. 186, 283-97 (1962)).

49. Dixon was also appointed chairman of the Central Wool Committee (1940-42); the Australian Shipping Board (1941-42); the Marine War Risks Insurance Board (1941-42); the Commonwealth Marine Salvage Board (1942); the Allied Consultative Shipping Council in Australia (1942); and mediator in the India-Pakistan dispute in Kashmir (1950). Merralls, *The Rt Hon. Sir Owen Dixon, supra* note 46, at 432-3. *See also* ZELMAN COWEN, SIR JOHN LATHAM AND OTHER PAPERS 33 (1965) (noting Chief Justice Latham was Australia's Minister to Japan, 1940-41); Wilson v. Minister for Aboriginal & Torres Strait Islanders, 138 AUSTL. L.R. 220 (1996) (deciding federal judges holding an executive advisory position is constitutionally incompatible with judicial independence). *Compare* BRUCE ALLEN MURPHY, THE BRANDEIS/FRANKFURTER CONNECTION: THE SECRET POLITICAL ACTIVITIES OF TWO SUPREME COURT JUSTICES 345-63 (1982) ("A Survey of Justices in Politics from 1789 to 1916"); Jeffrey D. Hockett, *Justice Robert H. Jackson, The Supreme Court, and the Nuremberg Trial*, 1990 SUP. CT. REV. 257 (discussing Justice Jackson's June, 1945-Oct., 1946, role as U.S. Chief Counsel at the Nuremberg War Crimes Trial).

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

51. JOSEPH P. LASH, FROM THE DIARIES OF FELIX FRANKFURTER (1975). *See id.* at 159, 196-97, 208 (references to Dixon). *Compare* INSIDE LINCOLN'S CABINET: THE CIVIL WAR DIARIES OF SALMON P. CHASE (David Donald ed. 1954); *Diary and Correspondence of Salmon P. Chase* (Edward G. Bourne et al. eds.), *in* 2 ANNUAL REPORT OF THE AMERICAN HIST. ASS'N (1902) (reprinted 1971) (Diary July-Oct., 1862); David N. Atkinson, *Justice Sherman Minton and Behavior Patterns Inside the Supreme Court*, 60 NW U. L. REV. 716 (1974) (referring to and utilizing Justice Sherman Minton's diary).

52. "Dixon kept a daily diary for more than 30 years . . . So sharp are the comments that there is a strong temptation for the biographer to sit back and let the subject speak for himself." Merralls, *Biography, supra* note 46, at 28. Small extracts are in 1 A.W. MARTIN, ROBERT MENZIES: A LIFE: 1894-1943 at 267, 288-89, 365, 387 (1993).

53. *See, e.g.*, STEPHEN, *supra* note 46, at 21 ("Justice Frankfurter . . . was [Dixon's] friend, his admirer and his correspondent"); Owen Dixon, *The Honourable Mr. Justice Felix Frankfurter - A Tribute from Australia*, 67 YALE L.J. 179 (1957), *reprinted in* DIXON, *supra* note 5, at 180-87.

have touched upon constitutional law and its comparative dimensions. Perhaps, for example, they discussed Dixon's speeches which juxtaposed the American and Australian constitutions.[54] Frankfurter's federalism is, of course, amply documented and analyzed.[55] Dixon, soon after "returning to Australia in November, 1944,"[56] led the High Court in the development[57] of an Australian[58] intergovernmental immunities doctrine[59] and persuaded other justices[60] to declare federal legislation unconstitutional.[61] Subse-

54. Dixon, *supra* note 5 (A.B.A. speech Aug. 26, 1942); *Address by the Hon. Sir Owen Dixon, K.C.M.G. to the section of the American Bar Association for International and Comparative Law,* 17 AUSTL. L.J. 138 (1943); Owen Dixon, *The Separation of Powers in the Australian Constitution,* AM. FOREIGN LAW ASS'N PROC. NO. 24 (Dec., 1942) (address delivered at the Lawyers' Club, New York City, Dec. 3, 1942). *See also* Owen Dixon, *Aspects of Australian Federation,* 5 U. TORONTO L.J. 241 (1944), *reprinted in* DIXON, *supra* note 5, at 113-22 (address at U. Toronto Law School, March 18, 1943 with the notation "Australian delegation, Washington D.C.); Dixon, *Government under the American Constitution, in* Dixon, *supra* note 5 at 106-12 (Address in Melbourne on Dec. 21, 1944, after Dixon "return[ed] to Australia in November, 1944, upon retirement as Australian Minister to the United States of America").

55. *See supra* note 41 (references); *See also* Mary Brigid McManamon, *Felix Frankfurter: The Architect of "Our Federalism,"* 27 GA. L. REV. 697 (1993). *Compare infra* note 59 (Dixon's federalism).

56. DIXON, *supra* note 5, at i.

57. For Dixon's pre-*Melbourne Corporation* (supra note 48) opinions, see, e.g., Australian Ry. Union v. Victorian Ry. Comm'r, 44 C.L.R. 319, 390 (Austl., 1930); West v. Comm'r of Taxation (NSW), 56 C.L.R. 657, 681-83 (Austl. 1937).

58. *See generally* ZINES, *supra* note 14, at 1-16, 319-72; Ronald Sackville, *The Doctrine of Immunity of Instrumentalities in the United States and in Australia: A Comparative Analysis,* 7 MELB. U. L. REV. 15 (1968). *Compare Re* Austl. Educ. Union *ex parte* Victoria, 184 C.L.R. 188 (Austl. 1995) (deciding that except for senior state officers, Commonwealth legislation can authorize awards setting minimum conditions of state employees), *with* Garcia v. San Antonio Metro. Transit Auth, 469 U.S. 528 (1985) (deciding that congressional legislation controlling overtime and minimum wages constitutional), *overruling* National League of Cities v. Usery, 426 U.S. 833 (1976) (invalidating congressional legislation applying federal minimum wages and maximum hours to most state and local government employees because of impermissible state sovereignty infringement), *overruling* Maryland v. Wirtz, 392 U.S. 183 (1968) (holding that Congress could regulate state employees' wages and hours).

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

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

quently, the High Court, despite infrequent invocations,[62] has refused to abandon this doctrine[63] and continues to look at U.S. Supreme Court decisions.[64]

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

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draft opinions).

61. Melbourne Corp. v. Commonwealth, 74 C.L.R. 31 (Austl. 1947) (deciding that Commonwealth legislation unconstitutionally discriminated against States). *See supra* note 48.

62. *But see* Queensland Elec. Comm'n v. Commonwealth, 159 C.L.R. 192 (Austl. 1985) (holding Commonwealth legislation, applying Commonwealth industrial dispute resolution procedures to state statutory authorities, unconstitutionally discriminated against Queensland); *Re* Austl. Educ. Union *ex parte* Victoria, 184 C.L.R. 188 (Austl. 1995) (holding Commonwealth legislation, governing states' capacity to determine how many people to employ or dismiss on redundancy grounds and the minimum wages and conditions of senior governmental personnel, unconstitutionally impaired States' capacity to function as an independent government); Victoria v. Commonwealth, 138 AUSTL. L.R. 129 (1996) (similar).

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

64. *See, e.g.*, D'Emden v Pedder, 1 C.L.R. 91, 114-15 (Austl. 1904) (quoting McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)); Federated Amalgamated Government Ry. & Tramway Serv. Assoc'n v. New South Wales Ry. Traffic Employees Association, 4 C.L.R. 488, 537-38 (Austl. 1906) (quoting Collector v. Day, 78 U.S. (11 Wall.) 113 (1871)); Baxter v. Comm'r of Taxation (NSW), 4 C.L.R. 1087, 1164-5 (Austl. 1907) (criticizing McCulloch v. Maryland, 17 U.S. (4 Wheat.) 316 (1819)); Australian Coastal Shipping Commission v. O'Reilly, 107 C.L.R. 46, 55-6 (Austl. 1962) (Dixon, C.J.) (quoting U.S. Supreme Court cases and applying the doctrine, that Congress can protect federal agencies from state taxes, "to federalism in Australia"); Koowarta v. Bjelke-Petersen, 153 C.L.R. 153, 252 (Austl. 1982) (Wilson, J., dissenting) (citing Oregon v. Mitchell, 400 U.S. 112 (1970); Fry v. United States, 421 U.S. 542 (1975); National League of Cities v. Usery, 426 U.S. 833 (1976)); Attorney General *ex rel.* McKinlay v. Commonwealth, 175 C.L.R. 1, 22-25, 39-40, 46-47, 65-68, 73, 75-76 (Austl. 1975) (citing U.S. cases, including Baker v. Carr, 369 U.S. 186 (1962), Wesberry v Sanders, 376 U.S. 1 (1964), Reynolds v. Sims, 377 U.S. 533 (1964)); Australian Capital Television Pty. Ltd. v Cth., 177 CLR 143, 144 (Austl. 1992) (citing Buckley v Valeo, 424 U.S. 1 (1976)); Theophanous v Herald & Weekly Tues. Ltd. 182 C.L.R. 104, 130-31, 133-38, 157-61, 166, 167-69, 182-83, 185 (Austl. 1994) (citing New York Times v Sullivan, 376 U.S. 254 (1964)); McGinty v. Western Austl., 134 AUSTL. L.R. 289, 310, 321-22, 336, 341-43, 352, 369-75 (Austl. 1996) (citing U.S. cases including Baker v. Carr, 369 U.S. 186, 283-97 (1962); Wesberry v. Sanders, 376 U.S. 1 (1964); Reynolds v. Sims, 377 U.S. 533 (1964)). *See also supra* notes 48-49 (references) & *infra* notes 283-85, 287 (references).

65. Do written documents constitute the totality of a Constitution? *See* Thomson, *supra* note 8, at 33 n.33, 43 n.80 (containing references to debates on this question).

the Australian Constitution was deliberately modeled on the American Constitution.[66] In addition to these legislative powers, the first version of the Australian Constitution,[67] drafted under Andrew Inglis Clark's[68] direction and supervision in February 1891,[69] followed the American Constitution even more closely than the 1901 Australian Constitution. What motivated this similarity? One answer - a causal link - might be the friendship of Oliver Wendell Holmes, Jr.,[70] and Andrew Inglis Clark.[71] They corre-

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

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

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

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

70. *See, e.g.,* GARY J. AICHELE, OLIVER WENDELL HOLMES, JR.: SOLDIER, SCHOLAR, JUDGE (1989); LIVA BAKER, THE JUSTICE FROM BEACON HILL: THE LIFE AND TIMES OF OLIVER WENDELL HOLMES (1991); DAVID ROSENBERG, THE HIDDEN HOLMES: HIS THEORY OF TORTS IN HISTORY (1996); G. EDWARD WHITE, JUSTICE OLIVER WENDELL HOLMES: LAW AND THE INNER SELF (1993); James A. Thomson, *Playing With a Mirage: Oliver Wendell Holmes, Jr., and American Law,* 22 RUTGERS L.J. 123 (1990) (reviewing SHELDON NOVICK, HONORABLE JUSTICE: THE LIFE OF OLIVER WENDELL HOLMES, JR., AND AMERICAN LAW (1989)).

71. Feb. 24, 1848 - Nov. 14, 1907; delegate to 1890 Federal Conference and 1891 Australasian Federal Convention; Chairman of Convention's Judiciary Committee 1891; Member of Convention's Constitution drafting Committee 1891; Tasmanian Attorney General 1887-1892, 1894-1897; Tasmanian Supreme Court Justice 1898-1907. *See, e.g.,* AN AUSTRALIAN DEMOCRAT, *supra*

sponded.[72] When Clark went to America in 1890, 1897-98, and 1902-03 he visited Holmes in Boston and Washington. Indeed, so strong was the tie, at least from Clark's side, that "Clark had the study window from Holmes's house in Boston shipped and installed into the study window of his own house, 'Rosebank,' in Hobart [, Tasmania]."[73] Going in the other direction, Clark sent to Holmes both editions of his *Studies in Australian Constitutional Law*[74] which were reviewed in the Harvard and Columbia Law Reviews.[75] In fact, Clark's empathy with America and Americans was even wider and deeper.[76] With the addition of two other factors - Clark's venerable position as an Australian Founding Father[77] and the inexorable transformation of Clark's draft 1891 Constitution into the 1901 Australian Constitution[78] - it is not surprising that Australia's constitution provides for three branches of government. First, "a Federal Parliament . . . consist[ing] of the Queen, a Senate, and a House of Representatives"[79] known colloquially as the Commonwealth Parliament.[80] Secondly, "[t]he Executive Government"[81] comprising the

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note 38; John M. Williams, *Introduction to the 1997 Reprint, in* ANDREW INGLIS CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW i-xxxix (reprint 1997) (1901); John Williams, *"With Eyes Open": Andrew Inglis Clark and Our Republican Tradition,* 23 FED. L. REV. 149 (1995).

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

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

74. CLARK, *supra* note 71; ANDREW INGLIS CLARK, STUDIES IN AUSTRALIAN CONSTITUTIONAL LAW (2d ed. 1905). *See* Thomson, *supra* note 38, at 78 (noting Clark's letters of Oct. 26, 1901 and Sept. 7, 1905 to Holmes).

75. J[ames] B[radley] T[hayer], *Book Review,* 15 HARV. L. REV. 419 (1902) (reviewing CLARK, *supra* note 71); E[ugene] W[ambaugh], *Book Review,* 19 HARV. L. REV. 319 (1906) (reviewing CLARK, *supra* note 74); *Book Review,* 6 COLUM. L. REV. 370 (1906) (reviewing CLARK, *supra* note 74).

76. *See, e.g.,* Clark's letters to Dean James Barr Ames and Thayer. *See* Thomson, *supra* note 38, at 246 n.37. Clark published in the Harvard Law Review. *See* Andrew Inglis Clark, *The Supremacy of the Judiciary Under the Constitution of the United States and Under the Constitution of the Commonwealth of Australia,* 17 HARV. L. REV. 1 (1903). Another Australian Founding Father published in the Harvard Law Review. *See* H.B. Higgins, McCulloch v. Maryland *in Australia,* 18 HARV. L. REV. 559 (1905); JOHN RICKARD, H.B. HIGGINS, THE REBEL AS JUDGE (1984).

77. *See supra* note 71.

78. Samuel Walker Griffith (*see infra* note 89), the principal draftsman of the Constitution Bill adopted by the 1891 Convention, extensively used Clark's 1891 Federation Bill (*supra* note 67). *See* Thomson, *supra* note 38, at 241 n.18. *See also* J.M. Neasy, *Andrew Inglis Clark Senior and Australian Federation,* 15 n.2 AUSTL. J. POL. & HIST. 1, 21-24 (Aug., 1969) (comparative table of provisions in Clark's Bill, 1891 Constitution Bill, and U.S. Constitution).

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

80. *See generally* AUSTL. CONST. §§ 1, 7-50. For commentary *see* R.D. LUMB & G.A. MOENS, THE CONSTITUTION OF THE COMMONWEALTH OF

Queen,[82] the Governor-General,[83] and ministers of the Crown, including the Prime Minister.[84] Thirdly, a federal judiciary consisting of "the High Court of Australia, and . . . such other courts as the [Commonwealth] Parliament creates, and . . . such other courts as [that Parliament] invests with federal jurisdiction."[85] Interestingly, there remains[86] a theoretical possibility of appeals from the High Court to the Judicial Committee of the Privy Council in London.[87]

Like Clark, other Australian Founding Fathers sojourned in America. Prominent examples include Henry Parkes,[88] Samuel Walker Griffith,[89] and William McMillan.[90] Parkes' 1882 visit to

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AUSTRALIA ANNOTATED 48-49, 57-111 (5th ed. 1995).

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

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

83. AUSTL. CONST. §§ 2-4 (appointed by Queen, salary, administrator). *See generally* CHRISTOPHER CUNNEEN, KINGS' MEN: AUSTRALIA'S GOVERNORS-GENERAL FROM HOPETOUN TO ISAACS (1983); WINTERTON, *supra* note 14; GABLES, GHOSTS AND GOVERNORS-GENERAL: THE HISTORIC HOUSE AT YARRALUMLA (C.D. Coulthard-Clark ed. 1988).

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

85. AUSTL. CONST. § 71. *See* J.M. BENNETT, KEYSTONE OF THE ARCH: A HISTORICAL MEMOIR OF THE HIGH COURT OF AUSTRALIA TO 1980 (1980); GALLIGAN, *supra* note 14; EDDY NEUMAN, THE HIGH COURT OF AUSTRALIA: A COLLECTIVE PORTRAIT 1903 TO 1972 (2d ed. 1973); DAVID SOLOMON, THE POLITICAL IMPACT OF THE HIGH COURT (1992); James A. Thomson, *History, Justices and the High Court: An Institutional Perspective,* 1 AUSTL. J. LEG. HIST. 281 (1995) (reviewing GARFIELD BARWICK, A RADICAL TORY: GARFIELD BARWICK'S REFLECTIONS AND RECOLLECTIONS (1995)).

86. Proposals to amend section 74 of the Australian Constitution ("Appeal to Queen in Council") have not been put to a section 128 referendum. *See* 1 FINAL REPORT OF THE CONSTITUTIONAL COMMISSION 388-89 (1988). The Australia Acts 1986 (Austl. & U.K.) § 16 (1) ("other than the High Court") expressly preserves section 74. On Australian appeals to the Privy Council *see* A.R. Blackshield, *The Last of England: Farewell to their Lordships Forever,* 56 LAW INST. J. (VICT.) 780 (1982). *Compare* JOSEPH HENRY SMITH, APPEALS TO THE PRIVY COUNCIL FROM THE AMERICAN PLANTATIONS (1950).

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

88. *See generally* A.W. MARTIN, HENRY PARKES: A BIOGRAPHY (1980).

89. *See generally* ROGER B. JOYCE, SAMUEL WALKER GRIFFITH (1984); Geoffrey Bolton, *Samuel Griffith: The Great Provincial,* 13 PAPERS ON PARLIAMENT 19 (Nov. 1991). *See infra* note 95 (brief sketch).

90. *See generally* P.M. GUNNAR, GOOD IRON MAC: THE LIFE OF AUSTRALIAN FEDERATION FATHER SIR WILLIAM MCMILLAN, K.C.M.G. (1995); James A.

the United States included meetings with President Arthur and Justice Stephen Field.[91] As a result, two conundrums remain. First, what was said at the Parkes-Field dinner?[92] Secondly, given the linkage between Parkes' 1891 Australasian Convention Resolutions, the text of section 92 of the Australian Constitution and *laissez-faire* constitutionalism,[93] is there, via that dinner, any Field[94] impetus to or impact or influence on these developments? Griffith traveled across - from New York to San Francisco - America during May-June 1887.

> Griffith was aware of the relevance of the American experience to Australia, particularly the development of its federal system, and he welcomed an opportunity of obtaining first-hand information about [America].
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> . . . .
>
> Besides making his own observations on this east-west journey, Griffith discussed mutual problems with Americans. His observations were to be especially significant in applying United States precedents to Australian law and federalism. Griffith was already deeply involved . . . in moves towards Australian federation, and was acutely aware of intercolonial jealousies. American attempts to

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Thomson, *Looking for Heroes: History, Framers and the Australian Constitution,* 3 DEAKIN L. REV. (forthcoming 1997) (reviewing *id.*). For biographical information on the framers of Australia's Constitution, *see* L.E. Fredman, *Economic Interpretation of the Constitution: Australian Style,* 1 U. NEW SOUTH WALES HIST. J. 17 (1968); Geoffrey McDonald, *The Eighty Founding Fathers,* 1 QUEENSL. HIST. REV. 38 (1968); J.A. LA NAUZE, *Who Are the Fathers?,* 13 HIST. STUD. 333 (1969); Geoffrey W. McDonald, The Social and Political Ideology of the Australian Founding Fathers (B.A. (Hons) thesis, U. Queensl., 1967).

91. *See* MARTIN, *supra* note 88, at 321-23 (Parkes' visit).

92. *See id.* at 322 (Parkes "met president Arthur . . . at a dinner given early in his visit to Washington by Justice Field"). Given the immense importance of section 92 of the Australian Constitution to Australian constitutional law, (*see infra* note 286), the Parkes-Field conversation[s], if any, and, if recorded or summarized, might assist in interpreting and applying section 92. *See generally* Cole v. Whitfield, 165 C.L.R. 360 (Austl. 1988) (formulating a discriminatory burden of a protectionist kind test); MICHAEL COPER, FREEDOM OF INTERSTATE TRADE UNDER THE AUSTRALIAN CONSTITUTION (1983); LUMB & MOENS, *supra* note 80, at 453-76, 573-98.

93. For this linkage, *see* LA NAUZE, *supra* note 14, at 35-38; *infra* note 286 (presenting an analogy between individual rights theory and due process references).

94. On Field and his *laissez faire* constitutionalism see PAUL KENS, JUSTICE STEPHEN FIELD: SHAPING LIBERTY FROM THE GOLD RUSH TO THE GILDED AGE (1997); CARL BRENT SWISHER, STEPHEN J. FIELD: CRAFTSMAN OF THE LAW (1960) (1930); Stephen A. Siegal, Lochner *Era Jurisprudence and the American Constitutional Tradition,* 70 N.C. L. REV. 1, 90-9 (1991). *See generally* Michael L. Benedict, *Laissez-Faire and Liberty: A Re-Evaluation of the Meaning and Origin of Laissez Faire Constitutionalism,* 3 LAW & HIST. REV. 293 (1985).

> minimize interstate rivalries and correlate state and federal jurisdictions were therefore highly pertinent. . . . [T]he justices of the United States Supreme Court were continually facing the kinds of problems that were to concern Griffith in the future. He was acquainted with one Supreme Court judge, Stephen Field, the uncle of Lucinda Musgrave, the wife of Queensland's governor. In New York, Griffith lunched with Field's brother, David Dudley, a constitutional lawyer. His American experience supplemented Griffith's own extensive reading, and was to be applied four years later in his contribution to the framing of the Australian constitution.[95]

Finally, McMillan, who visited the USA in 1876 and 1922, was, like Isaacs,[96] a voracious reader of American constitutional law and politics.[97] Undoubtedly, that American influence was at least partially responsible for McMillan's role, possibly of crucial importance, in erecting a strong Australian Senate with equal power, vis-à-vis the House of Representatives, over the deferral and rejection of annual supply or appropriation Bills.[98] Subsequent developments, including[99] the emergence of strong cohesive political parties,[100] a proportional voting system for Senate elections,[101] and territorial senators,[102] have not overborne the simi-

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

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

97. *See* GUNNAR, *supra* note 90, at 71, 80, 102 (indicating that McMillan had, for example, read 1-3 JOSEPH STORY, COMMENTARIES ON THE CONSTITUTION OF THE UNITED STATES (5th ed. 1891)).

98. *See* GUNNAR, *supra* note 90; Thomson, *supra* note 90. *See also* AUSTL. CONST. § 53 para. 2 ("proposed laws appropriating revenue or moneys for the ordinary annual services of the Government"); GEOFFREY SAWER, FEDERATION UNDER STRAIN: AUSTRALIA 1972-1975 107-40 (1977) ("[t]he Senate and the Deferral of Supply").

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

100. Was this development anticipated by the Constitution's framers? What is its effect on the (constitutional) notion of the Senate as a States', not party political, house? *See* Thomson, supra note 90, at nn.59,60. The Senate can be and has been "controlled" by independent and third party senators who are not members of the two main - Labor and Liberal - political parties. *See* Campbell Sharman, *The Senate, Small Parties and the Balance of Power* 21 POLITICS 20 (1986). On Australian political parties *see* DEAN JAENSCH, POWER POLITICS: AUSTRALIA'S PARTY SYSTEM (1994); PARTIES AND FEDERALISM IN AUSTRALIA AND CANADA (Campbell Sharman ed. 1994).

101. *See* OGDERS' AUSTRALIAN SENATE PRACTICE 1-26 (Harry Evans ed., 7th

larities,[103] especially equal state representation,[104] between the American and Australian Senates.[105]

## III. FOUNDATIONS

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

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ed. 1995).

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

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

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

105. On the Australian Senate, see generally OGDERS, *supra* note 101. On the U.S. Senate see 2 ROBERT C. BYRD, THE SENATE 1789-1989: ADDRESSES ON THE HISTORY OF THE UNITED STATES SENATE (Wendy Wolff ed. 1991).

106. *See generally* EDMUND S. MORGAN, INVENTING THE PEOPLE: THE RISE OF POPULAR SOVEREIGNTY IN ENGLAND AND AMERICA (1988); *infra* notes 299, 300 (debates on non-exclusive Article V amendment theories involving popular sovereignty notions). *Compare* President Lincoln's Nov. 19, 1863 Gettysburg Address ("government of the people, by the people, for the people"). 7 THE COLLECTED WORKS OF ABRAHAM LINCOLN 17-23 (Roy Basler ed., 1953). *See* GARRY WILLS, LINCOLN AT GETTYSBURG: THE WORDS THAT REMADE AMERICA (1992).

107. *See generally supra* note 14 (containing references).

108. On the 1891 (Sydney) and 1897-1898 (Adelaide, Sydney, and Melbourne sessions) Australasian Constitutional Conventions see LA NAUZE, *supra* note 14; QUICK & GARRAN, *supra* note 14. Also there was an 1890 Federation Conference in Melbourne. *See* Robin Sharwood, *The Australasian Federation Conference of 1890, in* THE CONVENTION DEBATES 1891-1898: COMMENTARIES, INDICES AND GUIDE 41-73 (Gregory Craven ed. 1986) *reprinted in* DEBATES OF THE AUSTRALASIAN FEDERATION CONFERENCE 465-97 (Gregory J. Craven ed. 1990) (1890).

109. Delegates to the 1891 Convention were appointed by colonial parliaments. However, except for parliamentary appointed Western Australians, 1897-1898 Convention delegates were elected. *See* LA NAUZE, *supra* note 14,

ing from those Conventions were debated and amendments proposed in colonial parliaments[112] by elected representatives.[113] Reinforcement of these democratic credentials was achieved by 1898 and 1899 referendums which approved a Constitution for Australia.[114]

Opposing this Americanization was United Kingdom parliamentary sovereignty.[115] In 1900,[116] the British Parliament

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

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

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

112. *See* LA NAUZE, *supra* note 14, at 87-90 (summarizing parliamentary discussion of 1891 Constitution Bill) and 161-66 (summarizing parliamentary discussion of 1897 Bill adopted by Adelaide session of the Convention); QUICK & GARRAN, *supra* note 14, at 143-50 (1891 Bill) and 182-87 (summarizing parliamentary discussion of 1897 Bill). For public discussions see LA NAUZE, *supra* note 14, at 166-68.

113. *See* McGinty v. Western Australia, 134 AUSTL. L.R. 289, 352-54, 367-68 (Austl. 1996) (indicating comparative electorate sizes for equality of votes and qualification requirements for voting eligibility pre-1900); Deborah Cass & Kim Rubenstein, *Representation/s of Women in the Australian Constitutional System,* 17 ADEL. L. REV. 3 (1995); Patricia Grimshaw, *A White Woman's Suffrage, in* A WOMAN'S CONSTITUTION: GENDER AND HISTORY IN THE AUSTRALIAN COMMONWEALTH 77-97 (Helen Irving ed. 1996); Stella Tarrant, *The Woman Suffrage Movement in the United States and Australia: Concepts of Suffrage, Citizenship and Race,* 18 ADEL. L. REV. 47 (1996); Anne Twomey, *The Constitution - 19th Century Colonial Office Document or a People's Constitution?, in* THE CONSTITUTION PAPERS 1, 28-32, 36 (Department of the [Commonwealth] Parliamentary Library: Parliamentary Research Service Subject Collection No 7, 1996) (providing information and statistics on who voted in the referenda).

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

115. *See* A[LBERT] V[ENN] DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-85 (10th ed. 1959) ("The Nature of Parliamentary Sovereignty"); E.C.S. Wade, *Introduction, in id.* at xvii, xxxiv-xcvi; H.W.R. Wade, *Sovereignty - Revolution or Evolution?,* 112 LAW Q. REV. 568 (1996) (discussing effect of the United Kingdom's membership of the European Community on the traditional doctrine of U.K. parliamentary sovereignty); George Winterton, *The British Grundnorm: Parliamentary Supremacy Re-Examined,* 92 LAW Q. REV. 591 (1976). On Dicey see RICHARD A. COSGROVE, THE RULE OF LAW: ALBERT VENN DICEY, VICTORIAN JURIST (1980). *Compare* the debate over U.K. parliamentary sovereignty and the American colonies. *See* Martin Stephen Flaherty, *The Empire Strikes Back:* Annesley v. Sherlock *and the Triumph of Imperial Parliamentary Supremacy,* 87 COLUM. L. Rev. 593 (1987).

116. *See supra* note 24 (referring to 1900). However, the Australian Consti-

amended[117] and enacted "the Commonwealth of Australia Constitution Act."[118] Consequently, as a matter of traditional orthodox legal doctrine the Australian Constitution - starkly contrasting with the American colonists' revolutionary repudiation of links to the British Empire and creation of autochthonous constitutions[119] - derived force and effect from the United Kingdom Parliament's paramount legislative power.[120] The British-Australian umbilical cord[121] remained intact.

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

117. On the UK Parliament's (and the U.K. Colonial Office's) involvement see LA NAUZE *supra* note 14, at 170-76, 195, 248-69; B[rian] K. deGaris, *The Colonial Office and the Commonwealth Constitution Bill, in* ESSAYS IN AUSTRALIAN FEDERATION 94-121, 197-99 (Allan William Martin ed. 1969); Twomey, *supra* note 113, at 33-35; B[rian] K. deGaris, *British Influence on the Federation of the Australian Colonies, 1880-1901* (Dec. 1965) (D. Phil. thesis, Oxford University).

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

119. *See* Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1229-30 (discussing and providing references to the political and legal history). For general discussions see GORDON WOOD, THE RADICALISM OF THE AMERICAN REVOLUTION (1992); Forum: *How Revolutionary was the Revolution? A Discussion of Gordon S. Woods'* THE RADICALISM OF THE AMERICAN REVOLUTION, 51 WM. & MARY Q. 677-716 (3d ser. 1994).

120.

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

Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. 106, 180-81 (Austl. 1992) (Dawson, J., dissenting). For enunciation of the same view by former Australian High Court Chief Justices see Owen Dixon, *The Law and the Constitution,* 51 LAW Q. REV. 590, 597 (1935) (asserting that the Australian Constitution "is not a supreme law purporting to obtain its force from the direct expression of a people's inherent authority to constitute a government . . . [but] a statute of the British Parliament enacted in the exercise of its legal sovereignty over the law everywhere in the King's Dominions"); John Latham, *Interpretation of the Constitution, in* ESSAYS ON THE AUSTRALIAN CONSTITUTION 1, 4 (R[ae] Else-Mitchell ed. 1961) ("The Constitution obtained legal efficacy only by enactment as a statute by the Parliament in Great Britain"). *See also* Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1231-32 (discussing Australian state constitutions' relationship with U.K. parliamentary sovereignty); Australia Act 1986 (UK) (discussed in Thomson, *supra* note 79). *Contra* note 132 (peoples' sovereignty).

121. For British settlement in 1788 in Australia (and its legal and other consequences) see Mabo v. Queensland (No 2), 175 C.L.R. 1 (Austl. 1992). *See also supra* note 14 (references).

A new Australian *grundnorm*[122] - re-aligning the American and Australian constitutions - may now, however, have emerged.[123] Four factors are primarily responsible for this tranquil, rather than violent,[124] revolution.[125] First, Australia's historical evolution[126] from a British penal settlement to colonial self-government to dominion status and to an independent nation-state.[127] Within these general parameters are pertinent issues: pre-1900 referenda;[128] post-1901 section 128 referendum amendments to the Australian Constitution;[129] and Australians continuing acceptance of their Constitution. Secondly, legislative severance - operative from 5.00 am Greenwich meantime on March 3, 1986[130] - of residual Australia-United Kingdom constitutional links.[131] Thirdly, ju-

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

123. *But* for contrary indications, *compare* Privy Council Appeals (*supra* note 86); Australia Act 1986 (U.K.) (discussed in Thomson, *supra* note 79 and cited by Mason, C.J., *infra* note 132); possible amendment of AUSTL. CONST. § 128 by Australia Act 1986 (UK) § 15 (*infra* note 297); and U.K. Parliament amending the AUSTL. CONST. (*see infra* note 297). *See also* McGinty v Western Australia, 134 AUSTL. L.R. 289, 397 (1996) (Gummow, J) (referring to the Australia Acts).

124. *See* ARMS AND INDEPENDENCE: THE MILITARY CHARACTER OF THE AMERICAN REVOLUTION (Ronald Hoffman & Peter J. Albert eds., 1984); Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1229-32 (contrasting 1776 American War of Independence with peaceful Australian evolution).

125. *See generally* G.J. Lindell, *Why is Australia's Constitution Binding? - The Reasons in 1900 and Now, and the Effect of Independence,* 16 FED. L. REV. 29 (1986).

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

127. *See supra* note 14 (references). *See also* W.J. HUDSON & M.P. SHARP, AUSTRALIAN INDEPENDENCE: COLONY TO RELUCTANT KINGDOM (1988); Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1231 n.31 (references on 1788-1901 evolution of Australian colonial constitutions). From a comparative perspective see LESLIE ZINES, CONSTITUTIONAL CHANGE IN THE COMMONWEALTH (1991).

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

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

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

131. *See* ZINES, *supra* note 14, at 303-08 ("The Termination of Constitutional

dicial pronouncements that "ultimate sovereignty reside[s] in the Australian people."[132] Fourthly, words - purveyors of power - in the Australian Constitution. Electors direct participation, by voting in referenda, in amending the Constitution is expressly mandated by section 128's terminology.[133] Perhaps even more important in pushing Australia towards American popular sovereignty notions[134] is the remarkable opening textual similarity. The first three words - "We the People" - in the American Constitution and - "Whereas the People" - in the Australian Constitution[135] convey the same factual and juridical premise: peoples' sovereignty.

Immense consequences might ensue for Australian constitutional law.[136] Popular, not parliamentary, authority will sustain and legitimize the Constitution. Power will flow in a reverse direction: from, not to, the people. In theory and practice, it will become the peoples' (not the Queen's, the Prime Ministers, or Parliament's) government. As agents, the latters' authority will more clearly be perceived as constitutionally circumscribed. Traditional

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

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

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

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

135. On the Australian preamble see LANE, *supra* note 14, at 2-3; LUMB & MOENS, *supra* note 80, at 38-39. On the U.S. preamble, see Milton Handler et al., *A Reconsideration of the Relevance and Materiality of the Preamble in Constitutional Interpretation,* 12 CARDOZO L. REV. 117 (1990); Dan Himmelfarb, *The Preamble in Constitutional Interpretation,* 2 CONST. L.J. 127 (1991); Craig M. Lawson, *The Literary Force of the Preamble,* 39 MERCER L. REV. 879 (1988).

136. *Compare* Lindell, *supra* note 125, at 43-49 (considering, but rejecting, changes in constitutional interpretation), *with* James A. Thomson, *The Australian Constitution: Statute, Fundamental Document or Compact,* 59 LAW INST. J. (VICT.) 1199 (1985) (suggesting consequences for nature or character of AUSTL. CONST. and constitutional interpretation).

Australian deference may dissipate into a more robust American posture towards authority. Greater focus on limiting governmental authority may change the Constitution's character to a rights generating, rather than a power conferring, document.[137] At an interpretative level, this transformation, from British statute to indigenous constitution, will promote the impetus to abandon rules and principles of statutory interpretation and head Chief Justice Marshall's admonition that "we must never forget that it is *a constitution* we are expounding."[138] One result is obvious: an increasing American resemblance typifies Australia's constitutionalism.

## IV. LEGISLATIVE POWER

Institutionally, stark contrasts differentiate the U.S. Congress - "which shall consist of a Senate and House of Representatives"[139] - and the Commonwealth Parliament - "which shall consist of the Queen, a Senate and a House of Representatives . . . ."[140] Occasionally, the Queen visits Australia and opens a session of Parliament.[141] However, not only is the President, unlike the Queen, not a structural component of Congress,[142] but also members of the executive, including the President's Cabinet, are expressly excluded from being a member of Congress.[143] Virtually

137. *Compare* the perspective of viewing the 1787 U.S. Constitution as a Bill of Rights. *See infra* note 279 (viewing the Constitution as a Bill of Rights).

138. McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 407 (1819) (emphasis in original). For a non-conventional view of Chief Justice Marshall's dictum see RAOUL BERGER, GOVERNMENT BY JUDICIARY: THE TRANSFORMATION OF THE FOURTEENTH AMENDMENT 373-79 (1977) (suggesting that the broad conventional view is incorrect and, by taking this dictum out of context, misrepresents Marshall's "constitutional philosophy"). For the High Court's invocation of the conventional view see A.G. (N.S.W.) v. Brewery Employees Union of N.S.W., 6 C.L.R. 469, 611-12 (Austl. 1908) (Higgins, J.); Queen v. Public Vehicles Licensing Appeal Tribunal of Tas. *ex parte* Australian Nat'l Airways Pty. Ltd., 13 C.L.R. 207, 225 (Austl. 1964); Victoria v. Commonwealth, 122 C.L.R. 353, 394 (Austl. 1971) (Windeyer, J.).

139. U.S. CONST. art. 1 § 1.

140. AUSTL. CONST. § 1.

141. For example, on Feb. 15, 1954, Feb. 28, 1974, and March 8, 1977. PARLIAMENTARY HANDBOOK OF THE COMMONWEALTH OF AUSTRALIA v (26th ed. 1993). *Compare* U.S. CONST. art. II, § 3 (President's "State of the Union" address to Congress).

142. But compare the President's role and powers vis-à-vis Congress. *See* U.S. CONST. art. I, § 7, cl. 3 (President's veto power over Congress' orders, resolutions, and votes); U.S. CONST. art. II, § 3 (President's "State of the Union" address to Congress). *See also* AUSTL. CONST. § 59, 60 (Queen's power to disallow Commonwealth legislation or refuse to assent to Commonwealth Bills).

143. U.S. CONST. art. I, § 6, cl. 2 ("no Person holding any office under the United States, shall be a Member of either House during his continuance in office"). *See* text and accompanying *infra* notes 226-32 (discussing the possibility of an American Cabinet consisting of members of Congress).

the reverse - a constitutional requirement for Ministers of the Crown to be members of Parliament - applies in Australia.[144] Separation of powers implications and differences in theory and practice are, of course, immense.[145]

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

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144. *See supra* note 84 and *infra* note 208.

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

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

147. *See supra* note 105 (Australian and U.S. Senates).

148. *See supra* note 104.

149. *Compare* AUSTL. CONST. § 24 ("The House of Representatives shall be composed of members directly chosen by the people of the Commonwealth"), *with* U.S. CONST. art. I, § 2 ("The House of Representatives shall be composed of Members chosen . . . by the People of the several States"). *See* A.G. (Commonwealth) *ex rel.* McKinnlay v. Commonwealth, 135 C.L.R. 1 (Austl. 1975) (discussing section 24); HOUSE OF REPRESENTATIVES PRACTICE (A.R. BROWNING ed. 2d 1989); HISTORY OF THE UNITED STATES HOUSE OF REPRESENTATIVES, 1789-1994 (House Document No. 103-324) (103d Cong., 2d Sess., 1994).

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

151. *But see* text accompanying *infra* notes 207-12 (noting circumstances when ministers have been or need not be senators or House of representatives members).

152. AUSTL. CONST. § 5. *See also id.* at § 28 (House of Representatives "may be . . . dissolved by the Governor-General"); AUSTL. CONST. § 57 ("Governor-General may dissolve the Senate and the House of Representatives simulta-

Thirdly, there is no Australian constitutional one vote, one value requirement.[153] *Wesberry v. Sanders*[154] has not been followed in Australia.

Lists of carefully enumerated concurrent legislative powers - eighteen items in the U.S. Constitution[155] and forty items in the Australian Constitution[156] - together with express recognition that the general residue remains with the States[157] are pivotal in estab-

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neously").

153. *See* A.G. (Commonwealth) *ex rel.* McKinnlay v. Commonwealth, 135 C.L.R. 1 (Austl. 1975) (concluding that section 24 of the Australian Constitution does not require equality of people or electors in House of Representatives electorates); McGinty v. Western Australia, 134 AUSTL. L.R. 289 (1996) (explaining and applying in a state parliamentary context McKinlay).

154. 376 U.S. 1 (1964) (invalidating a Georgia congressional districting plan for not complying with U.S. CONST. art. I, § 2 requirement that U.S. representatives "be chosen 'by the People of the several States' means that as nearly as practicable one man's vote in a congressional election is to be worth as much as another's"). On subsequent congressional districting cases see *Articles [and] Essays,* 26 CUMB.. L. REV. 287-536 (1996); *Symposium: Voting Rights After* Shaw v. Reno, 26 RUTGERS L.J. 517-774 (1995).

155. U.S. CONST. art. I, § 8.

156. AUSTL.. CONST. § 51. For other Commonwealth legislative powers see *id.* at §§ 52, 73, 76, 77, 122. *See* LANE, *supra* note 14, at 79-278, 380-83, 423-60, 619-35; LUMB & MOENS, *supra* note 80, at 112-303, 377-79, 402-18, 552-61.

157. *See* AUSTL. CONST. § 106 ("The Constitution of each State of the Commonwealth shall, subject to this Constitution, continue as at the establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be, until altered in accordance with the Constitution of the State"); *id.* at § 107 ("Every power of the Parliament of a Colony which has become or becomes a State, shall, unless it is by this Constitution exclusively vested in the Parliament of the Commonwealth or withdrawn from the Parliament of the State, continue as at the [1901] establishment of the Commonwealth, or as at the admission or establishment of the State, as the case may be."); U.S. CONST. amend. X. ("The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.") *See also* McGinty v Western Australia, 134 AUSTL. L.R. 289 (1989) (discussing sections 106 and 107 of the Australian Constitution); ZINES, *supra* note 14, at 336-41 (discussing section 106). For the United States, see New York v. United States, 505 U.S. 144 (1992) (discussing the Tenth Amendment); Printz v. United States, 66 F.3d 1025 (9th Cir. 1995), *cert. granted,* 64 U.S.L.W. 3829 (U.S. June 17, 1996) (No. 95-1478). On *Printz* and its companion case Mack v. United States, see Richard C. Reuben, *Finding the Right Target: Federalism is the Underlying Issue in Challenges to the Brady Act,* 83 A.B.A. J. 44 (Jan. 1997); Comment, *Looks Like a Waiting Period for the Brady Bill: Tenth Amendment Challenges to a Controversial Unfunded Mandate,* 43 KAN. L. REV. 835 (1995) (discussing recent Supreme Court decisions regarding the Tenth Amendment); Anthony Lewis, *E. Pluribus Unum,* N.Y. TIMES, Jan. 13, 1997, at 97. Is the Tenth Amendment the textual basis for exclusive state power (*see, e.g.,* Garcia v San Antonio Metropolitan Transp. Auth., 469 U.S. 528, 580 (1985) (O'Connor, J., dissenting)), or merely a truism (*see* United States v. Darby, 312 U.S. 100, 124 (1941))? For discussions see Lynn A. Baker, *Conditional Spending After* Lopez, 95 COLUM. L. REV. 1911 (1995); Anthony B. Ching, *Traveling Down the Unsteady Path:* United States v. Lopez, New York v. United States, *and the*

lishing the American and Australian federal systems.[158] Without entering the quagmire of American and Australian framers' intentions,[159] it can be suggested that they intended, at least relative to the States, to create weak central or federal powers and institutions.[160] Canada's framers, by enumerating legislative powers[161] in

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*Tenth Amendment*, 29 LOY. L.A. L. REV. 99 (1995); H. Jefferson Powell, *The Oldest Question of Constitutional Law*, 79 VA. L. REV. 633 (1993); John G. Schmidt, Jr., *The Tenth Amendment: A "New" Limitation on Congressional Commerce Power*, 45 RUTGERS L.J. 417 (1993). *See also* Thomson, *State Constitutional Law: American Lessons*, *supra* note 15, at 1240-48 (comparative analysis of state legislative power in America and Australia).

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

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

160. On Australia see LA NAUZE, *supra* note 14; James Crawford, *The Legislative Power of the Commonwealth*, *in* THE CONVENTION DEBATES, *supra* note 108, at 113-25; Michael Crommelin, *The Federal Model*, *in* AUSTRALIAN FEDERATION *supra* note 158, at 33-48; Thomson, *supra* note 38, at 62, 65-66, 246, 250-51; Leslie Zines, *The Federal Balance and the Position of the States*, *in* THE CONVENTION DEBATES, *supra* note 108, at 75-87. *See also infra* note 164. On America—the original intent of the U.S. Constitution's framers regarding federalism—*compare* RAOUL BERGER, FEDERALISM: THE FOUNDERS DESIGN (1987) (arguing that the framers intended to and created a limited federal government with states surrendering only a part of their sovereignty to establish a dual sovereignty system where states retained exclusive control over local and internal matters and congressional powers, including the Commerce Clause, were narrow in scope), *with* 1-3 WILLIAM WINSLOW CROSSKEY & WILLIAM JEFFREY, JR., POLITICS AND THE CONSTITUTION IN THE HISTORY OF THE UNITED STATES (1953-1980) (arguing that the Framers intended, via the U.S. Constitution, to create a unitary government and the Commerce Clause to regulate all - inter and intra state - commerce). For debates between Berger and Berger's critics' perspective which moves more towards, without going as far as, Crosskey's thesis, see Raoul Berger, *History, Judicial Revisionism and J.M. Balkin*, 1989 B.Y.U. L. REV. 759; Raoul Berger, *The Founders' Views - According to Jefferson Powell*, 67 TEX. L. REV. 1033 (1989); Raoul Berger, *Federalism: The Founders' Design - A Response to Michael McConnell*, 57 GEO. WASH. L. REV. 51 (1988); William Gangi, *On Raoul Berger's Federalism: The Founders' Design*, 13 LAW & SOC. INQUIRY 801 (1988). For criticism of Crosskey's thesis from a "Berger" perspective see Howard C. Anawalt, *Book Review*, 21 SANTA CLARA L. REV. 1199 (1981); Erwin Chemerinsky, *Empty History*, 81 MICH. L. REV. 828 (1983) (book review); William Jeffrey, Jr., *American Legal History, 1952-1954*, 1954 ANNUAL SURVEY OF AMERICAN LAW 866, 881 (bibliography of book reviews of CROSSKEY, *supra*); John M. Murrin, *Book Review*, 58 N.Y.U. L. REV. 1254 (1983). *See also* LANCE BANNING, THE SACRED FIRE OF LIBERTY: JAMES MADISON AND THE FOUNDING OF THE FEDERAL REPUBLIC (1995) (arguing that Madison intended to create a federal system of republics, not a consolidated national government, with states and the nation possessing appropriate and adequate powers and responsibilities); JACK N. RAKOVE, ORIGINAL MEANINGS: POLITICS AND IDEAS IN THE MAKING OF THE CONSTITUTION 161-202 (1996) (arguing that, although the framers intended to create a central government that was stronger than its Articles of Confederation predecessor, they created

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

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

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

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

163.

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

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

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

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

For Canada see HOGG, *supra* note 161, at 110 (asserting that "[o]ver the

In America expansion of federal power is particularly attributable to the commerce clause.[165] Despite its textual plagiarism, the Australian commerce clause,[166] perhaps because of the High Court's refusal to follow U.S. Supreme Court commerce clause decisions,[167] has had a much less expansionist role.[168] Instead, especially post-1970, the "corporations"[169] and "external affairs"[170] powers have sustained the Commonwealth Parliament's wide ranging

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years . . . there has been a steady growth in the power and importance of the provinces" and that in the 1990s Canada's Constitution "is less centralized than that of either the United States or Australia") (footnote omitted); Thomson, *supra* note 38, at 66 (concluding that comparatively Canadian provincial legislative competence "is much stronger and more independent than American states vis-à-vis their respective legislatures: the Canadian Parliament and U.S. Congress.") (footnote omitted).

165. "The Congress shall have power . . . To regulate Commerce with Foreign Nations, and among the several States . . . ." U.S. CONST. art I, § 8, cl. 1. *See* United States v Lopez, 115 S. Ct. 1624 (1995) (holding congressional legislation regulating citizens, rather than states, exceeded Congress' commerce power for the first time since Carter v. Carter Coal Co., 298 U.S. 238, 297-310 (1936)); Charles Fried, *The Supreme Court 1994 Term: Foreword: Revolutions?,* 109 HARV. L. REV. 13, 34-45 (1995) (characterizing Lopez as ordinary adjudication, not a constitutional amendment or revolution); Lawrence Lessig, *Translating Federalism:* United States v. Lopez, 1995 SUP. CT. REV. 125; Kathleen M. Sullivan, *Dueling Sovereignties:* U.S. Term Limits, Inc. v. Thornton, 109 HARV. L. REV. 78 (1995) (juxtaposing *Lopez* with *Term Limits*, 115 S. Ct. 1842 (1995) (holding unconstitutional state imposed term limits on candidates for Congress)); Symposium on *Lopez*, 74 TEX. L. REV. 695-838 (1996); Symposium, *Reflections on* United States v. Lopez, 94 MICH. L. REV. 533-831 (1995).

166. "The [Commonwealth] Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to: - (i) Trade and commerce with other countries, and among the States:" AUSTL. CONST. § 51(i).

167. *See, e.g.,* Airlines of NSW Pty. Ltd. v. New South Wales (No 2), 113 C.L.R. 54, 113-15 (Austl. 1965) (Kitto, J.) (discussing post-1936 U.S. Supreme Court commerce clause cases and concluding that "[t]o import the doctrine of the American cases into the law of the Australian Constitution would . . . be an error"); Attorney General (WA) v. Australian Nat'l Airlines Comm'n, 138 C.L.R. 492 (Austl. 1976) (similar). *But see id.* at 528-31 (Murphy, J., dissenting) (suggesting that the Australian commerce power "was adopted from the United States Constitution" and that "[t]he scope of the Australian [commerce] power . . . is at least as wide as, if not wider than, the United States [commerce] power.").

168. *See supra* note 28 (comparative analyses). *See also* ZINES, *supra* note 14, at 55-79 (containing a comparative analysis and critique of the Australian High Court's commerce clause jurisprudence).

169. AUSTL. CONST. § 51(20) (Commonwealth Parliament's "power to make laws . . . with respect to . . . Foreign corporations, and trading or financial corporations formed within the limits of the Commonwealth."). *See* LUMB & MOENS, *supra* note 80, at 189-98; ZINES, *supra* note 14, at 80-107.

170. AUSTL. CONST. § 51(29) (Commonwealth Parliament's "power to make laws . . . with respect to . . . External affairs."). *See* LUMB & MOENS, *supra* note 80, at 225-41; ZINES, *supra* note 14, at 274-97.

legislation. When financial powers - revenue raising[171] and conditional controlled expenditure grants[172] - are added, the resulting fiscal dominance and consequential central control ensures that American and Australian states are, as a matter of constitutional law and practical reality, subordinate.[173]

## V. EXECUTIVE POWER[174]

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

171. AUSTL. CONST. § 51(2) ("Taxation" power); U.S. CONST. art I, § 8, cl. 1 (Congress' "[p]ower [t]o lay and collect Taxes, Duties, Imposts and Excises.").

172. On Australia see AUSTL. CONST. § 81 ("revenues or monies . . . [in the] Consolidated Revenue Fund, to be appropriated for the purposes of the Commonwealth."), § 96 ("Commonwealth Parliament may grant financial assistance to any State on such terms and conditions as the Parliament thinks fit."); LUMB & MOENS, *supra* note 80, at 425-30, 479-83; ZINES, *supra* note 14, at 259-62, 349-53, 452-53, 472. On America *see* U.S. CONST. art. I, § 8, cl. 1 (Congress' "[p]ower [t]o . . . provide for the common Defense and general Welfare of the United States."); Baker, *supra* note 157 (debate over Congress' conditional spending power).

173. For Australia see ZINES, *supra* note 14, at 352 (concluding that the Commonwealth's "financial dominance . . . is very great" as a result of High Court decisions but "mainly . . . [due to] political and economic forces."). *See also id.* at 353-54 (noting that despite Commonwealth legislative and financial powers "Australia remains a federal state . . . [where] federalism . . . is alive and reasonably well."). On America see *supra* notes 58, 157, 158, 164, 165 (contrasting views of Framers' intent and subsequent developments, including *Garcia* and *Lopez* cases).

174. Part V draws upon Thomson, *Executive Power, supra* note 15.

175. *See supra* note 24 (Australian Constitution).

176. For comparative scholarship, see WINTERTON, *supra* note 14; Thomson, *Executive Power, supra* note 15. For other scholarship on Australian executive power, *see id. at* 560-61 n.5. For general comparisons, see *supra* note 15 (references).

177. U.S. CONST. art. II, § 1, cl. 1.

178. AUSTL. CONST. § 61.

179. U.S. CONST. art II, §§ 3, 1, cl. 8. *See also* Thomson, *supra* note 85, at 305 n.100 (reproducing the Governor General's oaths of office and allegiance to the Queen).

the Governor-General as the Queen's representative,"[180] while the "Commander-in-Chief of the Army and Navy of the United States" is the President.[181] Both have constitutional power to appoint federal judges and executive officers, to veto federal legislation, and to convene and adjourn proceedings of the federal legislature.[182]

There is one stark difference. Having adopted these specific provisions and borrowed notions of federalism and separation of powers from the American context,[183] the Australian Founding Fathers turned to the British institution of responsible government.[184] The "core of the British principle of responsible government" is that "when the government loses a vote of confidence in the House of Commons it must advise a general election or resign."[185] Thus, the executive must be able to command a majority of votes in the legislature.[186] If that central element "is clear," the tenets, princi-

180. AUSTL. CONST. § 68. *See* LUMB & MOENS, *supra* note 80, at 349; Ninian Stephen, *The Governor-General as Commander-in-Chief,* 14 MELB. U. L. REV. 563 (1984).

181. U.S. CONST. art. II, § 2, cl. 1.

182. U.S. CONST. art. II, § 2, cl. 2; *id.* art. I, § 7, cls. 2 & 3; *id.* art. II, § 3; AUSTL. CONST. §§ 72(i), 67, 58. *Compare* §§ 55, 56 and 90 of the Constitution Acts, 1867 to 1981 (Canada) (Canadian Governor-General's power to disallow provincial and veto federal legislation).

183. *See, e.g.,* WINTERTON, *supra* note 14, at 1, 53.

184. *See generally* Gordon Reid, *Responsible Government and Ministerial Responsibility: A Select Bibliography, in* RESPONSIBLE GOVERNMENT IN AUSTRALIA 264 (Patrick Weller & Dean Jaensch eds. 1980). The institution of responsible government did not spring full blown from the pen of any draftsman but evolved with time. For Australia, prior to Federation in 1901, see, e.g., MCMINN, A CONSTITUTIONAL HISTORY, *supra* note 14 at 40-91; WINTERTON, *supra* note 14, at 199-200, 266-68.

185. WINTERTON, *supra* note 14, at 2.

186. In the United Kingdom responsible government entails responsibility of Ministers of the Crown to the House of Commons. Only by rejecting Supply or Appropriation Bills could the House of Lords attempt to displace the government from office. That power of the House of Lords was removed in 1911. But in 1901 the Australian colonies were to become a federation under a written constitution. Therefore, the problem was to reconcile and combine American federalism, in which both Houses of Congress have approximately equal powers, with British responsible government, in which the power of one House is predominant.

A system in which the government or executive is responsible to both Houses is unworkable because they may contain majorities of differing political complexion. If the Senate has power to deny Supply to the government - which power is "the ultimate sanction of ministerial responsibility" (WINTERTON, *supra* note 14, at 6) - a majority of Senators will possess the means to make the government responsible to the Senate. The Australian Founding Fathers adopted federalism and responsible government but did not reconcile them. *See generally id.* at 2, 5-6, 74-80. In 1975, the Senate deferred Supply and the Governor-General dismissed the Prime Minister. Ministerial commissions were withdrawn by the Governor-General, who purported to act under section 64 of the Australian Constitution, at about 1 p.m. on Nov 1975. Despite initial post-1975 uncertainty, it appears that in Aus-

ples, and conventions that constitute the notion of responsible government become "steadily less clear" until "the edges are fuzzy and ill-defined."[187] Indeed, most of the elements of responsible government are not written into the Australian Constitution.[188] For several reasons, "[t]he task of spelling out the details of responsible government" was not undertaken by the draftsmen.[189] Nevertheless, despite a thoroughly documented and reasoned case for constitutionalizing responsible government in Australia,[190] some countervailing suggestions can be advanced. All involve an element of American constitutional law.

Clearly evident from the Australian Constitution's text is an express demarcation among provisions that vest executive power. Some confer power by reference to the "Governor-General in Council,"[191] an expression defined to mean "the Governor-General acting with the advice of the Federal Executive Council."[192] Members of that Council are appointed by the Governor-General, "hold office during his pleasure," and cannot "hold office for a longer period than three months unless" they are, or become, a "senator or a member of the House of Representatives."[193]

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

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

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

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

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

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

192. *Id.* at § 63.

193. *Id.* at § 64. Senators need not be elected. They can be appointed to fill casual vacancies. *Id.* at § 15. *See* James A Thomson, *Casual Senate Vacancies: Section 15's Continuing Conundrums*, 3 PUB. L. REV. 149 (1992). On the "three months" see *supra* note 84 and *infra* note 208.

Other constitutional provisions contain no textual reference to the need to act on advice. Executive power is merely required to be exercised by "the Governor-General"[194] or occasionally provisions specify that the Governor-General shall act "according to his discretion,"[195] "as he thinks fit,"[196] or "during his pleasure."[197] Such language, describing executive power in a manner "that even James I might have applauded" was, it has been argued, never intended by Australia's Founding Fathers "to be taken literally."[198]

Even if correct, as a matter of history, the premise upon which the argument bases the conclusion that "the Governor-General has no independent discretion and may act only on the government's advice"[199] is open to question. First, whether to treat Framers' intentions as determinative of constitutional interpretation is the subject of intense debate.[200] Secondly, Australian judges have been more reluctant than their United States brethren to permit history to have some role in judicial resolution of controversies as to the content and meaning of words and phrases in the Constitution.[201]

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194. AUSTL. CONST. §§ 2, 5, 21, 28, 56-58, 61, 62, 64, 54, 68-70, 126, 128.

195. *Id.* at § 58.

196. *Id.* at § 5, para 1.

197. *Id.* § 62; *see also id.* at § 64, para. 3. As to "he" *see* § 1(1)(a) Interpretation Act, 1889 (Ch. 63) (UK) ("words importing the masculine gender shall include females") and text accompanying *supra* notes 117-20 (AUSTL. CONST. is a U.K. statute).

198. WINTERTON, *supra* note 14, at 3. *Similarly,* 1 THE REPORT OF THE ADVISORY COMMITTEE, AN AUSTRALIAN REPUBLIC: THE OPTIONS 35, 83 (1993) (arguing that except for 'reserve powers' (*see infra* note 202) "it has always been understood" that, despite the textual position, even here Governors-General would only act on ministerial advice). *See also* 2 *id.* at 273 (comparative tabulation of "in Council" and other Governor-General powers).

199. WINTERTON, *supra* note 24, at 2. Winterton qualifies this conclusion by indicating that it only operates "in 'normal times', when Parliament has granted adequate Supply and the government commands a majority in the Lower House of Parliament...." *Id.* On other occasions it is unclear whether, under Winterton's view, the Governor-General can exercise reserve powers without advice. *See infra* note 202. Neither Winterton nor the Constitution's text defines "normal times."

200. Debate as to whether the history being recounted is "correct" and what role, if any, history has in constitutional interpretation, can be traced, for example, through RAKOVE, *supra* note 160, at 3-22, 372-74 ("The Perils of Originalism), 339-65, 418-20 ("Madison and the Origins of Originalism"); Daniel Farber, *The Originalism Debate: A Guide for the Perplexed,* 49 OHIO ST. L.J. 1085 (1989); Richard Kay, *Adherence to Original Intentions in Constitutional Adjudication: Three Objections and Responses,* 82 NW. U. L. REV. 226 (1988); Jack N. Rakove, *The Original Intention of Original Understanding,* 13 CONST. COMM. 159 (1996); *Symposium: Originalism, Democracy and the Constitution,* 19 HARV. J.L. & PUB. POL'Y 237-531 (1996).

201. *See, e.g.,* ZINES, supra note 14, at 480 n.23; Gregory Craven, *Original Intent and the Australian Constitution Coming Soon to a Court Near You,* 1 PUB. L. REF. 166 (1990); Daryl Dawson, *Intention and the Constitution - Whose Intent?,* 6 AUSTL. B. REV. 93 (1990); Paul Schoff, *The High Court and*

On some occasions, even proponents of a constitutionalized system of responsible government, concede the text must be taken literally. A Governor-General can, and in some circumstances perhaps should, act without ministerial advice and support for his actions by those who constitute a majority of the members of the House of Representatives. At this juncture, references to the Governor-General without the qualifying phrase "in Council" constitutionalize the Executive's reserve powers. Those are the occasions when the Governor-General can constitutionally act alone. Here, an Australian Governor-General comes closest to being President.[202]

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

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*History: It Still Hasn't Found[ed] What It's Looking For*, 5 PUB. L. REV. 253 (1994); James A. Thomson, *Constitutional Interpretation: History and the High Court: A Bibliographical Survey*, 5 U. NEW S. WALES L.J. 309 (1982). For framers' intentions on specific provisions and themes also see THE CONVENTION DEBATES, *supra* note 108; Thomson, *supra* at 324-26 (bibliography).

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

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

204. *See generally* Brian Galligan, *The Founders' Design and Intentions Regarding Responsible Government*, *in* RESPONSIBLE GOVERNMENT, *supra* note 184, at 1.

205. LA NAUZE, *supra* note 14, at 54. Clause 4 of Chapter II of the 1891 Bill required that officers appointed to administer Departments of States be members of the Federal Executive Council and that such officers "shall be capable of being chosen and of sitting as Members of either House of the Par-

"fundamental addition" to require ministers to be members of the legislature was made by the 1897 Constitutional Committee without recording any explanations or reasons.[206] This constitutional injunction was not, however, made absolute.

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

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liament." OFFICIAL REPORT OF THE NATIONAL AUSTRALASIAN CONVENTION DEBATES 993, 955 (1891).

206. LA NAUZE, *supra* note 14, at 127; *see also id.* at 137, 152. For the Framers' reasons, see WINTERTON, *supra* note 14, at 71-72, 75-76; Galligan, *supra* note 204.

207. The three months period was taken from section 32 of the Constitution Act 1855-1856 (South Australia), which "served as a model for § 64 of the [Australian] Constitution." WINTERTON, *supra* note 14, at 75. *See also* LA NAUZE, *supra* note 14, at 127, 342 n.12; QUICK & GARRAN, *supra* note 14, at 711.

208. *See supra* note 84 (quoting AUSTL. CONST. § 64 para. 3). For examples, see LUMB & MOENS, *supra* note 80 at 344 (referring to 1968 when John Gorton was Prime Minister while not a Senator or House of Representatives member); 1 FINAL REPORT, *supra* note 86, at 320-21 (indicating "several advantages" of this "three month period of grace").

209. 1 FINAL REPORT, *supra* note 86, at 320.

210. *Id.* at 321.

211. *See supra* note 208 (Prime Minister John Gorton). *See* ALAN REID, THE GORTON EXPERIMENT 30, 33 (1971) (noting that Gorton "took over the prime ministership on January 10, 196[8]" and "[o]n February 24, 1968 . . . Gorton secured formal entry to the House of Representatives by winning the Higgins by-election").

212. *See* 1 FINAL REPORT, *supra* note 86, at 321, 323. *See also id.* at 321, 322 (continuation of ministerial term after 3 year House of Representatives term expires (under AUSTL. CONST. § 28) or is sooner dissolved (under *id. at* §

bership of Parliament has ceased, for example, because the House of Representatives or Senate has been dissolved.

Outside those circumstances, a more obvious possibility pushes towards the 1891 position where the Constitution contemplates, authorizes or permits but does not, as a matter of constitutional law,[213] mandate or require responsible government. For example, the appointment as a minister or Prime Minister, of a candidate for election to the Commonwealth Parliament, where that person is a member of the political party which possesses a majority in the House of Representatives.[214] Even further removed, in degree and kind, from the above circumstances is the possibility that, by a contrived system of three monthly appointments, dismissals or resignation, and reappointments, the Australian Constitution could sanction a completely non-parliamentary executive. That is, without any constitutional amendment, the Australian executive could be forced into the American presidential mold.

American and Australian Constitutions contain somewhat analogous provisions on eligibility to be a member of the Commonwealth Parliament or Congress. Holding office under the executive government is specified in both documents to be constitutionally inconsistent with being a legislator.[215] The Australian Constitution, however, creates an exception for Ministers of the Crown, who are required within three months of assuming execu-

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5 or § 57).

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

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

215. AUSTL. CONST. § 64, para. 3 (quoted *supra* note 84); U.S. CONST. art I, § 6, cl. 2 ("no Person holding any office under the United States, shall be a member of either House during his Continuance in Office").

tive office to attain that status.[216] This divergence may be attributable merely to age. The older United States Constitution in this instance drew its inspiration from the venerable Act of Settlement of 1701 which disqualified persons holding an office of profit under the King from membership of the House of Commons.[217] In 1787 the principle of ministerial or executive responsibility to the House of Commons had not developed,[218] and concern remained focused on the possibility of undue and undesirable executive influence on individual members of Congress.[219] By erecting the eighteenth century English precedent into a constitutional prohibition, the way was seemingly[220] foreclosed under the United States Consti-

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216. AUSTL. CONST. § 44 para. 2 (noting that *id.* at § 44(iv) "does not apply to the office of any of the Queen's Ministers of State for the Commonwealth."). *See generally* REPORT BY THE STANDING COMMITTEE ON CONSTITUTIONAL AND LEGAL AFFAIRS [OF THE COMMONWEALTH PARLIAMENT], THE CONSTITUTIONAL QUALIFICATIONS OF MEMBERS OF PARLIAMENT 63-74 (1981) (discussing proviso to § 44(iv), especially in relation to whether assistant ministers and parliamentary secretaries come within the proviso and, therefore, can be paid remuneration for undertaking ministerial duties and not be disqualified from membership of the Commonwealth Parliament).

217. 12 & 13 Will. III, ch. 2 (1701). The Act of Settlement is reproduced in THEODORE F. PLUCKNETT, TASWELL-LANGMEAD'S ENGLISH CONSTITUTIONAL HISTORY FROM THE TEUTONIC CONQUEST TO THE PRESENT TIME 461-64 (11th ed. 1960). The sixth clause of § 3 stated: "That no person who has an office or place of profit under the king or receives a pension from the Crown shall be capable of serving as a member of the House of Commons." As to this clause and its antecedents and subsequent history, *see id.* at 467, 565-67.

218. "In Britain, the institution of responsible government reached maturity *only* in the nineteenth century, especially after the Reform Bill of 1832." WINTERTON, *supra* note 14 at 5 (footnote omitted) (emphasis added). It is a mistake to think "that responsible government had existed for centuries." *Id.* at 200. *See also id.* at 77. "The fact is that what the [U.S.] Framers had in mind was not the cabinet system, as yet nonexistent in Great Britain . . . ." EDWARD S. CORWIN, THE PRESIDENT: OFFICE AND POWERS 1787-1957: HISTORY AND ANALYSIS OF PRACTICE AND OPINION 14 (rev. 4th ed. 1957).

219. *See, e.g.,* Reservists Committee to Stop the War v. Laird, 323 F. Supp. 833, 835-37 (D.D.C. 1971) (noting incompatibility of offices clause and ineligibility clause in 1787 Constitutional Convention), *rev'd on other grounds,* 418 U.S. 208 (1974); Note, *Members of Congress May Not Hold Commissions in Armed Forces Reserves,* 50 TEXAS L. REV. 509 (1972), *Separation of Powers - Article I, Section 6, Clause 2 Renders a Commission in the Armed Forces Reserve Incompatible with Membership in the Congress* - Reservists Committee to Stop the War v. Laird, 40 GEO. WASH. L. REV. 542, 543-44 (1972); *see also To Reduce the Compensation of the Office of the Attorney General: Hearings on S. 2673 Before the Senate Comm. on the Judiciary,* 93d Cong., 1st Sess. (1973) (partially *reprinted in* PAUL BREST, PROCESSES OF CONSTITUTIONAL DECISION MAKING 15-31 (1st ed. 1975)). In regard to the adoption of the 1701 principle in the Articles of Confederation, state constitutions, and laws and charters prior to 1787, see DAVID HUTCHINSON, THE FOUNDATIONS OF THE CONSTITUTION 71-72 (1928).

220. See *infra* notes 226-231 and accompanying text. *Compare infra* note 232.

tution to adopt responsible government.[221]

When Australians debated and drafted a Constitution in the 1890s, the new British institution of responsible government had been established and was flourishing in Canadian and Australian colonies.[222] Australians were also familiar with the American presidential system.[223] Therefore, two models were available. By incorporation, as a constitutional requirement, of an exception to the principle embodied in the Act of Settlement, the English model of executive government has predominated in Australia.

Absolutes, however, do not prevail in politics. Movement in opposite directions has occurred in America and Australia. In practice, Presidents consult with senators and members of the House of Representatives. The strength and nature of this aspect[224] of the relationship between President and Congress varies and fluctuates.[225] Suggestions to formalize executive-legislative relations have been subjected to constitutional scrutiny. A leading executive power scholar concluded that "the creation of a Cabinet

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

EDWARD S. CORWIN'S THE CONSTITUTION AND WHAT IT MEANS TODAY 33 (Harold W. Chase & Craig R. Ducat 14th ed. 1978) (emphasis in original).

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

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

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

225. *See, e.g.*, CORWIN, *supra* note 218, at 16-30; LOUIS FISHER, THE POLITICS OF SHARED POWER: CONGRESS AND THE EXECUTIVE 33-61 (1981); HAROLD J. LASKI, THE AMERICAN PRESIDENCY, AN INTERPRETATION 111-66 (1940).

with legislative members would not encounter constitutional difficulties."[226] The U.S. Constitution's prohibition on the simultaneous holding of legislative and executive office[227]

> does not present an insuperable difficulty . . . . In the face of this provision the President might still constitute a cabinet council out of the chairmen of the principal congressional committees and then put his own powers and those of the heads of departments at the disposal of this council.[228]

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

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226. CORWIN, *supra* note 218, at 297. *See generally* Gary L. McDowell, *The Corrosive Constitutonalism of Edward S. Corwin,* 14 LAW & SOC. INQUIRY 603 (1989) (reviewing 1-3 CORWIN ON THE CONSTITUTION (Richard Loss ed. 1981-1988)) (noting Corwin's immense influence on the U.S. Supreme Court, public officials, and scholars).

227. U.S. CONST. art. I, § 6, cl. 2.

228. CORWIN, *supra* note 218, at 14.

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

*Id.* at 297 (footnote omitted) (emphasis in original). *See also id.* at 489 (noting suggestions that would encounter constitutional obstacles).

229. "Suggestions for [institutional reforms which duplicate the effect of cabinet government] abound." Giraudo, *supra* note 222, at 1184 n.281.

230. *See* CORWIN, *supra* note 218, at 490-93; BURTON I. HENDRICK, LINCOLN'S WAR CABINET (1946 rep. 1961); LASKI, *supra* note 225, at 70-110; M.J.C. VILE, POLITICS IN THE U.S.A. 195-200 (1970); SHIRLEY ANN WARSHAW, POWERSHARING: WHITE HOUSE-CABINET RELATIONS IN THE MODERN PRESIDENCY (1996).

231. CORWIN, *supra* note 218, at 296. Justice Story's views on this proposal are reproduced, *id.* at 488. *See also* EDWARD S. CORWIN, PRESIDENTIAL POWER AND THE CONSTITUTION: ESSAYS 171-72 (Richard Loss ed. 1976).

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

George Winterton, *The Concept of Extra-Constitutional Executive Power in Domestic Affairs,* 7 HASTINGS CONST. L.Q. 1, 19 (1979) (footnotes omitted).

British cabinet system of responsible government can be instituted in the United States.[232] Almost inevitably,[233] Australia is evolving[234] from a constitutional monarchy[235] to a republic.[236] Again, this includes some impetus for an Australian presidential republic analogous to the American Constitution.[237] Discussion of an Australian republic encompasses much more than constitutional law.[238] History, politics, culture, international trade and economics - virtually all aspects of Australia - are included.[239] Republicanism,[240] like other comparative issues, for example, the substantive

232. *See, e.g.,* CHARLES M. HARDIN, PRESIDENTIAL POWER & ACCOUNTABILITY: TOWARD A NEW CONSTITUTION 184 (1974) (advocating repeal of the incompatibility clause of U.S. CONST. art I. § 6, cl. 2); H. HAZLITT, A NEW CONSTITUTION NOW 30-36 (2d ed. 1974). But there is "little hope" for proposals to establish such a cabinet system. PHILLIP KURLAND, WATERGATE AND THE CONSTITUTION 154 (1978).

233. For early Australian history see MARK MCKENNA, THE CAPTIVE REPUBLIC: A HISTORY OF REPUBLICAN DEBATE IN AUSTRALIA (1996).

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

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

236. For the debate on an Australian republic see JOHN HIRST, A REPUBLICAN MANIFESTO (1994); GEORGE WINTERTON, MONARCHY TO REPUBLIC: AUSTRALIAN REPUBLICAN GOVERNMENT (rep. ed. 1994); WE, THE PEOPLE: AUSTRALIAN REPUBLICAN GOVERNMENT (George Winterton ed. 1994); REPUBLIC OR MONARCHY? LEGAL AND CONSTITUTIONAL ISSUES (M.A. Stephenson & Clive Turner eds., 1994); AN AUSTRALIAN REPUBLIC, *supra* note 198; Greg Craven, *The Constitutional Minefield of Australian Republicanism,* Spring 1992 POLITY 33; Michael Kirby, *A Defence of the Constitutional Monarchy* 37 n.9 QUADRANT 30 (Sept. 1993); Anthony Mason, *Towards 2001 - Minimalism Monarchism or Metamorphism?,* 21 MONASH U. L. REV. 1 (1995); George Williams, *The Australian States and An Australian Republic,* 70 AUSTL. L.J. 890 (1996). *See also* WINTERTON, *supra* at 192-202 (bibliography).

237. *See supra* note 236 (references).

238. For discussion of the constitutional law controversies and conundrums see *supra* note 236 (references). To what extent can a republic be achieved or evolve without a textual amendment to the Australian Constitution? For some possibilities see text accompanying *supra* notes 207-14. Also *compare* Stephen Gageler & Mark Leeming, *An Australian Republic: Is a Referendum Enough?,* 7 PUB. L. REV. 143 (1996) (answer: no), *with* Geoffrey Lindell & Dennis Rose, *A Response to Gageler and Leeming: "An Australian Republic: Is a Referendum Enough?,"* 7 PUB. L. REV. 155 (1996) (answer: yes).

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

240. For the Australian debate *see* Andrew Fraser, *In Defense of Republicanism: A Reply to George Williams,* 23 FED. L. REV. 363 (1995); George Williams, *What Role for Republicanism?,* 23 FED. L. REV. 376 (1995). For the American debate *see* Miriam Galston, *Taking Aristotle Seriously: Republican-Orientated Legal Theory and the Moral Foundation of Deliberative Democracy,* 82 CAL. L. REV. 329 (1994); Steven G. Grey, *The Unfortunate Revival of Civic Republicanism,* 141 U. PA. L. REV. 801 (1993); Richard H. Fallon, Jr., *What is Republicanism, and is it Worth Reviving?,* 102 HARV. L. REV. 1695 (1989); G. Edward White, *Reflections on the "Republican Revival": Interdisciplinary Scholarship in*

scope and limits of executive power[241] and their susceptibility to judicial review,[242] can also enliven and sustain the American-Australian dialogue.

## VI. JUDICIAL POWER[243]

Australian fascination with the American judicial system was demonstrable during the 1890s debate on and drafting of Australia's Constitution.[244] Textual comparison of judiciary provisions in the United States and Australian Constitutions[245] confirms that

> [m]uch of [Australia's] present discontent in this area [of federal jurisdiction] arises from unintelligent and uncritical copying of the provisions of the United States Constitution. It is from that Constitution that [Australia] gleaned the notion of federal jurisdiction. From that source [Australia] also copied many of the subject-matters of federal jurisdiction and then on a frolic of [its] own, assigned a formidable burden of original jurisdiction with respect to such matters to the High Court. . . . [T]heir presence can only be explained in terms of a hypnotic fascination with the American Judicature Article. It is easy to be wise after the event and to charge the Founding Fathers with a stronger disposition to copy than to

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*the Legal Academy*, 6 YALE J. L. & HUM. 1 (1994); *Symposium: The Republican Civic Tradition*, 97 YALE L.J. 1493-1723 (1988).

241. *See* Thomson, *Executive Power*, *supra* note 15, at 572-78. *See also supra* note 176 (comparative scholarship).

242. *See* Thomson, *Executive Power*, *supra* note 15, at 587-89.

243. Part VI draws upon Thomson, *State Constitutional Law: American Lessons*, *supra* note 15, at 1248-63.

244. For the history of the judiciary provisions (AUSTL. CONST. §§ 71-80), see, e.g., LA NAUZE, *supra* note 14; Brian Galligan, *Judicial Review in the Australian Federal System: Its Origin and Function*, 10 FED. L. REV. 367 (1979); A.J. Rogers, *State/Federal Court Relations*, 55 AUSTL. L.J. 630, 632-33 (1981); James A. Thomson, *Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution*, *in* THE CONVENTION DEBATES 1891-1898: COMMENTARIES, INDICES AND GUIDE 173-202 (Gregory Craven ed. 1986); Ross Alan Sundberg, The Origins of the Judicature Chapter of the Australian Constitution and Its Development to the End of the National Australasian Convention of 1891 (1982) (M.A. thesis, Melbourne University).

On the history of U.S. CONST. art. III, see, e.g., Akhil Reed Amar, *A Neo-Federalist View of Article III: Separating the Two Tiers of Federal Jurisdiction*, 65 B.U. L. REV. 205 (1985); Henry J. Bourguignon, *The Federal Key to the Judiciary Act of 1789*, 46 S.C. L. REV. 647, 651-67 (1995); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: Early Implementation of and Departures from the Constitutional Plan*, 86 COLUM. L. REV. 1515 (1986); Robert N. Clinton, *A Mandatory View of Federal Court Jurisdiction: A Guided Quest For the Original Understanding of Article III*, 132 U. PA. L. REV. 741 (1984); Daniel J. Meltzer, *The History and Structure of Article III*, 138 U. PA. L. REV. 1569 (1990); *Continuing Commentaries*, 85 NW. U. L. REV. 442-93 (1991).

245. U.S. CONST. art. III; AUSTL. CONST. §§ 71-80. On the latter see LUMB & MOENS, *supra* note 80, at 352-424; HAROLD EDWARD RENFREE, THE FEDERAL JUDICIAL SYSTEM OF AUSTRALIA (1984).

> think, but there can be little doubt that much of the wider interest in the study of federal jurisdiction in Australia lies in an examination of what results from inapposite transcription of another federal model.[246]

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

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246. ZELMAN COWEN & LESLIE ZINES, FEDERAL JURISDICTION IN AUSTRALIA xiv-xv (2d ed. 1978). "The influence of American precedents on Australian constitution making was considerable. In no area, probably, was that influence stronger than on the judicature chapter of the [Australian] Constitution." *Id.* at 1 (footnote omitted). *See also* Geoffrey Sawer, *Judicial Power Under the Constitution, in* ESSAYS ON THE AUSTRALIAN CONSTITUTION, *supra* note 120, at 71 ("The Founders of the Commonwealth Constitution were influenced by the experience of the United States of America in the provision they made for the place of judicial power in the constitutional structure"). *But see infra* note 247 (opposing view).

247. "The copying of the American judicature provisions was not slavish . . . ." COWEN & ZINES, *supra* note 246, at 1. "[T]he [Australian] Founders deliberately departed from the American example in many respects - so many as to make it very doubtful whether specific American authorities should ever be used in this connection, excepting by way of warning or contrast." Sawer, *supra* note 246, at 71. *See also* Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd., 148 C.L.R. 457, 476 (Austl. 1981) (Barwick, C.J.) ("whereas [the Australian] Constitution and [Australian] doctrine is expressed in relation to a 'matter,' the American Constitution and therefore its doctrine is expressed in relation to a 'case' or 'controversy'"); Felton v. Mulligan, 124 C.L.R. 367, 393 (Austl. 1971) (Windeyer, J.) ("The contrasts of our judicial arrangements with those of the United States are as striking as their similarities"); Rogers, *supra* note 244, at 644 ("except as a frightening example of the complexities which may attend a dual State/federal court system, the American experience has nothing helpful to offer").

248. *See supra* note 85 (references).

249. *See supra* notes 86-87 (Privy Council appeals from High Court).

250. *But see* AUSTL. CONST. § 73 ("with such exceptions and subject to such regulations as the [Commonwealth] Parliament prescribes"). *See generally* Smith Kline & French Laboratories (Austl.) Ltd. v. Commonwealth, 173 C.L.R. 194 (Austl. 1991) (special leave required from High Court to appeal was a "regulation" of High Court's appellate jurisdiction); LUMB & MOENS, *supra* note 80, at 378-81; DAVID O'BRIEN, SPECIAL LEAVE TO APPEAL: THE LAW AND PRACTICE OF APPLICATIONS FOR SPECIAL LEAVE TO APPEAL TO THE HIGH COURT OF AUSTRALIA 1-27 (1996); Anthony Mason, *The Regulation of Appeals to the High Court of Australia: The Jurisdiction to Grant Special Leave to Appeal,* 15 U. TAS. L. REV. 1 (1996). *Compare* U.S. CONST. art. III, § 2, cl. 2 ("with such Exceptions, and under such regulations as the Congress shall make"). *See generally* Gerald Gunther, *Congressional Power to Curtail Federal Court Jurisdiction: An Opinionated Guide to the Ongoing Debate,* 36 STAN. L. REV. 895 (1984); Lawrence Gene Sager, *The Supreme Court, 1980 Term-Foreword: Constitutional Limitations on Congress' Authority to Regulate the Jurisdiction of Federal Courts,* 95 HARV. L. REV. 17 (1981); *The Supreme Court, 1995 Term - Leading Cases - Federal Jurisdiction and Procedure: Exceptions Clause,* 110 HARV. L. REV. 277 (1996) (preferring a literal interpretation to give Congress expansive power over U.S. Supreme Court's

determine appeals from its original jurisdiction and federal courts.[251] Also, appeals can be taken from state courts exercising state or federal jurisdiction.[252] This express general appellate jurisdiction over state law is in marked contrast to the United States Supreme Court.[253] One federalism ramification protrudes: state constitutional law is ultimately[254] expounded by the High Court of Australia.[255] Australian state supreme courts, despite interpreting state constitutions,[256] are not the final judicial authority on state law questions. Secondly, is the Australian - "autochtonous expedient"[257] - variation. The Commonwealth Parliament is expressly

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jurisdiction, rather than a limiting structural approach).

251. AUSTL. CONST. § 73(i)-(ii).

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

253. U.S. CONST. art. III, § 2, cl. 2 (referring to the Supreme Court's appellate jurisdiction). But the Supreme Court does determine some state law issues under concepts of associated, accrued, and pendent jurisdiction. *See generally* MARTIN H. REDISH, FEDERAL JURISDICTION: TENSIONS IN THE ALLOCATION OF JUDICIAL POWER 53-77 (1980); Martin H. Redish, *Reassessing the Allocation of Judicial Business Between State and Federal Courts: Federal Jurisdiction and "the Martian Chronicles,"* 78 VA. L. REV. 1769 (1992). *See also* Thomas M. Mengler, *The Demise of Pendent and Ancillary Jurisdiction,* 1990 BYU L. REV. 247. But note the adequate and independent state law ground doctrine to preclude federal court adjudication of state law claims. *See, e.g.,* Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1262 n.228 (references); RICHARD H. FALLON, JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSYTEM 524-63 (4th ed. 1996).

254. The Judicial Committee of the Privy Council has (on appeal from the High Court) determined state constitutional law questions. *See, e.g.,* Attorney-General of N.S.W. v. Trethowan, 1932 A.C. 526 (P.C.) (U.K.). *See also supra* notes 86-87 (Privy Council appeals).

255. *See, e.g.,* McGinty v. Western Austl., 134 AUSTL. L.R. 289 (Austl. 1996) (interpreting Western Austl. Constitution Act 1889, § 73(2)(c)); Western Austl. v. Wilsmore, 149 C.L.R. 79 (Austl. 1981) (interpreting Western Austl. Constitution Act 1889, § 73).

256. *See, e.g.,* Wilsmore v. W. Austl., 1981 W. AUSTL. R. 159; A.G. for W. Austl. *ex rel.* Burke v. W. Austl., 1982 W. AUSTL. R. 241; Burke v. W. Austl., 1982 W. AUSTL. R. 248.

257. *Ex parte* Boilermakers Soc'y of Austl., 94 C.L.R. 254, 268 (Austl. 1956). However, it has been suggested that "[i]t is a mistake to suppose that investing State courts with federal jurisdiction is an unprecedented home-grown Australian arrangement. The United States Congress at an early dated invested State courts with jurisdiction to enforce some federal laws. Then came a period during which this practice was abandoned. Then it was revived." Felton v. Mulligan, 124 C.L.R. 367, 393 (Austl. 1971) (Windeyer, J.). For the U.S. see, e.g., John J. Gibbons *Federal Law and State Courts* 1790-1860, 36 RUTGERS L.J. 399 (1984). *But compare* Michael G. Collins, *Article III Cases, State Court Duties, and the Madisonian Compromise,* 1995 WIS. L. REV. 39 (questioning whether Congress was authorized to confer jurisdiction on state courts).

empowered to invest state courts with federal jurisdiction.[258] No express provision in the U.S. Constitution authorizes Congress to make state courts repositories of federal jurisdiction. However, different views confront two questions: Can Congress achieve the Australian position? If so, what, if any, constitutional limits exist?[259] Thirdly, the reverse situation prevails on creating federal courts. No express power or empowering provision authorizes the creation of Australian federal courts. Utilization of implied constitutional power is required.[260] A much more express and secure constitutional foundation supports U.S. federal courts.[261]

Descending from constitutional texts to practicalities exposes different attitudes about state courts in Australia and America. Different sentiments - from implicit trust in state courts as capable and neutral forums to enforce and vindicate federal laws and rights[262] to fears of hostile treatment, perhaps resulting from local sentiments and pressures[263] - have pervaded the background and influenced congressional decisions allocating jurisdiction between American state and federal courts.[264] In Australia, almost un-

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

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

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

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

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

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

264. *See generally* RICHARD A. POSNER, THE FEDERAL COURTS: CHALLENGE AND REFORM 3-52 (rev. ed. 1996) (comparing federal and state courts); Burt Neuborne, *The Myth of Parity,* 90 HARV. L. REV. 1105 (1977); Michael E. Solimine & James L. Walker, *Constitutional Litigation in Federal and State*

qualified approval of state courts has been characteristic.[265] Consequently, during the first seventy-five years of federation (1901-1975), Australian state courts were the major, but not the only,[266] forum for litigating federal issues. With the advent of the Federal Court of Australia[267] that relative calm ceased and jurisdictional controversies emerged.[268] Realization of the constitutional vulnerability of state court jurisdiction[269] and perceived problems of jurisdictional conflict in a dual - state and federal - court system[270] engendered reform proposals including the creation of a single unified Australian court system.[271] As a result, a Commonwealth - state legislative cross-vesting scheme was enacted.[272] Therefore,

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*Courts: An Empirical Analysis of Judicial Parity,* 10 HASTINGS CONST. L.Q. 213 (1983).

265. *See* Nigel Bowen, *Federal and State Court Relationships,* 53 AUSTL. L.J. 806 (1979) (asserting that in 1901 and 1979 all state Supreme Courts were "of high standard"); Rogers, *supra* note 244, at 633 (noting that reasons motivating establishment of U.S. federal courts "were and are absent in Australia"); Laurence Street, *The Consequences of a Dual System of State and Federal Courts,* 52 AUSTL. L.J. 434, 435 (1978) (indicating that, by 1901 Federation, Australia possessed "a well established, competent and reputable court system in each of the six States"). Generally on state courts see JAMES CRAWFORD, AUSTRALIAN COURTS OF LAW (3d ed. 1993); Thomson, *State Constitutional Law: Some Comparative Perspectives, supra* note 15, at 1087-92.

266. Other courts have adjudicated federal claims: for example, the Judicial Committee of the Privy Council; High Court of Australia; Commonwealth Court of Conciliation and Arbitration; Federal Court of Bankruptcy; and Commonwealth Industrial Court.

267. *See generally* Federal Court of Australia Act 1976 (Austl.); RENFREE, *supra* note 245, at 367-530; Nigel Bowen, *The Federal Court of Australia,* 8 SYDNEY L. REV. 285 (1977). On the federal Family Court of Australia see Family Law Act 1975 (Austl.); RENFREE, *supra* note 245, at 491-99.

268. *See* Thomson, *State Constitutional Law, American Lessons, supra* note 15, at 1252 n.163, 1258-262 (summarizing federal-state jurisdictional controversies).

269. *See, e.g., Re* Tracey: *Ex parte* Ryan, 166 C.L.R. 518 (Austl. 1989) (holding that the Commonwealth Act unconstitutionally oustered state court jurisdiction over defense personnel); McWaters v. Day, 168 C.L.R. 289 (Austl. 1989) (same); James A. Thomson, *Are State Courts Invulnerable?: Some Preliminary Notes,* 20 U. W. AUSTL. L. REV. 61 (1990); Thomson, *State Constitutional Law: American Lessons, supra* note 15, at 1256-257 (noting that the Australian Constitution is not "enamoured" with state courts and their possible redundancy).

270. *See supra* note 15 (jurisdictional controversies).

271. *See, e.g.,* JUDICATURE SUBCOMMITTEE ON THE AUSTRALIAN CONSTITUTION, REPORT TO THE STANDING COMMITTEE OF AN INTEGRATED COURT SYSTEM (1984), *reprinted in* 2 PROCEEDINGS OF THE AUSTRALIAN CONSTITUTIONAL CONVENTION: STANDING COMMITTEE REPORTS (1985); Rogers, *supra* note 244, at 643-48.

272. On this scheme, its problems, and possibilities see GARRIE J. MALONEY & SUSAN MCMASTER, CROSS-VESTING OF JURISDICTION: A REVIEW OF THE OPERATION OF THE NATIONAL SCHEME (1992); Herbert A. Johnson, *Historical and Constitutional Perspectives on Cross-Vesting of Court Jurisdiction,* 19 MELB. U. L. REV. 45 (1993); Thomson, *State Constitutional Law: Some Comparative Perspectives, supra* note 15, at 1089 n.178 (references).

concurrent federal and state jurisdiction vests in federal and state courts with each court able to remit cases to other courts.[273]

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

## VII. BILLS OF RIGHTS

No formal Bill of Rights is expressly adumbrated within,[278]

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273. *See generally* BP Australia Ltd. v. Amann Aviation Pty. Ltd., 137 AUSTL. L.R. 447 (1996) (discussing and upholding constitutional validity of cross vesting scheme). Special leave to appeal to the High Court has been granted with the nomenclature Gould v. Brown.

274. *See, e.g.*, MOLONEY & MCMASTER, *supra* note 272, at 6 (asserting that "these jurisdictional problems have long been regarded as a blot on the landscape of the administration of justice in Australia"); *Swearing in of Sir Harry Gibbs as Chief Justice*, 148 C.L.R. xi, xii (Austl. 1981) (Gibbs, C.J.) ("no legal proceedings are more futile and unproductive than disputes as to [federal and state courts'] jurisdiction"); Bernard O'Brien, *Arid Jurisdictional Disputes: The Federal Court Versus the State Supreme Courts*, 13 AUSTL. BUS. L. REV. 77 (1985); Rogers, *supra* note 244, at 631 (asserting that jurisdictional disputes are "highly detrimental" to the public).

275. *See, e.g.*, Philip Morris Inc. v. Adam P. Brown Male Fashions Pty. Ltd., 148 C.L.R. 457, 513 (Austl. 1981) (Mason, J.) (noting that "competing policy considerations" lurk behind federal-state jurisdictional arguments); COWEN & ZINES, *supra* note 246, at xiv (asserting that, despite superficial appearances, "broader issues of fundamental political and economic importance" underpin jurisdictional discussions).

276. *Compare* COWEN & ZINES, *supra* note 246 (asserting that in 1959 Australian lawyers did not consider jurisdictional issues to "offer any insight into more fundamental aspects of the Australian federal system"), *with supra* note 275 (1978 and 1981 recognition that fundamentals are implicated in jurisdictional issues).

277. *See, e.g.*, PAUL BATOR ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM xix (2d ed. 1973) ("jurisdiction of courts in a federal system is an aspect of the distribution of power between the states and the federal government"); FELIX FRANKFURTER & JAMES LANDIS, THE BUSINESS OF THE SUPREME COURT: A STUDY IN THE FEDERAL JUDICIAL SYSTEM 2 (1928); REDISH, *supra* note 253; McManamon, *supra* note 55 (arguing that Frankfurter revealed the connections between judicial federalism and balance of power relationships between the nation and states).

278. *But compare* Street v. Queensl. B.A., 168 C.L.R. 461, 521-22 (Austl. 1989) (Deane, J.) (asserting that, "while literally true," propositions "that the

structurally implicated in,[279] or appended to the Australian Constitution.[280] Australia's rejection of the American position[281] is stark.[282] Of course, where similarities might exist - property ac-

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Australian Constitution contains no bill of rights . . . are superficial and misleading"); PETER BAILEY, HUMAN RIGHTS: AUSTRALIA IN AN INTERNATIONAL CONTEXT 79 (1990) ("the list of rights in the [Australian] Constitution is surprisingly large and [Australians] . . . have in extraordinary measure overlooked or ignored them"). James Madison's June 8, 1789, proposal was to insert rights into, rather than append to, the Constitution. *See* WILLIAM LEE MILLER, THE BUSINESS OF MAY NEXT: JAMES MADISON AND THE FOUNDING 252, 256-57 (1992) (discussing Madison's proposal "to weave the amendments into the body of the Constitution"); Paul Finkelman, *James Madison and the Bill of Rights: A reluctant Paternity,* 1990 SUP. CT. REV. 301, 340-41 (noting that Madison "proposed a series of changes in the main body of the Constitution which would have been scattered throughout the document").

279. *But compare* development of implied federal constitutional rights in Australian Capital Television Pty. Ltd. v Commonwealth, 177 C.L.R. 106 (Austl. 1992) (freedom of political speech and communication); Theophanous v. Herald & Weekly Times Ltd., 182 C.L.R. 104 (Austl. 1994) (defamation and freedom of political speech); Stephens v. West Australian Newspapers Ltd., 182 C.L.R. 211 (Austl. 1994) (same). *See generally* Anne Twomey, *Dead Ducks and Endangered Political Communication* - Levy v. State of Victoria *and* Lange v. Australian Broadcasting Corporation, 19 SYDNEY L. REV. 76 (1997); George Williams, *Sounding the Core of Representative Democracy: Implied Freedoms and Electoral Reform,* 20 MELB. U. L. REV. 848, 850 n.13 (1996) (bibliography).

For a discussion of the U.S. Constitution, see Akhil Reed Amar, *The Bill of Rights as a Constitution,* 100 YALE L.J. 1131 (1991) (suggesting that to protect the people against government structural ideas and concepts, as much as individual rights, emanate from the Bill of Rights); Akhil Reed Amar, *Some Comments on "The Bill of Rights as a Constitution,"* 15 HARV. J.L. & PUB. POL'Y 99 (1992) (same); Akhil Reed Amar, *The Creation and Reconstruction of the Bill of Rights,* 16 S. ILL. U. L.J. 337 (1992) (same); Walter Burns, *The Constitution as Bill of Rights, in* HOW DOES THE CONSTITUTION SECURE RIGHTS? 50 (Robert A. Goldwin & William A. Schambra eds., 1985) (arguing that the 1787 Constitution itself is a Bill of Rights); Leonard W. Levy, *The Original Constitution as a Bill of Rights,* 9 CONST. COMM. 163 (1992) (elaborating framers' views). *See also infra* note 285 (right to travel).

280. Similarly, there are no state Bills of Rights. *See* James A. Thomson, *An Australian Bill of Rights: Glorious Promises, Concealed Dangers,* 19 MELB. U. L. REV. 1020, 1053 n.215 (1994) (references) (reviewing MURRAY R. WILCOX, AN AUSTRALIAN CHARTER OF RIGHTS (1993)). *Compare* American state Bills of Rights. *See* Thomson *supra* at 1029 n.30 (references).

281. U.S. CONST. amend. I-X, XIII-XV, XIX, XXVI. On historical origins, see generally WILLIAM E. NELSON, THE FOURTEENTH AMENDMENT: FROM POLITICAL PRINCIPLE TO JUDICIAL DOCTRINE (1988); THE COMPLETE BILL OF RIGHTS: THE DRAFTS, DEBATES, SOURCES, AND ORIGINS (Neil H. Cogan, ed., 1996); Morgan Cloud, *Searching through History: Searching for History,* 63 U. CHI. L. REV. 1707 (1996) (reviewing William John Cuddihy, *The Fourth Amendment: Origins and Original Meanings,* 602-1791 (unpublished Ph.D. dissertation)). *See also* DAVID HERBERT DONALD, LINCOLN 16 (1995) (noting that Michael Vorenberg "is preparing the authoritative history of the Thirteenth Amendment").

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

quisition;[283] jury trials;[284] freedom of movement;[285] freedom of trade

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Amendment, see generally Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. 106, 182-83 (Austl. 1992) (Dawson, J., dissenting); Thomson, *supra* note 38, at 69-72, 253-57. For a discussion of Australian electors referendum rejection of the Constitution Alteration (Postwar Reconstruction and Democratic Rights) Bill 1944 (Austl.) (containing provision to protect freedom of speech, expression, and religion) see PAUL HASLUCK, THE GOVERNMENT AND THE PEOPLE 1942-1945 at 456-59, 524-40 (1970); David Goldsworthy, *Playford, the LCL and the 'Powers' Referendum Issue 1942-4,* 12 AUSTL. J. POL. & HIST. 400 (1966); W.J. Walters, *The Opposition and the 'Powers' Referendum,* 4 POLITICS 42 (1969). On the 1988 referendum rejection of extending to states rights of jury trial, freedom of religion, and just terms for property acquisition see THE CONSTITUTIONAL COMMISSION AND THE 1988 REFERENDUMS (Brian Galligan & J.R. Nethercote eds., 1989); Enid Campbell, *Southey Memorial Lecture 1988: Changing the Constitution - Past and Future,* 17 MELB. U. L. REV. 1, 7-17 (1988).

283. *Compare* AUSTL. CONST. § 51(31) ("acquisition of property on just terms"), *with* U.S. CONST. amend. V ("private property [not to] be taken for public use without just compensation"). For Australia see Mutual Pools & Staff Pty. Ltd. v. Commonwealth, 179 C.L.R. 155 (Austl. 1994) (federal taxation legislation depriving company of contractual rights not infringe § 51(31)); Health Insurance Commission v. Peverill, 179 C.L.R. 226 (Austl. 1994) (retrospective reduction in Commonwealth statutory benefits not an "acquisition of property"); Georgiadias v. Australian and Overseas Telecomm. Corp., 179 C.L.R. 297 (Austl. 1994) (Commonwealth legislative extinguishment of a vested common law cause of action infringed § 51(31)); Nintendo Co. Ltd. v. Centronics Systems Pty. Ltd., 181 C.L.R. 134 (Austl. 1994) (intellectual property rights legislation not infringe § 51(31)). *See also* Commonwealth v. Tasmania, 158 C.L.R. 1, 247-48, 284 (Austl. 1983) (citing US taking clause cases including Penn. Central Transportation Co. v. New York City, 438 U.S. 104 (1978)). *See* LUMB & MOENS, *supra* note 80, at 242-58; ZINES, *supra* note 14, at 408-11; R. L. Hamilton, *Some Aspects of the Acquisition Power of the Commonwealth,* 5 FED. L. REV. 265 (1973).

On the Fifth amendment see RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985); Bruce W. Burton, *Regulatory Takings and the Shape of Things to Come: Harbingers of a Takings Clause Reconstellation,* 72 OR. L. REV. 603 (1993); Frank I. Michelman, *Property, Federalism, and Jurisprudence: A Comment on* Lucas *and Judicial Conservatism,* 35 WM & MARY L. REV. 301 (1993); Frank I. Michelman, *Liberties, Fair Values, and Constitutional Method,* 59 U. CHI. L. REV. 91 (1992); Jed Rubenfeld, *Usings,* 102 YALE L.J. 1077 (1993); William Michael Treanor, *The Original Understanding of the Takings Clause and the Political Process,* 95 COLUM. L. REV. 782 (1995); Symposium: Lucas v. South Carolina, 45 STAN. L. REV. 1369-1455 (1993); Symposium: *The Jurisprudence of Takings,* 88 COLUM. L. REV. 1581-1794 (1988).

284. *Compare* AUSTL. CONST. § 80 (trials "on indictment" of Commonwealth offences "shall be by jury"), *with* U.S. CONST. amend. VI (criminal trials "by an impartial jury"). For Australia see R. v. Federal Court of Bankruptcy *ex parte* Lowenstein, 59 C.L.R. 556, 581 (Austl. 1938) (Dixon & Evatt, JJ., dissenting) (citing U.S. CONST. provisions); Kingswell v. R, 159 C.L.R. 264, 300-02 (Austl. 1985) (Deane, J., dissenting) (citing US cases including Duncan v. Louisiana, 391 U.S. 145 (1968)); Brown v. R, 160 C.L.R. 171, 178-82, 185-88, 190-91, 194-96, 201-04, 208-13 (Austl. 1986) (citing Sixth Amendment, and U.S. cases including Singer v. United States, 380 U.S. 24 (1965)); Cheatle v. R, 177 C.L.R. 541, 549, 555-57 (Austl. 1993) (citing US cases including Burch v. Louisiana, 442 U.S. 404 (1979)). *See generally* LUMB & MOENS, *supra* note

and commerce;[286] religious freedom;[287] and out-of-state rights[288] -

80, at 421-24; ZINES, *supra* note 14, at 403-05; Clifford Pannam, *Trial by Jury and Section 80 of the Australian Constitution,* 6 SYDNEY L. REV. 1 (1968); Gordon Fell, Note, *The Role of the Jury in Criminal Cases - Entrenched* or *Vulnerable?,* 11 SYDNEY L. REV. 375 (1987); Editorial, *Right to Trial by Jury, the Constitution and the High Court,* 19 AUSTL. & N.Z. J. CRIMINOLOGY 65 (1986); S. Ricketson, Trial by Jury and § 80 of the Commonwealth Constitution (March 1983) (paper prepared for the Judicature Sub-Committee to the Australian Constitutional Convention); Jennifer H. Nicholson, *Section 80 of the Constitution: Judicial Interpretation and the Intentions of the Founders* (1986) (unpublished M. Pub. Law thesis, Australian National University). On the Sixth Amendment see Akhil Reed Amar, *Sixth Amendment First Principles,* 84 GEO. L.J. 641 (1996).

285. *Compare* AUSTL. CONST. § 92 ("intercourse among the States . . . shall be absolutely free") and the implied federal constitutional right of movement, *with* Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868) (constitutional right to travel) and Shapiro v. Thomson, 394 U.S. 618 (1969) (constitutional right to move from state to state and to the District of Columbia). On § 92's "intercourse" see Australian Capital Television Pty. Ltd. v. Commonwealth, 177 C.L.R. 106, 191-96 (Austl. 1992) (Dawson, J., dissenting); Gratwick v. Johnson, 70 C.L.R. 1 (Austl. 1945) (order under Commonwealth regulations prohibiting interstate travel without a permit issued at Director-General's discretion unconstitutional); MICHAEL COPER, FREEDOM OF INTERSTATE UNDER THE AUSTRALIAN CONSTITUTION 89-90 (1983) (discussing Gratwick).

On the Australian implied movement right see Theophanous v. The Herald & Weekly Times Ltd., 182 C.L.R. 104, 166, 168-169 (Austl. 1994) (citing Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)); Australian Capital Television Pty. Ltd. v Commonwealth, 177 C.L.R. 106, 185-86 (Austl. 1992) (Dawson, J., dissenting); R. v. Smithers *ex parte* Benson, 16 C.L.R. 99, 108, 109, 114-15, 119 (Austl. 1912) (citing US cases including Crandall v. Nevada, 73 U.S. (6 Wall.) 35 (1868)).

On the U.S. implied travel right see DAVID P. CURRIE, THE CONSTITUTION IN THE SUPREME COURT: THE FIRST HUNDRED YEARS 355 (1985); MARTHA F. DAVIS, BRUTAL NEED: LAWYERS AND THE WELFARE RIGHTS MOVEMENT, 1960-1973 at 76-80, 169 (1993); Robert C. Post, *William J. Brennan and the Warren Court, in* THE WARREN COURT IN HISTORICAL AND POLITICAL PERSPECTIVE 123, 127-28, 135 (Mark Tushnet ed. 1993).

286. *Compare* AUSTL. CONST. § 92 ("trade, commerce . . . among the States . . . shall be absolutely free"), *with* the negative implications of U.S. CONST. art. I, § 8, cl. 3 (Congress' power "[t]o regulate Commerce . . . among the several states") and amend. XIV ("due process" clause). On § 92's individual right theory and due process analogy see ZINES, *supra* note 14, at 109-14, 118-35 (discussing the "individual right" theory); Thomson, *supra* note 280, at 1054 n.220 (references). On the US see United States v. Lopez, 115 S. CT. 1624, 1640 (1995) (discussing dormant commerce clause and stating that the U.S. Supreme Court's "dormant Commerce Clause jurisprudence . . . [includes] the principle that the States may not impose regulations that place an undue burden on interstate commerce, even where those regulations do not discriminate between in-state and out-of-state businesses." (Kennedy, J., concurring)); Earl Maltz, *The Impact of the Constitutional Revolution of 1937 on the Dormant Commerce Clause - A Case Study in the Decline of State Autonomy,* 19 HARV. J. L. & PUB. POL'Y 121 (1995); Thomas Reed Powell, *The Still Small Voice of the Commerce Clause, in* SELECTED ESSAYS ON CONSTITUTIONAL LAW 931-32 (1938); Sullivan, *supra* note 165, at 107 (noting that some Justices would abandon judicial review under dormant commerce clause jurisprudence and permit states to regulate areas not regu-

American comparisons and contrasts have been utilized to explore the Australian Constitution.[289]

Despite this textual dichotomy, Australian constitutional law continues to look at the normative and empirical dimensions of the U.S. Bill of Rights and Fourteenth amendment[290] for guidance into

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lated by Congress); Peter D. Enrich, *Saving the States from Themselves: Commerce Clause Constraints on State Tax Incentives for Business*, 110 HARV. L. REV. 377 (1996); Mark V. Tushnet, *Scalia and the Dormant Commerce Clause: A Foolish Formalism?*, 12 CARDOZO L. REV. 1717 (1991); Mark Tushnet, *Rethinking the Dormant Commerce Clause*, 1979 WIS. L. REV. 125 (1979).

287. *Compare* AUSTL. CONST. § 116 ("The Commonwealth shall not make any law for establishing any religion, or for imposing any religious observance, or for prohibiting the free exercise of any religion, and no religious test shall be required as a qualification for any office or public trust under the Commonwealth"), *with* U.S. CONST. art. VI, § 4 ("no religious test shall ever be required as a Qualification to any Office or Public Trust under the United States"), *and* amend. I ("Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof"). On § 116 see Attorney-General (Vict.) *ex rel. Black* v. Commonwealth, 146 C.L.R. 559 (Austl. 1981) (Commonwealth government financial assistance to church schools not "establishing" religion) (citing First amendment and U.S. cases); ZINES, *supra* note 14, at 402-03; David C. Bennett, Casenote, 12 FED. L. REV. 271 (1981); I.K.F. Birch, *State - Aid at the Bar: The* Dogs Case, 1984 MELB. STUD. EDUC. 31; Michael Hogan, *Separation of Church and State: Section 116 of the Australian Constitution*, 53 AUSTL. Q. 214 (1981); Stephen McLeish, *Making Sense of Religion and the Constitution: A Fresh Start for Section 116*, 18 MONASH U. L. REV. 207 (1992); Clifford Pannam, *Traveling Section 116 with a US Road Map*, 4 MELB. U. L. REV. 41 (1963).

On the establishment and free exercise clauses see JESSE H. CHOPER, SECURING RELIGIOUS LIBERTY: PRINCIPLES FOR JUDICIAL INTERPRETATION OF THE RELIGION CLAUSES (1995); LEONARD W. LEVY, THE ESTABLISHMENT CLAUSE: RELIGION AND THE FIRST AMENDMENT (2d ed. rev. 1994).

288. *Compare* AUSTL. CONST. § 117 ("A subject of the Queen, resident in any State, shall not be subject in any other State to any disability or discrimination which would not be equally applicable to him if he were a subject of the Queen resident in such other State"), *with* U.S. CONST. art. IV, § 2 ("The citizens of each State shall be entitled to all Privileges and Immunities of Citizens in the several States"). On § 117 see Goryl v. Greyhound Australia Pty. Ltd., 179 C.L.R. 463 (Austl. 1994) (N.S.W. statutory provision limiting damages a NSW resident could recover under NSW law to less than under Queensl. law, where the injury occurred, infringed § 117); Street v. Queensl. B. A., 168 C.L.R. 461 (Austl. 1989) (state limitations on right to practice law infringed § 117); ZINES, *supra* note 14, at 406-08; Genevieve Ebbeck, *Section 117: The Obscure Provision*, 13 ADEL. L. REV. 23 (1991); Genevieve Ebbeck, *The Future for Section 117 as a Constitutional Guarantee*, 4 PUB. L. REV. 89 (1993); Clifford Pannam, *Discrimination on the Basis of State Residence in Australia and the United States*, 6 MELB. U. L. REV. 105 (1967). For an explicit comparison see Goryl v. Greyhound Austl. Pty. Ltd., 179 C.L.R. 463, 486 (Austl. 1994).

289. *See generally* Thomson, *supra* note 8 at 46-49 (references); *infra* Appendix A (Australia-U.S. comparisons). *See also supra* note 149 (one vote, one value cases).

290. *See* James A. Thomson, *Capturing the Future: Earl Warren and Supreme Court History*, 32 TULSA L.J nn. 1-2 (reviewing THE WARREN COURT: A RETROSPECTIVE (Bernard Schwartz ed. 1996) (references to empirical and

the future.[291] At least one ongoing debate mandates such inquisitiveness: should Australia have - whether legislatively or constitutionally entrenched - a Bill of Rights?[292] Of course, emergence of answer should, like Canada,[293] stimulate, not end, the dialogue.

## VIII. AMENDMENT

Questions of constitutional law pervade the power and process of amending the American and Australian Constitutions.[294] Express amendment powers and procedures[295] pose an initial

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normative debates)) (forthcoming 1997).

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

292. *See id.* (discussion and references). *See also* Peter Bailey, *"Righting" the Constitution without a Bill of Rights,* 23 FED. L. REV. 1 (1995); Gabriel A. Moens, *The Wrongs of a Constitutionally Entrenched Bill of Rights, in* REPUBLIC OR MONARCHY?, *supra* note 236, at 233-56.

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

294. For a U.S.-Canadian comparison see Walter Dellinger, *The Amending Process in Canada and the United States: A Comparative Perspective,* 45 LAW & CONTEMP. PROB. 283 (Autumn 1982); *Comparative United States/Canadian Constitutional Law,* 55 LAW & CONTEMP. PROB. 1, 253-302 (Winter 1992) ("Amending the Constitution").

295. *Compare* AUSTL. CONST. § 128 (referendum, proposed by the Commonwealth Parliament, approved by a majority of electors in a majority of states and by a majority of all electors, and assented to by the Governor-General), *with* U.S. CONST. art. V (Congress or a Convention proposes amendments which must be ratified by three-fourths of state legislatures or Conventions in three-fourths of the states). On section 128 see LUMB & MOENS, *supra* note 80, at 567-72; James A. Thomson, *Altering the Constitution: Some Aspects of Section 128,* 13 FED. L. REV. 323 (1983). On Article V, see generally RUSSELL L. CAPLAN, CONSTITUTIONAL BRINKMANSHIP: AMENDING THE CONSTITUTION BY NATIONAL CONVENTION (1988); DAVID E. KYUIG, AUTHENTIC AND EXPLICIT ACTS: AMENDING THE U.S. CONSTITUTION, 1776-1995 (1996); PETER SUBER, THE PARADOX OF SELF AMENDMENT: A STUDY OF LOGIC, LAW, OMNIPOTENCE, AND CHANGE (1990); JOHN R. VILE, ENCYCLOPEDIA OF CONSTITUTIONAL AMENDMENTS, PROPOSED AMENDMENTS, AND AMENDING ISSUES, 1789-1995 (1996); JOHN R. VILE, CONTEMPORARY QUESTIONS SURROUNDING THE CONSTITUTIONAL AMENDING PROCESS (1993); JOHN R. VILE, THE CONSTITUTIONAL AMENDING PROCESS IN AMERICAN POLITICAL THOUGHT (1992); JOHN R. VILE, REWRITING THE UNITED STATES CONSTITUTION: AN EXAMINATION OF PROPOSALS FROM RECONSTRUCTION TO THE PRESENT (1991); RESPONDING TO IMPERFECTION: THE THEORY AND PRACTICE OF CONSTITUTIONAL AMENDMENT (Sanford Levinson ed., 1995); Walter E. Dellinger, *Who Controls A Constitutional Convention? - A Response,* 1979 DUKE L.J. 999; Michael Stokes Paulsen, *A General Theory of Article V: The Constitutional Lessons of the Twenty-seventh Amendment,* 103 YALE L.J. 677 (1993); Kathleen M. Sullivan, *Constitutional Constancy: Why Congress Should Cure Itself of Amendment Fever,* 17 CARDOZO L. REV. 691 (1996); Robert Hajdu & Bruce E. Rosenbloom, Note, *The Process of Constitutional Amendment,* 79 COLUM. L. REV. 106 (1979); Frank I. Michelman, *Thirteen Easy Pieces,* 93 MICH. L. REV. 1297 (1995) (reviewing RESPONDING TO IMPERFECTION, *supra*).

AUSTL. CONST. § 128, unlike Article V, does not provide for a Convention. However, would Article V's convention process be assisted by consideration of

problem: Can these constitutions be amended without conforming to textual stipulations?[296] Other than the United Kingdom Parliament[297] or a revolution establishing an autochthonous constitution,[298] a vigorous Australian debate is yet to ignite. Is this context, American discussion denigrating the exclusivity of Article V amendments and postulating alternative procedures and sources of power - popular, majoritarian sovereignty[299] and constitutional

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the 1891, 1897-1898, 1970s and 1980s Australian constitutional conventions (*see supra* notes 108-110; Robert Doyle, *The Australian Constitutional Convention, 1973-79,* 61 THE PARLIAMENTARIAN 153 (1980); Cheryl Saunders, *Australian Constitutional Convention,* 13 MELB. U. L. REV. 628 (1982)) and U.S. state conventions (*See* ROBERT F. WILLIAMS, STATE CONSTITUTIONAL LAW: CASES AND MATERIALS 973-90 (1993))?

296. Textual possibilities, other than AUSTL. CONST. § 128, include *id.* at § 51(36), (37), and (38). *See* McGinty v. Western Australia, 134 AUSTL. L.R. 289, 382-86 (1996) (Gummow, J.) (discussing § 51(36)); Thomson, *supra* note 295, at 323-24 n.4.

297. As to whether the United Kingdom Parliament can and has amended the Australian Constitution see WINTERTON, *supra* note 236, at 138-40, 189 (discussing Australian request and U.K. parliamentary response to facilitate creation of state republican governments); ZINES, *supra* note 14, at 306-08 (discussing whether the Australia Act 1986 (U.K.) § 15 amended AUSTL. CONST. § 128); James A. Thomson, *supra* note 79 (same); Thomson, *supra* 295, at 342-44 (discussing U.K. Parliament's power). *See also* Gregory J. Craven, *The Kirmani Case - Could the Commonwealth Parliament Amend the Constitution Without a Referendum?,* 11 SYDNEY L. REV. 64 (1986) (discussing the Statute of Westminster 1931 (U.K.) § 2(2) as a source of power to amend the AUSTL. CONST.).

298. *See generally* Thomson, *supra* note 79, at 410 n.3 (revolutionary autochtony); Thomson, *supra* note 295, at 344-45 (general discussion). *See also* Thomson, *supra* note 290, at n.170 (revolution in constitutional law).

299. *See* Akhil Reed Amar, *Philadelphia Revisited: Amending the Constitution Outside Article V,* 55 U. CHI. L. REV. 1043 (1988) (arguing that "a majority of voters" possess "an unenumerated right to amend [the U.S.] Constitution in ways not explicitly set out in Article V"); Akhil Reed Amar, *The Consent of the Governed: Constitutional Amendment Outside Article V,* 94 COLUM. L. REV. 457 (1994) (arguing for a non-exclusive Article V amendment process so that the U.S. Constitution can be amended "via a majoritarian and populist mechanism akin to a national referendum"); Akhil Reed Amar, *Popular Sovereignty and Constitutional Amendment, in* RESPONDING TO IMPERFECTION, *supra* note 295, at 89-115. Would this national referendum proposal be assisted by consideration of the AUSTL. CONST. § 128 referendum (*supra* note 295)? *But see supra* note 301 (democratic and majoritarian defects in Section 128).

For criticisms of Amar's thesis see David R. Dow, *When Words Mean What We Believe They Say: The Case of Article V,* 1990 IOWA L. REV. 1, 30-35, 39-61 (criticizing Amar's popular sovereignty arguments); Fried, *supra* note 165, at 29-32 (characterizing Amar's popular sovereignty and majoritarian referendum theses as incorrectly using the nomenclature "amendment" for "popular upheaval"); Henry Paul Monaghan, *We The People[s], Original Understanding and Constitutional Amendment,* 96 COLUM. L. REV. 121 (1996) (suggesting that Amar's thesis is "historically groundless" and "ignores" the states' role and Constitution's text); John Vile, *Legally Amending the United States Constitution: The Exclusivity of Article V's Mechanisms,* 21 CUMB. L. REV. 271

moments[300] - ought to be invoked.[301]

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(1991) (rejecting Amar's popular sovereignty thesis on original intent and interpretative grounds); Eric Grant, Book Review, 13 CONST. COMM. 125, 136-38 (1996) (reviewing RESPONDING TO IMPERFECTION, *supra* note 295) (criticizing Amar's historical analysis); Lawrence Lessig, *What Drives Derivability: Responses to* Responding to Imperfection, 74 TEX. L.R. 839, 852-60 (1995) (reviewing RESPONDING TO IMPERFECTION, *supra* note 295) (questioning aspects of Amar's thesis).

300. *See* BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS (1991) (suggesting that the American people during "constitutional moments" - such as the Reconstruction and New Deal eras - structurally amend the U.S. Constitution outside Article V's purview); Bruce Ackerman & Neal Katyal, *Our Unconventional Founding,* 62 U. CHI. L. REV. 475 (1995) (suggesting three transformative constitutional moments: 1787 Founding, Reconstruction, and New Deal).

Support for Ackerman's non-Article V amendment thesis and history includes Martin S. Flaherty, *History 'Lite' in Modern American Constitutionalism,* 95 COLUM. L. REV. 523, 579-90 (1995) (favorable view of Ackerman's history); Eben Moglen, *The Incomplete Burkean: Bruce Ackerman's Foundation for Constitutional History,* 5 YALE J.L. & HUMAN. 531 (1993) (book review); Edmund S. Morgan, *The Fiction of 'The People',* 39 n. 8 N.Y. REV. BOOKS, April 23, 1992, at 46 (book review); James W. Torke, *"Grand Theory" and Constitutional Change,* 26 IND. L. REV. 677 (1993) (book review) (adumbrating critiques against and defense of Ackerman).

Critics include Dow, *supra* note 299, at 35-61; Laurence H. Tribe, *Taking Text and Structure Seriously: Reflections on Free-Form Method in Constitutional Interpretation,* 108 HARV. L. REV. 1221 (1995) (criticizing notion of "constitutional moments" on textualist and structuralist premises); William W. Fisher III, *The Defects of Dualism,* 59 U. CHI. L. REV. 955 (1992) (book review); Michael J. Klarman, *Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman's Theory of Constitutional Moments,* 44 STAN. L. REV. 759 (1992) (book review); Thomas K. Landry, *Ackermania! Who are We the People?,* 47 U. MIAMI L. REV. 267 (1992) (book review); Jack N. Rakove, Book Review, 97 J. AM. HIST. 226 (1992); Frederick Schauer, *Deliberating About Deliberation,* 90 MICH. L. REV. 1187 (1992) (book review); Suzanna Sherry, *The Ghost of Liberalism Past,* 105 HARV. L. REV. 918 (1992) (book review); Philip J. Weiser, *Ackerman's Proposal for Popular Constitutional Lawmaking: Can It Realize His Aspirations for Dualist Democracy?,* 68 N.Y. U. L. REV. 907 (1993) (book review) (discussing and criticizing Ackerman's proposed national referendum for amending U.S. Constitution); *Symposium on Bruce Ackerman's We The People,* 1994 ETHICS 446-535 (1994). *See also* Duffey, *supra* note 18, at 943-53 (applying Ackerman's "constitutional moments" thesis to the Northwest Ordinance); Michael W. McConnell, *The Forgotten Constitutional Moment,* 11 CONST. COMM. 115 (1994) (criticizing and applying "constitutional moments" theory to the 1877 end of Reconstruction).

301. Is an AUSTL. CONST. § 128 referendum (*see supra* note 295) an example or evidence of popular sovereignty? Despite referenda's normative democratic credentials, a negative response may be required because of § 128's pre-1901 history (*see* Thomson, *supra* note 295, at 328 n.19); requirements (for example, double majorities and Governor-General's assent as indicated in *supra* note 295); and limitations (*see infra* notes 303, 308, 309). *See also* McGinty v. Western Australia, 134 AUSTL. L.R. 289, 379 (1996) (Gummow, J.) (noting "that, in significant respects, § 128 does not provide for an equality of voting power at referendums. A negative power . . . may be exercised by a minority of the total electors of the Commonwealth if that minority is geographically distributed such as to constitute a majority in a majority of States").

If that occurs, Australian constitutional law offers little guidance on judicial review of constitutional amendments.[302] Would exceeding the amending power's limits[303] and defects in process or procedure[304] be subject to judicial review? What, if any, role does the political question doctrine[305] have in precluding judicial in-

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302. Perhaps, the only example is Boland v. Hughes, 83 AUSTL. L.R. 673, 675 (1988) (Mason, C.J.) ("The validity of the proposed amendment to the [Austl.] Constitution . . . if . . . carried at the [1988] referendum . . . could subsequently be determined by a court. If . . . there is a defect in the form and content of the proposed law and that defect goes to the validity of the amendment, the issue of validity will nevertheless then be susceptible of determination by the court"). More frequent is judicial review of amendments to Australian state constitutions. *See* Attorney-General of N.S.W. v. Trethowan, 1932 A.C. 526 (P.C.) (U.K.) (N.S.W. Constitution); W. Austl. v. Wilsmore, 149 C.L.R. 79 (Austl. 1982) (W. Austl. Constitution). *See also infra* notes 306 (America), 307 (India and Canada).

303. In the Australian context, for example, are amendments to the Constitution's preamble and covering clauses (*supra* note 24) beyond the scope of AUSTL. CONST. § 128? *See* 1 AN AUSTRALIAN REPUBLIC, *supra* note 198, at 8, 117-22 (affirmative response); 2 *id.* at 296-311 (same); LUMB & MOENS, *supra* note 80, 571 (same); Thomson, *supra* note 295, at 334-35 (differing views).

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

304. *See supra* note 303 (references concerning U.S. CONST. amend. XIII, XIV). For the controversy surrounding the addition of *id.* amend. XXVII see Richard B. Bernstein, *The Sleeper Wakes: The History and Legacy of The Twenty-Seventh Amendment,* 61 FORDHAM L. REV. 497 (1992); Sanford Levinson, *Authorizing Constitutional Text: On the Purported Twenty-Seventh Amendment,* 11 CONST. COMM. 101 (1994) (discussing defects in process by which this amendment added to the Constitution).

305. *See generally* MICHAEL J. GERHARDT, THE FEDERAL IMPEACHMENT PROCESS: A CONSTITUTIONAL AND HISTORICAL ANALYSIS 118-146, 208-12 (1996) ("Judicial Review of Impeachments"); Rebecca L. Brown, *When Political Questions Affect Individual Rights: The Other* Nixon v. United States,

volvement, including declarations of invalidity?[306] For example, amendments to the Indian Constitution have been judicially nullified.[307] Of course, these questions might become more obvious, if

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1993 SUP. CT. REV. 125 (advocating abandonment of non-justiciability doctrine); Louis Henkin, *Is There a "Political Question" Doctrine?*, 85 YALE L.J. 597 (1976) (answering no); Wayne McCormack, *The Political Question Doctrine - Jurisprudentially*, 70 U. DET. L. REV. 793 (1993); J. Peter Mulhern, *In Defense of the Political Question Doctrine*, 137 U. PA. L. REV. 97 (1988); Robert F. Nagel, *Political Law, Legalistic Politics: A Recent History of the Political Question Doctrine*, 56 U. CHI. L. REV. 643 (1989); Linda S. Simard, *Standing Alone: Do We Still Need the Political Question Doctrine?* 100 DICK. L. REV. 303 (1996).

306. For Australia see *supra* note 302 (Boland proffers a "none" answer). For America see Walter Dellinger, *The Legitimacy of Constitutional Change*, 97 HARV. L. REV. 386 (1983) (advocating active judicial review of the amending process); Walter Dellinger, *A Rejoinder*, 97 HARV. L. REV. 433 (1983); Thomas Millet, *The Supreme Court, Political Questions, and Article V - A Case for Judicial Restraint*, 23 SANTA CLARA L. REV. 745 (1983) (advocating application of political question doctrine); Walter F. Murphy, *An Ordering of Constitutional Values*, 53 S. CAL. L. REV. 703, 754-57 (1979) (arguing for judicial invalidation of constitutional amendments); Laurence Tribe, *A Constitution We Are Amending: In Defense of a Restrained Judicial Role*, 97 HARV. L. REV. 433 (1983) (supporting deferential, but not complete abdication of, judicial review of Article V amending process); John R. Vile, *Judicial Review of the Amending Process: The Dellinger - Tribe Debate*, 3 J. L. & POL. 21 (1986) (advocating limited judicial review). *See also* Jonathan L. Walcoff, *The Unconstitutionality of Voter Initiative Applications for Federal Constitutional Conventions*, 85 COLUM. L. REV. 1525 (1985) (noting state Supreme Courts' enjoining of voter initiative and Circuit Justice Rehnquist's refusal to stay these injunctions).

307. *See generally* Kesavananda Bharati v. Kerala, 1973 A.I.R. (S.C.) 1461 (holding that INDIAN CONST. art. 368, conferring Indian Parliament's power to amend the Constitution, does not authorize the abrogation or emasculation of the Constitution's basic elements or fundamental features); S.P. SATHE, CONSTITUTIONAL AMENDMENTS 1950-1988: LAW AND POLITICS 68-94 (1989) (discussing the scope of judicial review of Indian constitutional amendments); David Gwynn Morgan, *The Indian "Essential Features" Case*, 30 INT'L & COMP. L.Q. 307 (1981); N.K.F. O'Neill, *How the Indian Supreme Court Survived the Emergency*, 3 LAWASIA (N.S.) 362 (1981). For pre-1982 judicial review of Canada's constitutional amendment process *see* PETER RUSSELL ET AL., THE COURT AND THE CONSTITUTION: COMMENTS ON THE SUPREME COURT REFERENCE ON CONSTITUTIONAL AMENDMENT (1982) (discussing Reference to Amendment of the Constitution of Canada, 125 D.L.R. (3d) 1 (S.C.C.) (1981)); Peter W. Hogg, *Constitutional Law - Amendment of the British North America Act - Role of the Provinces*, 60 CAN. B. REV. 307 (1982) (same); A. Wayne Mackay, *Judicial Process in the Supreme Court of Canada: The Patriation Reference and Its Implications for the Charter of Rights*, 21 OSGOODE HALL L.J. 55 (1983) (same). For post-1982 judicial review of Canadian constitutional amendments *see* Re Native Women's Ass'n of Canada, 97 D.L.R. (4th) 548 (1992) (referendum process); Re Clifford and Attorney-General of Canada, 97 D.L.R. (4th) 80 (1992) (voting in referendum); Hang v. Canada, 97 D.L.R. (4th) 71 (1992) (referendum process); Re Sibbeston and Attorney-General of Canada, 48 D.L.R. (4th) 691 (1988) (Canadian Charter of Rights and Freedoms no application to amendments to Canadian Constitution); McLean v. Attorney-General of Canada, 35 D.L.R. (4th) 306 (1987) (amendments to pro-

some provisions in[308] or aspects of[309] the American or Australian constitutions were unamendable.[310]

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vincial constitutions must conform to the Canadian Constitution).

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

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

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

310. *See, e.g.,* U.S. CONST. art. V ("no Amendment which may be made prior to [1808] shall in any manner affect the first and fourth clauses in the Ninth Section of the first Article" dealing with the importation of slaves). On this provision, which endeavors textually to make specified provisions unamendable from 1787 to 1808 - at least through the Article V amendment process - *see* Amar, *Philadelphia Revisited, supra* note 299, at 1066-69 (concluding that Article V prohibits use of its amendment procedures to abolish slave importation but left intact peoples' right (outside of Article V) to change slave importation). *See also* Douglas Linder, *What in the Constitution Cannot be Amended?,* 23 ARIZ. L. REV. 717 (1981) (general discussion). *Compare* the 1861 proposed "unamendable" thirteenth amendment (called the Corwin amendment): "No amendment shall be made to the Constitution which will authorize or give to Congress the power to abolish or to interfere with, with any State, with the domestic institutions thereof, including that of persons held to labor or service by the laws of the said State." *See* Mark E. Brandon, *The "Original" Thirteenth Amendment and the Limits to Formal Constitutional Change, in* RESPONDING TO IMPERFECTION, *supra* note 295, at 215-36 (concluding that Corwin amendment would not have been unconstitutional and that rarely will any amendment be unconstitutional); Linder, *supra,* at 728-33 (similar conclusion on validity of 'unamendable' amendments).

## IX. CONCLUSION

Comparative constitutional law thrives on such conundrums. Given an abundance of similarities - written constitutions, federalism, and judicial review - and differences - responsible government, Bill of Rights and a High Court possessing state law appellate jurisdiction - embarkation from America and Australia on comparative constitutional law sojourns ought to be frequent and enjoyable. Consequently, movement in both directions should continue. Converting a constitutional monarchy into a republic and shifting from United Kingdom parliamentary sovereignty towards popular sovereignty as the constitutional foundation exemplify Australia's journey toward America. Proposals for constitutional amendments by popular electoral majorities outside the article V process and resolution of rights issues through political processes, rather than expansive judicial interpretation of the Bill of Rights, indicate some susceptibility of American constitutional law to Australia's Constitution. Obviating differences and diversity need not, however, be the objective. Simply, touring through foreign constitutions may suffice. If that assists constitutional law, the experience in and lessons derived from comparative analysis will carry their own rewards.

# APPENDIX A

## AUSTRALIA - U.S. COMPARISONS

RICHARD HEALD LEACH, STUDIES IN COMPARATIVE FEDERALISM: AUSTRALIA, CANADA, THE UNITED STATES, AND WEST GERMANY (1982).

LESLIE ZINES, THE HIGH COURT AND THE CONSTITUTION 55-79 (4th ed. 1997) (comparative analysis evaluation of U.S. and Australian commerce clauses).

Andzrej Rapaczynski, *Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad, in* CONSTITUTIONALISM AND RIGHTS: THE INFLUENCE OF THE UNITED STATES CONSTITUTION ABROAD 405, 442-47 (Louis Henkin & Albert J. Rosenthal ed., 1990) (Australia).

Kersi B. Shroff, *Australia, in* THE AMERICAN CONSTITUTION: ITS GLOBAL HERITAGE 1-11 (1987) (Library of Congress).

L. E. Fredman, *Economic Interpretation of the Constitution: Australian Style,* 1 U. NEW SOUTH WALES HIST. J. 17 (1968).

Gabriel A. Moens, *The Action-Belief Dichotomy and Freedom of Religion*, 12 SYD. L. REV. 195 (1989).

Robert M. O'Neil, *Freedom of Expression and Public Affairs in Australia and the United States: Does a Written Bill of Rights Really Matter?*, 22 FED. L. REV. 1 (1994).

Geoffrey Lindell, *Proportionate Representation of States in the House of Representatives and Associated Issues - Some Recent Developments in Australia and the United States*, 11 U. NEW SOUTH WALES L.J. 102 (1988).

W.M.C. Gummow, *Full Faith and Credit in Three Federations*, 46 S. C. L. REV. 979 (1995).

Brunson MacChesney, *Full Faith and Credit - A Comparative Study*, 44 ILL. L. REV. 298 (1949).

Brian R. Opeskin, *Constitutional Dimensions of Choice of Law in Australia,* 3 PUB. L. REV. 152, 173-80 (1992) (Full Faith and Credit).

Susan Kenny, *Constitutional Fact Ascertainment (With Special Reference to the Practice of the Supreme Court of the United States and the High Court of Australia)*, 1 PUB. L. REV. 134 (1990).

Christine Fletcher & Cliff Walsh, *Comparative Fiscal Constitutionalism in Australia and the U.S. - The Power of State Politics, in* EVALUATING FEDERAL SYSTEMS 345-61 (Bertus De Villiers ed., 1994).

Michael A. Fullilove, *Giving the Devil the Benefit of Law: Free Speech and Hate Speech under the United States and Australian Constitutions*, 1994 AUSTRALASIAN L. STUDENTS ASS'N ACAD. J. 47.

John E. Eichhorst & Ronald C. McCallum, Garcia *and Judi-*

*cially-Imposed Constitutional Protections of State Sovereignty: The Australian Experience*, 4 FLA. INT'L. L.J. 465 (1989).

F.E. Devine, *American Exclusion of Unlawfully Obtained Evidence with Australian Comparison*, 13 CRIM. L.J. 188 (1989).

Eric Barendt, *Importing United States Free Speech Jurisprudence?, in* FREEDOM OF COMMUNICATION 57-76 (Tom Campbell & Wojciech Sadurski eds., 1994).

David Tucker, *Representation - Reinforcing Review: Arguments about Political Advertising in Australia and the United States, in* FREEDOM OF COMMUNICATION 161-77 (Tom Campbell & Wojciech Sadurski eds., 1994).

Ian Loveland, Sullivan v. The New York Times *Goes Down Under*, 1996 PUB. L. 126.

Michael Newcity, *The Sociology of Defamation in Australia and the United States*, 26 TEX. INT'L L.J. 1 (1991).

Richard Lucy, *How American is the Australian Division of Powers*?, 6 LEG. STUD. 25 (Winter 1991).

Joan Rydon, *Some Problems of Combining the British and American Elements in the Australian Constitution*, 23 CLTH & COMP. POL. 67 (1985).

David Partlett, *From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech*, 22 VAND. J. TRANSNAT'L L. 431 (1989).

R.L. Hamilton, *Some Aspects of the Acquisition Power of the Commonwealth,* 5 FED. L. REV. 265 (1973).

Edward L. Barrett, Jr., *A Parliamentary System of Government in* a *Federal State - The Australian Experience,* 19 U.C. DAVIS L. REV. 153 (1985).

Edward L. Barrett, Jr., *A Look at the Australian Federal System*, 66 A.B.A. J. 742 (1980).

James A. Thomson, *Constitutional Authority for Judicial Review: A Contribution from the Framers of the Australian Constitution, in* 6 THE CONVENTION DEBATES 1891-1898: COMMENTARIES, INDICES AND GUIDE 173-202 (Gregory Craven ed., 1986).

James A. Thomson, *Principles and Theories of Constitutional Interpretation and Adjudication: Some Preliminary Notes*, 13 MELB. U. L. REV. 597 (1982).

James A. Thomson, *State Constitutional Law: Some Comparative Perspectives*, 20 RUTGERS L.J. 1059 (1989).

James A. Thomson, *Slouching Towards Tenterfield: The Constitutionalization of Tort Law in Australia,* 3 TORT L.R. 81 (1995).

Harry Gibbs, *The Influence of the American Constitution on Other Nations, in* THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF ASIA 69-84 (Kenneth W. Thompson ed., 1988).

Harry Gibbs, *The Separation of Powers - A Comparison*, 17 FED. L. REV. 151 (1987).

Anthony Mason, *The Role of a Constitutional Court in a Fed-*

*eration: A Comparison of the Australian and the United States Experience*, 16 FED. L. REV. 1 (1986).

David S. Bogen, *Comparing Implied and Express Constitutional Freedoms*, 2 JAMES COOK U. L. REV. 190 (1995).

William Rich, *Approaches to Constitutional Interpretation in Australia: An American Perspective,* 12 U. TAS. L. REV. 150 (1993).

Frank Bates, *The Courts and Religious Practice - Some Comparative Developments in Australia and Elsewhere,* March 1989 AUSTL. CURRENT L. 36001.

Stella Tarrant, *The Woman Suffrage Movement in the United States and Australia: Concepts of Suffrage, Citizenship and Race,* 18 ADEL. L. REV. 47 (1996).

Gerard Brennan, *Judicial Qualities of a Different Kind,* 60 LAW INST. J. 654 (Vict. 1986).

## APPENDIX B

## CANADA - AUSTRALIA COMPARISONS

PARTIES AND FEDERALISM IN AUSTRALIA AND CANADA (Campbell Sharman ed., 1994)

Campbell Sharman, *Parliamentary Federations and Limited Government: Constitutional Design and Redesign in Australia and Canada*, 2 J. THEORETICAL POL. 205 (1990).

Brian Galligan & Peter Russell, *The Politicisation of the Judiciary in Australia and Canada*, 67 pt 2 AUSTL. Q. 85 (Winter 1995).

John Goldring, *The Privy Council as a Constitutional Court: Canadian Antecedents of Australian Constitutional Interpretation*, 10 AUSTL.-CAN. STUD. 1 (1992).

Steven B.A. Bardy, The Federal Courts: The Necessity, the Desirability, and the Problems of Creation, Development and Continued Existence of the Federal Courts of Australia and Canada (LL.M thesis, Queens Uni, Kingston, 1982).

RICHARD CULLEN, FEDERALISM IN ACTION: THE AUSTRALIAN AND CANADIAN OFFSHORE DISPUTES (1990).

Richard Cullen, Federalism in Action: The Canadian and Australian Offshore Disputes Compared (Doctor of Jurisprudence thesis, Osgoode Hall Law School, 1986).

Richard Cullen, *Canada and Australia: A Federal Parting of the Ways*, 18 FED. L. REV. 53 (1988).

Roderick A. Macdonald, *Exiting from Meech Lake: Are the Lessons for Australia?*, 1 PUB. L. REV. 299 (1990).

David Estep, *Losing Jewels from the Crown: Considering the Future of the Monarchy in Australia and Canada*, 7 TEMP. INT'L & COMP. L.J. 217 (1993).

Peter H. Russell, *The Catalytic Role of Courts in Aboriginal Constitutional Politics: Canada in Comparative Perspective* (unpub. paper, Aug. 21, 1995) (to be published in a collection of essays, edited by Robert Drummond and David Sugraman, in honor of Donal Smiley).

Peter H. Russell, *Mega Constitutional Politics: Canada's Agony, Australia's Warning*, 30 QUADRANT 15 (October 1994).

Peter H. Russell, *Attempting Macro Constitutional Change in Australia and Canada: The Politics of Frustration*, 7-8 INT'L J. CAN. STUD. 41 (Fall/Spring 1993).

Peter H. Russell, *The Politics of Frustration II: Constitutional Politics in Australia and Canada Since 1987*, 10 AUSTL-CAN. STUD. 57 (1992).

Michael Crommelin, *Senate Reform: Is the Game Worth the Candle?*, 23 U. BRIT. COLUM. L. REV. 197 (1989).

Howard Cody, *Australia's Senate and Senate Reform in Can-*

*ada*, 27 PAPERS ON PARLIAMENT 99 (March 1996).

Torsten H. Strom & Peter Finkle, *Treaty Implementation: The Canadian Game Needs Australian Rules*, 25 OTTAWA L. REV. 39 (1993).

Nigel Bankes, *Constituionalized Intergovernmental Agreements and Third Parties in Canada and Australia* (Papers on Federalism No. 18, Centre for Comparative Constitutional Studies, Melbourne University, Jan. 1991), *reprinted in* 30 ALBERTA L. REV. 524 (1992).

Nigel Bankes, *Co-operative Federalism: Third Parties and Intergovernmental Agreements and Arrangements in Canada and Australia* (Papers on Federalism No. 19, Centre for Comparative Constitutional Studies, Melbourne University, Jan. 1991), *reprinted in* 29 ALBERTA L. REV. 792 (1991).

MURRAY R. WILCOX, AN AUSTRALIAN CHARTER OF RIGHTS? (1993).

## APPENDIX C

### CANADA - USA COMPARISONS

JOHN GEORGE BOURINOT, CANADIAN STUDIES IN COMPARATIVE POLITICS Chapter II (Dawson Brothers, Montreal, 1890).

HERBERT ARTHUR SMITH, FEDERALISM IN NORTH AMERICA: A COMPARATIVE STUDY OF INSTITUTIONS IN THE UNITED STATES AND CANADA (1923).

THE CANADIAN AND AMERICAN CONSTITUTIONS IN COMPARATIVE PERSPECTIVE (Marian C. McKenna ed., 1993).

*Comparative United States/Canadian Constitutional Law*, 55 LAW & CONTEMP. PROBS 1-302 (Winter 1992).

Colloquim, *Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation*, 37 BUFFALO L. REV. 337-73 (1988/89).

John T. Cross & Kristin M. Lomond, *The Civil Rights of the Aboriginal Peoples of the United States and Canada*, 10 ARIZ. J. INT'L & COMP. L. 253 (1993).

W.H. McConnell, *The Judges, The Courts, and The Constitution: A Third Branch of Government for Canada*, 52 SASKATCHEWAN L. REV. 335 (1988).

Daniel O. Conkle, *Harm, Morality, and Feminist Religion: Canada's New - But Not So New - Approach to Obscenity*, 10 CONST. COMM. 105 (1993).

Daniel O. Conkle, *Canada's* Roe: *The Canadian Abortion Decision and Its Implications for American Constitutional Law and Theory*, 6 CONST. COMM. 299 (1989).

Mary Ann Glendon, A Beau Mentir Qui Vent De Lion: *The 1988 Canadian Abortion Decision in Comparative Perspective*, 83 NW. U. L. REV. 569 (1989).

Paul Marshall, *Anglo-Canadian Perspectives on the United States Constitution, in* LIBERTY AND LAW: REFLECTIONS ON THE CONSTITUTION IN AMERICAN LIFE AND THOUGHT 65-86 (Ronald R. Wells & Thomas A. Askew ed., 1987).

Douglas V. Verney, *Parliamentary Supremacy versus Judicial Review: Is a Compromise Possible?*, 27 J. CLTH. & COMP. POL. 185 (1989).

Erwin N. Griswold, *Interpreting a Constitution or a Charter - "Original Intent", Strict or Liberal Construction, and Other Approaches*, 20 OTTAWA L. REV. 403 (1988).

Peter Hogg, *The Charter of Rights and American Theories of Interpretation*, 25 OSGOODE HALL L.J. 87 (1987).

Richard F. Devlin, *Ventriloquism and the Verbal Icon: A Comment on Professor Hogg's "The Charter of Rights and American Theories of Interpretation,"* 26 OSGOODE HALL L.J. 1 (1988).

Robert C. Maybank, *Constitutional Requirements for Administrative Warrants in Canada and the United States?*, 39 U. TORONTO L.J. 55 (1989).

Calvin R. Massey, *The Locus of Sovereignty: Judicial Review, Legislative Supremacy, and Federalism in the Constitutional Traditions of Canada and the United States*, 1990 DUKE L.J. 1229.

James R.P. Ogloff, *Children's Intellectual Rights in Canada: A Comparative Constitutional Approach*, 68 NEB. L. REV. 349 (1989).

Gerard V. La Forest, *The Use of American Precedents in Canadian Courts*, 46 ME. L. REV. 211 (1994).

Donald V. MacDougall, *Canadian Legal Identity and American Influences*, 15 LEGAL STUD. F. 15 (1991), *reprinted in* 25 GAZETTE: LAW SOC'Y UPPER CANADA 107 (1991).

Christopher P. Manfredi, *The Use of United States Decisions by the Supreme Court of Canada Under the Charter of Rights and Freedoms*, 23 CAN. J. POL. SCI. 499 (1990).

Donald Casswell, *Doctrine and Foreign Law in the Supreme Court of Canada: A Quantitative Analysis*, 2 SUP. CT. L. REV. 435 (1981).

David Rosenberg, *Litigating Civil Rights and Liberties in the United States: A Vital But Flawed Enterprise, in* LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 357-77 (Joseph M. Weiler & Robin M. Elliot ed., 1986).

Stephen L. Spitz, *Litigation Strategy in Equality Rights: The American Experience, in* LITIGATING THE VALUES OF A NATION: THE CANADIAN CHARTER OF RIGHTS AND FREEDOMS 385-410 (Joseph M. Weiler & Robin M. Elliot ed., 1986).

S. I. Bushnell, *The Use of American Cases*, 35 U. NEW BRUNSWICK L.J. 157 (1986).

Oliver Mowat, *Observations on the Use and Value of American Reports in Reference to Canadian Jurisprudence*, 3 UPPER CAN. L.J. 3 (1857).

Lex, *The Authority of American Decisions in Canadian and English Courts*, 35 CAN. L.J. 518 (1899).

Comment, *The Use of American Legal Literature,* 21 CAN. B. REV. 57 (1943).

J. M. MacIntyre, *The Use of American Cases in Canadian Courts*, 2 U. BRIT. COLUM. L. REV. 478 (1964-66).

Jamie Cameron, *Cross Cultural Reflections: Teaching the Charter to Americans*, 28 OSGOODE HALL L.J. 613 (1990).

Donald L. Beschle, *Judicial Review and Abortion in Canada: Lessons for the United States in the Wake of* Webster v. Reproductive Health Services, 61 U. COLO. L. REV. 537 (1990).

Robert Harvie & Hamar Foster, *Ties that Bind? The Supreme Court of Canada, American Jurisprudence, and the Revision of Canadian Criminal Law under the Charter*, 28 OSGOODE HALL

L.J. 729 (1990).

Robert Harvie & Hamar Foster, *Different Drummers, Different Drums: The Supreme Court of Canada, American Jurisprudence and the Continuing Revision of Criminal Law Under the* Charter, 24 OTTAWA L. REV. 39 (1992).

Willi Paul Adams, *Canadian and U.S. Constitutions: Evolutionary and Revolutionary Nationbuilding and Nationmaking*, 23 REV. AM. HIST. 545 (1995).

Cindy M. Brown, *Obtaining Photographic Evidence from Journalists: Differences Between the United States and Canada*, 17 COMM. & THE LAW 3 (1995).

Mayo Moran, *Talking About Hate Speech: A Rhetorical Analysis of American and Canadian Approaches to the Regulation of Hate Speech*, 1994 WIS. L. REV. 1425.

Mark Tushnet, *Policy Distortion and Democratic Debilitation: Comparative Illumination of the Countermajoritarian Difficulty*, 94 MICH. L. REV. 245 (1995).

Jeffrey L. Friesen, *The Distribution of Treaty-Implementing Powers in Constitutional Federations: Thoughts on the American and Canadian Models*, 94 COLUM. L. REV. 1415 (1994).

Ronald L. Watts, *Divergence and Convergence: Canadian and U.S. Federalism, in* PERSPECTIVES ON FEDERALISM: PAPERS FROM THE FIRST BERKELEY SEMINAR ON FEDERALISM 179-213 (Harry N. Scheiber ed., 1987).

Andrew S. Butler, *Constitutional Rights in Private Litigation: A Critique and Comparative Analysis*, 22 ANGLO-AM. L. REV. 1 (1993).

Claudius O. Johnson, *Did Judah P. Benjamin Plant the "States' Rights" Doctrine in the Interpretation of the British North America Act?*, 45 CAN. B. REV. 454 (1967).

Edward A. Fitzgerald, *The Seaweed Rebellion: Federal-State/Provincial Conflicts Over Offshore Energy Development in the United States, Canada, and Australia*, 7 CONN. J. INT'L L. 255 (1992).

Richard Janda, *Reviving Federalism: Canadian Reflections on an American Dream*, 19 YALE J. INT'L L. 207 (1994).

James Gray Pope, *Some Possible Lessons for Canada of the United States' Experience with Major Constitutional Change*, 37 MCGILL L.J. 1 (1992).

Ralph W. Johnson, *Fragile Gains: Two Centuries of Canadian and United States Policy Towards Indians*, 1991 WASH. L. REV. 643.

Peter H. Russell, *The Diffusion of Judicial Review: The Commonwealth, the United States, and the Canadian Case*, 19 POL'Y STUD. J. 116 (Fall 1990), *reprinted in* COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY 29-39 (Donald W. Jackson & C. Neal Tate ed., 1992).

Kent Roach, *Teaching Procedures: The Fiss/Weinrib Debate in Practice*, 41 U. TORONTO L.J. 247 (1991).

F. I. Ernest, American Influence in Upper Canada's Legal Development, 1791-1837: An Interpretation (1980) (unpublished manuscript).

Jonathan Dawe, *Standing to Challenge Searches and Seizures Under the* Charter: *The Lessons of the American Experience and their Application to Canadian Law*, 52 U. TORONTO FAC. L. REV. 39 (1993).

## APPENDIX D

## COMPARATIVE CONSTITUTIONAL LAW BOOKS

DURGA DAS BASU, COMPARATIVE FEDERALISM (1987).

LAWRENCE W. BEER, FREEDOM OF EXPRESSION IN JAPAN: A STUDY IN COMPARATIVE LAW, POLITICS, AND SOCIETY (1984).

ALAN R. BREWER-CARIAS, JUDICIAL REVIEW IN COMPARATIVE LAW (1989).

MAURO CAPPELLETTI, THE JUDICIAL PROCESS IN COMPARATIVE PERSPECTIVE (1989).

P. P. CRAIG, PUBLIC LAW AND DEMOCRACY IN THE UNITED KINGDOM AND THE UNITED STATES OF AMERICA (1990).

EUGENE NEWTON CURTIS, THE FRENCH ASSEMBLY OF 1848 AND AMERICAN CONSTITUTIONAL DOCTRINES (Octagon Books, 1980) (1917).

IVO D. DUCHACEK, RIGHTS AND LIBERTIES IN THE WORLD TODAY: CONSTITUTIONAL PROMISE AND REALITY (1973).

JOHN E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW (1991).

MICHAEL FOLEY, THE SILENCE OF CONSTITUTIONS: GAPS, 'ABEYANCES' AND POLITICAL TEMPERAMENT IN THE MAINTENANCE OF GOVERNMENT (1989) (U.K. and U.S.A. Constitutions).

MARY ANN GLENDON, ABORTION AND DIVORCE IN WESTERN LAW: AMERICAN FAILURES, EUROPEAN CHALLENGES (1987).

VIVIEN HART, BOUND BY OUR CONSTITUTION: WOMEN, WORKERS, AND THE MINIMUM WAGE (1994).

PATRICE HIGONNET, SISTER REPUBLICS: THE ORIGINS OF FRENCH AND AMERICAN REPUBLICANISM (1988).

KYOKO INOUE, MACARTHUR'S JAPANESE CONSTITUTION: A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991).

GARY JEFFREY JACOBSOHN, APPLE OF GOLD: CONSTITUTIONALISM IN ISRAEL AND THE UNITED STATES (1993).

RETT R. LUDWIKOWSKI & WILLIAM F. FOX JR., THE BEGINNINGS OF THE CONSTITUTIONAL ERA: A BICENTENNIAL COMPARATIVE ANALYSIS OF THE FIRST MODERN CONSTITUTIONS (1993).

KURT RABL, CHRISTOPH STOLL & MANFRED VASOLD, FROM THE U.S. CONSTITUTION TO THE BASIC LAW OF THE FEDERAL REPUBLIC OF GERMANY (1988).

JOHN A. ROHR, FOUNDING REPUBLICS IN FRANCE AND AMERICA: A STUDY IN CONSTITUTIONAL GOVERNANCE (1995).

EDMOND ORBAN, FEDERALISM AND SUPREME COURTS (1991).

ALEC STONE, THE BIRTH OF JUDICIAL POLITICS IN FRANCE: THE CONSTITUTIONAL COUNCIL IN COMPARATIVE PERSPECTIVE (1992).

MARKKU SUKSI, BRINGING IN THE PEOPLE: A COMPARISON OF

CONSTITUTIONAL FORMS AND PRACTICES OF THE REFERENDUM (1993).

MARY L. VOLCANSEK & JACQUELINE LUCIENNE LAFON, JUDICIAL SELECTION: THE CROSS-EVOLUTION OF FRENCH AND AMERICAN PRACTICES (1988).

GEORGE WINTERTON, MONARCHY TO REPUBLIC: AUSTRALIAN REPUBLICAN GOVERNMENT (1994).

YAACOV S. ZEMACH, POLITICAL QUESTIONS IN THE COURTS: A JUDICIAL FUNCTION IN DEMOCRACIES: ISRAEL AND THE UNITED STATES (1976).

LESLIE ZINES, CONSTITUTIONAL CHANGE IN THE COMMONWEALTH (1991).

HUMAN RIGHTS AND JUDICIAL REVIEW: A COMPARATIVE PERSPECTIVE (David Beatty ed., 1994).

CONSTITUTIONAL SYSTEMS IN LATE TWENTIETH CENTURY ASIA (Lawrence W. Beer ed., 1992).

AMERICAN CONSTITUTIONALISM ABROAD: SELECTED ESSAYS IN COMPARATIVE CONSTITUTIONAL HISTORY (George Athan Billias ed., 1990).

CONSTITUTIONS IN DEMOCRATIC POLITICS (Vernon Bogdanor ed., 1988).

REFERENDUMS AROUND THE WORLD: THE GROWING USE OF DIRECT DEMOCRACY (David Butler & Austin Ranney eds., 1994).

THE INFLUENCE OF THE U.S. CONSTITUTION ON PACIFIC NATIONS (F.E. Cameron ed., 1988).

CONSTITUTIONALISM ABROAD (Louis Henkin & Albert J. Rosenthal eds., 1990).

JUDICIAL REVIEW IN COMPARATIVE PERSPECTIVE (Kenneth M. Holland eds., 1991).

COMPARATIVE JUDICIAL REVIEW AND PUBLIC POLICY (David W. Jackson & C. Neal Tate eds., 1992).

CONSTITUTIONAL REVIEW AND LEGISLATION: AN INTERNATIONAL COMPARISON (Christine Landfried ed., 1988).

SOUTH AFRICA'S CRISIS OF CONSTITUTIONAL DEMOCRACY: CAN THE U.S. CONSTITUTION HELP? (Robert A. Licht & Bertus de Villiers eds., 1994).

THE EIGHTEENTH CENTURY (Michael Rozbicki ed., 1990).

CONSTITUTIONAL BASES OF POLITICAL AND SOCIAL CHANGE IN THE UNITED STATES 285-318 (Shlomo Slonim ed., 1990) ("The Impact of the Constitution Abroad: The View from Israel").

THE UNITED STATES CONSTITUTION: THE FIRST 200 YEARS (R.C. Simmons ed., 1989).

REFERENDUMS: CONSTITUTIONAL AND POLITICAL PERSPECTIVES (Alan Simpson ed., 1992).

COMPARATIVE CONSTITUTIONAL LAW (Mahendra P. Singh ed., 1989).

THE UNITED STATES CONSTITUTION: ITS BIRTH, GROWTH AND

INFLUENCE IN ASIA (J. Barton Starr ed., 1988).

THE GLOBAL EXPANSION OF JUDICIAL POWER (C. Neal Tate & Torbjorn Vallinder eds., 1995).

THE U.S. CONSTITUTION AND THE CONSTITUTIONS OF ASIA (Kenneth W. Thompson ed., 1988).

CONSTITUTIONALISM IN PERSPECTIVE: THE UNITED STATES CONSTITUTION IN TWENTIETH CENTURY POLITICS 209-51 (Sarah Baumgartner Thurow ed., 1988) ("Exporting Americanism: The Significance of the United States Constitution for Other Nations").

COMPARATIVE CONSTITUTIONAL FEDERALISM: EUROPE AND AMERICA (Mark Tushnet ed., 1990).

LIBERTY AND LAW: REFLECTIONS ON THE CONSTITUTION IN AMERICAN LIFE AND THOUGHT (Ronald A. Wells & Thomas A. Askew eds., 1987) (Canadian, German, South African, U.S.A. comparisons).

## ARTICLES

Thomas Allen, *Commonwealth Constitutions and the Right Not to be Deprived of Property*, 42 INT'L & COMP. Q. 523 (1993).

Alex H. Amankwah, *Constitutions and Bills of Rights in Third World Nations: Issues of Form and Content*, 12 ADEL. L. REV. 1 (1989).

Burton Atkins, *Interventions and Power in Judicial Hierarchies: Appellate Courts in England and the United States,* 24 LAW & SOC'Y REV. 71 (1990).

Burton Atkins, *Judicial Selection in Context: The American and English Experience*, 77 KY. L.J. 577 (1988-89).

Aharon Barak, *Freedom of Speech in Israel: The Impact of the American Constitution*, 8 TEL-AVIV U. STUD. IN LAW 241 (1988).

David G. Barnum et al., *Constitutional and Cultural Underpinnings of Political Freedom in Britain and the United* States, 12 OXFORD J. LEGAL STUD. 362 (1992).

George A. Bermann, *Taking Subsidiarity Seriously: Federalism in the European Community and the United* States, 94 COLUM. L. REV. 331 (1994).

David Beatty, *Protecting Constitutional Rights in Japan and Canada*, 41 AM. J. COMP. L. 535 (1993).

David Beatty, *Law and Politics*, 44 AM. J. COMP. L. 131 (1996).

Albert P. Blaustein, *New Constitutions Look to Our Own*, 26 TRIAL 56 (Nov. 1990).

William J. Brennan Jr., *The Worldwide Influence of the United States Constitution as a Charter of Human Rights*, 15 NOVA L. REV. 1 (1991).

Robert A. Burt, *Inventing Judicial Review: Israel and America*, 10 CARDOZO L. REV. 2013 (1989).

Andre Bzdera, *Comparative Analysis of Federal High Courts:*

*A Political Theory of Judicial Review*, 26 CAN. J. POL. SCI. 3 (1993).

Norman L. Cantor, *Religion and State in Israel and the United States*, 8 TEL-AVIV U. STUD. IN LAW 185 (1988).

Norman L. Cantor, *On Clear and Present Danger, Clear Probability and Free Speech Standards in Israel*, 16 ISR. Y.B. HUM. RTS. 260 (1986).

Mauro Cappelletti, *The Expanding Role of Judicial Review in Modern Societies*, 58 REVISTA JURIDICAL 18 (1989).

Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311 (European and American comparisons).

Jerome J. Curtis, *Comparison of Regulatory Takings Under the United States Constitution and the European Convention on Human Rights*, 14 EUROPE L. REV. 67 (1989).

William Dale, *The Making and Remaking of Commonwealth Constitutions*, 42 INT'L & COMP. L.Q. 67 (1993).

Richard Davis & D. Jeffrey Burnham, *The Role of the Federal Judiciary in the Development of Federalism in West Germany and the United States*, 12 B.C. INT'L & COMP. L. REV. 63 (1989).

Jacob Dolinger, *The Influence of American Constitutional Law on the Brazilian Legal System*, 38 AM. J. COMP. L. 803 (1990).

David Feldman, *Public Interest Litigation and Constitutional Theory in Comparative Perspective*, 55 MOD. L. REV. 44 (1992).

John E. Finn, *Federalism in Perpetuity: West German and United States Federalism in Comparative Perspective*, 22 N.Y.U. L. REV. 1 (1989).

William E. Forbath, *Courts, Constitutions, and Labor Politics in England and America: A Study of the Constitutive Power of Law*, 16 LAW & SOC. INQUIRY 1 (1991).

Alberto F. Garay, *Federalism, the Judiciary, and Constitutional Adjudication in Argentina: A Comparison with the U.S. Model*, 22 U. MIAMI INTER- AM. L. REV. 161 (1991).

John W. Guendelsberger, *Equal Protection and Resident Alien Access to Public Benefits in France and the United States*, 67 TUL. L. REV. 669 (1993).

Franklyn S. Haiman, *Words that may Injure: Contrasts in French and American Free Speech* Law, 28 FREE SPEECH Y.B. 8 (1990).

Louis Henkin, *Revolutions and Constitutions*, 49 LA. L. REV. 1023 (1989).

Donald J. Hogan, *Law of Confessions in the United States and Ireland:* A *Comparison*, 10 D.U.L.J. (N.S.) 43 (1988).

A.E. Dick Howard, *How Ideas Travel: Rights at Home and Abroad*, 22 STETSON L. REV. 893 (1993) *reprinted in* CONSTITUTION MAKING IN EASTERN EUROPE 9-20 (A.E. Dick Howard ed., 1993).

Daniel Walker Howe, *Why the Scottish Enlightenment Was*

*Useful to the Framers of the American Constitution*, 31 COMP. STUD. SOC'Y & HIST. 572 (1989).

Gary J. Jacobsohn, *Alternative Pluralisms: Israeli and American Constitutionalism in Comparative Perspective*, 51 REV. POL. 159 (1989).

Edward Johnson, *A Comparison of Sexual Privacy Rights in the United States and the United Kingdom: Why We Must Look Beyond the Constitution*, 30 COLUM. J. TRANSNAT'L L. 697 (1992).

Timothy H. Jones, *Legal Protection for Fundamental Rights and Freedoms: European Lessons for Australia*, 22 FED. L. REV. 57(1994).

Richard S. Kay, *Substance and Structure as Constitutional Protections: Centennial Comparisons*, 1989 PUB. L. 428 (1989).

Chin Kim & Gary D. Garcia, *Capital Punishment in the United States and Japan: Constitutionality, Justification and the Method of Infliction*, 11 LOY. L.A. INT'L & COMP. L.J. 253 (1989).

Koen Lenaerts, *Constitutionalism and the Many Faces of Federalism*, 38 AM. J. COMP. L. 205 (1990).

Fengming Liu, *Studying United States Constitutional Law: A Personal Experience of a Chinese Student*, 37 J. LEGAL EDUC. 346 (1987).

Rett R. Ludwikowski, *The Beginning of the Constitutional Era: A Bicentennial Comparative Study of the American and French Constitutions*, 11 MICH. J. INT'L L. 167 (1967).

Rett R. Ludwikowski, *Two Firsts: A Comparative Study of the American and Polish Constitutions*, 8 MICH. Y.B. INT'L LEGAL STUD. 117 (1987).

Edward McWhinney, *Electoral Laws in Free and Democratic Countries: Political Questions and Judicial Review*, 31 J. INDIAN LAW INST. 318 (1989).

Edward McWhinney, *Presidential and Parliamentary Executives Today: Utility and Limits of 'Reception' of Foreign Constitutional Ideas*, 28 J. INDIAN L. INST. 1 (1986).

Ziyad Motala, *Independence of the Judiciary, Prospects and Limitation of Judicial Review in Terms of the United States Model in a New South African Order*, 55 ALB. L. REV. 367 (1991).

Ziyad Motala, *The Jurisprudence of Constitutional Law: The Philosophical Origins and Difference Between Western Liberal and Soviet Communist State Law*, 8 DICK. J. INT'L L. 225 (1990).

Walter F. Murphy, *Civil Law, Common Law, and Constitutional Democracy*, 52 LA. L. REV. 91 (1991).

Charles Lewis Nier, *Racial Hatred: A Comparative Analysis of the Hale Crime Laws of the United States and Germany*, 13 DICK. J. INT'L L. 241 (1995).

Yasuhiro Okudaira, *Forty Years of the [Japanese] Constitution and Its Various Influences: Japanese, American, and European*, 53 LAW & CONTEMP. PROBS. 17 (1990).

G.L. Peiris & Eric G. Jensen, *Fundamental Rights and Academic Discipline: Current American and South Asian Trends Compared*, 38 INT'L & COMP. L.Q. 788 (1989).

Roland Penner, *The Canadian Experience with the Charter of Rights: Are There Lessons for the United Kingdom?*, 1996 PUB. L. 104 (1996).

Bodo Pierpoth, *An Essay on an Export from the United States: Constitutional Doctrine and Ideas*, 9 ST. LOUIS U. PUB. L. REV. 311 (1990).

Alessandro Pizzorusso, *Italian and American Models of the Judiciary and of Judicial Review of Legislation: A Comparison of Recent Tendencies*, 38 AM. J. COMP. L. 373 (1990).

Martin J. Raffel, *The Right to Demonstrate: A Comparative Study of Israel and the United States*, 11 ISR. L. REV. 348 (1976).

Una N. Raifeartaigh, *Fault Issues and Libel Law - A Comparison Between Irish, English and United States Law,* 40 INT'L & COMP. L.Q. 763 (1991).

J. Mark Ramseyer, *The Puzzling (In)dependence of Courts: A Comparative Approach,* 23 J. LEGAL STUD. 721 (1994).

Mathias Reimann, *Purient Interest and Human Dignity: Pornography Regulation in West Germany and the United States*, 21 U. MICH. J. L. REF. 201 (1988).

David A.J. Richards, *Comparative Revolutionary Constitutionalism: A Research Agenda for Comparative* Law, 26 N.Y.U. J. INT'L L. & POL. 1 (1993).

David A.J. Richards, *Revolution and Constitutionalism in America and France,* 60 MISS. L.J. 311 (1990).

Keith S. Rosenn, *Federalism in the Americas in Comparative Perspective*, 26 U. MIAMI INTER-AM. L. REV. 1 (1994).

Keith S. Rosenn, *The Success of Constitutionalism in the United States and Its Failure in Latin America: An Explanation*, 22 U. MIAMI INTER-AM. L. REV. 1 (1990).

Ronald D. Rotunda, *Exporting the American Bill of Rights: The Lessons from Romania*, 1991 U. ILL. L. REV. 1065 (YEAR).

Alan Ryan, *The British, the Americans, and Rights, in* A CULTURE OF RIGHTS: THE BILL OF RIGHTS IN PHILOSOPHY, POLITICS, AND LAW - 1791 AND 1991 366-83 (Michael J. Lacey & Knud Haakonssen eds., 1991).

Herman Schwartz, *The Bill of Rights in America and Central East Europe,* 15 HARV. J.L. & PUB. POL'Y 93 (199?).

Paul Schwartz, *The Computer in German and American Constitutional Law: Towards an American Right of Informational Self-Determination*, 37 AM. J. COMP. L. 675 (1989).

A.W. Brian Simpson, *Detention Without Trial in the Second World War: Comparing the British and American Experiences*, 16 FLA. ST. U. L. REV. 225 (1988).

Klaus Stern, *The Genesis and Evolution of European-*

*American Constitutionalism: Some Comments on the Fundamental Aspects*, 18 COMP. & INT'L L.J. 187 (1985).

Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, 53 LAW & CONTEMP. PROBS. 61 (1990).

Robert F. Utter & David C. Lundsgaard, *Judicial Review in the New Nations of Central and Eastern Europe: Some Thoughts from a Comparative* Perspective, 54 OHIO ST. L.J. 559 (1993).

J. Clifford Wallace, *The Influence of the United States Constitution on Pacific Nations*, 30 S. TEX. L. REV. 353 (1989).

Russell L. Weever & Geoffrey Bennett, *Is the* New York Times *"Actual Malice" Standard Really Necessary?*, 53 LA. L. REV. 1153 (1993).

Michael Wells, *French and American Judicial Opinions*, 19 YALE J. INT'L L. 81 (1994).

James G. Wilson, *Altered States: A Comparison of Separation of Powers in the United States and in the United Kingdom*, 18 HASTINGS CONST. L.Q. 125 (1990).

Kisaburo Yokota, *Political Questions and Judicial Review: A [United States-Japan] Comparison*, 43 WASH. L. REV. 1031 (1968).

Pu Zengyuan, *A Comparative Perspective on the United States and Chinese Constitutions*, 30 WM. & MARY. L. REV. 867 (1989).

Symposium, *The American Revolution Abroad*, 428 THE ANNALS 1-134 (1976).

*Symposium on Parliamentary Participation in the Making of Treaties*, 67 CHI-KENT L. REV. 293-704 (1991).

*Panel Discussion: The Influence Abroad of the United States Constitution on Judicial Review and a Bill of Rights*, 2 TEMP. INT'L & COMP. L.J. 59-78 (1987-88).

*Essays on the Influence of the American Constitution and Legal Institutions on Emerging Democracies*, 55 ALB. L. REV. 763-847 (1992).

Note, *Autonomy, Community, and Traditions of Liberty: The Contrast of British and American Privacy Law*, 1990 DUKE L.J. 1398 (1990).

Donna E. Arat, *Growing a Constitution: Reconciling Liberty and Community in Israel and the United States*, 19 LAW & SOC. INQUIRY 253 (1994) (reviewing JACOBSOHN, *supra* & DAPHNA SHARFMAN, LIVING WITHOUT A CONSTITUTION: CIVIL RIGHTS IN ISRAEL (1993)).

Gary J. Jacobsohn, *Three Models of Secular Constitutional Development: India, Israel, and the United States*, 10 STUD. AM. POL. DEV. 1-68 (1996).