

# UNITED STATES INFLUENCE ON THE AUSTRALIAN LEGAL SYSTEM

THE HON ROBERT FRENCH AC\*

## I INTRODUCTION

Contemporary debates in the United States about the use of foreign law precedents in constitutional decisions sometimes seem to reflect a determined resistance by conservative jurists in that country to foreign law influences. Some of that debate, however, comes off a rather narrow base of cases involving the use of foreign law to inform the application of normative constitutional terms, in particular, ‘cruel and unusual punishment’ in the Eighth Amendment. By way of contrast, the early legal history of the United States reflects a strong tradition of interdependence and interconnection with other countries of the common law tradition and beyond.

This paper concerns that history and the ways in which the United States has influenced our Constitution, the High Court’s interpretation of it, and the development of our own law in a variety of areas. Those influences come from decisions of United States courts on subjects relevant to the development of Australian law, the interaction of Australian academics, lawyers and judges with counterparts in the United States and, related to that, the important Restatement Projects of the American Law Institute which seek to provide comprehensive statements of the common law reflecting its development in the State jurisdictions of the Union and avenues for its future development. The United States also has had a more direct effect on our legal system through our bilateral free trade agreement.

From an Australian perspective, the United States legal system and jurisprudence is a rich intellectual resource for Australian judges, lawyers, academics and law-makers. A particular element of that intellectual resource is the work of the American Law Institute, discussed later in this paper.

## II THE MOVEMENT OF LAW ACROSS TIME AND SPACE

Major legal traditions and principles have historically resisted confinement to national silos. Much legal principle which we take for granted today is a product of evolutionary processes which were found in the common law tradition and which themselves borrowed from other legal traditions. The laws of ancient Rome collected by the Emperor, Justinian, in the 6th century AD, had a direct influence on the development of European legal culture and the civil law tradition,

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\* Chancellor, University of Western Australia

and an indirect influence on the development of the common law. The English legal commentators Glanville and Bracton, in the 12th and 13th century, used Justinian's institutes. Bracton resorted to principles taken from Roman law to fill in gaps in legal materials available to him at the time. The great American legal scholars James Kent and Joseph Story frequently cited Roman and civil law sources in the commentaries which they produced in the 19th century.

### III THE COMMON LAW TRAVELS TO THE UNITED STATES

The common law of England, evolved through custom and judicial decisions over centuries, became the common law of the English colonies subject to modification to local conditions. It travelled to the American colonies. There has been some debate about the basis upon which it travelled there, whether they were conquered colonies or ceded colonies or whether it travelled under the 'birthright of Englishmen' principle and whether and to what extent it was displaced by Frontier law. It is not necessary to explore those academic and historical debates here. It suffices to say that despite post-revolutionary hostility to things English, the work of the great English common law scholars was influential in the early United States. Blackstone's *Commentaries on the Laws of England*, published in the 18th century, sold almost as many copies in the United States as they did in England. When Abraham Lincoln was a law student he purchased a partnership interest in a grocery store and tried, without success, to generate an income. The story goes that the best business deal he ever did in the grocery line was the purchase of an old barrel for 50 cents, which turned out to contain, under some rubbish at the bottom, a complete set of *Blackstone's Commentaries*.<sup>1</sup>

### IV COMMON LAW EXPORTS FROM THE UNITED STATES

From the early years of the Union, the common law travelled back from the United States to its birthplace. James Kent's *Commentaries on American Law* tried to integrate the laws of each of the States of the United States with those of England, and to draw comparisons with the systems of France, Holland and other nations of the Continent. It was used as a resource in England, Canada and Australia. One of his underlying purposes was to offset the prevailing mood of hostility in the United States to the continued use of the common law as something English. He tried to do this by showing that the other systems of law, like the common law, were based on natural law and so arrived at similar results in practice.<sup>2</sup> Some of the principles developed in his *Commentaries* were adopted in English judicial decisions involving the law relating to bills of exchange, the effects of intoxication

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1 F T Hill, *Lincoln the Lawyer* (The Century Co, 1906) 50.

2 B H McPherson, *The Reception of English Law Abroad* (Supreme Court of Queensland Library, 2006) 490.

on contract and contractual liability and the sale of goods or bailment.<sup>3</sup>

## V KENT AND STORY TRAVEL TO AUSTRALIA

Kent's writings on the judicial review of legislation for constitutional invalidity were invoked in 19th century New South Wales. The Supreme Court of the Colony in 1861 held that it had the power and that it was under an obligation to decide whether an Act of the New South Wales Colonial Legislature contravened an Act of the Imperial Parliament and was thus invalid. Chief Justice Stephen referred to the limits placed by the United States Constitution on legislative powers. He noted the citation of Kent's book in many decisions on the point. One of his fellow judges, Justice Wise, cited Kent as 'one of the highest authorities on such a subject'. He referred to an important statement of principle by Kent reflective of what had been said by Chief Justice Marshall in *Marbury v Madison*<sup>4</sup> in 1803:

The attempt to impose restraints upon the Acts of the legislative power would be fruitless, if the constitutional provisions were left without any power in the Government to guard and enforce them.<sup>5</sup>

Story's texts also travelled to England and Australia. His *Commentaries on the Conflict of Laws* was praised in the Court of Common Pleas in England on account of his 'learning, acuteness and accuracy'.<sup>6</sup> The late Bruce McPherson, in his leading text on the *Reception of England Law Abroad*, commented on the influence of Kent and Story:

Between them, Kent and Story not only naturalised English law and consolidated its place in the United States, they also rationalised the use, understanding and teaching of it in the place of its origin. It would not be the last occasion when the words of the disciples of the common law from beyond the seas would be read in England.<sup>7</sup>

Both writers are still cited in Australian judicial decisions. In a constitutional case in 2003 in which the High Court held invalid a special Commonwealth tax on the judicial pensions of State judges, Justices Gaudron, Gummow and Hayne in a joint judgment said:

[S]ecure judicial remuneration at significant levels assists, as the United States Supreme Court has emphasised, to encourage persons learned in the law, in the words of Chancellor Kent written in 1826, 'to quit the lucrative pursuits of private business, for the duties of that important

3 Ibid 491, n 126.

4 5 US (1 Cranch) 137 (1803).

5 *Rusden v Weekes* (1861) 2 Legge 1406, 1420.

6 *Huber v Steiner* (1835) 2 Bing NC 203, 211 (Tindal CJ), cited in McPherson, above n 2, 493 n 26.

7 McPherson, above n 2, 493, n 26.

station'.<sup>8</sup>

In another case about water rights, decided in 2009,<sup>9</sup> Justices Gummow, Crennan and I said in our joint judgment:

The common law position in relation to flowing water, which adapted Roman law doctrine, was settled in *Embrey v Owen*. Parke B adopted the view of Chancellor Kent that flowing water is publici juris in the sense that no-one has 'property in the water itself, but a simple usufruct while it passes along'.<sup>10</sup>

Other cases in which the High Court has referred to Story have arisen in disparate legal contexts to do with the equitable doctrine of contribution,<sup>11</sup> the validity of control orders under anti-terrorism legislation,<sup>12</sup> the unpaid vendor's lien,<sup>13</sup> contribution between co-obligors,<sup>14</sup> the common law doctrine of failure of consideration,<sup>15</sup> unconscionable conduct,<sup>16</sup> and the proposition that guardianship applies to property and not to persons.<sup>17</sup>

## VI EXPORTATION AND RE-IMPORTATION OF CONSTITUTIONAL IDEAS

An interesting perspective on the possible re-importation to the United States of its own exports appeared in a comment by Chief Justice Rehnquist in 1989. He wrote:

When many new constitutional courts were created after the Second World War, these courts naturally looked to decisions of the Supreme Court of the United States, among other sources, for developing their own law. But now the constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.<sup>18</sup>

8 *Austin v Commonwealth* (2003) 215 CLR 185, 262 [159] (footnotes omitted).

9 *ICM Agricultural Pty Ltd v Commonwealth* (2009) 240 CLR 140.

10 *Ibid* 173 [55] (footnotes omitted).

11 *Friend v Broker* (2009) 239 CLR 129, 148 [38] (French CJ, Gummow, Hayne and Bell JJ).

12 *Thomas v Mowbroy* (2007) 233 CLR 307, 357, n 199 (Gummow and Crennan JJ).

13 *Tanwar Enterprises Pty Ltd v Cauchi* (2003) 217 CLR 315, 324 [21] (Gleeson CJ, McHugh, Gummow, Hayne and Heydon JJ).

14 *Burke v LFOT Pty Ltd* (2002) 209 CLR 280, 316 [87], 318 [94] (Kirby J).

15 *Roxborough v Rothmans of Pal Mal Australia Ltd* (2001) 208 CLR 516, 552-3 [94] (Gummow J).

16 *Australian Broadcasting Corporation v Lenah Game Meats Pty Ltd* (2001) 208 CLR 199, 242-3 [93] (Gummow and Hayne JJ).

17 *Clay v Clay* (2001) 202 CLR 410, 428-9 [37]-[38] (Gleeson CJ, McHugh, Gummow and Callinan JJ).

18 W A Rehnquist, *Constitutional Courts: Comparative Remarks* (1989) reprinted in P Kirchhof and D P Kommers (eds), *Germany and Its Basic Law: Past, Present and Future* (Nomos, 1993) 411, 422.

Justice Sandra Day O'Connor, in 2003, expressed similar sentiments<sup>19</sup> as have Justices Ginsberg, Breyer and Kennedy. The late Justice Scalia was an articulate opponent of that view. His opposition informed a febrile debate about the use of foreign law sources in American courts. In *Graham v Florida*,<sup>20</sup> decided by the Supreme Court in 2010, the Court held that a sentence of life imprisonment without parole imposed on a juvenile offender for a non-homicide crime, violated the Eighth Amendment's prohibition on cruel and unusual punishment made applicable to the States by the due process clause of the Fourteenth Amendment. Justice Kennedy, delivering the opinion of the majority of the Court, said there was support for its conclusion in the fact that, in continuing to impose life without parole sentences on juveniles who did not commit homicide, the United States adhered to a sentencing practice rejected the world over. Justice Thomas, with whom Justices Scalia and Alito relevantly agreed, dissented on the applicability of foreign sentencing practices.

The United States Constitution provided significant inspiration for the development of the Australian Constitution. United States court decisions in relation to its Constitution have had their impact on the development of Australian constitutional law. Notwithstanding the quoted comments of Chief Justice Rehnquist and the views expressed by Justices O'Connor, Ginsberg, Breyer and Kennedy about re-importation of constitutional concepts, it has been rather a one-way street.

## VII CONSTITUTIONAL CROSS-FERTILISATION: AUSTRALIA AND THE UNITED STATES

Our Constitutions have different histories. The United States was born out of revolution and its Constitution conferred by the people on themselves. The Constitution of the Commonwealth of Australia is a schedule to an Act of the British Parliament. It is the product of a negotiating and drafting process undertaken by colonial delegates at Conventions held in the late 19<sup>th</sup> century. The agreed draft was submitted to popular referenda in the colonies and then for enactment to the British Parliament.

The progression of Australia to full nationhood proceeded from 1901 through international executive independence in 1926 and legislative independence at the Commonwealth level following our adoption of the Statute of *Westminster* in 1942 retroactively to 1939. The last ties were cut in terms of legislative independence of the States from the United Kingdom Parliament and the final abolition of all Privy Council appeals from State Supreme Courts through the *Australia Acts* of 1986.

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19 S Day O'Connor, *The Majesty of the Law: Reflections of a Supreme Court Justice* (Random House, 2003) 234.

20 548 US 48 (2010).

## VIII THE AUSTRALIAN CONSTITUTION: BORROWING FROM THE UNITED STATES

Important elements of the United States Constitution were reflected in the Australian Constitution. A major coauthor of the Australian document was Andrew Inglis Clark, the Attorney-General for the Colony of Tasmania. He was familiar with the Constitution of the United States and with key decisions of the Supreme Court relevant to it. He had visited the United States on a number of occasions and had struck up a friendship and a correspondence with Oliver Wendell Holmes. He believed in the natural or rational rights of man as a counter to what he called ‘the tyranny of the majority, whose unrestricted rule is so often and so erroneously regarded as the essence and distinctive principle of democracy.’<sup>21</sup> He was a believer in judicial control of official power. The Supreme Court of the United States was a model which he admired. It could ‘restrain and annul’ any folly that the ignorance or anger of a majority of the Congress or the people might at any time attempt to do in contravention of the Constitution.<sup>22</sup> In a paper published in the *Harvard Law Review* in 1903, Clark remarked that:

The supremacy of the judiciary, whether it exists under a federal or a unitary constitution, finds its ultimate logical foundation in the conception of the supremacy of law as distinguished from the possession and exercise of governmental power.<sup>23</sup>

That view reflected a landmark decision by Chief Justice John Marshall in 1803 and it is to that decision and its effect on our own Constitution that I now turn.

## IX JUDICIAL REVIEW OF EXECUTIVE ACTION: THE IMPACT OF MARBURY V MADISON

In *Marbury v Madison*, Chief Justice Marshall asserted the power of the Supreme Court of the United States to decide that a law of the United States legislature is void if it exceeds the law-making power conferred upon the legislature by the Constitution.

The law in question in that case would have conferred upon the Supreme Court original jurisdiction to issue writs of mandamus to public officers of the United States. The Court held that the Constitution did not authorise the conferring of

21 A I Clark, *Studies in Australian Constitutional Law* (Legal Books, first published 1901, 1997 ed) 386.

22 A I Clark, *The Constitution of the United States of America* (1897), quoted in John M Williams, ‘“With Eyes Open”: Andrew Inglis Clark and our Republican Tradition’ (1995) 23 *Federal Law Review* 149, 164. See also A I Clark, ‘The Supremacy of the Judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia’ (1903) 17 *Harvard Law Review* 1.

23 A I Clark, ‘The Supremacy of the Judiciary under the Constitution of the United States and under the Constitution of the Commonwealth of Australia’, above n 22, 18.

that original jurisdiction. Clark had read the judgment. Because of his concern about the deficiency in the original jurisdiction of the US Supreme Court exposed in that case, he included in his draft Constitution for the 1891 Convention a clause conferring original jurisdiction on the High Court of Australia designed to avoid that deficiency. That jurisdiction was to be conferred ‘in all cases in which a writ of mandamus or prohibition or an injunction shall be sought against an officer of the Commonwealth.’

The clause was dropped partly at the instigation of Isaac Isaacs at the 1898 Melbourne Convention. Clark, who was no longer a delegate because he had been appointed to the Supreme Court of Tasmania, was informed of what had happened and sent a telegram to Edmund Barton. He reminded Barton of *Marbury v Madison*. Barton wrote back to Clark:

I have to thank you further for your telegram as to the striking out of the power given to the High Court to deal with cases of mandamus and prohibition against Officers of the Commonwealth. None of us here had read the case mentioned by you of *Marbury v Madison*, or if seen it had been forgotten – it seems however to be a leading case. I have given notice to restore the words on the reconsideration of the clause.<sup>24</sup>

Barton moved the reinsertion of the proposed subclause. He referred to *Marbury* and quoted from the judgment. Nowhere in his speech, as recorded in the Convention Debates, was Clark given credit for the intervention that led to the restoration of the clause. Perhaps everybody remembered that Clark had proposed it in the first place. Barton acknowledged that absent the inclusion of the provision it might be held in Australia that the courts should not exercise the power and that even a statute giving them the power would not be of any effect. He then said: ‘I think that, as a matter of safety, it would be well to insert these words.’<sup>25</sup> Another delegate, Josiah Symons, said: ‘They cannot do any harm.’<sup>26</sup> Barton responded, ‘They cannot do harm and may protect us from a great evil.’<sup>27</sup>

The purpose of s 75(v) was described by Sir Owen Dixon in *Bank of New South Wales v Commonwealth* as being to ‘make it constitutionally certain that there would be a jurisdiction capable of restraining officers of the Commonwealth from exceeding Federal power’.<sup>28</sup> Later justices elaborated on what Dixon J had said, linking s 75(v) to the essential character of the judicature for which Ch III provides: ‘it declares and enforces the limits of the power conferred by statute upon administrative

24 John La Nauze, *The Making of the Australian Constitution* (Melbourne University Press, 1972) 234.

25 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 4 March 1898, 1876.

26 *Ibid.*

27 *Ibid.*

28 (1948) 76 CLR 1, 363.

decision-makers.<sup>29</sup> Section 75(v) furthers that end through the control of ‘jurisdictional error’.

The jurisdiction conferred by s 75(v), being constitutional in character, cannot be removed by legislation. Its importance was underlined in *Plaintiff S157/2002 v Commonwealth*:

The reservation to this Court by the Constitution of the jurisdiction in all matters in which the named constitutional writs or an injunction are sought against an officer of the Commonwealth is a means of assuring to all people affected that officers of the Commonwealth obey the law and neither exceed nor neglect any jurisdiction which the law confers on them.<sup>30</sup>

## X STATUTORY INTERPRETATION IN FAVOUR OF COMMON LAW FREEDOMS: THE PRINCIPLE OF LEGALITY

Chief Justice Marshall had another significant input into the development of the rule of law in Australia. In *United States v Fisher*<sup>31</sup>, decided in 1805, the Court held that the United States was entitled to priority of payment out of the effects of a bankrupt and that a statute conferring such priority was a valid exercise of legislative power. Chief Justice Marshall approached the interpretation of statutes affecting rights thus:

Where rights are infringed, where fundamental principles are overthrown, where the general system of the laws is departed from, the legislative intention must be expressed with irresistible clearness to induce a court of justice to suppose a design to effect such objects.<sup>32</sup>

Marshall’s statement was paraphrased and reproduced in the 4<sup>th</sup> edition of *Maxwell’s Interpretation of Statutes*, published a century later in 1905. It was restated thus:

It is in the last degree improbable that the legislature would overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness; and to give any such effect to general words, simply because they have that meaning in their widest, or usual, or natural sense, would be to give them

29 *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 668 (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ) (footnote omitted).

30 (2003) 211 CLR 476, 513–4 [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

31 2 Cranch 358 (1805).

32 *Ibid* 390.



a meaning in which they were not really used.<sup>33</sup>

*Maxwell* was quoted by Justice Richard O'Connor in *Potter v Minahan*<sup>34</sup> in 1908. He used the presumption to construe the *Immigration Restriction Act 1901* (Cth) so as not to include within the concept of 'immigrant' the Australian born son of a Victorian woman whose Chinese father had taken him back to China at the age of five, and from which he had returned to Australia at the age of 26. He was found, on the evidence, not to have abandoned his Australian home. The passage has been much quoted since.<sup>35</sup> It has supported the evolution of an approach to statutory interpretation which is protective of fundamental rights and freedoms. Today it has the form of a strong presumption that broadly expressed official discretions are to be subject to rights and freedoms recognised by the common law. The House of Lords expounded its own version of the principle as a 'principle of legality' requiring that the legislature 'squarely confront what it is doing and accept the political cost'.<sup>36</sup>

Commonwealth statutes in Australia are made pursuant to the powers conferred by a written Constitution. That Constitution does not guarantee common law rights and freedoms against legislative intrusion. However, the interpretive rule stated in *Potter v Minahan* has a 'constitutional' character even if the rights and freedoms which it protects do not. There have been many applications of the rule in Australia which has been restated in quite emphatic terms by the High Court from time to time. Gleeson CJ described it thus in 2004:

The presumption is not merely a common sense guide to what a Parliament in a liberal democracy is likely to have intended; it is a working hypothesis, the existence of which is known both to Parliament and the courts, upon which statutory language will be interpreted. The hypothesis is an aspect of the rule of law.<sup>37</sup>

Two cases which exemplify the application of the presumption were the decisions of the Full Court of the Federal Court in *Minister for Immigration and Citizenship v Haneef*<sup>38</sup> and *Evans v New South Wales*.<sup>39</sup> In *Haneef* the Full Court was concerned to construe s 501 of the *Migration Act 1958* (Cth), defining the circumstances in which a person would not pass a statutory 'character test' and so be liable for cancellation of a visa on character grounds. A person would fail the

33 P B Maxwell, *On the Interpretation of Statutes* (Sweet and Maxwell, 4<sup>th</sup> ed, 1905) 122.

34 (1908) 7 CLR 277, 304.

35 *Bropho v Western Australia* (1990) 171 CLR 1, 18; *Coco v The Queen* (1994) 179 CLR 427, 437.

36 *R v Secretary of State for the Home Department; Ex parte Simms* [2000] 2 AC 115, 131; see also *R v Lord Chancellor; Ex parte Withan* [1998] QB 575.

37 *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309, 329.

38 (2007) 163 FCR 414.

39 (2008) 168 FCR 576.

character test if he or she ‘had an association with someone else or with a group or organisation, whom the Minister reasonably suspects has been or is involved in criminal conduct’.

The Court had to interpret the kind of association which would bring a person within the criterion. It held that it was not good enough to be a relative or a friend of a person involved in criminal conduct. Applying the principle of legality, the Court said:

Having regard to its ordinary meaning, the context in which it appears and the legislative purpose, we conclude that the association to which [the section] refers is an association involving some sympathy with, or support for, or involvement in, the criminal conduct of the person, group or organisation. The association must be such as to have *some* bearing upon the person’s character.<sup>40</sup>

It was not sufficient, for example, to be related to a terrorist.

In the second case, *Evans*, the Federal Court was concerned with the validity of regulations made under a law of the State of New South Wales dealing with the visit of the Pope for World Youth Day in 2006. Under the regulation, a person could be directed not to engage in conduct causing annoyance to participants in that event. The Full Court referred to cases about the interpretive presumption. It then interpreted the regulation-making power according to the common law principle and found that, so interpreted, it did not authorise a broadly stated regulation directed to conduct causing ‘annoyance to participants in World Youth Day events’.<sup>41</sup> The construction applied was that which minimised interference with freedom of speech.

The approach to statutory construction, reflected in what Chief Justice Marshall said in 1805, is not directly concerned with judicial review of executive action. However, it plainly has a major bearing upon that field of judicial activity for in determining the limits of executive power conferred by statute, the statute must first be construed.

## **XI US-STYLE RIGHTS GUARANTEES REJECTED**

In his preliminary draft, Clark proposed particular rights based on the US Constitution, which were:

1. The right to trial by jury;
2. The right to the privileges and immunities of State citizenship;
3. The right to equal protection under the law; and

<sup>40</sup> (2007) 163 FCR 414, 447 [130] (emphasis in original).

<sup>41</sup> (2008) 168 FCR 576, 598-9 [87]-[88].

#### 4. The right to freedom and non-establishment of religion.

He later sought to expand the equal protection guarantee by proposing that a State of the Commonwealth should not be able to ‘deprive any person of life, liberty or property without due process of law, or deny to any person within its jurisdiction the equal protection of its laws.’<sup>42</sup> He quoted the words of Justice Cooley of Michigan:

A popular form of Government does not necessarily assure to the people an exemption from tyrannical legislation. On the contrary, the more popular the form, if there be no checks or guards, the greater perhaps may be the danger that excitement and passion will sway the public counsels, and arbitrary and unreasonable laws be enacted.<sup>43</sup>

His rights guarantees, particularly those directed to equal protection and due process, were opposed on the basis that they would affect the legislative powers of the States.

Clark’s equal protection proposal was based on the United States 14th Amendment. Isaac Isaacs who, in the 1930s, became the Chief Justice of Australia and later the first Australian Governor-General, argued, at the Convention, that the 14th Amendment had been inserted in the American Constitution after the Civil War because the Southern States had refused to concede rights of citizenship to persons of African descent. He said the object of the amendment was to ensure that African Americans should not be deprived of the suffrage and various rights of citizenship in the Southern States. He did not think it necessary to insert such a clause in the Australian Constitution.<sup>44</sup>

Ultimately, only limited rights provisions were adopted. They comprised trial by jury in case of offences against the Commonwealth,<sup>45</sup> a prohibition on the Commonwealth establishing any religion or preventing the free exercise of any religion,<sup>46</sup> and the protection of the residents of one State from discrimination by another State on the basis of residence.<sup>47</sup> The anti-discrimination guarantee was the relic of Clark’s equal protection proposal.

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42 *Mercury*, 19 August 1897. See, also, Australian Archives, Mitchell Series, R216, item 310, 4, cited in Williams, above n 22, 176.

43 Williams, above n 22, 177.

44 *Official Record of the Debates of the Australasian Federal Convention*, Melbourne, 8 February 1898, 668.

45 *Ibid* 80.

46 *Ibid* 116.

47 *Ibid* 117.

## **XII RESPONSIBLE GOVERNMENT: AN IMPORTANT DIFFERENCE BETWEEN THE CONSTITUTIONS**

An important difference between the United States Constitution and the Australian Constitution is that the Australian Constitution provides for responsible government namely, for the Ministers of the Executive Government to be members of and responsible to the Parliament and to hold office only for so long as they retain the confidence of the Parliament.<sup>48</sup>

Sir Owen Dixon who occupied the interesting dual offices in 1942 of High Court Justice and Australian Ambassador to the United States, made a speech to the American Bar Association in which he compared the two Constitutions. In relation to the responsible government feature, he said:

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 of the day which undertook to expound it. They all lived, however, under a system of responsible government. That is to say, they knew and believed in the British system by which the Ministers are responsible to the Parliament and must go out of office whenever they lose the confidence of the legislature. They felt therefore impelled to make one great change in adapting the American Constitution. Deeply as they respected your institutions, they found themselves unable to accept the principle by which the executive government is made independent of the legislature. Responsible government, that is, the system by which the executive is responsible to the legislature, was therefore introduced with all its necessary consequences.<sup>49</sup>

## **XIII EXECUTIVE POWER: ANOTHER DIFFERENCE**

There is a difference in the way in which executive power is vested under our two Constitutions. Section 1 of Art II of the US Constitution vests the executive power of the United States in the President. Section 61 of the Australian Constitution is modelled in part on the Canadian Constitution contained in the *British North America Act 1897* at the time of the Australian constitutional Conventions. Executive power is vested in the Queen and is exercisable by the Governor-General as the Queen's representative. It extends to the execution and maintenance of the Constitution and of the laws of the Commonwealth.

The executive power under the Australian Constitution is constrained by the requirements and conventions of responsible government. It is also, as already

48 Ibid 64.

49 O Dixon, 'Two Constitutions Compared' in Woinarski (ed), *Jesting Pilate* (William S Hein and Co, 1997) 101.

explained, subject to constitutionally entrenched judicial review. Important aspects of executive power, particularly in the area of public spending, require authorisation by statute. There have been three cases in recent times concerning the scope of the executive power of the Commonwealth in relation to the expenditure of public moneys. The first, *Pape*,<sup>50</sup> concerned measures to provide a fiscal stimulus to offset the worst effects of the Global Financial Crisis in 2009. The second and third, concerned Commonwealth financial support for a schools chaplaincy program in State public schools.<sup>51</sup> Earlier in the 2000s and more recently, there has been debate about the scope of executive power to bar people from entering Australia<sup>52</sup> and to interdict them in the contiguous zone and remove them to other places.<sup>53</sup> However asylum seeker policy aside, debates about executive power in this country do not have the same intensity and consequence as debates in the United States.

As at 28 March 2017, United States President Trump had signed 32 executive orders, actions and memoranda. Professor John Yoo of the University of California at Berkley, the proponent of a robust approach to executive power in the age of terror, wrote in the *New York Times* on 6 February this year:

Faced with President Trump's executive orders suspending immigration from several Muslim nations and ordering the building of a border wall and his threats to terminate the North America Free Trade Agreement, even Alexander Hamilton, our nation's most ardent proponent of executive power would be worried by now.<sup>54</sup>

#### XIV FEDERAL JUDICIAL POWER: SIMILARITIES AND DIFFERENCES

A difference of significance between our Constitutions relates to the way in which federal judicial power is distributed. As to separation of powers, the emphasis under the Australian Constitution as it has been interpreted by the courts is on the separation of judicial power from legislative and executive powers. Further, the judicial power of the Commonwealth is vested in the High Court of Australia and in such other federal courts as the Parliament creates and in such other courts as it invests with federal jurisdiction. The latter reference picks up the courts of the States and Territories of Australia. There is no express provision in the United States Constitution for conferring federal jurisdiction on State courts, although they do deal with federal questions under the terms of their own State Constitutions.

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50 *Pape v Federal Commissioner of Taxation* (2009) 238 CLR 1.

51 *Williams v Commonwealth* (2012) 248 CLR 156; *Williams v Commonwealth (No 2)* (2014) 252 CLR 416.

52 *Ruddock v Vadarlis* (2001) 110 FCR 491.

53 *CPCF v Minister for Immigration and Border Protection* (2015) 255 CLR 514.

54 John Yoo, 'Executive Power Run Amok', *New York Times*, New York, 6 February 2017.

Despite the differences, decisions of the Supreme Court of the United States about the judicial power, including decisions of Chief Justice Marshall, and more recent decisions concerning legislative interference with court judgments, have played a role in Australian judicial reasoning.

Our judicial systems differ in that the High Court has jurisdiction to hear appeals from all judgments of any other federal court or court exercising federal jurisdiction or from the Supreme Court of any State. The High Court is therefore not only a federal court but a national court of appeal. It has appellate jurisdiction in matters arising under the laws of the States and Territories and the common law as well as in matters of federal concern. And so it is that there is one common law of Australia, determined ultimately by the High Court.<sup>55</sup> The Supreme Court of the United States does not have the same wide-ranging national jurisdiction. For that reason the Supreme Courts of the States are the final determinants in each State of the common law of that State. The American Law Institute, to which I referred earlier, seeks to draw together the common laws of the various States into single and persuasive documents designated as Restatements. They represent a combination of the leading academic, judicial and practitioner experts in the relevant areas. They are very influential in the United States. Depending upon the particular class of case they can be an important influence on the development of our common law.

## XV AUSTRALIAN REFERENCES TO THE AMERICAN LAW INSTITUTE RESTATEMENTS

In the last 10 years, there have been around 70 instances of courts in Australian jurisdictions referring to American Law Institute Restatements in their judgments. Most references have been made in Commonwealth and New South Wales courts (approximately 20 each), followed by Western Australia and Victoria (approximately 10 each), and a sprinkling of cases in South Australia, Queensland, Tasmania and the Australian Capital Territory. They are frequently referred to by the High Court in decisions relating to common law in this country.<sup>56</sup>

The ways in which the Restatements can be used in Australia are obvious enough:

1. First, as an exercise in comparative law to ascertain the state of the law

55 See *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520; *Lipohar v The Queen* (1999) 200 CLR 484. For a general discussion see L Boyle, 'An Australian August Corpus: Why There is Only One Common Law in Australia' (2015) 27 *Bond Law Review* 28.

56 Recent examples include *Equiscorp Pty Ltd v Haxton* (2012) 246 CLR 498, 520 [38] referring to the American Law Institute, *Restatement (Third) on Restitution and Unjust Enrichment*; *Amac Pty Ltd v Booth* (2011) 246 CLR 36 referring to the American Law Institute, *Restatement (Third) on Torts: Liability for Physical and Emotional Harm*; *Korda v Australian Executor Trustees (SA) Ltd* (2015) 255 CLR 62, 69–70 [5] referring to the American Law Institute, *Restatement of Trusts*.

across the United States and then to invoke it, if it be persuasive, to support an enunciation or development or application of common law principle.

2. To demonstrate consideration of the United States' position, albeit it may not be accepted or may be distinguished as inapplicable to a particular case or set of local conditions.
3. Sometimes simply in judicial reasoning as a felicitous formulation of a proposition of principle.

The Restatements are likely to continue to be influential, particularly in the areas of the general common law.

## XVI HIGH COURT CITATIONS OF AMERICAN JUDICIAL DECISIONS

The High Court has referred to decisions of the United States Supreme Court for over a century. The earliest reference appears to have been in the case of *Ah Yick v Lehmert*,<sup>57</sup> decided in 1905, where Chief Justice Griffith quoted *Marbury v Madison* as authority for the proposition that the High Court could use its appellate jurisdiction to set right an error of a Court of Appeal in allowing or denying an appeal from a lower court; an early constitutional issue which lay down basic principles for a nascent court.

Since then, the High Court has cited United States Reports of the US Supreme Court about a thousand times. The main topics as detailed in the Westlaw AU database are constitutional law, criminal law, 'High Court and Federal Court' and statutory interpretation. The most recent example is found in the High Court's decision in *Prior v Mole*,<sup>58</sup> delivered on 8 March 2017. Justice Nettle cited *Terry v Ohio*,<sup>59</sup> *United States v Cortex*<sup>60</sup> and *Illinois v Wardlow*<sup>61</sup> to support the need for 'due weight [to be] given to the specific reasonable inferences which a police officer is entitled to draw from the facts in light of his or her experience.'<sup>62</sup>

There was a substantial discussion of United States' authority in an important case which reached the High Court in 2015 concerning the patentability of DNA sequences containing mutations associated with susceptibility to breast and ovarian cancers.<sup>63</sup> The Supreme Court of the United States had held that a claim for an isolated DNA coding for the breast cancer mutation was not patentable for the purposes of US law.<sup>64</sup> In so doing it had overturned a decision of the United

57 (1905) 2 CLR 593.

58 (2017) 91 ALJR 441.

59 392 US 1 (1968).

60 449 US 411 (1981).

61 528 US 119 (2000).

62 (2017) 91 ALJR 441, 457 [71].

63 *D'Arcy v Myriad Genetics Inc* (2015) 325 ALR 100.

64 *Association for Molecular Pathology v Myriad Genetics* 569 US (2013).

States Court of Appeals for the Federal Circuit.<sup>65</sup> The Full Court of the Federal Court in Australia had preferred the reasoning of the US Court of Appeals. In overturning the Full Court, the High Court referred to what had been said by both the Court of Appeals and the Supreme Court of the US in some detail but went further than the Supreme Court of the US in holding that so-called cDNA, a synthetic DNA sequence bearing the relevant mutations, was not patentable. The essence of the holding was that what was being claimed as an invention was in truth just information coded in the DNA sequence of the particular human being from whom it had been replicated.

Another area in which the High Court has drawn on US jurisprudence in recent times arises out of cases in which the Parliament legislates to try to overcome the effect of a court decision. Sometimes it is asserted that the Parliament is not just changing the law but interfering with a judicial decision. Such challenges have generally not been successful. One case, decided in 2012, *Australian Education Union v General Manager, Fair Work Australia*<sup>66</sup> arose out of a challenge by the Australian Education Union to the registration of the Australian Principals Federation as an industrial organisation. In brief, the registration of the Principals Federation had been found to be invalid by a decision of the Federal Court. It was subsequently validated by legislative amendment which effectively gave the physical act of registration a new, valid legal effect. The High Court held that the validating legislation did not impermissibly usurp or interfere with the judicial power of the Commonwealth. It did not change the original judicial decision. In so doing the Court referred, among other things, to cases on similar points taken in the United States. The late Justice Scalia wrote about it in a case holding invalid legislation requiring federal courts to reinstate claims which had been dismissed because they were outside statutory limitation periods. He said:

Having achieved finality ... a judicial decision becomes the last word of the judicial department with regard to a particular case or controversy, and Congress may not declare by retroactive legislation that the law applicable *to that very case* was something other than what the courts said it was.<sup>67</sup>

That proposition would not, in this country, prevent a parliament from changing the law to overcome the consequences of a judicial decision without changing the decision itself.

A significant point of difference between Australia and the United States is the US doctrine of deference under which courts may defer to the interpretations adopted by government agencies of statutes where such interpretations are reasonably open.

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65 *Association for Molecular Pathology v United States Patent and Trade Mark Office* 689 F 3d 1303 (2012).

66 (2012) 246 CLR 117.

67 *Plaut v Spendthrift Farm Inc* 514 US 211, 227 (1995).



Australian courts would take the view that under our constitutional structure and jurisprudence the Australian courts are the final authorities on the interpretation of statute law and will not defer to any executive agency in that respect.

Without multiplying examples it is apparent that, for the Australian judiciary, the United States courts and the United States academy provide rich intellectual resources for the consideration of answers to both private and public law questions which arise before Australian courts. The use of these legal resources from the United States is part of a larger picture of the use of comparative law generally. Comparative law resources must always be used with care and discrimination and not taken out of context. The relevant context may include particular aspects of the history, the institutional setting and the legal culture of the country whose legal resources are used, which militate against their easy transplantation into an Australian legal setting.

## **XVII INTERNATIONAL TRADE LAW AND PRACTICE: CHANGING DOMESTIC LAW**

International conventions and treaties may lead to change in domestic law to give effect to the obligations of States Parties to them. The United States has an important influence in a global context through treaties and conventions to which it is a party. An important example of the influence of the United States on the Australian legal system occurring in this way arose directly out of the Australia-US Free Trade Agreement (AUSFTA) and in particular its impact on Australian copyright law.<sup>68</sup> In implementing the treaty, Australia passed two sets of amendments to copyright legislation. It extended the term of copyright protection, expanded criminal liability for infringements, introduced additional rights for live performers and reframed digital copyright law in relation to online copyright protection.<sup>69</sup> Professor Kimberlee Weatherall who wrote a review of the Agreement's impact on Australia's copyright trade policy in 2015 observed that:

Before AUSFTA, the general posture adopted by policymakers in Australia seemed to be that Australia's interests were in meeting, but not exceeding, international IP standards. Post-AUSFTA, Australian government officials have positively advocated that trade agreements should include strong, detailed and prescriptive copyright provisions, well beyond multilateral standards. This amended stance cannot be explained by reference to a change in Australia's economic interests or to international trends, and Australia's recent approach stands in marked contrast with the attitudes and methods of comparable countries. When

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68 *Australia-US Free Trade Agreement*, signed 18 May 2004, [2005] ATS 1 (entered into force 1 January 2005).

69 See the discussion in Kimberlee Weatherall, 'The Australia/US Free Trade Agreement's Impact on Australia's Copyright Trade Policy' (2015) *Australian Journal of International Affairs* 538.

looking back at the significance of AUSFTA, it is this change of stance that stands out as AUSFTA's lasting legacy in copyright.<sup>70</sup>

One thing that the AUSFTA did not establish was an investor-State Dispute Settlement process under which United States investors in Australia could bring arbitral actions against the Australian government for alleged State action affecting the value of their assets. There was provision for an investor-State settlement process in the proposed TransPacific Partnership (TPP). While arbitral processes of the kind that were inserted in the proposed TPP appear in a number of other trade and investment agreements around the world, including investment agreements to which Australia is a party, they do not directly impact upon Australian legislation. Nevertheless, they can result in the characterisation of some classes of legislation and even judicial decisions as breaches of relevant provisions of the trade or investment agreement.

The operation of international agreements and conventions, multilateral and bilateral in which the United States and other parties are involved, is just one of a vast array of arrangements which influence the legal systems of all countries and can contribute, to a degree, to their convergence particularly in areas of international trade and commerce.

## XVIII CONCLUSION

There are many ways in which, in today's world of global business dealings, people movements and transnational crime and terrorism, the legal systems of different countries interact and affect each other. This paper has not touched upon the extent to which Australian legislators and regulators are influenced by statutory models for the regulation of trade and commerce in the United States. Nor has it touched upon the migration of transactional models and business practices from one jurisdiction to another. To the extent that such influence occurs it may be seen as part of a global phenomenon of convergence in business law affecting international trade and commerce. This kind of convergence is actively promoted by a variety of bodies in a variety of ways.<sup>71</sup> The United States and Australia have different histories and different imperatives informing our constitutional and legal systems, which mean there will always be significant differences between them. However, there is enough in the way of our common traditions and common interests in a range of areas to mean that the influence of American legal developments on the Australian legal system will continue through its careful and discriminating consideration in this country.

That said, it is something of a one way street at the present time. Resistance in

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70 Ibid 539.

71 Chief Justice RS French AC, 'Convergence of Commercial Laws - Fence Lines and Fields' (Speech delivered at the Doing Business Across Asia - Legal Convergence in an Asian Century Conference, Singapore, 22 January 2016).

conservative legal and political circles in the United States seems to have spilled over from debates about judicial interpretation of normative standards contained in the Constitution and a fear of foreign cuckoos fouling the domestic nest. There is, of course, also the practical consideration that there is such a huge volume of American domestic judicial decision making on so many areas of the law, reflected in the Restatement Projects to which I have referred, that most American courts probably have more than enough to do just to keep up with what is going on at home. It is sufficient unto the day that Australia can look to the United States legal system and the work of its judges, academics and practitioners as a rich intellectual resource and to mine it for what it is worth in Australia.