COMPARATIVE LAW IN AUSTRALIAN CONSTITUTIONAL JURISPRUDENCE

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I INTRODUCTION

Comparative constitutional law is a complex, multi-faceted and contested undertaking. The very possibility of meaningful comparison is sometimes doubted and its legitimacy is often contested. Even among those who support its use, there is disagreement as to its rationale and method. In some countries its use is disputed; in others its use is taken for granted but the manner of its use is contested; in still others its use is widespread but largely unexamined.

Australia falls principally into the latter category. Comparative law is frequently used in Australian constitutional law, and its use is not especially controversial, but close analyses of its use are rare. General comparisons between the constitutions and constitutional law of Australia and other countries have certainly been undertaken [1] and specific issues have been examined in comparative perspective.[2] Sometimes the particular use to which comparative constitutional law

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1 See the list of references in James Thomson, 'Comparative Constitutional Law: Entering the Quagmire' (1989) 6 *Arizona Journal of International and Comparative Law* 22, 46-51. Among the most conspicuous: Owen Dixon, 'Two Constitutions Compared' in *Jesting Pilate and Other Papers and Addresses* (1965); P H Lane, *The Australian Federal System with United States Analogues* (1972); Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and United States Experience' (1986) 16 *Federal Law Review* 1; Christopher Gilbert, *Australian and Canadian Federalism 1867-1984: A Study of Judicial Techniques* (1986); William Rich, 'Converging Constitutions: A Comparative Analysis of Constitutional Law in the United States and Australia' (1993) 21 *Federal Law Review* 202; James Thomson, 'American and Australian Constitutions: Continuing Adventures in Comparative Constitutional Law' (1997) 30 *John Marshall Law Review* 627.

2 Eg, Julius Stone, 'A Government of Laws and Yet of Men Being a Survey of Half a Century of the Australian Commerce Power' (1950) 25 *New York University Law Review* 451; Sanford H Kadish, 'Judicial Review in the High Court and the United States Supreme Court' (1959) 2 *Melbourne University Law Review* 4; Cliff Pannam, 'Travelling Section 116 with a US Road Map' (1963) 4 *Melbourne University Law Review* 41; P E Nygh, 'An Analysis of Judicial Approaches to the Interpretation of the Commerce Clause in Australia and the United States' (1965-1967) 5 *Sydney Law Review* 353; Ronald Sackville, 'The Doctrine of the Immunity of Instrumentalities in the United States and Australia: A Comparative Analysis' (1969) 7 *Melbourne University Law Review* 15; Christopher W Besant, 'Two Nations, Two Destinies: A Reflection on the Significance of the Western Australian Secession Movement to Australia, Canada and the British Empire' (1990) 20 *University of Western Australia Law Review* 209; Gabriel Moens, 'Church and State Relations in Australia and the United States: The Purpose and Effect Approaches and the Neutrality Principle' (1996) 4 *Brigham Young University Law Review* 787; Jeremy Kirk, 'Constitutional Guarantees, Characterisation and the Concept of Proportionality' (1997) 21 *Melbourne University Law Review* 1; Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668; Nicholas Aroney, 'Formation,

is put has been criticised.[3] But the *way* in which comparative constitutional law is used in Australia has rarely been examined.[4] More controversial, and more often discussed, has been the use of international law, especially the law of international human rights, in Australian law.[5]

The reason why the use of comparative law in Australian constitutional jurisprudence has not been particularly controversial and rarely examined – in the context of controversy and passionate disagreement elsewhere – no doubt has to do with Australian conceptions of our place in the world and the unique way in which these conceptions filter into the attitudes and practices of Australian lawyers, judges and elected representatives. And yet, the Australian experience – perhaps like the experience of other countries within the British Commonwealth – is especially instructive, not least because the stated reasons why comparative jurisprudence has been readily admitted in Australia are surprisingly diverse. For instance, the High Court of Australia has appealed to the universal applicability of certain fundamental constitutional principles, the existence of functional equivalents in other constitutional systems, similarities of constitutional text and structure, the capacity of comparative constitutional law to furnish critical insights into Australian law, the rule (in the past) that the decisions of superior courts within the imperial hierarchy are authoritative precedents and, finally, the belief that the use of certain comparative materials is actually consistent with the intentions and expectations of the framers of the Constitution.

When placed into the context of debates in other countries concerning the use of comparative constitutional law, this is not only a diverse list, but an apparently self-contradictory one. Who would have thought, for example, that an argument from universal constitutional principles could stand alongside of – indeed, be articulated in the very same case as – an argument from the expectations of the framers?[6]

Representation and Amendment in Federal Constitutions' (2006) 54(1) *American Journal of Comparative Law* 277.

3 A recent, important example is: Gerald N Rosenberg and John M Williams, 'Do Not Go Gently into That Good Right: The First Amendment in the High Court of Australia' [1997] *The Supreme Court Review* 439.

4 Important exceptions include: Paul von Nessen, 'The Use of American Precedents by the High Court of Australia, 1901-1987' (1992) 14 *Adelaide Law Review* 181; Cheryl Saunders, 'The Use and Misuse of Comparative Constitutional Law' (2006) 13 *Indiana Journal of Global Legal Studies* 37.

5 See the sharp exchange between McHugh and Kirby JJ in *Al-Kateb v Godwin* (2004) 219 CLR 562. For a sample of the literature, see Henry Burmester, 'National Sovereignty, Independence and the Impact of Treaties and International Standards' (1995) 17 *Sydney Law Review* 127; Stephen Donaghue, 'Balancing Sovereignty and International Law: the Domestic Impact of International Law in Australia' (1995) 17 *Adelaide Law Review* 213; Anthony Mason, 'The Influence of International and Transnational Law on Australian Municipal Law' (1996) 7 *Public Law Review* 20; Hilary Charlesworth, 'Dangerous Liaisons: Globalisation and Australian Public Law' (1998) 20 *Adelaide Law Review* 57; Amelia Simpson and George Williams, 'International Law and Constitutional Interpretation' (2000) 11 *Public Law Review* 205; Kristen Walker, 'International Law as a Tool of Constitutional Interpretation' (2002) 28 *Monash University Law Review* 85; Michael Kirby, 'International Law – The Impact on National Constitutions' (Paper presented at the 7th Annual Grotius Lecture, Annual Meeting of the American Society of International Law, 30 March 2005).

6 *D'Emden v Pedder* (1903) 1 CLR 91, 105, 109-10, 113 (Griffith CJ for the Court). For example, Griffith CJ stated that the maxim *quando lex aliquid concedit, concedere*

In this article, I seek to explore the use of comparative constitutional law in Australia, understood itself in comparative perspective. It is sometimes pointed out that the Australian High Court is open to comparative constitutional jurisprudence to an extent much greater than the United States Supreme Court.[7] This is true, but it is so for particular reasons which do not necessarily reflect the degree to which there is openness, in principle, to comparative law in each country. Rather, I argue, it has more to do with the context in which the two Constitutions came into being and have continued to operate. As noted, the grounds upon which the use of comparative constitutional law in Australia has been defended are diverse. Some of these grounds are certainly controversial when judges appeal to them in the United States, but these very same grounds have been controversial when used in Australia as well. When we compare the use of comparative constitutional law from one country to another we need, in other words, to take account of the context of each constitutional system. Justifications for its use that are controversial in one context may not be controversial in another.

I begin the main body of this article by proposing a classification of approaches to comparative constitutional law based on the existing literature. I then seek to describe the various ways and grounds upon which comparative jurisprudence has been used by the High Court in its interpretation of the Australian Constitution. I point out that different approaches to the use of comparative law can be identified at different times and by different judges (depending upon their respective standpoints) and that they are best understood in that context. In so doing, I argue that the use of comparative constitutional law in Australia has been especially shaped by important historical and conceptual relationships between the Australian legal system and the legal systems of certain other countries and jurisdictions. And when this context is taken into consideration I conclude that the approach adopted in Australia seems much less different from prevailing attitudes among American judges.

II APPROACHES TO COMPARATIVE CONSTITUTIONAL LAW

Many different approaches to both the possibility and legitimacy of comparative constitutional law have been advanced.[8] At one end of the spectrum,

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videtur et illud sine quo res ipsa valere non potest was a 'doctrine of universal application', and then observed: 'This is, in truth, not a doctrine of any special system of law, but a statement of a necessary rule of construction of all grants of power, whether by unwritten constitution, formal written instrument, or other delegation of authority, and applies from the necessity of the case, to all to whom is committed the exercise of powers of government.'

7 Saunders, above n 4, 41-2; Anthony Mason, 'Comparison with other Courts' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 124, 125; Erin Daly, 'United States Supreme Court' in Tony Blackshield, Michael Coper and George Williams (eds), *The Oxford Companion to the High Court of Australia* (2001) 692, 693.

8 I draw here and expand upon what is said in Nicholas Aroney, 'Democracy, Community and Federalism in Electoral Apportionment Cases: The United States, Canada and Australia in Comparative Perspective' (2008) 58 *University of Toronto Law Journal* (in press). For some leading sources in addition to those cited above and below, see Donald Kommers, 'The Value of Comparative Constitutional Law' (1976) 9 *John Marshall Journal of Practice and Procedure* 685; William Ewald, 'Comparative Jurisprudence: What Was it Like to Try a Rat?' (1995) 143 *University of Pennsylvania Law Review* 1889; David Fontana, 'Refined Comparativism in Constitutional Law' (2001) 49 *UCLA Law Review* 539.

there are those attitudes to comparative constitutional law in which the particularity and uniqueness of each constitution is underscored. When comparative analysis is oriented in this way, it tends to highlight the individuality of systems of law. Each system of law is seen as the unique expression of the culture, history and traditions of the particular people from whom it emerges.[9] In some versions of this approach the differences are indeed regarded as so great that the very possibility of meaningful comparison is doubted. If each legal system is in this sense entirely distinct and unique, then the capacity of comparative inquiry to provide guidance for the resolution of practical problems of constitutional design and interpretation is radically undermined.[10]

On this account, particularist approaches to the possibility (or, indeed, the impossibility) of comparative constitutional law are based on a descriptive claim: the asserted fact that constitutions are so unique to their time and place that meaningful comparison is well nigh impossible. Closely related to particularist approaches, but more normatively oriented, are what might be called 'nationalist' approaches, in which it is not so much denied that constitutions can, in fact, be compared, but rather that it is illegitimate to use the interpretation of one constitution in the interpretation of another because each constitution owes its moral force to distinct political sources – to the people of *this* nation, but not another.[11]

There is a certain affinity between particularist and nationalist approaches to comparative constitutional law and legal positivism.[12] Like legal positivists in the Hartian tradition,[13] particularists are concerned with the specific facts of the matter, the social facts unique to each legal system, and likewise nationalists wish to identify the ultimate source of law within each legal system, as ascertained in the attitudes of senior legal and political officials of that system.[14]

At the other end of the spectrum, there are approaches to comparative constitutional law which emphasise not so much the particularity of each system, but rather the universality of certain norms and values said to be embodied in the

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9 Pierre Legrand, 'The Same and the Different' in Pierre Legrand and Roderick Munday (eds), *Comparative Legal Studies: Traditions and Transitions* (2003) 240.

10 Sujit Choudhry, 'Globalisation in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation' (1999) 74 *Indiana Law Journal* 819, 830-2.

11 Eg, the approach of Justice Antonin Scalia in Norman Dorsen, Antonin Scalia and Stephen Breyer, 'The Relevance of Foreign Legal Materials in U.S. Constitutional Cases: A Conversation between Justice Antonin Scalia and Justice Stephen Breyer' (2005) 3(4) *International Journal of Constitutional Law* 519. See, further, the exchange between Scalia and Breyer JJ in *Printz v United States*, 521 US 898 (1997). Other recent American cases which reveal this division of opinion include *Atkins v Virginia*, 536 US 304 (2002); *Lawrence v Texas*, 539 US 558 (2003) and *Roper v Simmons*, 543 US 551 (2005).

12 Catherine Valcke, 'Comparative Law as Comparative Jurisprudence – The Comparability of Legal Systems' (2004) 52 *American Journal of Comparative Law* 713, presents an illuminating, but perhaps too extreme, association between legal positivism and particularist/nationalist attitudes to the possibility and legitimacy of comparative law.

13 H L A Hart, *The Concept of Law* (1961).

14 Compare Ernest A Young, 'Foreign Law and the Denominator Problem' (2005) 119 *Harvard Law Review* 148; Jeffrey Goldsworthy, 'Questioning the Migration of Constitutional Ideas: Rights, Constitutionalism and the Limits of Convergence' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 115; James Allan and Grant Huscroft, 'Constitutional Rights Coming Home to Roost? Rights Internationalism in American Courts' (2006) 43 *San Diego Law Review* 1.

constitutional law of many different countries.[15] This orientation to universality provides its proponents with reason to expect to find similarities rather than differences between legal systems, comparisons rather than contrasts. It also provides (for its adherents) strong grounds upon which to think that comparative constitutional law can provide guidance for the resolution of problems of interpretation under particular constitutions.

Because this approach is often premised upon the existence of universal norms of just conduct, it is sometimes associated with natural law theory[16] and has a strong affinity with human rights discourses.[17]

Between particularity and universality, there are a number of intermediate approaches. These intermediate approaches can in turn be distinguished into two separate streams, one focussed upon the existence of historical connections and relationships between legal systems, the other concerned simply with the existence of conceptual similarities and parallels.

Historical relationships between constitutions can take many forms. Some constitutions, as it happens, are part of or subject to a wider system of law such that the constitutional norms and interpretations of that wider system are regarded as legally binding upon and provide authoritative guidance for the interpretation of the subsidiary constitution. The constitutions of subject territories, subordinate regions and settled colonies are of this kind, as well as, at least to some degree, the constitutions of the constituent states of federations. Thus, the decisions of the Privy Council were, for some time, binding upon the courts of the various colonies and dominions of the British Empire. Likewise, the decisions of the superior federal courts of federations such as the United States, Canada and Australia are, in varying degrees and in various respects (although certainly not in all cases and in all respects), binding upon the State or provincial courts of each country.

Secondly, as the history of former colonies such as Canada, Australia and even the United States clearly demonstrates, there can come a point at which the formal hierarchical relationship between the constitutional law of the Empire and the constitutional law of the colony comes to an end, and yet the decisions and principles of British law may remain highly persuasive and relevant, if not strictly binding or authoritative, precisely because the law of the former colony was historically derived from imperial sources.

Relatedly, and thirdly, the bodies of constitutional law of two colonies, or former colonies, because they share a common source and therefore common principles, can be especially relevant to one another.

Fourthly, an historical relationship between two constitutions can exist, not due to any legal relationship in the senses just described, but rather due to the fact that the framers of one constitution deliberately modelled their constitution upon another.[18] Such modelling can occur in different ways and in different respects. The

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15 Eg, Trevor Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (2001).

16 Roger P Alford, 'In Search of a Theory for Constitutional Comparativism' (2005) 52 *UCLA Law Review* 639, 659-73; Valcke, above n 12.

17 Eg, Christopher McCrudden, 'A Common Law of Human Rights?: Transnational Judicial Conversations on Constitutional Rights' (2000) 20(4) *Oxford Journal of Legal Studies* 499.

18 These four types expand on the possibilities suggested by classifications which distinguish between 'genealogical' connections, where one legal system has given 'birth' to another, and 'genetic' connections, where one constitution has been formed under the 'influence' of another. See, eg, Choudhry, 'Globalization', above n 10, 838-9; Vicki C Jackson, 'Constitutional Comparisons: Convergence, Resistance, Engagement' (2005) 119 *Harvard Law Review* 109; Louis Henkin, 'A New Birth of

most explicit modelling occurs when particular provisions, dealing with very specific matters, are literally copied from one constitution to another, with or without modification. A more general and thematic modelling occurs when overarching structures or underlying principles of one constitution are reproduced in or adopted by another. The drafters of constitutions rarely draw from only one constitution. Often they look to the constitutions of countries with which they have ties of language, culture and so on. But at times they seek to synthesise ingredients from a range diverse legal traditions, creating interesting and often difficult problems of implementation and interpretation.

Notably, where historical relationships of any of these four kinds exist, the use of comparative constitutional law and interpretation is widely regarded as both possible and legitimate, even on nationalist grounds, and with no need to appeal to universal principles of natural law or natural rights. Comparative constitutional law founded upon the existence of such relationships can even be justified from a non-extreme particularist standpoint, as the historical relationship between the two constitutions provides a reason to expect that genuine comparison might be possible.

A second set of intermediate approaches to comparative constitutional law, quite distinct from the historical ones just discussed, is founded not so much on the possibility of historical relationships but on the prospect of conceptual similarities, analogous legal issues and comparable practical problems. On the practical side, such approaches to comparative law take as their starting point the assumption that there are certain kinds of problems of human coordination and social ordering which arise in all societies, and that it is possible and meaningful to compare how different societies address those problems. On this so-called 'functionalist' view,[19] comparative inquiry identifies the different ways in which common problems can be addressed and suggests that societies can improve their institutions by learning from each other in this way. Relatedly, but with an emphasis that is more conceptual and less pragmatic, comparative inquiry can be presented as a dialogic exchange between two or more legal systems engaged in a relationship of mutuality and reciprocity.[20] The idea here is that comparison can shed light – and sometimes critical light – upon the underlying assumptions, structures and techniques of each body of law as it relates to analogous legal issues arising in each legal system. As one author has explained, 'dialogue takes account of the multiple layers of meaning that may potentially be drawn from foreign legal sources and acknowledges the possibility of both similarity and difference'.[21]

In sum, attitudes to the possibility and legitimacy of comparative constitutional law are shaped by a variety of considerations of both a descriptive and normative kind. Support for the use of comparative constitutional law is strongest from universalist points of view, and weakest from particularist and nationalist standpoints. Notably, as I have described them, the particularist and nationalist positions are respectively descriptive and prescriptive in orientation, whereas to this

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Constitutionalism: Genetic Influences and Genetic Defects' (1993) 14 *Cardozo Law Review* 533, 536-8.

19 Mark Tushnet, 'The Possibilities of Comparative Constitutional Law' (1999) 108 *Yale Law Journal* 1225, 1238-69.

20 Claire L'Heureux-Dubé, 'The Importance of Dialogue: Globalization and the International Impact of the Rehnquist Court' (1998) 34 *Tulsa Law Journal* 15, 17; Choudhry, 'Globalization', above n 10, 835-8, 855-8; Sujit Choudhry, 'Migration as a New Metaphor in Comparative Constitutional Law' in Sujit Choudhry (ed), *The Migration of Constitutional Ideas* (2006) 1, 20-25.

21 Saunders, above n 4, 52.

point I have presented the universalist in predominantly normative terms. However, claims about the universal applicability of certain fundamental constitutional norms, like claims about universal natural law or human rights, have both a descriptive and a normative dimension: descriptive in so far as they typically entail claims about the existence of such norms and their actual embodiment in bodies of positive law, normative in so far as they involve claims about what ought to be the case and what ought to be done. Likewise, the historically oriented rationales for comparative constitutional law (hierarchy, derivation, association and modelling) are largely factually based, whereas dialogic and functionalist rationales have a decidedly normative ring to them: dialogue is thought to produce *normatively* critical insight; common problems of social ordering *ought*, it is said, to be tackled with the benefit of comparative experience.

Given their respective orientations to the possibility and desirability of the use of comparative constitutional law, the different perspectives can be laid out along a continuum, with approaches generally supportive of the use of comparative constitutional law at one end, and approaches less supportive and even generally opposed to its use at the other.

<table>
<tr><td rowspan="2">Universalist</td><td>Hierarchic</td><td>Derivative</td><td>Associated</td><td>Modelled</td><td rowspan="2">Particularist</td></tr>
<tr><td colspan="2">Functional</td><td colspan="2">Dialogic</td></tr>
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III COMPARATIVE CONSTITUTIONAL LAW IN AUSTRALIA

Comparative law has entered Australian constitutional jurisprudence in several ways, largely corresponding to the various approaches to comparative constitutional law just outlined. It has also entered Australian law at different levels of generality. Sometimes foreign decisions have been cited for the very specific finding of the case, often on the assumption that there is a certain functional equivalence between the practical problems of social ordering arising in the two legal systems. At other times, the fundamental principles articulated by foreign courts have been adopted, usually on the ground that the two constitutions share certain basic values, perhaps due to a common legal heritage or similarities of fundamental design. The reception of comparative constitutional law by the High Court of Australia has been especially noticeable when the Court has been asked to address questions of basic principle. In particular, this has occurred when the Court has had to grapple with underlying structures and conceptions, such as the rule of law, federalism, the separation of powers and representative democracy.

A *Hierarchy and Derivation*

The first and most obvious way in which a kind of comparative law has entered Australian constitutional jurisprudence is through Australia's former colonial relationship to the United Kingdom. English law was received and applied by Australian courts from the date of colonisation and the decisions of English judges were necessarily regarded as authoritative, even to the point of maintaining that colonial courts must regard themselves as bound by decisions not only of the Privy

Council and the House of Lords, but also of the Court of Appeal in England.[22] Even though appeals to the Privy Council have since ceased and the British Parliament has abdicated authority to legislate with respect to Australia,[23] these principles continue to operate as a part of Australian law, and the High Court continues to take the decisions of English courts into consideration in particular cases, including constitutional ones.[24]

Sir Owen Dixon once famously remarked that the common law is the ultimate foundation and context of the Australian Constitution.[25] English law recognises no formal distinction between constitutional or public law and the entire body of common law.[26] The entire common law, including those aspects of the common law relating to constitutional matters, became part of the body of common law inherited by the Australian colonies. Dixon CJ was also famous for holding that, among those principles, the rule of law is an especially significant one, with very important practical implications.[27] Indeed, many of the most fundamental principles of the law in Australia relating to the courts and their powers of adjudication,[28] as well as the Crown and its prerogatives,[29] can be traced, in principle, to English precedents. For

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22 Bruce McPherson, *The Reception of British Law Abroad* (2007) 26-7, citing *Trimble v Hall* (1879) 5 App Cas 342, but noting that in *Robins v National Trust Co* [1927] AC 515 it was later concluded that only decisions of the Privy Council and House of Lords were binding.

23 *Privy Council (Limitations of Appeals) Act 1968* (Cth); *Privy Council (Appeals from the High Court) Act 1975* (Cth); *Australia Act 1986* (Cth) and (UK). See *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, 112-13 (McHugh J).

24 Eg, *Sue v Hill* (1999) 199 CLR 462, 489-90 (Gleeson CJ, Gummow and Hayne JJ), citing the English Court of Appeal in *R v Foreign Secretary; Ex parte Indian Association* [1982] QB 892. See also the general remarks of Mason J in *Kirmani v Captain Cook Cruises Proprietary Limited (No 1)* (1984) 159 CLR 351, 379-80.

25 Owen Dixon, 'The Common Law as an Ultimate Constitutional Foundation' in *Jesting Pilate and other Papers and Addresses* (1965) 203.

26 Frederic W Maitland, *The Constitutional History of England* (1908) 526-39.

27 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 193 (Dixon CJ). See, likewise, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 492 (Gleeson CJ); *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 118 (Kirby J).

28 See *Huddart, Parker & Co Proprietary Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ), a decision compared with English and American cases in *R v Davison* (1954) 90 CLR 353, 367-70 (Dixon CJ and McTiernan J). See also *Waterside Workers' Federation of Australia v JW Alexander Limited* (1918) 25 CLR 434, 464 (Isaacs and Rich JJ), citing *Blackburn v Vigors* [1887] App Cas 531, 543 (Lord Macnaghten); *Ruabon Steamship Co v London Assurance* [1900] AC 6, 9-10 (Lord Halsbury LC); *Dewar v Goodman* [1909] AC 72, 76 (Lord Loreburn LC).

29 Eg, *Roberts v Ahern* (1904) 1 CLR 406, 417-18 (Griffith CJ), citing *Attorney-General v Donaldson* 10 M & W 117, 124 (Alderson B); *New South Wales v Commonwealth* (1915) 20 CLR 54, 88-89 (Isaacs J), citing William Blackstone, *Commentaries on the Laws of England* (1765) vol I, 270; *Commonwealth v Colonial, Spinning and Weaving Co Ltd* (1921-1922) 31 CLR 421, 437 (Isaacs J), citing Blackstone, *Commentaries*, vol I, 190; *McGuinness v Attorney-General of Victoria* (1940) 63 CLR 73, 82-3 (Latham CJ), 95-8 (Dixon J), discussing *Case of Commissions of Inquiry* (1608) 77 ER 1312; 12 Co Rep 31. See George Winterton, *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (1983) ch 3; George Winterton, 'The Limits and Use of Executive Power by Government' (2003) 31 *Federal Law Review* 421; Bradley Selway, 'All at Sea – Constitutional Assumptions and "The Executive Power of the Commonwealth"' (2003) 31 *Federal Law Review* 495.

example, the general maxim that colonial legislatures, when acting within the limits of power conferred by the Imperial Parliament, have plenary powers of legislation as large and of the same nature of the Imperial Parliament itself,[30] having been applied by the Privy Council to the Parliament of New South Wales in *Powell v Apollo Candle Company* (1885),[31] has ever since been treated by Australian courts as fundamental to the nature of the legislative powers conferred upon the Commonwealth and State Parliaments.[32] And, in the interpretation of the Commonwealth and State Constitutions, Australian courts have consistently appealed to canons of statutory construction developed and applied by English courts.[33]

Cases such as *Powell v Apollo Candle Company* rested not only on the principle that the decisions of British courts were binding in Australia, but upon decisions of the Privy Council which happened to concern other colonies within the British Empire. *R v Burah* (1878) and *Hodge v The Queen* (1883), both relied upon in *Powell*, concerned the legislative powers conferred upon the Indian legislature and the legislature of the Canadian province of Ontario.[34] As a consequence of Australia's belonging to a wider empire, judicial decisions relating to other colonies were taken to be authoritative in Australia. The law applying to the colonies of Australia was part of a much larger body of law applying in other countries subject to the same ultimate legislative and judicial authority. And, as those other countries developed judicial institutions of their own, it was natural for Australian courts to take into consideration the decisions of those bodies, especially when determining issues analogous to those arising within Australia.[35]

The reception of English case-law into Australian constitutional law was not without its qualifications, however. From the outset, English law was received only to the extent that its rulings were applicable to the circumstances of the colony, and colonial statutes could operate to displace English laws that would otherwise have applied.[36] Moreover, as time has gone by the authoritativeness of English case-law has declined, more or less in step with the increasing independence of Australia's governing institutions.

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30 *R v Burah* (1878) 3 App Cas 889, 904; *Hodge v R* (1883) 9 App Cas 117, 132.

31 *Powell v Apollo Candle Company* (1885) 10 App Cas 282.

32 *D'Emden v Pedder* (1903) 1 CLR 91, 110 (Griffith CJ); *McCawley v The King* (1918) 26 CLR 9, 64-5 (Isaacs and Rich JJ); *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153 (Knox CJ, Isaacs, Rich and Starke JJ), 166 (Higgins J); *Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, 9-10 (Mason CJ, Wilson, Brennan, Deane, Dawson, Toohey and Gaudron JJ).

33 *Tasmania v Commonwealth* (1904) 1 CLR 329, 338-9 (Griffith CJ), citing *Sussex Peerage Case* (1844) 8 ER 1292, 1057; 11 Cl & F 85, 143-4 (Lord Chief Justice Tindal); *Hardy v Fothergill* (1888) 13 App Cas 351, 358 (Lord Selborne). See also *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 153, 155 (Knox CJ, Isaacs, Rich and Starke JJ), 164 (Higgins J); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 73 (Starke J); *Eastman v R* (2000) 203 CLR 1, 42-3 (McHugh J).

34 *R v Burah* (1878) 3 App Cas 889; *Hodge v The Queen* (1883) 9 App Cas 117.

35 Eg, in *Al-Kateb v Godwin* (2004) 219 CLR 562, Kirby J refers (at 619) to the views of judges of 'the common law', citing decisions from the United Kingdom, Hong Kong and the United States. Later (at 621 and 626-7) his Honour also refers to decisions from Israel, South Africa, Germany and New Zealand.

36 *State Government Insurance Commission v Trigwell* (1979) 142 CLR 617, 625-626 (Gibbs J), 634 (Mason J), citing Blackstone, *Commentaries*, vol I, 107; *Halsbury's Laws of England* (4th ed, 1973) vol 6, 589; *Cooper v Stuart* (1889) 14 App Cas 286, 291. See, generally, McPherson, above n 22, ch 10.

With responsible government in the 1850s came a local power to determine the content of the Australian constitutions.[37] The Commonwealth Constitution, which came into force in 1901, stipulated that appeals could not be taken from a decision of the High Court of Australia to the Privy Council in matters concerning the limits of power of the Commonwealth and the States without the High Court's certification.[38] Prior to the legislative abolition of appeals, only one certificate for appeal to the Privy Council was ever granted by the High Court.[39] But until the late 1960s and mid 1970s it remained possible for appeals in such matters to be taken directly to the Privy Council from the decisions of the State Supreme Courts, bypassing the High Court. A contest between the High Court and the Privy Council for final interpretive authority in such matters therefore ensued, a contest which unavoidably involved the State supreme courts as well.

Already by 1904 there were decisions of the Privy Council and the High Court on the power of the Commonwealth Parliament to bind the States which appeared to contradict one another,[40] and it was necessary for the State Supreme Courts to decide between the two of them.[41] Early in the contest, the High Court insisted that there was actually no contradiction between its decisions and those of the Privy Council.[42] But when it became clear that there was indeed a divergence, a choice had to be made between the principles of interpretation adopted by the two courts.[43]

In a development which would prove to be of utmost significance for Australian openness to comparative constitutional law, the underlying contest of ideas was framed, not simply in terms of British versus Australian interpretations of the Constitution, but in terms of British versus American constitutional ideas and principles. In other words, although the contest of institutions was between the Privy Council and the High Court, the underlying contest of ideas was between British and American approaches to constitutional law. Such a contest could not help but engage wider questions than simply the jurisdiction of courts and the authoritativeness of their rulings. The question was one of fundamental principles of constitutional design. To what extent were they British, to what extent were they American? The answer to this question provided the answer to the question whether American or British cases were to be followed. Questions of hierarchy and derivation thus opened the way to questions of constitutional design and modelling.

B *Constitutional Design and Modelling*

Viewed in comparative terms, the Australian Constitution was essentially an amalgam of British and American constitutional ideas and practices, supplemented

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37 See the general discussions of these developments in R D Lumb, *The Constitutions of the Australian States* (5th ed, 1991); Gerard Carney, *The Constitutional Systems of the Australian States and Territories* (2006).

38 *Australian Constitution* s 74.

39 *Colonial Sugar Refining Co v Commonwealth* (1912) 15 CLR 182. See also *Western Australia v Hamersley Iron Pty Ltd (No 2)* (1969) 120 CLR 74.

40 Compare *Bank of Toronto v Lambe* (1887) 12 App Cas 575 and *D'Emden v Pedder* (1903) 1 CLR 91.

41 See *D'Emden v Pedder* (1903) 1 CLR 91, 111-12 (Griffith CJ).

42 *Deakin v Webb* (1904) 1 CLR 621, 626.

43 Compare *Webb v Outrim* [1907] AC 81 and *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087.

by the important contributions of Switzerland and Canada.[44] On the basis of English precedents and their own experience of responsible parliamentary government at a colonial level, the Australian framers drafted a constitution under which a system of parliamentary responsible government would develop at a federal level.[45] At the same time, however, the framers wished to construct a federal system, modelled on the United States and Switzerland, in which only limited legislative powers would be conferred upon the Commonwealth Parliament and the Parliament would consist of a comparatively powerful Senate in which the people of each constituent State were equally represented.[46] Canada provided an example of how federalism and responsible government might be combined, but the Australians considered the Canadian model to be too centralist and insufficiently federalist (in other words, too British), and opted instead for their own unique combination of responsible government and federalism.[47]

Many of the most significant constitutional cases that came before the High Court in its early years concerned federal aspects of the Constitution. And, because the Australian Constitution was in certain respects a rather uneasy mixture of federalism and responsible government, the contest over the meaning of Australian federalism involved a debate over the degree to which American ideas and American cases – over against British ideas and British cases – should shape the interpretation of the Constitution. Thus, the proposition that the Australian Constitution was more British than American surfaced in this connection as a means of rejecting, or at least playing down, the relevance of American precedents.

The framing of the contest in this way had profound implications for the development of Australian attitudes to comparative constitutional law. The entire debate was framed, not as question *whether* comparative law should or should not be used, but as to *which* body of comparative law should be applied. Since the Constitution was deliberately modelled upon both British and American precedents, it seemed (to all concerned) that it was quite consistent with the framers' expectations and the very structure and content of the document itself to turn to British or American case-law for guidance, depending upon the issue raised in any particular case. The question was: *which* body of cases, in respect of *which* issues?

In the very earliest of these cases, a High Court dominated by Griffith CJ, Barton and O'Connor JJ, while acknowledging the relevance of British principles and canons of statutory construction,[48] on questions of federalism turned for decisive guidance to American ideas and precedents. Decisions of the United States Supreme Court were cited frequently and at length.[49] The rationale for the use of these

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44 See, generally, Erling M Hunt, *American Precedents in Australian Federation* (1963); J A La Nauze, *The Making of the Australian Constitution* (1974); Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (2008) chs 3-4.

45 Thus, the executive power of the Commonwealth remained vested in the Queen, to be exercised in Australia by a Governor-General, who would be expected to act on the advice of Ministers chosen from and accountable to the federal Parliament. See *Australian Constitution* ss 1, 61, 64.

46 *Australian Constitution* ss 7, 51, 52.

47 See Brian Galligan, *A Federal Republic: Australia's Constitutional System of Government* (1995); Aroney, above n 44, chs 7-8.

48 See *Tasmania v Commonwealth* (1904) 1 CLR 329, 339 (Griffith CJ), 346 (Barton J), 358-9 (O'Connor J).

49 *D'Emden v Pedder* (1903) 1 CLR 91, 113-16 (Griffith CJ), quoting from *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819) (Marshall CJ) over four consecutive pages of the Commonwealth Law Reports.

precedents was at least twofold. First, it was simply observed that the text and structure of the two constitutions was in many important respects either identical or so substantially similar that decisions interpreting the earlier American Constitution could not but provide relevant guidance.[50] Second, there was an abiding awareness that the framers of the Australian Constitution had deliberately modelled the document on the American precedent and expected it to be interpreted in like manner.[51] After all, Griffith CJ, Barton and O'Connor JJ had themselves been prominent participants in the Federal Conventions of the 1890's at which the Constitution was drafted.

In these cases it was reasoned that the Australian Constitution followed the structure of the American in conferring only limited powers upon the Commonwealth and reserving the remainder to the States, and that in considering the scope of the powers conferred upon the Commonwealth regard should be had, not only to the positive terms in which those powers were defined, but also to the powers reserved to the States.[52] Likewise, it was considered that the federal design of the Constitution was to preserve the States as independent self-governing communities alongside the Commonwealth, and that as a consequence of this, as had been decided by American courts, neither the Commonwealth nor the States should be allowed to interfere with the governing institutions of the other.[53]

However, Isaacs and Higgins JJ did not agree.[54] As participants in the federal conventions at which the Australian Constitution was drafted, Higgins and Isaacs had wished to see emerge an Australian Constitution much less federal (in the American sense) and significantly more parliamentary (in the British sense) than in fact had emerged. And as justices of the High Court, they sought to interpret the Constitution in the light of British constitutional principles and approaches to statutory interpretation. But it was not until 1920, in the landmark *Engineers* case – after the appointment of a new generation of justices to replace Griffith CJ, Barton and O'Connor JJ – that the views of Isaacs and Higgins JJ at last prevailed.[55]

Central to the reasoning in *Engineers* were three related propositions, all of them British in orientation. Against the idea that the Australian Constitution was fundamentally federal in character, it was insisted that the Constitution's central organising principle was the quintessentially British institution of parliamentary responsible government.[56] Against the view that the Commonwealth and the States

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50 *D'Emden v Pedder* (1903) 1 CLR 91, 111.

51 Compare, much later, *Attorney-General (Vict); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 601-3 (Gibbs J), 609-10 (Stephen J), 652 (Wilson J), discussed below.

52 The precise reasoning was somewhat more complex than this. For a more detailed explanation, see Nicholas Aroney, 'Constitutional Choices in the Work Choices Case, or What Exactly is Wrong with the Reserved Powers Doctrine?' (2008) 32(1) *Melbourne University Law Review* (in press). The key cases were: *Peterswald v Bartley* (1904) 1 CLR 497; *R v Barger* (1908) 6 CLR 41; *Attorney-General for NSW v Brewery Employees Union of NSW* (1908) 6 CLR 469; *Huddart Parker and Co Pty Ltd v Moorehead* (1909) 8 CLR 330.

53 *D'Emden v Pedder* (1904) 1 CLR 91; *Sydney Municipal Council v Commonwealth* (1904) 1 CLR 208; *Deakin v Webb* (1904) 1 CLR 585; *Commonwealth v NSW* (1906) 3 CLR 807; *Federated Amalgamated Governmental Railway and Tramway Service Association v New South Wales Railway Traffic Employees Association* (1906) 4 CLR 488; *Baxter v Commissioners of Taxation (NSW)* (1907) 4 CLR 1087.

54 See Nicholas Aroney, 'The Griffith Doctrine: Reservation and Immunity' in Michael White and Aladin Rahemtula (eds), *Queensland Judges on the High Court* (2003) 219.

55 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129.

56 Ibid 146-8.

were to be seen as essentially independent governments, it was urged that it is a fundamental principle of British imperial law that the Crown is one and indivisible throughout the empire.[57] And against the suggestion that the Constitution should be interpreted in the light of American ideas and principles, it was insisted that the Constitution is to be interpreted according to the ordinary principles of statutory construction developed by English courts, which principles instruct the courts to interpret the language of the statute according to its ordinary meaning and sense, without any weight being given to the personal hopes or expectations of its framers.[58]

This turn to British political ideas and principles did not only mean embracing the approach to statutory interpretation that had been adopted by the Privy Council. It also meant embracing a series of decisions of the Privy Council on the interpretation of the Canadian Constitution.[59] Just as the Privy Council had established that the colonial legislatures possessed plenary powers analogous to those of the Imperial Parliament,[60] so now decisions of the Privy Council emphasising the sovereignty of each legislature within its jurisdiction were used to draw the conclusion that the legislative powers of the Commonwealth must be construed as widely as the language used could possibly allow, and that they should not be cut down in view of any set of powers putatively reserved to the States, nor in terms of any supposed immunity from federal legislation enjoyed by the State governments.[61]

The *Engineers* case set the scene for constitutional interpretation for many years thereafter and is still probably the most significant decision brought down by the High Court.[62] Statistical analyses suggest that the use of comparative jurisprudence by the High Court declined during the decades that followed.[63] This may have in part been due to the availability of a growing body of Australian constitutional decisions, but this cannot be the whole story. During this period the High Court developed, for example, the idea that the separate treatment of the legislative, executive and judicial

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57 Ibid 146.

58 Ibid 148-9, citing *Grey v Pearson* (1857) 6 HLC 61; 10 ER 1216; *Sussex Peerage Case* (1844) 11 Cl & Fin 85; 8 ER 1034; *Vacher's Case* [1913] AC 107; *Inland Revenue Commissioners v Herbert* [1913] AC 326; *R v Burah* (1878) 3 App Cas 889.

59 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 149-50, citing *Attorney-General for Ontario v Attorney-General for Canada* [1912] AC 571; *Bank of Toronto v Lambe* (1887) 12 App Cas 575. See also *Engineers* (1920) 28 CLR 129, 154, citing *Compagnie Hydraulique v Continental Heat and Light Co* [1909] AC 194. I refer here to the Canadian Constitution, although technically the relevant legal instrument was the *British North America Act 1867* (Imp).

60 *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117, discussed above.

61 *Engineers* (1920) 28 CLR 129, 151, citing *Bank of Toronto v Lambe* (1887) 12 App Cas 575, 586-7.

62 Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (1967) 30; Leslie Zines, *The High Court and the Constitution* (4th ed, 1997) 8. Compare, however, *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 78 (Dixon J). See, also, Leslie Zines, 'Changing Attitudes to Federalism and its Purpose' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (2003) 86, 88.

63 Nessen, above n 4; Brian Opeskin, 'Australian Constitutional Law in a Global Era' (Paper presented at the A Celebration of a Federation – The Australian Constitution in Retrospect and Prospect, Perth, 21-23 September 2001); Anthony Mason, 'The High Court of Australia: A Personal Impression of Its First 100 Years' (2003) 27 *Melbourne University Law Review* 864, 873-4.

powers of the Commonwealth in discrete chapters of the Constitution implied a kind of *separation of powers*, especially of the judicial power. Now, it is clear that in this respect, the Australian Constitution was modelled upon the United States Constitution.[64] Thus, if ever there was an instance where recourse to American cases was justified, it was this. However, when concluding that the treatment of the three branches of government in this way implied a separation of powers, the Court insisted, rather, that the principle was to be inferred from 'an independent consideration' of the text and structure of the Constitution alone, 'unaided by any such knowledge' of the American Constitution and American cases.[65] Consistent with the general thrust of *Engineers*, comparative law of an American kind was thus discreetly avoided.

And yet, even during the middle part of the twentieth century, comparative constitutional law derived from the American Supreme Court figured in some of the most significant cases of the period. In *Melbourne Corporation v Commonwealth*, for example, which re-established a modified intergovernmental immunities doctrine, American decisions were very prominent.[66] Similarly, in *Australian Communist Party v Commonwealth*, the principle of judicial review, established in the United States in *Marbury v Madison*, was said to be axiomatic in Australian

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64 *Victorian Stevedoing & General Contracting Co Pty Ltd v Dignan* (1931) 46 CLR 73, 89 (Dixon J).

65 Ibid 96 (Dixon J). See also *New South Wales v Commonwealth* (1915) 20 CLR 54, 90 (Isaacs J); *Re Judiciary and Navigation Acts* (1921) 29 CLR 257, 264 (Knox CJ, Gavan Duffy, Powers, Rich and Starke JJ); *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275-6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ); *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 26-7 (Brennan, Deane and Dawson JJ); *Polyukhovich v Commonwealth* (1991), 172 CLR 501, 606-7 (Deane J). For doubts about this conclusion, see *R v Joske; Ex Parte Australian Building Construction Employees & Builders Labourers Federation* (1974) 130 CLR 87, 90 (Barwick CJ). It needs to be noted that Isaacs J adopted the words of Marshall CJ to describe the distinct roles of each branch of government ('the legislature makes, the executive executes, and the judiciary construes the law'): see *New South Wales v Commonwealth* (1915) 20 CLR 54, 90 (Isaacs J), citing *Waymen v Southard*, 23 US (10 Wheat) 1, 46 (Marshall CJ) (1825). See also the passing references to the American model in *R v Kirby; Ex parte Boilermakers' Society of Australia* (1956) 94 CLR 254, 275-6 (Dixon CJ, McTiernan, Fullagar and Kitto JJ).

66 *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 47, 50, 53, 56-61 (Latham CJ), 70-2, 74-5 (Starke J), 81, 83 (Dixon J), citing more than a dozen US cases, including *McCulloch v Maryland*, 17 US (4 Wheat) 316 (1819); *Osborn v Bank of United States*, 22 US 738 (1824); *Collector v Day*, 78 US 113 (1870); *Graves v New York*, 306 US 466 (1939); *Helvering v Gerhardt*, 304 US 405 (1938); *New York v United States*, 326 US 572 (1946). Compare *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 67 (Rich J, concurring), stating that it is 'interesting, although by no means conclusive, and in a sense perhaps hardly relevant, that in the federation of the United States of America there has been a somewhat similar development in constitutional law'. Justice Rich there relied instead upon two Privy Council decisions concerning Canada: *Attorney-General for Canada v Attorney-General for Quebec* (1947) AC 33; *Attorney-General for Alberta v Attorney-General for Canada* (1939) AC 117. Note also *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 90-1 (McTiernan J, dissenting), relying upon *R v Burah* (1878) 3 App Cas 889; *Hodge v R* (1883) 9 App Cas 117; *Attorney-General for Canada v Cain* [1906] AC 542. For a detailed discussion, see Sackville, above n 2.

constitutional law.[67] Other highly significant cases in which American cases were especially conspicuous during this era included *Australian National Airways Pty Ltd v Commonwealth*,[68] *Attorney-General (Vic); Ex rel Dale v Commonwealth*,[69] *Bank of New South Wales v Commonwealth*[70] and *Hughes and Vale Pty Ltd v New South Wales (No 2)*.[71]

Thus, even in the post-*Engineers* environment, the Court remained faced with the question whether in any particular case it would expressly take into consideration foreign decisions. Deciding in *which respects* the Australian Constitution could usefully be understood in the light of British and American principles and approaches to interpretation soon engaged the High Court, not simply in debate over models and modelling, but in a dialogue in which the reasoning of foreign courts – from potentially any jurisdiction – had to be assessed for its relevance and applicability, as well as for its currency and persuasiveness.[72]

C *Dialogic Analysis*

Although the High Court has in recent years become increasingly open to the citation of foreign cases from a range of countries, British and American case-law has remained easily the most common. Generally speaking, the next most prevalent have been decisions of other countries within or to some extent associated with the British Commonwealth, most notably Canada, India, South Africa and Ireland, followed lastly by jurisprudence of European civil law countries, especially Germany, and the European Union.[73]

Advocates and judges generally have little time and resources to engage in sophisticated and detailed comparative analysis, and comparative dialogue has for this reason tended to be selective and occasionally superficial. Nonetheless, by piecing together the sometimes isolated treatments in the case-law it is possible to reconstruct a general picture of the ways in which analytical dialogue has occurred.

In reconstructing this picture, it is convenient to begin with accounts of the ultimate source or sources of the Constitution. Here there is a consciousness that the origins and development of each constitutional system has its own peculiarities, and that comparative law must be used with care.[74] In particular, it has been recognised that American constitutional law developed separately from the rest of the common law world as a result of its revolutionary repudiation of the authority of the British Parliament and Crown in the late eighteenth century, and that this sets it apart from the constitutional law of Australia.

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67 *Australian Communist Party v Commonwealth* (1951) 83 CLR 1, 262-3 (Fullagar J), citing *Marbury v Madison*, 5 US (1 Cranch) 137 (1803). See also Owen Dixon, 'Marshall and the Australian Constitution' in *Jesting Pilate and other Papers and Addresses* (1965) 203, 174

68 *Australian National Airways Pty Ltd v Commonwealth* (1945) 71 CLR 29.

69 *Attorney-General (Vic.); Ex rel Dale v Commonwealth* (1945) 71 CLR 237.

70 *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

71 *Hughes and Vale Pty Ltd v New South Wales (No 2)* (1955) 93 CLR 127.

72 Anthony Mason, 'Future Directions in Australian Law' (1987) 13 *Monash University Law Review* 149, 154.

73 Nessen, above n 4.

74 See *D'Emden v Pedder* (1903) 1 CLR 91, 112 (Griffith CJ); *West v Commissioner of Taxation (NSW)* (1937) 56 CLR 657, 679 (Dixon J); *Attorney-General (Aust); Ex rel McKinlay* (1975) 135 CLR 1, 23-4 (Barwick CJ), 36-7 (McTiernan and Jacobs JJ), 45-6 (Gibbs J), 57 (Stephen J), 62-3 (Mason J).

One application of this in Australian constitutional law has concerned the question whether the Australian Constitution is to be understood to be the result of a federal compact between constituent States, a statute of the Imperial Parliament or a social contract founded upon the sovereignty of the Australian people.[75] Regarding the Australian Constitution as a kind of federal compact was informed by the experience of the federating process, itself inspired by early American experience.[76] In the *Engineers* case, on the other hand, the turn to British canons of interpretation was premised upon the fact that the Australian Constitution, like the Canadian, is contained within a statute of the British Parliament.[77] More recently, members of the High Court have shifted the debate again with the suggestion that the Australian Constitution derives its legitimacy and perhaps even its binding force from the Australian people, a development again inspired by the American example.[78] Although there is a sense in which the general tenor of the High Court's jurisprudence has shifted in this way from federal compact through imperial statute to popular sovereignty, it is widely acknowledged that the Constitution bears all three characteristics at least to some degree and that the integration of these three aspects is a complex undertaking.[79]

Closely related to these matters has been the question of rights, both explicit in the text of the Constitution and implied by its underlying structures and principles. The British tradition is one of parliamentary sovereignty, and drawing on this tradition, the Australian framers declined to insert much in the way of explicit rights provisions into the Constitution.[80] Indeed, most of what was entrenched concerned the body of principles which had been established in England as a result of the Glorious Revolution of the seventeenth century.[81] On the other hand, the American tradition includes a strong emphasis on constitutionally entrenched individual rights, enforced by the judiciary. Thus, while the First Amendment to the United States Constitution contains guarantees of free speech, free press, free exercise of religion

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75 James A Thomson, 'The Australian Constitution: Statute, Fundamental Document or Compact?' (1985) 59 *Law Institute Journal* 1199; Geoffrey Lindell, 'Why is Australia's Constitution Binding? – The Reasons in 1900 and Now, and the Effect of Independence' (1986) 16 *Federal Law Review* 29; Simon Evans, 'Why is the Constitution Binding? Authority, Obligation and the Role of the People' (2004) 25 *Adelaide Law Review* 103.

76 *Colonial Sugar Refining Co Ltd v Attorney-General for the Commonwealth* (1912) 15 CLR 182, 194 (Griffith CJ); *Buchanan v Commonwealth* (1913) 16 CLR 315, 327 (Barton ACJ); *Melbourne Corporation v Commonwealth* (1947) 74 CLR 31, 82 (Dixon J), 99 (Williams J).

77 *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, 148-54 (Knox CJ, Isaacs, Rich and Starke JJ); 161-2, 165 (Higgins J).

78 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 138 (Mason CJ); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104, 171, 173 (Deane J); *McGinty v Western Australia* (1996) 186 CLR 140, 230 (McHugh J).

79 See, eg, *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 180-1 (Dawson J); *McGinty v Western Australia* (1996) 186 CLR 140, 274-5 (Gummow J). For a comparative discussion, see Peter C Oliver, *The Constitution of Independence: The Development of Constitutional Theory in Australia, Canada and New Zealand* (2005).

80 Jeffrey Goldsworthy, 'The Constitutional Protection of Rights in Australia' in Gregory J Craven (ed), *Australian Federation: Towards the Second Century* (1992) 151. See also *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 182-3 (Dawson J), 228-9 (McHugh J).

81 Nicholas Aroney, *Freedom of Speech in the Constitution* (1998) 55-6.

and a prohibition upon religious establishments, the Australian framers deliberately chose to adopt the religion clauses of the First Amendment (in s 116 of the Australian Constitution), but just as deliberately chose not to adopt the free speech aspects. [82] Nonetheless, in 1992 the High Court found that the Australian Constitution, in providing for a system of representative government, by implication requires that communications of a political nature must be free from illegitimate legislative or executive interference.[83] Debate over the nature and scope of both s 116 and this implied freedom has involved a significant, extended dialogic exchange with the constitutional law of other countries, most prominently the United States, Canada and the United Kingdom, but others as well.

Section 116 is very closely modelled upon language of the First Amendment religion clauses,[84] and in cases on s 116 American decisions have been cited at length. For example, in *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) decisions of the US Supreme Court on the First Amendment were used to establish the proposition that the right to the free expression of religion does not prevent legislation which imposes justifiable restrictions upon antisocial behaviour.[85] *Attorney-General (Vict); Ex rel Black v The Commonwealth* (1981) in turn evinced a sharp difference of opinion between Murphy J and the rest of the Court. Justice Murphy argued that the High Court ought to follow a line of American cases decided since the 1940s in which the non-establishment clause had been interpreted to impose a strict separation between church and state preventing all forms of government support and assistance to religion.[86] However, a majority of the Court distinguished the American decisions on the ground of the slightly different wording of the Australian provision[87] and that at the time that the Australian Constitution was

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82 There is a similar selective adaptation of the American provisions relating to trial by jury (see *United States Constitution* art III(2) and amend V, VI and VII; *Australian Constitution* s 80) and the acquisition of property on just terms (see *United States Constitution* amend V; *Australian Constitution* s 51(xxxi)). This selective adaptation and its implications for interpretation is discussed, for example, in *R v Federal Court of Bankruptcy; Ex parte Lowenstein* (1938) 59 CLR 556, 580-4 (Dixon and Evatt JJ); *Minister for the Army v Dalziel* (1944) 68 CLR 261, 291 (Starke J), 294-5 (McTiernan J); *Grace Bros Pty Ltd v Commonwealth* (1946) 72 CLR 269, 290-1 (Dixon J). Contrast, however, *Newcrest Mining (WA) Limited v Commonwealth* (1997) 190 CLR 513, 147-51 (Kirby J), interpreting s 51(xxxi) in the light of Magna Carta, the Universal Declaration of Human Rights, the French Declaration of the Rights of Man and of the Citizen and the Constitutions of the United States, India, Malaysia, Japan and South Africa.

83 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

84 The First Amendment provides: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof …' Section 116 provides: '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.'

85 *Adelaide Company of Jehovah's Witnesses v Commonwealth* (1943) 67 CLR 116, 127-31 (Latham CJ).

86 *Attorney-General (Vict); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 625-33 (Murphy J), citing *Everson v Board of Education*, 330 US 1 (1947) among other American decisions.

87 *Attorney-General (Vict); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 579 (Barwick CJ), 609 (Stephen J), 615 (Mason J), 653 (Wilson J). The First Amendment prohibits laws 'respecting an establishment of religion'. Section 116 prohibits laws 'for establishing any religion'.

drafted, the non-establishment clause had been interpreted in the United States only to prohibit the establishment of a state church or the privileging of one denomination over another.[88]

Comparative law was also very prominent in a line of cases in which the implied freedom of political communication was first developed, beginning with *Australian Capital Television Pty Ltd v Commonwealth* (1992) and *Nationwide News Pty Ltd v Wills* (1992) and culminating in *Theophanous v Herald & Weekly Times Ltd* (1994).[89] The reasoning in the first two of these cases involved three steps: first, it had to be established that a constitutional guarantee of freedom of political communication was indeed implied by the Constitution; second, it was necessary to define the scope of the freedom and the limits of its operation; and, third, the tests devised in the second step had to be applied to the facts and legislation before the Court.[90] *Theophanous*, which was premised upon the two earlier decisions, further held that the constitutional guarantee operated, not only in relation to legislative and executive government interference with political communication, but also in respect of areas of the common law regulating the interactions of private citizens and organisations, such as the law of defamation.

In the course of its reasoning, a majority of the Court relied upon several bodies of comparative law derived from a range of jurisdictions, which were marshalled strategically in response to each of the issues that had to be addressed. As far as the first step in the reasoning was concerned (the initial derivation of the implied freedom), most significant among these were a series of Canadian decisions in which a similar freedom of political communication had been found to be implied by the Canadian Constitution.[91] These cases were especially helpful to the Court because, prior to the introduction of the Charter of Rights and Freedoms in 1982, the Canadian Constitution, like the Australian, did not contain a bill of rights. In a dialogical engagement with these decisions, the High Court considered that 'by parity of reasoning' a similar freedom should be inferred from the Australian Constitution.[92]

In relation to the second, third and fourth issues (the scope of the freedom, the limits of its operation, and its application to the common law of defamation) comparative law was also used, but in a significantly different way. Even if it is conceded that, in a sense, the Australian Constitution contains an implied freedom of political communication, it is difficult to see how the provisions of the Constitution provide much in the way of guidance as to the precise scope of that freedom and the

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88 *Attorney-General (Vict); Ex rel Black v Commonwealth* (1981) 146 CLR 559, 601-3 (Gibbs J), 609-10 (Stephen J), 652 (Wilson J).

89 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1; *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104. For a close analysis of the use of comparative law in these cases, see Saunders, above n 4.

90 Each of these steps itself involved its own series of inferences and argument. See Aroney, above n 81, ch 4.

91 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 140-1 (Mason CJ), 211-12 (Gaudron J); *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 47-50 (Brennan J), 79 (Deane and Toohey JJ), 103 (McHugh J), citing *Re Alberta Legislation* [1938] SCR 100; *Switzman v Elbling* [1957] SCR 285; *Re Ontario Public Service Employees' Union and Attorney-General (Ontario)* [1987] 2 SCR 2; *Retail, Wholesale & Department Store Union, Local 580 v Dolphin Delivery Ltd* [1986] 2 SCR 573, as well as several English, American and European decisions.

92 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1, 50 (Brennan J).

limits of its operation.[93] And yet, the Court found it necessary to identify a specific test to be applied when deciding whether a law unconstitutionally interferes with the freedom. Because the Constitution provided very little guidance on this point, the Court had to turn to other sources, including various political ideas and theories, the practices of democratic nations and the case-law of other countries.

However, the case-law on the question provided mixed guidance. Thus, on one hand, it was possible to cite decisions of the US Supreme Court in support of a categorical approach in which 'strict scrutiny' is applied to laws which directly interfere with political communication.[94] On the other hand, however, it was also possible to cite decisions of European courts in support of the proposition that Parliaments should be accorded a 'margin of appreciation'.[95] Likewise, on the question of the common law of defamation, it was possible to adopt the strong emphasis on free speech laid down by the US Supreme Court in *New York Times v Sullivan*, or alternatively the greater emphasis on the protection of personal reputation in the Canadian decision of *Hill v Church of Scientology* and the South African decision of *Du Plessis v De Klerk*.[96] As it turned out, a majority of the High Court tended to the American approach on both counts.

In reasoning in this way about the nature of the freedom, the scope of permissible regulation and the impact of the implied freedom on the law of defamation, a different kind of comparative constitutional law entered the Court's jurisprudence, one which tends to use comparative materials, not so much to provide guidance for the interpretation of specific texts or particular structural relationships between institutions, but rather to provide examples of how other jurisdictions approach the resolution of common problems of social ordering. In this kind of reasoning, while a kind of dialogic analysis of texts and structures is usually still undertaken,[97] the use of comparative materials is nonetheless largely freed from the limits imposed by hierarchy and modelling and is concerned, rather, with an open-ended inquiry into how the subject matter at hand could best be regulated.[98] And it is

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93 Adrienne Stone, 'The Limits of Constitutional Text and Structure' (1999) 23 *Melbourne University Law Review* 668.

94 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 143-4 (Mason CJ), citing *Konigsberg v State Bar of California*, 366 US 36 (1961); *Monitor Patriot Co v Roy*, 401 US 265 (1971); *Buckley v Valeo*, 424 US 1 (1975); *Cox Broadcasting Corp v Cohn*, 420 US 469 (1975).

95 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, 159 (Brennan J), citing the European Court of Human Rights in *The Observer and the Guardian v United Kingdom* (1991) 14 EHHR 153. See also Brennan J's judgment at 154-5, citing *X and the Association of Z v United Kingdom* (European Commission of Human Rights, 12 July 1971) and noting the practice in countries such as Denmark, Ireland, Japan, The Netherlands and Sweden.

96 *New York Times v Sullivan*, 376 US 254 (1964); *Hill v Church of Scientology* [1995] DLR 129; *Du Plessis v De Klerk* 1996 (3) SA 850 (CC). See Saunders, above n 4, 58.

97 Eg, *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 119-20 (Kirby J).

98 Contrast Saunders, above n 4, 73-4, arguing that the approach adopted by the Court in these cases remained largely dialogical and not functionalist. The difference is one of definition. Professor Saunders' conclusion is based on a relatively narrow conception of functionalism which, 'at its extreme', is defined as 'the transfer of a legal solution from one country to another'. When defined in this way, the High Court's methodology is indeed dialogic and not functionalist. However, when functionalism is defined more widely, to include the use of comparative materials to provide guidance about how common problems of social ordering are to be resolved, the Court's methodology in this area has definite functionalist characteristics, albeit tempered by dialogic exchange.

this essentially functionalist use of comparative constitutional law that has proved to be the most controversial in Australian constitutional law. Not only has it produced divergent results among the judges, but its very use has been contested.[99]

D *Pragmatic Functionalism*

The troubled path of functionalist comparative law in Australian constitutional jurisprudence is well illustrated in the case-law following *Theophanous*. The High Court's decisions in *McGinty v Western Australia* and *Lange v Australian Broadcasting Corporation* provide perhaps the best examples of what appears to have been a repudiation of functionalism in this sense, at least in the context of the implied freedom of political communication.[100]

The Australian Parliament is modelled upon the American Congress both as to its institutional structure and in terms of the specific language used to define its nature and composition.[101] In particular, both Constitutions stipulate that the House of Representatives is to be composed of members 'chosen by the people' of the entire federation, whereas the Senate is to be composed of Senators chosen by the people of each State. Now, in the United States, the Supreme Court, breaking with previous cases, has held that the idea of a legislature 'chosen by the people' meant that congressional electoral districts must be designed so as to ensure that they contain as nearly as practicable equal numbers of people.[102] Some decades later, in two important High Court cases, *Attorney-General (Aust); Ex rel McKinlay* (1975) and *McGinty v Western Australia* (1996), it was argued that the High Court should conclude that the Australian Constitution similarly requires that electoral districts be as nearly as practicable equal in population.[103]

The cases presented an opportunity for the use of comparative constitutional law in more than one mode. The fact that the relevant Australian provision was deliberately modelled on the American precedent provided a fundamental rationale for the use of American cases in its interpretation. However, the fact that the Australian Constitution embodies both British and American principles and practices gave reason to undertake a dialogic analysis of the Australian and American Constitutions in which layers of similarity and difference on this point might be identified. Moreover, the advent of a more functionalist outlook in *Australian Capital Television*, *Nationwide News* and *Theophanous* suggested that American and other foreign cases might be used, further, as examples of ways in which the general problem of electoral apportionment should be addressed.

In his dissenting judgment in *McKinlay*, Murphy J concluded that the number of people in each federal electorate must be 'as nearly as practicable equal', to the point

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99 Notably, McHugh J, although he joined the majority in *Australian Capital Television Pty Ltd v Commonwealth*, did not cite as many foreign cases (although see at 240-1), relying rather on arguments from the text and the structure of the Constitution and Australian case-law. On McHugh J's approach generally, see Nicholas Aroney, 'Justice McHugh, Representative Government and the Elimination of Balancing' (2006) 28 *Sydney Law Review* 505.

100 *McGinty v Western Australia* (1996) 186 CLR 140; *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520.

101 *United States Constitution* art I, s 2; *Australian Constitution* s 24; *Constitution Act 1889* (WA) s 73(2)(c).

102 *Wesberry v Sanders*, 376 US 1 (1964).

103 For more detail, see Aroney, above n 8.

of a 'good faith attempt at precise mathematical equality'.[104] Prominent in his reasoning were the several American decisions on the question.[105] However, a majority in both *McKinlay* and *McGinty* rejected the argument on several grounds, some of the justices appealing to Australia's historical relationship to and continuity with British traditions and practices, others engaging in a close, dialogical comparison of texts and structures, all of them limiting the scope of any open-ended appeal to comparative constitutional law in merely functionalist terms.

Thus, first, the constitutional history of Australia and Canada was distinguished from that of the United States. In *McKinlay*, it was emphasised that the American colonies had deliberately revolted against British authority and developed their distinctive institutions and methods of government, whereas Australia and Canada continued to acknowledge the sovereignty of the British Parliament and had reposed profound confidence in parliamentary institutions as means of protecting personal liberties.[106] In *McGinty*, it was similarly noted that the evolution of representative government in the United States had taken a different path to that of Australia and Canada, and that the Canadian cases provided more relevant guidance.[107]

Second, it was pointed out by the majorities in both cases that the Australian Constitution is contained in an Act of the British Parliament and is therefore to be interpreted, not by reference 'to slogans or to political catch-cries or to vague and imprecise expressions of political philosophy', but rather according to a methodology of 'strict and complete legalism', by which was meant a close attention to the text of the Constitution, read as an entire document and in light of the historical context in which it had been made.[108] Against the tendency in *Theophanous* to reason on the basis of a 'free-standing' conception of representative democracy, the importance of judicial restraint and fidelity to the text of the Constitution over and against judicially-devised implications was particularly underscored.[109]

Third, and finally, members of the Court engaged in a close, dialogical analysis of the relevant provisions and structures of the Australian and American Constitutions which suggested that the Australian framers had constructed a scheme in which the principle of representative democracy had been adapted to the principle of federalism, placing a far-reaching set of qualifications upon the idea of individual equality of voting power, and giving reason to reject the applicability of the American decisions on this issue.[110]

Lange v Australian Broadcasting Corporation, decided a year after *McGinty*, represented another important repudiation of a purely functionalist approach to comparative constitutional law. In *Theophanous*, as noted above, a majority of the High Court had depended very heavily on decisions of the US Supreme Court concerning the relationship between the principle of free speech and the law of defamation. In *Lange*, however, the Court in a rare unanimous judgment, rejected

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104 *Attorney-General (Aust); Ex rel McKinlay* (1975) 135 CLR 1, 70 (Murphy J).

105 Ibid 66-7 (Murphy J), citing *Wesberry v Sanders*, 376 US 1 (1964); *Kirkpatrick v Preisler*, 394 US 526 (1969); *Wells v Rockefeller*, 394 US 542 (1969); *White v Weiser*, 412 US 783 (1973); *Karcher v Daggett*, 462 US 725 (1983).

106 *Attorney-General (Aust); Ex rel McKinlay* (1975) 135 CLR 1, 23-4 (Barwick CJ), 36-7 (McTiernan and Jacobs JJ), 45-6 (Gibbs J), 57 (Stephen J), 62-3 (Mason J).

107 *McGinty v Western Australia* (1996) 186 CLR 140, 186-8 (Dawson J), 202-4 (Toohey J), 229, 246-8 (McHugh J), 267-9 (Gummow J).

108 *Attorney-General (Aust); Ex rel McKinlay* (1975) 135 CLR 1, 17 (Barwick CJ).

109 *McGinty v Western Australia* (1996) 186 CLR 140, 168-71 (Brennan CJ), 184-5 (Dawson J), 230-6 (McHugh J).

110 Ibid 236-40, 243-5 (McHugh J), 266-7, 269-78, 291-2 (Gummow J).

the reasoning and conclusions developed in *Theophanous* and established in their stead a more constrained approach to constitutional interpretation and the use of comparative constitutional law.[111]

The basis for the repudiation of the functionalism of *Theophanous* was essentially to be found in the Court's insistence that the implied freedom could only legitimately be based upon the text and structure of the Constitution and not upon any 'free-standing' concept of representative democracy derived from extraneous 'political principles or theories'.[112] This principle had a significant effect on the way in which the Court in *Lange* interacted with comparative jurisprudence in its reasoning. Thus, while it is true that at one stage in the judgment a series of American decisions were discussed at some length, the point of the discussion was to demonstrate that the context in which American constitutional law had developed was fundamentally different from the Australian context.[113]

Functionalism is not particularly concerned with the justification of the use of comparative jurisprudence in terms of such criteria as text, structure and original understandings. Functionalism looks to the experience of other countries for suggestions about how common problems of social ordering can be addressed. It has its place where a decision-making body has to undertake an open-ended inquiry into the resolution of some particular practical issue. However, in *Lange*, the High Court of Australia abstained from a functionalist adaptation of the constitutional law of the United States on the ground that the scope and meaning of the implied freedom of political communication must be determined solely and strictly in terms of the text and structure of the Australian Constitution.

Whether the High Court has successfully extricated itself from a functionalist imperative to discover 'solutions' to the problem of applying the tests laid down in *Lange* is another matter.[114] There is evidence in the cases following *Lange* to suggest that, on one hand, some justices are wishing to contain the application of the implied freedom and its tests within the rubric of the text and structure of the Constitution,[115] while others are not so constrained,[116] a pattern evident in other areas of the law as well.[117]

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111 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 574.

112 Ibid 566-7.

113 Ibid 562-4, pointing out that in Australia there is a single body of common law applying in all of the States and developed by the High Court as the final Court of Appeal in Australia, whereas in the United States the Supreme Court does not have a general appellate jurisdiction and must adopt in each case the common law of the particular State in question.

114 Adrienne Stone, 'The Limits of Constitutional Text and Structure Revisited' (2005) 28 *University of New South Wales Law Journal* 842.

115 See *Coleman v Power* (2004) 220 CLR 1, 30-2 (Gleeson CJ), 43-53 (McHugh J), 75-6 (Gummow and Hayne JJ), 109-14 (Callinan J), 119-27 (Heydon J), none of whom cite foreign judgments when specifically discussing the nature and application of the *Lange* test.

116 See *Coleman v Power* (2004) 220 CLR 1, 81 (Kirby J), citing foreign judgments at length.

117 Compare *Forge v Australian Securities and Investments Commission* (2006) 228 CLR 45, 139-40 (Heydon J); *Al-Kateb v Godwin* (2004) 219 CLR 562, 616, 618-19 (Kirby J).

IV CONCLUSIONS

It is sometimes said that the Australian High Court is open to comparative constitutional jurisprudence in a way and to an extent much greater than the US Supreme Court. This is a half-truth. While proportionately more comparative case-law can be found in judgments of the High Court compared to those of the Supreme Court, when the rationales justifying the use of comparative jurisprudence are examined, the differences in attitude are not so great. Both Courts are entirely open to the use of comparative law in the form of the traditional principles of the common law enunciated by English courts.[118] No judges in either Court seriously object to comparisons being drawn between their respective constitutions and the constitutional models to which the framers of their respective constitutions looked for guidance.[119] The US Constitution embodies many historic principles of English constitutional law, and so the US Supreme Court has looked to the decisions of English courts for guidance in this respect. However, the US Constitution was at the same time drafted as a conscious departure from certain characteristics of the English constitution (as well as other constitutional models), and in those respects the US Supreme Court has forged its own direction. On the other hand, the Australian Constitution was not only modelled on many historic principles of English constitutional law, but also upon the British practice of parliamentary responsible government, as well as the federal Constitutions of countries such as the United States, Switzerland and Canada. The High Court of Australia has, in this context, had good reason to look to judicial decisions on these constitutions for guidance.

Similarly, all judges in both Courts appear to be willing to engage in dialogical analysis, at least where this is understood to mean a careful process of examining the constitutional law of other countries in order to identify whether or not appropriate analogies exist – indeed, if only to show that they do not exist.[120] It is, rather, the open-ended, functionalist use of comparative constitutional that is controversial, in *both* countries, especially when used in a way that can be said to divert the Court's attention from its responsibility to remain faithful to the text and structure of a Constitution which owes its legitimacy to sources and principles internal to the country concerned.

The history and context of the Australian and American Constitutions is different, and it is this which makes the difference so far as the use of comparative constitutional law is concerned. Unlike the United States, Australian independence from the United Kingdom has developed gradually, and Australia has maintained many of its constitutional links with the United Kingdom and the British Commonwealth. Further, the Australian Constitution was drafted much later in time than the American, and was in various respects deliberately modelled on the American, Canadian, Swiss and British systems.[121] These two factors have provided strong grounds for the use of comparative constitutional law in Australia in ways and to an extent that is simply not applicable in United States. It is this difference in

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[118] Antonin Scalia, 'Foreign Legal Authority in the Federal Courts' (2004) 98 *American Society of International Law Proceedings* 305, 306, referring to his judgment in *Crawford v Washington*, 541 US 36 (2004).

[119] *Printz v United States*, 521 US 898, 921 n 11 (1997) (Scalia J).

[120] Ibid.

[121] See, likewise, Jeffrey Goldsworthy, 'Conclusions' in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (2006) 321, 342.

context and history, and not judicial attitudes to the legitimacy of comparative constitutional law, which has been the decisive factor.