THE NEW CONSTITUTIONAL SCHOLARSHIP IN AUSTRALIA

THE HON CHIEF JUSTICE STEPHEN GAGELER AC*

The prevailing view of the Australian Constitution *for much of the 20th century considered it uninspired, inflexible and ill-adapted to the advancement of the Australian nation. That view was not shared by early constitutional scholars, who regarded it as innovative, dynamic and capable of empowering popular sovereignty. Recently, a new generation of scholars is recapturing that earlier perception. Their emergent body of work is concerned with exploring the distinctiveness — the Australianness — of the* Australian Constitution.

In 1985, Sir Anthony Mason took leave from the High Court to visit the University of Virginia.[1] There, he gave the inaugural Sir Robert Menzies Lecture entitled 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience'.[2] He commenced the lecture as follows:

> To an Australian lawyer the surprising feature of the contemporary American scene is the satisfaction, indeed the pride, that Americans take in their *Constitution*. To be sure, continuous and contentious debate surrounds the Supreme Court's interpretation of particular provisions and the Court's methods of reaching those interpretations. But Americans generally have a strong conviction that the *United States Constitution*, despite its age, is just about as good a constitution as one can hope to get. Yet the *Australian Constitution*, which is less than one

* Chief Justice of the High Court of Australia. This article is a revised version of the Sir Anthony Mason Lecture delivered at Melbourne Law School on 31 October 2023.

1 Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' (1986) 16(1) *Federal Law Review* 1, 1 ('The Role of a Constitutional Court').

2 Ibid. The *Federal Law Review* version of Sir Anthony's lecture was reprinted as Sir Anthony Mason, 'The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience' in Geoffrey Lindell (ed), *The Mason Papers: Select Articles and Speeches by Sir Anthony Mason AC, KBE* (Federation Press, 2007) 110.

> hundred years old and, in its federal aspects, has much in common with its American model, is frequently condemned — principally by our politicians — as a product of the horse and buggy age.[3]

The 'horse and buggy' metaphor did not originate with Sir Anthony. For a decade, if not more,[4] it had been a constant motif in political and constitutional discourse in Australia. In his contribution to a collection of essays edited by Leslie Zines and published in tribute to Geoffrey Sawer in 1977, RD Lumb had observed that the rhetoric used to justify proposals for revision of the *Australian Constitution* in the 1970s included 'such words as "a constitution fit for a horse and buggy age" as though a reference to past methods of transport is indicative of social blinkers which guided the draftsmen of the *Constitution*, and therefore betrays its limitations'.[5] Sawer himself had written in 1967 that Australia was 'constitutionally speaking ... the frozen continent'.[6]

The product of the horse and buggy age: frozen at a bygone time; 'prosaic' even then;[7] antiquated and unimaginative in its design; rigid; clunky; blinkered; no longer fit for purpose. That was the prevailing view of the *Australian Constitution* amongst leading constitutional scholars when I went to law school and when I entered the legal profession.

The view persisted and can fairly be said to have prevailed into this century despite the *Australia Act 1986* (Cth) and despite the changes in judicial perspective which became apparent under the Chief Justiceships of Sir Anthony Mason and Sir Gerard Brennan in the decade after its enactment. Michael Coper and George Williams sought in 1997 to present a picture of the *Australian Constitution* then being in 'ferment', meaning that through 'on-going judicial interpretation and reinterpretation' it was 'in a state of constant change'.[8] But if that

[3] Mason, 'The Role of a Constitutional Court' (n 1) 1.

[4] See, eg, W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia: Being a Treatise on the Distribution of Legislative Executive and Judicial Powers of Commonwealth and States under the Commonwealth of Australia Constitution Act* (Law Book, 3rd ed, 1962) viii ('*Legislative, Executive and Judicial Powers 3rd Ed*').

[5] RD Lumb, 'Reform of the Constitution: The 1973 Session of the Australian Constitutional Convention' in Leslie Zines (ed), *Commentaries on the Australian Constitution: A Tribute to Geoffrey Sawer* (Butterworths, 1977) 233, 233 ('Reform of the Constitution').

[6] Geoffrey Sawer, *Australian Federalism in the Courts* (Melbourne University Press, 1967) 208.

[7] Sir Anthony Mason, 'The Australian Constitution in Retrospect and Prospect' in Robert French, Geoffrey Lindell and Cheryl Saunders (eds), *Reflections on the Australian Constitution* (Federation Press, 2003) 7, 8 ('The Australian Constitution').

[8] Michael Coper and George Williams (eds), *The Cauldron of Constitutional Change* (Centre for International and Public Law, 1997) v.

picture seemed accurate then, it was not to stay accurate for long. HP Lee and Peter Gerangelos evidently set out to be more ironic than provocative in publishing in 2009 their edited collection of essays in honour of George Winterton under the title *Constitutional Advancement in a Frozen Continent*.[9]

That view of the *Australian Constitution* as uninspired, inflexible, and ill-adapted to the advancement of the Australian nation was a very long way from the view of constitutional scholars of the age in which it was brought into existence.

Federation saw the publication of *The Annotated Constitution of the Australian Commonwealth* co-authored by the older and incongruously named John Quick and the younger, talented and nimble Robert Garran,[10] whose monograph, *The Coming Commonwealth*, had enthusiastically heralded Federation in 1897.[11] Garran would in later life endorse a description, attributed to the journalist Claude McKay, of Quick as having a mind 'like the mills of God grinding slowly and exceeding[ly] small' and would refer to his own collaboration with Quick as having placed him in the role of 'the junior partner of a steam-roller'.[12] But Garran also credited Quick with authorship of the Corowa Plan, which had set out the blueprint for the popular movement that led to Federation in the second half of the 1890s.[13]

The size and detail of Quick and Garran's valuable and influential commentary owed much to Quick. The elegant style owed much to Garran.

In the preface, Quick and Garran together said this:

> The Federation of the Australian colonies has occupied the best energies of the statesmen and the people of Australia for many years; and this *Constitution* is the outcome of exhaustive debates, heated controversies, and careful compromises. It is an adaptation of the principles of British and colonial government to the federal system. Its language and ideas are drawn, partly from the model of all modern governments, the *British Constitution* itself; partly from the colonial Constitutions based on the British model; partly from the *Federal Constitution of*

[9] HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009).

[10] John Quick and Robert Randolph Garran, *The Annotated Constitution of the Australian Commonwealth* (Angus & Robertson, 1901).

[11] See generally Robert Randolph Garran, *The Coming Commonwealth: An Australian Handbook of Federal Government* (Angus & Robertson, 1897) ('*The Coming Commonwealth*').

[12] Sir Robert Randolph Garran, *Prosper the Commonwealth* (Angus and Robertson, 1958) 137.

[13] Justice Stephen Gageler, 'Sir Robert Garran: Medio Tutissimus Ibis' (2018) 46(1) *Federal Law Review* 1, 5–8.

> *the United States of America*; and partly from the semi-federal *Constitution of the Dominion of Canada*; with such modifications as were suggested by the circumstances and needs of the Australian people.
>
> The *Constitution of the Commonwealth*, therefore, is not an isolated document. It has been built on traditional foundations. Its roots penetrate deep into the past. It embodies the best achievements of political progress, and realizes the latest attainable ideals of liberty.[14]

Looking on from afar, the Anglo-Irish polymath and statesman James Bryce was of a similar view. In his *Studies in History and Jurisprudence*, published in 1901, Bryce devoted a chapter to a detailed study of the freshly minted *Australian Constitution*.[15] His comparative conclusion was that the *Australian Constitution* was 'at least abreast of European and American theory, and ahead of European or American practice'.[16] It represented, he said, 'the high-water mark of popular government'.[17] It was, he said, 'penetrated by the spirit of democracy'.[18]

Bryce's friend and contemporary as a student and teacher at Oxford University, Albert Venn Dicey, also weighed in. The self-styled 'prophet of the obvious',[19] Dicey had done more than any other scholar of his generation to impose legal and conceptual order on late 19th-century constitutional practice in the United Kingdom. He had done so utilising his penchant for aphorisms and his facility for taxonomising by drawing binary distinctions. The aphorisms were catchy and all-encompassing. Though the distinctions were not always compelling, they were always confidently and clearly drawn.

In his *Lectures Introductory to the Study of the Law of the Constitution*, the first edition of which was published in 1885, Dicey had confidently drawn a clear-cut binary distinction between a 'rigid constitution' and a 'flexible constitution'. [20] He had confidently drawn another clear-cut binary distinction

[14] Quick and Garran (n 10) vii.

[15] James Bryce, *Studies in History and Jurisprudence* (Oxford University Press, 1901) vol 1, 468–553.

[16] Ibid 536.

[17] Ibid.

[18] Ibid.

[19] Richard A Cosgrove, 'Dicey, Albert Venn' in HCG Matthew and Brian Harrison (eds), *Oxford Dictionary of National Biography* (Oxford University Press, 2004) vol 16, 43, 44.

[20] AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, 1st ed, 1885) 114–16 ('*Lectures Introductory 1st Ed*'). Dicey's treatise was followed by a second edition

between 'political' sovereignty and 'legal' sovereignty.[21] He had drawn yet another clear-cut distinction between 'law' and 'convention'.[22] Building on those distinctions, he had managed to distil the entirety of the legal operation of what he saw as the flexible Constitution of the United Kingdom into the outworking of two stable if not timeless principles which he labelled parliamentary 'supremacy' and 'the rule of law'.[23] Looking across the Atlantic to what he saw as the rigid federal *Constitution of the United States*, he confidently informed his readers that '[f]ederalism' means 'legalism': 'the predominance of the judiciary in the constitution'.[24]

In the sixth edition of his *Introduction to the Study of the Law of the Constitution*, published in 1902, Dicey added what he described as a 'Note on Australian Federalism'.[25] He explained that the note was 'intended to illustrate the nature of federal government by setting forth the main features of the new and very interesting type of federalism exhibited in the *Constitution of the Commonwealth of Australia*'.[26] In the note, Dicey identified what he saw as the main characteristics of the federal system of government established by the *Australian Constitution*. He identified four characteristics, three of which can be seen from the present to have had enduring significance. They were, in Dicey's words: '*first*, a Federal form of Government'; '*secondly*, a Parliamentary Executive'[27] (we would now say, and would even then have said, 'responsible government'); and '*thirdly*, an effective Method for amending the *Constitution*'.[28]

Maintaining a distinction dear to his heart, Dicey characterised the *Australian Constitution* as 'rigid' — because to him a federal constitution could only ever be 'rigid' — but he observed that the self-governing colonies of Australia

in 1886 under the same title and eight further editions under the title *Introduction to the Study of the Law of the Constitution*: see AV Dicey, *Lectures Introductory to the Study of the Law of the Constitution* (Macmillan, 2nd ed, 1886); AV Dicey and ECS Wade, *Introduction to the Study of the Law of the Constitution* (Macmillan, 10th ed, 1959) iv.

21 Dicey, *Lectures Introductory 1st Ed* (n 20) 66–7.

22 Ibid 374.

23 Ibid 56, 167–8.

24 Ibid 160.

25 AV Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan, 6th ed, 1902) ix–x, 477 ('*Introduction 6th Ed*').

26 Ibid ix–x.

27 Ibid 477 (emphasis in original).

28 Ibid.

which had become states had 'flexible' constitutions which seemed to have served them well.[29] He continued:

> Now the people of Australia have, we may safely assume, no desire to forgo the advantages of a flexible constitution or to adopt a federal polity which should lend itself as little to amendment as does the *Constitution of the United States*, or should, like the *Constitution of the Canadian Dominion*, be amendable only by the action of the Imperial Parliament. Hence Australian Federalists were forced to solve the problem of giving to the *Constitution of the Commonwealth* as much rigidity as is required by the nature of a federal government, and at the same time such flexibility as should secure to the people of Australia the free exercise of legislative authority, even as regards articles of the *Constitution*.[30]

The solution to the problem arrived at by the framers of the *Australian Constitution*, as Dicey saw it, was 'ingenious'.[31] Their solution, as he explained it, was to produce a constitution which was 'rigid', 'since it cannot be fundamentally altered by the ordinary method of parliamentary legislation',[32] yet to temper its rigidity in three different ways. The first was to endow the Commonwealth Parliament with 'very wide legislative authority', much of which was to be concurrent with the legislative authority of the States.[33] The second was to provide for many provisions of the *Constitution* to remain in force only 'until Parliament otherwise provides' thereby allowing the Commonwealth Parliament to change them 'like any other law' whilst giving them a 'certain moral weight which may prevent their being hastily altered'.[34] The third was to provide for a formal mechanism of constitutional alteration, which he noted 'embodies the principle, though not the name, of the Swiss institution known as the referendum'.[35]

To Dicey, the *Australian Constitution* was therefore 'rigid', because according to his dogma any federal constitution had to be 'rigid'.[36] But it was also 'flexible', because in his view this federal constitution was, in critical respects, capable of

[29] Ibid 481.
[30] Ibid.
[31] Ibid.
[32] Ibid.
[33] Ibid 481–2.
[34] Ibid 482.
[35] Ibid.
[36] Ibid 481.

being moulded in order to secure 'the free exercise of legislative authority' to 'the people of Australia'.[37]

Incidentally, but interestingly, the copy of the sixth edition of Dicey's *Introduction to the Study of the Law of the Constitution* which is held in the High Court library in Canberra has inscribed on the cover page the handwritten words 'Owen Dixon 2nd Dec 1904'. In the margins appear some characteristically astute handwritten reflections on Dicey by the 18-year-old Dixon when himself a student at the University of Melbourne. Where, for example, in his introduction, Dicey quoted a passage from Henry Hallam's *View of the State of Europe during the Middle Ages* to the effect that the independence of the English nation had been 'derived' from 'the spirit of its laws',[38] Dixon wrote in the margin: 'Confusion of cause + effect — the laws are the expression of (not the cause of) the characteristic independence'. And where Dicey went on to describe Walter Bagehot and WE Hearn as 'philosophical theorists',[39] Dixon wrote in the margin: 'Both deal with legal facts — not theories'.

Writing in Hobart, in *Studies in Australian Constitutional Law*, the first edition of which was published in 1901 and the second edition of which was published in 1905, Andrew Inglis Clark described the *Australian Constitution* in terms which were not boxed in by Dicey's preconceived and dogmatically maintained distinctions and which were based instead on Clark's detailed and tolerably accurate understanding of the history and functioning of the *Constitution of the United States*.[40] In a review of the first edition of *Studies in Australian Constitutional Law*, published in the *Harvard Law Review* in 1902, the great American constitutional theorist James Bradley Thayer wrote that Clark was a 'careful and learned writer' who cited 'freely the apposite decisions of … [the United States] Supreme Court with a remarkable general accuracy'.[41] Nonetheless, Thayer continued that '[n]ow and then there is a slight error or inadvertence' in Clark's analysis of certain American constitutional cases.[42] At the end of his critique, Thayer himself referred to a 'radical difference' between the

[37] Ibid.

[38] Ibid 2, quoting Henry Hallam, *View of the State of Europe during the Middle Ages* (John Murray, 12th ed, 1868) vol 2, 267.

[39] Dicey, *Introduction 6th Ed* (n 25) 6.

[40] See A Inglis Clark, *Studies in Australian Constitutional Law* (Legal Books, rev ed, 1997) v, vii–viii.

[41] JBT, review of A Inglis Clark, *Studies in Australian Constitutional Law* in (1902) 15(5) *Harvard Law Review* 419, 420.

[42] Ibid.

Australian Constitution and the *Constitution of the United States*: that 'we ground ours on the authority of our own people, while theirs, in a legal sense, rests ultimately on an Act of the Imperial Parliament'.[43]

John Williams has pointed out, however, that Clark had a sophisticated understanding of the constitutive role of the Australian people both in creating and sustaining the *Australian Constitution*.[44] Clark set out that understanding in elegant prose. As to the role of the Australian people in creating the *Australian Constitution*, he wrote that the reference to 'the people' in the preamble 'acknowledges the historical fact that it was voluntarily adopted as an agreement by the people of the several colonies … and that the force of law was given to it by the Imperial Parliament in order to give effect to that agreement'.[45]

As to the role of the Australian people in sustaining the *Australian Constitution*, he wrote that

> the language of the *Constitution* must be applied, and hence it must be read and construed, not as containing a declaration of the will and intentions of men long since dead, and who cannot have anticipated the problems that would arise for solution by future generations, but as declaring the will and intentions of the present inheritors and possessors of sovereign power, who maintain the *Constitution* and have the power to alter it, and who are in the immediate presence of the problems to be solved.[46]

'It is they', he wrote, (the 'present possessors of sovereignty') 'who enforce the provisions of the *Constitution* and make a living force of that which would otherwise be a silent and lifeless document'.[47]

Writing here in Melbourne, in *The Constitution of the Commonwealth of Australia*, the first edition of which was published in 1902 and the second edition of which was published in 1910, Dixon's lecturer in constitutional law, Harrison Moore,[48] adopted a more constrained tone. He picked up on Dicey's earlier aphorism that federalism means legalism,[49] and, in contrast to Dicey's own

[43] Ibid 421.

[44] See generally Clark (n 40) iii–xxxix.

[45] Ibid 166.

[46] Ibid 21.

[47] Ibid.

[48] See Philip Ayres, *Owen Dixon* (Meigunyah Press, rev ed, 2007) 11–12.

[49] W Harrison Moore, *The Constitution of the Commonwealth of Australia* (Charles F Maxwell, 2nd ed, 1910) iii.

views about the flexibility of the *Australian Constitution*, he commented that the *Constitution* 'contains few evidences of that experimentalism for which the politics of the Colonies have become famous'.[50] But he observed that the *Australian Constitution* 'bears every mark of confidence in the capacity of the people to undertake every function of government'.[51] And, in explaining the choice of the framers not to include a bill of rights in the *Constitution*, he recognised the 'great underlying principle' of the *Australian Constitution* to be that 'the rights of individuals are sufficiently secured by ensuring as far as possible to each a share, and an equal share, in political power'.[52]

To bring this survey of the perceptions of early constitutional scholars to completion, reference must be made to Bryce's last major work, *Modern Democracies*, published in 1921.[53] Providing a high-level description of what he labelled the Australian frame of government, Bryce, there, said this:

> There is no such thing as a Typical Democracy, for in every country physical conditions and inherited institutions so affect the political development of a nation as to give its government a distinctive character. But if any country and its government were to be selected as showing the course which a self-governing people pursues free from all external influences and little trammelled by intellectual influences descending from the past, Australia would be that country. It is the newest of all the democracies. It is that which has travelled farthest and fastest along the road which leads to the unlimited rule of the multitude. In it, better than anywhere else, may be studied the tendencies that rule displays as it works itself out in practice.[54]

The prevailing perception of the *Australian Constitution* amongst early constitutional scholars was accordingly one of innovation, dynamism and democratic empowerment. They saw a flexible constitutional casing within which beat a heart of popular sovereignty, capable of adaptation to fulfil the aspirations and to meet the challenges of successive generations of Australians. A glimmer of that early perception, tinged with nostalgia, can be seen in Sir Robert Menzies'

[50] Ibid 607.

[51] Ibid 613.

[52] Ibid 616.

[53] James Bryce, *Modern Democracies* (Macmillan, 1921) vol 2.

[54] Ibid 166.

lectures delivered at the University of Virginia and published in 1967 under the title *Central Power in the Australian Commonwealth*.[55]

How and why Australian constitutional scholars departed from that early perception and had come to adopt the perception of rigidity and redundancy which was ascendant by the time I came to the study and practice of Australian constitutional law in the 1980s are questions that I will touch on but will not attempt to answer in full.

Constitutional scholarship in and after the 1920s became generally drier, more formalistic and more focused on the minutiae of legal doctrine. There were scholars who were notable exceptions. Sawer was one. Leslie Zines was another. Tony Blackshield was another. They were, it must be emphasised, exceptions. The prevailing approach was illustrated by the content and longevity of William Anstey Wynes' *Legislative, Executive and Judicial Powers in Australia*.[56] Wynes' treatise had been 'welcomed in 1936 as the first book of substance in the Australian constitutional field for some time'.[57] It also attracted the comment that 'the legalistic tradition that the work ... represent[ed], untouched by speculative theory or by conscious sociology, [was] not adequate to the task of constitutional exegesis'.[58] That criticism notwithstanding, the book became the standard text on Australian constitutional law with its fifth and final edition published in 1976.

The drivers of the prevailing perception of rigidity and redundancy were deeper than a mere change in jurisprudential orientation. The failure of the High Court to arrive at an enduring and workable approach to the express

[55] Sir Robert Menzies, *Central Power in the Australian Commonwealth: An Examination of the Growth of Commonwealth Power in the Australian Federation* (Cassell, 1967). See, eg, at 7, 9, 24–5.

[56] Wynes' treatise was published under four slightly different titles across its five editions: see W Anstey Wynes, *Legislative and Executive Powers in Australia: Being a Treatise on the Legislative and Executive Powers of the Commonwealth and States of Australia under the Commonwealth of Australia Constitution Act* (Law Book, 1st ed, 1936); W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia: Being a Treatise on the Distribution of Legislative Executive and Judicial Powers of Commonwealth and States under the Commonwealth of Australia Constitution Act* (Law Book, 2nd ed, 1956); Wynes, *Legislative, Executive and Judicial Powers 3rd Ed* (n 4); W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia: Being a Treatise on the Distribution of Legislative Executive and Judicial Powers of the Commonwealth and the States under the Commonwealth of Australia Constitution Act* (Law Book, 4th ed, 1970); W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* (Law Book, 5th ed, 1976) ('*Legislative, Executive and Judicial Powers 5th Ed*').

[57] P Brazil, review of W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* in (1977) 8(3) *Federal Law Review* 371, 372.

[58] Ibid.

guarantee of freedom of interstate trade in s 92 of the *Constitution* before the unanimous decision of the High Court led by Mason CJ in *Cole v Whitfield*[59] seems to me to have had a great deal to do with it. Beginning in the 1920s and continuing until 1988, the seemingly intractable problem of s 92 of the *Constitution* cast a pall over the entire constitutional landscape. Sir John Latham described it in 1957 as 'the curse of the *Constitution*' and as a 'boon to lawyers and to road hauliers and to people who want to sell skins of protected animals or to trade in possibly diseased potatoes'.[60] Twenty years later, Sawer described its study as involving 'gothic horrors and theological complexities'.[61] The fact that limitations on Commonwealth legislative power had repeatedly been seen to stifle national economic and social reforms may also have contributed to the prevailing perception. Policies frustrated by decisions of the High Court in the first 50 years after Federation included the Deakin Government's 'New Protection' tariff program,[62] pharmaceutical subsidies introduced during World War II[63] and the postwar nationalisation of Australia's banks.[64] The failure of multiple attempts at formal constitutional amendment also certainly contributed.[65]

From the late 1970s onwards, the constitutional crisis of 1975 became a major contributor. The 'standard narrative' of that crisis, as Brendan Lim has summarised it, quickly became that of 'aberrational politics' having been enabled by 'technical design flaws or ambiguities in the constitutional rules' the underlying cause of which was a fundamental and irremediable incompatibility between federalism and responsible government.[66] The theme of the standard narrative was captured in the provocative description of the *Australian Constitution* as the '"Washminster" mutation',[67] as if the Federation experiment of blending elements of different constitutional traditions had been shown by

[59] (1988) 165 CLR 360.

[60] JG Latham, review of W Anstey Wynes, *Legislative, Executive and Judicial Powers in Australia* in (1957) 1(2) *Melbourne University Law Review* 266, 271–2.

[61] Geoffrey Sawer, review of Christopher Enright, *Constitutional Law* in (1977) 8(3) *Federal Law Review* 376, 377.

[62] See generally *R v Barger* (1908) 6 CLR 41.

[63] See generally *A-G (Vic) ex rel Dale v Commonwealth* (1945) 71 CLR 237.

[64] See generally *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1.

[65] See Lumb, 'Reform of the Constitution' (n 5) 234.

[66] Brendan Lim, *Australia's Constitution after Whitlam* (Cambridge University Press, 2017) 37.

[67] Elaine Thompson, 'The "Washminster" Mutation' in Patrick Weller and Dean Jaensch (eds), *Responsible Government in Australia* (Drummond Publishing, 1980) 32, 32.

the course of events to have resulted in a constitutional version of a Frankenstein's monster. The revitalisation of the *United States Constitution* under the Warren Court and the proliferation of newer and swankier constitutions in many other countries throughout the world in the period of rapid decolonisation which followed World War II only added to a sense that what once had seemed new and vibrant was no longer fit for purpose.

My objective in undertaking such an historical excursus has not been to dwell on the movement of constitutional scholarship away from the perception of the *Australian Constitution* that prevailed at and soon after Federation but to draw attention to the recent emergence of a body of constitutional scholarship which is going some way towards recapturing that earlier perception. Traces of some of these emergent ideas can be seen in earlier writings of Geoff Lindell, Paul Finn, Leslie Zines, George Winterton, Greg Craven and Fiona Wheeler; in the more historical writings of Michael Crommelin, Helen Irving, John Williams and Nicholas Aroney; and in an important but insufficiently appreciated interdisciplinary contribution to constitutional analysis by social philosopher Percy Partridge.[68] Overwhelmingly, however, the ideas are being generated by a younger generation of scholars.

To describe those ideas and explain their emergence, something more general needs to be said of the trajectory of constitutional scholarship in Australia. Since the time I studied constitutional law at the Australian National University and then at Harvard University in the 1980s, constitutional scholarship in

[68] See, eg, GJ Lindell, 'Why Is Australia's Constitution Binding? The Reasons in 1900 and Now, and the Effect on Independence' (1986) 16(1) *Federal Law Review* 29; Paul Finn, 'Public Trust and Public Accountability' (1993) 65(2) *Australian Quarterly* 50; Leslie Zines, 'Dead Hands or Living Tree? Stability and Change in Constitutional Law' (2004) 25(1) *Adelaide Law Review* 3; George Winterton, 'Popular Sovereignty and Constitutional Continuity' (1998) 26(1) *Federal Law Review* 1; Greg Craven, 'Heresy as Orthodoxy: Were the Founders Progressivists?' (2003) 31(1) *Federal Law Review* 87; Fiona Wheeler, 'The Separation of Judicial Power and Progressive Interpretation' in HP Lee and Peter Gerangelos (eds), *Constitutional Advancement in a Frozen Continent: Essays in Honour of George Winterton* (Federation Press, 2009) 222; Michael Crommelin, 'The Federal Principle' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 853; Helen Irving, 'To Constitute a Nation: A Cultural History of Australia's Constitution' (Cambridge University Press, 1997); John Williams, 'The Emergence of the Commonwealth Constitution' in HP Lee and George Winterton (eds), *Australian Constitutional Landmarks* (Cambridge University Press, 2003) 1; Nicholas Aroney, *The Constitution of a Federal Commonwealth: The Making and Meaning of the Australian Constitution* (Cambridge University Press, 2012); PH Partridge, 'The Politics for Federalism' in Geoffrey Sawer (ed), *Federalism: An Australian Jubilee Study* (FW Cheshire, 1952) 174. See also Stephen Gageler, 'Foundations of Australian Federalism and the Role of Judicial Review' (1987) 17(3) *Federal Law Review* 162, 163.

Australia has become more integrated with constitutional scholarship globally. In line with global trends, it has become generally less beholden to legal positivism. In expanding its horizons, it has taken on concerns which in my youth would have been seen by most academic lawyers to be outside the province of law and within the province of social sciences. In moving beyond a concern with the content of legal doctrine, it has recaptured the concern which constitutional scholarship had in our earlier period of nation-building for democratic theory and institutional design.

Over the past three decades, two broad trends in constitutional scholarship seem to me to have emerged. First in time has been the rise of comparative constitutionalism, pioneered at Melbourne Law School through the establishment of the Centre for Comparative Constitutional Studies under the tireless leadership of Cheryl Saunders in 1988. Comparative constitutionalism in the sense that I am using that label has been broadly concerned with emphasising the similarities and differences in constitutional structures and modes of constitutional adjudication in comparable national jurisdictions. Australian examples in that vein include various contributions to *The Future of Australian Federalism* edited by Gabrielle Appleby, Aroney and Thomas John and published in 2012; Janina Boughey's *Human Rights and Judicial Review in Australia and Canada*, published in 2017; various contributions to *Comparative Judicial Review* edited by Erin Delaney and Rosalind Dixon, published in 2018; and Appleby and Delaney's 'Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony' and Jeffrey Gordon's 'Comparative Judicial Federalism', both published in 2023.[69]

Overlapping with comparative constitutionalism, and drawing upon some of its insights, has been another vein of constitutional scholarship which I think of as pan-constitutionalism: the emphasis of which has been on expounding deep principles common to constitutional structures or modes of constitutional adjudication in some or most comparable national jurisdictions. Australian examples of mature works of scholarship within that vein which have received international acclaim are Jeffrey Goldsworthy's *Parliamentary Sovereignty*,

[69] See generally Gabrielle Appleby, Nicholas Aroney and Thomas John (eds), *The Future of Australian Federalism: Comparative and Interdisciplinary Perspectives* (Cambridge University Press, 2012); Janina Boughey, *Human Rights and Judicial Review in Australia and Canada: The Newest Despotism?* (Hart Publishing, 2017); Erin F Delaney and Rosalind Dixon (eds), *Comparative Judicial Review* (Edward Elgar, 2018); Gabrielle Appleby and Erin F Delaney, 'Judicial Legitimacy and Federal Judicial Design: Managing Integrity and Autochthony' (2023) 132(8) *Yale Law Journal* 2419; Jeffrey Steven Gordon, 'Comparative Judicial Federalism' (2023) 21(4) *International Journal of Constitutional Law* 976.

published in 2010, and Rosalind Dixon's *Responsive Judicial Review*, published in early 2023.[70]

The emergent body of constitutional scholarship to which I draw attention is neither comparative constitutionalism nor pan-constitutionalism, although it draws inspiration from both. Rather than being concerned with comparing national constitutional systems or expounding transcendent principles, it is bent on exploring the distinctiveness — the Australianness — of the *Australian Constitution*.

A bridge between this emergent body of constitutional scholarship and pan-constitutionalism was a review, published in 2021 by Adrienne Stone and Lael Weis,[71] of Nicholas Barber's book *The Principles of Constitutionalism*, published in 2018.[72] One of Barber's claims in the book was that constitutional scholarship globally had become focused on constraining state power at the expense of engaging with an older constitutional tradition that focused instead on the capacity of the state to govern in the interests of its people.[73] Barber labelled that older tradition 'positive constitutionalism' and traced it to Aristotle.[74] Stone and Weis said in their review that they were 'not convinced' that positive constitutionalism had been overlooked to the extent that Barber claimed.[75] Instancing the Australian federal system, they wrote that 'although the constitutional law of federalism imposes limitations on power, its animating purpose is the enablement of a properly functioning federal state'.[76]

Stone expanded on the enabling or constitutive quality of Australian constitutionalism in her 2022 High Court lecture, published in the *Public Law Review*, in which she set out to describe what she referred to as 'Australian constitutional identity'.[77] The picture that she presented, in her own language, was one of 'egalitarianism within public debate', an 'inclusive' but 'incomplete' approach to franchise, a 'tradition of democratic innovation' and altogether, 'a robust

[70] See generally Jeffrey Goldsworthy, *Parliamentary Sovereignty: Contemporary Debates* (Cambridge University Press, 2010); Rosalind Dixon, *Responsive Judicial Review: Democracy and Dysfunction in the Modern Age* (Oxford University Press, 2023).

[71] Adrienne Stone and Lael K Weis, 'Positive and Negative Constitutionalism and the Limits of Universalism: A Review Essay' (2021) 41(4) *Oxford Journal of Legal Studies* 1249.

[72] NW Barber, *The Principles of Constitutionalism* (Oxford University Press, 2018).

[73] Ibid 2–5.

[74] Ibid 5–9.

[75] Stone and Weis (n 71) 1259.

[76] Ibid 1255 (emphasis omitted).

[77] Adrienne Stone, 'More than a Rule Book: Identity and the Australian Constitution' (2024) 35(2) *Public Law Review* 127, 128.

innovative (if imperfect) democracy and a socially progressive, active state'.[78] As supporting that picture, she pointed to what she described as the 'exciting emerging work' of several early-career and mid-career constitutional scholars.[79]

To illustrate the emergent body of constitutional scholarship, I will take Stone's list and expand on it slightly. My own expanded list should be taken to be indicative rather than exhaustive and encouraging rather than confining. Excepting just one slightly earlier publication, all of the scholarly output to which I will refer has been published only in the last four years or is in the course of being published. No doubt, there is other similar scholarship which remains work-in-progress.

The slightly earlier publication is Patrick Emerton's contribution to *The Oxford Handbook of the Australian Constitution*, which was published in 2018.[80] Under the heading 'Ideas', Emerton offered what he described as a 'counterpoint' to the perception of the *Australian Constitution* as a prosaic, arid legal text.[81] He argued that the framers of the *Australian Constitution* regarded its democratic character as fundamental and that they conceived of responsible government in 'active terms' of 'the people' wanting 'their parliament, and the government responsible to it, to do things'.[82]

In his article 'What Do Australians Talk about when They Talk about "Parliamentary Sovereignty"?', Ryan Goss disputes the notion that Dicey's doctrine of parliamentary supremacy has meaningful operation in Australia.[83] In a similar vein, in her article, 'Political Constitutionalism: Individual Responsibility and Collective Restraint', Yee-Fui Ng portrays Australian constitutionalism as a distinctive blend of 'political constitutionalism' (involving holding those who exercise governmental power to account through political processes) and 'legal constitutionalism' (involving legal mechanisms for

[78] Ibid 132–4, 136.

[79] Ibid 135, citing Lynsey Blayden, 'Active Citizens and an Active State: Uncovering the "Positive" Underpinnings of the Australian Constitution' (2024) 52(3) *Federal Law Review* (advance), Patrick Emerton, 'Ideas' in Cheryl Saunders and Adrienne Stone (eds), *The Oxford Handbook of the Australian Constitution* (Oxford University Press, 2018) 143, 143, William Partlett, 'Remembering Australian Constitutional Democracy' (2024) 52(3) *Federal Law Review* (advance).

[80] Emerton (n 79) 143.

[81] Ibid 143–4.

[82] Ibid 152 (emphasis omitted).

[83] Ryan Goss, 'What Do Australians Talk about when They Talk about "Parliamentary Sovereignty"?' [2022] (1) *Public Law* 55, 59–61.

delimiting governmental power, policed through strong form judicial review).[84] Having examined developments subsequent to the constitutional crisis of 1975, she argues that those forms of constitutionalism are not in irreconcilable tension but are rather in constant evolution.[85]

William Partlett's article 'Remembering Australian Constituent Power' recalls the popular movement to federate in the implementation of the Corowa Plan.[86] He portrays it as a process which resulted in the Australian people having both political sovereignty and legal sovereignty.[87] He considers that the people act through 'parliamentary representation to make ordinary law' and through 'special, extra-parliamentary representation to alter their constitutional order'.[88]

In his book *Responsible Government and the Australian Constitution*, Benjamin Saunders argues that responsible government in the form incorporated into the *Australian Constitution* is based on principles of popular sovereignty and political accountability and 'ultimately depends for its good functioning on an engaged citizenry and a vibrant political culture'.[89]

In her recent paper, 'Active Citizens and an Active State: Uncovering the "Positive" Underpinnings of the Australian Constitution', Lynsey Blayden focuses on the conciliation and arbitration power to contend that the design of the *Australian Constitution* was influenced not solely by a desire to limit governmental power but also by a concern 'to safeguard … social and individual wellbeing' by 'structuring and enabling effective government'.[90]

Will Bateman develops that theme. In his important paper 'Federalising Socialism without Doctrine', he reinterprets the *Australian Constitution* as having advanced what he describes as 'colonial socialism' which he explains in terms of 'empowering governments to own and operate vast public capital, while providing social insurance in a market economy'.[91] He argues that

[84] Yee-Fui Ng, 'Political Constitutionalism: Individual Responsibility and Collective Restraint' (2020) 48(4) *Federal Law Review* 455, 455–6.

[85] Ibid 467.

[86] William Partlett, 'Remembering Australian Constituent Power' (2023) 46(3) *Melbourne University Law Review* 821.

[87] Ibid 838–41.

[88] Ibid 857–8 (emphasis omitted).

[89] Benjamin B Saunders, *Responsible Government and the Australian Constitution: A Government for a Sovereign People* (Hart Publishing, 2023) 217. See also at 211.

[90] Blayden (n 79) 6.

[91] Will Bateman, 'Federalising Socialism without Doctrine' (2024) 52(3) *Federal Law Review* (advance), 1.

> [t]he Australian model of a constitutional state that emerged from the colonial phase was one of 'egalitarian state potency' which implied a vastly different balance of public and private authority to the constitutions administered in Washington or Westminster in 1900.[92]

He goes on to argue that the 'constitutional model of a potent egalitarian state accreted during the colonial phase' which was then drafted into the *Constitution* and was judicially endorsed in *New South Wales v Commonwealth* (the '*Surplus Revenue Case*') in 1908.[93]

What seems to me to be common to the body of scholarship, of which I have given examples, is an intense concentration on pre- and post-Federation constitutional history and a prioritisation of democratic empowerment over legal constraint. What is driving this scholarship's emergence is difficult to say. Global events over the past two decades have perhaps cast the British and American progenitors of the *Australian Constitution* in a new light in which they have seemed comparatively less attractive than their progeny. Outright breakdowns in constitutional order in scores of other countries with swankier constitutions have perhaps contributed to an appreciation of the robustness of our own constitutional system. Our relative success in dealing with both the global financial crisis of 2008–09 and the recent pandemic seems to have contributed to an appreciation of our *Constitution*'s adaptability and workability.

Be that as it may, I see in the emergence of the body of scholarship fulfilment of the founding era ambition so elegantly expressed in the words of Clark which I have earlier quoted.[94] It is the 'present inheritors and possessors of sovereign power, who maintain the *Constitution* and have the power to alter it, and who are in the immediate presence of the problems to be solved' who 'make a living force of that which would otherwise be a silent and lifeless document'.[95]

[92] Ibid 7.

[93] Ibid 24–5, citing *New South Wales v Commonwealth* (1908) 7 CLR 179, 189–90 (Griffith CJ), 195–6 (Barton J), 198–9 (O'Connor J), 200–3 (Isaacs J), 203 (Higgins J).

[94] See above nn 46–7 and accompanying text.

[95] Clark (n 40) 21.