

# *Some Observations on the Common Law and the Constitution*<sup>†</sup>

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## **1. Introduction**

It has been a recurrent and well-observed theme of the reasoning of the High Court in recent times to insist that the common law of Australia must conform to the *Constitution*. In *Lange v Australian Broadcasting Corporation*,<sup>1</sup> the High Court famously recognised that the common law defence of qualified privilege to an action in defamation required modification and extension to conform to the protection implied by the *Constitution* to communications on political and governmental matters relating to the federal system of government. In *John Pfeiffer Pty Limited v Rogerson*,<sup>2</sup> the Court acknowledged the significance of a national legal structure created by a federal constitution for common law choice of law rules in torts involving an interstate element, applicable in both federal and non-federal jurisdiction.<sup>3</sup> That particular change had been anticipated:

Is it an implication of [the] federal structure [of Australia] that the common-law [choice-of-law] rules must be adjusted so that, matters of procedure aside, the same substantive legal consequences will flow from a particular act or omission within the national jurisdiction, regardless of the particular state forum in which the relevant dispute is adjudicated?<sup>4</sup>

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† An earlier version of this paper was delivered as a commentary on a paper delivered by the Honourable Justice William Gummow, 'The Constitution – Ultimate Foundation of Australian Law?' at the Conference of the Australian Association of Constitutional Law and the University of Sydney Faculty of Law, 'Constitutional Fundamentals and Judicial Power' (27 November 2004). The paper by Gummow J was published under the same title in (2005) 79 *Australian Law Journal* 167.

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1 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 ('*Lange*') at 566.

2 *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 ('*Pfeiffer v Rogerson*').

3 *Id* at 528 [44]: '[I]deally, the choice of law rules should provide certainty and uniformity of outcome no matter where in the Australian federation a matter is litigated, and whether it is litigated in federal or non-federal jurisdiction' (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ). The matters specifically taken into account (at 534-535 [67]) favouring the adoption of a single choice of law rule in both federal and non-federal jurisdiction included: 'the existence and scope of federal jurisdiction', especially s 77(iii); the position of the High Court as the ultimate court of appeal in federal and non-federal jurisdiction; the impact of ss 117 and 118; the predominant territorial concern of the statutes of State and Territory legislatures; and 'the nature of the federal compact'. The Court ultimately favoured the *lex loci delicti* as the single choice of law rule in part because it was 'a rule which reflects the fact that the torts with which it deals are torts committed within a federation' (at 540 [87]).

4 William Gummow, 'Full Faith and Credit in Three Federations' (1995) 46 *South Carolina Law Review* 979 at 988.

It has also been argued that the common law rules governing judicial disqualification for bias may yet provide another illustration where the common law must conform to the *Constitution*;<sup>5</sup> this may be because, as noted elsewhere, ‘the rules as to reasonable apprehension of bias in their application to the courts have, at their root, the doctrine of the separation of the judicial from the political heads of power’.<sup>6</sup>

There is considerable debate<sup>7</sup> about whether or not the contemporary recognition by the Court of the primacy of the *Constitution* and the requirement, with respect to some particular legal principle, that the common law conform to the *Constitution* gives rise to an ‘entrenchment’ of that legal principle. Is the influence of the *Constitution* upon the common law ‘direct’, bringing changes that are ‘constitutionalised’ and immune from subsequent legislative restriction’,<sup>8</sup> or is the influence, or should it be, ‘indirect’, ‘suggest[ing] a direction for the common law, which can subsequently be overridden by legislation’?<sup>9</sup> Might the answer vary? There is also debate over whether it makes a difference to identify the source of a principle in the common law (but insist on conformity to the *Constitution*) or identify the source directly in the *Constitution* (at least with respect to attributes of judicial power such as the need to exercise power consistently with the rules of natural justice).<sup>10</sup>

This contemporary recognition of the primacy of the *Constitution* and its influence upon the content of the common law creates a productive tension with the historical reliance upon common law principles as the basis for the

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5 Fiona Wheeler, ‘Due Process, Judicial Power and Chapter III in the New High Court’ (2004) 32 *Federal Law Review* 205 at 217, based principally on the judgment of Gaudron J in *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337.

6 *Grollo v Palmer* (1995) 184 CLR 348 at 394 (Gummow J) (as noted by Wheeler, above n5 at 216).

7 See Adrienne Stone, ‘Freedom of Political Communication, the Constitution and the Common Law’ (1998) 26 *Federal Law Review* 219; Adrienne Stone, ‘The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication’ (1999) 23 *Melbourne University Law Review* 668; Adrienne Stone, ‘Choice of Law Rules, the Constitution and the Common Law’ (2001) 12 *Public Law Review* 9; Greg Taylor, ‘The Effect of the Constitution on the Common Law as Revealed by *John Pfeiffer v Rogerson*’ (2002) 30 *Federal Law Review* 69; Greg Taylor, ‘Why the Common Law Should be Only Indirectly Affected by Constitutional Guarantees: A Comment on Stone’ (2002) 26 *Melbourne University Law Review* 623; Adrienne Stone, ‘The Common Law and the *Constitution*: a Reply’ (2002) 26 *Melbourne University Law Review* 646. See also Kathleen Foley, ‘The Australian Constitution’s Influence on the Common Law’ (2003) 31 *Federal Law Review* 131.

8 Stone, ‘The Common Law and the Constitution: a Reply’, above n7 at 648.

9 Id at 647. At least it is clear that in *Pfeiffer v Rogerson* the ‘adoption of the *lex loci delicti* as the common law choice of law rule has not been “constitutionalised” and placed beyond legislative competence’: William Gummow, ‘The Constitution – Ultimate Foundation of Australian Law?’ (2005) 79 *Australian Law Journal* 167 at 180. See also *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 531 [56], 535 [70].

10 See Wheeler, above n5 at 217: ‘Judicial disqualification for bias thus provides a further illustration, along with the law of defamation in *Lange*...of a situation in which the common law must conform to the *Constitution*. Alternatively (although it may amount in substance to the same thing) it may be that the general law of apprehended bias should now be seen as “an attribute of the judicial power of the Commonwealth” with its source directly in Chapter III of the *Constitution*.’ (Footnotes omitted.)

interpretation of the *Constitution*. So much has been sharply observed elsewhere.<sup>11</sup> In particular, there is a need to be vigilant to the influence of the illusion of continuity created by the common law upon the development of constitutional law in Australia.<sup>12</sup> Radical points of departure can be masked by a Dixonian recourse to the common law as ‘an antecedent system of jurisprudence’<sup>13</sup> or, in more recent history, by the recognition of implied constitutional guarantees drawn from the common law as comprising the ‘fundamental principles’<sup>14</sup> upon which the *Constitution* is constructed. Invoking the language and logic of the common law may distract from an appreciation of the historical force of the *Constitution* as the instrument that established the Australian federal system; an instrument dividing legislative, executive and judicial authority between the Commonwealth and the States and creating the federal judiciary as the final arbiter.

In this article I consider first the central concept of the illusion of continuity as expressed by Professor Sir John Baker.<sup>15</sup> I then make some observations about the extra-judicial application of that concept by Gummow J to Australian legal history.<sup>16</sup>

## 2. *The Illusion of Continuity*

In his discussion of English law and the Renaissance, Professor Sir John Baker describes the striking changes in English society and culture during the Tudor period attributable to the ‘new spirit of humanist rationalism that pervaded all Europe in the wake of the Renaissance’.<sup>17</sup> As he says:

The whole universe came under questioning examination, from the heavens and the furthest reaches of the earth to the structure and physiology of tiny living creatures .... Nor did the new quest for rational understanding stop with God and the natural world; simultaneous advances were made in the humane sciences, such as history, philology, economics and politics. Could the law of man possibly be immune from this new spirit?

Anyone who approaches the history of the common law during this age of intellectual revolution has to confront the rather surprising fact that the law of England seems on the surface hardly to have changed at all.<sup>18</sup>

The edge of Baker’s observation lies in the qualification ‘on the surface’. In an attempt to respond to this anomaly, of which Maitland was struck, given the susceptibility of the legal systems of continental Europe to humanist influence, Baker proffers his own explanation: viz. that English law was in truth undergoing

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11 Gummow, above n9 at 181.

12 Id at 167.

13 Sir Owen Dixon, ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240 at 241, reproduced in Sir Owen Dixon, *Jesting Pilate* (1965) 203 at 205.

14 *Leeth v The Commonwealth* (1992) 174 CLR 455 (‘*Leeth*’) at 486.

15 Sir John Baker, *The Oxford History of the Laws of England – Volume VI: 1483–1558* (2003).

16 Gummow, above n9.

17 Baker, above n15 at 3.

18 Ibid.

‘something of a transformation, a process which in a rapidly changing world provided additional insurance against more drastic change imposed from without’.<sup>19</sup> This transformation was not based upon an application of classicism or knowledge of Roman history but manifest in tendencies in English legal thought and law reform, which can be linked with the ideals associated with the rationalist spirit of the Renaissance. To uncover those tendencies was a difficult task for Baker, not least because to search the printed sources, as opposed to the unpublished plea rolls of the case law, was to search ‘in vain for any direct allusion to the new learning’<sup>20</sup> but, more importantly, because, as he puts it ‘there is a deep conservative element in the common law which often conspires to deny or conceal any sense of movement’.<sup>21</sup>

It is this concealment of movement associated with the common law method of judicial decision-making that can potentially restrict historical understanding. Baker observes that lawyers have ‘been bemused by the apparent continuity of their heritage into a way of thinking which inhibits historical understanding’.<sup>22</sup>

In Australia this difficulty was evident in *Mabo v Queensland (No 2)*.<sup>23</sup> There the High Court accepted that the concept of native title ought to be accommodated within the common law<sup>24</sup> because the long-standing refusal to do so had rested upon ‘past assumptions of historical fact, now shown then to have been false’.<sup>25</sup> The view declared in *Mabo (No 2)* differed from the assumptions prevalent at the time of federation upon which basic propositions of Australian land law had been built. To the extent to which the common law was understood as the ultimate constitutional foundation in Australia, there was thus a perceptible shift in that foundation yet, as Gummow J noted in *Wik Peoples v Queensland*,<sup>26</sup> there was no established system of classification in the language or logic of the common law to reflect the significance of that shift, nor to regulate the use of a change in the perception of historical facts upon the formulation of legal norms. The commitment to the notion that the common law method is ‘incremental’, or that it involves only ‘gradual change by judicial decision, expressive of improvement by consensus, and of continuity rather than rupture’,<sup>27</sup> may thus leave the common law without the words or the methodology to assist in the task of the formulation of legal norms when assumptions based on historical fact are shown to be false.

### 3. *Imperial Constitutional Law*

In the context of Imperial constitutional law, Gummow J has argued that the illusion of continuity of the common law heritage assisted in obscuring the control

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19 *Id* at 13.

20 *Id* at 17.

21 *Ibid*.

22 Sir John Baker, *The Legal Profession and the Common Law – Historical Essays* (1986) at 436, as quoted in *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182–183 (Gummow J).

23 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo (No 2)’*).

24 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 39.

25 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 180 (Gummow J, commenting on *Mabo (No 2)*).

26 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 182–183 (Gummow J).

27 *Wik Peoples v Queensland* (1996) 187 CLR 1 at 179 (Gummow J).

by the Imperial executive government over the colonial legislative processes ‘by invoking the common law of England as embracing the conduct of colonial administration’.<sup>28</sup>

The various elements of control included, in respect of Western Australia, those considered by the High Court in *Yougarla v Western Australia*.<sup>29</sup> These included the reservation of Bills for the signification of ‘Her Majesty’s pleasure’ thereon; this phrase, in ‘what one might call the common law of the English constitution respecting the colonies’,<sup>30</sup> meant that:

When a Bill is so reserved it has no force until assented to by the King himself, ie by (in effect though not in form) the Home Government ... the Crown [acting] on the advice of the home ministers, who are responsible to the imperial Parliament.<sup>31</sup>

As is well known, the control exercised was given full effect by some colonial judges such as Mr Justice Boothby, a Judge of the Supreme Court of South Australia, who took the view that Instructions,<sup>32</sup> issued by the Home Government to Governors for their guidance in relation to Her Majesty’s assent and reservation, ‘had the force of law so that no colonial Act to which the Governor had given his assent contrary to the Instructions were valid’.<sup>33</sup> Indeed, it is universally acknowledged that a series of judgments by Mr Justice Boothby was the immediate cause of the passing of the *Colonial Laws Validity Act 1865* (UK).<sup>34</sup>

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28 Gummow, above n9 at 169.

29 *Yougarla v Western Australia* (2001) 207 CLR 344 (*‘Yougarla’*).

30 *Yougarla v Western Australia* (2001) 207 CLR 344 at 353 [13].

31 *Yougarla v Western Australia* (2001) 207 CLR 344 at 353 [13], quoting Sir Henry Jenkyns, *British Rule and Jurisdiction Beyond the Seas* (1902) at 15–16. Where the requirement to reserve was contained in an Imperial statute, assent by the Governor of a colony had no force or effect and the Bill would not become law. As noted in *Yougarla*, John Quick and Robert Garran, *The Annotated Constitution of the Australian Commonwealth* (1901) at 695–697, lists 28 Bills from Australian colonies, from details supplied in 1894, in respect of which, having been reserved, the home ministers advised the Crown to withhold assent. They also list five statutes passed by bicameral colonial legislatures and assented to by Governors of colonies possessing responsible government which were subsequently disallowed, that is, a step taken by the Monarch on the advice of British Ministers ‘to remove a law from the Statute Book’: *Yougarla v Western Australia* (2001) 207 CLR 344 at 358 [32], see also 360 [34] n57.

32 Quick and Garran, above n31 at 690, describe one of these Instructions as comprising ‘[t]hat in the passing of all laws, each different matter be provided for by a different law, without intermixing in one and the same Act such things as have no proper relation to each other’.

33 *Yougarla v Western Australia* (2001) 207 CLR 344 at 359 [34].

34 Sir Kenneth Roberts-Wray, *Commonwealth and Colonial Law* (1966) at 396. Amongst Boothby J’s pronouncements were judgments that the South Australian *Constitution Act* of 1856 was invalid in part because it required the Attorney-General to be a Minister and in Parliament and by reason that by passing the *Electoral Act* of 1855–56 the Legislative Council had incidentally destroyed itself: Arthur Berriedale Keith, *Responsible Government in the Dominions* (2<sup>nd</sup> ed, 1928), vol 1 at 339–340. On Boothby J generally, see John M Williams, ‘Justice Boothby: A Disaster that Happened’ in George Winterton (ed), *State Constitutional Landmarks* (2006) 21.

In *Yougarla*<sup>35</sup> the High Court held that a tabling requirement of 30 days contained in an Imperial Act of 1850 was inapplicable in 1905 so as to invalidate an Act passed in that year which was not so tabled.<sup>36</sup> The Court held that the tabling requirement had not survived the establishment of a bicameral legislature by the issue of the first writs for the election of members to serve in the Legislative Assembly, which was the historical point at which so much of the 1850 Act as was 'repugnant' to the Constitution Act 1889 (WA) was repealed.<sup>37</sup>

These forms of Imperial control over colonial legislatures were assisted by the view that colonial legislatures lacked the power to make laws which were contrary to at least 'the fundamental principles of British law',<sup>38</sup> including what might be called the common law of the British constitution respecting the colonies.<sup>39</sup> What was considered to be contrary to the fundamental principles of British law included, it seems, 'denying the sovereignty of the Crown ... allowing slavery or polygamy ... prohibiting Christianity ... authorizing the infliction of punishment without trial ... [and] the uncontrolled destruction of aborigines'.<sup>40</sup> No definition of what was and was not a matter of fundamental principle could be given.

While the view that colonial legislatures lacked the power to make laws that were contrary to the fundamental principles of British law may have stemmed from the express restriction imposed upon initial grants of power to make laws in the early colonial days, if not imposed it was implied and 'it became recognized as a general principle...that a colonial law was not valid if it was contrary to English

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35 *Yougarla* had to be decided by reference to the law as it stood before the enactment of the *Australia Act* 1986 (Cth): see *Yougarla v Western Australia* (2001) 207 CLR 344 at 350 [2].

36 *Yougarla v Western Australia* (2001) 207 CLR 344 at 363 [43]. The *Aborigines Act* 1905 (WA) ('the 1905 Act') repealed s 70 of *The Constitution Act* 1889–1950 (WA) ('the WA Constitution Act'). Section 70 had imposed an obligation to pay out of the Consolidated Revenue Fund 1 per cent of the gross revenue to be appropriated to the welfare of those whom it described as 'the aboriginal natives'. The Court held that the 1905 Act had thus successfully repealed s 70 despite not having been laid before both Houses of the Imperial Parliament for 30 days, but having complied with the then requirement for reservation under the second proviso to s 73 of the WA Constitution Act. The Bill for the 1905 Act had also complied with the requirements that the Governor signify in a particular manner and within a two-year period that the Sovereign had given the Royal Assent. These requirements, imposed by s 33 of the *Australian Constitutions Act* 1842 (Imp) 5 & 6 Vict, c 76, as extended by s 12 of the *Australian Constitutions Act* 1850 (Imp) 13 & 14 Vict, c 59 ('the 1850 Act') to Bills passed by the Legislative Council of Western Australia, were preserved and made applicable by s 2(a) of the *Western Australia Constitution Act* 1890 (Imp) 53 & 54 Vict, c 26 to laws reserved pursuant to a requirement in s 73 of the WA Constitution Act. See *Yougarla v Western Australia* (2001) 207 CLR 344 at 353–354 [14]. The requirement for reservation under the second proviso to s 73 extended to Bills other than those which interfered with the operation of s 70. Note that s 9(2) of the *Australia Act* 1986 (Cth) provides that: 'No law or instrument shall be of any force or effect in so far as it purports to require the reservation of any Bill for an Act of a State for the signification of Her Majesty's pleasure thereon'.

37 By dint of an 1890 Imperial Act, the *Western Australia Constitution Act* 1890 (Imp) 53 & 54 Vict, c 26.

38 Keith, above n34 vol 1 at 339.

39 *Yougarla v Western Australia* (2001) 207 CLR 344 at 353 [13].

40 Keith, above n34 vol 1 at 339–340.

law'.<sup>41</sup> As Roberts-Wray wryly observes, 'in *Phillips v Eyre*<sup>42</sup> it was hopelessly argued that this principle even survived the *Colonial Laws Validity Act*'.<sup>43</sup> The form of thinking was clearly stubborn. The restrictions on colonial legislatures arose out of the sense that colonial laws had to take their place within a single coherent system of law, the development of which could not accommodate the co-existence of two conflicting provisions productive of an 'antinomy', as Sir Owen Dixon said in describing the nature of repugnancy.<sup>44</sup>

#### 4. *Sir Owen Dixon and the Supremacy of the Common Law*

Sir Owen Dixon said much more concerning the common law as the fundamental source of legal authority in Australia, seeing it as 'antecedent in operation to the constitutional instruments which first divided Australia into separate colonies and then united her in a federal Commonwealth'.<sup>45</sup> This is a form of regard that is more consistent with the denial than the recognition of federal jurisdiction. Dixon said as much in his 1943 Address to the Section of the American Bar Association for International and Comparative Law on the 'Sources of Legal Authority' when he observed:

[The Australian legal system] is a system or corpus composed of the common law, modified by the enactments of various legislatures ....

It would, I believe, have been more consistent with this outlook upon the law, and at the same time better for the efficient administration of justice, if our Australian constitution-makers had refused to adopt the American distinction between State and federal jurisdiction.<sup>46</sup>

Federal jurisdiction can be defined as 'the authority to adjudicate derived from the Constitution'.<sup>47</sup> Federal jurisdiction, in providing for proceedings to be brought between States, or between the Commonwealth as a litigant on one side and a State on the other, includes 'species of litigation unknown at common law and in the Colonies before federation'.<sup>48</sup>

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41 Roberts-Wray, above n34 at 400.

42 *Phillips v Eyre* (1870) LR 6 QB 1.

43 Roberts-Wray, above n34 at 400

44 *Ffrost v Stevenson* (1937) 58 CLR 528 at 572. See also *Yougarla v Western Australia* (2001) 207 CLR 344 at 355 [17].

45 Sir Owen Dixon, 'Sources of Legal Authority' in *Jesting Pilate*, above n13 at 199.

46 *Id* at 201.

47 Gummow, above n4 at 984–985. Dixon proposed a similar definition when he said: 'State jurisdiction is the authority which State courts possess to adjudicate under the State Constitution and laws, Federal jurisdiction is the authority to adjudicate derived from the Commonwealth Constitution and laws': Commonwealth, Royal Commission on the Constitution of the Commonwealth, *Minutes of Evidence* (1929) part 3 at 787 ('*the Royal Commission Minutes*').

48 *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 62 [72] (McHugh, Gummow & Hayne JJ).

Although there was earlier some doubt about this,<sup>49</sup> it is now accepted that federal jurisdiction refers to the authority to adjudicate over the types of matters described in ss 75 and 76 of the *Constitution*.<sup>50</sup>

Dixon clearly disagreed with ‘the framers of the Australian Constitution’ who, he said:

had studied closely the principles upon which the American Constitution dealt with judicial power and found themselves unable to believe that these principles were not an integral part of federalism. Accordingly they established a federal jurisdiction extending actually or potentially to much the same description of matters as are covered by federal jurisdiction in [the United States].<sup>51</sup>

In the evidence he gave to the Royal Commission on the Constitution of the Commonwealth in 1929,<sup>52</sup> Dixon made clear the basis for his opposition to the creation of a distinctive federal jurisdiction. He regarded it as unnecessary in a system which, unlike the United States, has a single common law ultimately declared by the High Court<sup>53</sup> and not a separate common law derived from the State or Territory in which a proceeding commenced.<sup>54</sup> He said:

The original jurisdiction of the High Court is conferred by section 75 and under section 76 by statute. These sections bear traces of the American model. The Supreme Court of the United States does not possess an appellate jurisdiction from the courts of the States, and its jurisdiction arises from the provisions of the American Constitution contained in section 2 of article 3, which provides that the

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49 See *John Robertson & Co Limited (In Liquidation) v Ferguson Transformers Pty Limited* (1973) 129 CLR 65 at 93 (Mason J).

50 See, for example, *John Robertson & Co Limited (In Liquidation) v Ferguson Transformers Pty Limited* (1973) 129 CLR 65 at 87–88, 93–94; *Northern Territory v GPAO* (1999) 196 CLR 553 at 575 [35] (Gleeson CJ & Gummow J, Hayne J agreeing); *British American Tobacco Australia Ltd v Western Australia* (2003) 217 CLR 30 at 41 [5], 43 [8], 52 [41], 69 [98], 88–89 [165].

51 Dixon, above n45 at 201.

52 Comprising a memorandum prepared by the Committee of Counsel of Victoria consisting of Mr Menzies, Mr Ham and Dixon. Dixon told the Commission that Mr Menzies was ‘unfortunately, occupied on a matter which prevented his giving attention to this work, but Mr Ham and I, and to some extent, Mr Menzies, consulted together, and this memorandum was prepared’. See the Royal Commission Minutes, above n47 at 776.

53 In ‘The Common Law as an Ultimate Constitutional Foundation’ (1957) 31 *Australian Law Journal* 240 at 241, reproduced in *Jesting Pilate*, above n13 at 205, Dixon said: ‘We act every day on the unexpressed assumption that the one common law surrounds us and applies where it has not been superseded by statute’. This insight, which remained in dispute (see *Commonwealth v Mewett* (1997) 191 CLR 471 at 521 n190) until its contemporary acceptance in *John Pfeiffer Pty Limited v Rogerson* (2000) 203 CLR 503 at 514–515 [2], 517–518 [15], 534–535 [67] (Gleeson CJ, Gaudron, McHugh, Gummow & Hayne JJ) was reflected by Gummow J in ‘Full Faith and Credit in Three Federations’, above n4 at 989–990 when he said: ‘The High Court of Australia expressly declares the common law of Australia (including the common law rules as to choice of law), not the common law of the state or territory from when the appeal came or in which a federal court sat. The Parliament of the Commonwealth requires courts exercising federal jurisdiction to apply the “common law of Australia”’.

54 See also Cheryl Saunders, ‘Owen Dixon: Evidence to the Royal Commission on the Constitution, 1927–29’ (1986) 15 *Melbourne University Law Review* 553 at 570.

judicial power shall extend to all cases in law and equity arising under this Constitution, the laws of the United States, and treaties made or which shall be made under their authority; to all cases affecting ambassadors, other public ministers and Consuls; to all cases of admiralty and maritime jurisdiction; to controversies to which the United States shall be a party; to controversies between two or more States and between a State and citizen of another State, between citizens of different States, between citizens of the same State claiming lands under grants of different States and between a State or the citizens thereof and foreign States, citizens or subjects ....

These provisions arose from the view that certain controversies were, by their character, of such a nature as to be beyond the competence of the State judiciaries, or to require the services of a Federal judiciary, which might be considered more impartial than the State judiciaries. It may be doubted whether, if the thirteen States united in the union had been content to confer upon the Supreme Court of the United States a general and universal appellate power enabling it to review all decisions of the State judiciaries, any such provisions would have been found in the Constitution of the United States.<sup>55</sup>

He went on to say:

We think that, generally speaking, it might have been wiser if, when it was decided to bestow upon the High Court the functions of a final court of appeal, it had been thought this was enough to enable that court to maintain full control of the interpretation of the Constitution and the administration of the Federal law in common with that of all the other law. We realize that, on occasions, a prompt solution of constitutional controversies has been possible because of the power to bring them immediately before the High Court in its original jurisdiction; but we think this might be preserved without adhering to the very complicated and difficult criteria of jurisdiction which at present prevail.<sup>56</sup>

With respect to the investment in State courts of federal jurisdiction, under s 77(iii), Dixon decried what he saw as an unnecessary substitution of one source of authority for another.<sup>57</sup> For him, the ideal, consistent with an illusion of continuity, was for there to be ‘courts of justice administering the law without regard to the source whence it came’.<sup>58</sup>

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55 The Royal Commission Minutes, above n47 at 783.

56 Id at 784.

57 Id at 787. In this, his complaint was directed at replacing the source of authority State courts had with respect to so much of their jurisdiction ‘as fell within the description of matters set out in sections 75 and 76’. The State courts, before any express grant of federal jurisdiction, had jurisdiction in a number of matters within ss 75 and 76 (for example, jurisdiction between residents of different States) but, for example, there was no competence over matters in which the Commonwealth was a defendant (*Commonwealth v Bardsley* (1926) 37 CLR 393 at 405); see Sir Zelman Cowen & Leslie Zines, *Cowen and Zines’s Federal Jurisdiction in Australia* (3<sup>rd</sup> ed, 2002) at 196–197. For these matters the State courts were dependent upon a general grant of federal jurisdiction – it was not simply a matter of substituting the source of authority – and ss 39 and 56 of the *Judiciary Act* 1903 (Cth) confer only a limited jurisdiction upon State courts with respect to suits against the Commonwealth (viz. suits in contract and tort).

58 See the Royal Commission Minutes, above n47 at 787.

Dixon reiterated these views when in Sydney he took the oath of office as Chief Justice of the High Court in 1952 when he observed that the distinction between State and federal jurisdiction is one which ‘we unfortunately maintain’. He said:

That is an eighteenth-century conception which we derived from the United States of America in the faithful copy which was made of their judicial institutions. It is to be hoped that at some future time it will be recognized that under the English system of law, the British system of law which we inherited, the whole body of law is antecedent to the work of any legislature and that the courts as a whole must interpret and apply the whole body of law, so that there should be one judicial system in Australia which is neither State nor Commonwealth but a system of Australian courts administering the total body of the law.<sup>59</sup>

Thus, for Dixon, the embracing of federal jurisdiction by the framers of the *Constitution* was to be seen as a lapse of judgment, and moreover, a lapse the effect of which might be temporary and able to be remedied.<sup>60</sup> There may have been many reasons for the adoption of such scepticism, but Dixon’s reluctance to accept the need for federal jurisdiction is surely explicable in part in the character of federal jurisdiction as a ‘distinct non common law concept’.<sup>61</sup> That character precluded the maintenance of the illusion that federation had not fundamentally disturbed the continuity of the law and the legal system inherited from England; as Gummow J has said, there was thus a ‘striking respect in which the common law of which Dixon spoke could not control the provision by the *Constitution* of a system of federal jurisdiction’.<sup>62</sup>

## 5. *Implied Constitutional Guarantees*

The influence of the illusion of continuity upon the development of constitutional law in Australia is also apparent in the reasoning adopted by individual members of the High Court during the 1990s when recognising a species of ‘rights deeply rooted in our democratic system of government and the common law’<sup>63</sup> as giving rise to implied constitutional guarantees sufficient to function as restraints upon legislative power. These implied constitutional guarantees have included the right to legal equality recognised by some in *Leeth*.<sup>64</sup> Amongst the difficulties identified

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59 Sir Owen Dixon, ‘Upon Taking the Oath of Office as Chief Justice’ in *Jesting Pilate*, above n13 at 247.

60 Dixon also made it clear in his evidence before the Royal Commission that a federation ‘represent[ed] a compromise, and that the theory upon which it rests as a political device includes the supposition that it will serve during a period of transition while peoples separately governed may find it possible to unite more closely under a less rigid constitution.’ See the Royal Commission Minutes, above n47 at 790. See also the Royal Commission Minutes, above n47 at 793 and 795.

61 Gummow, above n4 at 984.

62 Gummow, above n9 at 172.

63 This is a special sense of rights as described by George Winterton in ‘Constitutionally Entrenched Common Law Rights: Sacrificing Means to Ends?’ in Charles Sampford & Kim Preston (eds), *Interpreting Constitutions: Theories, Principles and Institutions* (1996) 121 at 136, viz. ‘a unique hybrid of law and political fact deriving its authority from acceptance by the people and by the principal institutions of the state, especially parliament and the judiciary’.

in the thinking leading to the endorsement of implied guarantees is the paradox to which the reasoning is exposed. That paradox consists in invoking the historical source of the doctrine within the context of an English heritage, as it must do if the illusion of continuity is to be maintained, while yet at the same time seeking to give the content of the doctrine an ever-contemporary gloss.<sup>65</sup>

## **6. Conclusion**

If common law principles are to 'derive additional content from, or [be] influenced by, the *Constitution*'<sup>66</sup> there may be instances where the departure from existing principle is marked. The assumption underlying the methodology of the common law, of incremental change alone, ought not obscure or mask such a departure. The illusion of continuity ought not be permitted to preclude a transparent, proper and detailed account of the reasoning by which any departure from existing principle can be recognised and understood.

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64 *Leeth v Commonwealth* (1992) 174 CLR 455 at 487 (Deane & Toohey JJ); see also Gaudron J at 502–503.

65 Gummow, above n9 at 176.

66 *Id* at 180.

