

THE STATE OF CONSTITUTIONAL LAW IN THE STATES OF THE UNITED STATES: ARE THERE ANY LESSONS FOR AUSTRALIA?

JOHN D LESHY*

I. A COMPARATIVE OVERVIEW OF CONSTITUTIONAL LAW AND STRUCTURE IN AUSTRALIA AND THE UNITED STATES

A brief sketch of the constitutional frameworks in our two countries is a logical beginning point.¹ First, there are the decided similarities. Our nations share a strong tradition of federalism. Each national government overlays states that are themselves sovereign, with their own constitutions. In each country, in fact, self-governing states preceded the establishment of the central government. In each, moreover, the powers of the national government are formally enumerated, and the powers of the state governments are generally considered residual and inherent.

* Professor of Law, Arizona State University College of Law.

1. See generally, J A Thomson "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 Tex L Rev 1225; A Rapaczynski "Bibliographical Essay: The Influence of U.S. Constitutionalism Abroad" in L Henkin and A J Rosenthal (eds) *Constitutionalism and Rights: The Influence of the United States Constitution Abroad* (New York: Columbia University Press, 1989) 405, 442-447; C Saunders "The Constitutional Framework: Hybrid, Derivative but Australian" Paper no 13 on Federalism (Centre for Comparative Constitutional Studies, Law School, University of Melbourne, March 1989); P H Lane *An Introduction To The Australian Constitution* 5th edn (Sydney: Law Book Co, 1990); R D Lumb *The Constitutions of the Australian States* 4th edn (St Lucia: University of Queensland Press, 1977).

The constitutional arrangements likewise have broad similarities. The federal and state constitutions in both countries create democratic governments with legislative, executive and judicial branches. The legislative branches are bicameral (the states of Queensland and Nebraska excepted) and possessing of relatively sweeping powers. The judicial branches of state and federal governments in both countries are largely independent of the other branches. In both, judicial review of the acts of the other branches for conformity to constitutional commands is a long-accepted fact of constitutional life.

There are, to be sure, some important differences. Both the federal and state governments in Australia operate under a parliamentary system of responsible government that substantially unifies control of the legislative and executive branches. In the United States, by contrast, these branches remain separate and distinct in both the federal and all state governments. In fact, the trend in the US toward divided government - where one political party controls the executive and the other party controls one or both houses of the legislature - is accelerating in both federal and state governments. There are echoes of this experience in Australia; that is, upper houses can be controlled by parties out of power and have sometimes acted to check executive power.²

Constitutions in the US tend to be more formally self-contained charters, more sharply distinct from ordinary legislation, than in Australia. Here a state constitution is not located in one place; rather it is, in the words of Professor Lumb, "fissiparous both in content and form ... an elusive beast, hard to pin down."³

While there are substantial variations in procedures for amending state constitutions in the US, in every state but Delaware proposed amendments, no matter how arrived at, must be submitted directly to the voters for ratification. In Australia, on the other hand, amending procedures have been described as "basically ... flexible ... to which have been added some rigid ... 'manner and form' requirements."⁴

These differences might be more exaggerated in form than they are in practice. Many states in both countries share the common require-

2. See Thomson *supra* n 1, 1233 text accompanying n 44.

3. R D Lumb "Methods of Alteration of State Constitutions in the United States and Australia" (1982) 13 FL Rev 1, 4.

4. *Ibid.*, 2.

ment that legislative proposals for constitutional amendments must gain a special majority.⁵ While US state constitutions may have more of a veneer of permanence, many are in fact readily amendable by procedures that do not differ all that much from ordinary legislation. And they are quite frequently amended.

Another often-noted distinction is that the Australian constitutions, unlike those in the US, have no formal, separate bills of rights succinctly protecting a range of individual freedoms such as speech, religion, and privacy. Here too, however, it is easy to make too much of this difference. Some provisions in Australian constitutions strongly echo parts of US bills of rights, and other protections for individual rights can readily be implied, just as some important rights have been found implicit in US constitutions.⁶

Another difference is the fact that, in the US, decisions of state courts of last resort construing state constitutions are not reviewable by the US Supreme Court. In Australia the High Court is the final arbiter of state as well as federal constitutional law. In other words, there is no "adequate and independent state ground" doctrine like the one that prevents the US Supreme Court from reviewing state court decisions resting only on the state constitution.⁷ This suggests a greater potential for uniformity in Australian constitutional law than is possible in United States constitutional law. Whether this feature of judicial review is as significant in practice as it is in theory is not certain, but it might be a significant obstacle to a full flowering of state constitutional law in Australia.

A final difference is less formally structural than it is rooted in historical tradition. The US has long made what one scholar has aptly

5. Ibid, 3.

6. See, for example, *Street v Queensland Bar Association* (1989) 63 ALJR 715 Deane J, 737-738; N K F O'Neill "Constitutional Human Rights in Australia" (1987) 17 FL Rev 85. Compare *Griswold v Connecticut* 381 US 479 (1965).

7. It is not entirely clear whether the US could, without constitutional amendment, adopt the Australian model, allowing the US Supreme Court to become the ultimate arbiter of state as well as federal constitutional law. The Supreme Court has hinted that serious constitutional questions would be raised if Congress acted to vest the Court with the power of review over questions of state law. See *Murdock v Mayor and Aldermen of Memphis* 87 US (20 Wall) 590 (1874). A leading constitutional scholar in the US goes further, believing such legislation would probably be unconstitutional. See L H Tribe *American Constitutional Law* 2nd edn (Mineola, New York: Foundation Press, 1988) 163.

called a “cultural commitment to judicial oversight.”⁸ Americans are accustomed to the idea of a judiciary that engages in a relatively far-ranging search for perceived injustices to correct, often (though hardly exclusively) through interpreting and enforcing constitutional provisions.

Even though the idea of judicial review is well entrenched in Australia, this tradition does not seem as strong. One commentator recently concluded that Australia’s “generally less activist” judiciary, together with Australian constitutions’ more obscure protections for individual rights, make Australian courts “more a guardian of the structure of government established by the Constitution than a defender of the rights of the individual or of a minority against the state.”⁹

Without minimizing these differences, it nevertheless seems that the commonalities are, broadly considered, more notable. This suggests, in turn, that genuine opportunities for constitutional cross-fertilization exist.

II. THE RESURGENCE OF STATE CONSTITUTIONAL LAW IN THE UNITED STATES

Truly the most exciting development in constitutional law in the US in the past couple of decades has been the pronounced revival of interest and activity in state constitutional law. Like many US trends, this one might fairly be said to have begun in California in the early 1970s. It has spread with remarkable speed.

One illustration captures the point. The US Supreme Court squarely settled, in the mid-1970s, that a person has no right, under the free speech clause of the US Constitution, to engage in political speech or activity (such as gathering signatures on a political petition) in privately owned shopping malls.¹⁰ The Federal Constitution was held to prohibit governmental, and not private, restraints on speech. Put another way, the federal constitutional protection for free speech yields to private property rights.

8. A Chayes “The Role of the Judge in Public Law Litigation” (1976) 89 Harv L Rev 1281, 1307.

9. Rapaczynski *supra* n 1, 446-447.

10. *Lloyd Corporation v Tanner* 407 US 551 (1972); *Hudgens v National Labour Relations Board* 424 US 507 (1976).

In the last ten years, appellate courts of a dozen different states, including some of the most populous in the country (California, Connecticut, Massachusetts, Michigan, New Jersey, Pennsylvania and Washington) have considered the same issue under their own state constitutions.¹¹ For almost all of them, the matter was one of first impression, even though the state constitutional provisions in question had existed for decades or even centuries.

The results of these cases were mixed. Some of the state courts held that their constitutions did not protect such a right.¹² Others held otherwise.¹³ All the state courts agreed, however, that what the US Supreme Court had said was not controlling. This is the hallmark of this revival: a state court willingness to examine its own state constitution independently, and not to be suffocated by the US Supreme Court's constitutional analysis. No state high court - not even those in "outback" bastions of conservatism like Idaho, Utah, or Arizona - has proved immune from the lure of taking a fresh, independent look at its fundamental charter of state government.

Of course, judicial application of state constitutions existed prior to the 1970s. In most states, on some subjects, there has always been an active state constitutional law. Generally, though, these were areas where the US Constitution offered or implied no federal constitutional norm. As the US Supreme Court expanded the reach of the Federal Constitution (something it has rather consistently done over the last century), the gaps customarily filled by the state constitutions corre-

11. *Fiesta Mall Venture v Mecham Recall Committee* 159 Ariz 371, 767 P 2d 719 (App 1988) (Arizona); *Robins v Pruneyard Shopping Center* 23 Cal 3d 1989; 592 P 2d 341 (1979) affirmed 447 US 74 (1980) (California); *Cologne v Westfarms Associates* 192 Conn 48, 469 A 2d 1201 (1984) (Connecticut); *Batchelder v Allied Stores International Inc* 388 Mass 83, 455 NE 2d 590 (1983) (Massachusetts); *Woodland v Michigan Citizens Lobby* 423 Mich 188, 378 NW 2d 337 (1985) (Michigan); *State v Schmid* 84 NJ 535, 423 A 2d 615 (1980) (New Jersey); *Western Pennsylvania Socialist Workers 1982 Campaign v Connecticut General Life Insurance Co* 512 Pa 23, 515 A 2d 1331 (1986) (Pennsylvania); and *Alderwood Associates v Washington Environmental Council* 96 Wash 2d 230, 635 P 2d 108 (1981) (Washington).
12. Arizona, Connecticut, Michigan, Pennsylvania.
13. California, New Jersey, Washington. The Massachusetts decision allowing political activity in a shopping centre was not based on the free speech provision but on a constitutional provision which establishes free elections and the right of state inhabitants to elect offices and be elected to public office. *Batchelder* supra n 11.

spondingly shrank. As a result, state constitutional law steadily withered into obscurity, especially from the 1930s through the 1960s.

While not wholly new, state constitutional law is undergoing enormous expansion. State courts are not just applying state constitutional law by default, to fill those narrowing interstices left by the sprawling Federal Constitution. They are also, as the free speech in shopping mall example shows, applying state constitutions independently on issues addressed in nearly identical terms by both state and federal constitutions. They are, in short, manifesting a new attitude - a willingness to think for themselves with a confident spirit of independence that approaches hubris - as they exercise their power to interpret state constitutions.

This trend, once begun, becomes substantially self-reinforcing. Each time a state court renders a decision uncoupling its state constitution from the federal, or breathing life into a long-ignored or moribund constitutional provision, litigants are in effect invited to explore similar possibilities elsewhere. Because state constitutions often textually depart from the Federal Constitution, and cover many areas the Federal Constitution does not, they frequently contain fertile ground for law reform litigators across the political spectrum.

State courts also borrow emerging constitutional interpretations and ideas from each other. Such borrowing follows well-worn paths of communication. State high courts have long shared ideas in the many areas (such as the common law of torts, contracts, and the like, as well as constitutional law) where they share a common tradition.

Today, state constitutional law is booming, with an ever-widening supporting cast and satellite industries. Newsletters, regular columns in legal newspapers, greater coverage by the general media, and a monthly state constitutional law bulletin¹⁴ keep practitioners and scholars around the country in constant touch with emerging developments. State constitutional law is also finding its way back into law school curricula

14. The State Constitutional Law Bulletin is published by the National Association of Attorneys-General and the Council of State Governments. The National Association of Attorneys-General also inaugurated a new journal, *Emerging Issues in State Constitutional Law*, in 1988.

after a near-complete absence for several decades.¹⁵ Scholarly interest is rapidly growing; law journals have published more articles on state constitutional topics in the past five years than in the previous fifty. Symposia, conferences and other events help spread the word.

A. Example 1: Public school finance

The patterns and dimensions of this revival can best be illustrated with a few concrete examples. The first concerns constitutional norms applicable to the system of financing public schools in the US. From its beginnings in the nineteenth century, universal publicly financed education has always been primarily a concern of state government. As a result, the US Constitution contains not a single word on the subject, while nearly every state constitution has an entire article devoted to it.

Most states created local school districts, organised on a town or village basis, to operate public schools, and funded them through local property taxes. For decades concern has been growing in many parts of the country about the disparity in funds available to support education in property-rich and property-poor districts. For a variety of reasons many state legislatures were unable to overcome their inertia to address the issue, even when the disparities reached shocking levels.¹⁶

The obvious basis for a constitutional challenge to this system would have seemed to be at the state level. The typical state constitution not only contains a general “equality of treatment” clause, but also makes education a state (rather than a local) responsibility, and mandates something like a “uniform”, or “thorough”, or “efficient” (adjectives vary) state public school system. But by the 1960s, state constitutions had well-nigh disappeared from the general legal culture, and from the consciousness of most litigants. As a result, the option of applying state constitutions was not given much consideration.

At that time, by contrast, the federal courts and the Federal Constitution seemed to offer more promise. Although the framers of the

15. I cannot recall, during my three year stint at Harvard Law School in the late 1960s, ever hearing state constitutions mentioned in any course on any subject; certainly the standard courses in constitutional law dealt exclusively with the US Constitution.

16. As in Texas, where the ratio of property value per pupil varied from district to district by a factor of as much as 700 to 1. *Edgewood Independent School District v Kirby* 777 SW 2d 391, 392 (1989).

Federal Constitution's equal protection clause plainly did not have equality in state public education foremost in their minds, the US Supreme Court dramatically signalled its concern with equal educational opportunity, at least in matters of race, in its famous decision in *Brown v Board of Education of Topeka*¹⁷ ("Brown") in 1954.

As a result, school finance reformers turned to the federal courts and the Federal Constitution, challenging the gross differences in school funding among Texas school districts as a violation of equal protection. But the Court was retreating from the activism signalled in *Brown*, and by a 5:4 vote it turned back the challenge in *San Antonio Independent School District v Rodriguez*¹⁸ ("Rodriguez") in 1973.

This setback proved only temporary for reformers. The California Supreme Court had already held its school financing system unconstitutional under the equality clause of the state as well as the Federal Constitution,¹⁹ and in the years since *Rodriguez* high courts in nearly half of the fifty states have evaluated their school finance systems against the requirements of their state constitutions. About half of these have declared their systems unconstitutional.²⁰

Many have relied not on general equality clauses in state constitutions but rather on more specific provisions targeted at education. One of the latest state courts to do so is, ironically, Texas, the scene of the earlier unsuccessful federal challenge. There the state Supreme Court applied a constitutional provision requiring the legislature to make "suitable" provision for an "efficient" statewide public school system

17. 347 US 483 (1954).

18. 411 US 1 (1973). For more recent evidence of the US Supreme Court's reluctance to apply the equal protection clause of the fourteenth amendment to state public education, see *Kadrmas v Dickinson Public Schools* 487 US 450 (1988) deciding that a school bus user fee does not violate equal protection; compare *Plyler v Doe* 457 US 202 (1982) which held that the state must make public education available to children of illegal aliens on the same terms as other children in the state.

19. *Serrano v Priest* 5 Cal 3d 584, 487 P 2d 1241 (1971).

20. The state court decisions are collected and discussed in W E Thro "To Render Them Safe: The Analysis of State Constitutional Provisions in Public School Finance Reform Litigation" (1989) 75 Va L Rev 1639; and M W Catalano and C Modisher "State Constitutional Issues in Public School Funding Challenges" (1989) 2 Emerg Issues in State Const Law 207. For a frank discussion of one state high court Justice's assessment of the judicial role in such cases, see R Neely *How Courts Govern America* (New Haven: Yale University Press, 1981) 16-17, 19-20 and 171-189.

to throw out the existing financing structure.²¹ As this shows, the resurgence of state constitutional law is not confined to applications of the protections in formal bills of rights. Indeed, some of the most interesting and important developments in state constitutional law have not involved bills of rights or individual rights at all.

B. Example 2: The right to privacy

It remains the case, however, that popular attention given to state constitutional resurgence in the US has concentrated on the traditional area of glamour - constitutional protections for individual rights. One such issue undergoing rich application and doctrinal development at the state level is privacy, especially in civil matters.

In the Federal Constitution, the principal express privacy protections apply in the criminal context, providing freedom from self-incrimination and from unreasonable searches and seizures. While a federal constitutional right to civil privacy exists, it is one the US Supreme Court has had to strain somewhat to find, in the "penumbra" of various explicit constitutional guarantees and in emanations from the due process clause of the fourteenth amendment.²² The current Court under Chief Justice Rehnquist has not shown interest in extending federal constitutional protection for privacy; indeed, it has for the most part engaged assiduously in pruning it.²³

Many state constitutions, by contrast, contain more explicit or textually elastic protections for privacy. Arizona's constitutional privacy provision, for example, reads cryptically: "No person shall be disturbed in his private affairs, or his home invaded, without authority of law."²⁴

In case after case in the last decade, dozens of state supreme courts have applied such privacy clauses in a variety of contexts - contexts from which the Federal Constitution has often been exiled by decisions of the US Supreme Court. Among other things, state court decisions have tried to reconcile privacy notions with emerging telecommunications or other technologies (such as "caller ID" cordless telephones,

21. *Edgewood* supra n 16.

22. *Griswold* supra n 6.

23. See, for example, *Bowers v Hardwick* 478 US 186 (1986); *Webster v Reproductive Health Services* 109 S Ct 3040 (1989).

24. Ariz Const art II § 8.

and ever more sophisticated tests for drug use);²⁵ umpired collisions between emerging medical technologies and an individual's privacy right in medical treatment decisions (the so-called "right to die" cases);²⁶ and addressed the scope of personal privacy in reproductive or sexual behaviour or orientation (cases involving restrictions on or public funding for abortion, and cases on sodomy or homosexuality).²⁷

The constitutional issues being raised in these kinds of cases are controversial. They are on the cutting edge of constitutional law and social change. As has frequently been the case in the US, the courts have not hesitated to step up to meet the challenge of applying enduring constitutional norms to new contexts. The dramatic difference in the past few years, however, is that these are state courts, using state constitutions, intellectually liberated from the teachings of the US Supreme Court.

C. Example 3: Protecting access to courts for damage suits

Another area where the state courts have found fertile constitutional ground is in provisions protecting the right to sue for injuries. Some state constitutions contain guarantees that the courts shall always be open and available to supply remedies for every injury (so-called "open courts" provisions). A few states, like Arizona, have considerably more specific provisions. None of these has any counterpart in the text of the US Constitution, and the US Supreme Court has shown little inclination in modern times to apply the Federal Constitution (such as through

25. See, for example, *State v Gunwall* 720 P 2d 808; 106 Wash 2d 54 (1986). Interestingly, Justice David Souter, the newest member of the US Supreme Court (replacing Justice William Brennan) wrote an opinion for the New Hampshire Supreme Court expressing little interest in an argument that a "pen register" was a search under the state constitution. See *State v Valenzuela* 536 A 2d 1252, 1259 (1987). His opinion collected cases on both sides of the issue.
26. See, for example, *In the Matter of Karen Quinlan* 355 A 2d 647, 70 NJ 10 (1976); *Rasmussen v Fleming* 154 Ariz 207, 741 P 2d 674 (1987).
27. See, for example, *Moe v Secretary of Administration and Finance* 382 Mass 629, 417 2 Ed 387 (1981) (abortion funding); *Right to Choose v Byrne* 91 NJ 287, 450 A 2d 925 (1982) (same); *Gay Law Students Association v Pacific States Telegraph and Telephone Co* 156 Cal Rptr 14, 595 P 2d 592 (1979) (discrimination against homosexuals).

the due process or equal protection clauses) to interfere with state formulations of tort law.²⁸

These state constitutional clauses have been much litigated in recent years, often in the context of reviewing the constitutionality of "tort reform" legislation such as attempts to place ceilings on damage recovery, to adopt no-fault systems, or to provide immunities in certain situations. Here too the results have varied considerably from state to state and context to context. State constitutional clauses dealing with equality or due process have sometimes figured in this litigation, but for the most part the courts have concentrated on these "open courts" provisions.²⁹

These decisions involve the state courts quite heavily in the area of economic regulation, and have sometimes thwarted legislative attempts to limit liability or recovery. Because the cost of automobile, medical malpractice, and other forms of insurance have climbed in recent years in many places, some decisions have been controversial and provoked proposals for constitutional amendments to overrule them.

This is, furthermore, one area of state constitutional law where federal action has been proposed to overcome state constitutional obstacles. Congress, spurred on by the Reagan Administration, has for the past few years been considering enacting uniform federal standards for product liability that would pre-empt state law, including state constitutional limitations.

There is no doubt about Congress' power to do so. It may override state constitutional provisions in many contexts, under broad federal constitutional provisions like the interstate commerce clause, coupled with the supremacy clause.³⁰ So far, however, opponents of tort reform, defenders of state constitutions, and advocates of states' rights have prevailed, and even the limited incursion on state constitutions found in the products liability proposal has foundered in Congress.

28. See *Martinez v California* 444 US 277, 482 (1980); compare *Pacific Mutual Life Insurance Co v Haslip* 553 So 2d 537 (1989), cert granted, 59 USLW 3023 (1990), argued 3 October 1990 (constitutionality of state law award of punitive damages under due process abuse of fourteenth amendment of Federal Constitution).

29. See, for example, *Boswell v Phoenix Newspapers Inc* 152 Ariz 9, 730; P 2d 186 (1986); *Carson v Maurer* 120 NH 925, 424 A 2d 825 (1980); *Kluger v White* 281 So 2d 1 (1973).

30. US Const art I § 8 cl 17; art VI cl 2.

D. Example 4: Policing the separation of powers

State courts have long played a role in enforcing constitutionally mandated separation of powers among the branches of state government. Most state constitutions are, in fact, considerably more emphatic on the subject than the US Constitution, even though the basic constitutional ideas are the same at both levels. Yet here too the state courts in recent years have shown new vigour in dealing with these issues.

One example involves the state courts fending off what they perceive are legislative encroachments on their powers to regulate such things as the rules of evidence, the practice of law and the operation of the courts. Of course, the tort reform cases described in the previous example also involve legislative restrictions on the judicial process, but those court decisions are more rooted in specific constitutional clauses such as the “open courts” provisions. Here, on the other hand, the decisions rest more generally on the notion that the courts have inherent power, arising directly from the separation of powers over evidence, regulating attorneys, and administering the judicial branch.

Such issues very rarely emerge at the federal level because the federal judiciary almost never claims such inherent power. State courts do, however, and the boundaries of this power are fairly often litigated at the state level.³¹

31. See, for example, *American Trial Lawyers Association v New Jersey Supreme Court* 66 NJ 258, 330 A 2d 350 (1974); *Commonwealth, ex rel Carroll v Tate* 442 Pa 45, 274 A 2d 193 (1971); *People v McKenna* 585 P 2d 275 (1978).

III. REASONS UNDERLYING THE STATE CONSTITUTIONAL RESURGENCE IN THE UNITED STATES

Perhaps the most useful way to explore what relevance the revival of US state constitutional law might have for Australia is to identify the major factors underlying it.

A. Limiting the impact of the United States Supreme Court's rightward tilt

Certainly one reason for the revival - and the one usually first seized upon by extreme partisans for and against it - unabashedly seeks a particular substantive result. Those favouring an expansion of judicially protected individual liberties now look to state constitutions and state courts primarily in reaction to the retreat of the Reagan/Rehnquist Supreme Court. They perceive the state courts as offering the opportunity to retain and expand judicial protections that are being limited and dissolved as a matter of federal constitutional law.³²

The notion of relying on state constitutions for these protections is especially attractive to civil libertarians. State supreme court decisions applying state constitutions are not, generally speaking, subject to review or limitation by the US Supreme Court because of the "adequate and independent state ground" doctrine.³³ This is not, however, wholly true. State constitutional decisions expanding individual liberty may eventually collide with federal constitutional rights and, under the US Constitution's supremacy clause, have to recede. Thus a state constitutional decision protecting the right to engage in political activity on someone else's private property, such as a private shopping mall, could conceivably interfere with the federal constitutional rights of the property owner. In this particular context, however, the constitutional analysis becomes quite subtle, illustrating how intertwined state and

32. Indeed, the leading civil libertarian on the US Supreme Court, recently-retired Justice William Brennan, was among the first to call attention to the role state constitutions and state courts could play in this context, in his article "State Constitutions and the Protection of Individual Rights" (1977) 90 Harv L Rev 489.

33. See *Michigan v Long* 463 US 1032 (1983).

federal constitutional law can become, and how complex the interplay between state and federal constitutional law can be in the US federal system.

Federal constitutional law protecting property rights typically defers to state law for defining the content of those property rights. If state property law does not accord the shopping mall owner the right to exclude those who wish to engage in political speech on the premises, then the federal constitutional protection for property rights will generally respect that state law limitation and not enlarge the scope of those property rights.³⁴

As noted earlier, state court decisions resting upon state constitutional grounds are reviewable by the High Court in Australia. Perhaps, therefore, the notion of state constitutional law as a counterweight to federal constitutional law is not as applicable in Australia.

B. The "New Federalism" - resuscitating the power of the states

Although much of the attention focused on the revival of US state constitutional law has played up conflicting decisions between the federal and state courts on constitutional civil liberties, it is a serious mistake to conceive of the revival solely in those terms. Indeed, some of the more interesting trends have little or nothing to do with that field.

This points up the second factor underlying the revival of state constitutional law in the US: what some call the "new federalism" - an across-the-board renewal of interest in state and local governments as a source of creative solutions to social problems. This is of course an old idea, perhaps most vividly captured by Justice Louis Brandeis in his famous reference to the "happy feature" of federalism that allows the state and local governments to serve as "laboratories" for economic, social, and political experiments that can, should, and do influence federal policy making.³⁵ In modern times its appeal has been enhanced by the growing perception of a sprawling federal presence creating an increasingly stifling uniformity.

34. *Robins v Pruneyard Shopping Center* 447 US 74 (1980).

35. *New State Ice Company v Liebmann* 285 US 262, 311 (1932) Brandeis J dissenting; see also *Truax v Corrigan* 257 US 312, 344 (1921) Holmes J dissenting.

In fact, state courts have long served as laboratories of constitutional law, influencing the Supreme Court's view of the Federal Constitution.³⁶ Although too often forgotten by lawyers who came of age when the federal courts and the Federal Constitution monopolised the spotlight, over much of the two centuries of the country's existence there was a decided amount of intellectual cross-fertilization between state and federal courts, and state and federal constitutions.

The states' value as constitutional laboratories is demonstrated not just in judicial interpretations but in constitutional processes themselves. For example, more than forty states provide their chief executives with a constitutional right to veto single or "line" items in an omnibus legislative act appropriating money for various purposes. This power, denied the President by the United States Constitution, has been a frequent subject of political discussion at the national level in recent years as the political system seems unable to deal with our continuing large budget deficits. The discussion is richer, and better informed, by the actual experience provided by the state constitutions.

From a political standpoint, the "new federalism" reason for state constitutional resurgence coexists somewhat uncomfortably with the idea that state constitutions offer a refuge for the political left. In modern times, it has been the political right in the United States that has emphasised the primacy of local over national responsibility for most social questions. The idea of local control, in other words, gives the right its own reason to support development of state constitutional law.

State constitutions, and state court decisions applying those constitutions, are not only more susceptible to local control, they do not perform apply nationwide. Rather, they must compete in the intellectual and political marketplace if they are to find acceptance outside their own states.

36. For a useful summary of many historical examples of state court applications of the Federal Constitution that found favour with the US Supreme Court, see R F Utter "Swimming in the Jaws of the Crocodile: State Court Comment on Federal Constitutional Issues when Disposing of Cases on State Constitutional Grounds" (1985) 63 *Tex L Rev* 1025.

Over time, a growing diversity of state constitutional decisions may loosen the US Supreme Court's application of the Federal Constitution to the states. That Court might be persuaded to lower the "floor" of protection provided to individual rights by its application of the Bill of Rights to the states. At least it might become more flexible and deferential to state court balancing of the needs of the state versus those of the individual. Ultimately, in short, an increased reliance on state constitutions may diminish the reach and importance of the Federal Constitution, and the US Supreme Court's authority in interpreting it.

The idea that constitutional federalism allows the left and right sides of the political spectrum to swap institutional weapons is not new, of course. Numerous state constitutional provisions around the turn of this century were drafted in reaction to what their framers perceived as the unacceptable tilt rightward by the US Supreme Court. Later on, the right sought refuge in state courts and state constitutions, while the left perceived them as, for the most part, bastions of conservatism, and sought assistance from federal courts interpreting the Federal Constitution. Today the pendulum is once again swinging back.

This suggests, not incidentally, another important constitutional commonality between our two countries. Thomson has, for example, noted that "[e]bb and flow has also characterized the relative standing of national and state constitutions" in Australia. Thus in Australia too, "state constitutions and constitutional law have experienced periods of obscurity and prominence."³⁷

In a broader sense, the new federalism aspect of the revival of state constitutional law simply celebrates the diversity of the states and of the country's experience. The great English commentator James Bryce was struck by what he called the "pictorial" nature of American state constitutions. These charters, drafted at many different times through our country's history, disclose much about the "actual methods and conduct of government;" indeed, according to Bryce, they provide "the most instructive sources for the history of popular government."³⁸ As another early state constitutional commentator put it, "the romance, the

37. *Supra* n 1, 1234.

38. J Bryce *The American Commonwealth* 3rd edn (New York: Macmillan, 1906) 450, 458.

poetry, and even the drama of American politics are deeply embedded in the ... [American] state constitutions."³⁹

It is not only fun but useful to discover that Vermont, with its stereotypical image of taciturnity, has the shortest state constitution.⁴⁰ Or that Alabama, revelling in the Gothic politics of the deep south, has a constitution nearly twenty times longer, and one that has been amended nearly four hundred times in this century.⁴¹ The pictorial drama is, moreover, continually unfolding. Some twenty states have amended their constitutions in modern times to forbid discrimination on the basis of gender. A handful of states have adopted some sort of constitutional right to a healthy environment.⁴²

Such diversity extends to state courts as well as to the constitutions themselves. Two leading observers of state constitutional resurgence in the US have noted flatly that "there is no typical state supreme court." Rather, the state high courts tend to develop their own distinctive "institutional identities."⁴³

It is important to note that this celebration of diversity through a focus on state constitutions has not proved to be a serious threat to the national economic integration that has proceeded practically without interruption over the last several decades. The constitutional basis for national economic, social, and environmental regulation has not been seriously questioned by the US Supreme Court since the early 1930s, despite its recent sharp turn to the right in other areas.

39. Q Dealey *Growth of American State Constitutions* (New York: Da Capo Press, 1972) 11. See also L M Friedman *A History of American Law* 1st edn (New York: Simon & Schuster, 1973) 120.

40. At 6600 words, it is the only one shorter than the US Constitution.

41. A L Sturm "The Development of American State Constitutions" (1982) 12 *Publius* 57, 74-76.

42. See, for example, E A Sherwin "Sex Discrimination and State Constitutions: State Pathways through Federal Roadblocks" (1984) 13 *NYU Rev L & Soc Change* 115; J Avner "Some Observations on State Equal Rights Amendment" (1984) 3 *Yale L & Pol'y Rev* 144; A E Howard "State Constitutions and the Environment" (1972) 58 *Va L Rev* 193; R J Tobin "Some Observations on the Use of State Constitutions to Protect the Environment" (1974) 3 *Env Affairs* 473 (showing 11 states adopted environmental constitutional provisions between 1964 and 1973). See also the discussions of state constitutional change in the volumes of *The Book of the States* (Lexington, Kentucky: Council of State Governments) published annually.

43. G A Tarr and M C A Porter *State Supreme Courts in State and Nation* (New Haven: Yale University Press, 1988).

State supreme courts, even as they are flexing their state constitutional muscles in other areas, have likewise, for the most part, not seriously impaired this powerful, probably inexorable trend. If threats materialise, of course, the federal government has a ready remedy - pre-emptive legislation. As the current national debate over products liability legislation shows, however, the “political safeguards of federalism” are powerful protective forces for states’ prerogatives, including state constitutions.⁴⁴

This experience suggests that developments in Australia which seem to strengthen the federal constitutional case for national regulation, such as the *Franklin Dam* case⁴⁵ need not, of themselves, undermine the benefits of focusing on state constitutions.⁴⁶ In fact, just the opposite might be happening in the US. The comparative loss of states’ control over their economies may be heightening the value, politically and culturally, of state assertions of constitutional independence in other areas.

C. Breaking up the United States Supreme Court’s monopoly on constitutional law

A third justification for state constitutional revival is also closely bound up with federalism and with a fundamental concept upon which it rests. This is the idea, most often identified with Montesquieu and the framers of the US Constitution, of dispersing power among governmental layers and units as a means of restraining government and thereby promoting liberty.⁴⁷

In the context under discussion, the idea translates into a distrust of a single court monopolising constitutional interpretation. The idea of legislative and executive power being divided between state and national institutions is everywhere readily accepted in the US; basically

44. H Weschler “The Political Safeguards of Federalism: The Role of the States in the Composition and Selection of the National Government” (1954) 54 Colum L Rev 543.

45. *The Commonwealth v Tasmania* (1983) 158 CLR 1.

46. Compare, however, the recent decisions of the High Court in favour of regulation by the states: *Re Tracey; Ex parte Ryan* (1989) 166 CLR 518 and *New South Wales v The Commonwealth* (1990) 90 ALR 355.

47. Baron de Montesquieu *The Spirit of the Laws* 151-152 (T Nugent trans) (New York: Hafner Publishing Co, 1966).

the same justification exists for having different centres of judicial power over constitutional values. Ultimately, in short, a dialogue emanating from many supreme courts is better, and safer, than a monologue from the US Supreme Court.

In the Australian context, where the executive and legislative branches are substantially united under the tradition of responsible government, this argument for more dispersion of power might carry even more weight. On the other hand, in Australia the High Court has the power to review and reverse the decisions of the highest courts in the states even on matters of state constitutional law. At least as a formal matter, then, the state high courts cannot, absent federal constitutional change, exist as truly independent centres of judicial power. However, to the extent it is persuaded that there is a benefit from dispersing judicial power over constitutional norms, the High Court could refrain from vigilant review of state court decisions enforcing state constitutions. Moreover, states do have room to act to reinstate state court constitutional interpretations, after the High Court has disagreed, by amending the state constitution. In effect then, states can override High Court decisions on state constitutional law.

D. Carrying out the intent of the framers of the state constitutions

A fourth rationale for taking US state constitutions seriously is simply to carry out the intent of their framers. The drafters of these state charters expected that the constitutional structure and safeguards they were creating would be the bottom-line determinants of the boundaries of governmental power and individual liberty. Like the “new federalism” notion discussed earlier, this notion of faithfulness to the framers’ expectation is also usually identified with a conservative credo.

There can be no doubt in the US about the expectations of the framers of nearly all state constitutions. State and federal constitutions deal with many of the same subjects, but the constitutional texts are rarely identical. This suggests that the meanings of counterpart but textually different provisions are not identical. This view is reinforced by the individual histories of most state constitutions, which reveal beyond peradventure a general attitude of independence from the Federal Constitution. The decided tendency of state constitutional draf-

ters was to look much more closely to other state constitutions as models rather than to the Federal Constitution.⁴⁸

Thirteen state constitutions preceded the Federal Constitution and thus necessarily stood, when they were drafted, as the sole source of constitutional law for their citizens.⁴⁹ Although all the state constitutions that followed these original thirteen were drafted against the backdrop of the Federal Constitution, they were largely unaffected by it.

These subsequent constitutions were mostly fashioned at a time when the US Supreme Court was interpreting most provisions of the Federal Constitution to leave broad latitude for state power and state constitutional law. These Court-imposed limitations on the Federal Constitution went beyond the simple fact that most protections of the Federal Bill of Rights were not deemed applicable to the states until well into the twentieth century, when the process of incorporating them into the due process clause of the fourteenth amendment accelerated dramatically under Chief Justice Earl Warren.⁵⁰ They also extended to the Court's interpretation of a variety of other constitutional provisions, including the interstate commerce clause, the equal protection clause, and the limitations on federal court justiciability derived from Article III.

Thus the framers of most state constitutions found it only natural to assume that their charters would provide not only the basic framework of, but also the primary limitations on, state government. What is more remarkable is that this notion of independence from the Federal Constitution remains pronounced among drafters of modern state constitutions. The newer state constitutions, including those from states both old (Florida, Georgia, Illinois, Montana, North Carolina and Virginia have adopted new constitutions in the last twenty years) and relatively new (Alaska and Hawaii were admitted to the union with new constitutions in 1959), have not deferred to federal constitutional ideas, even

48. Friedman *supra* n 39, 124, 347-348; J W Hurst *The Growth of American Law: The Law Makers* (Boston: Little, Brown & Co, 1950) 224-225.

49. Indeed, judicial review of the acts of legislatures for constitutionality was invented at the state level before Chief Justice John Marshall adopted the idea for the US Supreme Court. See Sturm *supra* n 41, 62; A E Howard "State Courts and Constitutional Rights in the Day of the Burger Court" (1976) 62 Va L Rev 873, 877-878.

50. See, for example, Tribe *supra* n 7, 772-774.

though they were drafted at a time when those ideas were invading a lot of territory previously outside the bounds of federal constitutional law. The high courts in these states have also, for the most part, acted accordingly. Both the Alaskan and Hawaiian Supreme Courts, for example, have issued noteworthy decisions enforcing state constitutional rights to privacy.⁵¹

Therefore, looking to state constitutions as the primary source of constitutional law is consistent with their framers' expectations, regardless of when they were drafted.

E. The improved quality of state judiciaries

A few other considerations are worth mentioning, even though they are not usually offered as justification for the resurgence of state constitutional law in the US. Many states have acted in the past few decades to upgrade the quality of their judiciaries. A number have changed judicial selection methods to limit the role of partisan politics. Around the turn of the century, for example, over two-thirds of the states elected state high court justices; currently, fewer than half do.⁵² Many states have improved judicial salaries to add attraction to the position. Some have enlarged the independence of judges by, for example, lengthening terms of office.

Well over one-third of the states have adopted some version of "merit selection;" usually, some variant of the so-called "Missouri plan", where judges are appointed after some form of relatively bipartisan merit review and thereafter periodically stand before the voters in a nonpartisan, "yes-no" retention election. State supreme courts now generally have more discretionary control over the kinds of cases they review. They are also generally better staffed, financed and administered.⁵³

51. See, for example, *State v Ravin* 537 P 2d 494 (1974); *State v Kam* 748 P 2d 372 (1988).
52. Compare 47 Cong Rec Part 4, 3359-3363 (1911) compiling state judicial selection and retention processes as of that date, with *The Book of the States 1988-89* (Lexington, Kentucky: Council of State Governments, 1988) 157-158, 163-165.
53. See, for example, S D O'Connor "Trends in the Relationship Between the Federal and State Courts from the Perspective of a State Court Judge" (1981) 22 Wm & Mary L Rev 801.

Although it would admittedly be difficult to prove by empirical methods, such changes have probably made the judiciaries in many states more receptive to principled arguments for independent state constitutional interpretations.⁵⁴

F. State courts routinely handle much federal constitutional litigation already

Another consideration relevant to state constitutional activism is the underappreciated fact that state court judges in the US are on the front lines of making much *federal* constitutional law. In fact, most cases raising questions of federal constitutional law originate in state, not federal, courts. Therefore, state judges address and decide federal constitutional issues much more than federal judges (underneath the US Supreme Court) do.

The reason for this is that most cases raising federal constitutional issues are criminal cases where the accused routinely argues, among other things, that the state has violated the Federal Bill of Rights. There is relatively little substantive federal criminal law; as a result, the vast bulk of criminal prosecutions are brought in state courts for violations of state laws. Most of the US Supreme Court decisions in the last few decades dealing with the rights of the criminally accused have involved review of state court decisions.⁵⁵

If state courts are trusted to be on the front lines in applying federal constitutional law, the argument runs, it is difficult to argue that these same courts ought to be deemed incompetent to address issues arising under state constitutions.

54. A considerable literature exists comparing the performance of, and public confidence in, various kinds of elected versus appointed judicial systems across the US states. Some of these studies show relatively little difference among certain categories of measurement between different formal judicial selection systems, but none with which I am familiar tries to identify receptiveness to state constitutional arguments or creates a conclusive measurement of general overall ability. See, for example, S Nagel *Comparing Elected and Appointed Judicial Systems* (Beverly Hills Ca: Sage Pubns, 1973) (with a useful bibliography, 43-45); E Wasmann N P Lovrich and C H Sheldon "Perceptions of State and Local Courts: A Comparison Across Selection Systems" (1986) 11 *Just Sys J* 168 (with a useful bibliography, 184-185).
55. See, for example, *Miranda v Arizona* 384 US 436 (1966); H A Linde "E Pluribus - Constitutional Theory and State Courts" (1984) 18 *Ga L Rev* 165, 172-173.

The relevance of this feature to Australia is doubtful. Federal courts and other institutions in Australia can resolve issues of state constitutional law more readily than in United States, and state courts may be losing some authority over issues of federal law. As Thomson puts it:

In Australia jurisdictional impairment and vulnerability is afflicting state, not federal, courts. Almost simultaneously state courts are being deprived of federal jurisdiction, and federal courts are acquiring jurisdiction to determine state law issues.⁵⁶

IV. THE RELEVANCE (OR LACK THEREOF) OF THE RELATIVE EASE OF AMENDING STATE CONSTITUTIONS AND REPLACING STATE COURT JUDGES

US state constitutions are generally much easier to amend (or replace) than the Federal Constitution. Although procedures can differ markedly from state to state, most state constitutions require legislative proposals and popular approval to amend. In many states only a simple majority in both the legislature and among the electorate is required, in sharp contrast to the Federal Constitution, which requires approval by two-thirds of each house of Congress and three-quarters of the states. A sizeable minority of states also allows citizens to amend constitutions directly by popular initiative, bypassing legislatures.⁵⁷

The upshot of this is that an extraordinary political effort is usually not required to amend state constitutions, as actual experience shows. The US Constitution has been amended 26 times in slightly more than two hundred years. Most state constitutions have been amended far

56. *Supra* n 1, 1254. Of course, state and federal court jurisdiction in Australia has been considerably altered, at least in theory, by the so-called "cross-vesting" legislation recently adopted by both the states and the Commonwealth. See, for example, K Mason and J Crawford "The Cross-vesting Scheme" (1988) 62 ALJ 328; G Griffith D Rose and S Gageler "Further Aspects of the Cross-vesting Scheme" (1988) 62 ALJ 1016.

57. See Sturm *supra* n 41, 76-86. Unlike Australia, compulsory voting does not exist at either the state or federal level in the US. Voter turnout is low, involving fewer than half the eligible voters in many elections. This enhances the opportunity for numerical minorities among the population at large to control the outcome of elections.

more frequently. In two hundred years of state constitution-making, state constitutions have been amended nearly five thousand times. Thirty states have replaced their original constitutions with new ones, some as many as eleven times. The average state constitution is 82 years old and has been amended 94 times.⁵⁸ Moreover, despite the trend away from selecting state court judges by partisan elections, most state judges must still periodically stand before the voters.⁵⁹

It is difficult to say whether, and how, the relative ease of amendment and ouster of state judges might influence judicial behaviour. Because it makes judicial interpretations more easily "correctable" by the electorate, it may embolden state court judges to be more independent and even frankly experimental in their constitutional judgments.

On the other hand, by subjecting the process of constitutional interpretation to a more direct political check and the spectre of frequent reversal at the polls, it may lead judges to exercise more caution in their judgments. Indeed, the safest course of action for state court judges may often be simply to defer to and march in step with the US Supreme Court in interpreting the state constitutions.

Some of this restraint may be owed simply to human nature. One rarely enjoys seeing one's carefully considered judgments, especially those explained in writing and designed to persuade, rebuffed by others. In some cases, moreover, a judge's job might be in jeopardy. But there are deeper, less personal concerns at stake. The authority of the constitution as a fundamental charter, and of the judiciary as its prime expositor, rests on the power of the bench to command popular respect for its processes and judgments. The fear is that the more frequently the people "rise up" to strike down judicial interpretations of constitutional law, the less respect the constitution and the bench will command. That, in turn, would undermine the independence of the bench and the integrity of the judicial process.

Of course, judicial judgments interpreting statutes or the common law are quite frequently reversed by legislatures, yet few argue that this undermines respect for the judiciary and the rule of law. In almost every state in the US, however, reversal of state court constitutional judgments requires not just legislative action, but a popular vote.

58. *Supra* n 41, 74-76.

59. *Supra* n 52.

Moreover, the provisions for electing, retaining or recalling judges found in many states likewise call for some kind of popular vote. This gives the people at large a rare opportunity to express themselves directly on judicial performance and constitutional values.

Some are troubled by the very idea of direct popular referenda on judicial performance and individual decisions. Some are particularly concerned in light of the respectable (and growing) body of opinion in the US that holds that political campaigns generally are too dominated by media and image manipulation, ten to thirty second "sound bites", and other techniques that retard rather than advance public understanding of important issues. These considerations make many, particularly many lawyers and judges, nervous about the prospect of frequent popular referenda on judicial decisions.

The modern revival of state constitutional law in the US has seen a few notable instances of popular outcry, leading to constitutional amendment or other direct political action against particular judicial decisions. The Florida, California, and Massachusetts constitutions have been amended in the last few years to cut back on some specific state court decisions expanding the scope of individual freedoms under the state constitution. In a few cases, voters approved constitutional amendments providing for the death penalty after the courts had held it inconsistent with state constitutions and approved amendments fashioning crude, "shotgun" marriages tying the interpretation of specific state constitutional provisions to US Supreme Court interpretations of counterpart federal provisions.⁶⁰ Individual judges on a few state courts have faced hard-fought election contests for retention, where the opposition was at least partially grounded on the judges' state constitutional decisions. In the most celebrated case, three members of the California Supreme Court were soundly defeated in a retention election.⁶¹

60. See, for example, *People v Anderson* 100 Cal Rptr 152, 493 P 2d 880 (1972); Calif Const art 1 § 27 (subsequently amended); *Florida v Casal* 462 US 637, 638 (1983) Burger C J concurring; see generally D Wilkes "First Things Last: Amendomania and State Bills of Rights" 54 Miss L J 223 (1985); J M Fischer "Ballot Propositions: The Challenge of Direct Democracy to State Constitutional Jurisprudence" (1983) 11 Hastings Const LQ 43. On the other hand, some states have recently reaffirmed their constitutional independence. Rhode Island voters, for example, approved an amendment in 1976 providing that the rights guaranteed by the state Constitution "are not dependent on those guaranteed by the Constitution of the United States": R I Const art I § 24.
61. See J R Grodin "Developing a Consensus of Constraint: A Judge's Perspective on Judicial Retention Elections" (1988) 61 S Cal LR 1969.

Yet it is easy to make too much of this. First, consider the numbers. Only a very tiny fraction (certainly well under one per cent) of the thousands of state constitutional decisions rendered since the modern resurgence got underway has been the subject of any serious political or popular attention at all. Of these few subject to popular questioning, far fewer have been subject to organised efforts aimed at overturning them or turning their makers out of office. Only a minority of such attempts at reversal have actually succeeded. Indeed, in only a handful of the fifty states have any state constitutional decisions registered on the most discriminating scale of political sensitivity in recent years.

Although most state constitutions have frequently been amended, very few amendments have aimed at reversing judicial decisions. For example, only three or four of the one hundred-plus amendments to the Arizona Constitution have been prompted by judicial decision. None has involved individual rights decisions or been particularly controversial.

Most state constitutional amendments come about for other reasons. State constitutions tend to contain much more detail than the Federal Constitution, and many amendments are necessary to correct technical defects or instances where specificity has been rendered obsolete or unworkable by the passage of time. Amendments to remove or create new limits on legislative action are a popular subject, as are amendments to restructure executive or judicial branches to reflect demographic, economic, and other changes.

By contrast, amendments in the glowing, noble, elastic principles that are fruitful sources of creative judicial application are relatively rare. Indeed, state bills of rights are typically among the least-amended provisions of state constitutions.⁶²

The subject matter at the root of these reversals has also to be considered. By far the most prominent subject of judicial decisions that provoked popular outcry concerned the rights of those accused of crimes and the closely related subject of capital punishment. Criminal defendants generally have not commanded much popular favour in the best of times, and public concern about crime fuels hostility to court decisions perceived as “coddling” criminals. The rejection of the three

62. Only two of the 100-plus amendments to the Arizona Constitution have touched on individual rights; both restricted the right to bail in very narrow categories of criminal cases, and neither was prompted by outcry over judicial interpretations.

California justices was not, according to most knowledgeable observers, a referendum on state constitutional activism. Rather, it was voter hostility to what it perceived as those justices' refusal to acknowledge the constitutionality of capital punishment. Californians had, a few years earlier, overwhelmingly approved an amendment to the state Constitution reinstating capital punishment after the Court had struck it down.⁶³

This is not to deny the negative effects that can result from subjecting constitutional rights to popular referendum. Nor is it to deny that one of the most important features of US constitutionalism, state and federal, is its code of protections for persons suspected of crimes. Nor is it to deny that judicial decisions may corrode public support even when they do not inspire organised opposition. It is to say, however, that those constitutional decisions inspiring popular outcry are actually narrowly confined, by numbers and subject matter. One may fairly question the extent to which this kind of outcry undermines the rule of law, or the credibility of the bench, in general.

Many more state constitutional decisions with far-reaching impacts have, by contrast, been met with little disapproval, and some have commanded wide popular support. In the dozen or so states where the courts have struck down entrenched systems of financing public schools, for example, the state legislatures have generally responded not by proposing constitutional amendments, but rather by legislation overhauling the financing system to correct the violation.

Measured by almost any standard, the US state judiciary's success rate at making its constitutional decisions "stick" is very high indeed. In short, the relative ease of amending state constitutions and the frequency with which they are amended is deceptive.

In seeking to extract lessons from this for Australia, some of this ready acceptance is surely traceable to the fairly high tolerance in the US for judicial activism in general, and therefore may not be easily exportable. But it may suggest that state constitutional decision-making can be valuable and popular in and of itself, by tapping into and combining traditions of local control, the rule of law, separation of powers, and the value of careful decision-making with results explained in writing, that grows out of an orderly, adversary process.

63. *People v Anderson* supra n 60; Calif Const art 1 § 27 (as amended).

V. THE SIGNIFICANCE OF THE FAILURE OF THE BORK NOMINATION TO THE UNITED STATES SUPREME COURT

Another way of assessing popular opinion on constitutional principles, and the role of the judiciary in interpreting and applying them, was provided by the national debate on President Reagan's nomination of Judge Robert Bork to the US Supreme Court in 1987.

By tacit agreement of Bork supporters, opponents, and the nominee himself, this debate largely focused upon the broad question of how judges should approach cases involving constitutional issues and indeed, upon the role of the courts in American life. The process was quite extraordinary. The hearings before the Senate Judiciary Committee were televised from gavel to gavel on cable television and received enormous coverage in the general media. It might well have been the most intensive, open inquiry into the subject of constitutional values in US history. As a leading legal historian recently put it: "For a mass media era, the Bork hearings came as close to a serious and fundamental consideration of constitutional direction as we have ever had in America. ... In some sense, it was no less than a constitutional referendum."⁶⁴

The result was not just the rejection of Judge Bork: in the end, that might have been the least of its impact. Rather, the process signalled a rather widespread popular reaffirmation of the notion of judicial review and the value of judicial expression of constitutional values.

It is noteworthy that much of the focus of the Bork inquiry was on constitutional issues other than those involving the rights of criminal defendants. Bork opponents (as Bork himself had, in his previous writings) concentrated in particular on his opposition to a civil right of privacy: a right that, as noted earlier, the Supreme Court had implied into the Constitution in *Griswold* in 1965, ruling that a state could not outlaw the distribution or use of contraceptives.⁶⁵ To Bork, the *Griswold* decision typified everything wrong with modern constitutional inter-

64. M J Horwitz "The Meaning of the Bork Nomination in American Constitutional History" (1989) 50 U Pitt L Rev 655, 655.

65. *Supra* n 6.

pretation; to his opponents, his opposition typified everything wrong with his constitutional philosophy.⁶⁶

To the extent a philosophy of constitutional interpretation can be said to prevail in such an encounter in a frankly political forum, it was the Bork opponents who carried the day. Not only did a substantial majority of Senators vote on the record against his nomination, but they did it in the face of strong support from one of the most popular Presidents in this century. In a basic way, the Bork hearings showed that popular values had caught up with many of the constitutional innovations of the Warren Court. In Horwitz's words, the Bork defeat dramatically illustrated that a "constitutional consensus" had been formed "around the view that cherished personal rights were somehow embedded in the Constitution"⁶⁷ (and, implicitly, that they should be enforced by the courts).

In the struggle for control of the US Supreme Court, it seems clear that although the conservatives lost the Bork battle, they won the war. The person who eventually assumed the seat Bork was nominated for, Anthony Kennedy, has so far proved generally as conservative as Bork,⁶⁸ and a new conservative has replaced the Court's most prominent and influential stalwart on the left, Justice Brennan.

But the Bork episode may have important influence, ironically, on the direction of state constitutional law in the US. Specifically, while the centre of the storm over Bork was the Federal Constitution and the Supreme Court, the Bork defeat's affirmation of the value of creative constitutional interpretation encourages state supreme courts to play a more aggressive role in articulating state constitutional values.

Perhaps in Australia, too, courts have a reservoir of public goodwill upon which to draw in enforcing constitutional values in controversial settings. Thomson has observed that an "[a]lmost unqualified approval of state courts has ... been the salient feature of Australian judicial experience."⁶⁹ On the other hand, Galligan has suggested that

66. Interestingly, the Bork opponents chose not to concentrate heavily on the Court's abortion decision, *Roe v Wade* 410 US 113 (1973), although recent opinion polls and the pronouncements of many politicians show that support for that decision has grown significantly in recent years.

67. *Supra* n 64, 664.

68. See D Zillman "Military Criminal Jurisdiction in the United States" (1990) 20 *UWAL Rev* 6, 28 n 93.

69. *Supra* n 1, 1251.

Australian High Court decisions like the *Franklin Dam* case⁷⁰ have “alienated powerful sections of [the Court’s] elite constituency.”⁷¹

The Bork episode suggests that alienation has a way of healing itself, if the judiciary is correct in assessing the way the country is heading, and has sufficient public support to sustain it until the public opinion that counts (whether it is of an elite or the masses) catches up to its innovations.

VI. OPPOSITION TO STATE CONSTITUTIONAL REVIVAL IN THE UNITED STATES

An examination of some of the arguments made in opposition to the revival of state constitutional law in the US may also help illuminate whatever lessons the US experience may hold for Australia. Let there be no mistake, however. The opponents of the revival have lost their battle; indeed, they have been swept from the field in nearly every jurisdiction.

This is not to say that state courts believe the Federal Constitution and federal court decisions construing it have nothing of relevance to say about their own constitutions. It is to say, however, that the notion that federal constitutional decisions presumptively control what the state constitutions mean - an attitude that dominated most state court thinking for several decades - has been rejected by a consensus of state high courts.

It is also to suggest that this position has popular appeal in the US. Indeed, one might frankly doubt whether a prospective nominee to any state high court who vocally opposed taking an independent view of the state constitution could be nominated or, if subject to a confirmation process, be confirmed.

Most of the principal grounds for opposition have been implied in the previous discussion. Political conservatives and opponents of judicial review generally have criticized state constitutional revival as constituting sheer unprincipled reaction to the Reagan/Rehnquist Court retrenchment. As I have indicated, there is some truth in that observation. But there is room to doubt whether the legitimacy of state constitutional decision-making is destroyed because it

70. *Supra* n 45.

71. B Galligan *Politics of the High Court: A Study of the Judicial Branch of Government in Australia* (St Lucia: University of Queensland Press, 1987) 245.

judicial or constitutional forum shopping. Certainly the Reagan Administration's approach to federal constitutional decision making (through its judicial appointments and its advocacy before the federal bench) has been stridently reactive. A basic purpose of federalism, and the dispersal of somewhat overlapping powers it frequently embodies, is to allow for flexibility and diversity. Different constitutional results at the state level can serve this purpose, and are not objectionable just because they are different.

Secondly, opponents have argued the advantages of having a single, uniform national constitutional law, especially in certain contexts. It may be awkward, for example, to have two sets of constitutional restraints on the police's power to investigate, search and arrest, especially because state and federal police frequently engage in joint activities. It is not surprising, therefore, to find state prosecutors and other conservatives on the rights of the criminally accused in the vanguard of opposition to reviving state constitutional law.

But the argument that centralized authority is more efficient is, of course, precisely one of the reasons that led Montesquieu and the US founding fathers to promote separation of powers. Lord Acton's dictum that "[p]ower tends to corrupt and absolute power corrupts absolutely"⁷² still remains the bedrock of US (and, though perhaps to a lesser extent, Australian) political philosophy.

Even if this dispersion of power over constitutional values creates, on some issues, a babble of discordant voices, one may still argue that this is preferable to sticking with one constitutional voice, right or wrong. Indeed, differences frankly expressed in written judicial opinions help illuminate the truth, as they must compete in the marketplace of ideas, a market that has value here as it does in more conventional settings.⁷³

Another expressed concern about state constitutional resurgence in the US is that it risks a loss of national unity. The fear is that 51 different varieties of constitutional law can unduly strain the social

72. Letter from Lord Acton to Bishop Mandell Creighton (5 April 1887) in J R Fears (ed) *Selected Writings of Lord Acton: Volume II: Essays in the Study and Writing of History* (Indianapolis: Liberty Classics, 1985) 383.

73. The Australian tradition of individual justices of an *en banc* court issuing separate opinions furnishes more occasion for public intellectual exchange of views than the US tradition of justices joining the opinions of other justices.

fabric. The objective ought to be to arrive at a single national position on many important constitutional issues, and that is not possible if state courts go their own separate ways.

There are several possible responses to this. Supporters of the revival argue that whatever constitutional unity is desirable can be largely achieved by means of the federal “floor” created by US Supreme Court applications of the Federal Bill of Rights to the states. State freedom of action to raise state constitutional rights above this floor, the argument goes, cannot seriously imperil the cause of national unity. In Australia, of course, judicial uniformity is achievable through direct review by the High Court of state constitutional decisions. But in both countries, state constitutions may be explicitly amended to reinstate diversity, even if the courts interpret state provisions to be uniform with national constitutional norms.

Secondly, as noted earlier, national economic unity has not been seriously threatened by the revival of state constitutional law in the US. Moreover, the national legislature has ample tools to deal with it, such as a broad power to pre-empt state constitutional rules.

Thirdly, it might be disputed whether unity of constitutional thinking is really an important objective. To the contrary, diversity of opinions - a matter on which Americans pride themselves in so many other areas of life - may be more desirable. To return to the marketplace idea, plainly US policy is to disfavour monopolies in other parts of society. Should constitutional law and constitutional values be different?

VII. SOME CONCLUDING OBSERVATIONS

Some features of the state constitutional resurgence in the US seem to warrant special note in Australia. First, as the subject of a more formal, self-contained constitutional bill of rights continues to be discussed at federal and state levels in Australia,⁷⁴ the jurisprudence that the US states are developing under their own bills of rights may help inform Australian discussions of such important constitutional values as free speech, privacy, and due process of law.

Perhaps differences in constitutional result from state to state have no effect on the crime rate, or conviction rate for those accused of crime, or the quality of the environment, or the level of political activity, or the overall quality of life, or the general strength of the social fabric. It would be exceedingly difficult to explore these questions by systematic, careful scholarly study because of the high numbers of variables that would have to be controlled. No one to my knowledge has yet tried.

Perhaps, in the end, a careful comparison of constitutional law among different states and with the US Constitution would suggest two things. First, while differences in detail are the norm, there is, considered broadly, a remarkable consensus among American states on important constitutional values. What Hartz called America's liberal tradition is expressed as well in its state constitutions as it is in any other aspect of American life.⁷⁵ Or, as a leading legal historian recently warned in examining the history of state constitutions and state courts in the criminal justice context, it may be a mistake

to draw too sharp a line between state and national behavior. Each state, to be sure, has its own history, tradition, and habits. But everywhere, courts were ... exposed to the same dominant strands of legal culture, and they reacted to the great trends and events in the world around them.⁷⁶

74. See, for example, A Mason "A Bill of Rights for Australia?" (1989) 5 Aust Bar Rev 79.

75. L Hartz *The Liberal Tradition in America: An Interpretation of American Political Thought Since the Revolution* (New York: Harcourt Brace, 1955).

76. L Friedman "State Constitutions and Criminal Justice in the Late Nineteenth Century" (1989) 53 Alb L Rev 265, 281.

The meaning of the disparities that do exist among constitutional policies in various states may be more symbolic than practical. Perhaps it makes relatively little difference in the day to day lives of ordinary citizens whether one state places restraints on police behaviour, or protects the freedom to speak in a private shopping mall, and another does not. But even if the impact on society of constitutional outcomes is mostly unquantifiable, indeed inexpressible, it may still be real.

Another issue that bears more attention concerns the possible impact on constitutionalism of the Australian system of responsible government, as compared with the US system that allows (indeed in recent years has actually made commonplace) divided governments. The US system, at both the national and state levels (though perhaps more pronounced in the former), creates an enormous amount of legislative inertia toward the status quo. Many observers and participants in the US political scene have noted the difficulty of enacting legislation. The lack of enforced party loyalty, and divisions between the executive and the legislature, require much negotiation, compromise, and eventual consensus. It is far easier to stop legislation from being enacted than it is to enact it.

This means that impasses are frequent, where a sufficient agreement is lacking and sufficient tact and leadership is not forthcoming. This may be the case even where there is general agreement that something ought to be done but no consensus exists on the nature of the solution. The unsatisfactory status quo may linger for years, even decades.

In some such cases, the US tradition of an active judiciary, the general acceptance of judicial review, and the elasticity of US constitutions can combine to allow the judicial branch to dictate, to some extent, the legislative agenda. This judicial intrusion, through constitutional enforcement, is often enough to break through the inertia and force a solution. The school finance cases described earlier are an example of this, and others abound.

Perhaps in Australia there is less “need” for such judicial intrusions on constitutional grounds. The much stronger tradition of party loyalty and the constitutional (or quasi-constitutional) idea of responsible government reduce the chances for deadlock, or at least remove the deadlock somewhat from the purview of judicial scrutiny through constitutional enforcement.

A final aspect of US constitutional federalism does not involve direct application of state constitutions. It does, however, draw on a

source that helps sustain the resurgence of state constitutionalism; namely, the growing confidence of the US state courts in their ability to make valuable, independent constitutional judgments in enforcing the Federal Constitution as well as their own. As noted earlier, federal courts have sometimes disabled themselves from enforcing certain provisions of the Federal Constitution. Before the US Supreme Court's pathbreaking decision in *Baker v Carr*,⁷⁷ malapportionment at all levels of government was not subject to federal court scrutiny under the equal protection clause of the fourteenth amendment.

A rather similar situation exists today with respect to another federal constitutional provision with potentially important implications for state governments in the United States. This is the so-called "Guarantee Clause" of Article IV, section 4, which obligates the US to "guarantee to every State in the Union a Republican Form of Government...." The Supreme Court has not illuminated the meaning of that clause. For nearly a century it has taken the firm position that the federal courts have no power to enforce it.⁷⁸

It is not generally appreciated, inside as well as outside the US, that state courts are not bound by such judgments of the US Supreme Court, even though they concern a matter of federal constitutional law. That is, state courts can interpret and apply the Federal Constitution in circumstances where the federal courts will refrain from doing so. The justiciability limits that the US Supreme Court imposes on the federal courts cannot constitutionally be applied to the state courts because of their independent sovereignty. Under the same reasoning, the state courts can also decide cases involving federal constitutional issues where the plaintiff does not have standing to raise those issues in federal courts, or where the case would be regarded as moot if brought in federal courts.

Moreover, these state court judgments, even though they are on matters of federal constitutional law, are generally not subject to review by the US Supreme Court.⁷⁹ In fact, state courts have on occasion decided federal constitutional guarantee clause cases on the merits.⁸⁰ One distinguished state court judge, a leading intellectual figure

77. 368 US 186 (1962).

78. *Pacific States Telegraph and Telephone Co v Oregon* 223 US 118 (1912).

79. *Poe v Ullman* 367 US 497 (1961); see Tribe *supra* n 7, 162-173.

80. See, for example, *State v Pacific State Telephone & Telegraph Co* 53 Or 162; 99 P 427 (1909). Affirmed on other grounds 223 US 118 (1912).

in the resurgence of state constitutionalism, has urged state courts to begin taking more seriously their obligation to apply the Federal Constitution to some state processes: specifically, state direct legislation by the initiative that bypasses the state's representative institutions.⁸¹

The revival of interest in state constitutions in the US may also revive state court interest in matters of federal constitutional law that have previously not been regarded as fairly within the purview of state courts. Whether this would or could have any influence in Australia is unclear. Thomson has noted that the jurisdictional reach and power of federal courts in Australia is expanding, at the expense of state courts. He also notes that the opposite trend is apparent in the US.⁸² Still, illuminating insights can be gained by comparing the operations of the state and federal courts on constitutional issues in each system.

State constitutional law in the US today is exciting. One does not have to be an unvarnished foe of monopoly and an advocate of the competition of the marketplace to note that federal constitutional thinking seemed to grow tired when the US Supreme Court asserted what was effectively a monopoly position on constitutional jurisprudence. Even the bicentenary of the US Constitution, an occasion for much breast-thumping about the genius of the founding fathers, did not mask its moribund qualities.

Once one turns to the state constitutions, on the other hand, whole new worlds beckon, some of them quite uncharted. They reflect variety, history, various political theories, and romance. Each is an informative snapshot; a microcosm of the political and social values that dominated the place and time where it was created. Each has something potentially valuable to say about contemporary challenges to governmental structure and process, and the age-old tension between government and individual freedom. Each enlarges the opportunity for finding wisdom in what one of our early Supreme Court Justices called "the most abstruse of all sciences" - the science of government.⁸³ Perhaps the breezes blowing through state constitutional law in the US can provide some refreshment in Australia too.

81. H A Linde "When Is Initiative Lawmaking Not 'Republican Government'?" (1989) 17 *Hastings Const L Q* 159.

82. *Supra* n 1, 1253-1254. The recent adoption of "cross-vesting" schemes in Australia makes any such comparison of trends rather hazardous. See *supra* n 56.

83. *Anderson v Dunn* 19 US (6 Wheat) 204 Johnson J, 226 (1821).