ARE STATE COURTS INVULNERABLE?: SOME PRELIMINARY NOTES

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> In the scheme of the [United States] Constitution, [state courts] ... are the primary guarantors of constitutional rights, and in many cases they may be the ultimate ones.[1]
>
> [M]artial law in the all-encompassing form in which it existed in some Continental countries was unknown in England; the crimes of soldiers in England have always been amenable to the civil law and our concept of martial law is confined to the area of military discipline....[2]

For some[3] the legal system - epitomised by the judiciary - represents a bulwark of liberty and freedom[4] against government power and oppression perceived as emanating from legislative and executive author-

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1. H Hart "The Power of Congress to Limit the Jurisdiction of Federal Courts: An Exercise in Dialectic" (1953) 66 Harv L Rev 1362, 1401 revised and reprinted in P Bator, D Meltzer, P Mishkin and D Shapiro *Hart and Wechsler's The Federal Courts and the Federal System* 3rd edn (New York: Foundation Press, 1988) 393, 423. But see A Amar "Law Story" (1989) 102 Harv L Rev 688, 704-705 (criticising Professor Hart for "overlook[ing] the structural inadequacies of state courts as 'guarantors of constitutional rights' *against states*....") (emphasis in original), 709-710 (federal questions must be cognizable in federal judiciary's original or appellate jurisdiction); L Pollak "Amici Curiae" (1989) 56 U Chi L Rev 811, 814-819 (importance of federal courts' jurisdiction and judicial review power). For the application of Professor Hart's thesis in Australia see L Harvey and J Thomson "Some Aspects of State and Federal Jurisdiction Under the Australian Constitution" (1979) 5 Mon L Rev 228; J Thomson "State Constitutional Law: American Lessons for Australian Adventures" (1985) 63 Tex L Rev 1225, 1255-1263. For a comparative assessment of federal and state courts see J Thomson "State Constitutional Law: Some Comparative Perspectives" (1989) 20 Rutgers LJ 1059, 1089 n 180 (references).

ity.[5] Occasionally,[6] however, this threat radiates from military power.[7] That clash between civilian courts and military discipline in its historical, theoretical and practical aspects was resurrected in *Re Tracey: Ex*

2. *Groves v Commonwealth* (1982) 150 CLR 113, 126 (Stephen, Mason, Aickin and Wilson JJ).
3. Others, notably critical legal scholars, perceive the legal system as a hegemonic legitimation of contingent government power. See generally M Kelman *A Guide to Critical Legal Studies* (Cambridge: Harvard University Press, 1987); A Hutchinson and P Monahan "The 'Rights' Stuff: Roberto Unger and Beyond" (1984) 62 Tex L Rev 1477; D Price "Taking Rights Cynically: A Review of Critical Legal Studies" (1989) 48 Cambridge LJ 271; "An Exchange on Critical Legal Studies between Robert W Gordon and William Nelson" (1988) 6 Law & Hist Rev 139; D Kennedy and K Klare "A Bibliography of Critical Legal Studies" (1984) 94 Yale LJ 461; A Hunt "Critical Legal Studies: A Bibliography" (1984) 47 Mod L Rev 369.
4. For debate as to whether even the presumed modern exemplar of judicial protection and advancement of human rights, the United States Supreme Court, deserves such an appellation see Thomson "Comparative Perspectives" supra n 1, 1066 n 21 (references); E Chemerinsky "The Vanishing Constitution" (1989) 103 Harv L Rev 43.
5. This is a negative, not benign, view of governmental power and regulation. For both perspectives and a critique of neutrality theories within a public law context see for example C Sunstein "Constitutionalism After the New Deal" (1987) 101 Harv L Rev 421; C Sunstein "Lochner's Legacy" (1987) 87 Colum L Rev 873.
6. But contrast, for example, military interregna (1966-1979 and 1983 to present) since Nigerian independence in 1966. See Thomson "Comparative Perspectives" supra n 1, 1063 n 11 (references).
7. Classic examples are in the American Civil War (1861-65) and Reconstruction era (1865-77). Tensions between military power and constitutionalism during those decades are adumbrated in C Swisher *The Taney Period 1836-64* Vol 5 of the *History of the Supreme Court of the United States* (New York: Macmillan, 1974) 841-960; C Fairman *Reconstruction and Reunion 1864-88* (Pt 1) Vol 6 of the *History of the Supreme Court of the United States* (New York: Macmillan, 1971); C Fairman *Reconstruction and Reunion 1864-88* (Pt 2) Vol 7 of the *History of the Supreme Court of the United States* (New York: Macmillan, 1987); H Hyman *A More Perfect Union: The Impact of the Civil War and Reconstruction on the Constitution* (New York: Alfred A Knopf, 1973). As to Australian constitutional parameters see the Australian Constitution ss 51(vi), 51(xxxii), 68, 114 and 119; P Lane *Lane's Commentary on the Australian Constitution* (Sydney: Law Book Co, 1986) 125-135, 229-230, 326, 593-594, 615-616; A Blackshield "The Siege of Bowral - The Legal Issues" (1978) 4 no 9 Pacific Defence Reporter 6; N Stephen "The Governor-General as Commander-in-Chief" (1984) 14 MUL Rev 563. See also H Evatt *Rum Rebellion: A Study of the Overthrow of Governor Bligh by John Macarthur and the New South Wales Corps* (Sydney: Angus & Robertson, 1938) (rep 1975). For England see for example S Greer "Military Intervention in Civil Disturbances: The Legal Basis Reconsidered" [1983] Pub L 573.

parte Ryan[8] ("*Tracey*"). One usual federal variant also occurred: the clash of federal and state powers. Unexpectedly, at least within the context of more recent High Court decisions, state power prevailed.[9]

State courts' existence, from an orthodox constitutional law perspective, ultimately derives from state constitutions.[10] Their authority and jurisdiction flows from the same source but may also be conferred by the Australian Constitution[11] and federal legislation.[12] Another view envisages the Australian Constitution - especially section 106[13] - as the

8. (1989) 166 CLR 518. Initial commentary includes S Gageler "Gnawing at a File: An Analysis of *Re Tracey; Ex parte Ryan*" (1990) 20 UWAL Rev 47; R Brown "Military Justice in Australia: W(h)ither Away? The Effects of *Re Tracey; Ex parte Ryan*" (1989) 13 Crim LJ 263; J Goldsworthy and P Hanks "Constitutional Law" 164, 182-183 in R Baxt and G Kewley (eds) *An Annual Survey of Australian Law 1989* (Sydney: Law Book Co, 1990); Note "The Line between Military and Civil Justice in Australia" (1989) 63 ALJ 666. See also *McWaters v Day* (1989) 89 ALR 83 (discussion of *Tracey* case).
9. Sub-ss 190(3) and (5) of the (Cth) Defence Force Discipline Act 1982 "were held in *Re Tracey* to be invalid because they involved an impermissible ouster of the jurisdiction of the [state] courts to try charges of civil offences." *McWaters v Day* supra n 8 Wilson and Dawson JJ, 87-88. See also *Tracey* supra n 8 Mason CJ, Wilson and Dawson JJ, 545-547; Brennan and Toohey JJ, 574-576; Deane J, 592; Gaudron J, 599-600. Contrasting High Court decisions more favourable to Commonwealth legislative power include *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v Forestry Commission* (1988) 164 CLR 261. For more restrictive decisions see for example *Queensland Electricity Commission v Commonwealth* (1985) 159 CLR 192; *University of Wollongong v Metwally* (1984) 158 CLR 447; *New South Wales v Commonwealth* (1990) 90 ALR 355.
10. But do state constitutions derive their authority from United Kingdom statutes, the Australian Constitution or the (Cth) Australia Act 1986? For differing views see Thomson "American Lessons" supra note 1, 1229-1232.
11. See for example s 5 of the (UK) Commonwealth of Australia Constitution Act 1900 63 & 64 Victoria c 12 colloquially known as covering cl 5. Technically, the Australian Constitution is embodied in s 9 of that Constitution Act 1900. On the relationship between the covering clauses and the Constitution see J Thomson "Altering the Constitution: Some Aspects of Section 128" (1983) 13 FL Rev 323, 331-335. It has also been suggested that "Ch[apter] III [of the Australian Constitution] is premised on the continued existence of State courts (see Constitution ss. 71, 73 and 77)...." *Tracey* supra n 8 Gaudron J, 599. See also infra n 14.
12. See for example (Cth) Judiciary Act 1903. See generally H Renfree *The Federal Judicial System of Australia* (Sydney: Legal Books, 1984) 531-678.
13. "The Constitution of each State ... shall, subject to this Constitution, continue as at the establishment of the Commonwealth ... until altered in accordance with the Constitution of the State." In addition to infra n 14 see generally Lane supra n 7, 564-566; *Port MacDonnell Professional Fishermen's Association Inc v South Australia & The Commonwealth* (1989) 63 ALJR 671, 685-686 (relationship between ss 51(xxxviii) and 106); *Attorney General (NSW) v Ray* (1989) 90 ALR 263 (s 12 of the (Cth) Migration Act 1958 invalid to the extent that it permits

grundnorm of state constitutions and, thus, of state judicial systems.[14]

Can federal legislation obviate that domain of state judicial power? Affirmative responses are available. For example, state courts' federal jurisdiction invested, pursuant to section 77 (iii) of the Constitution, by federal legislation can be removed under section 77(ii) by federal legislation so that it resides exclusively in a federal court. State jurisdiction can be rendered otiose by federal legislation regulating matters previously governed by state law which are rendered inoperative by section 109 and investing, pursuant to section 77(ii), federal courts with exclusive jurisdiction over those matters. At this juncture federal laws may draw constitutional sustenance from two sources of Commonwealth legislative power. First, for example, from section 51. Second, from section 77(ii) which enables the Commonwealth Parliament to make federal court jurisdiction exclusive of "that [jurisdiction] which belongs to" state courts.[15] That is an explicit legislative power with respect to federal jurisdiction and contains, at the very least, a strong textual implication that it is also a Commonwealth legislative power with respect to state jurisdiction albeit only to denude that jurisdiction.

In the *Tracey* case only the first, not the second, constitutional power was available to sustain the federal legislation purporting to deny and oust state court jurisdiction. No federal court was involved. Whatever the nature of the power - judicial power or Chapter III judicial power of the Commonwealth - being exercised,[16] courts-martial established by the Commonwealth Defence Force Discipline Act 1982 were not Chapter III courts.[17] Could that first source provide the necessary constitutional warrant for federal legislation to vanquish state courts?

interference by a deportation order with state criminal courts' jurisdiction as a contravention of Australian Constitution s 106).

14. Opposing views are cited in *State of Western Australia v Wilsmore* [1981] WAR 179, 181-183. See also *Tracey* supra n 8 Gaudron J, 599: "[B]y ss 106 and 108 of the Constitution, the Constitutions and laws of the States respectively are preserved subject to the Constitution."
15. Three meanings of "belongs to" are discussed in Harvey and Thomson "State and Federal Jurisdiction" supra n 1, 231-232.
16. *Tracey* supra n 8 Mason CJ, Wilson and Dawson JJ, 537-540; Brennan and Toohey JJ, 572-574; Deane J, 581-588; Gaudron J, 598.
17. Ibid Mason CJ, Wilson and Dawson JJ, 540-541; Brennan and Toohey JJ, 564-565; Deane J, 588.

Chief Justice Mason and Justices Wilson and Dawson foreclosed at least one possibility.

> The method chosen in [section 190(3) and (5) of the Defence Force Discipline Act 1982] is to exempt persons from the operation of laws, for the most part State laws, which apply to those persons, by denying jurisdiction to the civil courts, for the most part State courts, to try cases brought under those laws.... [W]e doubt whether *provisions of that kind*, which strike at the judicial power of the States, could ever be regarded as within the legislative capacity of the Commonwealth *having regard to* s.106 of the Constitution, but it is sufficient to say that they clearly exceed the power to make laws with respect to the defence of the Commonwealth. No doubt if the imposition of criminal liability upon defence members or defence civilians in a particular instance or context were capable of interference with the defence of the Commonwealth, the Parliament would have the power under s.51(vi) to provide for the specific situation by enacting a law which did not involve the ouster of jurisdiction from the courts of the States. Such a law would prevail under s.109 of the Constitution.... But [subsections] (3) and (5) of s.190 extend across the whole range of criminal conduct and apply whenever a person prosecuted for an offence in a civil court has been tried by court martial for substantially the same offence or where a court-martial has taken into account an offence that is substantially the same.... [I]t is clearly beyond *the defence power* and *the incidental* power of the Parliament to interfere in this manner with the exercise by State courts of their general criminal jurisdiction.[18]

Not foreclosed is the possibility that section 51 powers - other than defence - would suffice to sustain the constitutional validity of "provisions of that kind." Justice Deane also limited his observations on this aspect of the *Tracey* case to section 51(vi).

> [I]n the context of the general structure of the Constitution including the provisions of [Chapter] III, the grant of legislative power contained in s.51(vi) [does] not authorise the conferral upon military tribunals of judicial powers which are supplantive rather than supplementary of the jurisdiction of the ordinary criminal courts or which are not confined to dealing with the disciplinary aspects of conduct.[19]

Justices Brennan's and Toohey's conclusion was, however, not confined to the scope of section 51(vi) or, apparently, even to other section 51 powers.

> [P]rovisions which purport to prohibit the exercise of the ordinary criminal jurisdiction vested in State courts by State law can find *no support* in the Constitution. State courts are an essential branch of the government of a State and the continuance of State Constitutions by s.106 of the Constitution *precludes* a law of the Commonwealth from prohibiting State courts from exercising their functions. It is a function of State courts to exercise jurisdiction in matters arising under State law. Although, by force of s.109, a law of the

18. Ibid, 547 (emphasis added).
19. Ibid, 592.

> Commonwealth prevails over an inconsistent State law, [subsections] 190(3) and (5) do not operate in that way. These sub-sections do not affect the substantive law; they purport to prohibit its enforcement.... [These subsections] are invalid.[20]

At the other extreme Justice Gaudron considered

> that, if the jurisdiction in issue may validly be vested in service tribunals, the exclusion of the jurisdiction of the civil courts, at least to the extent specified in s.190(5), must be viewed as reasonably incidental to the vesting of that jurisdiction in service tribunals.[21]

Her reason for this conclusion was

> because, without a provision such as that contained in s.190(5) ... the same conduct may fall for adjudication by a service tribunal and by a civil court with the possibility of *different results*.[22]

For Justice Gaudron section 109 provided one constitutional solution.

> That possibility may raise an operational inconsistency between the [Defence Force Discipline] Act and a law which vests jurisdiction in a civil court to hear and determine a civil court offence which is substantially the same as a service offence for which a person has been convicted or acquitted by a service tribunal.... Such an inconsistency would, by force of s.109 of the Constitution, result in the State law being rendered inoperative, and ... constitute an implied repeal of any earlier Commonwealth law vesting jurisdiction in a civil court to hear a civil court offence which was substantially the same as the service offence. If there be such an inconsistency, s.190(5) merely makes explicit the extent of the intended operational inconsistency.[23]

Another possibility was section 51(vi).

> If there be no operational inconsistency, the exclusion of the possibility of *different results* by exclusion of the jurisdiction of civil courts when a person has been convicted or acquitted by a service tribunal is reasonably incidental to the establishment of service tribunals with jurisdiction to hear and determine service offences which are substantially the same as civil court offences.[24]

Justice Gaudron also conceded that

> the existence of special or extraordinary circumstances ... would justify a law ousting the jurisdiction of the civil courts whilst those circumstances existed....[25]

Differing reasons stand behind these different conclusions. First, there is the existence of section 106. Is that provision an interpretative

20. Ibid, 574-575 (emphasis added).
21. Ibid, 599.
22. Ibid (emphasis added).
23. Ibid, 599-600.
24. Ibid, 600 (emphasis added).
25. Ibid, 602.

guide, a constitutional prohibition or merely "a truism"?[26] Terminology - "having regard to" - used by the Chief Justice and Justices Wilson and Dawson suggests the former with its reserve power doctrine flavour.[27] Pre-*Engineers*[28] interpretative methodology should not, however, be lightly attributed to Chief Justice Mason.[29] Justices Brennan and Toohey's exposition - "s.106 of the Constitution precludes a law of the Commonwealth"[30] - erects that provision into a constitutional prohibition. Justice Deane's cryptic reference to "the context of the general structure of the Constitution"[31] encompasses the constitutional dimensions of federalism and, thus, circuitously includes section 106. Despite conceding the relevance of this approach, Justice Gaudron does not nurture it into an impenetrable barrier. Its vulnerability is posited at the end of her suggestion that "Ch[apter] III is premised on the continued existence of State courts (... ss.71, 73, and 77) and, by ss.106 and 108 ... the Constitutions and laws of the States ... are preserved *subject to the Constitution*."[32]

The second reason for the invalidity of "provisions of that kind" also failed to command unanimous support. While the Chief Justice and Justices Wilson, Dawson and Deane concluded that section 51(vi) was too narrow to encompass such federal legislation, Justices Brennan and Toohey did not equivocate - "can find no support in the Constitution"[33] - in attributing to all Commonwealth legislative powers that

26. *United States v Darby* 312 US 100, 124 (1941) ("The [tenth] amendment [to the US Constitution] states but a truism that all is retained [by the States] which has not been surrendered [by them to the federal government].") Professor Tribe suggests that "[t]he decline of dual sovereignty is summarised in [this] epigrammatic dismissal of the tenth amendment as a limit on congressional power." L Tribe *American Constitutional Law* 2nd edn (New York: Foundation Press, 1988) 382 n 18.
27. *Tracey* supra n 8, 547. As to the reserve power doctrine see L Zines *The High Court and the Constitution* 2nd edn (Sydney: Butterworths, 1987) 5-7, 11-15.
28. *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129 ("*Engineers*").
29. See for example *Commonwealth v Tasmania* supra n 9 Mason J, 126-129; A Mason "The Role of a Constitutional Court in a Federation: A Comparison of the Australian and the United States Experience" (1986) 16 FL Rev 1. But compare *Mabo v Queensland* (1988) 166 CLR 187, 197 (Mason CJ dissenting) (interpreting Commonwealth legislative power by reference to the Australian Constitution s 107).
30. *Tracey* supra n 8, 575.
31. Ibid, 592.
32. Ibid, 599 (emphasis added).
33. Ibid, 575.

interpretation. Justice Gaudron provided section 51(vi) with a wider interpretation, at least sufficient to sustain the constitutional validity of legislation precluding "different results"[34] and legislation completely ousting state court jurisdiction in "special or extraordinary circumstances."[35]

In this exposition of section 51(vi) at least two of its facets are revealed. First, section 51(vi)'s two limbs can, as Chief Justice Mason and Justices Wilson and Dawson indicated, be severed. The power to make laws with respect to the "naval and military defence of the Commonwealth and of the States" they suggested "necessarily comprehended" defence force discipline. Their reason was simply that "the naval and military defence of the Commonwealth demands the provision of a disciplined force or forces."[36] The power to make laws with respect to "the control of the [defence] forces to execute and maintain the laws of the Commonwealth" related in their view to "law enforcement."[37] Left unexplored is the relationship between this second limb of section 51(vi) and the Governor-General's section 61 executive power to execute and maintain Commonwealth laws.[38] Whether the relationship between section 51(vi) and the Governor-General's section 68 power as Commander in Chief of defence forces would illuminate this context also remains unresolved.[39] Secondly, Justices Brennan and Toohey considered that

> [a]n object of the defence power is *the preservation* of the civil government *of* the Commonwealth and *the several States* a characteristic of which is the administration of the criminal law by the ordinary courts. To the extent that the

34. Ibid, 600.
35. Ibid, 602.
36. Ibid, 540. See also ibid, 541 (The first limb of s 51 (vi) of the Constitution authorizes the Commonwealth Parliament "to enact a disciplinary code standing outside Ch[apter] III and to impose upon those administering that code the duty to act judicially.")
37. Ibid. But compare ibid Brennan and Toohey JJ, 562 (disciplinary jurisdiction); Gaudron J, 600 (second limb of s 51(vi) may, depending upon the circumstances, encompass defence force discipline).
38. As to this aspect of s 61 see G Winterton *Parliament, the Executive and the Governor-General: A Constitutional Analysis* (Melbourne: Melbourne University Press, 1983) 28; J Richardson "The Executive Power of the Commonwealth" in L Zines (ed) *Commentaries on the Australian Constitution* (Sydney: Butterworths, 1977) 50, 82-86. Postulating this relationship requires account to be taken of the fact that s 51(vi) is "subject to" the Constitution, of the existence of section 51(xxxix) and the possible extent (see Winterton supra, 93-110) of parliamentary control of the executive.
39. *Li Chia Hsing v Rankin* (1978) 141 CLR 182, 186, 192, 203.

civil courts are *prohibited* from exercising their jurisdiction, that object is defeated.[40]

Positive and negative implications radiate from such an exposition of section 51(vi). The latter as utilized in *Tracey* may, at least partially, have been explicated from the reference in section 51(vi)'s second limb to only Commonwealth, not state, laws. Whether and to what extent the former implication permits Commonwealth laws to regulate or control states was not enunciated.

A further Commonwealth legislative power considered by Chief Justice Mason and Justices Wilson, Dawson, Brennan and Toohey to be too narrow to support "provisions of that kind" was the incidental power in its express - section 51(xxxix) - and implied manifestations.[41] Finally, divergence re-emerged concerning the scope of other Commonwealth legislative powers. Only Justices Brennan and Toohey unequivocally foreclosed the possibility that there existed any such power to authorize such federal legislation.[42]

A third and broader, but less obviously textually based, reason for the invalidity of such federal legislation is the constitutional principle or heritage of subordination of military power to civil authority.[43] Within the *Tracey* context this was particularized into two strands (the military being required to accord priority to civil courts and the imposition of military discipline not detracting from civil jurisdiction) and coalesced in the proposition that while civil courts remain open they retain criminal jurisdiction over military personnel.[44] That is, military law, power, authority and courts remain supplementary to, rather than supplant, their civilian counterparts.[45] How is that absorbed into the Australian Constitution?[46] For Chief Justice Mason and Jus-

40. *Tracey* supra n 8, 576 (emphasis added).
41. Ibid, 547, 576.
42. Ibid, 574-575: "[P]rovisions which purport to prohibit the exercise of the ordinary criminal jurisdiction vested in State courts by State law can find no support in the Constitution."
43. See for example ibid Brennan and Toohey JJ, 554-562 (history of civil-military relationship); Australian Constitution s 68. See also supra n 7.
44. *Tracey* supra n 8 Mason CJ, Wilson and Dawson JJ, 538, 545-547; Brennan and Toohey JJ, 554-562; Deane J, 583-586. For the American Civil War and Reconstruction experience see the references in supra n 7.
45. Ibid Deane J, 585-586, 592.
46. For historical exegesis, especially of the framers' intentions, in constitutional interpretation see Thomson "Comparative Perspectives" supra n 1, 1075 nn 77, 78 (references); B Bittker "The Bicentennial of the Jurisprudence of Original Intent:

tices Wilson and Dawson "the pre-1900 legislative history of the power of courts-martial to try members of the forces for civil offences is relevant to a consideration of the scope of s.51(vi)."[47] Justices Brennan and Toohey agreed: "A brief reference to history ... assists in the construction of the constitutional provisions ..."[48] That history is utilized to illuminate the textual parameters and limitations of section 51(vi) and Chapter III judicial power. Missing from *Tracey* is a detailed exegesis of the 1891 and 1897-1898 Convention Debates, draft Constitution Bills, colonial and United Kingdom parliamentary debates on those Bills and other aspects of the Federation movement which may be pertinent to the relationship of civilian and military authority and the Constitution's text.

Chief Justice Mason and Justices Wilson and Dawson alluded to another, perhaps constitutionally entrenched, ouster of state jurisdiction which is not dependent upon federal legislation.

> [I]n the absence of legislative provision, [do] the ordinary principles of autrefois acquit and autrefois convict ... apply in relation to trials by court martial[?] There are cogent arguments why those principles should apply given that a court martial exercises ... judicial power.[49]

From an examination of the English Mutiny Acts, Professor Dicey

The Recent Past" (1989) 77 Calif L Rev 235; D Farber "The Originalism Debate: A Guide for the Perplexed" (1989) 49 Ohio LJ 1085; P Finkelman "The Constitution and the Intentions of the Framers: The Limits of Historical Analysis" (1989) 50 U Pitt L Rev 349; M Perry "Why Constitutional Theory Matters to Constitutional Practice (and Vice-Versa)" (1989) 6 Const Comm 231; L Solum "Originalism as Transformative Politics" (1989) 63 Tul L Rev 1599. This interpretative debate encompasses questions such as the legitimacy of constitutional interpretation grounded on judicial conceptions of original intentions, the impossibility of ascertaining Framers' intentions, even if originalism is jurisprudentially appealing, because of deficiencies in historical records, and whether the Framers were originalists. For a specific application see "Symposium on Interpreting the Ninth Amendment" (1988) 64 Chi Kent L Rev 35; E Maltz "Unenumerated Rights and Originalist Methodology: A Comment on the Ninth Amendment Symposium" ibid, 981; S Sherry "The Ninth Amendment: Righting an Unwritten Constitution" ibid, 1001. See also *Cole v Whitfield* (1988) 165 CLR 360; *Port MacDonnell* supra n 13, 683-684; G Craven "Original Intent and the Australian Constitution - Coming Soon to a Court Near You?" (1990) 1 Public Law Rev (forthcoming). See generally M Griffin "What is Constitutional Theory? The Newer Theory and the Decline of the Learned Tradition" (1989) 62 S Calif L Rev 493; P Hamburger "The Constitution's Accommodation of Social Change" (1989) 88 Mich L Rev 239.

47. *Tracey* supra n 8, 541.
48. Ibid, 554.
49. Ibid, 546.

concluded that

> [i]n all conflicts of jurisdiction between a military and a civil court the authority of the civil court prevails.... [A]n acquittal or conviction by a court-martial ... is no plea to an indictment for the same offence at the Assizes.[50]

This represents an exception to the common law principle against double jeopardy. In England this exception has been removed.

> The *Armed Forces Act* 1966 (U.K.) ... debar[s] a civil court from trying a person who has already been tried by a court-martial for substantially the same offence. The *Naval Discipline Act* 1957 (U.K.) ... provides that a civil court is debarred from trying a person acquitted or convicted before a court-martial for the same or substantially the same offence.[51]

Has that common law principle, without the military court exception, been constitutionalized in Australia? If that has occurred, for example within the concept of Chapter III judical power,[52] then state courts, at least when exercising federal jurisdiction, may not be able to hear and determine matters adjudicated upon in a court martial.

Denudation of state jurisdiction by other means was not explored in *Tracey*. To what extent can state and/or federal legislation remove such jurisdiction and vest it (as state jurisdiction) in federal courts? Answers postulated in the context of the cross-vesting scheme[53] may provide some indications. Another more obvious and frequently used method is state legislation which changes or removes state jurisdiction. Two constitutional infirmities may arise. Most generally, could state legislation abolish state judicial systems? Is it a state or federal constitutional requirement that state courts exist and remain receptive to adjudicate state or federal legal issues? Reasons centring on sections 106 to 108 and Chapter III, such as adumbrated in *Tracey* may provide a departure point.[54] Less dramatically, state legislation may be enacted to deprive state courts of state jurisdiction over military personnel. Whether or not this results from federal/state co-operation to ensure that no civil jurisdiction existed and that only military jurisdiction remained, would

50. Ibid citing A Dicey *Introduction to the Study of the Law of the Constitution* 10th edn (London: Macmillan, 1959) 302. Compare *Tracey* supra n 8, 586 where Deane J quotes the same passage of Dicey but from the 5th edn 1897.
51. *Tracey* supra n 8, 543.
52. On this concept see generally Lane supra n 7, 329-350.
53. See generally Thomson "Comparative Perspectives" supra n 1, 1089 n 178.
54. *Tracey* supra n 8 Mason CJ, Wilson and Dawson JJ, 547; Brennan and Toohey JJ, 570, 575; Deane J, 592; Gaudron J, 599.

historic constitutional principles resonate from the text of the Australian Constitution to invalidate those state laws?

The *Tracey* case also did not involve federal courts. What relationship exists between military jurisdiction and federal courts? Subject to judicial tenure questions,[55] is federal legislative power sufficient to abolish federal courts?[56] Without proceeding to that position, is federal legislation depriving federal courts of jurisdiction over military personnel constitutional? Five justices provided, without elaboration, an affirmative answer. Chief Justice Mason and Justices Wilson and Dawson remarked that section 190(3) and (5) could not "be read down so as to apply only to federal courts. They are, therefore, wholly invalid."[57] Justices Brennan and Toohey were similarly cryptic: "As [section 190(3) and (5)] cannot be read down so as to restrict their application to federal courts, they are invalid."[58] Does the constitutional viability of that ouster of federal court jurisdiction in favour of military courts depend on whether state courts are available to determine federal and/or state offences against military personnel? Without elaboration the conclusion rendered by the five justices warrants at least a tentative negative reply.

55. Subject to an age limit, federal judicial tenure is provided for in the Australian Constitution s 72(ii). See generally Lane supra n 7, 369-74.
56. This would require consideration of ss 51(xxxix) (incidental power), 71 (legislative power to create federal courts), 77 (i) and (ii) (legislative power to define federal court jurisdiction) of the Constitution.
57. *Tracey* supra n 8, 547.
58. Ibid, 575.