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SIR OWEN DIXON TODAY

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I INTRODUCTION

In chapter 9 of his book *The Constitution and the New Deal*, published in 2000, Professor G. Edward White has traced the "canonisation" and "demonization" of Supreme Court Justices with particular reference on the one side to Justices Holmes and Brandeis and on the other side to Justices Van Devanter, McReynolds, Sutherland and Butler ("the Four Housemen of Reaction"). The author convincingly demonstrates the difficulty, after quiet reflection upon their judicial work, in attaching to judges conclusory labels such as "liberal", "progressive", "reactionary"; the processes of adjudication are simply too complex to be characterised in such a fashion.

In his address to the American Bar Association, delivered in 1942, Sir Owen Dixon regretted both the tendency to place more value upon the conclusion in judgments than upon the premises, and "the fashion to examine modes of judicial reasoning on the tacit assumption that anything may explain a judge's conclusion, except his legal training."[1]

Writing the preface to the second edition of his *Legislative, Executive and Judicial Powers in Australia*, which appeared in 1956 during the Chief Justiceship of Sir Owen Dixon and shortly after the landmark, and at the time highly controversial, decision of "the Warren Court" in *Brown v Board of Education*,[2] Dr Wynes observed:

> In the United States the Supreme Court has come to be regarded as a co-ordinate branch of the Government in an altogether different sense from that in which the High Court stands in relation to the other branches of government in Australia. Such a development was not to be expected in Australia and it is not surprising that it has not occurred. The decisions of the High Court are accepted in this country as a part of the natural order and do not excite anything like the comment that important decisions

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1 Dixon, 'Two Constitutions Compared' in Woinarski (ed), *Jesting Pilate* (1965) 100, 103; (1942) 16 *Australian Law Journal* 192, 194. Dixon had 'spent much time' in preparation of this address: Owen Dixon, Diary, 21 August 1942, Personal Papers. Dixon served as Australian Minister to Washington 1942–1944.

2 347 US 483 (1954).

> receive in America. … The tradition of legalism has served to place the Court outside politics and this process has been assisted by the fact that it is not only a "constitutional" Court, but also a general court of appeal for the whole country and, indeed, spends the greater part of its time in ordinary litigation not concerned with the Constitution or with Federal law at all.

The point made by Wynes 60 years ago about the respective standing of the two courts to a remarkable degree holds true today. One need only contrast the acceptance of the recent decisions of the High Court respecting the electoral process[3] and the scope of the marriage power[4] with the proposals during the 2016 Presidential Campaign that there be set in train an amendment to the Constitution to reverse the *Citizens United*[5] decision of the Supreme Court, and on the other that Justices to be appointed to over-rule *Roe v Wade*.[6]

The use by Wynes of the term "legalism" in a laudatory sense will be noted. But, wisely, he uses it to assist the important point he makes respecting the work of the High Court as a general court of (now final) appeal for the whole country. In what follows in this paper, consideration of the present standing of the work of Sir Owen Dixon does not divorce his thinking and technique in constitutional cases from the remainder of his extensive *oeuvre*.

What of the "canonization" and "demonizing" of particular Justices of the Supreme Court to which Professor White referred with respect to the New Deal? This has not abated. For example, the work of Justice Scalia has attracted strident attention by vigorous adherents to both sides of the "originalism" debate in the United States.

We largely have been spared the ascension of the "hero judge". Perhaps paradoxically, it is the reputation of Sir Owen Dixon, aided by his biographer,[7] which has come nearest to so such an Antipodean apotheosis. More than 50 years have elapsed since Sir Owen Dixon retired after serving as a member of the High Court from 1929 to 1964. The reports of his judgments appear between volumes 41 and 114 of the Commonwealth Law Reports.[8] His reputation has waxed and

3 *Roach v Electoral Commissioner* (2007) 233 CLR 162; [2007] HCA 43; *Rowe v Electoral Commissioner* (2010) 243 CLR 1; [2010] HCA 46; *Day v Australian Electoral Officer for South Australia* (2016) 90 ALJR 639, [2016] HCA 20; *Murphy v Electoral Commissioner* (2016) 90 ALJR 1027; [2016] HCA 36.

4 *The Commonwealth v The Australian Capital Territory* (2013) 250 CLR 441; [2013] HCA 55.

5 *Citizens United v Federal Election Commission* 558 US 310 (2010).

6 410 US 113 (1973).

7 Ayres, *Owen Dixon* (Miegunyah Press, 2003). The general approach by the author to this subject and his assessment of Dixon's judicial work was trenchantly criticised by Mr Dennis Rose AM, QC, in the detailed book review published in (2003) 6 *Constitutional Law and Policy Review* 18.

8 Volume 180, published in 1994, contains three decisions in which Dixon participated in 1940, 1948, and 1956 respectively.

waned but, as this paper will endeavour to show, over the last 20 years Dixon's general judicial technique and his approach to constitutional interpretation has been influential in the work of his successors.

Several introductory points may be made. The first concerns the range of Dixon's intellectual interests, exemplified by his inquiring mind, the second the time span of Dixon's work and the changes in the hierarchy of authority, and the third Dixon's attitude to the common law and the Constitution.

A The Cast of Mind

The first point is that throughout his career Dixon presented a number of papers and addresses which, in the collection entitled *Jesting Pilate*,[9] reveal a particular cast of mind. This required avoidance of what in the last of these addresses, given in 1957, under the title then adopted for the collection, Dixon said was "the real weakness of powerful and confident minds strengthened by dialectical gifts, and at the same time accustomed to the responsibility of decision". The weakness of such minds lay "in their tendency to work their way to a conclusion rather than to stop to inquire".[10] Rather, as in 1958 he observed to Professor Geoffrey Sawer, "I don't think that with judgments it is really a question of being wrong, but of being a bit too much on this side or the other".[11] That Dixon did stop to inquire is perhaps the basic reason we continue today to examine his judgments, even if, also stopping to inquire, we may not always wholly agree with them.

The range of Dixon's intellectual interests is demonstrated by the subjects he chose and the audiences to whom he addressed the papers collected in *Jesting Pilate*. The themes which recur in the Dixon collection include the inter-action between law and science law and economics and law and the teaching of Latin, the mental element in criminal responsibility, international relations, particularly with the United States, comparative federalism, and, perhaps curiously, the works of Trollope. The institutions which he addressed included not only legal bodies but those of medical practitioners, chemists and other scientists, accountants and classicists.

With respect to the importance of the classics, a senior judge recalls as very junior counsel appearing before Dixon CJ. Attempts to engage counsel in Greek, then Latin were unsuccessful and "I was obviously regarded as a failure". Of more significance is the influence of that Classicism upon Dixon's view of the place of the judicial branch in our system of government. It will be convenient to return to that matter in the concluding paragraphs of this paper.
The appreciation of scientific endeavour is manifest in the joint reasons with Kitto

9 Collected by Judge Woinarski and published in 1965. A second edition was published in the United States in 1997. References in this paper are to the first edition.
10 *Jesting Pilate* 1, 5.
11 Conversation of 26 February 1958; Geoffrey Sawer Papers MS 2688, Part 2/3.

and Windeyer JJ, explaining the width of the term "manner of manufacture" in patent law,[12] a *locus classicus* most recently (and controversially) considered in *D'Arcy v Myriad Genetics Inc*.[13] The consideration by Dixon J of testamentary capacity in *Timbury v Coffee*,[14] his charge to the jury in *R v Porter*,[15] his dissent (with Evatt J) in *Sodeman v R*,[16] his judgment in *Stapleton v R*,[17] and the rejection in *Parker v R*[18] of the decision of the House of Lords in *DPP v Smith*,[19] all bespeak a continuing interest in the meeting of medical science and legal responsibility.

Two further examples may be given of the range of Dixon's thought across the legal spectrum.

From his long contemplation upon the nature of the processes of the law, in *Bank of New South Wales v The Commonwealth*[20] he remarked:

> There are few, if any, questions of fact that courts cannot undertake to inquire into. In fact it may be said that under the maxim res iudicata pro veritate accipitur [a thing adjudicated is received as the truth] courts have an advantage over other seekers after truth. For *by their judgment they can reduce to legal certainty questions to which no other conclusive answer can be given*. (emphasis added).

Much later, the Court drew support from that observation in a very different context. In *Amaca Pty Ltd v Ellis*[21] the Court was required in asbestos litigation to reduce to legal certainty, by application of the laws of evidence and of standards of proof, a question of causation to which science and medicine were unable to give an answer in the affirmative or negative. In 1933, Dixon had remarked that the relation of science and judicial proceedings is an extreme instance of the relation of facts to the ascertainment of rights.[22]

B The Time Span and the Hierarchy of Authority

The second introductory point reflects the long time span across which Dixon's thought developed. On occasion he admitted and corrected past error. An example is his disavowal in *Dennis Hotels Pty Ltd v Victoria*[23] of earlier apparent approval

12 *National Research Development Corporation v Commissioner of Patents* (1959) 102 CLR 252; [1959] HCA 67.
13 (2015) 258 CLR 334; [2015] HCA 35.
14 (1941) 66 CLR 237, 283-4; [1941] HCA 22.
15 (1933) 55 CLR 182; [1933] HCA 1.
16 (1936) 55 CLR 193;]1936] HCA 75.
17 (1952) 86 CLR 358; [1952] HCA 56.
18 (1963) 111 CLR 610; [1963] HCA 14.
19 [1961] AC 290.
20 (1949) 76 CLR 1, 340.
21 (2010) 240 CLR 111, [6], [70]; [2010] HCA 5.
22 'Science and Judicial Proceedings' in Woinarski (ed), *Jesting Pilate* (1965) 11, 22.
23 (1960) 104 CLR 529, 538-9; [1960] HCA 10.

of "backdating devices" to circumvent the operation of s 90 upon duties of excise.[24]

In 1935,[25] Dixon J interpreted the term "absolutely free" in s 92 by what may be called the "criterion of operation formula".[26] This close attention to the text of the impugned law meant that, as Professor Zines put it, "a number of laws that had a considerable economic or practical effect on interstate trade were upheld as affecting that trade only indirectly".[27] Yet, by 1955 in the joint reasons in *Grannall v Marrickville Margarine Pty Ltd*[28] Dixon CJ was averring that "nothing that has been said before" denied that impermissible impairment of interstate trade might be by "circuitous means or concealed design"; nonetheless one asks whether the detection of that invalidating character may not require consideration of legislative purpose and practical consequences.

When Dixon joined the Court in 1929 the *Statute of Westminster* 1931 (Imp) had not been enacted, and federal statutes were "colonial laws" within the meaning of the repugnancy provision of s 2 of the *Colonial Laws Validity Act* 1865 (Imp).[29] He retired in 1964 when the United Kingdom was looking to membership of the European Economic Community (as it then was). In 1963 the High Court emphatically had declared that it would no longer consider itself as bound by decisions of the House of Lords.[30] In the years following Dixon's retirement and his death in 1972, the *Australia Act* 1986 (Cth) finally put a complete end to all appeals to the Privy Council. The High Court became the source of authoritative exposition of the law of Australia, constitutional, statutory, and unwritten. But in exercising that authority, as Professor Zines wrote on the Centenary of the Court, it "roams the world in search of enlightenment".[31]

That search is a feature of the judicial method which Dixon had developed. From his early period on this Court, Dixon had looked beyond the confines of English judicial authority. For example, in *Cowell v Rosehill Racecourse Company Ltd*[32] Dixon J derived support in disfavouring the decision of the English Court of Appeal in *Hurst v Picture Theatres*[33] from Sir William Holdsworth, Professor Hanbury and Justice O.W. Holmes. In his frequently cited reasons in *Briginshaw v Briginshaw*,[34] respecting what provides persuasion to a standard of "reasonable

24 Section 90 renders 'exclusive' the power of the Parliament 'to impose duties … of excise'.
25 *O. Gilpin Ltd v Commissioner for Road Transport and Tramways* (1935) 52 CLR 189, 205-6; [1935] HCA 8.
26 Section 92 speaks of 'trade, commerce, and intercourse among the States, whether by means of internal carriage or ocean navigation' being 'absolutely free'.
27 Zines, *The High Court and the Constitution* (2008, 5th ed) 159.
28 (1955) 93 CLR 55, 78; [1955] HCA 6.
29 *Union Steamship Co of New Zealand Ltd v The Commonwealth* (1925) 36 CLR 130; [1925] HCA 23.
30 *Parker v The Queen* (1963) 111 CLR 610; [1963] HCA 14.
31 Zines, 'The Vision and the Reality' in Cane (ed), *Centenary Essays for the High Court of Australia*, (2003) 3, 13.
32 (1937) 56 CLR 605, 637; [1937] HCA 17.
33 [1915] 1 KB 1.
34 (1938) 60 CLR 336 at 360-363; [1938] HCA 34.

satisfaction", Dixon J referred extensively to the treatise of Professor Wigmore. So it is no surprise to read Dixon in 1942 telling the American Bar Association:[35]

> [In Australia] we naturally stand midway between the two great common law systems … We study them both; we feel that, in some measure, we understand them both, and we seek guidance from them both.

There is no readily apparent path to an appreciation of the degree to which Dixon suffered constraint in the scope of his judicial work first, by the prevailing acceptance by the High Court until 1963 of the binding effect of decisions of the House of Lords, and secondly by the direct route to the Privy Council from decisions of State Supreme Courts when not exercising federal jurisdiction. If there could be no overt defiance, there could still be silence or "interpretation".

In *Australian Knitting Mills v Grant*,[36] Dixon J referred to the recent decision in *Donoghue v Stevenson*[37] but went on to rest his judgment on the facts. Thereafter there were three decades of silence until a glancing reference in *Voli v Inglewood Shire Council*.[38] That may have been no accident. The writer has it on good authority that, privately, Dixon held in low regard Lord Atkin's reliance upon Biblical aphorism; he may have shared the scepticism of Professor Julius Stone regarding Lord Atkin's formulation.[39] In retrospect, the significance of the "neighbour" concept may have been not as an operative criterion of liability in negligence so much as a proposition pitched at a level of abstraction which has stimulated consideration of the circumstances warranting recognition of the species of duty since revealed by the case law.[40]

What of the Privy Council? The treatment by the High Court in *Chapman v Hearse*[41] of *The Wagon Mound*[42] (which had come directly from the Supreme Court of New South Wales) speaks quite sharply in beginning with the phrase "[A]s we understand the term 'reasonably foreseeable' … ". Dixon's biographer details the unfruitful efforts he made to persuade Prime Minister Menzies to act to bring to an end all appeals from the High Court.[43] Dixon was appointed to the Privy Council in 1951, but never sat on the Judicial Committee.

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35 'Two Constitutions Compared' in Woinarski (ed), *Jesting Pilate* (1965) 100, 103; (1942) 16 *Australian Law Journal* 192, 194.

36 (1933) 50 CLR 387; [1933] HCA 35.

37 [1932] AC 562.

38 (1963) 110 CLR 74, 79–80; [1963] HCA 15.

39 Stone, *Legal Systems and Lawyers' Reasonings* (1964) 258-60. See also Edelman, 'Fundamental Errors in *Donoghue v Stevenson*' (2014) 39 *Australian Bar Review* 160.

40 As foreseen by R.F.V. Heuston '*Donoghue v Stevenson* in Retrospect' (1957) 20 *Modern Law Review* 1. Cf. Applegarth 'Lord Aitkin: Principle and progress' (2016) 90 *Australian Law Journal* 711, 737–41.

41 (1961) 106 CLR 112 at 122; [1961] HCA 46.

42 [1961] AC 388; [1961] UKPC 1.

43 Ayres, *Owen Dixon* (Miegunyah Press, 2003) 245–6.

C The Common Law and the Constitution

The final introductory matter concerns Dixon's attitude to the common law. This he made strikingly apparent when speaking in 1942 to the American Bar Association. He said:[44]

> Australia, as you know, is a common law country. That simple statement carries with it prodigious consequences. I believe that the outlook of a people nurtured in and living under the Roman law tradition can never be the same as that of a people whose conceptions of government, of liberty, of justice and of right have been moulded by the common law. This fact explains some of the features of the present conflict.

That averment of common law exceptionalism underestimated the force in European thought both of the ideals of the Enlightenment and of the traditions of Natural Law, and their significance for the legal and constitutional re-ordering in Europe which was to commence after 1945 and is still a work in progress.

Dixon went on in his speech to see in "our fealty to the common law" the "Anglo American conception of the rule of law"; this entered deeply into "our habits of thought about the relations of the individual to the State". What Dixon said here anticipates his approach to the *Communist Party Dissolution Act* 1950 (Cth) and to judicial scrutiny of executive action. His statement:[45]

> History and not only ancient history, shows that in countries where democratic institutions have been unconstitutionally superseded it has been done not seldom by those holding the executive power. Forms of government may need protection from dangers likely to arise from within the institutions to be protected resonates today no less strongly than when first written.

In another speech given whilst Minister to Washington,[46] Dixon differed from the view of Justice Holmes[47] that the common law was not "a transcendental body of law outside of any particular State"; rather, Dixon reiterated, in Australia we conceive "of a State as deriving from the law; not the law as deriving from a State." Moreover, he added that the British conception of the supremacy of Parliament "may be considered as deriving its authority from the common law, rather than as giving its authority to the common law." Implicit here is the proposition that in the United Kingdom it is the courts which expound the common law and the meaning

44 Dixon, 'Two Constitutions Compared' in Woinarski (ed), *Jesting Pilate* (1965) 100; (1942) 16 *Australian Law Journal* 192, 194.

45 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 188; [1951] HCA 5.

46 Dixon, 'Sources of Legal Authority' in Woinarski (ed), *Jesting Pilate* (1965) 198, 199; (1942) 17 *Australian Law Journal* 138, 139.

47 *Black and White Taxicab and Transfer Co v Brown and Yellow Taxicab and Transfer Co* 276 US 518 (1928) 533–4.

to be given to statute law, including laws of a "constitutional" character. From this starting point it would not be too lengthy a journey in Australia to conclude that in the judicial power of the Commonwealth there reposed the authority for interpretation of a rigid federal constitution.

In the United Kingdom,[48] Lord Hope of Craighead adopted Dixon's statement[49] that the courts shall disregard as unauthorised and void the acts of the other organs of government which exceed the power that organ derives from the law.

Recently, in *RC Miller v Secretary of State for Exiting the European Union*,[50] the majority judgment of eight Justices of the Supreme Court observed that "judges impartially identify and apply the law in every case brought before the courts", adding "[t]hat is why and how these proceedings are being decided".[51]

With respect to the issues at hand, their Lordships (i) emphasised that so long as the *European Communities Act* 1972 (UK) ("the 1972 Act") remains in force" the EU Treaties, EU legislation and interpretations placed on these instruments by the Court of Justice are direct sources of UK law", (ii) but affirmed that the conception of the supremacy of Parliament [which Dixon saw as derived from the common law] remained "the fundamental rule of recognition (i.e. the fundamental rule by reference to which all other rules are validated)", and (iii) concluded that, consistently with that unchanged *grundnorm*, "the 1972 Act can be repealed like any other statute".[52] (The corollary was that the Executive required the authority of statute to set in train at the international level the steps leading to that repeal).

With respect, while propositions (i), (ii) and (iii) may be accepted, with respect to the 1972 Act, given their source in the Dixonian concept of the common law, some qualification is required to allow for the dissolution by statutory means of the British Empire. Imperial statutes which provided for the constitutions of Canada, Australia, India and many other countries must be irreversible. The common law whence the supremacy of Westminster derives, must have accommodated political realities.

From here it is convenient to move to the following matters: Common Law and Statute; Social Attitudes; The Test of Time; Still the Starting Point; Thought Across Borders – the implicit negative; Current Orthodoxy; "Legalism" and Judicial Method; The Rule of Law.

48 *R (Jackson) v Attorney-General* [2006] AC 262, [107].
49 Dixon, 'The Law and the Constitution' in Woinarski (ed), *Jesting Pilate* (1965) 38, 43; (1935) 51 *Law Quarterly Review* 590, 596.
50 [2017] 2 WLR 583.
51 [2017] 2 WLR 583, [42].
52 [2017] 2 WLR 583, [60], [61].

II COMMON LAW AND STATUTE

In his attitude to the common law and its relation to statute Dixon was the child of his time. The preference of Jeremy Bentham and his disciples for statute to clear away what they saw as the chaos of the common law had been supplanted by the veneration expressed in the term used by Pollock, "Our Lady of the Common Law". Later, in the United States, this was to be taken up by Cardozo.[53] Codification might be attempted for India for such matters as contract, evidence and criminal law, and in Queensland by Sir Samuel Griffith with respect to criminal law. But in the fifth of his lectures at Columbia, published in 1912 under the title "The Genius of the Common Law", Pollock had the sub-heading "Reform by legislation: danger of amateur work".

May one not see here the genesis of the description by Dixon CJ and his colleagues in *Bitumen and Oil Refineries (Australia) Ltd v Commissioner of Government Transport* of s 5 of the *Law Reform (Miscellaneous Provisions) Act* 1946 (NSW) as "a piece of law reform which seems itself to call somewhat urgently for reform"?[54] Earlier, speaking extra-judicially in 1933, Dixon had observed:[55] "[For] the most part the daily relations of man and man are governed by the common law … disfigured but little by statute", and added:

> I confess that I am always more alive to the defects of our existing system and methods than confident of the success of the alternatives which suggest themselves.

The attitude to statute law manifested itself in *Clements v Ellis*[56] where Dixon J construed the Torrens system as one for registration of title rather than of title created by the very act of registration. A similar tendency may be seen in *Vallance v The Queen*.[57] In dealing with the Tasmanian Criminal Code, Dixon CJ referred to Pollock's description of codes as "a kind of brutal interference" with "the natural process" of the case law, and to the presence in the Code of "wide abstract statements of principle about criminal responsibility framed rather to satisfy the analytical conscience of the Austinian jurist than to tell a judge at a criminal trial what he ought to do".

With respect to the common law rules for choice of law, Dixon was reluctant to construe statute as replacing them. Thus, in *Wanganui-Rangitikei Electric Power Board v Australia Mutual Provident Society*[58] he rejected the submission that the *Interest Reduction Act* 1931 (NSW) applied to every payment of interest required

53 'Our Lady of the Common Law' (1939) 13 *St. John's Law Review* 231, an address in euphuistic terms Cardozo had delivered to a graduating class in 1928.
54 (1955) 92 CLR 200, 212; [1955] HCA 1.
55 'Jesting Pilate' in Woinarski (ed), *Jesting Pilate* (1965) 1, 13, 22.
56 (1934) 51 CLR 217, 236-42, 256-8; [1934] HCA 18.
57 (1961) 108 CLR 56, 59; [1961] HCA 42.
58 (1934) 50 CLR 581; [1934] HCA 3.

to be made in New South Wales, whatever the proper law of the contract of loan, here that of New Zealand.[59]

One may surmise that Dixon would have agreed with the statement made by Holmes to Pollock in 1924:[60]

> Naturally I think that our mode of proceeding by cases rather than by discussion of generalities leads to more accurate generalities, and I don't think that we need fear comparison with the continentals for philosophical views of the law.

So we have Dixon speaking in 1957 of the relationship between common law and the Constitution as follows:[61]

> Federalism means a rigid Constitution and a rigid Constitution means a written instrument. It is easy to treat the written instrument as the paramount consideration, unmindful of the part played by the general law, notwithstanding that it is the source of the legal conceptions that govern us in determining the effect of the written instrument.

III SOCIAL ATTITUDES

Whether approaching the common law, statute or the Constitution, there is to be observed across time, not the least in the period since Dixon retired in 1964, shifting assessments of what might be called social attitudes. In 1951, when assessing the evidence of indebtedness of the deceased to his mistress of 15 years (and executrix of his will), Dixon, Williams, Kitto JJ observed that "[n]o tenderness need be shown to a creditor whose debt grew out of a liaison between her and a married man."[62] This proved too much for the more worldly Viscount Radcliffe and Lord Asquith of Bishopstone, members of the Board from whom Sir Garfield Barwick QC, appearing pro bono, obtained a grant of special leave.[63] One may doubt whether the High Court today would ever express itself in such terms.[64]

In his dissenting judgment in the *Marriage Act Case*,[65] Dixon CJ saw a "paradox" where "bastardry, being a legal condition resulting from birth out of wedlock" was by that statute to be removed by the subsequent marriage of the parents; there was an ineffective exercise of the power to make laws with respect to "marriage".

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59 Cf. *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418, 442-3; [1996] HCA 39.

60 Howe (ed), *Holmes – Pollock Letters* (1946, vol ii) 137.

61 'The Common Law as an Ultimate Constitutional Foundation' in Woinarski (ed), *Jesting Pilate* (1965) 203, 205.

62 *Ellis v Leeder* (1951) 82 CLR 645, 652; [1951] HCA 44.

63 The subsequent appeal was allowed – *Leeder v Ellis* (1952) 86 CLR 64; [1952] UKPCHCA 2.

64 But see *Ashton v Pratt* (2015) 88 NSWLR 281, [29]-[31], [218]; [2015] NSWCA 12.

65 *A-G (Vic) v The Commonwealth* (1962) 107 CLR 529, 540; [1962] HCA 37.

One need not wonder what his response would have been to the statement in 2013 by the unanimous Court in *The Commonwealth v The Australian Capital Territory*[66] that s 51(xxi) refers to "marriage" not in the sense of unions which could be formed at the time of federation, having the legal content then given by English law, but in the sense of a topic of juristic classification.

Yet one must not overlook *Tuckiar v The King*.[67] The appellant, consistently with terms then (in 1934) in general use, was described in the joint reasons to which Dixon J was a party as "a completely uncivilised aboriginal native" brought to Darwin to stand trial for murder. His conviction was quashed. Defence counsel after the conviction of his client, who spoke no English, publicly divulged privileged communications with his client. The Court said "[o]ur system of administering justice necessarily imposes upon those who practice advocacy duties which have no analogies, and the system cannot dispense with their strict observance".[68]

IV THE TEST OF TIME

Not all of Dixon's work has stood the test of time. The most significant examples from constitutional law include the impact of *Cole v Whitfield*[69] upon his reading of s 92 of the Constitution and upon reference to the Convention Debates, and of *Pape v Commissioner of Taxation*[70] upon that reading of ss 81 and 83 of the Constitution as conferring a substantive spending power which Dixon J gave in the *Pharmaceutical Benefits Case*.[71] *Thomas v Mowbray*,[72] in basing federal anti-terrorist legislation upon the defence power in s 51(vi), did not accept the statement by Dixon J in the *Communist Party Case*[73] that its "central purpose" was "the protection of the Commonwealth from its external enemies."

Dixon's terse language when touching upon what at the time must have been seen as topics for future contention has not assisted his successors when cases for decision have come before them. An example is his remarks in *R v Burgess; Ex parte Henry*,[74] where he contrasted a treaty referring to "some matter indisputably international in character", and a "matter of internal concern which, apart from the [treaty] obligation undertaken by the Executive, could not be considered as a matter of external affairs". Just what was involved in this characterisation process was to exercise Stephen J, Mason J and Brennan J in *Koowarta v Bjelke-Petersen*;[75] they were part of the majority which upheld provisions of the *Racial*

66 (2013) 250 CLR 441, [14]; [2013] HCA 55.
67 (1934) 52 CLR 335; [1934] HCA 49.
68 (1934) 52 CLR 335, 347, per Gavan Duffy CJ, Dixon, Evatt, McTiernan JJ.
69 (1988) 165 CLR 360; [1988] HCA 18.
70 (2009) 238 CLR 1; [2009] HCA 23.
71 *A-G (Vic) v The Commonwealth* (1945) 71 CLR 237, 271-2; [1945] HCA 30.
72 (2007) 233 CLR 307; [2007] HCA 33.
73 *Australian Communist Party v The Commonwealth* (1951) 83 CLR 1, 194.
74 (1936) 55 CLR 608, 677
75 (1982) 153 CLR 168, 213-14, 232-3, 256-7, respectively; [1982] HCA 27.

Discrimination Act 1975 (Cth).

Another example is provided by a statement in the address "Sources of Legal Authority",[76] delivered at Detroit in 1943. Noting that Australians regard their legal system as a whole, Sir Owen Dixon also observed that "the States are distinct jurisdictions", each being "a fragment of the whole", and added:

> In other States the recognition of its statutes depends upon the general common law principles governing the extra-territorial recognition and enforcement of rights, *as affected by the full faith and credit clause"* (emphasis added).

However, in *John Pfeiffer Pty Ltd v Rogerson*[77] the Court was to prefer to develop a common law choice of law rule for intra-national torts which derived its force not from the text of s 118 but, more broadly, from considerations of the federal structure as a whole.

For many years, before and during Dixon's service on the Court, much time was devoted to supervision of industrial tribunals conducting conciliation and arbitration, and to attempts by the Parliament to insulate such tribunals from review under s 75(v) of the Constitution. The middle path laid out by Dixon J in *R v Hickman; Ex parte Fox*[78] was cryptically expressed, but certainly stopped short of entrenching the remedies of mandamus and prohibition for jurisdictional error, which are provided by s 75(v) of the Constitution.

It was not until 2003, in the environment of migration law and legislative endeavours since 1992 to restrict judicial review, that in *Plaintiff S157/2002 v The Commonwealth*[79] the decision was made that these remedies were constitutional, in the sense of entrenched, and went beyond their antecedents in English "public law". But, one may expect that Sir Owen Dixon would have not disagreed with the statement in the joint reasons:[80]

> The provision of the constitutional writs and the conferral upon this Court of an irremovable jurisdiction to issue them to an officer of the Commonwealth constitutes a textual reinforcement for what Dixon J said about the significance of the rule of law for the Constitution in *Australian Communist Party v The Commonwealth*.[81] In that case, his Honour stated that the Constitution:

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76 Reproduced in Woinarski (ed), *Jesting Pilate* (1965) 198, 201; 17 *Australian Law Journal* 198.

77 (2000) 203 CLR 503, [59]-[65]; [2000] HCA 36.

78 (1945) 70 CLR 598, 616; [1945] HCA 53.

79 (2003) 211 CLR 476; [2003] HCA 2.

80 (2003) 211 CLR 476, [103]-[104].

81 (1951) 83 CLR 1, 193; cf *Kartinyeri v The Commonwealth* (1998) 195 CLR 337, 381 [89] per Gummow and Hayne JJ.

> Is an instrument framed in accordance with many traditional conceptions, to some of which it gives effect, as, for example, in separating the judicial power from other functions of government, others of which are simply assumed. Among these I think that it may fairly be said that the rule of law forms an assumption.[82]

Then there is the corporations power. The Parliament was successfully emboldened from the period when the Attorney-General's portfolio was filled by Sir Garfield Barwick and the eventual passage of the *Trade Practices Act* 1965 (Cth) (s 7(2), (3) of which invoked the corporations power) to rely upon that power to a degree unknown during the time Sir Owen Dixon served on the Court. The reason for that protracted inactivity was explained by Sir John Latham, writing from retirement in 1961:[83]

> The Commonwealth Parliament has power to make laws with respect to foreign corporations and trading or financial corporations formed within the limits of the Commonwealth. Great difficulty has been found in attaching a practicable meaning to this provision. If it means that the Commonwealth Parliament may make any law whatever which applies to the corporations mentioned in the paragraph, then the Commonwealth would be able, under this heading of power, to control all the large-scale business and enterprise of Australia. The provision was considered in *Huddart Parker & Co Pty Ltd v Moorehead*.[84] The opinions expressed varied so greatly that the Commonwealth Parliament has not ventured upon any general legislation with respect to corporations. (footnotes omitted).

The legislative resurgence received a setback in 1990 with the decision (remarkable then, more so now) that the Commonwealth lacked the power to legislate for the incorporation of trading and financial corporations.[85] But otherwise the amplitude of the power in s 51(xx) was established in 2006 by the *WorkChoices Case*.[86]

In matters of "public law", which as remarked later in this paper is closely attached to what we call "constitutional law", even in his time on the Court, some of Dixon's work was not weathering well. The last reported case in Volume 114 of the Commonwealth Law Reports is *Cooney v Ku-ring-gai Corporation*.[87] This settled that the Attorney-General, or public authorities with a statutory backing might seek to enjoin breaches of laws directed to public health and comfort and the orderly arrangement of municipal areas. Kitto, Taylor, Menzies and Windeyer

82 (1951) 83 CLR 1, 193.

83 Latham, 'Interpretation of the Constitution' in Else Mitchell (ed), *Essays on the Australian* Constitution (1961) 1, 37.

84 (1908) 8 CLR 330.

85 *NSW v Commonwealth* (1990) 169 CLR 482; [1990] HCA 2. Deane J was the sole dissentient.

86 *NSW v Commonwealth* (2006) 229 CLR 1; [2006] HCA 52.

87 (1963) 114 CLR 582; [1963] HCA 47.

JJ disapproved the reasoning to the contrary by Dixon AJ (with Irvine CJ and Mann J) when an Acting Judge in Victoria in *A-G (Ex rel. Lumley) v TS Gill & Son Pty Ltd*.[88] In *Cooney*, Dixon CJ dissented, but on grounds which did not require him to face the repudiation of his 1926 decision by his present colleagues.

Thereafter, in 1971 the High Court unanimously adopted the doctrine of the "immediate" indefeasibility of registration of Torrens title[89] and consequently rejected the "deferred" indefeasibility which Dixon J had urged in *Clements v Ellis*.[90]

V STILL THE STARTING POINT

Nevertheless, it remains true that statements of principle by Dixon on a range of subjects remain an uncontested starting point from which immediate disputes are presented for determination. This aspect of Dixon's reputation should not be underestimated. Six examples will suffice. The first is the proposition from *Shepherd v Felt and Textiles of Australia Ltd*[91] that:

> A party to any simple contract who fails or refuses further to observe its stipulations [may] rely upon a breach of conditions, committed before he so failed or so refused, by the opposite party to the contract as operating to absolve him from the contract as from the time of such breach of condition whether he was aware of it or not when he himself failed or refused to perform the stipulations of the contract.

This proposition is regarded today as "well established".[92]

The second example is the distinction drawn in *McDonald v Dennys Lascelles Ltd*[93] between the various senses of the term "rescission". Thus, in *Federal Commissioner of Taxation v Reliance Carpet Co Pty Ltd,*[94] before entering upon the issues of interpretation of the GST legislation with respect to "taxable supply" and the forfeiture of deposits, the Court carefully emphasised that the forfeiture by the taxpayer had been upon "rescission" in the sense of termination upon a failure in performance, and referred to *Dennys Lascelles*.

The third example concerns the circumstances in which in the course of a liquidation equity supplies a first charge in priority to that of a secured creditor. As an application of the proposition that a party seeking the benefit of participation in a fund must be prepared to do equity by allowing first for the expenses reasonably

88 [1927] VLR 22, 32-5.
89 *Breskvar v Wall* (1971) 126 CLR 376; [1971] HCA 70.
90 (1934) 51 CLR 217, 236-42, 256-8; [1934] HCA 18.
91 (1931) 45 CLR 359, 377-8.
92 *Air Link v Paterson* (2005) 223 CLR 283, [143]; [2005] HCA 39.
93 (1933) 48 CLR 457 at 476-7; [1933] HCA 25.
94 (2008) 236 CLR 342, [2]; [2008] HCA 22.

incurred in the creation of the fund, a secured creditor of an insolvent company may not have the benefit of the fund created by the liquidator without allowing as first charge those costs and expenses. The statement of principle by Dixon J in *In re Universal Distributing Co Ltd (in Liq)*[95] was analysed and applied in the joint reasons in *Stewart v ATCO Controls Pty Ltd (In Liq)*[96].

The fourth example is now associated with *Project Blue Sky*[97] and has come to be accepted as a general principle of statutory construction. This is that the context, general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed.[98]

The fifth example concerns the distinction for income tax law between outgoings of a capital nature and outgoings otherwise incurred in gaining assessable income. Here, "the starting point"[99] remains the statement of principle by Dixon J in *Sun Newspapers Ltd v Federal Commissioner of Taxation.*[100]

The final example is the frequently cited passage in *House v The King*[101] in which Dixon J, Evatt and McTiernan JJ explain that error in the exercise of a judicial discretion may be inferred from a result which is "unreasonable or plainly unjust".[102]

Other areas of common law and equity remain under development in the case law. Here considerations by Dixon of fundamental principle remain the subject of discussion and inspiration in contemporary decisions. A striking example is the recourse to *Grundt v Great Boulder Pty Gold Mines Ltd*[103] in the three recent estoppel cases *Sidhu v Van Dyke*,[104] *ASPL v Hills Industries Ltd*,[105] and *Crown Melbourne Limited v Cosmopolitan Hotel (Vic) Pty Ltd*.[106] Another is *Yerkey v Jones*.[107] In *Garcia v National Australia Bank Ltd*[108] Callinan J observed that there remain "Many married women still in need of the special protection that *Yerkey*

95 (1933) 48 CLR 71, 174; [1933] HCA 2.
96 (2014) 252 CLR 307, [11]-[25]; [2014] HCA 2.
97 *Project Blue Sky (W'gong) Pty Ltd v ABA* (1998) 194 CLR 355, [69]; [1998] HCA 28.
98 *Commissioner of Railways (NSW) v Agalianos* (1955) 92 CLR 39, 397 per Dixon CJ; [1955] HCA 27; *Klein v Domus* (1963) 109 CLR 467, 473 per Dixon J; [1963] HCA 54. See, further, *Certain Lloyd's Underwriters v Cross* (2012) 248 CLR 378, [24], [70]; [2012] HCA 56; *Minister for Immigration v Li* (2013) 249 CLR 332, [67]; [2013] HCA 18.
99 *Spriggs v Federal Commissioner of Taxation* (2009) 239 CLR 1, [79]; [2009] HCA 22; *Federal Commissioner of Taxation v Citylink Melbourne* (2006) 228 CLR 1, [147]; [2006] HCA 35; *Ansett Transmission Group Pty Ltd v Federal Commissioner of Taxation* (2015) 255 CLR 439, [20]-[22], [140]-[144]; [2015] HCA 25.
100 (1938) 61 CLR 337, 363; [1938] HCA 73.
101 (1936) 55 CLR 499; [1936] HCA 40.
102 *House v The King* (1936) 55 CLR 499, 505; [1936] HCA 40.
103 (1937) 59 CLR 641, 675-7; [1937] HCA 53, further discussed by Sir Owen Dixon himself in 'Concerning Judicial Method' in Woinarski (ed), *Jesting Pilate* (1965) 152, 164.
104 (2014) 251 CLR 505, [79]-[86], [90]-[92]; [2014] HCA 19.
105 (2014) 253 CLR 560, [85]-[87], [149]-[151]; [2014] HCA 14.
106 [2016] HCA 26, [139]-[141].
107 (1939) 63 CLR 649; [1939] HCA 3.
108 (1998) 194 CLR 395, [113]; [1998] HCA 48.

v Jones[109] offers", and Gaudron, McHugh, Gummow and Hayne JJ left open the question whether what was said by Dixon J in 1939 "will find application to other relationships more common now than was the case in 1939 – to long term and publicly declared relationships short of marriage between members of the same or of opposite sex".[110]

These equity cases illustrate two related points made by Dixon CJ, McTiernan, Kitto JJ in *Jenyns v Public Curator (Qld)*.[111] First, the exercise of the jurisdiction of a court of equity to set aside dispositions of property by reason of circumstances affecting the conscience of the defendant calls for a precise examination of the particular facts, including a scrutiny of the exact relations established between the parties and their mental capacities, processes and idiosyncrasies. Secondly, the cases do not depend upon "legal categories susceptible of clear definition and giving rise to definite issues of fact" which when found "automatically determine" the outcome in the case rather than a "determination of the real justice of the case."

What then would Dixon have made of the characterisation by the President of the Supreme Court of the United Kingdom, in a speech in 2014 to an audience containing many Australasian commercial lawyers, of the remedial constructive trust as "equity at its flexible, flabby worst"? Sir Anthony Mason responds:[112]

> One can imagine the look of dismissive disdain on Sir Owen Dixon's face if the remark had been uttered in his presence.

VI THOUGHT ACROSS BORDERS – THE IMPLICIT NEGATIVE

Professor T.R.S. Allan, writing from an English viewpoint, has emphasised the impossibility of a clean cut distinction between "constitutional" and "administrative" and "public" law.[113] One surmises that from his standpoint Dixon would have been of like mind.

Further, it is important to appreciate that in Dixon's thinking about the law, concepts and ideas readily flowed across the borders of what unfortunately some may regard as distinct or self-contained "subjects". What follows is an example of this.

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109 (1939) 63 CLR 649, 684-6 per Dixon J.

110 (1998) 194 CLR 395, [22].

111 (1953) 90 CLR 113, 119; [1953] HCA 2.

112 Mason, 'Foreword' in Finn, *Fiduciary Obligations* (Federation Press, 40th Anniversary Republication with Additional Essays, 2016) v, xiv.

113 T.R.S. Allan, *The Sovereignty of Law* (Oxford University Press, 2013) 317. The insularity in the United Kingdom of the public and constitutional law 'fraternity' is noted by Professor Paul Craig in his essay 'Limits of Law: Reflections from Public and Private Law' in Barber et al (eds), *Lord Sumption and the Limits of Law* (2016) ch 10.

Anthony Hordern and Sons Ltd v Amalgamated Clothing and Allied Trades Union of Australia[114] turned upon the interpretation of s 40 of the *Commonwealth Conciliation and Arbitration Act* 1904 (Cth) respecting the power of the Court of Conciliation and Arbitration to require employers to give preferential treatment to unionists. Dixon J held that the subjection of the affirmative grant of power by s 40 to certain conditions for its exercise, necessarily implied a negative. This denied the application of more generally expressed provisions in the statute, freed from the conditions and qualifications found in s 40. This "*Anthony Hordern* principle" of statutory construction is regularly applied today,[115] most recently in the joint reasons in *Plaintiff S4/2014 v Minister for Immigration*.[116]

Six years after *Anthony Hordern*, in *R v Federal Court of Bankruptcy; Ex parte Lowenstein*[117], Dixon and Evatt JJ, *(a)* said that s 71 of the Constitution and the power under s 51(xxxix) to legislate with respect to matters incidental to the execution of Ch III "make it impossible" to treat the other pars of s 51 as containing within themselves powers to legislate independently of Ch III, and *(b)* referred to earlier decisions[118] establishing first that the judicial power of the Commonwealth cannot be vested in federal courts established otherwise than pursuant to Ch III, and secondly that no kind of judicial power other than that provided in Ch III can be conferred on a federal court. Thereafter, in the *Boilermakers' Case*[119] Dixon CJ was a party to the joint reasons which declared that Ch III was "a notable but very evident example of the proposition" that "affirmative words appointing or limiting an order or form of things may also have a negative force and forbid the doing of the thing otherwise." Hence the bar upon conferral of non-judicial power.

Here, then, is a principle of statutory construction carried upwards by Dixon to the interpretation of the Constitution.

The issue in *Re Wakim; Ex parte McNally*[120] was expressed by Gleeson CJ as whether the "autochthonous expedient" for the conferring of federal jurisdiction on State courts made by s 77(iii) of the Constitution might apply by a reverse process without such an express grant of power.[121] McHugh J, Gummow and Hayne JJ, (who with Gleeson CJ, Gaudron J and Callinan J formed the majority denying that reverse process) cited[122] the critical passage from *Boilermakers' Case* which has been set out above.

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114 (1932) 47 CLR 7; [1932] HCA 9.
115 See Herzfeld, Prince and Tully, *Interpretation and Use of Legal Sources* (2013) ¶25.1.1850.
116 (2014) 252 CLR 219, [42]-[43]; [2014] HCA 34.
117 (1938) 59 CLR 556, 585; [1938] HCA 10.
118 *Waterside Workers' Federation of Australia v JW Alexander* (1918) 25 CLR 434; [1918] HCA 56; *In Re Judiciary and Navigation Acts* (1921) 29 CLR 257; [1921] HCA 20, respectively.
119 (1956) 94 CLR 254, 270; [1956] HCA 10.
120 (1999) 198 CLR 511; [1999] HCA 27.
121 (1999) 198 CLR 511, [2], [22].
122 (1999) 198 CLR 511, [57], [111].

That statement in *Boilermakers* has recently been applied by the High Court to what has become known as the "indirect inconsistency" which engages s 109 of the Constitution. Upon its true construction, the federal law may contain an implicit negative proposition that nothing other than what it provides upon a particular matter is to be the subject of legislation, so that a State law which impairs or detracts from that negative proposition will enliven s 109.[123]

Again, it is now settled doctrine that the requirement in s 73(ii) of the Constitution that there continue to be a body fitting the description "the Supreme Court of a State" carries a negative implication for State legislative power. This denies such alteration of the constitution or character of its Supreme Court that it ceases to meet the description in Ch III.[124]

The same may be said of the significance of s 96 of the Constitution for federal financial relations, a matter emphasised with respect to the School Chaplains' Programme in *Williams v The Commonwealth*.[125] The presence of s 96, as it had been interpreted, was not consistent with a reading of s 61 of the Constitution as enabling the executive branch to "bypass" s 96, with its involvement both of the Parliament and the relevant State.

But what of the inter-relation between the powers listed in s 51 of the Constitution? May a limitation expressed in one paragraph limit the differently expressed terms of another? This question, with respect to s 51(xxxv) (settlement of interstate industrial disputes) and s 51(xx) (corporations) was answered in the negative by the majority in the *WorkChoices Case*.[126] Their Honours noted[127] the exclusive operation given Ch III in *Boilermakers*; but they held[128] that the course of authority, including *Pidoto v Victoria*[129] (decided in the absence of Sir Owen Dixon in Washington), denied in s 51(xxxv) a negative implication of exclusivity rendering invalid laws with respect to other heads of power which also had the character of laws regulating industrial relations in a fashion other than that stipulated in s 51(xxxv).

Indeed, as early as 1931, Dixon J had said that a Commonwealth law which provided that only trade unionists may engage in an essential element of interstate or overseas trade (the loading and unloading of cargo) would be a valid exercise of the commerce power conferred by s 51(i), and that this would be so "in spite of the industrial aspect which the provision undeniably presents".[130]

123 *Momcilovic v The Queen* (2011) 245 CLR 1, [244]; [2011] HCA 34; *The Commonwealth v The Australian Capital Territory* (2013) 250 CLR 441, [59]; [2013] HCA 55.

124 *Kirk v Industrial Court (NSW)* (2010) 239 CLR 531, [96]; [2011] HCA 1. See, further, Lindell, *Cowen and Zines's Federal Jurisdiction in Australian* (4th ed, 2016) 341-4.

125 (2012) 248 CLR 156, [141]-[148], [241]-[248], [497]-[507], [592]-[593]; [2012] HCA 23.

126 (2006) 229 CLR 1, [199]-[294]; [2006] HCA 52.

127 *New South Wales v Commonwealth* (2006) 229 CLR 1, [201].

128 *New South Wales v Commonwealth* (2006) 229 CLR 1, [223].

129 (1943) 68 CLR 87; [1943] HCA 37.

130 *Huddart Parker Ltd v Commonwealth* (1931) 44 CLR 429, 516; [1931] HCA 1.

The significance of the foregoing is twofold. First, it illustrates the difficulty, recently emphasised by the High Court,[131] in embracing any single all-encompassing method of interpretation of the text of the Constitution. Secondly, the particular significance attached by the High Court to Ch III, and to the place of s 96 and s 109 in Commonwealth – State relations, has not been replicated with respect to the inter-relation between the heads of legislative power in s 51.

VII CURRENT ORTHODOXY

It is convenient now to turn to instances where the views of Sir Owen Dixon, not generally accepted in his time on the Court, have come to be accepted constitutional doctrine.

The *first* instance concerns the position of "the Crown" in the constitutional structure. The awkward expression "the Crown in right of … ", while still in use in Canada,[132] in Australia has gone from daily constitutional discourse. In *Bank of New South Wales v The Commonwealth*[133] Dixon J said that the Constitution "goes directly to the conceptions of ordinary life" by treating "the Commonwealth and the States as organisations or institutions of government possessing distinct individualities." Later, he described the Commonwealth as "the polity established by the Constitution."[134] Thereby he bypassed attempts (still made) in English law to make "the Crown" do service in place of recognition of the United Kingdom as a juristic entity. (Devolution for Scotland, Northern Ireland and Wales presents further problems with this usage). That view of the Australian federal structure is now orthodoxy, at least since *Sue v Hill*.[135]

Secondly, in *Werrin v The Commonwealth*[136] Dixon J expressed the view that s 75 treated the liability of the Commonwealth and State in matters of federal jurisdiction as "already existing *in abstracto* as a duty of imperfect obligation made perfect by the creation of a jurisdiction in which the Crown *(sic)* may be

131 *The Commonwealth v Australian Capital Territory* (2013) 250 CLR 441, [14]; [2013] HCA 55. See, further, Selway, 'Methodologies of Constitutional Interpretation in the High Court of Australia' (2003) 14 *Public Law Review* 234; Gageler, 'Beyond the Text: A Vision of the Structure and Function of the Constitution' in Perram and Pepper (eds), *The Byers Lectures 2000-2014*, 191, 197-202.

132 See, generally, Saunders, 'The Concept of the Crown' (2015) 38 *Melbourne University Law Review* 873.

133 (1948) 76 CLR 1, 363; [1948] HCA 7.

134 *Lamshed v Lake* (1958) 99 CLR 132, 141–2; [1958] HCA 14. See, further, Aronson, Groves and Wilkes, *Judicial Review of Administrative Action and Government Liability* (6th ed, 2017) ¶19.40.

135 (1999) 199 CLR 462, [84], [90]-[92], [165]; [1999] HCA 30. It had been urged as long ago as 1904 by Dixon's lecturer at the University of Melbourne, Professor Harrison Moore: 'The Crown as Corporation' (1904) 20 *Law Quarterly Review* 351, 358-9. See, further, *Communications Union v Queensland Rail* (2015) 256 CLR 171, [53] per Gageler J; [2015] HCA 11.

136 (1938) 59 CLR 150, 168; [1938] HCA 3. See also *Bank of New South Wales v The Commonwealth* (1948) 76 CLR 1, 367, per Dixon J; [1948] HCA 7.

sued without its consent." In *The Commonwealth v Mewett*[137] it was decided that this reasoning should be accepted, such that the liability is created by the common law of Australia and the Constitution then operates to deny what otherwise might be doctrines from England of Crown and executive immunity.

The *third* instance concerns the interpretation of the powers listed in s 51 of the Constitution. The answer given to many legal questions, not only in matters of private international law,[138] will depend upon the level of abstraction at which the issue for decision is isolated and upon the characterisation then attributed to that issue.[139] With that in mind, one turns to the statement of Dixon J in *Stenhouse v Coleman*[140] that while the defence power involved "the notion of purpose or object" in most of the other paragraphs of s 51 of the Constitution the subject of power is so described that in assessing validity of a law said to be supported by the paragraph the Court would "disregard purpose or object." That method of analysis has brought with it a greatly expanded reach for the implementation of government policy. So, to take but one example, the corporations power may be engaged to effectuate a policy for a new industrial relations structure across Australia.[141]

But what if the purpose is contrary to implications involved in the federal system? This leads to the *fourth* instance where the views of Dixon still exert strong influence. It concerns the scope for implications in constitutional interpretation. The provision in the federal legislation at stake in the *Melbourne Corporation Case*,[142] s 48 of the *Banking Act* 1945 (Cth), was invalid not because it was beyond the banking power (s 51xiii), but because the law clashed with underlying assumptions respecting federalism.

Shortly before this decision, Dixon J had said in the *ANA Case*[143] that he "did not see why we should be fearful about making implications" when "dealing with an instrument of government." In the *ANA Case* the Court was dealing immediately with the interpretation of s 122 of the Constitution, and in *Melbourne Corporation* with implications drawn from the federalism evinced by the text and structure of the Constitution and respecting the singling out of a State for special burden or disability.

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137 (1997) 191 CLR 471, 491, 526-7, 549-51; [1997] HCA 29. See, further, *PT Garuda Indonesia Ltd v AECC* (2012) 247 CLR 240, [19]; [2012] HCA 33; cf *ACCC v Baxter Healthcare Pty Ltd* (2007) 232 CLR 1, [2]; [2007] HCA 38.

138 Gummow, 'The Selection of the Major Premises' [2013] 2 *Cambridge Journal of International and Comparative Law* 47.

139 Symeonides, *Choice of Law* (Oxford University Press, 2016) 65.

140 (1944) 69 CLR 457, 471; [1944] HCA 36.

141 *WorkChoices Case* (2006) 229 CLR 1; [2006] HCA 52.

142 (1947) 74 CLR 31; [1947] HCA 26.

143 *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29, 85; [1945] HCA 41.

The "doctrine" associated with the *Melbourne Corporation Case* for many years appeared to operate silently and *in terrorem*. Then it was successfully called into operation in 1985,[144] 1995,[145] 2003[146] and 2009.[147] What these cases have done, as Professor Winterton emphasised, is to assimilate the prohibition against discriminatory laws into the broader prohibition respecting laws of general application which curtail the capacity of the States to function as governments.[148]

The *fifth* and final matter concerns the place of s 122 in the constitutional structure. The view of Dixon J in the *ANA Case* that it was "hard to see why s 122 should be disjoined from the rest of the Constitution",[149] was repeated by him in *Lamshed v Lake*.[150] Finally, in 2008, with respect to the operation of the just terms provision (s 51(xxxi)) upon the Territories power, the Dixon view was adopted in *Wurridjal v The Commonwealth*;[151] the contrary (and abrupt) 1969 decision in *Teori Tau v The Commonwealth*[152] was overruled.

VIII "LEGALISM" AND JUDICIAL METHOD

Enough has been said above to indicate the continued vitality of much of what Sir Owen Dixon decided or foresaw. With that in mind, it is convenient to turn to the phrase "strict and complete legalism" used in his remarks on assuming office as Chief Justice on 21 April 1952,[153] and to Dixon's views on appropriate judicial method expressed in his address at Yale in 1955.[154]

As to the former, the context in which it appears is the misunderstanding of the function of the Court in deciding constitutional cases. The focus is not upon what may be the popular use and misuse of terms found in the Constitution. Rather, "close adherence to legal reasoning is the only way to maintain the confidence of all parties in federal conflicts." We know that Dixon had in mind criticism of the recent decision in the *Communist Party Case*, and its impact upon the Menzies government.[155] Further, it may be surmised that his period in Washington and correspondence with Felix Frankfurter had alerted him to the perils facing the

144 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192; [1985] HCA 56.

145 *Re Australian Education Union; Ex parte Victoria* (1995) 184 CLR 188; [1995] HCA 7.

146 *Austin v The Commonwealth* (2003) 215 CLR 185; [2003] HCA 3.

147 *Clarke v Commissioner of Taxation* (2009) 240 CLR 272; [2009] HCA 33.

148 See Winterton, 'The High Court and Federalism: A Centenary Evaluation' in Cane (ed), *Centenary Essays for the High Court of Australia* (2004) 197, 216-19.

149 (1945) 71 CLR 29, 85.

150 (1958) 99 CLR 132, 142; [1958] HCA 14.

151 (2009) 237 CLR 309; [2009] HCA 2 per French CJ, Gummow, Kirby and Hayne JJ.

152 (1969) 119 CLR 564; [1969] HCA 62.

153 (1952) 85 CLR xi, xiii-xiv; Woinarski (ed), *Jesting Pilate* (1965) 244, 247.

154 'Concerning Judicial Method' in Woinarski (ed), *Jesting Pilate* (1965) 152, 156–8; 29 *Australian Law Journal* 468.

155 The case had been decided on 9 March 1951. The subsequent failed referendum was held on 22 September 1951 with a majority attained in three States only and an overall minority of 52,082 votes.

Supreme Court since "the switch in time had saved the Nine" from the ire of President Roosevelt.

But what were the particular skills and techniques the exercise of which placed the Court above the tumult of the day? Dixon later told the young J.D. Merralls[156] that he regretted his use here of the term "legalism". It has the character of a rhetorical strategy which does not allow for the subtlety of his cast of mind.

However, the expression was to engender academic disputations of a Manichean dimension, a conflict between darkness and light. Nevertheless, in his 2002 Sir Maurice Byers Lecture,[157] Professor Zines correctly observed that whatever the content of "strict and complete legalism", it was not inconsistent with the finding of some large implications in the Constitution, with attributing broad social and economic purposes to particular provisions, or with the application of external theories and concepts in constitutional interpretation. And, as Dixon himself noted in his address at Yale, in the application of the judicial method he espoused "logic is not pursued so very strictly".[158]

Nor, it may be added, did Dixon take a narrow view of what matters lay within the scope of judicial notice. For example, in *British Medical Association v The Commonwealth*[159] Dixon J found assistance in construing the addition made in 1946 by the benefits and allowances provision in s 51(xxiiiA) of the Constitution by looking to the 1942 United Kingdom report by Sir William Beveridge on Social Insurance and Allied Services. Again, in *Stevens v Keogh*[160] Dixon J observed with respect to the policy of the law reflected in the common law misdemeanour of maintenance that:

> Notions of public policy are not fixed but may vary according to the state and development of society and conditions of life in a community.

However, in his Byers Lecture Professor Zines observed that generally there was lacking in Dixon's constitutional judgments recognition that legal reasoning could lead to more than one legally sustainable conclusion. But this observation gives one pause. For the system of adversarial litigation required by the judicial power of the Commonwealth is designed to ensure the presentation of competing submissions for acceptance or rejection. Hence, the need for study of the reports of argument in the Commonwealth Law Reports. However, Professor Zines then proceeds to reason that this possibility of different conclusions respecting the law

156 Mr J.D. Merralls AM, QC, (1936-2016) was Associate to Sir Owen Dixon 1960-1961. See, further, 'Statement from the Bench to acknowledge the life and work of James Merralls, AM, QC' (2016) 256 CLR v–vi.

157 Perram and Pepper (eds), *The Byers Lectures 2000-2012*, 48, 50-51.

158 'Concerning Judicial Method' in Woinarski (ed), *Jesting Pilate* (1965) 152, 158.

159 (1949) 79 CLR 201, 259; [1949] HCA 44.

160 (1946) 72 CLR 1, 28; [1946] HCA 16. See, further, *Gynch v Polish Club Limited* (2015) 255 CLR 414, [71]-[75] per Gageler J; [2015] HCA 23.

"might rationally require" attention (presumably for submission by counsel) to the "values and polices" which would produce a socially desirable outcome. He then, criticises among others, Chief Justice Gleeson for his disagreement with such a method of decision-making and for the absence of any deliberate balancing of conflicting social interests or values.

In response, one may refer to the difficulties experienced in Canada with the need for evidence in assessing "proportionality" and "the need for deference" when adjudicating cases under section 1 of the *Canadian Charter of Rights and Freedoms*.[161] On the other hand, Dixon emphasised that if a criterion of constitutional validity consists in a matter of fact the court must ascertain it "as best it can".[162] Also, one may consider the distinction drawn in *Cattanach v Melchior*[163] between the broad term "public policy" and the more nuanced expression "the policy of the law". In that case the High Court, by majority, rejected the submission that for reasons of "public policy" there can be no award of damages for the cost to the parents of discharging their legal and moral responsibilities in rearing and maintaining a healthy child who would not have been born but for the negligent failure of a gynaecologist to give certain advice to the parents.

In the practice of the judicial method described in his address at Yale,[164]Dixon favoured the "adaptation" of the law to new conditions, by such means as the extension of accepted principles to new conclusions and the admission of unforeseen instances to an established category. Recently, in *PGA v The Queen*[165] to these means the joint judgment added instances where the reason for a rule of a common law ("no rape in marriage") depends upon other legal rules (relating to the legal status of women), and by reason of statutory intervention or a shift in the case law these other rules are no longer maintained; the first common law rule now cannot be further upheld.

At the level of constitutional interpretation, reference has been made above in this paper to the unsatisfactory interpretation by Sir Owen Dixon of s 92, a major provision respecting the conduct of the economy, culminating in the fresh, and most would surely agree now proven successful, start in 1988 provided by *Cole v Whitfield*.[166] One may observe that by then the post-World War II fear of nationalisation as disturbing the framework of society had long faded into political history.

161 Discussed by McLachlin CJ in her paper 'Proportionality, Justification, Evidence and Deference: Perspectives from Canada', reprinted in *Judicial Colloquium 2015* (Judiciary of the Hong Kong SAR, 2016) 153, 171-81.

162 *Commonwealth Freighters Pty Ltd v Sneddon* (1959) 102 CLR 280, 292; [1959] HCA 11. See, further, *Woods v Multisport Holdings Pty Ltd* (2002) 208 CLR 460, [64]-[70] per McHugh J; [2002] HCA 9.

163 (2003) 215 CLR 1, [55]-[78]; [2003] HCA 38.

164 'Concerning Judicial Method' in Woinarski (ed), *Jesting Pilate* (1965) 152; 29 *Australian Law Journal* 468.

165 (2012) 245 CLR 355; [2012] HCA 21.

166 (1988) 165 CLR 360.

But what of that other important provision in the Constitution for the economy, s 90? The critical statement by Dixon J in *Parton v Milk Board v Victoria*[167] did look beyond form to substance and practical effect:

> A tax upon a commodity at any point in the course of distribution before it reaches the consumer produces the same effect as a tax upon its manufacture or production. If the exclusive power of the Commonwealth with respect to excise did not go past manufacture and production it would with respect to many commodities have only a formal significance.

Earlier, in *Matthews v Chicory Marketing Board (Vict)*[168] Dixon J had said that it was its "real nature" which determined whether an imposition was an excise and that one looked not to "logical definitions" but to "the actual course of industrial organisation and technique and of the productive arts."

To Dixon, the discrimen for the tax need not be local production or manufacture.[169] This reading of s 90 did not confine its purpose to ensuring that by adding to or reducing the cost of local manufacture or production no State could undermine the tariff policy of the Commonwealth with respect to imported goods;[170] thus the section is not so confined as to strike down only State taxes which discriminate between goods imported and those produced locally. Rather, under what has become the orthodox view of the Court,[171] and accepted at the political level by the G.S.T. scheme, s 90 gives the Commonwealth considerable and exclusive fiscal power at a national level. Thus, in the end and in a general sense, both s 90, and s 92 are now seen as concerned with the creation of national markets.[172] And there is no incomplete or inadequate approach to judicial methodology.

One is left to conclude that "legalism" was not meant to be synonymous with literalism, and that the judicial method advocated by Dixon very much is still with us.

IX THE RULE OF LAW

The foregoing treatment of Dixon's work is indicative of a well-furnished mind which, when brought to bear upon the interpretation of a federal constitution, would not shy away from large propositions. And so it proved when in the *Communist Party Case*[173] Dixon J (in a passage set out earlier in this paper) said that "the rule

167 (1949) 80 CLR 229, 260; [1949] HCA 67.
168 (1938) 60 CLR 263, 302-3; [1938] HCA 38.
169 *Dennis Hotels v Victoria* (1960) 104 CLR 529, 540 per Dixon CJ; [1960] HCA 10.
170 A view of s 90 explained, among others, by Dawson J in *Philip Morris Ltd v Commissioner of Business Franchises* (1989) 167 CLR 399, 465-7; [1989] HCA 38 and *Capital Duplicators Pty Ltd v ACT (No 2)* (1993) 178 CLR 561, 609; [1993] HCA 67.
171 *Ha v New South Wales* (1997) 189 CLR 465, 495; [1997] HCA 59.
172 *Betfair v Western Australia* (2008) 234 CLR 418, [12]-[13]; [2008] HCA
173 (1951) 83 CLR 1, 193; [1951] HCA 5.

of law" forms an assumption in accordance with which the Constitution is framed. But given the width of that major premises what minor premises might be drawn from it? Here Dixon gave one clear and another implicit instances. These concern the scrutiny by the judicial branch of the exercise of executive power.

The first instance was the immediate application by Dixon of the passage in question. The Parliament, in the *Communist Party Dissolution Act* 1950 (Cth), had provided no factual test of liability which operated independently of characterisation by the executive. This consideration was to assist the joint reasons in *Plaintiff S157 v The Commonwealth*[174] in rejecting the proposition that the Parliament might validly confer upon the Minister a totally open-ended discretion as to what aliens might enter Australia.

It may be noted that shortly before the *Communist Party Case*, in *Shrimpton v The Commonwealth*[175] Dixon J had said that complete freedom from legal control of the exercise of discretion was a quality the legislature could not confer on the executive, and in *Avon Downs Pty Ltd v Federal Commissioner of Taxation*[176] Dixon J had considered the drawing of an inference from the then inscrutable rulings of the Commissioner that the decision was infected by reviewable error. He said that it was not necessary to be sure of the precise error; it was enough to infer that in some way the Commissioner had "failed in the discharge of his exact function according to law". Of the recent decision in *Minister for Immigration and Citizenship v Li*,[177] Justin Gleeson SC has accurately observed[178] that while the High Court plurality may be seen to expand the techniques available on judicial review, in the end, the case was decided on "inferred error", consistently with *Avon Downs*.

The most striking instance of emphasis upon the rule of law is the orders made in *Tait v The Queen.*[179] The High Court stayed the imminent execution of Tait until it had disposed of special leave applications. The order was made "entirely so that the authority of this Court may be maintained." If that authority had not been maintained the rule of law would have been overthrown by the executive.
Here, it was the relationship between the judicial and executive branches which was in issue and we see "the rule of law" influencing judicial scrutiny of executive

174 (2003) 211 CLR 476, [101]-[104]; [2003] HCA 2. See, further the joint reasons of the Court in *Plaintiff M61/2010 v Commonwealth* (2010) 243 CLR 319, [54]-[59]; [2010] HCA 41 and the joint reasons of six Justices in *Graham v Minister for Immigration and Border Protection* (2017) 91 ALJR 890, [43]-[48].

175 (1945) 69 CLR 613, 629-90; [1945] HCA 4.

176 (1949) 78 CLR 353, 360; [1949] HCA 26.

177 (2013) 249 CLR 332; [2013] HCA 18.

178 'Taking Stock After Li' in Mortimer (ed), *Administrative Justice and its Availability* (2015) 33, 36.

179 (1962) 108 CLR 620. The matter is detailed by Justice Hayne in 'Sir Owen Dixon' in Gleeson et al (eds), *Historical Foundations of Australian Law* (vol 1, 2013) 372, 403-6, and by Professor Colin Howard, 'Time and the Judicial Process' (1963) 37 *Australian Law Journal* 39, 42-3.

activity. Other instances respecting observance of the rule of law may be seen in the treatment by the High Court of relations between the executive and legislature. One is the recent affirmation[180] that, in the absence of legislative authority, the executive has no power to arrest a fugitive offender (whether a citizen or alien) for extradition overseas. Another may be the constraints recognised in *Williams v The Commonwealth*[181] upon the expenditure by the executive of appropriated moneys for purposes lacking statutory support.

Enough has been said to indicate that the quest will likely continue for minor premises under the Dixonian major premise which classifies "the rule of law" as constitutional bedrock.

The development since *Lange v Australian Broadcasting Corporation*[182] of a constraint upon restriction of freedom of political discussion, whether by the common law of Australia or by legislation, may be seen as a recent instance of that minor premise. So also the development, beginning with *Roach v Electoral Commissioner,*[183] of constraints upon legislative restriction of the exercise of the franchise. In that regard, one notes that a month after his return from the United States in November 1944, Dixon told a Melbourne audience:[184]

> I believe that the central point of Australian political beliefs has been faith in the soundness of the opinion of the majority of the electors as a means of solving any large political question, and the need of providing constitutional machinery to ensure that when the occasion demands the opinion of the people is ascertained and, when ascertained is carried into effect.

However, it is a matter for speculation whether the adjudication of disputes in these areas by doctrines of "proportionality" would be regarded by Dixon as apt to disturb the equilibrium between the branches of government. One surmises that, as French CJ and Bell J put it in *Murphy v Electoral Commissioner*,[185] to Dixon this would depart "from the borderlands of the judicial power" and enter "into the realm of the legislative", or, as Gageler J said in that case,[186] would be to adopt a constitutional system in which the function of the judiciary is "the enhancement of political outcomes in order to achieve some notion of Pareto–optimality".

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180 *Vasilikovic v The Commonwealth* (2006) 227 CLR 64, [48]-[55]; [2006] HCA 40.

181 (2012) 248 CLR 156; [2012] HCA 23.

182 (1997) 189 CLR 520; [1997] HCA 5.

183 (2007) 233 CLR 162; [2007] HCA 43.

184 'Government under the Australian Constitution' in Woinarski (ed), *Jesting Pilate* (1965) 106.

185 (2016) 90 ALJR 1027, [39]; [2016] HCA 36. See also per Gordon J at [303]–[305]. See further, *Brown v Tasmania* [2017] HCA 43 esp. at [155]-[166] per Gageler J, [428]-[438], [471]-[482] per Gordon J."

186 (2016) 90 ALJR 1027, [110]. The 'Pareto principle', named after the Italian economist Vilfredo Pareto (1848–1923), emphasises the disproportionate unequal relationship between cause and effects.

With respect to the judicial function, a passage in Dixon's remarks on assuming office as Chief Justice retains its force today. This is so when emphasis by some in 1952 upon the promises of socialism has yielded to the imperatives of unabashed capitalism and "global markets". He said:[187]

> Lawyers are often criticised because their work is not constructive. It is not their business to contribute to the constructive activities of the community, but to keep the foundations and framework steady. Those who believe in a planned society should perceive that the rule of law administered by the courts offers a reconciliation of ordered liberty with planned control. Those who, on the contrary, believe that society is best served by giving rein to the competitive exertion of the energies of everyone in his calling or pursuit must also see that the courts must preserve the rights of each from the encroachment of the others. Between those two views there are gradations in which the court must serve the like function." (emphasis added).

This is perhaps as close as one gets to Dixon's view of the function of the judicial branch in upholding "the rule of law". Legislation for bank nationalisation may be seen as destabilising "the foundations and framework", were it not for the countervailing judicial doctrine of "individual rights" protected by s 92. Legislation aimed at the Communist Party had a destabilising tendency in the other direction. This view of the place of the judicial branch within the body politic may be seen to reflect the attachment of Dixon to the classical virtues of maintaining balance and observing the admonition associated with the temple of Apollo at Delphi. This read, "Nothing in Excess". The precept helps to explain why, in the best sense, Dixon remains a man for all seasons.

187 (1952) 85 CLR 1, xv; Woinarski (ed), *Jesting Pilate* (1965) 244, 249.